International Meeting

Justice
Not Impunity

Commission nationale consultative des droits de l'homme
International Commission of Jurists
Under the Auspices of the United Nations

2 to 5 November 1992
Palais des Nations - Geneva

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ISBN 92.9037.069.6

International Meeting

on

Impunity of Perpetrators of Gross Human Rights Violations

Organized
by

The Commission nationale consultative des droits de l'homme
and the International Commission of Jurists
and
held under the auspices of the United Nations

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Imprimerie ABRAX
21300 DIJON-CHENÔVE — FRANCE

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Foreword

Impunity for the authors of gross violations of human rights contains moral, political and juridical dimensions. When these violations are of a grave and repeated nature or are persistent or massive, they render peaceful coexistence between human beings extremely difficult and end up constituting an obstacle to the development of democracy.

History has taught us that the impunity enjoyed by this category of violators has led to some of the very worst crimes and violations in the field of human rights.

Aware of the crucial importance of this question today, the International Commission of Jurists (ICJ) and the French National Consultative Human Rights Commission (Commission nationale consultative des droits de l'homme - CNCDH) organized, under the auspices of the United Nations, an "International Meeting on Impunity", the elements of which are presented in this publication.

For four days, the meeting was the scene of intense work by some sixty experts from various disciplines and coming from all regions of the world. Also taking part were 28 representatives of non-governmental organizations (NGOs) and 38 diplomatic representatives accredited to the United Nations.

The experts were composed of government representatives, philosophers, historians, magistrates, lawyers, lecturers in law, human rights activists, journalists and priests. While experts had been invited to make presentations on the various themes of the programme around which the debates were to take place, all participants took part in these debates, enriching them with their opinions and points of view. The meetings were presided over by the French magistrate Louis Joinet, with diplomacy and open-mindedness.

Since the fall of nazism, the principal historic landmarks relating to impunity, are without doubt, the Nuremberg and Tokyo trials and, at national level, a series of trials of war criminals, perpetrators of crimes against humanity and former collaborators, which took place after the liberation of those countries which had been under enemy occupation during the Second World War.

Political evolution over the last few decades has been characterized by the return of democracy in numerous countries and regions. The fall of the Berlin Wall also saw the countries of Eastern Europe starting out on this path of democracy.

The common denominator in all these situations is that each country is questioning the attitude it should adopt with respect to the former regime's political leaders and their repressive law-enforcers, who were the authors or instigators of gross human rights violations.

The problem of impunity, however, also arises in democratic countries, particularly when security forces refuse to submit completely to civilian authority.

The question of impunity has become a major subject of preoccupation today, not only for the public authorities responsible for political action, but also for NGOs and political and social institutions and associations, particularly those constituted by the victims and their families.

Numerous are those seeking an historical and ethical analysis, a political and legal opinion, a sharing of experiences and information which would make it possible to find a happy medium between what is ideally desirable and what is practically possible. In this respect, all the statements and discussions brought the beginning of a response.

How can democracy and a State based upon the Rule of Law confront totalitarianism and barbarism without risking to go astray? As much for ethical reasons as for those of equity with the victims, it is difficult to accept impunity. It is nevertheless legitimate to question the concepts of pardon, appropriate punishment, individual and State responsibilities, the requirements of conciliation or national reconciliation.

The urgency of examining the question of impunity is often directly linked to the need to carry out peace negotiations to put an end to armed conflicts or grave internal conflicts.

In their analysis of the consequences of impunity on society as a whole, the participants at the meeting endeavoured to determine to what extent it harms justice and the right of people to equal treatment by the law, and also the extent to which it can nullify the fundamentally dissuasive effect of penal law and involuntarily serve to "encourage" new criminal offences.

When taking up the topic relating to what attitude the State should adopt with respect to the authors of violations, distinctions were established between those who directly participated in human rights violations and those who played an indirect role, with respect to those in high-level political positions - civil or military - who give the orders and instructions, and those who execute them. In this connection, the discussion also touched on the degree of responsibility of those who acted in response to orders from their hierarchical superiors.

In which ways can former oppressors be unmasked, tracked down and their responsibilities established? Should this be the work of courts or of public enquiry commissions? In this respect, various enriching experiences in Africa and Latin America were reported and discussed.

Bringing to justice those responsible can encounter difficulties, particularly during the establishment of tribunals, certain of whose judges had in fact favoured impunity. The necessity for judges committing themselves in favour of law and justice was stressed. Should courts of law with exclusive competence be set-up? And, if this were to be the case, how could it be done without conferring upon them a character of exceptional jurisdiction? Important discussions were also held on military courts in situations of conflict. These being considered as generators of impunity.

In the face of *de facto* impunity, the result of the poor functioning of the institutions of police and justice, impunity of a legislative or

administrative order can also result from amnesty measures, either in a spirit of national reconciliation before any judgement has taken place, or following negotiations between the parties to the conflict, or, again, after judgment and condemnation.

Participants analysed measures such as amnesty, limitations, clemency, pardon, and other types of measures implying renunciation in order to get at the truth and to pass judgment in court. The meeting also touched on the limitations which international law, whether it be customary law or law resulting from treaties relating to human rights, imposes on States in respect of their possibility of according impunity to their agents and officials.

Also studied was the question of knowing whether it might be possible for a mechanism to exist that would significantly delay the date upon which the limitation of criminal responsibility would commence, when the prevailing political situation prevented courts from functioning independently, or when the situation was such that the eventual plaintiffs or witnesses ran a grave risk of losing their lives, their integrity or their liberty.

In the view of certain participants, only international law found in treaties should be applied to conduct as particular as "crimes against humanity", with all the consequences that such an application implies. Others, however, felt that this application could also be determined by customary international law.

Another interesting discussion related to other types of non-legal measures which could be applied to the authors of violations, such as:

- purges
- forced or voluntary exile
- use or destruction of the archives and files of the former regime

Participants discussed the timeliness of drawing up international legal norms and the establishment of international mechanisms aimed at combating impunity, in particular the creation of a

permanent international penal court charged with judging those responsible for gross violations, when these are perpetrated massively, systematically or persistently. The question of the creation of a court to judge the authors of war crimes and infringements of human rights in the former Yugoslavia was evoked and examined.

Participants insisted on the fact that all reflection on these questions had to take the victims into account. One of the first categories is composed of the former opponents or dissidents. What attitude should be adopted with respect to those who had participated in armed struggles and had been condemned under the former regime?

How, in general, should victims and those who had disappeared (and their relatives) be sought out ? The necessity to ensure and guarantee their rehabilitation, their medical and psychological treatment, their right to moral and material compensation for the harm they had undergone, was stressed. An exchange of experiences from different countries permitted elements of clarification.

The "International Meeting on Impunity" was intended as a forum for discussions which would shed some light on a phenomenon that is troubling the conscience of humanity. This goal was attained and it can be hoped that decisive steps will be taken everywhere to fight against impunity. This is the wish of all those who took part in the Geneva meeting and to whom we address our sincere thanks for their eminent contribution. They have translated this hope into a unanimous appeal addressed to the international community and to public opinion. The appeal is reproduced in this document, which is published in three languages: English, French and Spanish.

It is to be hoped that this paper will make a useful contribution to the study on "the impunity of the perpetrators of violations of human rights" which the Sub-Commission on Prevention of Discrimination and Protection of Minorities is to carry out. It goes without saying that it will serve as a reference for all those who are interested in the question and who have already realized the necessity of fighting this phenomenon which is polluting society.

Our two organizations are firmly convinced that it is urgent to put an end to the impunity of the authors of violations of human rights. They thus took the initiative of convening the "Geneva Meeting".

The time has come to pass from discussion to reality in order to fight against the scourge.

Paul Bouchet
President
Commission nationale
consultative
des droits de l'homme

Adama Dieng
Secretary General
International Commission of Jurists

Speech

Antoine Blanca
Under Secretary-General
for Human Rights, United Nations

Ladies and Gentlemen,

In coming before you today, on the occasion of this International Meeting on Impunity, which is being held under the auspices of the United Nations, I would like, first of all, to thank the organizers of this important event for granting me the opportunity to express, in my capacity as Under-Secretary-General for Human Rights, the interest I share in this initiative and in the ideas and discussions it will generate. I would also like to take this opportunity to welcome all the participants – I am convinced that their professional experience and in-depth knowledge of the issues that are directly or indirectly related to the problem of impunity, will contribute to the high quality of this Meeting.

The topic you will be dealing with is of the utmost importance for the promotion and protection of human rights. As with any issue affecting these rights, impunity for perpetrators of human rights violations is multidimensional in nature, given its profound moral, ethical, political and legal consequences. This fact greatly complicates the task of all who wish to study it and draw practical conclusions from it. At this point I would like to address the political decision-makers, administrators of justice, historians and journalists among you, who, in one way or another, are committed to the protection and promotion of human rights. I sincerely hope that your work at this Meeting will be crowned with success and that you will find the *Palais des Nations* to be an ideal place for reflection and debate.

Impunity is a serious, world-wide phenomenon, which has taken on alarming proportions in a great number of countries with widely

varying levels of development. This has given rise to the question as to what attitude to adopt towards those who are or have been responsible for serious and less serious human rights violations.

Although, in principle, this decision falls within the sphere of competence of the State, it is now generally acknowledged that the international community must ensure that perpetrators of human rights violations do not go unpunished, in view of the obviously negative consequences of impunity. Indeed, the practice of impunity not only represents a serious obstacle to all democratic development and to maintenance of the Rule of Law, but it is also, without a doubt, the single most important factor in the perpetuation of grave violations, the most odious among which are enforced disappearances, torture and extra judicial executions.

The United Nations Organization has, for many years, taken steps to strengthen its role in the battle against impunity. As part of the contribution it has made since its inception to contractual international law in the field of human rights, the United Nations has produced many international instruments which are applicable to the practice of impunity. The most important of these are: the Universal Declaration of Human Rights, the Convention for the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the International Covenant on Civil and Political Rights, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Also worthy of mention is the Draft Declaration on the Protection of all Persons from Enforced Disappearance, which will soon be submitted to the UN General Assembly for final adoption. The draft declaration and the other instruments listed above contain provisions which require States parties to take effective legislative, administrative, legal and other measures to reduce the adverse effects of impunity and, in particular, to ensure adequate compensation to victims of human rights violations.

In addition to the contribution of the United Nations in establishing international standards which are applicable to

impunity, it is important to recall the most significant developments that have taken place within the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In the reports focusing on specific countries and topics, which were presented to the Commission by the special rapporteurs, and particularly in those by the special rapporteurs on torture and summary and arbitrary executions, impunity is considered to be the primary cause of the violations. The issue of impunity was also examined in several studies presented to the Sub-Commission concerning the status of the administration of justice and human rights. I am reminded, in particular, of Mr. Joinet's study of the role of amnesty laws in the promotion and protection of human rights, and of the reports of Messrs Chernichenko and Treat on *habeus corpus* and the right to a fair trial. By virtue of decision 1991/110, taken at its Forty-Second Session, the Sub-Commission requested that two of its members, Messrs Joinet and Guissé, prepare a working document to analyze the issue of impunity. This document was presented to the Sub-Commission at its Forty-Third Session last August. It contains an analysis of the legal and practical mechanisms which favour impunity and proposes guidelines for organizing efforts to prevent this phenomenon. This then is the Sub-Commission's first study to be based exclusively on the issue of impunity. It will surely aid the

During the meeting. From the left to right: Alejandro Artucio, Legal Officer at the ICJ; Adama Dieng, Secretary General of the ICJ; Louis Joinet, Member of the UN Sub-Commission on Human Rights and Robert Badinter, President of the Constitutional Council of France.

international community's understanding of the serious nature of the phenomenon, as well as its attempts to prevent it.

It would be unfair to end this brief survey without mentioning the efforts of the Working Group on Enforced Disappearances in analyzing the situation in the numerous countries where disappearances occur. Indeed, it was on the basis of this analysis that the Working Group, in its reports to the Commission, concluded that impunity is perhaps the single most important factor contributing to enforced disappearances.

In conclusion, I would like to express my appreciation for the considerable efforts of the non-governmental organizations in bringing attention to the negative consequences of impunity. It is my hope that the phenomenon of impunity will one day be eradicated, and that all victims of grave human rights violations will receive adequate compensation.

Thank you for your attention.

Opening Speech

Adama Dieng
Secretary General
of the International Commission of Jurists

Ladies and Gentlemen,

On the evening of 10 December 1948, in the wake of one of the most devastating wars of all time, the United Nations adopted the Universal Declaration of Human Rights, designating it "as a common standard of achievement for all peoples and all nations". Three years earlier, the Charter of San Francisco had embodied world sentiment in condemning the atrocious human rights violations which had occurred immediately before, and during, the Second World War. Consequently, respect for human rights became one of the declared objectives of the United Nations Organization, as set out in Article One and reiterated in Article 55 of its Charter.

The United Nations has undoubtedly made great strides in promoting respect for human rights. A list of its standard-setting action in this area is evidence enough of this. Yet, perhaps it would be useful to reconsider the impact of these standards, given the fact that violations of human rights – not only civil and political, but also economic, social and cultural – continue to occur on a large scale. It would hardly be an exaggeration to state that owing to their extreme inefficiency, certain UN mechanisms have actually contributed to denying justice to the victims, who find themselves defenceless within the international system.

Who would have ever thought that death camps would still be in existence on the eve of the third millennium? What measures were taken to assess the atrocities committed by the Khmer Rouges, which fall under the category of crimes against humanity?

Louis Joinet, Chairman of the Working Group on Arbitrary Detention set up by the UN Commission on Human Rights, has just published a damning report of the massacres committed in the

former republic of Yugoslavia. How could we have allowed the situation to progress to that point? Why didn't the international community take prompt legal measures to bring these criminals to justice? Why was priority given to political considerations? I can only hope that the facts will eventually prove that my friend, Olivier Russbach, was wrong when he stated that: "... as regards bringing war criminals to justice, whether in Yugoslavia or elsewhere, little can be expected from an international procedure which is subject to the whim of States, as will be the case for this new UN Commission, whose primary purpose appears to be to provide pretexts for not having to fulfil the precise obligations concerning prosecution contained in the Geneva Conventions."[1]

In countries around the world, innocent civilians, by the thousands, are being massacred for racial, ethnic or political reasons. Elsewhere, entire populations are being displaced, deported or subjected to inhuman treatment. And all of these crimes are committed under the authority of governments, which, in many cases, have ratified the very treaties and conventions designed to protect the most basic human rights.

Yet no action is brought against them, and their crimes thus fall into official oblivion.

Such impunity is an affront to the soul and conscience of anyone with even the slightest sense of morality, who can only find it intolerable that such acts as arbitrary imprisonment, torture, humiliation, deportation and assassination are permitted in the name of defending the interests of the State, or as part of battles over political ideology.

Many newly formed democratic governments are currently faced with the thorny problem of how to treat the perpetrators of serious human rights violations committed under the previous government. Often, the firm resolve of the new leaders to bring these criminals to justice is gradually weakened during the transition period. This provides many perpetrators of serious human rights violations a

1 Editor's note: extract translated.

means of escaping justice. Such impunity hardly contributes to strengthening the people's confidence in the new administration, especially when officials are allowed to remain in office in spite of their past crimes. It is useful, at this point, to recall that, by virtue of international instruments, obligations assumed by States to ensure respect for human rights carry with them the implicit duty to investigate the facts and bring to justice those guilty of violating human rights. In the terms of the Convention against Torture, on the other hand, the duty to punish torturers is explicit.

Should all persons suspected of involvement in human rights violations be prosecuted? Aside from the fact that this is virtually impossible, some feel that such a policy would be very dangerous with respect to efforts to achieve national reconciliation. It must be borne in mind that the goal of prosecution is to discourage the recurrence of such abuses, as well as to strengthen the Rule of Law, and thereby demonstrate to those invested with State authority that they are ultimately responsible for their actions.

A consensus appears to be emerging concerning the notion that total impunity – whether as the result of amnesty, clemency measures or simply the inefficiency of the courts – constitutes a violation of international law.

Not only have we, as humans, failed to increase our sense of moral and ethical responsibility during this closing quarter of the century, but in many respects we have actually allowed it to diminish. Moral integrity and honesty are rare qualities both in individuals and in the institutions of the State.

Faced with the ever increasing pace of change and absorbed by their own immediate concerns, the world's leaders seem to have been unable to grasp the problems as a whole. Instead of proposing long-term general solutions, they base their decisions on temporary circumstances. Even in situations where long-term solutions are not immediately applicable, States should develop a general plan incorporating goals to be achieved. Is it not high time that the religious and political leaders of the world propose something other than force and arbitrary measures to resolve conflicts?

All evidence seems to point to the fact that the only way to significantly improve the resolution of national and international conflicts and avoid war is to establish an international system of law and an accompanying mechanism of application. We can no longer afford to look upon such a system as an idealistic dream; we should instead view it as the only viable means of avoiding self-destruction.

Obviously, declarations and proclamations are not enough to protect human rights. Nor is public condemnation enough to prevent future violations. The only way to proceed from theory to practice is to develop some sort of instrument of "application" for protecting human rights. The Universal Declaration of Human Rights expresses this idea in its preamble, which stipulates that human rights should be "protected by the Rule of Law".

"For the Rule of Law" – this is the motto of the International Commission of Jurists. The Commission believes that justice is only fully expressed in a community protected by solidly established legal institutions, which are administered by impartial judges and independent lawyers aware of their responsibility towards society. In order to achieve these objectives, the Commission's activities are formulated along two main lines:

1. to promote and strengthen the Rule of Law in all of its practical aspects, whether institutional, legislative or procedural;
2. to mobilize world opinion whenever the principles of justice are systematically violated or seriously threatened.

It goes without saying that these two essential activities complement each other.

It is quite obvious that an enlightened democracy provides the best guarantee for the protection and promotion of individual liberties. Nevertheless, even in the most enlightened democracies, it is possible for the executive, the administration or even the parliament to abuse its power. Such abuses may be unforeseen, to the extent that they were not anticipated before passage of a particular law. In other cases, they may have been anticipated, but were minimized, in the sense that they were only applicable to a limited segment of the

population. Abuses also arise from laudable, yet mistaken, interpretations of "the common good". And even in an orderly democracy, abuses may be the result of political considerations. These must be guarded against.

Thus, regardless of the level of democracy achieved by a particular State, it is still necessary to provide an effective mechanism for protecting individual rights.

In those parts of the world where democracy is still in its infancy, or where it is not yet firmly established, the problem of protecting human rights arises in the same way, only in much greater proportions. The lack of a democratic tradition and, more generally, of a public opinion with the means to make itself heard, makes it much more difficult to resolve the problem in these countries.

A constitution, in and of itself, provides only one element, which, if it cannot be invoked or applied, loses all meaning. Many pompously-worded constitutions are rendered meaningless by being interpreted incorrectly or worse, ignored altogether. This is where a courageous and independent judiciary, which assumes responsibility for ensuring compliance with constitutional provisions, is able to prove its worth. All too often constitutional texts are ineffective, lacking as they do the appropriate mechanism to require adherence to their provisions by the executive and sometimes even the legislative powers. Constitutional guarantees may also be rendered ineffective by such innocent-sounding phrases as "for the common good", "in accordance with the law" or "in the public interest".

One must also not lose sight of the fact that whereas judicial proceedings are absolutely vital to the protection of human rights, they provide not only the ideal recourse, but also the last one. They are the last resort whenever a government or a parliament has already abused its power or has crossed the thin line between legality and illegality. It would be far more preferable for governments to adopt a normal policy of staying within the limits of the Rule of Law, rather than expanding their powers beyond what is legal. When this occurs, governments are always faced with the problem of lowered prestige when they are ordered to comply with the decisions of the courts.

From the international standpoint, the Rule of Law must seem like a distant reality. Whereas clear objectives may be found at the national level, governments which cling to outdated versions of sovereignty have difficulty accepting the Rule of Law. Yet an informed public opinion will get the attention of its government if it places the latter squarely before its responsibility to uphold the international protection of human rights with effective application through an international mechanism. It is the job of public opinion to keep the flame alive and to light the way. Denouncing flagrant human rights violations is not enough; demands must be made for an international mechanism of application to protect the Rule of Law and human rights.

The question of impunity is not, and should not, be limited to grave violations, such as summary executions, torture, disappearances, etc. It should also include serious violations of economic, social and cultural rights. Consider for a moment the consequences of the economic pillaging of the countries in the southern hemisphere, the fraudulent enrichment of high government officials and the shameless flight of capital from the South to the banks of the North – consequences which are equivalent to a violation of the right to life, in particular. In many of these countries, "the very concept of the State has been corrupted". Societies are divided and the blood of the poor does not even warrant the indifference of the sated rich. As the result of incompetence, nepotism, plunder and negligence, mankind pillages, squanders, embezzles, imprisons and murders... Freedom, democracy, the Rule of Law: what crimes have so often been committed in your names!

The Rule of Law, democracy and human rights – these are our shared positive values. "These notions represent universal values, which may be subject to different applications, but they are universal values just the same. They are among the achievements of civilization of the world's peoples and part of the common heritage of humanity." (René Jean Dupuy)

"Nowhere are basic freedoms invulnerable and they are equally

precious everywhere." At a time when the world's highest intellectual and moral authorities are concerned about the decline of justice in the world, it would be good to recall this axiom of the International Commission of Jurists, which, although it has all too often been borne out by experience, provides the foundation for the campaign it has been conducting for many years to promote observance of the Rule of Law and of human rights. Apolitical, independent and impartial action – these are the essential and indispensable rules of conduct followed by the ICJ, and those which have helped it gain a large audience, not only in legal circles around the world, but also among the international community.

The question does arise, however, as to the whether this role of righter of universal wrongs is perhaps too ambitious for a relatively small non-governmental organization with modest resources. Indeed, should this really be its role, given the existence of powerful governmental institutions which are apparently better equipped to handle this task?

And yet, this is precisely why the ICJ is indispensable. Governments are known to jealously guard their national sovereignty in order to have free reign over their own territory and even to perform deeds such as arbitrary arrests, detention without trial, cruelty to prisoners, summary executions, etc., claiming that this does not concern anyone else. Who is there to raise their voices, when crimes against humanity and attacks against the dignity of man are committed? Who is there to defend and aid victims denied of justice, if the officials cannot or do not wish to do so? This is where the non-governmental organizations, such as the ICJ, can intervene and the point at which their relative weakness turns to their advantage. Not only can the ICJ act while governmental representatives remain powerless, but it must do so, since it is often the only or the last chance for those who find themselves alone and defenceless against the blind and crushing machine of State interest.

The ICJ's mission is not only to defend the oppressed against abuse and arbitrary power, although human life certainly has no price, and whatever lives the ICJ has managed to save would alone suffice to

justify its existence and efforts. But it has gone beyond this by demonstrating initiative and creativity and has consequently had a positive influence on the legal systems and thinking of many countries, as well as on the international legal community.

I am convinced that as a result of your reflection, your critical analysis and the exchange of your common experiences, you will make an important contribution to strengthening respect for human dignity.

International Law and National Experiences

Emmanuel Decaux
Professor of Public Law
University of Paris X-Nanterre, France

INTRODUCTION

The Scope of International Law

Human rights abuses may be punished according to either national or international law. However, when a change of government is involved – as in the case of countries undergoing democratization – the question arises as to whether it is possible to apply the criminal statutes of the previous government to its own leaders and officials, even though such statutes may have been specifically designed to suppress opposition and ensure impunity to those acting in violation of human rights. In such cases, how might it be possible to establish new charges, without violating the important principle of the non-retroactivity of criminal laws?

As regards international standards, the question also arises as to how to combine the different, and sometimes competing, jurisdictional claims of States, including a universal criminal jurisdiction for such crimes as terrorism, drug trafficking, and assassination, with the search for a genuine international jurisdiction, based on the establishment of an overreaching international court, superseding all national courts.

Which legal, and for that matter, political criteria (involving sometimes contradictory questions of equity or national suitability) should be taken into account?

Which rules and which sanctions should be applied?

Responding to questions concerning national and international legal standards and jurisdictions is a delicate matter. This paper provides only a rough outline of the current state of the law and the prospects it has to offer.

National and International Criminal Statutes

The principal international instruments codifying human rights have emphasized two notions which, in theory, are complementary, but which, in practice, may be contradictory.

The first is that of the old principle of the non-retroactivity of criminal laws, which appeared as early as 1789 in Article 8 of the French Declaration of the Rights of Man, and which states:

"The law ought to establish only penalties that are strictly and obviously necessary and no one can be punished except in virtue of a law established and promulgated prior to the offence and legally applied."

These provisions were inspired by the philosophy of criminal law of Beccaria, and stand in contrast to the "arbitrariness" of the *Ancien Régime.*

This principle is also found in several American declarations of rights. The Declaration of Virginia, for instance, proclaimed that as of 1776:

IX. All laws having retroactive effect and created to punish offences committed before the entry into vigour of these laws are oppressive, and due care must be taken not to create similar laws.[1]

This same principle finds its modern expression in Article 11, paragraph 2, of the 1948 Universal Declaration of Human Rights, which states:

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1 Stéphane Rials, La déclaration des droits de l'homme et du citoyen, Hachette, Paris, 1988 (editor's note: extract translated).

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

The second principle concerns the protection of human rights, not only with regard to the State, but also with regard to public officials or private individuals who infringe upon the freedom or safety of others. While criminal law at the domestic level provides a series of guarantees to protect the individual, and, in most cases, has done so for quite some time, the issue is more complex with respect to international law. Is it, for example, possible to establish international offences which are not contained in domestic law?

Article 15 of the International Covenant on Civil and Political Rights strikes a balance between these two principles by declaring:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. (...)
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

According to the record of the preparations, Paragraph 2 was inspired as of 1947 by the need to take into account the trials for war crimes. Some considered the provision to be superfluous, since Paragraph 1 already contained a reference to "international law". After being narrowly adopted in 1950 by the UN Commission on Human Rights by a single deciding vote, Paragraph 2 was finally ratified in 1960 by the third Commission, with a vote of 53 in favour (including the United States, France and the USSR), four against (Argentina, Brazil, Japan and Lebanon), and

some 20 abstentions (including Canada, Italy and the United Kingdom).[2]

The International Criminal Responsibility of the Individual

The issue of individual responsibility was dramatically illustrated following the atrocities of the Second World War.

The London Agreement of 8 August 1945, which contains the Charter of the Nuremberg Tribunal, for the first time established the international criminal responsibility of the individual, as well as instituting new international charges, including war crimes, crimes against peace, and crimes against humanity.

Whereas the Hague Conferences of 1899 and 1907, which were intended to reflect customary practice, were able to serve as a basis for the charges of "war crimes" and "crimes against peace" made by the Nuremberg Tribunal, "crimes against humanity" escaped all existing laws, precisely because of their monstrous nature. Nevertheless, the preamble of the Fourth Hague Conference evoked a wider moral base than that strictly specified in the law, by recalling that

> "the inhabitants and the belligerents shall remain under the protection of and subject to the principles of the law of nations, as established by the usages prevailing among civilized nations, by the laws of humanity, and by the demands of public conscience".

According to Article 6 of the Charter of the Nuremberg Tribunal[3], crimes against peace are defined as the

> "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties..."

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2 Marc Bossuyt, Guide to the "Travaux préparatoires" of the International Covenant on Civil and Political Rights, Nijhoff, Dordrecht, 1987.

3 U.N. Doc. A/CN.4/368, "Compendium of Relevant International Instruments": the London Agreement of 8 August 1945 for the Nuremberg Tribunal and the Tokyo Proclamation of 19 January 1946 for the Far East Tribunal. For a recent review, see George Ginsburgs and V.N. Kudríavtsev (ed.), *The Nuremberg Trial and International Law*, Nijhoff, 1990.

War crimes primarily include

> "... murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

Lastly included are crimes against humanity:

> "... namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated".

The United Nations General Assembly resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 affirm "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal".

Resolution 177 (II) of 21 November 1947 entrusted the International Law Commission (ILC) with the task of preparing a draft code of offences against the peace and security of mankind. Following the report presented by Special Rapporteur Jean Spiroloulos, the ILC drafted a list of Nuremberg principles, which was submitted to the General Assembly in 1950 and transmitted to the States through Resolution 488 (V) of 12 December 1950, as follows:

Principle I:

"Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."

Principle II:

"The fact that national law does not impose a penalty for an act which constitutes a crime under international law does not

relieve the person who committed the act from responsibility under international law".

Principle III:

"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

Principle IV:

"The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

Principle V:

"Any person charged with a crime under international law has the right to a fair trial on the facts and law."

On the basis of a new report prepared by Mr Spiropoulos the following year, the ILC prepared a Draft Code which was submitted to the governments and revised in 1953. The Code limited itself to crimes of a political nature and those which were considered to endanger international peace and security, leaving aside other human rights violations condemned in international conventions, such as slavery. Article 1 of the Draft Code defines crimes against the peace and security of mankind as "crimes under international law for which the responsible individuals shall be punishable" and then goes on in Article 2 to list 13 categories of acts constituting such crimes.[4] Faced with the difficulty of defining the crime of aggression, the General Assembly decided by means of Resolution 897 (IX) of 4 December 1954, to suspend the ILC's work on the Code.

At the same time, the General Assembly, in its Resolution 260 B (III) of 9 December 1948, requested that the ILC study the desirability of creating an international

4 United Nations Action in the Field of Human Rights, 1986, page 262.

criminal jurisdiction, for the trial of persons charged with genocide, by virtue of the convention adopted that same day (see below). With the approval of the ILC, the General Assembly in 1950, and then in 1952, created a committee on international criminal jurisdiction, without taking a decision on the articles which were submitted to it.

It was not until 1981 that the ILC was invited to recommence its work, with the appointment of Mr Doudou Thiam as Special Rapporteur (see below).

Similarly, the codification of the international responsibility of the State could not help but have an influence on these efforts, with the distinction being made between the criminal responsibility of the State and that of the individual. Thus, following the report of Mr Roberto Ago on the responsibility of the State for illegal acts under international law, Article 19 of the Draft Code, which was adopted at first reading by the ILC in 1976, provides that

> "an international crime may result from ...
> c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid".

Besides, in its efforts to enlarge the meaning of the term "international crime" the ILC established that "not every international crime is necessarily a crime against the peace and security of mankind". This presented a double problem in terms of classification for completing the list adopted in 1954.

As regards war crimes, the four Geneva Red Cross Conventions of 12 August 1949 reiterated the definition contained in Article 6 of the Charter of the Nuremberg Tribunal. Serious breaches of the 1949 Conventions were put in the same category as war crimes. This was also the case with Article 85 of the first Protocol of 1977.

The category of crimes against humanity was also defined and completed. Resolution 96(I) of 11 December 1946 proclaimed genocide to be "a crime under international law".

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948, gave individual meaning to the crime of genocide "whether committed in time of peace or in time of war", whereas Article 6 (c) of the London Agreement, mentioned previously, included as crimes against humanity, those committed "in connection with" or "in execution of" crimes against peace or war crimes. Article II of the Genocide Convention provides the following definition:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) killing members of the group;
>
> b) causing serious bodily or mental harm to members of the group;
>
> c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> d) imposing measures to prevent births within the group;
>
> e) forcibly transferring children of the group to another group.

The States parties undertake to "provide effective penalties for persons guilty of genocide" (Article V), "whether they are constitutionally responsible rulers, public officials or private individuals" (Article IV).

The International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 creates a new offence, which it classifies as a crime against humanity. It forms part of a series of General Assembly resolutions which condemn various acts as crimes against humanity, including: the violation of the economic and political rights of sovereign people (Resolution 2184 (XXI) of 12 December 1966) and the policy of apartheid (Resolution 2202 (XXI) of 16 December 1966, Resolution 37/69 A of 19 December 1982, etc.).

Other instruments are aimed at encouraging international co-operation in the suppression of these crimes. This is true of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968, as well as of General Assembly Resolution 3074 (XXVIII) of 3 December 1973 concerning Principles of international co-operation in the detection, arrest, and punishment of persons guilty of war crimes and crimes against humanity, which was adopted by a vote of 94 to 0, with 29 abstentions.

Nevertheless, it must be recognized that all of these instruments do not carry the same weight universally. Thus, whereas the 1948 Genocide Convention binds a large number of States parties, the 1973 Convention has not been signed by the Western nations. Likewise, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity is only binding for some 30 States.

State Jurisdiction over Human Rights Violations

With respect to human rights violations that are specifically condemned in international conventions – aside from such classifications as "international crime" – the task of prosecution remains the responsibility of the State. International conventions, however, require that the States parties adapt their legal systems in accordance with their provisions.

The 1948 Genocide Convention provides for example that

> "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide..." (Article V).

Nevertheless, Article VI of the Convention left the door open to future developments in international law, in view of the work in progress at the time by the ILC:

> "Persons charged with genocide ... shall be tried by a

competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The same is true of the 1973 Apartheid Convention, which stipulates in Article V that

"Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

To date, such an international jurisdiction – whether referred to as an "international criminal court" or "international penal tribunal" – has not been established.

A fortiori, jurisdiction remains at the national level, whenever a violation, however serious it may be, has not been classified as an "international crime" as such. Thus, according to Article 4 of the Convention against Torture of 10 December 1984:

"Each State Party shall ensure that all acts of torture are offences under its criminal law".

Article 5 lists the cases in which the State should exercise jurisdiction, whether territorial or personal:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

b) when the alleged offender is a national of that State;

c) when the victim is a national of that State if that State considers it appropriate.

This plurality of criminal jurisdictions helps to avoid cases in which the State is reluctant to institute proceedings, by implementing the

"extradite or punish" principle. Still, this is merely a matter of substituting one national jurisdiction for another, and not of establishing a true international jurisdiction.

Aside from the precedent set by the Nuremberg and Tokyo trials in trying German and Japanese war criminals, the absence of an international criminal court has required that the national criminal courts take its place. This was illustrated by a series of trials, including the Eichmann case, which was tried in 1961 by an Israeli tribunal.

Thus, in 1982, the French Court *of Cassation* held that "whereas the Charter of the International Tribunal of Nuremberg established the jurisdiction of the Tribunal in the matter, it did not exclude the jurisdiction of the State in which the crimes were perpetrated, which, under the terms of Article 3 of the United Nations Resolution of 13 April 1946, and as expressly stipulated in the Act of 26 December 1964, may be tried and punished there, in accordance with the laws of that State". In the Barbie case, the Lyon Court of Appeal found that the crimes in question "do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign".[5]

A more recent example is provided by a piece of American legislation, which widened the criminal jurisdiction of the State, complete with measures for extra-territorial implementation, particularly with respect to prosecuting terrorist acts and fighting

5 For the Legay case, see the *Bulletin de la Cour de cassation,* 1982, p. 629. For the Barbie case, see the judgements of the Court of Cassation of 6 February 1975, 20 December 1985 and 3 June 1988. For the Touvier case, see the critical analysis of Roger Pinto in the *Journal du droit international,* 1992, p. 607.

drug trafficking, but not without eliciting wide controversy.[6] According to the Act, signed on 12 March 1992, victims of acts of torture committed outside the country may bring proceedings before the U.S. courts, against the foreign perpetrators of acts of torture or murder. Another example is provided by the Alvarez case, in which the US Supreme Court upheld the kidnapping of a Mexican "physician" who had confessed to torturing a federal narcotics agent, despite the existence of a bilateral extradition treaty between the United States and Mexico. A majority of the Supreme Court's members argued that the extradition treaty did not expressly exclude the kidnapping of suspects, thereby leaving a margin of non-law to the US Government. This argument elicited a number of diplomatic protests on the part of those States which had signed similar agreements with the United States.

Current ILC Efforts to Develop a Draft Code of Offences Against the Peace and Security of Humankind

Special Rapporteur Doudou Thiam presented his tenth report at the most recent session of the ILC, which was held in the spring of 1992. At that time, the Commission decided to establish a working group on the question of an international criminal jurisdiction, which in turn presented its report dated 6 July 1992.

In its Resolution 46/54 concerning the annual report of the ILC, which was adopted on 9 December 1991, the UN General Assembly invited the ILC in particular "to consider further ... the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism...".

In terms of the optional jurisdiction provided by the 1948 Genocide Convention and the 1973 Apartheid Convention, the

6 See the debate launched by Andréas Lowenfeld, "U.S. Law Enforcement Abroad: the Constitution and International Law", *American Journal of International Law*, 1989, p. 880; 1990, p. 712; 1991, p. 655. See also Geoff Gilbert, *Aspects of Extradition Law*, Nijhoff, 1991.

Special Rapporteur proposed to establish the jurisdiction of the court *ratione materiae* according to the following formula:

> "1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:
> - genocide;
> - systematic or mass violations of human rights;
> - apartheid;
> - illicit international trafficking in drugs;
> - seizure of aircraft and kidnapping of diplomats or internationally protected persons.
>
> 2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.[7]"

The exclusive jurisdiction for the "most serious crimes" described in paragraph 1 is based on a restrictive list. The Special Rapporteur invited the Commission to exercise the necessary "prudence" in order to overcome reluctance on the part of the States. In this sense, the list leaves aside the most controversial elements of the General Assembly resolutions adopted during the 1970s. The optional jurisdiction provided for in Paragraph 2 establishes a certain flexibility as regards the "other crimes".

This new element considerably alters the scope of the Draft Code as adopted at first reading in 1991, Article 6 of which deals with the "obligation to try or extradite", without prejudice to "the establishment and the jurisdiction of an international criminal court".[8]

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7 U.N. Doc. A/CN.4/442 and for the GT: U.N. Doc. A/CN.4/L.471.

8 U.N. Doc. A/CN.4/L.459 and Add.1. For the discussion of the 6th Commission, see A/CN.4/L.469. Compare from doctrinal standpoint with Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Nijhoff, 1987.

Likewise, Part II of the Draft Code establishes a series of definitions of "crimes against the peace and security of mankind" for the following crimes: Aggression (Article 15), Threat of aggression (Article 16), Intervention (Article 17), "Colonial domination and other forms of alien domination" (Article 18), Genocide (Article 19), Apartheid (Article 20), "Systematic and mass violations of human rights" (Article 21), War crimes (Article 22), "Recruitment, use, financing and training of mercenaries" (Article 23), International terrorism (Article 24), Illicit traffic in narcotic drugs (Article 25) and "Wilful and severe damage to the environment" (Article 26).

Of these 12 charges, only four were found in the tenth report to fall within the exclusive jurisdiction of the Court, with the addition of certain aspects of terrorism which have been the subject of international conventions. The "hard core" crimes within its jurisdiction – those that have already been codified, such as genocide, apartheid and illegal drug trafficking – were joined by "systematic and mass violations of human rights". Article 21 of the Draft Code, adopted at first reading, defines a systematic and mass violation of human rights as "consisting of any of the following acts:

a) murder;

b) torture;

c) establishing or maintaining over persons a status of slavery, servitude or forced labour;

d) deportation or forcible transfer of population;

e) persecution on social, political, racial, religious or cultural grounds."

For its part, the Working Group, which was set up in 1992 by the ILC, took a cautious and legalistic approach in its report, recommending that the international criminal court, or any other mechanism, be established by treaty. Likewise, it recommended that "the court's jurisdiction should extend to specified existing international treaties creating crimes of an international character. This should include the Code of Crimes against the Peace and Security of Mankind (subject to its adoption and entry into force), but it should not be limited to the

Code." However, the Working Group did not resolve the issue of whether certain crimes defined in the Code should fall within the exclusive jurisdiction of the international criminal court. It did affirm that regardless of its exact structure, the court, or other mechanism, must guarantee an orderly, independent and impartial procedure.

Without jeopardizing the future of codification in this area, Mr Thiam's reports illustrate a symptomatic evolution by going beyond the old tripartite notion which prevailed at Nuremberg, with the appearance of the synthetic notion of "crimes against the peace and security of mankind", and incorporation of the idea that "systematic and mass violations of human rights" may constitute "international crimes". According to this, human rights violations no longer fall exclusively within the jurisdiction of the State, shielded by the non-interference principle contained in Article 2, paragraph 7 of the Charter, but give rise to the principle of subsidiarity in terms of prosecuting human rights violations: while this task may fall primarily to the State as part of its internal order, since it is chiefly responsible for guaranteeing the freedom and security of all within its jurisdiction, in the case of non-fulfilment or of State culpability, the international obligations assumed by the State imply a collective guarantee.

Current legislation is moving in one main direction: towards the setting of standards to protect human rights, with enforcement entrusted to the State on the basis of its territorial or personal jurisdiction, which amounts to the same thing as universal jurisdiction. The Draft Code under consideration would be well advised to go beyond this plurality of horizontal jurisdictions, to envisage a genuinely international and vertical jurisdiction, complete with a criminal court. While waiting for such developments to take place, the task of suppressing human rights violations falls essentially to the State.

It is not possible, in a general presentation such as this one, to include a systematic inventory of the national legislations and their

implementation; however, certain main trends may help to illustrate some of the problems encountered at the Meeting. An exhaustive account would fall beyond the scope of such a presentation, and would risk being overly generalized and selectively critical. There is no doubt that the perspectives are somewhat skewed: in certain cases, the available information provides concrete, detailed examples, whereas with regard to other situations not mentioned here, the question of impunity does not even arise.

Still, it is important to avoid a piecemeal approach, and so, for the purposes of clarity, we shall proceed to a regional overview, however brief.

Part One

The Situation in Latin America

Democratic transition in Latin America has been characterized in many instances by a high degree of impunity, even though the police forces in these countries frequently and systematically practised such acts as torture and summary executions. The fact that military officers who had agreed to yield control to the civilians in the name of "national reconciliation" have remained in office is difficult to understand. Such compromise is more indicative of the weakness of the new democratic regimes than of the desire to establish a genuine Rule of Law, based on the respect of justice. Moreover, tolerance of past human rights violations does not create a favourable environment for improving practices in such untouchable institutions as the army and the police force, which virtually constitute a State within the State. Democratic development is thus mortgaged in exchange for a fragile compromise. Yet, to call this compromise into question during the delicate period of transition would risk hardening the position of the military, who would interpret this as a challenge. As elsewhere, the events of the past, together with the duration of dictatorship and the scope of its repression, are factors to be considered individually in each case.

1 - Argentina

In 1983, President Alfonsin ordered the trial and sentencing of the leaders of the 1976-1983 military dictatorship. On 15 December 1983, he appointed a national commission on the "disappeared", which, by the end of its proceedings in September 1984 and under the chairmanship of Mr. Ernesto Sabato, had prepared an exhaustive 500-page report entitled *Nunca Mas* (Never Again).

In December 1986, President Alfonsin sponsored passage of the *"Punto final"* law, which prevented the institution of new proceedings against military personnel beyond a certain date, and in June 1987, the "Due obedience" law, which allowed subordinate officers to escape prosecution.

The *"Punto final"* law was aimed at speeding up the trials in progress at the time and at setting a 60-day limit for the admissibility of actions against human rights offenders during the *"proceso"*, in an effort to avoid subjecting military personnel to on-going suspicion. According to a number of senatorial amendments, civilians who had collaborated with the armed forces were included in the enacting terms, but in the case of criminal suits for the kidnapping of children, the 60-day limit did not apply. In spite of leftist opposition to the bill, President Alfonsin pursued his goal to "associate the military with democracy" and to "reconcile them with the Argentine nation".

The "Due obedience" law was even more controversial; it established an undeniable presumption of "innocence" for troops and subordinate officers up to the rank of Lieutenant-Colonel, "having acted in due obedience" to their superiors. The presumption of innocence was also extended to superior officers, unless proof to the contrary could be furnished within 30 days. The first section of the law stipulates that the individuals in question "are considered by law to have acted under coercion, by the authority of their superiors and in compliance with orders, without being given the opportunity to question the advisability or legality of such orders, nor to oppose or resist them". Whereas the decision to grant a general amnesty may be understood from the point of view of wanting to turn the page once the main responsible individuals have been implicated, the

question arises as to the legal substantiation of the law and its compliance with the principles of humanitarian law.

Passage of the law came in time to interrupt the trials under way. There were charges that the law was unconstitutional in that it stripped judges of their authority to assess the facts in each case, but on 22 June 1987, the Supreme Court of Justice proclaimed its constitutionality by a three to two majority. One of the opposing judges viewed the law as the legislature's attempt to amnesty the acts "without legitimizing or justifying them", while the other judge held that "the general nature of the amnesty is linked to the characteristics of the amnestied facts and not to the personal qualities, such as the rank, of the persons amnestied". Among the officers who benefited from the law was the Lieutenant of the vessel Astiz.

President Menem pardoned, in October 1989 and December 1990, the last remaining leaders of the dictatorship. Menem's predecessor, President Alfonsin, at that time described the decision as erroneous and as a "step backwards". The public statements of former generals Videla (sentenced to life imprisonment for human rights violations) and Viola (sentenced to 16 years' imprisonment) in which they claimed that the armed forces had acted in order to "conquer subversion" during the dictatorship and requested that they be offered a gesture of "compensation", reopened the debate which the pardon, described as the "ultimate contribution to the achievement of national peace", was intended to help the nation forget. Currently, the only members of the military still in jail are those who participated in the *carapintada* (painted faces) movement of 4 December 1990, one year after they had been pardoned.

Such difficulties reflect the ambiguity surrounding a process in which the request for amnesty by the military leaders in the name of *"esprit de corps"* is more indicative of a desire to rehabilitate the disgraced officers than of a legitimate desire for reconciliation. On the occasion of Armed Forces Day, 29 May 1990, the ground forces chief of staff at the time himself affirmed that "the presidential pardon of the military leaders will contribute to the achievement of peace and will serve to acknowledge the efforts of the armed forces in conquering subversion".

2 - Brazil

Although the return to civilian rule was not completed until the presidential elections of 1985, the gradual restoration of freedoms had already begun in 1978 with the abolition of Constitutional Act No. 5, which had served as a basis for exceptional powers. During that same period, an amnesty law issued on 28 August 1979 enabled the military to throw a blanket of oblivion over the acts which had been committed during the worst years of the dictatorship. Hence, Brazil's self-granted amnesty both preceded and conditioned the democratization process.

3 - Uruguay

President Sanguinetti entered office on 1 March 1985, succeeding the outgoing military regime, and in December 1986 sponsored the adoption of what is known as the "Caducity" law, which granted amnesty for the acts of repression committed during the dictatorship (1973-1985) by civilian and military leaders. This law, which was intended to finalize the transition to democracy, was similar to the "Naval Club Agreement" concluded in 1984 with the military, according to which civilian rule would be negotiated in exchange for an agreement not to file charges against army leaders.

This amnesty was a counterpart to the one granted in 1985 to the former "Tupamaros" guerrillas, who, for their part, had been prosecuted and sentenced by the military government. According to Section 1 of the law, "recognizing that, in pursuing the line of reasoning contained in the agreement reached between the political parties and the armed forces in August 1984, and for the purpose of finalizing the transition towards the complete restoration of a constitutional order, the punitive power of the State is hereby rendered null and void with respect to the offences committed before 1 March 1985 by the members of the military and the police, or by those acting on their behalf, for political reasons, or to carry out actions ordered by the authorities in power during the dictatorship". Judges are required, in all trials, to request the President's opinion concerning the applicability of Section 1 of the law to the case in

question. In the event of an affirmative reply, the case must be dismissed. The only exception to this is in cases of enforced disappearance and abduction of minors, in which the President must himself proceed to an inquiry "with a view to clarifying these facts" within four months.

One attempt to call the 1986 amnesty law into question was made by a popular referendum held on 16 April 1989; the vote itself, however, reflected the wishes of the majority (60 per cent) to let go of the past, rather than to jeopardize the future of the still fragile democratic institutions. It is worth noting that in Montevideo, the majority of voters were against the amnesty law.

Since then, the debate over impunity has not resurfaced. Following the 1989 elections, the new president of the Blanco Party continued the efforts of his predecessor, a member of the Colorado Party, to achieve national reconciliation by affirming the pre-eminence of civilian rule.

4 - Paraguay

The process of democratic transition which began on 3 February 1989, following the coup d'Etat led by General Rodriguez and ending the dictatorship of General Stroessner, was not accompanied by decisions to punish the serious human rights violations committed during the previous regime. The perpetrators of crimes committed during the dictatorship, at least for the time being, enjoy total impunity, following the example of General Stroessner, who is exiled in Brazil and of General Duarte Vera, who remains Ambassador of Paraguay to Bolivia.

Nevertheless, some twenty lawsuits for alleged torture have already been filed by the families of victims, although to date, only one sentence has been handed down and it remains under appeal. Countless other cases have not been brought before the courts, some of which point to the widespread corruption still prevalent within the magistrature. In the meantime, the lawyers of the former officials generate enough legal red tape and delaying tactics to dissuade even the boldest of the families of victims. These lawyers

argue that cases filed for human rights violations which took place during the 1960s and 1970s should be dropped because the statute of limitations for these crimes has expired. However, the Attorney General ruled that statutory limitations do not apply to human rights violations committed by members of the former government, who enjoyed special privileges until the overthrow of the government in 1989.

The 1993 presidential elections will offer a fresh look at the issue of amnesty, which has not been reviewed since 1989. One of the Colorado Party candidates, Mr. Wasmosy, who is interested in gaining the favour of members of the previous regime within the army and industry, announced that, once elected, he would undertake to sponsor the passage of a *"Punto final"* law. His comments were: "Why dig up the past? I prefer to turn the page and look to the future with optimism." Other leaders have rejected what they refer to as a "legal aberration", which would "legitimize the acts of theft, fraud and torture committed by the thieves and police of the Stroessner tyranny". In the views of one independent candidate: "In order to heal the wounds, justice must be done."

The concessions made to the former government by the current leaders are too heavy to allow the debate to be clearly formulated at this time, both in terms of the principles involved and the application of justice to the human rights issues in question. However, according to the latest Amnesty International Report, a criminal court judge ordered former President Stroessner to be detained on charges of moral responsibility for the death of a victim of torture in 1974. When the general failed to appear, the judge charged him with contempt of court in August 1992.

5 - Chile

By April 1978, the military government had already adopted an amnesty law for the perpetrators of crimes and offences committed since the 1973 coup. The government of President Aylwin, which assumed power in March 1990, did not call the amnesty law into question.

In May, the President created a "truth and reconciliation" commission by means of an executive order, dated 25 April 1990, whose purpose was to shed light on the most serious instances of human rights violations. Although the commission had no judicial function, nor competence to determine individual responsibility, it was charged with "recommending fair measures of compensation", as well as "recommending the legal measures to be taken in order to prevent any new violations". As emphasized in the order to create the commission: "Only on the basis of truth will it be possible to satisfy the basic requirements of justice and create the necessary conditions for true national reconciliation." The 2'000-page report was submitted in February 1991, a summary of which was distributed and translated under the title *"Para creer en Chile"* ("Believe in Chile"), at the initiative of a "national educational campaign for truth and human rights" led by the Chilean Human Rights Commission, the IDEAS Centre and the Ministry of Foreign Relations.

Some cases eventually came to trial, either because they involved events which took place outside the country, as in the Letelier case, or because they concerned facts which occurred after the 1978 amnesty law. The former Director of the DINA and his deputy were arrested in September 1991 in connection with this assassination.

Finally, a law was issued on 31 January 1992 to create "a national corporation for compensation and reconciliation". In accordance with the recommendations of the report, the corporation was given a mandate of two years to encourage and co-ordinate moral and material compensation (such as pensions, health and educational assistance) to victims and their families.

6 - El Salvador

The model of the independent commission of inquiry used by Argentina and Chile was endorsed by the United Nations Mediator for El Salvador. The Mexico Agreement of April 1991, concluded between the government and the National Liberation Front, provided for the creation of a "truth commission", which was

reiterated in the peace accords of 16 January 1992. The three-member commission, which included Professor Thomas Buergenthal, former President of the Inter-American Court of Human Rights, was appointed by the UN Secretary-General to investigate the "most serious acts of violence" that have occurred since 1980, such as the assassination of Archbishop Romero. The commission was set up in July and was instructed to submit its report by the following January, at the end of six months of work.

Part Two

The Situation in Africa

The process of democratization currently under way in a number of African countries has led, in some cases, to political upheaval. Decisions concerning what type of attitude to adopt towards the former leaders is a problem facing the new governments and one which is made all the more difficult by the fact that some leaders have claimed responsibility for serious economic or human rights offences.

The concern for "national reconciliation" in the transition towards democracy has generally taken precedence over other considerations. This desire for political tranquillity may also be explained by the refusal to systematically investigate members of outgoing governments, for the simple reason that many current leaders are more or less directly descended from them. The few trials which have been conducted in order to punish the former leaders remain limited in number.

1 - Guinea

Since the political changeover which took place in April 1984, the government has carefully chosen to avoid taking any action against the former officials of the Sékou Touré regime. It is worth noting that this stance of appeasement was not maintained following the crushing of an attempted coup in 1985.

Not only did the authorities reject the claims of certain opposition parties within the National Conference which were critical of the regime, but they also sought to keep a tight lid on the political and ethnic frustrations aroused by the former regime, going so far as to appoint a former police officer under Sékou Touré, as Minister of the Interior.

2 - Benin

The situation in Benin provides a particularly interesting example of a successful first political transition in black Africa. The Benin National Conference, which met in February 1990, was able to make a non-violent transition from a Marxist-Leninist dictatorship to a pluralist democracy in the space of ten days.

The previous government had adopted appeasement measures in advance of the National Conference in an attempt to secure a more favourable position for itself with respect to the change it saw as inevitable. These measures included:

- a national amnesty law which permitted the return of exiled citizens;
- the formation of a human rights commission whose independence was guaranteed by law;
- the creation of a commission to audit the assets of government officials.

The National Conference enlarged these measures with a new amnesty law, a new audit commission, a decree ordering the restitution of illegally obtained assets, and a decree ordering the reinstatement of military personnel who had been victimized by the previous government.

This implicit trial of the former government was nevertheless weakened by a note of compromise, in the form of a personal immunity law covering all of the acts committed by President Kérékou since he seized power in 1972 until the end of the transition period. The law was passed on 12 April 1991, following the

presidential elections which signalled the defeat of the former President. In addition to the political shift which has taken place, is also important to note that a policy aimed at raising the moral standards of public servants has made slow, but steady progress.

The commission set up to audit the officials of the former government has made little headway and the ten or so individuals accused were indicted on the basis of investigations conducted by the former government itself. Among those indicted were two officers of the praetorian guard, accused of drug trafficking, and one former minister of the interior.

To date, the only trial to be held is that of Mr. Cissé, the marabout of the former President. He was tried by the Court of Assizes of Cotonou along with his accomplices, two former ministers, on charges of embezzlement, and was sentenced to ten years in prison. This trial is the first to reveal the mechanisms used by former government officials to pillage the nation and serves to illustrate the fact that government officials should be held accountable for their handling of public affairs.

