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Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable

Terence S. Coonan*

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Terence S. Coonan

Abstract

This Article examines four such strategies, those employed by Argentina, Brazil, Uruguay, and Chile. Part I of this Article examines the experience of military dictatorship in each of these countries and the respective efforts each country has made to bring torturers to accountability. Part II offers a comparison of such strategies and the judicial philosophies that informed them. Finally, Part III, explores a distinctly Catholic perspective from which such strategies might be assessed, the fundamental notion of sacramentality, and implications for such an assessment.

RESCUING HISTORY: LEGAL AND THEOLOGICAL REFLECTIONS ON THE TASK OF MAKING FORMER TORTURERS ACCOUNTABLE

*Terence S. Coonan**

Everything happened very quickly. From the moment they took me out of the car to the beginning of the first electric shock session took less time than I am taking to tell it. For days they applied electric shocks to my gums, nipples, genitals, abdomen, and ears. . . . [A]lthough the shocks made me scream, jerk, and shudder, they could not make me pass out. . . . At first the pain was dreadful. Then it became unbearable. . . . The normal attitude of the torturers and guards toward us was to consider us less than slaves. We were objects. And useless, troublesome objects at that. They would say: "You're dirt. Since we 'disappeared' you, you're nothing. Anyway, nobody remembers you. You don't exist. . . . We are everything for you. We are justice. We are God."¹

INTRODUCTION

Journalist Lawrence Weschler² has noted that the institution of torture functions at two levels. It seeks to break down not only individuals, but also the societies in which they live.³ The ultimate message of the torturer to his victim is often made ex-

* Law Firm of Joseph De Mott, San Antonio, Texas; J.D., University of Cincinnati School of Law, recipient of an Urban Morgan Human Rights Fellowship. Mr. Coonan served with the Vicariate of Solidarity in Santiago, Chile during the 1980s, and subsequently worked in conjunction with non-governmental human rights groups in Brazil, Uruguay, and Argentina. His current practice is concentrated on refugee and international human rights law issues.

1. NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 22-25 (Writers and Scholars International trans., 1986) [hereinafter NUNCA MÁS ARGENTINA] (quoting Dr. Norberto Liwsky, torture survivor in Argentina).

2. Weschler has written extensively concerning torture and its effects upon individuals and societies where it is practiced. He has detailed the story of how torture became institutionalized in Brazil and Uruguay in the 1970s and how both societies have confronted or failed to confront this national horror. See *generally* LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1990).

3. See Lawrence Weschler, *Introduction* to *SERVICIO PAZ Y JUSTICIA-URUGUAY, URUGUAY NUNCA MÁS: HUMAN RIGHTS VIOLATIONS, 1972-1985* xvi-xvii (Elizabeth Hampsten trans., 1992).

PLICIT during the act of torture itself: "Scream all you like, no one will ever hear you." Such a message makes two assertions of impunity. Most immediately, the torturer implies that his victim is utterly powerless and isolated. The second assertion is implicit as well, that civil society itself is likewise powerless and will never be capable of making the torturer accountable for his acts of savagery.⁴

Following the departure of regimes in which torture has been institutionalized, both individual torture victims and the body politic of the societies affected need healing. For individuals who have suffered torture, the road to healing is often one of physical and emotional therapy, constructed around the necessity of revisiting the painful memories of such acts of personal violation.⁵ So too with societies at large. Their own rehabilitation is possible only to the extent that they are willing to revisit their past and acknowledge the existence of such abuses.

In Latin America, this acknowledgment has rarely been completely forthcoming when democratic rule has been restored following a military dictatorship. In Argentina and numerous other Southern Cone countries, the stories of Dr. Norberto Liwsky and thousands of other torture victims have been eclipsed by amnesties, pardons, and concessions made by fragile civilian governments to unreconstructed militaries.⁶

4. Investigators in the unofficial truth commission in Uruguay have written: [T]orture has a purpose beyond its effect on the immediate victim, and that is to intimidate society at large. Punishing a single victim can dissuade others; the victim is made a martyr for the wider repercussions that his savage treatment can realize. Torturers assume that, confronted with the prospect of torture, an entire society can be paralyzed by the terror, and thus resistance movements to a dictatorship can be made to disappear. In such instances, torture is not directed at the body of the prisoner alone, but at the social body. Torture is transformed from the method to make a few talk, to a silencer of everyone. . . . For such a strategy to succeed, it obviously is necessary that torture is known to be practiced, that there is no doubt as to the treatment prisoners will receive or the immunity that torturers will enjoy.

SERVICIO PAZ Y JUSTICIA-URUGUAY, *URUGUAY NUNCA MÁS: HUMAN RIGHTS VIOLATIONS, 1972-1985* 84 (Elizabeth Hampsten trans., 1992) [hereinafter *NUNCA MÁS URUGUAY*].

5. See generally GLENN R. RANDALL & ELLEN L. LUTZ, *SERVING SURVIVORS OF TORTURE* (1992).

6. The amnesties granted to the human rights offenders of previous military regimes have generated a plethora of legal commentaries. See generally MARGARET POPKIN & NAOMI ROHT-ARRIAZA, 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 262-89 (Neil J. Kritz ed., 1996); Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions, and Constitutional Structure*, 10 *AM. U. J. INT'L L. & POL'Y* 1295, 1304-10 (1995); Michael P. Scharf, *Swapping Amnesty for Peace:*

A certain conventional wisdom has emerged that insists that these concessions are inevitable and even ultimately beneficial for countries returning to democracy. Uruguayan President Julio María Sanguinetti argues, "[n]ations . . . are constructed on the basis of great rememberings and great forgettings."⁷ Events of recent years, however, belie the assertion that democracy in Latin America has been consolidated by "great forgettings."⁸ In 1995, Argentina was rocked by the confessions of a retired naval officer who admitted to sedating political prisoners and then throwing them from airplanes into the South Atlantic during the Dirty War, an unofficial effort by the government to eliminate civilians considered dangerous to the regime.⁹ In Chile, the re-

Was There a Duty to Prosecute International Crimes in Haiti?, 31 TEX. INT'L L.J. 1, 3 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 866-75 (1995).

7. See WESCHLER, *supra* note 2, at 191 (citing Sanguinetti's quotation of nineteenth century French historian Ernest Renan).

8. See Carlos Castilho, *Latin America: The Open Wound of the Disappeared*, INTER PRESS SERVICE, May 18, 1996, available in WESTLAW, Allnewsplus Database (making new revelations of past torture by former military regimes in Brazil and Uruguay); Daniel Gatti, *Latin America-Human Rights: Still Pending After All These Years*, INTER PRESS SERVICE, Jan. 2, 1996, available in WESTLAW, Allnewsplus Database (stating that after two decades, wounds inflicted by military dictatorship in Argentina remain unhealed); Tim Johnson, *Ghosts of 'Dirty Wars' Still Haunt*, FRESNO BEE, Aug. 10, 1995, at D10; Howard LaFranchi, *Cleanup of 'Dirty Little Wars' Demanded in Latin American Countries*, CHRISTIAN SCI. MONITOR, Aug. 30, 1995, at 10 (discussing split among Latin American countries over how best to heal past wounds); Todd Lewan, *Relatives of Victims of 'Dirty Wars' Demand Full Accounting*, FRESNO BEE, Mar. 10, 1996, at A13 (discussing renewed debate about Dirty Wars); William R. Long, *'Dirty War' Debate Refuses to Die*, L.A. TIMES, July 25, 1995, at 1; Matt Miller & Arthur Golden, *Confronting the Brutal Past*, SAN DIEGO UNION-TRIB., Dec. 17, 1995, at A1; *The Past Raises Its Ugly Head*, ECONOMIST, July 1, 1995, at 31.

9. See Calvin Sims, *Argentine Tells of Dumping 'Dirty War' Captives into Sea*, N.Y. TIMES, Mar. 13, 1995, at A1. A national outcry followed this revelation, igniting public protests and a renewed debate concerning impunity for human rights offenders. See Calvin Sims, *National Nightmare Returns to Argentine Consciousness*, N.Y. TIMES, Apr. 5, 1995, at A1; see also *Argentina: Dirty War Will Not Go Away as New Details Emerge of Disappearances & Torture*, NOTISUR-LATIN AM. POL. AF., Mar. 31, 1995. In a further development unprecedented in Latin America, the army chief of staff publicly admitted that the Argentine military had tortured and killed political opponents during the dictatorship. Associated Press, *Argentine General Says Army Killed Leftists in 'Dirty War'*, L.A. TIMES, Apr. 26, 1995, at 19. The controversy these admissions engendered quickly engulfed President Carlos Menem, the military, and the Catholic hierarchy in Argentina. See, e.g., Stephen Brown, *Mothers Remember, Argentinians Won't Forgive or Forget*, MONTREAL GAZETTE, Jan. 14, 1996, at B5; Pamela Constable, *Revisiting the Horrors of Their Past*, WASH. POST, May 22, 1995, at B1; Gabriella Gamini, *Military Urged to Reveal Graves of Tortured*, THE TIMES (London), May 11, 1995; William R. Long, *'Dirty War' Confessions Revive Argentines' Suffering*, L.A. TIMES, May 25, 1995, at 1; Marcela Valente, *Argentina-Human Rights: Scandal Over Church's Role Heats Up*, INTER PRESS SERVICE, Apr. 11, 1995, available in WESTLAW,

fusal of the military to hand over two high-ranking officers convicted of planning the 1976 murder of Orlando Letelier¹⁰ set off a constitutional crisis and revealed how deeply unsettled the country remains in the wake of the Pinochet dictatorship.¹¹ Public protests also erupted in Uruguay, an indication that accommodation with the former military regime there likewise has failed to produce any sense of national reconciliation.¹² Although many of the atrocities in Latin America's Dirty Wars were perpetrated almost two decades ago, they have left wounds that have neither healed nor, in many instances, even been acknowledged by their respective societies.

Reinstituted Latin American democracies opted for a variety of strategies for dealing with former torture regimes. This Article examines four such strategies, those employed by Argentina, Brazil, Uruguay, and Chile. Part I of this Article examines the experience of military dictatorship in each of these countries and the respective efforts each country has made to bring torturers to accountability. Part II offers a comparison of such strategies and the judicial philosophies that informed them. Finally, Part III, explores a distinctly Catholic perspective from which such strategies might be assessed, the fundamental notion of sacramentality, and implications for such an assessment.

Allnewsplus Database; Marcela Valente, *Argentina-Human Rights: Murder of French Nuns Dogs Menem*, INTER PRESS SERVICE, Feb. 26, 1996, available in WESTLAW, Allnewsplus Database; Marcela Valente, *Argentina: Pressure Builds for Action On the Disappeared*; INTER PRESS SERVICE, May 14, 1996, available in WESTLAW, Allnewsplus Database.

10. Orlando Letelier was the Chilean ambassador to the United States when he and his assistant were killed. John Kavanagh, *President Is Focus for Chileans Seeking Justice*, IRISH TIMES, Mar. 28, 1995, at 8. Their deaths in 1976 were the result of a car bomb. John Otis, *Chilean General's Imprisonment for Political Killing Called Mockery*, DALLAS MORNING NEWS, Dec. 21, 1996, at 11A.

