



Accountability for Past Abuses

Juan E. Méndez

Working Paper #233 - September 1996

Juan E. Méndez, former General Counsel for Human Rights Watch and recently appointed Director of the Inter-American Institute on Human Rights in San José, Costa Rica, was a Visiting Fellow at the Kellogg Institute during spring 1996. His early law practice in Argentina focused on labor law and the defense of political prisoners, and he was held in administrative detention from August 1975 to February 1977 under the state of siege. In 1982 he became Director of the Washington office of Americas Watch and in 1989, Executive Director of Americas Watch. He is the author of many articles in books and academic journals and of numerous reports for Americas Watch on human rights in Argentina, Colombia, Nicaragua, Peru, El Salvador, Guatemala, and Honduras, including *Truth and Partial Justice in Argentina* (1987), *The 'Drug War' in Colombia: The Neglected Tragedy of Political Violence* (1990), and *Political Murder and Reform in Colombia: The Violence Continues* (1992).

A version of this paper is also forthcoming in the February 1997 issue of *Human Rights Quarterly*.

ABSTRACT

The transitions to democracy in the 1980s have yielded a wealth of experience regarding the way societies reckon with a recent past of massive human rights violations. This paper looks at the most influential literature produced contemporaneously with those experiences and analyzes its current validity in the light of new contexts in which the issue arises. The author places emphasis first and foremost on the duties that the State owes to the victims of human rights violations and to society and then looks at the objective limitations that most transitions place on governments' ability to satisfy demands for truth and justice. These duties are part of an emerging rule of international law that demands that certain crimes should not go unpunished. But the obligations of the State to the victims and to society are varied and not dependent on each other; even if prosecution and punishment are rendered legally or politically impossible, the duties to disclose all that can be established about each violation, to offer reparations, and to dismiss the culprits from the armed and security forces remain fully in force.

RESUMEN

Las transiciones a la democracia en los ochentas dieron lugar a una significativa acumulación de experiencias en relación con la forma en que las sociedades ajustan cuentas con pasados recientes de masivas violaciones a los derechos humanos. Este artículo revisa la más influyente literatura producida contemporáneamente con esas experiencias y analiza su validez actual a la luz de los nuevos contextos en que este problema se plantea. Se propone observar, primera y principalmente, los deberes del Estado en relación con las víctimas de violaciones a los derechos humanos y con la sociedad y, en segundo lugar, las limitaciones objetivas que la mayoría de las transiciones plantean sobre la capacidad de los gobiernos para satisfacer demandas de verdad y justicia. Esos deberes son parte de un emergente regla de derecho internacional que demanda que ciertos crímenes no pasen sin recibir castigo. Pero las obligaciones del Estado hacia las víctimas y hacia la sociedad son variadas e independientes entre sí; aún cuando el enjuiciamiento y castigo resultaran legal o políticamente imposibles, los deberes de revelar todo lo que puede ser establecido acerca de cada violación, de ofrecer reparaciones y de expulsar a los culpables de las filas de las fuerzas armadas y de seguridad conservan plena vigencia.

I. Introduction

This study focuses on the debates about holding perpetrators of massive human rights violations accountable and on the experience, in Latin America and elsewhere, of attempts to restore truth and justice to the legacy of abuse of the recent past. That experience is necessarily diverse and rich in variations, but I contend that it offers some principles of universal applicability. On this point I take issue with the view that democratic leaders know best what their societies need at any given time so that we should not attempt to impose any rules about what should be done about the recent past. The second view that I dispute accepts that there are principles governing this problem but insists that democratic leaders should strive only to restore truth to the recent past and, in general, forego attempts to restore justice, at least by way of criminal prosecutions. In just a few years there has been considerable progress toward the recognition that a legacy of grave and systematic violations generates obligations that the state owes to the victims and to society. There remains, however, considerable disagreement as to the content of those obligations and as to how they should be fulfilled. This article attempts to show that those obligations: (a) are multifaceted and can be fulfilled separately; but (b) should not be seen as alternatives one to the other. The different obligations are not a menu from which a government can pick a solution; they are in fact distinct duties, each one of which must be complied with to the best of the government's abilities. In this context, prosecutions and trials—as long as they are held under strict fair trial guarantees—are a necessary and even desirable ingredient in any serious effort at accountability.

II. Multiple Dimensions of the Problem

The experience accumulated since the early 1980s on this topic continues to be enriched: as we speak, the new South Africa is embarking on the most ambitious program so far to combine truth-telling, clemency, and prosecution, and eventual reconciliation. Undoubtedly, those who have designed the South African program have benefited from the Latin American and East European experiences, but it is hard to find a place where so much thoughtfulness and creativity have gone into this grave matter of public policy as in South Africa. Also broadening our horizons (and challenging our assumptions) is the ongoing experiment with justice that the United Nations has begun with the creation of the War Crimes tribunals for the former Yugoslavia and for Rwanda. Everything we say today about Truth and Justice must necessarily be reexamined in the next two or three years, in the light of what these experiments will produce.

The problem has legal, ethical, and political dimensions, and it is imperative that we recognize and tackle all three. It is a mistake for the human rights movement to allow itself to be painted into a corner of either a 'legalistic' or a 'moralistic' position. Inevitably it has been seen as worse than uncompromising—intransigent—and worse than naive about political realities—vindictive and opposed to reconciliation. We must, therefore, be ready to take a sober and realistic view of political constraints in proposing accountability measures. Such a view, on the other hand, does not necessarily result in *realpolitik* and surrender of principle. In fact, a good case can be made that a program of truth and justice is not only the right thing to do but is politically desirable because it goes a long way towards realizing our idea of democracy.

III. How Questions Are Framed

The multiplicity of dimensions mentioned above has changed the way human rights organizations conceive their work and how they work to promote and defend fundamental freedoms. They no longer look strictly for the facts that constitute a violation of a universal standard but trace how governmental institutions respond to each episode. And this approach is applied not only to a recent epidemic of abuses directed against a political enemy but also to the 'endemic violations' present in our democracies: police brutality, rural violence, prison conditions, the plight of minorities, and even domestic violence. This notion of an institutional response recognizes that abuses will happen even in the most advanced societies but correctly places the burden on the state to mobilize its resources to restore the imbalance and provide redress. The measuring stick of true commitment to democracy is the degree to which governments are willing to "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."¹

Beyond human rights work, accountability experiences inform the way we think about related but distinct areas: promotion of democracy, peace-making and peace-keeping. The need to consolidate a shaky democracy and the need to stop the fighting undoubtedly condition the possibilities of redressing past wrongs and even place limits on what can be achieved by a policy of accountability. But those urgent demands by no means relegate the objectives of truth and justice. On the contrary, it is increasingly recognized that making state criminals accountable says something about the democracy we are trying to establish, and that preserving memory and

¹ Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgment of 29 July 1988, pgph. 166.

settling human rights accounts can be part of the formula for a lasting peace, as opposed to a lull in the fighting.

