National Reconciliation, Transnational Justice, and the International Criminal Court

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The creation of international tribunals to try perpetrators of heinous crimes and the drive to establish a permanent International Criminal Court (ICC) represent a turn from blanket amnesties and de facto impunity toward policies of holding leaders and public officials accountable for their actions.[1] Applying universal jurisdiction to crimes committed in other parts of the world, dramatically exemplified by the eighteen-month-long detention in England of General Augusto Pinochet of Chile pursuant to an extradition request from a Spanish court, is an important new way to break the cycle of impunity for serious and massive human rights crimes.[2]

This drive is part of a larger campaign to ensure that truth prevails over denial and oblivion, and justice over impunity. The struggle to achieve these goals has taken place largely in countries going through transitions from dictatorship to democracy in Latin America, Eastern Europe, and Africa in the 1980s and 1990s. Those experiences have resulted in a variety of policy instruments, such as criminal prosecutions, truth commissions, reparations schemes, and disqualification of known perpetrators from performing important duties in the reconstituted agencies of a newly democratic state. In only a few years, these developments have effected an extraordinary change in international human rights law. Together they create a new paradigm for how societies in transition from tyranny to democracy confront massive and systematic abuses of human rights in the recent past.

Nonetheless, this shift toward holding leaders and public officials accountable raises its own questions: How should the legitimate interest in punishing perpetrators be balanced against the desire for national reconciliation in a society recently torn by conflict? Assuming that domestic courts, courts of other nations, and inter-

[1] Security Council Resolution 827 (1993), creating the International Criminal Tribunal for the former Yugoslavia (ICTY), and Resolution 955 (1994), creating the International Criminal Tribunal for Rwanda (ICTR); Rome Statute for an International Criminal Court, approved on July 17, 1998. See the debates leading up to this historic new treaty in M. Cherif Bassiouni, ed., *The Statute of the International Criminal Court: A Documentary History* (Ardsley, N.Y.: Transnational, 1998).

[2] Christine Chinkin et al., "In Re Pinochet," *American Journal of International Law* 93 (1999), p. 703.

national tribunals all have legitimate claims to jurisdiction over the same crimes, how should we determine the appropriateness of exercising jurisdiction in a given case? This essay will evaluate the arguments for the turn toward policies of accountability and offer some answers to these difficult questions.

Punishment, Pardon, and Peace

The creation by the United Nations of ad hoc war crimes tribunals, the disposition of the judiciaries of some countries to act extraterritorially by applying universal jurisdiction, and the adoption of the Rome Statute for an International Criminal Court reflect a clear tendency in international law to provide the means to ensure that genocide, war crimes, and crimes against humanity do not go unpunished. The norms prohibiting extrajudicial execution, torture, and prolonged arbitrary detention create a legal obligation to punish such crimes, and they are by no means new. Indeed, they can be found in major human rights instruments such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights. But recent events have given rise to "emerging principles" developed from those norms. These principles underpin the notion that states have affirmative obligations to prosecute and punish violations of these rights, discover and reveal the truth about them, offer reparations to the victims, and disqualify perpetrators from positions of power. They rest on a variety of authoritative interpretations by interstate organs (the UN Human Rights Committee, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights) as well as by "soft-law" mechanisms like UN Special Rapporteurs, Declarations, and other instruments.[3]

[3] Diane F. Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation," in Louis Henkin and John L. Hargrove, eds., *Human Rights: An Agenda for the Next Century, Studies in Transnational Legal Policy*, vol. 26 (Washington, D.C.: American Society of International Law, 1994). See also: Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); Theo Van Boven, UN Special Rapporteur on Restitution, Compensation, and Reparations for Gross and Consistent Violations of Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (1993); Louis Joinet, UN Special Rapporteur on Impunity, *Revised Final Report on the Impunity of Perpetrators of Human Rights Violations* (Civil and Political Rights), E/CN.4/Sub.2/1997/20/Rev.1(1997); UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, UN Doc. CCPR/C/79/Add.46 (1995) and *CCPR* [Covenant on Civil and Political Rights] *General Comment 20*; Inter-American Court on Human Rights, Velásquez Rodríguez, *Judgment on the Merits*, July 29, 1988; Inter-American Commission on Human Rights on Argentina and Uruguay, *Annual Report of the Inter-American Commission on Human Rights*, Reports 28/92 and 29/92 (1992); European Court on Human Rights, *Ibrahim Aksoy v. Turkey, Judgment on the Merits* (October 10, 2000).

Emerging principles are at the heart of the standard-setting exercise associated with the development of the international law of human rights since World War II, an extraordinary development spurred largely by the memory of the Holocaust. What is new is the determination to find ways and mechanisms to implement that obligation effectively, first at the domestic level, and later by the international community if the domestic jurisdiction is unable or unwilling to institute effective measures against impunity. In turn, the evolution of international and comparative law runs parallel with an interest in other disciplines (military studies, political science, international relations, ethics) for philosophical and practical justifications of this obligation to punish the most serious abuses of power and authority. In this sense, a school of thought is taking shape that expresses a drive for truth and justice and a rejection of impunity.