According to the latest Amnesty International Report, "The immunity granted to former President Kérékou provoked protest in view of the many cases of torture and killing of prisoners which had occurred under his government." But the report also indicates that two senior security officials were arrested in August and charged with murder, embezzlement and torture, following a complaint lodged by a former prisoner concerning the death of one of his fellow inmates in 1984.

3 - Mali

President Moussa Traoré, who had held power for 23 years, was overthrown by the army in March 1991, following a number of large pro-democracy demonstrations which were violently suppressed. Once again, the need for national reconciliation prevailed, although former President Traoré and his minister of the interior were the defendants in a public trial, which is still under way, on charges of corruption and conspiracy to murder in the massacre of the

March 1991 demonstrators. The charge of *"crime de sang"* ("blood crime") served as a catalyst for a flood of lawsuits against a number of senior officials, although there was a tendency to spare the army, as witnessed by the "total and personal" immunity granted in September 1992 to General Touré, who had led the government of the "Transitional Committee for the Salvation of the People" following the overthrow of President Traoré.

4 - Congo

The National Conference held in February 1991 debated the country's future and the human rights violations that had occurred since 1960, which included some 3'000 politically motivated killings, including that of the Archbishop of Brazzaville in 1977.

At the request of President Sassou-Nguesso, the Conference declared a general amnesty for all those responsible for political crimes or human rights violations as a means of encouraging national reconciliation. No investigations into past human rights violations were begun.

A new constitution was adopted following the transition period, during which the State security agency (DGSE) was dissolved and the Revolutionary Court of Justice abolished.

After the August 1992 political upheaval, the new leader also declared a general amnesty, as well as granting "special status" to the former Chief of State General Sassou-Nguesso in the form of an immunity covering his entire term of office.

Part Three

The Situation in Asia

National differences are even more pronounced in Asia, where democratization remains a marginal phenomenon. Authoritarian regimes continue to exist, under the pretext of economic liberalism and free capitalism, next to the last remaining Marxist powers on the planet and following the collapse of communism in Europe. The

growing militarization of the region, originating from past Cold War tensions and new regional rivalries, further reduces the chances of an emerging "civil society" to challenge the current political, economic and military powers. Moreover, the demographic and economic importance of the continent lead its spokesmen to question the term "universal values", and to favour instead an Asian version of human rights in which society takes precedence over the individual.

1 - Bangladesh

The 1971 war of independence was first and foremost a merciless civil war, which ended with a death toll of between one and three million Bangladeshis. After secession, the majority party of the new State, the Awami League, promised to try the war criminals and their collaborators. Yet, although more than 30'000 charges were filed as of March 1972, when the special courts were set up, only 2'850 persons were tried, and of these, 2'100 were released, and only 750 convicted. A general amnesty was declared on 30 November 1973.

In 1975, a presidential order was issued abolishing the collaboration law and restoring the civil rights of the former collaborators, while the law prohibiting religious parties was repealed in 1976. All of the orders issued under the martial law which lasted from 15 August 1975 to 9 April 1979, were incorporated in a constitutional amendment adopted in April 1979.

Following the assassination on 15 August 1975 of President Mujibur Rahman and some 40 persons surrounding him by armoured tanks, the new President issued an order on 26 September 1975 which granted amnesty to the officers responsible. This decision was also codified in Constitutional Amendment No. 5. Following a series of violent uprisings, the officers negotiated for their exile to Libya, as did the two leaders of the Sheikh Mujib assassination, who remained in Tripoli until 1986, while others secured diplomatic posts from General Ziaur Rahman, who ruled the country from 1975 to 1981. The Awami League, which since 1981 has been led by Sheikh Mujib's daughter, has made the repeal of this amnesty ordinance the

central theme of its political platform. In August 1991, the League even submitted a bill to lift the constitutional immunity benefiting the assassins of Bangladesh's first president. The bill is being considered by an *ad hoc* parliamentary commission.

On 15 May 1981, President Ziaur Rahman became the next victim of assassination, but this time punishment was swift. A dozen officers were tried *in camera* by an exceptional military tribunal and hung in September 1981. Soldiers participating or aiding in the assassination were also reportedly executed, following the coup led by General Ershad in March 1982. The former chief of staff had apparently hoped that this would eliminate all witnesses of the assassination which he was believed to have sponsored. The government which took power after the 1982 coup eventually crumbled under the weight of the opposition, which was provisionally united in October 1990. On 27 November, the army refused to enforce the state of emergency ordered by General Ershad to deal with the general strikes that were taking place. After being placed under house arrest, the General resigned on 6 December 1990. A commission to investigate wrongdoing during the Ershad regime was set up in December 1990 and delivered its report in March 1991. The former President has already been convicted on a number of counts – illegal possession of a dozen firearms (ten years), possession of funds exceeding his declared income (three years) – and is the defendant in ten or more proceedings under way, on charges of abuse of power, corruption and various other acts of wrongdoing, none of which, however, question his possible involvement in human rights violations committed between 1982 and 1990.

2 - The Philippines

The martial law declared in 1972 by the Marcos regime led to the militarization of the country, and, beginning in 1981, to the deployment of a network of paramilitary forces to put down any opposition. The army was given a free hand to commit human rights violations by virtue of Executive Order 1850, adopted on 4 October 1982, which ensured them impunity. The army continued to escape

criminal proceedings for human rights violations by virtue of the 1982 Order, which was not repealed until Republic Act 7055 was passed on 20 June 1991, which conferred jurisdiction in these matters to the civil courts. In addition, a Witness Protection Act was signed into law in April 1991.

Following the election of Mrs Aquino, a seven-member Presidential Human Rights Committee was created by Executive Order 8 of 16 March 1986 to investigate violations and promote human rights. The Committee, which is required to submit an annual report of its activities, recommended in its 1986 report, that all military promotions be subject to a Committee-led investigation and receipt of a certificate of good conduct. The procedure was apparently not implemented, however, until an Executive Order concerning officer promotions was issued on 30 August 1991.

The Committee was also set up to receive complaints concerning events which took place prior to and following the "February Revolution" involving public officials, but not those involving "rebels". Some 708 complaints were filed in 1986, of which 203 concerned events which occurred after the "Revolution".

In Article XIII, Section 17 of the Constitution of 3 February 1987, a five-member Commission on Human Rights, composed primarily of lawyers, was created to take over from the Presidential Committee, according to the modalities stipulated in Executive Order 163 of 5 May 1987. An entire structure was developed on the basis of this Order, particularly at the regional level.

The 1987 report pointed out that 1,463 complaints were registered over the course of that year. This figure increased to 1,629 new complaints in 1988, then to 2,315 in 1989 (of these, however, slightly more than half concerned events which had occurred that year). The 1989 report contains very detailed information on the types of violations and their statistical evolution; it also discusses their potential legal consequences and the issue of assistance for victims. The Commission is also empowered to consider future violations. It continues to propose reforms, sometimes in connection with the parliamentary commission, such as the bill to create a human rights

court for each province, which was presented in 1990, or to give advisory opinions on proposed legislation.

Yet the protection afforded the military under Executive Order 1850 has for a long time hampered all effective control, as pointed out in the 1992 Amnesty International Report. Thus, concerning the few cases in which military personnel were convicted for human rights violations, the Commission was not able to provide "very accurate information ... since all offences with very few exceptions ... are triable by courts martial". However, the separation of the police and armed forces, effective January 1993, should help to monitor military activities in the future.

Contrary to other ASEAN member States, the Philippines does not insist upon any Asian particularity with respect to human rights, since the new leader's moral reasoning is largely inspired by the Catholic Church. Yet, there is some concern about the current status of human rights in the country, given the continuing presence of communist and Islamic revolts, as well as the existence of private militias for wealthy landowners, which confront the country's weak executive. The army itself remains a threat, as evidenced by the numerous attempted coups since 1986, which have forced the civilian administration for years to close its eyes to the acts of extortion that have been committed, given the fact that the 1982 Executive Order remains in force. To make matters worse, the Commission on Human Rights has itself been widely criticized, despite the fact that its efforts at transparency have enabled national and international NGOs to report human rights abuses which would be ignored in neighbouring countries.

3 - Thailand

As the last remaining Buddhist kingdom in a region devastated by communism, Thailand's situation is a unique combination of feudalism and tolerance. Its army is the self-appointed guarantor of this hierarchical order, which has been preserved from colonialism and other outside influences. Yet, no less than 17 coups d'Etat have occurred since the one which ended the absolute monarchy in 1932,

most notable among which was the bloody suppression of the pro-democracy student movement in 1976. Because the notions of individual safety and pardon in this country are closely linked, the leaders of the coups and members of the communist rebellion were granted amnesty. In the case of Admiral Prapas, one of the chief instigators of the 1976 student crushing, retirement as a priest in a Buddhist monastery was equivalent to a pardon in the eyes of the population.

In May 1992, the army fired upon demonstrators calling for constitutional reforms to remove the military from public office, killing hundreds. As in 1976, the response was a royal amnesty, dated 20 May 1992, which was extended to the demonstrators and the army alike. This amnesty law was criticized for its implicit pardon of the military, which was impossible to accept as justice. However, a commission of inquiry was formed and the chief military officials were discharged. In addition, amendments made to the Constitution since June by the royally-appointed interim government have considerably reduced military influence, particularly with respect to the administration of public enterprises. The elections of 13 September, which resulted in a majority vote for the pro-democracy parties that had opposed the military in May, confirm the desire to gain control over the armed forces within Thai politics. The new government decided unanimously on 21 November 1992 to refer the matter of the amnesty granted to the generals responsible for the violent crushing of last May to the constitutional court, thereby attempting to pose the problem in legal terms.

4 - Indonesia

The situation in Timor is particularly critical and the official report on the "Dili incident" which occurred on 12 November 1991 is, at best, ambiguous. In fact, the Dili massacre led almost immediately to the creation, by executive order, of a seven-member "National Commission of Inquiry", which took up its duties on 21 November 1991. After gathering information in Jakarta and then in Dili, the

Commission described its work as having been carried out "freely, meticulously, fairly and thoroughly, in order to obtain information and the objective facts concerning the incident of 12 November in Dili". The report, however, does not mention the fact that the Commission was composed exclusively of public officials, the majority of whom were members of the military.

Stating that it "did not conduct an inquiry", the Commission did interview the principal ministers before proceeding to uncover "132 witnesses" (although it admitted that other witnesses may have been dissuaded owing to "fear") and was able to make several reconstructions of events.

The preliminary report, dated 26 December 1991, contains the immediate conclusions drawn by the army, which claimed that a violent riot had been provoked by the Fretelin, requiring that the soldiers defend themselves. The Commission described the chronology of events in terms of the following "generalities": "The rapid progress in education has produced a large number of diplomats who are currently in need of jobs. This is one reason why some of them have been easy targets for the propaganda of the anti-integration groups (Fretelin agitators)." The report also traces the first demonstrations back to the visit of the Pope in October 1989, then to that of the U.S. Ambassador in January 1990, and even to the visit of a Portuguese delegation, "while taking advantage" of the presence of Professor Kooijmans, the Special Rapporteur of the United Nations Commission on Human Rights.

As far as the massacre itself is concerned, which is described as a "deplorable accident", the report does nothing more than juxtapose the various versions it gathered, mentioning the role played by certain "uncontrolled" police units, describing shots "fired out of emotion by a group of plainclothes, off-duty security officers who found themselves in an irregular position". According to the Commission, the death toll was approximately 50, contrary to the initial figure of 19 announced by the army's chief commander. The Commission concluded that all persons implicated in the incident should be punished in accordance with the law.

5 - Cambodia

The intervention of the United Nations in setting up a temporary UN Transitional Authority in Cambodia (UNTAC) has placed this country in an exceptional situation, and is indicative of the tragedy its people have had to endure.

In the beginning, the search for a comprehensive and peaceful solution to the fratricidal conflict, marked by the exactions of the Khmer Rouge between 1975 and 1979, pointed to the need for national reconciliation. In the absence of a military solution, which was evidence that the long Vietnamese occupation had failed, it was decided that all parties would be brought together at the negotiating table where the Paris Agreement was eventually reached. The return to peace indeed appeared to require the participation of everyone, except for the most conspicuous leaders, in the country's political future.

After the UN-supervised elections, which are planned for the spring of 1993, it will fall to the newly-elected government to decide the fate of those responsible for the acts of genocide which were committed. There is nothing in the peace plan to prevent the future government from bringing those responsible to justice before either a national or an international court.

According to Article 16 of the Paris Agreement, the UNTAC – the human rights component of which has been headed since 1992 by Dennis McNamara (New Zealand) – is responsible, during the transition, for ensuring an environment guaranteeing the respect of human rights through administrative inspection, investigation of complaints and educational programmes.

Part Four

The Situation in Central and Eastern Europe

The collapse of the communist regimes which were established more than 40 years ago poses a number of basic problems with respect to dealing with the past.

Should the new democracies, which are sometimes the result of a gradual process of internal "liberalization" and "democratization" of the previous governments, maintain legal continuity with the latter, or should they make a clean break? Moreover, should the actions of former government leaders and dignitaries be called into question, even if such actions were considered "legitimate" according to the formal legal structures in place at the time and recognized as such by the international community, but supported by a State apparatus based on force, leaving no room for democratic legitimacy resulting from free elections?

Given these circumstances, does not the sole fact of having exercised authoritarian power automatically entail wrongdoing? Or is it the manner in which the power was exercised, together with the intentions and abuses to which it was put, that must be called into question? And in such a case, how should the hierarchy of responsibility be established as regards the political leaders who, while basing their power on repression, managed to remove themselves from the basic acts of the government, acts for which those who carried them out may be held accountable?

Finally, what consideration should be given to all those who participated in the totalitarian system, through its network of bureaucrats, militants and informants, but who were neither leaders nor those executing their orders?

How, in an invasive collective system which leaves no choice between adherence to the system and social marginalization, should individual responsibility be judged? What consideration should be given to "duplicity" and pledges to the enemy designed to deceive him better, or, on the contrary, to the traps of collaboration?

What allowance should be made for the amount of time that transpired, for the gradual disillusionment or sudden rebellion on the part of individuals who alone faced an omnipresent system which dictated the lives of everyone for two generations?

A country's legal situation is largely determined by such factors as whether the democratic transition is gradual and peaceful or

whether there are brutal attempts at repression on the part of the established government, as well as and whether formal conditions for the transfer of power are handled by maintaining legal continuity or by making a clean break. A political choice must also be made as to whether to let justice run its course or whether to choose national reconciliation instead, that is, whether to make amends for the past or simply "turn the page".

1 - Czechoslovakia

A "purification" law was adopted on 4 October 1991 to remove the former heads of the Communist Party and collaborators with the State security forces from the government and from politics. In contrast to the strong legalism of the judiciary, which explains the small number of proceedings instituted against the former leaders, stands a marked political determination to remove all who collaborated with the previous government from any post of responsibility, despite the warnings by President Havel against any "witch-hunts".

The number of lawsuits — at first — remained few in number, since they could only be initiated on the basis of the laws in effect at the time the acts were committed. The main count of these indictments was typically "abuse of power by a public official" and violation of individual liberties for the suppression of protest demonstrations in 1988 and 1989. During the trials, the government and the Party each accused the other of responsibility for these acts. Several former leaders were also charged with embezzlement and the illegal transfer of funds.

In contrast, statutory limitations applicable to the events of 1968, which date back to more than 20 years ago, have expired. However, an investigation conducted by the Ministry of Interior and rendered public in February 1992, enabled it to bring charges of "treason" against the former leaders who, "in conjunction with a former power", acted against the interests of their country and of peace. During the course of this investigation, Gustav Husak was given a hearing, but was then released (he died in November

1991). The eight defendants who are still alive were able to benefit from expiration of the statute of limitations for their crimes. Yet, a law dating from the 1950s on the protection of the peace stipulates the non-applicability of statutory limitations for crimes of this nature.

Lastly, a parliamentary commission was created in December 1989 to investigate the suppression of the 17 November 1989 demonstration. Its efforts led to the indictment of some 30 members of the police force, several of whom were tried in the spring of 1990 (receiving sentences of up to four years' imprisonment). The mandate of the parliamentary commission was renewed following the June 1990 elections. Its report, which was debated on 30 January 1992, broadened the original investigation with access to Ministry of Interior archives, and began a review into the past actions of senior political officials.

The political clean-up was initially carried out empirically, during the legislative elections of June 1990, when the candidates agreed to the "purification" of their past, by signing a declaration that they had never collaborated with the State security forces. The same verification process was carried out during the November municipal elections, forcing a number of members of Parliament, as well as officials and ministers, to resign following the investigations. The method has, however, been criticized. According to Alexandr Dubcek, President of the Federal Assembly, the disclosures of the parliamentary commission called into question the presumption of innocence.

A bill which attempted to provide a legal framework for the system, at the same time extended it to all decision-making posts within the administration, including the army, the judiciary, the television system, etc. This "purification" law established "a number of conditions for obtaining certain posts within the agencies and organisations of the State". These included: not having collaborated with the State security forces and not having held a post of responsibility within the Communist Party, except between 1 January 1968 and 1 May 1969. These conditions also apply to newly

recruited persons, as well as to those already employed, both of whom are subject to dismissal until 31 December 1996.

This law has been widely criticized. By considering categories of persons instead of individual cases and by establishing a presumption of guilt, with no recourse to appeal for those who feel they are being unjustly accused, it is difficult to see how this law is compatible with human rights guarantees enshrined in the European Convention of Human Rights, which was ratified by Czechoslovakia. In practice, the fact that 200'000 requests for certificates have been received by the Commission and that only a handful have been examined, has created a climate of suspicion made worse by leaks in the press and political campaigns. The crisis has also affected the heads of the judiciary, with the removal of the Czech Minister of Justice in December 1961, the Czech attorney general in March 1992 (he has since become President of the National Slovak Council), and the Czech attorney general in August 1992, for their lack of activism in the procedures.

2 - Hungary

Two bills have been under consideration by the Hungarian Parliament: one concerns lifting statutory limitations for certain crimes committed between 1944 and 1990, and the other deals with the ties between the former secret service and political leaders and senior government officials.

The law to lift statutory limitations, adopted by the Parliament on 4 November 1991, was declared unconstitutional on 3 March 1992 by the Constitutional Court, which had been convened by the President. The Court held that the applicable statute of limitation could only be the one prescribed by law at the time the acts were committed, in accordance with the non-retroactivity principle. The Court drew attention to the ambiguity of the law which it labelled "vague and unreliable", when it held that: "A crime committed in the past cannot be judged today. The former system is to blame for not having punished certain acts. The State may be considered guilty, but not the individual." Following this decision, the President expressed a

desire for "the country to continue exploring its past", while at the same time waiving criminal sanctions. In order to accomplish this, he proposed the creation of a historical committee to prepare a report which would "promote the search for the truth" and establish individual responsibility. Unfortunately, this proposal was never implemented and the debate on statutory limitations seems to be over.

To date, the law on the secret service has not been passed either. The first version, presented in March 1992, gave rise to differences of opinion over definition of which groups to investigate. A new version is to be presented during the autumn session of the Parliament.

3 - Bulgaria

There has been no general law for the elimination of communism in Bulgaria. Only scattered measures. The National Assembly decided on 29 February 1992, to create a "temporary commission of inquiry into the actions of the Communist Party", with respect to the process to forcibly assimilate the Islamic minority, which was begun in the 1960s.

A banking law of 18 March 1992 contains a provision which excludes the following persons from the leading institutions for a five-year period: "all persons who for the past 15 years were elected to the central, regional, departmental, municipal or communal bodies of the Bulgarian Communist Party, the Dimitrovian Communist Union of Youth, the National Front, the Union of Active Combatants against Fascism and Capitalism, the Union of Bulgarian Trade Unions and the Bulgarian Popular Agricultural Union, or, who were appointed to permanent leadership posts within the Central Committee of the Bulgarian Communist Party, as well as paid and unpaid government officials of the State Security Forces".

In addition, political trials have been conducted at the highest levels, as evidenced by the fact that Mr. Todor Jivkov, who led Bulgaria from 1954 to 1989, and is now 81 years old, was sentenced on 5 October 1992 to seven years' imprisonment for misappropriation

of public funds. He is required to pay back the equivalent of US$ 1 million, becoming the first former communist head of State to be handed such a sentence. The judges ruled four to three in favour of this sentence (the one opinion against is expected to be published soon). The prosecution had requested a ten-year prison sentence. The defence and the prosecution decided to appeal. Another former member of the Politburo, Mr. Balev, was sentenced to two years in prison for currency dealings.

Mr Jivkov is awaiting trial on charges of espionage, the creation of two labour camps where 149 persons are alleged to have died between 1959 and 1962, and his policy to forcibly assimilate the Islamic minority between 1984 and 1989. Mr Jivkov's close relations are also under investigation and three former prime ministers, Mr Filipov, Mr Atanasov and Mr Lukanov, have been arrested.

4 - Romania

The elimination of communism in Romania has elicited great controversy and the murder of several former accomplices of the communist leaders still in office, violates the most basic requirements of the Rule of Law. Following the summary trial of Mr Ceausescu and his wife, the Romanian authorities conducted two other trials: one for the officers who suppressed the Timisoara uprisings and one for the leaders of the former communist State.

On 9 December 1991, the military tribunal in the Timisoara trial handed down a series of seven sentences (ranging from 18 to 25 years' imprisonment), while releasing 16 other accused individuals (nine of which benefited from the amnesty law of January 1990). One of the principal accused, General Macri, died during the course of the trial.

As regards the trial of the Central Committee, the sentence handed down on 25 March 1991 by the Bucharest Military Tribunal was the subject of an extraordinary appeal by the Attorney General before the Supreme Court of Justice, which according to a vote taken on 12 December 1991, changed the initial charge from "genocide" to "conspiracy to commit murder with aggravating

circumstances". The sentences finally handed down by the Supreme Court in April 1992 range from 8 to 16 years' imprisonment for some 20 officials, with lesser sentences for those accused of "conspiracy for attempted murder with aggravating circumstances". The former Minister of Foreign Affairs, Mr Ion Totu, reportedly committed suicide the day after the verdict, which sentenced him to 16 years' imprisonment, was pronounced.

Mr Nicu Ceausescu was an exceptional case. The initial 16-year sentence for "genocide" he received on 3 June 1991 was quashed on 27 June 1992, following appeals made by the defendant and the Attorney General. The Supreme Court also revised its charge to "incitement to murder with aggravating circumstances". There will be a retrial pending further investigation.

The Romanian authorities have in fact chosen to limit their accusations to the period following the overthrow of the government, between 17 and 22 December, without calling into question the 25 years of government itself. No commission has been set up to investigate past human rights violations or to question the practices of the *Securitate.* The purpose of the trials was simply to put on a show which would serve as a collective catharsis at the expense of a few scapegoats. The Parliament made an attempt to set up a commission of inquiry after ethnic violence occurred in Tirgu Mures in March 1990 and after the break up of demonstrations in June 1990 in Bucharest, but these reports did not manage to assign any responsibility. The lack of a political clean-up has meant that several former *Securitate* agents continue working within the new Romanian Intelligence Service.

TOPIC 1

Historical and Ethical Reflections with Regard to the Basis of Human Rights

Democracy and the Rule of Law in the Face of Totalitarianism and Barbarism

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I sincerely congratulate those responsible for convening this important and timely international meeting. I am honoured to have been invited to participate by contributing a few brief reflections on the topic of the principles of human rights, and specifically, on the role of democracy and the Rule of Law in opposing totalitarianism and barbarism. To these, I would also add the risk of forgetting the past and the temptation of impunity for perpetrators of crimes against the life and dignity of the person as well as other human and peoples' basic rights.

I admit that when I received the invitation to participate in this thought-provoking meeting, I was hoping to be able to address the third topic which concerns legal standards and possible ways of combining the need to bring the perpetrators of human rights violations to justice — putting aside the risk of impunity — with equanimity as regards punishment and, above all, with the adoption of measures — sometimes crucial ones — to achieve national reconciliation and create a democratic State capable of generating lasting harmony and peace.

That approach would have allowed me to call upon the experience of Spain and its transition from an autocracy to a democratic political government based on the Rule of Law - not just any law, but an equitable law guaranteeing the basic rights of all citizens and in this way avoiding the threat of a new civil war.

This fortunate result was achieved through dialogue between the most ideologically opposed factions, firm efforts to obtain mutual understanding, and reconciliation through the establishment of reciprocal amnesties and creative solidarities. It was not a matter of forgetting the past, but rather of excluding an on-going attitude of resentment towards the past, and towards the national tragedy of the civil war which lasted from 1936 to 1939 and its painful consequences. If Spain had not taken this approach, today it would have neither democracy nor the Rule of Law, but interminable chaos and violence instead. Peace — with its advantages and disadvantages — was possible because the country looked to the future, and collectively forged a system of human coexistence, based not on forgetting the past, but on overcoming rancour, and clearing the way for freedom, justice and solidarity.

I will say no more on this topic, my esteemed colleagues and friends, because upon receiving the programme for the meeting, I realized that my public meditation in this historic building — the Palais des Nations — would be briefly limited to the subject of the principles of human rights and, specifically, the role of democracy and the Rule of Law in permanent opposition to that which the world urges and enjoins us to oppose; namely, those acts which violate liberty, equality and peace. (I confess that after listening to the excellent remarks of my colleague and friend Adama Dieng — Secretary-General of our ICJ — on the role of democracy and the Rule of Law, I feel there is little else I can add.)

With respect to the first topic — that of the principles of human rights — which was the subject-matter of my university teaching (as Professor of Law Philosophy), I will simply recall that once having overcome the respectable — but futile dispute — between the "naturalists" and the "positivists", what matters most today is that basic human rights — not only the classic rights of freedom, but also those of equality and solidarity — have, through the tragedy of the Second World War, achieved the patent and objective recognition of the "collective conscience". This was reflected in the United Nation's Universal Declaration of Human Rights of 10 December 1948, and later, in the International Covenants of 16 December 1966 — on civil

and political rights and on economic, social and cultural rights —, making them imperative for all States and requiring their effective implementation against all violations, whether caused by action or omission.

Respect for **all** of those rights — (the word all here is underlined to indicate the universality of their content and territorial scope of application) — is an essential and irreplaceable condition for guaranteeing the life and dignity of each human being, without discrimination, but also for the peace of all peoples (as reiterated in the preambles of these international instruments, and those of other complementary declarations and conventions). Those who violate these fundamental rights irrefutably commit injustices, and these injustices demand reparation; in addition, they are perpetrators of violence, sowers of the seeds of hatred, and saboteurs of authentic peace.

From that perspective, impunity is illegitimate, and what we can and should do is to repudiate its practice in the numerous countries in which it exists, as recalled by Amnesty International in its grave report for the year 1992. We should lament the fact that the protection of basic human rights (and I repeat, not only those of liberty, but also of equality and solidarity) today is unfortunately precarious (I would dare to say this protection is superficial, and failing this, then it is almost always merely rhetorical or ornamental).

It is becoming increasingly urgent to establish a judicial system within the framework of the United Nations (in connection with the International Court of Justice), to try and punish, not only the so-called "war crimes", but also gross and systematic violations of the human rights recognized and proclaimed in the International Covenants. The efforts of the UN International Law Commission in this area are to be applauded.

Also urgently needed is a system of severe, but not cruel, penalties, which categorically excludes the maintenance or reinstatement of the death penalty, even against terrorists. In any case, impunity must not be tolerated; emphasis should be placed on bringing the

perpetrators of those crimes to justice, rehabilitating the convicts, granting gradual amnesties or pardons for the purposes of national pacification, and providing compensation to the victims or their relatives.

With respect to the second part of the topic, I will simply say — owing to obvious time limitations — that without the establishment of democracy and the accompanying structures and institutions of the Rule of Law, the protection of human rights in each nation is devoid of meaning. Confronted with the risk of totalitarianism — either old or new — and faced with the barbarism of terrorism, drug trafficking, abuse and mistreatment of children, immigrants and refugees (to mention only a few of the more inhumane examples), it is important to note that the establishment of a democracy is a necessary condition, but it is not, in and of itself, sufficient.

We are all called to reflect upon the current fragility of many democratic governments, and on the need to forge sound democracies which are truly pluralist, participatory and transparent with regard to the actions of political parties and all institutional organizations. Democracy cannot exist solely as a structure for the organization of powers; it must also be a way of collective living, a public ethic. As regards the Rule of Law, it is important that it be qualified as the "social" Rule of Law. A State without freedoms is inhumane and in no way acceptable at the close of the twentieth century. A liberal State, in the classic sense, as true protector of the freedoms of its citizens, but not as promoter of equality and solidarity, is equally unacceptable. The establishment of a genuinely social and democratic Rule of Law for the protection of human rights and peace is the great challenge facing us in this closing century and millennium.

I shall conclude with the hope that as a result of this promising meeting, ways will be found to combine all of these values, as well as to improve the system for protecting the human rights which incorporate those values. Ways — esteemed colleagues and friends — in which the need for punishment does not prevail over the need for national reconciliation; nor does the yearning for

harmony shelter illegitimate acts of impunity. Not through "forgetting" the past, but rather through the preservation of a historical memory, undistorted by ideological judgements. This is a difficult challenge, but not an impossible one. It lifts my spirits to read in the Holy Bible (Psalms 85, 11 and 12) the prediction that "Kindness and Truth shall meet; justice and peace shall kiss". So be it!

Pardon, Oversight, Revenge, Equitable Punishment, Responsibility

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The concept of human rights involves an intertwined relationship, first, between the State and individuals within its jurisdiction; second, among individuals themselves governed by the State; and third, between the State and the international community. The promotion and protection of human dignity is an irrevocable responsibility of every State as well as non-State entity. While the notion of State responsibility is well known, the responsibility of non-State entities is not so well known but well established by the soft law (rules of morality)[1] as well as by the hard law (provisions of the International Bill of Human Rights).[2] Although every State is

1 In some schools of thought (Hindu philosophy, for instance), a wrongdoer has to pay a price for his wrongful acts not only in his life time but also after that. He would not be able to attain *moksha* (salvation) and his heirs would inherit his liability in the sense that the society would suspect their *sanskaras* (cultural credentials). Also this doctrine of pious obligation makes a son liable for a parental debt on the basis of the same philosophy.

2 See, in particular, Article 5 (1) of the International Covenant on Civil and Political Rights which reads as follows: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." See generally Erica-Irene A. Daes, *Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitation s on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights* (New York, 1990), U.N. Sales N° E.89.XIV, 5.

expected to discharge this responsibility with the help of the hard law, the rules of morality play a significant role in the process. There is a paradox: "a common standard of achievement" formulated by the international community goes along with the variant standards of morality adopted by different societies at different points of time. This paradox is compounded by the facts that human rights is a dynamic concept; that it promotes pluralism at the ideological, intellectual and functional levels; and that the social needs change from time to time and from place to place. It is in the background of this compounding paradox that we address the problem of amnesty to the violators of human rights.[3]

While domestic debates on the granting of amnesty to the perpetrators of human rights violations mainly address the question of the desirability of such a course of action in a political perspective, international debates focus on the legality of that course in a humanist perspective. Is amnesty for the perpetrators of human rights violations just a question of politics or law? Or, does it also include issues as subtle as morality of law and psychology of surrender? Although promotion and protection of human rights is a matter of universal concern, can we lay down universal standards for determining the validity of amnesty laws or indemnity clauses? How to strike a balance between the forced necessity to recognize the political reality of the power base of the perpetrators of human rights violations and the universal urge to establish their accountability for their wrongs? At what stage should we pardon a perpetrator of human rights violations? Should we grant an absolute pardon or a qualified one? What do we do with those perpetrators who leave their country after committing violations? What do we do with those people who violate the law during the course of their own human rights struggle and are charged with crimes against the State, such as sedition, attempt to overthrow the government, provocation of

3 Although the words 'amnesty', 'impunity', 'indemnity', 'exoneration', forgetfulness', 'forgiveness' and 'pardon' have different meanings, they are used here interchangeably because all of them imply the absence of punishment for the guilty.

demonstration, destruction of public property, etc.? What is the just punishment for a human rights violator and a law breaker?

These and other cognate questions need to be addressed not only from a legal, human rights perspective, but also from a non-legal, political perspective. A comprehensive but case by case approach, not merely based on legitimate legal claims and emotional feelings but also on unpleasant realities, may help us in seeking less counter-productive solutions. This paper first addresses leading issues on the subject, then attempts to outline a new approach, avoiding ideological extremes, and lastly tests that approach by referring to some striking cases of gross violations of human rights.

A breach of responsibility entails liability to make good the breach. The nature and extent of liability of course depends on the nature of the breach in question. What is the nature of liability arising out of the breach of respect for human dignity? Human rights violations are widespread and wide-ranging, from the denial of a passport to the torture of an innocent person. While the former is an arbitrary act of omission giving rise to no more than a civil liability, the latter is an offensive act of commission giving rise to a criminal liability. The nature of State liability for human rights violations, whether civil or criminal, is different from that of the liability of a person who is accused of an illegal act of omission or commission in his individual capacity. The rationale is that the official capacity of a person endows him with a higher degree of responsibility and liability. The failure of the State machinery in establishing the liability of such a person (i.e. a State official) is not only a violation of the human rights of the aggrieved persons but also a breach of social understanding. Frankly, it amounts to a denial of the Rule of Law by the rulers of law. Any State having such a sorry state of the Rule of Law deserved destruction in the Lockean traditions.[4] In the modern era,

4 It finds expression in the third preambular paragraph of the Universal Declaration of Human Rights which reads as follows: "*Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."

however, the State concerned is subject to the process of national as well as international accountability. It has a sovereign responsibility to establish its authority in order to promote and protect human dignity of its subjects, and this is possible only when it establishes the liability of its defaulting agencies – be they individuals or institutions. If the State does not have the capacity and willingness to do that, then it looses an important attribute of its sovereignty, thus questioning its *locus standi* in the international community.

State is the *parens patrie* of its subjects and has an obligation to investigate in good faith allegations of human rights violations made by them. In fact, there is no need of an allegation for the activation of the State machinery for monitoring the state of human rights. The monitoring role is an integral part of State responsibility at the domestic as well as international level. The main purpose of the reporting procedures laid down in the various international human rights instruments is to regularly reaffirm State responsibility for the promotion of human rights and also for the submission of information on the state of human rights.[5] How can a State meet that responsibility without collecting and collating information on the subject?

In other words, the investigation of human rights violations, irrespective of the ensuing action, is a legal, moral and functional necessity, which survives any amnesty to the perpetrators of those violations. If for nothing else, the investigation of allegations gives an impression that the State concerned is striving to establish the Rule of Law.

The investigation of human rights violations needs to be done by an impartial body of experts following the due process of law. It should not be an exercise in political vendetta. The same guideline should be applicable to the process of determination of liability. Otherwise, the entire exercise would be counter-productive. It would deny an opportunity to the State to establish the Rule of Law and

5 See *Manual on Human Rights Reporting* (New York, 1991), U.N. Doc. HR/PUB/91/1.

also make the human rights violators heroes of a sick society.[6] The involvement of international observers would enhance the credibility of the entity establishing the liability of human rights violators. NGOs can play an important role in this regard. They can supply relevant information to the State entity investigating violations and determining liability; and if there is no such entity, then NGOs may take initiative in establishing an impartial non-State entity for the same purpose.[7] It would be advisable that the investigation of allegations and the determination of liability be assigned to two different bodies of experts, taking into account the inherent differences in the nature of the two functions.

The establishment of liability leads to the question: What should be the ensuring penalty? Relatively, the latter is more difficult than the former. There are different theories on the question of penalty for wrongdoing in general. In regard to the treatment of perpetrators of human rights violations, each of the States concerned with that matter has dealt with the problem in the context of its special situation.[8] While ignoring the crimes against humanity already committed and allowing their perpetrators to go scot free is contrary to the Rule of Law as well as morality, the vengeance against them without weighing the competing factors and considering the consequences of the punishment are contrary to common sense.

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6 The criminal has always been the hero, almost the saint, of the uncultured. The holding of *bhog* ceremonies to glorify terrorists, the offering of *siropas* (saffron turbans as a mark of respect) to their heirs, and their nomination to the seats of power are widely practised in the Punjab (India). One advantage of the public investigation into human rights violations is that their perpetrators would not become heroes or saints after the exposure of their misdeeds.

7 The Permanent People's Tribunal (PPT) was founded in 1979. Its statute is based on the principles of the Algiers declaration. It has held sessions in wide range of cases involving violation of human rights in Afghanistan, Argentina, El Salvador, Guatemala, India, Philippines and Zaïre. See *Times of India* (New Delhi), 14 October 1992, p. 3.

8 John M. Dyke and Gerald W. Berkley, "Redressing Human Rights Abuses", *Denv. J. of Int'l Law and Policy,* Vol. 20 (1992), p. 243.

Hence, the quest for an appropriate point between amnesty and vengeance. It is a quest for a just punishment. It must begin with a question: what are the objects of punishment?

Generally, the objects of punishment are:

- to prevent a person from repeating the crime;
- to make him pay for the breach of the Rule of Law;
- to prevent others from committing a similar crime by drawing their attention to the consequences of a wrongdoing;
- to provide some psychological comfort to the victim and the society by conveying that the illegal act committed against them attracted the imposition of sanctions;

and, if possible,

- to reform a wrongdoer and to turn him into a law-abiding citizen.

From a humanist social perspective, punishment is a measure adopted to excite, in the soul of the guilty, true repentance, respect for justice, sympathy for their fellow human beings, especially the victims, and love of humankind.[9] A democratic society can afford neither a retributive system of punishment based on Lynch law nor the blindness of the administration of justice system caused by anarchy, backlog of cases and judicial corruption. Also, punishment in proportion to the severity of human rights violations (such as disappearances, torture and genocide) does not suit anybody.

In order to determine a just punishment, therefore, we should not overemphasize any theory of punishment. If a punishment is too lenient, or of the wrong type, it can deprive the law of its effectiveness, and result in encouraging dangerous violators of human rights. If too severe, or improperly conceived, it can reinforce their criminal tendency and lead to new violations by them. The system lacks efficacy if it fails to protect the society by deterring

9 H. Openheimer, Rationale of Punishment (1913), pp. 130-132. Cf. Mir Mehraj-ud-din, *Crime and Criminal Justice System in India* (New Delhi, 1984), p. 137.

offenders. It lacks credibility, if it does not reflect the mood and temper of the society towards the misconduct of offenders. The system deserves indictment, if it fails to provide an equitable justice to the offender, the victim and the community.[10] As a matter of policy, no punishment should reflect vengeance; it should have a rehabilitative content; it should apply the proportional penalty principle in the light of the consequences of the sentence; and it should not be of a deterministic nature and duration. We do not send a lunatic to an asylum for a definite period. Likewise, it is unwise to send a criminal to a prison for a fixed period. It would be expedient to treat the perpetrators of human rights violations in somewhat the same way, thus leaving the courts of justice to determine the guilt or innocence, while empowering the reformatory authorities, under a responsible supervision, to determine the nature and duration of the punishment. The use of open prisons, probation system, or exonerating the prison sentence in *lieu* of labour for the maintenance of the victim's family may be explored in selected cases.

This approach would lead to a disparity in sentencing. It might create a number of problems. Of course, the first casualty would be the principle of equality; then a feeling of discrimination would make the guilty cynical of the system and the determination of an indeterminate sentence would be a constant riddle for the institutions responsible for monitoring the guilty and determining an opportune moment to allow him to join the mainstream of the society. The experience of the domestic criminal law is that the disparity in sentences limits the system's ability to develop sound attitudes in offenders. An offender serving a ten-year sentence for the same act for which a fellow offender is serving a three-year sentence is not likely to be receptive to correctional programmes.[11] There would be a sort of bitterness and hostility towards the system. This would reduce the chances of re-socialization of the aggrieved offender as he would feel discriminated against. In any case, there

10 Mehraj-ud-din, *ibid.*, p. 147.

11 *Ibid.*, p. 148.

should be a rational basis of disparity in social reactions to human rights violations. What is, therefore, desirable is not uniform sentences but a uniform philosophy on the flexible societal responses to those violations that may produce a punishment in conformity with the enlightened legal and social policy. However, is it attainable in practice?

Even with a long experience in handling criminal cases, most of our judicial systems are ignorant about sentencing;[12] most of our judges cannot go beyond the age-old penal laws; and most of our scientific and technological innovations have not been tested from the angle of their social impact, especially on the behaviour of a delinquent.[13] One may not be sure whether traditional judicial institutions can handle sentencing of human rights violators with the requisite sophistication and satisfaction. Therefore, we need some judges of extraordinary qualifications, capability and creativity who may be assigned the task of determining just punishment in cases of human rights violations. Also, there should be a separate investigation and hearing for the purpose of determining just punishment.[14] The determining authority should be assisted in its task by anthropologists, sociologists, psychologists, human rights activists and others. It should take the following principal factors into account for determining a just punishment:

1. the philosophy of human rights violation, that is, the attitude of the perpetrator towards a violation. It can be ascertained by raising the following questions: is the perpetrator free from remorse? Does he deny his wrongful conduct? Does he justify it?

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12 Justice Krishna Iyer, *ibid.*, p. 152, fn. 239.

13 We have not heard of any court verdict based on an anthropological approach attempting to reform a delinquent by experimenting with the tampering or transplanting of an organ/activity of his body. Such an innovation should not be confused with various punishments, such as the amputation of hands of a thief, which fall in the definition of an inhuman or degrading punishment.

14 Many domestic laws require that. Moreover, a separate hearing on sentencing could reduce the prejudice (if any) of the process of punishing the guilty.

Does he treat it as a trivial matter? The records of investigation into the allegations of human rights violations may help in finding answers to these questions;

2. the social consequences of the punishment. They can be ascertained by raising the following questions; what is the general attitude of the society towards crimes akin to the human rights violations in question? What is the potential of the perpetrator of those violations for the social stability? What is the state of the Rule of Law at a given point of time? Social surveys, intelligence reports and opinion polls may be used to find answers to these questions;
3. the alternatives to punishment in a specific case. They can be identified by raising the following question: Is the society concerned mainly governed by the written law (e.g. the United States of America and most of the Western countries) or by the traditional practices as well (e.g. India, most of the Asian countries, and almost all the African countries)?

The last factor is of great importance because of the difficulties in punishing human rights violators, dubious effectiveness of the punishment in enhancing respect for human rights, and special problems of Asian, African and Latin American countries in handling human rights violations.

The human-rights-violators-must-be-punished principle has some problems.

First, criminal anthropologists and social scientists have not come to a final conclusion on the utility of punishment as a redress of grievances of a grave nature. On the contrary, many of them feel that long-term imprisonment is an obstacle in the re-socialization of an offender. M. Emile Gautier calls the prison "a hot-house for poisonous plants".[15]

15 Cf. Havelock Elles, *The Criminal* (1914), p. 309.

Secondly, if a human rights violator has reason to believe that he would be treated harshly, then why should he cooperate with the State and society. As a result, the investigation of human rights violations cannot be pursued without difficulty and all relevant fact cannot be unearthed.[16]

Thirdly, many offenders may be dealt with adequately by means of a fine. But this is not desirable in every situation. Certain losses cannot be quantified. The offender should not be allowed at will to choose between fine and imprisonment. The notion of reparation should be combined with the fine where possible. The offender must pay a reparation to the injured person, and a fine to the community. This kind of twin penalty does justice to the intertwined relationships involved in the concept of human rights articulated at the outset of this paper. However, when the offender is unable to pay a pecuniary fine or reparation, he should not be imprisoned, but induced to give his work and skill instead.

The violator-must-pay principle has a number of disadvantages. It tends to trivialize the tragedy. The danger lies in the possibility of enabling people to feel good about each other for the moment, while leaving undisturbed the attendant social realities creating the conditions conductive for human rights violations. Therefore, besides imprisonment of the offender, fine to the State, and/or reparation to the victim, there should be a restructuring of governmental institutions, a changing of societal attitudes and a transformation of social relationships. The redress programme must be integrated into the legal and moral foundations of the country concerned for responding to the domestic problems of tomorrow and for urging other countries to learn from its experience.[17] The

16 For instance, the failure of the Shah Commission which was established in 1977 to investigate the excesses committed during the 1975-77 emergency regime in India.

17 Edmonds, "Beyond Prejudice Reduction", *MCS Conciliation Quarterly* (Spring 1991), p. 5. Cf. Eric K. Yamamoto, "Friend, or Foe or Something Else: Social Meaning of Redress and Reparations", *Denv. J. of Int'l Law and Policy*, Vol. 20 (1992), p. 232.

legal, moral and functional legitimacy of that redress programme may be tested by raising the following question: Can this redress programme be a model for other countries? This can be answered by finding out whether any legal norms or political insights and commitments have been derived from a particular redress programme and whether any bureaucratic, legal and attitudinal restructuring have taken place.

The proper method of treating criminals is not the method of simply meting out to them "punishment" in the form of a term of imprisonment, fine, or reparation roughly equivalent to what social opinion and the judges consider to be the size of the offence, since such a method is merely a transformation of the old *lex talionis*. On the contrary, the notion of punishment should be read with the social reaction against crime and the ultimate values of a civilized society. Elles rightly observed: "All that is finest in civilization is bound up with a self-restraint and humanity, as well as a more intelligent insight, which, while admitting a more chastened social reaction, makes ferocity impossible".[18] Therefore, Ferri long ago in his *Sociologia Criminale* insisted on the necessity of "penal substitutes" or non-penal methods of combating criminality.[19] How to find an appropriate penal substitute for a human rights violator?

Different countries have different repertoires of sanctions. Even within a country, people of different cities show different preferences. Even within a city, people differ on different punishment for different crimes: while police officers favour a punishment based on "retribution", others have variant viewpoints.

In Japan, for instance, apology and restitution are two important sanctions. As Bayley notes: "An apology is more than an acceptance of personal guilt; it is an undertaking not to offend again."[20]

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18 Elles, n. 15, p. 301.

19 *Cf. ibid.*, p. XI.

20 David Bayley, *Forces of Order: Policing Modern Japan* (1991), p. 131. See also Hiroshi Wagatsumu and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States", Law & Society Review, Vol. 20 (1986), p. 461.

Japanese prefer a form of relationship restoration. On the other hand, surveys indicate that the sanctions chosen by the Americans and Russians were rarely directed at the restoration of bonds and often served to isolate the wrongdoer.[21]

In India, different religions, different regions and different castes have different extra-legal sanctions. Among the Sikhs, the severest sanction is to declare a wrongdoer a *tankhahya* (one who is fined on account of a breach of religious principles). Among the Muslims, calling a person a *Kafir* (non-believer) is a serious censure. Among the Hindus, a *shrapa* (curse) to the wrongdoer is a severe punishment. In the Indian villages, social ostracization or outcasting a person is considered a serious sanction. The most appropriate punishment for the crime of rape is to force the offender to marry the victim. Forcing a wrongdoer to shave his head, to blacken his face, and to ride a donkey in public is a popular punishment for many illegal and immoral acts in India. Also, begging, fasting, weeping, taking bath in the holy rivers, and remorse are still considered the most cultured means of admitting guilt, self-inflicting the punishment, and purifying the soul. The old English system of recognisances, in which the guilty party deposits a sum of money, was an excellent guarantee to society against his recidivism. Similarly, the Islamic concept of "blood money" under which the guilty pays for the potential losses suffered by the victim is an illustration of a confession, punishment and re-socialization.

We must study these informal social sanctions *vis-à-vis* formal legal sanctions and assess their comparative utility and effectiveness. Many of them are worth applying in cases of human rights violations. The need is to modernize the finest traditions of the society, to create a contextual legal culture, and to apply quasi-criminal or non-criminal educative sanctions to the perpetrators of human rights violations. Instead of condemning them to prison and hardening

21 Joseph Sanders and V. Lee Hamilton, "Legal Cultures and Punishment Repertoires in Japan, Russia and the United States", *Law & Society Review*, Vol. 26 (1992), p. 133.

their criminal tendency, it is better to ask them to go and see for themselves the suffering of their victims. They should be asked to go for internship at human rights organizations. Then they may be asked to take advantage of the services of human rights teachers, publicists or researchers, human rights monitors, assistants to the expert teams investigating human rights violations and organizers of legal aid programmes for victims of human rights violations.

The above-mentioned approach is applicable to a society where the law abiding forces are stronger than the violators and where the granting of amnesty or pardon to a wrongdoer forms an integral part of the process of administration of justice according to the due process of law. On the contrary, what approach can be adopted when perpetrators of human rights violations extract amnesty or pardon for themselves as a pre-requisite for allowing State authorities to re-establish the Rule of Law?

However serious legal and moral objections to the amnesty laws might be, the political power of the violators of human rights and the desire of others to seek reconciliation in order to restore law and order make the application of those laws an inescapable evil. No one can testify this better than a national of Argentina or Uruguay. The Argentine agony and the Uruguayans' inability to undo their amnesty laws with the help of a plebiscite convey a clear message: wherever the violators wield power, as they generally do, they do not easily yield to democratic processes without securing concessions, including amnesty. Their motto is simple: no amnesty, no peace. However, even amnesty does not ensure peace and order or the survival of a democratic process, since it impairs the roots of the Rule of Law. It is a vicious circle. The challenging task is as to how to make an amnesty law sensitive to serenity. For this purpose, we may evolve a package of compromise, consisting of the following components:

1. In respect to the question of legality of an amnesty law we should ask: who enacted the amnesty law in question? The regime of violators itself, or its successor, a democratically elected government? If the amnesty law was made by the violators

themselves then there is little doubt not only about the invalidity of that law but also about the abuse of the legislative process. If, however, that law was made by a democratically elected government, one has to look at the various factors including the circumstances under which the amnesty law was made and the provisions it contained. If that law was extorted from a democratically elected government then again there is no doubt about its invalidity, but if it was evolved after a free and fair debate on the subject and envisaged a balanced approach to the problem then the question of its validity is wide open at least at the international level.

2. In order to maintain the minimum morality of the law we should ask: What is the ambit of the amnesty law in question? If the amnesty law grants an absolute amnesty to the violators then its invalidity speaks for itself. On the other hand, it possesses some sort of validity if it leaves scope for bringing civil claims and some other kind of censure against the violators. Granting of amnesty for crimes committed in the natural course of discharging State functions is reluctantly acceptable. But heinous crimes such as genocide, rape, indiscriminate killings of civilians, torture of detainees and their relatives, and destruction of cultural heritage are unpardonable. Proceeding on this line, and following the line of derogable and non-derogable rights, we may adopt a broad categorization of pardonable and non-pardonable violations.
3. Amnesty for the violators of human rights does not mean that their crimes should remain in the realm of mystery. All cases of violations should be investigated by an impartial group of experts. Its reports should be made public. If nothing else they will tell the truth and, however cruel a violator might be, his conscience would reprimand him for his wrongs.
4. There should be a mechanism to monitor the behaviour of violators of human rights after their amnesty. If found guilty again, the question of their amnesty should be re-examined.

After outlining a theoretical framework of the flexible societal responses to the problem of impunity and gross violations of human

rights, let us test its efficacy on the anvil of some striking cases: Idi Amin's atrocities in Uganda, genocide by Pol Pot in Cambodia, "ethnic cleansing" in Bosnia and Herzegovina, and *apartheid* in South Africa.

Until today Idi Amin has not been prosecuted. There is no initiative to seek his extradition. It is only recently that the Government of Uganda has expressed its willingness to pay reparations to the Asians expelled by Idi Amin in 1972. There is no talk of reparations to thousands of unfortunate Ugandans who fell prey to Amin atrocities. Probably they do not have a comparable potential to promote the political economy of their own country. In the absence of an authentic and systematic investigation of atrocities in the nature of killings, however, the redress of the twenty-year-old grievances of massive human rights violations has become difficult.

The Pol Pot regime had committed genocide of one million of its subjects with impunity. One could forget this forgiveness by default during the Cold War era, but how can one ignore the continuing defiance of the law by the Khmer Rouge after the end of the cold War. Instead of prosecuting the perpetrators of genocide, the United Nations Security Council is trying hard to involve them in the peace process. After the implementation of the Paris agreements and the establishment of the Rule of Law in Cambodia, the Khmer Rouge can claim to be a saviour of democracy.

The "ethnic cleansing" in Bosnia and Herzegovina demonstrates the helplessness of the State machinery concerned (Bosnia is an independent State and also a member of the United Nations; it is supposed to possess the capability and willingness to fulfil its U.N. Charter obligations, including the protection of human rights of its citizens), the European Community, the United Nations, and the well-established humanitarian principles and their custodians. At last, the Security Council has decided to establish a group of experts to investigate the crimes.[22] Warring factions have not easily allowed

22 Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (New York, 1992).

relief workers to visit the theatre of war. One may wonder whether they would allow investigators to prepare ground for their prosecution.

The fifty-year-long denial of human rights in South Africa is rightly characterized as a "crime against humanity". Naturally, therefore, ANC radicals are saying that after the establishment of the majority rule they will establish a Nuremberg-type tribunal to prosecute the perpetrators of *apartheid.* It is a well-known fact that while the 15% White minority owns 87% of the most precious land in South Africa, the 75% Black majority own just 13%. How can there be a redress of grievances of the Black majority without taking away a large chunk of White property? Will the equitable redistribution of the land allow the reconciliation of the people? There is a feeling that the Mandela magic would bring about the long awaited liberation from the perpetrators of *apartheid,* but not the adequate reparations for their victims. The talk of a Nuremberg-type trial is no more than a dream. The Mugabe mirage proves it. The success of the ANC in forcing the De Klerk government to allow an international group of experts to investigate the Boipatong massacre cannot be overemphasized because less than three months after that came the Ciskei massacre. Strangely, while the former massacre led the ANC to withdraw from the constitutional negotiations, it resumed the negotiations shortly after the latter.

In sum, the Rule of Law-based approach advocating modernization, integration and application of the various social sanctions derived from the various cultures and traditions may be useful in establishing the responsibility and liability of the perpetrators of low-gravity human rights violations. But it may not be effective in high-gravity cases, such as those mentioned above. Only the collective responses of the international community, supported by both coercive and persuasive means, may prove worthy in those cases. When this cannot be done at the inter-governmental level, alternatives may be explored at the non-governmental level. In any case, the primary focus should be on the investigation of violations, the identification of causes underlying

them, and the evolution of widely acceptable and reasonable solutions. In "An Agenda for Peace"[23], the Secretary-General of the United Nations indicates the possibility of activating the entire U.N. system, among other things, for handling gross violations of human rights. For this purpose he suggests, *inter alia*, the establishment of an information gathering-*cum*-early warning system. The system may be used in order to monitor gross violations of human rights, to guard their perpetrators, and to initiate actions to redress those violations.

