American University International Law Review

Volume 5 | Issue 4 Article 1

1990

Transitions to Democracy and the Rule of Law

Follow this and additional works at: https://digitalcommons.wcl.american.edu/auilr

Part of the International Law Commons

Recommended Citation
(1990) "Transitions to Democracy and the Rule of Law," *American University International Law Review*: Vol. 5 : Iss. 4 , Article 1.
Available at: https://digitalcommons.wcl.american.edu/auilr/vol5/iss4/1

This Symposium or Conference is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

SYMPOSIUM

TRANSITIONS TO DEMOCRACY AND THE RULE OF LAW

Sponsored by
The Center for Human Rights and Humanitarian Law
in cooperation with
The International Legal Studies Program
of the
Washington College of Law,
The American University

INTRODUCTION

PROFESSOR ROBERT KOGOD GOLDMAN[1]

On March 8 and 9, 1990, the Washington College of Law hosted a conference on "Transitions to Democracy and the Rule of Law" as the inaugural activity of its Center for Human Rights and Humanitarian Law. The newly established Center, which I co-direct with my faculty colleagues, Claudio Grossman and Herman Schwartz, is a tangible expression of the Law School's commitment to the cause of human rights at home and abroad and will build on our record of scholarship and activism in these two complementary branches of international law. In addition to organizing and hosting conferences with international organizations and non-governmental groups, the Center will undertake domestic and international litigation, develop multilingual human rights and humanitarian law materials, and enable foreign and United States lawyers to acquire skills training and pursue advanced studies in both fields of law.

The March conference brought together an impressive group of

---

1. Professor of Law and Louis C. James Scholar, Washington College of Law, The American University, Washington, D.C.

prominent human rights leaders, practitioners, and scholars from Europe, Latin America, and the United States who, over two days on a series of panels, grappled with many of the formidable legal questions confronting the emergent democracies in Eastern Europe and Latin America. This volume of *The American University Journal of International Law and Policy* provides a comprehensive transcription of the remarks of the speakers on various panels at the conference. These proceedings are engaging reading with thoughtful insights into, and diverse perspectives on, the process of building genuine democratic institutions in these countries. The conference was a fitting beginning to our Center's important work.

OPENING REMARKS

DEAN ELLIOTT MILSTEIN[1]

Today we announce the birth of our Center for Human Rights and Humanitarian Law; a Center within the Washington College of Law which will permit us to consolidate and expand the work of our faculty in this very important area.

Our faculty has long been active in promoting the rule of law throughout the world as part of the struggle to protect human rights. They have observed elections and visited political prisoners. They have conducted litigation and influenced, or at least tried to influence, foreign policy. They have reported human rights abuses and published scholarly articles. They have organized symposia and spoken to the press. They have educated countless students. They have done these things because they share in a belief that the law provides powerful weapons for the just to fight against the wicked; a belief that for a lawyer to fight against the abuse of human rights is to engage in the most important fight of all.

Last fall, three of our faculty approached me with the idea of starting a Center for Human Rights and Humanitarian Law at the Law School. Claudio Grossman, Robert Goldman, and Herman Schwartz told me about the terrific ideas they have for this Center and the projects that we will be able to do as a law school in this field. The first project that they mentioned, this conference, is an important event in its own right and a fitting way to inaugurate our new Center.

1. Dean, Washington College of Law, The American University, Washington, D.C. In February 1990, Dean Milstein travelled to Nicaragua to act as an observer in the first free elections to take place in that country.

I suppose you all are familiar with the work of Claudio Grossman in the field of international human rights. Claudio has taught me many things. I have traveled with him to Chile, Nicaragua, Argentina, and Israel. Claudio, among other distinctions, litigated the first case to be tried before the Inter-American Court of Human Rights last year. The case was against Honduras. Through Claudio's work and the work of other lawyers working with him, Honduras has been ordered to pay money damages to the victims of its repressive political regime.

Bob Goldman has been involved in the human rights struggle for his entire career, more than twenty years. He has been involved in human rights missions in almost every country in Central and South America. Most recently he has been active in fighting against the amnesty that Uruguay has declared for crimes committed by the military.

Herman Schwartz has been active in fighting for the rights of prisoners in the United States; fighting for the disenfranchised. He was one of the founders of the National Prison Project.

Herman has also done many important things for the Washington College of Law. He started our Israeli civil rights program. Each year two lawyers come to the Law School from Israel to study international human rights and/or American public interest law. They then go back to Israel to be public interest lawyers. When I was in Israel last summer, two of these lawyers won a case to require the military to give notice and hold a hearing before they tear a person's house down. Though these rights seem basic, in Israel this was a new civil right. Herman can take some of the credit for making that kind of change in Israel. In addition, he brought the first South African lawyer to our program to study American public interest law and has been working in the human rights area in Eastern Europe, particularly in Czechoslovakia. These three people are the co-directors of our new Center.

We have other faculty who are also very well known in the human rights area. Tom Farer has a joint appointment with the Law School and the School of International Service and will be working in the Center. Rick Wilson, the newest member of our clinical faculty, is starting a clinical program at the Law School in international human rights next year. Rick and about eight students expect to be handling cases before the Inter-American Commission on Human Rights next year. This will be the first in-house clinical program handling human rights cases. Bob Dinerstein, the director of our clinic, has been on human rights missions to Chile. Fred Anderson, the former dean of our Law School, has been on human rights missions to Chile and Argentina.

It is also fitting that this Center will be at The American University.

The American University has students from more foreign countries than any other university in the world. We also have an International Legal Studies Program, a Master of Laws degree program that has attracted more than 100 students each semester from more than forty foreign countries. About a third of those students are here to study human rights. In addition, The American University has other notables such as Lou Goodman, the Dean of the School of International Service, Sandy Unger, the Dean of our School of Communications, and other faculty involved in human rights. We are very, very optimistic and proud of what we are going to be able to accomplish.

Our new Center is going to engage in scholarship, litigation, and advocacy. We will teach and prepare teaching materials. We are going to have symposia and conferences. We are going to provide education to hundreds and hundreds of lawyers from around the world. I am confident that this Center will be successful and invite each of you to participate in its future.

I would like to add one other personal comment as this conference on the "Transition to Democracy" begins. Two weeks ago I was with Claudio Grossman, the International Human Rights Law Group, Amy Young and Karen Penn, and others in Nicaragua. One day, we were in one of the poorest neighborhoods in Managua. It is hard to describe the poverty that we saw in Nicaragua, but this was the worst. The polling place was in a shack with a dirt floor and no windows. There were bags piled against the wall. The light came in through big spaces between the slats of the boards that made up the shack. A bare bulb hung from the ceiling.

A woman came in with her husband. The head of the polling place turned to the international observers and said, "We have a lot of illiteracy in the neighborhood and we have to be very flexible; so what we do is let the husband go in with an illiterate wife or vice versa to help them vote. Unless you have objections, that will occur." It did. The ballots were very large to protect against fraud. They were folded. There was a black ink stripe to make certain that the vote was secret. The wind blew the woman's ballot open as she came to put her ballot in the box. She had voted for "UNO."

I learned from this experience that there was an energy, a desire, to engage in the right of political participation even among the poorest and most illiterate people in the society. They felt free to vote for whomever they wanted. This made me feel that there is hope for the spread of democracy throughout the world.

PROFESSOR CLAUDIO GROSSMAN[1]

Are there common bonds that link a Bush Negro tribe in Surinam, Czechoslovakians, East Germans, Nicaraguans, Chileans, and Paraguayans? On December 31, 1987, eight members of the Saramaka tribe in Surinam were killed by the armed forces. They were made to dig their own graves before the soldiers executed them. The Saramakas are a Bush Negro tribe; a very proud African people with a tremendous sense of dignity. They had escaped long ago from the slavery of the Dutch plantations in Surinam in the 17th century. They had refused to be slaves, and since then they have struggled to "keep their own ways" and their right to be independent. Currently, a number of students at our Law School are assisting me in presenting a claim against the government of Surinam before the Inter-American Commission on Human Rights on behalf of the relatives of these slain Saramaka tribesmen.

Elections were recently held in Nicaragua, Chile, and Paraguay. The international monitors who observed these elections were all impressed by the quiet dignity, almost the religious dignity, with which people in those countries lined up to express their will and to freely determine their future. They exercised something that they perceived to be very important: the right to influence the political character of their nation—for the first time in years the people were truly actors in shaping their collective destiny.

In Czechoslovakia and East Germany, walls—both spiritual and material—have been destroyed. The people there are seized by the powerful idea of freedom and the notion that arbitrary controls placed by government on the development of human beings are morally and politically unacceptable.

In spite of huge differences in geography, culture, and experience, the Bush Negro tribe, the East Germans, the Czechoslovakians, the Chileans, and others share a common past of human suffering. That suffering, however, does not tell the whole story. They also are linked by their dignity in the face of repression and by their belief that it is possible to create a freer society and that they can be key actors in that endeavor. All of us who have had the opportunity to witness the political transitions taking place in these countries cannot help but be deeply moved by the intensity of the feelings and the powerful motivations of their people. We have returned to our own countries, after having viewed those events, with a renewed commitment to human dignity and with the hope that things can be better.

1. Professor of Law and Geraldson Scholar; Director, International Legal Studies Program, Washington College of Law, The American University, Washington, D.C.

The shared legacy of repression existing in these countries also poses some common legal questions for their transitional governments. One of the most difficult questions concerns accountability for human rights violations during the previous regimes. What should be done with members of the armed forces and the secret police who committed these crimes? How this issue is resolved can contribute either to strengthening or weakening the new democratic, but still fragile, institutions and to uniting or dividing society. Other questions address the creation and organization of new legal arrangements. What, for example, should be the role of the judiciary in protecting individual rights? How does a society beset by ethnic tensions reach consensus on a common core of values that recognizes and protects both majority and minority rights? What can the international community, and particularly the Non-Governmental Organizations (NGOs), do to aid this process?

We are here to discuss these and related issues. We are also here because we believe that lawyers can solve these problems. Although we will probably not be able to answer all these questions over the next two days, it is important that they be addressed and debated.

The new Center for Human Rights and Humanitarian Law of The American University is particularly pleased to provide a forum for the discussion of these matters. I look forward to listening to and exchanging ideas with you and, hopefully, together we can shed some light on, and pave the way for, an ongoing debate on these important issues.

PANEL I

TRANSITIONS IN THE MIDST OF CRISIS: THE ROLE OF THE NON-GOVERNMENTAL ORGANIZATION

REMARKS OF ARYEH NEIER[1]

The international community should not decrease its advocacy for human rights when a country makes the transition to democracy. An experience I had when I was with the American Civil Liberties Union illustrated this point to me.

I had traveled to India where I met a distinguished advocate of human rights who had once been associated with an Indian civil liberties organization. I asked him what had happened to the Indian Civil Liberties Union. He told me that Roger Baldwin, founder of the American Civil Liberties Union, had traveled to India and enlisted, among

1. Executive Director, Human Rights Watch, New York, New York.

others, Jawaharlah Nehru to organize the Indian Civil Liberties Union. Nehru became the group's chairman. But when Nehru became prime minister, he wrote a letter to the Board of Directors of the Indian Civil Liberties Union. He suggested that, since he had become prime minister there was no longer a need for an Indian Civil Liberties Union, the group should disband. The group complied.

My friend, the distinguished advocate, was arrested when Nehru's daughter, Prime Minister Indira Ghandi, imposed her state of emergency. Because of that state of emergency, the same group of people met to reconstitute a civil liberties organization in India.

Clearly, civil liberties should not disband during transitions to democracy. Indeed, evidence shows that some of the greatest dangers to human rights and some of the most severe violations take place in the years following soon after transitions to democracy.

The Human Rights Watch, for example, documents the persecution of human rights monitors worldwide. A report published this past December enumerated some sixty-eight killings of human rights monitors around the world that we found out about during the course of the year. All but five of those killings took place in countries that are ordinarily considered democratic. Only five took place in dictatorships of the right or the left. The majority of those which took place in the so-called democracies took place in countries that had fairly recently engaged in what would usually be described as free and fair elections.

Another organization, the Committee to Protect Journalists, is about to issue its annual report on attacks on journalists worldwide. It will show a similar pattern with respect to journalists. More than fifty journalists were killed around the world during the past year. Virtually all were killed in countries ordinarily labeled democratic.

The question is, why is it so dangerous for human rights monitors, journalists, and others in these circumstances? Though I am not sure of the answer, I offer a suggestion. There is a moment in the history of a country when the political process opens up and many people become active in human rights matters. Others engage in investigative reporting. Many other citizens are active in ways that were not possible during the period of dictatorship of the right or the left. People are encouraged at that moment to take advantage of the relative openness within a country, yet, in so many countries around the world the establishment of the rule of law does not accompany this openness. Accordingly, those who were active become subject to reprisals by people who do not care for human rights monitoring or who dislike investigative journalism that is underway. Further, the institutions of the society are too weak at that stage to hold accountable those who attack human

rights monitors, journalists, and others.

These are difficult times in many countries. Once the political process has opened, there is an opportunity to establish the rule of law. There is an opportunity to establish the institutions of a civil society through which it is possible for persons to associate freely with each other and to advocate the causes and press the interests that unite them in those organizations.

We have not reached the point of nirvana when political opening has taken place, and the so-called transition to democracy has begun. In many Latin American and East Asian countries, where this kind of transition is taking place, there is an increase in violence during this transition. In Guatemala, for example, there has been an increase in danger to human rights since the establishment of a democratic government. It is more dangerous in Guatemala today than it was during the last three years of military rule that preceded the establishment of the government of Vinicio Cerezo.

In Brazil, a country which is not ordinarily high on the human rights agenda in any significant way, there are enormous numbers of death squad killings, large numbers of disappearances, the routine practice of torture, and frequent and often violent violations of the rights of Indians. Summary executions of peasants over land disputes by killers working for rural landowners are common, and there is virtually no possibility for prosecution or court enforced punishment. Yet Brazil has largely disappeared from the international human rights agenda because it has made the transition to democracy. Democracy can provide a government with the opportunity to shield itself from the kind of scrutiny and criticism that is more easily directed against dictatorships of the right and the left. I am not saying that these situations of great danger will take place in every country. Two countries which are undergoing transitions at this moment are among those about which I am optimistic. In Eastern Europe, I am most optimistic about Czechoslovakia because it had a civil society "from below" and a democratic tradition which is reasserting itself. I believe that human rights will be very well protected in Czechoslovakia. In Latin America, the prospect for the protection of human rights in Chile is much better than in many other Latin American countries.

All over the world there are governments where abuses will persist. People concerned with human rights in the immediate aftermath of a transition may be in the most danger. The international community must combat the belief that problems are at an end once a transition to democracy has taken place.

REMARKS OF PROFESSOR RICHARD LILLICH[1]

I obviously view the events in Eastern Europe and elsewhere with great satisfaction. However, I do not think we want to view them, at least from the perspective of the NGO community, with too great an amount of self-satisfaction. I think most NGOs should be rather modest about the role that they have played in many of the recent developments. As indicated earlier, the people who really should get the credit for the remarkable developments we have witnessed are the people who were in the trenches over the past few years and decades. Moreover, the people who are going to play important roles in the future, of course, are these same people who are in the trenches now. Therefore, rather than rush into a variety of rather trendy activities, I would suggest that NGOs approach the future by considering how best they can assist in the development of human rights law and practice around the world in a very modest and low profile fashion. It may well be that in many instances the role of NGOs is going to be relatively marginal, or at least radically different from what it has been in the past.

I have grouped my remarks today under three points: First, a new emphasis for new problems; second, a renewed commitment to traditional concerns; and third, the impact of recent developments upon the approach to international human rights law in the United States, a matter I find to be almost entirely neglected in many of the editorial pieces and other commentaries now being published. There is great self-satisfaction about events in Eastern Europe on the part of the Bush Administration. There is great self-satisfaction among a variety of other groups who view recent developments as a victory not only for democracy, but also for their version of the free enterprise system. I think it unfortunate that few people are concerned with what we in the United States can learn from Eastern Europe. The East German Social Charter, that was adopted in March 1990, tells us things that we ought to be concerned about in the neglected area of economic, social, and cultural rights. The Eastern Europeans, I suggest, certainly want our form of democratic government, but by no means do they want the type of unregulated capitalism, coupled with the reduction of social programs, that became the hallmark of the Reagan Administration.

First, new emphasis on new problems. By and large, what NGOs are doing is fine, and they ought to continue to do what they have done in the past, not only in Eastern Europe, but also in many other areas of the world. I believe, however, that NGOs have to go beyond what they

1. Professor, University of Virginia School of Law, Charlottesville, Virginia.

have been accustomed to doing in the past. One has to move from just criticizing and pointing out human rights abuses in other countries—which has been the major activity of human rights groups in the past—to getting into the service area, if you will, by providing support to human rights developments in other countries. The old cliche about the carrot and the stick has some relevance insofar as the future role of NGOs are concerned.

Let me suggest that such things as institution building, constitution drafting, legal training, and legal aid and assistance may be much more important factors in the development of human rights in other countries than just the critical reports that have been the mainstay of NGO activities in the past. Obviously, there are going to continue to be many, many countries in which grave and serious human rights deprivations continue to occur. That is why I suggested that NGOs should continue with what they have been doing in the past. But it seems to me that there are a whole range of new ideas that have to be brought into play.

One important factor, of course, is that governments may no longer be the primary problem. The approach of the NGOs generally has been to criticize governments, but it may be that governments now need assistance in attempting to impose a human rights regime upon their countries to develop civil rights and liberties. Therefore, assistance, rather than criticism, may be the order of the day.

Another point I think we have to keep in mind is that international human rights lawyers *per se* may not be the most important actors in providing this kind of assistance. I, as I am sure is true of most of the members of the panel and a good many people in the audience, have been asked to go on a variety of constitution drafting missions. I have said no to all of these offers. I have recommended instead one of my colleagues, who is in Budapest right now and will be in the Soviet Union next week, because it seems to me that constitutional lawyers and administrative lawyers are the kind of people needed by many countries these days, more so than human rights lawyers. Moreover, one cannot forget, particularly in countries like Czechoslovakia, Hungary, and Poland, that there is a wealth of talent right there, waiting to be tapped. One must avoid the paternalistic approach to constitution drafting that surfaces from time to time. I am sure most of you saw the article on constitution drafting in *The New York Times*[2] which included the hourly rate of one prominent international human rights lawyer. I would suggest that is not the approach to take.

2. Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. Times, Feb. 2, 1990, at B6.

Additionally, we are going to have a lot of old problems in new contexts, as has been pointed out in one or two editorial pieces appearing this spring. Opening up the states of Eastern Europe has opened up old, racial antagonisms, so there are racial problems. We may have problems with the treatment of minorities where there had not been problems in those countries while the iron hand of the Communist regimes prevented them. We must take new approaches to new problems. I hope that all NGOs are considering these matters as they assess what their human rights agenda should be for the coming years.

Second, I would like to talk about a renewed commitment to traditional concerns, because, as I have indicated before, I think one has to continue what one has done before but do it in an even better fashion. Let us consider, then, the traditional human rights agenda of NGOs.

Obviously a lot of new things have come on the agenda. Some of these things should have been on it years ago. Frankly, a lot of things that in the past should have been on the agenda never were on the agenda of most NGOs. I wonder how many people paid much attention to Roberta Cohen's report on China two years ago. All of a sudden, human rights in China has become a very, very hot topic indeed. It should have been such a topic all along. Incidentally, I was very glad to read the report on Albania by the Minnesota Lawyers International Committee. Albania has been overlooked and has not been on the agenda of the NGO community in the past.

In addition to these overlooked areas, one could talk about certain countries in Africa. Some countries in Africa, such as Ethiopia, seem to get all the attention. Other countries, like Zimbabwe, get almost no attention at all. Recent efforts to get a prominent NGO to undertake a mission to Zimbabwe have fallen on deaf ears in the United States. That is unfortunate because, while there may be human rights problems in Zimbabwe, there have been remarkable successes too, which if publicized might serve to make that country a "role model" for other African states.

And dare one say it: There is a country called Israel; I wonder sometimes whether we should not have a group called Israel Watch. It would certainly have a very busy human rights agenda. And I can speak with some experience as well as disappointment here, because I have been remarkably unsuccessful in getting a prominent Washington NGO to investigate the situation on the West Bank.

Of course, there are other countries that need monitoring of the traditional type as well. We have to reassess, at least in my estimation, usual targets such as Turkey, which all of a sudden, because their im-

portance to the national security concerns of the United States may have lessened, have become more susceptible to governmental pressure than they were in the past. Perhaps NGOs should increase the attention they pay to such states.

My next point, insofar as the agenda is concerned, is to stress the need for a little bit more cooperation and coordination between NGOs in the United States and NGOs overseas, as well as between NGOs in the United States. I am on the board of one prominent English-based NGO. I find its attempts to reach out and coordinate activities and even to assist the activities of NGOs in the United States have not met with the enthusiasm on the part of their American counterparts that I would like to see. It seems to me unfortunate to turn aside efforts by NGOs in other countries to assist in the development of human rights law in the United States—for instance, by not taking up the offer of assistance in making European Convention precedents available for inclusion in *amicus curiae* briefs to the Supreme Court and other United States courts being filed by American NGOs. I just cannot understand why there is not more cooperation in that and other areas.

Moreover, there is a lack of cooperation, to say the least, between many NGOs within the United States. It may be fueled to some extent by the competition for the almighty dollar from foundations; in any event, one finds turf battles occurring all the time. I do not want to go into any of the turf battles that I have participated in—some I have won, some I have lost—but it does distress me when I hear that the Lawyers Committee for Human Rights in New York is thinking about establishing a branch office in Washington. One of the exciting things about the development of human rights NGOs in the United States—like the Minnesota group and Human Rights Advocates in San Francisco—is to have local groups around the country. The idea that we need to have some kind of centralized organization with branch offices—the Baker & McKenzie of international human rights law firms—is somewhat appalling.

My third point focuses on the impact of recent developments in Eastern Europe upon the activities of NGOs in the United States. One of the great overlooked issues today is the lack of the United States' participation in the monitoring bodies of the major human rights treaties. That follows from the fact that, with the exception of the Genocide Convention,[3] the United States has ratified none of the six major international human rights treaties pending before the Senate. During the

3. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

Reagan Administration the rhetoric was that these treaties were under study, but our guest speaker at lunch, Ambassador Schifter, eventually came out of the closet in Quebec in 1985 to say that he opposed these treaties. He used as an example against ratification one that I would hope that he would reassess now because, of course, it was the example of Poland's ratification of the Civil and Political Covenant.[4]

Why should we ratify the Covenant, he argued, when Poland, who has ratified it, takes advantage of its provision to derogate in states of emergency. Moreover, he argued, they have not subscribed to the Optional Protocol[5] and hence no effective enforcement mechanism exists. That argument comes like an ill wind out of the mouth of a United States spokesman, because even President Carter, as we all know, did not send up the Optional Protocol for Senate advice and consent. To criticize Poland on that score is somewhat unbecoming, to say no more.

In any event, Poland is aboard now. The Soviet Unión is going to ratify the Optional Protocol. Moreover, almost all the Eastern European countries now have applied for membership in the Council of Europe. The writ of the European Court soon will run over most of Central Europe. In place of the "Evil Empire" we shall have a host of independent states committed to the standards found in the major international human rights instruments.

Where does that leave the United States? I think we have a tremendous opportunity to push for U.S. ratification of at least the Civil and Political Covenant. I leave this afternoon for a two-day conference in Georgia where a variety of people, including Professor Sohn, and people from the United States government and the United Nations, will be talking about the ratification of this treaty. It would be a very good thing if the NGOs that have been relatively spoke on the need for the United States to ratify this and other treaties speak up more and made treaty ratification one of the major objectives on their agendas.

The PAIL Institute sponsored a conference here in Washington earlier this year that was very poorly attended by the very NGOs that are represented in this room. There does not seem to be much interest in mounting the long-term effort needed to obtain ratification of the human rights treaties. I think that NGOs should make it a major goal, because 1991 is the bicentennial of the ratification of the Bill of Rights, that the United States at least ratify the portion of the International

4. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

5. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 302.

Bill of Rights called the Civil and Political Covenant.

We hear so much rhetoric today, particularly from the U.S. government, but also from other sources, reflecting great self-satisfaction about the triumph of democracy and the free market system in Eastern Europe and the Soviet Union. I do not know if democracy necessarily embraces the free market system, but I would suggest that we have a lot to learn from the Eastern Europeans and from some of the ideas that they are going to bring to the West as part of their assimilation into the Council of Europe. The East German Social Charter is an example. I think that one of the areas that NGOs in the United States have not treated adequately—and I am certainly guilty of this dereliction in my own writing and my own work—is the area of economic, social, and cultural rights. I think this is one of the major areas that must receive far greater attention from the NGO community in the future. If, in effect, we are going to learn something from this process that is going on, as well as contribute to it in the future, I think we ought to be very concerned about the ways in which we can borrow from some of these other countries and develop our own system in a more effective and just and humane fashion.

REMARKS OF HUGO FRUHLING[1]

When I was asked to speak on Latin America and looked at the subject of this panel discussion, I began to ask myself a series of questions.

Whose crisis should I speak about? Should it be this crisis of the human rights situation in Latin America, for instance? I assessed the situation there. The human rights picture in some countries is as bleak as ever. In others, like Colombia and Peru, it is deteriorating. But in countries in the Southern Cone, the human rights situation is better than it has been in the last fifteen or twenty years.

Should I speak about the role of NGOs in Latin America, which is facing a very grave and terrible economic and social crisis, rising social demands, and a deterioration in the states' abilities to respond to this demand? This is too large an issue to discuss in ten or fifteen minutes, and there are certainly national differences which should be taken into account.

I decided to discuss the crisis of NGOs in situations in which transitions to democracy are taking place and human rights violations have

1. Visiting Professor, Harvard Law School, Cambridge, Massachusetts.

decreased dramatically since a new civilian government took charge. As Aryeh Neier was saying, this is not happening in Brazil, Guatemala, or El Salvador. At this moment this is happening in Uruguay and Argentina, and I predict it will happen in Chile.

This issue is a less dramatic one. We are not talking about the deterioration of the human rights scene in general; we are discussing the problems that human rights NGOs face in such a situation. NGOs were created to fight against gross and systematic human rights violations that took place under military regimes. In a new political environment, they have to expand their agendas, which is difficult. In many cases, as in Argentina and Uruguay for example, the struggle to make governments or past armed forces officers accountable for past violations exhausts NGOs' efforts and demoralizes their activists. In other cases, NGOs' close connections with the opposition mean that some of their members will enter public roles. The question is, therefore, how do we see the human rights movement?

What are the kinds of institutional arrangements that would promote a stronger human rights movement in situations in which transitions to democracy and serious attempts to impose a rule of law are occurring? This is a less dramatic question because, to some extent, NGOs face this crisis as a result of their partial success. They played a major role in weakening authoritarian rule. They played a measurable role in the transition to democracy. They are, to some extent, responsible for the new political situation. This crisis opens up opportunities to reflect on the human rights movement and the new priorities that should be assigned in countries of this sort. As in any crisis, there is the possibility for failures and for new successes.

I would like to address this issue by looking first at the new institutional structure. I would posit a few points dealing with what the new international human rights movement should be like in these countries in the future. I will explain what the goal of a human rights movement should be in these countries and what kind of steps national and international organizations should take toward that end.

The main goal of the human rights movement in such situations is to make the human rights issue a national issue. This means to stimulate debate about human rights and encourage cross-fertilization of dialogue among people of different political opinions about human rights issues. We must overcome divisions coming from the past without forgetting the issue of accountability and trials for human rights offenders. We must also try to build trust, as well as organizations that are capable of attracting people from different ideological persuasions.

To do that, we have to create an institutional structure that is comprised of more actors in the human rights field. I am a big defender of human rights organizations. I have participated in some of them and I have directed my work as an attorney towards them. I do, however, think that a strong human rights concern requires a more diversified group of actors working in the human rights field.

I begin with government. The government, by definition, is usually our opponent in the human rights struggle. But there is no possibility of building up an efficient, functional human rights system without the participation of the government, Congressmen, and judges. There is no possibility whatsoever of passing laws to reform current problems in the criminal justice system, in the administration of justice, in the lack of access to justice by the poor population, without at least influencing and having a fertile dialogue with public authorities. We should bring in the government to participate in the human rights field. We should recruit judges to participate in the human rights struggle.

We should push the universities to teach human rights as one of their main concerns. Universities play a major role in Latin American societies. Most judges and human rights advocates are going to get their degrees there. Human rights is taught in some courses at a very general level in a few universities in Latin America. We have to push these universities to give these courses more relevance in the curriculum.

NGOs should participate in that effort. They should prepare teaching materials based on their own experience and cases of human rights violations to provide the universities with teaching materials for these courses. They should create internships within NGOs for interested students. They should create career possibilities so people who are interested in human rights coming out of law schools may pursue professional careers in human rights litigation.

