The Legacy of Abuse

Confronting the Past, Facing the Future

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Preface

The origin of this volume dates back to late 1988, when several rights-abusing regimes in Latin America were moving toward becoming rights-respecting democracies. At that time, the Justice and Society Program of the Aspen Institute, with the support of the Ford Foundation, brought together a group of human rights scholars and advocates for a conference on *State Crimes: Punishment or Pardon*. Three background papers and the conference report were published and widely distributed the following year.

At that time there appeared to be only two ways in which successor regimes might deal with human rights violators who had remained members of the community…arrest, prosecute, and punish, or amnesty and amnesia.

Much has happened since: the birth of two ad hoc international criminal tribunals, national prosecutions for gross human rights violations, the advent of a permanent International Criminal Court, the proliferation of truth commissions, an emerging jurisprudence of universal jurisdiction, the detention of former heads of state, claims for compensation by victims of abuses endured more than a generation ago. Punishment or pardon are no longer the only available options.

In 1999, the Hauser Global Law School Program at New York University School of Law, founded the Project on Transitional Justice, directed by Alex Boraine, the former Vice Chair of the Truth and Reconciliation Commission for South Africa. The Project's experience with the issues of transitional justice, and the Aspen Institute's earlier conference and publication, made for a felicitous institutional partnering in sponsoring a conference in November 2000, at Wye Woods, the Institute's conference facility, on *The Legacy of Abuse: Confronting the Past, Facing the Future*.

A debt of gratitude is owed to Paul van Zyl and Alex Boraine whose support and assistance made this project happen, and to the Ford Foundation for helping to bring it to fruition. It is our hope that this publication will generate, as the earlier one did, a wide-ranging public discussion of the issues raised by the papers that follow.

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The Legacy of Abuse

CONFERENCE REPORT

Paul van Zyl and Mark Freeman

On November 10-12, 2000, The Aspen Institute in conjunction with New York University Law School, sponsored a conference on "The Legacy of Abuse" to discuss important new developments in the field of transitional justice over the past decade. The meeting brought together individuals from different countries and a diverse range of academic and professional backgrounds.

What follows is a summary report of the four papers written for the conference, the commentaries written in response, and the rich discussion during the course of the conference. This report also includes additional comments and observations regarding emerging trends in the field of transitional justice as a whole, as well as an update on relevant events in the field subsequent to the conference.

The Search for Truth, Justice and Reconciliation

The conference opened with an overview by Neil Kritz of major themes and recent developments in the field of transitional justice. Kritz notes that, in contrast to an earlier time, there is an emerging international consensus that countries should not simply turn the page, but endeavor to confront their legacies of past abuse. To that end a variety of mechanisms has developed to respond to past atrocities that go well beyond criminal prosecution carried out at the national level, including prosecutions before international and mixed national/international courts, non-criminal sanctions, truth commissions, and reparations programs for victims. Accompanying this expanded universe of transitional justice mechanisms is an exponential growth in academic and media treatment dealing with legacies of abuse, a growth that was facilitated by the end of the cold war but also spurred in no small measure by the first conference on this subject held by the Aspen Institute in 1988. Today, the subject has become a topic of study and policy-making for universities, think tanks, international organizations, and foreign donors.

Another significant trend in the field is the increasing international experience and expertise in dealing with legacies of abuse. Countries no longer construct their strategies in a policy vacuum, but instead can and do pay close attention to approaches taken in other places. Countries are often compelled to pay attention to the experiences of others because national and international human rights organizations are exerting increased pressure to adopt the best and highest practices in the field in order to comply with more stringent international standards. And yet, as Kritz notes, the prospect of "imperfect justice" in transitional contexts is nearly inevitable because criminal justice systems are often dysfunctional. Accordingly, while increased international standards and advocacy

have placed a premium on prosecutions, a realistic assessment of the ability of transitional societies to punish perpetrators is also necessary.

In this context, Kritz reviews prosecutions from a variety of perspectives. First, he looks at the record on domestic prosecutions at transitional moments in places ranging from Greece to Argentina to Ethiopia to Rwanda. His findings suggest that such countries face a difficult choice: either prosecute a broad set of defendants according to inferior standards of fairness; or prosecute only a small subset, usually the leaders, according to superior standards. Unfortunately, neither choice may be effective: if only the leaders are prosecuted and thousands of accused remain unpunished, there will be protests that more should have been done; and yet if attempts are made to prosecute too large a group, there is an increased likelihood of violations of due process. Kritz also looks at international tribunals, mixed or hybrid national-international tribunals, and foreign proceedings carried out on the basis of universal jurisdiction. He notes that these additional jurisdictions serve as important substitutes or adjuncts where domestic courts are unable or unwilling to prosecute, not only because they tend to command much greater human and financial resources, but also because of their symbolic impact, if not always upon local constituents, certainly upon the global community. Kritz argues in particular that mixed bodies, such as the Sierra Leone Special Court, are attractive options inasmuch as they are less costly than international tribunals and seem to combine the main advantages of both international and national trials.

In addition to prosecutions, Kritz also reviews three other complementary mechanisms for dealing with legacies of massive abuse: non-criminal sanctions; compensation programs; and truth commissions. Non-criminal sanctions take various forms including screening or purge programs, civil liability, community service, and economic penalties. Such sanctions are necessary in contexts of massive abuse: it is politically and economically impossible to subject all who bear some level of responsibility for past violations to the strictest procedures and the maximum penalties. On the other hand, because they are not subject to the same rigorous standards of due process, such sanctions more easily lend themselves to abuse.

Another strategy is the use of compensation schemes, which offer a tangible way to socially and economically help integrate victims of the old regime into the new order. However, since the allocation of public funds to reparation programs may divert resources from other important social programs, such as health care or education, and because the public coffer may be virtually empty at the point of transition, the adoption of an individualized payment scheme is not always easy to justify as a trade-off against the needs of the vast majority of the population.

Finally, perhaps the most prominent complement to criminal justice mechanisms is the truth commission. Official truth commissions have proliferated around the world since 1974. These non-judicial bodies are now almost always considered during political transitions. Although truth commissions may not be appropriate in every context, they have the potential to generate benefits for societies in transition, including fostering accountability, helping establish specific and general truths about the past, cultivating

social reconciliation, recommending reparations and institutional reform, providing a public platform for victims, helping inform or catalyze public debate about the past, and thereby incorporate the past events into the nation's history. Kritz asserts that truth commissions are most beneficial where systems of abuse were designed to hide the facts (e.g., Argentina) or where there exist multiple truths, each with a distorted perspective (e.g., the former Yugoslavia). He also notes that without the robust involvement of civil society in a truth commission process, the work of a commission can easily become irrelevant. However, he dismisses the concern of those who fear that establishing such commissions somehow reduces the likelihood of prosecutions and points to places like Argentina, Chile, and Guatemala, where commission findings have proven critical in subsequent attempts to prosecute abuses.

In his response to the Kritz paper, Paul van Zyl noted that at the heart of transitional justice lies the following dilemma: it is precisely in those societies in which the call for robust and comprehensive punishment is strongest that the difficulty in achieving it is greatest. This is because criminal justice systems are designed for societies in which the violation of the law is the exception not the rule; when violations of the law become the rule criminal justice systems cannot cope. Whether international criminal tribunals can fill the gaps in domestic justice, van Zyl pointed out that bodies such as the ICTY and the ICTR – though essential and important in many respects – have not been able to carry out more than a handful of prosecutions despite enormous budgets and staff. Thus, like Kritz, van Zyl asserts that multiple approaches and mechanisms are required. One of the more innovative recent approaches is the Commission for Reception, Truth and Reconciliation in East Timor, established in 2001. This commission consists of a novel fusion of prosecutorial and non-prosecutorial approaches. Persons responsible for "serious crimes" such as murder or rape will be prosecuted by a special court, while those responsible for lesser crimes will be entitled to enter into locally-mediated "community reconciliation agreements" which would require the performance of some form of community service by persons who confess to their crimes. This model also adopts the truth-telling elements of other truth commissions, without granting the form of amnesty that was offered by the Truth and Reconciliation Commission in South Africa, an approach that was successful in many respects but flawed in others.

Much of the discussion that followed focused on the asserted virtues of the "holistic" approach to legacies of abuse as compared to the "criminal justice" approach (with the former camp jokingly being described as "closet forgivers" and the latter as "romantic punishers"). Cautions were voiced about what trials can in fact achieve: they are important but insufficient responses to mass abuse. In response, it was suggested that one should avoid playing a "numbers game" because the moral and symbolic impact of even a limited number of notable convictions cannot be measured by numbers alone. On the other hand, trials can be symbolically counterproductive to the extent that they allow a complicit society to blame everything on a few "bad apples". For example, it was argued that the Nuremberg trials did not have a psychological or moral impact on the German population in the years immediately after WWII. It was not until Germany carried out its own domestic prosecutions and screening processes that Germans began, individually and collectively, to accept responsibility for their Nazi past – a lesson that also suggests

the need for some modesty about the depth of the impact that international justice efforts may have at the national level. It was observed that prosecution should not be regarded as a universally accepted response to past abuse. For example, victims in many parts of Asia tend to place more emphasis on acknowledgement and compensation than on criminal justice.

Much discussion focused on the relationship between criminal trials and truth commissions. Some suggested that it was always undesirable to have truth commissions and criminal courts operating concurrently because of the complications it could create in the conduct of investigations, the use of witness statements, and the integrity of trial proceedings. In response, it was suggested that any complications could be surmounted through effective cooperation and planning, and that in any event there were limitations in what national or international criminal tribunals could accomplish. In particular, it was suggested that truth commissions could complement the work of tribunals by doing what tribunals cannot do or cannot do as effectively, *viz.,* deal with lower-ranking perpetrators, recommend victim reparations and institutional reform, analyze the root causes of past violations, and provide a public platform for victims. It was also noted that in cases where prosecutions can not be carried out – whether due to a dysfunctional judicial system, a significant threat of violence, or a binding amnesty law – truth commissions can help to gather, organize and preserve evidence that can be used in prosecutions to follow at a more advanced and secure stage of transition. However, it was cautioned that just as one should not be too optimistic about what prosecutions can achieve, one should not overstate the utility of truth commissions. While it was acknowledged that advocates of prosecution have tended to be unsympathetic regarding the value of truth commissions, it was suggested that truth commission advocates should not be dismissive of the value of prosecutions.

The Impact of International Justice at the International and National Level

Jose Zalaquett presented a paper on the Pinochet case, focusing on the impact of international justice efforts at the international and national level. He began by commenting briefly on the significance of three events: the end of the cold war; the increase in democratic transitions; and the proliferation of civil wars. In his view, these events have led to three distinct new focuses within the human rights community, viz., transitional justice (or "truth, justice and reconciliation"), international criminal justice, and the legitimacy of armed intervention. It is against this evolving background that the implications of the Pinochet case must be analyzed.

Zalaquett argues that the 1998 arrest and ensuing proceedings against General Pinochet in the U.K. had several concrete, positive effects at the international level. First, the case seems to have inspired a score of other similar efforts around the world, including the pursuit of other former dictators and leaders such as Hissain Habre (Chad) and Mengistu Haile Mariam (Ethiopia). A second consequence is the "Garzón effect," viz., the emergence of a small but growing cadre of national prosecutors who pursue wrongdoers outside of their own country through a diverse array of international channels. A third, lesser consequence of the Pinochet case (some contend the only tangible consequence

thus far) is that it seems to have inhibited the international travel of many dictators and wrongdoers.

However, Zalaquett notes that there are some concerns that arise from these otherwise positive developments. While it can be surmised that these developments will likely have a powerful deterrent effect on the commission of new abuses, because of the ad hoc, patchwork character of these efforts, there is a risk that, for example, the issuance of an arrest warrant by an unaccountable foreign prosecutor or judge could adversely affect otherwise benign national political arrangements. Further, there is a risk of overzealous international prosecutions that do not fully adhere to the standards of impartiality and judicial rigor that is expected from domestic law enforcement in democratic countries, and may undermine international support for the idea of universal jurisdiction.

As to the impact in Chile of the arrest and detention of Pinochet in the UK, Zalaquett observes that the event had a catalytic effect on local justice and truth efforts. Pinochet's arrest led to a great number of criminal suits being brought before Chilean courts against Pinochet and others at the initiative of judges, or more frequently, by private parties under the mechanism known as the "querella". His arrest also led to the establishment of the "Mesa de Diálogo", a government-sponsored series of roundtable discussions on human rights, involving the military, human rights lawyers and other participants. He noted that the relatives of the disappeared opposed this initiative. They claimed it was part of a design to influence the course of the Pinochet case in London and to temper the new aggressiveness being shown by the Chilean judiciary. Finally, the events in the UK spurred a courageous local judge, Judge Guzmán, to petition the Chilean Supreme Court to lift Pinochet's senatorial immunity from prosecution, which ultimately took place following Pinochet's return to Chile.

Zalaquett argues that even these local developments must be seen in a contextualized and nuanced way. In his view, increasing efforts to call Pinochet to account in Chile would have taken place even without his arrest in the UK because of the fact that he had stepped down as head of the national army in March 1998 and that some private prosecutions or "querellas" had already been filed against him months before he traveled to London. However, Zalaquett acknowledges that such efforts would most likely have taken a different shape and possibly proceeded on a lesser scale or at a slower pace. He notes, for example, that Chilean courts had continued to investigate disappearances through much of the 1990s, thanks to a prior ruling of the Chilean courts in which it was held that unsolved disappearances were to be treated as kidnappings, and therefore as continuing crimes falling outside of the scope of the 1978 amnesty law, unless it was proven beyond doubt that the victims had indeed been killed during the period covered by the amnesty. Zalaquett also points out that both the Chilean judiciary and military were experiencing a "generational renovation" which included greater openness about the past. He notes as well the significant impact of the Chilean Truth and Reconciliation Commission, which revealed past abuses, led to a significant reparations program for many families of victims, and also proved to be a critical source of evidence in the Pinochet case itself.

As for the Mesa de Diálogo, the process generated a beneficial climate of understanding between civilian and military leaders. The armed forces officially acknowledged that during the military government, grave human rights violations were committed, something that Pinochet had always refused to accept. However, Zalaquett notes that the military refused to endorse the passage of a law that would have included penalties for those who continued to withhold information about unsolved disappearances (information obtained in such manner would not be used in court against the witness, so as to respect the general legal principle which forbids forcing self-incriminatory statements). Instead, accepting the claim of the military that they should be allowed to approach their older comrades in arms (most now retired) in search of relevant information, legislation was passed imposing the obligation of professional secrecy on the military investigators who would seek or receive such information, so as to encourage people who possessed it to pass it on. Yet no affirmative obligation was imposed on those with knowledge to come forward in the first place. In the end, the military offered insufficient evidence regarding the fate of the disappeared or the whereabouts of their remains.

Zalaquett concludes by observing that justice and reform in Chile continue to move at a distinctly measured and deliberate pace, that significant progress has been made but that there are important unfinished tasks. This is, of course, consistent with the Chilean democratic transition itself, wherein the parties that defeated Pinochet at the ballot-box accepted a "constrained transition", having decided that it was far better to have a democracy subject to some restrictions than to live under a government led by Pinochet or his successors, even if that meant deferring the prospect of full justice.

In response, Philippe Sands raised a number of points. He queried in what circumstances people outside of Chile should be entitled to contribute to the resolution of a conflict that essentially took place in that country and concerned mostly or only its own citizens. He considers that international law does not yet provide any clear or consistent answer to this question, but only a framework in which to assess the appropriate balance between national and international forums, and between the potentially competing objectives of truth, justice and reconciliation. As for the Pinochet case itself, while it was clearly a watershed moment for the development of international law, many key questions remain. The international community still has not decided in what circumstances a national amnesty could or should legitimately limit the conduct of judicial proceedings in foreign courts or international tribunals. In a different vein, regarding the emergence of "activist" criminal prosecutors who are often independent of executive control, Sands asks whether it is always going to be acceptable or sensible to promote an international legal system in which a judge in one state can issue an indictment against a current minister or leader of another state that effectively prevents him or her from foreign travel or engaging in other activities associated with his or her job description. Finally, he asks whether the embrace of the Pinochet precedent would have been as enthusiastic if the foreign arrest had been carried out, not against a notorious dictator, but against a current democratically-elected minister of the new South African ANC government for past "terrorist" activities. Each of these points indicates the emergent state of the international legal order.

In the discussion that followed, the question of the relation between national communities and the international community was explored further. Some participants were concerned by the prospect of arbitrary, ad hoc justice at the international level for the foreseeable future. There was also some discussion of the ways in which international tribunals, including the ICTY and the ICTR, could make a deeper impact on local constituencies, since it is easy to forget that it is the local societies that have suffered abuse and should be the targets of reform, not the international community. As for the incipient ICC, questions were raised about how the prosecutor will use his or her discretion to initiate investigations or prosecutions in circumstances in which the domestic arrangements include an arguably reasonable amnesty. As for the Pinochet case, most agreed that it was on balance a very positive development, although it was pointed out that its true legal significance ought to be viewed with some realism since in the end the matter was not settled in court but by political authorities.

Intergenerational Justice

Jonathan Steinberg presented a paper on the subject of intergenerational justice, based largely on his participation in a 1992 trial in Australia for war crimes committed in World War II, and in the investigation by the Historical Commission of the Deutsche Bank regarding asset claims arising from Nazi crimes. Steinberg begins by distinguishing intergenerational justice from transitional justice by reference to the lapse of time between the crime and the response. He defines "intergenerational justice" as a response to abuse that occurred at least a generation ago and "transitional justice" as a response to abuse that occurred less than a generation ago. Regarding prosecution for crimes committed during World War II, Steinberg notes the unease felt by many about conducting trials decades after the crimes were committed. He suggests that this unease – combined with the lack of hard evidence and living witnesses – may account for why so few trials have taken place and why so few convictions have been obtained.

With respect to historical claims for compensation, Steinberg demonstrates the complexity involved in assessing and calculating such claims, particularly when the assets cannot be traced and the persons in charge of the company or institution in question have all been replaced. For example, does a corporation have a moral, legal or financial responsibility today for criminal acts it may have committed a generation or two earlier? If it received gold stolen from the victims, must it pay back the gold itself or the proceeds from its sale? To whom should this be paid and at which exchange rate? If the victims have died, to whom should payment be made? Can a monetary sum, no matter how large, ever right the wrongs committed or restore the lost years or erase the painful memories of victims? These represent only a small subset of the full range of difficult issues that must be satisfactorily addressed in any historical compensation process.

In the specific matter of slave labor and stolen asset claims of Holocaust survivors against German, Austrian and Swiss multinational companies, Steinberg attributes the success of these claims to three factors. First is the role of American lawyers who launched class action lawsuits in the USA. Without these lawsuits the companies would not have felt compelled to take the victims' claims seriously. The second factor is globalization.

Multinationals need to operate in the American market and they cannot afford to have their licenses or mergers blocked by regulatory authorities, or their operations impeded by messy class action litigation. Globalization has also resulted in a communications revolution. Law suits that become international headline news are often a public relations disaster for multinational companies. Finally, a third factor behind the success of these claims was the collapse of the Soviet Union. The publication of new documentary sources and the opening of files and archives provided critical new evidence in support of the claims against companies.

A final agreement was reached a year ago that settled several class action lawsuits against German industries. Under the terms of the agreement a special foundation will pay $4.6 billion to over 900,000 surviving victims of Nazi slave and forced labor and other atrocities. Nearly 6,000 firms have contributed to the compensation fund which is financed 50% by the German government and 50% by industry.

In her response to the Steinberg paper, Carol Gluck took a slightly different look at the subject of intergenerational justice. She began with the trial of Maurice Papon in the 1980s – in which it seemed all of Vichy France was, allegorically, in the dock – and noted that as survivors testified and the photographs of victims were projected on the courtroom walls, the Papon trial also performed the ritual of "commemorative justice." She contrasted this with Japan, where, for a variety of reasons – including the cold war, the U.S.-Japan alliance, and the dominance of conservative politics – no national war crimes trials took place. Instead, in the 1990s after the cold war ended, an era of civil suits for wartime compensation began, as scores of suits were filed, first in Japanese and later U.S. courts, by victims of Japanese wartime atrocities. Gluck notes that in the five decades since the Nuremberg and Tokyo Tribunals, trials of war criminals have transformed into trials of memory in which the voices of victims have become as critical as the actions of perpetrators.

Gluck notes, however, that at a certain point even criminal trials become impossible because of the simple fact that perpetrators, victims and witnesses die. The question then becomes what to do, as a society and as a nation, about such past crimes, which at that stage have moved from courts of law into the realm of memory. Several complementary choices present themselves. One response is to provide some form of financial compensation to redress the enduring legacy of the abuse. Another is to build a national memory through memorials and education. On this point, Gluck comments that the proliferation of museums and monuments in the last part of the twentieth century perhaps attests to the fact that acknowledgment comes more easily than compensation. A third possible choice, and perhaps the most important one, is to redress the past by doing justice to the future. This involves doing more than simply taking ownership of the good and bad parts of one's history. For example, the wrongfulness of wartime sex slavery is already widely acknowledged by young Japanese. However, carrying a different attitude forward about violence towards women is their own individual and generational responsibility, and one that must be transmitted and re-performed between generations. Gluck asserts that in the end there are no guarantees in the rendering of intergenerational justice, which in the true sense of the word can only occur in the future: the troubling fact

is that you can choose to confront the past as a nation and it may still come back to haunt you, or you can suppress the past now and it may never come back to haunt you.

In the discussion that followed, the themes of compensation and memory were explored further. Regarding the former, questions were asked about the time limits to compensation, since as Gluck quotes, "It isn't likely that the Dravidians are going to get the Indian subcontinent back any time soon". Other concerns were expressed about the difficulty of creating justifiable hierarchies of suffering for the purposes of calculating compensation claims, without reducing the exercise to the type of "meat chart" approach used in modern litigation to calculate damages arising from automobile or workplace accidents. One participant suggested that a better way to compensate for past injustice is through prospective mechanisms such as affirmative action plans. Finally, several participants commented on two of the legal dimensions of intergenerational justice, namely the responsibility of successor states under international law, and the due process questions that arise in the context of war crimes trials conducted against perpetrators who, from a human rights perspective, should perhaps not be forced to stand trial due to old age and ill health.

Challenges for the United Nations in Negotiating, Enforcing and Building Peace

Ian Martin presented a paper on the responsibilities and dilemmas of peace negotiators, peacemakers, peacekeepers and peace-builders. Martin started with the proposition that general amnesty laws, which prevent prosecution of gross violations of human rights, are incompatible with international standards, and the UN should never promote them and should seek to actively discourage them. He acknowledged, however, that the issue often proves a stumbling block in negotiations, and there is no easy or obvious alternative for negotiators who prefer peace agreements to military intervention. Ultimately, he recommended that if justice is to be sacrificed in the pursuit of peace and democratic transition (as it was in Haiti and Sierra Leone), then at least UN negotiators should refrain from endorsing such agreements.

Martin next discussed what obligations of justice ought to apply in the case of UN (and NATO) military interventions in transitional environments such as Bosnia, Rwanda, East Timor and Kosovo. In Bosnia, there was a strong argument in favor of the arrest of war criminals because the ICTY was in place prior to the deployment of IFOR in Bosnia and KFOR in Kosovo. Nevertheless, it took several years before sufficient political will was generated to instruct NATO troops to affect such arrests. In Rwanda, where intervention came only after the genocide had already occurred, UNAMIR was not mandated under Chapter VII of the UN Charter and consequently did not have the authority to seize or arrest *genocidaires*. The French forces, who could have carried out the arrests, not only failed to detain the *genocidaires*, but actually facilitated their departure from Rwanda. In direct contrast, in East Timor the Australian-led multinational force INTERFET – which also had a mandate that was silent on the question of arrests – undertook to arrest, advise and process people accused of having committed serious crimes, and ultimately transferred confirmed cases to the civil judiciary of East Timor immediately upon its establishment. For Martin, the lesson from these and other examples is that when the

Security Council mandates an intervention force, it should explicitly address the force's responsibility not only for detaining and processing those against whom there is evidence of serious crimes, but also for taking custody of documents and other evidence.

Once a measure of peace has been established, the longer-term project of building a sustainable peace begins in earnest. Here the legacy of past abuse joins with the task of building, or rebuilding, a justice system. One lesson is that where local judges are weak or corrupt, it may be necessary to make use of foreign judges (even though this may mitigate against domestic ownership and involvement in justice). But to be an effective peace-builder, the UN needs to go beyond adding judges and must commit to participation in investigations, monitoring of trial proceedings, effective transfer of evidence, support for complementary truth and reconciliation processes, and, potentially, the appearance of UN personnel as trial witnesses. However, constructive action on any of these fronts will depend upon the specificity of mandates, the priorities for action, and the resources allocated to personnel on the ground. And yet, Martin concedes, even the best efforts of international actors are highly unlikely to be able to deliver justice that is fair and prompt in the aftermath of conflict. For this reason, he suggests that more consideration be given to pursuing reparations for victims, which could do something to ease immediate tensions and would be faster than criminal justice approaches, since it is easier and quicker to identify a victim than to establish the guilt of a perpetrator by due process of law.

