

BREAKING THE RULES OF TRANSITIONAL JUSTICE

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What a stupendous, what an incomprehensible machine is man! Who can endure toil, famine, stripes, imprisonment and death itself in vindication of his own liberty, and the next moment . . . inflict on his fellow men a bondage, one hour of which is fraught with more misery than ages of that which he rose in rebellion to oppose. . . .

—Thomas Jefferson¹

INTRODUCTION

Transitional justice involves the process by which countries shifting from tyrannical regimes to democratic rule attempt to rectify past state abuses.² As states make this transition,³ leaders of the new order must try to remedy the injustices of the former regime's repressive practices. These injustices may include torture, forced disappearances, arbitrary detentions, and summary executions. Transitional justice encompasses various judicial and non-judicial approaches to dealing with these legacies,⁴ and it has come to dominate discussion during times of tumultuous regime change. Given the facts and reasoning developed herein, this Comment reveals the deficiency of those approaches and aims to devise more effective policies.

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¹ Letter from Thomas Jefferson, United States Minister to France, to Jean Nicholas Demeunier (Jan. 24, 1786), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page005.db&recNum=0104>.

² See Governance Resource Center Exchange, Transitional Justice, http://www.grc-exchange.org/g_themes/ssaj_transitionaljustice.html (last visited Apr. 17, 2006).

³ Throughout this article the words “state,” “nation,” and “country” will be used interchangeably.

⁴ See HUMAN RIGHTS WATCH, ANNUAL REPORT 1989, at 81-83 (1989); *see also* International Center for Transitional Justice, Mission and History, <http://www.ictj.org/en/about/mission> (last visited May 22, 2006).

More than simply describing the circumstances surrounding a political change, transitional justice signifies a specific methodology that seeks to strike a balance between full enforcement for former abuses and impunity. While the first extreme risks overwhelming the new power with prosecutorial obligations, the second undermines its accountability. This Comment will utilize the term “transitional justice” as defined by advocates for a certain methodological approach, not to encompass the general changes experienced by a country in transition. Transitional justice, as the term is employed here, represents the set of options available to a new democracy, including prosecution, amnesties, pardons, truth commissions (bodies which investigate past human rights violations),⁵ and more. An emerging state can determine the austerity of its own path, but the approach will reflect both external pressures to establish the rule of law and peculiarities in the makeup of each state’s history and political evolution.

Because the goal of transitional justice is to find a balance, its promoters and most scholars agree that justice will inevitably be imperfect in the transitional context, due to the circumstances created by political shifts.⁶ When a political system shifts from one of repression to one of democracy, it is likely that state institutions will emerge with the taint of the repressive regime.⁷ Although there are a number of notable exceptions,⁸ perpetrators

⁵ International Center for Transitional Justice, What is Transitional Justice?, www.ictj.org/en/tj (last visited May 22, 2006).

⁶ Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE* 22, 31-32 (Alice H. Henkin ed., 2002) (commenting that “imperfect justice” in transitional contexts is nearly inevitable because such transitional criminal justice systems tend to be dysfunctional).

⁷ In Chile, for example, the judiciary remained in place during and after the coup d’état of General Augusto Pinochet Ugarte and it “did not seriously examine claims of human rights abuses.” Neil J. Kritz, *Editor’s Introduction: Chile*, in *2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 453 (Neil J. Kritz ed., 1995). The Supreme Court also gave as broad an interpretation as possible to the 1978 Amnesty Decree, impeding investigations into the truth, and was loathe to investigate or punish crimes committed after 1978. Jorge S. Correa, *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, in *2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, *supra*, at 455, 460.

⁸ Notable exceptions include the trials at Nuremburg, the Tokyo war crimes trials for atrocities committed in the Philippines, and several trials following the Soviet

of gross violations of human rights⁹ have generally escaped, unscathed by domestic or international adjudication. More often than not, in efforts to secure their nascent democratic system, newly elected leaders strike political deals with the outgoing leadership.¹⁰ While these deals provide short-term stability, they fail to deliver their overall goals of civil society: acknowledgment of crimes, accountability for those crimes, and relief to the victims.

At the core of transitional justice lies a fundamental issue: how does the treatment of the state's past relate to the success of its democratic future?¹¹ During the changeover from repressive regime to democratic society the burdensome legacy of past oppression threatens to undo newly stabilized foundations. Transitional justice, as defined by its proponents, is the first real test for democratic statehood. However, it also stimulates enduring political and legal ramifications which raise genuine questions about employing transitional justice as a mechanism for reaching democratic ideals.

The purpose of this Comment is to evaluate the legitimacy of transitional justice's systemic approach by examining both its exercised means and actual outcomes. This Comment will also explore the differing perspectives in dealing with past violations

collapse such as in Hungary and the former Czechoslovakia. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 34-37 (2000) (explaining that "Nuremburg dramatically expanded the potential individual criminal liability for state wrongs"); Kritz, *supra* note 6, at 23 ("[T]rials at Nuremburg established basic principles regarding command responsibility, the defense of 'just following orders' and other points that influence the debate over accountability in new transitions fifty years later.").

⁹ The term "gross violations of human rights," as identified by Human Rights Watch, applies to genocide, arbitrary, summary or extrajudicial executions, forced or involuntary disappearances, torture or other gross physical abuses, and prolonged arbitrary deprivation of liberty. HUMAN RIGHTS WATCH, *SPECIAL ISSUE: ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES* 2 (1989); see also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* § 702 (1987).

¹⁰ See, e.g., José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in 2 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, *supra* note 7, at 25 (offering Argentina's Full Stop Law (*ley de Punto Final*) and Law of Due Obedience (*ley de Obedencia Debida*) as examples of President Raúl Alfonsín's accession to the former junta's demands of limited punishments).

¹¹ TEITEL, *supra* note 8, at 3.

in transitional states. Part I will discuss why the mechanism of transitional justice limits the amount of justice that can be achieved. This section will describe the overarching theory of transitional justice and the underlying difficulties that seem to necessitate a more limited approach. In addition, Part I will suggest that, despite the unique context stimulated by transition, limitations in the form of impunity, amnesties, pardons, or the like are unacceptable.

Part II will examine specific tools employed in carrying out transitional justice. Specifically, this section will assess whether instruments such as amnesties and truth commissions are legitimate in light of the sacrifice of justice they make in the name of truth and reconciliation.

Part III will dissect the case study of Chile, a classic example of transitional justice at work. This country survived a transition from despotic rule to a democratic system, but not without significant concessions to the former authoritarian leaders. Part III will also address recent actions taken in Chile that call into question the concessions of transitional justice.

Finally, this Comment will ask whether the tools of transitional justice, given their inherent sacrifices, should be the mechanisms of choice to assist new democratic leaders. Based on the following analysis, this Comment concludes that implementing transitional justice's conventional tools comes at too great a cost for emerging democracies and abdicates the government's responsibility to the victims. Also, new governments must establish pro-prosecution policies to satisfy the demands of justice that democracies have come to expect.

I. WHY DOES TRANSITIONAL JUSTICE MEAN "IMPERFECT JUSTICE"?

Injustice anywhere is a threat to justice everywhere. . . .
Whatever affects one directly, affects all indirectly.