In addition, new NGOs should probably be created. These new NGOs should invite participation from people whose views span the ideological spectrum. They should address civil liberties issues that actually arise from the permanent structural deficiencies of their institutional system and economic inequalities that are present in so many Latin American countries.

I firmly believe that tolerance for a certain type of human rights violations, like tolerance for a terrible jail system or unacceptable behavior of the police, paves the way for a culture that permits gross and systematic human rights violations in the future. If we do not scrutinize violations that seem minor in comparison to what happened in the near past, we will not be able to build a strong democratic and human rights abiding culture. Institutional actors should be much more diversified. We should encourage the emergence of these new actors.

We should encourage research. I mention this not only because I am an academic but because research plays a major role in institutionalizing a certain practice or subject within a society. There is a lot of research coming out of Latin American NGOs which is excellent in some respects. The problem with research in human rights in Latin America is that the main consumer of research is the NGO community. This would not be a problem, however, if the human rights community was not small as compared to the many people who could create and who could appreciate this research. We should make an effort to reach out to the largest sectors of the community with our research pieces. Human rights research does not appeal to many people in Latin America. It does not attract the same type of respect as traditional constitutional research or social sciences research.

We should promote research and develop an audience for that research. First, we should press the teaching of human rights at the university level. Second, we should press and monitor the behavior of Congress and present to Congress new, just proposals concerning changes in many aspects of the judicial and institutional system and the legal systems that are present in Latin America today. By pushing proposals from a human rights perspective, we would impress on these groups the need to improve their expertise in human rights issues.

Human rights organizations and human rights researchers should look for collaborative projects that include people from organizations that are outside the human rights community. There is a clear division between those who are in and those who are out of the human rights community. The larger part of the intellectual community has no real knowledge of what research is done by human rights researchers.

International outreach is another major goal. Uruguay, Argentina, and Chile have developed a tremendous expertise in founding, managing, and establishing human rights organizations, in establishing large legal services for human rights victims, and in filing complaints before the international human rights fora. These kinds of expertise and experts should be called upon to play a role in building up and strengthening human rights organizations everywhere else, in Latin America and in other Third World countries. The South American experience is unique in some respects. Advantage should be taken of it. Human rights organizations in Chile should promote that effort.

Human rights organizations should also play a role in pushing the international, and specifically the inter-American, system to pay more attention to human rights violations that take place under democratic regimes.

There is litigation going on before the Inter-American Commission on Human Rights. We have the first three cases decided by an inter-American court. Yet these are the first steps in the development of a very strong inter-American human rights system. The experience of these NGOs in South America should extend beyond the boundaries of these countries.

Finally, training is important. Both new NGOs that specialize in civil liberties and old NGOs that were created under authoritarian regimes should play a role in training judges and public officers. They should also play a role in educating the government to devise the human rights policy. Latin American countries which have democratic credentials should play a more important role in the international fora that deal with human rights.

Events in Latin America and in Eastern Europe will cause the international human rights regime, all the rules and institutions that deal with human rights within the international arena, to be strengthened. They will have more importance and more impact in public decisions in each country. NGOs can push these governments to play a more important role in that process.

The real issue is to address the violations of the past and to build up the preventive capability for redressing human rights violations in the future. I am only speaking about countries which will not experience dramatic increases in human rights violations. That does not mean that we do not need a strong non-governmental movement. What we do need, however, is a more diversified structure of institutions that collaborate in that effort.

I will end with two basic points. First, we should encourage collaborative and trans-national research projects and conferences. We should bring in some human rights activists to learn about the American civil liberties experience. We should push for collaboration. This need not include technical assistance. Our effort should strive to give a wider audience the impression that the human rights movement is energetic and is very dynamic.

Second, NGOs should remain independent of their governments. If human rights organizations are not independent from the government and are incapable of criticizing their governments, then they are not non-governmental organizations. In order to institutionalize a human rights system, laws must be passed and policies must be implemented. This requires a policy of rejection—of denunciation—of abuses, and reaction to actions that violate or infringe upon human rights. Furthermore, it requires a policy that goes towards proposing alternatives and getting things done. That also requires a dialogue with the government.

Remarks of Michael Posner[1]

I am pleased to be here. There are several points made by previous speakers that I would like to comment on and I will add a couple of extra points to the debate, as well.

First, it is important that the title of this meeting is "Transitions to Democracy and the Rule of Law." Discussion about a transition to democracy, whatever that exactly means, and a transition to institutionalized protection of human rights rule of law can be very different things. The conversation we would have about Guatemala is a very different conversation than the one we would have about Chile.

Second, the topic of this panel is Non-governmental Organizations (NGOs). It is important that we distinguish and talk about the role of nationally based NGOs and the role of international NGOs. They are quite different. The role of international NGOs ought to be principally to support the work of national groups. Hugo Fruhling said a moment ago that part of the role of NGOs is to make human rights a national issue. He meant that within a country there needs to be a more diversified number of groups and individuals addressing these issues on a regular basis. I mean that another way. There needs to be enough of a domestic constituency that the international groups can go on to business in other places.

Our role—that is to say, international groups like Amnesty International, the watch committees, the Lawyers Committee and so forth— is eventually to put ourselves out of business. I do not see that happening in the next three or five years. But the ideal state would be one in which 170 countries each had a strong, aggressive, national human rights community which addressed these issues on a regular basis, independent of government, confronted governments regularly, worked for the reforms that Mr. Fruhling talked about, and had no fear of retaliation or persecution. Though we have a long way to go before we get there, this goal should guide all of our energies and our focus in these times of change.

I want to comment also on a couple of things that Richard Lillich said. One is the question of advice and support as opposed to reporting on gross abuses. Non-governmental groups right now are not playing an aggressive enough or active enough role in monitoring the efforts to provide advice and support. First, we in the non-governmental commu-

1. Executive Director, Lawyers Committee for Human Rights, New York, New York.

nity have been terribly remiss in allowing international organizations like the United Nations to divert a great deal of their attention away from their central mandate. The United Nations, in its Commission on Human Rights, has a central protection role which it is not following. It has moved instead, in the midst of the supposed transitions in places like Haiti and Guatemala, to a focus on what they call advisory services.

The advisory services program has been a total failure and those involved from the non-governmental community have not held the United Nations' feet to the fire to make sure that those programs get back on track. The United Nations has a central obligation to make sure that, in states like Guatemala and Haiti where gross violations occur, reports are prepared on an annual basis, that there are debates under its Item 12, which addresses gross violations of human rights, and that those governments feel held accountable for their actions.

This is not happening. It is not happening in part because non-governmental organizations are not doing enough to make that an issue of first order in the debate. The United Nations Human Rights Commission just met—is meeting right now, in fact—but just met to address these issues. The Mexican delegation led the fight to prevent Guatemala from going back to the Item 12 agenda to allow a report to be done on human rights violations in Guatemala. There was very little international or national NGO activity to prevent that from happening. We have failed to monitor and to advocate within international organizations to keep protection on the agenda in states like Guatemala.

The situation is the same in Haiti. Venezuela took the lead in Haiti's defense, making sure that Haiti remained for this year on the Item 22, or advisory services agenda, despite the fact that the United Nations advisor had recommended reporting because the situation was so miserable. All of us, internationally based groups and national NGOs, need to be more attentive to what governments are doing in the context of international organizations. We must monitor those practices.

Second, there are a variety of United States efforts to provide advice which are equally suspect or at least in need of monitoring, scrutiny, and advocacy by human rights NGOs. I refer to programs like the State Department and the Agency for International Development's (AID) Administration of Justice program, which has had a checkered record at best in places like El Salvador, Colombia, and Guatemala. This program continues with too little monitoring. There are not enough of those concerned about human rights who argue that the program must have a stricter sense of its purpose and a clear human rights perspective.

I refer also to various efforts to expand police training, which I think needs to be discussed in the context of a broader objective of demilitarizing countries and moving more toward democratic civilian control over armed forces. And I refer to the National Endowment for Democracy, which is now a widely praised program in the United States but which I, from a human rights point of view, consider a highly questionable enterprise that needs to be monitored on a regular basis and challenged every day.

Finally, Dick Lillich referred to the ratification campaign of the treaties. The United States-based human rights community should look at the two covenants. I would suggest not only the Covenant on Civil and Political Rights[2] but also the Covenant on Economic, Social and Cultural Rights.[3]

The campaign for ratification of that international bill of rights is only going to take off and only going to be effective if we mobilize and activate national NGOs in the United States, like the ACLU, the NAACP Legal Defense Fund, or the Coalition for the Homeless. We must mobilize a domestic constituency concerned about these issues in the United States and make it an American issue.

I think to view it in international terms, that is to say—we are doing this so that we can have enhanced standing in the rest of the world—is a hopelessly out-of-date way to address those issues. There is the potential now, which has not existed in the past, for that constituency in the United States to be mobilized. But we must use a very different approach, a radically different approach, than those who have campaigned for the Genocide Convention[4] and the Torture Convention.[5] Members of the Senate, and the United States in general, perceive these conventions as treaties that apply to "those people over there." It is time to look at the United States to figure out how can we use international treaties to improve our own country and get our house in order.

---

2. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S 171, *reprinted in* 6 I.L.M. 383 (1967)(*entered into force* Mar. 23, 1976).

3. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).

4. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1948). This convention calls for the formation of an international court to hear and rule on alleged cases of genocide. Comment, *Implied Waiver Under the FSIA: Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Calif. L. Rev. 365 (1989).

5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 40 U.N. ESCOR Annex (Agenda Item 10(a)), U.N. Doc. E/CN.4 (1984), *reprinted in* 23 I.L.M. 1027 (1984). Since its reprint, the Torture Convention has undergone several minor revisions. These revisions are discussed in 24 I.L.M. 535 (1985).

REMARKS OF MICHAEL SHIFTER[1]

As a member of the NGO community, I find the suggestions of the previous speakers extremely useful and relevant. Those of us in the foundation sector, along with others, would do well to rethink and reassess human rights programs throughout the world.

Today I am going to focus my comments on Peru. This probably strikes most of you as quite odd because the framework of this meeting is the transition to democracy. I hope you will not view this focus as reflecting an interpretation of the elections that will take place a month from now, or the new government that will begin in July 1990, in Peru. I think, however, the Peruvian case is quite instructive and unique in the Andean region and in Latin America generally. It might be useful to think about and draw some general lessons from it as other countries go through their transitions.

The transition in Peru took place a decade ago. The shift from military to civilian government was accompanied by a number of significant developments. For example, the emergence of the armed insurgency of Sendero Luminoso coincided with the Peruvian transition. Also, the country's legal left, and the United Left coalition of political parties and movements, was able to consolidate itself during this time. A myriad of popular organizations and social movements of various sorts that had their origins in the 1970s, also crystallized at the beginning of the decade. Finally, a set of human rights organizations emerged with very close ties to a dynamic sector of those popular organizations and social movements. So unlike the cases of Chile and Argentina in the Southern Cone, quite curiously the Peruvian transition essentially brought human rights organizations into existence.

These organizations emerged when they did because of serious human rights problems that several people in this audience have reported on for the last six or seven years. Both at the national and international level advocates and monitors have pointed to patterns of disappearances, extra-judicial executions, and torture. Such a grave situation continues to exist today.

The response to the human rights situation in Peru has been, until recently, quite traditional. The response has emphasized the documentation of violations and the denunciation of the Peruvian government

1. Program Officer, Andean Region and Southern Cone of South America, Ford Foundation, New York, New York.

because of the actions of its security forces against innocent civilians. It is worth stressing, then, that from the outset human rights organizations and the NGO community in Peru have been dealing with the issue of human rights violations committed under civilian, constitutional rule.

I would argue, however, that in the last couple of years there have been some new developments that are beginning to alter the strategies and the focus of human rights organizations in Peru. First, the insurgency in Peru, and principally the Sendero Luminoso insurgency, has been growing. This insurgency has expanded geographically, and the numbers of victims that it has included in its assassination campaigns have increased. In the last year and a half or two years, victims have included development workers, priests, teachers, and opposition politicians who have been associated (at least indirectly) from the very beginning with human rights organizations in Peru. This process has caused human rights organizations, and the NGO community in general in Peru, to reflect on their role.

Second, the weakening of the state in Peru in the last several years has been particularly pronounced. The state has failed to coordinate its policies, and has been unable to deal with the insurgency. It has failed to provide fundamental protections to Peruvian citizens.

Third, there has been a shift in public opinion more generally in Peru toward the view that human rights violations may in fact be an inevitable price to pay in some respects for fighting a guerrilla movement.

The traditional human rights framework has been unable to deal effectively with many of these new developments. As a result, the NGO community is beginning to experiment with a new emerging strategy and a new approach in Peru.

What does this new approach consist of? I think it consists of several elements. First is the documentation of atrocities committed by insurgent groups in Peru. Second, there is a greater emphasis on balance, on looking at both sides, in the Peruvian situation. Third, the NGO community is trying to find some common ground, and some consensus in Peruvian society regarding human rights issues. Efforts are underway that attempt to strengthen a non-violent democratic center in Peru. There has been much more emphasis in the last couple of years than in the early to mid-1980s on education and training activities that try to reach out and bolster key sectors in Peruvian society.

For the first time, I would argue, a key question is on the human rights agenda: how can Peru deal effectively with an armed insurgency within a democratic framework respectful of human rights?

This is a new question that has been asked increasingly by human rights advocates in Peru. People have perceived the limitations of the old framework that is no longer able to deal effectively with a fresh set of political conditions. Peruvian rights advocates are also increasingly turning to humanitarian law as a possible way to address some of these developments in a situation of internal conflict and political violence.

The emerging consensus that the traditional framework is no longer adequate has resulted in a number of very concrete and interesting and exciting alternative responses in Peru. One example would be the efforts of several human rights organizations to conduct training sessions and work closely with judges, prosecutors, and lawyers. Such programs reflect serious NGO attempts to deal with groups that are neglected by the state and that can play an important role in strengthening the rule of law in Peru.

Education work in Peru is among the most sophisticated in Latin America. There is a vigorous network that consists of six human rights organizations. They have an expanded program in the jungle region, in the coastal area, and in the highlands in Peru and work effectively at a variety of levels with church groups, neighborhood associations, unions, and so forth. This is a very exciting, innovative, and relatively recent development.

In addition, several human rights groups have made an effort to engage public officials and politicians of diverse political tendencies in a dialogue about human rights issues. The aim is generally to establish some common ground. This is something that has only taken place in the last few years and that I think responds to new developments in Peru.

I would argue that the Peruvian situation, both the human rights situation and the response of the NGO community, is in fact unique in Latin America. The Peruvian situation shares some elements with cases such as Colombia and El Salvador, where the principles of humanitarian law are plainly most relevant. I think it clear, however, that Sendero Luminoso and its peculiar characteristics sets the Peruvian case apart from the others.

The fact that victims in Peru are increasingly becoming members of popular organizations and social movements that have had historically close ties with human rights organizations is without parallel in Latin America. Furthermore, although one can point to many weak states and governments throughout the region, the crisis in Peru is particularly acute. Here, too, the human rights groups have perhaps attempted more than NGO human rights organizations in other countries to fill the space and assume the offensive in the Peruvian context.

Of course I do not mean to be too optimistic. There are enormous problems. The forces at work, the tendencies that reflect a deteriorating situation, are very powerful. It is unclear whether these human rights efforts can reverse those tendencies. There are opportunities for human rights organizations to be more aggressive in reaching out to the mass media in Peru, and to engage in a more effective campaign to work with groups in civil society.

A problem began to emerge in the last few weeks, which I presume all of us view with considerable alarm and concern. There have been some attacks on Lima-based human rights organizations that are clearly designed to impede and to stop their work. Obviously, such disturbing developments do not help create a favorable atmosphere for a new, experimental human rights strategy in Peru.

The Peruvian case illustrates that the NGO community has a strong political role to play. We should not deceive ourselves and say that these organizations are not political. They are perhaps not partisan, but they are political in several fundamental respects: they look for political space in society, adapt to new circumstances, try to be effective, and seek a significant measure of public credibility. In Peru, NGOs have been enormously resourceful, and courageous, in dealing with the country's complex and very difficult human rights problems.

PANEL II

THE RELATIONSHIP BETWEEN CIVIL SOCIETY, SECURITY ESTABLISHMENTS, AND HUMAN RIGHTS IN EASTERN EUROPE

TRANSLATED REMARKS OF ROBERTO CUELLAR[1]

I am going to talk mainly about organizations that have not been recognized as having a judicial status and that have had to face, interpret, and work within a crisis, especially in Central America.

It is important to analyze the role that these organizations are playing in the transition to democracy because they have had to face this process at a difficult time. Many human rights violations are still taking place. Despite all the problems these NGOs have faced, they have carried the banner of human rights, especially from the ethical point of view, against very severe problems. These include problems of international supervision, economic survival, and international acceptance, as well as many situations where the lives of people and members of the

---

1. Director of the NGO Project, Interamerican Institute of Human Rights, San Jose, Costa Rica.

NGOs not only have been in danger, but lost.

There is solidarity among the people working in the NGO movement in these countries in which life was in danger every day and silence meant the possibility of staying alive. They were silent among themselves. Their solidarity is one of the main assets of the NGOs' work in these countries.

These organizations went a lot further than providing legal protection. NGOs are working with indigenous populations, with refugees, with displaced people. There is a very wide range of actors in the work they are doing in Central America. The NGOs have themselves been taking a leading role as actors within the Central American system. This is the case of *campesinos* in Honduras, indigenous populations in Guatemala, and also the different people who work with the churches in Central America. These organizations made it possible for different international organizations and bodies, such as the Inter-American Commission on Human Rights and the OAS General Assembly, to learn about the situation in countries like Chile, Argentina, Brazil, Uruguay, and El Salvador.

It is important for NGOs to consolidate their credibility and to improve their images. Very often, NGOs have been too politicized and attacked both the right and the left. It is also very important for them to avoid the temptation to openly participate in political parties and take political positions.

There must be more objectivity and equilibrium among the organizations. Also, as other members of this panel have mentioned, NGOs must start dialogues with governments. There is room for NGOs to work with governments, and there are many areas in which we can work together. NGOs and governments should not oppose each other.

NGOs will have to be a lot more creative in order to face the new challenges; and I wonder what role NGOs in the United States will take in supporting Latin American organizations. Not only should they make claims on behalf of the people who have been killed, they should support and contribute new creative ideas that NGOs will need during the transition to democracy. These last ten years and this next decade will be a fight for survival. Survival is different for our societies than it is for the more developed countries. The environment will be, of course, a key issue in the next decade, but in the case of the NGOs in Latin America, survival also means being able to find a way to ameliorate economic disaster brought about by the external debt and the very high human price that we have had to pay for it.

We must address our work in the future mainly to children between ten and fourteen years. In the very near future, they will be the work-

ers, the soldiers, and the university students. Technology should serve human rights education and improve it in a substantial way. Our societies need it.

A Jesuit friend wrote to me a few days after the recent killing of the Jesuits in El Salvador. "Roberto, we cannot despair. We have to have faith and we have to believe that historical reasoning is going to prevail in human rights."

REMARKS OF JERI LABER[1]

I have been traveling for more than ten years now in some of the most repressive countries in Eastern Europe, usually one step ahead of the police, occasionally one step behind. I had the most direct contact with what is known as the security forces, however, last October in Prague and then in Sofia.

In Prague I witnessed leather-jacketed thugs arresting members of the Charter 77 movement with whom I was planning to meet. I took out my camera and tried to photograph what they were doing. The next moment I was engaged in a physical tussle with a security policeman who wanted to take the camera from me. When I refused to relinquish it, I was rather roughly but very expertly lifted into a car and taken off, with my colleagues, to the police station.

A couple of days later, I was in Sofia where I watched carbon copies of those thugs, this time speaking Bulgarian, roughing up a group of activists for environmental protection who were attempting to collect signatures on a petition in a park in central Sofia. The police did this not only in my presence but in the presence of Western journalists and diplomats, including representatives of several state departments of Western countries who were in Sofia at the time for a Conference on Security and Cooperation in Europe (CSCE) meeting.

I felt truly disgusted at the end of that trip. As I thought about it afterwards, however, I realized that what I had seen was not the sign of strength it initially appeared to be. I saw the bared fangs of a cornered animal.

When totalitarianism is working, you do not see the police. They are there, of course. They know where *you* are but you do not know where *they* are unless they choose to make themselves known. Back in 1982 or 1983, the police in Eastern Europe would never have tussled with dissidents in front of Western reporters, who take pictures and write

1. Executive Director, Helsinki Watch, New York, New York.

articles.

The two incidents I described also revealed the confusion of the police. I was released from the jail in Prague within a half hour because someone said, "You made a mistake. Don't do that." In Sofia, the authorities actually apologized the next day for what the police had done to the group of ecological activists.

I am describing the human rights situation in two countries of Eastern Europe just before the revolution. The events took place in mid-October. By November 10th, Bulgarian leader Todor Zhivkov had resigned. A week later there was a demonstration in Prague which marked the beginning of what became the "Velvet Revolution."

During that same visit, I discussed with Vaclav Havel the numbers that were necessary to make a revolution. As I remember it, he said that it would take 100,000 people in Czechoslovakia. He doubted that so many Czechs and Slovaks would ever take to the streets. This was also in October.

Peaceful demonstrations did begin, as we all know, first in East Germany, then in Czechoslovakia, and then in Bulgaria. The first demonstrations were usually met with some form of police violence—beatings, water cannons, and other attempts to stop them. But when the demonstrators came out again, the police held back. The power of the people was felt. And the revolutions of 1989 occurred virtually without violence except, of course, in Romania where everything was different.

What caused these demonstrators to go out on the streets, despite the predictions of people like Havel who have been fighting the battle for human rights for many years? There are many factors, of course. Many of them will emerge in the course of the discussions that will follow.

At the root of this activism is the fact that people in Eastern Europe have been left with a bankrupt ideology and increasing economic hardships. They became more and more aware of the repression and deprivation under which they were living. Glasnost in the Soviet Union brought about certain small but truly revolutionary changes. Perhaps the most important change, one that is seldom really acknowledged, was the end of jamming of foreign radio stations. With that move in the Soviet Union, which immediately affected Eastern Europe as well, people in the Eastern bloc countries suddenly began to learn about events in the outside world. The transformation was dramatic. It affected everyone—not just intellectuals. It affected the man in the street, the students, the people who ultimately engineered the revolutions.

The removal of jamming was tied to the technological revolution that

has been going on for some time now. Information became accessible despite all the efforts of the authorities in Eastern Europe and the Soviet Union to stop it. It was hard to outlaw computers and videotapes. The authorities themselves began to realize that they could not prevent their people from having access to technology and still remain part of this and the next century.

When the peoples of Eastern Europe took to the streets, they were talking about democracy. They were talking about freedom. They were talking about a market economy. It meant very different things in different countries, but these were the rallying cries.

The role of the local human rights organizations in these countries, of course, has varied. In Czechoslovakia, although those who led the revolution were mainly students, long-standing human rights activists took charge by popular mandate. They are now running the country.

In Hungary, where the revolution has been slow and steady, human rights activists who were once known as the democratic opposition, are running surprisingly strong in the forthcoming election. In Poland, where there is a unique combination of forces, Solidarity, which is both a trade union and a human rights movement, is in charge. In East Germany, Bulgaria, and Romania, there were no human rights groups to speak of before the revolutions. Groups formed during the revolutions themselves, and, to the extent that they exist today, are embryonic, and very much in need of advice and help.

The countries that have had long-standing, although persecuted, human rights movements have the best chance of success in the transition to democracy. Thus, in Poland, Czechoslovakia and Hungary, good progress has already been made. The fact that these groups had contact with each other and with groups in the West was very important. In Bulgaria and Romania, the prospects are much more dubious. East Germany, because of the situation with West Germany, is in a special class by itself.

I am not sure how this theory relates to the Soviet Union. The human rights monitoring effort in the Soviet Union started even before the signing of the Helsinki Accords,[2] and probably before any such movement in Eastern Europe, but the transition to democracy in the Soviet Union has been slow, to say the least. This may be because the Soviet groups were more isolated from groups in other parts of the world, including Eastern Europe, or because they were more persecuted.

Groups like ours have played an important role in what has hap-

2. Helsinki Accords, Aug. 1, 1975, *reprinted in* 14 I.L.M. 1292.

pened, but it has been hard going. Back in the early 1980s, when I first traveled through Eastern Europe, I was bringing messages from Adam Michnik in Poland to Miklos Haraszti in Hungary. The two had heard of each other, but had never met. Both were engaged in the beginnings of *Samizdat* ("self" or underground) publishing. They wanted to get each other's articles so that they could translate them, and so that they could establish some kind of contact. While the level of communication between them has changed, this was its level at that time.

As a human rights organization dealing mainly with the Soviet Union and Eastern Europe, the early 1980s was a pretty barren time. We kept talking, over and over and over again, about the same cases, trying to find a new angle to interest the press and the public. People kept saying, "Go away, already. We know about this. We know about Yuri Orlov. How many times can we publish an article about him?" There was no response from the Soviet government. There was no movement.

In 1982, when the cold war was at its height, we decided to launch an international Helsinki movement in Western Europe with the idea that groups in neutral countries like Austria and Sweden might have better access to the Eastern bloc countries than Americans did. We launched the International Helsinki Federation for Human Rights in 1982. It is now a very well established and effectively functioning organization with nineteen national groups, both East and West.

There are now Helsinki committees in all of the East European countries, except East Germany. The Federation has adopted the tactic of trying to push the limits of official tolerance. Thus, in addition to meeting with officials themselves, we as a Federation have held alternative meetings in Eastern Europe at the time of the CSCE meetings. We did it first in Budapest; we did it recently in Sofia. We also hold our annual meetings in Eastern bloc countries where no such meetings have been held before. We did so in Belgrade and Warsaw. This year we are going to try to do it in Moscow.

We are also organizing regional meetings. One took place at the beginning of February in Bratislava, Czechoslovakia, where representatives of non-governmental Helsinki committees in eighteen countries met to discuss future work in Eastern Europe.

The prospects for the future differ from country to country. Each country is now taking on a national character that it did not have before. In the past, when a panel like this assembled, each participant would give a slightly different variation of the same report: the press is controlled; there is no free speech; there is no freedom of assembly; and the writers' union does not represent the writers—you cannot publish

unless you belong to the union. All of Eastern Europe was operating under the same Soviet-style system. This, of course, has ended. Each country is now beginning to reclaim its own national characteristics.

It is a fascinating process. It is also one that is going to make our work much more difficult because we cannot just assume that what is happening in Czechoslovakia is going on in the same way in Hungary. It is not, anymore. There were fifty-nine political parties in Hungary, and something like twenty-seven in Slovakia when I was there. There is a lot to follow, and I suspect a lot of problems will remain.

I am going to list just a few, without going into them: the role of the secret police; the investigation, including fact-finding and documentation of past abuses; assistance with constitutional and legal reform; ensuring that due process is observed at trials of past abusers; sending trial observers; monitoring the conditions leading up to elections; reinforcing the right to strike; investigating states of emergencies and whether they were imposed because there was a legitimate need or whether the use of force was excessive; investigating conditions in prisons that we can now get into; rehabilitating political prisoners, which has not been done properly in a number of the countries involved; restoring citizenship to emigres who were deprived of their citizenship; learning the problems of minorities who are seeking cultural and religious rights—the Hungarians in Romania, the Turks in Bulgaria, the Hungarians in Czechoslovakia, the Czechs and the Slovaks. What do we do about nationalist movements, especially in the Soviet Union and Yugoslavia, that are tearing their countries apart? Their right to peaceful expression of their secessionist goals should be protected, but where does one draw the line? Finally, all of these countries face two ugly problems: the repression of Gypsies and the growth of anti-Semitism.

There are certain obvious tasks. We need to strengthen and expand networks and contacts between the countries that are now seeking democratic systems. We need to encourage the development of civil society in these countries. We need to find new human rights monitors to work with, now that so many of the people we worked with before are the presidents or the foreign ministers of their governments.

I would find it hard to generalize about the prospects for the future. As I said, each country is different. Czechoslovakia appears to have the best chance; Romania, the worst. But this has been a year of surprises. Nothing is necessarily what it seems. Certainly, the socialist bloc is no longer socialist and no longer a bloc. Each country is now reclaiming its national identity and will develop in its own distinctive way.

I have heard the same sentence in recent months, in a variety of

different languages, from new leaders in new countries: "It's easier to tear down a building than it is to build a new one." Nineteen eighty-nine was the year of tearing down. In 1990, the rebuilding will begin. It is going to be a hard time and a fascinating time. There will be many new problems, and many of them will involve human rights. The human rights struggle is not over. In some ways, it is just beginning.

