

Transitional Justice

Volume I
General Considerations

Transitional Justice includes:

Volume I: General Considerations

Volume II: Country Studies

Volume III: Laws, Rulings, and Reports

Transitional Justice

**HOW
EMERGING
DEMOCRACIES
RECKON
WITH
FORMER
REGIMES**

Volume I
General
Considerations

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EDITOR

Foreword by
Nelson Mandela



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The views expressed in this book are those of the authors alone. They do not necessarily reflect views of the United States Institute of Peace.

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VOLUME I: GENERAL CONSIDERATIONS

Summary of Contents

Foreword	xi
— <i>Nelson Mandela</i>	
Preface	xiii
— <i>Richard H. Solomon</i>	
Introduction	xv
— <i>Charles D. Smith</i>	
Acknowledgments	xviii
The Dilemmas of Transitional Justice	xix
— <i>Neil J. Kritz</i>	
1. Overview	1
2. Distinguishing Between Transitions: How Circumstances Shape the Available Options	55
3. The Relationship Between Justice and the Prospects for a Democratic Transition	121
4. Perspectives on Accountability and Moral Responsibility	155
5. Documenting the Former Regime: Commissions of Inquiry	223
6. Criminal Sanctions: The Question of Prosecution	335
7. Responsibility of Superiors and Subordinates	439
8. Non-Criminal Sanctions: Limiting the Public Role of Those Affiliated with the Former Regime	459
9. Treatment and Compensation of Victims	489
Contents of Volume II: Country Studies	593
Contents of Volume III: Laws, Rulings, and Reports	602

VOLUME I: GENERAL CONSIDERATIONS

Contents

Foreword.....	xi
— <i>Nelson Mandela</i>	
Preface.....	xiii
— <i>Richard H. Solomon</i>	
Introduction	xv
— <i>Charles D. Smith</i>	
Acknowledgments	xviii
The Dilemmas of Transitional Justice	xix
— <i>Neil J. Kritz</i>	
1. Overview.....	1
Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints.....	3
— <i>José Zalaquett</i>	
Justice After Transitions.....	32
— <i>Jamal Benomar</i>	
Project on Justice in Times of Transition: Report of the Project's Inaugural Meeting.....	42
— <i>Mary Albon</i>	
2. Distinguishing Between Transitions: How Circumstances Shape the Available Options.....	55
Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies.....	57
— <i>Guillermo O'Donnell and Philippe C. Schmitter</i>	
The Third Wave: Democratization in the Late Twentieth Century.....	65
— <i>Samuel P. Huntington</i>	
To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone.....	82
— <i>David Pion-Berlin</i>	
Justice After Transitions: On the Choices Successor Elites Make in Dealing With the Past	104
— <i>Luc Huyse</i>	
The End of Decommunization	116
— <i>Stephen Holmes</i>	

3. The Relationship Between Justice and the Prospects for a Democratic Transition	121
The Breakdown of Democratic Regimes: Crisis, Breakdown, and Reequilibration.....	123
— <i>Juan J. Linz</i>	
From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism	132
— <i>John H. Herz</i>	
How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?	146
— <i>Ruti Teitel</i>	
4. Perspectives on Accountability and Moral Responsibility	155
The Question of German Guilt.....	157
— <i>Karl Jaspers</i>	
What Should Be Done About the Guilty?.....	172
— <i>Aryeh Neier</i>	
State Crimes: Punishment or Pardon (Conference Report)	184
— <i>Alice H. Henkin</i>	
Transitional Governments in the Breach: Why Punish State Criminals?	189
— <i>Jaime Malamud-Goti</i>	
Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations.....	203
— <i>José Zalaquett</i>	
Individual Responsibility for Assisting the Nazis in Persecuting Civilians.....	207
— <i>Stephen J. Massey</i>	
Policy Statement on Accountability for Past Abuses.....	217
— <i>Human Rights Watch</i>	
Policy Statement on Impunity.....	219
— <i>Amnesty International</i>	
5. Documenting the Former Regime: Commissions of Inquiry	223
Fifteen Truth Commissions—1974-1993: A Comparative Study	225
— <i>Priscilla B. Hayner</i>	
Truth as Justice: Investigatory Commissions in Latin America	262
— <i>Margaret Popkin and Naomi Roht-Arriaza</i>	
Truth and Justice: The Delicate Balance—Documentation of Prior Regimes and Individual Rights.....	290
— <i>Mary Albon</i>	

Two Views from the Truth Commission for El Salvador	
The United Nations Truth Commission for El Salvador	292
— <i>Thomas Buergenthal</i>	
International Truth Commissions and Justice	326
— <i>Douglass W. Cassel, Jr.</i>	
6. Criminal Sanctions: The Question of Prosecution	335
Justice After Transition: On the Choices Successor Elites Make in Dealing With the Past	337
— <i>Luc Huyse</i>	
Trial by Fiat of the Successor Regime.....	350
— <i>Otto Kirchheimer</i>	
Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime.....	375
— <i>Diane F. Orentlicher</i>	
Response: The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina.....	417
— <i>Carlos S. Nino</i>	
A Reply to Professor Nino	437
— <i>Diane F. Orentlicher</i>	
7. Responsibility of Superiors and Subordinates	439
The Defense of Obedience to Superior Orders: The <i>Mens Rea</i> Requirement.....	441
— <i>Jeanne L. Bakker</i>	
Command Responsibility for War Crimes	456
— <i>Major William H. Parks</i>	
8. Non-Criminal Sanctions: Limiting the Public Role of Those Affiliated with the Former Regime	459
Lustration in Eastern Europe.....	461
— <i>Herman Schwartz</i>	
A Lesser Evil?.....	484
— <i>Andrzej Rzeplinski</i>	
Policy Statement on Eligibility for Public Office of Those Associated with Abusive Regimes	488
— <i>Human Rights Watch</i>	
9. Treatment and Compensation of Victims	489
A Miracle, A Universe: Settling Accounts with Torturers (Foreword and Afterword).....	491
— <i>Lawrence Weschler</i>	
Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Summary and Conclusions.....	500
— <i>Theo van Boven, Cees Flinterman, Fred Grünfeld, and Ingrid Westendorp</i>	