This expanding field of applicability of our topic calls, I think, for abandoning the notion that we are speaking here only in terms of 'transitions to democracy.' Our discussions were framed that way due to the influential article by José Zalaquett, "Confronting Human Rights Violations: Principles Applicable and Political Constraints."² The best collection of materials to date on this subject is called, in fact, *Transitional Justice*.³ However, in places like El Salvador and Guatemala we are not necessarily confronting a regime that has changed but governments coming to grips with violations committed in great part under their own watch. The need to consider accountability in the context of seeking solutions to an armed conflict presents political challenges that are not the same as those of transitions to democracy. The same is true of attempts to impose accountability through the demands of the international community, as in the creation of war crimes tribunals for the former Yugoslavia and Rwanda. Moreover, restricting the analysis to transitions leaves out the approaches taken by organizations of civil society to overcome impunity in situations of ongoing violations, as in Colombia and Peru.

Another reason to review the analytical framework is that issues of accountability have proven to have lives of their own beyond the short terms of what can reasonably be called the transition. Witness the renewal of public debate about what the state owes the families of the disappeared in Argentina in 1995, after the revelations of Navy Captain Adolfo Scilingo,⁴ and again in March 1996, on the occasion of the twentieth anniversary of the *coup d'état*. Coming after more than a dozen years of democracy, and after the measures taken in the 1980s both to reckon with the past and to attempt to bury it, the issue of the victims' rights in Argentina has far exceeded the limits of the transition.

Even for clearly transitional situations, in any event, this approach begins with the assumption that newly democratic governments are constrained in what they can do to correct past wrongs. Zalaquett is undoubtedly right in that. The problem is that it has led many others to assume too little of what governments *can effectively do* under the circumstances and not enough of what they *ought to do*. In regards to Latin America, especially, it has been all too

² José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in Aspen Institute, *State Crimes: Punishment and Pardon*, New York, 1989 and later in 13 *Hamline L. Rev.*, 623 (1990).

³ US Institute of Peace, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (3 volumes), Neil Kritz, ed., Washington, 1995 (with foreword by Nelson Mandela).

⁴ Horacio Verbitsky, *El Vuelo*, Planeta, Buenos Aires, 1995 (English version by New Press, New York, 1996, forthcoming).

common to think that any attempt to break the cycle of impunity would threaten democratic stability, as if a lesser form of democracy—without equality before the law—was all that we could aspire to. The framework of transitions has been extremely helpful in shaping our debates until now, but a new approach may be in order. Latin American democracies seem now more secure (and whether they are so because impunity prevailed or because some accountability has been accomplished is another matter), and experience shows that demands for accountability arise in a variety of historical contexts. It may be time to look at these problems in a broader scope.

IV. Emerging Principles

There is a strong legal argument to be made for an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights.⁵ Although existing international instruments do not specify what those obligations consist of, they establish that each state party "...undertakes to respect and to ensure to all individuals..." the rights they recognize.⁶ The duty to ensure means that states are obliged to take specific steps to redress the wrong committed by each violation of a right. In addition, most instruments establish the right of the victim of a violation to an effective remedy and to equal protection of the laws without discrimination.⁷ The UN Human Rights Committee, which is the authoritative interpreter of the International Covenant on Civil and Political Rights, has said that blanket amnesty laws and pardons are inconsistent with the Covenant because they create "a climate of impunity" and they deny the victims this "right to a remedy."⁸ International law also specifies that certain rights are so fundamental that they cannot be suspended even in the event

⁵ The best argument for this obligation is in Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," 100 Yale L. J. 2537, and also in her "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in *Human Rights: An Agenda for the Next Century*, Louis Henkin and John L. Hargrove, eds., ASIL, 1994. See also Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995. Two Special Rapporteurs appointed by the United Nations have had occasion to explore this obligation in depth: Theo Van Boven, Special Rapporteur on Restitution, Compensation, and Reparations for Gross and Consistent Violations of Human Rights, in "Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms," UN Commission on Human Rights, 45th Session, Provisional Agenda Item 4, UN Doc.E/CN.4/Sub.2/1993/8; and Louis Joinet, Special Rapporteur on Impunity, whose final report is forthcoming.

⁶ International Covenant on Civil and Political Rights (UN G.A. Res. 2200 A, 16 December 1966), Article 2. Similar language in American Convention on Human Rights (Organization of American States, 22 November 1969), Article 1.1.

⁷ ICCPR, Arts. 14 and 26; Am. Conv., Arts. 24 and 26.

⁸ CCPR/C/79/Add.46, adopted at Meeting No. 1411, 53d. Session, 5 April 1995, Item 10.

of an emergency that threatens the life of the nation or its national security. Those 'core rights' are the ones that are violated by extrajudicial execution, torture, disappearances, and prolonged arbitrary arrests.⁹ Impunity for those crimes constitutes an impermissible ex-post-facto derogation of rights that could not have been suspended at the time the acts were committed.

Many binding norms of international law point in the direction of an obligation to overcome impunity for crimes of this kind. The Genocide Convention establishes the obligation to punish genocide.¹⁰ The more recent Torture Convention obliges its signatories to make torture punishable within their domestic jurisdiction, to arrest suspected torturers, to extradite them to other jurisdictions or to prosecute them, and to cooperate fully with the prosecuting jurisdiction in the gathering and preservation of evidence.¹¹ Other conventions and customary norms rule on the nonapplicability of statutes of limitation to crimes against humanity, on the nonapplicability of the 'political offense' defense against extradition for such crimes, and on universal jurisdiction to prosecute them. Taken as a whole, these scattered norms point unequivocally to a trend in international law against allowing these crimes to go unpunished. In fact, it is hard to find disagreement on the point that their occurrence gives rise to certain obligations; if anything, the disagreement (or skepticism) is on the content of the obligation or on its justiciability—though the latter is a problem for all international law obligations and not just for these.

Some of the obligations discussed below are present when the state violates any right set forth in the universal instruments. The whole complex of obligations, however, applies only to situations of massive and systematic violations of the most basic rights to life, liberty, and physical integrity. In other words, a single case of torture, for example, gives rise to these obligations only if it is part and parcel of a systematic pattern of similar violations. The reason for this heightened protection is that human rights violations of this magnitude, when committed massively and systematically, are 'crimes against humanity.'

In response to crimes against humanity, a state is obliged: (1) to investigate, prosecute and punish the perpetrators; (2) to disclose to the victims, their families, and society all that can be reliably established about those events; (3) to offer the victims adequate reparations; and (4) to separate known perpetrators from law-enforcement bodies and other positions of authority.

Seen from the point of view of those entitled to a specific duty from the state, those obligations consist of rights: (1) a right of the victim to see justice done; (2) a right to know the

⁹ ICCPR, Art. 4; Am. Conv., Art. 27.

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide (UN G.A. Res. 260-A (III), 9 December 1948), Article I.

¹¹ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (UN G.A. Res. 39/46, 10 December 1984), Arts. 4–9.

truth; (3) an entitlement to compensation and also to nonmonetary forms of restitution; and (4) a right to new, reorganized, and accountable institutions. Society at large and not the victim is the titular head of this last right; for the previous three, the right lies first and foremost with the victims and their families, but also with society.