11. See Gabriel Escobar, *Case of Jail-Bound General Shatters Chile's Composure*, WASH. POST, Oct. 21, 1995, at A22; Gustavo Gonzalez, *Chile: Massive Event Organized By Relatives of 'Disappeared'*, INTER PRESS SERVICE, Oct. 2, 1995, available in WESTLAW, Allnewsplus Database; Susan Jackson, *In Chile, Pinochet Stands in the Path of Reconciliation*, S.F. CHRON., Sept. 19, 1995, at A8; William R. Long, *First Argentina, Now Chile: A Nation Looks Back in Anger*, L.A. TIMES, June 3, 1995, at 2; Lake Sagaris, *Chile Still Grapples with 1970s 'Dirty Little War'*, CHRISTIAN SCI. MONITOR, Aug. 15, 1995, at 8.

12. See Raúl Ronzoni, *Argentina-Uruguay: Fall-out of Dirty War Spreads*, INTER PRESS SERVICE, May 17, 1996, available in WESTLAW, Allnewsplus Database; Raúl Ronzoni, *Human Rights: Self-Criticism of Argentine Army Shakes Uruguay*, INTER PRESS SERVICE, Apr. 28, 1995, available in WESTLAW, Allnewsplus Database; *Silent Marchers Revive Abuses by Past Military Dictatorship*, AGENCE FR.-PRESSE, May 21, 1996.

I. TORTURE REGIMES IN LATIN AMERICA

A. Argentina

From 1976 until 1983, Argentina endured one of the most brutal dictatorships in Latin American history.¹³ Soon after seizing power, the military embarked upon a Dirty War in which the enemy included not only persons espousing leftist subversion, but anyone suspected of opposing the military regime, including priests, union workers, teachers, lawyers, psychologists, journalists, and students.¹⁴ In the months that followed the coup, the tactic that would become the hallmark of the Dirty War, forced disappearances, was introduced in Argentina.¹⁵

The decision to subject political adversaries to forced disappearances was not endemic to Argentina,¹⁶ nor was Argentina

13. NUNCA MÁS ARGENTINA, *supra* note 1, at xii. The 1976 coup was the sixth such military intervention in less than 50 years. Military leaders previously had wrested power from civilian governments in Argentina in 1930, 1943, 1955, 1962, and 1966. See AMERICAS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA 4 (1987) [hereinafter PARTIAL JUSTICE].

14. See NUNCA MÁS ARGENTINA, *supra* note 1, at xiii-xiv. The military were very explicit about the nature of the Dirty War that they were fighting. Several months after the coup, General Vilas of the Fifth Army Corps declared, "[u]p to now, only the tip of the iceberg has been affected by our war against subversion. . . . It is necessary to destroy the sources which feed, form and indoctrinate the subversive delinquent, and this source is the university and the secondary schools themselves." JOHN SIMPSON & JANA BENNET, THE DISAPPEARED AND THE MOTHERS OF THE PLAZA 209 (1985). General Videla himself asserted, "[a] terrorist is not only that for killing with a weapon or placing a bomb, but also for encouraging other persons, through ideas that are contrary to our Western and Christian civilization." PARTIAL JUSTICE, *supra* note 13, at 6-7.

15. A "disappearance" is the covert abduction, torture, and killing of a citizen by a government. See Chip Pitts & David Weissbrodt, *Major Developments at the United Nations Commission on Human Rights in 1992*, 15 HUM. RTS. Q. 122, 127 (1992) (quoting from U.N. Draft Declaration on Protection of All Persons from Enforced Disappearances). The Argentine Truth Commission, also referred to as the Sábato Commission, after its principal appointee, author Ernesto Sábato, reflected upon the evolution of disappearances in the early months of the Argentine military regime:

Watchful Argentines soon discovered what a dirty war was.

People—mainly but not only young people—began to disappear in great numbers. They were swept off the street, or from their homes in the middle of the night, by squads in plain clothes, and bundled into the trunks of the Ford Falcons with no license plates these squads drove. Most were never seen again. When desperate parents or friends sought information from the police or the military, they were told authorities had no knowledge of who had taken the victim or where he or she was. Some relatives hired lawyers to bring actions of *habeas corpus* in the courts. But almost all these actions were dismissed . . . and the lawyers who brought the actions began to disappear themselves.

NUNCA MÁS ARGENTINA, *supra* note 1, xiii-xiv.

16. Hitler had introduced this technique in Nazi Germany through his "Night and

the first country to utilize such tactics in the Western hemisphere.¹⁷ What made Argentina's Dirty War unprecedented in Latin America was that such tactics rose to the level of official state policy. For the first time in the Western Hemisphere, the entire resources of a nation were given over to systematic torture and murder.¹⁸ The effect was a calculated one. The Argentine populace was put on notice that the very institutions committed to maintaining the law were in fact intent upon subverting it.¹⁹

Between 1976 and 1983 thousands of people disappeared.²⁰ The Dirty War began as a military campaign to eradicate left-wing subversion, a campaign in which repression was utilized in the service of ideology.²¹ Such repression quickly became the ideology, however, and the torture and killing became more ca-

"Fog" policy, disappearing political opponents, with no government acknowledgment regarding the whereabouts or fate of the victims. See JACOBO TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 50* (Toby Talbot trans., 1981).

17. The tactic had been introduced first in Guatemala and Brazil in the 1960s and used again with savage effectiveness by Pinochet in the 1973 Chilean coup. See IAIN GUEST, *BEHIND THE DISAPPEARANCES* 32 (1990).

18. *Id.* "The Junta turned disappearances into a government policy and in so doing gave new meaning to the concept of state terror. It was as deliberate, methodical, and calculated as collecting tax[es], and as such very much out of character with the haphazard brutality of previous military regimes." *Id.*

19. See *id.* at 25-27; see also NUNCA MÁS ARGENTINA, *supra* note 1, at 386-427.

20. The exact number of those "disappeared" has never been ascertained. The Sábato Commission officially identified almost 9000 victims. NUNCA MÁS ARGENTINA, *supra* note 1, at 5. Americas Watch and Amnesty International have cited figures between 12,000 and 15,000. David Weissbrodt & Paul Fraser, Book Review, 14 HUM. RTS. Q. 601, 605 n.16 (1992) (REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION). Nongovernmental organizations in Argentina such as the Mothers of the Plaza del Mayo, Servicio de Paz y Justicia, and Emilio Mignone's Center for Legal and Social Studies have given estimates as high as 30,000. *Id.*

21. José Zalaquett, a human rights lawyer exiled from Chile who would later serve as an architect for the Chilean truth commission, summarized the national security doctrine that comprised the ideology of the Argentine military:

In its essentials, the national security doctrine regards domestic political struggles as an expression of a basic East-West conflict and sees Marxist penetration and insurgency as an all-pervading presence of a new type of enemy fighting a new type of war. Civilians are also warriors, ideas a different form of weapon. Democracy and politics-as-usual cannot lead the fight against Marxism (indeed they often pave its way). Neither can they effectively coordinate all national resources to achieve modernization and economic development, pillars of a modern notion of national security. This can only be done by the professionals of national security - the military. Since the war on Marxism is an insidious one, unorthodox methods are called for, including torture and extermination of irredeemable political activists.

José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in THE ASPEN INSTITUTE, *STATE CRIMES: PUNISH-*

precious and indiscriminate.²² Perhaps the greatest horror of the Dirty War was that so many of its victims were completely innocent, with no connections to the guerrilla movement.²³

The military eradicated the guerrilla movement by 1980, but the terror of the Dirty War continued unabated.²⁴ Argentina's central problem then became one of its own making; the military had created for itself a world that acknowledged no restraints or moral boundaries.²⁵ Through its own corruption and mismanagement, the junta²⁶ ultimately proved incapable of delivering the economic miracle it had promised.²⁷ Eager to distract public attention from the country's economic woes, the military, in April 1982, invaded the Falkland/Malvinas Islands, territory long disputed with Great Britain.²⁸ More accustomed to covert torture than to open combat, the Argentine armed forces suffered a stinging defeat at the hands of Great Britain.²⁹ In the wake of this humiliation, the military Government was forced to resign.³⁰

When Raúl Alfonsín was elected president in October 1983, he faced the daunting task of restoring democracy and the rule

MENT OR PARDON 23, 49-50 (1989) [hereinafter *STATE CRIMES*]; see SIMPSON & BENNET, *supra* note 14, at 52-55 (describing Argentine military's internalization of this ideology).

22. While torture ostensibly had been introduced to elicit information from suspected subversives, it eventually became an obsession for the torturers themselves. SIMPSON & BENNET, *supra* note 14, at 110. Some victims were pulled off the streets and tortured because they were wealthy. *Id.* A number of women were kidnapped, tortured, and raped, simply because guards found them sexually attractive. *Id.* at 109.

23. GUEST, *supra* note 17, at 31.

24. PARTIAL JUSTICE, *supra* note 13, at 6.

25. NUNCA MÁS ARGENTINA, *supra* note 1, at xvii. One commentator noted:

The original point of the "dirty war" - to create a climate of fear in which subversion would be impossible - was superseded, for the officers who actually carried it out, by an even more repellent purpose: the perverse exhilaration of absolute, uncontrolled dominion over others, which became an end in itself, a way of life. Nothing can seem out of bounds in a room where people are deliberately made to suffer excruciating pain.

Id.

26. A junta is a "group of persons controlling a government especially after a revolutionary seizure of power." WEBSTER'S NEW COLLEGIATE DICTIONARY 655 (9th ed. 1991).

27. See SIMPSON & BENNET, *supra* note 14, at 187-207.

28. See GUEST, *supra* note 17, at 335-39.

29. *Id.*

30. *Id.* Following the humiliation of the Falklands/Malvinas defeat, General Leopoldo Galtieri, then the head of the junta, resigned in disgrace. *STATE CRIMES*, *supra* note 21, at 50. General Reynaldo Bignone was appointed President on June 22, 1982. *Id.* He implemented an eighteen month transition back to civilian rule. *Id.*

of law in Argentina.³¹ Three days after assuming office, he ordered the trial of the nine generals who had headed Argentina's three military juntas from 1976 to 1983.³² In so doing, Argentina became the first Latin American country to try its own military officers for human rights crimes.³³ The junta members were not charged with genocide or crimes against humanity, crimes charged at the Nuremberg trials, but rather with violations of domestic Argentine law, such as torture and unlawful deprivation of liberty.³⁴ Ultimately, two commanders received sentences of life imprisonment and two others received lesser prison sentences.³⁵

In an act that would perhaps comprise an even more important precedent than the trials of the junta leaders, Alfonsín established a special commission to investigate the disappearances of the Dirty War.³⁶ Entitled *La Comisión Nacional sobre la Desapari-*

31. Alfonsín conceptualized his task as an even more basic one of restoring a sense of public morality to Argentine society. See Raúl Alfonsín, *Building Democracy*, 12 YALE J. INT'L L. 121, 123 (1987). Alfonsín was later to write:

The process of transition to democracy . . . was basically a response to a state of social disintegration in which the fundamental links necessary for cooperation and solidarity among individuals had been destroyed. For years the country endured a state of generalized violence in which Argentines lost the set of guidelines that constitute public ethics, legality, and even primary social relations. This loss generated fear, uncertainty, self-criticism, and, above all, insecurity stemming from the impossibility of predicting the arbitrary exercise of public authority. One result was a general and self-defensive withdrawal; people sought shelter in the private realm, abandoning all interest in public affairs. . . . [N]either democracy nor the rule of law can be definitively secured in a society if that society does not strongly internalize norms of public morality.

