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Jorge S. Correa

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# Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship

*Jorge Correa S.\**

## I. INTRODUCTION

In order to include this subject in a volume on dispute resolution, one must understand dispute resolution in a broad sense. We will be focusing on a government that succeeds a dictatorship and, while in the transition to a democracy, confronts the problem of past human rights violations. What the new government faces is not exactly, by common definition, a dispute among actual parties that has to be settled by a third one. Nevertheless, with this phenomenon there are, as in dispute resolutions, very intense and competing expectations. Expectations that range from complete impunity to direct revenge. The issue raises high fears and no less intense desires. As one of the relatives declared to the Commission, "I felt happiness and sadness when [President] Aylwin won. I knew that an era was coming to an end, the one of silence; but a more difficult era was starting, the need and the obligation to do something."<sup>1</sup>

Dealing with the problem of past human rights violations in periods of transition to democracy is probably one of the most complex situations a politician must face. It entangles in an inseparable way very difficult ethical, political, and technical issues, none of which offers a simple answer. Competing goals are often desirable, like those of bringing about peace and reconciliation to a highly divided society. Such a goal may require some degree of amnesty; the same amnesty may be needed in order to keep some of the public officers that served the old regime in office.<sup>2</sup> On

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\* Professor of Law, Diego Portales University Law School, Santiago, Chile. Former Secretary (Chief of Staff) of the National Commission for Truth and Reconciliation.

1 SECRETARÍA DE COMISIÓN Y CULTURA, MINISTERIO SECRETARIA GRAL. DE GOBIERNO, REPORT OF THE NATIONAL COMMISSION FOR TRUTH AND RECONCILIATION 785 (1991) [hereinafter REPORT]. All translations from Spanish to English of the report are made by the Article's author. They are probably different from the translation of the full report that the Notre Dame Law School will make by professional translators.

2 Many of these issues have been discussed in the recent transitions from authoritarian regimes to democratic ones, both in Latin America and in Eastern Europe.

the other hand, complete and severe punishments may be the way to destroy the organization that violated those rights, or the best way to prevent future violations. It would be easy to say that normative principles must prevail, yet, in order to achieve them, they need to be prudently balanced with expediency. "Everybody is aware of the ambiguities of transitional periods, where measures which are straightforward from the standpoint of human rights norms, could have undesired political implications which, in turn, would affect human rights adversely."<sup>3</sup>

The way statesmen deal with this issue is decisive as to the way democracy consolidates, the way legitimacy may be claimed, and in the very future of human rights. In the southern cone of Latin America, and especially in the transition of Uruguay, Argentina, and Chile, the manner in which the first elected government has dealt with past human rights violations has been so entangled with political transition that it is difficult to talk about one without having to deal with the other.<sup>4</sup> This relationship is not merely an accident, and one could try to explain it in many ways. For the purpose of our topic, I will propose some keys for understanding the Chilean case. I think it is impossible to look at what has been happening with past human rights violations if one does not bear in mind the characteristics and conditions under which that transition was made possible.

I will then focus on some of the characteristics of the Chilean transition to democracy. Then, I will focus on each of the goals of the report of the National Commission and shortly discuss the degree to which they were achieved. Finally, I will look at the Chilean situation as a case study about the merits and shortcomings of truth as a factor in a "dispute resolution" of this sort.

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3 Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in STATE CRIMES, PUNISHMENT OR PARDON 25 (1989). This Article follows closely Zalaquett's thought as expressed in the aforementioned work.

4 For a very good comparative analysis of this topic, see *id.* For a description of the Argentinean situation, see Carlos Acuña & Catalina Smultovitz, *¿Ni Olvido Ni Perdon? Derechos Humanos y Tensiones Civico-Militares en la Transición Argentina* (1991) (unpublished paper, on file with the author). See also Jaime Malamud-Gotú, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in STATE CRIMES, *supra* note 3; Carlos S. Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 YALE J. INT'L L. 217 (1985).

## II. TRANSITION TO DEMOCRACY

### A. *Introduction*

There can be no doubt, as already suggested, that political conditions limit a government that succeeds a dictatorship as to the kind of policies it can follow when dealing with past human rights violations. The goals, from a normative standpoint may be exactly the same, yet, the actual possibilities of achieving them and the best strategies to do so may be very different. A new government that had a military victory over those who had participated in gross human rights violations (like Nicaragua) is very different from an elected government that had to collaborate for a long time with the very same guerrillas that were responsible for past human rights violations in order to continue to fight a common enemy (like El Salvador). In the Nicaraguan example, there are no political restrictions, and the only dangers that the new authorities face are probably the excesses that one can commit when trying the cases in the courts. In the El Salvador example, however, attempting to keep the army and the police within the boundaries of civilian rule and forcing them to respect human rights are the only things that can be done.

Between these two extremes are cases like Greece and Argentina where the armed forces left power after a moral collapse, both because of internal political discontent and because they had lost an external war. Uruguay illustrates a negotiated transition after the armed forces suffered a political defeat; and, of course, less could be achieved in the Uruguayan case than in the Argentinean one.<sup>5</sup> Time is also a very important factor. It is of course a very different situation when the democratic authorities gain power shortly after the massive violations of human rights have been committed, than the case, like Spain, where there is a totally new generation in the most influential positions.

In the Chilean situation, the political constraints were great, and the newly elected government thought that it did not have enough power to bring about punishment. Therefore, acknowledgement became its policy. It thought that a full disclosure of an official truth would help to achieve the three moral objectives that the government perceived as its basic and unavoidable obligations:

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5 *Supra* notes 3-4.

(1) to do as much as it could to build a solid and preventive barrier against future human rights violations; (2) to compensate, as much as possible, the survivors that had been most severely damaged; and (3) to bring about reconciliation.

This Article first examines the character of the political constraints that made it impossible for the new government to impose a policy of penal sanctions. The Article then highlights some of the more important relations between that policy of social acknowledgement and the three principles that it sought to achieve.

*B. A Plebiscite Where the Ruling Junta  
Loses (Though Not Everything)*

In the case of the Chilean transition, it was not so much the threat of another coup that made it difficult for the new government to impose sanctions, but rather the way it achieved power and the expectations it created. The opposition to the military regime had been active and mobilized in the early 1980's, but it could not overthrow the authoritarian government. Neither the peaceful strategy of civil disobedience nor the most violent acts, ranging from street riots to attempts to kill General Pinochet, were successful enough to overthrow the regime.<sup>6</sup> Nevertheless, in order to stay in power, the authoritarian regime had to allow some civil liberties, and that liberalization made the final difference. After the democratic political parties failed to remove Pinochet by other means, they viewed the 1988 plebiscite as the only opportunity to beat the military rulers. Yet, the price they had to pay was high, and the democratic coalition could not eat the sweet without tasting the bitter.

In order to compete in that plebiscite, the democratic political parties had to accept the Constitution of 1980, and they had to promise that they would only change it according to its own rules.<sup>7</sup> This Constitution established the calling of the plebiscite and regulated what should happen after the plebiscite. In order to

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6 REPORT, *supra* note 1, at 665-709. For a good source of information about the political atmosphere of those years, see ASCANIO CAVALLO, *HISTORIA OCULTA DEL REGIMEN MILITAR* (Antartica ed., 1989).