The reference to these as 'emerging principles' and not as binding international law obligations, signifies their present status: only partially do they find justification in existing norms of universal applicability. For the most part they result from a fast expansion of those norms that is taking place in recent years by way of the means by which law—and particularly international law—is created: nonbinding resolutions, judicial and quasi-judicial precedent, the practice of nations, and *opinio juris*. For example, the Geneva Conventions of 1949 clearly establish an obligation to punish 'grave breaches' or war crimes that happen in international conflict. In the last year alone, that notion has been extended to similar crimes committed in the context of conflicts not of an international character, by the Security Council resolution establishing the International Criminal Tribunal for Rwanda and by the landmark jurisdictional decision of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case.¹² With respect to the right to know the truth, even though the international community has only recently begun discussing it, a recent meeting of experts convened by the United Nations has argued that it has achieved the status of a customary international law norm.¹³

These examples are presented to signify that the law on this issue is developing rapidly. The fact that these principles are not 'hard law' in all their aspects, furthermore, does not mean that they do not constitute obligations. It may not be possible in most cases to obtain a judgment ordering performance of these duties—and such a judgment would be hard to enforce in any case. Nevertheless, these principles can be invoked to advocate certain measures by states that like to see themselves as contributing to an international lawful order. More importantly, a government that confronts a situation of massive state crimes can and should be judged by how much it attempts to do to comply with these principles.

A second observation with regard to these four obligations is that each one of them is both integral to a fair policy of accountability and yet separate and distinct from the other three.

¹² ICTFY, Appeals Chamber, *The Prosecutor v. Dusko Tadic a.k.a. "Dule"*, Case No. IT-94-1-AR72, Decision on the Defense Motion of Interlocutory Appeal on Jurisdiction, The Hague, 2 October 1995. See also, Theodore Meron, "International Criminalization of Internal Atrocities," *Am. J. Int'l. Law*, Vol. 89: 554, 1995.

¹³ UN Commission on Human Rights, "Report of the Meeting of Experts on Rights Not Subject to Derogation during States of Emergency and Exceptional Circumstances," Annex I to 8th Annual Report of Special Rapporteur on States of Emergency, E/CN. 4/Sub. 2/1995/20/Corr. 1, 15 August 1995.

Every government should strive to comply with each one of these obligations, and a high measure of compliance in one area does not excuse noncompliance in another. For example, the Menem administration in Argentina has enacted a comprehensive and generous policy of monetary compensation available to victims of the ‘Dirty War’ of the 1970s but does little or nothing to tell each family of the disappeared what can be known about the fate and whereabouts of their loved ones and even less to purge the armed and security forces of the many perpetrators who continue to serve and advance through the ranks.

The separate and distinct nature of these duties also means, however, that even if one of them is rendered legally or practically impossible, for example by a blanket amnesty law that prevents criminal prosecutions, the others still remain in full force. The UN Human Rights Committee, in its latest periodic review of Argentina, rightly rejected the argument put forth by Minister of Justice Rodolfo Barra that the pseudo-amnesty laws of the 1980s and the presumption of innocence prevented the government from forcing known criminals into retirement by administrative or disciplinary procedures.¹⁴ Similarly, those laws may be insurmountable barriers to criminal prosecution, but they do not relieve the Argentine government from its duty to use all the means at its disposal to tell each family what can be known about the fate and whereabouts of the disappeared.¹⁵

This approach has the advantage of allowing us to insist on certain measures beyond the artificial attempt by governments to draw a line on the matter and ‘move on.’ It should also serve as a way for the human rights movement to avoid self-defeatism and reject all solutions because one of them, e.g. punishment, becomes unavailable. While continuing to condemn amnesties and pardons as inconsistent with these obligations, the victims and society can still demand the complete truth, reparations, and law enforcement bodies that are effectively purged of criminals.

A final observation about these principles is that, in all four cases, they constitute—in the familiar distinction made by civil law—‘obligations of means’ and not of ‘results.’ This means that a state is in full compliance with its duty to punish even if the trial results in acquittal, as long as the

¹⁴ CCPR/C/79/Add. 46, op. cit. (note 8).

¹⁵ Brief *amicus curiae* by Human Rights Watch/Americas and Center for Justice and International Law, presented to the Federal Court of Appeals, Buenos Aires, June 1995, in support of motion by Emilio F. Mignone in re *ESMA Case* and published in *El Derecho*, Buenos Aires, No. 8834, 14 Sept. 1995 and in *Revista IIDH*, San Jose, Costa Rica, No. 21, Jan.–June 1995. In the same edition, see supportive note by Germán J. Bidart Campos, one of Latin America’s leading constitutional and international law scholars (“La víctima del delito y el proceso penal,” p. 7). The notion that the state owes each victim an individualized ‘truth’ and therefore that a comprehensive report on practices and policies does not fully comply with it is one of José Zalaquett’s insights. At his urging, it was adopted by the Rettig commission in Chile: *Informe de la Comisión Nacional de Verdad y Reconciliación*, Tomo I, p. 3, Santiago, 1991 (English version by University of Notre Dame Press, Notre Dame, 1992).

prosecution has been conducted in good faith and not as a ritual “preordained to be ineffective.”¹⁶ In that regard, these obligations are subject to conditions of legitimacy in their performance.¹⁷ These conditions put constraints on governments in two opposite directions. In the first place, they are mandated to make good faith efforts to achieve the desired results. It follows that, if a government has leads, documentation, known actors whose testimony can be obtained, and so on, it has a duty to do all that it is reasonably within its means to tell each family the truth. In this context, however, ‘reasonably within its means’ signifies an affirmative organization of efforts and tasks that must be placed in the service of truth, not merely a pro forma act of bureaucratic compliance.

In the opposite direction, another condition of legitimacy is that these efforts must be conducted in full respect for due process standards mandated by international law. What process is ‘due’ depends, however, on the object of the exercise and its likely result. Prosecution and punishment require the highest degree of deference for the rights of the accused, because the outcome may be the loss of liberty of a person. But disciplinary or administrative separation from the force requires, arguably, a lesser standard of due process.

There is considerable dispute, in this regard, on the issue of whether truth commissions should ‘name names’ of officials accused of the violations they describe. José Zalaquett objects to it under all circumstances, as a violation of the due process rights of the persons so named and also as an invasion of judicial functions that truth commissions, by definition, do not exercise.¹⁸ An absolute position against naming names, however, can in certain circumstances result in an unacceptable limitation of the ‘full truth’ that governments are bound to disclose and that truth commissions are charged with rendering.

The legitimacy of a decision—either to name names or to withhold them—depends on whether prosecutions and trials (and with them a more exhaustive exploration of the truth) are available after the truth commission issues its report. If that possibility is open it is perhaps a good idea to allow the courts to rule on matters of personal criminal liability after a fair trial takes place. If, on the other hand, the report is likely to be the last opportunity to air these matters, an honest deference to truth would suggest the need not to withhold reliable information about the behavior of certain individuals just because they can hide behind the impunity given to them by amnesties

¹⁶ I/A Court HR, *Velasquez Rodriguez Case*, op. cit. (note 1), pgph. 177.