Id. at 121-23.

32. GUEST, *supra* note 17, at 1-6. Alfonsín also sent a bill to Congress, which Congress passed, that nullified an amnesty law, the Law of National Pacification, that the military had passed for itself before stepping down. See STATE CRIMES, *supra* note 21, at 51-52. A National Appeals Court found the Law of National Pacification to be unconstitutional and law nullifying it to be constitutional. Enrique Dahl & Alejandro Garro, *Introductory Note to Argentina National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders*, 26 I.L.M. 317, 319 (1987) (citing Fernandez Marino, [1984] L.L. 521 (CApel. Penal 1984)).

33. David Pion-Berlin, *To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone*, 16 HUM. RTS. Q. 105, 116 (1994).

34. Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina's Transition to Democracy*, 12 HUM. RTS. Q. 17, 20 n.15 (1990).

35. PARTIAL JUSTICE, *supra* note 13, at 31-39.

36. Decree No. 187/83, Dec. 15, 1983, [251] A.D.L.A. 17; see NUNCA MÁS ARGENTINA, *supra* note 1, at 428 (providing text of Decree No. 187/83).

*ción de Personas*³⁷ ("CONADEP" or "Sábato Commission"), the Sábato Commission was comprised of ten prominent Argentine citizens. Chaired by the respected Argentine novelist Ernesto Sábato, the mandate of the Sábato Commission was to collect evidence of human rights violations committed by security agents of the state.³⁸ It would remain the task of the Argentine courts to determine responsibility for such crimes and to try the guilty parties.³⁹

The Sábato Commission's mandate allowed it nine months to inquire into the circumstances surrounding the disappearances.⁴⁰ CONADEP was empowered to collect information, but it could neither subpoena witnesses nor compel testimony.⁴¹ It nonetheless compiled over 50,000 pages of documentation from interviews and eyewitness accounts.⁴² It visited clandestine jails and torture centers, establishing that the military had operated over 340 of these centers during the Dirty War.⁴³ The final report of the Sábato Commission, entitled *Nunca Más*, described in great detail the organization of, and the methods employed by, the Argentine military in carrying out the disappearances.⁴⁴ It also chronicled the gruesome tortures that were reported in almost every case referred to the Sábato Commission.⁴⁵ The report ultimately was able to identify 8960 victims of disappearances.⁴⁶ Additionally, it contained the names of over 1300 military officers implicated in torture or disappearances during the Dirty War.⁴⁷ CONADEP delivered its findings to President Alfonsín in September 1984, and the report became a best-seller

37. NUNCA MÁS ARGENTINA, *supra* note 1, at 428. Certain human rights groups were critical of this type of commission, insisting that a congressional one would have been better because it would have enjoyed subpoena powers that *La Comisión Nacional sobre la Desaparición de Personas* ("CONADEP") did not. PARTIAL JUSTICE, *supra* note 13, at 16. Nobel Peace Prize winner Adolfo Perez Esquivel refused his appointment to CONADEP for this reason. *Id.*

38. PARTIAL JUSTICE, *supra* note 13, at 16.

39. *Id.*

40. SIMPSON & BENNET, *supra* note 14, at 399.

41. Emilio Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 126 n.29 (1984).

42. SIMPSON & BENNET, *supra* note 14, at 399.

43. *Id.*

44. NUNCA MÁS ARGENTINA, *supra* note 1, at 9-284.

45. *Id.* at 20.

46. *Id.* at 10.

47. STATE CRIMES, *supra* note 21, at 54.

when released as a book shortly thereafter.⁴⁸ A two hour synopsis of the Sábato Commission's findings was shown subsequently on national television as a documentary.⁴⁹ President Alfonsín chose not to disclose publicly the names of the officers implicated by CONADEP, but the list was soon leaked to the press and published in the weekly newspaper *El Periodista*.⁵⁰

Even without the capacity to subpoena evidence or to prosecute, the Sábato Commission performed the crucial function of restoring collective memory to Argentina.⁵¹ In fulfilling its most basic mandate, CONADEP "ascertain[ed] the truth of what had happened."⁵² In so doing, it became a model for other truth commissions that would follow, serving as an example of how a newly restored civilian government might pursue truth and justice during a difficult transition period.⁵³

Attempts to prosecute members of the Argentine military for human rights violations were to prove less successful. From the outset, the military resisted such efforts fiercely,⁵⁴ especially when charges implicated officers still on active duty.⁵⁵ The Alfonsín Government devised a strategy in which members of the armed forces identified by CONADEP were classified according to three different levels of culpability.⁵⁶ Those deemed most culpable were the three military juntas' leaders, who had created the general policy of torture and disappearances.⁵⁷ The second level of culpability included those commanding officers who had ordered specific illegal acts.⁵⁸ The third category was comprised of those soldiers who, under orders, had committed the acts of kidnapping, torture, or murder.⁵⁹

Following the sentencing of those in the most culpable cate-

48. PARTIAL JUSTICE, *supra* note 13, at 22.

49. Priscilla B. Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 615 (1994).

50. STATE CRIMES, *supra* note 21, at 54.

51. NUNCA MÁS ARGENTINA, *supra* note 1, at 429.

52. *Id.* at 428.

53. See Hayner, *supra* note 49, at 614.

54. STATE CRIMES, *supra* note 21, at 55.

55. PARTIAL JUSTICE, *supra* note 13, at 61.

56. See Graciela Fernandez Mejjide et al., *The Role of Historical Inquiry in Creating Accountability for Human Rights Abuses*, 12 B.C. THIRD WORLD L.J. 269, 272-76 (1992) (symposium remarks of Graciela Fernandez Mejjide).

57. *Id.* at 275.

58. *Id.*

59. *Id.*

gory, military pressures on the Government mounted to curtail further prosecutions.⁶⁰ The federal court that had sentenced the junta members, however, had stipulated that no one who had committed vicious or atrocious crimes was to be immune from prosecution.⁶¹ This decision necessarily implicated many of the military in the second and third categories of culpability. Faced with the prospect of even more extended prosecutions, the armed forces responded with acts of military disobedience and efforts to destabilize the civilian Government.⁶² Bowing to such pressures, the Alfonsín Government, in December 1986, passed the *Punto Final* Law,⁶³ which established a sixty-day period beyond which no new charges could be brought for state-sponsored crimes committed during the Dirty War.⁶⁴

Meant to limit further prosecutions and appease the military, the law failed on both counts. The Government had anticipated that new charges filed within the sixty-day period would implicate no more than thirty or forty officers, most of whom were retired.⁶⁵ Instead, human rights groups worked frantically during the two month interim, bringing charges against several hundred military officers still on active duty, including more than forty generals and eight admirals.⁶⁶ At the end of the sixty-day period, the human rights community was outraged that a large number of officers responsible for some of the most egregious crimes of the Dirty War were, at that point, placed beyond the reach of the law.⁶⁷

In addition, the *Punta Final* Law did not placate the military. In fact, the prospect of wider prosecutions served only to precipitate a military uprising in April 1987.⁶⁸ The uprising was put

60. *Id.*

61. *Id.*; see Dahl & Garro, *supra* note 32, at 331-72 (providing English language excerpts from case sentencing junta members).

62. Fernandez Mejjide et al., *supra* note 56, at 275-76.

63. Law No. 23.492, Dec. 24, 1986, [1985-B] A.D.L.A. 1100; see Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 334-36 (1987) (describing text of Law No. 23492, *Punto Final* Law).

64. Law No. 23.492, art. 1, [1986-B] A.D.L.A. 1100; see PARTIAL JUSTICE, *supra* note 13, at 66. An exception was made for crimes involving the theft and irregular adoption of the children of the disappeared. Law No. 23.492, art. 5, [1986-B] A.D.L.A. 1101.

65. PARTIAL JUSTICE, *supra* note 13, at 66.

66. *Id.* at 66-67.

67. *Id.* at 67.

68. See *id.* at 68-69. Two other military uprisings would follow, one in January 1988

down, but the military ultimately received what it most wanted, an end to the prosecutions of officers still on active duty.⁶⁹ In June 1987, the Alfonsín Government enacted the Due Obedience Law,⁷⁰ which established an irrebuttable presumption of innocence for soldiers and officers up to the rank of Lieutenant-Colonel who had acted "in due obedience" to their superiors during the Dirty War.⁷¹ This sweeping measure effectively precluded all further prosecutions of officers except those who had headed the three military juntas.⁷² Subsequent years would witness additional judicial regression. Carlos Menem, the Peronist candidate who succeeded Alfonsín as President, ultimately would issue sweeping pardons to all officers accused of human rights abuses during the military dictatorship.⁷³ Ultimately, Argentina's efforts to secure truth were far more successful than its efforts to realize justice.

B. Brazil

After Argentina, the next country in South America to confront the institutional crimes of its recent past was Brazil. While Brazilian efforts to counter military impunity drew upon the Argentine experience, fundamental differences distinguished the two countries.

The armed forces of Brazil ruled the country from April 1964 until March 1985.⁷⁴ During that period, there were a succession of military administrations, each one headed by a four-star general.⁷⁵ As in Argentina, the military period was one

and another in December 1988. See Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 123 (1989).

69. STATE CRIMES, *supra* note 21, at 56.

70. See Law No. 23.521, June 8, 1987, [1987-A] A.D.L.A. 260; Garro & Dahl, *supra* note 68, at 337-39, 477 (discussing Law No. 23.521, Due Obedience Law).

71. Law No. 23.521, art. 1, [1987-A] A.D.L.A. 260; see Emmanuel Decaux, *International Law and National Experiences*, in INTERNATIONAL COMMISSION OF JURISTS, JUSTICE NOT IMPUNITY 27, 43 (1993) [hereinafter JUSTICE NOT IMPUNITY].

72. PARTIAL JUSTICE, *supra* note 13, at 70.

73. Shirley Christian, *Argentina Frees Ex-junta Leaders*, N.Y. TIMES, Dec. 30, 1990, at A9; see Stotzky, *supra* note 68, 123-26 (providing critical assessment of President Menem).

74. TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SÃO PAULO ix (Joan Dassin ed., Jaime Wright trans. 1986) (original in Portuguese BRASIL: NUNCA MAIS) [hereinafter NUNCA MAIS BRAZIL].

75. See generally THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 175-80 (1989).

marked by brutal repression, including widespread, systematic torture⁷⁶ and forced disappearances.⁷⁷ The justification for such repression, as in Argentina, was the national security doctrine.⁷⁸ The transition back to civilian rule was markedly different in Brazil, however, in that it occurred in phases over a decade.⁷⁹ The inauguration of General Ernesto Geisel in 1974 initiated the redemocratization process with the period of *distensão*, or relaxation.⁸⁰ This was followed in 1979 by the period of *abertura*, the opening, ushered in by the administration of General João Figueiredo.⁸¹

This gradual process of transition was characterized by a consensus that there would be no prosecutions of the military for human rights violations.⁸² Such a consensus was made explicit when Figueiredo passed an amnesty law as one of his first acts in office.⁸³ While the law offered the possibility of amnesty to all persons accused of political crimes, it specifically prohibited the investigation or prosecution of acts committed by state agents between 1964 and 1979.⁸⁴ First and foremost, then, it was an attempt by the Brazilian military to legislate impunity.