While, as it is evident from the above, the question of amnesty for gross violations of civil and political rights is complex enough, there is another vast area of human rights violations equally important that has not yet been adequately considered in the context of amnesty, and this relates to violations of economic, social and cultural rights. Such violations of economic, social and cultural rights have received a sharp focus particularly in the process of decolonization. In July 1992, for instance, the OAU Summit at Dakar decided to establish an expert group of eminent persons to prepare the case to make Europe pay reparations for its past colonization and enslavement of Africans.[24] It may be a difficult proposition in terms of results, but the intellectual validity of promoting historical awareness is unquestionable. Nobody knows the eventual outcome, but we know that Nauru – a tiny Pacific island country – has already gone to the World Court to claim rehabilitation reparations for colonial exploitation of its phosphate resources by Australia. The OAU resolution and the Nauru case indicate that a large number of countries and peoples look at the problem of gross violations of human rights from a wider perspective.[25] On the other hand, we the human rights academics,

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23 See footnote 22.

24 See *West Africa* (25-31 May 1992), p. 894.

25 In their perspective, group rights – such as the right of self-determination and permanent sovereignty over natural resources (Article 1 of both the Covenants on Human Rights) – find a prominent place.

activists and publicists have so far narrowly focused on the gross violations of civil and political rights. Are we now willing to enlarge our understanding of the subject under discussion by including and addressing the problem of perpetrators of gross violations of economic, social and cultural rights?

Reconciliation, and National Conciliation

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Magistrate
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Whether it is to end an international conflict, as in the case of the Second World War, or to end an internal conflict, as in the case of El Salvador, and as might one day be the case in Guatemala, Colombia or Peru; or, alternatively, whether it is to shift from dictatorship to democracy, as in Portugal, Spain or Greece, or in the South American countries of Chili, Brazil Argentina, Uruguay or Paraguay; the issue of national or international reconciliation has always been at the centre of the process to achieve political transition and peace, while contradicting the need to establish the truth about painful periods in a country's history and to punish those guilty of serious human rights violations.

While this contradiction has been expressed in a variety of ways, most often it has taken the form of amnesty laws or decrees, which, although sometimes ambiguous in terms of their objectives, have almost always resulted in ensuring *de facto* impunity to the perpetrators of serious human rights violations.

The examples for Latin America alone, include: in Chili, Decree-Law No. 2191, issued 19/4/78; in Brazil, Law No. 6683 of 28/8/79 and Constitutional Amendment No. 26 of 27/11/85; in Argentina, a series of legislative measures lessened the effects of a process which had allowed several members of the military junta to be tried and issued heavy sentences: these included the military junta's "final document" of 28/4/83, Law No. 22926 of 22/9/83, sometimes referred to as the "Self-amnesty law", Law No. 23942 of 12/12/86 on the dismissal of

criminal proceedings, known as the *"Punto final"* law, followed by Law No. 23521 of 5/6/87, known as the "Due obedience" law; in Uruguay, Law No. 15848 of 28/12/86 known as the "Caducity law"; in Guatemala, Decree-Law No. 8.86, which granted general amnesty and the Esquipulas II Agreement, which provided for the enactment of amnesty laws in all Central American countries; in El Salvador, Decree No. 805 of 27/10/87, which established an "Amnesty law for the purpose of achieving national reconciliation", then, following the peace accords of 31/12/91, the Legislative Assembly unanimously adopted a new amnesty law on 23/1/92; lastly, in Honduras, the Congress passed a "general and unconditional" amnesty law in November 1987.

Without entering into an analysis of these texts, it is sufficient to note that all are based on a desire for national reconciliation and reflect the belief that this cannot be achieved without pardoning former offenders. Yet before such a pardon can be granted, the truth must be established, the perpetrators of the most serious crimes identified, and the suffering of the victims and their relatives recognized. This has not always been the case in the transition processes observed in recent decades.

Is there any compatibility between the need for national reconciliation, without which there can be no transition towards a stable democracy, and the equally important establishment of the truth concerning a period of war or dictatorship? Can peace be achieved by denying the past?

It is extremely difficult to provide a satisfactory answer to these questions. All of the processes observed over the course of the past few years remain, to varying extents, quite unsatisfactory.

I would like, for the purposes of this meeting, to describe an experience, still in progress, of one country in which attempts are being made to transform a series of peace agreements into a process of lasting democratization and reconciliation. That country is El Salvador.

The situation in El Salvador is unusual for a number of reasons. Some of the innovative measures drawn up by the negotiators include: the first United Nations on-site mission to observe the human rights situation in a sovereign nation; reform of the country's institutions through the application of peace agreements between the government and the armed opposition movement; and, the appointment by the Secretary-General of the United Nations of a non-national "Truth Commission", whose final report could have an impact on the scope of the amnesty law.

Whereas the first talks to prepare for a negotiated settlement were held as early as 1984, it was not until 1989 that the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN) signed an agreement in Mexico on 15 September, to begin a process of dialogue for the purpose of putting an end, through political means, to the conflict in El Salvador. After the signing of this first agreement, the parties invited the UN Secretary-General to send a representative to subsequent talks, which were held in San José, Costa Rica from 16 to 17 October.

Since then, talks aimed at resolving the conflict have never ceased, in spite of enormous difficulties. The UN Secretary-General has played a decisive role in the many talks held over the course of the past two years, either personally or through his representative.

The first document to confirm this willingness to negotiate was the Geneva Agreement, signed on 4 April 1990, which confirms the commitment on the part of the government and the FMLN to refrain from unilaterally abandoning the negotiations. The four objectives of the Agreement are: to end the armed conflict through political means as soon as possible, to support the country's democratization process, to guarantee strict observance of human rights and to reunite Salvadorian society.

The reasoning behind the process was first to secure political agreements in a number of areas and then, thanks to the agreements, find a solution to the armed conflict.

The agreement concluded on 21 May 1990 in Caracas, Venezuela stipulated that the UN verification process to monitor implementation of these political agreements would begin at the same time as verification of future agreements to be negotiated. The subjects of these later agreements included: the armed forces, human rights, judicial and electoral systems, constitutional reform, socio-economic problems and, finally, the UN verification process. The second phase of negotiations was aimed at establishing the guarantees and conditions necessary for reintegrating FMLN members, in a fully legitimate capacity, in the civilian, institutional and political life of the country.

What followed were complex negotiations, although these did not always adhere to the schedule drawn up in Caracas. Numerous events occurred in connection with these negotiations, including a direct dialogue between the negotiating commissions, which involved the active participation of the Secretary-General's representative, who has always assumed the role of mediator.

It is worth noting that the first operational agreement to be concluded was the Agreement on Human Rights, signed in San José, Costa Rica on 26 July 1990. The parties and oddly enough, the FMLN, wished to link the entire process with the obligation, on the part of each, to respect human rights and international humanitarian law. They also requested the establishment of a United Nations verification mission, to monitor, at the national level and over the long term, respect for and observance of fundamental rights and freedoms. This mission is unprecedented in the history of the United Nations.

The San José Agreement on Human Rights consists of a preamble and two operative parts. The preamble refers to El Salvador's legal system, which provides for the recognition of human rights and the State's duty to respect and guarantee them. It also refers to the State's international obligations and to the FMLN's capacity and will "to respect the inherent attributes of the human person". It recalls the common purpose expressed in the Geneva Agreement "to guarantee unrestricted respect for human rights in El Salvador" and to

submit to verification by the United Nations, before going on to give a very broad definition as to what shall be understood by the term "human rights".

The first part lists a series of immediate steps and measures which should be taken to "avoid any act or practice which constitutes an attempt upon the life, integrity, security or freedom of the individual" and to "eliminate any practice involving enforced disappearance and abductions". It then describes all of the rights protected, including political rights; the freedom of movement; conditions for arrest and the rights of arrested or captured persons; the freeing of political detainees; the remedies of *habeas corpus* and *amparo*; the freedoms of association, expression and the press; the registration of displaced persons and returnees and their freedom to pursue economic, political and social activities. Although the parties recognized the importance of labour rights, these were postponed for consideration during future negotiations.

The second part defines the powers of the UN verification mission and establishes its priorities, which include: monitoring observance of the rights to the life, integrity and safety of the person; the right to due process of law; the right to personal liberty; and the right to the freedoms of expression and association. Its powers are very broad and include an extensive right to investigate; the ability to receive complaints from any person; to visit any place or establishment without prior notice; to interview any individual, group or institution; to formulate recommendations to the parties on the basis of conclusions resulting from its examination of cases or situations; to offer its support to the judicial authorities with a view to improving the judicial procedures for the protection of human rights and to increasing respect for the rules of due process of law; to plan and carry out an educational and informational campaign on human rights and the functions of the mission; to utilize the media; and lastly, to report regularly to the UN Secretary-General and, through him, to the UN General Assembly.

The parties have agreed to support the mission as fully as possible.

The mission is competent to examine cases of human rights violations which occur as from the date of its establishment; it may refer acts committed prior to this to the competent authorities, if it deems appropriate.

Whereas Article 19 of the Agreement provided that the mission would take up its duties as of the cessation of the armed conflict, the parties made a request to the UN Secretary-General that the mission begin monitoring implementation of the Agreement on Human Rights as soon as possible after November 1990. In March 1991, the Secretary-General sent a mission to El Salvador to study the feasibility of beginning this task before the end of the armed conflict. Upon receipt of the mission's report, which was submitted to it by the Secretary-General, the UN Security Council, on 20 May 1991, unanimously adopted Resolution 693 establishing a "United Nations Observer Mission in El Salvador" (ONUSAL). The observer mission was officially established on 26 July 1991, in honour of the first anniversary of the San José Agreement.

This was the first time that the United Nations had sent an on-site mission to verify respect for human rights, and the first time that such a mission began its duties before the signing of a cease-fire. The peace accords were not signed until midnight on 31 December 1991, which marked the end of the mandate of Javier Perez de Cuellar, who had been active in the process up to the last minute. The peace accords were solemnly ratified on 16 January 1992 in Chapultepec Castle in Mexico, in the presence of nearly a dozen chiefs of State and heads of government, as well as the new Secretary-General of the United Nations. The cease-fire went into effect on 1 January 1992, and has not been violated since, which, in and of itself, is an undeniable success.

Without going into the details of the work carried out by the UN mission to monitor respect for human rights, it may nevertheless be stated that its presence has had a calming effect. It has also facilitated the signing of the subsequent agreements and, above all, has allowed most Salvadorians to maintain confidence in the peace process. Indeed, the mission's continuing on-site presence, both in

San Salvador and in the regional capitals, as well as the mobility of its monitoring teams, especially in the conflict zones, has allowed for the registration of approximately 6,000 complaints.

Little by little, fear has subsided, freedoms have been re-acquired, and the on-going dialogue between the members of the mission and the governmental, judicial, and administrative officials, as well as with the churches, NGOs, trade unions and the FMLN have enabled many conflicts to be resolved. The ability for the teams to move, without prior notice, to any spot in the country where human rights abuses are alleged to have been committed and to have access to any prison, police station or barracks, or any FMLN concentration, has forced the parties to modify a number of behaviours.

The informational and educational campaign directed at the military, FMLN combatants, the judiciary, civilians and teachers has also undoubtedly played an important role in spreading awareness of the need for change. The reports of the Secretary-General, which have been made public, have also provided an opportunity for constructive dialogue with the parties in the conflict, as well as with the NGOs, whose constant support has been invaluable to the efforts of the mission. However, much remains to be done to make the transition from a culture of war and violence, which has taken root in the Salvadorian society over the past two decades, to a culture of peace, dialogue, tolerance and conciliation.

Obviously, the San José Agreement on Human Rights is not the only agreement capable of ensuring a lasting peace, far-reaching reconciliation and the establishment of a solid democracy based on the Rule of Law. One agreement cannot alone counter the widespread feeling in El Salvador that the perpetrators of serious human rights violations will benefit from impunity. The assassination of Archbishop Oscar Romero in 1980, the murder of six Jesuit priests and two employees of the José Simeon Canas University in November 1989, the Rio Sumpul or Mozote massacres, the deaths of innumerable human rights activists, trade unionists and innocent civilians with no involvement in the armed conflict are among the tragic events which stand out among these past twelve years of

fratricide, although the legal system has not been able to identify, try or sentence those originally responsible for these exactions.

One exception to this situation of impunity occurred in September 1991 when two superior officers, one of whom was a colonel, were sentenced for the killing of the Jesuit priests. Even so, the authorities were unable to trace the chain of responsibility back to the true "intellectual perpetrators" of these odious crimes.

The set of agreements which were signed on 16 January 1992 undoubtedly offer the best prospects for genuine reconciliation, since they call for a sweeping reform of El Salvador's institutions, as well as the implementation of a series of mechanisms which should allow, if not an end to the vicious cycle of impunity, then at least a means of getting closer to the truth about the period of the conflict and preventing a repeat of past horrors.

1 - The Armed Forces

The constitutional reform called for in the peace accords alters the very core of this institution by limiting its mission to that of protecting the sovereignty and the territorial integrity of the State. The army, a permanent institution in the service of the State, is henceforth required to be "obedient, professional, apolitical and non-deliberative". Its institutional structure is determined by the principles governing the Rule of law, the pre-eminence of human dignity and the observance of human rights.

Henceforth, a distinction will be drawn between the concepts of security and defence. This implies, *ipso facto*, the dissolution of the security forces which are accused of having in the past been instruments of repression and of having committed serious human rights violations.

Training programmes for the armed forces have also been changed to reflect "the pre-eminence of human dignity and democratic values, respect for human rights, and the subordination of the

said forces to the constitutional authorities", with the implicit acknowledgement that this was not the case in the past.

More importantly, perhaps, is the fact that a process to purge the armed forces has been set up; it will be based upon the findings of an *Ad-Hoc* Commission composed of three Salvadorians, whose impartiality and democratic record are irreproachable. The Commission is charged with evaluating the records of all military officers, examining their backgrounds from the standpoint of their respect for the law, and in particular, their observance of human rights, both in their personal conduct and in the consistency with which they carried out the correction or punishment of irregular actions, as well as abuses or violations of human rights committed under their authority, especially in the case of serious or systematic omissions.

Although the Commission has submitted its report, to date, it remains confidential. Logically, the findings of the report should lead to the dismissal of a number of officers.

Another development is that ranks of the army, which had swelled from 7,000 to 63,000 men during the war, have now been cut in half, and the elite battalions formerly charged with counter-insurgency operations have been disbanded.

The parties recognize the need for clarification and to investigate any indications of impunity on the part of officers, particularly in the case of human rights violations, and have entrusted these problems to the "Truth Commission".

As mentioned, two security forces units have been dismantled, as has the National Intelligence Directorate. The country's intelligence services will henceforth be entrusted to a "State intelligence agency" which is under control of the civil authorities, and specifically, under the direct authority of the President.

In addition, the following paramilitary organs have been disbanded:

The civil defence establishment and the Territorial Service, which in recent years have maintained tight control over the civilian population under direct orders of the military.

The private security services, responsible for a number of exactions and suspected of being the source of the sinister "death squads", are now regulated by a law whose purpose is to make them more transparent and to ensure tighter control.

Forcible recruitment has been abolished and a law has been passed to reorganize military service and the system of reservists.

2 - The National Civil Police Force

The creation of a new civil police force is certainly one of the most remarkable innovations of the peace accords. After a transitional period of approximately two years, it will become the only police force with national authority. Its doctrine is based on democratic principles, on the notion of public security as a service rendered by the State to the people, irrespective of any political, ideological or social considerations, as well as on respect for human rights. Its efforts will be directed at crime prevention and its authority will remain subordinate to that of the constitutional authorities.

The police force is completely independent of the armed forces and governs according to the principles expressed in the laws of all democratic nations.

A public security academy has been created to provide training for the new police force at the entry level, as well as at the intermediate and senior levels. Its system of admission is determined by an academic council which works to prevent discrimination. Members of the FMLN as well as former officials of the national police force are to be granted equal access to the academy, upon condition of meeting the necessary academic requirements and passing an entrance exam. The exam is based on general knowledge, as well as on the candidate's psychological aptitude for non-violently performing duties relating to maintaining order and protecting citizens.

3 - The Legal System

Efforts have been made to ensure better the independence of the judiciary, by means of a new process to appoint judges to the

Supreme Court and by creation of a "Judicial Training School", run by the National Council of the Judiciary, which has been assigned the general task of training judges and prosecutors, researching the country's legal problems and proposing solutions.

The post of "National Counsel for the Defence of Human Rights" has also been created through the constitutional reforms. It has been granted the rank of an independent authority with a very broad mission, which is to identify and eliminate any group which practices systematic violations of human rights, especially arbitrary detention, kidnapping and extra-judicial executions.

The Counsel for the Defence of Human Rights was appointed in February 1992 but only assumed his duties and opened his office to the public last July. With a team of lawyers at his disposal, he will be called, in the months to come, to play an important role in opposing human rights violations and in ensuring respect for the Rule of Law. His efforts are likely to be one of the important aspects of the process needed to bring about genuine national reconciliation.

The peace accords have affected a number of other political sectors as well. They have brought about a reform of the electoral system and have introduced a series of far-reaching measures designed to: deal with the agrarian problem in terms of improving the distribution of arable lands, both in the conflict zones and in the country as a whole; make it easier to obtain credit; channel international co-operation; and, alleviate the social cost of structural adjustment programmes. In addition, an Economic and Social Forum was created to promote economic and social dialogue in order to settle conflicts non-violently and to familiarize all economic sectors with the concept of dialogue, so as to gradually eliminate the spirit of antagonism that has dominated the country for so long.

A National Reconstruction Plan has been set up in order to bring together all sectors of society, including the FMLN and the NGOs.

The FMLN's political participation and its recognition as a party have been organized; the first, through the freeing of political detainees in accordance with the amnesty law issued in January 1992 and the latter, through a law permitting the party's creation and a series of measures (dealing with such topics as protection, the right to build infrastructure and the freedom of assembly) which are aimed at enabling it to carry out its activities.

An unusual organization, known as the National Commission for the Consolidation of Peace (COPAZ), has also been created. It is made up of representatives of government, all of the political parties of the Legislative Assembly, and the FMLN (before the latter had acquired legal recognition as a political party). The Commission is charged with monitoring implementation of all the agreements, proposing bills and nominating candidates to fill administrative posts within the new institutions to be created by the agreements. One might refer to the Commission as a "super-parliament" - an authority higher than the law, so to speak. It should be mentioned that it has already played and must continue to play a determining role in setting up the mechanisms to facilitate the transition.

It would be impossible to describe here, in all its detail, the particular mechanism used to end the armed conflict, which began with the cease-fire of 1 February 1992 and continued with the separation of the forces, the end of the FMLN military structure and reintegration of its members into the country's civilian, political and institutional life and lastly, the cut-back in the size of the army. There have been long delays in meeting deadlines, which has meant that attempts to purge the army have not yet been completed, the FMLN has only managed to demobilize 40 per cent of its forces, and the cut-off date to end the process, initially set for 31 October 1992, has been moved forward, for the time being, to the month of December. Such delays are unavoidable when dealing with such a complex operation. It can only be hoped that the mechanisms introduced are strong enough to bring about the desired conclusion in the weeks to come.

The last institution created in order to facilitate reconciliation was the "Truth Commission". If the negotiators took other Latin American experiences into account, particularly those of Argentina and Chili, then they have certainly created a very different institution. Obviously, the context was not the same, since in the case of El Salvador it was a matter of making the transition from war to peace and not from dictatorship to democracy.

The case of El Salvador also involved entrusting the evaluation of a difficult period not to nationals of the country, but to individuals from a variety of backgrounds appointed by the Secretary-General of the UN. Given its important responsibilities and its power to investigate, collect information, access any archives - governmental or other, and travel to any point within the country, the "Truth Commission" has a considerable task to perform. It must, in fact, investigate the most serious violations of human rights committed between 1980 and 1992, regardless of whether or not these resulted in legal suits.

The "Truth Commission" was officially established on 13 July 1992 in New York and on 14 July in El Salvador; it has six months within which to submit its report. While it does not have judicial powers, the findings of its report may not be ignored by the judiciary. Similarly, the *Ad Hoc* Commission, which is charged with purging the army, must also take into account "Truth Commission's" findings. An important step has just been taken with the exhumation of the bodies of those massacred in 1980 at Mozote, where, according to estimates made by the non-governmental organization, *Tutela Legal,* more than 800 civilians, including a majority of women and children, were murdered during a series of military operations. It is difficult at this time to predict the extent to which the judicial investigation began in October 1990 will be successful, even with the support and on-site presence of the "Truth Commission".

Furthermore, the January 1992 amnesty law has made the treatment of the most serious violations of human rights conditional upon the findings of the "Truth Commission", in the sense that the law provides that the Legislative Assembly may meet within six

months following submission of the "Truth Commission's" report to deliberate upon a potential new amnesty.

We have seen at the conclusion of this long civil war, which has claimed more than 75,000 victims, that the opposing parties not only expressed their desire to end the war, but also to provide a solid basis for genuine reconciliation. It is obviously too soon to evaluate this still on-going process, and one that has been subject to numerous delays and daily challenges with respect to implementing the agreements. Although the war appears to be over and the cease-fire has been duly respected, it does not necessarily follow that the Salvadorian society is fully reconciled. Nor is there anything to suggest that the phenomenon of impunity, prevalent for so long, will be completely eradicated through this process. Nevertheless, the means used to resolve the conflict, including political dialogue, in-depth reforms with a view to democratizing and demilitarizing the society, the importance attached to the respect for human rights in all of the agreements, together constitute a very original and dynamic approach. Only time, and the willingness to change attitudes of violence, will reveal the true worth of this approach.

The Consequences of Impunity in Society

Luis Pérez Aguirre
Roman Catholic priest,
Serpaj, Uruguay

"Our happiness will never grow as long as evil remains clothed in innocence. The time has come for virtue to triumph and for the wicked to be seen for what they are."

José Artigas

I have chosen to open my remarks with these words, spoken by Uruguay's founding father to the town council of Montevideo on 18 November 1815, because they seem to me to go to the heart of our topic – the consequences of impunity on the life of a community.

I am not a jurist or a politician, much less a social scientist. I do not have the therapeutic skills of a psychoanalyst or the influence of a statesman. I therefore have no choice but to discuss this topic from the perspective of one who witnesses reality from the grassroots. In other words, from the perspective of one whose experience is taken into account primarily when technicians formulate their learned theoretical and practical expositions on the reasons why States allow the existence of impunity for perpetrators of outrageous crimes.

Since I am an ordinary citizen, I have twice come face to face in the street with the man who was my torturer. He is a sinister person who walks along the streets of Montevideo with total impunity, playing the role of, although he is convinced he is, an honest citizen. I have no credentials for speaking of the social consequences of impunity other than this: I have once more encountered the man who tortured me, and I have been able to forgive him. Perhaps the only credit I may claim, then, is to speak from the standpoint of a victim, and not from the privileged position of a neutral intellectual.

Perhaps we should begin by being silent and listening because we do not have the first word in this matter. It is therefore not our place to open the dialogue. The victims are the only ones who can begin the dialogue when they are ready to speak. Our duty is to listen to what the victims have to say for themselves and about themselves. Would it be very far from the truth if I said that the defenders of human rights, as well as others, talk so much about their own ideas, political models and analyses of reality, that they do not give the victims a chance to speak? As defenders of human dignity, we will not find common ground until we are able to develop a new relationship with those who are made unjustly to endure the impunity of their oppressors. Once impunity has taken root, we are no longer free to walk alone, but must walk hand in hand with the victims. Only in this way will we reach a new kind of solidarity consisting of mutual confidence between the victims and the citizens who have resolved never again to trivialize the pain inflicted by allowing impunity to prevail for reasons of State or to "safeguard" our institutions.

I am sure you will understand why I choose not to analyse the way in which impunity grossly violates the equality of all citizens before the law, and why I shall not try to show that it runs completely counter to the general principles of law recognized by all civilized nations. I do not have the competence for that. Perhaps the jurists can show us how on both the national and international levels, impunity is inadmissible in view of the Convention on the non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Perhaps they can also tell us what legal mechanisms are best suited to battling this phenomenon.

Nor am I able to assess or analyse the psychological consequences of impunity on its direct victims, as I am neither a psychiatrist nor a psychoanalyst. What I can do is to express some of the concerns of an ordinary citizen, shaped by the experience of my country – Uruguay.

The Prohibition of Memory

It is an interesting fact that in all societies in which impunity reigns, every effort is made to secure a collective oblivion by erasing certain

memories. It is therefore important to understand why impunity and the act of forgetting go hand in hand. Why are efforts made to prevent recollection, and what consequences does this have for society?

Beyond the need to ensure a basic judicial remedy for the victims of impunity, there is the obligation to prevent, at all costs, a recurrence of what has happened. To this end, it is especially important to understand fully the consequences of this painful phenomenon. While human rights violations are being perpetrated in a given society, that society is subjected to the most complete disinformation, isolation, absence of communication and fear. It is not easy for that society to appreciate fully the extent to which the process of impunity affects it as a whole.

When we spend years collectively turning a blind eye, imprisoned by our own silence, striving merely to survive and to save what can be saved, we lose sight of what is happening. The true extent of the infringement upon freedoms, civil and political rights, human dignity, and upon the integrity of life remains unknown to the majority of the population. This underestimation and ignorance of the facts favours their repetition.

Tyrants know full well that society will fight to avoid a repetition of the past, but that its will to fight depends on its memory of what has happened. Certainly, the Uruguayan military was convinced of that when it tried, as part of its struggle against subversion, to instill that truth in us by quoting Santayana, who said: "those who do not remember the past are condemned to repeat it."

It is essential for a people to keep alive its memory of human rights violations if it is to neutralize impunity's most destructive implications.

The defenders of impunity will do everything they can to silence those who seek to explain why a people should not forget what has happened. It is just as important for the tyrants to ensure that society not look back, as it is for society to prevent a recurrence of what has happened. May that painful experience benefit not only those who

are still struggling to stop the bloodshed, but also the new generations whose astonished eyes are only now beginning to glimpse the terror of that irrational, incomprehensible cruelty.

Nevertheless, to remember the past means to know it fully. It is only through such knowledge and a clear perception of what has happened, that a people may draw the lessons of its experience. This leads to an important conclusion: we investigate the past and judge it not only to punish and condemn, but also to learn. When impunity prevents this investigation, it also prevents this learning which is so vital to the process of rebuilding a people's identity and preparing it for the future.

On 5 February 1983, at 22h15, Klaus Barbie was imprisoned in the Montluc penitentiary in Lyon, accused of crimes against humanity. Shortly thereafter, and notwithstanding the 40 years which had elapsed since the events took place, another historic trial began. As with the Nuremberg trials of the Nazi war criminals, our memory tends to retain only the condemnations and repudiations, but forgets how some attempted to justify their impunity by concealing their odious crimes or hiding behind assumed identities. I believe the Nuremberg trials made history because they marked the moment in time when the international community and the collective conscience of all peoples united to judge these most serious of war crimes and establish the legal, political and moral basis for preventing the recurrence of nazism, as well as the impunity of those responsible. Although only a handful of nazi war criminals were brought to trial in Nuremberg, the effect of such trials on the international conscience and memory has been exemplary. Those who stand to benefit from impunity know this, and seek by all means to erase this memory.

It is true that a historical review of wars, State-sponsored terrorism, acts of genocide, and so on, shows that the guilty have only rarely been tried – in many cases only to receive negligible sentences compared to the gravity and magnitude of their crimes. But the "real judgement" has always been a moral one, and it has endured as a heritage of peoples and of history. The ability to reach that judgment implies the ability to overcome impunity, to measure the

social disaster resulting from human rights violations, and to recognize and remember the truth.

Herein lies the key role of collective memory in protecting the present, for the present cannot be experienced properly without a recollection of the immediate past. The memory of the past is essential if we are to recognize ourselves and our common heritage as the sum of our pains and hopes. Where memory is not permitted, there is no knowledge of who we are. Without memory, we wander aimlessly about, as sleepwalkers. Without memory, we have no identity.

Caring for our collective memory will enable us to see history, to learn from it, and to bring light and bear witness where darkness and silence reign. That memory will provide us with an irreplaceable guiding principle – that history generally records nothing more than the acts and words of those who somehow managed to hold onto life, give it meaning and express it – but with the knowledge that millions of men, women and children were denied dignity, and even life, through abuse, terror and untruth, and were thus made silent. If history, then, will tell only of the more fortunate, the victims who were able to make their voices heard, the less fortunate must be kept alive in our memory. Those who were fortunate enough to survive must assume responsibility for fighting the silence and the shadows which impunity seeks to cast over society... or else become its accomplices.

The fainthearted will ask insistently if it is really useful and worthwhile to stir up that sad, painful and humiliating past, to reopen those still tender national wounds; they wonder if it is not wiser and more prudent to leave behind all that has happened. With what passes for "realism" and good will, they seek to forget in an effort to find peace. But by forgetting, a people loses its character, its spirit, and its most genuine traditions – all the subtle qualities that make it what it is, and not something else.

The aim of remembering is not to engage in useless reprisals against a beaten foe, but to transmit to new generations word of a past that those who lived refused to record. Perhaps they refused

because it was too hard to believe what the victims of torture related. This is exactly what the torturers had intended when devising a system to destroy human life – something that would far exceed "standard" savagery and leave everyone in disbelief. Yet, this must be recorded for posterity, because the young know next to nothing of this past, when history seemed to go mad, to leave this world, and to dwell for a time in hell.

What we have experienced must not be hidden away in some remote corner of our memory. It must instead be made part of the society that has been affected by impunity, and remain part of it forever. We must have the courage not to relegate that experience to the collective unconscious. We must remember it in order to avoid falling into the same trap again.

The Ongoing Crime

It is in the context of an ongoing crime that we must view cases of torture and disappearance. The situation of the disappeared person is, without a doubt, extreme, paradigmatic and exemplary, because the disappeared do not belong to the past. They and their families are the victims of an ongoing, ever-present crime. The disappeared person is considered a non-being, and the State which permits the existence of impunity refuses to recognize his human nature.

The condition of the disappeared is extreme, for society robs them of all human attributes. They are denied their human condition! They are deprived of their last remaining bond with society: the right to be in a given place at a given time. Their families are forced to live in the shadow of doubt and uncertainty, in a permanent state of anguish, and as victims of lasting torture and cruelty. This is an extreme form of evil (truly unimaginable in the case of disappeared children), leaving families in a suspended state of anguish, not knowing whether their loved ones are dead or alive and unable to bury their dead or work through their grief. To get a better idea of the situation, one might contrast it with the tomb of the unknown soldier. The tomb helps to channel the pain of many families, since the remains which physically lie buried there might very well be

those of the dearly departed. But a tomb for the "unknown disappeared"? That is contradiction in terms, for the disappeared leave no trace and no remains. There is no doubt that this open wound, this dark shadow in place of the disappeared, plagues more than just the family concerned, affecting society as a whole.

A Mockery of Truth

A society which fails to recognize that impunity has no place within it, once the past has been exposed and justice served, is committing political suicide and rushing headlong towards social suicide. Accepting impunity in theory is equivalent to allowing the "Mengeles" and the "Barbies" of the world to go free with the promise that no one will find them out or bring them to justice. It simply confirms their conviction that State-sponsored terrorism is the most effective kind because no one will ever know what happened and who was responsible. The law will never be able to touch them and justice will forever be mocked.

To thwart society's access to the truth is to eliminate the possibility of recovering essential elements which were lost during a painful period. It is an obstacle to learning the truth about very grave and important events in the history of a people. Such an obstacle is a source of extremely severe psycho-social disturbances, whose future effects are unpredictable. There will be no answer for those who ask "Why?", no explanation for the suffering that has been endured. The failure to find an answer can prevent a generation, especially the younger one, from knowing itself, forcing it to operate without the foundation of history and the essential elements it needs to define its own identity. Identity, after all, implies asking and finding more or less permanent answers to the basic questions of who we are, where we came from, and where we are going. To answer these questions we need a social and political map, a factual history, and the answers to our "Why's?" It is, therefore, essential to know what happened, how people acted during this particular period in history, how some tried to resist, how the people were subdued, how rights were violated, by whom, when, where and why, and to know how we managed

eventually to escape the nightmare. In short, it is necessary to hold onto this sad but very important story so that we may learn a lesson, draw conclusions, be able to look into each other's eyes without shame, and move towards the future.

The mere passing of time is not enough to heal a society and rid it of the infection caused by impunity. The problem will fester in the national conscience until the proper remedy is applied. Time will only make the infection grow worse.

To heal a wound is not the same as to forget. Forgetting is a sign of weakness, it indicates fear of the future. Those who would cast into oblivion the barbarous crimes that have been committed are, in fact, standing in the way of reconciliation. The crimes did take place, and as long as they go unpunished, they will continue to gnaw at the collective national consciousness and unconscious. History is what a people retains in its collective memory. Society will have to remember and live with the inescapable reality of those crimes. Let us not add impunity to that memory, but rather the capacity for forgiveness and reconciliation. Investigating these crimes will help to create the necessary conditions for reconciliation.

Obstacles to Reconciliation

Without some form of reconciliation to heal the wounds left by past crimes, efforts to establish the Rule of Law are doomed to fail, because the consolidation of institutions and democracy depends on the restoration of an ethical attitude at all levels and in all institutions.

It is commonly argued that dwelling on the past serves only to open old wounds. But that assumes that the wounds have been closed. They have not, and the only way to close them is to achieve a genuine national reconciliation based on truth and justice with regard to the past. These are the minimum basic requirements for genuine reconciliation.

A genuine national reconciliation also requires forgiveness. But forgiving is not forgetting (which, in this context, would be a sign of weakness or fear of the future). Nor is forgiveness the same as

indifference (essentially, an escape from reality due to a lack of conviction). Nor is it naïveté (a willingness to believe anything and being susceptible to any convenient manipulation of conscience).

We know many believe that forgiveness and reconciliation are human frailties, symptoms of timidity and cowardice. Some people know no other response to insult or injury than revenge or violence, but they are missing the point and are very confused. They are confusing forgiveness with weakness, and courage with revenge or the refusal to forgive. In truth, the situation is quite the opposite. It requires great courage to keep from giving in to resentment and/or to the urge for revenge. Contrary to popular opinion, forgiveness is a difficult and risky act and is a characteristic of strong and noble people. It can only be shown when one's self or one's rights have been offended by another. It has therefore nothing to do with forgetting or indifference, much less with naïveté.

Forgiveness is, and indeed must be, a lucid act. The person who is able to forgive judges that the one who caused harm is a lesser person than the one who suffered harm. The act of forgiveness is aimed at breaking the spell which otherwise leads the victim to internalize the oppressor within himself. Those who truly forgive break the vicious cycle which stifles all human communication. Forgiving involves risk because its only strength is the hope that the show of kindness will open the heart of the oppressor to something other than his own perverse logic. Those who forgive do not want to become imprisoned by the evil shown by their adversary. They do not seek to heal rape with rape, or torture with torture, or aggression with aggression. They seek instead to create a new relationship, asking only that evil not have the last word.

This also goes to show that one cannot forgive in the abstract. One cannot forgive without knowing who is being forgiven. Nor can one forgive on behalf of another: that kind of forgiveness is a form of cruelty towards the victim. Only the one who has been tortured or abused can forgive his or her oppressor. Only the one who has been the target of hatred and the victim of its destructive intent, can reveal the impotence and stupidity of that hatred and injustice. Only the

one who hopes that his or her act will open a new history of fraternal relations can truly forgive the one who has shown hatred.

In a society which has been dominated by injustice, reconciliation cannot help but cause enormous tensions which are not eased by an abstract kind of forgiveness. Attempts at forgiveness must take this conflict into account and begin to work on the basis of it. In any case, forgiveness will always appear as a challenge, a demanding requirement in the quest for national peace.

On an interpersonal level, when we forgive someone we run the risk of making a mistake by placing our trust in him, hoping to touch his conscience and his heart, to bring about a change, which will lead to reconciliation. In this sense, forgiveness is a positive attitude, profoundly optimistic as regards human nature. Those who forgive believe that human beings are truly capable of change, and that evil will not prevail. Forgiveness is confidence bordering on idealism, without being naïve. It is an act by which one puts one's self in another's hands, in the hope, shared by the entire community, that he will change. In this case, forgiveness is the ultimate act; it seeks to overcome and heal the deepest rifts between individuals.

Nevertheless, we must point out that while this may be so as regards interpersonal relations, things are quite different at the social and political level. Once we leave the context of interpersonal relations or the setting of a religious community, and enter a society torn by conflict, we cannot use the same categories when speaking of forgiveness and reconciliation. In a social or political setting, forgiveness and reconciliation must be seen from a more complex and less immediate perspective. There are no automatic prescriptions or procedures at this level, either. After all, the lives and destinies of so many are at stake. The risks must also be measured from different perspectives. It is still necessary to break out of the vicious cycle of revenge and retaliation, but never at the cost of taking back into the community an unrepentant enemy, without at least a serious and detailed analysis of the reasons for his injustice. That would be the same as showing the fox into the hen-house.

To understand these dynamics it may be useful to consider the secular experience of churches: they never granted forgiveness or acknowledged a sinner's reconciliation with the community until the sinner had first fulfilled certain basic requirements, and then only subject to certain conditions that were spelled out in all catechisms, namely: an examination of conscience, repentance for the sin committed, the firm resolve not to sin again, the acknowledgement of fault before the community and before God, and lastly, a penance to atone for the harm done. His Holiness John Paul II corroborates this in his Encyclical (No. 14) when he explains that the commandment to forgive does not pre-empt the objective requirements of justice, but that justice, properly understood, is the ultimate aim of forgiveness. Nowhere in the Gospels does forgiveness, or mercy as its source, mean indulgence for evil, scandal, injustice or offence. In all cases, reparation for evil or scandal, compensation for injustice, and indemnification for offence, are conditions for forgiveness.

Humiliation Brings Sorrow

It is sad having to retain forever in the collective memory the knowledge that impunity has made us into cowards, the shame of having bowed to the will and vile threats of a handful of criminals who forced us to overlook their crimes and allow them to go without punishment. It is unbearable to live with this shame and to have lost one's dignity. True peace, which is always the result of the reaffirmation of justice, becomes unattainable, remaining forever an illusion.

It is an illusion to think that we can place a "final point" on the horror we have lived through by bringing the criminals and the villains back into the fold, welcoming back into the "house" those who violated human rights through the State's apparatus, and allowing them to live under the same roof as their victims.

In order to cure our sadness, it is necessary to experience the depth of the pain and to see the open wounds and infection of the people's soul. Impunity stands in the way of this, for the sadness in our hearts

will only yield to social therapies that are based on knowledge of the truth.

Paradoxically, it is thanks to the presence of the victims that the future, which once appeared closed, remains open instead. Because suffering cannot be justified and should not turn into resignation. Suffering exists – blind, tyrannical and absurd. It touches not only the innocent victims of impunity: it touches everyone. The pain of the victims and their cries for justice sadden all of us, but they also test us, and challenge us, not to adopt one political attitude or another, but rather to cleanse ourselves, to look for new life in justice, and to imagine and fight for a world without tears.

A Brotherhood of Shame

As it now stands, forgiveness cannot benefit anyone – neither the armed forces nor the State security forces – since it is no longer possible to say who was guilty and who was not. As soon as impunity takes root in a nation, all members of the armed forces and all members of the police who served during the reign of terror pass, without distinction, into the ranks of the guilty. Every single one. This is ominous for a human community, for when an amnesty law (under any of its various guises) is adopted, all citizens will tend to suspect and see as guilty anyone who wore a uniform during those years. This is bound to happen if society fails to provide the opportunity and the appropriate legal machinery to separate the guilty from the not guilty. Notice that I do not say "the innocent"; in these situations none are innocent: all who were members of the security and defence forces during the years of human rights violations knew of the theft, rape, torture, abductions and abuse, yet they did nothing. Those who were not guilty should have insisted on being given the opportunity to say so; when they did not, they lost their last chance to come clean before society and their own children.

A democratic government which gives in to impunity guarantees the people a future of corruption and profound immorality. The captain who yesterday tortured, stole and murdered will tomorrow

become a general. That is all we know. All will be stained by that original sin: to belong to the security forces is to belong to a brotherhood of shame. No officer or member of the armed forces or police can escape the stigma. None can live in peace with his fellow citizens. That might have been possible if those who were not guilty had spoken up and shown that their units were untainted by abduction, torture, rape of defenceless prisoners, murder or stealing from victims. But all were shamefully silent, deceived into believing that they could act with impunity, and that this was part of the repressive system imposed on them. Now the only choice they have is to appear before the civilian population as unpunished criminals, or at least as those who harboured the criminals. The tragic consequence is that the civilian population is justified in suspecting each one of them of having transported a wounded woman in the boot of their jeep to the place where she would be tortured. What youth, what honest worker, what intellectual can now state with conviction that these people stand for national security and the protection of life? National security has become a shroud behind which are hidden outrageous crimes and betrayals. Impunity can thus be said to deliver a mortal blow to democracy.

The Lessons Learned

After the experience we have lived through, we will not tire of saying that there are no complete and unequivocal solutions for all cases of impunity. We say this, in part, because every "solution" that was proposed ultimately failed. But this is no reason to give up the search for new solutions to impunity in every possible field. We realize that without technically viable solutions (i.e. from a legal, political, social and humanitarian standpoint), there can be no way out – only a new problem to add to the existing ones.

The conclusion is as obvious as it is irrefutable: as with diseases in the human body, diseases in the social body caused by impunity cannot be cured through exorcism, utopic fantasies or voluntarist attitudes. What good would it do someone suffering from AIDS or cancer for us to roundly "condemn" the illness or hold seminars on his pain and

suffering? In the end, that person must put his hope in scientific progress and its correct application. Only the ignorant and the hopeless turn in despair to quacks and witch doctors. In the field of social diseases, such as impunity, we also have alchemists and sorcerers who pose as "doctors" and who, like the charlatans of old, offer marvellous potions to cure these ills. But in the meantime, impunity, a disease endemic to so many of our societies, survives, perhaps more deeply rooted and widespread than ever. How are we to fight this seemingly incurable disease? What are we to do? Perhaps we could start with what I suggested at the outset: perhaps we should begin by being silent and listening to the victims. Then, together, we could look for possible solutions. We must also listen also to those who speak seriously and are experts in these matters, in their respective disciplines and historical contexts. But who listens to those who speak seriously? It seems as though we listen only to demagogues. Perhaps that is why impunity still persists!

TOPIC 2

Identification and Judgment of Human Rights Violators

Identification and Investigation Methods

Joan Kakwenzire
Historian, Commissioner
Ugandan Human Rights Commission

In Uganda, large scale human rights violations have occurred in a context of acute political, social, economic, ethnic and religious polarization. Sometimes such polarization would erupt into armed conflicts, thus aggravating the situation.

At one time in 1984, Elliot Abrams, the US Assistant Secretary of State for Human Rights and Humanitarian Affairs, described the Uganda situation as "Horrendous", while Roger Winter, Director of the US Committee for Refugees alleged that conditions were then worse than they were under Idi Amin.

Thus, in 30 years of independence (1962-1992), Uganda's successive governments have torn apart the fabric of Ugandan Society and given the country a reputation of endless violence and bloodshed. For example, it is estimated that about 800.000 people disappeared between 1962-1986.

That, in short, is the background to the establishment of a Commission of Inquiry into Violations of Human Rights (CIVHR) in 1986, for the purpose of conducting a post-mortem of the past crimes.

At the same time, another body, known as the Inspectorate of Government Business, (IGB), was established to investigate crimes beginning in 1986.

Commission of Inquiry into Violations of Human Rights - CIVHR

On the 26th January 1986, the National Resistance Movement (NRM) Government assumed State Power after five years of a protracted guerrilla struggle, bringing to a close a turbulent political history, characterized by wanton killings, destruction of property, excessive abuse of State Power, complete disrespect for human rights and utter disregard for the Rule of Law.

There was an immediate and popular demand from the Ugandan people to identify and investigate those responsible for the atrocities and, where possible, punish them.

In line with its promise to the people of Uganda to address human rights issues as a priority, the NRM government established the Human Rights Commission, barely three months after taking office.

The Commission of Inquiry into Violations of Human Rights was established under the Commissions of Inquiry Act, (Cap. 56) by legal Notice No. 5 of 1986 (see Appendix I). This was considered necessary because, for nearly two decades, the people of Uganda had suffered diverse forms of violations of human rights in contravention of the Provisions of the Constitution of Uganda, and the Universal Declaration of Human Rights to which Uganda is a party.

The NRM government, anxious to reverse the trend of abuses of human rights, felt that it was expedient that the causes of, the circumstances surrounding, and possible ways of preventing the recurrence of these violations of Human Rights be inquired into and documented.

In short, the Commission was expected to inquire into all aspects of violations of human rights, breaches of the Rule of Law, and excessive abuses of power committed against persons in Uganda by the Government and its agents or agencies. The period of the Inquiry starts from 9th October 1962 to 25th January 1986 - date when the present Government assumed power.

Composition of the CIVHR

The Commission is headed by a Judge of the Supreme Court, assisted in the exercise by five Commissioners drawn from different walks of life. There is a farmer/writer, a historian (myself), a medical doctor who is also a Member of Parliament, and two lawyers, one of whom is a Professor of law at Makerere University, and another a Member of Parliament.

a) The Secretariat of about 26 people is headed by the Commission Secretary.

b) The Legal Department of four lawyers is headed by a senior Leading Counsel. This department advises on investigations, plans hearings and adduces formal evidence before the Commission.

c) The Investigation Department, is headed by a senior Police Officer. They were originally 22 in number. They receive complaints, follow them up, record statements, identify witnesses, and open proper case files for prosecution.

The Commission operates under the umbrella of the Ministry of Justice and Constitutional Affairs.

How Investigations are Conducted

Initial Publicity

The appointment of the CIVHR and subsequent swearing in of the members were given wide publicity in the mass media, and the public was invited to the official opening of the Commission. Lengthy speeches were made, and appeals were made to the public to come forward with complaints.

The Legal Notice No. 5 (see Appendix No. I) was translated into all local languages and was circulated through District Administrators and Village Resistance Councils so as to reach as many people as possible at grassroots. The public was advised either

to bring their complaints to our Headquarters in Kampala, or register them with the District Administrators in their areas and wait for the Investigators to reach them.

Once hearings commenced in December 1986, they were conducted in public, and all local newspapers as well as the national TV and radio drew their news headlines from these elaborate hearings. There was a weekly programme on national TV which gave such publicity to the Commission that hardly anybody in Uganda could ignore its existence.

Investigations and the Hearing of Evidence

Since the Commission commenced its work, it has visited all thirty-three Districts of Uganda. Prior to going to a particular District, a team of investigators is despatched ahead of time, in order to identify cases and witnesses, record statements and work on the sampling of all categories of violations of human rights. The team then brings back several cases, out of which the Legal Department selects representative cases for the Commission to hear.

For example, in the Kampala District, the Investigation Department opened 237 files - each with several witnesses. However, only 45 cases have been heard by the Commission.

Evidence is also collected on questionnaires from the hundreds of witnesses for whom it is impossible to open files. That information is very useful for the final report. So far, the country has been entirely covered, and the sampling of categories of violations has been completed. Volumes and volumes of transcribed proceedings of the Commission have been written - and more are still being produced. These will constitute a *verbatim* report.

The work at hand is the analysis and writing of the report and the printing and publication of both the *verbatim* and the report. The work is expected to be over in seven to ten months' time.

Implicated Persons

Throughout our Inquiry - that has lasted six years - many people have been discovered as being implicated in violations of human rights. These include Presidents, Ministers, Public Servants, Army and Police Personnel, as well as political party functionaries, commonly known in Uganda as "Youth Wingers".

Some names of violators stand out, during a given regime, as people who killed, tortured and terrorized people with impunity. Their crimes are unbelievable, and yet they have not been brought to justice. On the contrary, some of them are holding positions of power in today's Government, despite their having been mentioned at the Commission. Examples include:

1 Hon. Moses Ali, a Minister until last year, implicated in the killing of two Somalis in Moroto, Karamoja, 1971.

2 Hon. Mateke, Member of Parliament, implicated in the torturing of party opponents in Kisoro, 1980-1985.

3 Hon. Rurangaranga, MP. implicated in the massacre of 68 Moslems of Bushenyi District, 1979.

4 Idi Amin's Vice President Adrisi Mustapha, implicated in the killing of the late Archbishop Luwum and three Cabinet Ministers in 1977, together with Mr. Masagazi, a former Minister of Education in Amin's government, now prominent in the Moslem Community.

5 Dr. Rubaihayo, former Minister of Agriculture of President Obote II, now a Professor at Makere University, implicated in the callous expulsion of Banyarwanda from Uganda, 1982.

6 Mr. Maswere, a former Deputy Inspector of Police, implicated in the burning of two relatives with red-hot charcoal to force them to confess for an alleged murder. He has retired with benefits.

The list is long, and the Commission will soon give each person a chance to respond to the allegations.

Current Violations of Human Rights

There is no doubt, that the NRM Government is principally committed to observing human rights and the Rule of Law. But the problems involved in the implementation of a sound human rights policy are immense. The Office of the Inspector General of the Government, we are told, is overwhelmed by day-to-day complaints of abuses of human rights and corruption, and yet few of these get addressed. As a device for easing its work, some cases are off-loaded from the IGG's schedule and assigned to other *ad-hoc* Commissions of Inquiry. Again, their findings have not been adequately attended to. These Inquiries are mostly to do with cases where the army is involved, especially in the conflict areas, or where senior Government officials abuse their office in dubious financial dealings.

The latter cases are handled by the Public Accounts Committee while the former cases have been inquired into by specially appointed individuals. So far, all their reports — except one — remain Government secrets (see Amnesty Report 1992).

Conclusion

The NRM Government faces a serious dilemma insofar as the punishment of human rights violators in this country is concerned.

On the one hand, it is anxious to redress the human rights abuses that have characterized Uganda's political scenario since the 1960s, thereby giving the country a bad name at home and abroad. Hence the establishment of the various institutions to investigate human rights violations.

Yet, on the other hand, the National Resistance Movement Government is anxious to broaden its political base, and, therefore, is forced to woe certain individuals, some of whom, as mentioned above, should otherwise have been prosecuted on account of their involvement in human rights abuses.

In some fora, it has been alleged that the NRM Government is not concerned about justice for it is only concerned with its own survival, while in others, its dilemma is appreciated. It is argued that the NRM

seeks to harmonize short-term needs of punishing violators of human rights with the long-term objective of achieving peace and unity for the whole country. After all, common sense dictates that the more persons are pursued for their misdeeds, the more they are driven to the bush to wage war against the National Resistance Movement Government. The Conflict in the North and North East of Uganda is a case in point. A solution to this dilemma is yet to be found, hopefully, at this Geneva meeting on Impunity of Perpetrators of Human Rights violations.

ANNEX 1

Legal Notice N° 5 of 1986

THE COMMISSION OF INQUIRY ACT

(Cap 56).

A COMMISSION

WHEREAS for a period of nearly two decades the people of Uganda have experienced diverse forms of violations of human rights, breaches of the Rule of Law and excessive abuse of power, in contravention of the provisions of the Constitution of Uganda and of the Universal Declaration of Human Rights to which Uganda is party :

AND WHEREAS in the interest of good Government, public security and welfare and constitutional supremacy it is deemed expedient that the causes of, the circumstances surrounding and possible ways of preventing the recurrence of the matters aforesaid, be inquired into :

NOW THEREFORE,

IN EXERCISE of the powers conferred upon the Minister by Section 2 of the Commissions of Inquiry Act, Joseph Nyamihana Mulenga, DO HEREBY appoint,

(i) Hon. Mr. Justice Arthur O. Oder;

(ii) Dr. Edward Khiddu-Makubuya;

(iii) Dr. Jack Luyombya;

(iv) Mr. John Nagenda;

(vi) Mrs. Joan Kakwenzire;

to be Commissioners to inquire into all aspects of violations of human rights, breaches of the Rule of Law and excessive abuses of power, committed against persons in Uganda by the regimes in government, their servants agents or agencies whatsoever called, during the period from 9th day of October, 1962 and to the 25th day of January, 1986 and possible ways of preventing the recurrence of the aforesaid matters, and in particular, but without limiting the generality of the foregoing, to inquire into,

a) the causes and circumstances surrounding the mass murders and all acts or omissions resulting into the arbitrary deprivation of human life, committed in various parts of Uganda;

b) the causes and circumstances surrounding the numerous arbitrary arrests, consequent detentions without trial, arbitrary imprisonment and abuse of the powers of detention and restriction under the Public Order and Security Act, 1967;

c) the denial of any person of a fair and public trial before an independent and impartial court established by law;

d) the subjection of any person to torture, cruel, inhuman and degrading treatment;

e) the manner in which the law enforcement agents and the State security agencies executed their functions, the extent to which the practices and procedures employed in the execution of such functions may have violated the human rights of any person and the extent to which the State security agencies may have interfered with the functioning of the law-enforcement agents;

f) the causes and circumstances surrounding the massive displacement of persons and expulsion of people including Ugandan citizens from Uganda and the consequent disappearance or presumed death of some of them;

g) the subjection of any person to discriminatory treatment by virtue of race, tribe, place of origin, political opinion, creed or sex, by any person acting under any written law or in the performance of the functions of any public office or public authority;

h) the denial to any person of any other fundamental freedoms and rights prescribed under Chapter III of the Constitution of Uganda or the unlawful interference with the enjoyment by any person in Uganda of the said freedoms and rights;

i) the protection by act or omission of any person that perpetrated any of the aforesaid things from due process of law;

j) any other matter connected with or incidental to the matters aforesaid which the Commission may wish to examine and recommend;

AND I DO HEREBY direct that Hon. Mr. Justice Arthur O.Oder be the Chairman of the Commission :

AND I DO HEREBY appoint Mr. Ben B. Oluka to be the Secretary to the Commission :

AND I DO HEREBY direct that in the proper discharge of its duty, the Commission may call such witnesses and ask for the production of such evidence as it may deem necessary and may receive such assistance from any person as it may think fit :

AND I DO HEREBY prescribe that the said Commission shall in the course of its inquiry, so far as is practicable, apply the law of evidence, and shall in particular conform with the following instructions, that is to say,

a) that any person desiring to give evidence to the Commission shall do so in person;

b) that hearsay evidence which adversely affects the reputation of any person or tends to reflect in any way upon the character or conduct of any person shall not be received;

c) that no expression of opinion on the character, conduct or motives of any person shall be received in evidence;

d) that any person who in the opinion of the Commissioners is adversely affected by the evidence given before the Commission shall be given an opportunity to be heard and to cross-examine the person giving such evidence, and except in so far as the Commissioners consider it essential for ascertaining the truth of the matter into which the Commissioners are commissioned to inquire, not to depart from such instructions :

AND I DO HEREBY direct that the said inquiry be held at such times and in such places within Uganda as the said Commission may from time to time, determine, and may be held in public or in private or partly in public and partly in private as the Commission may from time to time determine :

AND I DO HEREBY direct that the Commission shall start as soon as possible and shall execute the said inquiry with all due diligence and speed and make their report to me with recommendations without undue delay and within the shortest possible time;

AND I DO HEREBY require all other persons whom it may concern to take due notice hereby and to give their obedience accordingly.