In response Michael Ignatieff began by cautioning against the trading of justice for peace. If you do you get neither, he warned, since no deal that affords impunity to violators is likely to translate into a durable peace. Moreover, granting impunity both legitimizes violators and removes any future incentive they may have to keep the peace. On the subject of peace-building, Ignatieff argues that unless international administrators make the establishment of a reasonably impartial police force and courts the key priority, they are unlikely to leave a stable and sustainable peace behind when they depart. He also observes that there is in practice a conspicuous disparity between the time that justice needs in order to take root and the time and resources that the international community are prepared to invest in planting its seeds. In addition, there is a problem inherent in international involvement, namely that it is difficult for internationals to come in to temporarily fill the gap for nationals without simultaneously relieving the locals of responsibility for justice. The other major challenge for the UN (and even NATO) is to achieve public security and public trust among both minority and majority populations. Ignatieff suggests that any UN improvement in this area will depend on its ability to get good intelligence on the ground, the kind that can prevent it from constantly arriving ten minutes *after* the bomb to condemn the attack, while the victims are taken home to die. The cycle of failure-to-prevent followed by sharp-condemnation makes it hard to generate any interest in power-sharing arrangements among locals (many of whom, understandably, do not feel safe), and severely undermines the legitimacy and credibility of the UN itself.

In the discussion that followed, some participants questioned the assumption that there is a zero-sum choice for negotiators between peace and justice. It was pointed out that there

are many creative options available to smart negotiators that involve elements of both. For example, negotiators can strategically pursue many options short of a full amnesty: an amnesty can cover certain crimes but not others; it can grant immunity from some consequences but not others; it can have conditionalities or preconditions attached to its application or operation; and it can be limited in time as well as scope.

With respect to the question of armed intervention, it was noted that there is no real consensus on when and how to intervene. It was suggested that more work was needed on developing post-intervention justice obligations, because the legitimacy of intervention also depends upon achieving some measure of post-conflict justice. In this regard, some participants expressed concern about the decision by the ICTY – in response to the NATO bombing campaign in Serbia – to conduct a preliminary inquiry but not a formal investigation of the campaign.

Finally, the participants discussed questions of risks and bias in the choices as to where and how to intervene. Some argued that the inability to assure that all cases are going to be treated alike should not deter the UN from intervening in cases where the willingness, need and capacity exist. Others argued the opposite. There was also some discussion as to who bears the costs of peacemaking and peacekeeping. Western countries, it was noted, are unwilling to take the political risk of sending their own soldiers into African countries, but have no problem insisting in the aftermath of tragedy that these same countries deliver justice to the victims of the conflict irrespective of the political cost. And while it is true that Western countries are willing to assist in *post*-conflict justice efforts, it was noted that this type of engagement involves no real political risk for them and may even be done as an attempt to compensate for their having been unwilling to take the risks necessary to prevent the tragedy. Thus, while it is generally desirable for the Security Council to establish principled and robust mandates for intervention, such measures must be balanced against the fact that the world's most well resourced countries are generally unwilling to offer the troops necessary to make these mandates effective.

The New Landscape of Transitional Justice

Transitional Justice, like the field of biotechnology, is undergoing such rapid change that new developments often precede careful consideration of their impact and implications. Dramatic increases in criminal jurisdiction caused by the establishment of international tribunals and courts, as well as a more robust approach to universal jurisdiction, is changing both international law and international relations. The possibility of obtaining financial compensation for past wrongs has been placed in the international spotlight by the $5.4 billion fund established by the German government and industry to pay victims of Nazi slave labor. This precedent has caused considerable concern amongst states that practiced slavery, and the possibility of reparation payments for slavery was a source of conflict and controversy during the World Conference on Racism held in South Africa in August 2001. Furthermore, the proliferation of truth commissions in almost two-dozen countries has changed the way countries deal with their pasts and raised difficult questions about the inter-relationship between prosecutorial and non-prosecutorial approaches to injustice.

These developments are attributable to a range of factors. The end of the cold war has caused a partial realignment in state attitudes to human rights. The declining imperative to assert hegemony in a global conflict reduced the tendency of superpowers to justify violations of human rights committed by themselves or their allies. This deprived repressive regimes and dictators of powerful political support and opened the space for creative strategies to scrutinize and hold them accountable for their conduct. Globalization has also been important. Countries are increasingly connected and inter-dependent and it is becoming difficult for repressive regimes, or those who engage with them, to dismiss charges of human rights abuse as a matter of purely domestic concern. The globalization of economic relations has required the development of an increasingly robust international law. In this context, states have recognized that it is difficult to assert an absolutist position on sovereignty and this has made it possible to argue that it is appropriate for international law to deal not only with economic matters, but also with human rights concerns. The globalization of communications has also increased the reporting of human rights issues as well as the speed at which it is drawn to international attention. The burgeoning of a sophisticated and influential network of advocacy organizations has created pressure to deal with human rights abuse so that it is virtually impossible for states to engage in multilateral discussions or negotiations without paying heed to the perspectives of advocacy groups and human rights organizations.

The emergence of a more energetic approach to dealing with the past has been significant in a number of respects. Whereas it was once possible and relatively uncontroversial for repressive rulers to negotiate blanket amnesties as a pre-condition to the transfer of power, the development of international law and policy has made such arrangements difficult to defend and enforce. For example, the United Nations recently attached a caveat to the Lomé Peace Accord, which sought to end a civil war in Sierra Leone, indicating that it did not intend the amnesty to apply to serious violations of international law. A corollary of the decreasing permissibility of amnesties is the increasing obligation of states to take affirmative steps in dealing with a legacy of human rights abuse. An important, although somewhat controversial, example of this phenomenon is the explicit linkage between access to international financial assistance and the extradition of the former Yugoslav President, Slobodan Milosevic, to face trial before the ICTY. It is no longer sufficient for states to "do no harm" in dealing with the past, they are often required to adopt a series of affirmative measures.

There has also been an expansion in the scope of measures which states are asked to undertake to remedy past injustice. Many human rights organizations and victim groups are no longer focusing exclusively on the prosecution of past offenders but are also demanding the payment of reparation, the uncovering of the truth regarding the fate of victims and the identity of perpetrators, and institutional reforms to prevent a repetition of abuse. This more holistic approach to dealing with the past is an important development, particularly given the limited reach of trials, and can be seen as an effort to augment rather than replace prosecutorial efforts.

The expansion of international obligations and initiatives in dealing with the past raises the difficult question of how these efforts should relate to domestic efforts. Interestingly,

there has been a discernible shift in thinking in this regard in recent years. The ICTY and ICTR embody an approach that attaches primacy to international efforts, not only in jurisdictional terms, but also because they are located in third countries and are therefore physically separate from domestic initiatives. While there may have been good reasons for the tribunals to adopt this approach, there is an increasing consensus that it is optimal for international and domestic efforts to be more closely interrelated. The ICC virtually inverts the domestic-international relationship adopted by the tribunals. The ICC will only assume jurisdiction when domestic authorities are either "unwilling or unable" to prosecute persons responsible for international crimes. While this approach has the obvious advantage of encouraging local ownership of prosecutions, thereby strengthening domestic institutions and increasing local engagement in dealing with the past, it fails to address a crucial and neglected issue. The question of jurisdiction for both the ICC and the tribunals is primarily concerned with resolving whether there should be a domestic or international prosecutorial *forum* and once that question is resolved little consideration is paid to the ongoing *relationship* between domestic and international efforts. It is vitally important for clearly articulated cooperative agreements between domestic and international efforts to be negotiated from the very outset. This should reduce the potential for competition over jurisdiction and allow for a range of complex issues to be resolved up front, including the sharing of evidence, the powers of international investigators, the development of a joint investigative strategy, the choice of targets and the sharing of institutional resources such as witness protection programs and translators.

The need for institutional cooperation is not confined to cases where international and domestic prosecutorial efforts share jurisdiction. It is also necessary in the growing number of cases where "mixed tribunals" are adopted as in East Timor, Cambodia and Sierra Leone, consisting of both local and international judges and prosecutors. These models are *usually* intended to target a limited number of perpetrators most responsible for serious crimes and therefore will have to make difficult strategic decisions regarding which investigations to conduct and which perpetrators to pursue. It will therefore be necessary to establish detailed cooperative relationships between the mixed tribunal and the domestic judiciary and prosecutors. This is an area where there has been insufficient writing and research.

A further area that requires research and clarification is the interrelationship between prosecutorial and non-prosecutorial approaches to dealing with the past. In a growing number of circumstances both truth commissions and prosecutions exist within the same jurisdiction. This overlap raises a number of extremely difficult legal and institutional questions. For example, in some cases it is envisaged that truth commissions could facilitate community level reconciliation by providing certain categories of perpetrators with an opportunity to come forward and confess their crimes. It is possible that communities may accept their apologies and agree to their reintegration into society but this will almost certainly be jeopardized if a truth commission undertakes to provide all evidence that it gathers to prosecutors. Perpetrators who might otherwise be inclined to participate in reconciliation processes will not be prepared to do so if this were to increase the likelihood of their prosecution. In such cases the potential exists for a genuine conflict to arise between a truth commission and prosecutors. There are equally

powerful arguments to be made for furnishing prosecutors with all information gathered in order to facilitate prosecutions, and for deciding to withhold information from prosecutors in order to facilitate community-level reconciliation. It is difficult to imagine resolving such dilemmas in the abstract. Each case will require a close analysis of local conditions and an open debate about priorities. Nevertheless, what will be required in each case is detailed discussions between truth commission staff and prosecutors in which each institution's *bona fides* is accepted and where every effort is made to develop a working cooperative relationship.

Postscript: Relevant Developments since the November 2001 Conference

Conference participants repeatedly noted that the field of transitional justice was undergoing such rapid development that it is almost impossible to keep track of unfolding events. In the year since the conference many significant developments have occurred that are worth noting:

- In February 2000, a court in Senegal indicted Hissen Habre, the former ruler of Chad, on charges of torture and crimes against humanity. In March 2001, however, Senegal's Court of Final Appeals dismissed the case, ruling that Habre could not be tried in Senegal for crimes allegedly committed in Chad. Nevertheless in June 2001, a court in Belgium sentenced four Rwandans, including two nuns, to long terms of imprisonment for the roles they played during the Rwandan genocide. These cases, before courts in Belgium and Senegal, demonstrated the limits and possibilities of pursuing prosecutions based on the principle of universal jurisdiction.

- No fewer than four truth commissions have been established. On January 18, 2001, the President of Panama, Mireya Moscoso, established a truth commission to investigate human rights violations that occurred between 1968 and 1989 during the rules of military dictators Omar Torrijos and Manuel Noriega. Yugoslav President Vojislav Kostunica established a truth and reconciliation commission in April 2001 to investigate gross violations of human rights that occurred in the former Yugoslavia since 1991. In August 2001, the process began to select the members of a Commission for Truth, Reception and Reconciliation in East Timor and in September 2001, Peruvian President Alejandro Toledo appointed the final members of a truth commission to investigate human rights violations committed since 1980. In addition truth commissions are now under active consideration in Mexico, Bosnia-Herzegovina and Ghana.

- In May 2001, the Rwanda government announced steps to implement a community-based system of justice called *gacaca*. Gacaca was devised in order to deal with the approximately 115,000 prisoners awaiting trial in Rwandan jails on suspicion of involvement in the genocide. Gacaca is an attempt to formalize Rwanda's traditional, village-based justice system and will entail the election of up to 250,000 judges to serve in more than 11,000 jurisdictions.

- In May 2001, General Wojciech Jaruzelski, the former ruler of Poland, stood trial on charges of manslaughter for allegedly authorizing the shooting of striking workers over three decades ago.

- In June 2001, Slobodan Milosevic, the former President of Yugoslavia, was transferred into the custody of the International Criminal Tribunal for the Former-Yugoslavia. The arrest and transfer of Milosevic represented a high point in efforts to ensure accountability for international crimes committed during the conflicts in the Balkans in the past decade. The transfer of Milosevic also demonstrated that in certain circumstances, the conditioning of substantial financial assistance on taking meaningful steps against perpetrators of human rights abuse can be an effective strategy to achieve justice.

- In July 2001, an Appeals Court in Santiago, Chile ruled that former dictator Augusto Pinochet could not stand trial for crimes allegedly committed during his rule. The court found that Pinochet suffered from dementia and loss of memory and was therefore unfit to stand trial. The judgment is likely to end efforts to bring Pinochet to justice in Chile.

The Fundamental Objectives of Transitional Justice

At the end of the conference it was agreed that in dealing with a legacy of human rights abuse it is important to adopt a strategy that is broad and holistic. To the extent possible such a strategy should include:

Investigation and truth seeking: Efforts should be made to uncover the truth regarding the suffering, fate and whereabouts of victims. These efforts should aim to acknowledge the pain and abuse suffered by victims and their families and to create an official record to preserve memory and guard against revisionism. Truth seeking should also focus on perpetrators and seek to identify, in as much detail as possible, not only those directly responsible for human rights abuse but also those who expressly or implicitly authorized such violations. Criminal trials often result in important disclosures and assist in seeking the truth regarding past human rights abuse. However, since the number of trials is likely to be small and the ambit of their inquiry likely to be narrow, it may be necessary to augment the criminal justice process with broader initiatives such as civil trials, truth commissions or other non-official inquiries. On the other hand, the stringent evidential standards applied in criminal trials confer a certain legitimacy on their findings, which may be more difficult to obtain in less rigorous proceedings.

Punishment: It is vitally important to seek to prosecute perpetrators of human rights abuse. Criminal trials can help achieve both general and specific deterrence, affirm the rule of law and serve an important educative role by publicly affirming the norms that underpin civilized societies. Nevertheless, it is important to be realistic about the scope of prosecutions, particularly in the wake of mass atrocity. Trials often face formidable political, legal, evidentiary and financial obstacles and these difficulties are exacerbated when seeking to prosecute thousands of perpetrators. Non-criminal sanctions such as

civil trials, the removal or barring from public office or the denial of other civic privileges, should also be considered, particularly because it is often impossible to prosecute all those responsible for human rights violations. In every case, those liable to punishment should be provided with due process protections as articulated in the international human rights conventions.

Reparations: Victims of human rights violations have a right to receive reparations for the harm they have suffered. Reparations should seek, as far as possible, to restore the victims to the position they were in prior to the violation. Reparations should be both material (e.g., financial compensation, pensions, scholarships and heath care) and symbolic (e.g., monuments, memorials, apologies and official acknowledgement of suffering). Reparations are particularly appropriate in cases where victims are unable to pursue civil claims due to insufficient evidence or other legal impediments, such as prescription. Reparation schemes can also allocate scarce resources in an equitable manner thereby avoiding the division and resentment that could potentially arise if only a limited number of victims obtain redress. Successor governments are often understandably ambivalent about paying reparations for crimes committed by prior repressive regimes. While it is settled law that they remain liable for providing compensation for past crimes, efforts should be made to mitigate this burden by holding perpetrators directly responsible for compensating victims.

Institutional Reform: One of the most important aspects of transitional justice is the obligation to reform abusive institutions to ensure they are not vehicles for human rights abuse in the future. Reform is not only achieved by asserting democratic control over state institutions but also by altering their purpose and *modus operandi*. Institutions such as the police, the military and the intelligence services warrant special scrutiny, but the reform of the legal system, the penal system, the media, the health care system and the educational system also deserve particular attention. Successor regimes should use the moral capital they often inherit at the time of transition to implement institutional reforms because changing the character of repressive institutions is indispensable to restoring trust between citizens and the state.

Reconciliation: In certain contexts reconciliation has become a code word for impunity because it has been used by those who wish to avoid accountability for human rights abuse. In other cases, it has acquired theological connotations and has become associated with an approach to the past that prioritizes (and perhaps compels) forgiveness. It is not surprising therefore that victims who may not be ready to forgive and human rights organizations that seek to achieve accountability, are reluctant to classify reconciliation as an objective of transitional justice. Nevertheless, if reconciliation is given its proper meaning it is a goal that can be embraced by all those seeking to come to terms with the past. Reconciliation is not about amnesia nor a pragmatic desire to ignore the past in order to build a stable future – reconciliation can only be achieved by a mature and responsible examination of the past in order to acknowledge suffering, condemn violations and alter abusive institutions to prevent violations in the future. Reconciliation is achieved through a commitment to pluralism, tolerance and respect for diversity. It is also based on rejecting violence as a legitimate political tool and a commitment to the

peaceful resolution of conflict. While reconciliation is necessarily a lengthy and difficult process, it is greatly facilitated by responsible political leaders and can be fatally undermined by those who seek to perpetuate conflict in order to achieve self-serving objectives. Achieving reconciliation can save thousand of lives and it is for this that it should be embraced as an objective by those committed to dealing with the past and protecting human rights in the future.

Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation

Neil J. Kritz

Introduction

At the dawn of the 21st century, it is increasingly recognized that societies that refuse to address the painful legacy of past abuses do so at their peril. The most vivid recent demonstration of this lesson was the experience of the former Yugoslavia. In the name of brotherhood and unity, the Tito regime prohibited any discussion of the brutalities committed by Serbs, Croats and Bosniaks against one another during the World War II period. The result was not brotherhood: accounts expanded into mythologies transmitted from one generation to the next in each ethnic community and further exaggerated along the way. This was exemplified by the mortality data for the notorious Jasenovac concentration camp in Croatia. By the 1990's, the story had expanded: Croat nationalists claimed that 20,000 people died at the camp during the war, mostly of disease; Serb nationalists insisted that up to a million people, overwhelmingly Serbs, were slaughtered by the Croat *Ustashe* at Jasenovac. After the death of Tito, cynical nationalists were able to exploit this unresolved history of atrocities to instill fear in each ethnic group and to manipulate them into new rounds of violence.

A variety of approaches have developed to respond to past atrocities in ways that are intended to facilitate justice and/or reconciliation. These include criminal prosecution of perpetrators - before domestic, international and mixed courts - the imposition of various non-criminal sanctions, truth commissions, and the provision of compensation to victims of the abuses, each of which are examined below. The importance of dealing with the demons of the past is now more broadly accepted: the challenge is to fine-tune and better coordinate the options.

In contrast to an earlier time, confronting the legacy of past abuses is no longer treated as a dismissible obstacle to conflict resolution, to be excluded from negotiations. Instead, recent peace agreements commonly incorporate provisions to deal with this legacy in various ways. The peace accords to end the conflicts in El Salvador, Guatemala, Bosnia, and Sierra Leone all reflect this trend.

Foreign donors routinely encourage and help fund the efforts of countries emerging from a period of mass abuses to deal with that legacy. The United Nations Development Program, with personnel in 137 offices around the world, is examining how best to build its capacity to assist the search for justice and reconciliation in societies in transition. New nongovernmental groups and projects pertaining to the topic are created every year.

Another manifestation of the extent to which the challenge of transitional justice is the focus of serious policy consideration is the growth in academic and media attention to the issue. According to one survey, limited just to English and German language literature, in the twenty-year period from 1970-1989, approximately 150 books, chapters or articles were published on the topic. In late 1988, when the Aspen Institute organized its first conference to bring together experts and scholars to ponder the question of whether to "punish or pardon" in transitions from repression to democracy, it was a pathbreaking event. In the single decade that followed, the proportional amount of material produced worldwide grew more than 13-fold, with more than 1,000 publications in the 1990s on various aspects of transitional justice – focusing on the experience of specific countries or regions or on substantive themes ranging from amnesty to reparations to collective memory and reconciliation.[1] This does not include hundreds of articles on the subject in the popular press.

Projects on justice and reconciliation in the aftermath of mass abuses have proliferated at universities and think tanks. It has become a topic of inquiry in a variety of disciplines, including law, philosophy, sociology, political science, theology, anthropology and the arts. Numerous conferences on the general theme, or on subtopics such as accountability, non-criminal sanctions, truth commissions, or victim compensation have taken place in the past decade on every continent. Comparative studies on the transitional justice approaches of various countries have become relatively common. Although much more development is needed, transitional justice has matured into a field of study worldwide.

Transnational Impact

The manner in which the challenge of transitional justice is addressed in one country can have an impact not only on the society in question but beyond its borders as well. The results of the Argentine experiment influenced the Chilean approach six years later. El Salvador's experience reverberated in neighboring Guatemala. South Africans took lessons from the programs of several countries, particularly Chile, and Rwandan authorities reacted in part to the drama in South Africa. Every national case has its own unique historical and cultural qualities and must select and adapt the models that are most appropriate to its circumstances, but one of the most significant developments of the past two decades in this field of transitional justice is the growing recognition that many of the questions and challenges are not unique. Rather than designing solutions in a vacuum, national societies can engage in a debate over the treatment of past abuses that is informed by the experience of numerous foreign predecessors. When Argentina's civilian government replaced the junta in 1983, it might have benefited from a briefing on Greece's experience with its aggressive approach to accountability nine years earlier. (Notwithstanding their significant differences, the parallels are interesting: both experienced the seven-year rule of a virulently anti-communist military junta, characterized by massive, systemic human rights violations; both regimes were increasingly isolated internationally because of these abuses; both had initially delivered on promised economic improvements but left the economy in a weakened state by the end of their rule; and both were ultimately forced to relinquish power following a failed military venture.) As President Alfonsin noted with hindsight, Argentine authorities

would not necessarily have copied the Greek example, but such information could have helped them frame many of the issues to be confronted. Instead, the new civilian team in Buenos Aires had no information on parallel transitions and had to, in Alfonsin's words, "invent" their approach "from nothing."[2]

In contrast, the evolution and design of South Africa's novel truth and reconciliation process benefited from extensive consultations regarding the earlier transitional justice experiences of several countries, the collection of comparative materials, study visits by South Africans to these nations and participation by experts from such countries in public conferences in South Africa to derive lessons for the transition from apartheid. Such exercises in reviewing and adapting of foreign models is not limited to countries like South Africa which can more easily afford the cost of study trips. When post-genocide Rwanda, with little resources and a decimated infrastructure and institutions, needed to develop an approach to justice and reconciliation that was appropriate to its circumstances, foreign donors helped assemble a four-day conference in Kigali in 1995 that brought together experts from several countries to share their experiences and contribute to the crafting of a uniquely Rwandan model. Similar programs have been organized for those pondering the dilemma of justice and reconciliation in the former Yugoslavia, Indonesia, and Colombia, to name a few. This process of providing policy-makers, NGOs and other relevant parties in a transitional country with access to experts and experience from other societies that have grappled with the dilemma of justice and reconciliation is, in fact, becoming relatively routine. The communications revolution is further accelerating the prompt sharing of experiences in dealing with this immensely difficult set of issues. Although this component is still at a relatively early stage, websites on truth commissions and tribunals, internet-based bibliographies on transitional justice issues, and international e-mail exchanges regarding draft proposals in transitional countries are changing the way solutions are designed. In short, a mere seventeen years after President Alfonsin and his colleagues struggled with the problem, no country need construct its approach to the legacy of mass abuse by "inventing it from nothing."

Trends in the Approach to the Problem

The focus of the present review is on developments over the past two decades, but the challenge of accountability in the aftermath of massive abuses is obviously not a new one. The dilemma of how, in the midst of transition, to reckon with past atrocities and systemic patterns of inhumanity, did not arise for the first time in the Latin American transitions of the 1980s. In the immediate aftermath of World War II, efforts to deal with the crimes of the Nazis and their allies and collaborators left their imprint on several European countries. The judgments of the International Military Tribunal and the subsequent trials at Nuremberg established basic principles regarding command responsibility, the defense of "just following orders" and other points that influence the debate over accountability in new transitions fifty years later. Thirteen million Germans were obliged to complete screening forms to determine levels of culpability, and 600,000 of these people were processed through de-nazification courts by 1949. In France, Italy, and other countries previously under Nazi occupation, hundreds of thousands of cases were processed through criminal trials, sanctions boards organized by various professions, or vigilante operations – more than 400,000 in France alone. Following the

1973 downfall of the brutal military regime in Greece, the Karamanlis government purged over 100,000 individuals from the military and government. Of greater significance, it prosecuted over 400 members of the military and police forces on charges of torture, an important landmark in the annals of accountability.

The newer transitions, starting with the Latin American experiments in the 1980s, have been distinguished from the earlier cases by the rise of the human rights movement. The development of international human rights agreements in the UN, of a body of norms by human rights organs in the Council of Europe and the Organization of American States, the human rights monitoring and debate which comprised a central element of the post-1975 Helsinki Accords process, and the emergence of nongovernmental human rights organizations like Amnesty International, Human Rights Watch and others made the massive abuses of repressive regimes a focus of international attention and pressure and enabled the advocacy of human rights from within, often contributing to the erosion of these regimes' hold on power.

Following the ouster of such governments, this growth of human rights organizations and standards arguably had two consequences for the transitions of the past twenty years. First, of course, is the increased pressure to not merely turn the page and move on, but to reckon with past abuses and establish accountability. Second, beyond forcing the issue onto the table, the same international norms and networks of human rights advocates informed the discourse regarding *which* approaches could be considered legitimate in dealing with the past. Put simply, the methods employed to deal with alleged perpetrators and collaborators in much of post-World War II Europe would not be defensible when scrutinized by the human rights standards in effect at the end of the century. The excesses of post-war France's "Great Purge," for example, included summary executions, torture and humiliation of alleged collaborators. By the 1980s, regional and international human rights bodies which had pressed for an end to past abuses would not turn a blind eye to a new round of abuses committed in the name of justice and accountability.

The contemporary standards relevant to transitional justice efforts cannot be treated exhaustively here, but include the following. The protections guaranteed to criminal defendants enshrined in the 1948 Universal Declaration of Human Rights, and elaborated in the 1966 International Covenant on Civil and Political Rights, have been supplemented by such UN standards as the Standard Minimum Rules for the Treatment of Prisoners (1957), the Basic Principles on the Independence of the Judiciary (1985); the Standard Minimum Rules for the Administration of Juvenile Justice (1985); the Basic Principles on the Role of Lawyers (1990); the Basic Principles for the Treatment of Prisoners (1990); Guidelines on the Role of Prosecutors (1990), and the Standard Minimum Rules for Non-Custodial Rules (1990) . The UN Human Rights Commission and UN Human Rights Committee have further elaborated these standards, as have the European Court and Commission on Human Rights, the Inter-American Court and Commission on Human Rights, and the 1990 Copenhagen Document and 1991 Moscow Documents produced through the "Helsinki process." These are further supplemented by the work of several

UN rapporteurs, the writings of many legal scholars, and the work of human rights organizations.