The 1979 amnesty law ironically provided the opportunity for the precise kind of truth-telling measure that it had been designed to preclude. The law permitted lawyers access to the records of the military courts to enable them to prepare amnesty petitions for clients who were still imprisoned for political crimes or who were living in exile.⁸⁵ Access to these records was restricted. Lawyers were permitted to take out individual files only,

76. NUNCA MAIS BRAZIL, *supra* note 74, at 16-37, 180-203.

77. *Id.* at 204-16.

78. *Id.* at 60-67. In Brazil, this doctrine found official expression in the National Security Law, promulgated in 1967 and revised several times thereafter. *Id.* at 66. Ultimately, any kind of opposition to the military regime was criminalized. *Id.*

79. Numerous sources have analyzed the Brazilian transition to democracy. See, e.g., GUILLERMO O'DONNELL, TRANSITIONS FROM AUTHORITARIAN RULE (1986); THOMAS E. SKIDMORE, THE POLITICS OF MILITARY RULE IN BRAZIL, 1964-85 (1988); ALFRED STEPAN, DEMOCRATIZING BRAZIL (1989); STATE AND SOCIETY IN BRAZIL: CONTINUITY AND CHANGE (John D. Wirth et al., eds., 1987).

80. See SKIDMORE & SMITH, *supra* note 75, at 177-78; WESCHLER, *supra* note 2, at 14.

81. See SKIDMORE & SMITH, *supra* note 75, at 178; WESCHLER, *supra* note 2, at 14.

82. See Weissbrodt & Fraser, *supra* note 20, at 607.

83. See WESCHLER, *supra* note 2, at 14.

84. *Id.*

85. *Id.* at 16.

and then for a twenty-four hour period only.⁸⁶ Even this limited access, however, led to a remarkable discovery. The military judges who had presided over the original trials of many of those detained for political offenses often had allowed the detainees to testify about the multiple tortures used to extract confessions from them.⁸⁷ The sworn testimonies were entered into the court annals, thereby becoming part of the Supreme Military Court's official records. The implication of this discovery was not lost upon the civilian attorneys who perused these records. As one commentator subsequently noted, it was immediately recognized that these records constituted:

[V]oluminous, conclusive proof from within the military government itself that torture was an essential part of the military justice system in Brazil. The official proceedings of political trials held in military courts indicate that the judicial authorities were fully aware of the routine use of torture during preliminary inquests, and that evidence produced under torture was considered valid in the courtroom, even when defendants revealed how their confessions had been extracted. They also make clear that in general the necessity for torture during the interrogation of political prisoners was submissively accepted by the Brazilian courts.⁸⁸

This discovery led to the formation of one of the most remarkable truth-telling endeavors in recent history. Apprised of such records, two Brazilian religious leaders who were long-time human rights activists, Cardinal Arns of the São Paulo archdiocese, and Presbyterian minister Dr. Jaime Wright, resolved to systematically classify and document the incidence of torture under the Brazilian military regime.⁸⁹

Because the military was still in power, the project necessarily was conducted in total secrecy.⁹⁰ As it developed, the effort became as much a tribute to ecumenism as it was to the discretion of its collaborators. Funded by the World Council of Churches in Geneva, a Protestant organization, the project was conducted in Brazil under the aegis of the Catholic Church and

86. *Id.*

87. *Id.* at 15-16.

88. NUNCA MAIS BRAZIL, *supra* note 74, at x.

89. See WESCHLER, *supra* note 2, at 9-40.

90. *Id.* at 17.

the leadership of Cardinal Arns.⁹¹ Proceeding with a team of twelve lawyers, Arns and Wright began what was to prove a three year endeavor of having the lawyers systematically check out case files, one at a time, from the military archives.⁹² The files were kept overnight, during which time they were copied surreptitiously.⁹³ The project began with three leased photocopying machines and a small staff working ten hours a day, seven days a week, consumed with the laborious task of copying what would ultimately amount to over a million pages of court documents.⁹⁴ It was imperative to the continued secrecy of the project that each and every file be returned after twenty-four hours in order to fulfill the prescriptions of the amnesty law and not to arouse the suspicions of the military.⁹⁵

After three years, members of the self-appointed truth commission suddenly realized that they had copied every file in the military archives.⁹⁶ Week by week, the copies had been hidden in a secret warehouse in São Paulo, where each page was then microfilmed.⁹⁷ Over 500 reels of microfilm created in this manner eventually were smuggled out of the country for safekeeping.⁹⁸ During this time, it had also been the task of one woman to examine the one million pages of documentation and to collect every sworn testimony of torture that had been admitted into the court records.⁹⁹ Computer specialists then processed this data, classifying it according to types of torture and their duration, the location of torture centers, and the names, ranks, and any other information available regarding individual torturers.¹⁰⁰ In the final phase of the project, two newspaper journalists were hired to prepare a written summary of the team's grim

91. *Id.* at 17-21. Arns undertook the project of his own initiative. *Id.* at 21. Certain that conservative sectors of the Church would derail such efforts if his participation were brought to light, Arns could provide moral but not financial backing for the endeavor. *Id.* He proceeded without consulting the Vatican or even his fellow bishops in Brazil. *Id.*

92. *Id.* at 16.

93. *Id.* at 16-18.

94. *Id.* at 17-18.

95. *Id.*

96. *Id.* at 18.

97. *Id.* at 36.

98. *Id.* at 36-37.

99. *Id.* at 38.

100. *Id.*

findings.¹⁰¹

In late 1984, Cardinal Arns met quietly with the director of *Vozes*, the preeminent Catholic publishing company in Brazil.¹⁰² Arns offered him the manuscript that had emerged as the fruit of five years of secretive, high risk work.¹⁰³ The offer came accompanied by three stipulations: the publisher was to maintain absolute secrecy regarding those who had produced the book, there was to be no publicity of the book prior to publication, and there were to be no explanations following its publication.¹⁰⁴ Arns and his team also decided out of a sense of discretion to withhold publication until a civilian government was re-inaugurated in 1985.¹⁰⁵

So it was that on July 15, 1985, *Brasil: Nunca Mais* appeared in bookstores all over Brazil.¹⁰⁶ Citing the verbatim testimony of 1843 political prisoners, the book detailed over 283 types of torture that the military had employed and identified 242 torture centers.¹⁰⁷ The book likewise documented a number of deaths that had occurred under torture,¹⁰⁸ identified 125 individuals who had been disappeared by the military regime,¹⁰⁹ and ascertained that doctors had been present in the torture chambers.¹¹⁰ Arns and his team waited another four months, until after the first municipal elections conducted by the newly restored civilian Government, to publish an additional list of 444 known torturers.¹¹¹ Alert to the possibility of retaliation by right-wing sectors, the names of the investigatory team, with the exception of Arns and Wright, were never revealed.¹¹²

101. *Id.* at 55.

102. *Id.* at 68.

103. *Id.* at 68-69.

104. *Id.* at 69.

105. *Id.* at 69-70.

106. *Id.* at 71; see *supra* note 74 (introducing *NUNCA MAIS BRAZIL*).

107. *NUNCA MAIS BRAZIL*, *supra* note 74, at x.

108. See *id.* at 192-203.

109. *Id.* at 204-17. Counted among the disappeared was Jaime Wright's own brother, Paulo, a community organizer and former congressman who was abducted by the army in September 1973. *Id.* at 210.

110. *Id.* at 33-37.

111. *Id.* at xiii.

112. WESCHLER, *supra* note 2, at 10. In order to avert any possibility that the Brazilian military might attempt to confiscate or ban the book, Arns and his team allowed word to leak out that the entire archives upon which the book was based had been smuggled to Europe and that a U.S. edition was being prepared for publication as well. *Id.* at 70.

Unlike the report of the Sábato Commission in Argentina, produced in a post-dictatorship period, *Brasil: Nunca Mais* was produced from within the repressive machinery of the military regime. What made the Brazilian effort even more remarkable was the irrefutable nature of its documentation. It used only those records created and verified by the military itself. That the military maintained and preserved such records is itself amazing. The reasons behind such self-incriminating record-keeping remain open to speculation, but are often attributed to the technocratic spirit of the Brazilian armed forces.¹¹³ Whatever the reasons for keeping such records, they comprised the basis and the ultimate authentication for a report that would rank as the number one best-selling book in Brazil for twenty-five weeks after its publication and would eventually go through twenty printings.¹¹⁴

Unlike their Argentine counterparts, the Brazilian *Nunca Mais* team enjoyed no official mandate to pursue their truth-telling efforts. Neither did the Brazilian team aspire to produce evidence that would one day be used in court against torturers. In fact, the Brazilian team made explicit from the outset that its purpose was not to produce evidence that might be used at a "Brazilian Nuremburg trial."¹¹⁵ Instead, Cardinal Arns, Jaime Wright, and their small but inspired team sought simply to reveal "to the conscience of the nation . . . the dark reality of the political repression that grew unchecked after 1964."¹¹⁶ Though torturers had secured judicial amnesty by the 1979 law, the efforts of Arns and his team served to deny a moral amnesty to the perpetrators of such egregious human rights violations.

C. Uruguay

In Uruguay, a military junta ruled the country outright from

113. Jaime Wright has noted that the Brazilian generals "were intent on doing things by the book, on following the forms, even if the results were often cruel and perverse. . . . They never imagined they'd be held accountable to anyone." *Id.* at 15. Another commentator has asserted that the Brazilian military "were like the Nazis. . . . They imagined that they were laying the groundwork for a civilization that would last a thousand years — that, far from having to justify themselves for occasional lapses, they would be celebrated by all posterity for the breadth of their achievement." *Id.* at 48.

114. *Id.* at 72.

115. *NUNCA MAIS BRAZIL*, *supra* note 74, at 8.

116. *Id.*

1973 until 1985.¹¹⁷ The military takeover in Uruguay has been termed a "slow coup,"¹¹⁸ in that it actually was accomplished through a progression of increasingly authoritarian measures by the Government, beginning as early as 1967.¹¹⁹ It has also been termed an "auto-coup," in that it finally occurred with the complicity of the conservative President Juan María Bordaberry.¹²⁰

The twelve-year military dictatorship that ensued was unrivalled in Latin America for the level of totalitarian control that it exerted over civilian life.¹²¹ Uruguay's population was small, a mere three million people, half of whom lived in the capital city.¹²² These demographics readily facilitated the military's efforts to restructure Uruguayan life at its very core.¹²³ The regime embarked upon a campaign to dismantle labor unions, political parties, and university groups.¹²⁴ Thirty thousand civil servants were fired, and twenty-six news publications were suspended or closed down.¹²⁵

117. AMERICAS WATCH, CHALLENGING IMPUNITY: THE LEY DE CADUCIDAD AND THE REFERENDUM CAMPAIGN IN URUGUAY 7 (1989) [hereinafter CHALLENGING IMPUNITY]. During the years of dictatorship, power was wielded by a junta of 24 officers, comprising the High Command of the Armed Forces. *Id.* The military chose to maintain a figure-head civilian president throughout these years, ostensibly to preclude the possibility that any single officer might conspire to fill the office himself. *Id.*

118. Pion-Berlin, *supra* note 33, at 118.

119. One of President Jorge Pacheco Areco's first acts as President in 1967 had been to outlaw a number of leftist groups and close two periodicals, *El Sol* and *Epoca*. NUNCA MÁS URUGUAY, *supra* note 4, at 6. A permanent state of emergency was imposed in 1968. *Id.* at 7. In the subsequent administration of Juan María Bordaberry, a "state of internal war" was declared and all civil liberties were suspended. *Id.* The June 27, 1973 coup represented a culmination of this anti-democratic progression of events.