7 The decision to accept the constitutional order as a given was highly contested among the democratic political parties for a long. The discussion took place first in the Christian Democratic party, where Aylwin's group made this an important point. This decision was even more contested among the Socialists. Only the Communists resisted entering the political process through this means and were left outside the political coalition that fought together in the plebiscite and the subsequent presidential election.

win the plebiscite, the democratic forces had to be very prudent. A large part of the population feared that the return of democracy could bring disorder and chaos, threatening the peace and economic progress that the country was experiencing. Because their vote could be decisive, the democratic parties had to promise full respect for the Pinochet institutional framework and that they would only change that framework through its own mechanisms.

The democratic political forces had to inaugurate a new political rhetoric that was not as confrontational. As a result, the human rights issue was strongly presented as a demand to encourage pacification and depolarization rather than as a demand for punishment.<sup>8</sup> The slogans chosen for the campaign in the plebiscite offer a good example: "Chile, happiness is already on its way" or "Without fear, without hatred, vote no." Another one of those slogans stated, "You only need a pencil to beat Pinochet."

As a result, the democratic forces not only won the plebiscite, but their new strategies were the key factor to victory and left indelible marks in the characteristics of the Chilean transition to democracy and the period of consolidation. From the moment of Pinochet's defeat in the plebiscite, the acceptance of the rules and the institutional scheme that had been created by the armed forces began to work to the advantage of the democratic parties. The Constitution stipulated that a general election was to be held in one year, and there was no doubt that the same forces that had defeated Pinochet could defeat any other person that would be seen as his candidate. Moreover, from the night after the plebiscite of October 1988, the possibility that the army could break its own rules and try to avoid future elections was the only real threat to the transition to democracy. So, surprisingly enough, it was the democratic groups who were caring about the maintenance of the Constitution enacted by the ruling Junta and its scheduled plan to recover democracy.

Of course, there were broad and well structured provisions in that constitutional and legal scheme that were designed to ensure that the new democratic forces would not make radical changes to the Constitution. The democratic parties could not take only one part of those rules, decide to play according to Pinochet's constitutional scheme, and then try to change the Constitution accord-

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<sup>8</sup> For a general description of this campaign, see EUGENIO TIRONI, *LA INVISIBLE VICTORIA* (Sur ed., 1990).

ing to their own rules. Yet, between the plebiscite and the presidential election, negotiations were held for the first time to repeal some of the most important of those authoritarian devices embodied in the Constitution. Unfortunately, only a limited number of agreements was reached. They were approved by another plebiscite with 87.7% of popular support.<sup>9</sup> The rest of the well-designed authoritarian structure remained.

*C. The Issue of Human Rights During  
the Presidential Campaign*

The discussion of human rights was very important during the Presidential campaign that followed Pinochet's defeat in the plebiscite. The democratic forces had Aylwin as a candidate, while the political right and the forces that had supported the military regime backed a civilian, the former Secretary of the Treasury Department, Hacienda. Chilean long-standing tradition is one in which the candidates are to put forward a program. The coalition giving support to Aylwin had great difficulty agreeing on how to deal with past human rights violations. The language of the final text of the program may express the difficulty in achieving agreement:

The democratic Government will put forth its best efforts in order to establish the truth in the cases of violations of human rights that have occurred since September of 1973. It will also procure the trial according to the actual penal law, of the human rights violations that represent atrocious crimes against life, liberty and personal integrity . . . .<sup>10</sup>

The program continued, "Cases are to be tried in civilian courts, which should act in accordance with the principle of due process of law, and with full respect of the procedural guarantees of victims and those held responsible."<sup>11</sup> Having in mind the Argentinean case and its problems with the *Ley de Punto Final*,<sup>12</sup> there was

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9 The plebiscite was held on July 30, 1989. An overwhelming majority (87.7%) of the population approved the proposal for reforming the Constitution.

10 PROGRAMA DE GOBIERNO, CONCERTACIÓN DE PARTIDOS POR LA DEMOCRACIA (1989) (translation by the author of this Article).

11 *Id.*

12 The Argentinean *Ley de Punto Final* was enacted on December 24, 1986, after major manifestations of discontent made by the military. It aimed at limiting the cases of past human rights violations that would be presented to the courts by limiting the time in which they could be presented. A large number of cases were brought to the courts during the established period. However, far from calming the discontent in the armed

a promise to establish a special and limited period to present the cases to the court. Finally, some very careful words were devoted in the program to the amnesty law of 1978:

Due to its very legal nature and true meaning, the amnesty decree-law of 1978 has not and cannot become an impediment for the disclosure of the truth, the investigation of the facts and the establishment of criminal responsibilities in cases of crimes against human rights, as are the detention of people followed by disappearance, crimes against the right to life and grave physical and psychological wounds. The democratic government will continue the program to promote the derogation or nullification of the amnesty law.<sup>13</sup>

The promise was not to repeal the amnesty law, but to make efforts to achieve that result.

Notwithstanding the careful wording of the program, it quickly came under forceful attack. Both the political right and the armed forces spoke out. Although the active officers of the armed forces refrained from making open statements on electoral issues during the presidential campaign, the Commander in Chief of the Air Force decided to speak. He was considered to be a key actor in support of liberalization and a very strong supporter of civilian rule. He had kept his soldiers away from the secret police and fired most of the men that were highly compromised in human rights violations. He was also the first to publicly recognize the defeat of Pinochet the night after the plebiscite (a very crucial moment where the government was not publishing the results and thus creating a tense climate).<sup>14</sup> This same general, very shortly after the program was presented, publicly said that repealing the amnesty law ran against the compromise the democratic parties had made to respect the institutional scheme. He further asserted that this represented a threat to the whole process of transition to democracy. Pinochet, of course, did not use very elegant words to say the same thing—announcing that if one of his men was

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forces, the cases augmented it. See Zalaquett, *supra* note 3, at 55; Acuña *supra* note 4, at 43.

13 PROGRAMA DE GOBIERNO, *supra* note 10.

14 Some versions argued that the results of the ballot-box were not given by the government in order to provoke street riots by the people that had voted no, and thus to regain political control by authoritarian methods. This version was denied by government officials. The weekly magazines covered this development the week after the plebiscite. See generally HOY, Oct. 1988; ANALISIS, Oct. 1988; QUE PASA, Oct. 1988; APSI, Oct. 1988.



touched, the rule of law would end. The democratic forces defended their program during the campaign. They frequently repeated that they would not risk a peaceful transition to democracy, that all they had promised in their program was to make efforts to repeal the law, and that obviously, those efforts had their natural limits in the very stability of the political process.

#### *D. The Final Political Conditions*

After the presidential and congressional election in 1989, it became clear that changing the Constitution and the laws of the previous regime would not be easy. Although the new government held a majority in the Lower Chamber, it did not control the Senate, where nine of the forty-six members were not elected, but rather, were designated to ensure a conservative, majority coalition. Therefore, the new government had to compromise with at least one of the right-wing political parties every time it proposed a legislative or constitutional change.