It was not always so. When Latin American societies in the early 1980s instituted truth commissions and prosecutions in some cases, many well-meaning experts felt that fragile new democracies could not withstand the pressure of still-powerful military establishments, and that insisting on this path would destabilize the democratic experiment. The same skeptics felt that these developments, even if partially successful, would have the effect of delaying the transition in neighboring countries, or of prompting the military to exact stronger guarantees of impunity as a condition for allowing the transition to take place. This contrary school of thought about transitions to democracy was not limited to those early exercises, even though their dire predictions never materialized (transitions to democracy did take place, with varying degrees of conditionality). It surfaced again, with more persuasiveness, when the issue was mixed with the need to achieve peace in fratricidal wars. If guerrilla movements were to be persuaded to give up their weapons and join the democratic process, they would need to receive assurances that their leaders would not be thrown in jail. Clemency for the insurgents gave a very powerful argument for seemingly "symmetric" amnesty for human rights violations committed by the security forces in the course of fighting the civil war. This argument was raised during the Dayton discussions to end the war in Bosnia, and more recently as a critique of the Spanish and British courts in the Pinochet case for disregarding the delicate balance between justice and stability supposedly arrived at in Chile with the consent of all forces.[4]

The argument for leniency rests on the need to achieve national reconciliation so that a conflict-torn society can proceed to build a new democracy based on tolerance and accommodation of factions that have very recently tried to destroy one other. Even among some who object to oblivion and impunity, the high goal of nation-

[4] The argument that the actions of Spanish and British courts were disturbing the delicate balance reached by Chileans was widely used by the Chilean government in its diplomatic offensive to bring Pinochet home.

al reconciliation, together with a general dislike of criminal prosecutions, argues in favor of truth-telling and reparations. [5]

There is great difficulty in defining "reconciliation" for these purposes, especially because the word has been recklessly used many times to attempt the justification of blatant impunity. Just as peace cannot be the mere absence of fighting, reconciliation cannot be decreed. It generally takes place through a long-term process aided by public policies and actions that confront the conflict between persons, institutions, or communities head-on and take an honest look at the conditions under which reconciliation can take place.

I agree that reconciliation should be a main goal of any policy of reckoning with past human rights violations. For these purposes, I understand reconciliation to mean the long-term setting aside of disputes between factions that have divided a nation. To the extent that the human rights violations have occurred in the context of those disputes, removing antagonisms is necessary to prevent recurrence of those abuses. It follows that the reconciliation to be sought is not a strained and hypocritical truce between victimizers and victims. Nor should reconciliation between previously warring factions take place at the expense of the victims' right to see justice done. For that reason, even if reconciliation is a worthy goal, it should not be the centerpiece of any policy of truth and justice. If we make it the centerpiece, reconciliation becomes the factor that validates or invalidates all aspects of the policy. Under those circumstances, it would be too easy to say that certain actions should not be undertaken unless it can be shown that they will result in reconciliation. In my view, truth, justice, and reconciliation are all objectives of the policy, and no one of them should be considered instrumental to the others. It is impossible to be certain that truth or justice will lead to reconciliation under all circumstances. If they do not in a given case, it does not mean that it was wrong to pursue them. Applying a purely consequentialist rule to efforts to bring about truth and justice is unfair to the victims and to those in society who wish to know the truth.[6]

There is nothing instantly convincing about a forgive-and-forget policy, nor about the position of pursuing prosecutions at whatever cost. It can only be said, rather safely, that extremes in both postures are easily rejected. Not many people would argue any more in favor of blanket amnesties and letting bygones be bygones, at least when it comes to crimes so outrageous that they offend our conscience. On the other hand, punishing each and every event—and doing so with complete respect for the rule of law—is clearly impossible in most situations, and could in some cases be

[5] José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in *State Crimes: Punishment or Pardon* (Queenstown, Md.: Aspen Institute, 1989).

[6] Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* 19 (May 1997), p. 271.

undesirable. The issue then becomes to determine which elements of truth, justice, and clemency measures are compatible with one another, with the construction of democracy and peace, with emerging standards in international law, and with the search for reconciliation. The most appropriate mix will depend on context, circumstances, and the free and rational choices made by local actors (choices that the international community should feel bound to respect).

Principles of human rights, along with respect for human dignity and the rule of law, present each society with some limits as to what can be done in reckoning with the past. But these principles leave ample room for local experimentation. Societies learn from each other's successes and failures. In particular, each transition to democracy becomes the testing ground for more and more creative adaptations of policies designed to produce societal processes of truth, justice, and reconciliation. For example, truth commissions are a frequently used instrument, especially when human rights violations have been characterized by denial, deception, or imposed silence. They are useful when the large number of individual violations call for a concerted and well-organized effort to find and disclose the truth. It is important to note that the truth to be established and reported is not simply an overall explanation about how the system worked. Individualized "truths" about the fate and whereabouts of all victims and about the circumstances of their victimization are also necessary.

Some policymakers, eager to "do something" but fearful of the consequences of prosecuting still-powerful defendants, can succumb to a tendency to view truth commissions as a substitute for justice. Many governments will find it expedient to issue a report and hope that the matter of past violations goes away. If a truth commission is set up for the purpose of avoiding the indispensable task of doing justice, it will be discredited from the start. Truth commissions are important in their own right, but they work best when conceived as a key component in a holistic process of truth-telling, justice, reparations, and eventual reconciliation. These four distinct obligations should be performed in good faith. They are not a "menu" of alternatives. Although they are independent elements, they deserve to be treated as integral parts of an overall commitment to accountability.

That is why the question of criminal prosecutions for the most egregious human rights crimes cannot and should not be avoided. Prosecutions are usually the most difficult part of any policy of accountability for many reasons, particularly because it is essential that they only be attempted under the strictest conditions of due process and fair trial. It may well be that a country needs to build up its tattered judiciary in order to guarantee a fair trial, and that attempting prosecutions with fledgling judiciaries can be a recipe for failure on all counts. But newly democratic societies need independent judiciaries, and prosecutions for the crimes

of the past can also be the occasion to establish credibility for courts that are trying in good faith to be judiciaries of the newly democratic state. In such cases, perhaps the time used by a truth commission to gather evidence for its own purposes can be used to shore up the judiciary, and trials can proceed at a later stage. The investigatory process of the truth commission can even be a good starting point for successful prosecutions.