The measures undertaken to deal with the past in transitional countries over the past two decades have not always been without their defects from a human rights perspective – the kangaroo trial and execution of Romanian dictator Nicolai Ceaucescu in December 1989 was hardly a major advance over the killing and disfigurement of Mussolini in Italy a half-century earlier – but they have generally been characterized by a heightened concern for adherence to the rule of law and greater sensitivity to the rights of the accused.

One manifestation of this difference is in the structure and procedure of international criminal tribunals established in the aftermath of mass abuses. The tribunals established in the 1990s for the former Yugoslavia and for Rwanda incorporate the contemporary norms noted above, providing to defendants and witnesses a far more extensive array of procedural guarantees than were available to those in the dock at Nuremberg and Tokyo.

Prosecuting Past Abuses

In fits and starts, the past two decades have been characterized by a growing acceptance of the need to prosecute those responsible for atrocities. The reasons for criminal accountability have been elaborated by activists and academics alike. Trials communicate that a culture of impunity that permitted the abuses is being replaced by a culture of accountability, giving a sense of security to victims and a warning to those who might contemplate future abuses. They provide some redress for the suffering of victims and help to curtail the inclination towards vigilante justice. They provide an important opportunity to establish the credibility of a previously compromised or non-functioning judicial system. Particularly in the context of recent intra-societal conflicts, criminal trials make the important statement that specific individuals have committed the crimes in question, not entire ethnic or religious groups, thereby repudiating notions of collective blame and guilt that can otherwise be used to foment the next round of violence.

The Greek transition from the junta of the colonels in 1974 brought with it a bold program of prosecution of those responsible for the repression of the previous seven years. In trials that were regarded as fair by outside observers, a few hundred individuals, ranging from the senior members of the junta to military and police officers responsible for torture and related abuses, were held accountable for their crimes. The Karamanlis government was able to pursue this approach, despite some fear of military backlash, as a result of a weakened military rendered more pliant by recent failures.

Ten years later, the Alfonsin government quickly undertook to prosecute the leaders of Argentina's military dictatorship. Junta leaders were charged with over 700 separate crimes. In a trial without precedent in Latin America, five of the them were convicted and sentenced to prison. Prosecutions then proceeded against numerous other military personnel. Within the year, military rebellions caused the government to limit these trials and, six months later, essentially terminate them. Controversy continues to this day as to whether Alfonsin should have (or could have) resisted military pressure and continued the prosecutions; at the time, the President was convinced that being any more aggressive

risked plunging the country back into military rule and abuse. The Argentine experience left two conflicting lessons for the continent: a courageous democratic government can pursue criminal accountability for past abuses, and a former regime or determined military which retains enough clout can effectively block such action. In the Latin American transitions that followed, outgoing governments took heed of the lessons of Argentina, and made certain that prosecution of past abuses would not be an option.

The next significant attempt at prosecutions was in Ethiopia after the fall of the Mengistu regime in 1991. Thousands affiliated with the rule of the "Dergue" were arrested. A Special Prosecutor's Office was established, and received significant financial, technical and staffing assistance from foreign donors. A group trial of 71 members of the Dergue (including 25 *in absentia*) began in late 1994 and is still ongoing, with the defendants charged with acts of genocide and crimes against humanity, torture, disappearances, and murder. More than 5,000 additional officials were charged with genocide, of whom over 2,000 have been in detention without trial for nearly a decade. The Ethiopian program has been criticized for its delays and its failure to comply with the due process standards described above.

With the exception of the trials of border guards and a handful of others from East Germany, the transitions of 1989 and the '90s from Communist rule were not characterized by large numbers of prosecutions. Some have suggested that this may have been partly a function of the duration of these regimes: they had been so pervasive and had existed for so many decades that the majority of citizens – in addition to the courts – were tainted in one way or another by association with the system, rendering trials too threatening to too many.

The growth of the human rights movement in recent years has created greater pressure not simply for confronting past abuses, but for doing so through criminal trials. The information revolution has also created greater pressure for prosecutions. Brutal regimes still manage to repress their media and can sometimes limit access by an increasingly intrusive foreign media. However, in an age when, with ever-greater ease, witnesses to atrocities can instantaneously post their accounts and photos on the internet for millions worldwide to see, the crimes become vivid and the pressure to put those responsible in the dock gains strength, both within the country and outside. It makes it harder for policy-makers and donors outside the country to dismiss the need for accountability. The massive nature and graphic reporting of atrocities in the 1990's created pressure for action.

International law has reflected this increased emphasis on accountability. States' legal obligations to investigate, prosecute and punish a wide range of atrocities have expanded. Specialized treaties such as the Genocide and Torture Conventions impose upon states parties the obligation to prosecute or extradite alleged perpetrators of these crimes. The obligation to guarantee and protect human rights found in the general human rights treaties, like the International Covenant on Civil and Political Rights and the American Convention on Human Rights, have been repeatedly interpreted by the authoritative bodies to include the duty to investigate, prosecute and punish those responsible for such

gross abuses as disappearances, torture, extra-legal executions. The work of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, combined with the efforts towards establishment of the permanent International Criminal Court, have given new attention to the obligation to prosecute genocide, war crimes and crimes against humanity. It has been established that rape may constitute a war crime when committed as part of an organized pattern, generating an international obligation to prosecute. Reflecting the reality that nearly all significant violent conflicts in recent years have been intra-state rather than inter-state, international law now recognizes a variety of atrocities as rising to the level of crimes against humanity (again triggering an international obligation to prosecute) when committed in a non-international armed conflict war or even during peacetime.

Trials: International, National and Mixed

The trends just described combined with the occurrence of two notorious rounds of atrocities in rapid succession to effect the next major development in dealing with the aftermath of mass abuses: the establishment by the United Nations Security Council of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The tribunals have had a major impact, developing new international legal precedents, providing authoritative interpretation of the norms of humanitarian law, removing leaders such as Radovan Karadzic from the Dayton negotiations and Bosnian politics, handing down the first conviction in history of a former head of government for genocide (former Prime Minister Jean Kambanda of Rwanda, sentenced to life in prison); the list goes on.

International tribunals have several strengths over domestic trials for the major crimes under consideration. An international tribunal will be more able to assemble the necessary human resources (including technical ability in forensics and other areas and expertise in evolving areas of international law). It is less subject to credible allegations of bias or victor's justice than a local trial process. Its impact will generally be far broader than a domestic process: first, by communicating to potential perpetrators of these crimes, not only in the country in question but worldwide, that the international community will not tolerate such atrocities and that the same fate would await them; second, by contributing to the further development and interpretation of international criminal law. Finally, the practical reality may be that an international tribunal can do for a society emerging from mass abuses that which the society cannot do for itself, either because senior perpetrators are beyond the reach of local authorities or because the domestic system is incapable of undertaking the task.

That said, it must be remembered that lessons for an international audience and the elaboration of international law are secondary functions. The primary audience is the population of the country in question, both victims and perpetrators. The ultimate goal is to help them confront the legacy of past abuses in an effective manner and re-build their society in a way that will prevent the recurrence of atrocity. This priority has, unfortunately, not always been apparent in the work of the current two international tribunals. Victims groups and local society were ignored for too long, and outreach to the local population to expose them to the work of the tribunals and break down barriers of

misinformation about their work took years to begin. In the last year or two, both bodies have made progress in this direction. One aspect of this question involves the location of tribunal proceedings. It is particularly notable that the Rwanda Tribunal sitting in Arusha, Tanzania, is preparing to conduct some of its proceedings in a courtroom in Kigali, bringing the process of justice to the people. These issues of local access and outreach are important to the effectiveness of international tribunals, and will require greater attention in the coming years.

Increased attention to international tribunals may encourage the pursuit of trials through the national courts in two ways. First, attention is generated by the debate over these international bodies regarding the importance and legal obligation of criminal prosecution following the commission of atrocities. This necessarily has its impact on the domestic process. Second, those governments wishing to avoid the intervention of an international tribunal – whether because of concerns over national sovereignty, the embarrassment of acknowledging the incapacity of the domestic system, or the fear that the investigations of the international body could extend too close to the government or its allies – may only be able to do so by engaging in an authentic domestic criminal process. In Indonesia's complicated and shaky transition, for example, the personnel and habits of the 32-year "New Order" regime will not be replaced overnight. There is resistance in many quarters to prosecuting senior members of the military or other senior officials for their role in the atrocities committed in East Timor or elsewhere in the country. The United Nations has threatened to establish an international criminal tribunal, along the lines of the Yugoslav and Rwandan models. Some Indonesian officials have indicated that prevention of such a move is the one thing that may spur domestic prosecutions. Similarly, the International Criminal Court, when established, will only be able to prosecute genocide, war crimes or crimes against humanity when domestic authorities are unwilling or unable to pursue the matter, creating a strong incentive to activate the local process of criminal justice. (This ICC deference to local ownership of the process is a significant shift from the current Yugoslavia and Rwanda tribunals, which enjoy primacy of jurisdiction vis-à-vis national courts.)

As noted earlier, international tribunals are far better positioned than domestic courts to attract needed resources. If the goal, however, is the creation of a stable society that can avoid the recurrence of massive violations, then a robust and credible system of justice is essential. Building a strong, independent criminal justice system is a difficult but crucial task that has been identified as a priority in every country actually confronting the dilemma of transitional justice, but is one that lacks the high profile of international war crimes trials. The total combined allocation by the international community for the ICTY and ICTR since their inception will, before long, reach $1 billion. The amounts allocated by international donors during the same period to strengthen the capacity of the domestic criminal justice systems of the countries of the former Yugoslavia and of Rwanda (with its caseload of 125,000 compared to the ICTR's 53 indictments to date) are miniscule in comparison. Even if the two tribunals are maximally successful, robust domestic systems will still be needed to avoid future atrocities. This is obviously not a zero-sum game, as both the international and local institutions help a society overcome the legacy of past abuse. The resources spent on the Hague tribunal, it should be remembered, are a small

fraction of the expenditures for NATO peacekeeping operations in the Balkans. Nonetheless, the disparities in resource allocation between international and domestic justice suggest a prioritization that requires greater examination.

An innovation that may bridge the gap is the creation of hybrid international-local tribunals. In Cambodia, twenty years after the Khmer Rouge killing fields, the legacy of that period has still not been effectively confronted, and the demand for justice remains. Cambodia's courts lack the capacity and independence to undertake trials of the remaining Khmer Rouge leaders, but the government opposes the establishment of a wholly international tribunal along the lines of the Yugoslav and Rwandan models. The result that has been the subject of long-running negotiations between the UN and the Cambodian government would be a body comprised of both Cambodian and foreign judges, a foreign prosecutor and a local deputy, and a mixed staff, with carefully balanced powers that would permit a sense of local ownership but enable the foreign personnel to ensure the independence of the process and its adherence to international standards. A similar hybrid court will likely soon be authorized by the UN Security Council and the government of Sierra Leone for operation in that country. International and domestic personnel similarly staff unique court structures in East Timor and Kosovo which are dealing in part with the aftermath of atrocities. These mixed bodies are less costly than international tribunals, and may combine the principal advantages of both international and local trials.

Prosecution in Foreign Fora: Going Beyond Domestic Constraints

The drive to curb impunity for massive abuses of human rights has manifested itself not only within countries in transition, but internationally as well. As a result of the increased popular pressure for accountability for the most heinous crimes, and the developments in international law discussed above, a growing number of national courts have acted on the basis of universal jurisdiction over such crimes as genocide, war crimes, crimes against humanity and torture to permit the prosecution of foreign perpetrators. Some states have begun to amend their criminal codes to explicitly incorporate this jurisdiction; in others, such exercise of universal jurisdiction does not require any legislative action. The relocation of refugees from countries where atrocities occurred, as well as the occasional encounter between victims and perpetrators in their new states of residence, has also given impetus to the exercise of domestic jurisdiction by these states over the crimes in question. In the past ten years, criminal cases have been opened in Belgium, Germany, Switzerland, Austria, Spain, Italy, Denmark, France, the United Kingdom, the Netherlands and Senegal against foreign nationals alleged to be responsible for crimes against humanity, war crimes, genocide, torture, disappearances or terrorism in their home countries. In some of these cases, independent judges and prosecutors have proceeded despite the desire of their own government and diplomats to avoid offending the foreign state.

This trend toward exercise of universal jurisdiction obviously has enormous ramifications for states in transition. If the national criminal justice system lacks the capacity, or the state lacks the political will, to prosecute those responsible for heinous crimes – or even if

the overwhelming majority of the nation's citizens should freely decide that a comprehensive amnesty is in the best interests of the country – frustrated victims can now circumvent these limitations by finding a foreign court willing to pursue the investigation and trial. Any foreign court, if its national law so permits, can exercise jurisdiction in place of the courts where the offense was committed. Dictators could previously assume that foreign governments would not want to get involved, and low-level perpetrators might reasonably assume that an international tribunal would not bother with them, but as the Pinochet case demonstrated, independent courts can act notwithstanding the discomfort of their own governments: Those culpable for heinous atrocities travel in this new world with less certainty as to their continued freedom. On the other hand, would any perpetrator submit their confession to a South African-style truth and reconciliation commission in exchange for amnesty, for example, if upon stepping across the border he or she could still be subject to prosecution for those crimes in the court of another state? As the Pinochet case showed, such exercise of universal jurisdiction can reverberate strongly in the home country of the defendant. The impact of this new experiment with universal jurisdiction is somewhat unpredictable.[3]

The Near Inevitability of Imperfect Justice

As noted above, evolving international standards have raised the bar for satisfactory transitional justice programs. It must be kept in mind that these standards set the goal – and should continue to do so – but can seldom be maintained to perfection in circumstances that are so far from perfect. In countries attempting a transition following civil war or years of dictatorship, the criminal justice system is generally in shambles. Even if the courts had once been credible, the institutions and personnel of the criminal justice system have typically been destroyed or corrupted. This, indeed, is axiomatic: had the criminal justice system been robust, independent and objective in upholding justice and the rule of law, then large-scale violations of human rights would have been investigated and prosecuted much earlier on. Even with significant foreign assistance, rebuilding an effective criminal justice system (or, in the case of some transitional situations, constructing one for the first time) will not occur overnight. The need to recruit and train investigators, prosecutors, judges and court personnel, adopt reforms to ensure fair criminal procedure, and put in place the material resources and equipment necessary to the operation of the system can take years. The international capacity to provide rapid-response legal assistance in such countries is developing, but still has a long way to go. In such circumstances, the need for justice cannot simply be put in abeyance. Insistence on the perfect can be the enemy of the good.

Even when the international community intervenes so thoroughly as to take over the task of local judicial administration, it can fall short of the international standards. A telling case in point is that of post-war Kosovo, where the UN mission is vested with all executive and legislative powers and foreign experts imported by the UN have the mandate to administer the system of justice. Even in this case, while praising the mission's efforts, an October 2000 report by the OSCE Kosovo office complained of common patterns and practices in the UN-run courts, and provisions of UN-imposed regulations, that fell short of international human rights standards.

A second case is that of Rwanda. The chilling genocidal campaign of 1994 resulted in the slaughter of up to one million souls in one hundred days[4] – a dizzying figure that dwarfs the rate, if not the number, of killings at the peak of the Nazi Holocaust. Building on a program of dehumanization of the Tutsi, this vast killing was accomplished through the mobilization of Rwanda's hierarchically structured society into an orgy of violence. People were recruited, enticed, manipulated, ordered and threatened to participate in the genocide, with the result that overwhelming numbers of Rwandans were implicated as potential defendants following the carnage.

Rwanda's new government fully endorsed the arguments that had been put forward by the human rights community (with far less success) in the Latin American transitions of the 1980s and the post-Communist transitions of the 1990s: that following mass abuses, criminal justice was crucial to transform a culture of impunity to one of accountability. The prison population soon swelled far beyond capacity to over 100,000 people. Foreign human rights advocates argued that these conditions violated international standards, as did prolonged, multi-year pre-trial detention. Trials, they argued, had to begin promptly. The criminal justice system, however, along with the other institutions of society, was decimated in the genocide. Rwandan officials warned that more time was needed to recruit, train and rebuild the system to provide the basis for fair trials. Under international pressure, they began the initial trials, only to be faulted by many of the same critics for the perceived failure of the proceedings to fully adhere to international fair trial standards.

In the past three years, the Rwandan courts processed more than 3,000 genocide cases – a herculean feat in proceedings that have been evaluated as generally fair by independent observers, including those representing the defense. That said, prosecution of the current caseload, which currently involves some 125,000 in detention, would take many decades at best. As a consequence, Rwanda will shortly move the overwhelming majority of the caseload to a new village-level system called *gacaca*, loosely based on an indigenous model of traditional justice. The program will not satisfy all the criteria set by international standards regarding criminal defense rights. On the other hand, most Rwandans in the justice system feel they have no alternative: the caseload cannot be handled by the courts in any timely manner; it is politically not an option to simply throw open the prisons and release over 100,000 alleged *genocidaires*; and it is not acceptable to continue to keep people locked up for years without trial. Although it will be criticized for its shortcomings, Rwandans argue that the *gacaca* program will engage local villages in the process of justice, return and reintegrate perpetrators into their home communities, and empty the prisons of untried cases within a relatively short time.

These cases serve to illustrate an important if uncomfortable lesson from recent transitions. First, pervasive gross violations of human rights almost always leave in their wake a legacy of traumatized societies, weakened economies, shattered institutions generally lacking in credibility, and the absence of a culture informed by the rule of law. Because of these circumstances, however, even when there is a good-faith attempt to hold perpetrators accountable for past abuses, transitional justice will almost always be

somewhat messy and imperfect. International standards and monitoring have made a vital contribution by significantly raising the bar of acceptable methods of dealing with past abuses. Suggesting that national efforts should not proceed until they can completely satisfy these standards is, in practical terms, to deny a society the option of dealing with its own demons. The goal should be a reasonable approximation of these standards. Striking the right balance is a key challenge.

Experience has demonstrated the enduring nature of the drive for adequate justice for gross violations of human rights. In Argentina, more than fifteen years after the transition, victims and authorities have found new ways to bypass legal constraints other than recourse to foreign courts, recently initiating the prosecution of those military officers responsible for the kidnapping of children during the period of the "Dirty War." Courts have also taken to viewing disappearances as ongoing crimes until solved, post-dating any amnesty cut-off and thus fair game for judicial attention. Chile has lifted Augusto Pinochet's immunity and is contemplating a trial a decade after he gave up his dictatorship. In Cambodia, France, Italy and elsewhere, trial efforts are pursued decades after the atrocities in question. The demand for justice is not easily put to rest.

In summation, the last few decades have brought us to a point of conflicting lessons regarding the vital but limited role of criminal trials. On the one hand, there is a far broader consensus that, in the aftermath of mass abuses, criminal prosecution of the most heinous offenses is morally appropriate, legally required and strategically correct to facilitate democratization and the reduction of conflict. This consensus applies whether the context is a transition from war or a transition from a repressive regime. On the other hand, trials, whether conducted by domestic courts, international tribunals, or hybrid bodies, will just touch the tip of the iceberg. Those prosecuted will constitute a tiny percentage of potential defendants implicated in the abuses. As a consequence, on their own, this small number of trials will generally not be sufficient to adequately address the needs of victims or to effect necessary changes in the culture that made the abuses possible. Criminal prosecution must be seen as part of an integrated package of mechanisms to deal with the legacy of abuse.

Amnesty: Shifting Sands

If a decision to avoid dealing with past abuses is determined to be the necessary price for obtaining a peace agreement or the departure of a repressive regime, then amnesty becomes readily acceptable as a way of achieving this transition. Advocates of this approach argue that wholesale amnesties are not simply the easy way out, the political path of least resistance. Those responsible for atrocities may continue to wield sufficient power to effectively block the transition, and consequently to dictate its terms. Beyond the imperatives of realpolitik, moral arguments can be – and have been – made that if an unsavory deal can facilitate a quicker end to the killing and facilitate the process of societal reconciliation, then it behooves the negotiators to accept it and move on.

With the exception of Argentina – which initially pursued trials of the leaders of the ousted regime and then moved on to prosecute other officers responsible for human rights

abuses before bowing to military pressure and calling a halt to further trials – the transitions in Latin America were largely characterized by a decision to abstain from pursuit of criminal accountability. Blanket amnesties were accepted as the routine.

Experience has proven such a calculation to often be flawed, however, as a blanket amnesty may prove to constitute not only a moral sacrifice but also a tactical blunder. An amnesty often does not mean drawing a temporal line and moving forward, leaving the problems of past abuses in the past. In addition to aggravating victims' sense of injustice and abandonment, an amnesty can actually preclude the demarcation of past and future by carrying the culture of impunity into the present. Two recent examples are instructive.

The logic of amnesties in exchange for peace continues to hold an appeal for some. The establishment of the International Criminal Tribunal for the former Yugoslavia by the UN Security Council was a major step in the battle against impunity. At the time of the various negotiations to conclude the war in Bosnia (culminating in the Dayton Agreement of 1995), there were many voices arguing that although the tribunal was a nice idea, amnesty for Radovan Karadzic, Ratko Mladic and others as the price of ending Europe's worst slaughter since World War II would be worth it. Due to the perseverance of the ICTY and its supporters, this logic did not carry the day, these indictees were excluded from the negotiations, and the Dayton Agreement affirmed the obligation of all parties to cooperate with the Tribunal. After Dayton, however, this commitment hardly received the highest priority, as various NATO policymakers pondered whether prompt apprehension of those indicted might actually threaten the fragile peace – the same logic implicit in the amnesty rationale. The result was a situation in which those most culpable for wartime atrocities continued to wield influence from behind the scenes, and hardliners continued to feel reasonably secure in an environment of impunity, obstructing refugee return and impeding political or economic reintegration of the country. Military peacekeeping efforts that cost billions of dollars were arguably significantly prolonged from what might have been possible with a more robust approach to accountability.

The amnesty logic was tested again in Sierra Leone in the summer of 1999. During the previous eight years, the Revolutionary United Front (RUF) had pursued a vicious civil war to control the country's rich diamond resources and to gain power. Among the atrocities inflicted on the people of Sierra Leone, the RUF's signature tactic was to terrorize the population by hacking off the limbs of civilians, often assembling the residents of a village for such mass amputations. In an attempt to bring an end to the brutality, the parties to the July 1999 Lomé Peace Agreement adopted a power-sharing arrangement that welcomed RUF leader Foday Sankoh into the government, put the RUF in charge of the diamond mines, and "in order to bring lasting peace to Sierra Leone," granted a sweeping general amnesty which provided "absolute and free pardon to all combatants and collaborators in respect of anything done by them in pursuit of their objectives."[5] Within months of the accord abuses were renewed, with the RUF attacking not only its fellow citizens but also UN peacekeepers. Accountability is not pursued in a vacuum and other factors will always be in play. In the end, however, impunity did not provide for lasting peace; to the contrary, it arguably emboldened those responsible for past abuses. Instead, reckoning with the past over the next few years through the

combination of a Truth and Reconciliation Commission, and a special court that will try those most culpable for past atrocities, will hopefully provide a more stable foundation for "lasting peace" in Sierra Leone.

The corollary to a growing global emphasis on accountability following mass abuses is a weakening of support for broad general amnesties. In addition to being politically distasteful, international law today regards such amnesties as impermissible for genocide, war crimes, crimes against humanity, torture and related abuses.

South Africa's truth and reconciliation process introduced a new approach to amnesty. Instead of a blanket amnesty, in which the state provides all perpetrators, anonymously and en masse, with a clean slate, South Africa offered a conditional amnesty. The burden was placed on perpetrators to come forward by a set deadline and apply for amnesty on an individual basis; the price was admission of their responsibility through a confession of their crimes and cooperation with Truth and Reconciliation Commission investigators. This was a profound distinction from earlier amnesties in Latin America and elsewhere; if anything, it more closely resembled the plea bargaining practiced in some criminal justice systems. Over 7,000 amnesty applications were received by the TRC, which is still processing these cases. Although some have expressed frustration with the slow pace of processing, it must be in a comparative context: it would have taken years longer for the courts to adjudicate a fraction of these cases, at much greater financial cost. Overall, the amnesty program was successful in establishing individual accountability and in facilitating the construction of a far more complete record and analysis of the patterns and institutions of abuse under apartheid than would have been possible without these individual confessions.

The South African approach to amnesty has proven attractive to other societies emerging from a period of repressive government or wartime atrocities. It has stimulated new academic work exploring the use of limited or conditional amnesties. A key element is often ignored, however. South Africa's TRC process was only able to generate so many applications for amnesty because of the maintenance of a second track: the threat of prosecution of those not entering the amnesty program. As more of one's colleagues provided information through amnesty applications that could be used by criminal investigators, the incentive to apply grew. Without the possibility of facing criminal proceedings, it is highly doubtful that any more perpetrators would have come forward in South Africa than did before the truth commissions of Latin America and elsewhere, namely those few individuals who felt remorse and felt compelled to try to clear a guilty conscience by telling their story. South Africa is now entering a phase in which the viability of its conditional amnesty program as a model for other countries will be put to the test. Once the TRC completes the amnesty proceedings, it remains to be seen whether those perpetrators of atrocities who did not enter the program will actually be subject to criminal proceedings.[6] There are those who argue that the country needs to close this chapter and move on. If none are prosecuted, however, then the incentive to apply for amnesty will be perceived to have been a hollow one. In this scenario, the viability of the South African model for replication elsewhere will be weakened, as perpetrators in those other countries assume that the same pattern will be repeated.