United Nations Commission on Human Rights: Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms	505
— <i>Theo van Boven</i>	
After the Elections: Compensating Victims of Human Rights Abuses	551
— <i>Ellen L. Lutz</i>	
On Doing What One Can: An Argument Against Post- Communist Restitution and Retribution	566
— <i>Jon Elster</i>	
Reparations: Attention Must be Paid	569
— <i>Ignacio Martin-Baro</i>	
Preliminary Reflections from a Psychological Perspective	572
— <i>Yael Danieli</i>	
Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation	583
— <i>David Becker, Elizabeth Lira, Moria Isabel Castillo, Elena Gomez, and Juana Kovalskys</i>	
Contents of Volume II: Country Studies	593
Contents of Volume III: Laws, Rulings, and Reports	602

FOREWORD

This important publication on transitional justice comes at a time when the world is grappling with the problems of governance, legitimacy, democracy, and human rights. In recent years, particularly during the past decade, there has been a remarkable movement in various regions of the world away from undemocratic and repressive rule towards the establishment of constitutional democracies.

In nearly all instances, the displaced regimes were characterized by massive violations of human rights and undemocratic systems of governance. In their attempt to combat real or perceived opposition, they exercised authority with very little regard to accountability.

Transition in these societies has therefore been accompanied by enormous challenges. While it has signified new hopes and aspirations, it has at the same time brought into sharp focus the difficult choices that these countries would have to make on their road to democracy and economic progress.

Ironically, the advent of democracy has also put the welcome endeavors for national consensus to a test. In South Africa, for instance, it has highlighted the deep divisions that have existed within society.

As all these countries recover from the trauma and wounds of the past, they have had to devise mechanisms not only for handling past human rights violations, but also to ensure that the dignity of victims, survivors, and relatives is restored. In the context of this relentless search for appropriate equilibria, profound issues of policy and law have emerged. They have arisen out of the question of how a country in transition should respond to allegations of gross human rights violations by individuals of either the predecessor or extant authority. The issue that has concerned the international community is the problem created by the incompatibility of such amnesties with a state's international obligations.

In so far as these volumes on *Transitional Justice* bring together under one roof the diverse experiences of transitional societies, they provide an impetus for the creation of an international community predicated on human dignity and justice. The variety as well as the richness of experiences contained in this publication will certainly be a useful guide not only to students and researchers in retrospective justice, but also in the popular endeavors to reorganize civil society.

My heartfelt congratulations to the United States Institute of Peace for this timely and well-organized publication.

Nelson Mandela
President of the Republic of South Africa

PREFACE

The movement from repressive regimes to democratic societies has become a worldwide phenomenon as humanity approaches the twenty-first century. The transitions in South Africa, Central and Eastern Europe, and large parts of Latin America provide inspiring recent examples of this trend. The legacy of past political repression, however, can be an emotional and practical burden, affecting the stability of many a transition. How can a new society peacefully integrate those former officials who were associated with a past of repression as well as those who were its victims? How can an emerging democracy respond to public demands for redress of the legitimate grievances of some without creating new injustices for others? From 1989 to 1992, I observed the practical import of these complex questions while negotiating the United Nations Peace Agreement for Cambodia. The ultimate success of Cambodia's effort to build a participatory political order will be at least partly determined by the way the country handles its own recent past of genocidal violence and revolutionary repression.

The national culture, the history of the former regime, and the political realities of the transition process all influence the approach adopted by any society emerging from a period of repression. A constant in each case, however, is the search for a political process that will achieve justice as well as social stability and reconciliation. The history of the last fifty years provides a wealth of positive examples of the transition process as well as some notable missteps and failures.

The United States Institute of Peace is exploring these challenging questions through an ongoing project entitled "Transitional Justice," under the direction of our Rule of Law Initiative. The present three-volume collection, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, is a major outcome of that project. *Volume I: General Considerations* addresses legal, political, and philosophical perspectives. *Volume II: Country Studies* examines more than twenty transitions in the period from World War II to the present. *Volume III: Law, Rulings, and Reports* includes over 100 samples of legislation, constitutional provisions, judicial decisions, and reports of official commissions of inquiry, as well as relevant treaty excerpts.

This collection should become a standard reference for governments, private organizations, scholars, and other individuals dealing with these difficult issues. Some of the models of a transition process documented here may suggest approaches that would facilitate a just and peaceful transition; others might best be consigned to the history books. The United States Institute of Peace does not endorse any one approach, but offers these volumes in the belief that a comparative review can provide insights and examples for leaders in emerging democracies as they confront the challenges of transitional justice.

Richard H. Solomon
President
United States Institute of Peace

INTRODUCTION

When the communist world began its collapse in the late 1980s and the post-Cold War period opened, newly democratic nations, some with vibrant histories of democracy, others ruled only by tyrants, and a few enjoying the promise of new nationhood, looked to the democracies, especially the United States, for help in creating democratic institutions and the complex foundation of a citizenry of democrats so necessary to traverse the inevitable rough waters ahead. How, they asked, might we best inspire our people with the habits of democracy and establish legal institutions to propel and protect our new freedoms?