Punishment as a Policy Tool

It could be argued that punishment is necessary in order to prevent future recurrences of the legacy of wholesale human rights violations that societies must confront. Prevention, however, is not the best justification for a policy of accountability. Jail time may prevent the same violators from doing it all over again, but in fact only rarely will the same perpetrator get a chance to repeat misdeeds. Another argument is that punishing past perpetrators may prevent other potential perpetrators from committing similar deeds in the future. The problem with this theory is that it relies too heavily on predictions about the rational behavior of persons disposed to committing irrational acts. In addition, there are too many factors intervening in those decisions beyond the eventual possibility of punishment. All we can say is that routine intervention of the courts and application of the law may have that preventive effect. Nevertheless, it is certainly to be hoped that, by breaking the cycle of impunity, the trials and convictions of those responsible will weigh in the minds of those tempted to commit new violations in the future.

Along the same lines, skeptics of international criminal tribunals worry that their mere existence may discourage dictators from leaving power if they know they will be prosecuted as soon as they do. The argument is as old as Nuremberg. Justice Robert H. Jackson, in defending the prosecution at Nuremberg, called for aspirations more modest than deterrence, because he knew that "personal punishment, to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible."[7] Martha Minow writes: "Individuals who commit atrocities on the scale of genocide are unlikely to behave as 'rational actors,' deterred by the risk of punishment. Even if they were, it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far."[8] Even though we cannot be sure that punishment is a preventive, it is clear that the pre-

[7] Cited in Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), p. 50.
[8] Ibid.

sent state of affairs, dominated by the prospect of impunity, offers no assurances that the criminals will end their crimes voluntarily. In fact, some argue that impunity makes it more likely that new crimes will be committed.[9]

If the only justification for criminal prosecutions was prevention, commentators and policymakers who advocate against them could make a case that, in a given set of circumstances, what best achieves prevention is a policy of forgiveness and oblivion. This was the rationale for "forgive and forget" policies advocated by some in the Latin American transitions to democracy. A version of this position held that only the newly democratic leaders of those countries were in a position to know what worked best in their societies, so that members of the international community should not second-guess them. In fact, all that local leaders could say in those circumstances was that strong military establishments would probably tolerate weak civilian governments at first, so long as no attempt was made to bring their past deeds to justice. The kind of peace that is achieved through this act of appeasement bears no resemblance to true reconciliation. Similarly, a weak constitutional government that is allowed to operate only as long as it recognizes its own limits also bears little resemblance to democracy or the rule of law. The argument, then, that prevention of future violations can be achieved by ignoring the open wounds of the present turns the policy of appeasement of the violators into undisguised and shameful yielding to blackmail.[10]

Prevention, therefore, is not by itself an adequate justification for a policy of accountability. The reasons societies punish certain anti-social acts are different, even if in the process they certainly hope that a preventive effect is attained. Societies punish these crimes out of deference to the victims, especially if the victims are among the most vulnerable and defenseless in society. In the act of punishment, a decent society signifies that no one in its midst is unimportant or disposable and that offenses against their inherent human dignity will not be tolerated.[11] At the same time, societies punish these acts to show the importance they assign to the norms that prohibit torture, disappearances, rape, and murder.[12] In the new democratic societies that we are trying to build, these violations cannot go unpunished.

[9] A persuasive case to this effect, with regard to successive amnesties in Haiti, is made by Kenneth Roth, "Human Rights in the Haitian Transition to Democracy," in Carla Hesse and Robert Post, eds., *Human Rights and Political Transitions: Gettysburg to Bosnia* (Cambridge, Mass.: Zone Books, 1999), pp. 93-131.

[10] See Margaret Popkin and Nehal Bhuta, "Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?" in *Ethics & International Affairs* 13 (1999), pp. 99–122.

[11] Aryeh Neier, "Prosecutions: Who and for What? Four Views," in Alex Boraine et al., eds., *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: Institute for Democratic Alternatives in South Africa, 1994), p. 99.

[12] Marcelo Sancinetti, *Los Derechos Humanos en la Argentina Post Dictatorial* (Buenos Aires: Lerner, 1988).

The heavy legacy of recent abuses requires that newly democratic states do something about them: If impunity is allowed to reign, the political system that is being built may be democratic in formal terms, but it will lack the essential ingredient of accountability.[13] If impunity for egregious crimes prevails at this founding stage, what will prevent it from being applied in the present and future to ordinary violations of law by state agents? Democratic societies are not simply those where majorities decide, but also those where the most vulnerable citizens are given their worth as members of the community and respected in their dignity. The rule of law should not be built on the unacceptable notion that some egregious crimes are forgivable if committed by men in uniform. If impunity pervades the new setting, it makes it harder for present and future generations to have faith in democracy and the rule of law.

These problems with the quality of the democracy to be built are compounded when the purpose is also to bring an end to armed conflict, and especially one with ethnic connotations. If well-known perpetrators are allowed to remain in positions of authority, the stigma that their actions deserve is transferred to the communities they belong to. In this fashion, the blame for past wrongs is placed with whole communities, sometimes generations removed, and true reconciliation between ethnic groups never takes place.[14] In contrast, investigation, prosecution, and punishment of the irresponsible leaders who exploit ethnic tension for political gain separate wrongdoers from the community in whose name they committed the crimes. It follows, therefore, that seeking peace between warring factions should be guided by these long-term goals and not simply by the more immediate need to persuade the actors to lay down their arms. A promise of impunity may well lead to a cease-fire; but a lasting peace can only be built over a foundation of truth, justice, and meaningful reconciliation.

José Zalaquett has argued that a policy to deal with the past has two conditions of legitimacy: that the whole truth be known and disclosed, and that any measure of punishment be arrived at with complete respect for international principles of due process. In his view, the main objective of any such exercise is to achieve reconciliation. Although punishment may well serve that objective, in certain circumstances a large measure of clemency would be more useful to it.[15] Zalaquett correctly points out that reconciliation requires some public policy initiatives and gestures from all sides, and it can be obtained only after a process that involves confronting the recent past honestly and truthfully.