The newly elected authorities had accepted the institutional framework that included other strong protection mechanisms that were impossible to overcome. Among the many was a self-amnesty law passed in 1978. The new government could not repeal or invalidate this law because it lacked the legislative majority to do so. A second inhibiting factor was the ideological sympathies of the judiciary. The Supreme Court applied the broadest interpretation possible to the amnesty law, making it difficult even to investigate the truth. The Court also had demonstrated a weak commitment to investigate and punish the cases that occurred after 1978. Because Pinochet had intervened in the judicial nominations only in accordance with the 1925 constitutional framework, the new authorities could not just replace the judges.

So Aylwin's problem was not an easy one. On the one hand, he had a moral obligation to disclose the truth and punish human rights violators. On the other, he could only achieve the final results he desired by breaking the very rules that had brought him into power.

Aylwin addressed the issue of past human rights violations in his opening speech the day he became President.<sup>15</sup> Until that

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<sup>15</sup> The inaugural speech was made at the National Public Stadium, March 12, 1990, and published in all newspapers the next day. See Patricio Aylwin, Inaugural Speech (Mar. 12, 1990) (transcript available at the Secretaría de Cultura y Prensa, Ministerio Secretaría General de Gobierno).

point, he had not defined a precise policy beyond its main principles. In his speech, he called for a compromise between the virtues of morality and prudence, stating clearly that a full disclosure of the truth was indispensable. His choice seemed to be judicial trials followed by pardon.<sup>16</sup> This strategy presented an enormous problem: the courts clearly would not follow that path and would continue to interpret the amnesty law as broadly as possible.

The Argentinean experience was close enough in time and distance to illustrate to Aylwin that even in much more favorable conditions maximalist policies had to be compromised (*e.g.*, Alfonsín had to abandon some of his goals in the midst of open and violent military resistance).<sup>17</sup> In Chile, a threat to the authority of the civilian president was very dangerous because the unity of the armed forces is a long standing tradition, and nothing showed that it had weakened. The political intervention of the military after the presidential election would have meant nothing but a coup.

The Uruguayan experience also influenced Aylwin. In Uruguay, the democratic forces had also started their transition to democracy with a plebiscite called and lost by the military rulers. Unlike the Chilean case, however, Uruguay had no amnesty law. When the cases were brought to the civilian courts, the officers openly resisted testifying, claiming that military courts had proper jurisdiction. The Supreme Court ruled that the civilian courts had jurisdiction. Shortly thereafter, the newly elected parliament passed an amnesty law. After that, twenty-five percent of the citizens signed petitions demanding a plebiscite in order to repeal the amnesty law. However, the plebiscite upheld the amnesty law. More than eight years passed between the first and the last of the aforementioned plebiscites.<sup>18</sup> The Uruguayan experience taught many Chileans to do quickly whatever had to be done.

In this environment of political restrictions, Chile's new democratic government believed that its basic moral obligations of prevention, compensation for the victims, and reconciliation could be met through an official disclosure of the truth. Accordingly, the Government created the Commission for Truth and Reconciliation.

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16 *Id.*

17 See *supra* note 4 for a general description of this situation in Argentina.

18 See Zalaquett, *supra* note 3.

### III. THE FINAL STRATEGY: THE COMMISSION OF TRUTH AND RECONCILIATION, ITS OBJECTIVES AND THE OUTCOMES

#### A. *The Creation of the Commission*

Within its first month in office, the government started private conversations in order to establish a commission that would investigate and disclose the truth regarding human rights violations. It soon became clear that the forces of the right, now in the opposition but controlling the Senate, would not follow such a strategy. During the electoral campaign, the opposition had claimed that remembering old wounds and divisions would not benefit Chilean society. They had also argued that only the courts could properly conduct such investigations. Nevertheless, some voices among the coalition supporting the new government argued in favor of an investigative commission of the House of Deputies.

Aylwin decided to create the Commission by presidential decree. He personally tried to integrate people from the right into the Commission. Although no member of the right-wing parties joined, some important and well-reputed, conservatives accepted. Aylwin drafted the plan and discussed it with those who accepted. On April 24, 1990, the creation of the Commission was announced, less than two months after the new government had taken office.<sup>19</sup>

The remainder of this Article tries to explain the goals that the Commission tried to achieve, noting its successes and shortcomings. In so doing, the Article examines both those things that truth can achieve in like situations and those goals that are unattainable. Some of this we understood from the very moment the Commission was created; some, we came to realize along the way or in the aftermath of these experiences.

#### B. *What Kind of Truth*

##### 1. Universal or General

The decree that created the Commission,<sup>20</sup> after stating that

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19 The announcement of the Commission was made in a solemn and public act on the night Aylwin's speech had been published in all the newspapers. An official version has been edited by the Secretaría de Comunicación y Cultura, Ministerio Secretaría de General del Gobierno.

20 Ministry of the Interior Decree No. 355, DIARIO OFICIAL (May 9, 1990). See also

the moral consciousness of the nation required the truth about past human rights violations, established that the truth about individual cases would not alone allow a general appreciation of what had happened. Accordingly, the Commission attempted to realize the following goals: (1) obtain an account of methods, policies, and excuses for human rights violations; (2) procure a history of the reactions of the different relevant sectors of society; and (3) attempt to explain the causes of such violations and their consequences for the victims, their relatives, and society. The Commission thought that these goals would provide a beneficial exercise for the sanity of social conscience and that the public exposure of the truth would have a special cathartic effect. Judicial investigation of particular cases clearly would not achieve these goals.<sup>21</sup>

The final report of the Commission tries to state all these characteristics. It tries to explain the political, legal, and judicial conditions that made the violation of human rights possible.<sup>22</sup> For each period studied, one can read the organization, the methods of acting, and the impunity of the violators of human rights.<sup>23</sup> Special attention is paid to torture. A description of the reactions of the most relevant social, political, and moral forces inside and outside the country is also stated for every period.<sup>24</sup> Finally, the report, in one of its most moving chapters, describes the suffering and the expectations of the victim's relatives, using their own words and statements.<sup>25</sup>

## 2. The Individual Case by Case Story

The Commission's aim was not only to achieve a general truth, but also to reach the truth concerning individual cases. There are two reasons for this. First, the only way to convincingly infer or explain a general truth, as previously described, is through the actual, individual cases of human rights violations. Second, because there were no real possibilities of judicial inves-

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REPORT, *supra* note 1, at 7-10.

21 For a general analysis of the judicial behavior during the authoritarian years, see REPORT, *supra* note 1, at 95-104. See also Jorge Correa, *Formación de Jueces para la Democracia*, in *FILOSOFIA DEL DERECHO Y DEMOCRACIA EN IBERO-AMÉRICA* 34-35 (Agustín Squella ed., 1992); Hugo Frühling, *Justicia y Violacion de Derechos Humanos en Chile* (1987) (unpublished paper on file with author).

22 REPORT, *supra* note 1, at 33-104.

23 *Id.* at 107-764.

24 *Id.* at 441-48, 606-15, 745-64.

