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Decommunization: Human Rights Lessons from Past and Present, and Prospects for the Future

Keywords

Human Rights Law, Law Reform, Trials

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I. INTRODUCTION

The countries of Eastern Europe are undergoing the nearly impossible task of attempting to right some of the wrongs brought about by more than forty years of communist rule and domination. Although "decommunization"¹ has taken different forms in the various countries involved, there are several core issues that will need to be addressed by each of these newly formed governments: (1) What should be done about private property that had been confiscated by communist (and/or Nazi) authorities?; (2) What does the citizenry have a right to know about the contents of secret government files?; (3) How, and to what extent, should government institutions and certain occupations "purge" themselves of communist influence and personnel?; (4) Under what circumstances should officials and officers of the former communist regimes be brought to trial?; and finally, (5) How should victims of the various communist regimes be rehabilitated and what means of restitution, if any, should be offered?

To date, the steps to address these questions have been uncertain, piecemeal, and halting at best.² In one East European country after another, it is not clear who or what is driving decommunization, how far it will go, or what it is seeking to accomplish. Moreover, there is a rising concern that, rather than seeking to achieve some measure of justice or to redress some egregious wrongs from the past, much of what is passed off as decommunization is little more than an attempt to find a few convenient scapegoats or the carrying out of personal or political vendettas.

Nevertheless, many Eastern European countries already have achieved greater success in coming to terms with the wrongs and horrors of the past than other countries that have made similar efforts.

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1. The process of attempting to remove the elements of a formerly repressive regime has gone under different names, depending on the circumstances involved. For example, following World War II, Italy went through a period of defascistization. In the 1970s, Greece pursued a policy of dejunfification, and so on. The current undertakings in Eastern Europe have been called both decommunization and debolshevization.

2. *Eastern Europe's Past: The Complexities of Justice*, THE ECONOMIST, Mar. 21, 1992, at 21.

There are several reasons for this. For instance, most people in these Eastern European countries desperately wanted to see the fall and dismantling of their communist governments. While this phenomenon is not much different from what has occurred in a number of other newly democratized countries, what does distinguish the situation in Eastern Europe is the fact that the military and secret police have lacked the power to resist such change even if they had been of the mind to do so. Because of this, the generalized fear of retaliation that continues to inhibit some other attempts at democratization, such as in Nicaragua, has not proven to be a major problem in Eastern Europe.

This does not mean that decommunization will necessarily proceed smoothly, or that it will even begin to uncover the sins of prior regimes or make restitution to their victims. For one thing, communist rule was so complete, and continued for so long, that few, if any, aspects of the governing apparatus were not dominated by it, including the judiciary. As a result, there is a basic problem of finding individuals qualified — professionally and, more importantly, politically — to pass judgment on the actions and policies of communist rule.³

Related to this is the inability to escape the duplicity that marked communist rule. As decommunization inexorably proceeds, and as the crimes of the past are uncovered, the distinction between friend and enemy becomes even more blurred than it had been previously. Almost daily there are new revelations that many who previously were thought to be the staunchest foes of communist rule, in some way, found it necessary or politically expedient to collaborate with it instead.⁴ Beyond this, scores of individuals have now come to the realization that even those thought to be their closest associates were really anything but this. What makes decommunization so bizarre and so unsettling, however, is that it is by no means certain whether such "revelations" really are what they purport to be. In short, it is politics as usual — or is it? From a societal point of view, these daily occurrences have engendered a cynicism that will make decommunization difficult if not impossible to achieve. The question truly becomes whether *anyone* can be trusted?

Another legacy of communism is the notion that there is only one "correct way" to go about changing the system, which has always been orchestrated through the governing apparatus. Despite the ostensible

3. One country that seems to have been able to accommodate those needs has been Poland, which essentially has been purging the judiciary for nearly a decade. Stanislaw Frankowski, *The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo W Polsce Ludowej (The Judiciary in Peoples' Poland (1989))*, 8 ARIZ. J. INT'L & COMP. L. 33 (1991); Anna Sabbat-Swidlicka, *Toward an Independent Judiciary*, REP. E. EUR., Sept. 14, 1990, at 28.

4. John Tagliabue, *Eastern German is Investigated*, N.Y. TIMES, Feb. 5, 1992, at A5; John Tagliabue, *Eastern German Quits Over Link to War Atrocity*, N.Y. TIMES, Mar. 11, 1992, at A7.

rejection of the communist system and its values, the new East European governments will have some difficulty accommodating themselves to any kind of pluralistic political system. Added to this are the previously submerged rivalries between different ethnic factions in various parts of Eastern Europe that threaten to engulf the entire region, including, most notably, the ongoing genocide in the former Yugoslavia.

All of the East European countries are poor; some, like Romania, are desperately poor. This raises the question of whether a country can pursue *both* democracy and justice at the same time. Several newly democratized governments in this similar situation, such as the Latin American countries, have taken the position that trade-offs have to be made between the two, and often the pursuit of justice has been made subservient to the goal of constructing a democratic society.⁵ Whether these two ends really are in conflict is open to debate. More importantly, perhaps, is the *perception* that justice is backward-looking, whereas democracy focuses on creating a better future.

The biggest hurdle of all to decommunization may be the inexorable return of the former communists to power under the banner of various socialist parties.⁶ The quintessential question is whether the decommunization efforts that have taken place will stay, or possibly continue, when those being investigated for past crimes continue to hold some levels of power.

Although certainly unique in their own way, the present transformations in Eastern Europe are not unprecedented.⁷ Thus, it might be useful to understand how other societies have undertaken to examine their own pasts and with what results. Part II of this article uses several examples to examine this issue: the treatment of Confederate officials following the American Civil War; denazification after World War II and comparable efforts in Japan; the overthrow of dictatorships in Spain, Portugal, and Greece during the 1970s; democratization in

5. For a more extensive discussion of this point, see Mark Gibney, *The Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community*, 24 CASE W. RES. J. INT'L L. 165 (1992).

6. A.M. Rosenthal, *So Back Come the Appartchiks in Eastern Europe*, INT'L HERALD TRIB., Aug. 10, 1994 (commenting on the strong electoral showings of former communists in nearly all of the eastern bloc countries as well as the former Soviet republics).

7. See generally GUILLERMO A. O'DONNELL ET AL., *TRANSITION FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES* (1986); *STATE CRIMES: PUNISHMENT OR PARDON?*, Papers and Report of the Conference of Nov. 4-6, 1988 (1989); U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 32nd Sess., U.N. Doc. E/CN.4/Sub.2 (1985), *Study on amnesty laws and their role in the safeguard and promotion of human rights*, 38th sess. (preliminary report by Mr. Louis Joinet, Special Rapporteur).

Brazil, Uruguay, Argentina, and Chile; and finally, similar problems currently being faced in El Salvador, Nicaragua, and South Africa.

Part III provides an overview of the decommunization efforts that have taken place in Eastern Europe to date, as well as those that are likely to occur in the future. The problem in attempting to catalog these events is that they change almost daily. Thus, more attention will be given to overall trends rather than particular events. Finally, Part IV takes a step back and asks what goals decommunization ought to have as well as the proper means of achieving these objectives. The new governments need to establish the truth about the nature of communist rule. While it is important to prosecute those responsible for past crimes, as well as to indemnify those who suffered the most under the old order, it is even more vital for these governments to recognize the social, moral, political and personal disintegration that was the most devastating aspect of communist rule.⁸ Perhaps the most important objective that decommunization ought to work towards is first to acknowledge and attempt to understand the past, and then to begin a process of healing in these ravaged societies.

II. HISTORICAL AND CONTEMPORARY EXAMPLES

A. *An American Dilemma: Settling Accounts with the Confederacy*

Nearly 130 years ago the United States government faced a situation with certain parallels to what Eastern European countries now face: namely, how to deal with former officials of the overthrown Confederate regime. As we will see, many of the same conflicts that were largely responsible for the war itself continued to play out through Reconstruction. In addition, the question of the appropriate policy to follow with former Confederate officials brought about severely strained relations between Congress and the Executive, eventually culminating in the unsuccessful effort to impeach and remove President Andrew Johnson from office. Finally, and with decided parallels with the *nomenklatura* in several Eastern European countries such as Romania and Bulgaria, the Confederacy example shows just how intractable the old guard can be, even after a devastating military defeat. A short time after the end of the Civil War, it was politics as usual in the South as many former Confederate officials eventually took their "rightful" place at the seat of power. Those who were victims of the old regime, Southern blacks in particular, soon found themselves in positions that were no better than those that had existed prior to the war, and some which were arguably worse.

The first attempt to address the treatment of Confederate officials after the civil conflict was over was made by President Abraham Lin-

8. For an excellent account of the relationship between political and personal disintegration in Eastern Europe, see IVAN KLIMA, *JUDGE ON TRIAL* (1993).

coln midway through the war. On December 8, 1863, Lincoln issued a Proclamation of Amnesty and Reconstruction that, subject to the exceptions listed below, set forth a plan to pardon former Confederate officers who would take an oath to support "the Constitution of the United States and the Union of the States thereunder."⁹ Those who were ineligible for the pardon were officers in the Confederate army and navy above the rank of colonel and lieutenant, respectively; those who had resigned commissions in the United States and aided in the rebellion; civil and diplomatic officers of the Confederacy; those who had left judicial and congressional posts in the U.S. government to join the Southern states; and those who had engaged in the mistreatment of prisoners of war.¹⁰ The Proclamation also stated that when persons equal in number to 1/10 of those who had voted in the presidential election of 1860 had taken this oath and established an appropriate government, such state government would be recognized.¹¹

Congress was of a much different mind. The Wade-Davis bill that made its way through both houses of Congress would have required a majority of enrolled white citizens to take an oath to support the Constitution before a convention to reconstitute the state government could be called.¹² Moreover, in order to be a delegate or to vote for a delegate to such a convention, one had to take what was called the "ironclad oath" contained in the Act of July 2, 1862.¹³ The oath affirmed that the person had never voluntarily taken up arms against the United States, given aid to persons in rebellion, or exercised the functions of any office under the Confederacy. Moreover, under the Wade-Davis legislation, those who in the future held office, civil or military, except merely ministerial offices and military offices below the grade of colonel in the Confederate army, were declared not to be citizens of the United States.¹⁴ In explaining the rationale behind this legislation, Representative Davis, one of the sponsors of this legislation, claimed that the war "has placed citizens of rebel states beyond the protection of the Constitution, and that Congress has supreme power over them as conquered enemies."¹⁵

The Wade-Davis bill never became law because of a pocket veto exercised by the President. In response to the restlessness in Congress, on May 29, 1865, Lincoln issued a second Proclamation of Amnesty and Reconstruction, saying that while he was unwilling to give formal approval to the Wade-Davis legislation, he regarded the system set

9. JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON 34 (1953).

10. *Id.* at 35.

11. *Id.* at 36-37.

12. JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 19-20 (1961).

13. *Id.* at 20.