Dealing with the Numbers

The kinds of massive abuses under consideration cannot, as a rule, be perpetrated by a small number of people. A systemic pattern of atrocity and trampling of fundamental rights potentially implicates everyone involved in the system, however tangentially. Depending on the nature of the violations, they require: relatively large numbers of first-line perpetrators, those who actually kill, torture, kidnap, and destroy property; the architects of the atrocities, those who organize, manage and give orders; complicit judges and other legal officials; those who incite the commission of abuses through their roles in the media, the educational system or the religious order; those who provide information regarding colleagues or relatives; those who provide materials or resources necessary to the commission of atrocities with negligent disregard to the effect of their actions; those who knowingly benefit from slave labor or knowingly acquire a child stolen from its parents; those who were cogs in the machinery – who worked at jobs seemingly unrelated to the abuses but which made it possible for a repressive regime to function. The list goes on and on, often into thousands of people.

In this context, subjecting everyone implicated in past abuses to the strictest procedures and the maximum penalties is impossible. The criminal justice system of every country emerging from a pattern of mass abuses is compromised and minimally functional, with severely limited capacity at best. It must be recognized, in addition, that even a robust and well-functioning judicial system would not provide a viable venue for the handling of what may be a substantial percentage of the society. Attempting to prosecute or purge all those implicated would be politically destabilizing, economically devastating and logistically impossible. In every nation reeling in the aftermath of heinous atrocities, there have been those who argue that too many perpetrators or their accomplices have been allowed to escape the hand of justice, but ethically defensible practical considerations will require compromise over absolutism. Furthermore, the evolution of international standards regarding, for example, due process rights or the housing and treatment of prisoners, has imposed an additional burden on the process, and the additional cost and time of compliance with these standards make it even more certain that casting the widest possible net of liability is not a realistic scenario for a transitional society at the turn of the century.

As a consequence, societies grappling with this problem are obliged to make choices and establish levels and categories of culpability. It is both morally and practically appropriate to distinguish between the mass murderer and the teacher who answered questions from police about a student's political views. Delineating categories is important both for purposes of properly calibrating penalties and for developing different mechanisms best suited to addressing each category.

Dealing with the Numbers through Non-Criminal Sanctions

Despite the maturation of the field of transitional justice, many observers too often assume that the options for dealing with those implicated in past abuses are punish or

pardon. Because the huge numbers cannot be handled by the criminal justice system, and simply leaving hundreds or thousands of these individuals untouched and in their past positions would pose a significant injustice and threat to reform, many countries have adopted a third approach, the use of non-criminal sanctions. Based on their past activities, associations or positions, individuals may be excluded from a variety of elected or appointed offices. This may include positions in government agencies, in the military or security forces, in banking, education, or a variety of other fields. Sanctions may also include a loss of benefits or selected civil rights.

As noted earlier, the post-communist transitions in the former Soviet Union and Central and Eastern Europe did not include many trials. Extensive debates have ensued, however, over the use of "lustration" programs. Although differing somewhat from one country to another, this approach has involved reviewing the extensive records of the former secret police services and excluding from various elected or appointed offices those implicated as former collaborators. In Poland, the debates have continued to this day, with a new lustration law recently adopted.

Purge programs have not been limited to the former Communist bloc countries. In El Salvador, the "Ad Hoc Commission" reviewed individual records and recommended the forced retirement of one hundred senior military officers based on their past involvement in human rights abuses, including the Minister of Defense. In Bosnia, the International Police Task Force is charged with screening all candidates for the reconstituted local police forces, rejecting anyone who has engaged in persecution of ethnic minorities.

Screening or purge programs carry several advantages: they can be used to process large numbers of cases quickly, not being burdened by the procedural rigors of the criminal process; they cost far less than trials in both financial and human resources; they are a measured response, allowing those less culpable to avoid trials or prison. In Bosnia, for example, most police officers who participated in ethnic cleansing will not be prosecuted, but they should be excluded from the new local police force, where their continued presence would cause their former victims to feel unsafe. However, precisely because they are lower profile than trials, generally hidden from public scrutiny, and not subject to the same due process guarantees, non-criminal sanctions are much more apt to be used for purely political reasons, to pursue vendettas or to empty bureaucracies in order to install one's own loyalists. As a general rule, the more onerous administrative sanctions employed by several countries in the post-World War II transitions have not been repeated. With the exception of Ethiopia, where the right of suffrage was denied to all members of the former ruling party, sanction programs have generally been limited to restrictions on employment. In some cases these restrictions have been limited to a cooling-off period of five or ten years, in theory giving time for democratization to take hold before re-opening a level playing field for all.

The use of trials and truth commissions has been the subject of numerous analyses and policy discussions. A great deal has been learned, and improved standards and protocols have developed as a result. The same attention has not been given so far to the use of non-criminal sanctions in confronting past abuses. In a process of democratization it is

problematic to deprive large numbers of people of their social status, source of livelihood and rights of political participation without affording them adequate procedural rights. Some have suggested that screening programs are not retrospective or punitive, sanctioning individuals for their past misdeeds or affiliations, but merely prospective, ensuring the qualifications of candidates and applicants for important positions in society. This analysis would impose much lower due process requirements on the effort, but actual practice in many countries has belied this non-punitive depiction. Some have argued alternatively that when it comes to purges, members of the police or military are not entitled to the same procedural protections as are those in government or in the private sector. Limited efforts are now being made to develop appropriate standards,[7] but much more thought is needed. Work on non-criminal sanctions is a missing link in the evolution of a comprehensive approach to transitional justice.

The Evolution of Truth Commissions

Clearly one of the most important developments of the last two decades in confronting a legacy of past abuses is the emergence of the truth commission. This institution has captured the public imagination and has made a singular contribution to the search for best practices in transitional justice. Information on the model is routinely requested by those contemplating their society's painful past.

Truth commissions have become increasingly sophisticated operations. Of the principal mechanisms employed to address the challenge of transitional justice – trials, non-criminal sanctions, compensation and truth commissions – truth commissions have benefited the most from the process of transnational learning and information sharing. Those designing a new truth commission in one country have often conferred with members or staff of truth commissions elsewhere, and routinely examine the charters and reports of these foreign counterparts. Some recent truth commissions have included among their consultants and staff veterans of truth commissions elsewhere. Advanced methodologies and computer software programs have been designed to aid truth commissions in their data collection and in their efforts to discern patterns from thousands of testimonies.

Truth commissions, as they have evolved, are appropriate in two different situations. When these bodies were established in various Latin American transitions — in countries such as Argentina, Chile, and El Salvador — they were needed because the systems of abuse in these countries had been designed to hide the facts. Torture and related abuses were committed largely in secret; crimes like "disappearances" were intended to erase any trace of the victim or the crime. As a consequence, there was a compelling need to uncover and acknowledge the truth. In Bosnia, on the other hand, truth is not hidden; rather, such a commission is needed because of the existence of multiple "truths," each with a distinct ethnic coloration. Nationalists of each of the three ethnic communities involved in the Balkan wars propagate a history that portrays their group as the sole victim of mass abuses and the others as evil perpetrators and monsters. Three separate war crimes commissions, dominated respectively by Bosniak, Croat and Serb perspectives, have focused almost exclusively on the victimization of their own group.

At a meeting in 1997, which included the leaders of these three commissions, one of them recognized that he and his counterparts were "in the process of creating three conflicting versions of the truth, and if we keep going along this path, fifty years from now our grandchildren will fight again over which one is correct."

The Role of Civil Society

One of the strengths of truth commissions is their ability to provide a forum in which all parties can participate. Any victim, perpetrator or bystander can come forward and tell their story. Representatives of relevant sectors are invited to contribute their perspective and respond to questions; these may include religious or political leaders, representatives of the media or of the business, medical and legal communities, human rights activists, and relevant NGOs. Historians, sociologists, and psychologists also have a role to play. To note three very different models and contexts as examples, Chile, South Africa and Guatemala each conducted successful truth commission processes. In each of these cases, the participation of civil society was crucial to that success. Without the work of victims' coalitions, human rights groups, church leaders and other components of civil society, the three truth commissions would have been much less effective. A truth commission, even if it doesn't hold open hearings, needs to engage the public in the process. It should be an exercise in collective soul-searching, an exploration of society's ills and defects that permitted the atrocities in question. Without the active participation of civil society and without the resultant sense of public ownership of and investment in the process, a truth commission could produce a technically accurate history of the conflict and abuses, but the report might be relegated to an academic shelf, without making any meaningful contribution to the reclamation of society's sense of values, tolerance and respect for human rights.

As a consequence, a nation in which the institutions and organizations of civil society have been wholly decimated by civil war or by a long period of harsh repression will not, in general, be an appropriate candidate for a truth commission. Where the grassroots no longer exists in any meaningful way, the situation will suggest more of a "top-down" mechanism for reckoning with past abuses. Such was the case in Rwanda following the 1994 genocide. All the institutions of society, both public and private, were destroyed. There was an urgent need to end the prevailing sense of impunity and to establish the principle of individual accountability. In addition, however, the reality was that the criminal justice model, organized and run by the state, and not as reliant on participation of the public, was the only option and consequently was adopted in 1995. Five years later, with civil society somewhat recovered and functioning on both the national and local level, Rwanda can now contemplate shifting from the model of criminal trials to a more participatory approach known as *gacaca*, which will actively engage the public and civil society down to the village level in the effort to recover the facts of the genocide, facilitate a cathartic exchange between perpetrators and victims, and institute justice.[8]

In Bosnia and Herzegovina, a notable characteristic has been the passivity of civil society. For too long, owing in no small part to the legacy of communism, people in Bosnia have come to expect a "top-down" approach, in which the population docilely

permits the leadership to determine their fate. As has been the case in many formerly communist countries, shedding this mentality has been a slow process. One of the most promising developments in Bosnia, however, has been the recent impatience of civil society with the top-down approach to dealing with past abuses. When it comes to confronting ills of Bosnia and Herzegovina's recent past with an eye to shaping a better future, a growing number of its citizens have begun to take the initiative without waiting for the approval of nationalist political leaders. The emergence of a dynamic civil society in Bosnia is apparent in the current effort to establish the Truth and Reconciliation Commission.

Over one hundred NGO, political, religious and civic leaders have, to date, signed a petition calling for establishment of the Truth and Reconciliation Commission. In January 2000, an extraordinary conference in Sarajevo brought together a diverse group of 80 civil society leaders, from both the Federation and Republika Srpska, from human rights groups, victims' associations, religious orders, political parties, academia, youth groups and others, collectively representing thousands of people throughout the country. A broad-based citizens' coalition is now advocating creation of the TRC by parliament following the November 2000 elections. Independent media – another element of the emerging civil society – has provided significant coverage to the effort. This leadership of civil society bodes well for the success of the Bosnian commission.

The significance of the role of civil society in coming to grips with the past is highlighted by the experience of El Salvador. The parties to that country's 1992 peace agreement determined that although a truth commission was needed to provide a forum for victims and to establish an objective record of abuses and responsibility, Salvadoran society was too polarized to undertake the task for itself. As a consequence, the Commission on the Truth for El Salvador was established as an international operation: All the members and the staff were non-Salvadoran. This "outsider" quality was cause for some rejection of the exercise, even though the Commission's report was regarded as generally accurate.

There have been no purely international truth commissions since El Salvador's, and that is likely to remain the case. To the extent that the mandates of these commissions are expanding to not only establish the facts but also to serve as a catalyst for reconciliation, a sense of local ownership and engagement in the process becomes increasingly important to the success of the exercise. Where polarization or the limited capacity of domestic society requires an international presence, a hybrid has been developed; a national truth commission with a foreign chair, local members and a mixed staff, similar to the development of mixed courts discussed earlier. This model proved effective in Guatemala. Hybrids of this sort are also contemplated for the truth and reconciliation commissions now being planned in both Sierra Leone and Bosnia and Herzegovina.

From Truth to "Truth and Reconciliation"

As truth commissions become more sophisticated, their goals and mandates get somewhat broader as well. Although the appellation "Truth and Reconciliation" was first

applied to the Chilean commission in 1990, the reconciliation element of the exercise has received increased attention in recent cases.

When Guatemala's truth commission organized a national conference in 1998 to elicit input from representatives of civil society from around the country regarding the kinds of societal reforms that were in order, there were those within the UN mission and elsewhere who complained that this kind of activity was beyond the commission's mandate of "historical clarification." The position of the commission, on the contrary, was that this was completely in accordance with its charge to "encourage national harmony and peace." In its final report, the commission's concern was not only to establish a historical record and a degree of accountability and reparations, but also the imperative to "achieve true reconciliation and construct a new democratic and participatory nation which values its multiethnic and pluricultural nature." Its analysis and recommendations in this regard extended to such matters as the social and political participation of indigenous peoples and their employment and professional training in state agencies; the need for fiscal reform; and the use of local traditional forms of conflict resolution.

Similarly, South Africa's Truth and Reconciliation Commission went far beyond an examination of victims and perpetrators in its five-volume report. Like most earlier truth commissions, it recommended measures to address accountability, prevent future human rights violations, provide reparations and rehabilitation for victims, and reform the security forces. The South African TRC went further, however, and also included extensive recommendations aimed at the faith communities, the business sector, the legal community, the health sector, and the media.

In the case of Sierra Leone, where large numbers of children were both victims and perpetrators of the abuses, the Truth and Reconciliation Commission is expected to play a key role in examining this horrible problem and in providing a mechanism for a traumatized society to begin the repair and reintegration of its next generation. In Bosnia, all parties have agreed to an intriguing innovation: as part of its mandate to record and analyze past abuses, their TRC will also document the stories of those on all sides who resisted the abuses, often risking their lives to protect neighbors across ethnic lines. Although nationalists of each ethnicity would prefer to bury such stories and convince their communities that all Bosnians of a different ethnic group are their enemies, moderates recognize the important contribution that acknowledgment of these many acts of humanity can make to the process of reconciliation.

One of the reasons for this increased focus on reconciliation and reform has to do, arguably, with the different contexts in which truth commissions are being established. In a transition from a repressive regime, which killed, tortured and disappeared people solely on the basis of suspected political leanings, the prevention of further abuses requires the establishment of accountability, democratization of government, and reform of the security forces and the criminal justice system – surely no small order. This roughly characterized the nature of the transitions in Argentina, Chile and El Salvador. When the atrocities also have a racial, religious or ethnic component to them – as they

have in South Africa, Guatemala, and Bosnia – then more is needed to rebuild society in a manner that will avoid new rounds of violence. Left unaddressed, grievances can be incorporated into group traditions and lore that are transmitted from one generation to the next, planting the seeds for future conflict. Many people have come to believe that truth and reconciliation commissions can make an important contribution in this regard.

Truth Commissions and Trials: From Choice to Co-existence

The battle against impunity for massive human rights violations has been a long and difficult one that still requires a determined perseverance by its advocates. Ironically, during the wave of democratic transitions in the 1980's, the establishment of truth commissions was welcomed by many as an important advance in that battle. As officially sanctioned bodies that investigated and exposed the systemic abuses that were otherwise hidden and denied by outgoing authoritarian regimes – at times even identifying culpable individuals by name – truth commissions pierced the wall of invincibility and impunity. Truth commissions in places like Argentina and Chile and El Salvador had greater success in documenting the details and structures of abuse than many had expected, and invigorated the growing worldwide effort to ensure greater accountability in the wake of serious human rights violations.

As discussed earlier, that effort has advanced to such milestones as the recent attempts to prosecute former dictators Augusto Pinochet of Chile, and Hissein Habré of Chad, in foreign courts; the creation of the international criminal tribunals for the former Yugoslavia and Rwanda; proposals for new tribunals in Cambodia, East Timor and Sierra Leone, and the adoption of the 1998 Rome Treaty on the ICC. Ironically, flush with this sense of momentum and determined to cement the principle of criminal accountability, many human rights advocates now view truth commissions as minefields that can complicate and weaken the drive against impunity.

Sound policy, however, demands moving beyond the simplistic belief that prosecutions before international tribunals like the ICC constitute an effective and principled response to genocide, war crimes and crimes against humanity, while truth commissions are "soft," second-best compromises. It is essential to recognize that mass atrocities – especially those perpetrated in the context of ethnic or religious conflict – generally expose or produce complex problems and rifts in society which are resistant to one-step solutions; they typically require sophisticated, multi-faceted and well-integrated responses.

The lack of recognition of this need for integrated responses has, at times, produced a certain heavy-handedness on the part of tribunals and their advocates. When Bosnians from across the ethnic and political spectrum decided that meaningful peace and reform called for a truth and reconciliation commission, senior officials of the Hague tribunal effectively blocked the project, refusing to meet with the locals, urging international institutions and national governments to oppose it, and at one point even suggesting that the TRC must be opposed even if it would improve the chances for lasting peace. In Sierra Leone, after the national legislature approved the charter for a truth and reconciliation commission as mandated by the Lome peace agreement, the UN Security

Council took steps towards establishment of a special court to prosecute war crimes and crimes against humanity committed in the country. The response from some was to assume that with this judicial process, the TRC was no longer necessary. In both cases, fortunately, a greater appreciation of the complementary nature of the institutions seems to have evolved.

Practical considerations demonstrate the need for a multi-faceted approach. As noted earlier, massive brutalities of a systemic nature are not carried out by a handful of individuals. Rather, their perpetration necessarily requires the participation of hundreds, and often thousands, of people at various levels of responsibility and proximity to the crime. The criminal justice system of a nation emerging from such a period of large-scale abuses is nearly always in fragile condition. In the transition period, the national courts do not have the capacity or credibility to mount trials for the enormous number of potential defendants implicated in the atrocities. International tribunals are not designed to try more than a small number of key defendants. The current ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda respectively had totals of 37 and 44 accused persons in custody five years after their establishment. The Special Court for Sierra Leone is projected to try approximately 25 people over a four-year period. When established, the ICC, obliged to respond to multiple incidents concurrently, in different parts of the world, will not be able to prosecute any larger numbers.

Prosecutions are essential to establish accountability, reject collective blame and hopefully deter future atrocities. When gross violations of a systemic nature have been committed by large numbers of people against large numbers of people within a society over an extended period, however, the trials of a few individuals cannot realistically be expected to cure that society of its ills. It is necessary to look wider and deeper at what factors made these mass abuses possible and how to build a community in which the likelihood of their recurrence can be reduced or eliminated.

Interestingly, the transition that provided the first truth commission of note, namely the Argentine transition of 1983-84, demonstrated the complementary and mutually reinforcing nature of truth commissions and trials. The "National Commission on the Disappeared," chaired by Ernesto Sabbato, provided a forum in fifteen different provinces for several thousand victims and relatives, and identified the cases of nearly 9,000 disappeared human beings, and some 340 secret detention centers. The National Commission investigated and analyzed the structures and patterns of repression, examined the respective roles of such sectors as the church and the judiciary, compiled over 50,000 pages of documentation, submitted over 1,000 dossiers to the courts for judicial investigation, and recommended actions to address its findings. In general, the Commission helped a society better confront and understand its painful recent past. It also provided valuable evidence for the criminal proceedings against members of the former military juntas that were initiated concurrent to the Commission's work. The two processes strengthened one another and together had a much more profound impact than would have been achieved by either approach on its own. And yet, seventeen years later, this lesson is only slowly being re-learned.

Truth commissions can be particularly helpful to the prosecution of such abuses as genocide and crimes against humanity. Trials alleging crimes against humanity, for example, require proof not just of individual violations like murder or deportation or rape, but also evidence that these acts were committed as part of a widespread or systematic attack directed against the civilian population. Determination of such patterns is a central element of the work of truth commissions, which can base such conclusions not only on single testimonies or pieces of evidence, but also on the analysis of thousands of statements and interviews of victims and perpetrators. This information can be invaluable to the work of prosecutors.

Beyond individual criminal accountability, a society which has been sullied by the commission of genocide or other widespread atrocities must also explore and reckon with the problem of passivity when war crimes are committed in the name of one's people, and with, in Karl Jaspers' words, the "commission of countless little acts of negligence, of convenient adaptation of cheap vindication, and the imperceptible promotion of wrong; the participation in the creation of a public atmosphere that spreads confusion and thus makes evil possible." At these crucial levels of reckoning, a truth commission can be a key element in the attribution of various levels of culpability and the reconstruction of fractured societies. Truth commissions can probe the role of entire sectors – the media, religious leaders and liturgy, the educational system, the judiciary – in contributing to the environment that made these abuses possible. This focus will generally be beyond the scope and jurisdiction of the criminal justice system.

What Do They Really Do?

Finally, it should be noted that truth commissions are still a relatively recent experiment. Although logic, visceral reactions and anecdotal evidence suggest that these bodies (when properly structured, staffed and financed and when understood to be part of an integrated and carefully tailored package) make valuable contribution to a society's reckoning with large-scale, systemic abuses and to laying a foundation for needed reforms, a distance of less than two decades since the first of these commissions is not enough to determine their long-term impact. What was the effect of any truth commission on the lives of victims and perpetrators, on their children and associates, and on their re-integration into society? Was the commission a catalyst for actual reforms in the military, security or intelligence services? Were its recommendations – whether directed at victims' benefits, the educational system, governmental agencies, the courts, or parts of civil society – ultimately implemented? Did the commission process or its aftermath have any impact on political, ethnic or racial divisions in the nation? Has the commission's factual findings withstood historical scrutiny? We are now entering the period in which retrospective studies are possible in order to begin to evaluate the effect of truth commissions.

Compensation

A practical problem has appeared in virtually every case under consideration, namely, balancing the allocation of reparations for individual victims against the needs of the

victim's community or the larger society. Chile was exceptional: with a relatively small class of eligible victims and a relatively healthy economy, it could undertake reforms while offering a generous and comprehensive package of benefits for individual victims. In most cases, however, the transitional government inherits a weak economy at best, decimated institutions and sectors, the legacy of neglect of basic services for large parts of the population, and significant poverty. In this situation, is the moral imperative to compensate the victim of torture, to rebuild homes for returning refugees, or to provide running water for ethnic enclaves that have been the object of years of discrimination? In South Africa, the Truth and Reconciliation Commission proposed individual reparations, but key members of the government have argued that the money should be spent instead to extend assistance to communities in need. In the post-communist transitions, the priority to be assigned to returning every parcel of state-owned property to its original owners or their descendants, versus the redistribution of property to maximize the development of an efficient market economy, was not easily determined. In Rwanda, those few victim plaintiffs who, under local law, joined as parties in domestic genocide trials won huge awards that, if paid, would deplete the funds designated for victim compensation, leaving nothing for distribution to the vast majority of genocide victims.

International law increasingly recognizes an obligation to provide reparations to victims of gross violations of human rights, but countries emerging from mass trauma face very difficult policy choices in this regard. Although the issue has been confronted repeatedly in various countries over the past twenty years, relatively little progress has been made in the development of clear and fair responses.

Conclusion

In recent years, the need for transitional societies to deal effectively with the legacy of past abuses has become widely accepted. Much has been learned and adapted from one country's experience to that of another. The mechanisms available to confront this challenge have become more developed, as has the recognition that the problems of traumatized societies are not amenable to "one size fits all" solutions. The policy, donor, and academic communities are all moving in a constructive direction in their treatment of the transitional justice dilemma. Until we can determine clearly that these methodologies actually reduce the incidence of violence and mass abuses suffered by people around the world, however, there is much work left to be done.

Notes

[1] Gunnar Theissen, International Internet Bibliography on Transitional Justice (Version 1.1; 27 January 2000) <http://www.reconciliation.org.za/tjb>.

[2] Conversation with the author, 1992.

[3] In a significant development for the exercise of universal jurisdiction, the International Court of Justice in February 2002 rejected an assertion of jurisdiction by a Belgian court over Abdulaye Yerodia Ndombasi. A Belgian investigating judge issued an international arrest warrant for Ndombasi on charges of offenses constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and crimes against humanity, in connection with the massacre of hundreds of Tutsi victims in the

Democratic Republic of Congo. Mr. Ndombasi was not a government minister when the alleged offenses occurred, but was Minister of Foreign Affairs at the time that the arrest warrant was issued, seeking his provisional detention pending an extradition request. The ICJ ruled that the arrest warrant and its international circulation were unlawful, "in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for foreign Affairs of the Democratic Republic of the Congo enjoyed under international law."

[4] Estimates range from a minimum of 500,000 up to one million; it is questionable whether the number of victims of the Rwandan genocide will ever be certain.

[5] In signing the accord on behalf of the United Nations, the Special Representative of the Secretary-General attached a proviso that the amnesty was not recognized with respect to the crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

[6] The processing of amnesty cases by the TRC was completed in 2001, and the Commission will submit its final revised report in March 2002.

[7] *See* in particular Articles 48-50 of the "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" drafted by Professor Louis Joinet for the UN Commission on Human Rights. UN Doc. No. E/CN.4/Sub.2/1996/18 (29 June 1996).

[8] Organic Law No. 40/2001, establishing this new *gacaca* system, was enacted on January 2, 2001. It is expected to transfer over 90% of the genocide caseload from the criminal justice system to locally elected *gacaca* panels.

The Pinochet Case: International and Domestic Repercussions

José Zalaquett

A New Scenario

The detention in London of Augusto Pinochet, from October 16, 1998 to March 2, 2000, has been widely seen as a major milestone in the emergence of a new international scenario, more conducive to the attainment of international justice for human rights violations and war crimes.