25 *Id.* at 766-85.

tigation in many of the cases,<sup>26</sup> some minimal justice had to be done in individual cases. Because authorities had neglected past violations, the relatives of those victims needed some kind of official recognition. As one of them said to us, "They told me that he had been freed. Now we find him in the tomb, with his eyes blindfolded and his hands bound."<sup>27</sup> Another said, "I want to cry out to the world, and with pride, that my father died because of his ideals. I want society to finally understand that the sons and daughters of those they killed are not dangerous people."<sup>28</sup> As these words demonstrate, the individual truth was important to re-establishing the dignity of the victims and their relatives.<sup>29</sup>

Of course, one of the most important goals of the Commission was to disclose the truth about the missing people. As one of the members of the Commission stated concerning disappearance: This kind of human rights violation is "a method of repression which, by its very nature, rests on secrecy and perpetuates its pernicious effects as long as truth remains hidden."<sup>30</sup> A mother of one missing person told us that after more than fifteen years, she still keeps the door of the house open during every holiday so that her disappeared son can come in. As a sister of another victim told us, "On every windy night my mother thought that it was him coming back. She would walk up, open the door, and cry."<sup>31</sup>

In order to achieve this individual truth, the Commission called the relatives of those persons who had been killed or were missing to present their cases and asked anyone with relevant information on any case to testify. Special requests were sent to the groups that had done human rights work in the past and to those who were named as being responsible for past human rights violations.<sup>32</sup>

The final report includes the individual history of each of the 2,279 cases in which a moral conviction was achieved, meaning that a human rights violation had resulted in a death or disap-

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26 Since the report was delivered, the courts have made significant advances in the investigation of a very few but highly symbolic cases. For example, Manuel Contreras, the former chief of the secret police, was tried for the assassination of Orlando Letelier in Washington D.C. in September 1976.

27 REPORT, *supra* note 1, at 781.

28 *Id.* at 785.

29 The recovery of the dignity of the victims was one of the established goals the Commission had to achieve. See Ministry of the Interior Decree No. 355, *supra* note 20.

30 Zalaquett, *supra* note 3, at 30.

31 REPORT, *supra* note 1, at 770.

32 For a complete description of the methods of the Commission, see *id.* at 3-13.

pearance after detention. The report also briefly states the reasons for such a conviction so that readers will be able to form their own opinion. In 641 cases, the Commission could not definitively conclude that a human rights violation had actually occurred, and another special commission is now being created to decide such cases.<sup>33</sup> As explained later, another 508 cases presented to the Commission were outside of its jurisdiction.

The series of explanations that the report establishes for distinguishing among cases may interest human rights scholars.<sup>34</sup> Probably the most important is the line drawn between those who died as victims of political violence and those who were victims of human rights violations. In the first group are those who were killed in the midst of the few combats that followed the military takeover and lasted only a few hours. Also considered as victims of political violence instead of human rights violations are those persons killed in the episodic armed conflicts between the police and the armed groups of the left. The report gives other conceptual considerations to explain the criteria applied to those who committed suicide while in prison. The principles used in other cases are more difficult to categorize.

The Commission largely failed to know and disclose the actual destiny of the missing people. In some thousand cases, the members of the Commission did arrive at the moral conviction that a person was missing and that either state officials were responsible for the initial arrest, or there was enough indirect evidence to point to state involvement.<sup>35</sup> Nevertheless, there was not enough collaboration on the part of former human rights violators to find out exactly when and how the missing people were killed and where their remains could be found. People that had played minor roles in the early months of the repression by the military regime did disclose some of that information either to us or other human rights groups. After that initial period, however, only a small number of highly trained and loyal men and women were involved in killing operations. Their methods also became much more sophisticated, both as to the secrecy of the ways of arresting the victim and to the way of disposing of the bodies of those

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33 DIARIO OFICIAL § 19.123 (Feb. 8, 1992) (creating this new Commission called Comisión Nacional de Reparación y Reconciliación).

34 REPORT, *supra* note 1, at 27-30.

35 *Id.* at 107-763.

killed.<sup>36</sup> As a result, much less is known about this period. Actually, only a couple of those involved with the secret police decided to testify before the Commission. Sending this information to the courts was difficult because we knew that the secrecy of those testimonies could no longer be guaranteed. Because some of the testimonies we received were given to us under the condition of secrecy, we had to protect them while still sending the relevant information so that the court could find and excavate the bodies.

Yet, most of the cases of missing people have not been resolved, leaving an open wound in Chilean society. A special new commission is now being created in the country to continue with that work,<sup>37</sup> a mission that the Catholic Church, through the Vicaria de la Solidaridad, is continuing to develop.

### 3. Authoritative Truth that Could No Longer be Contested

The Commission certainly was not the first group in Chile to investigate or report human rights violations. A wide range of such reports had already been published, both by national and international organizations.<sup>38</sup> Moreover, the work of the Commission would have been much more difficult, if not impossible, if the documents and files of human rights groups had not been made available to us (especially the ones of the Vicaria de la Solidaridad, an organization created by the churches and sustained by the Catholic Church).<sup>39</sup> The Commission did not take these reports for granted. In many cases, the Commission could add more information to the reports by extracting data from public records to which the Commission had legal access. In other cases,

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36 *Id.* at 478-84.

37 DIARIO OFICIAL, *supra* note 33.

38 Among the most internationally known reports about human rights in Chile is *Report on Human Rights in Chile*, INTER-AM. C.H.R. (Sept. 1985) (photocopy of original Spanish version on file with the author).

The United Nations published many reports during the Chilean dictatorship. Especially important were the reports published from 1979-1989, which were elaborated upon by the special rapporteur.

In its annual report, Amnesty International analyzed Chile in several instances. For information about the human rights violations during the dictatorship, see reports of 1979-1989, published both in English and Spanish.

39 The Vicaría de la Solidaridad and its predecessor organization, the Comité de Cooperación para la Paz en Chile, have documented tens of thousands of cases of violations of human rights in Chile. This organization presented its cases to the courts and had the most complete files on the subject. Most of them were made available to the Commission.

the data of the Vicaria was a very useful starting point for our own investigations.

The Church had already published part of its information, and some journalists had published books with many of the most relevant cases. Those publications had already become long-standing best sellers.<sup>40</sup> Legal and illegal copies were sold at bookstores, newsstands, and on the streets in all the cities and towns throughout the country. In this respect the Chilean transition was quite unique.

There are several reasons why a country should need a special commission to search for a truth that was quite widespread. First, none of the previous reports had tried a comprehensive coverage of the entire period in its generalities, and none had tried to cover all the individual cases. I have argued the importance of both. Second, and more importantly, all the previous disclosures were highly contested, even the ones deriving from the Church or from international forums. One has to remember that for a long time, and certainly for the time during which the massive violations of human rights were committed, the regime had absolute control over the press. So, for a long time, the killing and kidnapping of political dissidents was reported as being an invention of the Communist Party and its satellite groups who simply could not accept the fact that they had lost their power in Chile after their democratic experiment had finished in total chaos. Even the President of the Supreme Court advanced this explanation when referring to the writs of habeas corpus that were presented to the courts.<sup>41</sup> The propaganda of the regime could prove that some

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40 The most prominent example is probably PATRICIA VERDUGO, *LOS ZARPAZOS DEL PUMA* (America Cesoc ed., 1989). Another big best-seller was EUGENIO AHUMADA, *CHILE LA MEMORIA PROHIBIDA* (Pehuen ed., 1989).