Without question, the new historical era offers the most exciting opportunity for durable peace since the end of the First World War. With that prospect in mind, the United States Institute of Peace responded in a variety of ways, among them by establishing a Rule of Law Initiative and directing all programs—grants, fellowships, in-house projects, education and training, and library and communications—to pay special attention to the integral relationship between the rule of law and international peace with justice and freedom. By creating the initiative, the Institute underscored law as a crucial component of both scholarship and practice in peacemaking and peacebuilding, based upon the following propositions:

- Although in practice imperfect, democracy is by nature peaceful: on the international plane, democracies generally do not wage war against each other.
- Democratic structures require governance under the rule of law, which includes separate and independent lawmaking and judicial branches of government and incorporates basic norms of human rights and civil rights.
- The rule *of* law—not simply rule *by* law—ensures a system governed by openness, security, and accountability such that citizens may enjoy trust in their institutions and among each other.

In designing the initiative, we were intrigued by the immediate problem of how new leaderships in former totalitarian countries would treat previous governments. People had been ruled on a daily basis by violence, terror, and division, whether for decades or a few years. Civil trust had been impossible, economic opportunity crushed, and congenial social relations hard. With democracy now in the air, there were penetrating cries for retaliation against old rulers and for revelations about the past. Amnesties were discussed as were prosecutions. Decisions about the personnel and activities of the earlier governments came to mark a critical phase of this era of democratization. The Western world watched, commented, in some instances sent experts to advise. If judgments lacked fairness and if truth was subverted by bias and propaganda, the democratic foundation would be built on sand. If prosecutions (or decisions not to prosecute) complied with due process standards and if reports protected

individual rights, then the symbols, structures, and operations of the new state would be built upon justice and the start would be strong. In short, democracy would not be safe over time without a thorough and careful application of normative rules to ensure that justice was achieved upon a foundation of the rule of law.

We believed that, while each country's experience was not only dramatic but unique, their problems were not unique, in particular with respect to the treatment of former officials. We were confident that similar issues were being struggled with across the world and that studies from the recent past would hold lessons for today. We determined to create a set of first-rate readings on basic questions of "transitional justice," demonstrating that, despite the uniqueness of each society and its historical and political context, there are unifying themes common to nations moving from despotism to democracy and lessons that each nation might bring to others.

These volumes are a major compilation of carefully selected excerpts from studies as well as primary documents on transitional justice, a subject that is itself a defining theme of the second half of the twentieth century and is likely to endure well into the new millennium as suppressed ethnic, religious, and political disputes continue to be unleashed and the struggle for democracy continues. The readings show continuity of issues across continents and time, while demonstrating remarkable complexity: readers will find passages rich in legal, moral, political, and social content and, perhaps most tellingly, deep historical context.

This project proceeded from the belief that the collection, editing, and organization of the best existing material would be an important contribution to the field, facilitating comparative analysis of issues that many countries have previously viewed as unique to their own experience. The project began with a review of over 17,000 books and articles of possible relevance to the project. With the exception of Volume III, the search was mostly limited to English-language materials. We also consulted extensively with political scientists, historians, legal experts, psychologists, theologians, human rights activists, philosophers, and specialists on various countries for ideas and references in the literature. And above all, we read, edited, and structured the volumes as our findings developed.

These volumes are limited, as the subtitle indicates, to the way that emerging *democratic* societies address the legacy of their repression of their own people. This approach has excluded consideration of non-democratic successor states (for example, the transition from the Pahlavi to Khomeini regimes in Iran, or from Somoza to the Sandinistas in Nicaragua). It has also excluded most material on the transition policies of occupation authorities (such as post-World War II Japan). Lastly, although proper handling of the transitional justice issue is integral to the process of democratization, these two issues are conceptually distinct; the present study therefore does not examine democratization *per se*.

Each volume stands on its own, and each reinforces the others. *Volume I: General Considerations* provides a range of views on the broad issues

entailed in transitional justice. Political, historical, legal, psychological, and moral perspectives are all included.

Volume II: Country Studies examines the handling of these nettlesome issues in twenty-one countries during the last fifty years. These case studies are arranged in chronological order: five countries that dealt with the issues of transitional justice in an immediate post-World War II context (Germany, France, Denmark, Belgium, and Italy); South Korea's democratic interlude in the 1960s (with a brief discussion of that country's subsequent return to these issues nearly three decades later); transitional justice in Southern Europe in the 1970s (Greece, Portugal, and Spain); emergence from dictatorships in the 1980s in Latin America (Argentina, Uruguay, Brazil, and Chile) and in Uganda; and, finally, selected post-communist transitions in the former Soviet bloc (Czechoslovakia, Germany, Hungary, Bulgaria, Albania, Russia, and Lithuania). Because few authors have examined the full range of transitional justice issues in any one country, most of these chapters weave together material from several sources. Often, various excerpts from the same source are interspersed throughout a country study to permit thematic organization of the material.

Volume III: Laws, Rulings, and Reports contains samples of primary documents from the transitions in twenty-eight countries. Among the more than one hundred documents included are legislative charters for "truth commissions" along with lengthy excerpts from their resulting reports, amnesty and purge laws and their evaluation by the judiciary, and detailed provisions for the rehabilitation of victims of the former regime. While some of these are official translations, most are unofficial translations that we commissioned or obtained from a variety of sources.