The Pinochet case and the events it has spawned, are taking place during what may be considered a third stage in the development of the international human rights system inaugurated after World War II. The first stage was marked by international trials and intense law-making and standard-setting activities. It was a foundational time. A new international humanitarian order was being built. Its main pillars were International Human Rights Law,[1] International Humanitarian Law, and the International Law of Refugees.[2] During this foundational period the principal actors responsible for building the human rights system were the United Nations and the leading powers of the time. In parallel, regional intergovernmental organizations began to replicate these international developments[3]

A second phase in the post-war evolution of this human rights system began in the 1960s, with the emergence of an international human rights movement. Amnesty International, founded in 1961, acquired commanding presence in the late 60s. Other international nongovernmental organizations were created around that time. The nascent human rights movement gained sustained momentum in the beginning of the 70s and subsequently spread to most parts of the world.

It was the height of the cold war. In order to be credible and successful, the best known international human rights organizations avoided any partisan stance. Rather, they sought to work impartially for the observance of norms whose international legitimacy could not be disputed. From the late 60s to the early 80s, the work of the international human rights movement consisted mainly in documenting and denouncing state abuses, and in mobilizing pressure to defend the victims. It addressed governments who were violating human rights.

The situation in many countries was tragic and the work of the human rights movement was arduous and complex. Nevertheless, its intellectual and ethical bases were quite straightforward and simple: Most of those states had signed international human rights declarations or treaties and it was in their power to continue or to cease to commit such crimes. The human rights movement credibly documented gross violations, it captured the attention of the international media, it mobilized public opinion and succeeded in moving its

concerns on to the international agenda. During this second phase, the movement also helped to energize the intergovernmental human rights machinery by bringing complaints against states before United Nations' human rights bodies and before regional human rights commissions and courts. However, international criminal justice remained dormant.

A third stage in the development of the international human rights system may be said to have started in the early 80s. By then the values of human rights and democracy had gained unprecedented international legitimacy. The ferment of political change was felt everywhere. The demise of the Soviet Union and its allied regimes in Europe, and the end of the cold war, had immediate reverberations in Latin America, Africa and other parts of the world. Many countries formerly under dictatorial regimes, entered a process of what became known as a "transition to democracy". In this new climate, the need for these countries to confront their recent past was seen as a moral and political imperative in order to do justice, affirm the values that had been transgressed, and prevent the recurrence of arbitrary rule and state crimes. In parallel, in the post cold war years, internal warfare, often rooted in ethnic, national or religious conflict, erupted in many countries, in some cases facilitated by the debilitation or dissolution of central state authority. Crimes against humanity and war crimes were committed in the course of these conflicts, the most dramatic occurring in the former Yugoslavia and in Rwanda.

In response to these events, three distinct agendas developed during this last phase in the evolution of the international human rights system. First, a cluster of issues grouped under the term "transitional justice" or "truth, justice and reconciliation," referring to the need to build or rebuild a democratic system and to address, in the process, a legacy of human rights violations or war crimes committed in the recent past. The international human rights community has monitored these situations and it has demanded incoming governments to make special efforts to achieve truth, justice and reparations. In some cases, the UN has taken an active role in peace-making and in helping to implement transitional policies. Also, many governments facing the dilemmas of transitional justice have actively sought to learn from the experiences of other countries.

A second set of issues relates to humanitarian action. It raises questions about humanitarian assistance, peace-keeping and the legitimacy of armed intervention in foreign countries aimed at stopping or preventing major humanitarian crises. The contemporary cases that best illustrate the political, legal and moral dilemmas of armed humanitarian intervention are the former Yugoslavia, Haiti, Somalia, Rwanda, and East Timor.

A third group of issues concerns international criminal justice. Since the early 90s, the international community has shown a renewed determination to take a stance on the prosecution and punishment of major crimes under international law. This new impulse has run through three different channels.

- Establishment of ad hoc international courts. Since the Nuremberg and Tokyo trials, more than 40 years elapsed before new ad hoc criminal courts were established: the

International Criminal Tribunal for the Former Yugoslavia[4] and the International Criminal Tribunal for Rwanda.[5]

- Creation of a permanent international criminal court. On July 17, 1998, the Statute of the International Criminal Court was adopted at a conference in Rome. [Ed: On April 11, 2002, the required 60 ratifications were entered. The court will come into existence on July 1, 2002.]

- Universal jurisdiction. Forms of universal jurisdiction were gradually being established during the postwar period.[6] Starting in the 70s, a standard universal jurisdiction clause began to be incorporated, with minor variations, in different conventions dealing with matters as varied as the prevention, prosecution and punishment of terrorism[7], the fight against torture,[8] and the fight against corruption.[9] The new standard clause permits states, or imposes on them the obligation, to establish their jurisdiction over certain crimes based on four criteria: the criminal offense was committed in their territory; the alleged perpetrator is a national of that state; the victim is a national of that state; the principle *aut dedere aut judicare*, according to which states should establish their jurisdiction to prosecute alleged perpetrators of certain crimes who happen to find themselves within their territory, unless it extradites to states which fit any of the previous three criteria.

Against this background the many implications of Pinochet's detention in London may be better appreciated. It was the first time that a former head of state, notorious for his human rights record, was detained upon the initiative of foreign countries acting ostensibly within the framework of the new developments in international human rights law. Because of its extraordinary symbolic importance, the Pinochet case seems to have given great impetus to the machinery of universal jurisdiction. It also brought together the hitherto separate strands of international justice and the dilemmas faced by countries undergoing a process of transition to democracy.

International Impact of the Pinochet Case

The detention of Augusto Pinochet in London initiated lengthy and complex proceedings involving political decisions by the British Home Secretary, Jack Straw, and many judgments by various British courts. The latter include three judgments by the highest court of the United Kingdom, the Law Lords of the House of Lords. It is sufficient here to recall the bare essentials of the case.

Augusto Pinochet, *de facto* Head of State of Chile during the period 1973-1990, and former Commander-in-Chief of the Chilean Army, had stepped down from this last position on March 11, 1998, and became Senator for Life. Months later he traveled to London where he was detained on October 16, following an extradition request by Spain, who wished to try him for claims of genocide, terrorism, and torture brought by Spanish investigative Judge Baltazar Garzón.

The case raised many complex legal issues. Although international human rights organizations regarded the case as the application of universal jurisdiction for major human rights crimes - and for practical and symbolic purposes it had this character - the British courts treated the question principally within the framework of extradition law and international law concerning state immunity and the immunity of heads of state. One of the main principles of extradition law is called "double criminality." It establishes that the charges on which the extradition request is based must be penalized as criminal offenses in the law of both the requesting state and the receiving state.

The charges of genocide and terrorism leveled by Judge Garzón did not survive. The legal questions then revolved around whether torture committed outside the United Kingdom was a crime in that country and if so, beginning when. Another issue was whether or not Pinochet enjoyed immunity as a former head of state. In the course of the legal proceedings other European countries also requested the extradition of Pinochet, to be tried in their respective territories for various similar charges. The second and final substantive ruling by the Law Lords, on March 24, 1999, concluded that Pinochet had no immunity for acts of torture. Yet, it considered that torture committed abroad, or international torture, had become a crime in the United Kingdom on December 8, 1988, the date the Convention Against Torture entered into force in the UK. Therefore, only acts of torture committed outside the UK since that date could be prosecuted in the UK and would meet the requirement of "double criminality" for the purpose of extradition. This decision left standing just one case of torture from the original Spanish charges, although Judge Garzón subsequently added more cases.

Jack Straw, the British Home Secretary, who under UK law has considerable discretionary powers in cases of extradition, on April 14, 1999 issued a "Second Authority to Proceed" within the terms decided by the Law Lords. The case returned to the courts, this time to examine the technicalities of the extradition petition. Later in 1999, the Chilean government argued that Pinochet's health did not allow him to stand trial. Jack Straw ordered him examined by a team of doctors and on the strength of their report concluded that he was unfit to be tried. The decision was contested but the British courts upheld it. Pinochet was released and he returned to Chile where he arrived on March 3, 2000.

Cases Seemingly Inspired by the "Pinochet Effect"

The Pinochet precedent has inspired a score of cases around the world.[10] Some involve figures who may be compared to the former Chilean strongman.

Former Ethiopian dictator Mengistu Haile Mariam, who was living in exile in Zimbabwe, sought medical attention in South Africa in late 1999. On December 2, 1999, the South African Minister of Justice, acting at the behest of international human rights organizations and South African lawyers, requested the National Director of Public Prosecutions to investigate the possibility of charging Mengistu for crimes against humanity. Yet on

December 7, 1999 Mengistu left the country, apparently prior to the receipt by the government of a formal request for his extradition to Ethiopia.[11]

At the initiative of Human Rights Watch and Harvard Law School's Human Rights Program, a criminal complaint was filed by Senegalese lawyers, in Senegal, against Hissene Habré, the ex-dictator of Chad (1982-1990), accusing him of being responsible for the deaths of thousands of Chadian citizens. The complaint charged him with torture. Witnesses and victims came from Chad to testify before the investigating judge and Habré was summoned to a Senegalese court to hear the indictment. The case was dismissed on July 4, 2000.[12]

Jean-Claude Duvalier, the former Haitian dictator, has lived in exile in France since 1986. In September 1999, some of his countrymen who claimed they were tortured under his regime, filed a complaint before the French prosecutor's office, arguing that Duvalier had committed crimes against humanity. The complaint was rejected on the ground that the alleged facts did not fit the judicial definition of crimes against humanity under French law.

Similar attempts have been made to call to account less notorious figures. On March 9, 2000, the FBI detained Ricardo Anderson Kohatsu, a retired Peruvian major accused of torture in Peru. Anderson Kohatsu had been in Washington as a Peruvian government witness before the Human Rights Commission of the Organization of American States (OAS). He was set free a few hours later because his visa appeared to give him diplomatic immunity. A Mauritanian army captain, Ely Ould Dah, spent several months detained in France after human rights groups accused him of torture. He was released on September 28, 1999 but ordered to stay in the region until an investigation was completed. He returned to his country in April 2000.

The case of the Democratic Republic of Congo vs. the Kingdom of Belgium stands apart because it involves a seemingly unprecedented attempt to apply universal jurisdiction in its broadest sense. The charges were war crimes. A Belgian judge issued an arrest warrant against Congo's Acting Minister of Foreign Affairs, Mr. Yerodia Abdoulaye Ndombasi. According to Congo, the crimes were allegedly committed in the territory of Congo by a national of that state, without it being contended that the victims are of Belgian nationality, or that the facts constitute violations of the security or dignity of Belgium. On October 17, 2000, Congo instituted proceedings against Belgium before the International Court of Justice asking it to declare that Belgium must annul the international arrest warrant. [Ed. On February 14, 2002, the ICJ held that the Belgium arrest warrant contravened international law.]

There have been a number of civil law suits seeking damages for human rights violations brought in United States courts against foreign nationals. These cases are based on the Alien Tort Claims Act, 1789, which gives foreigners the right to file civil suits in U.S. courts for injuries suffered in violation of international law. In 1980 that ancient law was revived by American lawyers and used successfully in a civil suit against Américo Pena-Irala, a former Paraguayan police chief accused of torturing and killing a 17-year-old boy, Joelito Filartiga, in Paraguay. The same law was invoked in 2000 in law suits against Bosnian Serb leader

Radovan Karadzic and against Lt. Gen. Johnny Lumintang, Indonesia's former Army Deputy Chief.

The so-called "Pinochet effect" is thought to have spread also to Brazil, Argentina and Uruguay. The Washington Post reported that a congressional commission in Brazil filed a petition in August 2000, to indict Paraguay's former dictator Alfredo Stroessner. It added that "in Argentina, which briefly jailed its military Junta before pardoning members in 1990, former dictator Jorge Videla and eight other leaders of the 'dirty war' are back under arrest, facing charges that they stole babies from female political prisoners." The article cites another example of the effect of the Pinochet case: In Uruguay "a new commission has been formed to investigate the whereabouts of people who disappeared during the nation's military government."

International Consequences of the Pinochet Case: Hopes and Worries

The immediate impact of the Pinochet case has been on the nongovernmental human rights community. The former dictator's detention in London was seen by the leading human rights organizations as a major boost in their fight against impunity for grave human rights violations and war crimes. Amnesty International was heard before British courts. Human Rights Watch presented amicus curiae writs. Both organizations kept in touch with human rights groups and relatives of disappeared persons in Chile. Both issued reports and press releases as the case moved along, as did the International Commission of Jurists, the Lawyers Committee for Human Rights, and other international human rights groups. During and after Pinochet's detention in London important human rights NGOs have established programs aimed at fighting impunity. Some of these organizations have encouraged and assisted lawyers and victims in various countries in the filing of complaints against former dictators who live in exile, or against military or police officials responsible for grave human rights violations and war crimes.

Nongovernmental rights organizations view the Pinochet case and its after-shocks with optimism. In many countries around the world, this optimism is shared by local human rights groups, victims of state crimes, and common citizens. Human rights organizations put forward a number of claims to justify their eager pursuit of international justice. They note the legal obligations international law imposes on states, and specifically the duty to try and to punish those who commit international law crimes, as well as the rights of the victims or their families to have an effective legal remedy and to see justice done. However, most of the arguments revolve around the preventive aspect of criminal justice -- if dictators, strongmen and warlords are on notice that there would be no impunity and no safe haven for human rights violations and war crimes, a powerful deterrent will have been established to help prevent future atrocities.

It is premature to gauge the impact these developments will have on the work of international human rights organizations. To actively assist in the international detection and prosecution of perpetrators of human rights violations and war crimes, is a task which may require significant changes in the working methods of these institutions. Will Amnesty International

and other groups attempt to treat all like cases alike, or will priorities be established? If the latter, how will the cases for more active involvement be selected? These questions are related to the ad hoc character that international justice is bound to have in the foreseeable future.[13]

A second consequence of the Pinochet case may be termed the "Garzón effect". The initiative of the now world-famous Spanish investigative judge who sought Pinochet's extradition was soon emulated by judges from other European countries who likewise petitioned the United Kingdom to have him extradited. Garzón seems also to have inspired judges and prosecutors in many other countries. In Chile, Judge Guzmán, who is investigating the complaints presented against Pinochet, has often been called the "Chilean Garzón". Judge Garzón has been invited to give lectures in many countries. He has been asked to take up the plight of wronged groups in various nations. He seems to have ushered into the world arena a new figure -- the international judge (or more properly, the international prosecutor).

Judge Garzón can rightly claim credit for the Pinochet precedent. Without his efforts and his determination to overcome all difficulties (even the objections raised within the Spanish government and judiciary) the Pinochet case would not have been. Yet, his work in the Pinochet case has raised some technical legal questions. He will probably be remembered for having foreshadowed a period of international judicial activism rather than as the prototype after which a new progeny of international judges was modeled.

A third effect of Pinochet's detention and of the cases it seems to have inspired, has been to instill fear in many dictators and former dictators. Many of them are said to think twice or to consult their lawyers before making international travel plans. In the words of Richard Goldstone, "travel agencies have lost the business" of perpetrators of human rights violations.[14] So far, however, the results have not gone much further. One factor is politics. States who are requested to take legal action against visiting or resident former foreign rulers, are likely to weigh carefully the political and diplomatic consequences. It is a well known and widely spread speculation that, as Pinochet's detention continued, the British government felt that the case could bring it more political costs (not to mention the expense it incurred) than benefits, particularly if the old Chilean dictator were to die while in London. It has been said, too, that South Africa let Mengistu leave in order not to antagonize Zimbabwe, where the former Ethiopian dictator received refuge.

The Pinochet precedent has caused other political concerns. One of the most commonly heard is that it may have the undesired effect of strengthening the determination of dictators not to relinquish power for fear of becoming vulnerable to international legal claims. This is, of course, a speculation that can hardly be proven or disproved. It should be pointed out, though, that it ignores the historical evidence that most dictators do not think of leaving power while they can safely retain it. The notion that if they were assured of perpetual impunity they would consider an early departure from a position of power they firmly held, seems strange. The point is more pertinent concerning dictators who are fighting for political survival. Would the prospect of being prosecuted strengthen their determination to hold on to

power to the bitter end, with dire consequences for their countries? The case of Milosevic has often been cited à propos this supposed dilemma. It remains unresolved.

Yet another concern is that the recent spate of international judicial activism may lead to international disorder, a legal "pandora's box," and ad hoc "patchwork justice"[15]. It is said that outsiders intervening in other nations' domestic matters "may upset delicate and perhaps benign local political arrangements"[16]; that the nongovernmental organizations that play such an important role in these cases, simply lack accountability; that everyone can play the game and maverick judges, from any country, could initiate frivolous proceedings.

The permanent International Criminal Court has not entered into force as yet, but the pace of ratifications seems brisk. It is difficult to predict how this court will affect the efforts of the human rights community to breathe life into the existing rules about universal jurisdiction. For one thing, the jurisdiction of the court will extend to only the gravest crimes, leaving aside some offenses against international law which do not meet the standards for genocide, crimes against humanity or war crimes as written in its Statute. Current norms about universal jurisdiction may continue to apply to crimes not falling within the jurisdiction of the International Criminal Court, once it enters into force. They may also apply to genocide, crimes against humanity and war crimes involving alleged perpetrators who are nationals of countries that have not signed or ratified the respective conventions.

What seems clear, as David Bosco states[17], is that "in many cases and for years to come, ad hoc justice will be the only brand of justice available". This appears inevitable. History shows that moving to a higher plane of legal and political order, whether domestically or internationally, is seldom achieved neatly, as if one could just place a ready made new story on top of an existing building. The enthusiasm for these new developments in international justice ought to be combined with a healthy degree of wariness about the possible drawbacks they may provoke.

The Detention of Pinochet in London and its Effects in Chile

The detention of Pinochet in London had major political and judicial echoes in Chile. They include, prominently, a great number of criminal suits brought against Pinochet before Chilean courts; the establishment of the Mesa de Diálogo, a government sponsored series of roundtable discussions on human rights, involving the military, human rights lawyers and other participants; and the ruling of the Chilean Supreme Court lifting Pinochet's senatorial immunity from criminal prosecution after he returned to Chile.

It has become commonplace to assume that Pinochet's detention is a sufficient condition to explain all these developments. Such assumption must be nuanced. Of course one cannot underestimate the enormous impact that Pinochet's detention has had in Chile. Yet, it must be pointed out that in January of 1998, when Pinochet was still Commander in Chief of the Army (although his tenure was due to expire two months later), and well before he traveled to

London in October of that year, criminal suits had already been brought against him in Chilean courts.

It is this author's contention that increasing efforts to call Pinochet to account in Chile would have taken place at any rate - most likely in a different shape or on a lesser scale or at a slower pace - had the former dictator never traveled to London. Calling Pinochet to account was perceived by many in Chile as one of the main issues yet to be confronted regarding the legacy of abuses committed by the military regime. This goal was seen as hardly feasible while he remained firmly in control of the Army. The approaching end of his tenure as Commander in Chief of the Army, and a number of other factors which will be examined below, created new, more conducive conditions to that end. Granted, this contention is speculative. But it is equally speculative to suppose that had it not been for Pinochet's detention in London, the incipient efforts to call him to account in Chile would have come to nil.

With these caveats in mind, I will analyze the impact Pinochet's detention has had in Chile. In order to do so, it is necessary to begin by summarizing some essential facts regarding the military regime and the Chilean transition to democracy, which are often overlooked or misunderstood.

The Nature of the Military Regime, the Human Rights Violations it Committed, and Pinochet's Role

The military regime that ruled Chile from the time of the coup d'etat of September 11, 1973, until March 11, 1990, had an institutional character and an overall sense of political mission

The military government's mission, as understood by the Chilean Armed Forces and their political supporters, was to stop the nation from sliding into communism or civil war; to immunize its citizens from the seduction of radical leftist politics; to administer the country during the time required to build a new economic and political order; and eventually to return it to civilian rule, but not before building legal and institutional safeguards designed to prevent the undoing of the military regime's oeuvre.

The Chilean Armed Forces (the Army, Navy, Air Force and the Chilean police, called *Carabineros*) formally declared that they were taking over power "as institutions". Their respective commanders-in-chief formed the ruling Junta. Pinochet was not the natural leader of the coup, having joined the conspiracy only in its final stages. However, he was named president of the Junta, following a time-honored order of precedence among the different branches of the Armed Forces which gave primacy to the Army. Subsequently, he was named head of the executive office and the military Junta remained as the legislative authority.[18] In his position as head of the Junta and later Head of State, Pinochet became the undisputed leader of the military government, but this did not alter the institutional character of the regime nor did it bestow on him unfettered powers.[19]

The human rights violations committed by the military regime are amply documented.[20] More than 3,000 political opponents were victims of assassinations or "forced disappearances". Tens of thousands were imprisoned or exiled. Torture was widespread and systemic. Civil liberties were severely curtailed. These human rights violations shook the world. The tragically failed social experiment of Salvador Allende had captured the imagination of a wide sector of international public opinion. His death defending the powers of government[21] acquired the lasting mythic power of a symbol. Pinochet, in turn, became the symbol of the ruthless dictator.[22]

The most numerous and gravest violations were committed during the first four years of military rule. The main force responsible for these crimes was DINA (Directorate of National Intelligence), the secret police created by the government, which carried out a systematic policy of disappearances. The head of DINA, Army Colonel Manuel Contreras, answered directly to General Pinochet. DINA was also responsible for conducting terrorist attacks against prominent Chileans in exile in the USA, Italy and Argentina. When the involvement of DINA in the bombing assassination of Orlando Letelier, in Washington D.C. on September 21, 1976 was made public, the Chilean military regime came under strong pressure from the US government.[23] This led to the disbanding of DINA on August 13, 1977, and the creation of a new secret police, known by the acronym CNI (National Information Center).

CNI discontinued the policy of systematic disappearances and committed many other grave human rights violations, including murder and torture. This new secret police was active until the end of the military regime. It was always headed by an army official and answerable ultimately to Pinochet, although with the passing of time he is thought to have become less involved in the day-to-day operations of CNI.

Characteristics of the Chilean Transition to Democracy

On October 21, 1980, the military government promulgated a new constitution[24], which established an itinerary for a return to civilian rule: in 1988 a *yes-no* plebiscite on a person proposed by the military Junta would take place. If approved, the candidate would become president for another eight years. Thereafter there would be competitive presidential elections. If the person proposed by the Junta lost, competitive elections would take place the following year.

Not surprisingly, in 1988 the candidate proposed by the Junta, to be ratified by a plebiscite, was Augusto Pinochet himself. He lost. It was clear that in the competitive elections scheduled for the following year any pro-Pinochet candidate would be defeated. With that in mind, the military government engaged in negotiations with the opposition parties which led to a number of constitutional reforms. However, the military government refused to accept amendments which would undermine the main safeguards it built into the constitution. Chief among them were the following: a provision allowing Pinochet to remain as the head of the Army until 1998; a provision which added nine designated senators on top of the elected ones (also, former presidents who served the full term of office prescribed by the constitution

would become Senators for Life); the establishment of a National Security Council, with the participation of the military, which could serve as an institutionalized vehicle to debate the concerns of the Armed Forces on an equal level with the President and other State authorities.

Patricio Aylwin, the candidate for the Concertación para la Democracia, a coalition of opposition parties from the center and left of center, won the 1989 presidential elections. Aylwin was inaugurated on March 11, 1990, for a period of four years[25] and the same political coalition has won the presidency since then. Eduardo Frei was inaugurated in March 1994 and Ricardo Lagos in March 2000.

Thus, the Chilean transition to civilian rule was achieved through the ballot box and within the framework of legal and institutional constraints which imposed limits on the power of the new authorities to address the legacy of human rights violations. The presence of designated senators, in combination with constitutional provisions demanding special quorums to pass certain legislation, and an electoral system which favored the minority parties, prevented the approval of laws opposed by the right wing. The Supreme Court was stuck with appointees from the time Pinochet was in power. The 1978 Amnesty Law stood as a barrier against justice. As head of the Army, Pinochet remained a formidable presence to be reckoned with.

The political parties that defeated Pinochet in the plebiscite and in the subsequent presidential election, agreed to play by these rules because they concluded that it was far better to have a democracy subject to some restrictions than to live under a government led by Pinochet or his successors. The Armed Forces and their political supporters had a different interpretation of the opposition parties' attitude, which they continue to argue until today. In their view, the fact that in 1989 the opposition had negotiated with the military government some constitutional amendments meant that they had validated the 1980 Constitution.[26] To this, Pinochet's opponents reply that to have agreed to improve the Constitution to some extent did not mean renouncing the ability to seek further changes which could not be obtained at the time. The Armed Forces and Pinochet's political supporters further contend that the way in which the political transition proceeded implied at least a tacit understanding that Pinochet would not be touched. Such interpretation is, of course, rejected by those who opposed its regime.

By the time of the 1990 return to civilian rule, Pinochet's supporters in Chile regarded him not only as a savior who rescued the country from chaos, but as the harbinger of the epic victory against communism, long before the downfall of the Berlin Wall, and as a leader whose free market economic policies have been replicated all over the Third World. They believed or, perhaps more to the point, they needed to believe that the reports about human rights violations were part of a propaganda plot. History provides countless examples of this type of denial. Whenever intense group loyalties (political, ethnic, religious) come in conflict with moral norms whose legitimacy cannot be questioned, the most common response is to deny that such norms have been violated. The military government's supporters feel that if Pinochet were to be called to account, the whole legacy of his government could be questioned and the very worth of their own political loyalty would be undermined. Further, they fear that this

may have the additional effect of emboldening their former political enemies and perhaps bringing back the ghost of radical leftist politics. Pinochet's supporters are also wary of any indictment of his subordinates which may end up implicating him. In the end, the integrity of Pinochet's figure is the last bastion to be protected.

The Transitional Human Rights Policies in Chile up to the Time of Pinochet's Detention in London

The Aylwin administration (1990-1994) confronted from the outset the dilemmas of what has been termed "transitional justice".[27] Its human rights policies were adopted promptly after exhaustive consultation. Close attention was paid to the experiences of Argentina and Uruguay, neighbor countries which had returned to civilian rule respectively in 1983 and 1985, after being governed by like-minded military regimes.