—Martin Luther King Jr.¹²

Every country in transition faces impediments to a swift and thorough determination of responsibility for the past regime's

¹² Martin Luther King's Letter from the Birmingham Jail, Apr. 16, 1963, *available at* <http://www.almaz.com/nobel/peace/MLK-jail.html>.

abuses. Despite these impediments, the last two decades saw an increased consensus among states, inter-governmental bodies, and non-governmental organizations that the most effective way to establish accountability is through prosecution.¹³ In addition, over the last twenty years, the human rights movement amassed critical international legitimacy and clout, which had a direct effect in both international and domestic communities asserting their voices in demanding justice.¹⁴

However, neither a more excited international community nor a more aggressive domestic force can change the fact that transitional democracies exist in a unique paradigm. Unlike an established democracy, where the rule of law implies known rules and familiar concepts, emerging states face a set of conditions that render basic, everyday approaches to justice inapplicable.¹⁵

Depending upon the type of conflict that precipitated the political change, states in transition will face a string of cumbersome factors that complicate holding criminals accountable. First, transitional states will encounter a virtually nonexistent criminal justice system. Even where the judicial institutions and their personnel were once credible, civil war or years under repressive dictatorship have either destroyed them or left them tainted by corruption.¹⁶

Second, international assistance for the rebuilding or creation of an effective criminal justice system can go only so far. Such efforts require extensive training, development of material resources, and, often, the implementation of particular reforms or legislation, all of which require significant amounts of time to establish.¹⁷

Third, states in transition are forced to pursue justice in times of extremely fragile peace, often resulting in a limited ability to impose criminal sanctions.¹⁸ This is particularly true with respect to transitions from military rule, as in Latin America,

¹³ Kritz, *supra* note 6, at 25.

¹⁴ *Id.* at 24.

¹⁵ TEITEL, *supra* note 8, at 11.

¹⁶ Kritz, *supra* note 6, at 30.

¹⁷ *Id.*

¹⁸ TEITEL, *supra* note 8, at 48.

where residual power of the old order continued to constrain the objectives of the new government for significant periods after the “transition” itself was completed.¹⁹ Because of the ensuing conflict that strict prosecutorial objectives can incite, even the most insistent human rights advocates may oppose trials for past abuses and instead call for compromise.²⁰

In Chile, for example, despite his loss in a 1988 plebiscite and 1989 general election, General Augusto Pinochet Ugarte retained significant power upon his removal from office. He had named most of the judicial bench, packed the senate with military supporters,²¹ and remained commander-in-chief of the military until 1998.²² When Pinochet’s successor, Patricio Aylwin, appointed the National Commission on Truth and Reconciliation in 1990, Pinochet “warned the new government not to ‘touch a single hair of a single soldier’ nor ignore the 1978 amnesty law lest he repeat the events of September 1973.”²³ In response to Aylwin’s attempt to maneuver around the amnesty decree by suggesting that the disappearance of political prisoners could be considered an ongoing crime until deaths of *desaparecidos* were verified, Pinochet twice put the army on alert in battle-ready mode.²⁴ The combination of military threats and outrage from victims’ families forced Aylwin to strike a compromise.²⁵ His

¹⁹ Juan E. Mendez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 4 (A. James McAdams ed., 1997); see also Kritz, *supra* note 6, at 25 (explaining how transitional Argentina undertook to prosecute the leaders of the military dictatorship, charging them with over 700 separate crimes, and conducted a precedent-setting trial in Latin America where five of the junta leaders were convicted and sent to prison; when prosecutions continued, however, military muscle forced the government to step back, and eventually terminate the prosecutions altogether).

²⁰ Mendez, *supra* note 19, at 7.

²¹ Nine members of the Senate were hand-picked by Pinochet himself. José Zalaquett, *The Pinochet Case: International and Domestic Repercussions*, in THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE, *supra* note 6, at 47, 49-50.

²² *Id.*

²³ Kritz, *supra* note 7, at 454.

²⁴ *Id.*

²⁵ *Id.* Aylwin responded to the military alerts by proposing anonymity and amnesty laws to the military, causing an uproar amongst human rights and victims’ groups. He withdrew the proposals, but settled upon middle-of-the-road policies that left many dissatisfied. This will be explored in more detail in Section III.

aims at truth and national reconciliation, therefore, have been characterized as the pursuit of “justice insofar as possible.”²⁶

Finally, transitional settings often shape a civil society whose interests and objectives conflict with the limitations of the newly elected leadership. For example, Uruguay emerged from authoritarian rule in the 1980s and elected to follow a “forgive and forget” policy regarding past abuses.²⁷ President Julio María Sanguinetti championed this approach, reasoning that the value of moving forward outweighed any process that would force society to rehash the suffering and pain it had endured.²⁸ Disregarding apparent societal pressure to take prosecutorial action, Uruguay’s elected authorities settled the matter through a national referendum.²⁹ Despite attempts by the government to obscure the offenses from Uruguayan citizens, civil society has succeeded in massive efforts to document the violations.³⁰ One such effort was spearheaded by a private human rights group called *Servicio Paz y Justicia* (Service Peace and Justice), which authored a report entitled *Uruguay Nunca Más* (Uruguay Never Again).³¹

Due to the peculiar factors that distinguish the rule of law during transitions from the rule of law in times of peace, many scholars accept that transitional justice will almost always be less than complete.³² This notion results in a somewhat contradictory advocacy. While many scholars note the increasing agreement

²⁶ David Weissbrodt & Paul W. Fraser, *Book Review: Report of the Chilean National Commission on Truth and Reconciliation*, in 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 7, at 461, 462 (citing AMERICAS WATCH, HUMAN RIGHTS AND THE “POLITICS OF AGREEMENTS”: CHILE DURING PRESIDENT AYLWIN’S FIRST YEAR 4-5, 17 (1991)).

²⁷ Mendez, *supra* note 19, at 3.

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ *Id.*

³¹ Neil J. Kritz, *Editor’s Introduction: Country Studies: Uruguay*, in 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 7, at 384.

³² Kritz, *supra* note 6, at 31-32 (“[P]ervasive gross violations of human rights almost always leave in their wake a legacy of traumatized societies, weakened economies, shattered institutions generally lacking in credibility, and the absence of a culture informed by the rule of law.”).

on the obligation to prosecute crimes against humanity, this hard-line approach is tempered by the resignation that “it is politically and economically impossible to subject all who bear some level of responsibility for past violations to the strictest procedures and the maximum penalties.”³³ In what may more appropriately be termed “compromised justice,” many scholars advocate within a system restricted by potential threats to stability.³⁴

This curbed advocacy for prosecutions led to the creation of alternative mechanisms. These non- or quasi-judicial options have potential to fill gaps created by shortcomings in trials, but they have proved poor replacements in practice. The following section will review two of these alternatives, amnesties and truth commissions, and conclude that while truth commissions could validly supplement the process of criminal prosecutions, amnesties serve only to perpetuate impunity.