41 According to article 5 of the CIVIL CODE, the Chief Justice of the Supreme Court has to give an opening speech at the beginning of each year. In 1975 the Chief Justice of the Supreme Court stated:

Chile, which is not a land of barbarians, as it is often said abroad, either by bad Chileans or by foreigners has made diligent efforts to comply strictly with these rights. As to torture and other atrocities, I can say that here there are no walls where executions are committed and no Berlin wall, and any information in that sense is due to a political media compromised with ideas that have not and will not prosper in our country.

DIARIO OFICIAL (Mar. 14, 1975) (translation by author of this Article). Then, the Chief Justice discounted the fact that there were people missing in Chile, and went on to say that:



Communists were working at the Catholic Church's Vicaria de la Solidaridad, so they made the argument that the organization had been infiltrated and was dominated by the Communists.<sup>42</sup> Additionally, the regime attempted to discredit the stories of human rights violations that human rights groups were publishing by producing untrue stories about millions of people killed by the military regime and its secret police.

Aylwin, therefore, needed to appoint people to the Commission that the whole country would trust. He needed moral figures that could be trusted from the right to the left and especially by the relatives of the victims. Finding men and women that had taken a brave stand in defense of human rights and that had personally suffered for taking such a position so that the left and the human rights groups could trust them was not difficult. The problem was to find people on the right side of the political spectrum, especially after the right-wing parties had denied their collaboration. Aylwin made personal efforts in this. Finally, some well-reputed, conservative scholars accepted, including a former member of the Supreme Court and a former secretary of State of the Pinochet government.

The problem then became that of split votes. A dissenting opinion could deprive the report of all its value, or, even worse, two reports was a possible outcome. Fortunately, all the members became highly involved in the investigation of the cases. They personally heard many testimonies and checked the evidence. The final outcome was reached unanimously, and there is not a single dissenting opinion in the report.<sup>43</sup>

The report has not been recognized as the truth by the armed forces or the Supreme Court. Each branch of the armed forces answered the report separately and in quite different terms. The army, in a solemn act with Pinochet speaking, denied the truth of the Commission, arguing that it was partial (because not

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[T]he Appellate Court in Santiago and the Supreme Court had both been pestered in their work by the numerous habeas corpus presented to them, on the pretexts of arrests ordered by the Executive. This has disrupted the work of the Courts, interfering with their duty to occupy themselves on the urgent matters of their jurisdiction.

*Id.*

42 REPORT, *supra* note 1, at 608. (Pinochet sent a letter dated November 11, 1975, to the Archbishop of Santiago, Cardinal Silva Henríquez, requesting the dissolution of the Comité Pro Paz and arguing it was an instrument for the Marxists).

43 Not all the cases were solved unanimously. The differences were not important enough for the members to state them in the report.

enough attention was paid to the state of war in the country), that it was unilateral (because it only considered the victim's version), and that it was biased (as an attack on the armed forces and their patriotic contribution to peace and order).<sup>44</sup> Yet, not one single case or fact was contested as being untrue. The critics could only single out some of the more general interpretations or recommendations established in the report. The facts remain uncontested, a point that the government strongly argued in response to the army's statement. As I will argue later, a positive recognition by the critics of the report would have been of enormous importance.

#### 4. An Official Truth

An effort for an authoritative truth needed an official commission. It also was important that the commission be a state entity because of the political significance it represented. It was the same state that had violated human rights in the past and was now hearing the cases and gathering the information. This state role was especially important for the relatives of the victims. Although they have had access to nongovernmental organizations and international commissions and had received their support and comfort, the relatives pointed out that those were not official entities. As one relative said, "I don't want to have secret consultations any more."<sup>45</sup> The Chilean flag was at the entrance of our building and on top of every desk where a testimony was given. The same flag that was used so many times by the propaganda of the military was being recovered. It was a first reparation to their long standing feeling of marginality. "We feel like exiles in our own land,"<sup>46</sup> were the words used by one of them to express this common feeling.

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44 The army, in its final declaration, stated its fundamental disagreement with the report of the Commission and denied its historical and legal value. See EL MERCURIO, Mar. 28, 1991. The navy said that the situation in Chile during the coup was that of a virtual civil war and denies the value of the report because of its procedures, saying that the Commission recognized that not all gave their version of what had happened. *Id.* For an answer of the police, see EL MERCURIO, Mar. 29, 1991.

45 REPORT, *supra* note 1, at 785.

46 *Id.* at 780.

## 5. Publicly Exposed

For all this effort to have some meaning, it was indispensable that the report be made public. Only one single copy of the report was released to the President, who read it during his summer vacations in 1991. He made the entire report public on March 4, 1991. It was fully published in a newspaper the very next day.<sup>47</sup> Many new reprints were made and sold in the streets during the next several months. Finally, a three volume book appeared in the bookstores. A private group of politicians, scholars, and people related to cultural activities edited a short summary of the report in order to make a public campaign for its acknowledgement and discussion. That very short summary was translated into English<sup>48</sup> and French. The Center for Civil and Human Rights at the Notre Dame Law School is currently translating the full report into English.

The collected records and data have been kept secret to this day. The Commission for Reconciliation, an institution recently established by law, will dispose of them.

Whether the Commission should have published the names of the individuals that had actually committed the violations of rights was a publicly discussed issue. The Commission understood that it could not do so. As a special entity different from a court, it was clear from the beginning that it lacked the authority to try the violators, a right that only the preestablished courts could perform.<sup>49</sup> Because a full trial with due guarantees was not conducted in every case, the Commission understood that it could not disclose names. Instead, the Commission stated in every conviction that public officials had intervened, and their membership is frequently identified as if they were part of a branch of the armed forces or of the secret police. The Commission also published the places where people were killed or tortured, but the names of violators were not publicly disclosed.<sup>50</sup>

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47 DIARIO LA NACION, Mar. 5, 1991.

48 CHILEAN HUMAN RIGHTS COMMISSION, *TO BELIEVE IN CHILE* (Jean Becker trans., 1992).

49 Decree No. 355 clearly states that it should not perform judicial functions. See *supra* note 17; see also CHILE CONST. art. 19, no. 3 (1980) (guaranteeing that nobody can be tried by special commissions, but only by courts created by law).

50 For a more complete explanation, see REPORT, *supra* note 1, at 28-30.

## 6. Quick and, Thus, Limited

The official truth could not be delayed for too long, or both its importance and impact would have been severely diminished. The Commission was given six months to deliver its report, with a possible extension of three more months, which it used. In such a time period it would have been impossible to issue a statement that addressed all the cases of human rights violations that had occurred in the country during seventeen years of military government. It would have been impossible, not only because of the number of cases, but it also would have been difficult to distinguish what should have been counted as a human rights violation. The President decided that the Commission should only investigate the cases resulting in the death or the disappearance of the victim, and those cases where the Commission concluded that the state was morally responsible because of the involvement of a public official or a person working for the government. The President also decided to include one other type of case: those killed for political reasons. This meant that the Commission also had to report the actions of the guerrilla and liberation movements responsible for someone's death.<sup>51</sup> This was criticized by some human rights scholars, who argued that considering political crimes not committed by the state as human rights violations on the same level as the others was a great mistake because it deprived the notion of violation of human rights of its force. The Commission was careful in saying that cases could not be compared and that they were different in many ways.<sup>52</sup> I would certainly argue today that it was politically important to include those cases.