14. *Id.*

15. *Id.*

forth in the bill "as one very proper plan for the loyal people of any State choosing to adopt it."¹⁶

Following Lincoln's assassination, the conflict on this issue between the President and the Congress only heightened. While Congress was out of session, President Johnson attempted to enact a plan that was far more lenient than that proposed by his predecessor. Rather than requiring action by a majority of voters as the Wade-Davis bill would have required, or adopting Lincoln's "ten percent" plan, Johnson sought to re-admit a number of Southern states simply when "that portion of the people . . . who are loyal" had written a constitution.¹⁷ In addition, under a very generous pardon plan, among those now considered "loyal" to the Union were former top officials in the Old Confederacy. The generosity of Johnson's plan, but also the resistance to change in the South, was exemplified by the 1865 congressional elections. Among those elected to the 39th Congress were the Vice-President of the Confederacy, four Confederate generals, five Confederate colonels, six Confederate cabinet officers, and fifty-eight Confederate congressmen.¹⁸

Congress subsequently refused to seat these Southern delegations.¹⁹ The fight between the President and Congress continued. Over a presidential veto, Congress passed the Act of March 2, 1867, granting freed blacks the franchise for the first time.²⁰ Under this legislation, the only whites allowed to vote were those who had taken the "ironclad oath."²¹ Consequently, of the 1,363,000 registered voters in the former Confederate states, 660,000 were white, and 703,400 were black.²² For a brief period, blacks held government positions in the South, although the extent of what has been termed "Negro rule" has been greatly exaggerated. During his tenure in office, President Johnson established liberal guidelines for issuing individual pardons. In addition, Johnson proclaimed a number of general amnesties for Confederate officials, the final one occurring on Christmas day of 1868, that had the effect of pardoning nearly every former Confederate, including the unrepentant Robert E. Lee.²³ Soon enough, the "new" South began to resemble the old Confederacy. Federal authority over the southern states was in large part withdrawn, and one immediate result was greatly increased violence against freed blacks by such "underground" organizations as the newly created Ku Klux Klan.

16. *Id.*

17. *Id.* at 30-31.

18. FRANKLIN, *supra* note 12, at 43.

19. *Id.* at 56.

20. *Id.* at 70.

21. *Id.* at 81.

22. *Id.* at 80.

23. *Id.* at 83.

As early as 1871, only a few short years after the end of the Civil War, reconstruction was in shambles. Blacks were now effectively disenfranchised through intimidation and violence, despite the promises of the Fourteenth and Fifteenth Amendments. In addition, the establishment of "black codes" actually increased the level of racial segregation from what it had been previously and only worked to make the plight of blacks that much worse.²⁴ Finally, by the early 1870s, former Confederates were firmly entrenched in power, politically as well as economically. As historian John Hope Franklin has suggested, the Civil War and the Reconstruction period actually brought about far greater change to the North than it did to the South.²⁵

In sum, within a short period of time after the Civil War, virtually all efforts to prevent former Confederate officials from exercising political power had failed. The ideal expressed in Lincoln's Second Inaugural Address, "with malice toward none, with charity for all," was never realized. Instead, the continued influence of the rebels had been achieved much more through intimidation, violence, and the exercise of raw political power.

B. *Post-World War II*

1. Prosecuting Major German and Japanese War Criminals

The international proceedings against leading German and Japanese officials after World War II also parallel the situation the Eastern European Countries now face.²⁶ Although the number of Axis leaders convicted at Nuremberg and Tokyo was relatively small,²⁷ these trials were vital in at least two respects. The first was that these guilty verdicts established under international law the principle that the leaders of a nation could be held accountable to the world community for their actions. John Appleman writes that

[t]his was the first time that those in command of a nation's destinies have been called to general account. True, there have been isolated instances where losing leaders have been exiled or slain, but these were the price of defeat, not lawlessness. Henceforth, no leader can initiate or wage war with impunity. It is no longer his victory if he succeeds and the nation's loss if he loses. He may be called to personal account in future tribunals.²⁸

24. For a more extended treatment of this subject, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966).

25. FRANKLIN, *supra* note 12, at 226.

26. See generally ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1962); ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

27. There were 24 defendants at Nuremberg, 19 of whom were convicted, and 25 defendants at the Tokyo proceedings, all of whom were convicted.

28. JOHN A. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* vi. (1954).

A second principle established by the International Military Tribunal (IMT) proceedings, one that was to play a central role in the subsequent trials of lower-ranking government and military officials, was that the "superior orders" defense would not be upheld against the charge of violating domestic or international law.²⁹

Following the verdict at Nuremberg, a group of secondary leaders was brought to trial for similar charges in what has been called the "subsequent proceedings."³⁰ In addition, in both Europe and in the Far East, the victorious Allied powers established military tribunals to try persons charged with various war crimes. Although these military trials were able to bring a substantial number of war criminals to justice, vast numbers escaped prosecution. From his study of the Allied military trials in the Far East, Philip Piccigallo concluded that over ninety percent of those in the Japanese government and military who could have been charged with war crimes ultimately escaped prosecution.³¹ Piccigallo attributes this in large part to the inefficiency of the prosecution and the lack of interest in such proceedings by the governing Allied powers. Moreover, attempts to prosecute war criminals soon gave way to the political considerations of the Cold War.

Although the prosecution of Axis leaders for war crimes was an important advance in international law, these trials are less relevant to the present discussion than the larger, and more difficult, question of how to treat the massive number of individuals who collaborated or benefited from fascist rule. We turn first to denazification in the occupied countries³² and then examine the problematic and puzzling efforts in Germany and Japan.

2. Denazification in the Occupied Countries

In order to fully understand denazification in the countries that had been occupied by the Nazis, it is first necessary to place these events within the context in which they occurred. For the overwhelming majority of the citizens of the countries involved, occupation was a terrifying experience. Government and social processes were totally disrupted, property was confiscated or destroyed, thousands of innocent people were killed in German reprisals, and large segments of the

29. For a further discussion of this issue, see YORAM DINSTEIN, *THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* (1965).

30. There actually were 12 separate trials that went by different names: the Medical case; the Milch case; the Justice case; the SS, Pohl case; the Flick case; the Farben case; the Hostages case; the Rusha case; the Einsatzgruppen case; the Krupp case; the Ministries case; and the High Command case.

31. PHILLIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST* 117 (1979).

32. Although the treatment of collaborationists was also an important issue in the Pacific, particularly in the Philippines, much less is known about that phenomenon. Thus, the focus will be on the actions of various European countries.

native population were forced to support the Nazi war effort in one form or another, partly perpetuated through mandatory conscription. For various reasons, a sizable portion of the population in each of the occupied countries collaborated with the enemy in some form or another. Some attempted to benefit from the presence of the occupier, while others apparently believed that collaboration was the only means of surviving the war.

Liberation brought different responses. The most extreme form occurred in France where members of the resistance took immediate revenge against supporters of the Vichy government. Peter Novick estimates that there were at least 4,500 summary executions in France during the months after Liberation.³³ Others have suggested much higher numbers.³⁴ Such violence was rare in other European countries,³⁵ although the desire to bring collaborators to justice was nearly universal. One of the most extraordinary aspects of denazification was its scope. Literally hundreds of thousands of people were imprisoned for their actions during the war.³⁶ For example, within two days after being liberated from German rule, the makeshift Danish government had arrested and interned over 22,000 suspected collaborators.³⁷ Writing in 1948, Dutch law professor J.M. Van Bemmelen described the substantial number of suspected collaborators who had been (or still were) incarcerated for practices during the war.

In a small country such as Holland, about 100,000 people had been put in prisons and prison camps after the liberation. A year and a half later — in October 1946 — their number was still 50,000; in January 1947 it was 33,000. Denmark had 10,871 political prisoners in April 1946 . . . In France in January 1946 there were about

33. PETER NOVICK, *THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE* 71 (1968). This is not meant to suggest that vigilante justice was the norm. During the course of denazification, more than 100,000 French were brought to trial for their collaborationist activities. *Id.* at 153. In addition, of the nearly one million civil servants, 11,343 received some form of sanction for their wartime activities, and more than 5,000 were removed from office. *Id.* at 90. For other accounts of denazification in France, see HERBERT R. LOTTMAN, *THE PURGE* (1986); JULES ROY, *THE TRIAL OF MARSHAL PETAIN* (1967).

34. For example, Robert Aron has put this figure at 40,000. Roy C. Macridis, *France: From Vichy to the Fourth Republic*, in *FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM* 161, 171 (John Herz, ed. 1982) [hereinafter Herz].

35. There is an enormous amount of variation in the numbers purportedly killed by resistance forces. For example, the office of the Italian Ministry of the Interior has put the number at 1,732, while neo-Fascists have claimed more than 300,000 summarily executed. Giuseppe Di Palma, *Italy: Is There a Legacy and Is It Fascist?*, in Herz, *supra* note 34, at 107, 133.

36. Roy Macridis estimates that in France more than 400,000 individuals were directly affected by denazification. Macridis, *supra* note 34, at 172.

37. Carl C. Givskov, *The Danish 'Purge-Laws,'* 39 *J. CRIM. L. & CRIMINOLOGY* 447, 448 (1948).

38,000 political prisoners In Belgium 44,000 people had been deprived of their freedom after the liberation In Norway 25,000 out of 60,000 members of the Quisling-Movement (Nasjonal Samlung) had been arrested; in January 1946, 16,000 were still interned. If political prisoners in Poland, Austria, Czechoslovakia, Germany, Italy, Spain, Greece and other countries are included, it becomes evident that more than a million people are now in prisons and prison camps for political offences.³⁸

Several features of denazification should be of interest to present efforts in Eastern Europe. One was the near-universal abandonment of the principle *nulla poena sine lege* in order to be able to charge collaborators after the war for actions that had not been criminal at the time they were committed during the war. The rationale commonly employed was that the occupation itself precluded the passage of laws against collaborating with the enemy. In addition, several countries re-instituted the death penalty for collaborationist activities,³⁹ although relatively few individuals were executed.

Another noteworthy feature of denazification in the occupied countries was its quasi-criminal nature. For example, one of the more common charges of collaborationist activity in France was that of "national indignity,"⁴⁰ described in National Assembly debate as a "state entered into" by one who "directly or indirectly, voluntarily aided Germany or her allies, or harmed the unity of the nation or the liberty and equality of Frenchmen."⁴¹ Moreover, one's presence in this state was to be "declared," not by a judicial body as such but by a "jury d'honneur."⁴² In Denmark, a similar concept was expressed in the notion of the "loss of common confidence."⁴³ This entailed losing one's political and civil rights and was originally done in a separate proceeding following criminal prosecution. In Belgium, such individuals were called "inciviques," and the "crime" they were accused of committing as well as its consequences have been described in these terms:

38. Jacob Maarten van Bemmelen, *The Treatment of Political Delinquents in Some European Countries*, 1 J. CRIM. SCI. 110 (1948).

39. In Norway, where the last death sentence had been carried out in 1876, capital punishment was decreed by the Royal Ordinance of October 3, 1941. The Dutch government-in-exile decided to re-introduce the death penalty on December 22, 1943, although this was not announced publicly until September 1944, when the first Dutch territory was liberated. In Denmark, where there was no exile government, capital punishment for treasonous acts going back to the beginning of the German occupation was introduced by a law on June 1, 1945. NOVICK, *supra* note 33, at 210.

40. *Id.* at 85.

41. *Id.* at 146.