II. THE TOOLS OF TRANSITIONAL JUSTICE

[I]t is not the prerogative of the many to forgive the commission of crimes against the few.³⁵

The nature of a political transition is that there is a past to bear in mind.³⁶ Human rights advocates worldwide agree that, amidst the urgent tasks of democratization, a newly rising leadership’s duty to rectify past wrongs is both a legal obligation and a

³³ Paul van Zyl & Mark Freeman, *Conference Report*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE*, *supra* note 6, at 3, 4 (summarizing Neil Kritz’s position on complementary mechanisms to criminal prosecutions).

³⁴ *Cf.*, Mendez, *supra* note 19, at 4 (arguing that in situations of transitional justice “it is undeniable that the transitional setting presents important limitations on what can be done.”); Zalaquett, *supra* note 10, *passim*.

³⁵ Alice H. Henkin, *Conference Report*, in *STATE CRIMES: PUNISHMENT OR PARDON* 1, 4-6 (Aspen Institute ed., 1989) (referring to a statement made by a participant at the Conference on State Crimes).

³⁶ Mendez, *supra* note 19, at 1.

moral imperative.³⁷ This consensus derives in part from the understanding that seeking retrospective justice emphasizes the nature of the system to be established.³⁸ If a society desires to establish itself based upon the rule of law, it must demonstrate that the rule of law is fundamental to its character.³⁹ The unresolved issue, however, is the method by which such fundamental qualities can be demonstrated.

Periods of transition present a particular set of constraints upon the free function of justice, limiting the implementation of otherwise more desirable methods for achieving a just and functioning system. In the pursuit of justice during times of transition, as opposed to times of peace, the new government must address the fact that core members of the old order inevitably retain some amount of power.⁴⁰ Emerging regimes have a tenuous hold on the political power they attempt to assert.⁴¹ This is especially true with respect to authoritarian regimes defeated not on the battlefield, but at the ballot box.⁴²

Because of these unique constraints, the mechanism of transitional justice assumes that pure justice cannot be obtained. Human rights organizations that maintain a policy of absolute

³⁷ *Id.*; see also Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343, 343 (2004) ("Human rights advocates tend to regard the implementation of judicial norms and institutions as an omnipotent cure against war crimes and human rights abuses. . . ."); Ronald Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 175 (2002) ("[A] consensus has emerged in the last fifty years that certain acts by official actors are no longer beyond the reach of legal accountability.").

³⁸ Mendez, *supra* note 19, at 1.

³⁹ *Id.*

⁴⁰ *Id.* at 4.

⁴¹ A. James McAdams, *Preface to TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 19, at xi. This reality differs substantially from historically successful accountability trials. The tribunals at Nuremburg, for instance, involved a much different dynamic of power. "[T]he Allied powers had on unquestionable advantage. . . . They were able to impose their judgments upon a completely defeated enemy." *Id.*

⁴² Jorge Correa Sutil in collaboration with Francisco Jimenez, "No Victorious Army Has Ever Been Prosecuted . . .": *The Unsettled Story of Transitional Justice in Chile*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 19, at 123, 124.

justice are often criticized for failing to consider the relevant limitations that a transition imposes.⁴³ Transitional democracies, overwhelmed and seeking guidance, set limited goals. As they operate within the understanding that true justice is an illusion, new leaders only seek to establish that which transitional justice tells them is achievable. Within this restricted framework, the new order embraces the best of its limited options. These alternatives include, but are not limited to, amnesties and truth commissions.⁴⁴

A. AMNESTIES

When an authority grants an amnesty, it sets aside a period of time during which offenders are exempt from punishment. Specifically, it is “the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted.”⁴⁵ Although their application has varied from society to society, amnesties have been used throughout history and by nearly every nation at some point.⁴⁶ Due to the inherently anti-democratic nature of amnesties, their application has limits. Though the granting of amnesties for basic political offenses has been relatively non-controversial, their application to situations involving gross violations of human rights is much more troublesome. This suggests that amnesties may fall into categories such as “moral” and “immoral,” or “legal” and “illegal.”

Historically, amnesties have been used both to express public grace and forgiveness and to further government corruption and oppression through impunity; thus, they can be used as tools for societal healing or for continued abuse.⁴⁷ Governments have imposed amnesties both as an expression of “public grace and forgiveness, and to further government corruption and oppression. . . . They have been granted at times of great social stability

⁴³ See Zalaquett, *supra* note 10, at 3 (commenting that transitional political situations are a new area for human rights practice, yet human rights organizations continue to apply the same normative standards used to fight current abuses, with inadequate results).

⁴⁴ Other alternatives include pardons, commutation of sentences, and lustration.

⁴⁵ BLACK'S LAW DICTIONARY 93 (8th ed. 2004).

⁴⁶ Slye, *supra* note 37, at 174.

⁴⁷ *Id.*

and times of great social unrest.”⁴⁸ Throughout history, amnesties for war crimes and crimes against humanity were basically nonexistent,⁴⁹ but not because such crimes were considered too heinous for amnesty. Rather, until the end of World War II,⁵⁰ few states were willing to accept the “notion that their officials could be held accountable for such crimes.”⁵¹ The post-World-War-II era forced states to reassess the position of individuals under international law.⁵²

Proponents of amnesties for human rights crimes focus on pragmatic arguments, stating that political survival in times of transition automatically tempers the hopes of granting full reparations.⁵³ International law arguments against such amnesties also incorporate practical considerations, but focus more on the growing international consensus that crimes against humanity cannot be left unpunished. International law provides three arguments which refute the legality of legislating impunity through amnesties.

1. *Obligatory Prosecution*

First, there is a strong argument that international law requires states to prosecute for particular crimes.⁵⁴ For example, the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides “universal jurisdiction” for violations of the treaty.⁵⁵ This blanket jurisdiction suggests that the international community has determined that torture and other crimes against humanity are so reprehensible that any court in the world can undertake a prosecution.

For example, in October of 1998, a Spanish judge issued an arrest warrant for General Pinochet, and British law enforcement

⁴⁸ *Id.*

⁴⁹ *Id.* at 175.

⁵⁰ JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 408-09 (2002).

⁵¹ Slye, *supra* note 37, at 175.

⁵² DUNOFF ET AL., *supra* note 50, at 408-09.

⁵³ McAdams, *supra* note 41, at xii.

⁵⁴ Slye, *supra* note 37, at 182.

⁵⁵ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), Dec. 10, 1984, 1465 U.N.T.S. 85.

officials detained him.⁵⁶ Although the former Chilean President Eduardo Frei tried to protect Pinochet by claiming he had diplomatic immunity, the international human rights community argued that such immunity was meant to “facilitate relations between states,” not to protect criminals.⁵⁷ Furthermore, Pinochet was in Britain on a personal trip, not a diplomatic mission.⁵⁸ Pinochet’s subsequent detention was legitimized by the concept of universal jurisdiction over crimes against humanity.⁵⁹

Similarly, Article 1.1 of the American Convention on Human Rights states that parties to the convention must “ensure” . . . the free and full exercise of [the] rights and freedoms” guaranteed by the document.⁶⁰ The Inter-American Commission of Human Rights, which is part of the Organization of American States, recognized that “[a]s a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention. . . .”⁶¹ These documents call for more than mere investigation. They require state action which provides actual legal remedies.