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[13] Phillippe Schmitter and Terry Karl, "What Democracy Is . . . and Is Not," *Journal of Democracy* 2, No. 3 (1991); Guillermo O'Donnell, "Further Thoughts on Horizontal Accountability" (Notre Dame, Ind.: Kellogg Institute, 2000; mimeograph).

[14] Richard Goldstone, cited by Lawrence Wechsler in "Inventing Peace," *The New Yorker* (November 20, 1995), p. 64.

[15] Zalaquett, "Confronting Human Rights Violations Committed by Former Governments," pp. 42–3.

Zalaquett is right, of course, in demanding that policies of accountability strictly conform to certain rules, which he calls "conditions of legitimacy." Scrupulous respect for due process is indeed such a condition, because neither domestic nor international actors should embark on policies that themselves entail the violation of fundamental human rights principles. To rephrase this sine qua non more broadly, a blanket amnesty cannot be a part of a legitimate policy of national reconciliation. Unconditional, blanket amnesties have been declared to be violations of international human rights law. A blanket amnesty, therefore, would be an impermissible addition of a new violation.[16]

Spelled out in more positive terms, a policy to deal with the past is necessary, if not sufficient, to obtain reconciliation. The policy should also include—whether simultaneously or in stages— reparations for the victims and an attempt to disqualify known perpetrators of human rights abuses from serving in the armed and security forces or in decision-making positions in the new democratic regime. It can be achieved through truth-telling or through prosecutions, though the best policy should probably involve a measure of each. The purpose is certainly to recognize the plight of victims and offer them redress, but to do so in a manner that permits communities to move forward into a less adversarial future. It is not so much that the policy, to be successful, should settle once and for all conflicting interpretations of history; it should establish a basis of facts that cannot be honestly denied. Interpretations of history can proceed over those widely agreed-upon facts.[17] In a sense, the effort is directed toward the unavoidable task of stamping out "impermissible lies," like denial of the Holocaust, or claims that the disappeared ran off with other women or that torture never happened.[18] Whether the establishment of undeniable facts is best achieved through a truth commission, prosecutions, or both depends on the context and the circumstances of each country.

The fact that prosecutions are more often than not desirable does not mean that there is no room for clemency in a policy of accountability. A measure of forgiveness can be incorporated as the policy achieves the goals of truth, justice, and reconciliation, and even as a tool to obtain the cooperation of some actors in their achievement. What is impermissible is to put "official forgiveness" above all other considerations, and to allow clemency to thwart truth, justice, and reconciliation. Forgiveness that leaves perpetrators in their places of power and influence and that prevents the truth from being discovered and revealed is not forgiveness: it is impunity.

[16] Exchange between José Zalaquett and Kenneth Roth at Seminar on Transitional Justice organized by the Aspen Institute, Wye River Center, Md. (November 10–12, 2000).

[17] Mark Osiel, "Legal Remembrance of Administrative Massacre," *University of Pennsylvania Law Review* 144 (1995), pp. 463-680.

[18] This insight belongs to Michael Ignatieff.

It is clear that the newly democratic state is the primary actor in executing a policy of accountability. National authorities have primary responsibility for dealing with the past, and they also have the widest choice of policy tools. They are only constrained by the general principles outlined above (including obligations under international humanitarian and human rights law) and by the need to act democratically in consultation with their civil societies. Only if states fail to live up to these obligations is international action legitimate.

The outside world—courts exercising universal jurisdiction, ad hoc courts set up by the UN Security Council, and eventually the ICC—stands ready to offer redress to the victims if the national state fails to do so appropriately. The notion that such outside factors can place an objective limit on the ability of new democracies to decide by themselves how much justice and how much leniency to apply to the legacies of a repressive past has of course met with vocal hostility from freely elected authorities who think of these decisions as an essential attribute of their sovereignty.[19] On the other hand, victims and large segments of civil society in those countries welcome the possibility of extraterritorial prosecution because it narrows the effectiveness of local impunity schemes and can force local powers into stricter compliance with their obligation to seek truth and justice. If an extraterritorial prosecution is compared to a situation of full impunity, such as that enjoyed by Pinochet in Chile before his ill-advised trip to London, the solution looks simple enough: nondomestic courts have a legitimate claim to jurisdiction because certain crimes cannot go unpunished. Other cases may not be so simple, especially if the national community has indeed made a good-faith effort to restore justice and provide remedies to the victims. The legal, ethical, and political principles developed in recent years in several experiments with transitional justice may also offer guidance as to when the international community should refrain from disturbing local arrangements.

Termination of Armed Conflict as a Special Case

The need to put an end to an armed conflict adds a special dimension—and urgency—to dealing with the past. Significantly, these are the situations in which the outside world, via institutions like the United Nations, will most likely be called upon to make peace and will therefore have something to say about its terms. A promise of uncon-

[19] Witness, for example, the very active diplomacy of the democratic government of Chile to bring back General Pinochet and prevent his extradition to Spain. Significantly, all Latin American democracies publicly expressed their solidarity with Chile on this issue, even while distancing themselves from Pinochet's record of human rights abuse.

ditional amnesty might be considered a necessary step in persuading the parties to give up armed struggle. If the intent is to bring warring parties to the peaceful political process, they need assurances that they will not be prosecuted.