¹⁷ Zalaquett, *State Crimes*, op. cit. (note 2).

¹⁸ The UN-sponsored Truth Commission for El Salvador was the first of recent vintage to ‘name names.’ Priscilla B. Hayner, “Fifteen Truth Commissions—1974 to 1994,” *Human Rights Quarterly*, November 1994. Zalaquett in *Dealing with the Past: Truth and Reconciliation in South Africa*, Alex Boraine, Janet Levy, and Ronel Scheffer, eds., IDASA, Cape Town, 1994, p. 51.

or pardons. Even in that case, however, some measure of due process is necessary: at the very least the truth commission should be required to give them a chance to rebut the incriminatory information. If names are going to be named, it is also important that the truth commission deal honestly and impartially with the information and be perceived by the public as having done so. Because the Truth Commission for El Salvador was widely seen as having received many more names than it published, it should have been incumbent upon it to be more clear and forthright as to the criteria by which some names were published while other names were suppressed. Possibly improving on that experience, the South African Truth and Reconciliation Commission is charged not only with investigating and disclosing the circumstances of each case but also with identifying the perpetrators. At the same time, however, the statute that created the Commission requires that persons accused of human rights violations be given a chance to respond before their names find their way into the final report.¹⁹

¹⁹ Republic of South Africa, "Promotion of National Unity and Reconciliation Bill, 1995" Arts. 4(a), 31(2), and 38.

V. Avoiding False Dilemmas

The first misconception about the accountability problem is that there are no rules governing what states must do in response to massive violations of the recent past. Early on in the 1980s this was the prevailing view among many democratic- and even human rights–minded observers of Latin America and it resulted in lack of support for efforts to inaugurate some stage of accountability in the new wave of democratization. In its present incarnation this position is most prominently reflected in the views of former President Jimmy Carter, and it not only defers to the judgment of democratic leaders but expresses a preference for settlement of disputes based on forgiving and forgetting by fiat. In fact, President Carter’s most recent application of this idea was his offer of amnesty to General Raoul Cedras as a condition for allowing democracy to return to Haiti, an offer made over the express objections of Haiti’s democratically elected leader, Jean-Bertrand Aristide.

President Carter explained that he is less concerned about past violations than about avoiding ‘the next ones.’ Even so, it is far from proven that a policy of forgiving and forgetting automatically deflects the danger of future abuses.²⁰ In fact, at least in Haiti it is easier to make the case that the opposite is true: each self-amnesty by the military has only led to further interruptions of democracy and to further atrocities.²¹ This deference to democratically elected leaders, who supposedly know better than anyone what is best for their country and what the traffic will bear, is unwarranted. In the mid–1980s it allowed Vinicio Cerezo to get away with actively impeding any attempt to invalidate the shameless self-amnesty with which his military predecessors left office; at the end of Cerezo’s term there were more violations of human rights and further impunity.

A second pernicious position in this debate postulates that, even in the context of trying to settle accounts, truth is always preferable to justice. Columnist Charles Krauthammer, relying in part on Zalaquett’s ideas and presumably extolling the virtues of the Chilean and South African experiences, has recently offered as a universal proposition that ‘truth reports’ should be written but no trials should take place.²² With respect to the crisis in Bosnia, some observers have proposed closing down the war crimes tribunal and replacing it by a ‘truth commission’ modeled

²⁰ José Zalaquett, more cautiously, suggests that in given circumstances such a policy may be more conducive to averting this danger. *State Crimes*, op. cit. (note 2).

²¹ Ken Roth, monograph for book edited by W. Post, forthcoming, 1996.

²² Charles Krauthammer, “Truth, Not Trials,” *The Washington Post*, 9 Sept. 1994.

after Chile's and El Salvador's.²³

In affirming that truth-telling always promotes reconciliation while trials are vindictive, Krauthammer simplifies the facts about the positions espoused by Chile's new democratic leaders and by Nelson Mandela. He fails to take into account the facts that Chile successfully prosecuted and convicted Pinochet's right-hand henchman, General Manuel Contreras, and that Mandela has allowed justice to take its course in the case against former defense minister, General Magnus Malan. Both previously powerful men are behind bars: Does that mean that Aylwin and Frei and Mandela have turned vindictive?

It is hard to see what could possibly be gained by another 'truth report' in the Balkans, after UN thematic and country-specific rapporteurs have documented the crimes so painstakingly while the international community prefers not to hear. The UN has had a 'truth commission' for the former Yugoslavia already, in the form of the commission headed by Professor M. Cherif Bassiouni which preceded the creation of the special tribunal.²⁴ Incidentally, every eminent jurist appointed by the UN has proposed that the next inevitable step should be to do justice; Pastor and Forsyth suggest we ignore their recommendations until we get a commission that proposes impunity.

It is of course true that a process of accountability that neglects or downplays the truth would be unacceptable. Zalaquett even includes full knowledge of the truth as one of his 'conditions of legitimacy.' A policy that might result in convictions without a full airing of the facts, say by plea-bargaining, would not pass muster. That is not the same as saying that truth is preferable or superior to justice, or even that justice should come first.²⁵ Other than in the unlikely plea-bargaining scenario, a trial without full discussion of the facts would violate due process in any event. More importantly, posing the question as a contest between truth and justice fails to give credit to prosecutions for their specific contribution to the public's knowledge of the facts.

In the position exemplified by Krauthammer, Pastor, and Forsyth, truth is actually

²³ Robert Pastor, of the Carter Center, cited in "The Nation: Nuremberg Isn't Repeating Itself," *The New York Times*, 19 November 1995; David Forsyth, "The UN and Human Rights at Fifty: An Incremental but Incomplete Revolution," *Global Governance* 1 (1995), 297–318.

²⁴ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, S/1994/674 27 May 1994; *Final Report of Mr. Tadeusz Mazowiecki, UN Special Rapporteur for the Former Yugoslavia*, E/CN. 4/1996/9, citing 17 previous periodic reports between August 1992 and July 1995.

²⁵ See the polemics (and misunderstanding of Aryeh Neier's position, which he clarifies) in an exchange of letters to *The Nation*, "Truth, Justice and Impunity," and "Neier Replies," 24 December 1990, p. 790; and previously, Neier's "Watching Rights" column of 19 November 1990.

proposed as an *alternative* to justice. In fact, the best exercises in truth-telling so far have not been predicated on the prospect of immunity from prosecutions. Both the Sabato commission in Argentina and the Rettig commission in Chile withheld names of accused perpetrators in their final reports but submitted them and the relevant evidence to the courts as a way of contributing to justice. If they had been charged with telling the facts as the last step in accountability, their reports without names probably would have been received less favorably by the public, since the 'truth' they were telling would have been perceived as a preordained and incomplete one and not as a truth that lets all the facts speak for themselves and leads wherever it should lead.