REMARKS OF ZDENEK URBANEK[1]

The other day I was told to look at the front pages of several American dailies. The papers had published a picture showing about fifteen members of Romania's Securitate, indicted in front of a so-called court. Their heads were shaved. They had on the striped uniforms of prisoners.

My first question was: Why hold this theater of a court and trial if they have already been sentenced? I do not like the Securitate people, but I like much less the actions of those behind the scenes who decided to humiliate them in this way.

The picture reminded me of two things. During the so-called Prague Uprising, which started on May 5, 1945, a strange mixture of real freedom fighters and youngish, trigger-happy people entered the streets and some of the apartments of the city. The freedom fighters wished at long last to prove their desire for freedom. The others, a larger group, seemed more inclined to seek revenge for the humiliating experiences of the last five or six years and, at the same time, to have a kind of macabre fun. They had not fought back in any really effective way during the Nazi occupation years. Now they found it possible to use their energies and to show what kind of patriots they were. They shaved the heads of the wives of the Nazi military who were not clever enough to leave their Prague apartments in time. They painted crosses on their backs. In many cases, they wounded them and their children with knives and guns or rifles.

These were useless activities; they were irrational and expressed the lowest instincts of mankind. In a way they were continuations of the irrational movements of Fascism and Nazism during the previous decade or two. Millions of decent people died in the fight to overwhelm the old and successful Nazi war machine but at the moment when the battle for a less inhuman world was won, these young people in Prague, along with others in Europe, seemed to wish to continue the Nazis'

1. Translator, essayist, human rights activist, and a Signatory of Charter 77.

irrational, humiliating, and murdering ways.

The picture from today's Romania shows, as well, that the formerly oppressed have a tendency to repeat the prolonged, irrational, undemocratic, dictatorial, and murdering activities to which they were subjected. Human rights are indivisible. If former violators are treated the same way they treated their victims, then the fight for a less violent world has been in vain. The human rights movements in the West have been helpful during the two decades of the Czech, and other human and civil rights movements', struggle for more freedom. People, however, are no better than they are. A role for human rights movements is far from disappearing. The most important and most difficult work is only beginning.

Three steps are necessary to promote human rights in Central and Eastern Europe. First, we must support as strongly as possible the people or groups in Czechoslovakia, and anywhere else, who support the philosophy that revenge does not justify the continuation of human rights violations. Second, we must give as much advice as possible concerning the laws, law enforcement, and questions of political development—issues which come first in the defense of democracy. Third, we must defend even the former violators of human and civil rights against any attacks or humiliation which are not substantiated by the law of their country. Law and truth will prevail. The task is difficult but feasible, I hope.

REMARKS OF CATHY FITZPATRICK[1]

I received a list of questions to address today that asked me to describe the human rights situation in my country of expertise before the regime was overthrown, and what role human rights groups played in overthrowing that regime. I called the organizers and said, "Wait a minute, wait a minute. My regime wasn't overthrown yet. And furthermore, the human rights groups are still rather small and haven't played a role." The fact that I could appear on a list of people who were experts on the role of human rights groups in the first revolutions in Eastern Europe indicates the way in which the Soviet Union is perceived and the way Gorbachev is perceived as the initiator of changes within his own country and of the democratic revolution in Eastern Europe.

People say to me, "You human rights activists are never happy. Gorbachev came to power; Sakharov, who is the leading symbol of the

1. Research Director, Helsinki Watch, New York, New York.

human rights movement in the Soviet Union, entered the Parliament and took on Gorbachev. What's your problem? It seems like the regime was overthrown. You are still critical, even when the revolution has already taken place." I want to show that the revolution has not taken place, although it may be imminent.

The Soviet political situation is like the weather. If you do not like it, you wait five minutes. The battle for the revolution centers around Article 6,[2] which enshrines the Communist monopoly over all aspects of political and social life. Before Sakharov died, he mounted a huge campaign with the Inter-Regional Group, the parliamentary opposition of which he was one of the leaders, to try to put Article 6 on the agenda of the Parliament so that it could be abolished through the proper legislative body.

Sakharov lost that battle before he died. Gorbachev blocked placement of the issue on the agenda. Even a vote to discuss it failed. It was not until several months after Sakharov died that the party convened a plenum and decided for political reasons that they would step back from this monopoly. They issued a statement that Article 6 would be abolished at some time in the future, but this decision was really at the level of a promise. Article 6 has still not been abolished. In order for politics to become pluralistic and for civil rights legislation to be passed in the Soviet Union, the Parliament must remove Article 6 from its constitution.[3]

Furthermore, even after this article is removed, laws on freedom of assembly and freedom of association still have to be passed. A draft law now being discussed still involves the state giving permission for association; it is likely to be passed before the end of 1990.

It is important to note that this political decision to step down from monopoly happened after the election nominations process started. The elections that were so striking last week, that brought many democrats to power, were still one-party elections. No parties are legalized yet. And it is going to be quite some time before they are. A few associations have managed to get themselves registered. But it will be a while before parties as such, with platforms and with offices, buildings, newspapers, and so on, will appear.

We are now in an era where the next elections, local and national, are not scheduled to take place for another four or five years. Gorbachev has created a kind of a four-year period of sectarian polit-

2. Konst. SSSR (Constitution), art. 6 (USSR).
3. The Parliament amended Article 6 in a subsequent session but, as of the date of publication, has not ratified a law permitting opposition parties.

ics, possibly without a full legalization of the parties, or with numerous small parties too weak to make an impact.

The way to understand this whole struggle is to contrast it with what happened in Eastern Europe and with what I have identified as the process in the East European countries, a process that I have broken down into six stages. During the first stage, a social movement appeared, like Solidarity, or like the Green movement in East Germany, or a small, highly organized, but repressed, human rights group like Charter 77 in Czechoslovakia.

During the second stage, these movements would consolidate. They would begin to put pressure on the regime, begin to mount various actions, demonstrations, symbolic gestures, commemoration of various holidays, and so on. Sometimes this process took a year, sometimes ten weeks, or ten days. We have seen different schedules.

The third stage would be the large demonstration in the public square. Wenceslas Square in Prague is the place that many people remember, where citizens jangled their keys as a sign of unlocking the political process. They remember the people who crowded the squares of East Berlin and Sofia. They remember that the demand of all these mass rallies which, except for Romania, went peacefully, was for a round table with the government, for some kind of social dialogue. Many of the movements were named for this effort: there was "civic forum," "social dialogue," "new forum," and others. Specifically, the demand for a round table was to discuss the call for elections.

The fourth stage was the elections and the fifth stage, the parliament, would come from these elections. Once a parliament convened, it would begin the sixth stage: writing the constitution and the laws that hang from the constitution, and thus institutionalize civil rights.

In the U.S.S.R. this entire process happened largely in reverse. First, Gorbachev began with some economic reforms. But he rapidly realized by 1987 or 1988, that he would have to make some political reforms to energize the population. He conceived of the structure of an All-Union Parliament, the Congress of People's Deputies. Through changes in electoral law and the constitution, this parliament was, essentially, convened from above.

The Parliament that convened in June 1989 was in part a concession to freedom of expression. It was also partly a method of absorbing it, because it had the effect of diverting the large street demonstrations beginning to build in a number of cities in the Soviet Union. It was a way of siphoning off social energy to have change occur in a peaceful, orderly way. Many people thought this was a brilliant gesture of Gorbachev's.

This Parliament, however, did not behave. Although it was not elected democratically, it still was able to radicalize, so that the pressure on the regimes, (step two) began to happen on television, in a very accelerated way. There was pressure for step three, to pass laws that would guarantee civil rights, freedom of expression, press, and so on.

By step four, the Soviets were beginning to say, "What we really need to do is fix the constitution. We started out trying to legislate freedom of expression, but without a change in the constitution and without a change in one-party dominance."

This led to step five, large rallies in the squares. That would seem to be the end of this round in the process, whereas in Eastern Europe it was the beginning.

What are these large rallies in the U.S.S.R. calling for? They are calling for round tables with the government. This is step six that East Europeans know so well as the call for the round table, stage three for them.

In the Soviet Union, people got frustrated with parliamentary politics and moved to the streets. The large rallies that occurred in recent weeks were, at first, highly manipulated. Gorbachev used them to put pressure on the party to step down from power. He hoped that after the elections the rallies would begin to dissipate. Instead, they have grown even stronger and are no longer under control.

Right before the rallies began in the last week of February 1990, rumors abounded predicting violence and the possible declaration of martial law—no one was sure who was going to declare it. The left wing? The parliamentary opposition? The right wing, the conservatives, who would overthrow Gorbachev? Russia is very much a land of rumors, and without an opposition press, events are perceived through hearsay. The panic and the fear that the government may be forced into declaring martial law was, and remains, very real.

What happened? Instead, the KGB and the police got on television and warned everyone not to come to the demonstration. Authorities told schoolchildren not to come out to the rally. Professional unions pleaded with their members to stay home, but people, mainly the groups outside of parliament who were led by some of the parliament opposition, had the rally anyway. There were no incidents.

Pamyat, the ultra-nationalist anti-Semitic movement, was not visible at the rally. The fear, however, is still a very real one. The fear of "pogroms," originally a Russian word that means to destroy, to threaten, to kill, the fear of pogroms in all the major cities has led to a massive exodus of Soviet Jews in recent weeks.

I want to say something about anti-Semitism and pogroms, because

most of the rumors and the hysteria around this issue is based on dates of pogroms that are supposed to occur. One was supposed to be February 19, another on February 25. There is fear that one is coming up in May; different dates are given. So far, nothing has happened, thank God, but the fear is very real.

There are not any real incidents that one can point to, but in the climate of lack of news and manipulation by various forces, a few apartment robberies in Kharkhov of some Jewish families is enough to spread terror. There is a history of this and, of course, the climate exists where these things can take place.

All this hysteria on the issue of anti-Semitism has distracted attention from the actual pogroms that have taken place, which were directed at Armenians, Azerbaidzhanis, Meskhi, and Tadzhiks. There are many ethnic groups, some of which are unknown to most Americans. Hundreds of these people have died in various ethnic conflicts and in martial law situations where Soviet troops were involved in trying to maintain control.

Another side effect of the Pamyat fear has been that the prosecutor's office has decided to open up a case against Pamyat. This has thrown human rights groups into a bit of a quandary because we may find ourselves in the unenviable position of having to defend the very repugnant on free speech grounds. Now, fortunately for us, we have been able to stay out of this so far because there is no First Amendment in the Soviet Union and there is no First Amendment in international law. Articles in international law restrict free speech so as to discourage incitement of ethnic hatred or the advocacy of discrimination. That is the type of case that the prosecutor's office has opened against Pamyat.

The problem is that whenever the prosecutor's office opens up a case, hundreds of people fall into the net of the interrogation, people who have no relationship to the original case. It is a form of social control. The actual evidence used may pose problems. I devote this amount of attention to it because I see that this is the beginning of dozens, thousands, millions of similar cases throughout the Soviet Union.

The current prosecution involves a group called the Union for the Proportional Representation of the Peoples. The group is a Pamyat Front that says that Jews should be kept out of jobs, public positions, and so on, because they make up only X percentage of the population. This is still at the level of advocacy, and it is still not clear whether the prosecutor will be able to prosecute the Pamyat under international or Soviet law.[4] Members of these groups, however, are people in power, in

4. The Pamyat case came to trial in July 1990 and there has not been a verdict as

institutes, and in local Soviets. If they make the decision to pass discriminatory laws, they will be discriminating on the basis of this insane philosophy and we will be able to respond on that level.

To picture the ethnic situation in the Soviet Union, it is important to know that about sixty million Soviet citizens do *not* live in a republic matched to their nationality. In other words, the Armenians are in Russia, the Russians are in Estonia—there is a lot of mix-up. Twenty-five million out of sixty million are Russian. This has caused a lot of displacement. Furthermore, approximately half a million refugees are now fleeing various disasters. These groups of roiling, angry mobs do not have homes, are impoverished, and are the seed beds for the pogroms against everybody. Rumors could fly about pogroms in Leningrad one week because Russians who were kicked out of Baku arrived in Leningrad. Who did they want to blame? The Jews. It is a chain reaction and a very dangerous, volatile situation.

Gorbachev now has a new set of presidential powers, with some reference to the American model. He may declare emergencies, ban strikes, veto laws, and possibly close down the Congress and Parliament themselves, although they are not so weak that they did not mitigate his powers somewhat.

Already the All-Union Parliament is not really functioning. Even if it were not closed down, it has reached the point now where it is very unwieldy. It is not passing laws. Nine months have gone by and it has not gotten the civil rights legislation through. It is a terrible muddle; there are often no voting records. One does not know who one's congressman is or what he or she is voting for. There are no procedures. The mark-up is very sloppy. People get different copies of the laws and vote on things without realizing sometimes what they are voting on. It will be very easy for some people to say, as Lenin said back in 1917, "It's a talk shop. Let's just close it down." I might add that Gorbachev already began declaring emergencies without Congress, and even before he received any special powers. A small group of men in the Presidium, the executive organ of the Supreme Soviet, has declared seven states of emergency in seven different republics with Gorbachev's signature. Gorbachev's hand was behind banning the strikes in the summer of 1989. He has been blocking the passage of laws. He may not even have had to grant himself these powers to stay in charge, but the fact that he did shows his enormous power.

I just want to finish by attempting to answer a question that Jeri Laber raised, which is: Where are the human rights activists in all this,

---

of publication.

and is it too late for them to play a role, or have they already? In part, they were persecuted, jailed, forced abroad, killed—they were decimated; there is no question that their lives were ruined. Unlike in Eastern Europe, the people who went to the jails did not get elected to the U.S.S.R. Parliament, with the exception of Sakharov.

With the local elections, we have seen a smattering of other ex-political prisoners like Sergei Kovalyov who have come to power. Civil rights groups, the monitoring groups, have turned into political groups overnight. In most cases, they took on the nationalist programs if they were in Georgia, the Ukraine, or Estonia. All those groups which used to call themselves Helsinki groups became nationalist liberation movements as soon as they had freedom of speech. The few groups, like the Moscow Helsinki group that kept to monitoring, were under a lot of pressure to do something about the fact that parliament and the local Soviets were not working. They were asked to run, to do something for their country. These people formed little lobbying groups, the seed beds of future deputies. Those are all the democratic and human rights groups that you see so far, particularly in Russia.

Unfortunately, these groups are like people on a scaffold who, when they reach the top, kick the scaffold away. They do not remember to keep it because they may need it to climb down again. The organizations that people built, like Moscow Tribune and some other types of what we would call NGOs, all collapsed as soon as their people got into power; they were left without anything to do. They did not understand the point of being a lobbying organization because the object was to get into power.

The notion of a public interest group—all those things that we think of that make up civil society—does not exist in the Soviet context. There is no patience to build these things because the Soviets feel that they are in an emergency situation. To look at it from their point of view, I can understand why Sergei Kovalyov would not want to stay in a monitoring group. He does not have any law to monitor in his country. It has not been passed yet. There is no democratic constitution that is functioning yet. Freedoms are not in the current constitution. The press law has not been passed.[5] The law that would legalize the very group that he ran from—the association law—as well as other civil rights legislation still have to be implemented. That is why you saw the human rights activists, the lawyers and all of those people that we have associated with and protected over the years rushing into the parlia-

5. The press law was passed in July 1990, but the government maintains a monopoly over paper and printing presses.

ment. It is their last chance to create something that they may have the luxury of monitoring several weeks or years down the road.

REMARKS OF LAWRENCE WESCHLER[1]

We were originally going to give these talks "in the order in which things happened." The notion was that only after Gorbachev came to power did things begin happening everywhere, so that the Soviet Union should be discussed first. However, I think you can make a much stronger argument that Gorbachev is only in power today because of what happened elsewhere, specifically in Poland—that the sixteen months of Solidarity in 1980, for example, scared the hell out of the leaders in the Soviet Union. The notion of a worker's movement rising up against a worker's state was the most terrifying to the people who were able to know the most about it. People who were reading the Soviet press didn't have a sense of what was going on. But people in the KGB had a very strong sense of what was going on, and when Brezhnev died and the head of the KGB, Andropov, took over, I think an argument can be made that the specter of what had happened in Poland, the near-miss that had occurred in Poland, was very much on his mind as he began to maneuver his protege Gorbachev into a position to succeed him. Of course, this will all get played out years from now in terms of what came first, and naturally it is all part of the same process, but I would make a strong argument that the Polish example was very important. Having said that I will try to just go through some of the things that were distinctive about the Polish movement and that are valuable for other places to think about.

There had been a series of uprisings in Poland—after 1944, 1956, 1968, 1970, 1976—that had all failed, for one reason or another. Two factors stand out. One was the fact that up until 1976 the Polish leaders, the people in the Communist party, were able to play the intellectuals off against the workers. For example, you had intellectuals rising up over censorship issues during one year, 1968, and the workers were actually called out to beat them up (the worker/intellectual divide in Poland in 1968 was not unlike what was happening in the United States with the Vietnam demonstrations and the hard-hat labor people being angry at the students, and so forth). Two years later, in 1970, when the workers went out, the students sat it out. The intellectuals were not going to pay attention on worker kinds of issues—minimum

1. Staff writer, *The New Yorker*; author *The Passion of Poland* and *A Miracle, A Universe: Settling Accounts with Torturers* (both Pantheon).

pay, not being able to feed the children, terrible working conditions, and so forth. So a first thing that had to be surmounted was that some kind of unity had to be found between workers and intellectuals if there was eventually going to be an effective assault on power.

The other factor was this very notion of a direct assault on power. It had been tried several times, workers boiling out of factories, going to burn down the Communist party headquarters, and so forth, and such uprisings proved fairly easy to put down. Some other tactic had to be found, which is why the events after 1976, another failed worker uprising, proved so terribly important.

In Ursus and Radon in 1976 there had been a series of strikes, which were brutally suppressed. Terrible trials began directly afterwards. At that point a group of intellectuals set up a committee to monitor those trials, specifically on human rights grounds. This was the origin of KOR, the Committee for the Defense of the Workers.

During the next four years, links between workers and intellectuals began to be established that would prove very important when Solidarity came into being. Understanding the philosophy of the KOR and the kinds of resonances it created all through Polish society is vital if you are to understand what happened thereafter. There is a terrific book that I recommend to people interested in this topic, by Jan Jozef Lipski, called *KOR*.[2] He was one of the founders of KOR and wrote a history, which is published by University of California Press.

Let me point out two aspects of the KOR strategy. One of them might be called the strategy of "as if." The key here was that people were simply to start acting as if they were free. Do not fight battles about whether there are laws that will allow you to found trade unions; just found a trade union. The great phrase of Kuron was "Don't burn committee buildings; found other committees." Yes, of course you will be assaulted, but if first a few people and then still more people and then more people begin acting *as if* they were free, they will create a zone where freedom exists. Specifically, the zone they will create is the zone of civil society: a zone where there are underground publishers, underground universities, all these sorts of things.

That was one aspect. The other aspect I will quote from Lipski. The KOR made a distinction between political work and social work, and "[a]bove all, KOR meant social and not political activity . . . . KOR's dominant role was in the area of social work. What did this mean? Above all, it meant that KOR's primary interest was in real people who

2. J. LIPSKI, KOR: A HISTORY OF THE WORKERS' DEFENSE COMMITTEE IN POLAND 1976-1981 (1984).

needed help."[3] So rather than having long discussions about abstract issues, about what the post-Communist world should look like, or having arguments with Communists at symposiums or something, they began helping specific individuals who were on trial and their families; getting them financial and medical and legal assistance, and so forth.

Very quickly they were in the terrain of human rights, of finding basic grounds upon which to try and defend these people, at which point the Helsinki agreements,[4] which we have not talked about much up to this point, became very important. Poland, all these countries, were signatories to the Helsinki agreements, and it was possible to apply pressure on that basis.

As members of KOR began to help individuals, what they called social work, they began to see common links between the problems that different individuals were having, and that brought them a wider perspective. Those two areas, the notions of living as if you were free and helping specific individuals, moved things forward, as it turned out, extremely quickly during the 1976 to 1980 period.

Specifically, just to give some examples, in 1977 the KOR set up an intervention bureau which was headed by Zbigniew Romaszewski: If you were a worker and had a problem (how you were being treated or if your family was in trouble because the husband or the father had been thrown in jail), this group of people, who had no authority, just set up shop and began making interventions. By January 1980, KOR had established a Helsinki Committee that was specifically keeping records of human rights violations. They were planning to make a report to the Madrid conference, the follow-up conference on Helsinki. As it happened, in August 1980, the whole eruption of Solidarity took place. Eventually they published their first of many reports, called *Prologue to Gdansk*,[5] a very interesting and valuable report.

Without going into the whole history of Solidarity during those sixteen months, I will point out that the Helsinki Committee in Poland in November 1981 was making plans—the international Helsinki movement was planning to have a meeting in Spring 1982 in Warsaw to monitor human rights all over the world, and, of course, that meeting

3. *Id.* at 62. If you do not read anything else in Lipski, he has a chapter called "The Ethos of KOR," the ethos of the worker's defense committees. It's Chapter Four in the book and it's really quite fascinating. (It's just been translated into Chinese and is being smuggled into China.)

4. Conference on Security and Cooperation in Europe (CSCE) Helsinki Final Act, Aug. 1, 1975, Helsinki, Finland.

5. PROLOGUE TO GDANSK: A REPORT ON HUMAN RIGHTS BY THE POLISH HELSINKI WATCH COMMITTEE, New York (1981).

collapsed, it never took place, because of the coup in December 1981.

Let me talk just quickly about what the coup was about and the response in Poland, and how things went from 1981 to the present. The coup essentially was, in the words of the people who fomented it, about "normalizing" the situation of the country. To the extent that Poles talk about Solidarity as an expression of their subjectivity, by which they mean their capacity to act as subjects instead of objects, to be the originators of sentences instead of the ones who have sentences imposed on them, normalization is an attempt by the authorities to take these pesky little subjects and turn them back into good little objects once again. So in a way the whole fight is over who gets to say "I" or who gets to say "we,"—"We the people," or "We the state."

Ironically, the word "normal" itself was up for grabs all during this period. And when you ask Poles today, and certainly when you asked them back then, "What are you fighting for? What is up for grabs? What is the battle about?" they would tell you over and over, "We just want to live like normal people. We don't want all these crazy regulations. We don't want all this intervention, this overhang of bureaucracies, these *apparatchiks*. We just want to live like normal people." I want to read a passage from a letter that Adam Michnik composed during this period from prison. This, by the way, is from Adam Michnik's *Letters from Prison and Other Essays*.[7] They are very entertaining to read nowadays, with everything that has happened since. (Michnik is now the co-editor of Solidarity's aboveground daily.) He has one letter from prison called "Why You Are Not Signing?"[8] This is the classic KOR spirit. He is addressing anybody thinking about signing a loyalty oath. And he says:

> You know that you are no hero and that you never wanted to be one. You have never wanted to die for your nation, or for freedom, or for anything else. . . . You have always wanted to be alive, to live like a normal person, to have respect for yourself and for your friends. . . .
>
> Nevertheless, they did declare this war on you and over thirty million other people, and so you are forced to recognize that amid the street roundups, the ignoble court sentences, the despicable radio programs, and the distribution of leaflets by underground Solidarity [by signing] you will not regain the normalcy that was based on respect for yourself. Now you must choose between moral and material stability, because you know that today's "normalcy" will have the bitter taste of self-defeat . . . .[9]

He warns against giving in to the tempting offers of freedom made by

---

7. A. MICHNIK, LETTERS FROM PRISON AND OTHER ESSAYS (1985).
8. *Id.* at 3.
9. *Id.* at 11.

the policeman "who seeks to delude you with promises of happiness but really brings suffering and inner hell instead. No, this is not heroism. It is mere common sense."[10]

It is striking that in the same letter, Michnik insists that "You harbor no hatred toward the policeman, only pity. . . . You know that the sentence of national oblivion will be passed on them. . . ."[11] This too, is absolutely typical of the "KOR ethos," as Lipski called it—an ethos which was at once absolutely consistent and absolutely paradoxical.[12] It was characterized by an insistence on the crucial importance of "living in truth," as Vaclav Havel put the matter, in neighboring Czechoslovakia—the fundamental necessity, the deep spiritual value, of saying a true thing, of refusing to say false ones, of calling things by their true names. And yet the ethos was simultaneously suffused with a profound understanding of human fallibility and weakness, of the tragic dilemmas that actual people faced in their actual lives, of the inevitability of their failing to be able to live in truth at all times. No sooner has Michnik urged people not to sign a loyalty oath in this one letter—or not to emigrate, as he does in another—than he is lavishing understanding on those who felt that they had to. He is even refusing to hate the police. In both cases, in part because of what feelings of superiority or hatred do to the one who harbors them. But also because of the strategic requirements of the movement: how it desperately had to become more and more *in*clusive, rather than *ex*clusive, if it was going to succeed. In his recent New Year's address as president, Havel refused to shift all the blame for his country's debacle onto "them," the country's prior totalitarian leaders. He insisted that everyone who had lived in the system had to search his own heart, to gauge his own complicity, to establish his own truth as a first step before the country could move on.[13]

I see my time is running out, but I would just suggest that this duality—the insistence on naming things by their true names and the simultaneous lavishing of understanding and forgiveness—characterized Solidarity both as an underground movement and in the remarkable transition to state power which it has recently been undergoing. And as such it provides one model for the sorts of issues we will be considering in this conference.

---

10. *Id.*
11. *Id.* at 7.
12. J. LIPSKI, *supra* note 2, at 62.
13. *The Great Moral Stake of the Moment*, NEWSWEEK, Jan. 15, 1990, at 42 (providing excerpts from the inaugural address by Vaclav Havel on New Year's Day in Czechoslovakia).

REMARKS OF THE HONORABLE ALEX KOZINSKI[1]

My main claim to fame for participating in this gathering is that I was just in Romania. I came back about ten days ago. I have no previous intimate knowledge of, or dealings with, human rights organizations. I am a federal judge in the United States. I deal with human rights in this country when they are challenged in court. I share the view expressed by Jeri Laber and by some of the other speakers that Romania probably will be the most difficult case of all of those we now see. Change there is taking place, but it is going on in peculiar and, I think, even perverse ways. It is too early to tell, but I think there is some cause for optimism. There is also a good deal of cause for pessimism.

I spent a week in Romania and spoke with many people, some on the street, some that I picked up hitchhiking—and some government officials as well. The thing that perhaps struck me the most was that I never heard anybody say even the slightest positive thing about Nikolai Ceaucescu. Moreover, I do not have anything good to say about him myself. He was, nevertheless, the leader of the country for twenty-four years, and one imagines that he must have done something of which somebody, somewhere approved. He might have been a tyrant. He might have put people in jail, but perhaps he built a nice subway system, for example. Of course he may not even have done this.

I then asked myself, where are all the kooks? In other words, where are those people in a free society that take odd and unusual positions, unpopular positions, positions that maybe have no foundation in fact at all? I saw none of those people, or their ideas expressed. Although the last time I was there, everybody was a Communist and loved the First Son of the Republic, when I returned, no one was a Communist, not a single person.

Of course, I did not talk to twenty-seven million Romanians. Of the people that I did talk to—which was a fair sampling—not one admitted to being or ever having been a Communist, or even to having had Communist leanings, or to having ever said anything in support of Ceaucescu. One has to ask why. Perhaps it is too early to tell or perhaps the reason you do not see more diversity is that the people have been taught to move in a kind of goose step in the same direction for so long that if you turn them around, they will all turn around and march

1. Judge, United States Court of Appeals for the 9th Circuit, Pasadena, California.

in the opposite direction. I think there is more to it than that, and here I want to emphasize a very important area to which some of the other speakers have alluded, but which, I believe, needs more emphasis.

The problem in Romania is that nothing has changed economically. The state still owns everything: your job, your housing, your schooling, your entitlement to medical care, your entitlement to whatever it is that you can get legally. Now there is a lot one can get on the black market, but it is still dependent on the structure created by government. It is still dependent on the same people who were there six months ago or ten years ago. One still cannot see a doctor unless one has a pack of Kents, nor fill a car with gasoline unless one is willing to pay the right *baksheesh*. The degree of control that exists, even in a society where one is now free to speak and one is free to say anything—the stifling presence of this huge governmental apparatus that pervades every area of existence—continues to be the main impediment to the exercise of true human rights in Romania.

I do not know whether the *Securitate* is still operating. Most people I talked to were fairly candid and were willing to tell me how bad things were and how much hope they had for the future. When, however, we started approaching the subject of what is now taking place in Romania, they whispered. For example, I was sitting in a restaurant next to a curtain and the fellow with whom I was talking—someone quite sophisticated and intelligent—before answering a question, moved the curtain aside to make sure that no one was behind it listening. Additionally, when I was sitting in the United States Consulate, I started saying something to a United States citizen who works in a station in Romania. The statement was vaguely disparaging of something or somebody—I do not want to go into details. She quickly deflected my comment and said, "Oh, but he's a great man" pointing to the ceiling, and gave me a chance to say, "Of course he's a great man. He's a wonderful man."