Except as indicated, the articles and documents reprint the original text. With each of the 224 individual selections included, we have generally adhered to the style, format, and footnote numbering of the original material. As a consequence, the style may vary from selection to selection.

Finally, it is important to point to a fact that too often is left unsaid: readers should know that while they are using these books, people in many other countries are studying them too. We hope these volumes raise the profile of scholarship on transitional justice; it is extraordinarily important for the success of democracy and a world with greater freedom.

Charles Duryea Smith
Former General Counsel and Director
Rule of Law Initiative
United States Institute of Peace

ACKNOWLEDGMENTS

The compilation and editing of these volumes—involving tracking down thousands of books, documents, and articles, extensive consultations and research, conceptualization of the major issues as well as historical analysis—would not have been possible without the assistance of a great many people. Space does not permit the recognition of everyone who gave of their time and knowledge, but I would like to express my heartfelt appreciation to the following individuals: John Herz, Guillermo O'Donnell, Herman Schwartz, and Ruti Teitel, who reviewed a draft of the volumes and provided valuable advice and perspective; Tim Phillips and Eric Nonacs of the Project on Justice in Times of Transition; Dwight Semler at the Center for the Study of Constitutionalism in Eastern Europe; Susan Scharf, Jocelyn Nieva, and especially Donald Gressett, who, serving in succession on the staff of the Institute's Rule of Law Initiative, each ably managed myriad tasks to keep this project on course; the Institute's capable Publications staff; Bob Schmitt, the Institute's computer guru, who solved numerous technical problems; and last but far from least, my wife Francesca, for her patience and support.

THE DILEMMAS OF TRANSITIONAL JUSTICE

In March 1992, some fifty participants from twenty-one countries gathered in Salzburg, Austria for a two-day conference organized by the New York-based Charter Seventy-Seven Foundation. The group included a Czech journalist, members of the Lithuanian and Uruguayan parliaments, a former president of Argentina, a Hungarian philosopher, a professor of history from Madrid, and a member of the Bulgarian Constitutional Court. The subject of the meeting was the one thing this diverse collection of individuals had in common: each came from a country which had suffered through a brutal and repressive regime, been liberated, and was obliged to cope with the legacy of that ousted system.

One major theme of the conference (and of the effort to compile the present three-volume collection, which had begun in 1991) was the extent to which the Central and Eastern Europeans and former Soviets who were just emerging from communist rule could learn any useful lessons from the Latin American transitions of the previous decade.

A fascinating undertone seemed to dominate the first day of the conference, as the assembled began to describe the experience of their respective nations. In words spoken and unspoken, in skeptical glances and general body language, the Latin Americans and Europeans seemed to be expressing the same thing to one another: the suffering of our people during the old regime and the difficulties resulting from our legacy is far worse than any hardship you endured. Ours is the greater pain; there is little we can learn from your experience.

There is, of course, some legitimacy to each point of view. On the one hand, communism was entrenched for forty-five years in East Germany, seventy years in Russia—so long that whole generations of the citizenry knew no other way of life. Though the most horrific and large-scale abuses of the Stalinist period had yielded to milder forms of repression in later years, the entire culture and fabric of their societies had been decimated during those decades; in dealing with the legacy of the old system, those in the former Soviet bloc had to reconstruct both government and the private sector virtually from scratch. On the other hand, though the military dictatorships which seized power in Argentina, Uruguay, Chile, and elsewhere in that region ruled for much shorter periods of time, the brutality with which they systematically tortured, killed, and caused large numbers of their citizens to "disappear" numbs in its detail. Numerous other contrasts exist between the legacy problems of Latin America and of post-communist Europe.

And yet. By day two of the proceedings, there was a gradual but palpable recognition that many of the details and dilemmas were not so different. How best, for example, to highlight the division between old and new government, so as to instill public confidence in the latter? This was a key issue for the participants from both regions. How should they handle those perceived as having served the old regime—as senior officials and architects of the system, as bureaucrats who implemented the

old policies and may continue to be obstacles to reform, as members of the military or secret police, or as paid or volunteer collaborators with the secret police? In some countries of the former Warsaw Pact, more than half the population was potentially implicated in one of these categories. The challenge, as one participant put it, was to strike the proper balance between a whitewash on the one hand and a witch-hunt on the other. Could victims of the old regime be fairly compensated? For that matter, was it possible to achieve consensus as to *who* were the victims of a system that, by its design, affected everyone in society? Above all, how to achieve authentic reconciliation and prevent the future recurrence of abuses of the sort inflicted by the old regime?

Over lunch one day at that meeting, I described to Raul Alfonsín, the courageous former president of Argentina who returned his country from military junta to civilian democracy, the "transitional justice" project underway at the United States Institute of Peace and some of the questions emerging from our examination of transitions from repressive regimes to democracy from the Second World War to the present. I pointed out that there were intriguing parallels between the cases of Argentina and Greece. (1) In both cases, a military junta ruled the country for a period of seven years. The relatively short duration is relevant in determining whether there are people who have "clean hands" and who can bring pre-regime experience and training to the job in replacing those affiliated with the ousted regime—or whether, as in Russia, nearly every qualified person was a part of the system in which they grew up. (2) In both Greece and Argentina, the regime was driven by a virulent, right-wing, anti-communist ideology. (3) Both were characterized by human rights abuses on a massive scale, including extensive use of torture, which prompted gradually increasing international condemnation and ostracism of the country. (4) In both cases, the junta had promised economic improvement, but was faced with a faltering economy by the end of the seven-year rule. (5) Both regimes were finally forced to relinquish power immediately following a failed military venture (in Cyprus and the Falklands respectively).