Critics of an obligation to prosecute offer various rebuttals, most of which spring from the basic foundations that support action in the form of transitional justice. First, critics argue that an

⁵⁶ *HRW Hails Pinochet Detention as “Victory for the Rule of Law”*, HUM. RTS. WATCH, Oct. 19, 1998, available at <http://www.hrw.org/press98/oct/chile1019.htm>.

⁵⁷ *Id.* Diplomatic immunity differs from amnesties, and here is mentioned only to illustrate that crimes against humanity warrant universal jurisdiction. In the case of Pinochet, the technical application of diplomatic immunity would have protected him, but his crimes were so severe they removed any safeguards that would normally apply to a head of state.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ American Convention on Human Rights art 1.1, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁶¹ Organization of American States, *Report No. 25/98: Alfonso René Chanfeau Orayce y otros*, O.A.S. Doc. OEA/Ser.L/V/11.98, at 512 (1998), reprinted in DUNOFF ET AL., *supra* note 50, at 627, 629. This was a report of the Inter-American Commission evaluating the legitimacy of Chile’s 1978 Amnesty Decree, which was passed by General Augusto Pinochet. DUNOFF ET AL., *supra*, at 627. Though Commission decisions are non-binding, it found the Amnesty Decree incompatible with the American Convention on Human Rights. *Id.* This will be discussed further *infra*.

obligation to prosecute precludes strategic prosecutorial discretion, resulting in a less efficient criminal justice system.⁶² Second, obligatory prosecution may undermine other legitimate goals of the criminal system, such as reconciliation and rehabilitation.⁶³ Finally, critics such as Henry Kissinger worry that “[w]hen discretion on what crimes are subject to universal jurisdiction and whom to prosecute is left to national prosecutors, the scope for arbitrariness is wide indeed.”⁶⁴ Despite the practical concerns arising out of transitional justice, international treaties and international courts have found that an obligation to prosecute human rights violations exists under international law.

2. *Victims’ Rights*

It is also argued that amnesties violate victims’ fundamental rights under international law.⁶⁵ This argument stems from several decisions of international tribunals, such as the Inter-American Commission and the Court of Human Rights, which outlined five specific victims’ rights that are violated by amnesties.⁶⁶ These rights are the rights to “Justice,” “Truth,” “Judicial Protection,” “Reparations,” and the right of “Access to a Court.”⁶⁷

International bodies suggest that amnesties have the effect of diminishing the protection of these rights, especially the victim’s right to truth. In response, states claim that the only way to ascertain truth is through a peaceful transition of government. Only amnesty, they argue, can secure such a result.⁶⁸ They further argue that truth commissions are the proper method for this process.⁶⁹ However, international tribunals have rejected this argument, explaining that the “quality of truth” obtained through trial is preferable to that obtained through a truth commission.⁷⁰

⁶² Slye, *supra* note 37, at 185.

⁶³ *Id.* at 186.

⁶⁴ Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86, 92.

⁶⁵ See Slye, *supra* note 37, at 192.

⁶⁶ *Id.*

⁶⁷ *Id.* at 192-97.

⁶⁸ *Id.* at 195.

⁶⁹ *Id.* Truth commissions will be discussed further *infra*.

⁷⁰ Slye, *supra* note 37, at 195.

By using an amnesty, the state effectively removes any cognizable duty on the part of the violator. Without an enforceable duty, there is no mechanism by which a victim's rights can be recognized or protected.

3. *The Cyclical Nature of Transitions and The Role of Amnesty Programs*

The third major argument against enacting amnesties asserts that "even assuming amnesties contribute to short-term social stability, in the long-term they undercut efforts to establish a stable democracy that honors human rights and the rule of law."⁷¹ By failing to punish the political elite, amnesties perpetuate the cycle of impunity. Anyone powerful enough to pose a genuine threat to the fledgling system understands that by invoking that power he or she can escape accountability.⁷²

Supporters of amnesties during transitions argue that they provide the social stability and peace necessary to prevent a resurgence of the old regime that would result in further violations of human rights.⁷³ Proponents also argue that, in their rush to prosecution and judgment, states may run the risk of imposing upon the violators the very same abuses of human rights they aim to punish.⁷⁴ In the interests of due process, for example, one important principle to protect is "*nullen crimen nulla poena sine lege*, that individuals should only be held accountable to laws that were in effect at the time they acted."⁷⁵

It is true that no justification for seeking accountability can outweigh democracy's critical guarantees, such as due process or a fair trial.⁷⁶ Some proponents of amnesties argue that because democratic guarantees are absolute prerequisites for the legitimacy of an accountability proceeding, "it makes no legal, moral, or political sense to insist on prosecution in the presence of

⁷¹ *Id.* at 197.

⁷² *Id.*

⁷³ *Id.* at 198.

⁷⁴ McAdams, *supra* note 41, at xi.

⁷⁵ *Id.*

⁷⁶ *See* Mendez, *supra* note 19, at 11.

amnesties that have obtained legal effect despite their immorality.”⁷⁷ But wary as a state’s new order must be of carrying out the same transgressions as its predecessors, the state must not accept immoral amnesties merely because they appear to have legal effect. Not every amnesty granted at a time of transition is automatically illegal, nor should it necessarily be challenged. However, struggling states should be wary of any amnesty that provides an effective whitewash for the outgoing leadership.

International law dictates that amnesties applied to violators of human rights cannot be accepted, no matter what the tradeoff. Even when exercised in concert with truth commissions, discussed below, amnesties too often result in less than satisfactory outcomes.

B. TRUTH COMMISSIONS

One non-judicial alternative to criminal prosecution that is almost always considered during political transitions is that of the truth commission. Truth commissions are bodies created to investigate a past history of human rights violations. They can be nationally sponsored by the executive branch or internationally supported by the United Nations or human rights organizations.⁷⁸ Truth commissions often involve national scholars or other respected public figures spanning the political spectrum. The primary aim of a truth commission is to disclose the truth to the general public.⁷⁹

Despite the complementary role that truth commissions are envisioned to play in relation to prosecutions, history shows

⁷⁷ *Id.*

⁷⁸ Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, *supra* note 43, at 225, 225.

⁷⁹ See Jose Zalaquett, *Introduction to the English Edition* of *REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION* xxxi (Phillip E. Berryman trans., 1993). The Chilean National Truth and Reconciliation Commission consisted of eight nationally respected scholars, reflecting President Aylwin’s desire to garner nationwide respect. *Id.* at xxxi-xxxii.