120. Juan Perón as President of Argentina once noted that in Latin America, the military never comes in uninvited. WESCHLER, *supra* note 2, at 111. The case of Uruguay was illustrative; it was civilian President Bordaberry who in 1972 declared a state of internal war, established a law of internal security, and gave the orders that the military destroy the leftist Tupamaro guerrilla threat. *Id.* at 109.

121. *Id.* at 87.

122. *Id.* at 87-88.

123. The military decree that abolished Parliament on June 27, 1973 warned against:

[T]he criminal action of the conspiracy against the country, burdened with political groups without national feeling who have inserted themselves in the very institutions . . . under cover of a formally legal activity. Union organizations, the teaching profession in general and even the very powers of the state endure that penetration and suffer that conspiracy.

NUNCA MÁS URUGUAY, *supra* note 4, at 40.

124. *Id.*

125. CHALLENGING IMPUNITY, *supra* note 117, at 7.

Efforts at social control eventually became Orwellian in nature. The military authorities classified every Uruguayan according to their imputed political trustworthiness, and such classifications were stamped upon the individual's files in the Government's central archives.¹²⁶ Even the private realm became subject to arbitrary Government control. Joining sports clubs and professional organizations came to require police approval,¹²⁷ and birthday parties could not be held without the permission of a neighborhood precinct official.¹²⁸

Uruguay won international notoriety as well, by acquiring the highest per capita population of political prisoners of any country in the world.¹²⁹ One Uruguayan later commented, "[t]he whole country was run like a prison. The actual prisons were merely the punishment cells."¹³⁰ Such punishment cells, however, augured a gruesome reality for those incarcerated. Military officials would later admit that everyone who was arrested under the dictatorship was tortured.¹³¹

This torture, conducted by security officials, was both calculated and prolonged. One torturer explained this strategy to one of his victims:

126. *NUNCA MÁS URUGUAY*, *supra* note 4, at 42. Persons placed in category A were deemed politically trustworthy and were allowed employment in any public or private capacity. *Id.* Those assigned to category B were regarded as ideologically questionable and could work in the private but not the public sector. *WESCHLER*, *supra* note 2, at 90-91. The liberty of such citizens to travel was circumscribed, and they were subject to frequent harassment by the security forces. *Id.* Those found to be subversive were relegated to category C, where they were stripped of their rights and became virtual pariahs. *Id.* at 91. They were banned from all public employment, and any private enterprise that might hire them would be subjected to Government audits. *Id.* Any past affiliation with a leftist political party or expression of support for a labor union sufficed to sentence one to this final category. *NUNCA MÁS URUGUAY*, *supra* note 4, at 42.

127. *NUNCA MÁS URUGUAY*, *supra* note 4, at 43.

128. *WESCHLER*, *supra* note 2, at 92.

129. It is estimated that 600,000 Uruguayans were detained for political offenses during the dictatorship. Pion-Berlin, *supra* note 33, at 111. This statistic is remarkable, given how neighboring countries with much larger overall populations paled in comparison. In Chile there were an estimated 150,000 political prisoners and in Argentina some 30,000. *Id.*

130. *WESCHLER*, *supra* note 2, at 92.

131. *NUNCA MÁS URUGUAY*, *supra* note 4, at 79. Later surveys would confirm that torture under the military dictatorship was routine and that only in a handful of cases were prisoners spared this ordeal. *Id.* at 78. Some 26 common methods of torture were subsequently identified, many of which were inflicted simultaneously upon prisoners. *Id.* at 86. These included beatings, long periods of being hooded, electric shock torture, rape and sexual violation, and submarining, forced immersion into a tank of water mixed with urine or feces to the point of asphyxiation. *Id.* at 86-108.

Don't you realize that here we have all the time in the world? It is not like in Buenos Aires, where we were in a hurry to get information. Here we safeguard your life; we interrogate to the limit of your endurance; then we let you recuperate and go at the interrogations again.¹³²

The expertise of doctors was crucial to such a practice, and seventy percent of former prisoners interviewed stated that they had been aware of the presence of medical personnel at some point during their torture sessions.¹³³ It has been noted that there were significantly fewer forced disappearances, 164,¹³⁴ in Uruguay than in Brazil, Argentina, or Chile. The high incidence of torture, the long-term prison sentences meted out to political prisoners,¹³⁵ and the fact that torture was routinely practiced until the very end of the dictatorship in 1985,¹³⁶ imbued the Uruguayan military regime with a *sui generis* mode of brutality. The regime, in the words of the renowned Uruguayan novelist Eduardo Galeano, converted the country into "a vast torture chamber."¹³⁷

Poor economic performance, international human rights pressures,¹³⁸ and the example of neighboring authoritarian governments ultimately forced the Uruguayan military in 1980 to submit a revised constitution to a national plebiscite.¹³⁹ Despite the severe restrictions it placed on opposition advertising, the junta was unable to muster the support of the national electorate.¹⁴⁰ Stunned by a near sixty percent rejection of its proposed constitution, the military was left to negotiate a transition back to democracy.¹⁴¹ After a series of inconclusive meetings with

132. *Id.* at 179.

133. *Id.* at 236.

134. *Id.* at 214.

135. The average stay at the two major detention centers, Punta de Rieles and Libertad, was 6.8 years. Pion-Berlin, *supra* note 33, at 111.

136. NUNCA MÁS URUGUAY, *supra* note 4, at 81.

137. John King, *Introduction* to CARLOS MARTÍNEZ MORENO, *EL INFIERNO* ii (Readers International trans., 1988).

138. The aggressive human rights policy of President Jimmy Carter's Administration in the United States was later seen as having been instrumental in this process. See WESCHLER, *supra* note 2, at 149.

139. This attempt to win credibility for an authoritarian regime was likewise played out in Chile, Argentina, and Brazil during this same time period. NUNCA MÁS URUGUAY, *supra* note 4, at 49.

140. *Id.* at 51-52.

141. *Id.* at 52.

newly revived political parties, an agreement was finally struck in August 1984 between the armed forces and representatives of most of the major parties.¹⁴²

Termed the "Navy Club Pact," the contents of this agreement were never fully disclosed.¹⁴³ They ostensibly concerned plans for national elections. It is widely speculated that the military also obtained an implicit promise that there would be no special investigations of their conduct during the dictatorship.¹⁴⁴ Having concluded the pact, the military prepared to make a clean departure from the Government, secure in the knowledge that no further questions would be asked.¹⁴⁵

In the presidential campaign that ensued, all four leading candidates pledged to bring the human rights violators of the dictatorship to justice.¹⁴⁶ Colorado party candidate Julio María Sanguinetti won the election, and set about to restore Uruguay's hobbled democracy.¹⁴⁷ Almost immediately, civil courts were

142. *Id.* at 57.

143. *Id.*

144. *Servicio Paz y Justicia* ("SERPAJ"), the nongovernmental organization that prepared *Nunca Más Uruguay*, declared:

It would be hard to assert that one outcome of the pact was an agreement not to punish those in the military implicated in human rights violations. The political parties taking part in the pact had no authority to negotiate on this issue, nor could they know what an independent judiciary would decide on it once democracy was restored. Nevertheless, military commanders did obtain certain guarantees that made it almost impossible to carry out any investigation of their actions in the recent past.

Id. Other commentators remain more suspicious of what was transacted during this meeting. Lawrence Weschler asserts that Julio María Sanguinetti, the Colorado party leader who subsequently was elected president, gave his assurances to the military that the soon-to-be-restored executive branch would not initiate prosecutions of the military. WESCHLER, *supra* note 2, at 167. Sanguinetti allegedly qualified this assurance, however, with the stipulation that the executive branch would not block private citizens from raising claims through traditional judicial channels. *Id.* Sanguinetti himself would later insist:

The question of amnesty for the military was not discussed in the negotiations, just as no one said that the jailed prisoners would be turned loose the day after an elected government took office. It was an intelligent omission. We were seeking ways to remove obstacles, not to create them. You can't make a peace treaty discussing the origins of the war.

Id. at 166-67.

145. NUNCA MÁS URUGUAY, *supra* note 4, at 57.

146. CHALLENGING IMPUNITY, *supra* note 117, at 11.

147. The Sanguinetti administration reinstated the 1967 Constitution, restored legal status to the trade unions and political parties that had been proscribed under the military, and extended a pardon to all individuals facing trial by military courts. *Id.* at 12. Sanguinetti also secured passage of the Law of National Pacification, which freed

flooded with cases alleging instances of torture and forced disappearances by the military.¹⁴⁸ Such cases were stymied, however, when General Hugo Medina, the Defense Minister, ordered officers who had been indicted to refuse to appear before the civilian courts.¹⁴⁹

In December 1986, under mounting pressure from the military, Sanguinetti introduced a sweeping measure known as *la Ley de Caducidad*, which provided complete amnesty for all members of the security forces who had committed human rights violations between 1962 and 1985.¹⁵⁰ The law narrowly passed on December 22, 1986, amidst accusations, recriminations, and even fistfights in the Uruguayan legislature.¹⁵¹ The next day, which was also the day that the first subpoena was to have been served on a military officer, the legislature adjourned for the summer.¹⁵² A potential constitutional crisis was averted, but at the price of having legislated impunity for torturers.

What followed was clearly not anticipated by either Sanguinetti, the military, or the legislators. Political activities traditionally decelerate in Uruguay during the summer months of December to February, and it can be surmised that Sanguinetti hoped that the warm summer would dull the electorate's memory of the last-minute passage of this law.¹⁵³ Instead, an alliance of families of the disappeared, former torture victims, and human rights advocates banded together in late February 1987.¹⁵⁴ Determined to deny amnesty to perpetrators of human rights violations, the alliance embarked upon a campaign to repeal *la Ley de Caducidad*.¹⁵⁵

Such a campaign was unprecedented in the history of Uru-

the vast majority of those still imprisoned for political offenses, and which expressly excluded from any amnesty all those who had committed human rights abuses under the military regime. *Id.*

148. *Id.* at 13. Eventually, 180 police and military personnel were implicated for human rights violations. *Id.*

149. *Id.*

150. *Id.* The only exceptions to this broad measure were cases involving forced disappearances or the abduction of children. JUSTICE NOT IMPUNITY, *supra* note 71, at 46; see Law No. 15.848, Dec. 22, 1986, D.O. 879; see also CHALLENGING IMPUNITY, *supra* note 117, at 15-16 (providing text of *la Ley de Caducidad*).