42. *Id.*

43. Givskov, *supra* note 37, at 452.

Both the government and the people feel that some punishment should be given to those whose conduct during the occupation was not what it should have been. For instance, all those who, without being guilty, cannot be called innocent will, on a simple notification of the public prosecutor, lose their vote, their right to engage in certain professions, and so on. Those who feel they have been unjustly penalized can appeal to the tribunals unless their cases have already been examined by the commissions. Those who are thus penalized will be able to request their rehabilitation and the recovery of their rights in ten years' time.⁴⁴

As suggested above, collaborators were subjected to a number of penalties. In addition to the more common form of criminal sanctions — death, prison, fines and so forth — large numbers of individuals also had their property confiscated and their civil and political rights taken away.⁴⁵ In addition, individuals could also be “purged” from certain occupations, particularly those in government service, for their wartime activities.⁴⁶ One of the most difficult situations involved the judiciary. On the one hand, there was a desperate need for judicial personnel to deal with the enormous number of collaborationist cases and disputes engendered by the war, such as property confiscation. On the other hand, in several countries, France and Holland in particular, there was a deep-seated feeling that most judges had generally cooperated with the Nazis. In France, for example, judges in the occupied territories were required to take a special oath of loyalty to the “chef d'état.”⁴⁷ All but one judge in Vichy France had done so.⁴⁸ Because of this situation, only judges who had displayed an unusual enthusiasm in carrying out the Nazi plans were purged from their position.⁴⁹

44. Pierre Vermeylen, *The Punishment of Collaborators*, 247 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 77 (Sept. 1946).

45. In Holland, those who had been members of certain German-sponsored military and police organizations were judged to have entered the service of a foreign power and were consequently deprived of their Dutch citizenship. NOVICK, *supra* note 33, at 212. In addition, the post-war Dutch government seemed most accepting of vigilante justice aimed at the collaborators. HENRY L. MASON, *THE PURGE OF THE DUTCH QUISLINGS: EMERGENCY JUSTICE IN THE NETHERLANDS* (1952).

46. NOVICK, *supra* note 33, at 79.

47. *Id.* at 84. In Holland, there was an attempt to purge judges who had either 1) shown themselves unfaithful to the Kingdom or the Crown, 2) had shown a National Socialist state of mind by their conduct or utterances, or 3) had seriously failed in the task during occupation, in a manner harmful to the Dutch judiciary. MASON, *supra* note 45, at 93. However, the purge was never completed and a settlement was reached under the direction of Dr. Donner, who had resigned during the occupation. *Id.* at 96-97.

48. NOVICK, *supra* note 33, at 84.

49. *Id.* at 87. On the other hand, the purge of the National Parliament was much more complete. All those who had voted in favor of delegating all constituent power to Marshall Petain on July 10, 1940 — 569 representatives total — were purged from serving in this or any other political office.

Despite the initial zeal for denazification in the formerly occupied countries, most programs were terminated rather quickly. One reason was the enormity of the task involved and the lack of adequate resources and personnel with which to carry it out. In addition, denazification did little to rebuild these devastated societies, and many believed it detracted from such efforts. As a consequence, within a relatively short period of time, nearly all of the sentences that had been handed out were reduced, in some cases rather severely.⁵⁰ The same was true for many of those who had been purged or had their political and civil rights restricted. Frederick Engelmann's description of denazification in Austria, "uneven, formalistic, and quite brief,"⁵¹ was essentially true in every other European country as well.

To see denazification in the occupied countries as a complete failure, however, would be a mistake. Virtually all of those who had collaborated with the enemy during the war were somehow called to task for such actions. Moreover, thousands of individuals were fined, imprisoned, or had their property confiscated. Still others either had their civil and political rights curtailed for a time, were removed from their occupations, or else suffered some form of public acknowledgment of their wartime activities. The larger significance of these efforts was to somehow make public account of those "whose conduct during the occupation was not what it should have been." In this respect, denazification in the occupied countries had at least some measure of success.

These efforts, however, failed to discern and understand some of the larger truths about the occupation, and these facts, unfortunately, still have not been confronted or addressed. Nowhere is this more evident than in France. Although retribution against particular individuals was fairly common after the war,⁵² the French people have never truly come to understand the nature of Vichy France. Instead, the societal-wide conspiracy of silence that assisted in Nazi atrocities during the war still exists today.⁵³ The recent prosecution and conviction

50. For example, Novick wrote that although nearly 40,000 persons were initially imprisoned for collaborating with the Vichy government, this number had been reduced to 13,000 by December 1948, 8,000 by October 1949, and under 4,000 by early 1951. That year the first important Amnesty Law was passed. The result was that the overwhelming majority of collaborationists only served a fraction of their original sentence. NOVICK, *supra* note 33, at 187, 188. France is not the exception; the same phenomenon occurred in the other occupied countries as well.

51. Frederick C. Engelmann, *How Austria Has Coped with Two Dictatorial Legacies*, in Herz, *supra* note 34, at 135, 144.

52. See *supra* notes 33-36, 40-42, 49-50 and accompanying text.

53. Between 1942 and 1944, more than 76,000 French and foreign Jews were deported to Germany. Most of these individuals were arrested by French police on orders of French officials and were carried on French trains for delivery at the German border. Alan Riding, *The Painful Past Still Eludes France*, N.Y. TIMES, June 13, 1993, at E4.

tion of Paul Touvier may reverse this trend. As Ted Morgan reported on the trial,

[t]he importance of the trial was that it presented the French past as it really was, so that the nation had to face up to it, and to pass it on to future generations. It became clearer than ever before how the Milice [neo-Nazi police force] became a criminal enterprise and how it conducted the roundups of Jews that were a part of the Final Solution.⁵⁴

3. Denazification in Germany

Denazification in Germany occurred in two phases, each with different aims and approaches. The first was under Allied control, where an attempt was made to prosecute leading war criminals⁵⁵ and also to purge those in administrative positions who had most zealously pushed the Nazi ideology. The second phase occurred under the direction and control of German authorities and attempted to pass judgment on the wartime activities of the entire German population.⁵⁶ Given the scope and ambiguous nature of this aspect of denazification, its near total failure is by no means surprising. To begin to accomplish this impossible task, questionnaires were sent to all Germans.⁵⁷ From the answers provided, individuals were placed into one of five categories: major offender, offender, lesser offender, follower, and exonerated.⁵⁸ After being categorized by a prosecutor, the defendant had to deal with the local boards, or *spruchkammern*. If a defendant thought that the categorization was incorrect, the burden was on the defendant to prove it.⁵⁹ Yet, this ignores how relatively easy denazification was for the overwhelming majority of Germans, including tens of thousands of individuals who were in fact war criminals.

For instance, due to a lack of personnel, all individuals were automatically categorized as "followers"⁶⁰ unless a person was actually incriminated by himself or by someone else. This was rare, though, due to the so-called "witnesses strike" and the recurrent claims of "victor's justice." Even when denazification did seem to work, its effects were short-lived.⁶¹ Amendments to the Liberation Law, as well as the

54. Ted Morgan, *The Hidden Henchman*, N.Y. TIMES MAG., May 22, 1994, at 78.

55. See generally part II(B)(1) of this text.

56. For a discussion of these efforts, see Fritz Weinschenk, *Nazis Before German Courts: The West German War Crimes Trials*, 10 INT'L LAW. 515 (1976).

57. John Herz, *Denazification and Related Policies*, in Herz, *supra* note 34, at 26.

58. *Id.*

59. *Id.* at 27.

60. *Id.*

61. The same phenomena occurred in post-war Italy. Di Palma writes that [d]espite defascistization, the old administrative class remained in place. Judicial applications of the purge decrees and a final amnesty adopted

final amnesties in 1947 and 1948, allowed almost every case of major offenders to be downgraded to the category of "follower."⁶² Moreover, as Ingo Muller has recently shown, within a relatively short period of time after the Germans took control over "denazification," *former Nazis actually fared better than those who had resisted the regime*. Among other things, under "Law 131" a perverse quota system was established that actually gave preference for such things as jobs to former Nazis and removed from office those who had resisted Nazi rule. Muller writes that

[t]here was a general sense of relief at being rid of the unpopular "de-Nazifiers." Only a minority of them found other work quickly; two thirds remained dependent for a long time on welfare and unemployment benefits. The exclusion of these outsiders, who could have provided a counterweight in the government agencies of the postwar period, accelerated the process of re-Nazification that was to have a profound effect on the development of democracy in West Germany. The few experienced public servants without an incriminating past, who were needed so urgently, were now considered to have "incriminated" themselves by supporting de-Nazification; in the early years of the Federal Republic, this was a far worse stigma than to have been a National Socialist.⁶³

How effective was German denazification? John Herz, perhaps the most astute scholar of this phenomenon, has described the limited goals and achievements of this policy as

at best barring certain persons temporarily from positions of influence rather than providing for their indefinite or long-term ineligibility to serve in such positions. In the economic field, the same was true of the confiscations of property, which were restored following the downgrading or the exoneration of owners; confiscations based on the verdicts of tribunals were extremely rare, notably, in the case of industrialists or other major owners . . .⁶⁴ The result of both denazification and the prosecution (or nonprosecution) of Nazi criminality may be summed up as follows: The top elite of the Nazi regime, small in numbers, was eliminated (or eliminated itself through suicide, flight abroad, and so on); most of the collaboration-

in February 1948 resulted in the fact that most of the 1,879 civil servants who had been dismissed . . . and the 671 who had been compulsorily retired were reinstated. Similarly, the whole process of confiscating the illicit gains of Fascist profiteers and of purging compromised business leaders came close to naught. As to Fascist criminals, the justified restraint shown in the early legal proceedings turned, as the war faded into the background, into a veritable travesty of prosecution . . .

Guiseppe Di Palma, *Italy: Is There a Legacy and Is It Fascist?* in Herz, *supra* note 34, at 122.

62. *Id.* at 28.

63. INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 203-4 (Deborah Lucas Schneider, trans., 1991).

64. Herz, *in* Herz, *supra* note 34, at 29.

ist elite, in administration, justice, education, the economy, remained in or reentered positions held under the Nazi regime.⁶⁵

A good part of the blame for the failure of denazification rests with the Allied forces. A short time after German authorities took control over the process, it should have been apparent that little would be accomplished given its unsystematic nature. Although the various military governments did urge greater efforts to bring Nazi officials to trial,⁶⁶ little else was done. Moreover, with the advent of the Cold War, Allied officials, such as U.S. High Commissioner John McCloy, actually pushed for the cessation of denazification. Notwithstanding these shortcomings, however, a good part of the blame for the failure of denazification rests with the Germans themselves.⁶⁷ In fact, some, such as John Appleman, have suggested that Germany's half-hearted attempt at denazification demonstrates that the rise of Nazism was no accident:

It became apparent that Nazism was not a matter imposed upon a people by the dictates of one man — but a militaristic spirit alive in Germany at its roots and all too often affecting the men in charge of such denazification tribunals or in positions of political power.⁶⁸

4. Post-War Japan

Germany's minimal interest in removing Axis officials was mirrored by its wartime ally Japan. While the IMT proceedings and other Allied Military Commission trials successfully brought some Japanese officials and military personnel to justice, these trials touched only a small percentage of Japanese war criminals.⁶⁹ Notwithstanding this fact, the Japanese government never undertook any investigation on its own to uncover and punish other atrocities committed by its nationals during the war.⁷⁰

In addition to these military commission trials, the occupying forces attempted to institute purges of those who had been "active exponents of militarism and militant nationalism."⁷¹ The Allies enjoyed very little success in this endeavor. Although screening commis-

65. *Id.* at 30.

66. See generally JAMES F. TRENT, *MISSION ON THE RHINE: REEDUCATION AND DENAZIFICATION IN AMERICAN-OCCUPIED GERMANY* (1982).

67. It should be noted that while the Germans were far more successful in indemnifying those who had property destroyed, they were far less successful — or interested — in compensating those who suffered through the horrors of the Holocaust. On this latter point, see BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979).