The cornerstone of the Aylwin government's policy was the establishment of a Truth and Reconciliation Commission. In February 1991 the Commission delivered a massive report documenting more than 2,000 political killings and disappearances. (After the work of a successor commission, the final figure was established at nearly 3,200.) The Commission gave an overall account of the military regime's repressive policies, institutions and methods. Its report was widely publicized and provoked great stirrings within Chile. Political parties across the spectrum acknowledged the revelations it contained. However, Pinochet and other fellow commanders-in-chief refused to accept the Commission's report.

The report named the victims individually and attributed moral responsibility to the State for the violations of their fundamental rights. It did not name individual perpetrators on the basis that it would amount to the moral equivalent of a guilty verdict issued by a body which was not a court of law and did not institute procedures for the accused to defend themselves. President Aylwin sent the Commission's report to the Supreme Court with a letter stating that in his view the Amnesty Law of 1978 should not prevent the judiciary from at least investigating the truth concerning the crimes committed and covered by that law. Based on the Commission's findings, Congress passed a law providing for pensions and other reparations for the families of the victims named in the report.[28]

During the Aylwin administration, Pinochet's army made threatening gestures on a couple of occasions. These were carefully designed to send a message of displeasure but at the same time to allow Pinochet to pretend that they amounted to nothing more than routine military exercises. In formal terms, Pinochet was a subordinate of President Aylwin and did not want to appear in open contempt of his authority.[29]

By the end of President Aylwin's four-year administration his human rights policies showed some significant results: the publication of the Truth and Reconciliation Commission's report; the acknowledgment of its findings by most Chileans, with the salient exception of the Armed Forces; measures of reparation for the families of the victims; cases not covered by the 1978 Amnesty Law being tried before Chilean courts;[30] and many of the cases intended to be

covered by the 1978 Amnesty continued to be investigated by the courts, although they did not lead to indictments or convictions. Eduardo Frei, President Aylwin's successor, was inaugurated on March 11, 1994. During the first years of his administration there were no significant new government initiatives concerning the legacy of human rights violations committed by the military regime, except for a failed negotiation between the government and right wing parties to pass new legislation. Such negotiations were aborted after they were publicly criticized as containing elements of a "Full Stop Law".[31]

When in 1995 the Supreme Court confirmed the conviction of retired General Manuel Contreras, the former head of DINA, for the assassination of Orlando Letelier, the Frei government had to confront the difficult task of apprehending him and sending him to prison. The process took months but finally Contreras was confined to the specially-built prison of Punta Peuco on October 20, 1995.

Since the publication of the Truth and Reconciliation Commission report in 1991, the political supporters of the military regime began to draw a line between DINA and Pinochet. In their public statements they implied that Contreras and the secret police might have committed all those foul deeds, but somehow Pinochet was exempt from responsibility. To assume that a powerful ruler knows nothing of the many crimes perpetrated over several years by a police body directed by his immediate subordinate, is as much an insult to intelligence as it is a poignant illustration of the power of the impulse to deny.

During the Frei government the Chilean courts continued to investigate many cases covered by the Amnesty Law. Progress was made, although painstakingly. The cases of disappeared persons remained open because of a legal interpretation which held that disappearances should be treated as kidnappings, unless it could be proven that the victims had indeed been murdered and that the crime was committed in the period covered by the 1978 Amnesty Law.[32] During the course of these judicial investigations, scores of military men, both retired and on active duty, were summoned for questioning. The military and their political supporters saw this as a degrading "military parade" before the courts and claimed that the judicial interpretation was contrary to the original spirit of the Amnesty Law.

The State of Transitional Justice in Chile at the Time of Pinochet's Detention in London

At the time of Pinochet's detention in London the main unresolved issues concerning the legacy of human rights violations could be clearly identified:

- Over the years only 15-20% of the remains of the disappeared had been identified or recovered. Nearly 1,000 disappeared persons remained unaccounted for.

- The Armed Forces, and in particular the Army, had yet to acknowledge the human rights violations committed during the military regime. To the extent that they did not

do so, new generations of the military would live under the burden of denial and at the same time under the implicit doctrine that such acts were justified.

- The courts had meted out justice (or were still investigating) in the most important cases not covered by the 1978 Amnesty Law. Yet, this law still stood as a barrier against the possibility of justice for the crimes committed between 1973 and 1978. Politically it was not feasible either to repeal it or to confirm it. The matter was left entirely in the hands of the judiciary.

- Pinochet had never acknowledged any wrongdoing. He never made any gesture towards the victims of human rights violations. He was never called to account before a court of law. In practice, he stood above the law. In addition to his *de facto* impunity, his continuing presence as a powerful figure in Chile's public life was an obstacle to the Armed Forces' ability to acknowledge the human rights violations of the past, or to cooperate in discovering the truth about the disappeared.

Measures of clemency or national reconciliation (to the extent that they did not condone crimes against humanity) could not be considered in the absence of a solution to these matters.

The Detention of Pinochet in London: Initial Reactions in Chile

Augusto Pinochet traveled to London on an official passport extended by the Frei government. Purportedly he was on an official mission although this did not meet the formal requirements established by the Convention on Special Missions, affording immunity to special envoys.[33]

Soon after the news of Pinochet's arrest in London, President Eduardo Frei issued a statement claiming that he enjoyed diplomatic immunity and asserting that his detention was in violation of Chilean sovereignty, as only Chile's courts have jurisdiction over crimes committed in the country's territory. Both statements were incorrect. The second one ignored provisions in Chilean law (in particular, the UN Convention Against Torture, which had been ratified by Chile) that allow for various forms of extra-territorial jurisdiction.
The Armed Forces and the right wing parties were pleased by the stance taken by President Frei. In turn, many politicians within the ruling coalition contested the position he adopted and the restricted view of sovereignty being voiced by his government. Among the general public, opinions were divided. Some protested that Chile was being treated by Spain as if it were still its colony. Others took heart that Pinochet was being called to account before any court. The debate was loud and acrimonious and it was feared that the old impassioned political polarizations of Chile's past could be revived. In parallel, more and more criminal suits were being brought against Pinochet.[34] Appeals Court Judge Juan Guzmán was in charge of investigating these complaints.

The Frei government's decision to give Pinochet a special passport revealed that it had failed to calculate the political risks of such a move. It was well known that Spanish Judge Baltazar Garzón had initiated an investigation. Also, from a technical standpoint, the UK authorities were never notified of Pinochet's supposed official mission and therefore he was not entitled to diplomatic immunity. But the fact that Chile had officially issued the passport compelled it to make Pinochet's plight in London a matter of State.[35] In this manner, the Frei government appeared to be actively endorsing Pinochet's impunity, rather than tolerating a *de facto* situation Frei could not change, as President Aylwin did with regard to the inherited restrictions he had to face. In fairness, President Frei claimed that he did not seek impunity but rather to assert the prerogatives of the Chilean courts. At any rate, the narrow view of international law his government ended up advocating put it at odds with the position taken by the international human rights community.

In the first months of 1999, the initial impassioned reactions Pinochet's detention provoked in Chile, tended to subside. Soon it became apparent that the continued presence of Pinochet as head of the Army had not allowed a new generation of the military to come forth. The Armed Forces were now led by men who had barely initiated their careers at the time of the 1973 coup. The emergence of this new generation did not mean that the institutional continuity of the Armed Forces was broken. Neither did it mean that they reneged from the political role the Armed Forces had played, or from the figure of Pinochet who, more than anyone else, symbolized that political past. Yet, the Armed Forces were redefining their mission to bring it more in line with the professional role the military is supposed to play in a democratic society. To that end, it was essential that the Armed Forces become an integral part of the institutions of democracy and that they be accepted and respected by the country's citizenry. This was seen as an inherent component of a modern conception of national security.

In this respect, the new commanders of the Armed Forces could not help noticing that international human rights law and activism had been steadily expanding. The Chilean judiciary, which was also experiencing a generational renovation, was slowly but perceptibly absorbing some of the new developments in human rights law. The unresolved human rights issues would simply not go away. It was also evident that it was untenable for the Armed Forces to keep refusing to acknowledge what everybody knew -- that during the military regime, systematic human rights violations were committed. In particular, the tragedy of the disappeared and the continuing uncertainty suffered by their relatives, could no longer be ignored. To make a serious effort to solve that situation was not only a moral imperative. It was a political necessity.

In the first month of 1999, Admiral Jorge Arancibia, the head of the Chilean Navy, made public statements to the effect that there was a moral duty to try and find the truth about the disappeared. The political right wing was also undergoing a generational change of sorts. Similar voices were heard from the leaders of UDI (Unión Democrática Independiente) and RN (Renovación Nacional), the parties which represent the political sectors that supported the Pinochet regime.

Given this new climate, the Chilean government and the opposition parties decided to explore the possibility of agreeing on effective measures to find out the truth about the disappeared and to recover their remains, whenever possible. Following discrete talks, by July of 1999 it was apparent that an agreement was possible. President Frei demurred. In August, his Minister of Defense, Edmundo Pérez Yoma, took the initiative and made public a new proposal: to establish a Mesa de Diálogo - a series of round table discussions on how to address the problem of the disappeared - with the participation of human rights lawyers and the military.

The Mesa de Diálogo - Round Table Discussions on Human Rights

The initiative of Minister Pérez Yoma to establish a Mesa de Diálogo on human rights immediately captured the attention of Chilean public opinion. The organization which represents most of the relatives of the disappeared publicly opposed the idea, claiming that it was part of a design to influence the course of the Pinochet case in London and to curb the upsurge of diligence shown by the Chilean judiciary. The Communist Party also voiced its opposition as did several well known human rights lawyers. However, other prominent human rights lawyers agreed to participate in the Mesa de Diálogo.

The Mesa de Diálogo was officially established on August 21, 1999,[36] and concluded its work on June 15, 2000. During its nine months of activities it met 22 times. In addition there were many drafting group meetings. The Mesa de Diálogo's activities and statements received ample media coverage. The very fact of engaging in a face to face dialogue for countless hours helped to create a climate of understanding among parties that had never talked to each other and that symbolized quite opposite positions.

After several initial meetings devoted to general statements, it was agreed that the Mesa de Diálogo would address two main points: To propose measures to establish the whereabouts and fate of the disappeared and to formulate an acknowledgment of the responsibilities borne by different sectors of the Chilean society for past wrongdoings. This would include an acknowledgment of responsibilities for human rights violations committed during the military regime and for the climate of political violence during the time of the Allende government (1970-1973); it was stressed that these were separate responsibilities that did not cancel each other. The issue of Pinochet's detention in London was studiously left aside. Strange as it may seem, his name was barely mentioned during the nine months of the Mesa de Diálogo's life.

Another major issue was left aside. The military worried that the prevailing judicial interpretation that disappearances should be treated as abductions unless proven otherwise, would lead to endless legal proceedings, implicating many military men, both retired and on active duty. To this, the human rights lawyers responded that the judicial investigations would not go on forever if the truth about the disappeared people was found. The courts could then freely decide - having been legally established that the victims had been killed -

whether or not the Amnesty Law was applicable. Either way, the judicial proceedings would come to a close.

For the human rights lawyers, the 1978 Amnesty Law was illegitimate in its origin; it involved a self-amnesty, it covered crimes against humanity, and it had the effect of preventing the disclosure of the truth. For the military, it was a measure designed to pacify the country and should be complied with. They pointed out that opponents of the military regime who were convicted of committing crimes, had been either amnestied or pardoned long ago.[37] After some discussion it was clear that there could be no accord on this issue. While some would have liked to see the Amnesty Law reaffirmed, others wished that it could be declared inapplicable to human rights violations. It was agreed that the matter be left to the courts.

Clarifying the fate of the disappeared was also largely a judicial matter. The work of the Mesa de Diálogo was to propose measures which could improve the chances of the judicial investigations' success. Two main options were discussed. One was a recommendation already advanced by the National Truth and Reconciliation Commission in its 1991 report: a law should be passed declaring that anyone who had any knowledge about the fate or whereabouts of disappeared persons was under a legal obligation to communicate it to the proper authorities, under penalty of law. In exchange, they would have immunity from prosecution, otherwise the proposed measure would run contrary to the basic legal principle which prohibits compelling self-incriminatory statements.

The military stressed that the Armed Forces did not have centralized information about the disappeared. They said that during the military government, members of their institutions were assigned to DINA or other such government bodies, but that the military as such had continued to perform their professional military duties. They added, nevertheless, that they stood ready to help in the process of reconstituting this information. To that end, they could approach the military personnel (most of them now retired) who might have relevant information. They insisted that it was necessary to implement trust-building measures to persuade their former comrades to disclose information they might have, because there were no legal means to compel them to do so.

Regarding the second major issue, that is the acknowledgment of historical responsibilities, it was agreed that on the interpretation of the coup d'etat itself, Chileans would continue to differ.[38] Instead, the key issue was to acknowledge the responsibility for the way the military authorities exerted their power, in violation of fundamental human rights. The military no longer denied - as Pinochet did nine years before - the findings of the Truth and Reconciliation Commission, although they felt that they could not yet formally endorse the report as a whole. Their main concern was that in formulating an acknowledgment of past responsibility for human rights violations, the Armed Forces were not blamed as institutions. This meant that they drew a subtle (and somewhat confusing) line between the military government and the Armed Forces. Further, although they didn't state so explicitly, they worried that by acknowledging the military government's human rights responsibilities they could be seen as admitting Pinochet's guilt while he was still being subject to legal

proceedings. In any case, it was clear that it was not the role of the Mesa de Diálogo to ascribe criminal responsibilities but only to acknowledge the historical, political or moral responsibilities of different sectors or institutions.

The discussions proceeded through the first months of 2000. By then Ricardo Lagos had been elected President and was due to be inaugurated on March 11, 2000. In London, Home Secretary Jack Straw had ordered medical examinations to determine if Pinochet was fit to stand trial. At the same time, in Chile, more and more criminal suits against Pinochet were being brought before Judge Juan Guzmán.[39] The Mesa de Diálogo was working intensely, attempting to conclude its deliberations before the new President's inauguration. Draft final statements were prepared. Few discrepancies remained. An agreement seemed within reach. Then Augusto Pinochet was released from detention in London. He flew back to Chile where he landed on March 3, 2000 to a welcoming reception by the Armed Forces and by his political supporters. He looked fitter than was expected.

His arrival again incensed passions which reverberated in the Mesa de Diálogo. It was not possible to reach an agreement in the following days. After President Lagos' inauguration, the Mesa de Diálogo entered a period of relative inactivity. In Chile, the President is traditionally expected to play a strong leading role and signals were expected at the beginning of a new administration. In the meantime, Judge Guzmán formally petitioned the Court of Appeals to lift the senatorial immunity of Augusto Pinochet.[40] The Mesa de Diálogo resumed a more regular schedule of meetings in April 2000. Yet, the parties now seemed further apart than before the arrival of Pinochet. By late May, the political establishment and the media had grown impatient. Quick results were expected, lest the Mesa de Diálogo be considered a failure.

After intervention by President Lagos and following a final and dramatic stretch of meetings, culminating in the early hours of the morning of June 13, 2000, an agreement was reached and a final statement was signed. In the section devoted to the acknowledgement of responsibilities, the most salient paragraph condemns "the grave human rights violations committed by agents of State organizations during the military government". On the issue of the disappeared, the Armed Forces and Police "solemnly commit themselves to develop ... all efforts aiming at obtaining useful information to find the remains of the disappeared prisoners or to establish the truth about their fate." To this end the Mesa de Diálogo proposed that legislation be passed imposing the obligation of professional secrecy on those who would seek or receive the information, so that they could not reveal the source.[41] This agreement fell short of the goal pursued by some members of the Mesa de Diálogo, namely that tougher measures should be proposed, including legal penalties for those who withheld information. The Mesa de Diálogo requested the President to evaluate, after six months, the progress made and asked him to consider additional measures, if necessary, in order to obtain the truth about the disappeared, including, among such measures, those which were debated by the Mesa de Diálogo but could not be agreed upon.

The agreement was welcomed with relief by Chilean public opinion. Those who were against the Mesa de Diálogo from the outset, rejected the results. Some of those who supported the agreement pointed out that the acknowledgment of responsibility could have been more specific or categorical. Yet, it was clear for the majority of public opinion that this was a watershed statement. For the first time the Armed Forces as a whole were officially accepting what the rest of the country knew. Comparisons were made with a similar statement issued by General Martín Balza, the head of the Argentinean Army, in 1995. The Mesa de Diálogo statement, if anything, went further inasmuch it was subscribed to by all branches of the Armed Forces.

The agreement was announced in an impressive public ceremony that included the President of the Republic, other State authorities, leaders of major political parties, commanders-in-chief of the Armed Forces and the members of the Mesa de Diálogo. The President sent a bill to Congress, adopting the recommendation of the Mesa de Diálogo about professional secrecy. It was swiftly approved.

Pinochet Before the Chilean Courts

Alongside the above developments, the legal battle over Pinochet's senatorial immunity continued. His defense team argued that before considering the lifting of his immunity, the court should order medical tests to ascertain if he was fit to stand trial. They stressed that British Home Secretary Jack Straw had stated that Pinochet was not fit to stand trial anywhere.[42]

The issue had undeniable political connotations. Pinochet's supporters felt that if he was first declared unfit to stand trial, there would be no need for the Court of Appeals to rule on the lifting of his immunity. Thus, his historical image would not be tainted by a judicial decision which, although it would not pronounce him guilty, at least it would mean that there was reasonable cause to proceed against him. Naturally, Pinochet's accusers expected that such a symbolic effect was obtained, even if he was subsequently ruled unfit to stand trial.

The Court of Appeals decided against ordering medical tests before ruling on Pinochet's immunity. On June 5, 2000, it agreed, on a close vote, to lift his immunity. This decision did not prevent the Mesa de Diálogo from reaching an agreement a week later. On August 8, 2000 the Supreme Court confirmed, by a significant majority, the Court of Appeals' ruling. This time the majority opinion contained some reasoning which worried the military. It seemed to indicate that the Amnesty Law could be applied to individuals only after their full responsibilities had been established, rather than applied once it was clear that the victim was not abducted but had been killed within the period covered by the Amnesty.

Following the Mesa de Diálogo agreement, different branches of the Armed Forces and the Police declared publicly that they were preparing themselves to conscientiously fulfill their commitment to find the truth about the disappeared. However, after the ruling of the Supreme Court, far more reserved statements were heard from the military. While continuing to assert

their commitment, they publicly worried that the new environment was not conducive to obtain the cooperation of those who may know about the disappeareds' fates. The main argument was that the new ruling of the Supreme Court was likely to deter prospective informers from revealing the truth about the disappeared because they would fear that such revelations could lead to further investigations about individual responsibilities.

At the time of concluding this article, a judicial decision is pending about the medical tests Pinochet ought to undergo and the legal conclusions which may be derived from the doctor's findings. In the first week of January 2001, the Armed Forces and Police are due to report to the President about the results of their efforts to find out the fate of the disappeared.

The Pinochet saga continues. An Argentinean judge who had been investigating for years the bomb assassination of General Carlos Prats and his wife, in Buenos Aires on September 30, 1974,[43] found that DINA orchestrated the assassination. The public trial of the only person so far charged with this crime, Chilean DINA operative Enrique Arancibia Clavel, began in October 2000. At the time of writing this, the Argentinean judiciary formally requested the extradition of Pinochet, of Manuel Contreras, the former head of DINA, and of several other Chileans.

Not even Pinochet's accusers expect him to end up serving time in prison. He is 85 years old and enfeebled. Chilean legal procedures are such that trials may last for years. Many people in Chile think that the fact that he underwent detention in London and that his immunity was lifted by the courts, had radically changed the situation of total immunity he enjoyed until 1998. For historical and symbolic purposes, he has already been called to account, albeit late and not fully.

Another consideration, and certainly not a minor one, is that justice cannot be pursued in disregard of human rights norms, including those about fair trials. If a court of law finds that Pinochet is too ill to stand trial and the charges against him are dropped, justice will not have failed but rather it will have been realized in all its complex dimensions, including encompassing the rights of the accused person.

Notes

[1] The major postwar initiatives regarding international criminal justice were the establishment of the International Military Tribunal of Nuremberg and the International Military Tribunal for the Far East at Tokyo. The normative cornerstones of the postwar international humanitarian order were the human rights provision of the UN Charter; the Universal Declaration of Human Rights; the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; the Geneva Conventions of 1949; and the Convention Relating to the Status of Refugees, 1951. Later, in 1966, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were signed (they entered into force in 1976).

[2] Up to that time of World War II, international law had incorporated what we now call human rights norms only in specific fields, such as labor rights and minority rights. International humanitarian law, which was much older - its first instrument dates back to 1864 - received a major new impetus with the Geneva Conventions of 1949. International refugee law was virtually nonexistent before the end of World War II.

[3] The European Convention on Human Rights was signed in 1950; the American Declaration of Human Rights was proclaimed in 1948 and the American Convention of Human Rights was signed in 1969.

[4] Established by UN Security Council Resolution 808 of 22 February 1993.

[5] Established by UN Security Council Resolution 955 of 1994.

[6] All four Geneva Conventions of 1949 contain an identical norm (Art. 49 of Convention I; Art. 50 of Convention II; Art. 129 of Convention III; Art. 146 of Convention IV) which establishes an obligation to search for and bring to trial persons alleged to have committed or ordered to be committed grave breaches of the Conventions, regardless of their nationality. Other post-war instruments and resolutions establish the non-applicability of statutory limitations to certain crimes, or the obligations of States to cooperate in preventing and punishing such crimes. Among them: the Convention on the Prevention and Punishment of Genocide of 1948; the Convention on the non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968; and UN Resolution 3074 (XXVIII), of 3 December 1973, which establishes the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.

[7] International Convention Against the Taking of Hostages, adopted in New York on December 17, 1979, Art. 5.

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 10, 1984, Art. 5.

[9] Inter-American Convention Against Corruption, of March 29, 1996, Art. V.

[10] I am grateful to Reed Brody from Human Rights Watch and Mona Rishmawi from the International Commission of Jurists, who have forwarded to me copies of their files on the cases that are mentioned in this section.

[11] Amnesty International, News Release, 8 December 1999. AI Index: AFR 53/99.

[12] The court ruled that Senegal had no jurisdiction to pursue charges that Habré was guilty of massive torture during his rule in Chad because the crimes were not committed in Senegal.

[13] Years ago Amnesty International discussed a proposal to create a separate nongovernmental organization specifically devoted to assist in the international pursuit of criminal justice. The idea was put forward by Menno Kaminga, a Dutch professor of International Law who had served in high level positions within Amnesty International.

[14] This statement was made during a lecture Judge Richard Goldstone gave at New York University's Law School, on October 18, 1999.

[15] In what follows I draw from the opinions cited in the article "Dictators in the Dock", by David Bosco, published in The American Prospect, August 14, 2000.

[16] As stated by John Bolton, an Assistant Secretary of State in the Bush administration, quoted by Bosco, ibid.

[17] ibid.

[18] Decree Law 527 of June 26, 1974, established these separate roles for Pinochet and the Junta.

[19] This is clearly illustrated by two facts:

(a) On April 19, 1978, the military Junta issued an Amnesty Law covering the human rights violations committed since the time of the 1973 coup d'etat. No second amnesty was passed in the twelve remaining years of military rule. Pinochet is reported to have sought a second amnesty law but to have encountered the opposition of fellow commanders-in-chief who felt that in the years since the 1978 amnesty, their respective institutions had nothing to reproach themselves and did not want to appear as morally incriminating themselves by seeking a new impunity measure.

(b) On October 5, 1988, a *yes-no* plebiscite was held to decide on the continued rule of Augusto Pinochet for another 8 years. He lost, but late into that day's night, his spokesman was still issuing misleading interim reports about the vote counting. Following an after-midnight meeting of Pinochet with the Junta members, the government finally conceded its defeat. In October of 2000, the Chilean television broadcast an interview with former Air Force General Fernando Matthei, one of the participants in that meeting. General Matthei confirmed

what had been widely suspected up to that time: that Pinochet had refused to accept the results and had wanted to pull out the troops but the other commanders-in-chief did not support him.
See the report of the Chilean National Commission on Truth and Reconciliation, 2 Volumes, University of Notre Dame Press, Notre Dame, Indiana, 1993.

[21] The report of the National Commission on Truth and Reconciliation established that he committed suicide.

[22] Neighboring South American countries such as Argentina and Uruguay were ruled in the 70s and early 80 by similarly minded military regimes which exhibited, like Chile, a dismal human rights record. None of their rules, however, attained the symbolic notoriety of Pinochet, perhaps because in those countries the military regimes were governed by successive juntas, whereas Pinochet remained in power all along. Other factors may account for the fact that Pinochet's image became the trademark of the ultimate dictator. Among them, and in addition to the international sympathy towards the deposed Allende government and the attack of the palace of government, one may count the detention of thousands of political prisoners in football stadiums, the public burning of books and DINA's terrorist assassinations in foreign countries.

[23] Orlando Letelier, a leading opponent of the Chilean military regime, had been a cabinet member in the Allende government. The bomb planted in his car also killed Ronnie Moffit, an American citizen.

[24] The text of the Constitution was approved by a plebiscite on September 11, 1980. The conditions under which the vote was conducted did not meet the minimum standards for fair elections.

[25] According to the amended Constitution the subsequent presidential administrations would last six years.

[26] The 1989 constitutional amendments were ratified by a plebiscite.