151. WESCHLER, *supra* note 2, at 171.

152. *Id.*

153. *Id.*

154. *Id.* at 175.

155. *Id.*

guay,¹⁵⁶ although Uruguay's Constitution stipulated that a voting drive mustering the signatures of twenty-five percent of the total number of voters in the immediately prior election, in this instance, approximately 550,000 signatures, would suffice to bring a contested law up for a national referendum.¹⁵⁷ Facing the opposition of Sanguinetti, the military, the major political parties, and a deadline of December 22, 1987, the human rights coalition began this herculean task.¹⁵⁸ Remarkably, support swelled for the grassroots effort, and by October 1987 the coalition had collected 520,000 signatures.¹⁵⁹ In December, they submitted a total of 634,702 signatures to the Electoral Court for authentication.¹⁶⁰ Having predicted that four months would be required to verify the votes, the court prolonged the verification process for almost a full year.¹⁶¹ In the meantime, it disqualified thousands of signatures, often on grounds of mere technicalities.¹⁶² On November 28, 1988, the court announced that only 532,718 signatures were valid, leaving a deficit of approximately 23,000 signatures.¹⁶³ It declared, however, that roughly 36,000 signatures were "in suspension" and could qualify if such persons confirmed their signatures at specially designated courts between December 17 and 19.¹⁶⁴ The human rights coalition frantically sought to rally the required signatures a second time.¹⁶⁵ Sanguinetti went so far as to denounce the renewed drive as a "campaign of hate."¹⁶⁶ As the terminal hour of 2:00 P.M. struck on December 19, crowds of people waiting outside court offices

156. *Id.*

157. *Id.* at 175-76. This referendum provision had been based on a similar one in the Swiss Constitution. *Id.* The Swiss provision, however, only required 50,000 signatures, and this in a country with twice the population of Uruguay. *Id.* at 176.

158. CHALLENGING IMPUNITY, *supra* note 117, at 27.

159. WESCHLER, *supra* note 2, at 178.

160. *Id.* at 179.

161. *Id.* at 221.

162. The signature of General Liber Seregni, leader of the opposition party *Frente Amplio*, was disqualified because the "S" in his name was deemed not to match the "S" he had first signed in the voter register 40 years previously. *Id.* at 219.

163. *Id.* at 221; see *supra* note 157 and accompanying text (discussing number of signatures required to force referendum).

164. WESCHLER, *supra* note 2, at 221-22.

165. The outcome of the signature drive came down to a matter of hours. Pro-referendum radio stations updated the voting totals frequently, and even inquired over the air about the whereabouts of particular voters whose signatures were still needed. See *id.* at 225.

166. *Id.* at 222.

forced their way through the doors before they could be locked out.¹⁶⁷ Such insistence paid off, as the voting drive accrued a final tally of 23,166 votes, forcing a referendum.¹⁶⁸

Two and a half years later, the long-awaited referendum at last came before the Uruguayan electorate. On April 16, 1989, eighty percent of Uruguay's eligible voters went to the polls,¹⁶⁹ with fifty-three percent of them voting to sustain the amnesty law, and forty-one percent voting to overturn it.¹⁷⁰ Since then, there have been no serious attempts to revive the amnesty issue politically.¹⁷¹ A little publicized congressional commission ascertained that there were 164 disappearances under the military regime, but the commission was not given a mandate to investigate torture or illegal detentions.¹⁷² In 1989, a non-governmental organization, *Servicio de Paz y Justicia* ("SERPAJ") published *Uruguay Nunca Más*, a more comprehensive survey of human rights violations during the dictatorship.¹⁷³ To date, however, there has been no officially authorized effort by the Uruguayan Government to establish the full truth of what occurred in the country between 1973 and 1985.¹⁷⁴

While the referendum upheld the amnesty law, thereby precluding prosecutions of human rights violators, one judicial card remained to be played. In the months following the referendum, lawyers from the Uruguayan non-governmental organization *Instituto de Estudios Legales y Sociales de Uruguay* ("IELSUR"), in conjunction with Americas Watch, filed eight cases before the Inter-American Commission on Human Rights.¹⁷⁵ The suits were based not on direct human rights violations suffered under the military regime, but rather on the effects of *la Ley de*

167. *Id.* at 226.

168. *Id.* at 227.

169. *Id.* at 233.

170. *Id.*

171. JUSTICE NOT IMPUNITY, *supra* note 71, at 46.

172. See Hayner, *supra* note 49, at 616. Hayner notes that the commission was so little publicized, inside or outside the country, that many commentators do not even realize that Uruguay had such a group. *Id.*

173. See Weschler, *supra* note 3, at xxiv.

174. Ironically, the cases of Uruguayan citizens who disappeared or who were victimized in Argentina were more fully investigated and better documented, through the efforts of the Argentine Sábato Commission, than cases involving Uruguayan citizens within Uruguay. WESCHLER, *supra* note 2, at 130.

175. Weschler, *supra* note 3, at xxv.

Caducidad itself.¹⁷⁶ The petitioners alleged that the law as applied violated their rights to judicial recourse and judicial remedy.¹⁷⁷ Almost four years later, the Inter-American Commission found for the petitioners, declaring that the effects of the amnesty law violated international human rights treaty obligations that Uruguay was bound to honor.¹⁷⁸ While the Inter-American Commission's findings did not require that Uruguay repeal *la Ley de Caducidad*, it did establish, as precedent for the future, the obligation of signatory states to investigate and prosecute claims of egregious human rights violations.¹⁷⁹

D. Chile

Chile is the most recent country in the Southern Cone to confront the question of how to deal with former torturers. The military dictatorship in Chile was one of the continent's longest, extending from 1973 until 1990.¹⁸⁰ During those seventeen years, a military junta under the command of General Augusto Pinochet ruled Chile, and human rights violations were both systematic and widespread.¹⁸¹

The coup in Chile on September 11, 1973 met with little to no armed resistance, and within days the armed forces exercised effective control over the entire country.¹⁸² The military nevertheless embarked upon a campaign of terror meant to intimidate the populace, as well as to eliminate physically supporters of

176. *Id.* at xxvi.

177. *Id.*

178. The Inter-American Commission found that *la Ley de Caducidad* violated the American Declaration of the Rights and Duties of Man, in particular: Article 18, the right to justice; Article 1, the duty of state parties to respect and ensure rights; and Article 8, the right to a judicial remedy. *Id.* The Inter-American Commission also found the law violated Article 25, the right to judicial protection, of the American Convention on Human Rights. *Id.*

179. *Id.* The Inter-American Commission's decision also serves as legal precedent for human rights groups to oppose similar amnesty measures in the future. *Id.*

180. See generally Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L L. 253 (1995); see also Weissbrodt & Fraser, *supra* note 20, at 601.

181. Snyder, *supra* note 180, at 258-64. Gross human rights violations included arbitrary detentions, forced disappearances, and the systematic use of torture by security forces. *Id.*

182. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 129 (Phillip E. Berryman trans., Introduction by José Zalaquett, 1993) [hereinafter CHILEAN NATIONAL COMMISSION].

Salvador Allende's deposed socialist Government.¹⁸³ Widespread arrests followed, and more than 7000 prisoners were detained in the National Stadium in Santiago alone.¹⁸⁴ The torture of prisoners during interrogation became common practice at this time,¹⁸⁵ and the first weeks of the coup witnessed the indiscriminate killing of civilians by the military.¹⁸⁶

The early weeks of the military regime also signaled the beginning of a calculated practice that would characterize the first four years of the dictatorship, the forced disappearance and murder of selected individuals deemed to be ideologically suspect.¹⁸⁷ While the initial bloodletting of the coup subsided after December 1973, such disappearances continued through 1977, primarily at the hands of the military intelligence service known as *Direccion de Inteligencia Nacional* ("DINA").¹⁸⁸

A different phase of the repression began in 1977, when DINA was dissolved after its role in the assassination of Orlando Letelier in Washington, D.C. had been revealed.¹⁸⁹ The military intelligence branch was reorganized under the title of the *Centro Nacional de Informaciones* ("CNI").¹⁹⁰ The CNI spearheaded the regime's repressive activities until the transition to democracy in 1990.¹⁹¹ Although fewer disappearances occurred during this

183. *Id.* at 136-43. Salvador Allende's "peaceful way" or "Chilean way" to socialism has been much analyzed and discussed. See, e.g., BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM (1979); PAUL SIGMUND, THE OVERTHROW OF ALLENDE AND THE POLITICS OF CHILE, 1964-1976 (1977); ARTURO VALENZUELA, THE BREAKDOWN OF DEMOCRATIC REGIMES: CHILE (1978).

184. CHILEAN NATIONAL COMMISSION, *supra* note 182, at 151.

185. *Id.* at 150.

186. *Id.* at 148.

187. Approximately 1000 victims were ultimately ascertained to have disappeared in this fashion, most of them in the first months after the coup. *Id.* at xxv.

188. *Direccion de Inteligencia Nacional* ("DINA") was established formally in 1974 under the leadership of Army General Manuel Contreras Sepulveda. The organization became the instrument through which the regime systematically practiced its policy of forced disappearances between 1974 and 1978. AMERICAS WATCH, HUMAN RIGHTS AND THE "POLITICS OF AGREEMENT" 45 (1991) [hereinafter AMERICAS WATCH].

189. *Id.*; see 3 EUGENIO AHUMADA ET AL., CHILE: LA MEMORIA PROHIBIDA 9-47 (1989). The dissolution of the DINA after the revelations regarding the Letelier assassination is also recounted in JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (1980). See also Judith Hippler Bello et al., *Prosecution of Officials of Secret Service for Assassination of Former Ambassador to United States*, 90 AM. J. INT'L L. 290 (1996) (summarizing Letelier case history).

190. CHILEAN NATIONAL COMMISSION, *supra* note 182, at xxv. *Centro Nacional de Informaciones* ("CNI") replaced DINA when it was dissolved in 1977. *Id.*

191. Weissbrodt & Fraser, *supra* note 20, at 617.

later period, torture and assassinations continued.¹⁹²

Throughout the years of dictatorship in Chile, a network of Chilean human rights organizations emerged despite the intimidation and repression of the military. Foremost among these was the Catholic Church's Vicariate of Solidarity, based out of the Catholic cathedral in Santiago.¹⁹³ Originally founded in conjunction with a number of other churches, the organization that evolved into the Vicariate offered direct assistance to victims of human rights abuses and their families and also compiled a vast set of archives documenting human rights violations under the military.¹⁹⁴

In 1988 a plebiscite was convened, ironically, by the terms of Pinochet's own 1980 constitution.¹⁹⁵ The plebiscite was scheduled to determine whether Pinochet would continue as head of state until 1997.¹⁹⁶ So confident was Pinochet of his own popular approval that he allowed strict electoral processing and the presence of hundreds of foreign observers.¹⁹⁷ On October 5, 1988 the Chilean population, voting in the first undeniably free election in fifteen years, delivered a resounding defeat to Pinochet's final quest for electoral legitimacy.¹⁹⁸ Fifteen months

192. CHILEAN NATIONAL COMMISSION, *supra* note 182, at xxv.

193. The Vicariate, or *La Vicaría de la Solidaridad*, began as an ecumenical effort at the time of the coup to assist victims of Government repression, particularly the families of the disappeared. Known first as the Committee for the Peace, it was reorganized in 1976 by Cardinal Raúl Silva under the explicit auspices of the Catholic Church. See PAMELA LOWDEN, *MORAL OPPOSITION TO AUTHORITARIAN RULE IN CHILE, 1973-90*, (1996) (analyzing history and political function of Vicariate); see also AMERICAS WATCH, *THE VICARÍA DE LA SOLIDARIDAD* (1987) (detailing profile and history of Vicariate's founding and its human rights activities).