In Greece, President Karamanlis assumed power from the junta and dealt with the issues of "transitional justice"—including prosecution of ousted officials, purging from governmental and quasi-governmental agencies those affiliated with the former regime, access to and use of the surveillance and interrogation records of the military police, and compensation and rehabilitation of victims—in an unusually firm and swift manner in 1974-75. Certainly there were important differences between the Greek and Argentine cases. Given the striking continuities, however, I asked President Alfonsín whether he had had any information on Greece and the Karamanlis program when formulating his own government's approach to these same issues nine years later. Alfonsín was intrigued by the parallels between the two cases, but confirmed that, as he and his advisors grappled with these difficult questions in the transition from repressive rule, they had no such information to draw upon; they "invented" their approach from nothing. They would probably not have

followed the identical course as Greece, he assured me, but having material regarding the Greek experience on the table would have been extremely valuable in helping them to frame the issues and the options. President Alfonsín urged that we at the United States Institute of Peace pursue the present project so as to ease the transition process in future cases.

In countries undergoing the radical shift from repression to democracy, this question of transitional justice presents, in a very conspicuous manner, the first test for the establishment of real democracy and the rule of law—the very principles which will hopefully distinguish the new regime from the old. Strong political pressure for victor's justice in dealing with those who served the repressive regime, and the need to demonstrate a separation between the old and the new governments, may call for immediate and harsh retribution against a large number of individuals. New terms are created for the country or region in question—*denazification* in Germany after Hitler, *defascistization* in Italy, *dejuntafication*, *decommunization*—but they all express the same attempt of a liberated society to purge the remnants of its vilified recent past. If handled incorrectly, however, such action may deepen rather than heal the divisions within the nation. The temptation exists to compartmentalize, by viewing the need to "clean up old business" as unrelated to the democratization process. A vivid demonstration to the contrary, however, is the kangaroo trial and execution of former dictator Nicolae Ceausescu immediately following the fall of his government in Romania: with that one act seen on television around the world, the new government damaged its ability to move forward and the credibility of its interest in democracy and the rule of law—in the eyes of both other nations and its own citizens. Dealing firmly and aggressively with those who participated in, or benefitted from, the repression of the past is one way to demonstrate a clear break between the old regime and the new order. Adhering to the new government's pronounced commitments to principles of democracy and the rule of law, particularly in the tough cases, is another. The tension between the two is a theme which runs through each of the basic components of "transitional justice."

Criminal Sanctions

A basic question confronting all transitional governments, of course, is whether to undertake the prosecution of the leaders of the ousted regime or their henchmen for the abuses they inflicted upon the nation. Some will argue that trial and punishment of these people is not only essential to achieve some degree of justice, but that a public airing and condemnation of their crimes is the best way to draw a line between the old and new governments, lest the public perceives the new authorities as simply more of the same. Others will claim that these are simply show trials unbecoming a democracy, that they are manifestations of victor's justice, that the best way to rebuild and reconcile the nation is to leave the past behind by means of a blanket amnesty. In some cases, abuses have been

committed both by the former government and by its opponents, and it can be argued that the best approach is to forgive the sins of both sides.

The debate recurs time and again. Following the death of Franco, the relatively peaceful Spanish transition was marked by such a mutual amnesty. In Greece, nearly twenty years after the conviction of junta leaders who had overseen the torture of hundreds, plans to release them from prison still prompted huge protests. In newly democratic Argentina and Chile, the prospect of trials for the gross violations of human rights that had occurred under the old regime provoked bald threats of military intervention and a return to the terror of the past. In post-apartheid South Africa, disagreements at the end of 1994 regarding amnesty were reported to threaten the stability of the new coalition government. International standards are evolving which help deal with this question; there is a growing consensus that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.

When a decision is made to prosecute, the desire to use criminal sanctions against those who served the old regime may run directly counter to the development of a democratic legal order. The principles of *ex post facto* and *nulla poena sine lege*, for example, form one of the basic concepts of that legal order, barring the prosecution of anyone for an act which was not criminal at the time it was committed. At the very time that countries emerging from repressive regimes are committing themselves to these basic principles, the reality is that many of the acts that they desire to punish today were not crimes when they were committed under the former regime; they were often laudable and encouraged under the old system. In post-war France, for example, this issue was fiercely debated. Ultimately, thousands of people were prosecuted under a 1944 law establishing the new offense of "national indignity" for acts they had committed prior to the law's adoption. In the immediate post-communist period, largely owing to this same *ex post facto* dilemma, German officials initiated proceedings against Erich Mielke, the former head of East Germany's Stasi secret police, not for any abuses of the hated Stasi, but for a murder he had allegedly committed half a century earlier—based on evidence extracted by Nazi police. Although some sort of justice might have been served by this trial, the Mielke prosecution could not provide for East Germans the kind of catharsis that would be achieved through a public airing and trial of secret police wrongdoing.

Some of the worst abuses inflicted by former regimes *were* crimes under the old system, but they obviously were not prosecuted. If the statute of limitations for these crimes has already elapsed by the time of the transition, can the new authorities still hold the perpetrators accountable for their deeds? In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes (particularly those committed to suppress dissent in 1956 and 1968 respectively) had not been prosecuted for wholly political reasons, it was legitimate to hold that the statute of limitations had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could

begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly. In both countries, the matter was put to the newly created constitutional court for review. In a fascinating pair of rulings, each court handed down a decision which eloquently addressed the need to view this question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On this basis—with plainly similar fact patterns—the Czech constitutional court upheld the re-running of the statute of limitations for the crimes of the old regime as a requirement of justice; the Hungarian court struck down the measure for violating the principle of the rule of law.