“state preferences for truth commissions *over* trials during a period of transition.”⁸⁰ Furthermore, truth commissions generally have a very limited mandate and are only temporary entities.⁸¹

Scholars offer various justifications for why truth commissions are either a necessary or positive response in the transitional context. Some argue that truth commissions, as they have evolved over the last several decades, are appropriate in two situations. First, these bodies were often established because the former regime’s system of abuses was designed to be secret. Therefore, many important facts about systemic policies and chains of responsibility remain hidden in the absence of a truth commission. A classic example of this scenario can be found in transitions within Latin American countries, where covert collaborations such as “Operation Condor” facilitated disappearances to erase any trace of the victim.⁸² There, uncovering the truth was critical.⁸³

Scholars also deem truth commissions appropriate when there are multiple truths. For example, the Bosnian conflict involved three different ethnic communities. Each group proffered a version of history carrying a distinct ethnic bias in its favor, portraying the other groups as the instigators of violence.⁸⁴ In this scenario, three separate war crimes commissions were

⁸⁰ Slye, *supra* note 37, at 187 (emphasis added).

⁸¹ Hayner, *supra* note 78, at 226. For example, the Chilean National Truth and Reconciliation Commission was only given six months to carry out its work (Creation of the Commission on Truth and Reconciliation, Supreme Decree No. 355, art. 5, Apr. 25, 1990), and its mandate was limited to investigating only the gravest violations, such as disappearances, executions, kidnappings, and torture, though only if that torture led to death. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *supra* note 79, at 13-14. It should be noted that scholars continue to debate whether truth commissions do or do not pave the way for subsequent trials. See van Zyl & Freeman, *supra* note 33, at 5.

⁸² *Chile: Supreme Court Confirms Pinochet Indictment*, HUM. RTS. WATCH, Jan. 4, 2005, available at http://www.hrw.org/english/docs/2005/01/04/chile9943_txt.htm.

⁸³ See Kritz, *supra* note 6, at 37. Operation Condor was a joint plan launched in the 1970’s. The military governments of Chile, Argentina, Brazil, Uruguay, Bolivia and Paraguay collaborated in efforts to “disappear” dissidents, and aided in the abduction of nationals and smuggling them to their home countries for torture, interrogation and imprisonment. *Chile: Supreme Court Confirms Pinochet Indictment*, *supra* note 82.

⁸⁴ Kritz, *supra* note 6, at 37.

formed by Bosnians, Croats, and Serbs, respectively.⁸⁵ When the commissions met in 1997, one of them noted that they “were ‘in the process of creating three conflicting versions of the truth, and if we keep going along this path, fifty years from now our grandchildren will fight again over which one is correct.’”⁸⁶

Other scholars suggest that truth commissions facilitate not so much a fact-finding role as a truth-*acknowledging* role. Whether a country’s transition is precipitated through a gradual democratization, a negotiated settlement of civil war, a military victory by rebels, or a rapid shift to democracy after brutal military rule, truth commissions often merely confirm what is already suspected throughout the community.⁸⁷ In this sense, truth commissions imply state acceptance of responsibility, which can provide more than mere truth. For a country’s citizenry, “[o]fficial acknowledgement at least begins to heal the wounds.”⁸⁸

In addition, some scholars explain that truth commissions become necessary in light of the corruption and incompetence of both the police and the judiciary in many transitional states. By circumventing the “‘normal’ investigatory channels,” truth commissions avoid postponing justice until an independent, capable judiciary is established, constitutional reforms are implemented, and political concerns about the power of the past regime are overcome.⁸⁹ However, avoiding delays does compromise the resulting quality of justice. In order to be swift and independent, truth commissions operate within strict time constraints. They are also restricted in the subject matter they can review. Thus, truth commissions suffice only as complements, not replacements, for prosecutions.

Though truth commissions are generally viewed as having preeminently positive impacts upon a society, a new government may create a commission in order to divert attention away from

⁸⁵ *Id.*

⁸⁶ *Id.* at 38.

⁸⁷ Hayner, *supra* note 78, at 228.

⁸⁸ Juan Méndez, Book Review, 8 N.Y. L. SCH. J. HUM. RTS. 577, 584 (1991), *cited in* Hayner, *supra* note 78, at 228.

⁸⁹ Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 78, at 162, 264.

the present. In attempts to keep current abuses off the commission's radar, a government can use a truth commission, mandated to investigate the past, to exploit the public perception of a prior regime's tarnished past.⁹⁰ Truth commissions do not act as a blanket protection against the recurrence of human rights abuses, or even make futures abuses less likely. At the very least, however, the publication of a catalogued record of violence will educate the public to recognize and resist signs of repression if they return in the future.⁹¹

Critics of truth commissions generally oppose the process for two reasons. First, they argue, truth commissions are an insufficient replacement for prosecutions. Trials rarely follow the establishment of this type of body, and therefore the non-adjudicative role that truth commissions play remains the only source of justice that addresses victims' grievances.⁹² This argument is heavily criticized, however, by proponents of truth commissions who point to examples such as Argentina, Chile, and Guatemala, where commissions' findings have played a vital role in subsequent attempts at prosecution.⁹³

The second criticism likens the problems with truth commissions to those associated with aggressive efforts to bring violators to trial. Transitional states rest upon tremendously fragile ground, and revelations of a "hot" report threaten to destabilize the foundations for democracy.⁹⁴ Strangely, this same argument is offered in support of truth commissions. In the cases of Chile and Argentina, the abusing regime maintained enough control throughout the transition to represent a cogent threat, and many

⁹⁰ Hayner, *supra* note 78, at 228-29.

⁹¹ *Id.* at 229.

⁹² *See id.* at 226; Popkin & Roht-Arriaza, *supra* note 89, at 264-65.

⁹³ van Zyl & Freeman, *supra* note 33, at 5. It should be noted, however, that even where truth commissions provided critical information for subsequent prosecutions, the prosecutions have not always naturally followed from the fact of a truth commission. Many transitional states, such as Chile, try to cap the process after the truth commission, but face societal pressure to the contrary. *See, e.g., Pinochet Case a Milestone: Chile Urged to Prosecute Ex-Dictator*, HUM. RTS. WATCH, Mar. 2, 2000, available at <http://www.hrw.org/press/2000/02/pin0302.htm>; *HRW Hails Pinochet Detention as "Victory for the Rule of Law"*, *supra* note 56.

⁹⁴ Hayner, *supra* note 78, at 230.

argued that actual prosecution was impossible.⁹⁵ As one scholar noted, “the best alternative was telling the truth about the past.”⁹⁶

As noted above, many countries have utilized truth commissions following the downfall of a totalitarian regime, with varying levels of “success.” Champions of truth commissions point to examples such as South Africa’s Truth and Reconciliation Committee,⁹⁷ regarded by some as the sole case in which all factions involved were satisfied.⁹⁸

Nonetheless, the relativity of “success” may make outcomes from truth commissions either illusory or simply insufficient. If success is defined merely as official acknowledgement of past state acts or as shedding light on particular suspicions, then truth commissions may indeed execute the role they are intended to play. Failure to fulfill this task would render truth commissions completely ineffectual.

However, success may entail far more than a process of simple storytelling. Truth commissions provide families with the information of how, when, and by whom their loved ones were violated, but the commissions then request that victims and their families be satisfied with mere truth. Although revealing the facts behind a violent past may bring victims and their families a measure of comfort, truth commissions may be considered insufficient. Without the complement of a subsequent prosecution, truth commissions may fail to deliver the kind of justice democratic societies have come to expect.