I do not know whether these perceptions are all in the nature of the pains you feel in an amputated leg or whether these are realities. What I do know is that the situation will not change easily as long as there are no economic reforms; as long as a fair measure of the population is unable to control their economic existence without relying on government bureaucrats. This is a fundamental issue. We have talked about speech. We have talked about voting. We have talked about political participation. We have talked about fair trials. All of those things are very important. I advance the view that there are other important rights as well. Those rights include choices about what one does with one's life, what profession one practices, where one works, and in what

city one lives. Those choices in Romania are entirely dependent on where one gets assigned (*repartizat*). Therefore, if one becomes a doctor, one draws the name of one city, and then lives in that city. The government made all those decisions, and until there is change, until Romania—I cannot speak for other Eastern Bloc countries although I guess it may be the same—gets a heavy dose of capitalism, to use a term which is not always a favorite in this country, we are not going to see real change in what are considered traditional human freedoms. It simply cannot, and will not, happen.

Next I would like to discuss why, aside from the fear, changes in Romania will be difficult. Romania has one television station. It is owned and controlled by the government. If one wants to be a political party, one must get time on that single television station. There were forty-three parties declared at last count. Every day I was there, two or three young men stood up and declared a new political party. The ability to disseminate one's point of view through television, on the other hand, is vital to realistic success in politics today.

There are several newspapers now. There are long lines for everything in Romania, but none longer than those for getting a paper, which shows there is a healthy interest in the democratic process. The papers, however, lack newsprint. They lack basic equipment such as computers, cameras, and lenses. They gave me a long list of things they needed in order to be able to keep putting out their alternative publications. Problems result because the editors' housing is controlled by the government. The government controls their heat and their telephones. While I have not verified this, I was told that they printed some articles that criticized the government, and all of a sudden they lost their heat and telephones. Whether there is a connection between their criticism of the government and their loss of heat and power, or whether it was just the way the Romanian economy works, is not clear. Nevertheless, they perceived this as governmental control over their activities.

Writers are dependent upon the printers' union to get articles printed. The printers' union fiercely favors the National Liberation Front, the current government. There is one printing plant, Casa Scînteia. It could be seen in photographs from the square where Lenin's statue was removed. This huge building called the House of Scînteia, used to house the Communist paper that is now defunct. However, it is full of printing presses, effectively the only printing presses in the country. If one wants to run a paper that is critical of the government, critical of the current regime, one must have access to resources such as newsprint, printing presses, and distribution. That does not currently exist.

While I was in Romania, I spoke with Strelian Tanase, a man who runs one of the more radical papers, named "22" after the events of December 22nd. I use the term radical in the most positive sense, since the publication contains the most ideas and alternatives currently available for reading. Tanase commented that Romania has a real problem that other Eastern Bloc countries do not face. Romania no longer has any Communists. At least in the other East Bloc countries, there is a Communist party. There is a Communist presence. Everybody knows who they are, and can differentiate among the groups. The Communists, as well as other parties, present their respective views, and distinguish themselves from each other by what they offer. In sum, there is an exchange of ideas.

We have a hidden enemy in Romania. There are still people who are Communists. I think there should be people who believe in Communism. I think it is a healthy thing in a democratic system to have people espousing those views, if only to have them, I hope, rejected. They should, nevertheless, be offered. The idea that people might espouse Communism as a means of testing the ideas of others is dead in Romania, and it handicaps Romanians. It handicaps them in identifying who is an enemy, and it handicaps them in really sharpening any of the ideas that they do have.

One can go into Victory Square or into the Palace Square—the big squares where there was a lot of shooting and blood during the revolution—and people are now there speaking vigorously about the current situation. A lot of heat and passion are generated, something one would never have seen while I was growing up there. One never would have seen such discussions last year. However, if one listens, they are not saying anything. There is a vacuum of ideas. Discussions are on the following level: "Things were bad. Democracy is good. We want more democracy." Well, democracy is a vessel. Democracy is a vessel which you have to fill with ideas. Ideally, democracy reflects and represents what the people think. Right now there is no thought whatsoever.

I share the view that it would have been better for Romania if the change had not occurred quite so suddenly and that Communism had not become such an unspeakable word. My views on this are well known, but I hope that it will not be too long before Communism returns to Romania. I hope Communism does not return as ruling doctrine, but at least as acceptable political doctrine—something that can be talked about, debated, and considered along with the other ideas that I also hope will be generated. When it does, then we can be much more optimistic.

ADDRESS BY THE HONORABLE RICHARD SCHIFTER[1]

This morning I met with a group of parliamentarians from Iraq who were telling me about human rights progress in Iraq, and I listened. I tried to engage in a dialogue with them in the hope that they will, upon their return to their country, work on this subject.

I had initially written a few thoughts for today, but rather than delivering a written statement, I want to follow up on the previous discussion. I would like to comment on the developments in Eastern Europe. This is one situation in which we can do more than just make statements on the subject. Now we can actually go to these countries and see whether, in cooperation with the people involved, something can be done to effect change for the better.

For example, Professor Herman Schwartz is now very actively involved in Czechoslovakia. Judge Alex Kozinski has just been to Romania. The question is, what can we do that will advance the human rights cause in Eastern European countries? Let me offer a few comments. I would be very interested in getting reactions to them.

As far as the United States government is concerned, let me emphasize very strongly that there is a deep interest in, first, trying to figure out what it is that we can do most effectively to advance the cause of democracy and human rights in Eastern Europe. The next question is, once you have figured out precisely what it is that can be done, how can one get the job done? Above all, once you have agreed to put a certain amount of money into the cause, in a good many of these situations we must ask where can we get the right people to provide the required help? These are the thoughts I would like to express by way of background. Let us look at each country on a case-by-case basis. I will give you my impressions of what we are dealing with in each country because, while there are a great many similarities, there are also a good many differences.

First, I would leave out East Germany because, by and large, the West Germans are dealing with the changes in East Germany, and at this particular point, no one in Leipzig, Dresden, or any other part of East Germany is waiting for us to arrive there. Rather, they are waiting for people to come from Bonn, Frankfurt, and other West German cities—and that is fine. It makes it possible for us then to see what we can do elsewhere.

I want to say that as far as Poland is concerned, as I see things

1. Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State, Washington, D.C.

operate there, I was struck by what can happen in a country which, although having a reputation for a great deal of internal disagreement and divisions of various kinds, it was, nevertheless, possible under those circumstances for a group to come together. The Solidarity movement by and large set up a shadow government. In Poland, people in the opposition really trained themselves for the day when they could take over. When the day came, they moved in and they are now doing an amazing job in terms of trying to run the country in a highly effective and responsible way. It is something that had not been expected in the past. Given the fact that Poland owes forty billion dollars accumulated in the Gierek era of the 1970s, and in spite of all its difficulties, Poland is really moving in the right direction.

Even in Poland problems do arise, and these difficulties are of concern to people throughout the region. The concept of local government responsive to the people is something that is largely unknown in that part of the world. Interior ministries ran local governments in most of these countries. A good many people have told me that they really need to train municipal officials. They need to understand how to run an autonomous local government that really looks to the population for its mandate and has powers of its own. It is necessary to provide a legal framework for that type of government and then train people to run it. Again, this is something that is of interest throughout the region. It is a very important element of grass roots democracy. That is one point I wanted to make with regard to Poland.

In Czechoslovakia, there is also a group of people who are skilled and able. Those who participated in the "Charter 77" movement and are now in the Civic Forum will know how to run the country. When I recently met with the new Czech Ambassador, Rita Klimova, who was a spokeswoman for Charter 77 and then the Civic Forum, one of the points she made to me was that Czechoslovakia will have to run a good election. She pointed out, however, that Czechoslovakia lacks the capability to organize the electoral process. Czechoslovakia needs outside assistance to put the process together. She stated she was not worried about the process becoming repressive or anything of that nature. Rather, she was primarily worried about creating a mess due to disorganization. So again, it is necessary for outsiders to help Czechoslovakia put the process together, purely in terms of technical advice.

The situation in Hungary involves a group of people who really took responsibility—not just the reformers in the Communist party—for reforming the country and opening the road to democracy. They hoped that they could stay in power, but it looks like they are going to lose the vote. We will have to see how we can be of help to whoever is

elected and provide assistance to those who are interested in engaging in necessary reforms. In the meantime, the incumbent minister of justice, Kulcsar, has actually taken a very effective role in getting the legal structure of the country reorganized. I think he has received some help, but undoubtedly additional assistance can be rendered.

Next I will address the more difficult situation. Judge Kozinski made a point about the situation in Romania. Let me continue with some of the thoughts he expressed. It is my impression from observing the various postwar East European Communist countries, that the one common thread that runs throughout the entire system was that the Communist parties, most of which were illegal—certainly all of them were illegal during World War II and were illegal in many countries prior to World War II—were groups bound together by ideology and also by some sort of fraternal spirit.

The communists had all been in the underground together and after the war took office together with a collegial feeling toward each other. That kept the entire system operating for quite some time. Ideology fell by the wayside as the years passed, but the collegial spirit was still with them in most countries with the exception of Romania. What Ceaucescu did, as Alex Kozinski pointed out, was to destroy the Communist party and substitute for it what resembled to me when I first went there, a Byzantine court.

There was an emperor and a group of courtiers whose only tie was the tie to the emperor. That is the way the system operated. The kind of relationship that tied officials to each other in other countries simply did not exist there. So when one killed the emperor, the entire system shattered and overnight there was nothing left, absolutely nothing. What remained available was the debris that had been cast off over a period of time. The people on the outside, who had for one reason or another antagonized Ceaucescu, came together and formed the National Salvation Front that now is functioning as the government of Romania.

The question that arises now is: under these circumstances, where one deals with people who have very little identification with democracy in anything other than perhaps book knowledge, how can one be of assistance to them? Let me simply say that it ought to be possible to design a program that meets the needs even under these difficult circumstances.

For example, I believe the minister of justice in Romania is someone who is willing to listen. He also understands what is necessary for Romania to become a recognized and respected member of the concert of democratic nations.

It would be productive to engage the Romanian government through him and provide the building blocks for the establishment of democracy as Romania tries to establish a democratic system. That requires people spending time in a country which is not particularly pleasant to go to at this point—unless one wants to go to Transylvania and enjoy the mountains. We must find a consistent means for working with the people over there, and at the same time make sure that various democratic countries send a clear message about what the minimum standards are for acceptance as a member of the democratic family. There is no guarantee that this is going to work but at least it is worth an effort.

Bulgaria presents a slightly different problem, but there are similarities. In Bulgaria, by and large, the Communist party as it has existed in the past has slightly reformed itself. The leader, Zhivkov, was tossed out by a Politburo vote of five to four. This vote in the Politburo came about, I believe, after very severe pressure from the Soviet Union. This is how they were able to get Zhivkov removed. There is, nevertheless, new leadership there. There are some people who are better than others. The old system has, by no means, been dismantled. There is reason to believe that during the election, which is due next June, the Communist party will be defeated and a new group will take over.

In Bulgaria, as in Romania, there was not an effective outside group that was organized enough to move in and take office. They also will need a great deal of outside help. Here again, the question that arises is, how can one put it together? Who is willing to spend some time going over there and working with them?

In all of these situations, while outside assistance is provided only if it is invited, I think that a good many of the East Europeans would be eager and anxious to receive guests from the West—particularly from the United States—who are prepared to render advice and counsel on how to set up a scheme that is democratic and that is protective of human rights.

We normally do not think of Yugoslavia in this context, but while Yugoslavia may have been out in front in the past, it is certainly not out in front at this particular point, particularly in Serbia. There are, indeed, serious problems as to where that republic within Yugoslavia is going and what this means about centrifugal forces at work in Yugoslavia. Slovenia, on the other hand, is moving toward an open democratic society with Croatia somewhere in between and Serbia not moving at all. In addition to all the other problems, there is a very serious problem in the Kosovo province between the Serbs and the Albanians. Here again the question is to what extent are the Yugoslavs interested in engaging in consultation? I plan to be there next month and that is

very definitely one of the issues that is going to be on the agenda. As to Albania, there has been no clear word about their being interested in receiving advice and counsel on how to move toward democracy and human rights.

Finally, I would like to make a few comments about the Soviet Union because some of the most recent developments in the Soviet Union have not been fully discussed in the American media or in any analyses that I have read. In many respects, the Communist party of the Soviet Union as a controlling force has started on a decline, not only because of forces at work internally from the bottom, but also because of specific actions of Gorbachev. What we need to keep in mind is this: there has been a great deal of discussion during the last few weeks about the new powers assumed by Gorbachev as president. The question raised by Sakharov before he died is to what extent is this an augmentation of authority that is inappropriate for a democracy?

I think that what one will find on close examination is that the powers that the president of the Soviet Union has now assumed are similar to the powers the president of France assumed under the De Gaulle constitution. The powers of the French president under the Fifth Republic Constitution have some similarity to the powers of the Soviet president. Of course, the difference is that Mitterrand, for example, was elected by the people. The same cannot be said for Gorbachev.

What should also be noted is: from whom did the president take this power? The power that has been assumed by Gorbachev was taken from the Politburo. The power vested in the past in the top leadership of the Communist party was power vested in a committee in the post-Stalin period, a committee in which Gorbachev actually shared power with his colleagues. By and large, what he has done now is outflank his colleagues in the Politburo. Even if they decide to dump him, and he is no longer general secretary of the party, unless there is a coup that ousts him as president, he remains president. That is where the power now rests.

I have not seen this discussed in any of the analyses of changes in the Soviet Union. Similarly, looking at the elections that have taken place in the last few weeks, first in the Baltics and, on March 4th, in the Slavic Republics of the Soviet Union, the party is being made irrelevant at the local level. Formerly the party apparatus operated at the local community level and ran the city of Moscow. In Moscow, in very short order, there will be a city council with power as a state organ derived from the general population. The voters have elected new leaders in an effort to sideline the Communist party establishment. This is a very interesting development. Many of the reformers in the Soviet

Union are now interested in getting advice on how to improve the local structure of government, the structure of government generally, and above all, their legal system.

Gorbachev has started talking about the creation of a state built on the rule of law—an issue that has been on the agenda for a number of years. This is now a term frequently used in the Soviet Union when one talks to people, for example, at the Ministry of Justice, the Institute of State and Law, those in the court system, and even people in the Ministry of the Interior. In one funny incident, the last time I was there, I got an interview with the Deputy Chairman of the KGB. In the course of the conversation, believe it or not, he told me that the problem with his country is that people do not know their rights. Worse than that, lawyers do not defend people adequately. I am not saying this is the last word from the KGB on that subject, but the mere fact that he made such statements was interesting. One ought to pick up on this.

Moreover, Minister of Justice Venamin Yakolev, who I really believe is a reformer, has said that more lawyers are needed. There are only 27,000 lawyers, whereas I understand there are more than 52,000 in the District of Columbia alone, which can make quite a difference. Many lawyers in Moscow, where there are more lawyers perhaps than elsewhere, tell me that everybody practices on the run. They do not have enough time to pay useful attention to individual cases.

We must try to build up a relationship with people in the legal profession and in the various parts of the government of the Soviet Union who are concerned with reform as it relates to the law. It is in that context that some of us are presently engaged. The United States government should support an effort to engage in dialogue and expose the appropriate Soviet officials to concepts of legal structure and protection of human rights in a democratic society. Particularly, we should try to reach those people who, because they held positions of influence, can have the effect of a multiplier in an effort to change human rights conditions for the better in the Soviet Union.

PANEL III

CIVIL/MILITARY RELATIONS IN THE WESTERN HEMISPHERE AND HUMAN RIGHTS

REMARKS OF ALEXANDER WILDE[1]

The issue of military accountability in Latin America has gone through two generations. They are now overlapping generations, but they are separable somewhat in time, and certainly analytically. The first generation of issues was that concerned with violations committed by military dictatorships, with penalties and sanctions for past abuses. That led to debates within the human rights community about amnesties; debates about the relative balance and equity to be sought between truth, justice, and reconciliation in different societies. That first generation of issues is still relevant. It is certainly relevant for Chile. It is relevant for Nicaragua, and it may someday be relevant for El Salvador—but with those nations I might be getting a bit ahead of the story. I would like to come back in particular to Nicaragua and El Salvador at the end of my remarks.

The second generation of issues has had to do with the ongoing abuses committed by the armed forces—violations of human rights under putative, and sometimes genuine, political democracies. Unfortunately, we know a good many cases of this abuse. El Salvador and Guatemala are just outstanding ones, but Peru, Colombia, Brazil, and Honduras are additional examples. These issues are in many ways at the core of this panel highlighting the broader questions of transitions to democracy and to the rule of law because they relate to the place of the armed forces in the larger democratic order or, as Louis Goodman described it, within the political system.

It is well known that Latin America has been characterized by cyclical patterns of variation between military dictatorships and rather weak, and many times unsatisfactory, democracies. It is important to recall that cyclical history in this triumphant moment today when the map of Latin America looks in a superficial way "democratic." There have been times when the map looked a good deal more democratic than dictatorial in Latin America, such as during the fifties and early sixties, but dictatorships came back. Today when we explain why that happened we emphasize the cold war—the ideological and military global competition that blighted the possibilities of institutionalizing

1. Executive Director, The Washington Office on Latin America, Washington, D.C.

democracy. However, we should not forget that dictatorships also replaced democracies in that earlier period because of deep, underlying injustices and inequalities, to which democratic institutions failed adequately to respond.

We stand now at a moment when many people hope that we can break the old cycle, and that Latin America can undergo a genuine democratization. Against that hope stands the history of the region, and many of the same factors that explained the end of the earlier wave of democratization. For example, the same underlying injustices continue, and now involve a deeper economic crisis across the region than in that earlier period. In addition, the military doctrines of low-intensity and counter-insurgency warfare which developed in that time are still very much alive in the armed forces of Latin America. Those doctrines led the military to consider dissidence in society illegitimate because it could lead to the overthrow of the democracy by revolution.

Against that background remains the hope that Latin America is not condemned to cycles of dictatorship because the world order has changed fundamentally with the end of the cold war. Another factor that is less noticed in the United States, but that is very real for anyone who knows Latin America, is the flowering of "civil society." It demonstrates today perhaps the greatest vitality ever in Latin America at the popular level—a response to the long dictatorships—and is organized in ways beyond anything Latin America has known in the past. That is a source of hope and potentially genuine democratization.

Now there is a new possibility between the alternative of a return to dictatorship and that of genuine democratization. It is that many countries in Latin America could continue in some kind of semi-democratic state for a long time. In this "*democradura*" situation, the military mobilizes violence in the name of the state to combat internal enemies. Its arm may reach into many different aspects of policy and of national life—without feeling the effect of democratic accountability. I used to think such a system was impossible, because it was inherently unstable. If there were any freedom of information—disclosures that the army was engaged in gross abuses, for example—this would be intolerable to a military which would not want such things revealed, and intolerable to a civil society unable to punish such deeds. Yet, for a decade in El Salvador and for more than several decades in Colombia, an uneasy kind of state, with a civilian political leadership and military presence throughout society, has existed. One has to wonder whether, in fact, that kind of situation might not become the norm in many other countries in Latin America.

I have been generalizing broadly. Latin America has many different

situations. There are many possible factors we could examine that shape the impact of the military on human rights. I would like to look at two. They have more to do with the political context that permits the military to intervene in politics than with the armed forces themselves. One of these is the continuing political character of the armed forces, the fact that it "represents" certain interests in society. Professor Wiarda, Professor Charles W. Anderson, and other scholars have pointed to this as a normal feature of politics in many countries. This has undeniably been the case.

The other factor limiting genuine democratization and the rule of law is the military's "exclusionary" role. In many different countries, the political spectrum is truncated in the sense that the interests of significant parts of the population—even the majority, as in the case of Guatemala—are simply not represented at all in politics. The military, however, also acts directly to exclude certain existing political forces—to push organized interests out of the political system, both majority and significant minority interests. These are old patterns. In Argentina, this is what happened to the Peronistas. The Colombian left is another example. Of course, we have two very important and contemporary cases with which I will conclude: El Salvador and Nicaragua.

Let me just compare them briefly. First, in the case of Nicaragua during the present transition, human rights groups have a number of clear principles upon which we can operate. One is certainly that past abuses of human rights by the army should be punished. There are a variety of issues that we could debate about the character of amnesties that might be used and the tradeoff between truth and justice that has long been discussed in Chile, for example. That could come up very quickly in Nicaragua.

The broader question, probably the one in which Washington is most interested, is what it would mean for the Sandinista revolutionary armed forces of Nicaragua to be controlled democratically. In other words, what does democratic control of that army translate into? Certainly, the constitution is a basic document, providing one guide to this question. People are looking it over carefully in order to frame this issue.

There are at least two other qualities or factors that we need to consider when asking what it would mean for the armed forces to be democratically controlled as the government passes from the Sandinistas to the UNO opposition. One fundamental factor in maintaining political order in the country, one very much related to reconciliation, is the possibility of an insurgency breaking out at the local level. The poten-

tial for this has existed for some time. Many of us fear this possibility. Therefore, a legitimate role exists for the military in maintaining political order. What will enable the military to do that is a crucial question. I refer to the nature of the political control over that military.

A second factor involves the question of political space. A remarkable fact that has gone rather unnoticed is that, if the Sandinistas accept a position as a democratic political party, the Sandinista National Liberation Front (FSLN) will become the first and only large party of the left in Central America. The Sandinista party achieved its preeminence militarily; the difficulty is whether they can maintain it democratically, considering not only Nicaragua itself but the region as a whole. This is a central issue. If it can make this evolution, it will be a tremendous sign of hope, not only for Nicaragua, but potentially for other countries in that region. Above all, it provides hope for El Salvador. The FSLN is a strong, disciplined political party, and every place where the military has been brought under civilian control in Latin America, it has occurred in the context of a strong party system. UNO is not a strong party, but it may become one. With even one strong party in Nicaragua, it is conceivable that the military can be brought under control. The Sandinistas, although only a minority in the February elections, still represent a very significant and important portion of the political spectrum.

They have no counterpart in El Salvador. With electoral turn outs of more than ninety percent in Nicaragua and fifty percent in El Salvador, El Salvador has not simply a truncated political spectrum, but rather excludes a very significant part of the politically active population, namely, popular organizations and groups at the grass roots level.

In addition, of course, the civilian government in El Salvador has only the most tenuous control over the military institution. The security forces continue to be guilty of gross violations of human rights, only a minuscule number of which result in punishment. The real danger in El Salvador is that it remains a "*democradura*," a highly restricted and limited civilian regime without genuine democratization. It does have one important advantage compared to Nicaragua. It has in ARENA a strong political party on the right, a party that can compete electorally. If ARENA, like the FSLN, accepted a full political spectrum and competes in that fashion, there would be greater potential for removing the military from politics.

Let me conclude with a final comparison of Nicaragua and El Salvador today. In Nicaragua, international organizations have made an enormous contribution to pluralistic electoral competition. If it is possible to transfer control of the government peacefully in that country, it

will happen because of the active role of the international organizations during the campaign and election, and the period following the election. If the United States supports that kind of presence in El Salvador (and there are promising signs) such a transition might also be possible in that tragic country in the future.

REMARKS OF PROFESSOR HOWARD J. WIARDA[1]

In focusing on the question of civil/military relations in the Western Hemisphere and human rights, my sense has always been that one ought to know the institution with which we deal before we rush in to reform it. I worry that in various kinds of meetings in which we all participate that, with the best of intentions, we rush into various controversial and very difficult and complex issues without necessarily knowing what we are doing. With all due respect, lawyers can fall into this trap just as much as the United States government, which, incidentally, does it very often.

I will begin by providing a sense of realism about the military in Latin America, how it is organized, and what we can do. First, the military simply cannot be wished away as doubtless some of the panelists would like to do. It has to be dealt with on the basis of realism, not on the basis of romance. I heard a comment this morning by one of the speakers suggesting the demilitarization of Latin America. I think that simply will not work, especially if it is attempted by the United States.

Second, we cannot understand the Latin American military through United States' models for interpreting civil/military relations. Instead, we are dealing with a quite different historical, sociological, political, and strategic context in the region. It is doubtful that United States models of civil/military relations are really appropriate for our understanding of Latin American military activity and their interrelations with civilian institutions.

Third, if we are going to deal with the Latin American military, we need to understand it realistically and, most importantly, on its own terms and frequently in its own language, which is also quite different from the language that we in the United States use to discuss themes like civil/military relations. Let me just suggest very briefly what some of those terms and realities might be. First, as already indicated by a number of speakers, in many of the countries it is virtually impossible to subordinate the military to civilian authority. We may have to come

1. Professor, University of Massachusetts, Amherst; Research Associate, Center for International Affairs, Harvard University.

to grips with that, although we may lament it. In a number of the Central American countries and the smaller and less institutionalized South American countries, there is a dual power structure—civilian and military, co-existing uneasily, side-by-side—with the relative balance of power between them being renegotiated on virtually a daily basis.

Second, we have to understand the military in Latin America as virtually a fourth branch of government, one included in basic laws and in the constitutions of a number of countries and recognized as such by both the political and civilian elite. Thus, the military is not separate from the state, but is, in fact, one of its main pillars. In a sense, the military's position in society is analogous to that of the church. One cannot think of the separation of church and state in the historically Catholic societies of Latin America in the same way that one thinks of the separation of church and state in the United States. Civil/military relations in Latin America are often governed by the same special considerations.

Third, it is appropriate to recognize, while we may again lament it, that we are dealing with a violence-employing institution operating frequently within a culture of violence. The two frequently feed upon each other. The society is very often violent and the military itself, almost by definition, is a violent institution. It is very difficult for North Americans to come to grips with and understand this reality.

Fourth, historically the Latin American militaries in many countries have played a "moderative" role. The Spanish and Portuguese crowns used to play this role; now it is the armed forces who often moderate the action of political forces in the context of crises and breakdown, where seemingly only the military has sufficient legitimacy or sufficient strength to step in and set the political order straight again.

Fifth, we need to understand the motivations of military officers. The military institution is very fearful even today that it will be destroyed by guerrilla and leftist groups. In my earlier research experience dating back to the early 1960s in a number of Latin American countries, we systematically interviewed military officers about their conception of communism. We received some very interesting responses, and not at all the responses that one might expect. They had nothing to do with ideology nor competitive economic or political programs. Rather, the Latin American military officers' conception of communism is precisely what had happened in Cuba a few years earlier. Members of the old Battista officer corps were tried in the baseball stadium, lined up against a wall and shot. That is the Latin American military's conception of what happens when they negotiate with guerrillas, and it helps

explain why situations like El Salvador are so bloody, so wrenching, and so difficult. If that is their conception of what leftist forces do to the military officer corps, it is certain there is not an awful lot of room for negotiation on the part of the military over those kinds of issues.

We also have to deal with the fact, one which Louis Goodman wrote about in his recent book, *The Military and Democracy: The Future of Civil-Military Relations in Latin America*,[2] that the role of the military is expanding. The military is not only engaged in counter-insurgency activities and with a national security doctrine that leads it into more forceful kinds of roles, but in the last twenty-five years the military has taken a very active role in the administration of the economy and the administration of public enterprises in virtually all of the Latin American countries.

If one studies the training programs at the Latin American military academies, what one discovers is that they no longer study Napoleonic tactics, but rather modern management, public administration, international trade, international law, and national development. They are learning precisely all the skills required to run their countries and, in fact, the military are sometimes convinced—at least up until they also were poisoned by their experience in office during the 1970's—that they could run their countries better than the civilians. In examining the curricula and the quality of some of the officer corps and their members, they may indeed be better equipped than the civilians to run the countries.

Finally, let me suggest that if one is going to work in the area of human rights and the military, it is necessary to understand the concept of the *fuero militar*. Few people have an understanding of what the *fuero militar* really means. This term defines the place of the military within a set of societies that have historically been thought of as organic, or corporate in organization. If one does not understand the *fuero militar*, the military's place and *rights* in society, which is quite different from American-style human rights, it will be very difficult for outsiders to deal with the issue of civil/military relations.

The fact is that in country after country of the Americas, the *fuero militar* is presently being redefined and renegotiated. The outcome will vary from country to country, but we need to be aware of the issues involved. Unless we understand both the history and the current aspects of these notions of *fuero militar* and the organic laws that govern the military's relations to the state, we are not going to get very far,

2. THE MILITARY AND DEMOCRACY: THE FUTURE OF CIVIL-MILITARY RELATIONS IN LATIN AMERICA (L. Goodman, J. Mendelson, and J. Rial eds. 1990).

either in our analyses or in our efforts to bring better human rights to the region.

Allow me briefly to try to provide answers to some of these quandaries and conundrums that have been raised. First, it should be noted that this will be a long-term process whereby civil/military relations are renegotiated and redefined within the region. It will not be settled by a simple election or by civilian elites imposing a new model of military behavior on what are, after all, proud and quite independent officer corps.