DATED this 16th day of May, 1986.

Joseph Nyamihana Mulenga, S.C.,
Minister of Justice/Attorney-General

Judges Committed to Justice and Law

José Antonio Martín Pallín
Supreme Court Magistrate
Spain

I - Under the general topic of the identification and judgment of human rights violators, I have been asked to prepare a report on the specific, yet somewhat variable, issue of the conduct of judges in the context of human rights violations.

In a political situation in which the values of liberty, equality and pluralism are not recognized, it is logical to find numerous daily occurrences of fundamental human rights violations, which eventually turn into a habitual and systematic disregard for human rights.

The responsibility for this situation cannot be traced exclusively to one branch of the State apparatus; rather, it is to be found in the political organization itself, which is structured in such a way that it generates a daily series of offences against coexistence in liberty and security.

Hence, responsibility does not rest entirely on the executive branch, which tends to secure for itself the major share of the State's power, but extends also to the legislature, and goes so far as to affect the judiciary as well. In referring to the three traditional branches of government, I have purposely avoided the word "power", since in this case, it is neither appropriate, nor justified, to use terminology which should be reserved for democratic States, in which, if human rights violations do occur, the mutual checks and balances of the three branches of government act to correct and punish abuses, as well as to restore the law.

Political systems currently appear to be evolving towards democratic and constitutional structures; however, mere constitutional formalism is not enough to ensure that the mechanisms provided in a country's fundamental political text will operate within their respective spheres of competence.

II - The judiciary is in a unique and delicate position in those States in which human rights violations have become generalized to the point of constituting a systematic practice, rooted within the State itself.

Judges are responsible for guaranteeing the fundamental rights of the person, suppressing all acts which infringe upon those rights, and restoring the law.

The very structure of the judicial branch requires a permanent commitment on the part of judges to provide guarantees to those who come to them in search of justice.

Judges wield a certain amount of power which must be exercised with responsibility. In rationally organized societies, there is a direct relationship between power and responsibility. The issue of judicial responsibility, therefore, depends upon the level of power held by the judge in question.

Except in totalitarian or pre-democratic States, judges possess adequate powers which are expressly stipulated in constitutional texts and in the laws which derive from them. Even if a State's operational model is flawed, judges maintain the ability to act as guarantors of freedoms and to punish day-to-day occurrences of human rights violations.

Judges therefore have a dual responsibility: the responsibility that goes hand in hand with their position of power, and the responsibility to account for their administration of justice. No authority is exempt from accountability. As pointed out by Mauro Capeletti - when an authority is not held accountable for its actions, this indicates a pathology in the system and a lack of rational organization in the State, characteristics which political

scientists can only equate to authoritarianism, and in extreme cases, to tyranny.

It is, therefore, true to state that power without responsibility is incompatible with a democratic system. Indeed, it appears to be beyond question that in a liberal democratic system of government – one which seeks to guarantee fundamental freedoms in a social democratic regime – there is a fairly proportional relationship between public authority and public responsibility, so that an increase in power leads to an increase in the control of such power.

III - In situations of declining respect for human rights, judges have the option of implementing constitutional mechanisms to counteract abuses on the part of the executive branch by requiring that perpetrators of violations against the life, integrity, freedom or security of the person be held responsible for their actions. In many countries with democratic constitutions, armed confrontations and the pressure of terrorist acts, significantly alter normal patterns of coexistence.

Yet, even in extremely difficult situations, experience has shown that it is still possible to exercise judicial power. It should be recognized that the political/constitutional system in these countries is subject to tensions creating divisions within the executive branch. The latter often succeeds in obtaining exceptional powers for itself, then places these, unconditionally, in the hands of the military, whose members enjoy privileges and immunities that make it difficult to apply constitutional laws. The dynamics of an armed confrontation are such that they give rise to a military style of logic at the expense of a more balanced response to conflict.

Such systems generate states of emergency that upsets constitutional formality by not only revoking fundamental rights and freedoms, but also by limiting the means of controlling army and security forces operations.

This phenomenon is part of a wave of militarization overtaking the laws of some countries with its resulting backslide in

human rights ideology. Battles waged against terrorism, for example, are transformed into minor "wars" which are used to justify abuses, and whose effects on innocent third parties are only later admitted with resignation. This type of situation cannot go on for long in a democratic system without causing irreversible damage to the Rule of Law and to representative democracy.

The entire functioning of the exceptional mechanisms becomes subordinate to winning the war against subversion, without any response from the other branches of government which might otherwise attempt to contain the increasing predominance of military action over civilian authority.

Yet, even in such situations as these, judges may act as counterweights by invoking the Constitution's basic principles, in an attempt to preserve their independence. This is neither an easy nor risk-free task, but it is an unavoidable one if they are not to become accessories to systematic violations of human rights.

A positive reaction from a judge is, unfortunately, a rare occurrence and almost always takes place in an isolated fashion, outside the structures that govern the judiciary, and apart from other judges who adopt similar attitudes.

These judges feel helpless; they have no other option but to become accessories to a given situation or run afoul — either individually or collectively — of the Rule of Law.

I believe that compromized judges are those who feel the need to intervene on behalf of human rights, but because of the risk to their personal security and even to their lives, remain silent, and through their silence, become accessories to the daily abuses which permeate their existence.

In addition to the judge turned accessory or the compromized judge, there is also the judge who actively and purposely collaborates in the system's abuses, invalidating the authority with which he has been invested, by co-operating in flagrant human rights violations.

These are the judges who allow such acts as extrajudicial executions, enforced disappearances, torture and arbitrary detentions to occur without protest, and who allow their perpetrators, both material and intellectual, to act with total impunity.

IV - A climate of tension makes it much easier for the judiciary to renounce its judicial powers to those directly responsible for maintaining public order. Freed from all control and restraint, the latter are then able to act in complete autonomy.

Yet, judges are not the only ones who unilaterally abdicate their responsibilities. The constitutional and supreme courts also interpret constitutional provisions in such a way as to favour the excessive claims of the factitious authorities.

It is important to note that even in a state of emergency, the nature of the rights affected in these exceptional situations warrants and demands a broad interpretation of the powers of guarantee conferred by the constitution upon the various bodies of the judiciary. Consequently, any decision aimed at defending constitutional rights and guarantees could never be considered a deviation from the laws in effect, nor as an action likely to be subject to disciplinary proceedings or any other kind, for that matter.

This issue takes on special significance in the regions of Central America and the southern tip of South America. The progressive enlargement of emergency zones and the repeated extension of the time periods during which they remain in force have adversely affected the independence of the judiciary, and have exacerbated the restriction of and disregard for fundamental human rights.

In these areas, the judiciary finds itself emptied of its natural content and no longer the guarantor of individual rights. Faced with a lack of real power, it must stand idly by as other branches of the government strip it of its duties, thereby removing the power and guarantees it offers under normal conditions.

Only a society whose courts and judges enjoy independence and the authority to investigate and judge the behaviour of the citizens and servants of the State, as well as to guarantee their rights, may call itself a civil society. The others are no more than tribes or tyrannies, regardless of their attempts to disguise themselves with semantics or superficial reforms. Nor are periodic elections sufficient to restore a nation's sovereignty. So long as there is no separation of powers, no guaranteed civil rights, there is no democratic system of government.

Judges who find themselves surrounded by an exceptional and repressive legislation — which is responsible for acts of indiscriminate cruelty — cannot resign themselves to becoming mere spectators of the on-going, irregular practices sponsored by that legislation. They must stand up in protest to the excessive accumulation of provisions which prevent the free exercise of their judicial faculties, and must recover whatever principles remain in those constitutional provisions that have not yet been expressly revoked.

Currently, the judicial system of guarantees is not limited to the scope of internal law; rather, nations are bound by an international law which grants universal recognition to certain individual rights and guarantees. In the case where a country's internal law is insufficient, there still exists the possibility of recourse and appeal to international treaties signed by the country exercising jurisdiction.

In the American region, the Inter-American Court of Human Rights has endorsed a broad interpretation of the protective mission of the judicial function during states of emergency, strongly affirming that the suspension of guarantees does not suspend the Rule of Law. It goes on to maintain that guarantees such as *habeas corpus* may never be suspended since they are vital to guaranteeing the life, integrity, dignity and freedom of detained persons.

The Inter-American Court is categorical in its affirmation that constitutional or legal ordinances which implicitly or explicitly authorize suspension of the procedures of *habeas corpus* or *amparo* in emergency situations should be considered incompatible with the

international obligations deriving from the American Convention on Human Rights, which is expressly recognized in constitutional laws.

V - The independence of the judiciary should mean that judges preserve their powers intact, not only with regard to the executive branch, but also with regard to the exceptional laws which result from the government's extraordinary powers and which receive the approval of the legislative branch.

It is not a matter of inciting rebellion against the sources of legality, but rather of recovering the judge's interpretative faculties, thereby allowing him to complete the law in accordance with the basic principles of the system. As pointed out by F. de Chiara, in *"La Conciencia de los Jueces"* (The Conscience of Judges), judges do not encroach upon the legislative camp so long as they restrict themselves to overcoming, through interpretation, those norms which, when evaluated historically, do not correspond to the social reality. Such a function should be considered necessary inasmuch as it is determined by the fact that inappropriate laws are enacted as a result of inertia on the part of the legislature.

Even judges and magistrates whose hands are tied by repressive laws replete with ambiguity and incitement to indiscriminate cruelty, who are relegated to the position of spectators of practices which border on or fall outside the law, still have some options available to them. They can attest to their own situations, expose them publicly and honestly proclaim that with each passing day they find it increasingly difficult to guarantee even the most minimum level of freedom - a task nominally entrusted to their care.

It calls for a certain amount of heroism to ensure that justice prevails. The determined efforts of judges are the only hope left for the citizen who is subjected to the arbitrary use of power. These expectations must not be disappointed by blind acceptance of the exceptional powers of those who violate human rights. Judges must not stop at the doors of a detention centre and accept the excuses and obstacles placed in their paths by the custodians of the emergency

government. Their delicate mission is to carry out the duties required of them by constitutional law.

As pointed out by Radbruch, an order is an order - and that goes for soldiers too. Similarly, jurists believe that the law is the law. However, whereas for the soldier, his duty and the law no longer require compliance when he knows that an order involves a crime or an omission, the jurist may hide behind the facade of legal pantheism by declaring that the law is the law and, in most cases, has the power to prevail.

This positivist concept of the law has been adopted both by jurists and by societies who stand defenceless against laws, no matter how arbitrary, civil or criminal they may be. According to this concept, the law ultimately equates to power, but only where there is power does the law exist.

Judges must overcome this blind positivism and have enough courage to deny legal status to laws which violate human rights. Some legal principles are stronger than any legal provision; hence, any law which contradicts these principles is completely lacking in validity.

Judges must strive to bring arbitrary methods back into line with the Rule of Law. If they fail to do so, they become accessories to those who exercise unchecked power, as well as co-perpetrators of all human rights violations. These violations degrade the political situation and demand a firm response from civilized society condemning any legal pronouncements which disregard human rights.

No judge is capable of passing judgment on a law which not only is unjust, but which, furthermore, is criminal. Fortunately, human rights supersede all written prescriptions.

Investigating Commissions on Human Rights Violations The Case of Chad

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On 20 May 1992, the Inquiry Commission concerning crimes and embezzlement committed by former President Hissein Habré and his accomplices publicized the results of its investigations, summarized as follows:

- more than 40,000 victims died in imprisonment or were simply executed on the outskirts of cities and villages; the Commission was able to identify almost 4,000 persons by name.

As to the misappropriation of public funds, when the fallen dictator fled, he took with him more than 4 billion CFA francs, drawn from the safes of the State and the public treasury.

National and international opinion were alarmed upon the announcement of such gruesome findings. Before this Commission made its investigations, no one had any idea of the extent of the disaster (except Habré and his secret police); even the investigators themselves only became aware of the genocide after several months of in-depth research. Had there not been the initiative to inquire into the nature of Habré's regime, this cruel reality would have been buried and no one would have been able to

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evaluate the extent of the crimes which had been committed. So regimes would follow one another, violating the fundamental rights of citizens with impunity.

Since independence in 1960, Chad has experienced several repressive regimes. All have, with varying extents, followed the practices of summary execution, torture and arbitrary detention; but no light has been shed on these crimes: time passed and oversight effaced them. Yet the losers are not only the victims and their families, but the whole of society, an entire people permanently subjected to the extortions of their rulers.

To contain this criminal tendency, which for too long has enjoyed complete impunity, instruments of dissuasion must be urgently sought, both national and international, capable of curbing the vigour of the transgressors.

The new era of democracy that spreads across the continents has inspired transition governments to react, each in their own way, to the serious human rights violations committed by their predecessors. Some countries have been reluctant to open the criminal records of deposed governments, others have decided to prosecute them. Thus, the latter have created commissions of inquiry to bring to light offenses against human rights committed by the former regimes. Some of these commissions have been able to bring their investigations to a close, together with pertinent recommendations for the future to guarantee that human rights be respected.

My intention, in the following paragraphs, is to present the different forms of such commissions and the frequent obstacles they encounter.

The Research of Violators Ordered by a Regime in Power

The search for violators of human rights, today, is not only ordered after the fall of a given regime, but may, sometimes, be mandated to clarify violations committed by a regime still in power. These investigations are often the result of the pressure of public and international opinions. Sometimes, regimes in power at the present

time are directly implicated in serious human rights violations and will consequently take no initiative of their own to identify the authors. Two interesting examples may be found in Africa:

- the Chadian Commission of 14 November 1991, established to search for the authors of offenses committed during the events of 13 October 1991;
- the Commission delegated to Togo by the International Federation for Human Rights, established to identify the authors of the assault against Mr. Olympio, a renowned opponent of the regime of President Eyadema.

Chad: The Commission of Inquiry of 14 November 1991 Appointed to Identify the Authors of Offenses Committed During the Events of 13 October 1991

On 13 October 1991, the new government which had, nearly a year before, replaced the Habré regime, accused a group of Chadians, mainly of the Hadjeray ethnic group, of having attempted a coup against the new government. Following the disclosure, military partisans of the government started to pursue members of the Hadjeray indiscriminately. There were mass arrests, dozens of people were summarily executed, there were disappearances, cases of torture and the looting of private property. International humanitarian organizations, notably Amnesty International, entreated the government of Idriss Deby to open an inquiry on these events.

Even though the violators were faithful partisans of the present regime, the government appeared to yield to the appeals of international opinion, and the Commission was established on 14 November 1991. This initiative was an exceptional occurrence, for it was the first time in Chadian history that a government in power, involved in human rights offences, accepted to create a national commission to investigate ignominious acts of its own doing.

This Commission of nine people is directed by a magistrate. Initially he was given two months to file his report. However, one year went by before the commission could do anything at all. A few

declarations were obtained from the victims; as to authors and accomplices, it could get hearings from none.

As mentioned above, the presumed authors and accomplices of the crimes were faithful partisans of the present regime and still occupy, in spite of the crimes committed, important posts both civil and military. The latter are so powerful that no one dares question them for fear of reprisals.

With respect to the members of the Commission, it must be noted they have no power on which they can rely to protect their lives or, if necessary, comply solicited persons to appear before them. I, therefore, strongly doubt that the Commission will ever be able to deposit its report. In my opinion, this is the type of commission created in order to bury a sensitive issue.

To avoid such difficulties, some African leaders have sometimes preferred to appeal to international commissions of investigation. This was the case recently in Togo concerning the Olympio affair.

The IFHR Inquiry Into the Assault Against Olympio in Togo

On 5 May 1992, in northern Togo, Mr. Gilchrist Olympio, the son of the first President of the Republic of Togo assassinated in 1963, and a noted opponent of the present regime of President Eyadema, was the victim of an attempted assassination. Several important personalities accompanying him were killed.

The Prime Minister of Togo, Mr. Joseph Kokou Koffigoh, appointed to this post by the National Conference, appealed for help to the International Federation for Human Rights (IFHR) to elucidate this affair. The Federation responded positively and sent three investigators to Lomé: a French judge, a Belgian lawyer and a former chief of Britain's Scotland Yard.

I will not go into the various legal problems this brought up; what particularly interests me is the reason why the Togolese Prime Minister should appeal to an international institution when, it seems, nationals could have performed the task. Why did the Prime Minister resort to an international non-governmental organization? Are

the Togolese and their institutions incapable of accomplishing this mission?

To understand the decision of the Prime Minister, the present political situation of Togo should be recalled. For several months, this country has been going through a difficult period in its transition to democracy. The Supreme National Conference, held last year, designated a Prime Minister with wide prerogatives, while President Eyadema, who had been the absolute ruler of the country since 1963, was deposed from all his powers. In practice, however, the latter retained his hold on the security forces and the army, which explains numerous incidents of intimidation provoked by his military partisans.

In light of the dual nature of power in this country - on the one side, a government established by popular will and on the other, a president clutching onto power in spite of having been disavowed by the people - the attitude of the Prime Minister seems justified for several reasons: the climate of insecurity and suspicion which reigns in Togo is such that it would be difficult for a national commission to be able to fulfil its mission; immersed in this voluntary chaos, the State would be incapable of safeguarding the lives of national investigators; experience has shown that several national commissions created in such circumstances were never able to file their conclusions.

These are bitter facts that may not be ignored by decision-makers.

An international commission has both advantages and disadvantages: among its privileges, immunity and neutrality; among its inconveniences, for example, the short working time it is generally allotted, which does not permit it to delve deeply into a matter, but only to take an overview of hastily collected facts. This is not to mention unfamiliarity with the region, which can lead to serious blunders. Yet, the real limits of this type of commission derive from the fact that a sovereign State cannot indefinitely resort to it every time a political crime is committed.

The two cases of Chad and Togo are good examples of the studies and reflections on solutions for getting around the deficiencies of

national investigation commissions or substituting them in the event of their inability to accomplish their mission in a normal fashion.

It is true that international commissions may sometimes be useful in extremely delicate and well-defined situations. However, they should be a last resort and all preference should remain with national institutions whenever possible.

Parallel to these types of inquires into crimes committed by regimes presently in power, other national investigation commissions have been established after the fall of oppressive regimes, such as the Chadian Inquiry Commission formed after the escape of Hissein Habré, the Chilean Commission, that of Argentina, and others.

Inquiries Ordered After the Fall of Dictatorial Regimes

The most thorough inquiries are probably those which are conducted after the fall of oppressive regimes, because the investigators have a great deal of leeway, room to manoeuvre and assurance with which to successfully carry out their search. But again, the distinction must be made between inquiries decided against a fallen regime having no hold on the new regime and its institutions - as in the present case of Chad - and those ordered against a dictatorship already ousted but where the former leaders still exercise pressure on or control of certain important national institutions, such as the army. Chili could be mentioned as an example, where though he is no longer the head of State, General Pinochet has a firm grip on the army. The Chilean Commission, which conducted a remarkable and praiseworthy inquiry on the violations of the deposed regime, could, unfortunately, not name the violators personally.

Violators and Oppressive Agents: the Case of the Regime of Habré

As soon as he was installed in June 1982, Hissein Habré buckled down to one priority: to set in place four oppressive agencies as the pillars of his dictatorship. These were the secret police, called the Direction de la documentation et de la sécurité (DDS), the

Presidential investigation service (SIP), the Renseignements généraux (RG) and the State party, "Union nationale pour l'indépendance et la révolution" (UNIR).

All these bodies had the task of controlling the people, surveying their every move and attitude in order to drive out enemies of the nation, meaning the enemies of his regime, and to definitively neutralize them.

The DDS - Principal Organ of Oppression and Terror

Of all the oppressive institutions of Habré's regime, the "DDS" was most notorious for its cruelty and contempt of human life. It fully succeeded in its mission of terrorizing the population to better enslave it.

The first article of the Decree on the establishment of the DDS stated that it was attached to the presidency of the Republic because of the confidential nature of its activities. Thus, there was no intermediary between the DDS and Habré, Habré giving it his direct orders and instructions, and the DDS rendering him a daily account of its activities in files.

Interrogated by the Commission on this subject, the ex-minister of the Interior, Djimé Togou, declared, "Everything concerning the DDS was reserved for the President and no person, whatever his level or function, could intervene in the affairs of that direction."

The initial task devolved upon this secret police was the gathering and centralization of all information emanating from both the interior and exterior relative to foreign activities or of foreign inspiration susceptible to threaten national interest (Article 4 of the Decree No 005/PR of January 1983 establishing the DDS).

The vigilant observer reading through the initial attributions of this security service, inserted into the said decree, finds no worrying or intriguing text. There is no trace of arbitrary arrests, detentions without trial or judgment, or even less, of summary executions.

Nevertheless, it would be an error to trust these texts of eloquently constructed regulations; it would be ignoring the pathological

duplicity of Habré, who has always been a two-faced man: he displays a legalist and conformist visage to the public and conceals another which is the incarnation of evil, and is his real nature.

Thus, this apparatus was transformed in the first months of its activities into an instrument of terror and oppression. In my opinion, two decisive factors constituted the basis of this deliberate orientation: on the one hand, there was the tyrannical and perverse character of Habré himself, and on the other, the frustration and revenge complexes that corroded the leaders and employees of the security services.

Habré's attitude towards his adversaries, real or imaginary, was very curious. He believed that everyone who did not think the way he did was against him and did not have the right to live.

During the eight years of his rule, this macabre logic did not change an iota.

To give an example, on the afternoon of 10 August 1983, 150 Chadian prisoners of war of different ethnic groups, captured in the north of the country, were removed from the jail in N'Djamena by military personnel attached to the presidential guard, taken 25 kilometres north-east of the capital, near the village of Ambing, and shot at point blank. Their bodies were abandoned in the open air for almost two years. Nobody could approach to bury them, nobody dared utter a word.

This was the sort of action Habré took to dissuade any eventual adversaries.

Sometimes, in orders of arrest coming from above, the identity of the person was not even specified. Thus, during the anti-Habré revolt of the Zaghawa community, he gave the order to his secret police to arrest all the members of this ethnic group, without distinction.

In the words of Mr. Abbas Abougrène, ex-agent of the DDS: "On 1 April 1989 at 6 o'clock in the morning, Guihimi Koreï, ex-director of the DDS, gathered all the heads of the service and asked them to arrest all persons belonging to the Zaghawa community

without exception. He specified that this was the instruction of the President of the Republic."

As far as the regime of Habré is concerned, it has been shown that serious human rights violations were only rendered possible because the Head of State not only consented to what was happening all over the country, but personally gave instructions and orders to this effect. The proof of this is that during the eight years of his rule, Habré held several political prisoners and prisoners of conscience, considered as dangerous for his regime, just a few steps from his official residence.

As in all the strategic mechanisms of the State where Habré placed his relations, the four successive directors heading this bloodthirsty machine and a great number of the direct executors of its vile chores were recruited from the ethnic group to which the President belonged.

The executor-agents of the DDS came from the most impoverished and marginalized social classes of Chadian society. When they suddenly found themselves with no time for adjustment, at the forefront of the national scene, equipped with absolute, limitless power, they thought that the entire country had become their property and that they could dispose of its people and its goods as they so desired. Such power, coupled with such a manna, would inevitably pervert the humblest of citizens. Thus strengthened and with a weapon as terrifying as the security services, these newcomers could neither retain nor master their impulses of revenge against those who had recently considered them as marginal.

The oppressive machine was put very quickly to work. Arrests were made in all directions at once, day and night, generally without or with a banal motive unrelated to State security.

Here are a few examples of the hights of arbitrariness:

- Narassoum Ngarkol: official, arrested on 30/09/1987. Grounds: he was reproached for having said at a drink counter that the father of Hissein Habré was a *"Sudiste"* (Southerner). He died on 11 August 1988.

- Brahim Bourma, arrested 18/01/1988. Justification: he attempted to travel in the Central African Republic without a *laissez-passer*. He died on 12 July 1988.

- Kouna Moussa Néné: journalist, arrested on 8/02/1988. Grounds for arrest: illegal possession of a handgun. He passed away on 15 August 1988.

A thousand people could be easily named who were similarly arrested on useless grounds and illegally detained by the security services without indictment or judgment.

As soon as the unfortunate person was arrested, his belongings acquired during long years of hard work were plundered. The worst was that the boarders of the DDS had little chance of recovering freedom alive. Many died through physical exhaustion, others by poisoning or summary execution.

The aim of the DDS was quickly achieved: the population was terrorized; every citizen was anxious, not knowing what would happen to him the following day.

The terror and contempt for human life, purposefully maintained, was summarized by a former Director of the DDS, Saleh Younos, who said:

> "It must be admitted that the primary mission of the DDS was progressively modified by President Habré himself. In the beginning, the Direction was supposed to look after the interior and exterior security of the country, notably, to counter any action of the Libyans against Chad. But little by little, the President gave a new orientation to the Direction of the DDS and made of it an agent of terror."

In conclusion, the human rights violations in our countries are not a question of fate, but rather of political will. If at the top there is real political will to change things, the situation will improve rapidly.

TOPIC 3

The Juridical Norms

The Principles of Legality and Non-Retroactivity and the Principle of Limitation

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Introduction

Since I have no desire to depart from the intellectual line proposed in the excellent "Explanatory Memorandum" prepared by the organizers of this momentous event, I will concentrate my comments on the impunity which usually benefits the perpetrators of and collaborators and abettors in the most serious human rights violations which have taken place and are still taking place in the world. This necessarily means analyzing and assessing the responses of criminal law and international law, and the proposals put forward by the new academic branch born of their convergence which is commonly known as international criminal law.

I feel that the complex set of problems and tangential issues of interest surrounding the basic themes, both individually and as a whole, compel me to begin straightaway by looking at the themes whose development the programme has assigned me: the principles of legality and retroactivity on the one hand, and on the other the principle of limitation.

I - The Principles of Legality and Non-Retroactivity

1 - Background

If we take the most serious violations of human rights and the responses made by the various branches of the law as the reference points for our thoughts, we inevitably end up in the period

following the Second World War since, with hostilities over the *de facto* and supposedly *de jure* attempt to criminalize the law began, with a view to setting up military tribunals to try the major war criminals alleged to have committed the most appalling crimes against peace - and which had unlimited power to impose any kind of sentence, including life imprisonment and the death penalty.

There was an inevitable clash of ideas concerning the sentences and the implementation of the punishments between those lawyers with a background in international law, and those trained in criminal law. The international sought to justify the concept of a flexible penal system, of a common law nature and with natural law features in the light of the alternative, which was to choose between impunity and the acceptance of the criminal law jurists' proposal of developing a model parallel to domestic penal systems which would avoid infringing the fundamental liberal principles on which they were based, in particular that of legality.

It must be acknowledged that the criminal law jurists were the most fervent in this interdisciplinary confrontation, proving Quintano Ripolles right in his attempt at conciliation, since they considered that the above-mentioned experiment, called international criminal law or criminal international law - the order of the words is of secondary interest - was not based in law and was not international, much less criminal. Jimenez de Asua confirmed this assessment, telling his followers in exile that if the war had been against authoritarianism and barbarism, then the winners would be making a bad start in restoring law, freedom and human dignity if they trampled underfoot the fundamental principles and most characteristic guarantees of an invoked universal, democratic, legal order.[1]

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1 Quitano Ripolles, Antonio, "Tratado de Derecho Penal Internacional e Internacional penal", Madrid, 1955, pp.11 - 12;

Jimenez de Asua, Luis, "Tratado de Derecho Penal", Buenos Aires, 1950, Vol. II, No. 898, p. 1295.

Maybe these considerations already contain the response to the intelligent and profound question posed at the beginning of the Explanatory Memorandum: "how must democracies and States based on the Rule of Law confront totalitarianism and barbarism without running the risk of losing their very essence?"

2 - The Supreme Principle of Legality

Summed up in the original maxim "*nullum crimen sine lege* ", it has been expanded to include elements like non-retroactivity, and characteristics like the requirements of strictness and documentation.

As in all doctrinal clashes, this particular one was greatly provocative in that it raised problems such as the sources of criminal law, the relation between the principles of legality and non-retroactivity and the nature and the structure of criminal law.

The theory of the sources took on special significance since, while in the penal systems the need for the organic law as the sole source for defining offences and fixing sentences was beyond question[2], the internationalists, on the other hand, possibility motivated because in fact the collapse of the principle was one of the most serious and widespread criticisms of the performance of the military tribunals, agreed, without further question that the dogma of criminal legality" had remained at the margins of international law until the post-war period, and, in addition, that despite its function of "safeguarding individual rights" and its "primacy" as established in the constitutions of democratic States, it was a principle that could not be transferred from codified law to a customary law like international law[3]. Nevertheless, they ended up by accepting that basing legality on a foundation of justice like custom was also

2 Polaino Navarrete, Miguel, "Derecho Penal", Parte General, Barcelona, 1989, p. 483

3 Glaser, Stefan, "Introduction à l'Etude de Droit International", Brussels, 1954, p. 79.

universally valid. "This is a further victory of criminal technicality over the internationalists", said Quintano Ripolles finally in his study of the subject, quoting Jimenez de Asua: the reasons for respecting the maxim have now been added to, precisely through its establishment as one of the fundamental human rights in article 10 of the Universal Declaration, and at the same time as a ringing retrospective condemnation of the Nuremberg Trials.[4]

Curiously, opinions have persisted which, without exaggerating the performance of the military tribunals, indeed going so far as to criticise them on dogmatic grounds, consider, like Zaffaroni that "*nullum crimen sine lege*" was not violated, at least not in most cases, because crimes on a vast scale, and war crimes are generally violations of international laws like the 1909 Hague Convention and other laws.[5] I am sorry to have to disagree with the distinguished Argentinean professor and director of ILANUD — whom I respect intellectually and whose friendship is an honour to me — in the first place for his conception of crimes against humanity, which is limited to the mere repetition of common offences, when precisely, they are characterized by their own essential elements and a specific legal objectivity[6] and, secondly with his assertion that the sentences have only violated "*nullum crimen sine poena*" when in reality this principle makes a morphologically inseparable unit with "*nullum crimen sin*e

4 Quintano Ripolles, Antonio, op. cit., p. 103. The provision mentioned States that " Noone shall be convicted of acts or omissions which at the time they were committed were not crimes according to national or international law. Neither shall a penalty harsher than that applicable at the time the crime was committed be imposed."

5 Zaffaroni, Eugenio Raul, "Tratado de Derecho Penal", Parte General, Buenos Aires, 1980, Vol. I, pp.250-253.

6 Graven, Jean. "Les Crimes contre l'Humanité", Extrait de Recueils de Cours de l'Académie de Droit International, Paris, Sirey, 1950; Jeschek, Hans. "Tratado de Derecho Penal", Parte General, Vol.I, p. 163; Mera Figueroa, Jorge. "Delitos contra los derechos Humanos", Doctrina Penal, Year VIII, Buenos Aires, 1985; Lopez Goldaracena, Oscar. "Derecho Internacional y Crimenes contra la Humanidad.",Montevideo, Uruguay, F.C. Universitario, 1986, pp. 36-39; Shurmann Pacheco, Rodolfo. "Los Delitos de Lesa Humanidad", FORUM Internacional de direito Penal Comparado, Salvador, Bahia, Brazil, 1989, pp. 178 ff.

lege". This makes the collapse of one part unthinkable since the legal norm itself is integrated, ontologically, with the precept and the punishment.

II - Limitation

1 - Reason for Considering Limitation

The inclusion of this principle in the particular themes to be dealt with turns out to be necessary as well as opportune, for various reasons.

Firstly, because the nature of limitation, is indicative of a species within the category of renunciations of the State's power to sanction, in accordance with domestic legal criminal regulations.

Secondly, because of the very structure of international criminal law, which should not neglect in its projected systemisation the study of the inclusion or exclusion of a principle of this kind in or from domestic criminal law, as was done in the Convention on Genocide, even though it had declared itself in favour of the non-applicability of statutory limitations.

Thirdly, because of the very nature of most international crimes, which include the most serious and atrocious attacks on human rights.

2 - Limitation in Domestic Criminal Legislation

Since antiquity, criminal limitation has consisted in a renunciation of the punitive intent, originally dispensed by judges and subsequently by the penal system, as a rule for crimes considered to be ordinary — according to the historical time and place — but not for those considered to be atrocities (including *lèse-Majesté*, parricide, extortion, murder, forging money) which by their very nature were held to be exceptions not subject to statutory limitation.

In the final analysis limitation recognizes the corrosive effect of time on memory as a substantial foundation, and the requirement that it should be legally dispensed and graded as a formal foundation.

For the dogmatist, quite naturally, what is decisive is the legality of the principle, and even more so for the specialist in criminal policy – freed from the exegetic rigour of the "*lege data* " and motivated by the creative spirit which characterizes an elaboration of "*lege ferenda* ", the substantial formulation is for him or her primordial, since it is not only about formulating a provision, but also assessing its practical necessity and dogmatic validity.[7]

Lastly, it is not about basing the argument that "the simple passage of time has a mystical power which damages the law "as Von Listz[8] observed on metajuridical considerations, but using "the power of law itself in its practical finality" and a real legal process to determine the disadvantages of delayed punishment.[9]

3 - A Way of Confronting the Passage of Time in International Crimes

I dare to suggest that the proper way to make this meeting worthwhile is for us to place ourselves precisely in this last context, recognizing but not exaggerating the difference between a piece of internal legislation and an international one. In this line of thought, I believe that Professor Bassiouni's method is the most useful since it includes observations which, through the generality or universality of their bases, have the virtue of applying equally to international and domestic legislation.[10]

This is not an abrupt or marked departure from the methodological position currently held by the criminal law jurists, an example being the international criminal law conferences and associations which have been organized with the common aim of

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7 Manzini, Vicenzo ."Trattado di Diritto Penale, Vol. III, p. 480 and nat. 3.

8 Von Listz, Franz. " Tratado de Derecho Penal", Vol. III, translated by Quintiliano Saldana, p. 402.

9 Soler, Sebastian. "Derecho Penal Argentino", Vol. II, p. 510.

10 Basiouni, Cherif M.. "Derecho Penal Internacional", translated by Professor Joseph de la Cuesta Arzamendi, Madrid, Edit. Tecnos. 1984, p. 86.

resolving questions concerning the overall academic development of our discipline and the particular development of our systems.

In this regard let us look for an example to one of the issues of most interest concerning limitation.

a) For some doctrinaires, the principle might provide grounds for extinguishing the crime and the punishment, as established by the Italian Penal Code and almost all the Latin American bodies of Law that followed it, including that of Uruguay. Despite the widely-held opinion that the actual offence, translated into an act which really occurred, cannot be destroyed or eliminated, not even if the penalty — which is its consequence — is subject to the concept of limitation thus understood, legal systemization maintains the hope that it can be improved upon.

It has really been said, quite rightly, that "the death of Caesar will always be murder" and in the same way it can be said with even better reason that an atrocious crime against humanity can never be abolished by limitation since it will always be one of the principal criminal evils.

On the whole, I think that we, criminal law jurists and internationalists, must agree that the extinction of an offence is one thing, and the renunciation of the intent to punish is something very different, just as — in its turn — the abolition of a penalty is one thing and the legal provision of grounds annulling it is something else.[11]

b) Another issue, this time raised by the internationalists is that of whether the acceptance of limitation for crimes as serious as war crimes and crimes against humanity is dispensable or not.

The celebrated Professor Verdros said in that respect that "the fact that this is a principle admitted by the legal order of all civilized countries favours giving the principle on limitation force in international law", and the distinguished Professor Pella has already

11 Manzini, Vicenzo, op. cit., Vol. III, p. 479 et f.f. Maggiore, Guiseppe, "Derecho Penal", t.II, p. 351.

pointed out that there was no need to insist on necessarily submitting the public right of action to limitation in cases of international crime, "since the same reasons on which the principle was based in international systems provided a basis for it in the Penal Code of Nations [12]

In turn, the well-known Argentinean writer, Pablo Ramella, also of this school of thought, stated in his recent study of "Crimes Against humanity" that when codifying these crimes, it is "absolutely necessary too include prescriptive norms... so as to preserve international public order", but nevertheless acknowledged that "difficulties arise... when there is no already existing formally established law or punishment and no norms fixing prescriptive terms."[13]

On the subject of difficulties I would like to add to those described by the Argentinean professor one which I had to resolve together with the distinguished lawyers Alejandro Artucio and Oscar Adolfo Lopez Goldaracena when the bar Association of Uruguay asked us to draw up a draft bill on Crimes Against Humanity (currently under review by the Parliament), a problem which arose from the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity" of 9 December 1968 (United Nations Treaty Series, 277).

We chose to resolve the problem in favour of the non-applicability of limitations with the dogmatic criterion, or "*lege data*" if you prefer bearing in mind the international commitment undertaken by Uruguay in that field (Art. 6 and the introductory explanation accompanying the draft bill) and the tenacious position against limitation for these crimes held to be "irrevocable" by Alejandro Artucio - who I have decided not to classify as a criminal law jurist or

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12 Verdross, Alfredo. "Derecho internacional Público", Madrid 1957; Pella, Vespaciano V. "La Criminalidad Collectiva de los Estados Unidos y el Derecho Penal del Porvenir", Madrid, 1931.

13 Ramela, Pablo A. - "Crímenes contra la Humanidad", Buenos Aires, Argentina, pp. 126 ff.

as an internationalist although he has studied both branches of the law in depth, but rather as a well-known and active protector of human rights throughout the world – and who thus in this analysis of the law on impunity in Uruguay maintained that the recognized crimes against humanity (brutal torture, political assassinations, hostage-taking, enforced disappearances) deserve and require special treatment and concerted action by the United Nations to declare them not applicable to limitation.[14]

In his less radical, syncretistic position, Professor Bassiouni favoured, in the unsurpassable draft International Penal Code the rule on limitation established in article 10 that no criminal legal proceedings for international crimes shall be "suspended or its implementation impeded by the passage of a period of limitation inferior to the duration of the maximum sentence provided for the crime in question", pointing out — in the explanatory footnote — that exceptionally, if the maximum applicable penalty was prison in perpetuity or death, there would be no period of limitation. He added that this system had been adopted "despite the Convention on the Non-Applicability of Statutory Limitations of 9 December 1968 and the 1974 European Convention in order to avoid the innumerable problems and difficulties which had actually impeded the ratification of the Conventions by many States".[15]

In the first place, this is a position which does not violate any principles of criminal law, since the principle of limitation is not one of them, and neither is it an absolute and universal principle like "*nullum crimen nullum poena sine praevia lege*", which we looked at above. Confirmation of the aptness of this consideration lies in the establishment of the non-applicability of limitation in cases where the punishments might be very heavy in various penal codes and special laws annexed to them, which is what happens in Italy with crimes punishable by death or long terms of imprisonment –

14 Artucio, Alejandro. Tribunal Permanente de los Pueblos "La Comunidad Internacional frente a la impunidad uruguaya" 1990, pp. 5 and 6.

15 Bassoiuni, Cherif M..op.cit., pp. 237 and 238.

"because the memory of these crimes does not disappear from the memory of the generation which saw them committed"— and in — Germany for crimes against peace and humanity, and war crimes.[16]

In the second place it is a position which takes account of the widespread trend in domestic penal systems to grade periods of limitation according to the maximum sentences laid down in the abstract by legislators[17]

Finally, in the third place, it is a procedure which is both practical and fair since the more or less extensive list of international crimes to be contained in an International Penal Code or a special internal penal law, would inevitably include a broad or a large range of sanctions ranging from major penalties which might justify non-applicability of limitations — in conformity with its supporters — and lesser penalties for crimes of little political significance, for which non-applicability of limitations would be truly excessive. It is if you like a solution of "legislative policy", but it is inevitable in the case of countries like Uruguay which would refuse to consent to any formula which, however eclectically and exceptionally contained the possibility of not applying limitations. My country removed prison terms of over 30 years from the penal system in the thirties, just as, more recently, it removed eliminative security measures and the death penalty, considered since the 19th century to be "legal murder".[18]

16 Bettiol, Giuseppe. "Diritto Penale", Edition III, Pallermo p. 610; Jeschek, Hans H., "Tratado de Derecho Penal (Parte General)" translated by Professors S. Mir Puig and F. Munoz Conde, Edit. Bosch, Barcelona, 1981.

17 In the Uruguayan Penal Code. for example, "when the maximum sentence fixed by law is between 20 and 30 years, the statutory period of limitation shall be 20 years, and shall then decrease in proportion to the maximum sentence.".

18 Schurmann Pacheco, Rodolfo. "La Pena de Muerte en el Uruguay", United Nations, Número extraordinario sobre la Pena Capital, del Boletín sobre la Prevención del Delito y Justicia Penal, Viena, 1986, pp.35 ff.

The Fair Trial

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According to a maxim of Canadian trust law, fairness will not allow a wrong to go unrighted.

The idea of fairness can be seen as the most sophisticated form of justice, that is, the most comprehensive and the most just. Understood in this way, it is an ideal to be achieved, one to which all peoples can aspire and progress towards. A fair trial, then would be the best possible balance between the interests of the parties involved in a trial, a balance the judge must seek assiduously.

It is the domestic legal standard *par excellence* and is now established in international law in the phrase the right to a fair trial.

Article 14 of the International Pact on Civil and Political Rights recognizes that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Paragraph 1 of the article states. "All persons shall be equal before the courts and tribunals".

With regard to the guarantee of the right to a fair trial, article 14 makes a distinction between criminal cases and the disputes and claims of civil proceedings.

To determine the substance of the right to a fair trial, we must enumerate the many procedures designed to ensure fairness and objectivity in a trial.

The concept covers civil cases as well as criminal ones, even though each type of proceeding has its own characteristics.

The guarantees of a fair trial are set out in the same terms in the major international instruments and in certain domestic law provisions of some States. International courts, courts of arbitration, and elements of the judicial practice of domestic courts apply certain principles of fairness. Now that the legal foundations have been briefly outlined, we must go on to look at impunity, which we will define as" the absence or inadequacy of criminal and compensatory sanctions for intentional or unintentional violations of the rights and freedom of the individual".

Impunity, according to this definition, has serious repercussions on the administration of justice and is a denial of the human right to a fair trial, particularly when looked at in connection with compensation.

The right to a fair trial should allow the victim of a violation to be able to obtain compensation for the damage he or she has suffered as a result of the violation.

There must then necessarily be an investigation to establish the facts and identify the culprits and victims. Then, after the investigation, a trial should take place determining the responsibilities of all the parties and offences should be penalized as much to punish as to compensate the damage caused to the victim. This is vital if the intention is for each of the parties to benefit from and exercise their right to a fair trial. The Convention against Torture and Other Cruel Inhuman, Degrading, Treatment stipulates that any individual who claims to have been tortured has the right to complain to the competent authorities, who should immediately carry out an impartial investigation.

I - The Right to a Fair Trial in the Phase of Investigation to Establish the Facts and Impunity

The duty of States to carry out exhaustive investigations into human rights violations is emphasised in certain international standards.

The Principles on the effective Prevention and Investigation of Extra-legal, Arbitrary and Summary executions adopted in

December 1989 by the United Nations General Assembly, calls on governments to open a thorough, prompt, and impartial investigation of all suspected cases of extra-legal, arbitrary or summary executions, and recalls the right to victims to fair compensation.

The Principles should be applied to all cases of human rights violations. They enable those responsible for violations and the victims to enjoy the right to a fair trial at every stage of the proceedings.

The word investigation covers a wide range of procedures which might be used by various bodies which might be permanent like police forces, or temporary, like parliamentary commissions.

These bodies can automatically become involved or they can be informed by individual complaint or following the bringing of criminal indemnification proceedings by a victim. The investigating body rarely has direct knowledge of the violations.

It is normally alerted by information from elsewhere, a complaint or an accusation. The form of the accusation or complaint does not really matter, what does matter is that they inform the authorities of the existence of the violation of an individual's human rights.

However, the absence of a complaint or accusation should not prevent an investigation being opened when there is reason to believe that human rights have been violated.

Any error or omission which might slip into the investigation procedure might broadly influence future decisions of trial courts and thus adversely affect the parties' right to a fair trial. In many cases investigations are difficult to carry out.

The difficulties of investigating vary according to the methods used As has been pointed out elsewhere, there are *de facto* and *de jure* mechanisms which tend to impunity and the non-observance of the individual's right to a fair trial.

II - The Right to a Fair Trial - Judging Human Rights. Violations and Impunity

After a speedy investigation has determined that violations have been committed and the culprits and victims have been identified comes the next stage, that of judgment by a jurisdiction which shall decide on the punitive measures to be taken.

Jurisdiction should be understood as the recognized power of the State to deliver justice and resolve disputes arising from relations between private individuals and between the State itself and its nationals.

It refers to the power of the State to implement the law by attaching an official value to the solutions provided, and to impose implementation where necessary. In modern societies, the State has, in theory, the monopoly to judge.

The right to judge is, therefore, like a debt. The State owes justice to everyone under its jurisdiction The right of the ordinary citizen to a fair trial stems from this feature of the State and from its international commitments.

In order to accomplish this mission it creates institutions and trains a legal staff capable of delivering justice. They form a whole called the judiciary which must combine certain qualities, in particular competence and independence. Reality is sometimes otherwise and the judiciary can be dependent and wholly in the thrall of political or financial power.

The collusion of the judiciary, politics and finance is at the origin of the development of impunity and consequently the systematic violation of the individual's right to a fair trial.

The United Nations concerned itself relatively early on with the administration of justice and the independence of the magistrature. It has formulated international standards on the independence of the judiciary which all member States must put into practice.

Competent courts and an independent judiciary guarantee all the parties in a case the implementation of their right to a fair trial.

The inverse would lead to impunity for violations submitted to courts for consideration.

The court dealing with the case must then be competent to give an appropriate response, which would include both the punishment for the violation and compensation for the damage suffered by the victim.

However, even when the actions held to constitute the violation have been punished correctly by a verdict handed down by a competent tribunal, the execution of the decision might still lead to impunity.

III - The Right to a Fair Trial - The Implementation of Judicial - Decisions and Impunity

A correctly diligent investigation followed by a judgment fairly delivered can eventually end in impunity, either because the sentence is not carried out or because it is incompletely carried out.

Thus, a person who has been identified, charged, judged and convicted can go unpunished.

An outcome like that can arise from a State's prison system since some States hand over responsibilities for prison administration to a body which is not connected to the Ministry of Justice but to another one, most often the Ministry of the Interior, which supervises the police force.

The prevailing *"esprit de corps"* ensures impunity for guilty members of the police force and means that compensation due to the victim is simply forgotten.

Other States organize prison administration differently by entrusting it to a legal body which can continue legal proceedings. This can for example be the visiting magistrate whose task is to ensure the optimum implementation of sentences fixed by the courts.

The spread of institutions like this could help combat the inadequacies linked to impunity.

The right to a fair trial as laid down by international instruments in force could, if respected at every level of procedure, effectively combat impunity.

Amnesty, Pardon and Other Similar Measures

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In this essay we intend to analyze the importance which amnesty for armed opponents and insurgents may have, as mechanisms of reconciliation and political breakthrough, along with the risks nonetheless involved regarding the impunity of human rights violations.

The subject has immense consequences, it is one of the main preoccupations of human rights organizations in Latin America.

Thus, the Government of Uruguay, for example - in defending the Law of Caducity on the punitive intention of the State (No. 15.848, 22 December 1986) - alleged before the Inter-American Commission of Human Rights (IACHR) that "this law was an integral part of a national reconciliation process", that it "was adopted for the sake of legal symmetry and for very justified and serious reasons of the utmost political importance", and, finally, that it aimed to put an end "to division among Uruguayans".[1]

Amnesty, for the purpose of this presentation, means, any internal legislative measure taken by a State by which the criminal nature of actions is removed, thereby rendering their authors and co-authors non-liable to prosecution or any punishment; it means also that

1 IACHR, Report No 29/92, approved by the Commission in its session No 1169, held on October 2 1992, paras. 11 and 22. The Government of Argentina defended in similar fashion its Laws 23.492 and 23.521 as well as the Decree 1002/89.

proceedings are stopped and a punishment which has already been fixed or is in the phase of execution is left without effect or ceases to be applied.[2]

Independently of the procedures used in approving it, amnesty has the consequence of weakening penal actions and in some cases, of precluding material and moral reparation for the actions protected by the injunction.

In Latin America it has been the tradition to resort to this type of measure as a mechanism to initiate, safeguard or conclude processes of peace and reconciliation after bloody civil conflicts or as a corollary to the process of democratic restoration.

On the other hand, in conformity with international law, States have the obligation to investigate and sanction all violations of human rights as a derivation of the general duty to respect and ensure them.[3]

In this sense, the duty of the State amounts to respecting and ensuring human rights in such a way that any infringement of those rights attributable, by action or omission, to any State agent or authority, is an act imputable to the State and involving its responsibility.[4]

The obligation of the State to investigate all violations of human rights implies the right of the victims to be re-established in the full enjoyment of their rights and, if this is not possible, to receive, they or their families, remedy and compensation. Furthermore, families have the right to know about the fate of those of their members who have disappeared and, eventually, the location of their remains.

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2 See Document E/CN.4/Sub. 2/1985/16, para. 5.

3 The International Covenant on Civil and Political Rights, art. 2; The American Convention on Human Rights, art. 1.1.

4 Organization of American States, Inter-American Court for Human Rights, Velásquez Rodríguez Case, Judgment of 29 July 1988. English version taken from *Human Rights Law Journal* 9/2-3 1988, p. 241 ff.

From international human rights instruments, the following principles may be drawn.

a) The duty, at the charge of the State, to ensure and respect human rights recognized in international instruments (art. 2 of the International Covenant on Civil and Political Rights and art. 1.1 of the American Convention on Human Rights).

b) The subsequent accountability of the State for the behaviour of its agents and authorities when this constitutes an infringement of the rights, recognized in international instruments, of persons subject to its jurisdiction.

c) The right of victims and, eventually, their families to be re-established in the full exercise of their rights, to obtain just and equitable compensation, and to know the truth concerning the violation and the persons responsible for it.

Within this framework, a law of amnesty may not exonerate or cover acts committed by State agents which constituted violations of the rights recognized in the international instruments. As the Inter-American Court states, "[a]ccording to Article 1(1) [of the American Convention], any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention."[5]

Amnesty, as an instrument of peace and reconciliation, may only be granted to opponents and insurrectionists against an established order, for, amongst others, the following reasons:

1. Any amnesty which favours the agents of the State would be contrary to international law.

2. With regard to offences of conscience, the only true amnesty is to conform to international law that proscribes all forms of mistreatment on these grounds.

5 Ibid., para. 169.

3. The enforcement of democratic procedures, and the overcoming of internal conflicts through processes of peace and reconciliation, implies the recognition, be it partial or reserved, of the political content of the rebels' objectives and of the unjust and politically undemocratic social situation which existed at the time of the insurrection.

It is nevertheless true, and Latin American experience has made this clear, that as confrontation evolves, all groups commit barbarous acts and assaults against the dignity of persons.

This means that in these processes it is necessary to clarify the facts, identify those responsible, restore the rights of, and grant indemnity and compensation to the injured.

Therefore, we repeat, that amnesty, in the sense defined at the beginning of this essay, is not legally admissible by international human rights law when it concerns State agents who have committed violations within a framework of generalized, systematic transgression. Similarly, the right of the victims and their families to know the truth and to obtain just and equitable compensation and, when possible, to be re-established in the enjoyment of their rights, should be safeguarded and guaranteed in the agreements of peace and reconciliation.

Amnesty and the peace processes in Colombia[6]

Regarding State measures of amnesty and pardon for certain offences and their relation to problems of impunity for human rights violations, the situation of Colombia is different from that of other Latin American countries, especially those of the southern horn. In Colombia, on the one hand, amnesty has not been granted to State

6 This part of the essay was basically elaborated by Rodrigo Uprimi of the Colombian Section of the Andean Commission of Jurists. However, the final version is the responsibility of the writer alone.

agents but to armed insurgents, with, in view, the enabling of peace processes and the relaxing of political tension. On the other hand, the grave charges of impunity with regards to human rights in Colombia are not due to the granting of measures of pardon to State agents, but rather to a number of factors which do not permit that legal investigations arrive at sanctions against those responsible. Among these factors is the decision of the military that members of the security forces[7], charged with human rights violations, would not be judged by ordinary and impartial civil judges but by military tribunals, and the impediments set by members of the security organizations themselves before ordinary justice when it investigated the conduct of officials.[8]

However, the preceding remarks do not mean that the theme of amnesty has no relation, in Colombia, to impunity for human rights violations, for, in certain aspects, the relationship does exist and is important. On one side, the processes of political opening, linked to negotiations with insurgent forces, were not accompanied by proposals to clarify the facts, sanctions against those responsible for human rights violations, or appropriate reparation to the victims. On the other, some demobilized guerrilla forces proved to be obstinate in the investigation of acts of violence imputable to State agents, for fear that these discussions would have a negative effect on their reinsertion in national life.

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7 Art. 221 of the Constitution of 1991 states: "Crimes committed by the members of security forces in active service and related to this service will be tried by martial courts or military tribunals, according to the rules of the Military Penal Code". Art. 216 states that the security forces are a part of the military and police forces.

8 For a presentation of these factors of impunity, see the Permanent Peoples' Tribunal, *Proceso a la Impunidad de Crímenes de Lesa Humanidad,* Bogotá, author, 1989, p. 225 ff. IEPRI Univ. Nal, CAJ SC, CINEP, CECOIN, 1992, p. 155 ff; (Trial on Impunity for Crimes against Humanity, 1990).