The third Latin American exercise in truth telling was, in fact, the last word to be heard on accountability in El Salvador. The three international jurists who formed the UN-sponsored Truth Commission specifically argued against the blanket amnesty that President Alfredo Cristiani passed immediately after their report was published. Through no fault of the Truth Commission, Cristiani's amnesty actually took away much of the weight that the report would have otherwise had in Salvadoran society. As it happened, however, the report did contribute greatly to peace in that country, precisely because it was not premised on a previously decreed amnesty. In contrast, a truth report designed as an alternative to justice would be an exercise in tokenism and as such doomed to be forgotten rather quickly by the society it purported to serve. Justifiedly, the public expects the truth-telling to be a step in the direction of accountability, not a poor alternative.

This is not to say that we should reject truth commissions unless prosecutions and punishment are also on the horizon. As stated earlier, if punishment is rendered legally or factually impossible within legitimate conditions, the state is still under an obligation to investigate and disclose the facts, to acknowledge the wrongs committed in its name. But that situation is different from the one in which governments sanction impunity and, as a gesture to the victims, give them a report instead, hoping that everything will soon be forgotten.

To the extent that the truth-as-an-alternative position cites Zalaquett, it misrepresents his views. Zalaquett has frequently agreed that crimes against humanity give rise to an obligation to punish, even while arguing that the concept needed further elaboration.²⁶ He has never suggested that states should not punish when they can but rather that the rest of us should not hold them to a high standard of achievement in that regard. He has also praised President Aylwin for not broadening the scope of impunity in Chile, in contrast to the pseudo-amnesty laws passed by democratic governments in Argentina and Uruguay.²⁷

It would be a mistake, however, to assume that Krauthammer and others have simply not

²⁶ *State Crimes*, op. cit. (note 2).

²⁷ *Dealing with the Past*, op. cit. (note 18), p. 105.

read Zalaquett carefully. His articles do favor truth-telling as preferable to justice and do reflect skepticism about prosecutions. His insistence that leaders who must reckon with a legacy of human rights violations should be guided by an “ethics of responsibility” reinforces that impression.²⁸ Zalaquett quotes Max Weber for the need to follow an “ethics of responsibility” as opposed to an “ethics of convictions” (also translated as an “ethics of ultimate ends”).²⁹ It is not clear what this distinction actually adds to the debate, since—according to Zalaquett—Weber readily acknowledges that, just as an ethic of responsibility does not imply a lack of conviction, neither does an ethic of conviction imply a lack of responsibility.

Max Weber has made a gigantic contribution to modern sociology, but the incursion into moral philosophy that Zalaquett cites is less convincing. That every person should act responsibly (in the sense of measuring the likely even if unwanted results of one’s own actions) does not say much about the intrinsic morality or immorality of those actions. In fact, it leads to judging those actions exclusively by those potentially unwanted results and not by the purposes or means of human conduct. In this sense, Weber’s dichotomy aligns him with a consequentialist philosophy that is increasingly called into question. More precisely, applying the “ethics of responsibility” to our topic means that going too far in the direction of accountability creates the serious risk that the enemies of justice, who still retain residual power, will interrupt democracy again and return to a policy of human rights violations. That may well be so, but an “ethics of responsibility” analysis unfairly burdens the well-intentioned democratic forces with all the consequences of a bad result that is owed primarily to the behavior of other actors and only secondarily, if at all, to that of the democrats.

It is easy to agree that it makes no sense to urge leaders to act recklessly or irresponsibly. Insisting on punishment without due process, for example, would be irresponsible not because of the possible consequences, i.e., the reactions of the enemies of democracy, but because the quest for justice would thereby surrender the moral high ground of principle. In the absence of insurmountable legal obstacles to prosecutions, however, the problem lies with establishing the limits of what can be accomplished given the cards that the particularities of each transition have dealt each society. Urging leaders first and foremost to ‘be responsible’ seems to open a large door to excuses for inaction and accepting the status quo of impunity for egregious abuses. Worse, it conveys the message that it is highly ethical to govern by yielding to the blatant blackmail

²⁸ José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,” *Hastings Law Journal*, Vol. 43, No. 6, August 1992, 1425–38.

²⁹ *Ibid.*, citing Max Weber, “Politics as a Vocation,” in *From Max Weber: Essays in Sociology*, H.H. Gerth and C. Wright Mills, eds. & trans., 1946.

of powerful undemocratic forces.

In particular, setting a universal standard of 'responsible leadership' without simultaneously stressing the debts that are owed to the victims assumes that prosecutions are inherently destabilizing, while a Truth Commission report will presumably be swallowed more easily by the enemies of democracy. Experience shows, however, that those enemies are probably just as terrified by the prospect of truth being revealed as they are by the threat that some of them will have to face trials. It would be best if we strongly set forth the duties owed to the victims and to society, and then carefully and in a particularized way analyze what can be done and what would be irresponsible to attempt.

The emphasis on the limits as opposed to the possibilities also assumes that whatever is done is the most that could have been done under the circumstances. Although each transition is certainly different, this cannot possibly account for the wide gap between the amount of accountability that was accomplished in Argentina compared to Uruguay or Brazil, for example, unless we incorporate the factor of the relative adherence of political leaders to the values of human rights and the rule of law, as well as the ability of the human rights movement (domestic as well as international) to push their agenda onto the national debate. Highly respected democratic leaders like Julio Sanguinetti and Wilson Ferreira of Uruguay, for example, could claim to have been acting responsibly when they lent their influence to a policy of impunity that yielded to the blackmail of the Uruguayan military.³⁰ In retrospect, it would have been helpful if Sanguinetti and Ferreira had heard from the international community a stronger voice of support for the efforts of the Uruguayan victims and human rights community to set the record straight.

Undoubtedly, to insist on prosecutions in the presence of an important legal obstacle like a pre-existing amnesty law that has had firm legal effects would be irresponsible, because it would subvert the very rule of law that we proclaim and because it would violate the cardinal principle of *nullum crimen nulla poena sine lege* (the defendants at all times are entitled to be judged by the criminal law most benevolent to them that exists at or after the time of the commission of the

³⁰ In Uruguay, the military allowed the transition only after a secret pact that banned Ferreira from seeking the presidency and in which the major political leaders pledged not to investigate human rights violations. When societal pressures forced a judicial dénouement, Sanguinetti's government pushed through the *Ley de Caducidad de la Pretensión Punitiva del Estado*, for all practical purposes a blanket amnesty law. Human rights groups organized a petition drive and forced the issue of repeal of that law into a plebiscite. Sanguinetti openly campaigned to retain the law on the basis of the inevitability of a coup d'état if it was repealed, effectively calling on Uruguayans to choose between justice and democracy. The repeal proposal was defeated by a narrow margin. See Cynthia Brown, *Challenging Impunity: The "Ley de Caducidad" and the Referendum Campaign in Uruguay*, Americas Watch, New York, 1989; Lawrence Weschler, *A Miracle, A Universe*, Pantheon, New York, 1990.

crime). It is quite a different matter to advocate amnesties and pardons to be enacted by democratic authorities. In the case of Chile, one can accept the objective limitations that Pinochet's orderly retreat has put on the new democratic government, without prejudice to criticizing the self-amnesty of 1978 as a shameful act. That Chilean society has still produced a great deal of accountability within those objective limitations should be praised, but there is no need to turn necessity into virtue.