In fact, international law seems to give some support for amnesties in internal conflict situations: the 1977 Protocol II Additional to the Geneva Conventions (the body of laws of war applicable to conflicts not of an international character) prescribes that, at the end of the hostilities, the parties will give each other a broad and generous amnesty.[20] This norm, however, was not intended and cannot reasonably be interpreted to promote impunity for major war crimes or crimes against humanity committed in the course of the conflict. The International Committee of the Red Cross, as the most authoritative interpreter of the laws of war, has taken the position that the amnesty required by Protocol II is for the domestic law offenses of rebellion and sedition, and for otherwise relatively minor transgressions of international humanitarian law, and that more serious war crimes should not be subject to an amnesty.[21]

In any event, it is by no means a certainty that warring parties will not give up the fight unless they are promised amnesty. In several recent conflicts in which the United Nations intervened, peace was achieved without such a major concession, even though in all cases the extent and scope of amnesty was an issue. In El Salvador in 1992, the negotiators rejected the option of a full and unconditional amnesty and still obtained, first, an on-the-ground civilian observation mission; then a cease-fire; then a truth commission; then an ad hoc commission to single out military officers for disqualification; and ultimately a full armistice. The government of El Salvador nonetheless unilaterally passed a full amnesty, immediately following the release of the truth commission report and against the wishes of the three international members of that body. This act elicited strong condemnation from the UN secretary-general. Although the peace agreement did not fail because of the impunity, eight years later the issue is still very much alive in El Salvador. Following resolutions of the Inter-American Commission on Human Rights on the incompatibility of the amnesty law with El Salvador's treaty obligations, there has been much social pressure for the reopening of major cases like the murders of Monsignor Oscar Romero in 1980, of four U.S. church women the same year, and of six Jesuit priests, their landlady, and her teenage daugh-

[20] Art. 6(5), *Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 7, 1977.

[21] Letter from Toni Pfanner, head of the Legal Division, International Committee of the Red Cross Headquarters, Geneva, to Douglass Cassel, April 15, 1997, cited in Douglass Cassel, "Lessons from the Americas: Guidelines to International Response to Amnesties for Atrocities," in M. Cherif Bassiouni and Madeline H. Morris, eds., "Accountability for International Crimes and Serious Violations of Fundamental Human Rights," *Duke University Review of Law and Contemporary Problems* 59 (Autumn 1996), p. 218.

ter in 1989. A ruling by El Salvador's Supreme Court in late 2000 gave rise to expectations that these cases may indeed be reopened.

In Haiti in 1993, the joint mission of the United Nations and the Organization of American States seemed at times to put pressure on the rightfully elected president, Jean Bertrand Aristide, to promise an amnesty in exchange for his being allowed by the usurpers of power to return. To his credit, Aristide resisted. The Governors Island Agreement of July 3, 1993, designed to facilitate Aristide's return to power, did include his commitment to pass an amnesty law, but the scope of this law was to be severely limited by Haiti's constitution, which authorizes amnesties for political crimes such as staging a coup d'état, but not for murder, torture, or disappearance, which are treated by Haitian law as common crimes. In the end, Aristide was restored to power through the deployment of U.S. and other troops, without having granted a blanket amnesty for human rights crimes. In late 2000, a major massacre in the slum of Raboteau, committed during the Raoul Cedras regime, was finally prosecuted successfully. The court requested the extradition of Cedras and other leading figures of Haiti's most recent military dictatorship.

In Guatemala in December 1996, the UN again successfully brokered a historic peace agreement to end the country's thirty-seven-year war. The amnesty law was the last item to be resolved before the final signing ceremony. Because of the strong position adopted by the UN, and the demands of domestic human rights organizations, the amnesty law constituted a significant landmark. It was the first of its kind in Latin America to exclude categories of offenses that international law recognizes as genocide, war crimes, or crimes against humanity. For that reason, a few prosecutions that had already taken place survived the amnesty. The UN-sponsored Commission on Historical Clarification produced a strong and authoritative report that did not hesitate to categorize the crimes against the indigenous majority of the country as genocide. The vast majority of cases in that bloody war remain mired in de facto impunity, though some slow progress is being achieved through the pressure of the victims' families and Guatemalan human rights organizations.

In 1993 the issue of amnesty was an important point of contention during the Dayton talks to end the conflict in the former Yugoslavia. There were even serious attempts to shut down the International Criminal Tribunal for the former Yugoslavia, which by then had barely begun to operate. Fortunately, more reasonable positions prevailed, and the most prominent leaders of the "ethnic cleansing" campaigns, Radovan Karadzic and Ratko Mladic, were excluded from the talks. They were indicted by the ICTY and remain fugitives. Not only was this not an obstacle to the achievement of peace; most observers agree that forcing Karadzic and Mladic into a status of

virtual prisoners in their own circumscribed area was crucial to reducing their influence and grip on their forces, which ultimately made peace achievable.

Most recently, a blanket amnesty was signed in 1999 as a condition of peace in the cruel conflict in Sierra Leone, at the insistence of rebel leader Foday Sankoh. Following instructions from New York, the UN mediator issued a public statement to the effect that the United Nations did not condone the broad and unconditional terms of the amnesty, as it violated international law. In fact, that agreement did not end the conflict, for the rebels continued to fight and to commit atrocities. In the search for new possibilities for peace in Sierra Leone, it is now quite clear that a blanket amnesty will not be countenanced. This example points to the need for careful consideration of all human rights aspects of a peace treaty and militates against the superficial offer of guarantees of nonprosecution as a way to peace.[22]

Finally, international negotiators must bear in mind that the possibility of an amnesty held out as an inducement to warring factions to lay down their arms is at best a double-edged sword. It may well encourage the fighters to hold out for better terms, including impunity for their crimes. Conversely, if international law and the policy of an international peacemaking agency like the United Nations preclude the granting of amnesty for egregious crimes, that option is effectively taken off the bargaining table and the parties to the conflict cannot inject it as a demand.