68. APPLEMAN, *supra* note 28, at 358.

69. See *supra* note 31 and accompanying text.

70. See *infra* notes 80-85 and accompanying text.

71. Arthur E. Tiedemann, *Japan Sheds Dictatorship*, in Herz, *supra* note 34, at 199.

sions examined over two million questionnaires, only one-tenth of the respondents (202,000) were actually purged.⁷² Moreover, the vast majority of these individuals were provisionally purged, meaning that they were not removed from office. Consider the fact that only 830 out of 42,251 officials who served in the Japanese bureaucracy during the war were ever removed from office in the period following the war.⁷³ In addition, the few who were purged invariably were replaced by their former proteges.⁷⁴

As in Germany, the attempt to rid the society of those responsible for the war soon came to a halt. Not only were the Japanese themselves apparently not interested, but with the advent of the Cold War neither were Allied officials. In February 1949, the Japanese government began to "depurge" certain officials.⁷⁵ By 1952, when Japan had fully regained its sovereignty, only 8710 purgees out of the original 202,000 still remained in that status.⁷⁶ The remaining individuals were eventually pardoned.⁷⁷

Aside from the treatment of individuals who committed crimes against humanity, there is also the more important question of having the Japanese people publicly acknowledge the war crimes they collectively committed. In this sense, Japan and Germany offer stark contrasts. While there is little doubt that the vast majority of Nazi sympathizers suffered very little recrimination or punishment,⁷⁸ there is no question that the German people have in some way addressed the unspeakable crimes that their nation committed. One example of this is the reparations payments made by the German government to victims of Nazi rule.⁷⁹

The same cannot be said of the Japanese government or the Japanese people.⁸⁰ In fact, there has been scant acknowledgment of any of the atrocities committed before or during World War II.⁸¹ Only very

72. *Id.* at 201.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 202.

77. *Id.*

78. *See generally* part II(B)(3) of this text.

79. *But see* FERENCZ, *supra* note 67 (arguing that the government and private corporations actively resisted indemnification).

80. For a fascinating discussion comparing and contrasting German and Japanese reactions to the war, see IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* (1994).

81. An interesting case involves the legal challenge by Saburo Iegaga, who brought suit nearly 30 years ago challenging the actions of the Education Ministry in censoring his accounts of Japanese wartime atrocities. In a decision handed down earlier in 1993, the Japanese Supreme Court sided with the government in banning Mr. Ienaga's textbooks from use in schools. David Sanger, *A Stickler for History, Even if It's Not Very Pretty*, N.Y. TIMES, May 27, 1993, at A4.

recently, for example, has the Japanese government even acknowledged the fact that it forced thousands of foreign women to serve as prostitutes for Japanese forces,⁸² and after facing mounting international pressure the Japanese government finally agreed to pay reparations to the countries involved (but, inexplicably, not to the victims).⁸³ In terms of the panoply of other war crimes — the fact that 20 million people died in the Pacific war; the attempt to eradicate the Korean language and culture; the rapes and killings in Janjing; and the starvation of over two million Vietnamese civilians⁸⁴ — the Japanese government has been silent. One of the very few admissions of Japanese wrongdoing was made by Prime Minister Morihiro Hosokawa, who personally admitted that the war was “wrong.”⁸⁵ Now, the larger society should make the same acknowledgment, and the Japanese government should begin to pay homage and reparations to those who suffered from Japanese wartime atrocities.

C. *Transitions in the 1970s: Spain, Portugal and Greece*

We now turn our attention to democratization efforts in other settings, and in other times and places as well. The link between the old and the new is Spain. Although an integral part of the Fascist movement from the period before World War II, defascistization as such did not come to Spain until Franco's death in 1975. It would be a mistake, however, to view this year as a watershed. Instead, Spain was well on its way toward democracy before this time. By the same token, elements of the old regime continued to hold political power after this time as well. In a sense, then, defascistization in Spain was more of a gradual process, rather than the result of concerted governmental policies.⁸⁶ In short, unlike virtually every other country that we will examine, there were no attempts at purges, no trials of former government officials, and no land confiscation. Instead, there was a quiet transformation from dictatorship to democracy.

In 1974, Portugal emerged from forty-six years of authoritarian rule. Unlike the transition to democracy in Spain, the break with the past in Portugal was both sudden and complete.⁸⁷ Although the new

82. David Sanger, *Japan Admits It Ran Army Brothels During War*, N.Y. TIMES, July 7, 1993, at A1.

83. Andrew Pollack, *Japan to Offer Reparations for Wartime Brothel Abuse*, N.Y. TIMES, July 7, 1993, at A1.

84. *Japan's Other War Crimes*, N.Y. TIMES, July 12, 1992, at E20. There also is the question of whether those who suffered from Japanese brutality during the war could bring a cause of action at this time. In January 1994, eight Dutch citizens — some prisoners of war, civilian internees, as well as a woman forced into a Japanese brothel — brought such a suit. *Eight Dutch Citizens Sue Japan*, N.Y. TIMES, Jan. 26, 1994, at A4.

85. James Sterngold, *Admitting Guilt for the War: An Outraged Dissent*, N.Y. TIMES, Aug. 21, 1993, at A2.

86. Edward Malefakis, *Spain and Its Francoist Heritage*, in Herz, *supra* note 34.

87. Kenneth Maxwell, *The Emergence of Portuguese Democracy*, in Herz, *supra*

regime went about purging some elements of both the left and the right, it ultimately accomplished something far greater: a social revolution.⁸⁸ In the south, landless workers seized the great estates and established collective and cooperative farms.⁸⁹ Most of the large industrial enterprises and banking and insurance businesses were nationalized.⁹⁰ Portugal also abandoned its colonial claims in Africa.⁹¹ In short, the country emerged from the democratization process a much different country than it had been previously.

The year 1974 also marked the return to democratic rule in Greece after the seven-year dictatorship of George Papadopoulos (1967-73) and Demetrios Ioannides (1973-74). Like the situation in Portugal, the transition was engineered by a coup, in this case in the wake of the regime's disastrous policy in Cyprus. This, however, is where the two processes diverge. In a compromise between military officers and political officials, the decision was made to turn power over to the exiled former premier Constantine Karamanlis.⁹² Karamanlis moved quickly against the old regime. He immediately released all political prisoners and amnestied all political offenses (except those relating to the rule of the colonels).⁹³ In addition, all general secretaries of the ministries and all prefects who held power under the junta were dismissed immediately.⁹⁴ This was soon extended to all agencies, organizations, and corporations operating under public law.⁹⁵ All told, some 108,000 civil servants and other officials had been dismissed, transferred, or otherwise disciplined by mid-January 1975.⁹⁶

Karamanlis called for parliamentary elections for November, 1974, less than four months after the removal of the dictatorship. Emboldened by a strong electoral showing, Karamanlis' regime then proceeded to move against senior military officials, selectively retiring and transferring those who had been a part of the old order.⁹⁷ The new government also started to prosecute and purge four groups: 1) those involved in the 1967 coup, 2) those responsible for the killings during the Polytechnic University uprising of November 1973, 3) those responsible for committing torture, and 4) those responsible for the coup in Cyprus. Harry Psomiades writes of the prosecution of the former dictators that

note 34.

88. *Id.* at 236.

89. *Id.*

90. *Id.*

91. *Id.*

92. Harry J. Psomiades, *Greece: From the Colonels' Rule to Democracy*, in Herz, *supra* note 34, at 251-274.

93. *Id.* at 255.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 262.

[t]he trials, which received widespread radio, television, and press coverage, served to demystify the dictatorship. The trials made possible the exposure of seven years of maladministration, repression, scandal, corruption, and conspiracies and depicted a regime much worse than even the military had imagined. The details of torture, particularly of distinguished senior military officers by subordinates, were most offensive to the professional officer class. The statements and the demeanor of the accused revealed to many their pettiness and their incompetence and destroyed within seconds the military image of the strong man. The trials exposed the "supermen" without their clothes, and what the public and the officer corps saw, they did not like.⁹⁸

Still, the trial that aroused the most emotion in the country was the first Military Police torture trial. Psomiades offers this analysis. "Trial testimony offered a detailed picture of the junta's system of torture and conclusive evidence that torture was practiced in a systematic way in order to perpetuate the junta's control. It dramatized the system's degrading effects on victims and torturers."⁹⁹

Democratization in Spain, Portugal, and Greece occurred in markedly different ways. In Spain, the process was quite gradual, and it eventually became difficult to determine what was from the old order or the new. In contrast, democratization in both Portugal and Greece began quite suddenly, and both brought about far greater societal change. Although Portugal experienced some purging, it is noteworthy that it was aimed at elements of both the left and the right. In addition, far more attention was given to transforming the old order than to examining its misdeeds. In contrast, the democratization that occurred in Greece was not only more concerned with removing the vestiges and the personnel of the dictatorship, it also sought to create a national catharsis by publicly exposing the horrors of the colonels' rule.

D. *Democratization in Latin America*

Efforts by several Latin American countries — Brazil, Uruguay, Argentina, and Chile¹⁰⁰ — to address the horrors of the past have occurred with some form of logical progression. In Brazil, the government made every attempt to seal off the crimes of the past, but it was ultimately unsuccessful. Still, no prosecutions or purges occurred, even

98. *Id.* at 264.

99. *Id.*

100. Other countries in this region are also experiencing various forms of democratization, and they also have been faced with the situation of addressing crimes from the past. One unique situation has occurred in Paraguay where Martin Almada, a Paraguayan lawyer and teacher who was repeatedly tortured by soldiers during the reign of General Stroessner, is attempting to lead an effort to bring the perpetrators to justice. Isabel Vincent, *Terror leaves a paper trail*, GLOBE & MAIL (Toronto), June 19, 1993, at A1.

when the perpetrators were known publicly. In Uruguay, the question whether to pursue the past or not was the subject of public discussion from the onset of democracy. In Argentina, the overthrow of the military junta was premised on the idea of bringing those responsible for the commission of gross human rights abuses to justice. Fairly soon, however, practical and political considerations threw these efforts aground. Finally, despite the continued presence of former dictator Augusto Pinochet as head of military forces in Chile, democratization has proceeded apace with some nascent efforts to expose the practices of the dictatorial regime.

1. Brazil

Brazil initially came under military rule in 1964, although the worst forms of political terror did not occur until 1969 when General Emilio Medici assumed control over the Presidency.¹⁰¹ During the next five years, thousands of Brazilians were either tortured or killed in the course of the internal war against so-called "leftist subversives."¹⁰² In 1974, Medici was replaced by General Ernesto Geisel. Although human rights abuses were not completely eliminated, a period of relative relaxation began.¹⁰³ The country entered a new phase in March 1979 with the inauguration of Geisel's chosen successor, General Joao Baptista Figueiredo. One of Figueiredo's first acts in office was to issue a blanket amnesty for any state security agents who might otherwise become liable in the future to charges arising from their human rights violations.¹⁰⁴ As Lawrence Weschler comments, "[i]ndeed, his edict was drafted in such a way as to foreclose even the possibility of any future official investigations into the behavior of the security forces between 1964 and 1979. Bygones were to be bygones: the book was closed."¹⁰⁵

Despite the amnesty, and in spite of the government's concerted efforts to conceal this dark period of Brazilian history, the horrors of the military's rule have now become public knowledge. Through a daring and clandestine effort by several human rights organizations and segments of the Catholic Church, the trial transcripts of those who denounced their own torture in previously secret military trials was published in a book that was to become a national best-seller, *Brasil: Nunca Mais*.¹⁰⁶ Although this book documented who was responsible for ordering and carrying out the torture and killings, because of the amnesty proclaimed by Figueiredo, no prosecutions have taken place or

101. LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE 47 (1990).

102. *Id.* at 64.