A frequent misconception in this debate is that prosecutions are inherently inimical to peace and to reconciliation. Protocol II to the Geneva Conventions (applicable to internal conflicts of a particularly intense nature) actually promotes broad and generous mutual amnesties to put an end to the conflict. But that amnesty refers to the offenses of rebellion or sedition and to comparably minor infractions of the laws of war on the governmental side. It is not meant to encourage impunity for attacks on civilians nor for serious crimes against life and the integrity of the person of the adversary. For "grave breaches" of the laws of war, on the contrary, there is a clear obligation to punish.³¹ Beyond the question of a binding legal obligation, however, it is clear that the threat of prosecution can be a definite disincentive to actors in an armed conflict to give up their resort to violence. And yet, it does not necessarily follow that the interest of peace can only be served in these cases by a blanket amnesty for both sides. In fact, a strong argument can be made that a lasting peace is only possible if the process by which it is arrived at carefully and honestly addresses human rights and laws of war violations by all sides.

That the object of the whole exercise is to obtain reconciliation in societies torn by conflict should be undisputed. Unfortunately, the human rights movement has been reluctant to embrace reconciliation as a goal, perhaps because as used by the proponents of impunity the word has achieved a bad name. The net result, in any case, is that human rights organizations have been unjustly labeled as enemies of reconciliation and obstacles to leaving the past behind. Human rights organizations should, instead, adopt reconciliation as their own agenda but insist on its true meaning. In the first place, true reconciliation cannot be imposed by decree; it has to be built in the hearts and minds of all members of society through a process that recognizes every human being's worth and dignity. Second, reconciliation requires knowledge of the facts. Forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive knows exactly what it is that he or she is forgiving. Third, reconciliation can only come after atonement. It seems to add a new unfairness to the crimes of the past to demand forgiveness

³¹ Art. 146, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. As stated earlier (see text accompanying Fn. 12) this standard, once applicable only to international conflicts, has been extended to civil wars as well.

from the victims without any gesture of contrition or any acknowledgment of wrongdoing from those who will benefit from that forgiveness.

A final objection to prosecutions is that they stand no chance of addressing all the possible violations or of trying every single perpetrator. This inevitable selectivity, it is said, discredits the effort because it instantly smacks of discrimination and favoritism.³² The risk of selectivity is equally present in truth-telling exercises, although that does not seem to bother proponents of truth reports as alternatives to justice. Selectivity is certainly inevitable, but it is also part of the rules of the game of trials. No system of justice in the world even pretends that it punishes each and every case of antinormative behavior. In cases of this sort, there is an initial self-selecting factor in that the evidence will plainly be lacking to initiate prosecutions in many cases. If all perpetrators were bound to be convicted and punished without regard to the evidence, the trials would not be consistent with the rule of law. Cases can be lost for lack of evidence and should be lost if fair trial guarantees are violated; this chance element and especially the fact that all defendants have the opportunity to prevail is what distinguishes fair trials from mockeries of justice.³³ Beyond that, a certain selection on the basis of degrees of culpability is not only necessary but quite legitimate. There is nothing wrong with selectivity as long as the rules are clear and do not discriminate on the basis of a proscribed category.³⁴ Those rules should also be reasonable and clear to the public and not subject to change to suit the political needs of the moment or in response to undue pressures on the democratic leadership.³⁵ On

³² David Forsyth, lecture, "Legal Justice for Human Rights Violations: A Political Analysis," Kroc Institute for International Peace, University of Notre Dame, 5 February 1996.

³³ On the normative legitimacy derived from the uncertainty of trials, see Mark J. Osiel, "Ever Again: Legal Remembrance of Administrative Massacre," *U. Penn. L. Rev.*, Vol. 144, No. 2, December 1995, p. 680.

³⁴ ICCPR, Article 26.

³⁵ On this point I disagree with José Zalaquett and Aryeh Neier on what went wrong in Argentina. Zalaquett believes that the Alfonsín administration initially went too far (and presumably acted under an ethics of conviction, not of responsibility) and was forced by circumstances to backtrack. (See *Dealing with the Past*, op. cit. [note 18], pp. 15, 39, 88). Similarly, Neier writes that, in retrospect, it would have been better if Argentina had limited prosecutions to the top commanders while continuing to publicize the crimes committed by lower-ranking officers, rather than attempting to prosecute other perpetrators down the chain of command and risking military revolts that eventually forced the Alfonsín government to backtrack (Aryeh Neier, "What Should be Done about the Guilty?" *The New York Review of Books*, 1 February 1990). Support for trials and effective punishment grew with every step taken in the direction of accountability and with every rumbling of objection by the military. There was no legal or moral basis for restricting prosecutions to the top officers without violating the principle that obedience to orders is not a defense in these crimes. The ability or inability to resist a manifestly illegitimate order is a matter of proof that should have been left for courts to decide on a case-by-case basis. Finally, military pressures were certainly there, but there was demonstrated capacity in the country to resist them.

this point there is considerable agreement among human rights activists that prosecutions should start at the top where possible, without however allowing obedience to orders as a defense where a clear opportunity to resist an immoral order was available.

VI. Moral Justifications for Prosecutions

These ideas are not meant to establish an absolute preference for prosecutions over truth-telling or the other two duties mentioned above—as stated earlier, all four obligations must be met by the state to the best of its abilities. They are definitely meant, however, to object to a rationale that makes prosecutions seem less preferable. There is no question that prosecutions are the hardest choice of the four paths and should therefore be thoroughly justified in moral terms.

In this sense, a position that justifies prosecution exclusively on deterrence is not enough foundation on which to advocate trials. As Aryeh Neier has repeatedly said, deterrence of future violations is unreliable as the foundation of punishment, because we cannot predict the future behavior of the relevant actors. Societies can only hope that punishment will deter the transgressor as well as other potential offenders, but it can never assume it. If we justifiably criticize the dogma that takes at face value that the death penalty is an effective deterrent to crime when statistical information proves the contrary, we cannot just as facilely affirm that prosecution and punishment of state crimes will prevent future violations by the same or by other state actors. In some country-specific situations it is certainly possible to show that a policy of impunity—by way of repeated amnesty laws or simply *de facto* refusal to investigate crimes of the security forces—results in encouragement of further human rights violations.³⁶ But the converse is not necessarily true. And it may well be true that in a given situation a policy that favors forgiveness is better suited to avoiding recurrence of egregious violations; but that proposition cannot be categorically proven either.