Vicissitudes of the Processes of Peace and Amnesty

With varying intensity since 1981, the democratic sectors of Colombian society had sought a negotiated settlement to the conflict which had opposed various insurgent organizations and the State since the mid 1960's. This allowed the beginning of a peace process during the government of Betancur (1982-1986), but it collapsed in the middle of 1985 because of pressure from powerful sectors which opposed it, the inconsistency of the guerrillas, and hesitations on the part of the government itself. One of the most dramatic events of this continued armed struggle was the violent assault on the Palace of Justice by the April 19 Movement (M-19) in November 1985, which was countered by a disproportionate and violent attack on the part of the army. It led to the death of more than 80 people among the guerrillas, soldiers and civilians, including two magistrates of the Supreme Court, and the disappearance of 15 others.[9]

In the latter part of 1988, the government of President Barco (1986-1990) and the M-19 began a rapprochement, allowing new steps toward peace in 1989. In 1990, the M-19 demobilized and converted into a legal political movement. This fed further negotiation processes between the government of President Gaviria (1990-1994) and other insurgent organizations (the Popular Army of Liberation, EPL; the Quintín Lame, the Revolutionary Workers' Party, PRT), which demobilized in 1991 and were thereby able to participate in the constituent assembly between February and July 1991 to draft the new Colombian Constitution.

The affiliation of these groups did not mean the end of guerrilla warfare in Colombia, for the two most militarily powerful organizations, the National Liberation Army (ELN) and the Colombian Revolutionary Armed Forces (FARC), continued the armed struggle. Yet these peace processes, in spite of their

9 For a synthetic presentation of these events, see Guido Bonilla and Alejandro Valencia, *Justice for Justice. Violence against Judges and Lawyers in Colombia. 1979, 1991* Bogotá: CIJ, CAJ-SC, 1992, p. 26 ff.

weaknesses, permitted a considerable relaxation of tensions while reducing one of the factors of violence in the country and facilitating a political breakthrough. Furthermore, it was felt as an important precedent demonstrating that negotiation can be an appropriate and efficient way to meet the demands of the guerrillas.

Arrangements with the guerrillas presupposed the issuance of laws of amnesty or pardon for political crimes they had committed (rebellion, sedition and assault) as well as common related offences, provided that they did not constitute acts of "ferocity, barbarity or terrorism". This did not fail to provoke adverse reactions on the part of certain socially powerful sectors which had not seen with a good eye either the amnesty of the guerrillas or the idea that they should participate in legal political life. This reticence tended to be reversed in certain conjunctures. Thus, for example, when in September 1990 the Attorney General's Office dismissed General Arias Cabrales for failing to respect human rights during the assault on the Palace of Justice in 1985, many dominant sectors rejected the decision of the Ministry of Public Affairs, not only because they believed the commander to be innocent, but also because they considered it unjust to judge the actions of the military while the crimes of the guerrillas were pardoned. The reaction of the demobilized leaders of M.19 then was to propose to "forgive and forget" all the acts at the Palace of Justice, including the serious violations against human rights committed by the military.

This call to put an end to certain investigations on human rights violations was again made by the direction of the M-19 in May 1992, because of a warrant for arrest issued by a public order judge against the leaders of this organization: because he treated it as an act of terrorism, the judge mistakenly thought that the case of the Palace of Justice could not be pardoned. On this occasion then, some members of the M-19 proposed a law of *"punto final"* ("full-stop") for the Palace of Justice case. Although the law was not passed because other legal methods were found to resolve this episode, it is certain that in this way the door was open to legitimating measures of pardon for human rights violations committed by State agents.

A Proposal for Colombia

The process of negotiation with insurgent groups in Colombia was the best democratic alternative for finding a way out of the guerrilla conflict. As it unfolded, however, it provoked reactions which tended to endorse impunity for grave human rights violations. What can one do? We will attempt to formulate a response and find a mechanism which, while serving as a proposal for reconciliation, does not endorse impunity.

a) The Precondition: Clarify the Facts and Respect the Rights of the Victims

It has been said that reluctance to bring human rights violations to evidence comes both from members of State security organizations and the ex-guerrillas themselves. The former, along with certain social groups, consider it inequitable that officials be judged while guerrillas are amnestied. Nevertheless, this objection is not valid if one takes into account that the atrocious crimes of the insurgents have not been the object of a policy of "forgive and forget" and must be then investigated. Furthermore, the reaction of the State agents would be admissible if sanctions were advanced against them without grounds; but it being a case of grave violations and actions committed with the help or the tolerance of public authorities, the inference of responsibility should not be overlooked.[10] Besides being incomprehensible from the ethical and judicial point of view, to proceed to the contrary would be politically dangerous in a twofold way: just at the time when, with the new constitution, great legitimacy is being conferred on the negotiations, it would generate a lack of confidence in State organizations, and it would tolerate the permanency of State officials who could continue committing serious abuses.

10 Judgement of the Inter-American Court quoted above, para. 173.

The demobilized, and now reinserted, guerrilla groups might also be reluctant to bring past human rights violations of State agents to evidence, from fear that the debate generated by each case could rekindle due resentment over the past actions of the respective guerrilla group, making its reinsertion as a legal political force that much more difficult. Nevertheless, it is not possible to condone grave violations committed by officials in deviation of their duty, nor atrocious crimes imputable to the guerrillas. The simultaneous treatment of both should permit a more suitable management of eventual reactions. To this, however, should be added the fact that the demobilized guerrilla groups are not depositories or guardians of the necessity and the right of the victims and their families that justice be done with regards to human rights violations. They have the right to know the truth of what happened and to obtain proper reparation; no process of reconciliation can be constructed which avoids this elemental aspiration. To obviate, in the present, the evidence of what happened on the pretext of not wanting to risk the easy insertion of demobilized forces is to instil serious reasons for social disintegration and destabilization in the future.

b) The Search for a Mechanism Adapted to the Colombian Situation

In these circumstances, the Colombian Commission for Overcoming Violence, which originated precisely in the peace agreements between the EPS, the Quintín Lame and the Government,[11] proposed a mechanism to confront impunity of past human rights violations.

11 See Commission for Overcoming Violence, *Pacificar la Paz,* Bogotá: IEPRI Univ. Nal., CAJ SJ, CINEP, CECOIN, 1992, p. 167 ff. Similar mechanisms had already been proposed on other occasions: during the discussions which accompanied negotiations with the M-19, representatives of social and political organizations arrived at a consensus on the necessity of creating a commission to assure the efficiency of justice, in particular in the reception of complaints of human rights violations. (See Maricio García, *Procesos de Paz. De la Uribe a Tlaxcala,* Bogotá, Cinep, 1992, p. 296.

This mechanism, which seeks to adapt the experiences of other countries to the special circumstances of Colombia, could have the virtue of allowing negotiation and amnesty for insurgent groups without overlooking human rights violations. The essential idea is to create a "working group for the clarification of and reparation for acts of violence", commissioned for six months to gather and evaluate information, use it to supervise the judicial proceedings, and identify and satisfy the corresponding needs for economic and social reparation. The group would be constituted of six high State officials and six representatives of social organizations, mostly from the Political Social Council, for the purpose of measures on compensation. It would be assisted further by a suitable and impartial team of investigators. Their functions would not be judicial, for there is no question of creating a special tribunal; its existence would not seek to alter ordinary procedures, for Colombian experience shows that the recourse to exceptional procedures — a current practice in the country for other purposes — has not produced positive results and, in fact, has caused a worrisome weakening of ordinary justice. But this group would be actively linked to ordinary procedures through the Department of the Public Prosecutor, which would have a role in it, and in this way it would be a powerful dynamic in the work of justice. Furthermore, the other six State officials would be those most directly related to this type of activity within the actual State structure: the Ombudsman, the Attorney General, the Public Prosecutor, the Attorney for Human Rights *(Procurador Delegado para Derechos Humanos),* the Presidential Advisor for Human Rights and the Advisor for National Security. Similarly, the representatives of social organizations would also be those nearest to the field: some from the main effected groups (the peasants, the impoverished, the workers), a delegation of those who suffered damages, another from human rights organizations and one from the churches.

It would be, then, a mechanism which would not alter the normal functions of justice, apart from its impelling input. It would result in no cost, for far from meaning the creation of new expenditures, it would require the connecting and putting into relation of existent

functions. Finally, its mixed membership — officials and representatives of social organizations — would make its activity dynamic.

Particularities of the Colombian Mechanism

The Colombian proposal is based on the experience of similar mechanisms, proposed in other countries and other circumstances, such as the Sábato Commission in Argentina, the Commission for Truth and Reconciliation in Chile or the Commission for Truth in El Salvador. It shares with these experiences the aim of bringing to evidence acts constituting grave violations of human rights, but has its own characteristics derived from the particularities of the Colombian case.

It does not pretend to establish a tribunal that would directly sanction the violators, for this task is assigned to ordinary criminal justice; in this it is comparable to Latin American experiences founded on the creation of non-official organs.[12] But it has other characteristics of its own: firstly, it seeks the simultaneous intervention of authorities and victims, so that they can directly evaluate the possibilities and limits of penal action. Secondly, therefore, beyond the attempt to clarify and make reparation for the violations — traits it partially shares with the other Latin-American experiences cited above — the Colombian working group seeks to open up and dynamize the legal proceedings. Thirdly, the group also tries to generate a mechanism of supervision and special correction of human rights violations, not only with regards to the past, but also

12 In this respect, the Inter-American Commission has expressed the following: "Every society has the undeniable right to know the truth what past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future... Such access to the truth presupposes..., the establishment of investigation committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the Judiciary itself may undertake the necessary investigations." Annual Report, 1985-1986, p. 193.

with violations in the present and the future, subsequent to the amnesty or reconciliation. Finally, in principle, it does not foresee international participation — as in El Salvador — though this is not excluded *a priori.*

With these characteristics, the proposal seeks to take national particularities into account: the fact that Colombian impunity does not reside in precise laws; the refusal of actual authorities to recognize the systematic and persistent violence on the part of State agents; the necessity to democratically enforce justice; the Colombian reticence towards international mediation. But it shares — with other Latin American experiences — the essential aim, that is to construct a democratic society based on the respect of human rights.

TOPIC 4

The Applicable Legislations Including those of Emergency

Impunity and International Law

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Preliminary Remarks

The phenomenon of impunity and its effects on society as a whole involve violations of a wide variety of human rights, including those of a civil, political, economic, social and cultural nature.

In this document we shall refer to impunity as it relates to the perpetrators of only certain gross human rights violations. In fact, we shall consider only those violations which, owing to their grave nature, are an attack on human life and integrity. These include summary or arbitrary executions (political assassinations), permanent enforced disappearances, torture, and cruel, inhuman or degrading penalties or punishments.

By framing our discussion in this manner, we do not intend to establish priorities among rights, but rather to concentrate our attention on a select few. There will be other opportunities to consider the issue of impunity from the standpoint of other types of human rights violations, which may have great impact on a particular society. Take, for instance, the case of high-level government corruption, in which unscrupulous leaders appropriate public funds, place them in foreign banks, and in so doing prevent vast sums from being applied to their country's development.

We shall focus on the issue of impunity from the legal standpoint, that is, from the standpoint of international law as it relates to human rights.

Another distinction which must be made concerns the perpetrators of these crimes and those participating with them. The type of impunity with which we are concerned here is that granted to government agents or to individuals acting on the orders, or with the complicity, consent, acquiescence or tolerance of such authorities. Of course, there have been and continue to be cases in which members of the armed opposition to a particular government commit equally serious crimes. No one doubts, however, that in these cases the perpetrators should be brought to justice. If this does not always occur, it is usually due to a practical impossibility in that the perpetrators are outside the reach of justice.

Acts such as torture, cruel or inhuman treatment or punishment, political assassination and forced disappearance constitute criminal offences which are punishable nearly everywhere in the world. Included among the purposes and objectives of penal law are: to correct or rehabilitate criminals so as to reintegrate them into society, to separate them from society until such time as they are ready to be reintegrated, and to act as a deterrent. The threat of punishment is often an effective means of fighting crime (although it is certainly not the only one). The prior assurance of impunity, however, completely destroys this deterrent effect.

History, which usually serves as good counsel, has shown that impunity has opened the door to the worst types of conduct and as a result, to crimes against humanity. This may be seen in the experience of the Second World War in Europe and the Far East; in the 1970s era in Latin America, with its plethora of military dictatorships; in the current situation in countries such as Colombia or the Philippines, which do have democratic regimes, but in which the armed forces are not entirely under the control of the civilian authorities, and in which, in the context of an internal armed conflict, all sorts of atrocities are committed by government and opposition forces alike.

What we would like to demonstrate is that a state of war or armed conflict does not alter these concepts. Torture, the killing of prisoners, cruel, inhuman or degrading treatment or punishment and

the taking of hostages are prohibited even in these situations. This is clearly stipulated in the 4 Geneva Human Rights Conventions of 1949 and the two Additional Protocols of 1977.

The Ways in which Impunity is Granted

Impunity is sometimes granted through legal channels and at others it is brought about by circumstances. It is granted through legal channels in the form of amnesty, exemptions, pardons, favours or any other measure through which investigation and trial are waived. In Latin America, for example, there have been a series of acts and decrees issued which grant impunity. These include: in Argentina, the "Self-Amnesty" Law No. 22.924 of 22 September 1983 (which was later cancelled by the democratic government), the "Final Point" Law No. 23.492 of 12 December 1986, the "Due Obedience" Law No. 23.521 of 5 June 1987, and the pardons granted in October 1989 to a series of mid-level commands and in January 1991 to the ex-Commanders in Chief of the Armed Forces; in Brazil, Act 6.683 of 28 August 1979 and Constitutional Amendment No. 26 of 27 November 1985; in Chile, Legislative decree 2.191 of 1978 granting "self-amnesty"; in El Salvador, Decree 805 of 1987; in Guatemala, Legislative decree 8/86 of 10 January 1986; in Honduras, the "Act of General and Unconditional Amnesty" of November 1987; in Uruguay, the "Expiration of the Punitive Power of the State", Act 15.848 of 22 December 1986.

Impunity which is brought about by circumstances, or *"de facto"* impunity, arises whenever there is a failure to investigate the facts; when the facts are denied or covered up or the names of their perpetrators covered up; when the police or courts of justice do not take action against those responsible, whether as the result of a freely made decision, for political reasons, or as the result of intimidation. A more sophisticated form of impunity — but impunity nevertheless — is that which results from criminal sentencing that is totally disproportionate to the seriousness of the crime committed.

Another determining factor in *"de facto"* impunity — as recognized by the UN Working Group on Enforced Disappearances (Doc.E/CN.4/1991/20, of 17 January 1991, paragraphs 408 to 410) and the Human Rights Committee (ICCPR) — is that of military exemption; that is, the existence of military tri bunals, staffed by officials of the armed forces sitting in judgment on the conduct of their own comrades-in-arms. This so-called military justice is not sufficiently independent since it is subject to the Ministries of National Defence; it is not impartial since its judges have been inculcated with a sense of *esprit de corps* and have often participated in "anti-subversive" activities; and lastly, it is not qualified, since its "judges" have been trained for combat and not to administer justice.

Ethical Reasons and Principles on which we Base our Opposition to Impunity.

The Permanent People's Tribunal which convened in Bogota in April 1991 after completing two years of summary proceedings in nine countries on the continent, found that failure to apply sanctions to the perpetrator of a crime lessens and even eliminates the legal effect of the norm which defines the conduct as criminal and therefore becomes an authorization or license to repeat that conduct. In its San José (Costa Rica) session of July 1990, it concluded that, insofar as impunity does not precisely identify those at fault, it lays upon all the members of institutions or the groups to which they belong a collective and anonymous charge of guilt.

The impunity referred to here is an affront to justice and undermines the principle of equality before the law by freeing certain persons from all responsibility. Such individuals are considered to be above the law by sole virtue of their belonging to the police force or to the military.

The opposite of impunity is the proper functioning of justice. It holds all persons responsible for their actions, avoids the temptation

to take the law into one's own hands, affords a measure of stability to society, and as mentioned previously, provides an effective deterrent to future criminal behaviour.

Moreover, democracy is as inextricably bound to justice as it is to the respect for the constitutions and the law; those governing and those being governed must submit to them equally, and the law must prevail over force.

We do not believe that, following a difficult period of conflict and confrontation, national reconciliation and peace can better be achieved by throwing a blanket of oblivion over the past, without having revealed the facts. On the contrary, taking account of the past and restoring historical memories are essential steps towards achieving the above-mentioned objectives. No good can come of building a future on a silenced past.

Limitations to Impunity Imposed by International Law

Human rights violations usually imply concrete violations of national criminal laws and therefore call for legal action.

In exercising the powers provided by internal law, authorities may, in principle, grant amnesty, exemptions, pardons or favours. However, international law imposes limitations on the ability to grant such measures of clemency when they imply the waiving of investigation and trial. Some of these limitations arise from customary international law *(jus cogens)*, and others from multilateral treaties concerning human rights, to which governments have freely consented.

A - Limitations Derived from Customary International Law (Jus Cogens). Crimes Against Humanity

By their acceptance of the United Nations' Charter (of 1945) and regional instruments, such as the Charter of the Organization of American States (OAS, 1948), the Council of Europe (May 1949), and the Organization of African Unity (1963), States undertook a solemn commitment, of both a legal and ethical nature, to respect

and to ensure that others respect the fundamental rights of human beings and the dignity and worth of the person.

The issue of impunity calls for a discussion — limited by necessity — of what are known as crimes against humanity.

After experiencing the horrors of the Second World War, the international community concluded that certain types of conduct, because of their seriousness and their grave consequences for large sectors of society, constitute an attack on the very conscience of humanity. They violate principles which should govern the life of civilized nations and transgress the principles and objectives of the United Nations' Charter, thereby posing a threat to international peace and security. For this reason they must be classified as crimes in violation of international law, regardless of whether or not they have been punished as offences in any particular country.

These crimes, which have been given a number of labels — crimes in violation of international law, crimes against humanity, crimes against peoples' rights — shall be referred to in this document as crimes against humanity. They require and deserve special procedures for handling their prevention, suppression and punishment. The international community concluded that it was neither sufficient nor advisable to entrust their prosecution solely to the national courts of the State in which they were committed, but that they should be prosecuted on an international level as well. The reasons for this, among others, are:

a) that the consequences of these crimes extend far beyond those suffered by the victims;
b) that these crimes are usually perpetrated by government officials or individuals acting as their accomplices, and that the crimes would obviously not be punished while the regime which permitted them remained in power;
c) and lastly, that if such a regime were to fall, the perpetrators of such deplorable acts would flee the country.

Therefore, with the objective of prosecuting, judging and preventing these crimes in the future, a variety of solutions have

been proposed. Some of these have already been enshrined in international instruments. They include:

- promoting international co-operation in the detection, arrest, extradition or punishment of those guilty of crimes against humanity;[1]
- declaring that no statutory limitations shall apply to the penal action and the penalties corresponding to these crimes.[2] This implies that the passage of time would not be considered a hindrance to the trial, nor to carrying out the penalty imposed;
- not allowing the claim of due obedience — that is, the fulfilment of a superior's orders — to be considered an exemption from responsibility (however, it could be considered an extenuating factor). No one is obligated to carry out orders which are manifestly illegal, much less those that go against basic human principles;
- not allowing the perpetrators of such crimes to benefit from political asylum or refuge;
- granting extradition to those responsible, which means that the State in whose jurisdiction they are located would deliver them to the State in whose jurisdiction the crimes were committed, if the latter so requests. Since these crimes would not be designated as political crimes, there would be no obstacles to extradition;
- if there are impediments to extradition (for example, if a particular constitution does not authorize the extradition of a national), then the suspect, being a national of the State receiving the summons, would not be extradited but instead would be tried by a national court of that State. The same solution would be employed

1 "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity". Resolution 3074 (XXVIII) of 3 December 1973, United Nations General Assembly.

2 "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity", of November 1968.

when the State in whose jurisdiction the crimes were committed does not request extradition of the suspect. In both cases, suspected perpetrators would be detained and brought to justice, regardless of where the crimes were committed; this is what is known as universal jurisdiction;

- to bring those responsible to trial before an International Penal Court or Tribunal, competent by virtue of international treaties, to judge these crimes. This idea of an international judicial body appeared as early as 1948, in Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide and, later in 1973, in Article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid. In spite of how much time has passed since then, the world's nations have not reached an agreement on the premises which would underlie such a judicial body nor what powers it would possess;
- to reaffirm the fact that criminal responsibility is always an individual matter (separate from the responsibility of the State, which functions on a different level), and therefore that perpetrators of crimes against humanity, and their accomplices, instigators, and accessories shall be held responsible for their actions, whether they are private citizens, government employees or military personnel, regardless of their rank, or whether they are government officials, including Heads of State.

The international instruments which codify one or more of these ideas contain references to:

- war crimes, as defined in the Charter of the International Military Tribunal of Nuremberg (August 1945) which tried the main Nazi war criminals (others were tried by the national courts of the formerly occupied countries) and in that of the International Military Tribunal for the Far East, which

was convened in Tokyo to try the cases of Japanese war criminals. Both Charters contain definitions of war crimes[3] limiting them in time and in space to acts which occurred during the Second World War. These instruments received confirmation by the UN General Assembly in resolutions passed in February and December of 1946;

- crimes against humanity, which are also defined in the above-mentioned Charters[4] but with the significant difference that these extend to both wartime and peacetime crimes. They also received confirmation in the resolutions passed by the UN General Assembly in 1946;
- serious breaches of the 1949 Geneva Conventions and the Additional Protocols I and II of 1977, on Humanitarian Law in situations of war or armed conflict;[5]
- genocide, as it is defined in the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948;
- *apartheid*, as it is defined in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, of 30 November 1973.

3 These include executions of military or civilian prisoners, killing of hostages, forced deportation of civilians and populations, plundering, unnecessary destruction not caused by war, policies of mass extermination based on racial, ethnic or other considerations, etc.

4 Among other acts, crimes against humanity include the expulsion of civilian populations by armed attack or military occupation in the territory of a sovereign State, forced displacements of civilian populations, even within the same country (if unjustified).

5 "Gross violations" include the taking of hostages, torture, inhuman treatment, executions and conducting biological experiments on prisoners.

Do Torture, Political Assassination and Permanent Enforced Disappearance Constitute Crimes Against Humanity?

The problem lies in knowing whether or not such crimes may be classified as crimes against humanity under current international law, with all the consequences that accompany such a classification (including the non-applicability of statutory limitations, no amnesty, the non-admissibility of claims of due obedience, no political asylum or refuge, and the requirement of extradition, or trial before the courts of the State in which the suspect is found).

The Position of those in Favour

Various authors contend that if the acts described above occur in a systematic, repeated, persistent (others add the term "massive") fashion as a repressive practice on the part of government officials, then they should be classified as crimes against humanity. It is argued that the development of customary international law *(jus cogens)* leads to this position. Isolated acts are punishable by law, but they do not constitute crimes against humanity.

Various precedents are cited in support of this theory:

a) the Universal Declaration of Human Rights. In spite of its status as a "declaration" and not a "treaty", and because of its 40 years of existence and unquestioned validity, it is commonly held that its terms have become compulsory (binding) for all States, as a matter of custom, which is also a creative source of international law. The Declaration expresses, in the words of Professor Truyol, "the legal conscience of mankind";

b) in May of 1951, the International Court of Justice issued an advisory opinion in which it maintained that the Convention on the Prevention and Punishment of the Crime of Genocide is applicable even to States which have not ratified it or acceded to it, since the principles it contains have proved to be compulsory for all States irrespective of contractual commitments;

c) the Convention against Torture (1984), establishes a nearly universal system of jurisdiction for torture, thus it carries with it one of the same consequences as does crimes against humanity;

d) on 18 November 1983, the OAS General Assembly declared that forced disappearance is an affront to the conscience of the hemisphere and constitutes a crime against humanity. The preamble to the "Declaration on the Protection of All Persons from Enforced Disappearance", which was approved by the UN Commission on Human Rights and by the General Assembly in December 1992, is quoted as follows: "Considering that enforced disappearance undermines the deepest values of any society... and that the systematic practice of such acts is of the nature of a crime against humanity";

e) the term "crime against humanity", which first appeared in the Nuremberg Charter, has since acquired sufficient autonomy as to be applicable outside the context of the Nuremberg trials and in clear contrast to the term "war crime". This was demonstrated by the proceedings of the UN International Law Commission, which in July 1991 approved the Draft Code of Crimes against the Peace and Security of Mankind and which is now before the UN General Assembly;

f) the crimes of torture, political assassination and permanent enforced disappearance, because of their grave nature and their consequences for society, affect the very conscience of humanity. The same points which were made in the discussion of crimes against humanity, which have already been recognized in international treaties, are applicable to these acts.

In accordance with this position, customary international law *(Jus Cogens)* imposes limits on impunity. All States are bound to enforce these limits. The officials of a State may not grant amnesties, pardons, favours or any other type of exonerations which imply the renunciation of investigation and trial.

The Position of Those Not in Favour

Other experts maintain that, on the contrary, according to the current development of international law, the classification of crime against humanity does not correspond to the acts discussed above.

They argue that such a classification can only be made by international treaties in which it is clearly specified, as is the case in the Conventions against Genocide and Apartheid. They argue that the "crime against humanity" classification may not be extracted from doctrinal interpretations, no matter how convincing these may be.

B - Limitations Derived from Treaties, Conventions, Pacts, and Agreements on Human Rights

By virtue of one or more of these instruments (which we shall generally refer to as treaties), States undertake the legal and ethical obligation to respect human rights and to ensure the integrity of the person. When transgressors are found among the agents of these States, they must be prosecuted to the full extent of the law.

By ratifying or acceding to one or more of these treaties, States accept a limitation upon their sovereignty in favour a common interest, which they deem to be of a higher order. That common interest is human dignity.

Treaties have a binding legal value. States which have accepted them are obliged to comply with them, both with respect to other States which are parties to the treaty, as well with respect to their own people.

This is particularly true in the case of human rights treaties. As concluded by the Inter-American Court of Human Rights in its Advisory Opinion No. 2, issued in September of 1982:

"in concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction".

Article 27 of the Vienna Convention on the Law of Treaties, stipulates that "a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty..."

Furthermore, the "Declaration on the Rights and Duties of States", which was adopted by the United Nations General Assembly, resolved that every State has the duty in its relations with other States to comply with international law and with the principle which holds that the sovereignty of each State is subject to the supremacy of international law. (Article 14).

At least in those States in which the provisions of a treaty have incorporated portions of internal law, such provisions have equal or greater validity than the national law, since in order to nullify the obligations arising from the treaty, it is not sufficient to pass another law, rather the treaty must first be denounced and the State must wait the prescribed amount of time for the denunciation to take effect. This means that when acts such as genocide, apartheid, torture, or assassination are committed, a State may not, by simply passing a law or decree, be allowed to grant amnesty, pardon or any other type of exoneration involving the waiving of investigation and trial. To do so, it must first denounce the treaty.

In the case of States which have granted constitutional status — which is therefore higher than the law — to certain treaties (the Constitution of Peru is one example), an even stricter limitation applies insofar as a constitutional amendment is required to denounce the treaty.

When we talk about the limits on impunity imposed by human rights treaties, there is no longer the requirement that the acts involved consist of a systematic or repeated practice. In these cases, one sole act of genocide, apartheid, torture or assassination is sufficient to require the State which has ratified the treaty to proceed to investigation and trial.

The treaties to which we refer include: the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the International Covenant on Civil and Political rights, the Convention against Torture and other Cruel,

Inhuman or Degrading Treatment or Punishment and the American Convention on Human Rights.[6]

By ratifying or acceding to one or more of these instruments, States agree to:

a) complete a prompt and impartial investigation, shortly after acts of torture, homicide, apartheid or genocide are reported;

b) bring the guilty parties to justice and if warranted, apply penalties proportionate to the seriousness of the crime;

c) provide monetary compensation to the victims, while granting them the best means of restoration possible; in the case of the victim's death, to provide compensation to his family.

Numerous decisions have been adopted by the Inter-American Commission on Human Rights (OAS), as well as by the UN Commission on Human Rights, recommending to the various governments against which violations of this type have been reported that they should investigate, bring to trial and punish the perpetrators and provide compensation for the victims.[7]

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6 From a slightly different angle, the International Convention on the Elimination of All Forms of Racial Discrimination, of December 1965, requires States to designate as crimes punishable by law, several of the acts and practices prohibited by the Convention, as well as requiring them to provide reparation to the victims (Articles 4 and 6).

7 See below the cases resolved by the Committee on Human Rights: Communication R.7/30, Eduardo Bleier v. Uruguay, Final Observations of 29/3/82; Communication R.6/25, Carmen Améndola and Graciela Baritussio v. Uruguay, Final Observations 26/7/82; Comm. 84/81, Guillermo Dermit Barbato v. Uruguay, Final Observations 21/10/82; Comm. 107/81, Elena Quinteros Almeida and María del C. Almeida de Quinteros v. Uruguay, Final Observations of 21/7/83; Comm. 124/82, Tshitenge Muteba v. Zaire; Comm. 146/83 and 148-154/83, John Khemraadi Baboeram et al v. Surinam; Comm. 156/83, Luis A. Solórzano v. Venezuela, Observations of 26/3/86; Comm. 161/83, Joaquín Herrera Rubio v. Colombia; Comm. 176/84 Walter Lafuente Peñarrieta et al v. Bolivia; Comm. 194/85, Jean Miango Muiyo v. Zaire. Also see the cases resolved by the Inter-American Commission of Human Rights: No. 9810 Miguel A. Ramos Ayala v. El Salvador, Resolution 24/89 of 28/9/89; No. 10.179, Sebastián Gutiérrez, José Ma. Cruz

A government may not nullify the above-mentioned obligations through the mechanism of passing an act or a decree. These would both be considered unilateral acts on the part of the State, which do not void the obligations assumed by it with respect to other States and with respect to its people, and which furthermore would constitute a violation of international law.

In discussing the notions of impunity and measures of clemency for violators of human rights, three aspects may be distinguished:

1. an investigation of the facts, in order to reveal the Truth, which is so highly sought after by the victims and the NGOs;
2. the trial and criminal sentencing of those responsible, so that Justice may be served, which is also very much sought after;
3. the carrying out of the penalty imposed. This is the point at which might appear the various types of exoneration, such as amnesty, pardons, exemptions, favours or their equivalents.

We can conclude that, at least for those States which are bound by the treaties mentioned earlier, the requirements of investigation and trial may not be waived. However, it is allowable that for well-founded reasons intended to put an end to conflicts dividing a society, authorities may decide to grant clemency measures, whether in the form of amnesty or its equivalents. Yet the only effect such

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and Félix Rivera v. El Salvador, Resolution 26/89, of 28/9/89; Case No. 9918, Leady Girón Ruano v. Guatemala, Res. 49/90, of 15/2/91; Case No. 9905, Vladimir David v. Haiti, Resolution 44/90, of 15/2/91; Case No. 10.163, Tecero Lava Ramírez and five other persons v. Peru, Resolution 75/90, of 15/2/91.

In addition to the cases cited above involving homicide, disappearances and torture, there are tens (or hundreds) of other cases that have also been resolved by the U.N. Commission on Human Rights and by the Inter-American Commission of Human Rights.

measures can have is to avoid carrying out penalties which have already been imposed.[8]

Some of the treaties mentioned earlier have progressed more in the direction of curbing impunity. This is true of the Convention against Genocide. After the contracting parties confirm that genocide "is a crime under international law which they undertake to prevent and punish" (Article I), the Convention stipulates that those who commit this crime "shall be punished" (Article IV). The States agree "to provide effective penalties for persons guilty" (Article V). Concerning the issue of jurisdiction, in addition to requiring the extradition of the guilty parties to the State rightfully requesting it (Article VII), the Convention reaffirms the general principle that suspects shall be tried by the courts of the State in which the acts were committed. But it provides a new dimension when it adds "or before the international penal tribunal" which is competent before those States which have accepted its jurisdiction (Article VI). This is the first time that the intention to create an international judicial body appears in a multilateral treaty.

For its part the International Convention against *Apartheid,* classifies *apartheid* as a "crime against humanity" (Article I). The States which are parties to the Convention undertake to suppress as well as to prevent such practices, to charge, bring to trial and punish the guilty parties before their national courts (Article IV), and to grant

8 On 2 October 1992 the Inter-American Commission of Human Rights (OAS), in cases against the State of Uruguay (Report 29/92 - 1169 session, found that Act No. 15.848, of 22 December 1986, concerning the "Expiration of the Punitive Power of the State" in Uruguay (granting impunity), violated the American instruments. The ICHR concluded that Act No. 15.848 of 22 December 1986 was in violation of Article XVIII of the American Declaration of the Rights and Duties of Man and Article Nos. 1,8 and 25 of the American Convention on Human Rights. The above-mentioned articles refer to the right to justice, judicial guarantees and judicial protection. The ICHR resolution reaffirms the duty of the State to prevent, investigate and punish and to provide just compensation for what was impeded with the sanction of the law.

extradition to the State in which the crimes were committed (Article XI). But they also undertake to try the guilty parties by "an international penal tribunal" which is competent before those States which have accepted its jurisdiction (Article V).

Finally, the Convention against Torture establishes a form of universal jurisdiction (Articles 5, 6 and 7), by virtue of which any State in whose territory persons suspected of having committed the crime of torture are found — even temporarily — shall undertake an investigation of the case. If circumstances warrant, the said State shall proceed to the arrest of such persons or shall take other measures to ensure that they are brought to justice. Subsequently, it would proceed to extradite the suspect to the State rightfully requesting it. If there are legal impediments to extradition, or if it is determined that the suspect would risk being tortured himself in the requesting country, or because no other State with the right to do so requests extradition, it shall conduct the trial before its own competent courts, but only in two instances: a) if the suspect is a national of that State, or b) if the victim is a national of that State. The States parties to the Convention must include these crimes in any extradition treaty which they conclude among themselves in the future; when no such treaty exists, they may consider the Convention against Torture as the legal basis for granting the extradition.

In conclusion, impunity, as it relates to the crimes discussed in this paper, is a violation of international law and a detriment to the cause of democracy.

National Jurisdictions and Human Rights

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National Courts and Human Rights

1 - In modern, democratic societies subject to the Rule of Law, it is the work of the judiciary to protect human rights when they are seriously threatened and to punish those responsible for violating those rights. Protection by international tribunals is an ideal that is still far from reality. Therefore, national judicial systems must be improved, a task that could be done simultaneously and with immediate effect. It is all too obvious that in order to protect human rights effectively it is not enough, indeed it is dangerous merely to go through the legal motions, to maintain the appearance of legal protection, since this is nothing more than the illusion of justice.

2 - The first issue to consider when attempting to put legal protection into practice is the judges' ignorance of international norms for the protection of human rights and the conditions and effects of their integration into the national legal system.

It is widely accepted in the modern theory of international law, as summarized by Daniel Campos, that there is something rather strange in the nature of international human rights law: "States make a commitment at the international level to implement the (human rights) treaties domestically (in the appropriate courts)". But what exactly does this mean? That, once a State has ratified or acceded to the treaties, these treaties become part of that State's domestic legislation and, thus, directly invest every man and woman

belonging to the population of that State, or living under its jurisdiction, with the entitlement to the rights and freedoms contained in the treaties.[1]

In practice this is neither acknowledged nor accepted by most, indeed virtually all national judges and courts. In general, the judiciary is taught superficial notions of international law during legal training, with little or no perspective on the application of international norms, and furthermore, it is all associated with the memory of a tedious discussion on the formalities required to integrate the provisions of a treaty into the national legal system: accession, ratification, the depositing of the instrument of ratification or accession, with the added factor, maintained by many traditional theories, of the need for a domestic act approved by Parliament and promulgated by the executive, giving internal, domestic force to international norms.

For all these reasons, judges tend to refuse to accept references to international treaties and other instruments as valid foundations on which to base a legal claim. This is what happens, for example, in the case of torture which has not yet been classified as a crime in most national legal systems, thus ensuring that notorious torturers go unpunished.

3 - Another fundamental point relates to the influence of the political and legal beliefs of judges, who quite simply do not acknowledge that they have a legal duty to uphold human right norms, or who demand absurd formal requirements of proof of the violations and responsibility for them, and in addition hand down ridiculously lenient sentences which are an affront to justice and invite recidivism.

There are judges who, through personal conviction or interest become the accomplices of governments which violate human rights and therefore protect those directly responsible for violations. In some

1 Derecho Internacional de los derechos Humanos, Buenos Aires, EDIAR, 1991, p.250

cases the complicity is blatant and impossible to conceal, but in others the judges appear to be neutral. The latter are, possibly, more dangerous because they pretend to want justice and wrap their decisions in a cloak of responsibility. This considerably reduces the force of accusations made against unjust governments and systems which deny human rights since it helps to create and maintain the illusion of judicial control.

Another hazard which favours impunity is that of judges who, by a defect of legal training, are excessively formalistic. On the whole, enthused by the apparent logic of legal positivism, all too often they fail to see that an excessive devotion to formal requirements impedes or makes extremely difficult the consideration of the rights involved in the trial. Conditioned by an exclusively formalistic vision of the law, these judges believe that respect for procedural formalities is the prime objective of the legal process. They are not bothered by the most grave human right violations provided that the formalities are observed. It can thus be said that formalistic judges are the unwitting accomplices of human rights violators and contribute significantly to ensure their impunity.

A close cousin of the formalist is the moderate judge who claims to be apolitical and does not believe that it is his or her place to question the justice, the legitimacy or social effects of laws. Most judges probably fall into this category. They are the ones who have passively accepted the "institutional acts" imposed as superior legislation by Latin American dictatorships in recent decades. They are the ones who, throughout the world, apply without thinking the"law of the land", as if it was indisputably normal and regardless of the kind of government, or the justice or injustice of the law as long as it seems legal. This is the sort of behaviour that most often compromises the integrity of the judiciary, and is seen as "a legal way of promoting injustice", as Albert Camus put it. These judges too are accomplices, not so unconsciously either, in the impunity of human rights violators.

Without forgetting the real world — and also for reasons of justice — it must be acknowledged that, very often, impunity takes

place through the lack of independence of judges. There are situations in which the restrictions are such, that even the most conscientious or courageous judge would be unable to punish a human rights violator. It is not hard to find examples of genuinely heroic judges who, when sentencing, expose and condemn the difficulty of finding out the truth, the badly carried out police investigations and the obstacles set up to prevent the identification or bringing to justice of those who are actually responsible for serious human rights violations.

Frequently these judges are isolated voices who do not receive the support of the legal establishment. It is, therefore, important always to insist on the need for judges to be independent, without forgetting though that often the complicity and indifference of judges and leading members of the judiciary are elements that unjust governments count on to ensure impunity for human rights violators. As for judges and judicial protection, it should be acknowledged that without well-informed judges, aware of their social responsibility and genuinely committed to justice, it would be impossible to genuinely protect human rights.

4 - Military courts deserve special consideration. They are part of the apparatus which guarantees impunity for the military and their associates in and out dictatorships and regimes described euphemistically as "strong governments". It must be born in mind that even in situations which can be described as "normal" from a legal standpoint, military courts are elements of discrimination and privilege, and as much guarantors of the impunity of members of the armed forces who have violated human rights.

From the legal and moral point of view there is no reason why a member of the armed forces who commits a crime defined as such in ordinary penal legislation should be removed from ordinary jurisdiction. It does not matter where the crime was committed, whether in a military establishment or in the street, civilian or military. Thus, for example, if a member of the armed forces is physically assaulted in barracks, the act should be characterised as a

common crime and the culprit should be tried in an ordinary court and not in a military court. There is nothing to prevent a parallel, concurrent military administrative hearing to purge and if necessary to punish a disciplinary offence-without prejudice to the full competence of ordinary courts to punish criminal acts according to common penal legislation.

With regard to military courts, it is important and ever appropriate to recall one of the conclusions of the World Conference on the Independence of Justice, which took place in Québec in June 1983 and which endorsed the Universal Declaration on the Independence of Justice: "2.06.e) The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right to appeal from such tribunals to a legally qualified appellate court."

It is essential that the characterisation of an offence as "military" should be as narrow as possible and that under no circumstances could a civilian be tried by a military court. In times of freedom and normality the law must assert that, without exception, members of the armed forces are subject to ordinary justice for all the crimes defined in ordinary penal legislation, even if the crime is committed in barracks and even when the victim is also a member of the armed forces. This is an important criterion in ensuring justice for all without conceding to some the privilege of corporate protection which is often the guarantee of impunity.

5 - To provide a much-needed complement to these thoughts on military courts, it is necessary to mention a singular institution which exists in Brazil - the State-Military Court. To obtain an accurate idea of the nature of this court it must, above all, be born in mind that Brazil is a Federative Republic.

The old provinces of Brazil became autonomous federated States in 1891 on the adoption of the federal system, and each State organized a military police force to carry out typical police duties and in addition to protect the federated States from possible threats from the other federated States or from the central Brazilian government.

This hybrid institution, with no logical justification, is still in existence today. In the States with greater economic capacity, the military police has taken on the features of a small army, as in the State of Sao Paulo. Through their categorisation as "military", these bodies have a great deal of autonomy and frequently act with considerable violence as if they were an army in enemy territory, indeed they carry out activities that are prohibited even in wartime by national and international law.

The military police force of the State of Sao Paulo is acknowledged to be the most violent in the world. It has in its ranks the hardened killers of street children and of "suspects", most of whom are poor, dark-skinned and in the street at night or in the early hours of the morning. The number of its victims is, on average, four murders a day and its most telling exploit this year (1992) was the massacre of 111 prisoners, who did not have fire-arms and were savagely murdered on the pretext of restoring discipline in the Carandiru prison in Sao Paulo. It took place on 2 October 1992.

Such privileged murderers are guaranteed impunity because they would be judged by a court of special jurisdiction - the military court of the State of Sao Paulo. In order to stop the violence it is imperative to demand acknowledgement that policing the cities is an operation of a civil nature and that police officers must be subject to ordinary justice.

6 - Lastly, something should be said about the so-called "courts of special jurisdiction", which in fact are only compatible with the word "special" since they have nothing in common with the traditional concept of a court as the instrument of justice.

As a basic rule what the Universal Declaration on the Independence of Justice states is enough " 2.06.a) *Ad hoc* tribunals shall not be established".

However, bearing in mind recent lessons of history, it is worth sounding a warning over the malicious practice of establishing "exceptional competences". This has been done and is still being done in countries under military rule as the competence of already

existing, military courts is extended to cover the judging of civilians and of crimes, which, although they are defined in ordinary legislation, have been given the malicious characterization of "offences related to military offences". On the other hand, in some cases the extension of competence can be used to place members of the armed forces who have committed crimes covered by ordinary legislation under the protection of a military court.

To conclude, there are many obstacles hindering the spread of the Rule of Law throughout the world and the eradication of impunity for human rights violators. To achieve these two goals require constant, untiring, uncompromising effort. It is in this way that the world will be able to live in justice and peace.

Amnesty Laws and International Law
A Specific Case

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One very disquieting feature of the shift to democratically elected governments throughout Latin America, during the last decade, has been the practice of granting amnesty — or comparable legal measures — to State security forces for their gross human rights violations committed during the previous military reigns.

Amnesties, for example, have been granted in recent years in Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Suriname and Uruguay. In some cases, military regimes have promulgated self-amnesty before relinquishing control to civilian authorities. In others, the military has extracted a guaranteed amnesty from civilian leaders as the "price" to pay for restoring a civilian government. In several instances, furthermore, the new governments, under pressure from the military, have enacted amnesties, euphemistically, in the name of democracy or for the bringing about of national reconciliation or pacification.

The question of whether States, that are parties to human rights treaties, are obliged to prosecute human rights violators has been extensively studied and debated by international lawyers and human

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rights advocates in recent years. The Inter-American Commission on Human Rights was the first inter-governmental body to squarely address this contentious question. It recently found that Uruguay's 1986 amnesty law *(Ley de Caducidad)* violated basic provisions of the American Convention on Human Rights and of the American Declaration of the Rights and Duties of Man.[1]

The Position of the Petitioners

• *The Theory of Complaints*

The Commission's action decided eight consolidated cases, with multiple victims, which were jointly filed by the Institute of Legal and Social Studies of Uruguay and Americas Watch shortly after the Uruguayan Parliament, under pressure from the military, passed the *Ley de Caducidad* on 22 December 1986. This law terminated the State's power to prosecute and punish military and police personnel responsible for human rights violations committed during the period of de facto military rule (June 1973 to March 1985). The application of this law resulted in the dismissal of 40 criminal cases in civilian courts, initiated by attorneys for victims of human rights abuses or their relatives against approximately 180 military personnel. Uruguay's Supreme Court upheld the law's constitutionality on 2 May 1988. The law won narrow approval by Uruguay's electorate in a national referendum on 16 April 1989.

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1 Report N° 29/92 (Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375) Uruguay, OEA/Ser.L./V/II.82, doc. 25, dated 2 Oct. 1992.

In Report N° 28/92 (Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311) OEA/Ser.L/V/II.82, also dated 2 Oct.1992, the Commission found that Argentina's "Due Obedience" and "Final Stop" laws violated the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. While factually dissimilar from the Uruguayan cases, the Commission disposed of challenges to these Argentine measures applying essentially the same legal reasoning as in the Uruguayan cases.

All eight cases before the Commission involved violations by State agents of certain "preferred" human rights, *inter alia*, the right to life, the right to humane treatment and the implicit freedom from forced disappearance. The complaints were not based directly on violations of these rights — all of which had occurred before Uruguay ratified the American Convention — but rather on the effect of the amnesty law, which was enacted after Uruguay's ratification of that instrument.

Specifically, the petitioners' fundamental claim was that the *Ley de Caducidad* — by terminating judicial investigation of these past abuses and dismissing proceedings against their perpetrators — denied petitioners their rights to judicial recourse and remedies in violation of Articles 8.1 and 25 of the American Convention and in relation to Article 1.1 thereof.

• ***The Misapplication of Amnesty***

During three lengthy oral arguments before the Commission, petitioners freely conceded that every government has the prerogative to amnesty or pardon certain criminal offences or offenders under its domestic law. But petitioners claimed that when the effects of such a measure deprive victims of such offences of judicial protection guaranteed by an international instrument to which that State is a party, then the matter could no longer be regarded as purely domestic in nature or beyond the scrutiny of competent international bodies. Petitioners also asserted that the *Ley de Caducidad* was a morally and legally perverse application of the concept of amnesty.

In this connection petitioners noted that, conceptually, amnesty abolishes or forgets the particular offence. It normally applies to crimes against the sovereignty of the nation, i.e., political offences. Petitioners argued that, properly viewed, this concept should not apply to the *Ley de Caducidad* and similar measures that forgive agents of the State who have grossly violated the human rights of citizens. The State's right to abolish or forget the crimes of

those who have infracted its sovereignty, by rebellion or other means, flows from the role of the State as the victim. Thus, the State may find that its interests, such as national reconciliation, are best served by an amnesty. However, petitioners contended that the State should not have the prerogative to abolish or forget its own crimes or those of its agents committed against its citizens. If the right to abolish or forget such crimes exists, then it belongs only to the victims themselves.

• ***The American Convention's Superiority***

The petitioners also argued that even if the *Ley de Caducidad* could deny them judicial remedies, as a purely domestic legal matter, it could neither deprive petitioners of their remedies under the American Convention nor relieve Uruguay of its duty to fulfil its obligations thereunder. Petitioners contended that, by denying them access to local legal redress, Uruguay had rendered illusory its basic obligation to respect, ensure and remedy violations of Convention-based rights and in effect had interposed its domestic law as a bar to compliance with the Convention.

Petitioners noted that, on the international level, it is well established that a State's international obligations are superior to any obligations it may have under its domestic law. Thus, a State cannot invoke its own contrary domestic law as an excuse for non-compliance with international law. With regard to international agreements, this principle is codified in Article 27 of the Vienna Convention on the Law of Treaties, which states in pertinent part: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ..."

Accordingly, notwithstanding its failure to give internal legal effect to a provision of the American Convention, Uruguay remained bound by that treaty and was responsible for its violation. This principle has been repeatedly invoked and affirmed in decisions of the Permanent Court of International Justice and

of the International Court of Justice, as well as those of other international tribunals.[2]

Petitioners also cited another related and basic principle of international treaty law directly binding on Uruguay: the customary law doctrine of *pacta sunt servanda,* embodied in Article 26 of the Vienna Convention. It states: "every international agreement in force is binding upon the parties to it and must be performed by them in good faith." This principle implicitly reinforces the doctrine that a State's treaty obligations are unaffected by changes, whether by legislation or referendum, in its domestic law.

• ***Governmental Succession to Treaty Obligations***

Similarly, petitioners pointed out that a change in government, by whatever means (since the identity of a State remains the same), does not alter the binding nature of the State's international legal obligations. Thus, the Sanguinetti and Lacalle administrations were internationally responsible for unredressed violations of the American Convention, attributable to the de facto military regime. The Inter-American Court of Human Rights applied this principle specifically to State-sponsored human rights violations in the Velásquez Rodríguez case: in a landmark decision on 29 July 1988 it found Honduras responsible for the disappearance of Manfredo Velásquez. The Court said in this regard:

> [a]ccording to the principle of continuity of the State in international law, responsibility exists both independently of changes in government over a period of time and continuously from the time of the act which creates responsibility to the time when the act is declared illegal. The

2 For example, in its 1930 advisory opinion in the Greco-Bulgarian Communities case the Permanent Court of International Justice stated: "It is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." The Permanent Court has also ruled that this same principle applies even when a state invokes its constitution "with a view to evading obligations incumbent upon it under international law or treaties in force".

foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred (para. 184).

• ***The State's Obligations***

During these oral arguments, the petitioners particularly emphasized the authoritative interpretation by the Inter-American Court of Convention Article 1.1 in the Velásquez case to support their claim that Uruguay was obliged to investigate and prosecute perpetrators of State-sponsored human rights violations.[3]

In its opinion, the Court declared that Article 1.1 "constitutes the generic basis of the protection of rights recognized by the Convention" (para.163). The Court indicated that the obligation to "respect" rights recognized in the Convention is founded on the notion that "the exercise of public authority has some limits which derive from the fact that human rights are inherent attributes of human dignity which are, therefore, superior to the State" (para. 165). It interpreted far more broadly the State's other obligation under Article 1.1 "to ensure the free and full exercise" of these rights. The Court stated that this "obligation implies the duty of the States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights" (para. 166).

The Court stated that whenever a State organ, agent or public entity, violates a right protected by the Convention, the State is

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3 The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

internationally responsible, not only for the violation of the infringed right, but also for a violation of its duty, under Article 1.1, to respect and to ensure that right. Significantly, the Court found that as a consequence of their dual obligations under Article 1.1, States "must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights" (para. 166). The Court also noted that compliance with Article 1.1 necessarily requires the government to investigate each and every violation of a protected right. Failure to investigate or an investigation not undertaken in "a serious manner" and "as a mere formality preordained to be ineffective," resulting in the violation going unpunished and the victim uncompensated, violates the duty "to ensure" the full and free exercise of the affected right (paras. 176 & 177).

Petitioners argued that since the Ley de Caducidad terminated criminal investigations, it clearly violated Article 1.1. They also contended, from a policy perspective, that the prosecution of perpetrators "ensures" the protection of human rights by preventing or deterring future violations by the actor(s) or others. Moreover, such prosecution symbolically represents a clear break with the legacy of the past and helps restore public confidence in democratic institutions.

The Position of the Government of Uruguay

- ***The Law's Contextual Setting***

The Uruguay Government's basic arguments, some of which were oral, were summarized and explained in its written response to the Commission's preliminary report.[4]

4 Uruguay, which has accepted the jurisdiction of the Inter-American Court, had 90 days upon receipt of the Commission's report to submit these complaints to the Court but declined to do so.

The government criticized the Commission for having ignored the "democratic juridical-political" context, the "domestic legitimacy" and the "higher ethical ends" of the *Ley de Caducidad*. Specifically, it asserted that the amnesty question "should be viewed in the political context of reconciliation, as part of a legislative programme for national pacification that covered all actors involved in past human rights violations" (Commission Official Report, para. 22). It emphasized that the law was enacted with the requisite parliamentary majority and had been the subject of a national referendum expressing "the will of the Uruguayan people to close a painful chapter in their history in order to put an end, as is their sovereign right, to division among Uruguayans" (Official Report, para. 22). As such, the government continued, the law "is not subject to international condemnation". In addition, the government pointedly declared that it "cannot accept the Commission's finding that while the domestic legitimacy of the law is not within the Commission's purview, the legal effects denounced by petitioners are".

• ***Lawful Restrictions***

The government contended that the *Ley de Caducidad* violated neither the American Convention nor any other international engagement, but was instead a legitimate exercise of the State's basic rights to grant clemency and to place lawful restrictions on rights. It argued that Convention Articles 8.1 and 25.1 must be interpreted in light of Convention Articles 30 and 32, which permit States to restrict the enjoyment and exercise of Convention-based rights "when such restrictions are the product of laws enacted for reasons of general interest or when those rights are limited by the rights of others, by the security of all and by the just demands of the general welfare in a democratic society" (Official Report, para. 23). Furthermore, the government contended that Convention Article 4.6, as well as Articles 6.4 and 14.6 of the International Covenant on Civil and Political Rights, granted Uruguay the requisite authority to enact the disputed law.

• ***Articles Disputed***

The government averred that the fair trial guarantees in Convention Article 8.1 refer to "the rights of the accused in a criminal proceeding and not to someone filing a criminal action" (Official Report, § 24). While asserting that "private parties are not the owners of a criminal action", and that Uruguayan procedural law does not recognize an individual right to bring a criminal complaint independently of a case brought by the public prosecutor, the government conceded that private interests are allowed to "intervene" in "exceptional cases" (Official Report, para. 24). It claimed that such an individual right is "not protected by international human rights law".

Julio Strassera, Prosecutor at the trial of nine Argentinean Generals, former members of the Military Junta, accused of having violated human rights. He was the Permanent Representative of Argentina to the United Nations Office at Geneva, but resigned from this post in protest over the pardon granted by the President to the Generals.

The government asserted that it had not violated Article 25.1 of the Convention whose purpose, it argued, was intended to "redress the injured rights and, if not, secure reparation for the damage suffered" (Official Report, para. 25). It further stated that "since, in the cases being denounced, it is impossible to redress rights injured during the *de facto* regime, all that remains is the right to damages, which the [ley] has in no way impaired".

• ***The Ley's Intentions***

The government claimed that the *Ley de Caducidad* did not violate Article 1.1 as interpreted by the Court in the Velásquez case. Noting that the duty to investigate and the question of an amnesty law "must be analyzed as a whole", the government noted that the *ley's* intention was in furtherance of the common good because "investigating facts that occurred in the past could rekindle the animosity between persons and groups", thus obstructing reconciliation and the strengthening of democratic institutions. While acknowledging that the legal system should make available to interested parties the procedural means to establish the truth, the government, nonetheless, argued that, for those same reasons, the State may choose "not to make available to the interested party the means necessary for a formal and official inquiry into the facts in a court of law" (Official Report, para. 26).