Truth commissions alone cannot be satisfactory. The positive by-products of their efforts are undeniable, but any government seeking to facilitate a just transition must view truth commissions merely as predecessors or complements to prosecutions, not as replacements.

⁹⁵ Mary Albon, *Truth and Justice: The Delicate Balance – Documentation of Prior Regimes and Individual Rights*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 78, at 290, 290.

⁹⁶ *Id.*

⁹⁷ Slye, *supra* note 37, at 247.

⁹⁸ *See id.*

III. A LIMITED HUMAN RIGHTS POLICY: CHILE

The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.

—Thomas Jefferson⁹⁹

Similar to many of its Latin American counterparts, Chile suffered the brutal leadership of a military junta during the 1970s and 1980s. In fact, many South American despotic regimes of that era coordinated with one another in a joint maneuver called Operation Condor.¹⁰⁰ Outlasting many other dictatorships in the region, Chile looked on as other countries went through the transition process.¹⁰¹ In 1990, the Chilean public elected Patricio Aylwin as president, putting an end to sixteen years of military rule.¹⁰² In describing the rationale of the Aylwin administration's human rights policy, human rights scholar Jose Zalaquett stated:

Although Chile could learn from recent precedents, the sobering lesson they taught was that the political stakes involved in settling accounts with the past are extraordinarily high, that a fully satisfactory outcome can hardly be expected, and that the social tensions brought about by the legacy of human rights violations linger on for a long time.¹⁰³

Aylwin formulated a policy based on the assumption that full justice could never be achieved. The confines of transitional justice created a limited framework, and politicians and policy-makers allowed that framework to dictate a narrow policy.

The inadequacy of such an approach was not immediately apparent. After assuming office in March of 1990, Aylwin ordered the formation of the National Truth and Reconciliation Commission.¹⁰⁴ Many of the commission's recommendations on

⁹⁹ THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 310 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

¹⁰⁰ *Chile: Supreme Court Confirms Pinochet Indictment*, *supra* note 82.

¹⁰¹ Zalaquett, *supra* note 79, at xxiii.

¹⁰² Sutil, *supra* note 42, at 125.

¹⁰³ Zalaquett, *supra* note 79, at xxiii.

¹⁰⁴ Creation of the Commission on Truth and Reconciliation, Supreme Decree No. 355, art. 5, Apr. 25, 1990.

reparations and prevention have been set into motion, such as a pension to victims' families, and the report also spurred suggested legal reforms.¹⁰⁵ Despite the commission's respectable efforts, Chile is still crying out for criminal justice more than twenty years after the fall of its dictator. Civil society does not feel the government's actions have been sufficient. Groups such as the Association of Relatives of the Disappeared, the Association of Relatives of Victims of Political Execution, and others have organized in many instances to confront governmental efforts to halt the progress of military prosecutions.¹⁰⁶ If truth had been enough, General Augusto Pinochet would not be facing criminal charges for the third time.

A. THE POLITICAL CONTEXT PRIOR TO 1973

The political and social situation in Chile leading to the 1973 coup d'état involved a peculiar set of social dynamics. This distinct state of affairs had grown from both the existing geopolitical structure at that time, during the Cold War, and Chile's own internal ideological battle.¹⁰⁷

Historians, human rights activists, and politicians alike characterize pre-September 11, 1973 Chile as a country in "acute crisis."¹⁰⁸ The 1960s witnessed a growing polarization of Soviet-side insurgent ideology versus United States counter-insurgency, a product of the Cold War and, in particular, the Cuban revolution.¹⁰⁹ Throughout this decade, parties from both sides of the ideological spectrum began to embrace a policy of armed struggle. By the election of *Unidad Popular's* Salvador Allende in 1970, two general factions, the government and the opposition, were engaged in an increasingly violent political dialogue that grew more and more polarized as the economic state of the country continued to decline.¹¹⁰

¹⁰⁵ Zalaquett, *supra* note 79, at xxxii.

¹⁰⁶ See *Chile: Probes of Pinochet-Era Crimes Face Shut Down*, HUM. RTS. WATCH, Apr. 15, 2005, available at <http://hrw.org/english/docs/2005/04/15/chile10494.htm>.

¹⁰⁷ REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *supra* note 79, at 48.

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Id.* at 48.

¹¹⁰ *Id.*

When General Augusto Pinochet's forces stormed the Moneda palace on September 11, 1973,¹¹¹ Chile's political structure could scarcely have been characterized as a democracy. The ravages of street battles and violence wreaked havoc on the security of the populace.¹¹² Nonetheless, Chile had a democratic history on which to build. While confidence in that democratic tradition began to wane as violence increased in the 1960s, Chile's population had witnessed free elections (such as Allende's) and had known a democratic judicial system.¹¹³

B. THE POLITICAL CONTEXT AFTER THE COUP

In 1991, Chile's official National Truth and Reconciliation Commission confirmed that the Chilean government, under the authority of General Pinochet, "executed 1,068 people without trial and "'disappeared' another 957."¹¹⁴ By 1998, that total number rose to more than 3,100.¹¹⁵ The numbers alone might have been enough to spur a pro-prosecution policy, but the Aylwin administration felt constrained by both military threats and the need to make forward progress.¹¹⁶

When Pinochet left power in 1990, human rights advocates encountered three substantial barriers to prosecution that essentially left them with no legal recourse against the former dictator. The first barrier was the Chilean government's refusal to cooperate in any pro-prosecution approach to the transition.¹¹⁷ The second was the 1978 Amnesty Decree, a self-amnesty granted by the Chilean military which protected it from prosecution and punishment for all crimes that took place from 1973 to 1978, the worst years of the dictatorship.¹¹⁸ The third barrier was the "senator-

¹¹¹ Sutil, *supra* note 42, at 124-25.

¹¹² See generally REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *supra* note 79, at 47-57.

¹¹³ *Id.* at 48.

¹¹⁴ HRW Hails Pinochet Detention as "Victory for the Rule of Law", *supra* note 56.

¹¹⁵ Why Chile Won't Prosecute Pinochet, HUM. RTS. WATCH, Nov. 11, 1998, available at <http://www.hrw.org/press98/nov/pino1111.htm>.

¹¹⁶ See Kritz, *supra* note 7, at 45.

¹¹⁷ See Why Chile Won't Prosecute Pinochet, *supra* note 115.

¹¹⁸ *Id.*

for-life” status Pinochet arranged for himself in 1990, ensuring his immunity from prosecution.¹¹⁹

For years after the former dictator left power, Chilean human rights activists felt paralyzed by both the tyrant’s lasting legacy of legal barriers and the Chilean government’s unwillingness to move forward with any type of prosecution. Aylwin’s establishment of the National Truth and Reconciliation Commission should not be dismissed as insignificant, but, as this Comment has already discussed, truth commissions should function only as a catalyst to spur action to the ultimate achievement of justice – prosecution.

C. CHILE NEEDED A PRO-PROSECUTION HUMAN RIGHTS POLICY

There are two reasons why Chile should have designed a pro-prosecution human rights policy to supplement its National Truth and Reconciliation Committee. First, Chile was well acquainted with democracy and its privileges. Although its institutions were tainted, Chilean society did not need to be taught and trained in the ways of democratic governance. Chile had both the infrastructure and the history of a criminal justice system, albeit an antiquated one. At the time of the military junta’s fall, the newly elected democratic government had the institutional capability to begin prosecuting the perpetrators.