103. *Id.* at 65.

104. *Id.* at 14.

105. *Id.*

106. See WESCHLER, *supra* note 101. This book provides an exciting tale of the brave effort to have the transcripts published.

are likely.¹⁰⁷ Instead, although the truth has become known, individuals go about their daily business as if none of this terror has occurred, and torturers pass their victims on the street.

2. Uruguay

Until the 1960s, perhaps the South American country least likely to experience political terror was Uruguay, described by some as the "Sweden of South America." All of this began to change in the 1960s when the government first sought to repress the Movement for National Liberation, or the Tupamaros as it came to be called. By the early 1970s, this internal conflict affected nearly all segments of the population,¹⁰⁸ and its purpose was to terrorize the entire society. Weschler writes:

Obviously, one of its main functions, as the architects of the system declared outright, was to break the prisoners. But an even more important goal appears to have been to break the wider society . . . Uruguay was such a small country, and the repression there so widespread, that everyone knew someone — knew several people, in fact — in prison or under torture. The military wanted it that way — relied on the fear that such knowledge engendered.¹⁰⁹

The beginning of the end of military rule occurred in 1980 when the regime's plebiscite for a new constitution was rejected by the population.¹¹⁰ Through a political compromise, Presidential and legislative

107. This is not to say that participation in the terror has not had some ramifications. Weschler writes that

[i]n some places . . . some men whose names appeared on the list were summarily fired. In other places, during the months ahead, some men found their careers blocked: the list was occasionally consulted as promotions came under consideration. But for the most part those whose names appeared on the listed [as having committed torture] retained their positions and, thanks to the amnesty, had little more to endure than the public's contempt.

Id. at 76.

108. The scope of the government's repression is numbing. Weschler provides this description:

Of Uruguay's entire 1970 population of somewhat less than 3 million (half of whom lived in the capital, Montevideo), somewhere between 300,000 and 400,000 went into exile during the next decade and a half. Of those remaining, according to Amnesty International, one in every fifty was detained at one time or another for interrogation; and one in every five hundred received a long prison sentence for political offenses The sheer scope of this emigration, detention, and incarceration, however, only begins to suggest the extent of the military's absolute mastery of Uruguayan daily life during this period.

Id. at 87-88.

109. *Id.* at 147.

110. *Id.* at 151.

elections were held on November 25, 1984.¹¹¹ President Sanguinetti took office on March 1, 1985. One week later he signed a bill that constituted an amnesty for all remaining political prisoners, although torturers and other military violators of human rights were explicitly excluded.¹¹²

Soon thereafter, victims of the political terror began filing lawsuits against specific individuals in the military alleging torture, kidnapping, disappearance, extortion, rape, and murder. As these cases made their way through the judicial system, Sanguinetti proposed a second amnesty, one that absolved military officials of any responsibility whatsoever. The Law Declaring an Expiration of the State's Punitive Authority was passed on December 22, 1986,¹¹³ the day before the first subpoena of a military official was due.

Late in February 1987, a group of human rights organizations under the banner of the Commission National Pro-Referendum began a campaign to overturn the *impunidad* law. In order to call a referendum, it was necessary to have petition signatures of at least a quarter of the number of people who had voted in the previous national election.¹¹⁴ Overcoming a tremendous amount of adversity, the pro-referendum forces were successful in obtaining the requisite signatures. Although the referendum was ultimately rejected (attributable in large part to the thinly veiled threats by the ruling government),¹¹⁵ the process itself seemed to accomplish something. Weschler balances the positives and negatives this way:

Certainly, the two cases I've studied in these pages — Brazil's and Uruguay's — afford no ideal outcome. (For that matter, no country exists where anything remotely approaching the ideal has yet been achieved.) The transition in both countries has been mired in the muck of forced compromise, bad faith, self-delusion, betrayed hopes, and abandoned responsibilities. In both of these instances, the little success that was achieved was at the best provisional (there were no trials in either country, no expressions of justice; torturers whose prior conduct was thoroughly documented in *Brasil: Nunca Mais* didn't even necessarily lose their jobs; in Uruguay, the referendum finally lost and the issue was largely set aside).¹¹⁶

Still, Weschler maintains, some victories were gained in both countries:

In both cases, thanks to the herculean efforts of relatively small sectors of the population (in the case of Brazil, of an infinitesimally

111. *Id.* at 158.

112. WESCHLER, *supra* note 101, at 159.

113. *Id.* at 171.

114. *Id.* at 176.

115. *Id.* at 233.

116. *Id.* at 245.

small sector), the interests of truth were served. Facts were established, and the actual history was inscribed in the common memory.¹¹⁷

3. Argentina

During the early 1970s, Argentina suffered from a wave of violence carried out primarily by the leftist Montoneros movement.¹¹⁸ In response, security forces and a terrorist group from the extreme right, the Argentine Anti-Communist Alliance, undertook a counterattack aimed at known or suspected left-wing terrorists, as well as those considered to be sympathizers with the left. When the violence persisted, President Isabel Peron declared a state of siege in November 1974.¹¹⁹ In 1975, the Peron government concluded that police and security forces were not capable of preventing terrorist activities. The government then issued Decree No. 2770/75, which established the Council of Domestic Security comprised of the President, the Cabinet, and the commanding officers of the armed forces.¹²⁰ Decree No. 2772/75, issued the same day, gave the armed forces the task of carrying out the "military and security operations they deem necessary to annihilate subversive elements throughout the country."¹²¹

Despite a dramatic downturn in incidents of left-wing violence at the beginning of 1976, in March of that year the commanders of the armed forces staged a successful coup.¹²² Soon thereafter, the military embarked on a *guerra sucia*, or dirty war, against so-called left wing subversives and sympathizers. During the course of this "war," a minimum of 8,961 persons disappeared,¹²³ and tens of thousands of

117. *Id.* at 245.

118. 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, 287 (1987).

119. *Id.* at 288; Decree No. 1368, Nov. 6, 1974, in BOLETIN OFICIAL (OFFICIAL GAZETTE), Nov. 7, 1974 (Arg.).

120. *Id.*; Decree 2770/75, Oct. 6, 1975, in BOLETIN OFICIAL (OFFICIAL GAZETTE), Nov. 4, 1975 (Arg.).

121. *Id.* at 289; Decree 2772/75, Oct. 6, 1975, in BOLETIN OFICIAL (OFFICIAL GAZETTE), Nov. 4, 1975 (Arg.).

122. There were actually three different military juntas. The first was comprised of General Jorge Videla, commander of the Army (Aug. 27, 1975 - July 31, 1978); Admiral Emilio Eduardo Massera, commander of the Navy (1973 - Sept. 15, 1978); and Brigadier General Orlando Agost, commander of the Air Force (Jan. 1, 1976 - Jan. 25, 1979). Members of the second and third juntas included General Roberto Viola, commander of the Army (July 31, 1978 - Dec. 28, 1979); Admiral Armando Lambruschini, commander of the Navy (Sept. 15, 1978 - Sept. 11, 1981); Brigadier General Omar Domingo Rubens Graffigna, commander of the Air Force (Jan. 25, 1979 - June 19, 1982); Admiral Jorge Isaac Anaya, commander of the Navy (Sept. 11, 1981 - Oct. 1, 1982); Brigadier General Basilio Arturo Lami Dozo, commander of the Air Force (Dec. 17, 1981 - Aug. 17, 1982).

123. Nunca Mas, Report of the Argentine National Commission on the Disap-

people were detained without being charged with specific crimes. Iain Guest comments:

Never before had the resources of a state been geared to systematic torture and murder. 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 tax¹²⁴

In 1979, the ruling junta declared victory in the war against subversion. In the face of growing domestic and international opposition, the military government issued a law declaring that those who had been reported missing during the previous five years were to be considered legally dead.¹²⁵ By 1981, the military junta was facing growing demands from all quarters asking for information about the "disappeared." Also at this time, the military government was met with greater opposition from restless trade unions and political parties. What ultimately caused the downfall of military rule, however, was the disastrous Falklands-Malvinas war with Great Britain in 1982.

By 1983, a transitional junta was established to set the stage for a return to civilian rule — not, however, before attempting to exonerate the deeds of the military. On April 28, 1983, the government published the Final Document on the War Against Subversion.¹²⁶ This report conceded that human rights abuses had occurred but that such actions were in the "line of duty."¹²⁷ In September 1983, the military government enacted the Law of National Pacification, which granted immunity from prosecution to suspected terrorists and members of the armed forces for human rights violations committed between May 25, 1973 and June 17, 1982.¹²⁸ Finally, the military junta issued Decree No. 2726/83, which ordered the destruction of all documents relating to the "dirty war." On October 29, 1983, the state of siege was lifted, and free elections took place. Civilian President Raul Alfonsin was inaugurated two months later.

One of Alfonsin's first official acts was to issue Decree No. 158/83¹²⁹ ordering the arrest and prosecution of the nine military officers who comprised the three military juntas from 1976 to 1983. The Decree provided that under new legislation that was to be sub-

peared [*also known as the Sabato Commission Report*] (1986) at 447.

124. IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* 32 (1990).

125. Law No. 22068, Sept. 12, 1979 on "Presumption of Death Because of Disappearance" [1979-C] A.L.J.A. 2845; *see* Garro & Dahl, *supra* note 118, at 300.

126. *Id.* at 301; App. Court Judg. Sec. 46.

127. *Id.*

128. *Id.*; Law No. 22924, Sept. 22, 1983, [1983-B] A.L.J.A. 1681.

129. *Id.* at 302. Decree No. 158, promulgated on December 13, 1983, [1983-B] A.L.J.A. 1943.

mitted to Congress, such prosecutions were to be initiated before the Supreme Council of the Armed Forces.¹³⁰ However, the Decree also provided that any judgment by the Supreme Council was subject to review by the federal courts of appeal.¹³¹ The jurisdiction of the Supreme Council was reasserted by the passage of Law No. 23049,¹³² the impending legislation referred to in Decree No. 158/83. One of the most noteworthy aspects of Law 23049 was a provision that authorized federal appellate courts to take away jurisdiction from the Supreme Council if there was unjustifiable delay in the prosecution of these cases.¹³³

As this was going on, the government also faced the problem of the existence of the junta's self-amnesty law. In December 1983, the Congress passed Law No. 23040 nullifying the amnesty provisions.¹³⁴ The Federal Court of Appeals subsequently upheld the constitutionality of Law No. 23040, at the same time declaring the self-amnesty law unconstitutional.¹³⁵

During that same month, charges were brought against the nine military commanders who had served in each of the three military juntas. By June 1984, the Supreme Council had made little progress in determining the outcome of these cases.¹³⁶ In October, the Council issued a report announcing its inability to estimate when the criminal proceedings would be completed. In addition, the Council also indicated that, in its view, military operations against subversion were "unobjectionable."¹³⁷ The report pointed out that the testimony of victims and their relatives was so biased as not to be credible.¹³⁸ In response, the Federal Appeals Court issued a resolution taking over the proceedings against the military commanders.¹³⁹ In early 1985, the Court issued a

130. *Id.* at 303.

131. *Id.*

132. *Id.* at 306; Law No. 23049, Feb. 14, 1984, [XLIV-A] A.D.L.A. 8 (1984).

133. Garro & Dahl, *supra* note 118.

134. *Id.* at 305. Law No. 23040, December 27, 1983, [1983-B] A.L.J.A. 1813. Articles 1 and 2 read as follows:

Art. 1. *De facto* Law No. 22924 is hereby repealed as unconstitutional and null and void.