[27] See Transitional Justice, the three-volume compilation of theoretical writings, case studies and legislation from different countries, edited by Neil Kritz. (United States Institute of Peace, Washington D.C., 1995).

[28] Law Nº 19.123 of 8 February 1992.

[29] Pinochet even responded to the written inquiries of the Truth and Reconciliation Commission (although in a purely perfunctory manner) in order to appear as complying with the directives given by President Aylwin.

[30] These trials included the 1976 assassination of Orlando Letelier in Washington, D.C., which the Pinochet government expressly exempted from the 1978 Amnesty Law in order not to antagonize the United States.

[31] The expression refers to a bill which became known as *Ley de Punto Final* (Full Stop Law), passed by the Argentinean Congress at the behest of President Alfonsín, on December 24, 1986 (Law Nº 23.492). Since that time, any measure which may be interpreted as putting an end to trials or to the possibility of initiating criminal proceedings concerning human rights violations, is considered unacceptable by most domestic and international human rights organizations.

[32] In Chilean law, kidnapping is a continuing crime, that is, it is being committed as long as the victim is not released or killed.

[33] The reasons why Pinochet received this official passport are obscure. While he was Commander-in-Chief of the Army, he was legally entitled to an official passport and traveled abroad carrying such document. Probably the authorities extended this type of passport to him out of sheer inertia, since he had received it several times before.

[34] Chilean law has only recently introduced the institution of public prosecutor. A new code of criminal procedure will be enacted gradually. In the meantime, the old system is in force whereby criminal proceedings may be initiated, ex officio, by a judge or - what is far more frequent - it may be initiated by a private party under the modality called "querella", which allows the "querellante" to act as a sort of plaintiff.

[35] Probably it would have been difficult anyway for the Chilean government to take a back seat, given the political reverberations of the case in Chile.

[36] Participants in the Mesa de Diálogo included the Minister of Defense and some of his closest aides; five human rights lawyers; four top level military officials designated, respectively, by the commanders-in-chief of the Army, Navy, Air Force and the Chilean Police (Carabineros); representatives of the Catholic Church, a coalition of Protestant churches, the Free Masons and B'nai B'rith; and some prestigious intellectuals, historians and scientists.

[37] The 1978 Amnesty Law effectively favored, in theory, people who had been convicted by military courts. However, the trials were grossly unfair and many of them were sent to exile anyway. In 1990, after Chile returned to democratic rule, President Aylwin set about pardoning or commuting the penalty imposed on

opponents of the military regime who had been convicted after 1978. Many of the people favored by this pardon had served several years in prison. They received unfair trials. Most of them were tortured.

[38] The Truth Commission report had reached a similar conclusion in 1991, namely that some Chileans would continue to consider the coup an unacceptable violent interruption of the democratic process, while others would deem it legitimate, in view of a political situation which was leading to civil war.

[39] At the time of writing this article, in October of 2000, Judge Guzmán has received 175 "querellas" that is, criminal suits brought against Pinochet by private parties.

[40] Even before the time of the military government the Chilean Constitution establishes that members of Congress enjoy immunity from prosecution. This immunity may be lifted by the Court of Appeals, if it finds that there are reasonable grounds to proceed against a senator or deputy. Such decisions may be appealed to the Supreme Court. In theory, congressional immunity, common to many countries, is meant to prevent elected representatives from being dragged to the courts on frivolous grounds.

[41] This did not provide immunity to the informers if the courts obtained, through other means, incriminating evidence.

[42] The Chilean legal standards to determine if a person is fit to stand trial are a matter of controversy. Pinochet's defense team has argued for the most progressive interpretation of international human rights law, which may seem ironic but it is an understandable legal strategy.

[43] General Prats was Pinochet's predecessor as commander-in-chief of the Army. He supported the Allende government and resigned his post a few weeks before the 1973 coup d'etat. After the coup, he exiled himself in Buenos Aires.

Reflections on Intergenerational Justice

Jonathan Steinberg

In my long career as an academic historian I had not met practitioners from the human-rights community before I attended the Aspen Institute's Justice and Society conference. Most of the participants at the conference had worked for the United Nations in troubled parts of the world, represented nongovernmental organizations, were lawyers in the human rights field, had served on truth commissions or had been involved in war crimes tribunals as judges or prosecutors. They had seen the horrors that human beings inflict on each other in Latin America, Africa, the Balkans, Asia and the Pacific Islands.

My colleagues at the conference inhabited a different universe from mine, and it became clear to me that, while we had comparable experiences, they were not identical. They talked about what I would call transitional justice, that is, how to make amends, punish perpetrators, restore law and order, and refashion the procedures of civil society in the immediate aftermath of a genocidal catastrophe. The debate swirled around the extraordinarily painful choices of a moral, legal and practical kind, which the participants had themselves made or advised others who had to make them. As representatives of international or domestic agencies they have had to decide - or help the post-genocidal authorities to decide - whether to promise amnesty to mass murderers for their cooperation in restoring something like order, or whether truth commissions or war crimes tribunals should be the appropriate instrument to carry out such decisions. The crimes involved were recent, the corpses not yet cold.

My experience has been different. In 1992, I served as an expert witness in an Australian war crimes trial, *Paul Gregory Malone v. Mikolay Berezowsky*, a case brought by the Commonwealth of Australia against one of its citizens for a crime committed in a different country fifty years before the court proceedings. The defendant was alleged to have had a role in the murder in the summer of 1942, of 102 Ukrainian Jews in the village of Gnivan as part of Nazi genocide. The difference between my experience and that of my colleagues arose almost entirely from the lapse of time between genocide and its retribution. I call such issues intergenerational as opposed to the problems of transitional justice described above. How could a trial fifty years after the crime, and half way round the world from the site, be just? And what could be done for the victims? Was justice possible for the defendant? Was it morally right to try an old man when the witnesses had either died or forgotten what they once knew? These questions have either directly or indirectly involved the emergence of a new intergenerational jurisprudence.

The war crimes trials of the 1990s raised these questions in an acute form. Like other English-speaking countries, Australia had passed a War Crimes Act immediately after the Second World War, which received the Royal Assent on October 11, 1945[1], but it had

turned a blind eye to whom it admitted to its ports and eventually to its lists of citizens. No prosecutions followed under the Act until in 1987 newspaper stories about war criminals among Australia's Balkan and East European diasporas began to appear in the press. The public debate in Australia and elsewhere led to amendments to the War Crimes Act, passed by the House of Representatives in October 1987 and by the Senate in December 1988. The War Crimes Amendment Act 1988 came into force on 25 January 1989.[2] The amended text added a further paragraph to the preamble:

> c) it is also essential in the interests of justice that persons accused be given a fair trial with all the safeguards for the accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes.

It is clear that the unease felt by many about conducting trials forty to fifty years after the crimes were committed, had influenced the passage of the amendments. A feature of the Australian legislation which caused controversy was that neither the original Act nor the amendment made any reference to UN or other human rights instruments for its authority but merely states in Section 3 that "this Act extends to all external territories and has extra-territorial operation according to its tenor". (I understand that there was a challenge to the constitutionality of the amendment raised by the defense in the Polyukovich case, the first case to be brought to trial, but it had been resolved before I was involved and I was not briefed on those matters.)

By June 30th, 1990, the Special Investigations Unit of the Attorney General's Department had undertaken 105 active investigations of individuals alleged to have been involved in genocide, from which, in the end, three cases were actually brought to trial[3]. None of the accused was convicted. Indeed of all the various war crimes trials in English-speaking jurisdictions in the last ten years I believe only one has led to a conviction.

What was not in doubt and never contested by the defense was the crime itself. The crime was committed sometime in the summer of 1942. Witness Lipinsky said "approximately June, but I cannot tell you exactly, up towards the middle of June," but witness Blinova said "in May just before my going, I mean, I was taken to Germany," other witnesses said other things,[4] - the date was uncertain but the facts were not. 102 Jews, the entire Jewish population of the town of Gnivan, less a little boy called Raykis who hid (and survived), were marched out of town some three or four kilometers to a huge pit, which an advanced party of their group had been forced to dig. They climbed into the pit, where they were murdered by a unit of the SS *Sicherheitspolizei* and covered over. In 1991 a forensic unit from Australia's Special Investigations Unit opened the pit and found precisely 102 skeletons, empty shell cases and vodka bottles. It was a small event in a great crime and an entirely typical one, a "pit killing", as they were known, by which almost as many Jews were murdered as by the more clinical procedures used at Auschwitz, Treblinka or Sobibor.

Was justice done in the trial of Mikolay Ivanovich Berezovsky? Did the dead get what they had a right to expect from the trial of one of their murderers? That is less easy to answer categorically. As the Qantas jet lifted off the runway in Perth and I saw the great empty waste beneath the wings that is Australia, I had contradictory answers to that question. I felt certain that Berezowsky was guilty. Mr. Raykis had seen the round-up and had not spent decades plotting to kill Berezowsky in some sort of delusion of mistaken identity. On the other hand, a guilty man, if my assumption was correct, had been given a scrupulously fair trial. Under the tests applied in Australian law, Mikolay Ivanovich Berezowsky had not been proved guilty "beyond reasonable doubt". Even I had to accept that there was a "reasonable doubt". A fair trial under strict procedures had not been accorded to the victims. They had been machine-gunned by an SS man, no doubt smoking and drinking vodka as he stood on the edge of the pit and pulled the trigger. Yet that terrible crime was part of a greater crime that began on the 30th of January, 1933, when Adolf Hitler became Chancellor of the German Reich.

My second experience involved assets and claims arising from other Nazi crimes. As a historian of the Holocaust with a background in the banking business, I became a member of the Historical Commission of the Deutsche Bank AG, Frankfurt am Main, and was principal author of the bank's report on its gold transactions during the Second World War.[5] After thirty-five years as a professional historian, I thought I understood my trade, its obligations and ethical issues. Nothing had prepared me for the difficulties, pressures and anxieties of historical research carried out in the pay of a giant German multinational banking group under the scrutiny of the world's press. Of course, I knew that the bank was only partially interested in the search for truth. By December 1997, Nazi gold was a "hot issue" on the front pages of the world's press. Deutsche Bank's *Vorstand* (its executive board) were certain that, when the media, lawyers and Jewish organizations finished pounding the Swiss, the Germans would be next. In addition, though none of us knew it in January 1998, when the Historical Commission met for the first time, Deutsche Bank intended to take over Bankers Trust, Inc. of New York for the tidy sum of $9.5 billion. The acquisition needed permission from the Federal Reserve Bank and approval from New York State and city banking authorities. A nasty story about its Nazi past was not ideal public relations for the takeover.

The bank needed a historical commission as prominently staffed and lavishly supported as possible. A handful of historians, staying at the Frankfurter Hof and getting retainers, high by their standards but not the bank's, was a form of accident insurance and cheap at the price. The Federal Reserve System issued an order "approving an application [by Deutsche Bank] to become a bank holding company". The Fed took account of the objections made to the take over by "individuals and organizations that expressed concern about certain activities of Deutsche Bank during World War II." The Fed noted, however, that "Deutsche Bank has provided substantial information about the steps that the bank has taken and is taking to address its activity during World War 2." A footnote followed which refers to the Historical Commission and our "Gold Report".[6]

Both the war crimes trial and the gold report dealt with crimes committed fifty years or more before the moment of retribution. They involved claims by present actors against present actors, a named individual in one case and a business corporation in the other, for things that they personally, or their predecessors, had done in the past. Both were examples of intergenerational justice in the literal sense. Does a big German or Japanese corporation, have moral, legal or financial responsibility today for the acts of the company a generation or two earlier? If Deutsche Bank received gold stolen from Holocaust victims, and it did, must it pay back the gold or the proceeds from gold sales? To whom? At which exchange rate? Did it know where the gold came from and does such knowledge make a difference? If Daimler-Benz employed slave labor, and it did, must the present multi-national, Daimler-Chrysler, pay compensation to the victims? If the victims have died, to whom should payment be made? How should the compensation be calculated? Are courts of law suitable venues to decide such matters?

In matters of transitional justice the questions have to be answered, here and now, by the survivors of the genocide. With intergenerational justice, the need for trials is less obvious and the assessment of claims less certain. There are those, and not just persons who wish to suppress the crimes of the Nazis, who deny that either case can achieve anything like justice. And then there is the question – why now?

Intergenerational justice, although not always so called, has been an important theme of the past ten years. War crimes trials, claims for restitution of assets, demands for compensation for past wrongs by minorities subject to persecution or exploitation, disputes about memorials and museums to commemorate past injustice, committees and commissions of enquiry of all sorts, have created an assembly of evidence, claim and counter-claim that nobody can now begin to absorb. What does it all mean? Why now and not earlier? Much of the evidence has been available for years; in the case of Nazi crimes, even in print since the 1940s. Is there some general pattern we can discern?

First, there is the role of American lawyers. At the final plenary session on July 17th, 2000 of the international committee that established the German foundation to deal with Holocaust asset claimants from German firms, Stuart Eizenstat, speaking for the American government, put it this way:

> We must be frank. It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. It was their research and their work that highlighted these old injustices and forced us to confront them. Without question, we would not be here without them. The settlement we reached of 10 billion DM will help hundreds of thousands of victims, beyond those whom the lawyers represent, live out their declining years in more comfort. For this dedication and commitment to the victims we should always be grateful to these lawyers. But they have also worked diligently to find solutions to seemingly intractable problems and to cooperate in finding ways to

> achieve legal peace for German companies. The legal fees they will receive are far less than would normally be received for such a large settlement and represent only about 1% of the total Foundation sum. This is eminently reasonable given their contribution.[7]

There is a sense in which that statement is right. The huge suits which lawyers brought against German, Austrian and Swiss firms were not legal cases in the usual sense. They were quite literally publicity stunts, intended to get headlines, like bringing frail elderly survivors to stand outside the gleaming glass tower of some powerful German company and demanding some unthinkable sum in restitution. The strategy worked and continues to work. On April 17, 2000, ABC News reported:

> Austria is reeling from an $18 billion claim for compensation launched in the U.S. courts by Jewish Holocaust victims. The sum would "bankrupt the Austrian state," said Maria Schaumayer, the Austrian government's recently appointed special envoy for World War II compensation claims. Austria's Chancellor Wolfgang Schuessel calls the claim "ridiculous." The lawsuit alleges the companies conspired with the Nazis in the theft of property from Holocaust victims and in the exploitation of wartime slave labor. It was filed in New York Thursday by attorney Edward Fagan, who specializes in Holocaust suits. Court documents allege that the Austrian companies continue to conceal their wrongdoing while failing to account for assets that once belonged to Holocaust victims, whom the lawsuit seeks to certify as a class.[8]

Now, as it happens, Austrian companies actually behave as the plaintiffs' lawyers say they do. They continue to conceal their wrongdoing in every way they can and the contents of the writ mean nothing. The cases are not legal but political.

The real key to the success of the claims of the American lawyers rests on several interlocking factors: the first of these is the class action suit, which enables hundreds of claimants to be consolidated in a single case. The class action would be merely an American oddity, were it not for the second vital factor: globalization. Deutsche Bank, Daimler-Benz, BMW, the big Swiss banks, Nestlé, Hoffmann-LaRoche, Novartis, the German insurance and chemical companies, Japanese car and electronics firms, Austrian banks and machine tool companies, all need to operate in the greatest market in the world: the United States. They simply cannot afford to have their licenses revoked or their mergers blocked by regulatory authorities at state or federal level or their legal departments tied up for years in messy class action litigation.

The world has changed for companies and their governments. In the period after 1945, the Swiss government could afford to drag its feet and haggle about how much gold it would or not contribute to the victims of Nazi atrocities or even to central banks like the Dutch or Belgian which the Nazis had looted. On June 25, 1949, as Peter Hug describes it,

> the Federal Council [the Swiss executive-JS]exchanged confidential letters with the Polish government in which it agreed that 'heirless' assets held in Switzerland belonging to missing Polish nationals would be transferred to the Polish central bank's 'nationalization compensation account' at the Swiss National Bank for the benefit of Swiss citizens whose property had been nationalized by Poland.[9]

Just think about what the Swiss were doing. The Swiss government agreed to barter the unclaimed assets of what were almost certainly victims of the Holocaust to pay off its own citizens, who had lost assets in the socialization of industrial and commercial enterprises by the new People's Republic of Poland. On December 7, 1949, *The New York Times* reported the story, as did the Toronto *Globe and Mail*. International protests from governments and non-governmental agencies arrived at Swiss embassies and at the Federal Political Department in Bern, but nothing happened. The 1950s passed with questions in the Swiss parliament but the international outcry died down. The "immoral" agreement, which even the Swiss Neue Zürcher Zeitung called "a complete violation of the depositors' property rights or the rights of their private heirs and.. [a] blatant contradiction of our private law,"[10] continued to operate. No such outcome would be conceivable today. The plaintiffs' lawyers would ensure that the fuss would not die down, and the Swiss government and its companies' vulnerability to the American market would ensure that the cries were heard.

The collapse of the Soviet Union made the emergence of the Holocaust asset claims possible. The publication of new documentary sources and the opening of archives transformed the evidential bases of claims against companies. The files of several of the Nazi economic ministries had landed in Russian hands in 1945 and had been transferred to secret archives in Moscow. These were now open to public inspection. High copying charges and low incomes of Russian archivists created an ideal situation for locals to exploit the big consumer of new historical material, such as a German or Austrian company in search of its Nazi past. The emergence of successor states to the Soviet Union played a part. In the years 1989 to 1992 the government of Ukraine attempted to gain international respectability by offering its archives and procurators as aids in the war crimes trials that began in 1991 and 1992 in Australia and Canada.

A journalist in Kiev wrote an article in 1990 that led directly to the arrest of Nikolay Ivanovich Beresovsky, now an Australian citizen living in Adelaide, South Australia. The article alleged that he took an important part in the murder of the 102 Jews in Gnivan in 1942 while a member of the Ukrainian auxiliary police. The Australian Special Investigations Unit, charged in 1988 with hunting down suspected war criminals, had not known about Berezowsky until the journalist published his finding. In his concluding remarks in July, 2000, Under Secretary Eizenstat paid tribute to "the five central and eastern European governments -- Belarus, the Czech Republic, Poland, Russia, and Ukraine" which had played an important part in bringing the slave labor compensation

negotiations to a conclusion. Belarus and Ukraine, in particular, bankrupt and threatened as they are, need support for the citizens who suffered as slave laborers and the monies which they hope will flow from the German Foundation eastward to Minsk and Kiev.

The collapse of the Soviet Union changed the climate in which Holocaust matters were treated. The official doctrine in Eastern Europe had always been that the crimes of Nazism had to do with the existence of fascism, an extreme form of capitalism. Since capitalism had been abolished in the socialist states, they had no cause to look to their own pasts. Many important contributions were made by historians working in Eastern Europe but they tended to be ignored by Western historians for equal, if opposite reasons.

Other less tangible changes have made it possible to pursue the issue of asset restitution. The first is simply the passage of time. If elderly criminals are to be brought to justice or equally elderly victims to be compensated, there is no time to lose. Time itself has been instrumentalized by the exploitation of anniversaries: the fiftieth anniversary of the outbreak of the Second World War in 1989, or its end in 1995. The books, films, documentaries and shows which accompanied these events flowed into the general turbulence of the media in the 1990s and may have produced the extraordinary reception which Daniel Goldhagen's book *Hitler's Willing Executioners : Ordinary Germans and the Holocaus*t enjoyed. The book appeared in hardcover in March 1996. By the beginning of April, Goldhagen was a national celebrity. By the end of April he undertook promotional tours in Britain and Germany and became within two months an international celebrity. Whatever merits or demerits academic historians may see in the work, nobody has put the issue of collaboration in Nazi crime by the great mass of the German people to the great mass of the German people as vividly as Goldhagen. (One of my graduate students told me that she had seen people reading the book on the streetcars in Hanover. If in these media-saturated days attention has become a rare commodity, Goldhagen grabbed a lot of it.)

Genocide in neighboring Yugoslavia during the 1990s has kept the discussion of genocide in World War Two alive. Croatian massacres of Serbs during the period 1941 to 1944 have left an indelible stain on Serbian self-definition and prompted what Serbs saw as justifiable reprisals in return. Terms like "ethnic cleansing", a contemporary version of *Säuberung*, one of the Nazi euphemisms for murder, hold up the greater Holocaust as the measure of lesser ones. Indeed the term itself, Holocaust, has become part of the speech of many victims and groups who wrap their claims in the shrouds left outside Auschwitz and Sobibor. Many of the investigators and prosecutors who learned their trade in the Nazi war crimes trials in Australia or Canada in the early 1990s, where the defendants had killed Jews, now investigate or prosecute in a different tribunal Serbs, Croats or Bosnians who murdered their neighbors in the Yugoslav wars of the 1990s.

In the 1990s, the world has discovered, as Elazar Barkan points out in his recent book, *The Guilt of Nations*, that all sorts of groups and peoples want "to redress through negotiation painful historical injustice." There is, he argues, " a desire to redress the

past."[11] In retrospect I see the war crimes trials of the 1990s as an early manifestation of what Barkan describes as the emergence of a new international morality. "The novelty in the discourse of restitution is that it is a discussion between the perpetrators and their victims. . . a new form of political negotiation that enables the rewriting of memory and historical identity in ways that both can share."[12] He also suggests that our reigning liberal assumptions, designed in the eighteenth century to protect individual rights, are gradually evolving into a "neo-enlightenment" in which groups have rights as well. As President George Bush (the elder) put it when he signed a bill authorizing reparations to interned Japanese-Americans,

> A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past.[13]

Intergenerational justice in some rough sense can be done to Japanese-Americans or their children because there are still beneficiaries to receive it. In the case of the slave workers in Nazi concentrations camps who worked for German businesses, as Thomas Kuczynski argues in his expert memorandum, the profits made by the German firms were real. Their slave laborers cost them about half what paid German workers would have. The firms simply pocketed the difference and, by stalling as they have, made sure that most potential beneficiaries were dead by the time restitution was being considered. Kuczynaski was violently attacked for arriving at a sum of DM 180 billion, but in his defense he argued that that sum was less than 1% of the capital owned by the top 10% of German asset-holders and only amounted to approximately DM 12, 500 per claimant. His calculation continues:

> If we reckon at a minimal level of decency the sum of DM 10,000 per person and apply it to the total number of persons involved, about 14 to 15 million, we arrive at a minimal claim of DM 140 billion. It follows that the sum of DM 180 billion is a bit higher than the minimal claims of those entitled to reparation. [my translation-JS][14]

Kuczynski's remarkable study shows what can be done by strict application of economic reasoning. Where there are living claimants, a sum can be calculated which economists may debate but which can be respectably put forward. Yet Kuczynski reminds his readers that nothing can compensate those slave-laborers for what they suffered while they served Hitler's Reich, nor the permanent damage to health and psyche which they endured. President Bush also saw that nothing could undo what the interned Japanese had suffered. In the end, intergenerational justice in these extreme cases simply does not exist.

Yet the attempt to attain it is not entirely futile. The last ten years – the war crimes trials, the class action suits against German companies, the claims of Korean "comfort women"

against the Japanese state, the attack on Switzerland and Swiss banks, the controversy stirred by Daniel Goldhagen's book, *Hitler's Willing Executioners*, the failure of international intervention to prevent genocide in Rwanda and Burundi, the Truth and Reconciliation Commission in South Africa, the arrest and detention of General Pinochet, the international outrage at "ethnic cleansing" in the Balkans – testify to a change in international morality which may be as fundamental as any seen in modern times. A new moral awareness among and within the community of modern states about retribution for past crimes falls short of any idea of either transitional or intergenerational justice but such new attitudes may reduce the need to demand it. And that is not a trivial step for the international community to take.