How widely should the net be cast in imposing sanctions on those who served the former regime? How high up the chain of command should superiors be responsible for abuses inflicted by their underlings? What standard of evidence is required to demonstrate that, rather than random events, these acts of persecution, corruption, and violence were designed, or at least condoned, by those at the top? Conversely, how far down the chain should soldiers or bureaucrats be held liable for following the orders of their superiors in facilitating these abuses? In dealing with the legacy of the former East Germany, several young border guards were prosecuted in 1991 for implementing shoot-to-kill orders that produced nearly 600 deaths of East Germans attempting to escape across the border. Many criticized the first of these trials for punishing the "small fry" at the end of the chain of responsibility who actually pulled the trigger, while leaving untouched the party leaders who had designed the repugnant system and given the orders. (In January 1995, seven former senior East German officials *were* eventually charged, in a 1,600-page indictment, with manslaughter and attempted manslaughter for their roles in developing and overseeing the system.) In Rwanda, after ousting a regime that organized genocidal killings of at least half a million people, if the new government were to undertake prosecution of every person who participated in this heinous butchery, some 30,000-100,000 Rwandan citizens could be placed in the dock—a situation that would be wholly unmanageable and extremely destabilizing to the transition. Moving the nation forward toward both justice and reconciliation plainly precludes an absolutist approach to the chain of responsibility.

In bringing those who served the former regime to account for their actions, what kind of deeds should be scrutinized? Should prosecution be limited to egregious violations of human rights? Should they be extended to charges of corruption and economic mismanagement? In Bulgaria, for instance, several former officials were convicted because of their role in specific foreign aid decisions that contributed to the country's economic ruin.

Should there be limits on the penalties imposed in these criminal cases? Some will argue that, even in those countries in which capital punishment is used, it should not be available in transitional purge trials. Given the high emotion and political pressures inherent in these trials, they suggest that use of the death penalty will further aggravate tensions within the society.

The temptation of victims of ghastly human rights violations under the old regime to make short shrift of the criminal procedural rights of those put in the dock for the crimes of that regime—to pay them back for the abuses they inflicted—is certainly understandable. Providing yesterday's dictators and torturers with the judicial guarantees and procedural protections that they never afforded their victims may be a source of short-term frustration during the transition, prompting cynicism of the sort expressed by an East German activist: "what we wanted was justice; what we got was the rule of law." Nonetheless, if these defendants are not afforded all the same rights granted to common defendants in a democratic order, the rule of law does not exist and the democratic foundation of the new system is arguably weakened.

Non-Criminal Sanctions

At least as great a challenge to the installation of democracy and the rule of law comes in the context of administrative penalties. Most frequently, the issue is that of purging from the public sector those who served the repressive regime. In post-war France, the process was called *epuration*; in the Czech and Slovak Federal Republic, *lustration*. A variety of effective arguments are made in favor of this process. The new democratic authorities must find ways to restore public confidence in the institutions of government. The public may reasonably be skeptical when told they will now be treated differently, if these institutions simply retain all their existing personnel. These, after all, are the same people who kept the engine of the repressive state operating; it is unlikely that many of them have undergone a sudden epiphany that has turned them into committed democrats. Even if they do not actively attempt to sabotage the changes undertaken by the new authorities, these people are set in the old ways and will serve as obstacles to the process of democratic reform. Finally, jobs in public service, whether as senior ministers or as clerks, should be granted first and foremost to those who have demonstrated loyalty to the democratic ideals of the new order.

Depending on the country, those perceived as having supported the old regime might include senior officials and architects of the system, bureaucrats who implemented the old policies and may continue to be obstacles to reform, members of the military or police, paid or volunteer collaborators with the secret police, or even simply party members. Perhaps the most difficult of these categories in one country after another is the vague description of "collaborators." In some emerging democracies, those who fit into one of these categories potentially comprise more than half the population.

On the other hand, particularly in those countries where the ousted regime was in power for many years, these people may be the only ones with the knowledge and experience to staff the ministries and the banks and the other institutions without which the national infrastructure would surely collapse. Practical considerations may make them indispensable.

How to undertake such a purge while rebuilding on the basis of democratic principles? These programs of administrative sanctions do not, as a rule, provide individuals with the same level of due process protections from which they would benefit in a criminal proceeding. Driven by the fact that they involve a large number of people, purges tend to be conducted in summary fashion. Beyond procedural considerations, the rule of law rejects collective punishment and discrimination on the basis of political opinion or affiliation. In establishing accountability, even in a non-criminal proceeding, the burden of proof should be on the authorities making the accusation, not on the accused to prove his or her innocence. When large numbers of people are removed from their places of employment purely because they had worked there under the old system or because of their membership in a political party, without any demonstration of individual wrongdoing, they may legitimately cry foul and question the democratic underpinnings of the new government. Rather than contributing to reconciliation and rebuilding, the result may be the creation of a substantial ostracized opposition that threatens the stability of the new system.

In much of the former communist bloc, the issue of lustration was a source of great controversy during the first years after the revolutions of 1989. In Poland, for example, only 38 percent of those polled in late 1991 supported creation of a system for disqualification of former communists, officials, and collaborators from public offices; a March 1992 poll showed an increase to 64 percent in favor of disqualification. Some observers suggested that the trend was related to the complex questions of privatization and redistribution of wealth: necessary austerity programs and wrenching efforts to overhaul the entire economic system result in many people becoming more impoverished, and the desire consequently grows to assign blame for society's ills. In addition, a perception exists that many former communist officials gave themselves "golden parachutes" as they exited their government posts, in the form of embezzled funds and property or controlling interests in the newly privatized companies; rather than being punished, in other words, the old guard had won once again.