The Commission's Opinion and Conclusions

• ***Competence to Examine the Ley's Effects***

Before addressing the merits of the cases, the Commission first rejected Uruguay's claim that it was not empowered to decide whether the *Ley de Caducidad* was compatible with the American Convention. While admitting that it lacked jurisdiction to pass on the domestic legality or constitutionality of national laws, the Commission stated that "application of the Convention and examination of the legal effects of a legislative measure, either judicial or of any other nature, insofar as it has effects incompatible with the rights and guarantees embodied in the Convention ... are within the Commission's competence" (Official Report, para. 31). The Commission affirmed that its competence arises from the Convention which, *inter alia*, vests it with jurisdiction respecting matters relating to the fulfilment of the commitments made by States parties to the Convention (Article 33) and to receive and take action on petitions pursuant to its authority under that instrument (Articles 41, 44 and 51). It also noted that contracting States are obliged by

Convention Article 2 to adopt "such legislative or other measures as may be necessary to give effect to those rights and freedoms". Thus, it concluded, "*a fortiori*, a country cannot by internal legislation evade its international obligations" (Official Report, para. 32).

- ***Violation of Fair Trial Guarantees***

The Commission noted that by sanctioning and applying the *Ley de Caducidad,* Uruguay had not only, by design, dismissed all criminal proceedings against perpetrators of past human rights abuses, but also, had not undertaken any official investigation to establish the truth about these past events. It pointedly cited its own "general position on the subject" as stated in its 1985-86 *Annum* Report:

> "[o]ne of the few matters that the Commission feels obliged to give its opinion in this regard is the need to investigate the human rights violation committed prior to the establishment of the democratic government. Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigations may be necessary (Official Report, para. 37)."

The Commission also indicated that it had "to weigh the nature and gravity" of events to which the *ley* applied, such as forced disappearances and abduction of minors, stating that "the social imperative of their clarification and investigation cannot be equated with that of a mere common crime" (Official Report, para. 38).

The Commission indicated that the *Ley de Caducidad* "had various effects and adversely affected any number of parties on legal interests. Specifically, the victims' next of kin or parties injured by human rights violations have been denied their right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment" (Official Report, para. 39).

It then addressed the merits of the petitioners' essential claim that the disputed measure, as applied, violated their rights to a fair trial and judicial protection guaranteed in Convention Articles 8.1 and 25.1, respectively. Article 8.1 provides in pertinent part: "Every person has the right to a hearing with due guarantees [by a competent tribunal] ... in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a cure, labour, fiscal or any other nature."

The Commission rejected Uruguay's contention that Article 8.1 only applies to the rights of criminal defendants. It concluded that Uruguay, by enacting and applying the *Ley de Caducidad* after it had ratified the Convention, had deliberately prevented petitioners from exercising rights "upheld" in Article 8.1 and, accordingly, had violated the Convention. For the same reasons, the Commission found that Uruguay had violated the petitioners' right to judicial protection stipulated in Article 25.1 of the Convention.[5]

- ***A Violation of Obligation***

The Commission also concluded that the *Ley de Caducidad*, which prevented investigation of past human rights abuses, violated Uruguay's duty under Article 1.1 "to ensure" petitioners the free and

5 Article 25.1 states: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

full exercise of these Convention-based rights. Predictably, it found the Inter-American Court's authoritative interpretation of Article 1.1 in the Velásquez case to be controlling on the issue of investigation in these cases. The Commission cited with approval the following passages, among others, from Velásquez:

> "[i]f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. As for the obligation to investigate, the Court notes that an investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government (Official Report, para. 50)."

- ***Commission's Recommendations to Uruguay***

Based on its conclusion that the *Ley de Caducidad* was incompatible with the American Convention, and violated Articles 1.1, 8.1 and 25.1, as well as Article XVIII of the American Declaration of the Rights and Duties of Man, the Commission recommended to the Uruguayan Government that it pay just compensation to the applicant victims or their rightful claimants for its violations of these rights. It also recommended that the government adopt "the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the *de facto* period" (Official Report, para. 54).

Conclusion

It is sobering to note that amnesties granted to violators of human rights during the rule of previous military governments in Latin

America have rarely deterred and, at times, have become a licence for these State agents to repeat the same crimes under the new governments. By conferring, and indeed, enshrining impunity, these laws have deeply divided civil society and compromised the very notion of the Rule of Law, rather than promoting genuine national reconciliation and consolidating democracy. In these circumstances, it is not surprising that changes from military to civilian government, in the hemisphere, have often translated into military tutelage instead of actual civilian control over the security forces.

Most of these transitions, particularly in the case of Uruguay, have also been accompanied by a policy of official "amnesia" that makes second-class citizens of those who, having suffered violations of their rights, find that democracy does not offer them any more legal recourse as plaintiffs than they had as victims or defendants under military rule. The new civilian government, by active omission and by refusing to acknowledge and redress past horrors, becomes a party to the continuity of official contempt for the fundamental rights of certain citizens. The full measure and enjoyment of citizenship is thus reserved for others who, under military rule, inflicted pain, or who did not feel directly and painfully the loss of guaranteed rights. Too often the victims are left with only collective memories of suffering for which there has been no reparation.

In its reports on Uruguayan and Argentine amnesty measures, the Inter-American Commission on Human Rights has clearly and authoritatively established the duty of States, parties to the American Convention, to investigate, identify and prosecute the perpetrators of State-sponsored human rights violations. The Commission's decisions are an important and clear repudiation of impunity.

Extenuating Circumstances According to the Principle of Superior Orders

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1 - On the difficult path that leads to the punishment of serious violations of human rights, the eventual consideration of extenuating circumstances is approaching the goal and, at first glance, may appear to be the concern of an academic debate.

For this question is only submitted if numerous essential stages have been overcome since the perpetration of a serious violation of a fundamental right:

- the violation has been denounced as such;
- legal proceedings have begun; this presupposes, then, a State organ (police or justice) - let us not dream of a supranational organ - which has been able to conduct competent investigations;
- one or several presumed actors have been identified and formally questioned in the proceedings;
- the act or its authors are neither amnestied nor are beneficiaries of an immunity;
- legal proceedings for the act are neither covered by a prescription nor remain imprescriptible;
- the presumed author or authors of the act are detained before a tribunal or a judge considered sufficiently impartial and independent, notably with regards to authorities which might have favoured, even recommended the violation of the human rights henceforth concerned;

- the presumed author or authors are assumed to answer personally and directly for the indicted violation.

The tribunal or judge must then give a verdict on the sentence, and only then, can eventual extenuating circumstances be brought up.

2 - Criteria for establishing sentences will not be discussed here, but it is on these that extenuating circumstances will have an influence.

In its "Draft Code of crimes against the peace and security of mankind" presented in 1991, the UN International Law Commission did not arrive at an agreement on the penalties for the different crimes it defined, envisioning to leave it up to internal law.[1]

In a completely general manner, however, "a deprivation of liberty" was referred to, of which the duration would be fixed within a minimum and maximum limit. Supposedly, within this normative framework, a sentence will be determined according to the guilt of the author, taking into account elements concerning the act itself and the personality of the author.[2]

It is difficult to talk about extenuating circumstances without referring to a specific legislation, for the expressions used do not always have the same meaning. We do not have in view here, for example, what the French law qualifies as excuses, whether an excuse involving acquittal or an extenuating excuse.[3] In this text we will consider as an extenuating circumstance a fact permitting a tribunal or

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1 Informe de la Comisión de Derecho Internacional sobre la labor realizada en su 43° período de sesiones (Report of the International Law Commission on the work of its forty-third session), New York, 1991 [A/46/10], chap. IV, p. 213 ff, particularly p. 281.

2 For Swiss law, see Art. 63 of the Criminal code of December 21 1937, particularly Arrêts du Tribunal fédéral suisse, Recueil officiel, 116 IV 288. For French law, cf. for ex., Stefani, Levasseur and Bouloc, *Droit pénal général* (Paris, 1980[2]) p. 476, n° 535.

3 G. Cornu, *Vocabulaire juridique* (Paris, 1987) v° Excuse.

judge, within conditions and limits fixed by law, to deliver a less heavy sentence than that which was legally attached to the acts for which the person concerned is recognized as guilty.[4]

In some legal systems, such extenuating circumstances are left to the discretion of the judge; this is the case in French law.[5] But in other cases, the law itself enumerates and defines several circumstances which can lead the judge to reduce the normal penalty, either under obligation or voluntarily, within a set limit (the abatement of the minimum or maximum) or according to the discretion of the judge.

For our purpose, it is not important which of these systems we are in. In effect, the extenuating circumstance of which we are speaking can be operative in a similar manner whether it is the result of a precise norm or stems from the assessment of a tribunal.

3 - In classical criminal law, it is the author of a breach of the law who is responsible for it, that is, the person who personally committed the material acts which constitute this infraction. We refrain here from considering the various modes of participation in an infraction (intellectual authorship, co-authorship, instigator, accomplice) and the problem of crimes of omission.

But the person who commits such acts under the effects of irresistible constraint is exempt from the sanctions of the law.[6] What is the case if the author acts under the order of a person to whom the author owes obedience by virtue of that person's particular status? Is there still guilt on the part of the agent?

The question essentially concerns persons incorporated in a strictly hierarchic State organization such as the army or police, and eventually certain functional organs. In these structures in which

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4 G. Cornu, op. cit., v° Circonstances.

5 Code pénal, 1810, Art. 463: see Stefani, Levasseur et Bouloc, op. cit., p. 489, n° 554.

6 See, for ex., in the Code pénal français, Art. 64.

discipline and submission to a superior are vital elements, various acts are considered like breaches of discipline, such as insubordination or non-compliance,[7] and therefore the margin of liberty of the agent is institutionally reduced or even removed.

In such situations, specific provisions of national law exempt the author of a crime from any penalty.

Thus, the French Criminal Code punishes the public agent who "has ordered or done some act either arbitrary or injurious to the individual liberty or civil rights of one or several citizens or to the Constitution". But if this agent "proves that he acted under the order of his superiors towards objectives under their control and for which he owed them hierarchic submission, he is exempt from the punishment which, in this case, will be applied only to the superiors who gave the order".[8]

This is a typical application of the notion of the so-called mediate or indirect author: the indirect author makes another person act - who is not in a position to decide for himself and whose intervention is not intentional.[9]

Military criminal law often invokes these notions; thus the Swiss military code: "[i]f the execution of an order of service constitutes a crime or an offence, the chief or the superior who gave the order is punishable as the author of the infraction."[10]

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7 Thus the Code de justice militaire français, 1982, Book IV, chap. III: Des infractions contre la discipline (art. 442 ff); The Code pénal militaire suisse, 13 June 1927, second part, chap. 1: Insubordination (art. 61 ff).

8 Code pénal français, Art. 114; cf. also Art. 190 (Des abus d'autorité contre la chose publique).

9 G. Stratenwerth, Schweizerisches Strafrecht, Allgemeiner Teil, I, Bern, 1982, p. 312 ff; P. Logoz, *Commentaire du code pénal suisse*, Partie générale, 19762, p. 123.

10 Code pénal militaire suisse, Art. 18 al. 1; identical measures existed in federal military legislation already in the beginning of the 19th c.: see D. J. Daubitz, *Phlicht zur Niectbefolgung von Kriegsbefehlen* (Zurich, 1979) p. 23 ff.

Nevertheless, the execution of an order consisting of the commission of a crime cannot be made blindly and with impunity by the subordinate, even in an organization based on discipline and obedience. Therefore classical military criminal law does not exempt the agent from all criminal responsibility: in Switzerland, "the subordinate or inferior is also punishable if he realized that, in following up the order he was participating in the perpetration of a crime or offence".[11] The Code of Military Justice of Chile — before the dictatorship of the last decades — presented an interesting measure in this regard: the superior who gives an order of which the execution constitutes an offence is "the only person responsible"; but the subordinate will be punishable if he committed excesses in executing the order and, when the order tended to notoriously perpetrate an offence, if he was not fulfilling one particular condition – that of deferring the execution of the order and in urgent cases modifying it, immediately informing the superior; but if the latter persists in giving the order, the subordinate should carry it out, so long as it concerns his service.[12] Doctrine has criticized this measure which formally implies blind obedience when the order is confirmed.[13]

However, it will be noted that even in the rigid framework of a hierarchical organization, the subordinate who blindly executes any order does not necessarily avoid criminal responsibility nor, moreover, does the hierarchy which gives the order.

The problem, certainly, is not yet that of extenuating circumstances. But it is a necessary prerequisite.

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11 Chili, Códico de justicia militar, December 23 1925, art. 214 al. 1.

12 Chili, Código de justicia militar, art. 214 al. 2 et art. 335.

13 R. Astrosa Herrera, *Códico de justicia militar comentado* (Santiago, 19853) p. 347, and the authors mentioned in n. 2.

4 - It must not be overlooked that among lawyers concerned by the respect for human rights on an international level, the term "superior orders" has a very mediocre reputation.

One will recall, in effect, the Argentinean law of 1987 — that regulates the duty of obedience — adopted by a fragile democratic regime felt cornered and avoiding arraignment for the innumerable atrocities of the military in connection with the former dictatorship, which could have threatened its institutions. The irrefutable presumption was made that the military or the police were not punishable for certain offences because they had acted "under superior orders", "under constraint and compliance to higher authority and upon the execution of orders, with no possibility of control, opposition or resistance as to the opportunity and legitimacy of these orders".[14]

But the notion of an act in accordance with due submission is anterior to this law and, in French, it is better rendered by the phrase: *acte sur ordre d'un supérieur* "an act pursuant to the order of a superior".

However, in many countries, such a situation is expressly considered in criminal law when extenuating circumstances are defined in the law itself. It is found, in a certain way, in the prolongation of the norm of ordinary penal law according to which, in Switzerland, for example, the judge may soften the sentence when the accused has acted "under the influence of a person to whom he owed obedience or on whom he depended".[15] The Swiss military penal code contains literally the same directive, but it also includes a rule rendering the subordinate punishable if he executes an order which he knows is the perpetration of a crime or an offence; and it adds: "The judge may freely lighten the sentence (...) or acquit the accused of any penalty whatsoever".[16]

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14 Argentine, Ley de obediencia debida, June 5 1987, art. 1. Cf. Amnesty International, Report 1988, p. 112.

15 Swiss Criminal Code, art. 64 al. 4.

16 Swiss Military Penal Code, art. 45 al. 2 and art. 18 al. 2.

In the Chilean military penal law mentioned above, the subordinate who executes an order evidently consisting of the commission of an offence, without attracting first the attention of his superior to this point, is liable to a sentence of a lesser degree than that conceived for this offence.[17]

These references were only taken as random examples of national law. But in spite of some significant differences, they suffice to reveal two extremes: on the one side, they go as far, sometimes, as to exempt the agent who acted upon the order of a superior from any culpability whatsoever. On the other, according to the degree and criminal nature of the act ordered, the decision to punish the agent is reached, while he is also accorded an extenuating circumstance, the effect of which is facultative under Swiss law.

5 - Ultimately, this is a domain in which one cannot limit oneself to the study of any given national law. The rules of national law mentioned thus far can be applied to infractions of any nature, including relatively benign pranks in relation to which the shocking aspect of certain exemptions of culpability is erased. But our subject leads us back to serious violations against human rights.

International law was interested very early on by such heinous crimes, perhaps first in the form of war crimes. Thus, a relay may be seen in a judgement of the German *Reichsgericht* which deemed in 1921 that, "the order does not excuse the accused from his culpability... if the order is universally known as being contrary to law";[18] but after this essential principle is stated, there still remains, first the question of the degree of culpability of the author, and then that of the attenuation of the ensuing penalty.

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17 Código de justicia militar, art 214 al. 2; R. Astrosa Herrera, op. cit., 348.

18 E. Müller-Rappard, *L'ordre supérieur et la responsabilité pénale du subordonné* (Thesis Geneva Univ.) Paris, 1965, p. 190-1.

Even if, as seen above, the notion existed much earlier, it is undoubtedly the Statute of the International Military Tribunal of Nuremberg, annexed to the London Accord of August 8, 1945, which marked this problem: "The fact that a person acted pursuant to orders of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."[19]

One writer of this period made a good summary of the question and of its different aspects:

> "...at the one end, a person obeying an obviously unlawful order of which the refusal to obey would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying, in an isolated case, an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of summary military discipline, may rely on the plea of superior orders. There will be a variety of intermediate situations between these two extremes."[20]

6 - These principles are expressed today in international conventions between many countries.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that, "An order from a superior officer or a public authority may not be invoked as a justification of torture."[21] This principle was already found, furthermore, in the Code of Conduct for Law Enforcement Officials adopted in 1979.[22]

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19 Art. II (b) (ch. 4) of the Allied Control Council Law 10, December 20 1945, which instituted the tribunal.

20 H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", in *The British Yearbook of International Law* 1944, p. 73. Quoted by Müller-Rappard, op. cit., p. 196.

21 Convention concluded in New York, December 10 1984, art. 2, ch. 3.

22 Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly on December 17 1979, art. 5 (published also notably by Amnesty International, *Au-delà de l'Etat* (Paris, 1985) p. 246.

This rule ultimately responds to the principle revered by many international instruments according to which, even in the case of war or public danger threatening the life of a nation, the suspension of human rights can never affect certain essential rights, notably the right to life and the integrity of the human person.[23] For there exists an intangible core of human rights which no legislation can rightfully undermine.[24] The notion is still relative, nevertheless, if one thinks of the soldier who, in a classic war, kills an enemy on the order of his superior officers...

In the "Code of crimes against the peace and security of mankind" mentioned above, as proposed by the International Law Commission in 1991, two provisions exclude the exemption from penal responsibility of both the superior who gives the task to a subordinate and the actor who is invested with an official function.[25]But a preliminary rule states that, "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order."[26]

7 - After this overview, the following conclusions may be drawn:

- Even the execution of an order from a superior does not, in principle, exonerate the subordinate of criminal responsibility for the commission of a crime or offence constituting a serious violation of a human right.

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23 Convention (européenne) de sauvegarde des droits de l'homme et des libertés fondamentales, November 4 1950, art. 15; stricter yet, the American Convention of Human Rights, November 22 1969, art. 27.

24 See in particular P. Meyer-Bisch et alii., *Le noyau intangible des droits de l'homme,* VIII colloque interdisciplinaire sur les droits de l'homme, Fribourg, 1991.

25 Draft published in the report mentioned in n. 1, arts. 12 and 13, p. 262 (English p. 242).

26 Idem., art. 11, p. 262 and the commentary, p. 276 (English p. 242 and 256).

This first point is fundamental: with regards to acts which are violations of internationally recognized fundamental rights, the agent of any power whatsoever, civil or military, may not take advantage of an order to construe himself as a blind and unaccountable instrument. Even if he acts pursuant to an order, the agent is responsible for his actions.

- The culpability of the subordinate depends upon a) the extent to which he could recognize the criminal nature of the command and b) the possibility of extricating himself from carrying it through without incurring heavy sanctions.

This principle supposes that the author is in a position to realize that the act he is accomplishing constitutes a serious violation of a human right. The formulation of the Swiss Military Penal Code, according to which the agent "knew" is not satisfactory: the agent must also be responsible for acts which he reasonably *could have* recognized as constituting a violation of human rights. For the aim is not to favour someone who acts blindly, whatever the act, without ever questioning himself about it. This point must be assessed according to the time and place of the act, in accordance with the personality and aptitudes of the person concerned.

The author who recognized that the execution of a command would constitute a serious violation of human rights must also have been in a position not to comply without incurring important risks for himself or his relations. Rules should hardly be conceived to permit only heroes to elude penal law; the agent need not necessarily find himself before the dilemma of committing torture or being shot. But certainly a balance can be found between the violation that would be committed and the risk which would be incurred by the military or police who refused to obey.

- In these conditions, the subordinate who is the author of such a crime or offence may benefit from an attenuation of the sentence.

To the extent that the author of a grave violation of a human right did not find himself under irresistible constraint, he should, in

principle, be punished. But his culpability will be lessened to the degree that the orders given him were imperatives and he was not at ease to avoid them. One might take the circumstance into account that many other agents were in the same situation and did not react or, on the contrary, that others did refuse to comply. In that case, there might have been the compelling impetus of surrounding fanaticism, a difficult force to properly evaluate: the lawyer concerned with the respect of human rights will hesitate before granting forbearance towards the person who violates fundamental rights in a collective movement "like everybody else", without ever questioning himself. Yet, the lawyer who is careful about sentencing, according to the need of the offender - also an aspect of human rights - will be inclined to examine the movement in which the actor found himself, led by a sweeping current, leaving little place for the exercise of sound judgement, to which the agent of the government in power is not necessarily prepared.

Before concluding, let it be simply recalled, as it does not really concern our subject, that other extenuating circumstances may come into the picture, such as those which certain national laws grant to a government agent who, in repenting, has denounced the acts once committed by himself and others.[27]

The consideration of extenuating circumstances is seen then to involve a delicate evaluation of the situation of the author with regards to his own personality, as defined by his place of origin, education and training, and the influences exerted upon him. This evaluation will be the critical task of the judge, and in his power lies both the advantages and the inconveniences of such a conception.[28]

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27 For example, Chili: *"Ley de arrepentimiento eficaz o delación compensada"*, voted in June 1992 for the sake of former members of terrorist organizations, including security organs (Revue Hoy, Santiago, June 15-20 1992) p. 14-5.

28 See for example, U. A. Kholi, *Handeln auf Befehl im Schweizerischen Militärstrafrecht* (Bern, 1975) p. 101 ff.

For the judge or the tribunal must also be free of influence from the organs which gave the orders that led to the perpetrating of serious violations of human rights...[29]

Moreover, the judge must see that the author of grave violations of human rights deferred before him is condemned in a manner equitable to that of other actors; that this one is not some sort of underling and victim of propitiation set up to serve as an example or an alibi by a government willing to change, yet still largely shielding the principal miscreants. For if the impunity of violators of human rights is an affront to victims as well to the rights themselves, the way of true justice, one that does not necessarily exclude mercy, also runs great risks.

29 For example, A. Artucio, *El Salvador, Una brecha a la impunidad aunque no un triunfo de la justicia,* (Comisión Internacional de Juristas, November 1991) part. p. 62.

TOPIC 5

Measures Other than Penal Administrative

Purges

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Introduction

Before actually addressing the subject of this paper, I think it would be useful to point out just how wonderfully apt the word *"épuration"* is in French, and I believe that the same is true in the major Latin languages: *"depurazione"* in Italian, *"depuracion"* in Spanish, *"depuracao"* in Portuguese. I am not sure that the English words purification, in one sense, and purge can, individually, convey the various concepts contained in *"épuration"*. In its purest sense, it means decontamination, purification. The first image to spring to mind is that of the transformation of polluted river water into drinking water. The comparison between the process of clearing polluted water and what needs to be done to clean up a society illuminates the most appropriate procedures for a purge worthy of the name. Very simply, water is purified in two operations of a different nature. The first consists of passing the water through a series of sedimentation tanks in order to get rid of waste products, and is a mechanical procedure. The second, and more refined operation, is based on chemical procedures which destroy noxious elements.

The same applies for political and social purges. In the first place, all those people who are obviously guilty and have played a decisive role must be got rid of. For this first operation, ordinary justice must be used, since this is law enforcement itself. The second operation, which involves denouncing people who behaved in a reprehensible way and removing them temporarily or permanently from political life, is considerably more delicate and calls for far more refined procedures.

Let us move on to the subject of this paper which is intended to introduce the discussion on the measures to be taken to devise and organize a purge in a healthy way, measures which are always specific to a particular context. We shall attempt to draw up an inventory of the problems posed by purges and to find solutions to them. The inevitably incomplete inventory can be completed by your individual contributions. Whenever I address a problem, I will try to illustrate it by critically reviewing an example taken from the only purge with which I am slightly acquainted, which took place in France for the most part in 1944-45. I have decided not to use examples from the other countries occupied by Germany, since the information I have on them is too fragmentary to allow me to comment on them. I would also like to point out that my references to France are only intended to illustrate my talk. They can be disregarded.

It is essential to remember, when recalling the nature of the purge in the aftermath of the 1939-45 war, that the forms it took were the product of collaboration with the enemy and its exactions. A purge in the transitional period before true democracy is established is by nature somewhat different since in the previous State there had, strictly speaking, not been an enemy. However, with the exception of that missing element, the problems that arise are similar.

I - The Purge: Necessity - Obstacles - Organization

a) The Need for the Purge

The institutions of a genuine democracy cannot be content to use people who have served a dictatorial or oppressive regime. Organizing a new society does not only require new ideas but also, and indeed above all, new men and women who were maybe, but not necessarily, in the old opposition. The new people should not have compromised themselves with the former regime. What seems certain, even blatantly obvious, to me, is that it is impossible to build something new with the lackeys who had kept alive the old system. Moreover, I am surprised that this is not a universally accepted belief. People cannot change from one day to the next. Former

Communist leaders and the former aides to dictators of all hues do not become perfect democrats overnight. Acquiescence in situations where yesterday's leaders are still used allows them to continue wreaking havoc and can only delay the establishment of democracy.

I have already differentiated in the introduction between penal purges — which I prefer to call criminal because as a description criminal has the advantage of being understood equally well by those familiar with Roman law and those familiar with common law, and because on the whole they cover the same concepts in the two major legal systems which share between them part of the world — and purges, a term which I prefer to administrative purification measures.

I am not going to go into great detail about criminal purges, I will just point out that they require recognized principles and run-of-the-mill organization and inevitably take the form of a legal clear-out - if they did not, all those principles would be betrayed. The questions they raise are essentially to find out whether it is enough to implement them by using the already existing arsenal of enforcement measures, or by creating new charges and having recourse to courts of special jurisdiction. Furthermore, overshadowing the whole subject is the need to pronounce upon the principle of the non-retroactivity of laws. Should it be respected, or put quietly aside whilst supposedly being respected, or does it demand the courage and honesty to acknowledge that it is inapplicable? I believe that clear, honest solutions are always the best, so I would prefer the latter.

On the other hand, administrative purges must be reinvented every time. Their very originality means that they must always create the mechanisms for their own implementation, but on the way lie obstacles which must first be overcome and then eliminated.

b) Obstacles Common to All Purges

There are not many of these obstacles. They either predate the purge and affect its actual organization, or post-date it and spoil its effect. Essentially, they are the fear of losing expertise, the desire for national reconciliation, and forgetting.

The first reflects a rather Manichean idea of society, according to which some people are competent and others not at all competent. This is at the very least inaccurate, since competence is not a gift. It is acquired through work and experience, and, as the saying so correctly goes, none is indispensable. Better a serious, hardworking and honest civil servant in a new regime than a corrupt official who had unscrupulously served a now-disgraced regime even if he or she is exceptionally competent. That might seem perfectly obvious but governments are not always convinced. The veneration of competence has led to terrible excesses. The most well-known example, taken from the last war, is that of Barbie, who was unhesitatingly used by the American army intelligence service as a spy in the anti communist struggle, in full knowledge of his Nazi past. This case is relatively well-known thanks to the highly documented though incomplete August 1983 report of the director of the US Department of Justice's Office of Special Investigations, which in my opinion was not used to its full potential in the Barbie trial. The Barbie case is far from unique. All the occupying armies in Germany used former Nazis in their intelligence services on the pretext of their individual expertise.

Forgetting can take place at two points. The first of these is well before any purge, when it is the decisive element countering any desire to clean up a society - the regime has changed but professes to have forgotten the horror of what has gone before and expects to forge something new using the same people as before. Impunity then takes an absolute form. This is what has happened in most of the countries of Latin America which have entered the so-called transition phase. By adopting this attitude, the new regimes show just how fragile they are and, more often than we realize, increase the danger and risk of a coup d'Etat. Their timorous spirit weakens the very regime they are trying to strengthen.

Forgetting can also happen after a purge, when it takes the form of a pardon, amnesty or early release. Amnesties are the most frequently used measure and are wrongly felt to be more democratic than pardons because they are voted by Parliament, but when they come soon after the punishment they actually repudiate the offence.

This is the case of the French Amnesty Act of 16 August 1947, passed three years after the liberation of Paris, which freed about 13,000 prisoners found guilty of collaboration, and, among other things, abolished the infamous nature of national indignity. The avalanche of amnesties in France (1947, 1951 and 1953) inevitably discouraged those who had fought for the purge and fanned the desire for revenge of those who had been punished and then absolved, and who only wanted to recover the functions and positions they had been deprived of for several years.

Do not misunderstand me - I am not opposed to amnesties on principle, on the contrary, but I believe that forgiving and forgetting take time and I am against forgiving when it comes so soon after the acts which must be excused. With regard to the deprivation of rights, they should only be restored a long time after the punishment is imposed, for otherwise the punishment is rendered futile. It is better not to punish at all than to punish and then scrap the sentence before it has even had time to take effect.

Good intentions have no place in politics. After a troubled period under a dictatorial regime with many victims, it is a delusion to imagine that after the change, with the establishment of a transitional regime or the institution of a genuinely democratic system, the surviving victims will embrace their torturers or that the torturers will extend a hand to their former victims. The desire for national reconciliation is a noble sentiment which all too often conceals less noble undercurrents and is an obstacle to any kind of reform. On the pretext of national reconciliation, General de Gaulle helped create a France divided in two, with the two halves in violent confrontation, which has resulted today in parties that have crumbled, making the country almost ungovernable and preventing any root and branch reform.

c) Organization of the Purge

The precondition for organizing a purge must be to determine the acts and reprehensible conduct which justify it. This problem must be confronted head on. It is a political decision of considerable

importance for the effectiveness of the purge and can only be taken by politicians. It is only when the criteria have been clearly determined that legal experts should be asked to translate them into legal language and where necessary to adapt or even amend them. The roles must not be reversed. As far as possible the criteria must be precise. Contrary to popularly held opinion, a broad, relatively vague indictment will not catch a larger number of individuals in the net of prosecution and punishment. It hampers judges, whether they are professional or not, to go beyond their mandate and look for more limiting criteria.

Is it possible to find a single criterion to cover everyone who might be purged or is it preferable to apply separate criteria for each category of individual? I would tend towards the single criterion. That is not the choice which was made in the French case. It is probably wrong to refer to a choice - if the initial criteria decided in Algeria and extended with some modification for the administrative purge were subsequently amended for run-of-the-mill cases, it was because the legislature considered the initial criteria to be inadequate when prosecuting a citizen who was not a State official.

After the armistice for civil servants, elected officials and State agents, understood in an extremely broad sense because it covered among others members of the legal profession and of the doctors and barristers professional associations, the justification for the sanctions imposed in the territories liberated before metropolitan France was the article 3 of the Ordinance of 6 December 1943, as follows:

> "have by their acts, their writings, or their personal attitude,
>
> - either encouraged enemy undertakings;
>
> - or prejudiced the action of the United Nations and French Resisters" (Grouping together, in one indictment, behaviour prejudicial to the actions of the United Nations and of the Resistance — one wonders exactly what that word means — demonstrates, I believe, how little the authorities in Algiers understood what the Resistance was in France. The wording used later in the Ordinance of 27 June 1944 on the administrative purge is more judicious: "hindered the war

effort of France and its allies", but is still very vague);

- or interfered with constitutional institutions or fundamental public liberties;

- or knowingly derived or attempted to derive any direct material gain from the application of regulations enforced by the *de facto* authority contrary to the laws in force on 16 June 1940;

- or made denunciations leading to the prosecution of French resisters.

So, at first, there were five categories of behaviour, which were reduced to four in the ordinance on the administrative purge since denunciations became just one example of behaviour which hindered the war effort. In my opinion this significantly understates the impact of denunciations.

The desire to leave nobody out of the reach of the purge was reflected immediately after the Liberation of Paris on 26 August 1944 in one of the last important ordinances dating from Algiers, the one instituting national indignity. The first two paragraphs of the explanatory introduction to the text show better than any commentary the intentions of the legislature of the Provisional Government. It states: "[t]he Ordinance of 26 June 1944 on the punishment and prosecution of collaboration and the Ordinance of 27 June 1944 on the administrative purge on the territory of metropolitan France do not allow for the resolution of all the problems raised by the need for a purification (the word is almost religious) of the homeland after it has been liberated. The criminal conduct of those who collaborated with the enemy did not always take the form of a specific act for which there could be provided a specific penalty according to the terms of a legal regulation under the strict interpretation of the law. Frequently it has been a question of antinational activity reprehensible in itself. Moreover, the disciplinary measures by which unworthy officials could be removed from the administration are not applicable to other sections of society. It is as necessary to bar certain individuals from various elective, economic or professional positions which give their

incumbents political influence, as it is to eliminate others from the ranks of the administration.

The concept of national indignity is born of that dual concern. It is a response to the following idea: any French citizen who, even without having violated an existing penal law, has been guilty of activity defined as antinational, has degraded him or herself - he or she is an unworthy citizen whose rights must be restricted insofar as he or she has failed in his or her duties. Such a legal discrimination between citizens may appear serious since all discriminatory measures are repugnant to democracy. However, it is not contradictory to the principle of equality before the law for a nation to distinguish between good and bad citizens in order to bar from positions of leadership and influence those among the French who have rejected the ideals and the interests of France during the most painful experience of its history.

We will return later to national indignity but let us note straight away that what the explanatory introduction characterizes as activity defined as antinational becomes in the general incrimination of article 1 of the Ordinance: "have after 16 June 1940, directly or indirectly, voluntarily aided, in France or abroad, Germany or its allies, or harmed the unity of the nation or the liberty and equality of French citizens".

These constant references to June 1940 can only be understood if we remember that Gaullism tried to treat Vichy as a parenthesis and always based itself on the fiction of the legal non-existence of Vichy. The various criteria proposed also overlooked something very obvious, which has been insufficiently stressed in my opinion, namely that whatever regime a country is under, whether or not it is against human rights, or oppressive, all the men and women in that country must carry on with their lives. As well as the regime's supporters, the indifferent and even the opposition must obey the laws in force if they want to survive. Where absolutely necessary, civil servants must carry on administering, teachers teaching, and magistrates judging, to take but a few examples. The other solution is to resign and resist, but we cannot expect everyone to behave heroically.

The French example shows that it is those people who stayed, living and breathing the country's problems who should determine the criteria for the purge, and not those who chose to leave.

II - Various Aspects of Purges

a) Administrative Internment

Should administrative detention be provided for at all costs for allegedly dangerous individuals who have nevertheless not committed an offence under ordinary law, justifying preventive arrest? I personally believe that nothing is more contrary to the idea of justice than administrative detention but I am aware that it is a very common practice. It should come as no surprise, then, that the Provisional Government of the French Republic instituted and regulated that measure in its Ordinance of 4 October 1944. To be sure, the text provided for a verification commission which, of course, intervened after the measure had been implemented. The measure itself was very general, stipulating that "individuals endangering the national defence or public safety" could, on the decision of the chief of police in the Seine department or of prefects in the other departments, be removed from their place of residence or be subject to restricted residence, or administrative detention until the legal date of the cessation of hostilities.

b) Purging the Army, the Police and the Magistrature

By grouping these three bodies together in one section, I am not trying to assert that they should all be treated in the same way. I just want to emphasise that since they are the State's most formidable arm for carrying out a purge, it is absolutely essential that the purge should begin with them.

In France the army came within the framework of the administrative purge. There was, therefore, a purge commission for the army just as there was one for the civil service, but even before it started functioning, the government cancelled all the appointments

and promotions made by the Vichy Government. The purge commission prepared at the same time for punishment and for reinstatement. It has been estimated that approximately 5,000 officers were discharged.

Approximately the same figure is given for the police.

As for the magistrature, almost 20% of the judiciary passed before the magistrates central purge commission, set up two weeks after the Liberation of Paris. By January 1945, 266 judges had been suspended. Most of them were reinstated in the following years. In May 1945, after a period of suspension, irremovability was re-established.

c) The Conditions of Ineligibility

For as long as democracy is based on elections (I am not sure that it is an eternal principle, for developments in the circumstances in which elections are held and the need for candidates to have access to ever greater amounts of money in order to have a chance of succeeding, are of increasing concern to people who believe equality of opportunity should be guaranteed and who wonder whether electors really have freedom of choice - this is just a digression which merits further development), so, as long as elections remain the foundation of democracy, and as long as those we call the representatives of the people, which stops us questioning the value of the supposed representativeness, are elected, the organization of a purge will involve dealing with ineligibility, since it would be difficult to understand how people who had occupied important posts in the old regime or had participated in the consultative or ruinous assemblies under that regime can be representatives of the people in the new regime. I do not think I am being naïve in stating that such situations are viewed in a poor light and the fact that many contemporary examples seem to contradict that statement is no reason to endorse them.

In the Ordinance of 21 April 1944, on the organization of the State authorities in France after the Liberation, the legislature was already planning the removal of a certain number of individuals who had

served Vichy from public life and making them ineligible to local assemblies. Four categories of individuals were decided. First and foremost were the members of the Vichy Governments, then collaborators defined according to the same criteria as those indicated above in the Ordinance of 6 December 1943. Then came those who had occupied positions of authority under Vichy, or had held a seat as a national councillor or nominated departmental councillor or Paris municipal councillor. Lastly, all those members of Parliament, deputies and senators, who had voted constituent power to Marshal Pétain on 10 July 1940. According to the same fiction of the legal non-existence of Vichy, the members of Parliament who had voted for the delegation of powers were considered to have abdicated their mandate and ultimately to have renounced it. On the other hand, the 80 who rejected the delegation were almost regarded as heroes, especially in their own eyes — they tried to obtain special advantages from their behaviour, which was not in itself especially courageous and did not expose them to any particular risk. Luckily the government did not take them up on that attempt. From that first ordinance it was stipulated that the members of Parliament who had abdicated their mandate as well as the other categories mentioned in the ordinance could be relieved of ineligibility by a prefect after an inquiry if they could be rehabilitated by their active and direct participation in the Resistance, attested to by the Departmental Liberation Committee. The Ordinance of 6 April 1945 revised some of the provisions of the Ordinance of 21 April 1944, in particular by establishing a new list with six categories of individuals who could be made ineligible. Most importantly however it replaced the prefects with a *jury d'honneur* composed of the Vice-President of the Council of State, the Chancellor of the Order of the Liberation and the President of the National Council of the Resistance. The Amnesty Act of 1953 suspended all the ineligibilities and leading Vichyites often returned to public life.

d) Administrative Purges

In all the branches of the administration it is maybe more essential than in any other kind of field to prevent the purge only hitting the

underlings, the staff and minor civil servants. To that end it is vital to be clear about principles and not to argue in terms of a single penalty for all State officials.

First off, automatic sanctions can be introduced. This would mean determining, probably by law, that occupying a position of authority at a certain level would automatically lead to removal from that position and being placed under the charge of the minister responsible for the senior civil servant concerned, without the possibility of the removal being lifted. With regard to dismissals, with the standard distinctions of with or without pension, recourse should be had to a separate procedure, similar to legal procedure including requirements for the presence of the accused and the need for a defence.

I do not see what is so shocking in itself about removing a civil servant from the centre of power when a regime changes. Why try and hide things when everyone knows that the promotion of an official, when not based exclusively on seniority, does not depend exclusively on that official's own qualities and his or her merit but also on flexibility and diligence in serving the powers — that — be. It is in the very nature of things that the highest positions will be allotted to those who get on best with whoever is in power. It is just as logical that when power changes hands those senior civil servants will be dismissed. I will be self-indulgent and illustrate my proposition with my own humble experience. Under the right I was in opposition, under the left I have remained more or less anti-establishment. I believe that explains my fairly modest career. While I have sometimes been saddened by the lack of recognition for my merits, I have not really been surprised by it and I do not feel particularly resentful. I have made a choice, to express myself freely, to criticise without inhibition, to act in relatively complete independence. I have never expected to be liked for it.

Another system, which I prefer because it seems closer to my concern for fairness and justice, is to limit the purge to those people who, if they remained in place might obstruct the implementation of reforms and the establishment of a genuine democracy. The first

step would be to locate the centres of power. An example drawn from life in the magistrates trade union will clarify what I mean by centre of power. One day, convinced that the left would soon be in power (we were three years ahead of reality), we indulged in a sort of role play. We decided to purge the magistracy, either playing the part of the new government or acting at the level of Minister of Justice. Our first measure was to remove all the procurators-general of the appeal courts. We did not think it would serve any purpose to remove the procurator-general of the Court of Cassation, since, according to our analysis, although he is at a higher level in the hierarchy than the other procurators-general and occupies one of the most senior posts in the magistracy, to which doubtless aspire most of the procurators-general of the appeal courts, he has no real authority over the workings of justice. Neither did we consider it necessary to change the senior presidents of the appeal courts, because our analysis told us that they had no real power beyond their administrative and disciplinary functions and their status, on paper, as heads of all the jurisdictions under their authority. On the other hand, the procurators-general are, in their own jurisdiction, the strong arm of the government, and they direct penal policy and supervise public prosecutors and the police. They really hold legal power, so it is better to have them as partners in government policy than as adversaries if the government wants its reforms to succeed and its judicial policy fully implemented. They do not need to be autonomous as in the Italian system, as some people believe, in order to be powerful. What holds for the legal system, of which I have some experience, will be the same I am sure for the other public services. We must look for the reality below the surface.

I think, therefore, that before any purging of the administration, the real centres of power must be identified, and to that end I think that it would be judicious to call on sociologists to participate in the bodies which will prepare the purge. For me, a purge is not law enforcement. Its overriding aim is to get rid of obstacles to implementing new policy. This is some way from the organization of the administrative purge in France on Liberation.

The basic text for the purge of the administration in France is the Ordinance of 27 June 1944, which, for the behaviour I have already mentioned, provided for a number of sanctions ranging from dismissal to prohibition of the wearing of medals, but did not stipulate the machinery for the purge, leaving that task to government ministers. Nevertheless, it conferred upon the *commissaires de la République* who replaced the prefects, the special power to suspend any civil servant whose behaviour was, in their judgment, covered by the charges contained in the ordinance. A study of the administrative purge in France would require the comprehensive perusal of all the decrees and orders which established the various purge commissions, which were made up of representatives of the Resistance and senior civil servants and were often chaired by a magistrate. The decision-making power lay with the relevant minister but it seems that, despite the denials of certain ministers, for the most part they followed the recommendations of the purge commissions whose task in theory was only to recommend. It is highly likely that some ministers, moved by a spirit of Christian charity rather than by a genuine concern for justice, tended to reduce the suggested sanctions or not to impose one at all. I think that they often showed a rather dubious generosity. Some incredibly imaginative figures have circulated about the work of the administration purge commissions. The official figures were provided by the government in reply to written questions. They are very difficult to interpret because they adopt different classifications to those of the ordinance. The total number of sanctions for the whole of the State's public services, government-owned corporations and nationalised industries was apparently 16,113 of which slightly more than 4,000 were dismissals without pension.

III - Deprivation of Civic, Political and Even Some Civil Rights

This deprivation of rights, which can affect any citizen, has been given the name of national indignity in France, and we have already mentioned the justification for it in the explanatory introduction to the Ordinance of 26 August 1944. Measures identical or similar to national indignity were adopted in the four other West European

countries occupied by the Germans. The idea on which the concept of indignity is founded is always the same: it is simply that a man or woman who has committed a certain number of reprehensible acts, not necessarily infringements of ordinary law or covered by the specific purge texts, is discredited and has become an unworthy citizen. Consequently he or she must be stripped of a certain number of rights or at least prohibited from exercising them.

It is a similar concept to that of depriving some criminals of civic, political and civil rights or even making them persons under statutory interdiction. Personally I think that the presence in our codes of these prohibitions (for infringements of ordinary law, I mean) is archaic and contradicts the declared intention of reforming offenders. Turning criminals into second-class citizens after their release — without mentioning the obstacles created by disqualifying criminals during imprisonment — stops them becoming genuinely reintegrated into society.

If I followed the programme assigned me by the letter I would not even mention national indignity, which I hold to be a veritable aberration, in France, where it has become a crime subject to the criminal penalty of national degradation. This is an excellent example of the inability of some legal experts at the very time when they are creating a new concept to escape the old categories with which they are familiar. The name itself, "national degradation", recalls a penalty which already existed in French criminal law at the liberation, "civic degradation". It was a political punishment created in 1832 as an infamous punishment which could be passed both as a principal and as an accessory sentence. The effects of civic degradation were considerable, including deprivation of the rights to vote, of election and eligibility, and to bear arms, being ineligible for jury service and the positions of guardian, surrogate guardian or trustee, as well as dismissal and exclusion from all public position and deprivation of the right to serve in the French armed forces (cf. the list in article 34 of the Penal Code). However, it seemed inadequate to the 1944 legislature and new prohibitions were added for national degradation (cf. list in the Ordinance of 26 December 1944). National degradation is,

all things considered, nothing more than aggravated civic degradation.

It should have been possible as a last resort to make the Court of Assize competent, for national indignity is a punishable crime, like all crimes, with a criminal punishment called national degradation, but the sluggishness of the criminal process fits ill with that kind of offence. So, setting aside principles, a special jurisdiction was set up competent only to judge those accused of national indignity, the *chambre civique,* made up of a president, a magistrate appointed by the senior president of the court of appeal and four jury members.

I do not think that the French example of national indignity, national degradation and *chambre civique* is an example worth imitating. Purges cannot lead to the institution of new punishments in that way, which even if they are called punishments are in fact just administrative measures.

Conclusion

Even as far as France is concerned I have omitted to mention some sectors in which purges took place, for instance, the press and literature. It is not because I do not attach any importance to the means of information, on the contrary, I am among those who believe that the uncontrolled power of the mass media and their self-absorption is one of the most serious threats to society. It is a field in which reflection is totally inadequate. With regard to France at the Liberation, the reorganization of the press called for by the Resistance and initiated in the first years was closely interwoven with the purge. A study of the circumstances of the purge in the press would require thorough knowledge of the pre-war press, the press that held sway in the occupied zone and the press which survived in the free zone until its disappearance. In the context of a subject as general as that treated here, it can only be alluded to. As for the purge in literature that subject has already caused such an amount of ink to flow and attempts at rehabilitation have been so numerous, to the extent of the recent celebration, probably in the name of the value of knowledge, of the journal of Drieu la Rochelle, one of the most

prominent collaborators, that there is nothing I wish to add today. Let us just recall for the record that André Castelot, a self-styled historian and one of the journalists who is most famous today to a mass audience, far more than the great historians of our time, was prohibited from publishing anything for over a year by his peers in the writer's purge commission.

As I reach the end of this paper, I would like to point out a pitfall which can seriously impede a purge and which the French example shows must be guarded against. The ambition of the purge's planners must not be too great. It is unrealistic to expect that everybody whose conduct during the previous period was less than irreproachable can be got rid of. It must be accepted that a society cannot be like clear, limpid water. The purge must simply strike fast and hard and, as all lovers of justice would hope, aim to get the people who are really responsible and exclude them from public life.

Exile and Political Asylum

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I - Exile - The Russian Experience

Before discussing exile as a mode of action against perpetrators of human rights violations, it is necessary to take into consideration the fact that exile was broadly used, by those perpetrators themselves, as a repressive measure against the peoples of Russia during the years of Communist domination.

Exile, as an administrative punishment, was used by the Communist Party and the Secret Police ("CheKa", "OGPU", "MGB", "KGB") to deport to the glaciers of Siberia and the sands of Central Asia, millions of so called "class enemies" in the twenties, wealthy peasants ("Kulaks") in the thirties, whole nations like the Germans of the Volga, Tartars of the Crimea, Chechens, Kalmikhs, Greeks and many other peoples from the Caucasus and other regions of the former Soviet Union. For most of them, this "exile" meant degradation and extermination, that could be qualified as genocide.

From time to time, the Communist regime applied administrative exile to deport abroad its intellectual and political opponents. For example, in 1922, by order of Lenin, some two hundred people, members of the Russian intellectual *élite* (scholars, writers, philosophers) were deported from Russia to the West. Towards the end of the twenties, Leon Trotsky — Stalin's main rival — was forced to leave the Soviet Union and was killed by a communist agent twelve

years later in Mexico. In the seventies and in the beginning of the eighties, this measure was applied to some dissidents like Solzhenitzin, Litvinov, Orlov and others. The measures were enforced by special decisions of the Politburo of the Central Committee of the CPSU. These have been discovered in 1992, during the trial on the constitutionality of the Communist Party in the Constitutional Court of Russia.

Towards the end of the fifties, administrative exile — as a special measure of punishment — was officially abolished by the Fundamental Criminal Law. It began applying as a measure of principal or supplementary penal punishment in many articles of the Soviet Criminal Code, including the famous Article 70 (on "anti-Soviet agitation and propaganda") which broadly applied to many dissidents in the 1960s - 1980s. Nevertheless, even after these changes, administrative exile was applied to academician Andrey Sakharov who was deported to Gorky without trial, solely by order of the Politburo. Later, this Party decision was authorized by a secret Decree of the Presidium of the Supreme Soviet of the USSR. This was a gross breach of the law, for, constitutionally, the Presidium had no right to change the law.

The current Administrative Code of the Russian Federation does not mention exile in any case. In accordance with the current Penal Code, exile applies as a principal punishment for two crimes and as a supplementary punishment for dozens of other crimes. These crimes do not comprise those which are usually committed by perpetrators of human rights violations (murders, tortures, kidnappings, crimes against justice and so on). This Code is about to be abolished. A new Penal Code for Russia will soon be adopted (its draft is under discussion now in Parliament) which totally rejects exile as a punishment for any crime.

Exile, meaning deportation abroad, is now absent from Russian legislation and practice. In accordance with Article 36 of the Russian Constitution, a "citizen of the Russian Federation may not be deprived of citizenship and deported out of its limits".

Russian legislators and public opinion, therefore, regard exile as a relic of the totalitarian past and tend to its total abolition.

Taking into account all of the above-mentioned, one may arrive at the conclusion that contemporary Russian legislation and practice does not permit the application of exile as a punishment for any criminal whatsoever, including perpetrators of human rights violations - for both legal and moral reasons.

Political Asylum

In this context, the debate appears to be on the following question: is it or not possible to grant political asylum to perpetrators of gross human rights violations?

The response to this question exists in International Law. The basic international decisions in this field are:

1. article 14 of the Universal Declaration of Human Rights of 10 December 1948, which provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution". However, it is also stated that "this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations";

2. the Declaration on Territorial Asylum adopted by the U.N. General Assembly on 14 December 1967. The Declaration, "recognizing that the granting of asylum by a State to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act ...", lays down at the same time in Article 1, point 2 that "the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he/she has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes".

This clearly means that the right of political asylum may not be granted:

a) to persons who commit genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide (Article III of the

Convention on the Prevention and Punishment of the Crime of Genocide). The reason for this is that Article VII of the same convention provides that such acts shall not be considered as political crimes for the purpose of extradition, and the Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force;

b) to persons who commit the crime of apartheid and of establishing and maintaining domination by one racial group of persons over any other racial group of persons, and systematically oppressing them by acts enumerated in Article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* – because, in accordance with Article XI of the same Convention, such acts shall not be considered political crimes for the purpose of extradition. The States Parties to the Convention, undertake in such cases to grant extradition in accordance with the legislation and with the treaties in force;

c) to persons who commit war crimes and crimes against humanity, as they are defined in the Charter of the International Military Tribunal and other relevant and corresponding decisions of the United Nations. This is, taking into account that in accordance with Article III of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the State Parties to this Convention undertake to adopt all necessary domestic measures, legislative or otherwise, in view of rendering possible an extradition, in accordance with international law, of those persons. Furthermore, following the Principles of international co-operation in the detection, arrest and punishment of persons guilty of war crimes and crimes against humanity, adopted by the U.N. General Assembly on 3 December 1973, it is stated that the States shall cooperate on questions of extraditing such persons (point 5).

It is necessary to add to the above-mentioned persons other categories of perpetrators, such as persons guilty of acts of terrorism, kidnapping, hijacking and so on. In these cases, the right to asylum must not serve as a cover for perpetrators of crimes against human rights.

Let us now consider this problem in the Russian context. The right to political asylum does not appear directly in the acting Constitution of the Russian Federation. However, the Constitution contains some indirect references to this right. Article 37 stipulates that "a person may not be deprived of or granted political asylum within the territory of the Russian Federation without the consent of the Supreme Soviet of the Russian Federation."

Article 121 (5) (point 13) gives to the President of the Russian Federation the right to grant political asylum "in accordance with the law". However, this law is not — at the present moment — yet in existence. Instead, there exists a draft of the new Constitution of Russia which declares in Article 19 (2), that the "Russian Federation grants the right to asylum to foreign citizens and persons without citizenship in accordance with the universally recognized principles of International Law and the federal law adopted on its basis".

If this draft is to be adopted (the question of its adoption is, at present, the subject of much political battling in Russia), the legislative approach to the problem of the granting of political asylum should take into account what follows:

1. that one of the universally recognized principles of International Law is the principle of respect and observance of human rights and freedoms; and that the other one is the principle of *pacta sunt servanda*;
2. that following these principles, the State has the obligation to encourage human rights and act against violations and persons who commit such violations. The State must also observe the relevant international obligations and decisions;
3. that entails the necessity of implementing, in the Russian legislation, all the international obligations concerning asylum which are mentioned in the beginning of this document. It must be noted that both the acting and the future constitutions recognize the primacy of International Law over domestic legislation.

At present we only have a draft of the future law "On the granting of political asylum" which stipulates that "political asylum on the territory of the Russian Federation may be granted to foreign persons and stateless persons in order to save them from persecution in other States for their political, religious, scientific and other creative activities". The draft envisages that political asylum may not be granted if persons are persecuted for committing crimes of a "non-political character" or for actions in "contradiction to the principles that are common to all humanity".

Such wordings are certainly far from perfection and require compliance with the exact criteria of international law.

The former Communist regime, in practice, granted political asylum — both *de jure* and *de facto* — to many of its adherents from other countries. Among them were notorious perpetrators of crimes against human rights, such as the Hungarian communist leader Matthias Rakoszi, the former chief of the East German secret police Markus Wolf, the last president of East Germany Erich Honnecker, and many others. The two last persons — Wolf and Honnecker — were deported from Russia following the collapse of the Communist government. Moreover, other less notorious people of the kind are probably still in their shelters.

In conclusion, it is necessary to mention that the problem of impunity with regard to the perpetrators of human rights violations is one that is very painful and complex in contemporary Russia. After seventy years of terrible cruelties and crimes committed by the Communist regime, almost no criminals have been punished. Only about 100 of the most dreadful butchers of the secret police, including its chief Beria, were sentenced in the mid-fifties, after the death of Stalin. There were, in reality, scores of such people. Many of them still hold positions in the police, State attorney offices and courts of law. The context created by impunity passed on from generation to generation, and this was one of the main reasons for gross violations of human rights being committed in the seventies and eighties. The Chapter on "Crimes Against Justice" in the Soviet

Penal Code was indeed the most unpopular of all in the Soviet Courts of Law, and was practically never applied.