Art. 2. *De facto* Law No. 22924 has no legal effect with regard to criminal, civil, administrative, and military responsibility that said law intends to affect. Article 2 of the Criminal Code in particular is inapplicable to Law No. 22924.

What has been set forth in the foregoing paragraph is not altered by final judicial decisions that have applied *de facto* Law No. 22924.

135. In re Fernandez Marino Amador, Oct. 4, 1984, [1985] L.L. 521 (Arg.). For an explanation of the response of the Alfonsin regime, see Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

136. *Id.* at 310.

137. *Id.* at 320.

138. *Id.*

139. Resolution [Acordada] No. 42, Oct. 4, 1984, published in L.L., Nov. 19, 1984

series of indictments and placed several of the former leaders under rigorous preventive detention.

The trial of the military commanders finally began on April 22, 1985, and lasted five months, during which time more than 800 witnesses testified.¹⁴⁰ Judgment and sentence were handed down on December 5, 1985. The Court found five of the former commanders guilty. Two former Presidents — Generals Jorge Videla and Roberto Viola — were both convicted. Videla, President during the first military junta, was given a life sentence; Viola was given 17 years. Admiral Emilio Massera of the Navy, a member of the first junta, was given a life sentence and his successor, Admiral Armando Lambruschini, received eight years imprisonment. Brigadier General Orlando Agosti, who was head of the Air Force in the first junta, received a 4 1/2 year sentence.¹⁴¹ These verdicts were upheld by the Supreme Court, which slightly modified the sentences of Viola and Agosti.¹⁴²

Soon after the trial of the junta leaders, the prosecution began pursuing charges against other military officers for their part in the dirty war. However, in the face of growing unrest within the ranks of the military, the Congress passed Law No. 23492, or the "Full Stop Law."¹⁴³ Article 1 of the Law stated that the time had come for "the armed forces to take part in rebuilding a democratic society."¹⁴⁴ Accordingly, 23492 imposed a 60-day deadline on the filing of any complaints or charges against alleged torturers.¹⁴⁵ Although the obvious intent of the law was to impede, and perhaps preclude, further criminal proceedings, the prosecution was able to file over one hundred fifty summonses before the February 22, 1986 deadline.¹⁴⁶

By March 1987, fifty-one military and police officers had been arrested in connection with human rights cases, although only twelve had been convicted and sentenced, including the five military generals discussed above.¹⁴⁷ An important event that occurred at this time was Major Ernesto Guillermo Barreiro's refusal to appear before the Federal Appeals Court in Cordoba, seeking refuge with his army unit instead. The commander of the unit subsequently announced that Barreiro would not be turned over to the court and what followed was an insurrection that came to be known as the Easter Rebellion.¹⁴⁸

(Arg.).

140. For a description of the trials, see Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 UNIV. MIAMI INTER-AM. L.R. 491 (1987).

141. GUEST, *supra* note 124, at 389.

142. [1987-A] L.L. 531, 553 (1987) (Arg.).

143. Law No. 23492, Dec. 23, 1986, A.D.L.A. [XLVII-A] 193.

144. *Id.*

145. *Id.*

146. Garro & Dahl, *supra* note 118, at 336.

147. *Id.* at 337.

148. *Id.*

In response, President Alfonsín made a dramatic trip to talk with Colonel Aldo Rico, the leader of the insurrection. The rebellion collapsed and many of its leaders were arrested. However, in the face of this kind of military opposition, on June 4, 1987, the Congress passed the law of "due obedience," Law No. 23521, which created an irrebuttable presumption that military personnel accused of committing human rights abuses were acting under orders and were unable to question the legitimacy of these orders.¹⁴⁹ This irrebuttable presumption protected all military officers below the rank of Brigadier General. The law even barred the judiciary from undertaking any case-by-case analysis to determine if the defendant's actions were self-motivated. As a result, hundreds of officers were effectively immunized from prosecution. Guest writes of the due obedience law: "Alfonsín's long balancing act aimed at healing the national trauma without humiliating the military was finally over. It would be left to his Peronist successor, Carlos Menem, to bring the curtain down on the final act."¹⁵⁰

It took a very short period of time for this to occur. In October 1989, almost immediately after assuming office, President Menem issued a broad pardon covering nearly 280 people, some of whom had taken part in various military rebellions against the Alfonsín government, others who had been accused of committing criminal offenses in carrying out the dirty war.¹⁵¹ A year later the tragedy was completed: Menem pardoned and released the military junta leaders who directed the war including Jorge Videla, Roberto Viola, and Emilio Massera.¹⁵²

Has Argentina's democratization been successful? On one level at least, the answer to that question has to be no. Like many of the countries attempting denazification following World War II, the Alfonsín government originally set forth an overly ambitious agenda that it did not come near to accomplishing. Moreover, because of the widespread and ambiguous nature of the prosecutions, there were numerous run-ins with the military that, in turn, resulted in repeated retreats by the government. In terms of what it set out to do, then, the Argentine response was only moderately successful at best.

On another level, however, Argentina has achieved some notable victories. Bringing former government and military leaders, at times one and the same, to trial was a tremendous accomplishment for a newly democratized country. Moreover, the trials themselves served

149. Law No. 23521, E.D.L.A. 260 [1987-A] (1987).

150. GUEST, *supra* note 124, at 390.

151. *200 Military Officers are Pardoned in Argentina*, N.Y. TIMES, Oct. 8, 1989, at A12.

152. Shirley Christian, *Argentina Frees Ex-Junta Leaders*, N.Y. TIMES, December 30, 1990, at A9.

the same kind of catharsis function as the trials had in Greece.¹⁵³ Months of testimony not only brought forth the inhumanity of the military regime but, just as importantly, the humanity of its victims as well. In describing the trials of the military junta, Iain Guest writes that

[g]radually, over these four months, the ghosts have started to slip into this court. Some have come vividly alive again as witnesses have recalled seeing them in the detention centers. Now they seem to fill the benches as if silently waiting to pass their own verdict on Argentina's "dirty war." What did they think of in those final terrifying moments, as they went to their deaths? The testimony has been so detailed that it is impossible not to speculate.¹⁵⁴

Finally, most of the truth about military rule has been published in the Sabato Commission report, *Nunca Mais*. Like its counterpart in Brazil, it soon became a national best-seller. In sum, Argentina's attempt to come to terms with the horrors of its past has brought about mixed results. It never effectively prosecuted the high number of officials that the government had intended to, and those who were prosecuted are now free. On the other hand, most of those responsible for the terror have been removed from office, and the specter of military rule appears to be a phenomenon of a long-distant past.

4. Chile

Unlike the situation in the other Southern Cone countries, Chile is still in the process of attempting to deal with those responsible for committing past horrors. As had been the case in Uruguay, Chile had enjoyed more than a century and a half of stable, constitutional rule. There were, however, social tensions between the left and the right that were greatly exacerbated by the election of Socialist President Salvador Allende. On September 11, 1973, Allende was killed in a military coup and his party, Popular Unity, was removed from power. A military junta took his place and quickly moved against leftist "subversives." Constable and Venezuela write that

[b]y December, at least fifteen hundred civilians were dead — shot in confrontations, tortured to death, hunted down by vigilantes, or executed by firing squads. Thousands of detainees had been shipped to military prison camps, more than seven thousand had fled into exile after receiving safe-conduct passes, and the grounds of the Venezuelan, Swedish, Argentine, Italian and British embassies were jammed with asylum seekers. A revolutionary dream had been crushed in a spasm of military fury, and a reign of professional state terror had begun.¹⁵⁵

153. *Supra* notes 97-99 and accompanying text.

154. GUEST, *supra* note 124, at 2.

155. PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE*

Pinochet consolidated his power by means of a plebiscite held in 1980, where two-thirds of the electorate ostensibly supported a new Constitution drafted by the Pinochet regime. There have been many reports of massive corruption in this plebiscite.¹⁵⁶ Under the provisions of the Constitution, Pinochet was to remain in office for eight years. In 1988, another plebiscite was called — this time to enable Pinochet to run for re-election — but a majority of the electorate voted against this proposal.¹⁵⁷ In national elections that followed, Patricio Aylwin Azocar was elected President.¹⁵⁸ Although Pinochet surprisingly gave up the Presidency, he has maintained a firm grip on power in his capacity as the head of the military forces.

Aylwin took office in March 1990. Within a short period of time he had created the Truth and Reconciliation Commission, which began to gather evidence from relatives of people believed to have disappeared during the years of military rule. In July 1990, mass graves were discovered for the first time, touching a raw nerve in the military and setting off a national debate regarding the repression of the Pinochet regime.¹⁵⁹ In March 1991, President Aylwin addressed the nation on national television and issued a report describing how 2,043 people had been killed by military personnel, with most of the violence occurring before 1978.¹⁶⁰ The report described how the secret police had systematically killed those who were viewed as politically dangerous to Pinochet's regime. On behalf of the nation, Aylwin apologized to the families of the victims for the horrors described in the report, and he announced plans to assist them with pensions and health and housing care.¹⁶¹ He also asked the Supreme Court to ensure that cases of human rights abuses were heard as soon as possible.¹⁶²

At this point it is not clear what action, if any, will be taken against those responsible for the documented terror between 1973-1988. The biggest obstacle is that Pinochet remains firmly in control of the most powerful military establishment in the Southern Cone, and he has repeatedly stated that there will be no prosecutions of any military personnel.¹⁶³ Another problem is that the amnesty law pro-

UNDER PINOCHET (1991).

156. *Id.* at 72-3.

157. *Id.* at 310.

158. *Id.* at 316.

159. Shirley Christian, *Chilean Military Defends Killings*, N.Y. TIMES, July 10, 1990, at A2.

160. *Chile Details Over 2,000 Slayings Under Pinochet*, N.Y. TIMES, Mar. 6, 1991, at A8.

161. *Id.*

162. *Id.*

163. Nathaniel C. Nash, *Chile Human Rights Report Answered by Violence*, N.Y. TIMES, Mar. 24, 1991, at A6; Nathaniel C. Nash, *Pinochet Assails Chilean Rights Report*, N.Y. TIMES, Mar. 28, 1991, at A3; Nathaniel C. Nash, *Chile's Army Stands Tall, and Casts a Shadow*, N.Y. TIMES, Jan. 26, 1992, at E4.

claimed by the Pinochet regime in 1978 has been upheld by the Chilean Supreme Court as recently as 1990.¹⁶⁴ On the other hand, the national legislature recently defeated a bill, the "Aylwin Law," that would have disposed of all pending cases through secret civilian hearings. These hearings involved more than 200 military officials accused of killings, torture, rape, and beatings.¹⁶⁵

In fact, democratization has proceeded alongside efforts to uncover the horrors of the past. In September 1991, under court order, the Chilean government began exhuming and trying to identify the remains of more than 120 people found in a mass grave.¹⁶⁶ In addition, there have been some important developments in the case of Orlando Letelier, Chile's ambassador to the United States under the Allende regime, who was killed in a bomb explosion in Washington, D.C. Although Chile had previously agreed to pay restitution to the families of the deceased, for years it had refused to subject the masterminds of the operation to criminal prosecution. In a remarkable change of events, in July 1991, Chile's Supreme Court overturned attempts to close the case. Then, on August 26, 1991, Justice Bandons issued an order prohibiting the two defendants, General Juan Manuel Contreras Sepulveda and Colonel Pedro Espinoza Bravo, from leaving the country. On September 21, 1991 Bandons issued an indictment against Contreras and Espinoza, and, in a 3-2 decision, the Chilean Supreme Court upheld this indictment.¹⁶⁷ In November, 1993, sentences were handed down with Contreras being sentenced to seven years in prison and Espinoza to six years.¹⁶⁸

Given Pinochet's continued and very visible presence in Chilean political life, the effort to uncover the misdeeds of his rule has actually proceeded further than might have been expected. Obviously Aylwin had to walk a tightrope, but he performed a noteworthy job. Most importantly, the Chilean government has made both a public acknowledgment and an apology for the horrors of the past. In addition, the new governments have made the decision to fully investigate the horrors of the past, even if no punishment results because of the amnesty granted under the Pinochet regime.