In choosing only to investigate and disclose the truth about the people killed or missing, the government not only selected the most dramatic situations, but in so doing it also chose to focus on the truth that was more clearly denied by the human rights violators. Others, like exiles, restrictions on the press, and violations on socio-economic rights, were not denied but excused as justified under the emergency conditions. Torture was also denied. Only because of time constraints could it be considered legitimate to leave the individual cases of torture aside. The report made an effort to generally describe the practice of torture and illustrated

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51 *Id.* at 432-441, 602-06, 665-701.

52 *Id.* at 17-19.

its explanations with some examples.<sup>53</sup> The report of the Commission only incidentally refers to those who lost their jobs for political reasons, suffered major physical or psychological injuries, had to go to exile, or were kept in prisons for long time without charges.

#### IV. WHY THE TRUTH?

I will consider now the importance of publicly disclosing an official truth, and its impact on the goals of prevention, compensation, and reconciliation, the three issues considered by the democratic government as the basic moral obligations that it could not compromise. I will start by focusing on prevention and its relation to penal sanctions.

##### A. *Truth and Prevention: Truth as a Lesser Alternative of Punishment*

It is commonly accepted by legal doctrine that the goal of penal sanctions are retributive and preventive. The first is highly contested as a desirable end in society, while the second is generally accepted.

##### 1. Retribution

The retributive function of penal sanctions is illustrated by the classic examples of Kant, in which he argues that criminals should even be punished by a society living on an island that decides to dissolve itself.<sup>54</sup> According to this theory, penal sanctions have a moral, autonomous, and obligatory character. When applying this theory to militarily imposed human rights violations, however, major problems arise. According to this theory, all wrongdoers should be punished. This would severely restrict the theory of due obedience to superior orders. This is not to claim that the theory is wrong or morally illegitimate. Yet, it illustrates the difficulties of fully complying with Kant's theory when there are political restrictions.<sup>55</sup> Moreover, even if one is not dealing with human rights

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53 For the concept of torture used by the Commission, see *id.* at 25. For a description of the practices of torture during the different periods, see *id.* at 111-14, 478-83, 651-53.

54 IMANUEL KANT, *DIE METAPHYSIK DER SITTEN* (F. Nicolovious Koenisberg ed., 1797).

55 An interesting analysis of this topic related to the Argentinean situation can be found in Luis Moreno Ocampo, *Justicia y Derechos Humanos Balance y Futuro*, C.E.D.E.S. (1991) (unpublished paper, on file with author).

violations during transitions to democracy, one would have to recognize that in any given system, only a minority of the crimes committed are actually punished by the state.

The only way that an outcome can be consistent with the goals that the retributive theory assigns to penal sanctions is obviously through judicial application of prison sentences. One cannot meet them through other ways, and the Chilean results could not be justified in these terms.

## 2. Prevention

Utilitarian arguments justifying criminal sanctions have normally considered its preventive character. This preventive character may be achieved because of the following: First, the society protects itself from the wrongdoers by keeping them in jail; second, it avoids future criminal actions committed by the wrongdoer through the threat that the actual sanction poses to him or her; third, it may rehabilitate the criminal through some kind of specialized treatment; fourth, potential, future wrongdoers may be persuaded not to act considering the costs they can be obliged to pay by way of the penal sanctions; and fifth, the criminal sanction reinforces the desired values in the general community.<sup>56</sup>

It can be argued that any of the first three reasons may be convincing in dealing with human rights violations committed by a military regime. They are all reasons directed at preventing future crimes by the actual criminals that have already committed them. I will not argue that those who committed the human rights violations in Chile, and especially those who planned and directed them, have no personal responsibility in doing so. Yet, I would argue that if one accepts preventing criminals from future criminal actions as the goal of criminal punishment, then, sending human rights violators to a jail is not a very effective device. I think it is generally accepted that these people cannot be rehabilitated through special treatments. Their commitment to crime is largely due to ideological fanaticism. Nor is it convincing that their future criminal action would be dissuaded by their actual imprisonment. Except for very few cases, they will violate human

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56 H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); JOSÉ ANTÓN ONECA, *LA PREVENCIÓN GENERAL Y LA PREVENCIÓN ESPECIAL EN LA TEORÍA DE LA PENA* (1945); SANTIAGO MIR PUIG, *DERECHO PENAL, PARTE GENERAL* (1984). For a more recent discussion about the role of criminal punishment in Latin America, see EUGENIO RAÚL ZAFFARONI, *EN BUSCA DE LAS PENAS PERDIDAS* (1989).

rights again only if they recover political power. And under such conditions human rights violations would again be granted impunity. The preventive theory in this area is related not so much with the past wrongdoers, but with the conditions that made it possible. The two other arguments of the preventive theory are directed towards those conditions.

The last two reasons justifying the preventive theory of punishment—persuading potential criminals not to act and reinforcing the positive values in society—are, from my own perspective, the most important goals a democratic government must achieve when dealing with past human rights violations. I am convinced that one of the most important moral obligations of a government conducting a transition to democracy is to prevent future human rights violations. In order to do that, social repudiation of past human rights violations is of great importance. It sends a message to potential violators that the society grants no legitimacy to their actions and that it is willing to punish them.

The second reason, social reinforcement of the doctrine and the values of human rights, is probably the most effective way to prevent future violations. A culture that views such actions as highly illegitimate makes it less probable that any political actor in need of popular support would be tempted to violate them. If my argument is correct, then the most important justification for punishing human rights violators during a transition to a democracy is that the criminal sanction best expresses society's moral repudiation of the human rights violations. Punishment appears then as a means and not as an end in itself.

I would certainly argue that the criminal sanction is the best means, the best way to express and reinforce social repudiation. Full disclosure of the truth may be considered a second best option because it demonstrates the moral repudiation of the violations and helps society remember the facts.

But perhaps I passed too quickly through the issue of rehabilitating the criminal. There is a related problem in human rights violations, and it is of maximal importance. I refer to the task of destroying the organization that was built up for violating human rights. In the Chilean case, that organization was highly institutionalized and was transformed into a department of the army that today performs intelligence functions. Many, though not all, of the officers that were involved in human rights violations are now retired.