The second reason Chile should have instituted a pro-prosecution human rights policy is reflected in the judicial action unfolding in the country over the last seven years. In 1998, a Spanish judge issued an arrest warrant for Pinochet, who was subsequently arrested in Britain by law enforcement officials.¹²⁰ This international action represented the first indication that the commission’s truth had not been sufficient. The arrest set an epic precedent in the arena of international law, justified by the fact

¹¹⁹ *Pinochet Case a Milestone: Chile Urged to Prosecute Ex-Dictator*, *supra* note 93.

¹²⁰ *HRW Hails Pinochet Detention as “Victory for the Rule of Law”*, *supra* note 56.

that “crimes against humanity are subject to universal jurisdiction.”¹²¹ Yielding to insistent pressure from Chilean officials, Pinochet was eventually returned to Chile in 2000.¹²² Many feared that Pinochet’s entrenched supporters would further his impunity by not taking judicial action.¹²³

The legal activity surrounding Pinochet’s indictment has been extremely chaotic since his return to Chile. Although Chile is currently in the process of instituting major criminal justice reforms, Pinochet is being processed under the rules of the antiquated inquisitive system. The inquisitive process relies purely on judge-run investigations and functions with limited guarantees of due process.¹²⁴ The system does not involve jury trials, and each stage of the process takes the form of a written document.¹²⁵ The written records constitute a meticulously organized file, which is kept secret and ultimately provides the foundation for the judge’s decision. There is no oral or public testimony.¹²⁶ Substantial abuses, such as attorneys buying copies of the file or purchasing other favors, have placed the system under intense criticism.¹²⁷

On December 1, 2000, Judge Juan Guzman opened the domestic case against Pinochet.¹²⁸ Judge Guzman charged Pinochet with murder and kidnapping, but these charges were thrown out by the Santiago Appeals Court on the grounds that Guzman had failed to question Pinochet before he was charged, a requirement under Chilean law.¹²⁹ The Chilean Supreme Court affirmed this

¹²¹ *Id.* Since the establishment of the “Pinochet Precedent,” the concept of universal jurisdiction has been used to indict other former heads of state for human rights violations committed under their rule, such as the former Chadian dictator, Hisssein Habre, on charges of torture. *Pinochet Case a Milestone: Chile Urged to Prosecute Ex-Dictator*, *supra* note 93.

¹²² *Pinochet Case a Milestone: Chile Urged to Prosecute Ex-Dictator*, *supra* note 93.

¹²³ *See Why Chile Won’t Prosecute Pinochet*, *supra* note 115.

¹²⁴ Mauricio Duce & Cristian Riego, *La Reforma Procesal Penal en Chile*, in PROCESO PENAL EN AMERICA LATINA Y ALEMANIA 154 (Horst Schonbohm & Norbert Losing eds., 1995).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Christian Riego, Lecture at University of Diego Portales (Mar. 16, 2005).

¹²⁸ *Re-instatement of Pinochet Charges Hailed*, HUM. RTS. WATCH, Jan. 29, 2001, available at http://www.hrw.org/english/docs/2001/01/29/chile205_txt.htm.

¹²⁹ *Id.*

ruling.¹³⁰ Although Guzman pressed on with his investigation, and eventually brought the case before the courts, the Chilean Supreme Court terminated the proceedings in July 2002 after deeming Pinochet mentally unfit to stand trial.¹³¹

Judge Guzman, supported by both the Chilean and international human rights community, continued his fight. On December 13, 2004, Guzman succeeded in indicting the former dictator once again, charging him with nine kidnappings and one homicide.¹³² Pinochet was ordered to “be held under house arrest at his Santiago home.”¹³³

The December indictment was precipitated by an appellate court ruling, earlier that year, which stripped Pinochet of his immunity from prosecution as a former head of state.¹³⁴ In August, that decision was upheld by the Chilean Supreme Court.¹³⁵ Pinochet has also been stripped of his immunity for a 1974 murder in Buenos Aires.¹³⁶ At the December indictment, Judge Guzman declared that Pinochet was declared lucid and coherent enough to stand trial.¹³⁷ In January 2005, the Chilean Supreme Court confirmed Pinochet’s indictment, voting 3-2 to reject his attorneys’ arguments that he was mentally unfit for trial.¹³⁸

¹³⁰ *Id.*

¹³¹ *Chile: Court Ruling May Define Future of Rights Prosecutions*, HUM. RTS. WATCH, May 27, 2004, available at http://www.hrw.org/english/docs/2004/05/27/chile8622_txt.htm.

¹³² *Chile: Pinochet Indicted for Human Rights Crimes*, HUM. RTS. WATCH, Dec. 13, 2004, available at http://www.hrw.org/english/docs/2004/12/13/chile9840_txt.htm.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Chile: Supreme Court Confirms Pinochet Indictment*, *supra* note 82. Another January ruling of the Chilean Supreme Court has human rights activists concerned about the Court’s commitment to justice for these crimes. “On January 25, 2005, the Chilean Supreme Court ordered all judges investigating human rights violations under military rule to halt their inquiries within six months.” *Chile: Probe of Pinochet-Era Crimes Face Shut Down*, HUM. RTS. WATCH, Apr. 15, 2005, available at <http://www.hrw.org/english/docs/2005/04/15/chile10494.htm>. The Court ruled that unless trials are begun within this six month deadline or parties appeal for extensions, all ongoing investigations into human rights violations under the dictatorship would be terminated. *Id.* This decision truncated a 2001 initiative that assigned some appellate and first instance judges the task of investigating

D. LET THERE BE A PROCESS

Thus far, the prosecution of Pinochet has been a judicial voyage reflecting both systemic shortcomings and entrenched cronyism. Many of Pinochet's supporters criticize the prosecution as a waste of judicial resources.¹³⁹ Others point to the 1978 Amnesty Decree and claim that it undermines the rule of law to insist on prosecutions in the presence of amnesties that have obtained legal effect.¹⁴⁰ As discussed above, this argument encounters considerable resistance, as it is doubtful that any amnesty for human rights violations should ever be legally enforceable. Nonetheless, critics are correct in that the attempted prosecution of Pinochet has not been a perfect process. But few prosecutorial systems are perfect, and democratic nations worldwide face similar problems.

Faults and inadequacies in a criminal justice system usually translate into prosecutorial discretion. However, strongly supported international arguments suggest that in the area of crimes against humanity, no such discretion can be exercised.¹⁴¹ Prosecutions must be carried out even if their duration seems to diminish the possibility of their delivering the desired effect.

The point is not that the system or the process be flawless. Judicial systems continue to prosecute criminals in spite of setbacks or deficiencies. The point, rather, is that there is a process at all. Pinochet must still be tried with all democratic safeguards in place, including the presumption of his innocence. Prosecution does not assure conviction, for any predetermined outcomes

exclusively human rights violations. *Id.* Currently there are still 350 cases open, including inquiries into the mysterious death of former President Eduardo Frei, who is suspected of being poisoned by Pinochet's agents. *Id.* If the Chilean Supreme Court's ruling remains in effect it will effectively create a statute of limitations on crimes against humanity.