Together with deterrence, retribution is the other object traditionally assigned to criminal punishment. For the present purposes, it seems unnecessary to ‘sign up’ with one or the other theory of punishment. Provisionally, however, it can be said that deterrence alone does not seem

³⁶ Ken Roth, *op. cit.* (note 22); Cynthia Brown, *Peru under Fire*, Yale University Press (Human Rights Watch Books), 1992, p. 11; Carlos Chipoco and Juan E. Méndez, *Tolerancia frente a los abusos: Violaciones a los derechos humanos en el Perú*, Americas Watch and Commission Andina de Juristas, Lima, October 1988, pp. 7–9; Cynthia Arnson and Robin Kirk, *State of War: Political Violence and Counterinsurgency in Colombia*, Human Rights Watch/Americas, New York, 1993, pp. 16–28; Juan E. Méndez, *The Killings in Colombia*, Americas Watch, New York, 1989, p. 2.

to explain why societies punish, even though it may well be the goal that is hoped for each time a criminal sanction is meted out. Societies punish offenders in some situations in which recurrence is unlikely and in which the deterrent effect over the conduct of others is not demonstrable.

That modern penology strives towards rehabilitation of the offender is also not contradictory with a theory of punishment that recognizes some place for retribution, since rehabilitation is the object of the penalty, not the reason why the behavior is penalized. In any event, retribution need not be seen as a policy of vindictiveness. In its true form, it simply says that society does not brook behavior that breaks the rules. This is all the more important when those rules protect the innocent and defenseless. An enlightened theory of punishment, therefore, puts the victim at the center of the need to redress wrongs: societies punish because they signify to the victim that his or her plight will not go unheeded.³⁷ This is not tantamount to resurrecting the theory of 'victims' rights' that, in the United States, is often used by politicians in attempts to introduce mandatory sentences, including life sentences and capital punishment, to limit judges' discretion in imposing penalties and on occasion even invoked to justify removing a prosecutor from a case because the prosecutor's 'toughness' does not match that of the politician.³⁸ Victims do not have a right to a certain form of or amount of penalty, but they do have a right to see justice done by means of a process. Zalaquett's concern, therefore, that victims should not have a veto over how society decides to punish is misplaced: majorities in society do not have a right to tell the victims that their cases will be forgotten for the sake of a higher 'good.' Victims have a right to a process that fully restores them in the enjoyment of their rights and in the dignity and worth that society owes to each of its members. Clemency, if advisable, can only come after that process is fulfilled.

A moral justification of punishment that has been offered in Argentina is probably a variation of a 'just deserts' theory, but it is especially attractive in this setting. It holds that when it comes to torture, murder, and disappearances, societies must punish those acts out of respect for the *norm* that prohibits such conduct. It is not just a matter of restoring the rule of law, and not only of doing so because the rule of law protects the individual against other powers in society. It is the heightened value of those particular norms (i.e., prohibiting torture, state-sponsored murder, and disappearance) that gives rise to the duty to punish them.³⁹ In countries striving to move out of dictatorship and authoritarianism, this argument seems to say a lot about the new

³⁷ Aryeh Neier, in *Dealing with the Past*, p. 99; "What Should Be Done..." p. 34.

³⁸ Rachel L. Swarns, "A Killing in the Bronx: The Overview; Governor Removes Bronx Prosecutor from Murder Case," *The New York Times*, 22 March 1996.

³⁹ Marcelo Sancinetti, *Los derechos humanos en la Argentina post-dictatorial*, Lerner Editores Asociados, Buenos Aires, 1988.

society that the people are trying to establish. In those case, therefore, we punish torture, murder, and disappearances because we want to draw a 'thick line' above the past: from now on there will be no privileged defendants, the plight of victims will not go unrecognized, and abuse of power will be checked.⁴⁰

A final argument for prosecutions is that they are the most effective way of separating collective guilt from individual guilt and removing the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed on other communities. An eloquent plea to that effect was recently made by Judge Richard Goldstone, the General Prosecutor for the international criminal tribunals for the former Yugoslavia and Rwanda.⁴¹ That argument is especially appropriate to the need to break the cycle of ethnic violence, because trials would allow the victimized communities to distinguish between ordinary members of rival ethnic groups and those who manipulate their fears for political ends. It also applies, however, *mutatis mutandi*, to countries in which the abuses were not linked to ethnic strife. In Argentina, for example, the civilian population might today be more reconciled with democratic armed institutions if the pseudo-amnesties had not allowed the relative minority of very culpable officers to seek refuge in a misguided *esprit de corps*. As it happened, it is taking a long time for Argentines to recognize that it was a gang of murderers in uniform and not necessarily the armed forces as such who committed the massacres of the 1970s.

⁴⁰ I am aware that the 'thick line' analogy was used by former Prime Minister Mazowiecki and by Adam Michnik to support a policy of not prosecuting leaders of the old Communist regime. I use it here without any irony intended.

⁴¹ See Lawrence Weschler, "Inventing Peace," *The New Yorker*, 20 November 1995. A similar point was made by Kenneth Roth in the introductory essay to Human Rights Watch, *World Report 1996*, New York, December 1995, p. xv.

VII. Trials and Memory

Even from the perspective of the all-important goal of telling the truth when the killers cling to silence and denial, it does not seem apparent that the report of a truth commission is automatically more effective than trials. There are two clear advantages to truth commissions in this regard: one is the concentration of effort in a limited time and the capacity to assemble information from varied sources; the other one is the process that is usually established by which the victims and their families are 'listened to' and respected in their dignity as they have not been before. In contrast, courts necessarily need to take on cases in a relatively piecemeal fashion, must treat victims more or less neutrally as witnesses, and are constrained in their assembly of evidence—and even in their analysis—by stricter rules of admissibility.⁴² But these comparative advantages in favor of truth commissions assume that the exercise is conducted thoughtfully, in good faith, and with adequate time and resources, which is not always the case.

For their part, trials offer their own advantage in promoting a measure of truth and acknowledgment. The adversarial format, with the ability to compete with equal arms in the establishment of the truth and to confront and cross-examine the opponent's evidence, results in a verdict that is harder to contest. There is certainly no infallibility in the judicial approach to evidence, but the truth thus established has a 'tested' quality that makes it all the more persuasive. This obviously also presupposes fair trial guarantees but, as stated earlier, we should in any event reject any effort that falls below that standard.