194. CHILEAN NATIONAL COMMISSION, *supra* note 182, at xxvii. It has been observed that Cardinal Silva's formal establishment of the Vicariate marked the first time that human rights work and advocacy became recognized as a sacramental ministry of the Catholic Church.

195. SAMUEL CHAVKIN, *STORM OVER CHILE: THE JUNTA UNDER SIEGE 282-83* (2d ed. 1989).

196. *Id.* at 279.

197. *Id.* at 282. The junta's confidence, however, admitted to certain limits. Opposition advertising was limited to fifteen minutes a day on television for the two weeks preceding the plebiscite. *Id.* at 279. The pro-Government lobby, in contrast, was given access for more than a year to hours a day of television and radio time on government-controlled stations. *Id.* at 280.

198. Nearly 55% of the electorate voted against Pinochet, while 43% voted in his favor. *Id.* at 281. Despite the defeat, Pinochet vowed to stay on as Commander-in-Chief of the army, per the provisions of the 1980 Constitution. See Timothy Scully & Alejandro Ferreiro, *Chile Recovers Its Democratic Past: Democratization by Installment*, 18 *NOTRE DAME J. LEGIS.* 318-22 (1992).

later, Patricio Aylwin of the Christian Democrat party was elected President, and his inauguration on March 11, 1990 signalled Chile's return to civilian government.

Aylwin's administration, while enjoying a strong electoral mandate, was limited by the constraints of the 1980 Constitution, by Pinochet's ongoing presence as commander-in-chief of the Army, and by the fact that Chile's military exited from power united and undefeated.¹⁹⁹ Notwithstanding such constraints, one of Aylwin's first decisions as President was to establish the National Commission on Truth and Reconciliation ("National Commission"), with the charge that the National Commission "clarify in a comprehensive manner the truth about the most serious human rights violations" suffered during the military dictatorship.²⁰⁰ Aylwin's charge was one that from the outset admitted to limitations. He very explicitly noted that the goal of the National Commission was *justicia en lo posible*, translated as "justice inasmuch as was possible."²⁰¹

Eight persons comprised the National Commission. They were chosen from across the Chilean political spectrum, with no apparent political bias.²⁰² Heading the National Commission was Raúl Rettig, a distinguished senior member of the Radical Party who had served as Ambassador to Brazil under Allende.²⁰³

The mandate of the National Commission was threefold. It was to clarify how the repressive system had worked, account for every person reported dead or disappeared, and propose meas-

199. When confronted with the possibility of prosecutions of the military for human rights violations, Pinochet vehemently declared, "[n]o-one is going to touch my people. The day they do, the rule of law will come to an end." AMERICAS WATCH, *supra* note 188, at 48. The legal limits the outgoing authoritarian regime imposed upon the civilian Government have been described as "tutelary powers." See Scully & Ferreiro, *supra* note 198, at 317 (detailing limitations imposed on civilian Government).

200. CHILEAN NATIONAL COMMISSION, *supra* note 182, at 5-9 (reprinting Supreme Decree No. 355, promulgated April 25, 1990).

201. AMERICAS WATCH, *supra* note 188, at 5; see Jorge S. Correa, *Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455 (1992).

202. See Weissbrodt & Fraser, *supra* note 20, at 603. Such balance won immediate credibility for the National Commission. That there were an even number of members was seen as a further good faith measure on the part of the Aylwin Government that no attempts were being made to guarantee a majority vote in case of divided opinions. José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1433 (1992).

203. Weissbrodt & Fraser, *supra* note 20, at 604.

ures for reparation and prevention.²⁰⁴ Implicit in this mandate were a series of significant limitations. First, there was the constraint of time. The National Commission was allowed only nine months to complete its tasks.²⁰⁵ Second, the scope of violations to be investigated was closely curtailed. While types of torture employed by state agents were to be catalogued, only those cases ending in death were to be investigated.²⁰⁶ Finally, the National Commission was not given subpoena powers. As an organ of the executive branch, it could not conduct trials.²⁰⁷

Despite such limitations, the National Commission compiled a massive, 1800 page report that remarkably won the endorsement of each of the eight commissioners.²⁰⁸ Such unanimity marked a significant political victory for the Aylwin Administration and did much to ensure the wider credibility of the National Commission's findings.²⁰⁹ Presented to President Aylwin in February 1991, the report identified 2025 victims who died as the result of human rights violations by the state and ninety victims killed by opposition groups.²¹⁰ The National Commission did not publicly name those responsible for human rights violations, but sent all incriminating evidence that it gathered to the courts.²¹¹ While the Chilean military would contest the National Commission's finding that no state of internal war existed in 1973,²¹² none of the National Commission's conclusions regarding individual victims were refuted.²¹³ In the words of one of the Commissioners, "[a]cross the political spectrum, those findings were explicitly recognized as the truth."²¹⁴

II. A COMPARISON

Each of the South American countries surveyed in this anal-

204. Zalaquett, *supra* note 202, at 1433-34.

205. *Id.* at 1434.

206. *See supra* note 200 and accompanying text (discussing Supreme Decree No. 355).

207. Zalaquett, *supra* note 202, at 1435.

208. *Id.*

209. Weissbrodt & Fraser, *supra* note 20, at 604.

210. Zalaquett, *supra* note 202, at 1434.

211. CHILEAN NATIONAL COMMISSION, *supra* note 182, at xxxii. Commissioner José Zalaquett defended this course of action, asserting that to have publicly named people would have been the equivalent of convicting them without due process of law. *Id.*

212. Weissbrodt & Fraser, *supra* note 20, at 617 n.76.

213. Zalaquett, *supra* note 202, at 1435.

214. *Id.*

ysis dealt with accountability for former torturers in a different manner.²¹⁵ Uruguay pursued neither trials nor official truth-telling measures, and never revealed the names of torturers. In Brazil, there were likewise no trials or official efforts to establish the truth, but officially sanctioned government records were utilized to morally indict those responsible for egregious human rights violations. Moreover, a list of torturers was later disclosed in the Brazilian press. In Chile, there was an officially sanctioned effort to establish the truth regarding human rights violations resulting in death, but there were few prosecutions and no public identification of individuals responsible for such violations. In Argentina, efforts to restore democracy included an official truth commission, prosecution of high-ranking military officials, and the public, albeit unofficial, disclosure of the names of individuals who had engaged in torture.

How are such divergent efforts to be assessed? A standard of pure retributive justice might require that every human rights violation be prosecuted to the fullest extent possible.²¹⁶ Such a position, however, could only be maintained consistently in an ideal world.²¹⁷ In a world that instead finds reinstated democracies precariously fragile, such a mandate may be decidedly unrealistic and even ill-fated for countries in transition.²¹⁸ A standard of pure consequentialist justice, conversely, would be con-

215. See Pion-Berlin, *supra* note 33 (analyzing different approaches for dealing with former torturers in newly democratic governments).

216. Jaime Malamud-Goti, one of Raúl Alfonsín's legal advisers in Argentina, notes that the retributivist philosophy of punishment is based on the notion of just desert, one must pay the consequences for one's actions. Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?* 12 HUM. RTS. Q. 6 (1990).

217. Malamud-Goti espouses a modified retributivist philosophy, asserting that transitional governments, in order to consolidate democracy and protect human rights, have a moral obligation, at the very least, to initiate trials against the highest ranking officers responsible for violations. *Id.* at 13-14. He notes, however, that there is no such obligation to punish every officer who has transgressed the law. *Id.* at 14. Widespread prosecutions, he acknowledges, may actually diminish the people's trust in democratic institutions and imperil a transition to democracy by provoking a backlash by the military. *Id.* Because Malamud-Goti insists that any strategy to prosecute human rights violations must consider consequences, his position is not one of pure retributivism.

218. Carlos Nino, another legal adviser to President Alfonsín, flatly rejected the theory of mandatory retribution and its demand that punishment be meted out for every crime committed. Carlos Nino, *The Duty to Punish past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2620 (1991). Any prosecutions, Nino insisted, must be counterbalanced by the need to preserve the democratic system. *Id.*

cerned merely with gauging the larger social advantages or disadvantages of prosecuting human rights violators.²¹⁹ A consequentialist approach is essentially utilitarian, asking simply whether a society as a whole would benefit from efforts to hold torturers accountable for their misdeeds. Individual rights, particularly rights of due process and reparation for victims, could well be dismissed in such an assessment. Sanguinetti justified his refusal to prosecute or even investigate human rights violations in Uruguay on grounds of almost pure consequentialism.²²⁰ One commentator has ventured, "Sanguinetti perceived that the pursuit of justice would yield doubtful rewards that were simply not worth the imagined costs."²²¹

Ultimately, a theory of justice based on deterrence and reparation to victims may prove more feasible given the constraints of *realpolitik* in countries returning to civilian control. While still acknowledging the rights of victims, such a theory nonetheless makes allowances for the fragility of restored democracies and the many limitations under which they function.²²² The judicial philosophy underlying this type of approach has been termed "an ethic of responsibility" and holds that politicians must be guided by ethical insights but must always consider the predictable consequences of their actions.²²³

In none of the above-mentioned countries was there an ideal solution. Realistically, there was never a possibility of one. It simply was not feasible to bring every perpetrator to justice or

219. Malamud-Goti, *supra* note 216, at 14.

220. Sanguinetti declared, "[i]f the French were still thinking about the Night of St. Bartholomew, they'd be slaughtering each other to this day. This is a political, and not a moral, decision. It has to be resolved politically because it's a political conflict . . ." WESCHLER, *supra* note 2, at 191.

221. Pion-Berlin, *supra* note 33, at 129.

222. José Zalaquett, considered to be the architect of the Chilean National Commission, has written that deterrence and reparation comprise the two fundamental objectives of any policy meant to deal with past human rights violations. STATE CRIMES, *supra* note 21, at 29. Zalaquett further asserts that other objectives, such as retribution and revenge, can never be considered legitimate. *Id.*

223. José Zalaquett has articulated this theory, which could be said to characterize the approach chosen by the Chilean truth commission. Zalaquett, *supra* note 202, at 1429. The theory is based upon Max Weber's distinction between an ethic of responsibility and an ethic of conviction. *Id.* (citing FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *Politics as Vocation*, 77, 120-22 (H.H. Gerth & C. Wright Mills eds. & trans., 1946)). An ethic of conviction, states Weber, entails acting regardless of the outcome. *Id.* In contrast, an ethic of responsibility considers the predictable consequences of one's actions, though it does not imply a lack of conviction. *Id.*

to satisfy the expectations of every individual or family that had been victimized. It was perhaps inevitable that the human rights constituencies in each of these countries were to remain dissatisfied with the solutions adopted.²²⁴ It may even be argued that the ultimate efficacy of each solution can only be assessed historically, in terms of whether such authoritarian regimes are precluded from ever again seizing power in the future. The title that many of the truth commissions chose to announce their findings alludes to such an awareness: *Nunca Más*, Never Again.