Second, we need greater education through such sources as the book edited by Louis Goodman, *et al.*, and a recently published book by Al Stepan about Latin America's military institutions.[3] Greater education and professionalism is also needed within the officer corps and on the part of civilian elites in Latin America, who often not only know nothing about their own militaries, but also dislike them due to the social and racial gaps between civilian elites and the military elites. They seldom mix well at embassy events and other places where they meet.

Third, we need to understand the changes that are going on within the Latin American militaries, on their own terms, including the notion of military role expansion. It is going to be very difficult, since the military has in fact expanded its role from what it was in the forties and the fifties into areas of politics, administration, and economics, for the military to simply go back to the barracks and spend their time cleaning their rifle barrels again and again. That is not likely to happen, and we have to recognize this fact.

Fourth, civilians will have to be required to better understand the military and not intervene in its internal professional affairs—that is, the military hierarchy, the chain of command, the promotion structure, etc.—if they want the military to stay out of civilian and political affairs. This is a two-way process.

Fifth, as uncomfortable as it may leave us, it is very important for us, as well as for the civilian elites in Latin America, to think about finding something for the military to do. For example, the military's involvement in drug enforcement activities is much preferable to the military's being involved in overthrowing civilian governments, although it carries certain risks. But those are the types of trade-offs one has to be willing to make.

As another example, I offer the case of Spain. The United States and the Spanish government very cleverly were able to envelop the Spanish military in NATO committees, meetings, and travel to Brussels or

3. A. STEPAN, RETHINKING MILITARY POLITICS (1988).

Paris, matters with which the military had not previously been involved. The military did not have time to think about the kind of political activities in which it historically had been engaged. NATO activities kept the military off the civilian government's back during the Spanish transition to democracy. This is a very clever strategy and one that obviously will find its counterparts somewhere in Latin America. Spain is a much more appropriate model to use to understand the redefinition of civil and military roles than is the United States model that simply cannot be exported to Latin America.

Another thought which might be uncomfortable for us to accept, is that we may need to provide increased perks, benefits, budgets, golf courses, and clubs to the military. All of the political science literature indicates that military budgets tend to go up under civilian governments rather than decrease. The reason for that is quite obvious. Civilian governments are most threatened by military activities, and, therefore, a smart and shrewd civilian president will take steps to make sure that the military poses no threat by paying it off with privileges, perks, and benefits. So we may face the prospect that the Latin American military budgets, in order to maintain civilian democratic government, may have to increase.

We should also bear in mind that the military remains very suspicious of and often hostile to civilian politicians, not only because they are civilians—probably the least important motivating factor—but rather because they tend to be whiter, more upper class, and from better families. This racial, cultural, and social distinction between the officer corps and the civilian elites in many of the countries is a very important one, and it leaves the military very suspicious of the actions, including the political preferences, of the civilian elites.

In many respects the military has good reason to be suspicious of civilian governments. For example, in Peru, where the outgoing President absolutely ruined the national economy of that unfortunate country, the military is very uncertain about what its attitude should be toward the civilian president on issues of the economy as well as a host of other issues.

Meanwhile, one ought to recognize that for a better human rights policy with regard to some of the less institutionalized and less professional Latin American militaries, it will be necessary to keep the pressure on and focus the spotlight on the abuses of the military. This involves, for example, going to El Salvador as George Bush did when he was Vice President, and laying down the law to the Salvadoran officer corps by threatening to cut off their water—United States' aid. This is the one message that these officer corps understand. They do not un-

derstand much about human rights considerations expressed here in the United States, but they do understand having their water cut off. That may be the kind of tough, hard message that the United States will have to convey from time to time. It may be necessary to paint these countries as pariahs and isolate them internationally as was done in Paraguay, Chile, and some other countries. Their wheels may eventually turn once this pressure is mobilized.

Finally, although I have spoken in general continent-wide terms, let me suggest that one ought to recognize that there are obviously differences in each country. Nor has it been adequately acknowledged that the military itself is internally divided, not so much on ideological terms in the way most Americans focus on, but rather along professional and institutional lines. There is currently a major debate within the officer corps themselves as to whether the army ought to be subordinated to civilian authority as under a United States/West European model, or whether it ought to be a separate institution retaining special rights and duties under emergency circumstances, or whether a model somewhere in between should be adopted. It would seem that those very divisions and the internal debate occurring provide some room for human rights proponents to operate, to exercise leverage, and to secure some better human rights considerations. However, that can only be done if we actually know the institution with which we are dealing.

TRANSLATED REMARKS OF THE HONORABLE PEDRO NIKKEN[1]

When discussing security issues in civil/military relations in the region, one has to consider four aspects of changed conditions. First, Latin America is free as never before. Second, there are democratic governments throughout the region, but the region is worse off than ever before. The worst economic crisis ever currently exists. Third, the military is not an answer to problems and the region is exhausted with unsuccessful military solutions to problems. Fourth, Latin America's reality is in the context of a different world. Anti-communism is not an important ideology for the world. Glasnost and the new relations between the superpowers have changed the world view and all of this causes a redefinition of civil/military relations, both with respect to domestic situations, and also with respect to collective security relations that we have for the region.

The need to rethink collective security arrangements could not be

1. Judge, Caracas, Venezuela and former President of the Inter-American Court of Human Rights.

more clearly articulated than in the recent collapse of these agreements with the invasion and intervention of the United States in Panama. All of the bases of previously existing collective security arrangements were violated. I suggest that when thinking about civil/military relations and new collective security agreements, we should consider them within the context of understanding why we are worried about security.

I suggest that there are five new common enemies. The first enemy is the violence which results from the very difficult social reality confronting country after country in Latin America, not only armed violence, but also the violence of unemployment, and social violence. The second enemy is the impact of external debt and the amount of decision-making that is made for Latin American countries by forces outside of those countries. The impact of drug trafficking and the way it has transformed societies is a third enemy. The continuing problem of terrorism and domestic subversion is a fourth enemy. A fifth enemy is the paradox in which the debt situation undermines democracy. The narcotics trafficking is, in a way, financed by developed countries, especially the United States. Another paradox results from increasing prospects for democracy in other parts of the world that places less emphasis and less concern on Latin America and its democracies.

I suggest two ideas for considering future collective security arrangements and future domestic civil/military relations. First, it is incorrect to think that there are common threats, enemies, or problems for the United States and Latin America. Second, Latin America is more isolated now than it ever has been before. I am very concerned about both of these facts. I am pessimistic and I certainly argue for concern about this contemporary situation.

Remarks of Professor Genaro Arriagada[1]

About ten days ago I was invited by the International Human Rights Law Group to be an international observer in Nicaragua. I was a member of President Carter's group. The day after the election, I made a comment that the road to democracy was so, so long.

I suppose the Sandinista army will look to two models of civil/military relations. One model resembles that of General Wojciech Jaruselski in Poland, and the other resembles the model of President Augusto Pinochet in Chile. Like the Jaruzelski model, they would want to be part of a coalition. Here, the army that has been defeated in the electo-

1. Professor, John F. Kennedy School, Harvard University, Cambridge, Massachusetts.

ral process may ask to remain in charge of the Ministry of Interior and the Ministry of Defense. If they follow the model of Pinochet, the army defeated in the polls may ask for a completely isolated army, independent of civilian control. This army would have a commander-in-chief who has the full confidence of the forces that have been defeated.

I think that there are many people, both inside and outside of our countries, that are always concerned about the problems posed by military men. They advise us not to be romantic; rather to be realistic. In this way, a strange combination of principles is selected, but not according to principles that work in any one democratic regime.

Many solutions are possible in Latin America. One of the main problems in Latin America is that for more than a century, we have been looking at these problems with an excess of realism. In that way, some on the left suddenly discovered that the military men on the left can create a fantastic revolution. Peru provides an example of this. As with the Ecuadorian army, some on the right believed that the military leader was very capable and could work better than a civilian leader. The United States sends this message at times as well. For example, in 1969 the Rockefeller report[2] suggested that the church cannot be trusted. It described the church as being leftist. Moreover, politicians could not be trusted because they were irresponsible. However, because the army was more moderate, it could work better in a modernist age.

There have been ten years of dirty wars. Some people are delighted with the performance of Pinochet in Chile since the economy there has performed well. However, it is nonsense to say that an economic miracle has occurred because, when looking at the sixteen years under Pinochet, there has been more or less average growth during this period. The difficulty with this view is that we have to think of civil/military relations in terms of what will work in another country. It will be a terrible mistake to go against these principles in order to make accommodations. What we want to achieve must be clear. Of course, it will take a long time to obtain those principles, but the mistake is acting without principles. Additionally, a military state within a democratic state never works. At present, there are a lot of armies in Latin America that in the name of the "*fuero militar*" want to be a military state within a democratic state. If one knows what is impossible to achieve, then one knows the first step.

What are the principles of good civilian military relations? The first principle is respect for the monopoly of the arms in the hands of the army. We need to make a very strong appeal against the politics of the

2. UNITED STATES, ROCKEFELLER REPORT ON CENTRAL AMERICA (1989).

left in Latin America. They have been dreaming for the last twenty years about a different definition of the monopoly of arms by the army, one that has been extremely useful to the rightist military dictatorship. There is no way that the politicians and societies in Latin America can achieve democracy if we have very strong leftist groups supporting the idea that they have the right to organize guerrillas, or dispute the military's monopoly of arms.

The second principle involves putting the army under civilian control. It will take time, but it is necessary for the civilian president to appoint the commander-in-chief of the military. This is a good time to move because the militaries in South America are exhausted. Their performance in the management of power has been awful. Their record in human rights abuses has been awful. We are facing a new reality. I remember that the military men in Peru came to power because somebody lost the second page of the contract with the International Petroleum Company. Presently, Peru has two or three thousand percent inflation, and the military men are not assuming power because they are exhausted. The countries are exhausted with military intervention. In 1964, Joao Goulart had ninety percent inflation. The military, forecasting complete destruction, used this as a justification to take control.

While this is a good time to apply new principles, I agree with Professor Wiarda that this is a two way road and that the civilians must have respect for the military. Politicians who try to make strong reform inside the army will not be successful if the military believes those reforms will mean the destruction of professionalism or the military career. If we want to create democracy in our countries, we have to adopt the right solution to problems. It will take a long time, but we have to be very careful because there are some principles that we have to respect. That means that the left has to change and of course the politicians must be extremely prudent in dealing with these changes.

There are some events which provide hope. One is the dramatic crisis of military ideology. I published a book on the military ideology in South America ten years ago.[3] At present, the military ideology, especially counter-subversive and anti-communist ideology, has been the ground upon which they legitimized human rights abuses. We have a breakdown in the military ideology and there is room to create a better approach to dealing with the civilians and the military by matching military ideology with democratic bias.

We also face a trend toward disarmament in the near future. In the

3. G. ARRIAGADA, IDEOLOGY AND POLITICS IN THE SOUTH AMERICAN MILITARY: ARGENTINA, BRAZIL, CHILE, AND URUGUAY (1979).

last fifteen years, the military expenditures in Latin America have been growing very fast, especially in Central America. I hope that the electoral defeat of the Sandinistas, resembling the fall of the wall in Berlin that ended the Cold War, will end counter-subversion wars in Latin America. Presently, there is a tendency to reduce the military expenditures in Europe, in the United States, in the Soviet Union, and it will be difficult not to do so in Latin America as well.

I agree with Professor Wiarda that in Latin America the military budget grows faster under a civilian government because Latin America does not face an arms race. Rather, it is a race of salaries, of pensions, and all those expenditures that are linked to the idea of war, but mainly to social security and the military establishment. I hope that we see in Central America and South America in the near future a reduction of the military budget.

It is a long road. But we must place at the top of the agenda the problem of how to adjust our weak democracies to the democratic principles that work in Western Europe and in the United States in spite of differences in the militaries. I think that this is possible.

REMARKS OF PROFESSOR LOUIS GOODMAN[1]

Professor Arriagada, not being a United States citizen, is too polite to add an additional point relating to what has to be done in the future: The Unites States and its military diplomacy has a role and has had a role to play in all of this. I find intriguing the set of principles on which Professor Arriagada focused. It is critical to give this future that he describes a chance to evolve. The United States must be clear about and value these principles.

With some exceptions, I am optimistic about recent changes in United States policy, but it is very important that the United States stand behind the principles that Professor Arriagada has discussed. Is Professor Arriagada's vision too optimistic? We have heard some optimistic and pessimistic scenarios. As Professor Wiarda pointed out, it is very important to *know your armies* and know that armies are not monolithic. Many important changes that have arisen in Latin America have occurred in the context of huge splits within the armed forces.

There are substantial members of every armed force in Latin America that are concerned, not with role expansion, but rather with professionalization, identifying the national security needs of the coun-

1. Dean, School of International Service, The American University, Washington, D.C.

try, and adjusting those needs to modern times. There are variations from country to country, about how much the world is changing. One constant however, exists among Latin American countries and the military in country after country: they are very concerned that they do not become isolated. This concern about isolation is very much on the minds of Latin American nationalists, both civilian and military.

There are opportunities to have the military, in my view, play roles that are consistent with strengthening democracy and the protection of human rights, but only if civilians and the military take very seriously the kinds of principles that Professor Arriagada articulated and take very seriously the national security role of the military. It is necessary to develop structures that allow civilians and the military to engage in a dialogue, and that give civilians the knowledge to effectively exercise their roles vis-a-vis the military. Such a framework is severely lacking in virtually all of the countries of this region.

PANEL IV

ACCOUNTABILITY AND THE TRANSITION TO DEMOCRACY

REMARKS OF JACK TOBIN[1]

I had originally planned to speak about the challenge to the Salvadoran amnesty law which was filed recently by El Rescate, a refugee rights organization in Los Angeles. I helped write that petition. In light of some recent developments in the United States, however, I thought I would be a little provocative, and broaden our discussion on the question of accountability and the transition to democracy by looking at some events within the United States which should give us pause when thinking about transitions.

We will be discussing the notion of "transition," an unusually dynamic term in the otherwise static lexicon of human rights. Human rights scholars and advocates tend to steer very clear of notions of human rights which erode the fixity of rights. The approaches taken by Bob Goldman, myself, and others who are involved in international cases dealing with the question of accountability for past human rights violations are in this mold, founded essentially on the principle that there are certain human rights which are fixed and which are always and everywhere inviolable. Thus to do anything other than demand that violations of such rights be investigated and prosecuted is really to

1. Administrative Director of the Human Rights Program, Harvard Law School, Cambridge, Massachusetts.

make a mockery of the very idea of non-derogability and the obligations of states under international human rights law.

"Transition" implies process, fluidity, even instability, and with it comes the now well-known pragmatic debate on the extent to which post-dictatorial states can safely put the principle of non-derogability into practice with respect to past violations. In one sense this is healthy, a clear confrontation between the realities of political power and the imperatives of protecting the most basic human rights not only as a defensive matter of the present, but as a prophylactic against future violations. This is an important confrontation, posing challenges to a normative and institutional structure of human rights which remains weak.

Recent discussions of accountability, however important and interesting, have been limited. They have focused almost exclusively on a particular sort of transition—military to civilian—in a particular part of the world—the Third World, or the economically less developed parts of Western Europe. Discussions of accountability after transitions from Stalinist regimes have also recently begun.

Aside from the range of questions relating to the process and the possibility of investigating, prosecuting, and punishing past violations of human rights, the human rights community is faced with a new phenomenon: The widespread existence of human rights violations under nominally democratic civilian governments. Peru, Colombia, El Salvador, and Guatemala are clear examples in this respect. We can possibly add Brazil.

Such transitions raise serious questions about the nature of the democracy to which the countries in question ostensibly have transited. These situations raise problems for the NGO community and for the Inter-American system, both long used to responding to cases of relatively clear-cut violations of human rights under military regimes.

This said, I would like to turn our attention to another transition, one occurring in the opposite direction, in another part of the world. I have in mind the transition to higher levels of repression in developed countries. For all of its achievements, in my view one of the greatest challenges which the human rights movement now faces is that of bringing to bear the lessons learned by human rights advocates in the context of Third World conditions to those in developed countries. In some developed countries economic crisis has led to an increase not only in violations of economic and social rights—to housing, to education, to work, to an adequate standard of living—but also to a disturbing rise in violations of civil and political rights. As in other societies, heightened social contradictions in our own have engendered heightened repression.

The arduous recent history of human rights defense has been tremendously costly in human terms. Often trial and error and under the press of events, this history is inhabited by the spirits of friends and colleagues who have been killed, and more anonymously, peopled with peasants, unionists, lawyers, teachers, and religious workers who have been destroyed or injured by state repression.

Fortunately, we have learned a lot. We now know a bit about the modalities of repression, its stages, and that numbers of deaths or disappearances are by no means everything. We know about low-intensity conflict and psychological operations. We have also seen the creative and courageous responses of individuals and groups to a sophisticated range of repressive techniques. This experience has been preserved primarily through the work of international and local human rights NGOs.

The United States' human rights organizations now need to look closely at conditions closer to home and to devise responses to abuses which are ever more obvious even to white, middle-class eyes. Recent years have seen the decimation of American labor unions. Deaths of striking workers have gone unsolved. We are witnesses to an increasing militarization of policing, the proliferation of special anti-crime tactical units, and the rise of a national security rhetoric no longer directed to the Soviet threat abroad, but to our own streets and cities. Black youths in Boston are now systematically and openly harassed by the police through an anti-drug "stop-and-search" policy, in which standards such as reasonable suspicion based on articulable facts and probable cause are losing whatever meaning they had in the past. There are frequent accounts of public strip searches of young black men, and a recent investigation by *The Boston Globe* revealed strip searches of fifteen people without arrest.[2]

In the Stuart case,[3] witnesses, most of them black and vulnerable to arrest or harassment by the police, were intimidated into saying the "right thing," changing their testimony in the face of threats by police investigators. This is perhaps the extreme case. For the middle class, it seemed the horrifying exception to the rule, the result of astute manipulation of racist attitudes by a clever murderer. In contrast to this view,

---

2. Canellos, *Youths Decry Search Tactics*, Boston Globe, Jan. 14, 1990, at 1.

3. A Boston case in which there is strong evidence that Charles Stuart murdered his pregnant wife on October 23, 1989, then fabricated an account of the murder which referred to a black attacker. A subsequent police investigation focused on William Bennett, a black man with a previous criminal record. Several witnesses have said they were coerced and intimidated into implicating Bennett. Stuart committed suicide one day after his brother went to the authorities to implicate him in the killing.

people in the black community have told us the Stuart case is paradigmatic of police conduct, not anomalous.

Right here in Washington, D.C., we have seen an attempt to impose an 11 P.M. to 6 A.M. curfew on young people under eighteen.[4] Fortunately, this effort was scotched by United States District Judge Charles Richey.[5] In 1985, we saw the execution in Philadelphia of "Operation Cold Turkey," which consisted of police sweeps of known gang areas. This also was ruled illegal.[6] Los Angeles has instituted periodic Friday sweeps of so-called gang neighborhoods, in which dozens of young people are detained for the weekend and released on Monday without being charged with crimes. A local lawyer-referral service there received about 2,000 complaints of police misconduct last year. This was double the number received in 1988, which was itself double the 1987 total. Shock detention—in which young drug offenders are subjected to paramilitary-type regimes of incarceration has spread to several states.

Problems such as these are not going to go away. The Children's Defense Fund informs us that one out of five American children are now living in poverty, and that this figure will reach one in four by the year 2000. Recent years have seen a rapid rise in the number of child labor violations. Cuts in social spending continue. The inability of society to address the root causes of the problems of crime and drug use necessarily entails the use of repression and the demonization or scapegoating of those who are denied basic human rights.

Paralleling these repressive responses at the grass roots level has been a shift toward broader executive emergency powers. Jules Lobel discusses these matters in a recent piece in the Yale Law Journal.[7] During his last months in office, President Reagan issued an Executive Order outlining his wide-ranging emergency powers: to use military personnel in civilian law enforcement, to regulate aliens, to impose wage and salary controls, to control civilian transportation, to acquire and lease property, and to take control of civilian nuclear plants.[8]

Spend some time watching prime time TV. What do you see? Show after show romanticizing and glorifying the police, no longer the plod-

---

4. *Police Ready to Start Enforcing D.C. Curfew; ACLU Challenging New Law in Court*, Wash. Post, Apr. 24, 1989, at D5.

5. Waters v. Barry, 711 F. Supp. 1121 (D.D.C. 1989).

6. *See* Cliett v. Philadelphia, No. 85-1846, slip. op. (E.D. Pa. Oct. 17, 1985) (noting that the court had ordered the police to respect the constitutional rights of all individuals in carrying out "Operation Cold Turkey").

7. Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

8. Assignment of Emergency Preparedness Responsibilities, Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (1988).

ding but honest and careful Columbo using his logic and street smarts to decipher criminal behavior. It is now the loose cannons who get the kudos. Constitutional norms are for wimps.

The human rights community needs to respond to this disquieting transition. While I do not argue that we face the same situation as our colleagues in Latin America, the models of human rights defense which have been developed in Latin America and other parts of the world can be used effectively in our own country. What then is needed?

What is needed are human rights monitoring offices, trusted by the community, which will systematically collect, investigate, and document complaints of abuses, then publish their findings. Someone who is systematically harassed by the police will, in most cases, not file a complaint with the police department out of fear of reprisal, lack of confidence in the system, or simple pride. Young black men have told me they were not about to go back to the very place which abused them to lodge a complaint.

Such offices would perform the familiar function of fact-finding. All of the experience of the recent past is here relevant: The need for a consistent methodology, a defensible normative framework, and the importance of accuracy and impartiality. Such offices would combat the social fragmentation which accompanies repression, the tendency to isolation and individual fear, which has been amply documented in Chile, Argentina, El Salvador, and elsewhere. Human rights offices can serve as centers around which organized community action can be taken to confront common community problems. The work of groups like ILSA, the Latin American Institute of Alternative Legal Services, can be useful here in devising roles for lawyers which link them closely to community organizations.

Aside from their fact-finding work, human rights offices can serve as crucial points of orientation for the community through human rights education. The experience of the Latin Americans is relevant here as well. Initial efforts are just beginning in Boston in the form of "street law" workshops for youths on their constitutional rights. A more systematic effort is needed, including publications, links with public and private education, training of paralegals, and work with parents.

A final important task is to continue and expand the important work done by a number of American and other lawyers in the use of international human rights bodies. In recent years, local human rights organizations have discovered the importance of international fora as fields of contestation which can support the work of local groups. We need to do a lot of work in this last area.

REMARKS OF JAIME MALAMUD-GOTI[1]

I suppose that almost everybody is acquainted with what went on in connection with the trials in Argentina.[2] Until today, no one has examined—at least not carefully—what underlay these trials. These trials meant a lot. That is why they caused so much conflict in Argentina.

First, underlying the trials was this permanent battle over oblivion and memory. Oblivion, because torture perpetrated in Argentina was in dark, underground dungeons with summary, secret executions, with no names disclosed. On the other hand, there is the problem of memory, or the idea of a known history, and a legalized version of Argentine history.

Second, there was a conflict between privilege and equality. The military, and most of the civilians who marched with the military, had always enjoyed an enormous amount of either social or caste privilege in Argentina. This battle was against privilege. It was for the ideas that the law would apply to everybody in society, including the military, and that no one would be governed by special rules any longer.

Third, there was an ongoing struggle between the idea of private and public morality. Once I had to speak to a general on behalf of President Raoul Alfonsin. I explained to this general that, in fact, trials were not only to restore some sense of justice to the civilians, or in some way to compensate for the outrages the military had committed. They were also the best way to make distinctions among members of the military themselves for the gravity of the deeds they had perpetrated. So I said to this general, "Would you like to be taken for or confused with Admiral X?" Admiral X had stolen money and was engaged in almost every sort of black business going on.

He said, "Of course not."

"And would you like to be confused with General Y?" I asked. General Y probably had killed more people than Metro-Goldwyn-Mayer and was involved in illegal banking activity and so forth.

He said, "Of course not."

I said, "What about General Z, the former chief of police of Buenos Aires?"

He said, "Well, General Z is a different case."

---

1. Guggenheim Fellow and former senior advisor to President Raoul Alfonsin of Argentina; former Solicitor to the Supreme Court of Argentina (1987-88).

2. Referring to trials in civilian courts beginning in April 1985 of nine former military commanders and junta members charged with criminal responsibility for human rights violations committed during the so-called "dirty war against subversion" in the mid 1970s.

"Why is it a different case?"

"Well," he replied, "General Z is a different case because his comrade, General A, had his arm blown off by a terrorist bomb. Therefore, his case is entirely different from the other examples you gave."

That illustrates how privilege and caste allow you to apply a private morality to yourself, even though these are never reasons for action within the realm of public morality. Whatever we understand about public morality, detachment from our own interests is one of the first tools for defining public morality.

Within this struggle, there was the idea of setting up a landmark. There was a discontinuity between the previous regime and the democratic regime. If we had not resorted to the mechanism of trying the military, this discontinuity probably would have been in some way or another erased.

Of course there are other grounds for struggle between equality, on the one hand, and individual rights on the other. I think that in some way, this paradox always exists for political systems that have individual rights as a main core. If you try to ensure individual rights in the future, there is also some way by which you might jeopardize these individual rights by cornering the military. But there is also the idea of equality. A political system which recognizes individual rights must also proclaim that every citizen is subject to the same rules and must abide by the same authority.

Now, in the middle of this battle, there was also the idea that when you emphasize the idea of individual rights, you tend to forget the trials. You say, "Well, let us go on; let us move on and try not to embrace the past because the past might close in on us and deteriorate our consolidation of democracy." Then the idea of a victim all of a sudden surfaces, and one begins to doubt whether a system of individual rights can actually call itself a system of individual rights when it has not granted the victims any particular role or any particular weight within this new arrangement. If the victim is totally forgotten, the democracy in some way lacks legitimacy.

Within these many discussions, condensed onto one single battlefield, I suppose that there was also the idea of utilizing criminal punishment in a retributive sense and/or in a utilitarian manner. If we think the military that committed the most heinous crimes must be punished, and we try to find some sort of justification for punishment, we might find ourselves at odds as to the answer we will give to this. Of course, the answer will depend largely on the extent to which they ought to be individually tried for their own actions and also to be tried for the nature of the deed. According to Argentine and most Latin American

legislation, almost every single military officer would have to have been tried for either having failed to avert harm or reporting a harm. Omission has an important role in criminal law and in military criminal law in particular. So, room for political decision was ample enough.

There were four or five reasons to try the military, which were hardly susceptible to disagreement. The first is that trials, in fact, unveil the pretext and therefore shrink the room for political speculation. It is one thing to know that a certain number of people have been killed, executed, or tortured, and another to show that Juan Gomez had been tortured on July 3rd, that there were witnesses to this deed, and the perpetrators, at least the indirect perpetrators, were General C or Colonel D. Room for political speculation shrinks considerably.

The second reason for trying the military was to state in some institutional, symbolic way that there was discontinuity between the previous military regime and the current regime. There are many ways to stress this discontinuity. One example is to freeze the promotions of implicated members of the armed forces. I think, however, that the idea of criminal punishment or condemnation is symbolically the strongest way to disapprove of both certain conduct and the way the state was being managed. Of course, if you go deeper and try corporals for having failed to report crimes or lieutenants for having failed to avert harm, you probably would be questioning not only a previous regime but also the structure of the state. Between these two extremes, there are a great number of political decisions which must be made.

Third, I think that it is very important to promote general confidence in institutions, especially in a country like Argentina that has endured at least twenty coups since 1930. In Argentina, there is widespread lack of confidence. One way to encourage confidence would be to set up a new government and have it try to sneak its way in without impinging upon military interests. The other method is to say that these institutions are strong enough to be applicable to all members of society regardless of their condition.

The fourth point derives from the previous principle. I think that by derogating the idea of erasing special fora, we would provide democracy with one of its main ingredients—equality. This would provide new grounds for legitimacy.

Finally, I think that trying the military was also a means of adapting the military institution to the new society. If you single out those officers who have committed the worst acts, then you can say, in some way or another, the rest of you are welcome to the new society and now we can start talking about how you are going to work from now on. Of course, this is consistent with a certain logic, but not with the logic of

the general to whom I referred earlier. He would say, "Well, you are convicting somebody who was deprived himself because he was abducted for two weeks. The terrorists that abducted him did not supply him with whiskey."

Now the problem is that the general grounds for justifying punishment do not necessarily apply to the military in the way we apply them to common criminals. If we talk about deterrents, I am not sure that those who got immediate approval from their comrades and superior officers would be dissuaded from acting because of an eventual and potential punishment. Immediate approval, immediate encouragement, is the way to dilute or to compensate for whatever dissuasive effect your punishment could have in the ordinary sense. I also think that the idea of reformation is always attached to that of punishment, and would never, from a liberal point of view, constitute a justification for punishment. We tend to agree that punishment is given to those who voluntarily break rules. We might think that punishment is legitimate, but that manipulating someone in order to force him or her to adapt to society is not legitimate. The idea of reformation is not consistent with our idea of rights in general.