Universal Jurisdiction, the ICC, and Limits to Clemency

The examples in the previous section demonstrate that broad amnesties and assurances of immunity from prosecution are not necessary to obtain peace and that they may indeed be counterproductive to that end. In the future, in any event, the possibility of including effective guarantees of that sort in peace negotiations will be severely restricted. As we have seen, the international community—through the United Nations' peacemaking efforts—has developed a doctrine on this topic, consistent with a correct interpretation of principles of international law. In addition, the international community has been moving decisively in the direction of ensuring that justice

[22] An interesting legal issue arises from this amnesty. Undoubtedly, Foday Sankoh and his accomplices will invoke it as a defense against future prosecutions, either in Sierra Leone or abroad. A strong case can be made that it is invalid both as a matter of domestic and of international law, not only because it is contrary to the emerging principles discussed in this essay, but also because it was conditional on the rebels' abiding by the obligations they assumed in the peace agreement and then promptly ignored. In October 2000, the UN settled this question with regard to the hybrid court that is being set up and will have jurisdiction both for international crimes and for some domestic law offenses. The amnesty will apply only to the latter. See Michael Scharf, "The Special Court for Sierra Leone," *ASIL Insight*, October 2000; available on American Society of International Law Web page at www.asil.org/insigh53.htm.

is actually done when it comes to genocide, war crimes, and crimes against humanity. The Security Council has created two ad hoc tribunals (former Yugoslavia and Rwanda) and may soon create two or possibly three more (East Timor, Sierra Leone, and Cambodia).[23] The ICTY and ICTR are endowed with primacy of jurisdiction, so that domestic acts of clemency (amnesties or pardons) and even fake prosecutions set up to preempt serious ones will have no effect over the cases they choose to try.

Another important limitation on domestic clemency schemes comes with the sudden importance of universal jurisdiction as a result of the Pinochet case. The case began with a prosecution in Spain by judge Baltazar Garzón, based on a broad reading of the Spanish procedural and jurisdictional statute, a reading upheld unanimously by the Audiencia Nacional, the court with appellate criminal jurisdiction.[24] The indictment deliberately ignored the self-amnesty decree passed by Pinochet in 1977 as contrary to international law and thereby included many charges that in Chile would have been covered by that blanket amnesty. Eventually, the Law Lords in Britain did not rule on the validity of Chile's amnesty law as a bar to extradition, because those offenses and many others not covered by the amnesty were set aside on other grounds.[25] Significantly, the three other European jurisdictions that requested Pinochet's extradition also ignored the self-amnesty decree.

The Pinochet precedent has given rise to other actions in Senegal (prosecution of dictator Hissein Habre of Chad), Mexico (arrest of an Argentine Navy officer and initiation of extradition proceedings pursuant to a request by Judge Garzón), Italy (arrest of an Argentine Army officer pursuant to a request for extradition from France), and even the United States (brief detention of a Peruvian intelligence operative, later allowed to return to his country because of immunity attached to his temporary visa). In most of these cases, and probably in future ones as well, the defendants will attempt to invoke a domestic act of clemency and demand that the rest of the world respect it. They are unlikely to succeed on those grounds, especially if those acts of clemency consist of blanket amnesties of the nature that international law prohibits.

[23] In Sierra Leone the hybrid option is to set up a court of domestic jurisdiction with international support and some UN participation. Michael Scharf, "The Special Court for Sierra Leone." It appears that something similar is being negotiated for Cambodia.

[24] Although Spanish nationals were included as victims in the early stages of the Garzón prosecution, the Spanish jurisdictional statute is not a "passive personality" but a true "universal jurisdiction" statute, meaning that Garzón had jurisdiction whatever the nationality of the victims. In fact, the case was later expanded to include many non-Spanish victims, and the warrant of arrest against Pinochet came out of Garzón's evidence about Operation Condor, whose victims were not Spanish nationals.

[25] They were excluded under the "double criminality" rule of extradition law, as the Law Lords decided that extraterritorial torture (as opposed to torture itself) had not become a crime in British law until 1988, when the Convention against Torture was ratified and implemented.

Even more decisively, the Rome Statute for an International Criminal Court, adopted on July 17, 1998, places further restrictions on the future effectiveness of amnesties and pardons.[26] The historic adoption of this treaty by itself signifies the will of the international community not to allow impunity for genocide, war crimes, and crimes against humanity. Unlike the ICTY and ICTR, the ICC will not have primacy of jurisdiction over domestic courts exercising territorial, personal, or universal jurisdiction. At the same time, the ICC will have only prospective jurisdiction starting on the date in which the treaty enters into effect (after sixty states ratify it). Even so, as the expression of a very broad agreement among the nations that participated in drafting it, the Rome Statute is an authoritative indication of the status of the issue in international law. In this regard, the Rome Statute is very clear in placing responsibility squarely on the ICC itself for deciding whether a domestic amnesty should be a bar for prosecution and whether any other domestic prosecution or conviction is a good-faith effort that should trigger the principle of *ne bis in idem* (exclusion of double jeopardy).

It is safe to say that the Rome Statute, the future existence of the ICC, the creation of ad hoc courts by the Security Council under Chapter VII of the UN Charter, and the proliferation of universal jurisdiction statutes in countries that are signatories of multilateral treaties that so prescribe[27] have the salutary effect of narrowing the availability of broad amnesties and pardons, even when such amnesties are allegedly required to put an end to armed conflict. In fact, they will prompt peacemakers and domestic actors to seek formulas to achieve true reconciliation while respecting the inherent dignity of the victims of human rights abuses.

Guidelines for Respecting Local Arrangements

The ICC and courts exercising universal jurisdiction should not be *ipso jure* oblivious to domestic arrangements that may include some form of clemency. We can only state with a high degree of certainty that local statutes or decrees the effect of which is to create "an atmosphere of impunity" (in the words repeatedly used by the UN Human

[26] *Rome Statute for an International Criminal Court*, UN Doc. A/CONF.183/9, Rome, July 17, 1998. The statute has been signed by 135 countries and ratified (as of February 2001) by 28 countries. Sixty ratifications are needed for the statute to enter into force.

[27] Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* [United Nations Treaty Series], p. 277, entered into force January 12, 1951; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 *UNTS*, p. 85, entered into force June 26, 1987; Inter-American Convention on Forced Disappearance of Persons, adopted in Belem do Pará, June 9, 1994, entered into force March 28, 1996, reprinted in 32 *ILM* [International Legal Materials] (1994), p. 1529.