III. AN ASSESSMENT FROM THE PERSPECTIVE OF SACRAMENTALITY

An assessment of post-torture regime strategies based upon the Catholic notion of sacramentality begins neither with the unyielding maxims of pure retributivism, nor with the sole focus upon results that characterizes consequentialism. The principle of sacramentality is not a judicial one and does not purport to articulate a philosophical theory of punishment. It instead is concerned with a fundamentally different question: how can the truth be known? Unlike the theory of retributivism, a sacramental analysis posits no requirement that punishment be meted out for offenses.²²⁵ Unlike consequentialism, it purports to make no judgments about whether or when individual rights must be trumped by the collective needs of a society. A sacramental approach would even insist that this latter endeavor comprises a false dichotomy, in that the endeavor to ascertain the truth ultimately vindicates both social and individual rights.

The Catholic concept of sacramentality has traditionally

224. Victims and their families were not only left dissatisfied but their impact on government policymaking ultimately was deemed to be minimal. See Pion-Berlin, *supra* note 33, at 126 (stating “[t]he human rights lobbies of the Southern Cone had a negligible impact on government policy. Their pleas for the wholesale punishment of those involved in acts of state terror went unanswered.”).

225. Luis Perez Aguirre, a Jesuit priest who himself is a survivor of torture and the founder of SERPAJ notes:

State-sponsored terrorism, acts of genocide, and so on, shows that the guilty have only rarely been tried—in many cases only to receive negligible sentences compared to the gravity and magnitude of their crimes. But the “real judgment” has always been a moral one, and it has endured as a heritage of peoples and of history.

Luis Perez Aguirre, *The Consequences of Impunity in Society*, in JUSTICE NOT IMPUNITY, *supra* note 71, at 107, 110.

been the belief that the visible, material elements of the world can in fact reveal what would otherwise be the invisible divine presence.²²⁶ Central to the Catholic Eucharist is the notion that elements such as bread and wine can embody the fullness of the divine. This belief is confined neither to the Eucharist, nor simply to material objects. The entire range of human existence is seen, in the Catholic vision of the world, as being revelatory of God.²²⁷

This sacramental sense of reality, sometimes termed “sacramental sensibility,” is deemed to be more than simple possibility in the Catholic vision. The Catholic tradition rather insists that such a world view is absolutely necessary. Lacking it, humans would have no tangible experience of the invisible God.²²⁸ In a Catholic notion of metaphysics, then, it is of paramount importance that grace that is otherwise invisible become concrete and accessible.

Such a theological premise bears direct implications for countries negotiating the transition from torture regimes to reinstated democracies. By way of legal analogy, if democracy is to connote anything beyond an aspirational norm for civil society, it must embody something of palpable substance. In the

226. Theologian Richard McBrien writes:

No theological principle or focus is more characteristic of Catholicism or more central to its identity than the principle of sacramentality. The Catholic vision sees God in and through all things: other people, communities, movements, events, places, objects, the world at large, the whole cosmos. The visible, the tangible, the finite, the historical—all these are actual or potential carriers of the divine presence.

RICHARD MCBRIEN, *CATHOLICISM* 1180 (1980). It was Augustine who first developed a theory of sacraments, in the framework of Neoplatonic Christian philosophy. HERBERT VORGRIMLER, *SACRAMENTAL THEOLOGY* 45 (1992). Augustine defined sacraments as “visible signs that represent an invisible reality” (*invisibilis gratiae visibilis forma*). *Id.* Hugh of St. Victor later defined sacrament as “a bodily or material element that is used to make present an invisible or spiritual grace.” *Id.*

227. Writings on the Catholic notions of sacrament and sacramentality are extensive. *See, e.g.*, KARL RAHNER, 6 *SACRAMENTUM MUNDI* 378 (1970); *A WORLD OF GRACE* (Leo J. O'Donovan ed., 1980); ALEXANDRE GANOCZY, *AN INTRODUCTION TO CATHOLIC SACRAMENTAL THEOLOGY* (1979); BERNARD COOKE, *SACRAMENTS AND SACRAMENTILITY* (1983); LEONARDO BOFF, *SACRAMENTS OF LIFE, LIFE OF THE SACRAMENTS* (1987); *see also* JOSEPH MARTOS, *DOORS TO THE SACRED* (1981) (providing excellent historical survey of sacraments' development in Catholic tradition).

228. Referring to the elements of the world and of human experience that convey the divine presence, McBrien asserts, “[i]ndeed, it is only in and through these material realities that we can even encounter the invisible God.” MCBRIEN, *supra* note 226, at 1180.

context of reinstated democracies, such substance lies precisely in a nation's need to know fully and irrefutably what occurred during the years of a torture regime.

This need for truth is at once a need for the revelatory dimension of sacramentality; that which was shrouded in secrecy and terror must be made concrete and rendered part of a country's collective memory. Even when there is a general awareness that torture has occurred, as there inevitably is, there remains the task of imbuing such awareness with official recognition.²²⁹ The failure to do so further perpetuates the suffering of victims of human rights violations.²³⁰ Legally, it may deny families of the disappeared the closure of at least having missing loved ones declared dead, and it may preclude claims for reparations by living survivors of human rights abuses. Often, the need for an official recognition of the truth is more acutely felt by victims and their families than the need for justice.²³¹

The need to establish the truth implicates more than questions of reparation for individual victims of human rights abuses. It concerns societies as a whole, particularly societies that have endured torture regimes. A sacramental imperative that the truth be officially established is never more exigent than in cases where an authoritarian regime has foisted its own aberrant version of history upon an entire country.²³² Reflecting on the task

229. Professor Thomas Nagel made this point at the 1988 Aspen Institute Conference. Explaining why knowledge must be official, Nagel ventured, "[i]t's the difference between knowledge and acknowledgment. It's what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the *public cognitive scene*." *STATE CRIMES*, *supra* note 21, at 93.

230. Richard Goldstone, Prosecutor for the International Criminal Tribunal for the Balkan States and Rwanda, has emphasized that the most important lesson learned by truth commissions has been the deep need of victims for acknowledgment. Richard Goldstone, *Exposing Human Rights Abuses—A Help or a Hindrance to Reconciliation?*, 22 *HASTINGS CONST. L.Q.* 607, 615 (1995). Goldstone notes, "[f]orgiveness cannot be granted without knowledge; and without forgiveness, there cannot be any meaningful reconciliation." *Id.*

231. José Zalaquett has observed that the families of the Chilean disappeared often emphasized that what mattered most to them was that the truth be revealed and that the memory of their loved ones not be vilified or forgotten. Zalaquett, *supra* note 202, at 1437. The same has been observed regarding torture victims. Another commentator declares, "[i]f anything, the desire for truth is often more urgently felt by the victims of torture than the desire for justice. People don't necessarily insist that former torturers go to jail—there's been enough of jail—but they do want to see the truth established." *STATE CRIMES*, *supra* note 21, at 93.

232. Zalaquett noted the consequences of denials by the military regime that there was any practice of forced disappearances in Chile:

facing Uruguay after the military dictatorship, the writers of *Uruguay Nunca Más* observed:

[F]irst we had to learn the magnitude of the catastrophe . . . [of] the period from 1972 to 1985, when Uruguayan society was continually subjected to lies, isolation, silence, and fear. Only with difficulty did we come to realize how deeply the dictatorship had affected the whole body of society, what it meant to have spent years living as collective *encapuchados*, as if with the torturer's hood over our heads, in silence. We pretended to be ignorant, a strategy some found necessary for survival, for salvaging the salvageable. . . . Because Uruguayans never fully understood what was happening, it has been easy to minimize and lie about the crimes that were committed.²³³

Any transition to democracy gauged from a sacramental perspective would be assessed according to one primary criterion: how fully has the truth officially been made known? By these terms, Uruguay would be the most deficient country of those surveyed in this analysis. While the Uruguayan Government has acknowledged that a limited number of disappearances occurred during the dictatorship, it has refused to either investigate or document the far more extensive incidents of torture and illegal imprisonment.²³⁴ Chile has investigated and acknowledged incidents of political violence resulting in death, but the stories of countless torture victims who survived have not yet become a part of the country's collective memory in a full or official way. Brazil and Argentina, despite political limitations, have managed to document both torture and disappearances; Argentina, through an officially mandated commission, and Brazil, through the publication of Government verified documents.

A sacramental mandate to establish the truth does not proceed apart from the judicial realm. Often, it is only the judicial

These denials were largely believed by most of [the military regime's] civilian supporters (many of them probably preferred not to know for sure). They would accept the official explanations that nothing more than isolated, inevitable excesses could have occurred. At most they would believe that the real extent of the abuses was far less than what was reported by domestic and international human rights organizations and by the foreign press.

CHILEAN NATIONAL COMMISSION, *supra* note 182, at xxv.

233. Weschler, *supra* note 3, at vii-viii.

234. See *supra* note 172 and accompanying text (discussing lack of mandate for National Commission to investigate torture and illegal detentions).

process, with the power to subpoena information, and with due process rights guaranteed for the accused, that ensures that the full measure of the truth will be ascertained.²³⁵ Moreover, the obligation of establishing the truth has, in recent years, become a norm stipulated by international law.²³⁶

Ultimately the sacramental imperative of establishing the truth, however, is a matter that transcends the judicial process.²³⁷ An even more compelling need than a legal one ultimately demands truth-telling measures. In the absence of such efforts, the collective memory of a nation is inherently flawed. The writers of *Uruguay Nunca Más* seized upon this insight when they asserted:

Unless we commit ourselves to revealing the truth, to seeing that justice is carried out, and demonstrate that acting with impunity no longer has a place on our national scene, our Uruguay will be committing political suicide Allowing acts to have been performed with impunity keeps us from recovering essential things that were lost in the dark years [Y]ou need a social and political geography, a known history: you need to know what happened and why, what went on in a historical period, how events were resisted or submitted to, how rights were abused, how passage out of a dark period was achieved, and how the future will be. To rescue that history . . . is to look without shame at the future.²³⁸

The task confronting nations in a transition back to democracy

235. STATE CRIMES, *supra* note 21, at 93.

236. The mandate to establish the truth would arise out of customary international law, as well as from the obligations that nations incur in becoming parties to international human rights treaties. See, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). States party to comprehensive human rights conventions, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, assume an obligation to at least investigate serious violations of physical integrity, namely torture, extra-legal executions, and disappearances. *Id.* at 2568. States party to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment assume a further obligation to prosecute such offenses. *Id.* at 2562-65.

237. Recent scholarship has even suggested that legal measures and criminal prosecutions may have only a minimal capacity for informing the collective memory of a country regarding the human rights violations of a previous military regime. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995).

238. Weschler, *supra* note 3, at x-xi.

is precisely that of “rescuing history.” If this is to be done, the stories of a former regime’s torture victims must be acknowledged publicly and become a part of the larger collective memory of their country. The best hope for such victims and their respective societies may well be a biblical one: “You shall learn the truth and the truth will set you free.”²³⁹

239. John 8:32.