The courts reflect an interesting problem relative to the purge process. On the one hand, the rule of law requires an independent judiciary insulated from political pressures. This generally means that judges are not easily removable from their posts. Even if judges were easily purged, it might take years to train a qualified class of new lawyers and judges to replace them on the bench. On the other hand, in most cases of transition from totalitarian or authoritarian regimes, the judiciary was severely compromised and was very much a part of the old system, implementing the repressive policies and wrapping them in the mantle of law. In post-war Germany, when victims of Nazi persecution were authorized to file claims for damages, some of them were stunned to find their claims assigned to the very same judge who had sentenced the claimants or their relatives in the first place. In order to enhance the power and independence of the judiciary as part of the democratization process in post-communist Poland, a law was enacted establishing the irremovability of judges. One

consequence, subsequently recognized, was that many tainted communist judges thereby became entrenched in the "new" court system. An effort followed to create a system for the verification of judges based on their past activity and affiliation, and apply that system to both prospective new judges and those already in office.

In Ethiopia, it was proposed that all members of the former ruling party be denied the right to vote in elections. Such denial of suffrage based on previous party affiliation has occurred in other places, such as Norway after World War II. Other countries may attempt to ban the former ruling party and its successor parties. In Russia, President Boris Yeltsin's decree banning the Communist Party and seizing its assets was hotly debated and resulted in a closely watched case before the country's new constitutional court, which ultimately struck down half of the ban while leaving significant elements of it intact.

Once again, these efforts can rub against the intention to create a new, freer society wholly unlike the old regime. Administrative purge programs can easily be abused for purely political motives. In many cases, the old regime actually used the same methods, banning political parties, denying people a say in choosing their government. Citizens' rights to vote, to run for office, or to exercise their freedom of association are fundamental elements of a democracy. The balancing act for countries feeling their way through transitional justice is not an easy one.

Acknowledging the Past

In all cases of transition from a repressive regime, history has been controversial. Even after its ouster, the old guard will still have its defenders, who will deny that the evil acts of which it is accused ever took place, or will claim that they were actually perpetrated by others, or will suggest that they were justified by exigent circumstances. If left uncontested, these claims may undermine the new government and strengthen the hand of those determined to return the former regime to power. They will also add insult to the injury already inflicted on the victims.

Establishing a full, official accounting of the past is increasingly seen as an important element to a successful democratic transition. Criminal trials are one way in which the facts and figures of past abuses may be established. The establishment of a "truth commission," several variations of which are covered at length in each of the three volumes, is another. Following the initial phase of transition, this history may be reaffirmed in the long-term through national days of remembrance, the construction of museums and commemorative monuments, and the incorporation of this recent history into the curriculum of the nation's schools.

Compensation, Restitution, and Rehabilitation

In Russia, during the early stages of the transition from communist rule, there was no program to provide restitution of property or material

compensation to victims. There was also initially no attempt to deal with recent abuses. Instead, efforts focused on restoring to victims of Stalinism their good names. On a case-by-case basis, hundreds of these victims were granted posthumous rehabilitation. While acknowledging the wrongs inflicted decades earlier, such an approach is, of course, far less costly to the new government—in both material and political terms—than compensation of recent victims.

In Chile, where the terms of the transition proscribed the criminal prosecution of former officials—and the sense of justice and catharsis which might be achieved thereby—the new democracy undertook instead one of the most comprehensive programs of compensation and rehabilitation of those described herein, encompassing life-long pensions for the survivors of those who died in General Pinochet's prisons, compensation for prison time and for lost income, educational benefits, a national network of medical and psychological services for victims and their families, and exemptions from military service.

More often than not, the legacy left by departing totalitarian or authoritarian regimes includes a weak economy and empty government coffers, depleted through corruption or mismanagement. The nascent democratic government must use its limited resources to turn the economy around, restructure the bureaucracy to restore public trust in government and better fulfill its basic functions, and invest in new present- and future-oriented programs (such as overhaul of the educational system where it was previously infused with the ideology of the old regime) to ensure the security of democracy. In this circumstance, many will ask, how much of its limited funds should the new democracy be obliged to allocate for victims' compensation, paying for the sins of the old guard? In addition, some will argue, since it is impossible to adequately compensate all victims for their loss, perhaps it is unjust to divert precious resources when the only result is to make some more whole than others.

To be sure, the parents whose daughter was tortured to death by the former regime, which then disposed of her body without a trace, or the man who spent a dozen years in prison for his political beliefs when he should have been completing his professional training, building his career, and watching his toddlers become young adults cannot be made whole for their loss. Nevertheless, compensation serves at least three functions in the process of national reconciliation. First, it aids the victims to manage the material aspect of their loss. Second, it constitutes an official acknowledgment of their pain by the nation. Both of these facilitate the societal reintegration of people who have long been made to suffer in silence. Third, it may deter the state from future abuses, by imposing a financial cost to such misdeeds. There is a growing consensus in international law that (a) the state is obligated to provide compensation to victims of egregious human rights abuses perpetrated by the government, and (b) if the regime which committed the acts in question does not provide compensation, the obligation carries over to the successor government.