Notes

[1] *War Crimes Act 1945, reprinted as at 30 April, 1990*, p. 12
[2] Ibid. p. 3
[3] ibid. p. 6
[4] Witness depositions in the matter of the War Crimes Prosecution of Nikolay Ivanovich Berezowsky
[5] Jonathan Steinberg in Verbindung mit den Mitgliedern der Historikerkommission zur Erforschung der Geschichte der Deutschen Bank in der N S-Zeit Avraham Barkai, Gerald D. Feldman, Lothar Gall, Harold James,*Die Deutsche Bank und ihre Goldtranskationen während des Zweiten Weltkrieges,* aus dem Englischen übersetzt von Karl Heinz Siber (Verlag C.H. Beck München 1999);See also the parallel report on Dresdener Bank Ag: Johannes Bähr, *Der Goldhandel der Dresdner Bank im Zweiten Weltkrieg*, unter Mitarbeit von Michael C. Schneider. Ein Bericht des Hannah-Arendt-Instituts. Gustav Kiepenheuer Verlag GmbH. Leipzig, 1999
[6] Federal Reserve System, Deutsche Bank AG Frankfurt am Main, Germany "Order approving an application to become a Bank Holding Company and Notice to acquire Nonbanking Companies", Federal Reserve Release, May 20, 1999, pp 16-17, and Note 27
[7] http://www.state.gov/www/regions/eur/holocausthp.html "Holocaust Issues"
[8] http://www.abcnews.go.com/sections/world/DailyNews/austria000417_holocaust.html "abcNEWS.com, April 18, 2000
[9] Peter Hug, "Unclaimed Assets of Nazi Victims in Switzerland: what people knew and what else they ought to know" in Georg Kreis, ed. *Switzerland*, p. 82
[10] *Neue Zürcher Zeitung*, March 7, 1950, ibid. p. 85
[11] Elazar Barkan, *The Guilt of Nations. Exploring the Global Politics of Restitution from 1945 to Bosnia* (New York: W.W. Norton & Co, 2000) p.X
[12] ibid. p. xviii
[13] ibid. p. 43
[14] Thomas Kuczynski, "Entschädigungsansprüche für Zwangsarbeit im 'Dritten Reich' auf der Basis der damals erzielten zusätzlichen Einnahmen und Gewinne", *Zeitschrif für Sozialgeschichte des 20. und 21. Jahrhunderts*, 15. Jahrgang, März 2000, Heft 1, and *Junge Welt*, 1-2 July, 2000, Nr 151, p. 12

Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders

Ian Martin

Introduction

From mid-1993 to the spring of 1994, representatives of the United Nations (UN) and the Organization of American States (OAS) pressed exiled President Aristide and Haitian legislators to enact the broadest possible amnesty for the military leaders who had seized power in September 1991, and maintained it through the killings of thousands of Haitians. Desperate to induce them to accept a return to constitutional government, the Office of the UN/OAS Special Envoy for Haiti obtained amnesty laws from other countries as possible models - including laws criticized, and eventually formally condemned, as contrary to international law - and drafted amnesty bills for the Parliament. International pressure to adopt this legislation was applied at a time when constitutionalist legislators were subject to military intimidation, some had fled the country, others felt unable to participate for reasons of personal security, and supporters of the military elected illegitimately were participating in the senate. The culmination of these efforts came when a draft bill which would have covered all crimes stemming from the coup right up to the date the law would be promulgated was presented at a ceremony attended by diplomats and welcomed by the UN spokesperson - this at a time when egregious human rights violations were still being committed, and would thus be exempt from prosecution.[1]

In July 1999, a peace agreement for Sierra Leone was signed in Lome. Foday Sankoh's Revolutionary United Front, which had been responsible for extreme atrocities against civilians, agreed to lay down their arms in exchange for a promise of amnesty for past acts, together with their inclusion in a new coalition government in which Sankoh's control over the country's diamond mines was formalized. The agreement was brokered by African and Western governments which did not want to commit their troops to fight to restore the control of the elected government. Although the amnesty provision had been accepted with little discussion, at the last moment the UN Secretary-General instructed his Special Envoy, who had helped to steer the negotiations and was to witness the agreement, to append to his signature on behalf of the UN a disclaimer to the effect that the amnesty provision should not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[2]

On Human Rights Day, December 10, 1999, Secretary-General Kofi Annan announced that during the course of the year,

I issued guidelines to my envoys and representatives involved in peace negotiations to assist them in tackling human rights issues that may arise during their efforts. These guidelines address the tensions between the urgency of stopping fighting, on the one hand, and the need to address punishable human rights violations on the other. The guidelines do not attempt to address sweeping answers to these questions. However they are, I believe, a useful tool with which the United Nations can assist in brokering agreements in conformity with the law and in a manner which may provide the basis for lasting peace. They are a significant step in the direction of mainstreaming human rights.

The "tensions" which the Secretary-General referred to in the task of peace-makers do not end with a peace agreement. As the claims of justice are pressed with growing determination, peace-makers, peace-enforcers, peace-keepers and peace-builders are increasingly confronted with responsibilities which may pose real dilemmas in reconciling the multiple objectives of peace operations.

Negotiating Peace with Justice

All those involved in peace negotiations may have to confront the tension between the urgency of stopping fighting and the demands of justice. The UN however has a special responsibility as the guardian of the Charter and of international law. It may be necessary and proper for immunity from prosecution to be granted to members of an armed opposition seeking reintegration into society as part of a national reconciliation process. The ICRC interprets the relevant provision of the Geneva Conventions as encouraging amnesty at the end of hostilities "for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated humanitarian law."[3] At the same time, government negotiators may seek endorsement of self-amnesty proposals. The UN responsibility should be clear: it cannot condone amnesties regarding war crimes, crimes against humanity and genocide, or foster those which violate relevant treaty obligations of the parties. In years to come, the UN will find that it is negotiating peace in countries where the jurisdiction of the International Criminal Court applies: but already it should be affirmed that the crimes defined by the ICC Statute can never be amnestied. In any event, general amnesty laws which prevent prosecution of gross violations of human rights, including torture, disappearances and extra-judicial executions, are incompatible with state obligations under some human rights conventions, and even where they are not, undermine principles endorsed in General Assembly resolutions: the UN should never promote them, and should seek to discourage them. The UN/OAS actions in the case of Haiti were improper; conversely, the UN's refusal to endorse the amnesty in Sierra Leone is to be applauded. On the assumption that the latter reflected the Secretary-General's announced but confidential guidance, it represents a principle and a precedent that must now be followed.

Human rights advocates opposing amnesty proposals have, however, sometimes understated the significance the issue can assume as a stumbling block in negotiations. There is no avoiding the dilemma for negotiators: maintaining the principle of accountability may well raise the initial hurdle to a peaceful transition, even if it serves its eventual sustainability. For peace-makers and human rights advocates alike, there is thus

a link to the debate regarding military intervention, as the cases of both Haiti and Sierra Leone imply. A determination to uphold to the fullest the principle of accountability may imply a greater dependence on military action; conversely, a desire to seek only a peaceful solution may imply being unable to assert the accountability of those who are prepared to prolong the fighting to evade justice. This is unwelcome, but has to be recognized by those who would wish to endorse military interventions or solutions only as a last resort, or who are simply realistic about their difficulty in practice.

Strict principle might seem to require that a UN negotiator should not only oppose unacceptable amnesty provisions, but should insist that the claims of justice are recognized in a peace agreement. In some circumstances, however, it may better serve the cause of justice that the issue is not addressed at a time when the balance is weighted towards the need for immediate peace. Recent years have shown that time is likely to be on the side of those who claim justice, and what is politically impossible now may become politically feasible later. The best realistic objective may be not to assert immediately the claims of justice, but at least to prevent an endorsement - certainly an international endorsement - of impunity.

The responsibility of the UN is not only to bring immediate peace, but to look to the sustainability of the peace. This involves anticipating in negotiations the debate as to how far the pursuit of individual justice will sustain or threaten the peace: it also involves a practical anticipation of the ways in which the peace-keepers and peace-builders can support the pursuit of justice, truth and reconciliation. The peace negotiation may determine the political and legal framework within which these goals are to be pursued. Beyond that, the institutional and funding arrangements for peace implementation will determine the international support available to pursue them.

Intervention and Justice

In recent years, international military and police personnel have been deployed in widely differing contexts where perpetrators of war crimes, crimes against humanity, genocide and other gross human rights violations have been at large. In former Yugoslavia, the jurisdiction of the International Criminal Tribunal for Former Yugoslavia (ICTY) was firmly in place before the deployment of IFOR in Bosnia and KFOR in Kosovo. In Rwanda, the deployment of French troops under a Security Council mandate in 1994 (*Operation Turquoise*) took place before an international jurisdiction was established, and when the nature of the country's government was uncertain and the national legal system had disintegrated. In East Timor, INTERFET recognized Indonesian jurisdiction when it was first deployed to East Timor in September 1999, and within weeks the UN transitional administration had become the domestic jurisdiction.

In Bosnia, law and politics argued for the arrest of war criminals: it is widely acknowledged that the international political strategy to overcome extreme Serb nationalism would have been greatly aided by the early arrest of Karadzic, Mladic and others, and was undermined by the failure to do so. Only "force protection" argued for caution, although some would add as a further explanatory factor pro-Serb sympathies on

the part of some national contingents. In practice, NATO's policy of arresting indicted war criminals only as and when its troops "came across" them evolved, from early failures to carry out arrests even within the terms of this policy, to pro-active arrests by some contingents, particularly after the change of UK government in 1997.

In Rwanda, by the time the French intervention force entered the country in June 1994, the scandalous international reluctance to recognize the massacres of Tutsi as genocide had finally given way to a general acknowledgement, embracing the UN and France, that genocide it was. The UN peace-keeping mission, UNAMIR, mandated only under Chapter VI of the UN Charter, had neither the means nor the geographical reach for the arrests of *genocidaires* to be a realistic possibility. The French forces, mandated under Chapter VII, established a "safe humanitarian zone" which at one time contained key members of the political and military leadership which had planned and executed the genocide. French officers had compiled detailed information about the responsibilities of some of them. The possibility of their arrest was explicitly considered. A senior French civilian official with the operation reported to Paris:

Since we consider their presence undesirable in the secure humanitarian zone and knowing as we do that the authorities bear a heavy responsibility for the genocide, we have no other choice, whatever the difficulties, but arresting them or putting them immediately under house arrest until a competent international judicial authority decides their case.

Paris however declared that "our mandate does not authorize us to arrest them on our own authority. Such a task could undermine our neutrality, the best guarantee of our effectiveness." In practice, the French intervention not merely failed to detain those who would later be indicted for genocide, but facilitated their departure from Rwanda, in many cases enabling them to participate in the re-launching of a genocidal insurgency against the new Rwandan government from Zaire.[4]

The Australian-led multinational force, INTERFET, which first deployed to East Timor on September 20, 1999, had to decide how to respond to the denunciation of anti-independence militia allegedly involved in serious human rights violations. Initially this remained the formal responsibility of the Indonesian police and justice system, but these had ceased to operate; with the mandating of the UN Transitional Administration (UNTAET), they would become the responsibility of the UN civilian police and an East Timorese judiciary yet to be established. The Security Council resolution mandating INTERFET, while stressing the individual responsibility of persons committing violations of international humanitarian and human rights law and demanding that they be brought to justice, was silent on INTERFET's responsibility or authority to carry out arrests. INTERFET therefore had to arrive at its own interpretation of its general mandate to restore peace and security in East Timor. It concluded that permitting persons accused of committing serious offences prior to its arrival to remain at large in East Timor would encourage the East Timorese to take the law into their own hands, and this in turn was likely to have an impact on INTERFET's mandate to restore peace and security. Its commander therefore issued a Detainee Ordinance which created various categories of

detainees. Anyone accused of committing serious offences prior to September 20 would be held as a security detainee and handed over to the civil judiciary in East Timor once it was established. INTERFET troops were also authorized to detain any person on suspicion of commission of a serious criminal offence. INTERFET troops who had taken a person into custody were required to deliver that person to the Force Detention Centre in Dili within 24 hours of the detention. If a detainee was held for more than 96 hours, he/she was provided with the grounds for his/her detention, together with the material considered by the commander of INTERFET as the basis for continuing the detention. A Defending Officer was available to assist the detainee to show why he/she should not be held in detention, and on a number of occasions detainees were released because it was established that there was insufficient evidence. Those who remained in detention were handed over to the civil judiciary of UNTAET established on January 7, 2000. [5]

These cases suggest that when the Security Council mandates an intervention force, it should explicitly address the force's responsibility for detaining those against whom there is evidence of genocide, war crimes, crimes against humanity or other gross human rights violations. Where an international jurisdiction already exists, the responsibility to detain and hand over those subject to it should be clear: when the Statute of the ICC has come into effect, the Security Council will have the power to decide that a situation it is addressing should be referred to the ICC if it is not already within its jurisdiction, and should normally do so, most obviously where genocide is involved. Where such crimes remain subject to domestic jurisdiction only, the responsibility and the arrangements necessary to give effect to it may be more complex. When forces acting under UN authority are detaining accused persons, best practice for doing so in accordance with human rights standards must be made available to them and expected of them.

It is not only the responsibility for the custody of persons which needs to be clarified: so too does the responsibility for custody of documents and other evidence. The US intervention forces operating under a Security Council mandate in Haiti took out of the country, to the US, documentation of the Haitian armed forces and of the paramilitary group FRAPH, relevant to criminal proceedings and to the investigations of Haiti's National Truth and Justice Commission. These have not been returned to the Haitian government: the US authorities have insisted on removing the names of US citizens from these documents, while the Haitian authorities have refused to accept them back in this state.[6] The Australian forces of INTERFET also took custody of documentation and other evidence in East Timor: much – but apparently not all - of this was transferred to UNTAET, and more controversially (with names redacted) to the Indonesian government.

Justice in Peace Building

The immediate aftermath of armed conflict requires difficult judgements as to how the demands of justice and reconciliation are to be addressed. Ideally this should be the subject of a mature national debate, informed by international legal obligations and standards. In practice it often requires early decisions of a political leadership that may be fragile and of untested legitimacy, with the UN and the international community heavily

involved in the decision-making, and in the extreme cases of East Timor and Kosovo, bearing formal transitional authority.

The long-term sustainability of the peace must be the overriding criterion, but short-term considerations may be pressing. Refugee return is a goal in itself, and a failure to achieve it may seriously threaten the peace: the camps in Zaire were the base for Hutu extremist insurgency in Rwanda, and the camps in West Timor threatened the stability of East Timor. The government may be dependent on and struggling to control a military with human rights violators within its ranks, and it may need to achieve the integration or demobilization of other combatants with similar responsibility for abuses: Sierra Leone exhibited both features.

Such considerations are likely to give rise to the pressure for amnesties or pardons. To concede to such pressure may not only breach the principle of justice and the requirement of sustainable peace: it may threaten immediate peace if excluding the possibility of justice leads to reprisals by individuals, groups or communities. These concerns need however to be answered by clarity as to what categories of persons are and are not liable to prosecution, and assurances of proper arrest procedures, decent conditions of detention, and fair and prompt trials.

Such assurances may be hard to offer plausibly, either because a criminal justice system (including decent prisons) does not exist, as in post-genocide Rwanda, or because its personnel are incapable of impartial justice, as in Kosovo. For the peace-builder, addressing the legacy of past abuse here joins with the task of building a justice system for the present and future. Growing recognition of the centrality of this task has yet to be reflected in any great competence in the UN or other multilateral or bilateral actors to address it. One lesson learned painfully in Kosovo and East Timor is that where local judges are lacking, politically compromised or subjected to community pressures they cannot withstand, it may be necessary to make use of foreign judges. This is of particular relevance to the assurance of fairness in prosecuting past abuses: indeed it might be argued that any such prosecutions under international authority should be undertaken by international personnel. The experience of foreign judges in East Timor's trials, and of the formulae for international participation negotiated by the UN for trials in Cambodia and Sierra Leone, will offer lessons, positive or negative, for the future.

In most contexts, it will be quickly recognized that the numbers of potential defendants and the limitations of the formal justice system imply that only a proportion - probably a small proportion - can in practice be brought to trial. In the extreme case of Rwanda, this led the government to categorize offenders according to the seriousness of their alleged involvement in the genocide, to encourage confessions (and thus economize on the resources of the justice system) in return for reduced sentences, and to propose an alternative form of community justice for lesser offenders (bearing a traditional name, *gacaca*, but in fact largely novel). Categorization and an adaptation of community justice have also been introduced as East Timor wrestles with the need to encourage the return and reintegration of those who fled or were forcibly removed to West Timor in the post-ballot violence. The CNRT (the coalition of pro-independence parties), East Timorese

NGOs and the UN developed a proposal for a Commission for Reception, Truth and Reconciliation in East Timor. Those who were responsible for the most serious crimes, such as murder and rape, or who led or organized the violence will be referred to the justice system, but the Commission will help to facilitate "community reconciliation processes" to promote the return of those responsible for less serious crimes, such as burning, looting and assault. They must admit responsibility for their acts, and may have to agree to some form of community service, reparation, public apology or other act of contrition, as a demonstration of their remorse and their desire to be reintegrated into the community. These agreements will be brokered by traditional leaders or other respected members of the community, assisted by the Commission, and registered by a local court, so that the perpetrators will no longer be liable for the acts disclosed. The immediate task of facilitating return is linked to the larger purpose of establishing the truth of the human rights violations perpetrated since the 1970s, and recommending measures to provide assistance to victims and prevent future abuses.[7]

East Timor is again a special case, as it is the UN Transitional Administrator who formally promulgated and has responsibility for these arrangements during the transition period, although they were endorsed by the East Timorese National Council after extensive consultation. In Rwanda, the international responsibility is confined to deciding whether to endorse and fund quasi-judicial processes which cannot be said to conform to international human rights standards.[8]

Whatever the framework for individual accountability, the international peace-building presence must consider its own responsibility in the process of investigations. This responsibility should be referred to in its formal mandate: if it is not, it will be harder to get the resources necessary to fulfil it. The relationship of its responsibility to that of the Office of the High Commissioner for Human Rights, under mandates of the Commission on Human Rights or her general mandate, should be defined. Where there is an international jurisdiction - the International Criminal Tribunals today, tomorrow the ICC - the peace-builders should not duplicate its investigations, but should extend every cooperation to them, including the transfer of all information in their possession. Where prosecutions are to take place within the national jurisdiction, the relationship is more complex. The peace-builders should be part of an international effort to create a justice system which can promise fair trial. But the immediate reality may be far from that.

Efforts to create an equitable justice system must extend to the defense of accused persons: the more unpopular this is, in the extreme cases of genocide and war crimes, the more essential it can be assumed to be. The fairness of proceedings should be monitored. In Bosnia, while national prosecutions were recognized to be an essential complement to those of the ICTY, the international organizations had to attempt to monitor closely and mitigate the unfairness of proceedings in courts subject to ethnic and nationalist biases and pressures. Uniquely, arrests were made subject to a degree of international control: the Bosnian authorities were induced to agree that alleged war criminals would be detained only if the indictment had previously been reviewed and "deemed consistent with international legal standards" by the ICTY. These so-called "Rules of the Road", promoted by the US and other governments concerned to remove an obstacle to free

movement between the ethnic enclaves, were liked by neither the Bosnian authorities nor the ICTY. The latter resisted efforts to widen their interpretation by the Office of the High Representative, which would have liked the ICTY to maintain some scrutiny of the fairness of the ensuing proceedings and consider taking over major cases where they were seen to be unfair.

The issue of transfer of evidence will also prove more problematic between international organizations and a national jurisdiction. In Haiti, the UN/OAS International Civilian Mission (MICIVIH) which had been present to collect information on human rights violations during the military regime, was criticized for not doing more to facilitate legal actions after the return to constitutional government. The guidance it received from the Office of the UN Legal Counsel (OLC) was that it could, on a voluntary basis and without prejudice to the privileges and immunities of the UN, provide documents or disclose their contents. However, the confidentiality of information emanating from the mission's investigations and the protection of the identity of sources had to be maintained.[9] A related issue, perhaps requiring more than case-by-case decision-making by the OLC, is the appearance as witnesses of past or current UN personnel, in international or national jurisdictions. MICIVIH made a significant contribution to the successful prosecution of the perpetrators of the 1994 Raboteau massacre in Haiti, through its initial investigations, extensive technical support to the subsequent judicial proceedings, and the testimony of its former Executive Director at the trial when it eventually took place in September 2000.

The investigation and prosecution of the crimes committed by Indonesian military and police and East Timorese militia in East Timor in 1999 present issues which are doubly unique. First, they are being pursued in two domestic jurisdictions, in Indonesia and in East Timor; second, in East Timor the domestic jurisdiction is currently under UN authority. This gave rise to a formal agreement on cooperation between UNTAET and the Indonesian authorities, covering transfer of indictees and transfer of evidence, which was controversial within UNTAET and criticized for lack of consultation with the East Timorese human rights community. As was predictable, Indonesia has flatly refused to transfer indictees to East Timor, and has even failed to enable UN investigators to question suspects in Indonesia, as the agreement requires. Meanwhile the issue of transfer of evidence gave rise to a tension between the UN's desire to cooperate with Indonesia and see its prosecutions succeed (or at least not be blamed for their failure) on the one hand, and its responsibility to protect identity of sources and suspicion of the integrity of a process involving Indonesian military and police investigators on the other. A further unique issue will arise when East Timor becomes independent, inevitably with a still frail judiciary: how will the evidence collected by UNTAET's international prosecutor and police be passed on, beyond UN authority?

The best efforts of international and national jurisdictions are highly unlikely ever to be able to deliver justice that is both fair and prompt in the aftermath of conflict. The case for reparations for victims is usually overlooked, perhaps because the international community would be likely to have to fund it. Yet reparations could in principle be faster than justice, and do something to ease immediate tensions: it is easier and quicker to

identify a victim than to establish the guilt of a perpetrator by due process of law.

Peace-Builders, Truth and Reconciliation

The extent to which the establishment of the truth of past violations does or does not serve the purpose of reconciliation is beyond the scope of this paper. In any given country, it should be the subject of an open national debate, although this may be regrettably foreshortened if the process of negotiating peace requires early decisions. As with the issue of individual justice, the question of timing is not simple: in what circumstances is it better for the options to be debated and the process got under way soon after the end of the conflict, and when is it better for some time to pass? At what stage will a reopening of political, ethnic or other tensions threaten the peace, or when will it serve the cause of longer-term reconciliation? How far back should the process of truth-telling go? - in Haiti, the decision to start from the military coup and exclude the period of the first Aristide government was controversial, and some would have wanted to encompass the decades of Duvalierism; East Timor had to decide whether to address the entire period of Indonesian occupation since 1975, or even to go back to the mutual killings by East Timorese parties which preceded it. A further issue is the relationship between a judicial process and a truth commission: the Prosecutor of the ICTY argued vigorously that the establishment of a truth commission in Bosnia in 1998 would be incompatible with the prosecutorial process for some time to come, and the relationship between the Special Court and the Truth and Reconciliation Commission in Sierra Leone is yet to be thought through.

As has been examined elsewhere[10], Truth Commissions have ranged from the fully international (El Salvador), to mixed national and international (Haiti, Guatemala), to exclusively national (Argentina, Chile). The first responsibility of the peacemaker or peace-builder is to ensure that the varied international experience is fully available to those considering the options for their own society. International voices should not attempt to become prescriptive. Efforts to develop suggestive international guidelines for the creation and operation of truth commissions could usefully be pursued.[11], but there will be a tension between the pressure for the best international standards and the need to respect national decision making, not only to choose among the existing variety of experience but to invent its own. Once a decision to establish a truth-seeking process is made, the peace-builder's responsibility is analogous to the responsibility to support the justice system. There should be no inhibition to the maximum feasible practical support, while transfer of information should be to the fullest extent consistent with protection of sources.

Conclusion

The conceptual debate regarding the relationship between justice, truth and reconciliation is of particular relevance to the contexts of conflict that have given rise to peace operations of the UN or other international organizations. What happens in these actual situations will, however, depend upon the clarity of guidance regarding international legal obligations given to the peace negotiators, the specificity of mandates given to the

peace-enforcers and peace-keepers, and the priorities and resources given to the peace-builders.

Notes

The views expressed in this paper are solely those of the author and do not represent the official views of the United Nations.

[1] For a detailed account, see Ian Martin, "Haiti: International Force or National Compromise?", in *Journal of Latin American Studies*, Vol.31 Part 3, October 1999, p.711-734.

[2] See John Hirsch, *Sierra Leone: Diamonds and the Struggle for Democracy*, International Peace Academy Occasional Paper, Boulder Colorado, 2001, p.80-84.

[3] Letter from ICRC Legal Division, quoted in Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", in *Law and Contemporary Problems*, 1996. The relevant provision, Article 6(5) of Protocol Additional II of 1977 to the Geneva Conventions of 1949 states: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[4] See Alison Des Forges, *"Leave None to Tell the Story"*, New York 1999, p.668-690; Gerard Prunier, *The Rwanda Crisis*, London 1995, p.307-311; Organization of African Unity, *Report of the International Panel of Eminent Persons to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, 2000, paras.15.53-15.85.

[5] For a description of these arrangements, of the orders issued to ensure that the Force Detention Centre complied with international standards, and of the Detainee Management Unit established for those accused of offences committed after the deployment of INTERFET, see Major Bruce M. Oswald, "INTERFET Detainee Management Unit in East Timor", Yearbook of International Humanitarian Law, Vol. 3, 2000, forthcoming.

[6] Colin Granderson, "Institutionalizing Peace: the Haiti Experience", in Alice H.Henkin (ed.), *Honoring Human Rights: From Peace to Justice*, Aspen Institute, 1998, p.249-250. See also the Report of the independent expert on Haiti, Adama Dieng, *Situation of human rights in Haiti*, A/54/366, 20 September 1999.

[7] Priscilla Hayner and Paul van Zyl, *The Challenge of Reconciliation in East Timor: Report on a Mission to East Timor, June 18-28, 2000, on behalf of the Human Rights Office of UNTAET*. The regulation to establish the Commission was approved by the Cabinet of the East Timor Transitional Administration in February 2001 and endorsed by the National Council in April 2001, subject to consideration by a panel established to gather further input from civil society.

[8] The Special Representative of the UN Human Rights Commission puts it like this: "The question facing Rwanda's international partners is relatively simple. Do they grasp the nettle and participate, on the grounds that anything is preferable to the abuse in prisons, or do they hold firm to established legal principles and stay aloof, thus increasing the likelihood that *gacaca* will fail?" *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr Michel Moussalli, pursuant to Commission resolution 1999/20*, E/CN.4/2000/41, 25 February 2000.

[9] Granderson, "Institutionalizing Peace", p.251-252.

[10] Especially by Priscilla Hayner, in *Unspeakable Truths: Confronting State Terror and Atrocity*, New York 2001.

[11] See Priscilla Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal", in *Law and Contemporary Problems*, 1997.

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Acronyms

ANC	African National Congress
CNI	National Information Center (Chile)
CNRT	National Council of Timorese Resistance
DINA	Directorate of National Intelligence (Chile)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Intervention Force (Bosnia)
INTERFET	International Force in East Timor
KFOR	Kosovo Force
MICIVIH	International Civilian Mission in Haiti
NGO	Nongovernmental Organization
OAS	Organization of American States
OLC	Office of the UN Legal Counsel
OSCE	Office for Security and Cooperation in Europe
RN	National Renewal Party (Chile)
RUF	Revolutionary United Front (Sierra Leone)
TRC	Truth and Reconciliation Commission
UDI	Democratic Independent Union (Chile)
UNAMIR	UN Peacekeeping Mission to Rwanda
UNTAET	UN Transitional Administration in East Timor

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