Rights Committee) will not enjoy any deference. But it is quite apparent that even societies that engage in a good-faith effort to confront the past with due regard for the plight of the victims and respect for international law principles will frequently have to incorporate some form of clemency into the mix. The most interesting example is South Africa and its Truth and Reconciliation Commission (TRC). The Act of Parliament that created the TRC wisely chose to avoid the path of a blanket amnesty. Instead, "immunity" from prosecution was offered to the perpetrators of abuse from all sides, but on condition of their coming forward and contributing to the knowledge of the events, and of the fate and whereabouts of the victims. Immunity was to be conferred on condition of truthfulness and only for those crimes to which the suspects confessed. The grant of immunity was issued by a special panel of the TRC formed by judges, only after hearing those victims who chose to object. At the end of the process, many crimes of the apartheid era remain unpunished; on the other hand, only a few perpetrators are now protected by immunity conferred by the TRC, and prosecution can proceed against all others.

It is easy to see that there is a vast difference between a blanket amnesty and what South Africa chose to do. Blanket amnesties of the type generally passed in Latin America have the effect of preventing any questioning of any suspect, any investigation or gathering of evidence on the events they cover. They also produce the immediate repeal of convictions and the release of those convicted, along with the termination of pending proceedings and the release of anyone awaiting trial. They do not require any act of contrition or remorse, any atonement from the alleged perpetrators. And they are a serious obstacle to the discovery and disclosure of the truth surrounding egregious crimes that, like disappearances, condemn families to the unending sorrow of not knowing what happened to their loved ones.[28]

Increasingly, societies confronting the past must deal with the enormity of the challenge that effective prosecutions present. In one or another measure, all countries emerging from nightmares of repression, genocide, or war crimes will have serious deficiencies in their administration of justice. Considerations of justice will also

[28] Not surprisingly, in countries like Chile, Argentina, and Uruguay, courts have begun to interpret these laws narrowly, so as to give effect to principles of international law. For example, judges will continue inquiries and investigations until the facts establish clearly whether the amnesty applies. Disappearances are considered "continuing crimes" whose effects outlive the amnesty, at least until the death of the victim and its circumstances are reliably established. Courts also institute procedures of investigation into the facts in order to give effect to the "right to truth" as one of those emerging obligations of the state, even if in the end no punishment is possible. See Felipe Michelini, "El largo camino de la verdad," *Revista IIDH* 24 (July/December 1996), pp. 157–72; Martín Abregú, "La tutela judicial del derecho a la verdad en la Argentina," *Revista IIDH* 24 (July/December 1996), pp. 11-47; Juan Méndez, "Derecho a la verdad frente a las graves violaciones a los derechos humanos," in Martín Abregú and C. Courtis, eds., *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (Buenos Aires: Del Puerto-CELS, 1997); Méndez, "Accountability for Past Abuses."

require distinctions on levels of complicity and responsibility. In some cases, communities will resort to customary law and traditional practices to engage in attempts at "restorative justice." As in South Africa, there will be new occasions in which a reasonable bargain may be struck, offering some form of clemency in exchange for information to satisfy the right to truth, or perhaps leading to the prosecution and punishment of more culpable actors.

The question then arises as to how much deference the international community owes to those domestic arrangements that include some form of clemency. Right now, the question is more or less abstract and philosophical, but it will sooner or later become subject to legal decision-making, as courts exercising universal jurisdiction or entertaining extradition requests, and eventually the ICC, are confronted with a legal challenge based on those arrangements.

It is not only a matter of who makes the decision, but of what set of objective criteria govern it. As to the first question, governments that have attempted some form of coming to terms with their past would argue that they alone should decide whether external interventions are useful, or even justified. This is the position taken by the Chilean democratic government (as opposed to Pinochet's defense team) in arguing in Britain against the general's extradition to Spain. To its credit, their success in bringing Pinochet back to Chile was not predicated on a defense of absolute sovereignty, but on Chile's ability and willingness to prosecute such crimes. The argument did not sound persuasive at the time, since there had been ten years of democracy during which Pinochet had enjoyed complete impunity. But to the surprise of many skeptics (including this author), the wheels of justice have begun to move even against Pinochet since his return to Chile.

In general terms, the opinions of a government that has made good-faith efforts at accountability should be carefully considered. The decision should lie, however, with the courts exercising universal jurisdiction, and eventually with the ICC. If these forms of international justice were seen as mere forums of convenience for the national states of the accused, their effectiveness could be severely compromised. That is why the Rome Statute wisely left the ultimate decision on jurisdiction to the ICC itself, though it also wisely provided for a process by which all claims about that jurisdiction can be heard.

At this point, at least, the matter of the criteria under which universal or international court jurisdiction will be exercised is governed only by the principle of complementarity, the meaning and scope of which elicited strong debate in the discussions leading to the Rome Statute of 1998.[29] Complementarity is essentially the

[29] Rome Statute, Art. 1. Complementarity does not apply to the ICTY and ICTR, since they enjoy primacy of jurisdiction. For the same reason, they are not bound by any domestic decision on clemency.

principle that the ICC's jurisdiction is subsidiary to those of appropriate national courts. This treaty made it clear that the ICC will be the ultimate arbiter of complementarity, after hearing all competing claims to jurisdiction. The ICC is also empowered to decide what weight, if any, to give to domestic amnesties or to domestic prosecutions for the same offenses. The general principle of complementarity is informed by the rule on admissibility set forth in Article 12.[30] The ICC is required to defer to domestic jurisdiction unless the respective national court is unwilling or unable to prosecute the potential defendant.[31] The ICC is also bound by the rule of *ne bis in idem*, unless the domestic prosecution is a sham to help the defendant avoid justice.[32] These are appropriate general guidelines, but eventually the ICC will have to develop more detailed criteria in its jurisprudence, particularly if it is confronted with local arrangements that are not blatantly unfair. When the time comes, the ICC will have to judge each case on the basis of the principles of international human rights law mentioned earlier. The degree to which a society has made a good-faith effort to deal with its past will be considered in deciding whether to retain jurisdiction or leave local arrangements undisturbed.