REMARKS OF THE HONORABLE DIDIER OPERTTI[1]

I would like to express my deep pleasure and satisfaction for the opportunity to participate on this panel. I am particularly pleased to be at The American University today, for as many of you know, the university is my natural habitat. In this state of mind, I will give today my personal views in this academic forum.

Every transition to democracy is unique to each particular country. The Uruguayan experience, whose transition to democracy ended on April 16, 1989, was an exceptional one. The Uruguayan transition put an end to confrontation prevailing in the Uruguayan society, and did this within the legal system.

I should begin by stating that the transition to democracy in my country has been finalized. It began in 1980 through a plebiscite in which the military consulted the public about the constitutional ground upon which the new system should be built. That process continued in 1982 as political parties and the military cooperated to hold internal elections. We elected senators, representatives, mayors, the president, and the vice-president. The first important legislative act of the new

1. Ambassador of Uruguay to the Organization of American States.

government was the approval of the national law known as the "law of national pacification." This law included amnesty for all those who had committed crimes of sedition against the state, specifically the terrorist organizations.

During the first two years of the new government of President Julio Sanguinetti, there was no special legislation on that issue. There was no resolution of the preceding military government's abuse of human rights. Because the amnesty law was geared specifically toward amnesty for terrorists and not toward the military or the police, it was necessary to complete the amnesty process. This was accomplished through the Law of Nullity of 1986 (Ley de Caducidad). This law terminated the state's power to prosecute military and police personnel for crimes committed during the period of military rule.

Soon after the law was approved, however, some sectors of the public asked for a constitutional referendum to remove this law. From 1987 to 1988, proponents gathered enough signatures to hold a constitutional referendum. It is necessary to clarify that this collection of signatures was a political mobilization led by the opposition, more specifically, by the leftist sectors. On April 16, 1989, we held the referendum. The final vote to keep the Law of Nullity was 53%, with 47% voting against it. In this manner, Uruguay resolved the problems of the past. It took the same approach in 1851, when it ended the civil war, and in the 1930s when it put down a confrontation of the Uruguayan population. As for human rights, the Supreme Court upheld the Law of Nullity as constitutional before it was submitted for the popular referendum.

We have a tradition of resolving our problems through democratic elections, and we will continue to do so. Under the Uruguayan Constitution, national elections are held on the last Sunday of the fifth year of the government's tenure. In this past election, the opposition party came to power with a large percentage of votes. In this forum, the White (Blanco o Nacional) Party triumphed over the Red (Colorado) Party. At the same time, in Montevideo, the leftist Marxists obtained the mayoral candidacy for the capital city. This change of political parties clearly demonstrates the climate of recomposition of the political power in my country.

I would like to end by stating that Uruguay approved two laws of amnesty. With these two laws, Uruguay attempted to reconcile the conflict between the military and the civil societies. Nonetheless, the families of the victims, or the victims themselves, began actions against the state claiming compensation from the state.

That the amnesty laws and laws of nullity did not exonerate the state

of its responsibilities is a clear demonstration of justice. From an international point of view, it is necessary to harmonize each state's sovereign power to enact legislation and the state's international responsibilities. Uruguay found that point of harmonization through the process of democratization. If steps toward democratization did not accompany amnesty laws or laws of nullity, those steps would simply be elegant ways to exonerate perpetrators from their responsibilities.

In my country, this has not been the case. Ultimately, it has been the people themselves who have said that they do not want to keep looking to the past. We wish to reaffirm the democratic system. While the price is very high, it is absolutely necessary.

I began by saying that the transition to democracy had ended. I do not say this with vanity. I simply say it thinking that when a country resolves its problems through consultation with its own people, when a law is declared and when a country elects its own governmental officials in a free way, it is not possible to keep saying that a government is still in transition.

Finally, it is necessary to have amnesty available in a majority of Latin American societies at the end of a civil war. This has almost always occurred. The problem is to determine when amnesty is created by its own beneficiaries, rather than instituted by society. In Uruguay, a freely elected parliament approved the amnesty laws and the laws of nullity. The Law of Nullity, which was originally criticized at the international level, was ratified by a popular referendum that was organized freely, and freely executed.

We have never denied that human rights violations were committed during the military regime. To do so would be to deny reality. Through democratic government, however, we have guaranteed the pacification of our country; we have done so through the law, within the constitution, and within the system. It is necessary for the international legal community to look for a way to reconcile these different internal and international values, which are intimately associated with, and which demand, a profound comprehension of the price that each country has to pay in order to reach peace.

Finally, in analyzing human rights violations, it is necessary to remember that in our countries the social pressure of poverty is perhaps the strongest enemy of the institution of democracy. In order to preserve democracy we must find a way to eliminate the extreme poverty and the underdevelopment which is surrounding us and in which the political extremes of both the right and left are born.

REMARKS OF NIGEL RODLEY[1]

After that very eloquent statement by Ambassador Opertti, I fear the rather juridical approach that I shall be taking may seem a bit boring—but perhaps it needs to be said anyway. Before doing so, I would like to indicate that I find myself in a state of transition. I shall soon belong to an institution analogous to this new Center for Human Rights and Humanitarian Law, at the University of Essex in the United Kingdom. As I do for the moment still work for Amnesty International, I shall in my remarks say something about Amnesty International's approach to this issue, but I shall stress the legal aspects about which it might be appropriate for me to be speaking in my new capacity.

In the introduction to the reports of the Aspen Institute Discussion on State Crimes: Punishment or Pardon,[2] the following is written: "The Conference considered whether international law requires states to punish violators of human rights. It was agreed that there was no general obligation under customary international law to punish such violators."[3] I do not have any fundamental disagreement with that as a general proposition. I do not think that international law requires that those who imprison people whom the courts have convicted for, say, acts of freedom of expression, should necessarily be criminally punished when the nation later realizes that the imprisonment was, indeed, a violation of human rights. In the same section, however, the report said: "Several participants suggested that while there may be room for governmental discretion in dealing with the perpetrators of lesser crimes, gross abuses such as genocide, torture, disappearance and extrajudicial or summary executions must always be criminally prosecuted and punished."[4] This is the point from which I will depart. That is a statement couched in the language of *de lege ferenda*, the law as several participants in this conference would like to see it. I also think it is a fair statement of *lex lata*, or of law that either already exists or so nearly exists as to be indistinguishable.

First, I will discuss Amnesty International's perspective. In August 1987, the organization wrote a letter to President Julio Sanguinetti of Uruguay[5] which read:

---

1. Reader in Law, University of Essex, England; author of *The Treatment of Prisoners Under International Law* (Claendon Press, Oxford, 1987); and former Head of Legal and Intergovernmental Organizations Office, Amnesty International, London.
2. THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON (1989).
3. *Id.* at 4.
4. *Id.* at 6.
5. Mr. Rodley at this point in his statement explained that his remarks were gen-

> Amnesty International does not take a position in general either for or against measures of clemency such as amnesties, pardons or reductions of sentences in favor of persons accused of human rights violations under previous governments. Our organization recognizes that in certain historical circumstances, particularly after periods of civil strife or political polarization, governments may consider measures of magnanimity toward those responsible for past human rights violations to be both legitimate and prudent as a means of promoting a climate of reconciliation and political stability which may favor the future promotion of respect for human rights . . . . Whatever policies are adopted to limit criminal prosecution and punishment, governments must do whatever lies in their power to ensure that full and impartial investigations are carried out into abuses committed under the authority of previous governments in such a way that the full truth about such violations may be known.

The language in that statement in 1987 seemed to suggest that if the truth in each individual case would be established, then Amnesty International might not take issue with the question of amnesties for those who perpetrated the offenses. By April 1989, however, that position had evolved. Amnesty International stated with respect to the Uruguayan referendum, that it believes:

> [t]he results of the referendum cannot be interpreted as freeing the Government of Uruguay of its international obligations, including the need to take steps to make the truth about past criminal human rights violations such as torture, "disappearances" and extra-judicial executions publicly known, to bring those responsible for such violations to justice and to ensure that measures are taken to ensure that such abuses are not under any circumstances tolerated in the future.

In September 1989, referring to the developments in Argentina (*e.g.* due obedience and full stop laws) Amnesty International expressed concern that "any law which grants immunity from prosecution to people charged with criminal responsibility for grave violations of human rights runs the risk of being seen as encouraging or facilitating future abuses."

I should clarify that Amnesty International does not call for the prosecution of any particular individual. This is a position from which it has never strayed. It is concerned about the international legal principle.

It should also be noted that "prosecution" does not necessarily refer to punishment. Amnesty International has never argued that any particular sentence is appropriate for any particular individual. The question of prosecution and the extent of punishment are two separate issues. The organization at the moment opposes pre-conviction amnesties, but not necessarily post-conviction amnesties. That is the Amnesty In-

---

eral and not directed at any one specific state.

ternational position so far. It is a position that has been evolving and remains under discussion: It is not, as an organization, unaware of the problems.

I would like to suggest what may be some of the legal basis for this evolution. With regard to criminal human rights violations such as torture, extra-legal executions, and "disappearances," there is a strong case to be made that international law requires basically three steps to be taken: One, that the facts be investigated to bring the truth to light; two, that there be compensation for victims or their surviving families if the victims have been killed; and three, that the perpetrators be brought to justice.[6]

These principles are found in international legal documents. As far back as 1975, Article 10 of the Declaration Against Torture,[7] adopted by the United Nations General Assembly, provided for alleged torturers to be prosecuted. In 1984, the United Nations Convention Against Torture[8] provided not only that evidence of torture be submitted to the prosecuting authorities of the state in question, but also to those of any state in which the individual alleged to have committed the torture may happen to be. This is the principle of universality or quasi-universality of jurisdiction, which provides that torture is in a special category of crime; it is a crime that can be tried anywhere.

The Committee Against Torture, established under the Convention Against Torture,[9] had to rule inadmissible three cases from Argentina due to timing: The Convention had not yet come into force at the time of the abuses in question, but the Committee stated, in a rather surprising paragraph, after declaring the complaints inadmissible:

> The Committee notes with concern that it was the democratically elected post-military authority that enacted the Punto Final and Due Obedience Acts, the latter after the State had ratified the Convention against Torture and only 18 days before the Convention entered into force. The Committee deems this to be incompatible with the spirit and purpose of the Convention. The Committee notes that as a result, many persons who committed acts of torture remain unpunished. . . .[10]

---

6. N. RODLEY, *The Legal Consequences of Torture, "Disappearance" and Extra-Legal Execution*, in NEW DIRECTIONS IN HUMAN RIGHTS (Lutz, Hannum, and Burke eds. 1989).

7. G.A. Res. 3654 (XXX), Dec. 9, 1975.

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 40 U.N. ESCOR Annex (Agenda Item 10(a)), U.N. Doc. E/CN.4 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

9. *Id.*

10. O.R., M.M. and M.S. v. Argentina, U.N. Doc. CAT/C/3/D/1, 2 and 3/1988 (1989), para. 9.

The language seems to indicate that if the cases had been tried after the Convention had entered into force, the Committee would have found a violation. Indeed, it would have been unable to do otherwise, but, of course, this particular Committee was not applying general international law. Its function was to apply the Convention, and the Convention did not apply to these particular cases.

Many Inter-American Commission on Human Rights decisions on torture call for exactly the steps to be taken as I have mentioned—investigation, compensation, bringing to justice of those responsible. So, too, does the Human Rights Committee established under the International Covenant on Civil and Political Rights.[11] It does so in its general views on the nature of the specific Covenant articles and in a whole series of individual cases. Investigation, compensation, bringing to justice—those are the consequences that flow from the finding of torture.

That torture itself is a violation of customary international law is beyond serious dispute, so it is not too tendentious a suggestion that there is an international responsibility to bring alleged torturers to justice. I shall more briefly suggest that the same is true for extra-legal executions and disappearances.

With extra-legal executions, as with torture, the Inter-American Commission on Human Rights cases that find violations conclude that the elements of investigation, compensation, and a bringing to justice follow. As recently as last year the Economic and Social Council adopted a text called the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions."[12] This text was subsequently endorsed by the United Nations General Assembly in December of 1989.[13] Paragraph 18 of these Principles states:

> Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offense was committed.[14]

---

11. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 383 (1967) (*entered into force* Mar. 23, 1976).
12. E.S.C. Res. 1989/65, May 24, 1989.
13. G.A. Res. 44/165, Dec. 15, 1989.
14. E.S.C. Res., *supra* note 12, at para. 18.

Again, this is fairly straightforward, calling for the universality of jurisdiction for extra-judicial executioners as for torturers. Furthermore, Paragraph 19 reads:

> An order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their hierarchical authority if they had reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary, or summary executions.[15]

This comes down very precisely to the issue under discussion, an issue which was not, unfortunately, before the drafters of the Convention on Torture.

According to one theory, disappearances are a form of torture and everything I have said about torture would apply to disappearances. In practice, the findings of the Human Rights Committee and of the Inter-American Commission on Human Rights have called for the same things in respect to disappearances as they have in respect to torture and extra-legal executions. In addition, the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities is currently drafting text that envisages very clearly that the commission of disappearances should be treated as a crime (and one of universal jurisdiction); that there be compensation and investigation; that people responsible be brought to justice; and that there be no defense of superior orders. None of these concepts have been at all contentious in the drafting process.

It seems to me that one does not have to be a very adventurous international lawyer to suggest that international law does require the bringing of these human rights *crimes* to justice, while not requiring the perpetrators of human rights violations that do not amount to crimes to be tried. At the very least, the law-making trend is clear. It is a basic tenet of international law that states cannot unilaterally relieve themselves of international legal obligations. There may, nevertheless, be room for discussion as to the rigor of application of the rule requiring prosecutions in cases of amnesties that genuinely reflect a national will towards reconciliation and which do not prevent the establishment of the truth.

15. *Id.* para. 19.

REMARKS OF DIANA ORENTLICHER[1]

I am fortunate to have as a foundation for my remarks Nigel Rodley's lucid exposition of important recent developments in international law.

The developments he described represent a notable departure from the more conventional approach of international human rights law with which we are all familiar. While it has long been recognized that international law requires governments to respect and ensure particular rights, that same law has traditionally allowed governments broad discretion to determine precisely how their human rights obligations will be fulfilled. As Mr. Rodley has just pointed out to us, the measures used to secure human rights are no longer subject to the broad discretion of governments when it comes to a narrow category of atrocious human rights crimes comprising torture, disappearances, and extra-legal executions. When violations of this sort occur, international law now makes clear, governments must make good-faith efforts to bring the wrongdoers to justice. Though for the most part recently developed, these duties are now firmly established in international law.

The clearest basis of a duty to prosecute human rights violators is found in several human rights conventions that prohibit particular acts and require States Parties to investigate violations and prosecute or punish those who are responsible. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[2] which requires States Parties to make torture a criminal offense and to either extradite an alleged torturer or institute criminal proceedings against him; and the Convention on the Prevention and Punishment of the Crime of Genocide,[3] which similarly requires States Parties to punish acts of genocide committed in a territory subject to their jurisdiction.

In contrast, the more comprehensive human rights conventions, including the International Covenant on Civil and Political Rights[4] and the American Convention on Human Rights,[5] are notably silent about

---

1. Orville H. Schell, Jr. Fellow and Visiting Lecturer, Yale Law School, New Haven, Connecticut.
2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), 24 I.L.M. 535 (1985).
3. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951) [hereinafter Genocide Convention].
4. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 *reprinted in* 6 I.L.M. 368 (1967) (*entered into force* Mar. 23, 1976) [hereinafter International Convention].
5. American Convention on Human Rights, *entered into force* June 1978,

a duty to punish violations of their substantive guarantees, and the *travaux preparatoires* of both conventions contain little, if any, indication that such a duty was contemplated by the drafters. Nevertheless, authoritative interpretations of these conventions, as well as of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[6] have made clear that criminal punishment plays a necessary role in States Parties' duty to ensure the full enjoyment of a narrow group of rights. For example, the Human Rights Committee established to monitor States Parties' compliance with the International Covenant has repeatedly concluded that States Parties found to be responsible for disappearances or extra-legal executions are under a duty to investigate the crimes and to bring to justice those who are responsible.[7] Interpreting the duties imposed by the International Covenant, the Committee has likewise asserted that complaints of torture "must be investigated effectively by competent authorities" and that "[t]hose

---

O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1 Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970) [hereinafter American Convention].

6. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, Europ. T.S. No. 5 [hereinafter European Convention].

7. *See e.g., Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 84/1981*, 38 U.N. GAOR Supp. (No. 40) at 124, para. 11, U.N. Doc. A/38/40 Annex IX (1983) (expressing the view that a government responsible for victim's death-in-detention is "under an obligation to take effective steps . . . to establish the facts of [the victim's] death [and] to bring to justice any persons found to be responsible. . . ."); *Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication Nos. 146/1983, 148-154/1983*, 40 U.N. GAOR Supp. (No. 40) at 187, para. 13(2) Annex X (1985) (concluding that respondent government should take effective steps to clarify fate of victims who had disappeared and to bring to justice those found responsible); *Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R. 7/30* 37 U.N. GAOR Supp. (No. 40) at 130, para. 15, U.N. Doc. A/37/40 (1982) (holding that respondent government should take effective steps to clarify fate of a disappearance victim, prosecute those responsible, and compensate family members); *Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 107/1981*, 38 U.N. GAOR Supp. (No. 40) at 216, para. 16, U.N. Doc. A/38/40, Annex XXII (1983) (concluding that the respondent government should investigate fate of disappearance victim, bring to justice those responsible and pay compensation).

Petitioners filed complaints in these cases pursuant to the Optional Protocol to the International Covenant. *See* Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 383 (1967) *entered into force* Mar. 23, 1976, (authorizing the Human Rights Committee to consider communications from individuals who are subject to the jurisdiction of states that have ratified the Optional Protocol and who claim to have suffered a violation of any of the rights set forth in the International Covenant).

found guilty must be held responsible."[8] Similarly, in the 1988 Velasquez Rodriguez Case,[9] which involved a 1981 disappearance in Honduras, the Inter-American Court of Human Rights interpreted the American Convention to impose on States Parties the "legal duty to . . . use the means at its disposal to carry out a serious investigation of [human rights] violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[10]

The European Court of Human Rights, which has generally accorded Contracting States substantial discretion to determine the means they will employ to give effect to their duties under the European Convention, has made clear that punishment plays a necessary role in this process. In a 1985 case, *X and Y v. The Netherlands*,[11] the Court found the Dutch government responsible for a violation of article 8 of the European Convention, which ensures respect for private life, because Dutch law precluded the petitioner—a mentally defective woman who had been raped—from filing a criminal complaint; the rapist had escaped punishment. While acknowledging that, in general, Contracting States enjoy a "margin of appreciation"[12] in determining the means they will use to secure the enjoyment of rights protected by article 8, the Court found, nonetheless, that only the criminal law was an adequate means of protecting what it regarded as a crucial area of private life.[13] In their analyses of the European Convention's exhaustion-of-domestic-remedies requirement, the European Court and Commission of Human Rights have observed that a failure to punish repeated

---

8. *Annual Review of United Nations Affairs*, Human Rights Committee, General Comments under article 40, para. 4 of the Covenant, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982).

9. Case ___, INTER-AM. C. H. R. ___, Velasquez Rodriquez Case, Judgment of July 29, 1988, Ser. C, No. 4 [hereinafter Velasquez Rodriquez Case].

10. *Id.* at para. 174. *See also id.* at para. 166 (asserting that States Parties "must prevent, investigate and punish any violation of the rights recognized by the Convention. . . ."); *id.* at para. 176 (asserting that a "State is obligated to investigate every situation involving a violation of the [human] rights protected by the Convention").

Although the Court implied that punishment is required for every violation of the Convention, it seems likely that such a duty exists only with respect to serious violations of the right to physical integrity. In the Velasquez Rodriquez case itself the Court found the government of Honduras responsible for the disappearance of Manfredo Velasquez and heard testimony that the victim had been tortured and killed.

11. X and Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985).

12. *Id.* at 12, para. 24.

13. *See id.* at 13, para. 27 (reasoning that "[t]his is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated").

instances of torture constitutes "official tolerance,"[14] which is incompatible with Contracting States' duties under the Convention[15] to secure freedom from torture.

Thus, each of these three conventions has been interpreted by authoritative bodies to require that States Parties investigate and punish serious violations of physical integrity. If the texts of these conventions are silent about such an obligation, how have such interpretations come about?

Part of the answer lies in the nature of the obligations imposed by the three conventions. Each one requires States Parties not only to respect enumerated rights but also to "ensure" or to "secure" the enjoyment of those rights to persons subject to the states' jurisdiction.[16] The bodies responsible for monitoring compliance with these conventions have interpreted this language to require States Parties to undertake affirmative obligations to ensure enjoyment of the rights set forth in the conventions, and have found that effectively "ensuring" or "securing" rights relating to physical integrity requires that States Parties investigate violations and bring to justice those who are responsible.

Although few of these interpretations articulate a rationale for the result they reach (this is especially true of the decisions of the Human Rights Committee), they appear to rest upon reasoning that goes something like this: Because the rights involving physical integrity are of paramount importance in the international human rights regime, it is appropriate to insist that governments who have undertaken a binding commitment to ensure protection of those rights employ the most effective means available to secure their enjoyment, and criminal prosecution is the most effective means. The analysis of the European Court in *X and Y v. The Netherlands* conveys similar reasoning in more forceful terms: Only application of the criminal law is deemed an adequate deterrent to violations of crucially important rights that merit special protection by the State.[17]

This approach is closely related to a legal argument advanced by a number of international law experts: Under both customary and conventional human rights law, a narrow class of fundamental rights, including the ones we have been discussing, are non-derogable. If governments are required to uphold these pre-eminent rights in all

---

14. The "Greek" Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 196 para. 29.

15. Ireland v. The United Kingdom, 25 Eur. Ct. H.R. 65 para. 159 (ser. A) (1978).

16. International Covenant, *supra* note 4, at art. 2, para. 1; American Convention, *supra* note 5, at art. 1, para. 1; European Convention, *supra* note 6, at art. 1.

17. X and Y v. The Netherlands, *supra* note 11, at para. 27.

circumstances, including situations of public emergency, they should not be permitted to suspend operation of the legal machinery necessary to ensure the substantive rights.[18]

Punishment also plays a necessary part in governments' fulfillment of their obligations under customary international law, which is generally thought to prohibit torture, extra-legal executions, and disappearances. Support for this view is found in the Restatement of Foreign Relations Law of the United States, which asserts that a state violates customary international law "if, as a matter of state policy, it practices, encourages or condones"[19] torture, murder, or disappearances, and suggests that "[a] government may be presumed to have encouraged or condoned [these] acts . . . if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."[20] Under this formulation, a government's wholesale failure to punish repeated or notorious human rights crimes would generate state responsibility for a violation of the substantive rights because the government's failure fairly can be regarded as complicity in or encouragement of the crimes.

Similar reasoning can be found in a large and growing number of reports prepared by Special Rapporteurs, Special Representatives, and Working Groups appointed by the Commission on Human Rights of the United Nations to investigate human rights conditions in particular countries or particular types of human rights violations, such as torture and disappearances. These reports, which frequently cite the International Covenant and other human rights instruments—as well as customary international law—as the basis of the rights examined, have repeatedly condemned governments' failure to punish acts of torture, disappearances and extra-legal executions, and have suggested that the resulting impunity encourages further violations.[21] Although these re-

---

18. *See* American Convention, *supra* note 5, at art. 27, para. 2 (providing explicitly that certain substantive rights are non-derogable, and that "the judicial guarantees essential for the protection of such rights" are likewise non-derogable).

19. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987) [hereinafter RESTATEMENT].

20. *Id.* § 702 comment b.

21. *See, e.g.*, U.N. Doc. A/38/385 (Agenda Item 12) at para. 341 (1983) (concluding in a report of the Special Rapporteur on Chile that impunity enjoyed by Chilean security organs "is the cause, and an undoubted encouragement in the commission, of multiple violations of fundamental rights"); U.N. Doc. E/CN.4/1987/21 (Agenda Item 12) at para. 60 (1987) (observing in a report of the Special Representative on El Salvador that failure of Salvadoran courts to render convictions that bear reasonable relationship to the number of violations of right to life creates a "climate of impunity"); U.N. Doc. E/CN.4/1989/18 (Agenda Item 10(c)) at para. 312 (1989) (asserting in a report by the Working Group on Disappearances that impunity in the face of repeated instances of disappearances "creates conditions conducive to the persistence of such practices").

ports are not authoritative interpretations of international law, resolutions of the U.N. General Assembly have endorsed many of the reports' conclusions regarding punishment of persons responsible for torture, disappearances and extra-legal executions. The sheer repetition of these conclusions in numerous U.N. reports and resolutions is itself impressive, suggesting an inexorable link between the assurance of fundamental rights and punishment of violators.

I would like, now, briefly to address the question that Nigel Rodley raised toward the end of his remarks: If international law generally requires governments to investigate acts of torture, extra-legal executions, and disappearances and to bring to justice those who are responsible, does that obligation apply with full effect in the peculiar circumstances prevailing in countries that have just emerged from a prolonged period of sweeping state violence?

In addressing this question, it is important to begin by making clear what is not at issue. First, the fact that a democratically-elected government succeeds a repressive regime has no bearing on the state's international obligations. It is well established that a change in government does not relieve a state of its duties under international law.[22] Accordingly, if an outgoing government failed to discharge its duty to punish egregious human rights violations, its successor is generally bound to fulfill that obligation.

Second, that prosecution of human rights violators may be politically inexpedient is no excuse for a state's failure to discharge its obligations under international law. Let me be more direct: If a state is required by international law to secure fundamental rights by punishing violations when they occur, it cannot evade its duty by enacting an amnesty designed to placate restive military forces or to promote national reconciliation. However desirable the objectives, the government must find other means to promote them.

I find more difficult the question whether international law can accommodate the constraints on judicial resources faced by governments that succeed a massively abusive regime. In a country like Argentina, where some 9,000 people are estimated to have disappeared during the military juntas' "dirty war against subversion," any thought of prosecuting all who participated in the atrocious crimes would be untenable. Even a well-functioning judiciary would be incapable of discharging

22. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, International Law 266 (2d ed. 1987). *See* Velasquez Rodriquez Case, *supra* note 9, at para. 184 (stating that obligations under international law continue despite changes in government).

such a burden; much less could a judiciary in a country where the rule of law had totally collapsed in recent years be expected to do so.

In this regard, little difficulty is posed by states' duties under customary international law. Applying the Restatement rule, customary law would be violated by an amnesty that established a wholesale impunity for gross and systematic violations of the right to physical integrity,[23] but would not appear to require prosecution of every person who committed such a violation. Selective prosecutions, focusing perhaps on the leaders who were most responsible for designing and implementing a system of human rights atrocities or on especially notorious cases, would seem to be all that is necessary to satisfy governments' customary-law obligation not to condone or encourage such violations.

I believe that a similar interpretation of States Parties' obligations under the three human rights conventions that I discussed previously is also appropriate. The route to this result is more complicated, however, since some of the authoritative interpretations of those conventions imply that States Parties must investigate and prosecute virtually every[24] instance of torture, extra-legal execution and disappearance.[25] A rigid application of the general rule of international law that a state's international obligations persist despite a change in government might suggest that successor governments must attempt to prosecute every instance of such violations that has not yet been punished.

I believe that the comprehensive human rights conventions do not compel such a result. Instead, those conventions should properly be interpreted to forbid complete impunity for grave violations of physical integrity, but to permit transitional governments to satisfy their punishment-related obligations by undertaking a limited program of prosecutions. This conclusion is based upon a functional analysis of the general rule requiring States Parties to investigate and prosecute certain violations.

As suggested earlier, the primary rationale for requiring States Parties to prosecute certain human rights violations is deterrence. Consis-

---

23. RESTATEMENT, *supra* note 19, at § 702 comment b.

24. *See* Velasquez Rodriquez Case, *supra* note 9, at para. 177 (indicating that legitimate factors such as insufficiency of evidence may justify a failure to prosecute, provided the State has undertaken a good-faith investigation).