Trials contribute to truth, however, only if they are used for what trials are for. Any attempt to turn them into the site of 'historic' judgments or the instrument to 'settle' long-standing political, social, or ideological conflict runs the risk of a double failure: it can result in a mockery of justice as well as in a contrived and unsatisfactory 'truth.' In order to serve the purposes of truth, a court must strictly observe due process guarantees and restrict its analysis to the principles of criminal law and its insistence on individual responsibility for each person's conduct. Strict adherence to principles of criminal liability does not exclude convictions on theories of command responsibility, 'control of the episode' (*dominio del hecho*), and even conspiracy, so long as each element of the

⁴² This comparison is only general: without harm to the defendants' rights to a fair trial, the Argentine judiciary tried together a multiplicity of criminal acts. Invariably, victims who were heard as witnesses in those trials said they felt vindicated by the judicial process itself. In the celebrated trial of Paul Touvier in France, the children of his Nazi-era victims felt the same way (Mark Osiel, *op. cit.* [note 34], p. 704, citing *Le Monde*, 10 Apr. 1994). Also, truth commissions can be more welcoming to victims, but to remain credible they also have to detach themselves somewhat from the stories they hear.

crime is scrupulously established in the evidence. But it does exclude forms of collaboration, sycophancy, and cheer-leading that may be morally contemptible but not criminally illegal at the time they took place. It follows that an attempt at sweeping historic 'settlement of accounts' can result in a miscarriage of justice.⁴³ To quote another important author: "Just as belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics...but good politics don't necessarily serve the truth."⁴⁴

In fact, it is useless to try to settle a dispute over history by way of trials as well as by any other way, because history cannot ever be 'officially' written with such an effect as to end all disputes about its interpretation. The most that we can aspire to is to get the facts right, so that arguments about their meaning can go on for as long as necessary. Mark Osiel argues that trials can nonetheless be of great service in a continuing disagreement by moving a conflict outside the realm of violence and constraining it within nonlethal bounds. This approach, which Osiel calls liberal, is distinguished from Durkheim's belief that criminal trials can obtain settled consensus over moral fundamentals as well as from the postmodern view that any settlement is by definition impossible and its celebration of permanent disruption. The merit of Osiel's liberal approach is that it inspires respect among adversaries and promotes social solidarity, as all sides accept the rules by which the facts are going to be established and responsibilities determined. It also allows the continuing disagreement to proceed over a set of uncontested facts and it "confronts those with something to hide with evidence they have tried to keep from coming to light."⁴⁵

VIII. Universal Principles and Different Solutions

The problems of the transition in Eastern Europe and its own legacies of human rights violations of the Communist era are clearly distinguishable from those of Latin America. The most salient features of repression in Latin America were extrajudicial executions, disappearances, and torture over a relatively short but tragic period in the life of each country. For those actions, it is relatively easy to single out a manageable number of victims and, more importantly, identifiable perpetrators, instigators, and master-minds. In contrast, repression in Eastern Europe lasted several generations; it imposed a pervasive social control through surveillance and informer

⁴³ See the insightful and well-documented views on this by Mark J. Osiel, op. cit. (note 34).

⁴⁴ Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan*, Farrar Straus Giroux, 1994, p. 142.

⁴⁵ Mark Osiel, op. cit. (note 34), p. 503.

networks and asphyxiated dissent through professional and social ostracism, but much more rarely resorted to violations of the right to life and physical integrity.⁴⁶ In such a context, criminal responsibility is harder to establish when the actions were not illegal under the laws in force at the time and moral responsibility is perceived as shared by large sectors of the population. For this reason, human rights activists in those countries have generally favored memory over punishment.⁴⁷ South Africa is the next country to have embarked on an ambitious program of truth and reconciliation as part of its own attempt to leave *apartheid* behind. Arguably, repression in South Africa participates in the worst features of Latin America and of Eastern Europe; this makes the problems of accountability all the more complex there.

Nevertheless, the four obligations outlined above are universally applicable within the conditions of legitimacy also mentioned. In the first place, the obligation to punish postulated here applies to violations so serious that they qualify as crimes against humanity, not to acts of pervasive surveillance, denials of free speech and association, short-term arbitrary detention, denial of due process, and suppression of religious freedom. For these, however, concern for the victims does require that the truth be known and acknowledged. The right to reparations and the obligation to purge the security forces of elements steeped in those abject traditions also apply.

Since we must insist on scrupulous respect for due process, the 'lustration' laws that have been applied in different forms in Eastern Europe almost always constitute punishment without a fair trial and for that they deserve firm rejection. On the other hand, Eastern Europeans should be encouraged to find ways of having the full truth known and disseminated without adverse legal consequences to individuals who cannot defend themselves at trial. The files of the intelligence services must be made available to the public; the mistake is to take at face value the 'truth' that they describe. A process that allows individuals to demonstrate the falsehood of the substantive information contained in those files can be incorporated into the decision to release those files. Democracy and the rule of law demand that state files do not remain secret; their disclosure will in fact serve the purposes of truth and reconciliation as long as it is balanced with the rights to privacy and to their reputation on the part of the individuals who may see themselves stigmatized by their publication.

⁴⁶ A dramatic exception to this generalization is the large scale massacres of peasants in the Soviet Union under Stalin.

⁴⁷ See the views of the organization called Memorial and of human rights leader Sergei Kovalyov, as cited by Aryeh Neier, "What Should Be Done..." op. cit. (note 38). In some cases, objections to prosecutions have extended to all forms of accountability efforts, as not conducive to reconciliation. See Wiktor Osyatinski in *Dealing with the Past*, op. cit. (note 18), pp. 59–63.

Similarly, we must criticize attempts at prosecution under contrived principles of what was legal and what illegal under the laws applicable at the time. And we must condemn with equal firmness attempts to punish small cogs in the wheel of repression while allowing the head planners and perpetrators to go free.⁴⁸ The limitations and dangers of using courts to settle historic grievances can easily be applied to the legal contortions that seem to characterize some German attempts to punish human rights violations by East German officials.⁴⁹ But those 'false starts' do not invalidate all attempts at accountability in Eastern Europe, nor do they justify the preference by many to sweep the recent past under the rug. In particular, truth-telling, integral reparations, and security forces purged of known criminals should proceed whether or not there are trials; and for particularly egregious human rights violations, like the murder of Father Popieluzko, prosecution and punishment in a fair trial is in order.

IX. Conclusion

Proponents of accountability have gained a lot of ground in the last twelve years. The theme is firmly established in the agenda of all major challenges of our time. But a few ideological battles must still be waged, especially to overcome the lack of imagination and vision that often passes for prudence and *realpolitik*. As in the past, it is not enough to insist on moral principles. We must acknowledge the political constraints while we insist that we all look at them objectively and without preconceptions. The most important point is not so much to impose upon democratic leaders a set of obligations but to find the means by which the international community can effectively support the efforts made by some of those leaders—and by organizations of civil society—to achieve accountability. In a world marked by globalization, such encouragement is crucial to the legitimacy and acceptability of those efforts, and it has been sorely missing.

It is also time to review the theoretical framework under which we have discussed these issues. The presentation of the moral principles and the political constraints made, among others, by José Zalaquett and Aryeh Neier early on were immensely useful when we confronted new situations with relatively little experience to guide us. They will continue to be useful, to be sure, but after the rapid development of many new experiences it is time to review all of their assumptions and to examine their continued applicability.

⁴⁸ See Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism*, Random House, New York, 1995; this book is reviewed by Timothy Garton Ash in "Central Europe: The Present Past," *The New York Review of Books*, 13 July 1995.

⁴⁹ A. James McAdams, "The Honecker Trial: The East German Past and the German Future," Working Paper #216, Kellogg Institute, University of Notre Dame, January 1996.