The Russian society now faces a fatal question: what to do with our past? Two opinions prevail: The first demands that the Communist Party be made accountable to the court (not the constitutional but the criminal court) so that it may be punished for its crimes. The second opinion is that this approach must be countered, for it may lead the society to new mass purges and repressions. This opinion, interestingly, is shared by many former dissidents who, themselves, passed through prisons and camps.

Both positions, however, tend to avoid the central question – that justice must be done. The Rule of Law in a democratic State does not, however, necessarily mean that all the members of the former ruling party or all the servants of the former secret police be brought to court. Nevertheless, those who have in fact committed crimes must be made accountable. And if such people are guilty they must be punished. This is not repression, this is Justice.

Preservation or Destruction of Personal Files

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It has become almost a common practice in the former communist countries for political opponents to make use of the personal history of rivals in their electoral bid.

In most of these countries there is not yet a clear rule concerning the use of personal files and archives collected and stored by the former authorities, or, if a rule does exist, its implementation sometimes entails unfortunate consequences.

On the other hand, certain files and archives are necessary for administrative purposes in the new regime. In the absence of any other system of information, public services such as taxation, healthcare and the police need personal data for administration.

Furthermore, access to such data is sometimes deemed necessary by a public searching for a redress of past wrongs.

The privatisation process, which often involves restitution of property, has made it necessary for individuals to seek information about their former family property.

In Estonia, for example, there have been 20'000 applications for data kept in the archives, particularly since the adoption, in February 1989, of a decree on restitution and compensation of the property of the victims of repression. Of the total 6 million items preserved in the State archives (the majority of which were kept in the Central State Archives of the October Revolution and Socialist Construction in Moscow), 6% were secret, but were returned to Estonia. Under

social pressure, the archives were opened to the public before the adoption of the new archive law.

Different approaches have been taken in Central and Eastern European countries to accommodate this transitory situation with a varying degree of consideration for the protection of privacy and freedom of information. In illustrating the examples of how different countries of Central and Eastern Europe have handled this problem, the following questions will be examined:

- types of existing archives and files;
- files stored by secret police;
- examples of dealing with files and archives; and
- ways and means of ensuring freedom of information and protection of privacy.

Types of Existing Archives and Files

Distinction should be made between:

- archives which include State archives, communal and municipal archives, State enterprise documentation, Communist Party archives, archives kept by the military, etc.;
- administrative data legally collected by State authorities and still in use, such as ID cards, passports and criminal records; and
- data secretly collected by intelligence services such as the STASI (former GDR), KGB (former Soviet Union), STB (former Czechoslovakia) and the III/III (Hungary).

Files Stored by Secret Police

The legal basis of these files is unclear. The data were collected often on the basis of secret decrees of the Ministry of the Interior. According to international norms, such as are found in the Council of Europe Convention for the Protection of Individuals with regard to

Automatic Processing of Personal Data, or the draft EC directive, these files are not lawful. As stated in Article 5 of the Council of Europe Convention:

"Personal data undergoing automatic processing shall be:

a. obtained and processed fairly and lawfully;

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

d. accurate and, where necessary, kept up to date;

e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

The sheer volume of the secret police data is often overwhelming. The Stasi documents, for example, are most impressive: 6 million files on individuals collected by 110,000 full-time employees[1] and 140,000 informers. The collected data concerned various categories of individuals, such as:

1. files on those who were spied upon;
2. files on all kinds of people working for the security service;
3. files on the people whom the secret service supported or encouraged; and
4. files on other persons.

1 Data protection, human rights and democratic values: XIII Conference of the Data Protection Commissioners (Strasbourg, 2-4 October 1991).

Dealing with Files and Archives

Archives

In Estonia, for example, a decree guaranteeing the preservation of documents kept by State enterprises, institutions and organizations was passed in August 1990, with an accompanying statute of the Estonian Archives Department of September 1990. Reorganization of archives is underway, and access by the public has been facilitated. There is, however, no privacy protection law.

In Hungary, the Communist Party archives have been transferred to the State. Its successor, the Socialist Party, received only those documents which directly concern the functioning of the Party. The list of Party members was destroyed, with the exception of the names of the new Socialist Party members.

Secret Police Files

In a few countries such as Poland, most files have been destroyed, but the scope of destruction is unclear. In many cases, they were destroyed by the secret services themselves. In some countries, these files are placed under the supervision of Parliamentary Committees. There are cases in which these Committees handle personal data in an utterly unprofessional way.

There is a tendency toward arbitrary selection of the information that should be revealed to the public. In Russia, for example, foreign intelligence service is revealing its data in the name of *Glasnost,* whereas the domestic security service is holding the information.

In other countries, an independent office belonging to the government has been created to handle the secret police files. This has been the case in Hungary since 1990 and in the Federal Republic of Germany since the adoption of the new law concerning the documents of the State security service of the former German Democratic Republic (Stasi documents law — StUG) of 20 December 1991 (the text of this law and its draft translation in English are attached).

The law allowed for access to personal files under a well-defined procedure. The law is somewhat unclear as to:

- whose information should or should not be compiled;
- the circumstances under which the authorities would be obliged to give the requested information; and
- how the rights of a third party might be protected.

Administrative Data

Three mutually supportive institutional mechanisms have helped to clarify the status of previous administrative data and their use in the new regime: constitutional reform, legislation of a data protection law and judicial review by the Constitutional Court.

The case of Hungary may indicate how these mechanisms can intervene. Until the constitutional amendment was introduced to the chapter on Basic Rights, Freedoms and Duties (Article 59) in 1989, only the Civil Code provided checks against arbitrary use of personal data. The new Article 59 includes the right to a good reputation, the inviolability of one's home and the protection of private secrets and personal data. It also foresees the adoption of a law on the protection of personal data by a two-thirds majority of the Parliament. The bill is currently under discussion. The Constitutional Court decision of 9 April 1991 on Personal Identification Numbers (PINs) further clarified certain principles in the handling of personal data. It held: "[t]he Constitutional Court rules that the collection and processing of personal data in the absence of a definite purpose and for arbitrary future use are unconstitutional. The general and unified PIN available for unlimited use is unconstitutional."

Freedom of Information and Protection of Privacy

Several ways and means can be sought to establish freedom of information and protection of privacy in the confused, politically and

morally sensitive situation surrounding personal data in the ex-communist countries:

- the elaboration of a law along the lines of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been followed by Poland, Hungary, Bulgaria, although the law has not yet been passed;
- technical assistance in the field of data protection and archive organization;
- *ad hoc* international investigatory mechanisms.

Setting up legal and procedural rules concerning the storage and use of archives and files is clearly a necessary step towards reducing the possibilities of their abuse. The abuse inevitably occurs not only for political reasons, but also for economic motives. For example, marketing companies seek information on income, taste and social affiliations, etc. in the private sphere. The legal framework for privacy protection covering data collected by the previous regime is needed.

However, legal and procedural rules are only one aspect of the morally and politically complex problem of how to deal with the past activities of individuals and unreliable data about them. In elaborating a data protection law, moral and political consequences of implementing the law should also be taken into consideration.

TOPIC 6

The Victims

Measures Applicable Concerning Ex-Opponents who were Persecuted and Tried by the Old Regime

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Czech and Slovak Federative Republic

The "Velvet Revolution", the Czechoslovak revolution of November 1989, was voiced in a few simple slogans, one of which was: "we are not like them".

From 1969 onwards (after the autumn of 1969 - not 1968), following the August 1968 invasion of the Warsaw Pact troops and the subsequent military occupation of Czechoslovakia, representatives of the new government imposed on Czechoslovakia launched a wave of repression. It was directed against the protagonists and partisans of the "Prague Spring" democratization process, against civil servants and members of the Communist Party (CPCz) and against those sections of the population that had refused to declare loyalty to the new authorities. Measures ranged from several years of hard imprisonment to the withholding of foreign travel permits and widescale professional discrimination. The pretence of normalization lived on for many years, and subsisted in practice — with modifications — up to 1989. Based on the arbitrary, on the disrespect of the law and of the international norms solemnly adopted by Czechoslovakia, this repression — though less strict than that of the 1950's — for no trial ended in capital punishments, was, from the start, an important cause of popular discontent. That discontent, originating in the timid political opposition of the 1970's, triggered the independence movement that mobilized tens of

thousands of men and women and ended up being a full-fledged political revolution.

Amongst neighbouring countries, including those of the Balkans and all those that had composed the former Soviet Union, Czechoslovakia was, with the exception of the GDR, the only country of the former Soviet empire to have sought motifs for separation from the former regime, not in economic and social spheres, or even in national oppression, but almost exclusively in the domain of the respect of fundamental human rights.

Who can be surprised, therefore, that the Czechoslovaks considered Law and Justice (both with capital letters), the Rule of Law and fundamental human rights as essential elements of their revolution, for "we do not wish to be like them".

Should laws and legal norms published during the period of "non-liberty" have remained in use, and, consequentially, have been respected? In 1945 this same fundamental legal question was answered in the negative, given the almost absolute refusal to recognize the legislation imposed by the German and Nazi occupier. In addition, there was a technical problem, as the country had been divided from 1939 to 1945 into several parts: the Bohemian-Moravian Protectorate, the State of Slovakia, and large areas annexed to Germany, Hungary and Poland.

Czechoslovakia had faced the same problem when it was first created in 1918. At that time, it was decided to maintain all the laws of the Austro-Hungarian Empire, except those that had been repealed by, first, the provisional, and then by the duly constituted authority of the legislature. As the Czech lands on the one hand, Slovakia and Subcarpathian Ukraine on the other, had been parts of the two different units of the Empire until 1918 — Bohemia and Moravia of Austria, and Slovakia and Ruthenia of Hungary — these two regions of Czechoslovakia had separate legislations and were only unified successively.

After November 1989, the question of the continuity of legislation was only exposed a year or two later with the progressive

polarization of society. One segment, particularly in the Czech regions, had permitted itself to be enticed by simple solutions, in this historical moment, by what one might qualify as primary anti-communism. This anti-communist movement was strongest at the end of 1991 and the beginning of 1992. In the media, in gatherings, and even in Parliament, people were often claiming vengeance, sowing the seeds of hate, openly calling for the non-respect of the laws in force and the adoption of legal norms contrary to the very principles of the Rule of Law. This agitation was due to a minority, politically situated - according to the greater public and to itself - to the right of the right. Although sometimes backed by the Parliamentary right, this minority was marginalized in the next months. That, however, did not prevent it from making itself heard, declaring: "no, Bolshevik laws must not be respected!"

From the perspective of our global analysis on the impunity of crimes committed against human rights, it is not irrelevant to study the opinions of this rightist group which demanded punishment for human rights violations, independently of whether or not these violations were criminal acts at the time they were committed, or of the eventual orders of which they could have been the object. In Czechoslovakia, this purgative group consisted of the Anti-communist alliance of the club of independently committed, the editors of the "Uncensured Journal Rudé kravo" (the Red Cow), and a party of the Confederation of Political Prisoners with the right wing of the Civic Democratic Party (ODS) of Vaclav Klaus.

The main idea of this movement is that there exists something above legality, law and justice which we must respect. This is the moral superiority principle, justice based on morality which juridical norms cannot contain. This conception, based on natural law, exists by dint of circumstance - not apologetics. This conception, on the contrary, denying all the legal dispositions inherited from the old regime (as if most of them did not already come from a heritage still older) or those issued by the new "near Communist" Parliament, goes against the principle of objective law and, consequentially, objective law entirely. The revolutionary character of these intentions is obvious. Historically, the purgative group is to be

classified in the extreme left and not the right, as pretended by its partisans.

Twice the Federal Assembly, the legislative organ of the Czechoslovak Federation, came near to questioning the legislation in power, by adopting the law concerning judicial rehabilitation (April 1990) and the law on the period of non-liberty (November 1991). In all other cases, those who called for the condemnation of "Communist" ideology and the annulment of laws stemming from it, failed. This notwithstanding, they did succeed in questions of administrative (non-penal) measures applicable to persons accused of human rights violations. (This concerns the famous law of "lustrations" on the incompatibility of exercising certain functions today in connection with certain formerly occupied positions related to the secret police, the CPCz and popular militia. This law is subject to an inquiry of the Constitutional Court, which should give a ruling on the complaint of the 99 deputies of the Federal Assembly, represented by the author of this text, in mid-November. The deputies demand that this law be declared unconstitutional.)

The two cases which questioned the continuity of legislation are very different from each other.

The rehabilitation of the victims of dictatorial regimes represents, in my view, one of the first imperatives of the new political regime, whatever the "colour" of the dictatorship in question, whether it is situated in Czechoslovakia or elsewhere. The problems posed are rather "extra-judiciary" than "judiciary", for the moral and material satisfaction of the victims of the old regime depends upon the will and the wealth of society. In effect, the first Czechoslovak law on rehabilitation, passed after the November revolution, concerned judiciary rehabilitations. It defined and justified the cases in which a tribunal conviction could be declared null and void in the case of violation by the tribunal of "material" penal law or procedural law and, failing that, without there having been a violation of law. These last words symbolized the questioning of the former legal dispositions and, consequentially, of the principle of the continuity of law and, finally, of today's legislation.

The preamble of law 119 of 23 April 1990 on judicial rehabilitation is formulated as follows:

> "[a]cts amenable to the application of rights and freedoms both guaranteed by the Constitution and expressed in the Universal Declaration of Human Rights and successive international agreements relative to civil and political rights, though they tended to bring these rights into effect through non-violent means, were declared punishable by Czechoslovak criminal law, in contradiction with international law; and, therefore, the legal prosecution of the authors of these acts as well as their penalty was also contrary to international law."

The articles define then which laws are subject to automatic judiciary revision without the person concerned appearing in court. This is rehabilitation directly codified by law. In contrast, the law defines situations where the person concerned should appear in court and the tribunal should pronounce new verdicts of culpability (in cases of acts of violence, for example) that would result in a reduced sentence. The law also determines the amount of compensation, its settlement date, etc.

The period during which court judgements could be partially or completely annulled was limited from 25 February 1948 to 1 January 1990.

In my opinion, this "breach" in the principle of the continuity of legislation was necessary, for without it, the victims of a regime which repressed people, not only by violating its own laws but also by applying laws which were unconstitutional or contrary to international norms, could never have been rehabilitated - either morally or financially. But it is clear that this solution was not ideal: the responsibility of the State is not the same if it concerns proceedings which are fabricated from start to finish or plainly disrespectful of the Universal Declaration of Human Rights. This was the case in the suppression of the Catholic clergy in the 1950's, for it involved the detention of persons in charge of a "parallel" culture who were accused of embezzlement, committed in fact so that they could

support actions against the regime. But the law on rehabilitation has no legal basis that would justify legal proceedings against those whose penal judgement has lapsed. A new legislation, at present non-existent, should be made in order to differentiate between victims.

For all these reasons, the Federal Assembly adopted the law on judicial rehabilitation by a full majority of votes, including those of the Communist deputies (15 % of the Assembly). This law fitted the slogan of "national reconciliation". Other laws on rehabilitation, which were also adopted, led to serious political problems. These, notably, concerned former prisoners and other victims of persecutions. The application of these laws presented, from the start, the character of a restoration. Beginning with the indemnification of former political prisoners, then with the reintegration with full rights of other victims - including the rendering of their possessions - these laws finally brought about some compensation for parts of the forests and ponds as well as the private property of nobles that had been taken by the State. A fraction of the political right — paradoxically weaker today than after the last legislative elections of June 1992, when it had obtained a relative victory — does not hide its intentions: "what was stolen must all be given back!" Up to now, the date of 25 February 1948 for restitution has been respected; however, compensation does not apply with regard the nationalizations of 1945 and 1918, nor that of Joseph II which strongly hit the Catholic Church.

The other law passed by the Federal Assembly, which could be considered as having questioned the principle of the continuity of legislation, is law 480 of 13 November 1991 on the period of non-liberty, which states:

> "[t]he Federal Assembly of the Czech and Slovak Federative Republic has adopted the following law:
>
> Art. 1: From 1948 to 1989, the Communist regime violated human rights and its own laws.
>
> Art. 2: Juridical acts adopted during the period mentioned in

Art. 1 can only be annulled by specific laws.

Art. 3: This law comes into effect on the day of its declaration.

Signed by Havel, Dubcek, Calfa."

Several violent confrontations occurred in Parliament when it denounced the project of a part of the right to condemn Communist ideology and to consider it, and the Communist Party, as criminal. The legal consequences of this law, had it been adopted, would have been serious in the case of repression, especially had the right also wanted to establish the principle of retroactivity of the laws of the time and attack the imprescriptibility of "Communist" crimes by using well-chosen legal constructions. The right did attempt to get another law passed on the "third resistance", but without success. (The first resistance is that of the 1914-1918 war, the second that of 1938 to 1945.)

Satisfied with the condemnation of the violations of human rights committed during "its" period, that is after February 1948 (not only after 1968, the favoured period of the left), and powerless to attain a better score in Parliament, the right voted for this remaining fragment of its project. As a deputy, I did not vote for the law, not because I did not approve of the text; on the contrary, except for the word "Communist", too ideological for me, I did. I would voluntarily sign such a declaration outside of Parliament, for I esteem that it is not the role of Parliament to pronounce historical judgments and, moreover, I consider Art. 2 superfluous because self-evident.

In the case of the rehabilitation law, it was clear that violence in political struggle is an obstacle for complete rehabilitation, and even partial, unless the court does not find extenuating circumstances in new proceedings. A historical illustration is fitting at this point.

The dictatorship of 1948-1989 in Czechoslovakia did not come about by a coup d'Etat, against the will of the Czechoslovak population, as certain people pretend today. The prelude to Stalin's

dictatorship between 1945 and 1948 can hardly be considered a democratic period. In its majority, the proletariat supported the CPCz. Furthermore, it was also championed by large sectors of the population, the intelligentsia first of all, and even the "left" wings of other political parties. The Soviet Union was generally well considered because of the war - and its political system was respected because (thanks to the hypocrisy of leftist intellectuals) it was unknown. Armed resistance against "Communist" power was limited to a few hundred individuals, of which some were simply mercenaries paid to feed the Cold War. To discover the motifs, the proportions and all the details is a task for historians. The tens of thousands of men and women who suffered in prisons and mines, those who were repressed, forced to relinquish their property, chased from their homes and villages, especially during the period from 1948 to 1956, were all victims of this inhuman system. Most of them (according to me, more than 90%) did not militate against the regime and only a very few were participants in the armed struggle.

Paradoxically, those who spent many years in prison, like the victims of Stalinism, today very elderly, remained silent at the time of their liberation in the early 1960's. Today they wish to be recognized as "participants in the third resistance", while those who fought, not with arms, but through their texts, speeches and public activities in the 1970's and '80's, who were also often imprisoned for years under Husak (in more favourable conditions than those of the '50's), do not claim anything, knowing very well that their struggle, which finally led to a political revolution, could not be considered as resistance. It is the dissidents of the '70's and '80's, including political prisoners, who consider the reality of today as a synthesis of all the past and of recent history.

The author of this article spent nine years in prison, from 1969 to 1973 and from 1979 to 1984. The second time, he was imprisoned for his participation in Charter 77 and the VONS - Committee for the Defence of the Rights of the Unjustly Prosecuted, of which he is a founder. In June 1990, he was elected as a Civic Forum deputy to the

Federal Assembly for a period of two years. From February 1990 to September 1992, he occupied the post of Managing Director of the Czechoslovak Press Agency; he was removed from this function by the new federal government, presided by Vaclav Klaus. At the present time, he works for the Agency as an editor.

Identifying Victims and Searching for Disappeared Persons

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The detention and disappearance of persons has become one of the most serious and, in many cases, systematic forms of human rights violations. The attentive monitoring of this terrible practice by both non-governmental organizations and organizations associated with international systems of protection, has revealed how prevalent it is in a number of countries around the world, and the fact that it is not always confined to dictatorial regimes or *de facto* governments; on the contrary, in Latin America, it is precisely in countries governed by constitutional systems such as Peru and Colombia, where the detention/disappearance phenomenon has escalated most dramatically in recent years.

The monitoring of detention/disappearance by NGOs has also revealed the complexity of the problem, not only by virtue of the range of fundamental rights affected by this phenomenon, but also with respect to the specific political and social contexts in which it occurs, which contribute significantly to its recurrence. Experience has indicated the need to adapt instruments and mechanisms for controlling and preventing these crimes, in view of the variety of ways in which they are perpetrated, the new and more sophisticated methods used by their perpetrators, and the risks faced by those who report these crimes or participate in the corresponding investigations.

Despite the differences noted in the detention/disappearance practices of the various countries where the problem exists,

it has nevertheless been possible to identify its common and essential components, the conditions which promote it, its direct and indirect consequences, the main obstacles to its eradication, the measures which may be required of the governments in question, as well as the measures which should be taken by the bodies responsible for human rights protection at the international level.

The intense efforts of the Working Group on Enforced or Involuntary Disappearances, which was created by the United Nations Commission on Human Rights in the early 1980s, have been complemented by a number of instruments, including the "Declaration on the Protection of all Persons from Enforced or Involuntary Disappearances", which was adopted by the Commission at its 48th session, and the draft convention on this same topic which is under the consideration of the Inter-American system.

The proposals formulated with regard to the drafting of the above-mentioned instruments by the various bodies concerned have once again highlighted the difficulty of the task at hand; at the same time, however, they have brought the problem into much clearer focus. It is, therefore, encouraging to note how the willingness on the part of each of those bodies to share its experiences has vastly contributed to advancing the ambitious objective of eradicating the phenomenon of detention/ disappearance from the face of the earth.

This document reviews some of the most relevant points resulting from the exchange of views and experiences as regards two specific aspects of the problem: identifying the victims and searching for disappeared persons.

I - Identifying the Victims

1 - Who are the Victims?

The analysis of detention and enforced disappearance practices

leads to the conclusion that the victims are not only those who have been detained, but also those who, in one way or another, suffer the consequences of such acts.

Indeed, in addition to the serious breach of the human rights of those subjected to this practice, the family and friends of the original victim are also adversely affected. These persons suffer, in varying ways, an effective violation of their rights, owing to the characteristics of the detention/disappearance process and the conditions it generates. Their moral and material suffering is compounded by an exposure to defencelessness, risk and vulnerability.

In the countries where the State's violation of human rights has become a systematic practice, this exposure to fear, defencelessness, risk and vulnerability clearly extends to the group or community in which the original victim lived and worked. Thus, in rural areas where the phenomenon is most widespread, the statutory institutions or mechanisms responsible for safeguarding the human rights of those affected either are inoperative or simply go through the motions.

Furthermore, the magnitude and persistence of these crimes do great damage to society as a whole, to an extent and in ways that have yet to be fully analyzed or described, notwithstanding references in various working papers to the scope of that damage in terms of the ethical values of society, the considerable weakening of its institutions and the loss of democratic forms of coexistence.

At any rate, in order to focus on the most significant aspects of the problem of identification, we shall for the time being limit our definition of victim to those persons who are subjected to enforced disappearance and who suffer its immediate consequences.

2 - Problems Relating to Identification

Fully identifying the victims of detention/disappearance is complicated enormously by one or more specific factors, sometimes arising simultaneously. This difficulty in identifying victims tends to hamper steps which would otherwise set in motion the legal

mechanisms for protecting disappeared persons. This has the effect of increasing the vulnerability of those persons and consolidating the impunity of those responsible for this serious human rights violation.

2.1 Systems of Registration and Documentation

Among the specific obstacles to full identification are those which may be traced to the deficiencies in civil registration and documentation systems which are commonly found in economically depressed countries, where the State lacks the minimum infrastructure required to provide these basic services. In fact, the majority of reported disappearances are concentrated in such countries.

The registry of vital statistics or other registers kept for recording births are often less than easily accessible to substantial segments of the population; for these persons the required procedures are very difficult to complete and, in many cases, overly burdensome. Moreover, inadequate administrative infrastructures have meant that birth registration services are often far removed from the rural populations, in particular.

Consequently, a great number of persons living in rural areas or in marginal urban areas commonly find themselves in the position of being "undocumented", and retain this status indefinitely. This situation usually grows worse in times of great violence, when many people tend to leave their homes, in search of safer surroundings. Then the task of obtaining personal documents or keeping them in order becomes next to impossible.

The problem of the lack of documentation, which we may qualify as the rule rather than the exception in most of the countries in which the practice of enforced disappearance is or has been prevalent, is undoubtedly a major factor contributing to the vulnerability of persons, as it makes it impossible to identify the victims quickly and accurately.

2.2 Lack of Centralized Records of Detainees

These countries generally do not have centralized records of detainees, and it is therefore not possible to establish with certainty

whether a person has been incarcerated within a given provincial jurisdiction or, much less, within the country as a whole. The lack of such records is part of a much more complicated issue, having to do with the way in which the right of persons not to be detained arbitrarily is widely and systematically violated.

These arbitrary detentions, which are practised systematically even, in some cases, in violation of explicit constitutional provisions, are used by governments as a means of social control (above and beyond their use as a specific means of controlling criminal behaviour), without judicial oversight. Most often it is the police force which internalizes as a legitimate and necessary requirement for discharging its functions the authority to detain citizens for a variety of reasons which, in most cases, do not even involve suspicion of criminal activity.

In this context, the phenomenon of detention/disappearance tends, at least in the initial stages, to be confused with the earlier and more common phenomenon of arbitrary detention, to which, incidentally, the population has become "accustomed". For this reason, neither the authorities nor the people themselves have thought it advisable or necessary to keep registers of detainees; in countries such as Peru, the number of unregistered detainees is considered to be around ten times higher than the officially recognized number.

Without a single, centralized register of detainees, the confirmation of detention by State authorities and the proper identification of the victim is considerably delayed. This seriously affects the security and integrity of the detainee, since a disappearance is confirmed only after relatives have made long trips to the various detention centres (which are often a wide distance from one another), and after the authorities in each of these centres have certified that the detainee is not in their facility.

2.3 Irregular Detention Centres

The above-mentioned situation is made worse by the irregular nature of some places in which detained persons are kept: in many cases, it has not been expressly or categorically established which

detention centres are the official ones. This creates conditions which seriously complicate efforts to locate victims in normal circumstances, but which make the process truly impossible in the context of civil strife or martial law.

In such circumstances the frequency with which detainees are imprisoned in military installations rises so sharply that it is safe to say that such conditions account for the majority of detention-disappearance cases. This obviously limits or precludes the access of family and friends of the victim, and even that of the judicial authorities, when they are requested by family or friends to open proceedings aimed at determining the whereabouts of the disappeared persons and to provide them immediate protection.

Furthermore, the characteristics of the military facilities or installations (which are usually quite extensive, scattered and often camouflaged or inaccessible) generally thwart judicial investigations since it is practically impossible to find the person being detained.

2.4 Intimidation of Relatives and Witnesses

On another level, identifying victims is often complicated by the failure on the part of witnesses, who are usually relatives or friends, to report the incident or to collaborate in the ensuing investigation. Such behaviour may be explained by the intense fear to which the phenomenon of detention/disappearance gives rise, the threats which they often receive and their feelings of vulnerability and defencelessness, especially where the security forces have in fact assumed the power and prerogatives of the civil authorities.

In addition, there is the well-founded fear that the majority of the victims of disappearance will not turn up alive; indeed, the initial violation of their basic human rights is usually followed by cruel and summary execution. Sometimes, the fear that any steps taken with the authorities might accelerate that dreaded outcome has a paralyzing effect on those who would otherwise file a complaint.

2.5 Clandestine Burial Sites

To hide their heinous crimes, the perpetrators must bury the bodies of their victims in clandestine burial sites, which are usually individual or mass graves located in remote and inaccessible areas. The bodies are buried after removing any belongings or external indications which might aid in their identification.

Notwithstanding efforts to keep the location of these clandestine graves secret, many are routinely discovered in the various countries in which the practice of disappearance is or has been common. The identification of the victims is unlikely and difficult to substantiate, so that, in most cases, it is not possible to determine if the bodies are those of persons who were previously reported as having disappeared.

In this connection, forensic anthropology has been helpful in developing highly technical and effective procedures for identifying bodies. For the moment, however, these techniques have not been fully utilized, though they have been used not only in Argentina and Chile, but also in conjunction with investigations carried out in Bolivia, Brazil, Colombia, Guatemala, Iraqi Kurdistan, Panama, Philippines, Uruguay and Venezuela.

In Guatemala, where the phenomenon of disappearance is still prevalent, the exhumations which were begun in July 1991 had to be suspended owing to threats issued by civil patrols to members of the team (composed of Guatemalan, Argentine and North American doctors and anthropologists), according to reports received by the UN Working Group.

One can only hope that clear-cut and effective machinery can be established in the future so that these procedures and techniques may be called upon as soon as possible, whenever and wherever clandestine burial sites are discovered. This will certainly require the support of the international bodies in demanding that governments provide the physical facilities that may be needed for this forensic work, as well as the necessary protection and guarantees.

3 - The Major Consequences of Such Difficulties

Among the unavoidable consequences of the difficulties in identifying victims is the enormous number of complaints which the competent agencies, both at the domestic and international levels, are unable formally to register. This makes it much more difficult to determine with certainty the true magnitude of the phenomenon of detention/disappearance and the indirect responsibility of the States concerned; it also contributes significantly to the impunity associated with this repugnant practice.

The problem is illustrated by the case of Sri-Lanka: the United Nations Working Group, until shortly before the time of its visit there, had registered and transmitted complaints to the government in a vastly smaller number than those which had actually been received.

II - The Search for the Disappeared

1 - Political Violence and Systematic Violations of Human Rights

As already mentioned, there is cause for concern when, even under constitutional systems, individuals are systematically subjected to enforced disappearance. Such disappearances occur in countries with limited democratic traditions, where weak civil and political institutions have fostered the rise of dissident, subversive or terrorist groups, which in turn have prompted States to respond through simple repression - a task entrusted to the forces of law and order, in most cases the army.

The armed forces, in turn, prepare to fight so-called unconventional wars, using similar patterns of action which are justified, in the case of Latin American countries, by invoking national security. Such forms of action have given rise to what is referred to as the "dirty war", in which authorities claim to be fighting the "enemy within", without respecting any standards or rules of conduct as defined in various instruments concerning human rights and their protection.

The situation is made all the more serious by the fact that these strategies are not carefully targeted against those suspected of belonging to subversive organizations, but are applied to the population as a whole (especially to the masses of the poor, who are also the most vulnerable). Experience has shown that in spite of their adverse effects, nothing has been done to change such strategies; on the contrary, the governments concerned have been reluctant to question the role of their armed forces and police, or have simply yielded to pressure from such forces for yet more power, even in contravention of explicit constitutional provisions.

In addition to the foregoing, there is the relatively common phenomenon of armed gangs or paramilitary groups, whose links to the official organs of the State are extremely difficult to prove. However, coinciding testimony from numerous sources concerning their *modus operandi*, their freedom of action even in zones under strict military control, and the fact that they enjoy total impunity, suggests that these groups represent an even more perverse form of the State's abusive and illegitimate exercise of power.

Another arrangement which appears in similar contexts to those mentioned above consists of so-called civil defence, self-defence or patrol groups, which are primarily located in rural areas and which cover territory that the regular forces are not able to control on an ongoing basis.

Such groups are encouraged (when not forcibly organized) and armed by the State itself. However, questions concerning the extent of their powers and scope of action generate conditions which favour the perpetration of human rights violations by these groups against defenceless populations, as a result of personal grudges or long-standing conflicts between neighbouring communities.

Thus, there has been reported cases of detention/disappearance which have been attributed to these groups, but investigations into such allegations have been made more difficult owing to the nature of the groups' motives and the physical and subjective inability of State agencies to control such acts.

As a result of the situation of violence described previously, efforts to provide protection in a given country generally have a slim chance of success, particularly if, as already mentioned, the disappearances take place in areas under military control.

Such situations require that each country develop ongoing efforts to demand that the public institutions concerned effectively defend citizens whose human rights are seriously violated. This task is closely linked to the duty of the competent international forums to apply pressure on governments, insisting that they fully assume their responsibilities.

Likewise, the international bodies involved in efforts to promote the rights of disappeared persons must recognize the constraints and difficulties faced by those reporting such crimes when setting the criteria for complainants as regards the requirement for the exhaustion of internal remedies.

2 - The Importance of Habeas Corpus and Similar Remedies

Without a doubt, the most effective legal instrument in the search for disappeared persons is that of *habeas corpus*. Whether it is known under this or another name, this remedy is available in most modern States. Its main purpose is to prevent arbitrary measures which affect personal freedom and integrity.

Although the practice of enforced disappearance involves certain characteristics which may sometimes render *habeas corpus* inapplicable, it nevertheless remains the main remedy in such cases. It is therefore essential that efforts be undertaken to regulate this protective mechanism so that it is readily accessible to all citizens and works smoothly and efficiently in all cases.

In practice, obstacles frequently arise, both at the normative and operative levels, and impair the proper functioning of these actions. Thus, in some countries, such as Peru, attempts have been made through legislative amendments or regulations to restrict individual access to *habeas corpus* or to postpone procedures already underway.

Separate mention should be made of the problems related to areas under direct military control and subject to emergency regulations, in which the power of the civil authorities, particularly that of judges and prosecutors, is either severely weakened or simply non-existent.

In such conditions, judges often decline to admit or conduct *habeas corpus* procedures, either out of fear or out of complicity, claiming that such actions are not admissible under states of emergency. Repeated jurisprudence along these lines has required an intense legal effort to invalidate these claims. The consultative opinion (N OC-8/87) of the Inter-American Court of Human Rights has contributed significantly to this objective; it states that *habeas corpus* is applicable even under states of emergency.

However, the few magistrates who do initiate the procedure are often forced to interrupt it when they are denied access to military installations by officers in charge. Such refusals to cooperate are frequently accompanied by threats and other forms of intimidation.

It is therefore indispensable that international human rights protection agencies apply pressure to require that States bring their *habeas corpus* procedures into line with the provisions of covenants and treaties, as a means of ensuring their proper functioning. At the same time, steps must be taken to ensure that such treaties expressly stipulate that governments develop special mechanisms for cases in which the effective implementation of *habeas corpus* procedures are seriously impaired, as in states of emergency.

3 - The Role of NGOs and Associations of Relatives

An essential factor in the search for disappeared persons consists of the efforts of non-governmental organizations active in the field of human rights, and particularly, those of the associations formed by the relatives of the disappeared. Although it is not possible to say how much more acute the problem of detention/disappearance might have been had these organizations not intervened by registering complaints and promoting protection mechanisms, their efforts have undeniably been of great value in reducing the extent of the phenomenon.

Indeed, these organizations have played a key role in shaping public opinion and its condemnation of the grave violations of human rights in the countries in which they occur; they have also kept the issue alive before political and governmental bodies and the international community. Wherever there has not been a significant presence of these organizations, it has proved to be extremely difficult to monitor individual cases of enforced disappearance and to act to discourage the practice.

In recent years there has been a steady increase in the growth and concerted action of NGOs and associations of relatives, despite the risks which membership in these organizations usually entails. The work of these groups has not been limited to reporting disappearances and monitoring the ensuing investigations, but has included sustained and successful efforts in various international forums to ensure the adoption of measures to prevent these crimes.

4 - The Effectiveness of International Mechanisms of Protection

Systems with machinery for the protection of human rights applicable to the countries in which the phenomenon of detention/disappearance occurs, include the United Nations system and the Inter-American system, which is composed of the member States of the Organization of American States (OAS). However, only the United Nations has developed specialized mechanisms to deal with this complex problem; in so doing, it has demonstrated great flexibility in adapting its efforts on the basis of past experience.

As for the Inter-American system, its political and technical bodies have not dealt systematically or specifically with the practice of enforced disappearance. Since this practice implies the simultaneous violation of a number of fundamental human rights enshrined in the system's charters, its specialized body, the Inter-American Commission on Human Rights, keeps records of reports of disappearances and monitors the respective cases in ways that are similar to those used in handling other kinds of violations.

At any rate, the reports presented to the OAS General Assembly include information on such disappearances, and are useful in

allowing an assessment of the human rights situation in the countries in question. There is, however, no specific procedure for handling these cases on an individual basis.

Only recently has support begun to coalesce for a convention against detention and enforced disappearance, which was originally proposed by the Inter-American Commission on Human Rights in its annual report to the General Assembly in 1988, and redrafted by a working group created for this purpose by the Permanent Council.

Unfortunately, the draft version presented to the General Assembly at its meeting in the Bahamas last May is seriously flawed by its recognition of the "due obedience" principle as grounds for exculpating perpetrators of the crime, and its stipulation of difficult evidentiary requirements in order for an offence to be classified as a case of detention/disappearance engaging the responsibility of the State. These and other aspects of the draft elicited intense criticism from a number of members of the General Assembly, including the Chilean representative, who went so far as to characterize the draft as a "serious step backwards".

Currently, the draft is once again under the consideration of the Permanent Council which will continue to revise it in the light of the opinions expressed by member States and will draw upon the documents drafted for this purpose by the non-governmental organizations and institutions "when it deems appropriate".

The NGOs and associations of relatives are determined to influence the work of the Commission as much as possible in order to correct the deficiencies of the current draft, despite the fact that proposals for their direct participation made by several States were rejected.

It is primarily within the United Nations system that the issue of detention and disappearance has undergone the most rapid and specialized development. In particular, the United Nations has established innovative and effective machinery for maintaining pressure on the States concerned to respond to the problem in fulfilment of their international obligations, as well as for permitting

effective action in respect of recent cases of detention. As a result of this, many victims have been reappearing, still alive.

Indeed, there is no longer any question that the Working Group on Enforced or Involuntary Disappearances, which was created in 1980 by the UN Commission on Human Rights, has made great strides towards the goal of eradicating the practice of enforced disappearance. The group, composed of five experts from different regions, has become an effective mechanism for dealing with this deplorable practice; more importantly, it has proved capable of adapting to the challenges posed by changing circumstances, and of continuing to systematize the experiences of more than a decade of activity.

Among the most noteworthy of the Working Group's efforts is its adoption of emergency procedures which allow it to contact governments immediately concerning cases of disappearance having occurred within three months prior to the Working Group's receipt of the complaint. These procedures allow the Working Group's chairman promptly to intercede with governments and to request information concerning recent disappearances, without having to wait until its next session is convened.

Such emergency procedures have made possible the live reappearance of numerous persons who had been reported as missing. Although they represent only a small fraction of the overall number of reported cases, they nevertheless constitute irrefutable proof of the importance and effectiveness of these measures.

In order to address the flow of complaints it receives concerning threats and other forms of intimidation by agents of the State or entities with ties to the State against associations of relatives, NGOs or human rights activists with whom it maintains ongoing relations in its monitoring of specific cases, the Working Group has recently decided to establish a new procedural mechanism known as early intervention. This consists of measures which allow the Working Group to intervene on behalf of victims once their disappearance has been reported, by cabling the governments concerned and requesting guarantees for the victims' protection.

The results of these measures suggest that the Working Group's efforts have acquired a new focus, since they transcend the terms of its original mandate. Its early intervention procedure represents an important step for the victims of enforced disappearance, especially if this term is understood to include also those who suffer the indirect consequences of this terrible practice.

The "Declaration on the Protection of all Persons from Enforced or Involuntary Disappearance" is another example of United Nations' efforts to halt the phenomenon of detention and disappearance. It was adopted by the Commission in February 1992 by means of Resolution No. 1992/29.

Although some aspects of the declaration have been questioned by such qualified organizations as the Latin American Federation of Associations for Relatives of Disappeared Detainees (FEDEFAM), the overall consensus is that it is a valuable instrument, unmarred by the deficiencies noted in the Inter-American system's draft convention. This achievement was undoubtedly aided by the participation and consultation of NGOs and the associations of relatives in the formulation of the declaration.

It is important to note that the progress and success of the efforts of the UN system of protection have not been dependent upon the existence of a convention, which, depending upon its content, could seriously limit the flexibility with which experience has been assimilated and translated into creative means of action. In this sense, the non-binding character of the declaration has allowed for a broad definition of the phenomenon, and has consequently not in any way restricted the activities of the Working Group.

5 - The Search for Victims and the Matter of Impunity

Lastly, it should be pointed out that the difficulties inherent to the search for the disappeared and the persistence of enforced disappearance are, no doubt, exacerbated by the mechanisms of impunity which operate in favour of the perpetrators of these crimes.

In some countries, these acts are not classified as criminal offences. In others, where they are specifically regulated, provisions in the penal code leave much to be desired. This legislative failure complements the practical aspects of impunity and is indicative of a lack of political will to punish those responsible. As a result, those who should be held accountable for serious violations either are not brought to justice because of the anonymity of their collective action, or, in the few cases in which legal proceedings are initiated, these are conducted before military courts or tribunals which ensure their exoneration.

Hence, impunity not only constitutes an affront to justice and to the conscience of mankind, but also a serious impediment to a full investigation of the facts, and consequently, to a determination of the whereabouts of the victims of this practice.

III - Conclusion

1. The phenomenon of detention and disappearance is linked to other human rights violations which constitute "traditional" practices in the societies in which they are most widespread, including arbitrary detention, torture and the violation of personal integrity. These practices provide a foundation for detention and disappearance, which is used as a tool to combat political opposition in the context of heightened social conflicts or, indiscriminately, by institutionally weak constitutional governments confronted by subversive or terrorist groups.

Consequently, policies aimed at preventing the practice of disappearance must give priority to the protection of other, related fundamental rights. This requires the efficient co-ordination of national efforts with those of international organizations and machinery. In this regard, respect for the freedom and personal integrity of individuals in all circumstances must be recognized as an end in itself, as well as a means of eliminating the conditions which promote the practice of enforced disappearance.

At the national level, it is indispensable, for example, to give full effect to such instruments as *habeas corpus* in any type of arbitrary detention. In terms of international systems of protection, initiatives such as the recent creation of a Working Group on Arbitrary Detention by the UN Commission on Human Rights deserve special attention. The co-ordinated efforts of these international bodies can contribute effectively to reducing the arbitrary actions of States, which serve as a basis for detention and enforced disappearance.

2. The increase in the number of detention/disappearance cases in the world (from 19,000 until 1990 to 25,000 in 1992, according to the Working Group, and counting only those reported in communications to governments), indicates the magnitude of the problem and the need to prepare for future challenges in this area. International instruments such as the UN Declaration represent important advances which should be utilized fully by all who work for the elimination of this phenomenon. Along the same lines, the draft convention of the Inter-American system should be carefully reviewed so that it may, after its current limitations have been overcome, take advantage of past experience, particularly with respect to measures of prevention and procedures to require the compliance of States, while at the same time consolidating existing instruments.

It is particularly important to safeguard the international instruments against positions which tend, in practice, to limit the intervention of international bodies in cases concerning countries responsible for the perpetration of these crimes. By the same token, it would be useful if such documents did not unduly restrict the scope of action of such bodies as the UN Working Group, whose experience has revealed the importance of an ongoing and creative effort, capable of meeting the fresh challenges presented in each case of detention and disappearance.

In addition, possibilities should be explored for developing various mechanisms to respond to different situations, such as, for example, those in which the practice of disappearance occurred in the past,

and those in which it continues to occur and has become systematic. In the latter case, pressure could be applied more forcefully to adopt the suggestion of the Working Group regarding the provision of advisory services to the governments concerned.

This point is reinforced by the experience of the Working Group in its visits to countries where the detention/disappearance phenomenon has been prevalent, such as in the case of Peru. The two visits which took place in 1985 and 1986 allowed for the establishment of joint action to raise consciousness concerning the extent of the problem and to pressure governments to take action, resulting in a temporary reduction in the number of cases.

The monitoring and supervision of the implementation of measures which governments have been recommended to adopt with respect to this problem is an area in which, to date, it has not been possible to obtain very encouraging results and in which greater efforts must be requested of the system's upper bodies.

3. Lastly, the issue of impunity should be approached not only as a problem of justice and of ethical values affecting society as a whole, but also as a serious impediment to halting the practice of enforced disappearance, as well as to identifying and searching for the victims.

It is, therefore, imperative to promote measures to combat impunity, such as: requiring the classification of the crime of detention/disappearance in terms which make its application feasible in concrete cases and, furthermore, designating it as a crime against humanity, which implies the non-applicability of statutory limitations; studying the feasibility of establishing a universal jurisdiction; and, removing the possibility of political asylum for the guilty.

In addition, special attention should be given to the implications of political measures such as amnesty or pardon with respect to efforts to establish the facts. It is imperative to ensure that investigations not be obstructed in any way, in recognition of the

fundamental right of victims (which include relatives and friends) accurately to establish the facts. The grave nature of the detention/disappearance phenomenon, which has already been labelled as the most global form of violation of human rights, requires nothing less than that.

The Right to Restitution, Compensation and Rehabilitation

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I - Introduction

The world has witnessed, in recent times, the demise of many repressive regimes grossly violating human rights and fundamental freedoms. While the end of a dictatorship is not necessarily followed by the introduction or the re-establishment of the Rule of Law, in a good number of countries democracy was, indeed, restored and respect for human rights and fundamental freedoms became prevalent. In such situations a number of complex issues arise, such as when to punish or to pardon, what are the responsibilities of post-repressive regimes to the victims, to the violators and to society at large, what are the responsibilities of other national and international actors, what are the prescriptions of international law, and in particular international humanitarian and human rights law.[1]

This paper addresses only one of the issues, viz. restitution, compensation and rehabilitation for the victims. While this issue

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1 See: States Crimes, Punishment or Pardon; Papers and Report of the Conference held from November 4 to 6, 1988 as part of the Justice and Society Program of the Aspen Institute, Queenstown, Maryland, 1989.

poses itself with particular emphasis and persuasion in post-dictatorship situations and with reference to gross violations of human rights and fundamental freedoms affecting the life, liberty and security of the human person, the scope of the problem should by no means be limited to that context alone. The issue also comes up with respect to victims of violations of humanitarian law in times of international and non-international armed conflicts. Also the illegal occupation of a country or territory may constitute a situation causing injuries and damages in matters of human rights and giving rise to legitimate claims for restitution, compensation and rehabilitation. The line can be drawn much further so as to encompass redress and reparation for victims of nuclear and other disasters, including environmental accidents and hazards and the injurious effects or by-effects of certain pharmaceutical products. Individual and collective victims of the Bhopal tragedy and the Chernobyl accident come to mind.

This paper will first present an inventory of relevant international norms with respect to human rights, crime prevention and criminal justice and humanitarian law (section II). The next section will contain an overview of relevant decisions and views of a number of international human rights organs, with special reference to the Human Rights Committee, the Committee against Torture and the Inter-American Court of Human Rights (section III). Thereafter, the issue of impunity is referred to in its relation to the right to reparation for victims of gross violations of human rights (section IV). Finally, a few concluding observations will be made (section V). In an Annex to this paper the conclusions of the Maastricht Seminar on the subject (11-14 March 1992) are reproduced. These conclusions deal *inter alia* with actors and levels of responsibility, types of violations, victims, forms of reparation, standards, and procedures and mechanisms.

II - Inventory of Existing International Norms

A - International Human Rights Norms (Global and Regional Human Rights Instruments)

A number of both universal and regional human rights instruments contain express provisions relating to the right of every individual to an "effective remedy" by competent national tribunals for acts violating human rights which are granted to him by the constitution or by law. Such formulation is contained in article 8 of the Universal Declaration of Human Rights. The notion of an "effective remedy" is also included in article 2 (3) (a) of the International Covenant on Civil and Political Rights and in article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination. Some human rights instruments refer to a more particular "right to be compensated in accordance with the law" (article 10 of the American Convention on Human Rights) or the "right to an adequate compensation" (article 21 (2) of the African Charter on Human and Peoples' Rights).

Even more specific are the provisions of article 9 (5) of the International Covenant on Civil and Political Rights and of article 5 (5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which refer to the "enforceable right to compensation". Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a provision providing for the victim of torture a redress and "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible" (article 14 (1)).

In some instruments, a specific provision is contained indicating that compensation is due in accordance with law or with national law (article 14 (6) of the International Covenant on Civil and Political Rights and article 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Provisions relating to reparation or satisfaction of damages are contained in the International Convention on the Elimination of All Forms of Racial

Discrimination, article 6 of which provides for the right to seek "just and adequate reparation or satisfaction for any damage suffered". The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries also refers to "fair compensation for damages" (article 15 (2)), to "compensation in money" and "under appropriate guarantees" (article 16 (4)), and to full compensation "for any loss or injury" (article 16 (5)).

The American Convention on Human Rights speaks of "compensatory damages" (article 68) and provides that the consequences of the measure or situation that constituted the breach of the right or freedom "be remedied" and that "fair compensation be paid to the injured party" (article 63 (1)). The Convention on the Rights of the Child contains a provision to the effect that States Parties shall take all appropriate measures to promote "physical and psychological recovery and social reintegration of a child victim ..." (article 39).

B - Norms in the Area of Crime Prevention and Criminal Justice

Substantial provisions relating to various questions of restitution, compensation and assistance for victims of crime are contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Resolution 40/34 of 29 November 1985). The Declaration provides for the following:

(a) victims are entitled to prompt redress for the harm that they have suffered;

(b) they should be informed of their rights in seeking redress;

(c) offenders or third parties should make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights;

(d) when compensation is not fully available from the

offender or other sources, States should endeavour to provide financial compensation;

(e) victims should receive the necessary material, medical, psychological and social assistance and support.

The Declaration also provides that governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions (principle 9).

C - International Humanitarian Law Norms

Article 3 of the Hague Convention Regarding the Laws and Customs of Land Warfare provides for the obligation of the contracting party to pay indemnity in case of violation of the regulations. Article 41 of the IV. Hague Convention also provides for the right to demand an indemnity for the losses sustained in cases of violations of the clauses of the armistice by individuals. The four Geneva Conventions of 12 August 1949 contain similar articles providing that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or another High Contracting Party" in respect of grave breaches involving such acts as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

Article 68 of the Geneva Convention Relative to the Treatment of Prisoners of War contains specific provisions with regard to claims for compensation by a prisoner of war. Article 55 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that the Occupying Power "shall make arrangements to ensure that fair value is paid for any requisitioned goods". Finally, Protocol I (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts), states in its article 91 that a Party to the conflicts which violated the provisions of the Conventions or of this Protocol "shall ... be liable to pay compensation".

III - Relevant Decisions and Views of International Human Rights Organs

A - The Human Rights Committee

Under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee may receive and consider communications from individuals who claim to be victims of a violation by a State party of any rights set forth in the Covenant. The decisions of the Human Rights Committee are referred to as "views" in article 5, paragraph 4 of the Optional Protocol. After the Committee has made a finding of a violation of one or more provisions of the Covenant, it usually proceeds to ask the State party to take appropriate steps to remedy the violation. The basis for such remedy is article 2, paragraph 3, of the Covenant, according to which each State party undertakes to ensure that any person whose rights or freedoms as recognized in the Covenant are violated shall have an effective remedy. More specific provisions on compensation are contained in article 9, paragraph 5, of the Covenant, which provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation and in article l4, paragraph 6, which provides for compensation, when a person has suffered punishment as a result of a miscarriage of justice.

While the case law of the Human Rights Committee has dealt with the great majority of the provisions of the Covenant, the issue of providing remedies, including compensation, to victims of violations of the Covenant came up most prominently with respect to:

(a) the right to life (article 6 of the Covenant);

(b) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (article 7);

(c) the right to liberty and security of person (article 9), including:

(i) the right not to be subjected to arbitrary arrest and detention (article 9 (1)),

(ii) the right to be brought promptly before a judge and tried within a reasonable time (article 9 (3));

(iii) the right to challenge one's arrest and detention (or the remedy of habeas corpus) (article 9 (4));

(d) the right to be treated humanely during imprisonment (article 10);

(e) the right to a fair hearing (article 14), including:

(i) a fair and public hearing by a competent, independent and impartial tribunal (article 14 (1));

(ii) minimum guarantees in the determination of any criminal charge, notably the right to communicate with counsel (article 14 (3) (b));

(iii) the right to legal assistance of one's own choosing (article 14 (3) (b) and (d));

(iv) the right to be tried without undue delay (article 14 (3) (c));

(v) the right to examine witnesses (article 14 (3) (e));

(vi) the right not to incriminate oneself (article 14 (3) (g));

(vii) the right to review of conviction and sentence (article 14 (5)).

A review of the case law of the Human Rights Committee, involving violations of, particularly, articles 6 and 7 of the Covenant, brings out that there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party concerned with respect to remedies called for in the Committee's view.

As regards the obligation of States parties to ensure that persons whose rights and freedoms are violated have an effective remedy (article 2, para. 3, of the Covenant), the Committee, in addition to stating its opinion that States parties are under an obligation to take effective measures to remedy violations, has spelled out specific types of remedies that are called for, depending on the nature of

violations and the condition of the victim(s). Consequently, the Human Rights Committee has repeatedly expressed the view that the State party is under an obligation:

(i) to investigate the facts;

(ii) to take action thereon as appropriate;

(iii) to bring to justice persons found to be responsible;

(iv) to extend to the victim(s) treatment in accordance with the provisions and the guarantees of the Covenant;

(v) to provide medical care to the victim(s);

(vi) to pay compensation to the victim(s) or to his (her) family.

As regards the obligation to pay compensation, the Human Rights Committee has used a variety of formulations:

(i) compensation to the victim (the disappeared person) or his family for any injury which he has suffered;[2]

(ii) compensation to the husband for the death of his wife;[3]

(iii) appropriate compensation to the family of the person killed;[4]

(iv) compensation for the wrongs suffered;[5]

(v) compensation for physical and mental injury and suffering caused to the victim by the inhuman treatment to which he was subjected;[6]

(vi) compensation to the surviving families.[7]

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2 Case No 30/1978 (Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay).

3 Case No 45/1979 (Pedro Pablo Camargo v. Colombia).

4 Case No 84/1981 (Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay).

5 Case No 107/1981 (Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay).

6 Case No 110/1981 (Antonio Vianna Acosta v. Uruguay).

7 Cases Nos 146/1983 and 148-154/1983 (John Khemradi Barboeram et al v. Surinam).

In this respect two observations should be made. First, it may be assumed that in the Committee's view the basis for determining the amount or nature of the compensation is not only physical injury or damage but also mental injury or damage. Second, it is not fully clear whether the Committee recognizes, in the case of the death or disappearance of a person, that family members are in their own right entitled to compensation because of their own sufferings and anguish or that family members are entitled to compensation for the injury inflicted upon the immediate victim. At least in one case[8] the Committee ruled that the mother of the disappeared person had herself also been a victim.