164. Supreme Court of Chile, *Recurso de inaplicabilidad de ley* brought by Alfredo Insunza Bascunan, August 24, 1990, *Manuel Contreras et al.*, Rol No. 553-78.

165. Nathaniel C. Nash, *Chile Refuses To Forget Crimes of Past*, N.Y. TIMES, Sept. 26, 1993 at E3.

166. Nathaniel C. Nash, *Graves Without Names Yield Secrets*, N.Y. TIMES, Sept. 19, 1991, at A4.

167. *Indictment of Chile Police Chiefs in Murder of Ex-Envoy is Upheld*, N.Y. TIMES, Nov. 19, 1991, at A12.

168. *Chile Sentences Two Generals for Letelier Killing*, N.Y. TIMES, Nov. 13, 1993, at A7.

E. Other Transitions in the Present: The Painful Evolution to Democracy in El Salvador, Nicaragua, and South Africa

Peace is slowly and painfully being achieved in El Salvador and Nicaragua after more than a decade of slaughter and mayhem in both of these countries. As desirable as this is, there is some question whether the tenuous peace that exists in both countries will bring any greater understanding about the past. In El Salvador, a United Nations Truth Commission has placed much of the blame for the horrors of the past decade squarely on right wing politicians and army officers, but rebel forces were not spared criticism either.¹⁶⁹ The Truth Commission also suggested that, because of gross inadequacies in the Salvadoran judiciary, no attempt at prosecuting those responsible for these war crimes ought to take place. The national legislature readily enacted a blanket amnesty a few days after the publication of the Commission's report.¹⁷⁰

This is not to suggest that there has not been any progress in attempting to rectify the policies of the past. For one thing, despite constant delays from the original timetable established by the United Nations, the Army has now been purged of certain officers responsible for ordering some of the worst human rights abuses.¹⁷¹ In a related move, the architect of many of these policies, former Defense Minister Rene Emilio Ponce, eventually was forced to resign from office.¹⁷² Beyond this, certain truths about human rights abuses during the darkest days, most notably the massacre at El Mozote,¹⁷³ have now been confirmed. Still, few can be pleased that thousands of brutal murders will not be prosecuted and that the few who have been convicted for their crimes during the war will now be set free. In essence, exoneration has occurred with very little acknowledgment and understanding of the past.¹⁷⁴

169. Tina Golden, *Can the Truth Help Salvador Outlive Hate?*, N.Y. TIMES, Mar. 21, 1993, at E1.

170. Howard W. French, *Amnesty in Salvador Denounced As Against Spirit of Peace Pact*, N.Y. TIMES, Mar. 22, 1993, at A2.

171. *El Salvador Finally Removes Military Chiefs*, N.Y. TIMES, July 2, 1993, at A5.

172. Howard W. French, *Salvadoran Official, Under U.N. Scrutiny Over Rights, Resigns*, N.Y. TIMES, Mar. 13, 1993, at A5.

173. Tina Golden, *Salvador Skeletons Confirm Reports of Massacre in 1981*, N.Y. TIMES, Oct. 20, 1992, at A1. See generally MARK DANNER, *THE MASSACRE AT EL MOZOTE: A PARABLE OF THE COLD WAR* (1994); Joan Didion, 'Something Horrible' in *El Salvador*, N.Y. REV. OF BOOKS, July 14, 1994, at 8.

174. For a further examination of these issues, see John J. Moore, Jr., *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L.R. 733 (1991). Exoneration has not been limited to El Salvador. The so-called Christopher Commission, appointed after the public findings of the U.N. Truth Commission were released, purportedly investigated U.S. policy in El Salvador during these same years but found precious few "mistakes" — a result

The situation in Nicaragua is not even this sanguine.¹⁷⁵ The social, political, and economic inequalities that brought about war in the first place have not changed. In addition, there has been no real effort to understand the causes of the civil war. Instead, Nicaragua teeters on the brink of erupting into a bloody civil war once again. At this point, prosecutions against those who committed war crimes would serve no purpose and would probably exacerbate an already unstable and dangerous situation. On the other hand, some attempt to learn the truth about the war, its causes, the way it was conducted, and its consequences is desperately needed because there is little prospect for any real peace without it.

The transition from a white-dominated government in South Africa offers another case of attempting to deal with crimes of the past, although these efforts are still evolving under the new regime of President Mandela.¹⁷⁶ The most controversial piece of legislation is the Indemnity Act, which provides the State President with the authority to grant amnesty to those who "advised, directed, commanded, ordered or performed" any act with a political objective.¹⁷⁷ The Act applies to activities that occurred prior to October 8, 1990, although it also gives the President the authority to extend this period.¹⁷⁸ The Act proscribes both civil and criminal proceedings.¹⁷⁹ Those seeking amnesty for acts that have not been punished must apply to the National Council on Indemnity, which conducts its proceedings in secret.¹⁸⁰

The biggest problem inherent in the Indemnity Act is its lack of public accountability. Although lists of those who benefit from the provisions of the Act are to be kept, there is to be no public record of what the indemnification was based upon. While the Indemnity Act might assuage segments of the right wing and the military, it does nothing to advance national understanding concerning the insidious

which hardly squares with the findings of the U.N. Truth Commission Report. Moreover, documents later released by the State Department have shown that American military officers in El Salvador trained Salvadorans associated with right wing death squads. Clifford Krauss, *U.S., Aware of Killings, Worked With Salvador's Rightists, Papers Suggest*, N.Y. TIMES, Nov. 9, 1993, at A9; Tim Weiner, *In 1990, U.S. Was Still Training Salvador Civilians Tied to Killings*, N.Y. TIMES, Dec. 14, 1993; at A1.

175. Tina Golden, *Where Politics and Poverty Intersect, Signposts Are Missing*, N.Y. TIMES, Aug. 31, 1993, at A5.

176. Most of the documentation of the human rights abuses that occurred under the apartheid governments is the result of the Goldstone Commission. Bill Keller, *Inquest Finds South Africa Police Aided Zulus in Terror Campaign*, N.Y. TIMES, Mar. 19, 1994, at A1.

177. Act No. 163-92, Further Indemnity Act (Nov. 9, 1992).

178. Lynn Berat, *Prosecuting Human Rights Violators From a Predecessor Regime: Guidelines for a Transformed South Africa*, 13 B.C. THIRD WORLD L.J. 199, 211 (1993).

179. *Id.* at 211.

180. *Id.* at 212.

nature of apartheid rule. The African National Congress has strongly opposed the Act, and the amnesty itself might serve to heighten tensions rather than helping to usher in a new political and social spirit.

Improbably set alongside these acts of amnesty, President Mandela has vowed to probe into political crimes committed under the apartheid regime. Toward that end, on his 100th day in office, Mandela established a truth commission.¹⁸¹

F. *Transitions to Democracy: An Appraisal*

Perhaps the most striking aspect of the transitions that we have examined thus far is how incomplete and ineffectual they have been. In the U.S. Confederacy example, those who had been in power in the South prior to the Civil War quickly regained power despite efforts by Congress to remove them. The examples following World War II seem to teach the same lessons. Despite the military defeat and devastation of both Germany and Japan, many of those who had previously wielded power in each country continued to do so within a fairly short time after Allied governance was removed. In fact, however, many of the aborted purges were accomplished with the blessing of the Allied powers, as Cold War political considerations soon took precedence over the aim of removing or punishing members of the old order. One important lesson that *does* emerge rather clearly is that it is impossible and counter-productive to attempt to hold an entire nation accountable, as was attempted in Germany.

The more recent examples of democratization offer a mixed bag. The transitions in countries such as Brazil and Spain took place over such an extended period of time that it became nearly impossible to separate the old regime from the new. One difference between these two situations is that more of the truth is known about the situation in Brazil than that of Franco-led Spain. In neither case were any prosecutions brought or purges carried out. The transitions in Portugal, Greece, Uruguay, Argentina, and Chile were much more sudden in terms of particular events — coups, referenda, elections, and the like. Still, in each country it has been very difficult to remove the influence and power of the old order. What *has* been achieved in several cases, most notably, Greece, Argentina, and Chile, is some greater understanding of the past, and in the case of Greece and Argentina, some measure of justice against some of the perpetrators of the worst human rights abuses.

El Salvador, Nicaragua, and South Africa were also briefly examined, although one still cannot be certain, at the present time at least, that these countries are truly in the process of transforming themselves to peaceful democracies. The best candidate for such a transition

181. *Mandela to Probe Apartheid Crimes*, INT'L HERALD TRIB., Aug. 19, 1994, at 2.

appears to be El Salvador, which has not only been able to maintain the peace after more than a decade of civil war, but through the U.N. Truth Commission there has been an important attempt to understand the genesis of the conflict and the manner in which it was carried out. What is most unfortunate, however, is that no prosecutions or purges will ensue because of an amnesty law that was passed within days of the publication of the U.N. report.

We now turn to Eastern Europe and the decommunization efforts that have occurred to date. In many respects, these countries are better situated to address the crimes of the past for two reasons. One is that there is little apparent opposition to such efforts by the military in any of these countries. The second reason is that, unlike many of the other countries that we have examined, the vast majority of the population desperately wanted to see the removal of the communist regime. Working against these efforts, however, have been two phenomena. One, simply, is the poverty that afflicts so much of the Eastern bloc and, coupled with that, the desire to move forward rather than to examine the past. The second major obstacle involves yet another aspect of communist rule, most notably the distrust and disinformation that continue to infest these societies.

III. DECOMMUNIZATION IN EASTERN EUROPE

Once the euphoria of the fall of communism quickly passed, the people of Eastern Europe were faced with the cold prospects of dealing with the aftermath of decades of communist rule. Most of the new non-communist governments seem uncertain what end they hope to accomplish. One of the biggest obstacles, mentioned earlier, is that the duplicity that marked the old order has not been removed. If anything, the transformation has possibly added a new layer of distrust and misinformation. What follows are some of the more noteworthy trends of decommunization efforts to date.