If one compares the situation of Chile with that of Argentina, some paradoxes exist. The Argentines made an attempt to punish the human rights violators. Military intervention threatening democracy was successful enough to restrict punishment only to the most important political figures, who were afterwards pardoned. One could conclude that such a situation of partial justice was not unlike the Chilean situation by referring to the previously discussed goals of general prevention. But a great difference can be seen in the changes that the democratic rulers could make in the armed forces. As a faction of the Argentinean armed forces struggled violently in support of their former leaders, Alfonsín backed the loyal officers who were able to beat and retire the most radical officers. But, in order to gain such loyalty from the moderate militaries, the government had to guarantee them that its punishing policies would be restricted. Through such concessions, the government cleaned the army of its most dangerous people.<sup>57</sup>

Other means are especially relevant in this effort to prevent human rights violations, and the Commission addressed some of them: the approval of international covenants of human rights, the reinforcement of the internal legal system, and others. Two seemed especially important in the Chilean situation. The first was the reinforcement of the Chilean judiciary in its capacity to protect human rights. The report of the Commission extensively analyzes this fact.<sup>58</sup> Shortly after announcing the report, the President stated that many judges had lacked moral courage in dealing with human rights cases. The Supreme Court reacted very strongly to both the Commission's analysis and the President's statement.<sup>59</sup> A public discussion on the role of the judiciary followed, and a compromise is now being achieved among the political parties. Some changes will be made in the judicial structure to reinforce its accountability to the people and its modernization, while still protecting its independence.

Another preventive issue that the report addresses is the need to reinforce the values of human rights in the culture of the

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57 See Acuña, *supra* note 4.

58 REPORT, *supra* note 1, at 843-52.

59 The Supreme Court strongly criticized the report stating that the Commission went beyond its mandate, that it unjustly criticized the role of the courts, and states that the judges went as far as the law permitted them in the protection of human rights. A complete version of the answer was published in EL MERCURIO, May 16, 1992.



country. Some measures are now being undertaken to introduce the topic of human rights in the curriculum of elementary schools.<sup>60</sup>

### *B. Truth as a Starting Point for Reparation*

As prevention of future human rights violations is a very important moral obligation in the type of situations on which I am focusing, another inescapable one is the need to compensate, to the extent that it is possible, the suffering of the people most severely affected. To comply with this obligation, the truth seems indispensable.

To be sure, full compensation for the suffering of the victims and their relatives is impossible, but that does not eliminate the obligation to do whatever is possible. It is also true that compensation should come directly from the wrongdoer. Although too long to argue, I would make the case that in situations of past human rights violations, an obligation arises for the state and for all of society to involve itself in that reparative process.

It became clear early to the members of the Commission that a full disclosure of the truth had enormous links with the beginning of a reparative process and in the way we came to understand it. The report frequently insists that a meaningful reparative process must express a recognition of the truth, both by the state and society. "The reparative process presupposes the courage to face the truth and to bring about justice: requires the generosity to recognize the responsibilities and the attitudes of pardon in order to achieve reconciliation."<sup>61</sup> It is the recognition of the truth that produces the three basic components of the compensatory process upon which the Commission focused. These components include the following: First, the disclosure of the truth and the end of secrecy as reparation; second, expressions signaling the recognition of the dignity of the victims and the pain of their relatives; and third, efforts to increase the quality of life of the relatives of the victims.

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60 There is a bill that has been enacted by the Education Department (Ministerio de Educacion), that must be approved by the Superior Council of Education (Consejo Superior de Educacion), called "Bill of Fundamental Objectives and Minimal Contents for the Elementary and High School Education." This bill establishes some minimal requisites that all schools must fulfill. Among other things, this bill requires that students be taught the importance of human rights.

61 REPORT, *supra* note 1, at 824.

### 1. Truth as One of the Most Important Components of the Reparative Process

The suffering of the relatives of those killed and missing is the pain that anybody suffers when losing a beloved, yet it is much more. Among those considerations, violence and secrecy are of great relevance. As one relative stated:

My mother died a year ago, and I told myself that she was finally at rest. My father died when I was young and I told myself that that was going to make me mature and responsible. Concerning the unjust and inexplicable death of my husband, I can find no meaning.<sup>62</sup>

Another said, "I had to explain to my five year old son that as human beings destroyed the lives of the flowers and the animals, sometimes human beings killed human beings."<sup>63</sup> If those words, spoken to us by the relatives themselves may explain the extra suffering of violent crimes, the following may express the extra suffering because of secrecy: "I have been looking all around the world. I have lost all I have because of the false information that was given to us, all false. I need to rest and die peacefully. That is why I need to know what happened to my son."<sup>64</sup> As another stated, "Even if nothing else can be done, even if it may seem of no use, I need to know why they killed him, what happened, what was he doing, or how did they discover him. Anything that would bring my mind to rest."<sup>65</sup> Secrecy affects not only the people who need to know the truth about what happened, but it is also frustrates the need for social recognition. Other statements made by the relatives may explain this need. As one relative stated:

I was taken prisoner in the same truck as my husband. His parents came to believe that I had denounced him. I could not enter into their house during seventeen years. I was left alone, hated by those who had killed him and scorned by those who loved him. What happened in this country that people can believe that a woman in love is capable of turning in her husband?<sup>66</sup>

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62 *Id.* at 767.

63 *Id.*

64 *Id.* at 771.

65 *Id.*

66 *Id.* at 777.

The truth is especially indispensable in the reparative process of the relatives of those missing:

Until recently we were expecting to find him alive. Today we are looking for his bones. This will never end . . . this long nightmare, from which I don't know any more if I can awake because I forgot normal life. . . . I need to know what happened to him. . . . Every time I eat good food, I ask myself if he is not hungry.<sup>67</sup>

As I said before, although some progress was made by the Commission, it was, to a large extent, incapable of finding this truth about the missing people.

## 2. Recognition of the Dignity of the Victim and of Relatives' Claims

Not only did the relatives have to suffer the loss and the secrecy, but they also had to suffer a long campaign where their relatives were treated as the worst criminals in the world. A newspaper tabloid entitled, "They killed themselves like rats do,"<sup>68</sup> explained that some people were killed by their comrades after there had been an armed struggle between factions of the extreme left. This version was then discovered to be a covert action of the Chilean secret police to explain the deaths of people they had previously arrested.<sup>69</sup> Again, some relatives said, "In the first meeting we had with the governor he told us that our husbands were criminals."<sup>70</sup> Still another relative stated, "The newspapers said that they were terrorists. With that, everybody justified their murders."<sup>71</sup> This propaganda affected all the population, especially the children: "In the school I was told, 'your father was killed because he was a politician.' We were called the small terrorists."<sup>72</sup> As one person stated, "This was like the plague, both relatives and friends turned their backs on us."<sup>73</sup>

Following the general proposals of the Commission, some, though few, symbolic acts have taken place both to remember the dignity of the victims and to keep the social memory of the

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67 *Id.* at 771.

68 *Id.* at 482-84, 610.

69 *Id.*

70 *Id.* at 780.

71 *Id.*

72 *Id.*

73 *Id.*

facts.<sup>74</sup> The President made a solemn declaration of the dignity of the victims when he presented the report. Congress followed with similar acts. Artists have been working on symbols in the cemetery and in other places. Public parks have been proposed. A national symbol, like the impressive one that the United States has built to keep alive the memory of the Vietnam war and its casualties, is still lacking.

Not only a recognition of the facts and the victims is needed, the relatives also need the social recognition that the battle they have fought for many years was not a campaign of marxism but the expression of their deeper sentiments. For many years, they were told lies and the official version was not that they were fighting for truth and punishment, but that they were trying to subvert the political order. The country has also benefitted from recognizing the enormous signs of life, solidarity, and compassion that can be gained from examining the victims' organizations and movement.