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In this respect, she too is a victim of the violations of the Covenant suffered by her daughter, in particular of article 7." (para. 14)

The Committee urged that compensation be paid for the wrongs suffered, presumably for the wrongs suffered by both the disappeared daughter and the mother.

The preventive aspect of the remedies is constantly underlined by the Human Rights Committee in its frequent calls upon States parties "to take steps to ensure that similar violations do not occur in the future". Equally, the Committee has repeatedly expressed the view that States parties are under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant. More particularly with regard to the right to life the Committee urges, by way of preventive action, that the State party concerned ensure the due protection of that right by amending the law.[9]

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8 Case No 107/1981 (Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay).

9 Case No 45/1979 (Pedro Pablo Camargo v. Uruguay).

B - The Committee Against Torture

Under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, individuals who claim that any of their rights enumerated in the Convention have been violated by a State party and who have exhausted all available domestic remedies may submit written communications to the Committee against Torture for its consideration. As of 31 December 1990, 26 out of 55 States parties have declared that they recognize the competence of the Committee to receive and consider communications under article 22 of the Convention. In cases Nos 1/1988, 2/1988, 3/1988 (O.R., H.M. and M.S. v. Argentina) the petitioners, relatives of three deceased victims of torture, challenged the "Due Obedience Act" and the *"Punto Final"* as being incompatible with the State party's obligations under the Convention. The Committee declared the communications inadmissible *ratione temporis* inasmuch as the Convention could not be applied retroactively.

However, in a remarkable *obiter dictum* which is most relevant to the subject matter of the present essay, the Committee observed that the laws in question were incompatible with the spirit and purpose of the Convention. The Committee urged the State party not to leave the victims of torture and their dependants without a remedy. The Committee felt that if civil action for compensation was no longer possible because the period of limitations for lodging such action had run out, it would welcome, in the spirit of article 14 of the Convention (dealing with the enforceable right to fair and adequate compensation), the adoption of appropriate measures to enable adequate compensation. The Committee indicated that it would welcome receiving from the State party detailed information concerning the number of successful claims for compensation for victims of acts of torture during the "dirty war" or for their dependants, including the criteria for eligibility for such compensation. Soon after the Committee had formulated its

views it received a substantive reply from the Government of Argentina.[10]

Two aspects should be highlighted with respect to the above-mentioned cases. First, in spite of the fact that the Committee against Torture declared the communications inadmissible *ratione temporis*, the Committee, very mindful of the important principles involved in the cases in question, chose to make known its strong views on the substance and to impress upon the government concerned the need to take remedial action, including the provision of adequate compensation. Second, following the policy and the practice of the Human Rights Committee, the Committee against Torture made itself available to enter into a dialogue with the government concerned on questions relating to redress and remedies for the victims and their relatives.

C - The Inter-American Court of Human Rights

The Inter-American Court of Human Rights has been seized with a number of cases involving disappearances attributed to the armed and security forces in Honduras.[11] The Court reached decisions in the Velásquez Rodriguez case[12], the Godinez Cruz case[13], and the Fairen Garbi and Solis Corrales case[14]. In view of the similarity of these cases, reference will only be made to the Velásquez case, for practical purposes. Three aspects will be singled out as deserving special attention. First, the obligation to pay compensation in relation to the obligation to prevent, to investigate and to punish.

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10 Report of the Committee against Torture to the General Assembly at its forty-fifth session, A/45/44, Annex VI.

11 See Juan E. Mendez and Jose Migual Vivanco, "Disappearances and the Inter-American Court: Reflections on a litigation experience", in Hamline Law Review, Vol. 13 (1990) pp. 507-577.

12 Judgement, Inter-American Court of Human Rights, Series C. No 4 (1988).

13 Judgement, Inter-American Court of Human Rights, Series C. No 5 (1989).

14 Judgement, Inter-American Court of Human Rights, Series C. No 6 (1989).

Second, the establishment of compensatory damages. Third, the issue of follow-up and monitoring.

It should be noted that the Inter-American Court interprets the obligation contained in article 1 of the American Convention on Human Rights to the effect that States parties undertake to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized in the Convention, in a comprehensive manner. The Court stated that:

> "[a]s a consequence of this obligation, the States must prevent, investigate and punish any violations of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations."[15]

In the same vein the Court ruled:

> "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation."[16]

In the Court's approach, which is very similar to the approach of the Human Rights Committee, as discussed above, the obligation to prevent and the obligation to restore are closely interlinked. Moreover, it is clear that the preventive approach should receive due priority and emphasis because one ounce of prevention is more effective than a pound of cure. It is also worth noting that among the means of redress the Court mentions in a subsequent order are the investigation of the violations committed, the punishment of the guilty and the provision of adequate compensation. In other words,

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15 Judgement, note 12, para. 166.

16 Ibid., para. 174.

redress means that full justice should be done vis-à-vis society as a whole, the persons responsible and the victims. Compensatory measures form part of a policy of justice.

In its judgment of 29 July 1988 the Inter-American Court decided, taking into account article 63 (1) of the American Convention, that the State party concerned was required to pay fair compensation to the next-of-kin of the victim and that the form and amount of such compensation, failing agreement within six months of the date of the judgment, was to be settled by the Court and that, for that purpose, the Court retained jurisdiction of the case. Consequently, the Court became again seized with the matter and on 21 July 1989 delivered a judgment on compensatory damages in the Velásquez Rodriguez case.[17] In this judgment the Court defined the scope and content of the just compensation to be paid to the family of the disappeared person.

The Court made it clear that as a principle of international law every violation of an international obligation which results in harm creates a duty to make adequate reparation. In this respect the Court ruled that reparation "consists in full restitution *(restitutio in integrum),* which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm".[18] As to emotional harm, the Court held that indemnity be awarded under international law (i.e. the American Convention on Human Rights) and that indemnification must be based upon principles of equity. In this context the Court referred to the applicable provision of the American Convention (article 63 (1)), which according to the Court "is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it".[19]

17 Judgement, Inter-American Court of Human Rights, Series C. No 7 (1989).

18 Velásquez Compensation Judgement, para. 26.

19 Ibid., para. 30.

As regards the scope of the reparation the Court observed that such measures as investigation into the facts, the punishment of those responsible, a public statement condemning the practice of involuntary disappearances and in fact the judgment of the Court itself on the merits constituted a part of reparation and moral satisfaction of significance and importance for the families of the victims. On the other hand, contrary to what had been requested by the lawyers of the victims, the Court held that punitive damages were not included in the expression "fair compensation", used in article 61 (1) of the American Convention. This expression referred, according to the Court, to a part of the reparation and to the "injured party" and is therefore compensatory and not punitive. As a result, the Court concluded that fair compensation included reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of the victim.[20] It should further be noted that the Court also gave ample consideration to the question of moral damages and found that the disappearance of the victim produced harmful psychological impacts among his immediate family which should be indemnified as moral damages.[21]

IV - The Issue of Impunity in Relation to the Right to Reparation for Victims of Gross Violations of Human Rights

Any study of questions relating to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms is bound to face the issue of impunity. It cannot be ignored that a clear nexus exists between the impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependants.

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20 Ibid., paras. 32-39.

21 Ibid., para. 51.

In many situations where impunity has been sanctioned by the law or where *de facto* impunity prevails with regard to persons responsible for gross violations of human rights, the victims are effectively barred from seeking and receiving redress and reparation. In fact, once the State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation.

Legal bodies whose task it is to see to it that States parties to human rights treaties comply with their obligations under these human rights instruments, have set out a coherent and consistent line prescribing the measures that have to be taken in order to remedy of violations of human rights. This coherent and consistent line of action includes the investigation of the facts, the bringing to justice of persons found to be responsible, and ensuring reparation to the victims.[22] In particular the Velásquez Rodriguez case[23], the well known landmark decision of the Inter-American Court of Human Rights, confirmed the same coherent and consistent line. The Inter-American Commission on Human Rights heavily relied on this judgment when it concluded in the cases of eight petitioners that Uruguay's 1986 Amnesty law, the *Ley de Caducidad* which grants impunity to officials who had violated human rights during the period of military rule, is in breach of articles 1,8 and 25 of the American Convention on Human Rights.

The Inter-American Commission noted in its report, dated 4 October 1991, that the country concerned, by adopting and applying the *Ley de Caducidad,* had not undertaken any official investigation to establish the truth about past events. The Commission reiterated the Court's view in the Velásquez Rodriguez case that a State's failure to investigate or to investigate in a serious

22 See section III of this paper.

23 Note 12 above.

manner with the consequence that the violation remains unpunished and the victim uncompensated, violates the State's undertaking to ensure the full and free exercise of the affected rights. The Inter-American Commission concluded by recommending to the government that it pay the petitioners just compensation for their violated rights.[24]

It is also relevant to recall that the UN Working Group on Enforced or Involuntary Disappearances has taken a strong position against impunity. It stated that perhaps the single most important factor contributing to the phenomenon of disappearances is that of impunity. Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law. The Working Group further argued that impunity can also induce victims of these practices to resort to a form of self-help and take the law into their own hands, which in turn exacerbates the spiral of violence.[25] It may, therefore, be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive a system of justice that cares for the rights of victims and remains at the same time indifferent and inert towards gross misconduct of perpetrators.

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24 See in more detail the written submission by the International Commission of Jurists to the forty-fourth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN doc. E/CN.4/Sub.2/1992/NGO/9).

25 E/CN.4/1990/13, paras. 18-24 and 344-347.

V - Concluding Observations

Reparation for past human rights abuses is not only a pecuniary matter. It implies the recognition of harm and injustice done to people who have become the victims of crime and abuse of power. Reparation also implies that the truth be revealed and that responsibilities are clearly established.

Reparation is part and parcel of broader strategies and policies of political, social and criminal justice which oppose impunity and which require, as has been repeatedly stated by international human rights bodies, an investigation of facts and a bringing to justice persons found to be responsible for crimes and abuses committed. At the same time reparation, in addition to doing justice and providing remedy for wrong suffered, is part of preventive strategies and policies. Again, international human rights bodies have constantly stressed the preventive aspect of remedies and the close link between the obligation to prevent and the obligation to restore. It is essential to devise and develop policies with a view to stopping gross violations of human rights and to provide means for relief and redress. It is equally or even more essential to frame and implement strategies aimed at preventing that such gross violations of human rights occur, thus sparing people from great suffering.

The annex to this paper contains the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, held from March 11 to March 14, 1992, at the University of Limburg, Maastricht, Netherlands. It is expected that these conclusions may serve a useful purpose in connection with all efforts, at national and international levels, to further develop principles and guidelines for the reparation of gross violations of human rights and for the prevention of the reoccurrence of such violations. Any comments on the conclusions as reproduced in the annex to this paper will be most welcome.

ANNEX

Conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms

(Maastricht, Netherlands, 11-14 March 1992)

General

(1) In these conclusions the term "reparation" refers to all types of redress, material and non-material, for victims of human rights violations. The terms "compensation", "restitution", and "rehabilitation" cover particular aspects of reparation.

(2) The question of reparation has received insufficient attention and should be addressed both in the United Nations and other international organizations, as well as at the national level.

(3) The question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of the prevention of violations of such rights and freedoms.

(4) Due regard should be paid to the experiences gained in various countries that have passed through a period of gross human rights violations.

(5) While all States are as a matter of principle duty bound to make reparation for gross human rights violations, different levels of development and particular circumstances should be taken into account when drawing up universally applicable guidelines.

Actors and Levels of Responsibility

(6) As a matter of principle every State has the responsibility to redress human rights violations and to enable the victims to exercise their right to reparation. States must faithfully apply international, regional and national norms of human rights. Accordingly, every government should set in place laws, institutions, policies and programmes intended to guard constantly against gross violations from taking place.

(7) The United Nations and other intergovernmental organizations at the global and regional level should support and assist a proper consideration and management of reparation at national levels.

(8) Non-governmental organizations should, where necessary, insist on the recognition and implementation of the right to reparation of victims of gross violations of human rights, both at the international and national level, inter alia by exposing violations and assisting victims in pursuing their claims.

(9) The United Nations, other intergovernmental organizations, States and non governmental organizations should give increasing attention to ways and means of

preventing and correcting abuses of human rights. When potential violators know they will have to account for their conduct, this may have a preventive effect.

Types of Violations

(10) While the violation of any human rights gives rise to a right of reparation on the part of the victim, for present purposes it is understood that the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination.

(11) Violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and must consequently be given all due attention in connection with the right to reparation.

Victims

(12) A basic tenet for approaching the issue of reparation are the needs and wishes of victims of gross violations of human rights and fundamental freedoms. All agencies and mechanisms dealing with human rights and humanitarian issues at national and international levels should be mindful of the perspective of victims, and of the fact that victims often suffer from long term consequences of the wrongs inflicted on them.

(13) For the purpose of determining the notion of victim, attention should be given to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res. 40/34 of 29 November 1985), in particular the following phrases from paragraphs 1 and 2 of the Declaration:

"'victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights ..."

"the term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

(14) In addition to individual means of reparation, adequate provision should also be made to entitle groups of victims or victimized communities, to present collective claims for damages and to receive collective reparation accordingly.

Forms of Reparation

(15) Reparation is a means of repairing the past and setting norms for the future. In all cases reparation must be appropriate and just.

(16) Compensation is a form of reparation which is to be paid in cash or to be provided in kind. The latter includes health and mental health care, employment,

housing, education and land. In this respect compensation may involve, in appropriate situations and cases, a substantial reallocation of resources in order to meet by way of affirmative action, essential needs of persons and groups whose human rights have been grossly violated or neglected. Generally, this category includes those forms of compensation, the value of which may be expressed in monetary terms.

(17) Non-monetary reparation serves the moral and social welfare of the victims and the causes of justice and peace. It includes the following important elements:

(a) the verification of the facts and the full and public disclosure of the truth,

(b) the public acknowledgement of responsibility for violations committed,

(c) the bringing to justice of persons found to be responsible,

(d) the protection of victims, their relatives and friends, and witnesses,

(e) the holding of commemorations and paying tribute to the victims,

(f) the establishment and the sponsoring of institutions for victim after-care and the training of personnel for helping the victims,

(g) the prevention of the recurrence of violations by such means as:

(i) putting closer control over security forces, in particular by bringing them under civilian command,

(ii) limiting the competence of military courts,

(iii) strengthening the independence of the judiciary,

(iv) protecting effectively the legal profession as well as human rights workers,

(v) improving detention registration systems,

(vi) providing human rights training to security forces and to law enforcement officers.

Standards

(18) It is recommended that the United Nations give priority attention to drawing up a set of principles and guidelines that give content to the right to reparation of victims of gross violations of human rights.

(19) It is further recommended that, where appropriate, new international instruments on human rights include provisions on reparation and that consideration be given to the amendment of existing instruments in this regard.

(20) The proposal to prepare an International Convention on Redress for Victims of Gross Violations of Human Rights deserves due consideration. The preparatory and drafting processes for such a convention can serve to focus the attention of governments on these issues, promote exchanges of national experience and lead countries to develop adequate arrangements for anticipating, preventing, stopping and remedying gross violations of human rights.

Procedures and Mechanisms

(21) Every State owes it to the victims of gross violations of human rights to see to it that those responsible are brought to justice and that those who have suffered receive reparation. The legal system of every State should, therefore, deal with such issues in a just and effective manner. Even when the bringing to justice of the perpetrators is impossible, the State must continue the investigations and make all necessary efforts in finding and revealing the truth.

(22) Every State should have in place permanent monitoring mechanisms to detect situations of potential gross violations of human rights, to provide early warning about them, to prevent them from occurring, and, in the unfortunate event of gross violations still taking place, to respond promptly to stop them and to see to it that reparation is given to the victims and justice is done to the perpetrators.

(23) Verification of the facts can only be credibly undertaken by an independent body of recognized competence reporting publicly about its findings.

(24) Procedures relating to the settlement of claims should be expeditious and effective, respect the needs of the victims and be in accordance with basic principles of fairness and justice.

(25) The establishment of courts of human rights, or criminal courts, regionally or internationally, could help in the process of making those responsible for gross violations of human rights accountable for their acts, as could legislation authorizing universal jurisdiction over such violations.

(26) Decisions relating to reparation for victims of gross violations of human rights should be implemented in a diligent and prompt manner. In this respect follow-up procedures should be devised at various levels, including the government, the courts and/or special mechanisms.

(27) Claims relating to reparation of gross violations of human rights should in principle not be subject to a statute of limitations. They should be dealt with expeditiously. Nobody may be coerced to waive claims for reparation.

(28) The establishment of national and international centres or institutions for the promotion of justice for victims of gross violations of human rights would add a useful dimension to the protection of human rights. Such centres or institutions should establish and keep a permanent public record of the truth. Furthermore, they should gather and collect information, laws, studies and other materials on relevant national experiences, promote an exchange of experiences and comparisons, distil relevant lessons, and help to build up a stock of knowledge.

The Treatment of Victims and of their Families Rehabilitation, Reparation and Medical Treatment

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I - General Features of the Human Rights Policy of the Government of the Coalition of Parties for Democracy

After the military coup of 11 September, 1973 and fifteen years of dictatorship, a peaceful process of return to democracy began in Chile on 5 October, 1988. In the plebiscite convened by the regime on this date, the majority of Chileans rejected the prolongation until March 1997 of the leadership at the head of the government of General Pinochet, who had been nominated by the heads of the three branches of the Armed Forces and the Police.

In accordance with the terms of the political constitution elaborated by the military regime itself, the effect of this rejection resulted in the calling of elections for a President of the Republic and for the members of the bicameral Parliament on 14 December of the following year.

The presidential elections were won by more than 55% of the votes by Mr. Patricio Aylwin, standard-bearer of the political parties which had constituted the democratic opposition before the dictatorship. Now these had been regrouped under the name of "Coalition of Parties for Democracy," and they amply defeated the official union of rightist parties associated with the military regime.

The Coalition of Parties for Democracy also triumphed in the parliamentary elections with a similar percentage, gaining a large

majority in the Chamber of Deputies; however, in spite of obtaining 22 of the 38 seats in the Senate selected through the popular vote, the presence of nine remaining "institutional" senators, appointed independently of the electoral process, reversed this situation and left them in a minority in the Senate.

President Aylwin took command of the nation on 11 March 1990 and the Parliament was formally installed. The process of democratic reconstruction began, in which the human rights problems inherited from the dictatorship were prominent.

Human rights had been a central issue in the proposal of the parties forming the Coalition by which they had called the people of Chile to replace the dictatorship, first in the plebiscite of October 1988, and then in the elections of December 1989.

The declaration of these rights were considered as fundamental to the building of democracy, that only their respect and the exercise of the people's right to self-determination would permit the full development of democracy, that their guarantee is essential for the restoration of a democratic Rule of Law which ensures an order founded on the respect for life, liberty and justice. Such a declaration is consistent with the fundamental ethics which inspired the parties in the Coalition and its democratic and humanistic vocation.

It was also a response to, doubtless, the most important demand of Chilean society in the transition period begun in March 1990.

The theme of human rights expressed, perhaps as nothing else could, the wounds and pain Chilean society suffered during the dictatorship.

Its experience of institutionalized, massive and systematic violence constituted the principal factor of the social de-legitimating of the dictatorial regime. Correlatively, it was the unifying element which gave incentive to overcome past antagonisms, disagreements and mistrust, and consolidated the social, cultural and political encounter between democratic forces.

In a simplified schema, the human rights policy of the Coalition had two principal objectives:

- to assure the full force and respect of fundamental rights of citizens and prevent their infraction by strengthening the constitutional and legal status of their promotion and protection, and by cultivating respect for human rights;
- resolve the pending human rights problems inherited from the dictatorship.

Amongst those problems left by the dictatorship, the democratic government had to deal with three pressing subjects:

- the finding of the truth concerning crimes against human rights and the moral and material reparation to victims and their families;
- the freedom of the political press;
- the exiles.

II - The Search for the Truth

The human rights movement in Chile emerged almost simultaneously with the military coup of September 1973 and was rapidly present all over the country with a good level of efficiency.

Nevertheless, in spite of persistent action to denounce violations of human rights and demand investigations, these crimes continued with impunity up to the end of the dictatorship; as much because of the inertia of the courts and deliberate inefficiency of police investigations, as by the covering up on the part of the authorities — first *de facto* and later in law — by means of self-amnesty.

In most cases, the authorities evaded penal action, avoiding even to be identified, they were sheltered by the scope of the impenetrable secrecy of the security services which covered the actor; they were not even available for judicial investigation to establish the circumstances and occurrence of crimes and, still more serious, the fate and destiny of the victims.

The Programme of the Coalition guaranteed the commitment of the democratic government to persist in the establishment of the

truth with respect to the cases of human rights violations that occurred from 11 September 1973 onwards.

Being unable to count on a majority in the Senate after the elections of December 1989, the Democratic Coalition could already visualize the likely difficulties in dispatching legal measures to achieve this objective.

All the factors which obstructed the search for truth during the dictatorship subsisted, with the sole exception that the civil police was no longer interfered with by a political mandate rendering it inefficient; and to change the circumstances through legislation did not seem feasible. Another way had to be found to satisfy the just demand for the truth.

On 24 April 1990, the President of the Republic announced to the nation his decision to create a National Commission for Truth and Reconciliation entrusted with "the indispensable task of preparing a conscientious report which would establish the most complete picture as possible of the most serious violations of human rights committed between 11 September 1973 and 11 March 1990", stating clearly that "serious human rights violations are to be understood as cases of disappearance of detainees, execution and torture resulting in death, in which State responsibility seemed to be involved for acts of its agents or of persons in its service, as well as the kidnapping and assaults against the life of politically committed persons."

The Commission, comprising people of prestige and moral authority, received, collected and analyzed all the facts they could gather from families of victims and third parties, witnesses of denounced acts and human rights organizations, or on their own initiative. After nine months of hard work, the Commission issued its unanimous report, presenting it to the Head of State on 8 February 1991, who then made it known to the nation on the following 4th of March.

To describe the work of the Commission and the contents of its report goes beyond the necessary limits of this study. What is important is to point out its fundamental value:

it established the truth of what had happened in the nature of human rights violations during the period between 11 September 1973 and 11 March 1990; the facts remain between its pages as the testimony of uncontradictable historic fidelity. None of the facts affirmed there have been disputed; some attempts at explanation have been made which do not negate the facts, but on the contrary, tacitly recognize them. The truth contained in the report is, today, a common verity of national society; the clarification and acceptation of the facts thus constituted partial satisfaction to the demands for justice on the part of the victims, since truth is an essential component of justice.

That truth, recognized and assumed by the majority of Chileans, also constituted a significant form of reparation of the dignity of the victims. With profound emotion, the entire Chilean nation felt fully and intimately represented when, making known the Report, the President of the Republic vindicated "publicly and solemnly the personal dignity of the victims... vilified by the accusation of crimes none of which were proven and for which none found the opportunity or the adequate means to defend themselves", and representing the entire nation, in its name asked pardon from the families.

Another relevant effect of the Report is its contribution to the process of national reconciliation. The knowledge of the truth is primarily a legitimate and inalienable right of the victims and their families, as of all society. As the President of the Republic has repeatedly said, the violations of human rights which occurred in the past "constitute an open wound in the soul of the nation which cannot be ignored, nor will it be healed by any attempt to forget"... "The moral conscience of the nation demands that the truth be made clear." After such a long time of absolute power during which truth was systematically concealed, few people were critical, others who knew negated the truth and those who ought to have investigated did not; during which these facts were kept rigorously covered by a secret inaccessible to the people, it was right and necessary that this be overcome by the truth of what had happened. This secret explains why many people did not believe the gravity and the magnitude of the alleged violations. No

country can endure divided over important events in its history and this certainly was one; dissent was in turn a factor of division and malaise between Chileans, which the Report of the Commission largely cleared up, thus rendering a valuable contribution to national reconciliation.

It was mentioned above that at the end of the dictatorship most of the crimes against human rights remained unpunished; it was not expected that a significant change would take place in the behaviour of courts of justice in the course of these investigations. Furthermore, the decision of criminal responsibility is the private attribution of the court and the Executive Power is forbidden to interfere with it. Before such circumstances, the option of the President of the Republic to create the Commission for Truth and Reconciliation amounted to an option for "social truth" over judicial truth concerning these crimes.

In spite of its effective redress of the dignity of the victims, the Report leaves pending fundamental exigencies of justice, such as the individualization of the authorship of crimes, the determination of personal responsibility, and the clarification of the fate of victims. In the majority of cases of disappeared or executed prisoners whose remains had not been handed over to the family, the Commission did not find sufficient details to permit the establishment of their whereabouts.

III - Reparation of Human Rights Violations for Victims and their Families

Once the Report of the National Commission for Truth and Reconciliation was known, there remained the task of promoting programmes for material reparation.

Welcoming the recommendations of the Commission, on 26 March 1991 the President of the Republic introduced in the Legislature a government bill which would create the National Corporation for Reparation and Reconciliation and establish various reparatory benefits to families of victims who did not survive human rights

violations and political violence, qualified or to be qualified in the future as such by the said commission.

The legislative process was concluded on 28 January 1992 and the law 19.123 was definitively promulgated and published in the Official Daily of 8 February 1992.

The damage caused by the loss of a loved one is not open to evaluation and no material prestation can repair it; nevertheless, by means of recognizing the right of the families of victims to the different benefits foreseen by the law, the State assumed the moral obligation to contribute to repairing the harm that these families suffered in the way of health and, possibility, of material and social advancement, in brief, in the restitution of a quality of life severely deteriorated over a very long time.

The law regulated a regime of compensatory annuities, the right to free medical prestations and, to the children of victims, educational benefits.

The victims who prompted the right to compensatory benefits envisioned in the law were those who were already qualified as victims of human rights violations or of political violence by the Commission for Truth and Reconciliation and those who would be thus qualified in the future by the Superior Council of the National Corporation for Reparation and Reconciliation. Victims which had not survived - persons who had been detained and disappeared or were executed - had to be treated as the consequence of acts occurring during the military regime, between 11 September 1973 and 11 March 1990.

The said Commission qualified a total of 2,279 victims (957 disappeared prisoners and 1,322 deaths). Concerning 641 cases, without rejecting them, it declared that in the time given to complete its mandate, it was not able to form an adequate opinion. These cases not decided upon by the Commission, and others which were not brought early enough to its attention or over which it could not make a pronouncement because of a lack of sufficient details, had to be defined by the National Corporation for

Reparation and Reconciliation. The Corporation had until 15 July 1993 to complete investigations and collect data before issuing its judgment.

1) The Regulation of Annuities

With respect to annuities, the law fixed a monthly compensation to the families of victims, of up to Ch$ 140,000 (roughly US$ 370) to be periodically adjusted according to the general norms of readjustment of social security benefits, and was distributed in the following way:

- 40% to the surviving spouse (Ch$ 56,000 = roughly 150 US$);
- 30% to the mother of the victim, or in her absence to the father (Ch$ 42,000 = roughly 110 US$);
- 15% to the mother or the father of any natural children of the person in question (Ch 21,000 = roughly 55 US$);
- 15% to each child of the person in question up to 25 years of age but without limit of age if incapacitated (Ch$ 21,000 = roughly 55 US$). If there is more than one child, all and each one will receive 15 % unless this exceeds the global amount of compensation.

If one or more of these beneficiaries does not exist, or dies, or voluntarily forgoes the compensation, his or her quota will devolve to that of the remaining beneficiaries, *pro rata* of their rights. If only one single beneficiary exists or is found, monthly compensation will be Ch$ 100,000 (roughly 263 US$).

Although the law was promulgated on 8 February 1992, compensation to the beneficiaries of those causes qualified by the National Commission for Truth and Reconciliation were drawn with retroactive effect from 1 July 1991. To the beneficiaries of causes designated in the future by the National Corporation for Reparation and Reconciliation, compensations will be drawn from the date when the Superior Council of the Corporation accords the relevant verdict.

In addition, the designated beneficiaries collect one unique compensatory allowance equivalent to 12 months of their rightful annuity.

Neither the annuity nor the compensatory allowance is subject to a rebatement or to any dues and the allowance is not considered as income for any legal purpose.

In addition, at the charge of the State, the monthly annuities are augmented by a minimum quota of 7% of the health system, permitting the beneficiaries access to the prestations granted by the system.

Finally, the annuities are compatible with any other, of whatever nature, enjoyed by or which could agree with the respective beneficiary, and with any other social security benefit fixed by the law.

Up until September, monthly annuities were collected by 4,505 beneficiaries with respect to victims who did not survive human rights violations or political violence, accredited by the National Commission for Truth and Reconciliation with the following parenthood:

- children of victims less than 25 years of age or any age and incapacitated:	1,867	(41.44%)
- spouses or spouses by common law (fathers or mothers of natural or illegitimate children):	1,300	(28.86%)
- mothers or fathers of victims:	1,338	(29.70%)

The figure for annuity beneficiaries just quoted should increase with the families of victims already designated by the Commission for Truth and Reconciliation whose recognition of the right to annuities is in progress and with those of persons designated in the future by the National Corporation for Reparation and Reconciliation as victims of human rights violations or political violence. It is estimated that the final figure of beneficiaries of these compensations will come to about 8,000 people.

The fiscal outlay for this cause for the year 1992 will amount to 8,200 million pesos (some 22 million US$).

2 - Health Benefits

The reparation of physical or mental damage suffered by the victims of repression or by their families was given special attention by Chilean human rights organizations. The experience of their health professionals qualified them to formulate a very complete diagnostic for the Commission for Truth and Reconciliation of the consequences of the damage to these persons, which necessitated a special programme.

On the basis of this diagnostic, the Commission for Truth and Reconciliation recommended that the State, through the Ministry of Health, assume the development of one or more specialized programmes for the most directly affected citizens. This proposal was acknowledged in the Law No 19.123.

In contrast to the regulation of annuities which benefit direct relatives of non-surviving victims, and to educational benefits which are only obtained by children, medical benefits were extended to a larger scope of beneficiaries.

On the other hand, the quota at the charge of the State, equivalent to 7 % of the value of the annuities, permits access to the general health scheme, which partially allows the health prestations granted by private institutions or professionals. As an appendage to the annuity, this modality only benefits direct families who have the right to obtain it.

The law also confers the right to free medical prestations in the mode of institutional attention in establishments dependent upon or assigned to the national system of health services (of a State character). In these establishments free services are given only to those qualified as impoverished, a requirement not demanded of the beneficiaries with the right to compensation or of the father or brothers of non-surviving victims, even when these do not have the right to compensation.

Finally, anticipating the promulgation of the law, in 1991 the Ministry of Health established the Programme of Reparation and Integral Health Care, "]IV", which covered those affected by human rights violations for general medical care, social services, health check-ups, individual and family psychological attention, consultations with specialists and laboratory tests, all free except when the beneficiaries count on some other security system, in which case they must use the latter.

Up until the present, this Programme has established eleven multi-professional teams in different cities of the country, from Iquique in the north to Punta Arenas in the south, offering general medical and mental health care. By June of the current year (1992), the number of patients who had been brought to its specialized and systematic attention reached 5,007, to whom should be added those the Programme teams have directed to the Service of Health for immediate care.

The cover given by this Programme is significantly greater than that of the other two, inasmuch as its benefits are extended to the relatives of detainees who disappeared and politicians who were executed, to families in which one member had lived through a traumatic situation of detention and torture, and to exiles who had returned.

3 - Educational Benefits

With regards to educational benefits, the law conferred upon the children of victims designated by the Commission for Truth and Reconciliation and of those to qualify later under the Corporation for Reparation and Reconciliation for the next 35 years, studying in secondary schools, universities, professional institutes or centres for technical education which receive financial aid or not but are recognized by the Ministry of Education, the right to a monthly subsidy of up to 1,24 monthly tax units (Ch$ 19,292 in the month of September: roughly 50 US$), a benefit in the case of children up to 25 years old which comes over above the regular amount of monthly compensation.

On top of this subsidy, the students of universities, professional institutes and centres for technical education have the right to the payment of matriculation and monthly tariff, for which the cancellation is made directly to the respective establishments by the Scholarships and Higher Education Development Fund of the Ministry of Education or eventually by the Scholarships Programme of the President of the Republic.

In the first six months of the school year (March-August), monthly subsidies were paid off to 782 students at different levels of education, with a fiscal layout of Ch$ 87,218,794 and an estimated annual cost for this benefit reaching to 150 million pesos (roughly 400,000 US$).

As to the payment of matriculation and tariff to students of higher education, in 1992 it has benefited approximately 560 students, with an annual cost of around 215.5 million pesos (575,000 US $).

4 - The National Corporation for Reparation and Reconciliation

The Law No 19.123, along with regulating the regime of compensations and benefits of a medical and educational nature, created a decentralized public service called the National Corporation for Reparation and Reconciliation.

Two clearly different categories can be seen among the functions of the Corporation.

The first consists in continuing the tasks performed by the National Commission for Truth and Reconciliation; the second in the execution, coordination and promotion of actions of a preventive nature, also the recommendations by that Commission, with the objective of improving the juridical statutes for the regulation and protection of human rights and the strengthening of a culture truly respectful of these rights.

In continuing the tasks performed by the Commission, the Corporation must compile facts and conduct the investigations necessary to decide upon the qualification of victims of human rights violations or political violence concerning those cases known to the

Commission in which it was not possible to form a conviction and those of a similar nature of which the Commission did not have early enough knowledge or having it, did not make a decision for lack of sufficient details.

The cases which the Corporation must register are estimated to exceed a thousand.

Also in this category, the Corporation must promote and contribute to attempts to determine the whereabouts and circumstances of the disappearance or death of disappeared detained persons whose remains have not been located, in spite of the legal acknowledgement of their death. For this, it must compile, analyze and systematize all useful information.

The importance of this commitment of the Corporation is clearly indicated in Commission's Report: "[t]he State cannot abandon the task of determining the whereabouts of the victims..., this is a longing shared by large sections of the population which will persist, as long as it is not resolved, in serious difficulty for friendship and reconciliation in Chile".

From the perspective of prevention, the law charged the Corporation with the principal mission of "co-ordinating, executing and promoting the actions necessary to fulfil the recommendations contained in the Report of the National Commission for Truth and Reconciliation".

These recommendations, for the most part of a preventive nature, advocate the assertive features of human rights and their protection in wide cultural and juridical dimensions, while situating them as the indispensable foundation of a well-functioning democratic society. Thus the task of the Corporation can effectively help de-dramatize the theme of human rights, not only just linked with the painful experiences of the past, but, rather, inspired by models of social and cultural behaviour in which the values of pluralism and tolerance of opinions are complemented by peaceful methods for resolving social and political conflict.

Among the preventive initiatives which the Corporation must take are those oriented toward the prevention of human rights violations through the reinforcement of constitutional and legal statutes for their regulation and protection.

The Commission firmly indicated in its Report that "a country without a fully developed conscience of the respect, promotion and defence of human rights produces ineffective legislation for the protection of these rights. This is the case of Chile."

The Corporation will have to directly execute, promote and co-ordinate the revision of national juridical provisions, to adapt them to international human rights law in order to obtain an internal juridical norm effectively protective of these rights.

Also of unmistakable importance is the drive to put together a society truly respectful of human rights, an objective which opens to the Corporation a very large field of educational and cultural ventures.

An aim relating to those actions in the social-cultural field is the public restoration of the dignity of the victims, this being understood as a conjunction of acts which express the acknowledgement and responsibility of the State. This is a task to be taken with conscientiousness and deliberation without aiming to manage the convocation of all of Chilean society. The State entity which must promote these initiatives, by order of the law, is precisely the National Corporation for Reparation and Reconciliation.

General Report

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The first phase in the modern history of human rights was introduced by the United Nations Charter which enshrined human rights, and by the 1948 Universal Declaration of Human Rights which laid down the basic principles. These instruments marked the début of human rights on the international scene.

Today, the international community is deeply involved in human rights and all of its members are bound by the commitments of principle contained in the Charter and the Universal Declaration.

Despite the fact that these principles appear to be among the most widely shared values, serious human rights violations continue to be perpetrated on every continent, even in traditionally democratic countries. Whereas the concept of "crime against humanity" originated during the course of the Nuremberg and Tokyo trials, since then it has reverted to theory, despite the early efforts of the International Law Commission.

Now, as this century draws to a close, a second phase is emerging; it is characterized by a strong new determination to report and investigate violations, as well as to find and punish those guilty. The time has come for human rights to focus on effectiveness: now that the "Right of access to the law" has been defined and universally accepted, all that remains is for it to be exercised.

The analyses of the phenomenon of impunity have been carried out on the basis of this historical context.

The method which was adopted during this Meeting to further develop these analyses is original and productive in that it combines a

review of the international instruments with an inventory — if not exhaustive, then at least extensive — of the national legislation enacted in this area, as well as with experiments in the field, and direct and indirect accounts by individuals, thereby fuelling a continual debate between legal analyses and the realities in the field.

Given the fact that this final report is presented in summary form, it was difficult to include the names of all the authors concerned. We extend our apologies to the numerous contributors, and ask that each recognize his/her own contribution to the collective effort. We will attempt to publish all of the reports and debates after the conclusion of the Meeting.

Historical and Ethical Analysis of the Principles of Human Rights

1 - Generally Accepted Notions

The analysis of this topic led to a number of observations upon which there was general agreement.

A - The Dangers of Impunity

Impunity is a grave and universal phenomenon.

It presents an obstacle to democracy, constitutes a failure of the Rule of Law and encourages the perpetration of further violations.

Its effect on society is to destroy confidence in the initial stages of the democratization process. Impunity is a cancer on the social body, in the sense that it arises out of a "brotherhood of shame". Attempts to exorcize it are in vain; it being essential for the victims to be heard. Impunity impairs the collective memory and allows martyrs to fall into oblivion. It prevents institutions from fulfilling their role of transmitting the non-selective history of a people. No people can afford to forget its past, which provides the very foundation for its reconstruction.

Impunity threatens a budding democracy by rendering its constitution meaningless, weakening its judiciary and damaging the political credibility of its executive. Impunity is unlawful, and constitutes an affront to the Rule of Law.

Total impunity is a violation of international law.

Impunity is an attack on the dignity of the human person, which is a universally recognized principle.

While it recognized that impunity may also be found in connection with gross and systematic violations of economic and social rights, the Meeting was not able to pursue this issue, which it felt merits individual consideration.

B - The Need to Oppose Impunity

The purpose of rejecting impunity is to discourage the repetition of violations and to reinforce the Rule of Law.

Somewhere between impunity and vengeance — which is an admission of weakness and cowardice — lies the risky and difficult gesture of pardon, a gesture which conveys neither forgetting nor indifference.

C - The Role of the State

Legal and moral responsibility are primarily incumbent upon the State; however, private entities also share in this responsibility. The monitoring of human rights violations is the task of the State. If it fails to accomplish this task, it discredits itself and undermines its own legitimacy.

The State must respect the international obligations and responsibilities it has undertaken.

However, if domestic legal systems are incapable of resolving an issue, then an international response and sanctions are called for.

D - The Role of the International Community

For many years now, and following the example of the Convention against Torture, which expressly stipulates that violations be denounced as punishable offences, various international instruments have been aimed at establishing standards applicable to situations of impunity. As regards the overall problem of impunity, some initial thoughts on the subject resulted from the 42nd session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities which requested a report of Messrs Joinet and Guissé.

II - The Various Ways and Means of Dealing with Impunity

In the absence of sufficiently effective international standards, many countries have taken their own approach to dealing with the problem of impunity. Such experiments, applicable to specific times and places, are not always easy to reproduce elsewhere and in other circumstances. Nevertheless, they may serve to illustrate potential solutions.

For some countries, a peaceful transition helps avoid chaos and violence - not by advocating disregard for the past, but by seeing that justice is done. The matter of punishment must be balanced with the historical need for reconciliation if the goal of democracy is to be achieved, given the fact that as long as human rights are not respected, lasting peace is not possible.

Reconciliation, or at least national conciliation, may be considered a means of beginning the process of transition towards democracy or towards peace. This method, however, is complicated by the fact that it denies the historical truth and the need to punish the guilty.

Reconciliation, or failing this, national conciliation, only seems to be possible given certain combinations of factors. For some, it is only achieved if accompanied by sincere repentance on the part of the offenders. For others, it must be based exclusively on justice, and not on the State's interest on the condition that it does not deny the people's desire for justice.

A normative approach to penalties and sentences, in keeping with the principle of proportionality, stands in contrast to the extremely serious nature of violations (genocide, for example) in which no compensation seems sufficient. Some advocate a contextual approach as opposed to a universal one, taking into account the fact that laws apply to particular societies. According to this approach, punishment is determined on a case-by-case basis, within the following three parameters: who was responsible for the impunity? have statutory limitations for the crimes expired and is remission no longer possible? what type of behaviour do the offenders exhibit? Are they repentant?

The Need to Remember

The Role of Historians:

Whatever political choice was made — from among the possibilities mentioned above — it has been shown that it is imperative to preserve historical memory.

Whereas the collective memory may be selective and therefore distorted, the "scholarly memory", or that recorded by historians, does not distort the truth. A society is incapable of building its future upon a denial of its past.

Transferring this historical memory is the responsibility of educators, as well as of the media.

Victims Suffering From the Inability to Remember:

Victims, or their relatives, may attempt to forget the terrible situations they have experienced by refusing to talk about them. It therefore takes quite some time to bring them forward as witnesses. And yet, the relatives of victims, especially of the disappeared, are eager to know the truth. This, however, remains difficult and even dangerous so long as the former offenders remain in office, causing the victim's memory to be blocked by terror.

The Victims

The victim is at the very heart of any discussion of impunity and of any action aimed at combating it. It is in empathizing with the victims that the world's conscience mobilizes on their behalf.

The first task is to identify the victims, together with all of the problems this entails, in particular, obtaining prison registers and compiling lists of unregistered detentions. The practical difficulties of investigation are aggravated by the impunity of the torturers. It should be noted that in some cases, the phenomenon of detention and disappearance is linked to other so-called structural practices in the societies concerned.

Victims are often marginalized and many stumbling blocks are laid in their paths. However, victims in a number of countries are now beginning to break the pattern of silence and to speak.

Theoretically, victims may obtain restitution and compensation by virtue of existing international instruments. This is normally in form of material, non-financial assistance. It is hoped that future international standards will include such compensation. It was even suggested that an International Centre for the Defence of Victims be created.

In the meantime, the non-governmental organizations in the field which are involved in providing assistance to victims are at least managing to break the chain of silence, which serves to encourage impunity.

Finding and Bringing the Offenders to Justice

I - The Consensual Principles Based on the Primacy of Human Rights

1. The first principle on which unanimous agreement was reached is that calling for the rejection of doctrines which tend to legitimize impunity or justify violations on behalf of the State's interests.

As far as this is concerned, there is no possibility for compromise as barbarism is the very negation of the law.

2. Bearing this in mind, and regardless of the situation, we all agree that the chief priority is to establish the facts, that is, to pursue an investigation. This is an obligation owed the victims and their relatives, an obligation owed historical memory and a safeguard against forgetting.

   The experiences of the various commissions of inquiry were presented. They all still share the fact that their members are motivated by a clear-minded courage. They often represent a mixture of the legal profession and civil society. In most cases, they are in need of international support and protection.

3. The third requirement, which was unanimously approved, was that of identifying the offenders. Beyond this, however, attention turns to an analysis of the mechanisms used to carry out the violations and repressions and to a description of the oppressive machine in action. This leads to the observation that human rights violations are neither the result of fate, nor the product of some negligence, but the manifestation of a deliberately conceived and executed political will. It also reveals the clear connection between tyranny and corruption and between human rights violations and economic and financial pillage.

4. The fourth point of consensus concerns the basic demand of the victims for their urgent rehabilitation, regardless of whether they are imprisoned objectors, disappeared persons, or exiles. This demand must be met if human dignity, confidence in the Rule of Law and in the stabilization of democracy are to be maintained.

II - The Various Ways of Dealing with Human Rights Offenders

Bringing offenders to justice is the stage which presents the greatest difficulties and the most options.

Offenders may be dealt with either at the national or international level.

A - Dealing with Offenders at the National Level

It has been shown from the various experiences presented at the Meeting that at the national level, there are three different approaches to dealing with offenders:
- political;
- legal;
- administrative.

1 - As regards the possible political approaches, we have focused primarily on the topic of national reconciliation as a means of achieving civil peace.

It was shown that there is a contradiction between, on the one hand, implementing a transition or peace process and facilitating it through international or national reconciliation, and on the other, the need to record the historical truth concerning the past, however troubled, and to punish those responsible. The ambiguity surrounding such national reconciliation processes further encourages the *de facto* impunity enjoyed by the offenders.

In any case, such efforts at reconciliation should be accompanied by constitutional reforms. They should not stop at maintaining old structures in a new environment governed by the Rule of Law, such as allowing an *esprit de corps* — particularly a military one — to persist along with its thirst for revenge.

2 - The legal approach to dealing with offenders focuses on individual responsibility, and by extension, institutional responsibility.

The following points will deal with the judicial process, statutory limitations and the non-applicability of statutory limitations, and amnesty.

As regards the judicial process, the following four aspects will be discussed: the law, judges, procedure and punishment.

Concerning the law, the participants recalled the conditions and guarantees of a fair trial. Any breach of the rules for a fair trial opens the door to eventual impunity.

As far as judges are concerned, a number of problems may be noted with respect to judges who have been corrupted, politically influenced or threatened.

The legal procedure, for its part, should offer all of the usual guarantees.

Finally, even if the facts have been found to constitute a violation of human rights, and even if the offenders are properly sentenced by a competent court, there is still the issue of carrying out the sentence, which remains a potential source of impunity.

The existence of exceptional military courts and judges creates confusion with regard to the civil legal system and most often results in summary trials. Also noted were threats of a so-called private system of justice.

Generally speaking, the lack of, or lessening of sentences for identified and convicted perpetrators tends to encourage new violations.

It is nevertheless true that, regardless of the outcome of such fair trials, public investigations and the reports of witnesses reported in the media have a definite pedagogical impact. The role of non-governmental organizations are of great importance at this stage.

During the Meeting, the issues of statutory limitations, the non-applicability of statutory limitations and retroactivity were also considered under the topic of legal standards, as were both the strict and enlarged definitions of crimes against humanity. Although the theory concerning these issues is well known, uncertainties persist as to how they should be put into practice. These uncertainties should be cleared up.

The third and last aspect of dealing with offenders at the national level using a legal approach concerns the issue of amnesty.

Amnesty, and its various equivalents, such as the *"Punto final"* law, removes the criminal character of certain acts, dismisses proceedings underway or suspends sentences which have been handed down, for the political purposes of achieving national reconciliation, such as by ending an armed conflict, for example.

Such amnesty may only be tolerated in certain limited conditions:

- it must respect the right of the victims and their relatives to rehabilitation and compensation;
- it must not cover violations recognized in international instruments;
- it must not jeopardize civil suits filed by the relatives.

As for the issue of pardon, it is currently the subject of much debate. The grant of pardon may nevertheless be made dependent upon one certain condition, that is, of obtaining the permission of the victims. The victims are the only ones who should be entitled to grant pardons.

In addition to using a political or a legal approach to dealing with offenders, we must now add the methods involved in an administrative approach.

3 - Purging, which is a definite attempt to remove any obstacle to the establishment of a new policy, is not without limit or danger. It is political in nature and must be handled carefully: first, in terms of defining responsibility for wrongdoing, and next, in forming the purging committees. Experience has shown that, in all cases, there is an inevitable degree of arbitrariness.

It is not possible to speak of searching for the guilty, rehabilitating the victims, or of purging, without bringing up the problem of the files and archives of the regimes responsible for violating human rights. Despite the excesses and backlogs observed, particularly in terms of denunciations, these files and archives must nevertheless be preserved, but with precise legislative guarantees for their consultation for the dual purpose of reconstructing the historical past to provide evidence for the victims and, failing this, as a basis to contradict those under prosecution.

Up to this point, we have presented the various ways of dealing with human rights offenders at the national level. The second facet of the analysis concerns dealing with offenders at the international level.

B - Dealing with Offenders at the International Level

The perpetrators of war crimes and crimes against humanity, including genocide, all too often escape prosecution at the international level, even though their crimes are among the most serious that can be committed.

International law contains all of the necessary provisions and instruments to counter the impunity with which serious violations are committed. Such violations are an attack on the life and integrity of the human being. Crimes against humanity are defined and expressly codified in international instruments. Provisions concerning the search for perpetrators exist in many of the declarations and conventions mentioned.

Impunity nevertheless prevails owing to the fact that an international jurisdiction has not yet been established, despite the fact that legal debate on this subject has been in progress on for some time and is currently very active. The choices to be made require taking courageous political stances.

Concerning the creation of international jurisdictions, a consensus was reached on at least four points:

(1) impunity, as it relates to major international crimes, outrages the conscience of mankind;

(2) criminals under prosecution must be guaranteed the right to a fair trial;

(3) the national courts are responsible for judging these criminals. However, if they fail to do so, which happens all too frequently, this responsibility should be assumed by an international court;

(4) lastly, all are in favour of the sort of international legal environment in which its effectiveness as a deterrent would count as one of its most outstanding features.

Having affirmed these principles, let us now examine the various ways of achieving them, for which there are several available options and on which opinions are divided.

The creation of an international criminal jurisdiction gives rise to a series of questions which have not yet been addressed.

– Which Crimes are to be Prosecuted?

The definition of these crimes ranges from a wide interpretation, such as international crimes already specified in international treaties, to a more limited interpretation, such as crimes against peace, war crimes and crimes against humanity, specified in existing conventions, while including an intermediate jurisdiction for such crimes as terrorism and drug trafficking.

– What would be the Jurisdiction of the International Court?

There are three available options with respect to national jurisdictions. These include exclusive, joint or subsidiary jurisdiction, to which must be added collateral mechanisms, such as appeals for interpretation.

– What Local Jurisdiction would the International Court Have?

This jurisdiction could be an international criminal court with a universal orientation or, alternatively, it could take the form of several regional courts, while nevertheless retaining an underlying unity of jurisprudence founded on a necessary system of shared values.

As far as the regional court is concerned, some useful lessons have been learned from the European Court of Human Rights, which is competent to judge the States within its jurisdiction, and from the Inter-American Court of Human Rights. Would the international court be permanent or temporary? Or could it be both, as has been suggested? The establishment of a permanent court by virtue of an international convention would have deep symbolic value, but *ad-hoc* solutions — taken or rejected by the Security Council — could provide a quick and appropriate response to urgent situations. It was pointed out, however, that this might lead to a politicization of justice.

In addition to these decisions, there are technical problems relating to administration which would need to be solved.

It was pointed out that jurists have already studied and devised all of the possible modalities for this.

The choice to be made today derives from an international political will that would be based upon a legal preference. There have been moments in the history of humanity in which urgency has dictated that impunity no longer be allowed to triumph. We are undoubtedly experiencing one such moment. This is the strong feeling that has emerged from the debates.

If I were to evaluate this Meeting in a few words, I would say that through the richness and high level of the learned reports, through the many experiences and poignant accounts presented, as well as through the constructive debates, an immediate and imperative need has arisen to never again allow the perpetrators of human rights violations to go unpunished. Unless this need is met, the noble idea of human rights which has illuminated this last half century will lose all credibility, be voided of significance and fall hopelessly into oblivion.

From left to right: Adama Dieng, Secretary General of the ICJ; Louis Joinet, Member of the UN Sub-Commission on Human Rights, and Paul Bouchet, President of the CNCDH, presenting the results of the meeting before the representatives of the press accredited to the UN.

Appeal

The expert participants who have gathered at the Palais des Nations in Geneva for the International Meeting Concerning Impunity, organized jointly by the Commission Nationale Consultative des Droits de l'Homme of France and the International Commission of Jurists under the auspices of the United Nations, issue the following appeal.

• Extremely preoccupied by the particularly grave international crimes now being committed with impunity in various regions of the world such as war crimes or crimes against humanity or flagrant violations of human rights;

• Ascertaining that, since the Second World War, national jurisdictions are often ill-suited to prosecute and punish such crimes despite their exceptional gravity;

• Considering that this deficiency, which tends to make impunity a universal phenomenon, constitutes an outrage for the victims, a serious obstacle to the authority of the law as well as to the development of democracy and incites new violations;

• Recalling that in all circumstances truth is an obligation, that the future of a people cannot be built on ignorance or the negation of their history, as the people's knowledge of their history of suffering forms a part of the cultural heritage and as such must be preserved;

• Ascertaining that if the international legal standards repressing such crimes can still be perfected or supplemented, notably those concerning major violations of fundamental economic and social rights, they are already sufficiently established to open prosecution against the atrocious crimes now being committed;

• That consequently the prevalence of impunity results less from the absence of laws condemning it than from insufficient mechanisms to ensure that the laws are applied and respected;

• Emphasizing that absolute impunity is a denial of justice and a violation of international law;

• That impunity cannot question the principles of law, by justifying the barbarity in the name of the State or allegiance to the prevailing power;

• That the pre-eminence of human rights is the necessary base for all national reconciliation;

• That national solutions should not impede full respect for international commitments concerning a State's duty to prosecute and judge those responsible for the most serious violations;

• Estimating that restrictions on legal punishment, which might be authorized in exceptional circumstances in order to favour the return to peace or the transition to democracy, should be subordinated in any case under the following conditions:

- the decisions should not be taken by the authors of the violations or their accomplices;
- they should not violate the rights of the victims and their lawful beneficiaries which include the right to know the truth, the right to equitable compensation and, if appropriate, the right to full rehabilitation;

• Affirming that the international community has to take action in cases when a State fails to exercise its legal capacity;

• That, as a deterrent, international co-operation should be fully practised by complying with treaties that all the States should ratify and apply, notably the Geneva Conventions and their Protocol I;

• That the most effective international action requires public awareness beginning with the political leaders and a clear choice in favour of appropriate international bodies, as for example an international penal body.

The expert participants at the International Meeting Concerning Impunity appeal to the States, to the non-governmental organizations and to the inter-governmental organizations:

1. That the Security Council initiative creating an impartial panel of experts responsible for investigating the violations of the

Geneva Conventions, and all other violations of international humanitarian law, committed on the territory of ex-Yugoslavia (Resolution 780) reaches a conclusion without delay so that this experience can be a first step in establishing an international penal tribunal, which is more essential than ever.

2. That during the World Conference on Human Rights, meeting in Vienna in June 1993, a proposal is made to set up an international penal tribunal according to the most appropriate modalities, in order to finally break the cycle of impunity.

Geneva, 5 November 1992

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