25. *See* Velasquez Rodriquez Case, *supra* note 9, at para. 176 (asserting that a State Party to the American Convention must investigate and punish "every" violation of the rights protected by the Convention); X and Y v. The Netherlands, *supra* note 11 (finding the Dutch government responsible for violating the European Convention because a gap in Dutch law prevented the petitioner from initiating a criminal complaint against her rapist, even though Dutch law generally provided for such a procedure and, more generally, for prosecution of rape).

tent with this rationale, one would expect that, when considering particular cases alleging, for example, that a government committed an extra-legal execution, bodies such as the Human Rights Committee would generally find that the State Party responsible for the violation is under an obligation to initiate criminal proceedings. If the Committee regards criminal sanctions to be the most effective (or the only truly effective) means of securing the right to life, investigation leading to punishment would be the most appropriate response of a State Party to any particular violation of that right. Moreover, the deterrence "model" implicit in the various decisions of bodies responsible for monitoring States Parties' compliance with comprehensive human rights treaties would operate most effectively if States Parties consistently responded to particular violations, such as disappearances, by initiating serious investigations that led to appropriately severe punishment.

This rationale would not, however, compel prosecution by a successor government of every violation committed by a previous regime on a wide scale. In a post-transition context, while the deterrence model sketched above would seem to require the new government to investigate and seek to punish each violation committed thenceforth, it would simply be too late for that model effectively to prevent the past violations.

Still, a failure to punish *any* of the past violations would undermine the deterrence objectives underlying the general duty to punish. If the new government established a wholesale impunity for past violations of fundamental rights committed on a vast scale, its action would, as the Restatement reasoned, have the effect of tolerating or condoning the past violations and thereby encouraging similar ones. Such an effect would be incompatible with states' convention-based duty to undertake affirmative measures to prevent such violations. But even a limited program of exemplary punishment could serve a deterrent function and thus accomplish the chief objective underlying the general duty to punish egregious human rights violations, provided the government did not vitiate the deterrent effect of punishment by cynically targeting for prosecution a small group of scapegoats.

In the short time that remains, I would like briefly to touch on one other source of international law that is often cited as a basis of a duty of new democracies to punish past violations—customary norms relating to crimes against humanity. The concept of crimes against humanity has a compelling symbolic power, and strikes many lawyers as particularly pertinent in a context where a period of massive and flagrant human rights violations has just come to an end.

While their intuition is well-founded, the concept of crimes against humanity is difficult to apply, in part because its substantive meaning is shrouded in ambiguity. For example, it is not clear whether the term still refers, as it did in the Nuremberg Charter,[26] only to violations that have a nexus to war. Moreover, a number of post-Nuremberg legal developments[27] have sought to expand the crime to cover practices, including apartheid, that were not explicitly included in the Nuremberg Charter's definition of crimes against humanity. Some of these developments have generated more controversy than consensus, and it is difficult to identify genuine agreement that the term "crimes against humanity" refers to any conduct beyond Nazi-type criminality.[28]

Definitional issues aside, it is not immediately obvious that Nuremberg law establishes an *obligation* to punish certain human rights crimes. The most controversial legal issue surrounding the prosecution of crimes against humanity at Nuremberg was whether the Allied nations had the *power* to assert jurisdiction criminally to punish acts committed by the German government against its own citizens. Such an assertion of jurisdiction had no precedent in international law, and in fact flew in the face of a central tenet of the international legal order—respect for national sovereignty. It requires some work to derive from the assertion by foreign powers of a right to punish certain offenses a duty of governments to punish similar crimes committed by their predecessors.

If the technical legal implications of the Nuremberg precedent are not particularly tidy, the normative implications are somewhat more clear. Simply stated, that precedent, as subsequently ratified by the international community, stands for the principle that crimes against hu-

---

26. Charter of the International Military Tribunal, *signed* Oct. 6, 1945, art. 6, para. c, 59 Stat. 1544, E.A.S. No. 472, *reprinted in* IV TRIALS OF WAR CRIMINALS BEFORE THE NUERENBERG MILITARY TRIBUNALS XIV [hereinafter Nuremberg Charter].

27. *E.g.* International Convention on the Suppression and Punishment of the Crime of "Apartheid", *entered into force* July 18, 1986, art. 1, para. 1, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974).

28. One reason for this ambiguity is that the most significant post-War developments in human rights law have moved away from use of the term "crimes against humanity." crimes against humanity prosecuted at Nuremberg that were also violations of the laws of war were subsequently codified and clarified in the four Geneva Conventions of 1949. Geneva Conventions of 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31. The most important crime against humanity committed by Germans against their own citizens—genocide—was codified (and redefined) in the Genocide Convention. Genocide Convention, *supra* note 3. While numerous conventions adopted since Nuremberg have expanded the catalogue of rights that governments must assure to their own citizens, these conventions generally have not purported to develop the concept of crimes against humanity.

manity should not go unpunished. The Nuremberg tribunals regarded that principle to be so important that its vindication justified an exception to traditional notions of sovereignty.[29]

Post-Nuremberg developments, such as the adoption of conventions providing that crimes against humanity shall not be subject to statutes of limitations[30] and international cooperation in the extradition of war criminals,[31] have underscored the international community's determination to ensure that no person guilty of crimes against humanity escapes punishment.

Pre-eminent values underlying the international legal order are best served if a government whose predecessors committed crimes against humanity assumes responsibility for their punishment. Prosecution under these circumstances reconciles international law's determination, on the one hand, to ensure that such crimes do not escape punishment, and its concern, on the other hand, to respect national sovereignty. Whatever remains unclear about the scope of transitional governments' duties in this regard, there can be little doubt that a wholesale impunity for Crimes Against Humanity would do violence to the norms that underlie the international human rights legal regime.

REMARKS OF JUAN MENDEZ[1]

Diane Orentlicher raised the issue that is foremost in my mind when we discuss human rights questions, and that is the issue of impunity.

---

29. One of the United States military tribunals at Nuremberg reasoned that international jurisdiction was conferred because, without it, crimes against humanity would not be punished:

> Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.

IV TRIALS OF WAR CRIMINALS CASE 9 UNITED STATES v. OHLENDORF 498 (1946-1949).

30. Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, (*entered into force* Nov. 11, 1970), European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, *opened for signature* Mar. 26, 1974, 13 I.L.M. 540 (1974).

31. *See* G.A. Res. 3074 (XXVIII), U.N. Doc. A/9326, A/L.711/Rev. 1 (1973) (setting forth the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity).

1. Executive Director, Americas Watch, Washington, D.C.

This is what we are discussing here: Whether or not we, as a human rights community—and it is a worldwide human rights community that includes governments and government officials as well—can live with impunity.

We have dealt with questions of self-amnesty laws in the past and have always been very much in agreement that those are unacceptable, for both policy and moral reasons, and simply illegal. Obviously, the issue of impunity is highlighted in situations of transition to democracy. The burden placed on an innocent government is something that we cannot just dismiss, but the issue is still the same: Are we going to live with impunity?

Today's newspapers bring the issue very much up to date because Nicaragua is about to issue another amnesty law. In effect, Nicaragua has been issuing very generous amnesty laws for the opposition and some partial amnesty decrees for their own wrongdoers within the security forces. In Americas Watch we have consistently opposed these amnesties and we are preparing to do it again.

It is important to point out that we object to amnesties and pardons for the opposition insurgent groups as well as for officers of the state, at least when we are dealing with very serious breaches of international humanitarian law, in cases of combatants, and with gross abuses of human rights in the case of government agents.

There is really no need for symmetry. There is no obligation to absolve one's own agents simply because we have given amnesty to the opposition. Of course, we have no objection to amnesties for purposes of national reconciliation for the crime of sedition, and certainly we would not propose that people who fought a clean war or people who actually killed in a combat setting should be punished as well.

There is a very clear difference between the act of taking up arms against the state and the commission of very serious crimes in the context of war. For that reason we oppose amnesties even for people who have taken up arms against the state if they committed serious breaches of human rights laws.

In this context, in Human Rights Watch, like Amnesty International, we have dealt with the issue, debated it and issued our own guidelines and decisions. I have brought issues of a special edition of our news bulletin, called "Human Rights Watch,"[2] that spells out this policy. I think it is also very important to review past experiences. For that reason we have published a report called "Truth and Partial Jus-

2. HUMAN RIGHTS WATCH, NO. 4, ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES (1989).

tice in Argentina,"[3] that tried to deal with the events occurring between 1982 and 1987. We have also had occasion to comment on the plebiscite and the process towards the plebiscite in Uruguay.[4]

The question of amnesty is coming up in many different contexts, especially in Latin America, but perhaps also in other countries. We are now faced with people of good will beginning to question whether it is a good idea in the first place to begin the process of healing and challenging impunity. We are beginning to see people of good will stating that perhaps these are the things that have to be set aside for the sake of future peace. I believe very strongly that we in the human rights community have to be waging a new battle, an ideological, philosophical battle to vindicate the effort that has been made, at least in Argentina, to bring people to justice, to begin the process of restoration of justice, and to avoid impunity.

It is very auspicious that this Center begins its work on this very issue. Obviously the question that comes to mind is the extent to which we require governments to search for justice; limitations on prosecutions and punishment will be inevitable. At the very least, we should require that there be no scapegoating. For example, if a new and final pardon is issued in Argentina, it may well happen that the only general made to pay any price for human rights violations may be General Carlos Guillermo Suarez Mason, because the other generals do not like him anymore. They despise him. I am not going to defend Suarez Mason's innocence here, but certainly I do not think it would be a good result to dump the whole responsibility for the dirty war on him alone.

I also think that any limitations should be undertaken without twisting legal concepts or without forcing the letter of the law, because that creates distrust in the general population about legal institutions. For example, one of the justices of the Supreme Court of Argentina, in order to pass on the constitutionality of the due obedience law, had to call it an amnesty because as a due obedience law he could not find it acceptable on constitutional grounds.

If the government and the legislature of Argentina decided not to use the word amnesty, there has to be some reason for it. In the Argentine due obedience law, the legislature usurps certain functions that are more properly left to the judiciary, such as determining if the evidence shows there has been due obedience, or whether there was an opportunity to disobey a wrongful order.

---

3. AMERICAS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA (1987).
4. AMERICAS WATCH, CHALLENGING IMPUNITY: "THE LEY DE CADUCIDAD" AND THE REFERENDUM CAMPAIGN IN URUGUAY (1989).

I want to make one more point regarding the reason for punishment. I am not going to go into the international law questions because both Nigel Rodley and Diane Orentlicher have been very eloquent on those subjects. One of the reasons we insist on punishment is to uphold the norm. We use punishment because we hold certain norms of our civilized society in such high regard that we want to make sure that they are observed, even in punishment. That is because we think that the prohibition against torture, the prohibition against disappearances, and the prohibition against extra-judicial execution should have a high standing in the society that we are trying to build. We make certain that they are respected by making sure that violations of those norms do not go unpunished.

Finally, the only valid reason that I have heard in all these debates over the years for not prosecuting and not punishing, is a "real-politik" kind of reason: The fact that the state is powerless to punish. That is a valid reason in some circumstances, but it is also a very debatable reason. I think, in fact, the nature of democracy is that we should have a very public debate, but more importantly, if institutions are powerless, then we have to empower them. If we decide, proclaim, and dictate that they are powerless, we are only weakening them a little further.

REMARKS OF LAWRENCE WESCHLER[1]

Because I must proceed quickly, the analogy I will make is even more of a caricature than I otherwise would present. If I take Bob Goldman, Diane Orentlicher, and Juan Mendez into the next room, beat them silly so that the audience can hear their moans and groans, fire a few shots, return, put the gun on a table and then say, "Let us vote on whether to forget about what just happened," the status of that vote is not clear to me. Even if we forget about the gun, it is not entirely clear to me that the people in this room have the right to vote on whether or not we can ignore the reality of what took place. Ironically, this is a situation where a vote that might otherwise seem to be the very nature of democracy and the very essence of democracy, is being used to overthrow another part of democracy: the rule of law. These situations create this type of dilemma.

The events in Uruguay were not quite as bad as the scenario I just described, but there is an underlying sense in which that is what happened. A very fundamental aspect of torture is that during torture, the

1. Staff writer, *The New Yorker*, and author, *The Passion of Poland* and *A Miracle, A Universe: Settling Accounts with Torturers* (both Pantheon).

torturer claims to the torture victim that nobody will ever know what is going on in the room, nobody will ever care: "Scream all you want. It does not matter. Nobody can hear. Nobody would dare to hear."

In the same way that a disappearance goes on indefinitely— when a baby is taken away from its parents, the baby goes on living and growing and the abduction is an ongoing crime without any statute of limitations, so torture, whose very premise is that no one will ever know, is likewise continuous. The torture victim who lives in a society that votes not to know continues to be tortured. In effect, the society that votes not to know, or through its inaction chooses not to know, is perpetuating the torture. A democracy cannot have torture. So there is another argument for why we must confront these issues fairly.

Those of you who were here heard me yesterday laud the principles of tremendous forgiveness, tolerance, not hating the policemen, all those principles that people like Michnik and Lipski were discussing in Poland. However, where these two notions come together is a wonderful observation of Hannah Arendt who, in *The Human Condition*,[2] also suggested that forgiveness was called for. She pointed out that men are unable to forgive what they cannot punish.[3] If there is not even the capacity to punish, then the kind of forgiveness given is not free forgiveness and does not move the society in any direction.

At the very least, what is called for is truth-telling within a legal framework, within the rule of law. At the end of a prosecution there is much latitude for grace, for forgiveness and so forth, but without a certain number of bare minimum factors being recognized, the rule of law has not been established.

I would like to close quickly with a quote from Zbigniew Herbert, the Polish poet, who has a wonderful poem on the need for precision.[4] He talks about the end of the Second World War where there were people saying there are millions and millions of victims and it is pointless to try to remember them all. Everybody wants to just move on to the future. We cannot be precise. We cannot know everybody's name. He writes:

> and yet in these matters
> accuracy is essential
> we must not be wrong
> even by a single one
> we are despite everything

---

2. ARENDT, THE HUMAN CONDITION (1958).
3. *Id.* at 236-43.
4. Z. Herbert, *Mr. Cognito on the Need for Precision*, in REPORT FROM THE BESIEGED CITY AND OTHER POEMS 64-68 (Ecco ed. 1985).

the guardians of our brothers
ignorance about those who have disappeared
undermines the reality of the world.[5]

Ignorance about those who have disappeared undermines the reality of the world. It seems to me that a democracy can consist of many things: laws, elections, parliaments, debates. At the very least, the democracy has to be real. It has to imbibe; it has to exist in a real world, and a willed ignorance undercuts that very reality which is the essence of a democracy.

PANEL V

THE ROLE OF INTERNATIONAL LAW AND SUPERVISION IN STRENGTHENING DEMOCRATIC TRANSITIONS

REMARKS OF PROFESSOR JORDAN PAUST[1]

International Legal Standards Concerning the Legitimacy of Governmental Power

Nearly 200 years ago Thomas Paine expressed a common expectation that the "authority of the people [is] the only authority on which government has a right to exist in any country."[2] Similarly, the United States' Declaration of Independence declared that governments are properly constituted in order "to secure [the inalienable rights of man, that governments derive] their just powers from the consent of the governed, [and that] it is a right of the people to alter or abolish [any form of government which] becomes destructive of these ends."[3] Today, these claims and expectations are still relevant to transitions to democracy, still meaningful with respect to precepts of authority, the legitimacy of governmental power, human rights, and self-determination under international law.

The United Nations Charter sets forth among its major purposes "respect for the principle of . . . self-determination of peoples"[4] and the promotion and encouragement of "respect for human rights and for fundamental freedoms for all."[5] The preamble to the Charter also reaffirms "fundamental human rights" of individuals and, importantly,

5. *Id.* at 67.
1. Professor, University of Houston Law Center, Houston, Texas.
2. T. PAINE, THE RIGHTS OF MAN 8 (1794).
3. The Declaration of Independence, *quoted in* 3 SOURCES OF OUR LIBERTIES—DOCUMENTS AND COMMENTARY 1 (R. Perry ed. 1959).
4. U.N. CHARTER art. 1, para. 2.
5. *Id.* para. 3.

"the dignity and worth of the human person . . . [and] the equal rights of men and women."[6] Importantly also, Article 56 of the Charter sets forth the obligation of all member states "to take joint and separate action [to achieve] universal respect for, and observance of, human rights and fundamental freedoms for all. . . ."[7]

Necessarily, such precepts and obligations are interrelated. It is evident, for example, that during what may well be a continuous global transition to democracy, the right to change a governmental structure necessarily is interrelated with the question of the legitimacy of that structure in terms of the accepted standard of authority in international law and with the precept of self-determination. Both of these concepts are interrelated and interconnected with the human rights of individuals to participate in the governmental and political processes and to individual worth and dignity.

As recognized in numerous international legal instruments and by the International Court of Justice, all peoples have the right to self-determination, and by virtue of that right, to freely determine their political status. Similarly, the Court has recognized "that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."[8] A state that complies with the principle of self-determination is one possessed of a government representing each and every person—the whole people—belonging to its territory. Political self-determination, in fact, is a dynamic process, the outcome of which is a genuine, full, and relatively freely expressed will of a given people. It is, in other words, a dynamic aggregate will of individuals and a will which reflects an equal and aggregate participation by individuals and groups in a process of authority.

The authoritative 1970 Declaration on Principles of International Law seems to emphasize these points by stating that "[b]y virtue of the principle of equal rights and self-determination . . . all peoples have the right freely to determine . . . their political status . . . and every State has the duty to respect this right in accordance with the provisions of the Charter."[9] In subsequent paragraphs, the Declaration adds: "[e]very State has the duty to promote, through joint and separate ac-

6. *Id.* preamble.
7. *Id.* art. 56, para. 9.
8. Western Sahara Advisory Opinion, 1975 I.C.J. 12, 31-33, 36.
9. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), *reprinted in*, 9 I.L.M. 1292 (1970).

tion . . . [the] self-determination of peoples" and that "[e]very State has the duty to promote . . . universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."[10] Importantly, and in view of recent events in Panama, the Philippines, Afghanistan, and the ongoing struggle in South Africa, the Declaration adds that a relevant people "in their actions against, and resistance to such forcible action" depriving them of self-determination have the right "to seek and to receive support [from outside groups or states] in accordance with the . . . principles of the Charter."[11] In 1984, for example, the General Assembly reaffirmed the illegality of apartheid and recognized the right of the people of South Africa to self-determination assistance.[12]

The need for a free or consensual determination is also evident in a subsequent paragraph which provides even more insight. As if to illustrate the process of self-determination and to offer a partial definition through the use of relevant examples, the General Assembly declared that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."[13] Thus, what is most relevant is the relatively free determination of the political status, not the particular form of that status. Thus, and importantly for a new Europe, self-determination may result in the formation of a newly integrated state, a new bloc of states, or "any other political status," and thereby implicitly a changing of state, regional, and sub-state territorial boundaries.

What is also quite evident is that self-determination is the right of peoples, not states, governments, or a particular political party. Indeed, an illegal regime, acting contrary to the rights of its people, has no right under international law to assure its own survival. Its claims of necessity are illegitimate.

The consistency among the precept of self-determination, the human right to individual participation in the political process and the only standard of authority recognized in international law is also evident in

---

10. *Id.*

11. *Id.*

12. G.A. Res. 2, 39 U.N. GAOR Supp. (No. 51) at 14, U.N. Doc. A/39/51 (1984). *See* Paust, *The Illegality of Apartheid and the Present Government of South Africa*, speech at A.B.A. Annual Meeting, Seminar on Legal Aspects of Apartheid, July 7, 1985, *reprinted in* 131 CONG. REC. S16,854 (1985) (discussing the recognition of the illegality of apartheid).

13. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, *supra* note 9.

documented expectations concerning the sharing and shaping of political power through a process involving a relatively full, free, and equal participation by individuals who are members of a given nation, state, or community. Indeed, self-determination and human rights both demand that the only legitimate basis of the authority of any government is a dynamic process of self-determination and authority as noted above.

The first two paragraphs of Article 21 of the Universal Declaration of Human Rights recognize the rights of every person "to take part in" the governmental processes of one's country and to "equal access to public service."[14] The more significant content of Article 21, however, is set forth in paragraph 3, which states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which . . . shall be held by secret vote or by equivalent free voting procedures."[15] A legitimate government, the Universal Declaration affirms, is one in which the will of the people is the basis of authority. Just as Thomas Paine remarked much earlier and the peoples of Eastern Europe are still affirming, the authority of a government exists lawfully on no other basis, in no other form. Indeed, the only specific formal reference to the concept of authority that one finds in all of the major legal instruments is the reference to the authority of the people of a given community.

Many interrelated norms of the Universal Declaration, when taken together, tend to confirm a clear and unswerving criterion of authority contained in the third paragraph of Article 21. The Universal Declaration affirms, for example, that "[a]ll human beings are born free and equal in dignity and rights,"[16] that "[e]veryone is entitled to all the rights and freedoms set forth without . . . distinction of any kind."[17] These include the freedom from distinction on the basis of race, sex, political, or other opinion.[18] Of additional significance is the affirmation that everyone has the right to recognition as a person and that all people are equal before the law and are entitled to equal protection.[19] When one considers how individuals acting within a political process

---

14. G.A. Res. 217A, at 135, U.N. Doc. A/810 (1948). *See* Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 570 n.182, 596 notes 369-370 (1989) (discussing the legal relevance of the Universal Declaration).

15. G.A. Res. 217A, at 135, U.N. Doc. A/810 (1948).

16. Universal Declaration of Human Rights, art. 1, G.A. Res. 217 A(III), U.N. Doc. A/810 at 7 (1948).

17. *Id.* art. 2.

18. *Id.*

19. *Id.* art. 7.

are to exercise their rights—their rights to take part in governmental processes and to obtain equal access to public service in a manner that is consistent with the rights of each person to equality, worth, dignity, and the equal protection and enjoyment of law—it seems clear that participation should be on the basis of one person, one voice. Stated differently, an equally weighted "will" of each individual conjoined in a so-called "will of the people" or common expression is the only formula that allows equal individual worth and participation in political processes.

Having this in mind, one can understand why Article 21 contains other references to what one might term related aspects of the process of authority. These include, as mentioned previously, the right "to take part in" and the right of "access" respectively. Thus, one has examples of the interconnections between individual rights of equal participation and the right to participate in the political process and an outcome of a political process that allows a relatively full, free, and equal participation—the aggregate will of individual participants.

From the above discussion it is also evident that the people of a given community have the right to alter, abolish, or overthrow any form of government that becomes destructive of the process of self-determination, and the right of individual participation. Such a government, of course, would lack authority, and as a government representing merely some minority of the political participants, it could be overthrown by the majority in an effort to insure authoritative government, political self-determination, and the human rights of all members of the community equally and freely to participate. A member of the "elite" attempting to stifle or to kill a relatively free political process can be considered to be engaging in politicide, or what others have termed crimes against self-determination or crimes against human rights. This involves crimes of international concern that are not simplistically the affairs of a single state or those elites who hide behind the mantle of state power.

A related point must be stressed. In partial opposition to Ambassador Opertti's remarks, crimes against humanity, like war crimes, involve *obligatio erga omnes*, and attempted grants of amnesty or immunity, or statutes of limitation, by a particular state are not binding on the rest of the international community or other sovereign, independent states. Further, such a concept would play havoc with a state's obligation under Article 56 of the Charter and a universality of responsibility and opportunities for effective implementation and effective sanctions. Moreover, Article 8 of the Universal Declaration expressly recognizes the right of all persons to an effective remedy for violations of their

human rights.

Finally, Ms. Orentlicher made a point that needs to be addressed. The concept of crimes against humanity, she stated, started with Nuremberg. Actually, the concept of crimes against humanity is quite old. It has a history of more than two hundred years. Fortunately, we can use "Lexis" or "Westlaw" in the United States to demonstrate that concepts of duties of humanity, rights of humanity, and even the phrase "crimes against humanity" have been utilized in this country in the past. Indeed, the 1907 Hague Convention, a primary treaty on the laws of war or humanitarian law, in its preamble addresses duties of humanity that are nevertheless strictly incumbent upon others.[20]

> Can you hear them?
> They call in your name,
> Authority,
> Law Creators,
> Foundation of the Contemporary Soul
> Of Humanity.
> Can you hear them
> Calling in your name?
> More directly,
> When you answer,
> Little stays the same.
> Rejoice,
> You have much to gain
> More directly
> In your name.
> Can you hear them?
> "They're not listening still,
> Perhaps they never will."

REMARKS OF AMY YOUNG[1]

It is a great honor for me to participate in the inaugural activity of the new Center being established by The American University and the Law School. It is also a great honor to appear on the panel with other

20. 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, preamble, T.S. No. 539; League of Nations Treaty Series vol. XCIV (1929), No. 2138; 36 Stat. 2277 (Oct. 18, 1907) ("laws of humanity"), *quoted in* Ex Parte Quirin, 317 U.S. 1, 35 (1942); Cobb v. United States, 191 F.2d 604, 611 n.30 (9th Cir. 1951); Aboitiz & Co. v. Price, 99 F. Supp. 602, 614 (D. Utah 1951). *See* Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 91 n.1 (1989) (providing further insight into the duties of humanity as expressed in myriad sources).

1. International Human Rights Law Group, Washington, D.C.

distinguished election observer groups such as CAPEL, of the Interamerican Institute of Human Rights, which has done such distinguished and innovative work in Latin America, and also the Southern Africa Project of the Lawyer's Committee for Civil Rights Under Law which played a major role during the elections in Namibia. I want to discuss the role of observers, but I would like to start out with a caveat. The issue to be considered is the scope and definition of the electoral process. For the International Human Rights Law Group ("Law Group"), elections include not only election day, but also the entire electoral process.

If during the campaign or the electoral process there is no openness, no dialogue between the different factions, no possibility of debate within the society; if the laws are not revised or modified to allow fair access to media, or if there is no fair registration process for voters and for candidates; it gives a very clear indication that there may not be a transition to democracy regardless of who wins on election day. Observers should monitor the whole process and be prepared to comment on all these aspects of the election, not just the technical fairness of the balloting and counting procedures.

The most important aspect of the election, therefore, is the process leading up to the day of the elections. There must be an openness and exchange of ideas. There must be a possibility for a redistribution of power, a loss of power, or a sharing of power. One can observe the formulation of coalitions in which power is shared as well as measures that a government may take unilaterally prior to an election, such as releasing political prisoners or revising laws regarding the media, freedom of assembly, or freedom of speech and press. All of these measures are the essential primary indicators of whether there indeed will be a transition to democracy. To the extent that observers can play a role in this pre-election process, they have the opportunity to strengthen the transition to democracy.

Jordan Paust has just stated the premises upon which observers really should be acting under international law: Articles 21 of the Universal Declaration of Human Rights[2] and Article 25 of the International Covenant on Civil and Political Rights,[3] both of which state very clearly that citizens have a right to periodic, genuine elections and a secret ballot which will guarantee that the will of the people is

2. Universal Declaration of Human Rights, art. 21, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

3. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 383 (1967)(*entered into force* Mar. 23, 1976).

respected. Because all nations have adopted the Universal Declaration, every country in the world is bound by the international norm to hold genuine, periodic elections.

Many observer groups monitor elections because they are invited by the government or by one of the parties. Some even wrangle an invitation—that is fine, too. Whether they want observers present or not, governments accept observer groups because of political pressure and the obvious conclusions that can be drawn about denying access to the process.

The Law Group's policy is to observe an election regardless of whether the organization is invited by any of the participants. The premise upon which we decide to observe an election is the extent to which we feel we can effectively protect the right to political participation. The Law Group, as a human rights organization, monitors the right to genuine, periodic elections in the same way that we would initiate a fact-finding mission to monitor the right to be free from torture, to have freedom of the press, or to be free from summary arrest and execution.

What is the role of observers? Observers can certainly bear witness to the event and report their findings to the international community. They can give moral support and confidence to people who want to run for office. They certainly encourage people to freely vote their consciences because they know that observers will make certain, at least on election day, that nothing happens to them if they vote for the opposition. Observers generally deter fraud, although I do not think that observers can always detect fraud, except for the most blatant examples like that witnessed in the Philippines, Panama, and Haiti. For example, chain or relay voting (in which people switch pre-marked ballots for their own ballot) is almost impossible for observers to detect or deter.

Observers, however, should play more of a role in the pre-election day activities, and not just come to witness the election. Again, the internationally-recognized right to political participation provides the legal basis for observers to enter a country, monitor its electoral process, and make recommendations about election laws, access granted to the media, or campaigning rules.

The standards and international norms by which the Law Group judges elections is set forth in the *Guidelines for International Election Observing*.[4] The book sets forth four minimum standards for a free and fair election derived from international norms. The first guideline requires respect for the integrity of the individual. There cannot be free

4. L. GARBER, GUIDELINES FOR INTERNATIONAL ELECTION OBSERVING (1984).

and fair voting, there cannot be secrecy of the ballot, there cannot be a genuine process, if people are being arbitrarily detained, arrested, threatened, intimidated, or are receiving death threats over the telephone. In a climate of fear and government repression, the electorate certainly cannot feel like they can freely cast their votes, even if they are assured that the vote is secret, because they think that the government is too powerful. If the government has the power to arrest, torture, and even kill with impunity, then certainly it will know how the vote was cast and will retaliate against supporters of the opposition. Respect for the integrity of the individual throughout the entire electoral process, therefore, is essential.