### 3. Compensating for the Quality of Life

The Commission also recommended that measures be taken to compensate the relatives of the victims.<sup>75</sup> First, the Commission recognized that there were many unresolved legal problems for the families of those missing that the ordinary legislation could not adequately resolve. Second, the Commission proposed that the state freely provide physical and psychological treatment. As to the psychological effects on the families, much literature has been written, and I am no specialist in that field. One of the psychological effects that most impressed me while working in the Commission was the guilt that many spouses felt. There were no accepted norms of how to live in such situations. Some spouses felt that they had dedicated themselves "too much" to finding out about their spouses and felt guilty because they had abandoned their children who were also suffering. On the other hand, spouses had moved away from their communities soon after their husband or wife had disappeared and had dedicated themselves to raising their children. These spouses were often viewed by themselves and their children as traitors of the memory of their spouses because

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<sup>74</sup> Some actions have been taken to build a monument in the main graveyard of Santiago, in honor of all those who died as victims of human rights violations during the dictatorship.

<sup>75</sup> REPORT, *supra* note 1, at 827-35.

they could have dedicated more time on behalf of the organization or trying to find their relatives.

Another component of reparation that the Commission proposed was to grant scholarships to the sons and daughters of the victims. The legislature recently approved such a measure. Finally, the Commission proposed that the state provide a pension for the relatives of those considered victims. A law was finally approved in February, 1992, granting state pensions to the parents, spouses, and young sons and daughters of those considered victims by the report.<sup>76</sup>

Although these social expressions of recognition have generally been accepted and welcomed by the relatives, they insist that justice should be achieved and that the truth about those missing is absolutely indispensable in bringing about reconciliation.<sup>77</sup>

### *C. Truth and Reconciliation*

I will now turn my attention to a final and very important point. It focuses on the issue of reconciliation. The Commission was not only an entity created to disclose the truth, but it was also created to bring about reconciliation. Reconciliation was an extremely important moral goal of the transitional government.

The relation between truth and reconciliation is evident. I will only focus now on two components, or possible meanings of the word reconciliation. One is depolarization, and the other deals with the problematic issue of reconciling the people with their history.

#### 1. Reconciliation as De-Polarization

One of the biggest problems that frequently faces a government during a period of transition to democracy is the one of a polarized society. To bring about peace is then a necessary goal of the new democratic government.

After the creation of the Commission, the military and the political right publicly stated their fears that the truth would open old wounds from the past that the country had successfully overcome, and that it was going to create again (and now artificially) a division among the Chileans. The government insisted that the

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<sup>76</sup> DIARIO OFICIAL § 19.123 (1992).

<sup>77</sup> See Sola Sierra, Speech as President of the Association of Relatives of the Disappeared Detainees (Jan. 1992).

truth was a moral obligation and that the old wounds were not healed but merely bandaged. Analogies to the situation of gangrene were frequently made.

Relatives and human rights groups recognized that the creation of the Commission was a good decision, a step in the right direction, though they claimed that justice was also necessary. They probably understood that the government could do no more at that moment, and their demands for more forceful steps were frozen. Viewing it from a political perspective, the creation of the Commission produced an important result. It postponed for a year a discussion that was viewed as highly dangerous for the stabilization of democracy. The democratic government had time to prove and reinforce its authority before facing one of its most difficult topics. Finally, the issue of the creation of the Commission dissolved itself in a way that will be analyzed later.

The truth brought some relief and moral compensation for the relatives of the victims. While insisting that it is not enough, they have frequently recognized the work and report of the Commission as being of enormous value. The relatives' strongest criticism of the Commission is, of course, the old, largely unanswered question of where are the missing?

If justice cannot be achieved, what else can be done? When delivering the report, President Aylwin, in a solemn and emotional moment of his speech, said with a broken voice, "That is why I endeavor, as the President of the Republic, to assume the representation of all the nation in order to, in its name, acknowledge accountability to the relatives of the victims."<sup>78</sup> He continued to "solemnly request the armed forces and all those who could have participated in the excesses committed, to make gestures of recognition of the suffering caused and to collaborate in diminishing it."<sup>79</sup> His statements were widely commented upon and they were followed by some similar words from leaders of the right-wing parties. The President's speech was a major sign of reconciliation.

The second request was not followed. Full recognition of the truth by the armed forces and some gestures to demonstrate this on their part would have made an enormous change in the situation and could have transformed a situation of impunity into a situation of pardon. As a mother of a victim once said, "I want to

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78 EL MERCURIO, Mar. 5, 1991 (translated by the author of this Article).

79 *Id.*

pardon; just tell me, whom should I pardon?" Even from a religious perspective, pardon requires the acknowledgement by and repentance of the wrongdoer. Armies, however, except when they are beaten, do not excuse themselves. The reaction of the Chilean armed forces, and especially the reaction of the army was not, unfortunately, an exception.

## 2. Reconciling People with Their History: Accepting the Truth

Finally, one can give another meaning to the word reconciliation. Men and women not only need to reconcile with each other, but they also need to reconcile themselves as a people. They need to reconcile their own history as a nation. History is their mirror and, in order to reconcile themselves, they first need to recognize themselves in that mirror.

The Chilean situation is difficult in this area. We like to see ourselves as a highly civilized nation. It is part of our national myth to call ourselves the "Englishmen of Latin America." We take pride in our history of democratic stability, and we used to love to make comparisons with other Latin-American countries that had a worse record than ours. Our national anthem names Chile as the asylum against oppression. Violence, torture, and massive human rights violations were reserved for those "banana republics," as we used to call them with arrogance.

Soon after the delivery of the report, politicians started discussing responsibilities for the crisis of the democratic government. Some talk addressed the issue of who was responsible for human rights violations. But the discussion about how Chileans involved themselves in sophisticated methods of torture, or how Chileans could hate each other so much that such massive and gross human rights violations could take place were never seriously addressed. Chileans could not handle facing for too long the worst part of our collective history, except at the superficial, political level. The introductory chapters of the report were widely discussed, but an explanation of the facts described there was never seriously attempted.

Perhaps it is too early to expect such a collective reaction. The time for the artists and the psychiatrists' explanations will come. Perhaps the report came too late. The country had already known about the horrors by rumors and partial stories when nothing or very little could have been done and when the only way to stay alive was to continue minding your own business, while acknowledging that something was happening to somebody else.

A month after the report was made public and the media and public opinion had focused widely upon it, somebody killed one of the most influential young leaders of the right, Senator Jaime Guzman. Attention shifted from the "past" to the dangers of the future. Political violence and delinquency became the new issues. As one politician said, the report of the Commission was buried with Jaime Guzman. Yet, the report remains as a testimony of horror.

To be sure, not wanting to face and discuss the issue any more is not a frivolous reaction. It comes from a people who can no longer suffer from the stories of horror that they have finally come to believe. Yet, the question remains whether the country has looked at these horrors enough to build a sufficiently strong cultural barrier against the possibility of that happening again.