Internationalization of the Issues

In our ever-smaller world, the handling of transitional justice has increasingly become a source of interplay between new successor governments and those outside the country. When the Czech and Slovak Federal Republic adopted its "lustration" law to screen and purge a range of former communist officials and collaborators, it became a major focus of international attention. The Council of Europe and the International Labor Organization each analyzed it, as did numerous foreign non-governmental organizations. Foreign attention is often welcome. The report of the Chadian "Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories" begins with a map and profile of the country—obviously meant mostly for foreign consumption.

Foreign governments are forced to play a role in either providing refuge to those from the former regime or facilitating their exclusion or extradition for trial. Assisting in the tracing and return of assets which have been moved out of the country by the former leaders and their cohorts may also be appropriate. Some functions may be performed by wholly international bodies, such as the truth commission for El Salvador or the UN war crimes tribunal for Rwanda. Alternatively, foreign governments may play a part in advising, critiquing, or participating in the new leaders' plans with respect to such issues as amnesty, purging, and retraining for government personnel; the United States has arguably played such a role in Haiti.

These issues of transitional justice are highly charged flashpoints in many countries emerging from repression, with societal wounds still open and in need of treatment. Having recognized that the way in which these dilemmas are handled can directly affect the short- and long-term stability of the transition in many countries, foreign policy makers would be well-advised to keep this lens in focus as they monitor, anticipate, and respond to such transitions around the world.

Financing Transitional Justice

In theory, all victims of past repression are entitled to maximum compensation from a new government emerging from years of repression, but who is going to pay for it? High profile trials of former officials, particularly when they are looking farther back in time, can be expensive propositions, but justice done on the cheap is inadequate. Truth commissions, if they are to credibly research and create an unimpeachable historical record, need human, financial, and technical resources. Each of the aspects of transitional justice discussed above has a price tag attached—a serious problem for most emerging democracies struggling to rebuild their society anew. Most observers will agree, of course, that the long-term price of not dealing with these issues is greater still.

A recent Polish example drives home the point. A victim of human rights abuses under the old regime filed a successful lawsuit for damages

from the government, resulting in an order to pay a huge sum to the plaintiff. Following a public outcry over holding the new, financially strapped government accountable for the sins of its communist predecessor, all the money was donated to charity.

If the transitional government cannot afford to pay for these efforts, foreign governmental or private funding is obviously an option. The truth commission for El Salvador received \$1 million, some forty percent of its total budget, from the United States government. The commission in Uganda has received major infusions of funding from the Ford Foundation in the U.S. and Danita in Denmark. The Rwandan court system will hopefully receive foreign funding for the genocide trials it will undertake. In a lengthy bulletin produced "for NGOs and the media," the Special Prosecutor's Office created to investigate and prosecute crimes of the Mengistu regime in Ethiopia includes a section on "foreign support" which lists the contributions of six countries to the effort, ranging from a Canadian donation of \$40,000 to \$403,000 from Sweden. A recently established United Nations Voluntary Fund for Victims of Torture may also be of assistance in certain cases.

Some observers are wary of moving to foreign funding too quickly, particularly for victim compensation programs. If the national government is freed to allocate its resources and fiscal priorities without factoring in this issue, if it does not reach into its own coffers to acknowledge the victims of repression in a material sense, then the new regime may less effectively integrate the lessons of the past, and the sense that the state is paying its respect to the victims and restoring to them their dignity may be lessened—weakening both long-term democratization and rehabilitation.

The national resources so often embezzled by the leadership of totalitarian and authoritarian regimes—yet another issue facing emerging democracies—offers an interesting source of financing. Whether this entails efforts like that undertaken by the Philippine government to lay legal claim to millions of dollars worth of foreign assets and accounts controlled by Ferdinand and Imelda Marcos, or the efforts in Bulgaria and Albania to seize properties amassed by the former ruling clique and order them to reimburse the state millions of dollars, there is a certain sense of justice and balance to recapturing these ill-gotten gains and applying them directly to pay for other aspects of transitional justice. A curious variation on this was a legislative proposal in Poland to impose a special tax on communists, with a sliding scale based on one's position within the Communist Party hierarchy.

Particularly in countries emerging from communism or other centrally controlled economies, property restitution is not only a form of justice for victims, it is also a highly complex issue of economic conversion and privatization with obvious consequences for clarity of ownership and for business and investment opportunities in the emerging democracy. This may provide an additional incentive for foreign governments or businesses to help the restitution process along, including through subsidization.

As a rule, these are not problems that disappear quickly or easily. A half-century after the Second World War, the scars of Nazism are still felt in Germany. After the fall of the Berlin Wall and reunification, many acknowledged that the debate over decommunization was in many ways a shadow debate among East and West Germans over the success of denazification and was significantly colored by a desire to "do it better this time." The trials of Klaus Barbie and Paul Touvier for their crimes as part of the Vichy regime exposed still-raw nerves and soul-searching in France some fifty years after the facts in question. In Namibia, several years after the transition, officials claim that it is still too soon for an investigation and accounting of those who disappeared on both sides of the conflict, that such an effort would threaten Namibian stability; others argue that this past will haunt the country until it is dealt with. And in Cambodia, talk of bringing charges against leaders of the Khmer Rouge for the genocide they inflicted on their country twenty years ago will continue to affect the reconstruction process.

This is, of course, an ongoing process. A full accounting is yet to be written of transitional justice in countries such as South Africa, El Salvador, or Ethiopia. The current global trend from totalitarian and authoritarian systems to democratic ones will hopefully continue, producing new cases of transitional justice in the years to come. Through the publication of these volumes and the ongoing work of the United States Institute of Peace and others on this subject, one can hope that positive lessons will be derived from past experience, that future transitions will bolster their own stability by achieving justice and reconciliation through the rule of law.

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