The second minimal requirement is the right of all citizens to participate actively in the campaign and electoral process. This means that people who may want to run for office, to assist in running parties or leafletting, and those who want to participate in rallies or assemblies may do so.

The third guideline is freedom of association, assembly, and expression for a period adequate to allow political organizing, and campaigning to inform citizens about the candidates and the issues. This is a *minimum* standard and general guideline. It does not say there must be thirty minutes for each candidate to appear on television or that air time has to be free. Those are regulations that should flow from that principle.

The final guideline is administration of the voting and counting processes in a fair and honest manner.

These four criteria are based on international norms and derive from the basic principles found in Article 25 and Article 21 of the Universal Declaration of Human Rights.[5] They are not tied to any ideology, nor do they promote any particular political system. They are the basic norms by which the fairness of any election can be judged.

It is also very important for observers to follow through on the process and not just monitor the event. If a group monitors the process leading up to the election and is present for election day, they have an obligation to monitor the transition to power afterwards. This has been lacking in many countries. It may not happen in Nicaragua because everyone is so focused on the process. Fortunately, a lot of people are still focused on the elections in Chile. Prior to those elections, the international human rights community was remiss in its monitoring duty in countries such as El Salvador and Guatemala.

The international community, in addition to observing the electoral

5. Universal Declaration of Human Rights, *supra* note 2.

processes, should look for indications that democratic institutions are being established, respected, and allowed to flourish. For example, civilian control over the military, an independent judiciary, freedom of the press, and the ability of non-governmental organizations to conduct their activities free from intimidation or any sort of repression are all indications that democracy is taking root.

The role of inter-governmental monitors is also important to understand. In Nicaragua, there were 3000 election observers. Someone stated that there was one observer for every 500 Nicaraguans voting, which is probably quite accurate. Surprisingly, we did not keep bumping into each other, which was somewhat of a miracle. The international observer teams from the United Nations and the Organization of American States (OAS) played a tremendous role prior to the election in mediating and negotiating difficulties, in teaching groups in little towns in rural areas, as well as the cities, and in holding meetings with citizens' groups and the parties. UNO and the Sandinistas would ask the OAS to mediate to resolve a dispute, for example, over the destruction of campaign literature. I saw a dramatic demonstration of the lessons learned in Nicaragua from the mediating presence of the inter-governmental observers. Nicaraguans have now learned how to negotiate and to reconcile their differences in a very peaceful manner.

One of the Law Group's observer teams was in a very small town in Estali, which is the region to the north of Managua, bordering on Honduras. On the day of the election there was a problem. A young woman reported that after she voted, a group of women approached her and said, "You voted for UNO," and took a knife and slashed her hand. Some of the leaders of the two parties asked us if we would assist them in resolving this dispute. While we could not get involved, we certainly were interested to see what they would do.

The leaders brought the young woman to the Sandinista headquarters and confirmed that her hand had been badly slashed. Each side questioned the parties and determined that the women had been enemies before the incident. Thus, rather than being a politically motivated act, it really had been a personal vendetta. The parties decided to let the incident go unreported. They learned from that, and other incidents, that there is a way of resolving these disputes with means other than violence.

Finally, the Law Group, as an institution with seven years of experience monitoring elections, is concerned that international observers are not applying international norms to the process of observing. The Law Group has tried to promote the concept of applying reasonable, minimal standards to the whole process of election observing. We hope that

the kind of efforts demonstrated in Nicaragua, especially by groups such as CAPEL, the Center for Democracy, the United Nations and the OAS, will be more representative of the kind of things that observers will do in the future.

I want to raise a few other problems. First, nobody is focusing on countries such as Cuba, North Korea, and many others where there are no elections taking place at all. Indeed, if there is a right to political participation and to genuine and periodic elections, why are these countries not criticized for failing to hold them? Elections have not been held in many countries, and the international community is not speaking out about the abridgement of that very important right. Why are we not bringing those cases to the inter-governmental organizations? Why do we not state that failing to hold genuine, periodic elections constitutes a gross and consistent pattern of violations, and take the complaint to the United Nations or to the Inter-American Commission?

I am also concerned about a backlash of too many observers coming in to monitor an election. One week after Nicaragua, the Law Group was denied a request to monitor elections in another country, in another part of the world. I have a very strong feeling that it had a lot to do with what happened in Nicaragua. Governments must see that there will be almost an irrebuttable presumption of fraud unless they admit election observers.

TRANSLATED REMARKS OF ALEJANDRO GONZALEZ[1]

I would like to thank you for this invitation to join you in celebrating the newly established Center for Human Rights and Humanitarian Law. I think it is a great initiative and is excellent news for people working in the field of human rights. The creation of this Center will support the work of many people in the human rights field. After our long period of dictatorship in Chile, we appreciate the international support and solidarity in Chilean human rights work. Certainly, the same international solidarity should be focused today on other countries with similar problems and human rights violations. International solidarity in human rights is sometimes a crucial factor for sustaining the hope of human rights activists within our countries. I am not a human rights academic. My experience basically comes from my legal practice in human rights defense in Chile.

1. Chief of the Legal Department, Vicar a de la Solidaridad, Santiago, Chile.

Almost from the beginning of the dictatorship we could see that international human rights activism was extremely important for us at the internal, domestic level. Immediately after the coup d'etat in Chile in 1973, important representatives of the international community in the human rights sector came to Chile and advised us to utilize the international conventions and instruments for protecting human rights internally. One month after the coup in Chile, the Inter-American Commission on Human Rights visited and pointed out to the government the concern of the Commission for human rights violations in Chile. Three days after the coup, Amnesty International and the International Commission of Jurists submitted a complaint to the Inter-American Commission on Civil Rights about the gross human rights violations that were taking place in Chile. The Inter-American Commission on Human Rights tried to persuade the Chilean government to respect human rights. Later, in October of 1973, the Commission visited Chile. After the coup, the United Nations hired a commissioner to visit Chile in an on-site mission to determine the condition of the political prisoners.

All these contacts with international organizations, non-governmental organizations, as well as inter-governmental organizations, made it possible for the Chilean human rights community to establish contacts with the international community to help provide protection for human rights internally. The Chilean case is an excellent case for research in human rights because of the great combination of legal defense work and international attention to the protection of human rights.

John Densa wrote an article recently published by the magazine, Interamerican Institute on Human Rights, pointing out that the Chilean case (and possibly the South African case) has been one of the most remarkable cases in the world of international solidarity. It revealed the progress that can be made with both international and internal efforts of human rights NGOs to protect human rights.

I would like to make a couple of very important points with relation to the international defense of human rights. First, there are differences between individual petitions for violations of human rights and denunciation of gross violations of human rights. Second, the work of international political organs in human rights and the work of a technical organ in the human rights area vary greatly. In the beginning, we introduced the practice of submitting complaints to the Inter-American Commission on Human Rights and the Human Rights Commission of the United Nations, while at the same time we tried to use local remedies. During the first five or six years after the coup, we submitted about 1,700 complaints and petitions to international institutions. After

a few years, in 1978 or 1979, we found that global denunciation derived from individual petitions pending before international organizations such as the Inter-American Commission on Human Rights was helpful. We made decisions based on the impact global human rights reports could make in the international community. We found these reports very helpful and now favor the presentation of global studies of the human rights situation in Chile over other methods. Nevertheless, in these global reports of human rights in Chile we include the study of individual petitions, as well as studies of the human rights situation in relation to different rights, like the right to life, or the right to live in one's own land. We enjoyed much greater success using these reports rather than individual petitions. We worked with the Inter-American Commission on Human Rights, which we consider the technical organ because it includes members who work in their personal capacity as experts in human rights issues.

In theory, we know that we always should prefer working with technical organs. Nevertheless, the real impact and effectiveness of these organs depends upon the support of political organs. The Inter-American Commission on Human Rights has done a great job in the Chilean case, and published excellent reports, particularly the last one in 1985,[2] one of the best done on human rights in Chile. Nevertheless, the work of the Commission has received a very restrictive response from the General Assembly of the Organization for American States (OAS). The excellent report in 1985 did not get endorsed or approved by the OAS General Assembly. In Chile, we consider the General Assembly's human rights activity in South America to be a failure. In contrast, the technical organs of the United Nations have our strong support. We observe a great contrast between the work of the technical organs of the United Nations and the political organs of the United Nations. In theory, one of the priorities of United Nations is human rights supervision. Unfortunately, this support has not been found in the Inter-American system, with the single exception of the work of the Inter-American Commission on Human Rights.

REMARKS OF GAY MCDOUGALL[1]

In 1981, Ralph Zackland, the senior officer in the Office of Legal

---

2. *The Situation of Human Rights in Chile [Resolution Concerning the Report on the Situation of Human Rights in Chile]*, 1985 INTER-AM Y.B. ON HUM. RTS. 550.

1. The Lawyers Committee for Civil Rights Under Law, Southern Africa Project, Washington, D.C.

Counsel at the United Nations, wrote: "Namibia stands as a monument to the shortcomings and ineffectiveness of international law and international organizations when applied to a problem, a situation in which a superior force is confronted by the exclusively moral weight of the international community."[2] His is not an optimistic view of the role of the United Nations in solving the Namibian dispute. Upon close examination of last year's events in Namibia, however, his statement about the relative power between the United Nations and South Africa will stand. The problem of securing self-determination for the people of Namibia has engaged the major organs of the United Nations and the United Nation's predecessor, the League of Nations, throughout their histories. It has also been an international dispute that has eluded resolution for many decades in spite of the unique global consensus on the moral and legal issues involved.

The transition that finally occurred, or is in the process of occurring in Namibia, started on April 1, 1989 and Independence Day will be March 21st. In its conceptualization and implementation, that transition departed significantly from the parameters of international law within which the question of de-colonization of Namibia towards independence should have been resolved.

At this point, the international community appears to be largely satisfied with the outcome of the process in Namibia. Perhaps more importantly, the political parties in Namibia have made a decision to accept the results as a basis for going forward. They have little option to do otherwise. Nevertheless, it is very important to accurately assess the conduct in this process.

I want to focus on conceptualization and implementation. In 1978 there was a dramatic turn of events in the process of United Nations' efforts to gain independence for Namibia. Five members of the Security Council, who were all Western members at that time and under the leadership of the United States, proposed a modification in the plan previously adopted for free and fair elections in Namibia. The previous plan, adopted in 1976, was Resolution 385.[3] The Security Council eventually adopted the Western Plan as Resolution 435.[4] It was the blueprint used for the transition processes that began in April. In my view, that resolution and its mandated terms, provisions, and arrangements really turned international law on its head—at least with respect to Namibia.

---

2. R. ZACKLIN, THE PROBLEM OF NAMIBIA IN INTERNATIONAL LAW 330 (1981).
3. 31 U.N. SCOR (1884th mtg.) at 8 (1976).
4. 33 U.N. SCOR (2087th mtg.) at 13 (1978).

Under the previous resolution, the first step in the process was for South Africa, the illegal occupier in Namibia, to withdraw from the territory. Next, the United Nations, the de jure administering authority, was to enter the country, take control of the governmental processes, and run the election.

Under Resolution 435, in contrast to Resolution 385, South Africa, the illegal occupier, was given a de jure legitimacy in Namibia. It would remain in the territory with some of its troops, run the government, and run the elections. Under the Resolution South Africa would draft the election laws, register the voters, print the ballots, staff the polls, and count the votes. Its police force was to maintain law and order. In fact, its police force was the primary threat to law and order.

The United Nations' role under Resolution 435 was then reduced to merely a monitoring role, euphemistically referred to as supervision and control. This arrangement appeared to fly in the face of the dictates of advisory opinions of the International Court of Justice and subsequent Security Council resolutions which had mandated that the international community take no action that would imply legitimacy to South Africa's role in Namibia. There was a fundamental problem in how this process was conceptualized or how the blueprint would work.

Second, I want to discuss implementation. Of course, during the implementation phase, South Africa used the authority granted to it under Resolution 435 to its full advantage. The whole transition process was plagued with persistent problems. South Africa engaged in a consistent pattern of delays, half-measures and ruses that could only be interpreted as intent to manipulate the process.

Consider the following examples of manipulation by South Africa in light of Amy Young's four guidelines defining a free and fair election mentioned previously. In violation of Resolution 435, South Africa refused to disband its dreaded counter insurgency unit, *Koevoet*. This was the group responsible for all of the worst atrocities during the war in Namibia. Its commander testified in court proceedings that he trained his personnel to be killers and they had one role: to search out and destroy SWAPO (South West Africa's People's Organization) members as well as SWAPO supporters and suspected supporters. They remained in the field for the whole electoral process engaging in serious acts of intimidation, including murders and beatings. All of this occurred throughout the voting, forcing the Namibian people to vote in an atmosphere of complete fear and intimidation.

Second, in violation of the plan, South Africa refused to repeal the law which had established apartheid structures in the country. Under Resolution 435, the South Africans were to repeal all of the repressive

and discriminatory legislation in Namibia. They did this very late in the process, but left one key law out: the law that had established apartheid. Thus, throughout the process of transition to a democracy, apartheid was still very much in effect legally, and in many respects, de facto. South Africa promulgated election laws which enfranchised certain white South African civil servants and members of the army who had been assigned to Namibia as part of the occupation forces in Namibia as well as their family members if they had been residents for only four years.

I do not think anybody had an objection to the notion that there were whites from South Africa or elsewhere who, after having made a commitment to the country, should be allowed to participate as citizens of the new nation. But this was no ordinary election. It was an election under a mandate that had been postponed for many decades, an election which was to determine the future course of Namibia through decolonization. It was highly inappropriate, and perhaps a violation of international law, for those people to have been given a franchise to vote. They flew in charter flights from South Africa to vote at polls set up in the airport especially for the convenience of South Africans who crossed the border to vote. Additionally, any black Namibians who decided to vote at the airport polls during those days were shunted into a separate line so they would not interfere with white South Africans who might miss their charter flights back.

Throughout the election campaign, the South African-controlled media monopoly of radio and television showed unrepentant bias in their reporting and in allowing access of political parties to the airwaves. In this country where sixty to seventy percent of the population is illiterate, the radio certainly is a major form of communication. There were needless and damaging delays in promulgation of the election laws, leaving political parties in a situation where they did not even know the rules of the game until a few weeks before the election. This is a country that had never really voted. With parties like SWAPO, the liberation movement never really operated in the context of an election. Knowing the rules of the game and being able to accurately educate voters, was vital to winning.

South Africa attempted to promulgate election laws that would permit wholesale fraud and totally violated any concept of secrecy of the ballot. It was here where we as observers and monitors were able to have the greatest impact because we held firm on the issue of secrecy. The United Nations' operation in Namibia simply was not willing to do that. South Africa even created a special covert unit to engage in dirty tricks to discredit SWAPO in Namibia. This was revealed in the last

month of the election campaign as people who were employed in South Africa in this covert unit defected. Just one week before the elections, South Africa threatened to derail the process because of claims, that were later found to be totally bogus, that the United Nations was cooperating with SWAPO in allowing SWAPO military forces to infiltrate the country.

In this context, the United Nations' role was not looked upon favorably by the population. It is true that the Namibian people had some very unrealistic expectations about what the United Nations was authorized to do and in fact could do in Namibia. They had lived through decades of very brutal war that ravaged the country and South Africa had been in charge. The Namibians actually expected the United Nations to come in and save them, or at least take control of the situation, but that is very far from what the United Nations actually did. There was a lot of frustration and bitterness among the population as a result.

I think Martti Ahtisaari, the U.N. Special Representative in Namibia, should have interpreted UNTAG's (the U.N. Transition Assistance Group) admittedly limited role in the most expansive way possible. UNTAG should have been as aggressive as possible. All through the process we had a lot of concerns about the relationship between UNTAG and the South African Administrator General—the South African governor in Namibia. In most cases UNTAG was in a secondary or subordinate relationship to the Administrator General in every way; protocol as well as substance. UNTAG consistently yielded to the Administrator General even when it was absolutely obvious that the Administrator General was wrong in a particular situation.

In general, the United Nations inaccurately analyzed its leverage with respect to South Africa's role in Namibia. The United Nations had far greater power to compel compliance than it realized or demonstrated. After all, South Africa for many reasons had to hold these elections. This was not altruism; they had to and they knew it. They knew they had to have the United Nations' endorsement of the process. They gave the United Nations a lot of leverage, whether it existed within the terms of Resolution 435 or not, and the United Nations simply did not use that leverage well. It was reluctant to play a role that involved pro-active supervision and control. It was reluctant to adopt a firm and assertive stance towards South Africa and did not hold its overall posture.

While Resolution 435 can certainly be blamed, a lot happened after the resolution which allowed the United Nations to take this subservient or secondary position. For example, the status agreement was negotiated so that the United Nations civilian contingent, members of

the UNTAG team, had to get visas from South Africa, an illegal occupant, in order to enter the country in which it had de jure authority to administer the elections. This was not just on the books. The arrival of a number of U.N. officers was also delayed and certain staff members were refused visas altogether. It seems to me that is a situation in which the United Nations should have exercised its muscles. UNTAG seemed to be negotiating with South Africa rather than exercising its supervision and control throughout the process. In addition, UNTAG was woefully understaffed and had few resources to fulfill the mission that it confronted.

There are a lot of examples that I could detail, but I will conclude by saying that, as one of the people who monitored this process very closely over the past year, I have serious problems in concluding that it was free and fair by any criteria. The international community had quite a large stake in a successful de-colonization process in Namibia in order to make it a model for a transition to democracy in South Africa, but it was also a test of the United Nations' role in the post-cold war era. After all, the United Nations is now moving into election monitoring. It is a growth industry currently in Nicaragua, Cambodia, and possibly Afghanistan. It is very important that the United Nations emerge from this process with an assessment that it handled the situation well. It is in all our interests to take a critical look at the process in Namibia and learn some very important lessons from it.

REMARKS OF PROFESSOR HURST HANNUM[1]

Let me begin by saying that I am a bit uncomfortable with the topic that I have set for myself, which in a sense is designed to rain on the rather pleasant celebration of transitions to democracy that has occurred during the last couple of days. On the other hand, I do believe that a little reality is generally helpful, and perhaps as we consider the events of the last few years, and how positive they have been in many ways, it might be good to bear in mind the problems that are likely to arise during the next few years.

Let me say that international law per se has a very minor role to play in the transition to democracy, with one very important exception: The human rights norms that have been developed over the last forty years certainly have legitimized foreign and especially international interest in this transition to democracy, wherever it occurs. These inter-

1. Professor, Fletcher School of Law and Diplomacy, Tufts University, Medford, Massachusetts.

national human rights norms have become legal obligations for most countries in the world.

However, I think that the major contribution has been provided not so much by international law, but by the international supervision—political as well as legal—of human rights norms that have encouraged democracy and that will be essential if the recent gains are to be maintained in coming years.

One example of what could be termed an over-emphasis on international law was provided by the panel this morning, which dealt with the question of accountability or punishment of human right violators. Nigel Rodley, who is not only a good friend, but who has probably contributed more to the progressive development of international human rights law in the last fifteen years than any other international lawyer, stated that his conclusion that punishment of human rights violators was required under international law was not an adventurous one. I think it is not only adventurous, but it in fact cannot be sustained at the present time. One convention, the Torture Convention,[2] several United Nations' resolutions, declarations, or principles and occasional comments by expert bodies (to whom no one pays much attention) are simply insufficient evidence for the assertion that customary international law now requires the punishment of human rights violators. I am quite attracted to Diane Orentlicher's suggestion that "wholesale impunity," as she put it, may be an illegal abdication of international responsibility, but I think we are far from having achieved customary international law that any foreign ministry in any country in the world would consider itself bound by.

On the merits of the issue, I agree that punishment should be the norm and not the exception, but I think that an overly ambitious reliance on international law is dangerous for a couple of reasons. First, it gives governments concerned a very easy target, because any government would be able to dispel the notion that the punishment of violators is required under customary international law.

Second, emphasizing international law may divert attention from the much more difficult political and moral issues involved by attempting to force them into a legal framework that is really not appropriate. One needs to distinguish between the progressive development of international law and a statement of international law as it is. Exaggerating the latter category is not particularly helpful.

---

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 40 U.N. ESCOR Annex (Agenda Item 10(a)), U.N. Doc. E/CN.4 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

My remarks refer to the dangers of democracy. I would just like to mention three or four issues that may have been alluded to by other speakers but that deserve serious attention as we consider not only how transitions to democracies occur, but what is needed once they have occurred.

The first danger is the obvious one of dealing with the raised expectations that are created by those who focus almost exclusively on free elections or "democracy" in general terms as likely to resolve the many complex problems that face most people in most countries. It is certainly true that democracy and elections are in many cases a necessary condition for the achievement of social equity, economic development, and other important goals. They are not, however, very effective at achieving these goals quickly. From Poland to Nicaragua to the Philippines, we have seen a backlash by those who have been led by politicians both inside and outside the country to expect great things very quickly from democracy. Democracy's social and economic benefits have not yet been received and will not be evident soon, and that is something that human rights advocates need to be very careful about promising.

The second danger is brought about by the fact that democracy is, after all, for everyone. Frankly, I do not think that either UNO or the Sandinistas were particularly attractive candidates in the recent election in Nicaragua, but that is all we had. In the first democratic elections in South Korea a couple of years ago, the "bad guys"—in many people's view—that is, the government, won. It was to the credit of organizations such as the International Human Rights Law Group that they nevertheless declared the results to be fair, despite the fact that such organizations had frequently supported the opposition's claims of human rights violations in the past. Similarly, I do not think that one can ignore the results of the referendum in Uruguay on the amnesty law. That also is democracy, and we cannot assume that people we like, those who have been fighting hardest for democracy, will automatically benefit from its fruits.

This leads me to underscore a point made by Amy Young, that is, that the only legitimate outside interest we have as human rights lawyers, or as human rights activists, is in the *process* of democracy, not in the result. If we want to be politically active and favor one result or the other, we can be, but we should not claim that we are doing it under the rubric of human rights or international law.

This leads to another danger which arises from the theory that the ends justify the means and suggests that intervening in favor of democracy is always legitimate. The United States invasion of Panama is the

most obvious example of this kind of thinking. A somewhat less obvious, perhaps even more pernicious, example was the United States financial support to the opposition during the Nicaraguan elections. Even though this was legal under Nicaraguan law, one can imagine the outcry in this country if the Japanese were to give an equivalent amount of 200 or 300 million dollars to the Republican Party for its use in the next United States election.

The real danger of democracy is that it does not necessarily lead to the protection of human rights. Democracy, as amply pointed out by Jordan Paust, implies majority rule. Professor Paust went so far as to say that it implies one person, one vote, which is the essence of self-determination, the essence of government by the people. But one-person, one-vote is not even the essence on which the United States' government is based, as evidenced by the unequal representation of states in the Senate. This inequality may not be very important today, but it represents the kind of fundamental constitutional compromise that may be required in many countries where one-person, one-vote not only fails to resolve existing problems, but may create new ones.

For example, a majority of the people in Azerbaijan would like to kill a lot of Armenians; a majority of Romanians would like to repress ethnic Hungarians. These issues of minorities, of marginal groups, of regional groups, exist everywhere in the world, and they cannot be resolved merely by appealing to numerical democracy.

I think that it is appropriate for us to rejoice in events not only of the past year in Eastern Europe but also events of the last few years in many parts of the world. We really do seem to be heading in the right direction. Democracy, however, does not necessarily lead to the protection of human rights, and the mere protection of human rights does not necessarily lead to social justice and economic development. Certainly, mere law, whether it is domestic or international, cannot ensure the achievement of either one of these goals. It is important for both lawyers and non-lawyers to bear that in mind in the years ahead.

CLOSING REMARKS

PROFESSOR HERMAN SCHWARTZ[1]

I have been asked to make a few closing remarks. They are not going to be even a half- or quarter-hearted attempt at a summary because a conference like this, which covers so much so thoroughly and so percep-

1. Professor of Law, Washington College of Law, The American University, Washington, D.C.

tively, does not lend itself to any kind of summary. The closing remarks are really an attempt to take into account the mixture of blessings and fears that the last year, and indeed the last years, have presented.

We are approaching the third millennium and it does look as if, in a kind of definitely anti-Marxist Marxian twist on Hegel, there is something of a march of freedom through history. There has been a movement which seems to have come not from an elite, as in 1848 and at other times, but as a groundswell from people in general. It was true in the Philippines some years ago. It has certainly been true in Europe and in Latin America. It seems to be true even in places like South Africa, which we have not talked about very much, where clearly we have seen some of the most remarkable changes. Who knows where or how far that situation is proceeding? But still, it is very different from what it was.

Turkey is another example that I had hoped somebody would discuss, but it does not fit into any pattern or category. Turkey had martial law until a few years ago, and is now caught between East and West. Istanbul itself is half in Asia and half in Europe and is trying to reconcile an Islamic population and tradition with Western secular traditions, hopes, and aspirations.

All of this has been going on for a couple of years and, of course, it has been enormously significant. What it represents, however, primarily is a revolt against one tyranny, or form of tyranny, and an opening of the *possibility* for some freedom. We must not forget that these are all terribly fragile and delicate situations.

I do not know very much about Latin America, but it does not take much to know that there have been repeated cycles in the histories of those countries. In fact, just a few weeks ago there was a story about the dreadful inflation in Argentina and there is talk about a strong man or the military coming back to produce some order. It is the economic issue that has both driven and threatens these changes. The great dangers that we face come from the enormous expectations that democracy will bring economic security and prosperity. The people of these nations have seen on Western television that everybody lives in a lovely fifteen-room house with many neat and clean things, plenty to eat, three VCRs, and much more. If that is not achieved, if the rather desperate situations of the poverty in Latin America, the bankrupt economies and the backward industries of Eastern Europe, or the failure to keep up with the information revolution continues, then there will be deep, bitter disappointment, not only with the way the economy is being handled, but probably with democracy itself. We may see, especially in countries which do not have a strong tradition of democracy, a move

away, probably not back to communism, but towards some other kind of authoritarianism. Countries in Latin America with high illiteracy rates; countries in East Europe like Romania, which, as Alex Kozinski said yesterday, have almost no tradition of democracy; and countries like Hungary which have a tradition of impatience with democracy, are vulnerable.

Among the things that human rights groups can and should do is to keep up the pressure on human rights issues. I am a novice in this work. Many of those present have done much more work in this field than I have, but the one thing that struck me right from the beginning is the power of international public opinion and international pressure. I was discussing with Nigel Rodley some work that I did on Polish prisons. The Polish guards were particularly terrified about having their identities revealed over the Voice of America. There was a great deal of brutality when I was there. Part of the reason for that was that the torturers believe that nobody will ever know and nobody will ever be able to pin the blame on them.

There are many stories of how international pressure has worked. Czechoslovakia is one very well known example. In some ways, the Czechoslovak revolution started last January 1989. In other ways it started even earlier, in Bratislava in March 1988, but one of the great blunders of the not-very-bright Czech regime, in office before the revolution, was arresting and prosecuting Vaclav Havel, in January 1989, on a clearly trumped-up charge. It was a real joke. In fact, the regime held him for two days while trying to figure out with what it would charge him. Milan Jakes, the prime minister at the time, was quoted in a secret meeting (of which a tape was made and smuggled out) that they had made a very bad mistake. Nevertheless, they prosecuted, convicted, and sentenced him to nine months in a second level prison, which meant that he would not have been released until October. All hell broke loose. The Austrians threatened to cancel all relations. A meeting of the Helsinki group was scheduled for June. There was an appeal of Havel's conviction.

On appeal, and for no good reason, they reduced his sentence to eight months in a first level prison. As a result he became eligible for parole and release on May 15, a month before the meeting of the Helsinki group, defusing the tension. Those who followed these events are convinced that the reason for his release was that the Czechoslovaks did not want to stand up in Paris at the meeting and justify this incredibly stupid, outrageous violation of Havel's human rights.

There are other examples, that we all know, where external pressure and public opinion have been crucial. It strikes me that among the

things that we should be doing is focusing heavily on those factors and trying to breath some life or put some teeth into some of the international institutions, even if only in terms of exposure, making it possible for them to visit and reveal what is taking place. We know that the threat of a United Nations investigation of Cuba produced significant improvements in the Cuban prison situation in 1987-88. That is the kind of thing on which we should concentrate.

Dick Lillich suggested yesterday that there were too many human rights organizations tripping over each other, and that they ought to cooperate a little more, and not fight over turf. I disagree with that. First, it is counsel of hopelessness. It is not going to happen. Every organization needs money and every organization will fight for its turf and for its share of publicity. Second, why not have many human rights organizations? The more, the merrier. The more people talk, the more people get involved, the more people are exposed, the more people try to bring those who violate human rights and their governments to book, the better it is. So what if there are turf fights? We have that in the United States in the American civil liberties/civil rights community. It is nothing more than annoying and is actually very useful.