The matter applies as well to prosecutions attempted extraterritorially under the principle of universal jurisdiction. The issue is even more pressing in those cases, because complementarity is at best an implied rule there with potential for a wide variety of interpretations, and because prosecutions of this kind often take place as targets of opportunity. In Pinochet and the other cases mentioned above the solution may have been relatively simple, given the illegitimate nature of the norms under which the defendants enjoyed impunity in their home countries. But in the near future we may be confronted with cases in which respecting or ignoring local clemency is not so clear-cut. At that time, it will be important to think these issues through and to apply universal rules, because mistakes can have a serious effect on the credibility and legitimacy of efforts at international justice when local justice fails. The wide variety of possibilities of universal jurisdiction, and the complexity of working across different legal traditions, make it all the more important to ascertain that in each case the effort is guided by objective legal norms and shielded as far as possible from perceptions of political motives.

One recent example of the need for more objective standards is the decision by the Spanish courts to drop a case against Guatemala's generals brought by Nobel Peace laureate Rigoberta Menchú. If the decision had been based on a lack of evidence or the failure of the complaint to meet the threshold of information needed to

[30] The territorial state or the state of nationality of the accused must be parties to the treaty or must accept the jurisdiction of the ICC for the case under investigation.

[31] "Unwillingness" and "inability" are defined in Art.17, para. (2) and (3).

[32] Art. 20 (3).

proceed, it might have been well received. But the stated reason was that it had not been proved that Guatemalan courts were unable or unwilling to act. It was on these grounds that the court distinguished this case from those against Pinochet and several Argentine defendants. On those grounds, however, the decision does not make much sense. The military in Guatemala is shielded by several amnesties passed by military and civilian regimes before 1996. It is true that the 1996 amnesty law, enacted as part of the peace process, explicitly excludes crimes like the ones the Nobel laureate submitted to Spanish courts. The Guatemalan judiciary, however, has shown no disposition to investigate seriously such crimes, even if the previous amnesties were considered inoperative. In contrast, both in Chile and Argentina possibilities remain open for the courts to hear the same cases prosecuted by Judge Garzón in Spain. The question of de facto impunity is also arguably a much more serious problem in Guatemala than in Chile and Argentina.[33]

This example does not by itself disqualify the effort to use courts that can exercise universal jurisdiction. It does, however, illustrate the need for clear thinking about its limits and purposes. In my view, if a country has made an effort to live up to international obligations emanating from the principles outlined above, there should, at least at the outset, be a strong presumption in favor of deferring to its authority. In this regard, the first step will always be an examination of the general scheme that was adopted, including all its conditions of legitimacy, and the degree to which it represents a good-faith effort to achieve reconciliation without ignoring the plight of the victims. The inquiry, however, should not end there. A general analysis is necessary but not sufficient, and the authority making the judgment as to the deference due to local arrangements must also look into how the general scheme was applied to the case in question. Some grants of clemency may offend our universal sense of justice and humanity, even if the general scheme is in principle legitimate. For example, I agree with John Dugard that the South African policy and statute creating the TRC are generally compatible with international law.[34] Many and perhaps most of the individual decisions on amnesty, both granting or denying it, are probably also correct. But the immunity awarded to the perpetrators of the St. James Church massacre, in which members of the Pan African Congress shot randomly at churchgoers because they were white, does not deserve deference from the international community because it violates South Africa's affirmative obligation to investigate, prosecute, and

[33] De jure impunity is secured via amnesties or laws designed to prevent investigation and punishment. De facto impunity prevails when prosecutors, judges, and other authorities simply decline to investigate and prosecute, or when high authorities deliberately interfere to thwart investigations.

[34] John Dugard, "Reconciliation and Justice: The South African Experience," *Transnational & Contemporary Problems* 8 (1998), p. 277.

punish crimes against humanity.[35] Similarly, the acquittal of General Magnus Malan and his codefendants, in a trial marred by prosecutorial misconduct favoring the accused, probably should not be respected by non-South African courts, should they ever get the chance to exercise jurisdiction over the serious crimes committed by the covert operatives Malan commanded.

Conclusion

There is, of course, a way in which international action to curb impunity can go awry. We occasionally come dangerously close to determining from a long distance what societies torn by violence actually require, and we do not stop to consider the views of the people who have to live with the legacy of abuse and also with the consequences of a policy to deal with that legacy. It is not a matter to be resolved simply by an opinion poll, or even by an election or referendum, because respect for the inherent dignity of each victim is essentially a countermajoritarian principle. It would indeed be a travesty to follow blindly the will of the majority—even if democratically expressed—when almost always the victims will come from very discrete minorities (political, religious, or ethnic) in each society.

On the other hand, the point of international intervention in these matters is not to replace the judgment of domestic actors, but to prompt war-torn societies to live up to their international obligations and to seek reconciliation in its truest form. Ideally, therefore, the ICC and courts of universal jurisdiction would have little or no business. If societies confront their past and reckon with it effectively, there should be no need for the international community to step in. In cases of this sort, the ICC and other judicial actors should defer to local arrangements and decline to prosecute. It would be a very healthy sign if cases of effective national reconciliation were frequent, though the current state of affairs in the world does not offer grounds for optimism. The prospect of extraterritorial or international prosecution and trial, under these circumstances, provides an important incentive to societies emerging from conflict and despair, an incentive to approach the question of national reconciliation seriously and humanely.

[35] Garth Meintjes and Juan E. Méndez, "Reconciling Amnesties with Universal Jurisdiction," *International Law Forum* 2 (2000), pp. 76–97.