¹³⁹ See, e.g., *Special Report: Augusto Pinochet in London*, GUARDIAN UNLIMITED, <http://www.guardian.co.uk/gallery/galleryguide/0,,192735,00.html> (last visited June 5, 2006) (Margaret Thatcher categorizing the "long legal wrangle over Pinochet as a waste of public money." She stated that "Senator Pinochet was a staunch friend of Britain throughout the Falklands war. His reward from this government was to be held prisoner for 16 months."); cf. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 315 (2001).

¹⁴⁰ Mendez, *supra* note 19, at 11.

¹⁴¹ Slye, *supra* note 37, at 182-83.

would taint the credibility of the entire system.¹⁴² As Juan Mendez, the U.N.'s Special Advisor on the Prevention of Genocide aptly states, "[As much as it may hurt us to see known criminals go free, it is more important that we uphold fundamental principles of human rights – even in favor of those who once trampled on them – than in meting out well-deserved punishment to possible offenders."¹⁴³

A process will, however, raise the quality of truth provided from a truth commission, allowing courts to employ all the judicial resources that are denied to those bodies. Most importantly, prosecution will provide victims the reassurance that, if found guilty, perpetrators will be properly punished.

CONCLUSION

Transitional countries will always emerge from their authoritarian pasts with unique legal and political histories. For this reason, there is no one simple formula that applies in each case. However, the creation of a pro-prosecution policy for any gross violations of human rights plays a central part in establishing the rule of law and protecting the citizenry.

Prosecutions establish the rule of law by allowing the new government to demonstrate the fundamental qualities that will constitute its democracy. Any lesser policy that facilitates impunity "sets the new political order on the weak foundation of privilege and denial of the rule of law."¹⁴⁴ "Such a democracy may not be worthy of its name."¹⁴⁵ Prosecution also sends the message that such abuses will never again be tolerated.

Prosecutions further protect the citizens of a new nation by recognizing the fundamental rights of victims. In his article criticizing the use of amnesties, Ronald Slye has stated that "[c]entral to the effectiveness of a right is a mechanism by which that right can be recognized, protected, and vindicated."¹⁴⁶

Chile is not the only country whose citizens are demanding action in the form of prosecution. In Argentina, Las Madres de

¹⁴² Mendez, *supra* note 19, at 12.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

¹⁴⁶ Slye, *supra* note 37, at 192.

la Plaza de Mayo still gather every Thursday to protest the disappearances of their missing loved ones, which the government still has not explained.¹⁴⁷ In Uruguay, despite the official state policy of “forgive and forget,” groups such as *Servicio Paz y Justicia* have managed to document past abuses, the next best thing to nothing. Many are still calling, though unsuccessfully, for criminal adjudications.¹⁴⁸

In South Africa, victims’ advocacy groups, dissatisfied with President Thabo Mbeki’s one-time payment of government reparations for apartheid policies, took their complaints to the international level. Even though many victims had the truth, one group brought a class action suit against twenty-one foreign corporations for their alleged support of apartheid, including JP

¹⁴⁷ Las Madres de la Plaza de Mayo is an organization that was founded after the military junta in Argentina, beseeching the government to take action in helping to find “los desaparecidos,” *the disappeared*. Asociación Madres de Plaza de Mayo, Historia de Plaza de Mayo, <http://www.madres.org/asociacion/historia/historia.asp> (last visited Feb. 12, 2006). Protests by Las Madres and continuing efforts by human rights organizations appear to be having the desired effect. On June 14, 2005 the Argentine Supreme Court struck down two historic amnesty laws that had blocked prosecutions for crimes against humanity committed under the country’s military dictatorship. *Argentina: Amnesty Laws Struck Down*, HUM. RTS. WATCH, June 14, 2005, available at <http://www.hrw.org/english/docs/2005/06/14/argent11119.htm>. The 7-1 decision confirmed lower-court rulings as well as a 2003 Argentine congressional law that had annulled the amnesties. *Id.* At least 14,000 people “disappeared” under the military junta of Argentina from 1976-1983. *Id.* The amnesty laws were the response of newly-elected President Raúl Alfonsín to the violent military backlash that arose once democracy was established and prosecutions began. *Id.* “The ‘full stop’ law of 1986 (Law No. 23,492) set a sixty-day deadline for the initiation of new prosecutions,” effectively creating a statute of limitations on human rights violations. The “due obedience” law of 1987 granted automatic immunity from prosecution to all military personnel who acted under orders, excluding only top commanders. *Id.*

¹⁴⁸ Uruguay has recently taken unprecedented steps toward ensuring accountability for grave abuses during Operation Condor. On May 20, 2005, an Uruguayan prosecutor filed charges of “aggravated homicide” against the former de facto president under military rule, Juan María Bordaberry, and his foreign minister, Juan Carlos Blanco. *Uruguay: Ex-President Faces Prosecution for Military-Era Abuses*, HUM. RTS. WATCH, May 20, 2005, available at <http://www.hrw.org/english/docs/2005/05/20/urugua10987.htm>. The charges were for the murders of two exiled politicians who had sought refuge in Argentina and two suspected members of the Tupamaro guerilla group. *Id.* The bodies were found two days after they were abducted from Buenos Aires. *Id.* These charges represent the first potential prosecutions Uruguay has seen. Due to a 1986 amnesty law that was ratified in a public referendum in 1989, no steps have been taken to bring justice for these crimes. *Id.*

Morgan Chase, IBM, Ford, and General Motors.¹⁴⁹ As recently as 2004, families and victims of massive tragedies that occurred in Indonesia opposed a law that established a Truth and Reconciliation Commission because it granted perpetrators amnesty if they confessed the whole truth.¹⁵⁰

Truth has never been enough, either for victims or for establishing respect for the rule of law. At first glance, truth may seem to deliver closure to a society. However, this closure is more illusory than real. In response to the South African Truth and Reconciliation Committee's final report, an aid to President Mbeki stated: "By granting amnesty to the tormentors, society made the hard choice to suspend these victim's civil rights. To crow about 'closure' is premature and insensitive. The search for the truth and lasting reconciliation continues."¹⁵¹ And it will continue in all new democracies until former perpetrators are prosecuted and brought to justice.

Fortunately, the international community appears to be arriving at a consensus that the most serious human rights violations must be prosecuted. Until this agreement is universal policy, however, democracy will continue to fail those who need its protections the most.

¹⁴⁹ Meron Tesfa Michael, *South Africa's Truth and Reconciliation Commission Closes Its Doors: Moment of Truth*, WORLD PRESS, May 2, 2003, available at http://www.worldpress.org/article_model.cfm?article_id=1187&dont=yes.

¹⁵⁰ Tony Hotland, *Foreign Experts Criticize RI's Truth Commission*, JAKARTA POST, Feb. 22, 2005, available at <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20050222.A02>.

¹⁵¹ Michael, *supra* note 149.