A. *Germany*

For a variety of reasons, the most important of which has been reunification itself, decommunization has seemingly proceeded further in Germany than in any of the other former Eastern bloc countries. Already, thousands of individuals in certain occupations, such as public officials, judges, police officers, professors, and schoolteachers, have been purged from their occupations.¹⁸² An agreement between East and West Germany has established a legal framework for reprivatization to occur.¹⁸³ Several former East German border guards have

182. John Tagliabue, *East Europe Astir on Ex-Communist*, N.Y. TIMES, Mar. 18, 1992, at A3.

183. Katie Hafner, *The House We Lived In*, N.Y. TIMES MAG., Nov. 10, 1991, at

been tried and convicted of killing individuals who sought to escape.¹⁸⁴ The secret police apparatus (Stasi) has effectively been dismantled, and individual citizens have been given ownership rights over their own files.¹⁸⁵ In addition, the former head of the secret police, Erich Mielke, has been prosecuted and convicted of murder. Finally, a Legislative Commission under the leadership of former dissident Rainer Eppelmann is conducting a sweeping investigation into the effects of communist rule.¹⁸⁶

Despite this apparent progress, however, decommunization has raised as many issues as it has answered. For one thing, there has been a continuous charge made that decommunization has only focused on lesser or peripheral officials of the old order, such as the young border guards, while many former leaders of the communist regime have been immune from criminal prosecution. The most visible example of this allegation involves Erich Honecker, the long-time leader of East Germany who was eventually returned to Germany after an extended stay in Russia only to be allowed to move to Chile and pardoned from trial because of the purported nature of his health. Criticism grew when rank and file soldiers were prosecuted before those who had given orders, and the few convictions of former top officials that have occurred have provided scarcely little understanding of the nature of communist rule.¹⁸⁷

A continuing problem facing decommunization in Germany, and elsewhere in Eastern Europe, relates to the volume of information and records that have to be sifted through, as well as the number of individuals who apparently collaborated with the secret police. For starters, it is estimated that there are more than 1.5 billion pages of Stasi reports, the vast majority of which are mundane material of inconsequential events.¹⁸⁸ The number of individuals who spied on others — some tens of thousands of individuals who worked directly with the Stasi, and upwards of 180,000 who were “unofficial collaborators” — is rather astonishing, and this fact alone will make any at-

32.

184. Stephen Kinzer, *2 East German Guards Convicted of Killing Man as He Fled to West*, N.Y. TIMES, Jan. 21, 1992, at A1; David Margolick, *'Just Following Orders': Nuremberg, Now Berlin*, N.Y. TIMES, Jan. 26, 1992, at E6; *2 More Guards Convicted in Wall Killings*, J. & COURIER (Lafayette, IN), Feb. 6, 1992, at A5.

185. Stephen Kinzer, *East Germans Face Their Accusers*, N.Y. TIMES MAG., Apr. 12, 1992, at 24.

186. Stephen Kinzer, *German Panel To Scrutinize East's Rule and Repression*, N.Y. TIMES, Mar. 30, 1992, at A4.

187. Stephen Kinzer, *3 Ex-East German Leaders Convicted*, N.Y. TIMES, Sept. 17, 1993, at A3. Those recently convicted were former Defense Minister Heinz Kessler, his deputy Fritz Streletz, and Hans Albrecht. All were convicted of inciting border guards to kill citizens who sought to flee westward.

188. Kjell Engelbrekt, *The Stasi Revisited*, RFE/RL RES. REP., Nov. 19, 1993, at 23.

tempt to purge or punish that much more difficult.¹⁸⁹ Since January 1992, anyone mentioned in Stasi documents had the right to examine any document pertaining to that individual, except for the portion containing the name of the informant.¹⁹⁰ However, as of mid-1993, only 625,000 individuals had been given this opportunity.¹⁹¹ As a result of this slow process, a proposed amnesty for East German secret police officials who had committed "misdemeanors" that was scheduled to go into effect on the third anniversary of German reunification, October 3, 1993, was postponed until the end of 1995.¹⁹²

On the surface, decommunization in Germany has proceeded rather smoothly, especially in comparison to some of the other Eastern bloc countries, but there have been some major problems. The most noteworthy problem has been the apparent indecision of the government regarding prosecution of members of the old order. One such example involves the rather bizarre proceedings against Erich Mielke, the former chief of the secret police in East Germany. Mielke headed the Ministry of State Security from 1957 until the Berlin Wall collapsed in 1989. Still, the charges that he faced were based on events relating to the killing of two police officers in 1931.¹⁹³ It is puzzling how or why the prosecution of this particular individual would advance decommunization. If anything, the decision to initially prosecute Mielke for his activities that occurred over 60 years ago, rather than for his actions as the head of Stasi, gives every indication that the government is hesitant to delve into the reign of terror of the communist regime.¹⁹⁴

As in each of the other Eastern bloc countries, the German reprivatization program has run into a number of unforeseen administrative problems that have slowed such efforts considerably. Under the German program, former owners will be able to reclaim property they had once owned before confiscation occurred, or be compensated if this is not possible.¹⁹⁵ Notwithstanding this, there are several unique

189. *Id.* at 21.

190. *Id.*

191. *Id.* at 19.

192. *Id.*

193. Stephen Kinzer, *German on Trial in 1931 Slayings*, N.Y. TIMES, Feb. 11, 1992, at A3; Stephen Kinzer, *German Ex-Police Chief is Guilty in 1931 Murders*, N.Y. TIMES, Oct. 27, 1993, at A6.

194. Another indication of the ambivalence of decommunization is the recent conviction of Hans Modrow who was a former state premier in East Germany. Modrow was convicted for the obvious: vote tampering by the communist party. Marc Fisher, *E. German Ex-Premier Convicted*, WASH. POST, May 28, 1993, at A32. What the trial lacked was any meaningful examination into communist rule. Moreover, Modrow's case is only the first of 50,000 possible prosecutions that might be brought. *Id.*

195. For an excellent overview of the land agreement and its inherent problems, see Dorothy Ames Jeffress, *Resolving Rival Claims on East German Property Upon*

features to this plan. The first is that the baseline for reprivatization is 1933, so as to include land that had been confiscated by the Nazis. However, property that had been confiscated between 1945 and 1949, the period of Soviet occupation, has been exempted as part of the deal originally struck with the Soviets to allow reunification to occur. In addition, the Bundestag subsequently made a number of changes to the law, attempting to favor the interests of investors over those of former owners, to the point where the law is now referred to by some as the "Law on the Abolition of Restitution."¹⁹⁶ As a final point, perhaps the sheer scope of reprivatization remains the biggest obstacle of all as more than one million claims for the return of property have already been made.¹⁹⁷

Decommunization in Germany has raised a number of thorny issues. One is whether East German officials should be held to a higher, or different, standard than their (former) West German counterparts. This question has been raised repeatedly in the case involving Markus Wolf, a former East German spy, who claims that his "crimes" were nothing more than what was also done by West German and American officials.¹⁹⁸ A related issue is whether it is hypocritical to purge those who cooperated with the East German regime when that was the stated policy of the West German government's Ostpolitik.¹⁹⁹ Finally, things have come full-circle when some (former) East German politicians have asked how it is that Western politicians who were so resistant to denazification are suddenly pushing decommunization.

B. *The Former Czechoslovakia*

Clearly the most controversial aspect of decommunization in the former Czechoslovakia was the "lustration" law passed by what was then the Czech and Slovak National Assembly on October 4, 1991.²⁰⁰ Under its terms, individuals associated with the communist regime were placed into three broad categories. The first consisted of those who were former secret police agents and their collaborators or former members of the communist party who held positions of authority from the district level up. These individuals are banned from certain high

German Unification, 101 YALE L.J. 527 (1991).

196. Ulrich K. Preuss, *Restitution vs. Investment*, 1 E. EUR. CONST. REV. 22, 24 (Summer 1992).

197. Tyler Marshall, *Germany's Judicial Nightmare*, L.A. TIMES, Apr. 25, 1991, at A1.

198. John Tagliabue, *Ex-Spy-master Has Germans Curious*, N.Y. TIMES, Oct. 18, 1991, at A4; Craig R. Whitney, *A Top Spy's Trial Opens in Germany*, N.Y. TIMES, May 5, 1993, at A11.

199. See generally TIMOTHY GARTON ASH, IN EUROPE'S NAME: GERMANY AND THE DIVIDED CONTINENT (1993).

200. Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, 2 REP. E. EUR. (No. 43), Oct. 25, 1991, at 4.

level administrative positions for a period of five years.²⁰¹ They are deemed guilty if their names appeared in the files of the Ministry of Internal Affairs.²⁰² The second category are those who have been termed "conscious collaborators." A third class of individuals were those who fell into what has been termed Category C, "potential candidates for collaboration." In February 1992, an Independent Appeals Commission was created, and one of its major purposes was to hear appeals by those who claim to have been wrongly accused of conscious collaboration. However, it soon became apparent that the overwhelming majority of cases before the Commission consisted of so-called Category C cases. Moreover, in many of these cases, individuals had been "talked to" by the authorities but had refused to cooperate, yet they were still listed as "potential candidates for collaboration." In response, the chairperson of the Commission then brought a suit before the newly created Constitutional Court challenging the legality of the lustration law in its entirety. In November 1992, the Court ruled that Category C was illegal but that the remaining paragraphs of the law were within the bounds of the Constitution.²⁰³

Although the legality of lustration apparently has been settled, the law has a number of critics. For example, human rights scholar Jiri Pehe has argued that

[t]he chief flaw of the . . . legislation is that it is partially based on a presumption of guilt rather than of innocence; that is, the burden is on people in certain government positions to prove they did *not* work for the secret police or were *not* communist officials. Moreover, by barring entire categories of people, such as former communist officials, from holding certain positions, the law espouses the principle of collective guilt. Impractical as it might have been, the government's original draft sought to avoid enshrining that principle by stipulating the necessity of proving a particular official's participating in the suppression of human rights under the communist regime. Finally, the law does not distinguish between various degrees of guilt. Former secret police officials will be treated no more severely than people who were coerced into collaborating with or informing for the secret police.²⁰⁴

One of the biggest problems lustration has faced in practice is the inability to verify the information in the secret police files. Instead, names of "informants" and "collaborators" of the old regime have appeared and disappeared, depending on who has been able to obtain

201. Ross Larsen, *Thousands on Leaked StB List, But Is it Legitimate?*, PRAGUE POST, June 9-15, 1992, at 1.

202. *Id.*

203. *Id.* at 19.

204. Pehe, *supra* note 200, at 8.

and circulate such lists.²⁰⁵ In a recent review of the lustration law, Paulina Bren concludes that

[d]espite the initial high hopes, lustration does not seem to have fulfilled all of its stated aims. On the one hand, it has prevented some former communist officials and StB collaborators from acquiring positions of current political and economic influence. On the other hand, it has also fostered an atmosphere of political instability in which scandals often took precedence over more important legislation. Nor, it seems, has lustration necessarily allayed the public's suspicions that former communist officials and StB collaborators continue to exert political and economic influence and to reap the same benefits as were afforded them under the communist regime.²⁰⁶

More recently, the Czech Parliament adopted the "Law on the Illegitimacy of and Resistance to the Communist Regime," which, among other things, lifts the statute of limitations for ideologically motivated crimes committed between February 25, 1948, and December 1989.²⁰⁷ Proponents of the law have argued that the number of prosecutions will be quite limited.²⁰⁸ The more important question is whether such trials will serve to illuminate the true essence of communist rule.

The new government already has prosecuted several high level officials of the communist regime.²⁰⁹ However, it is not clear what the government hopes to accomplish through these trials. There already is the puzzling situation involving Miroslav Stepan, a former member of the Central Committee Presidium, who was originally sentenced to a four-year prison term on charges of abuse of power for ordering that force be used against anticommunist demonstrators in 1988 and 1989.

205. Paulina Bren, *Lustration in the Czech and Slovak Republics*, RFE/RL RES. REP. 16, July 16, 1993, at 16.

206. *Id.*

207. Jan Obrman, *Czech Parliament Declares Former Communist Regime Illegal*, RFE/RL RES. REP., Aug. 13, 1993, at 6. The law reads as follows:

The CPCS, its leadership, and its members are responsible for the manner in which our country was administered in the years 1948 to 1989; [they are responsible] for the systematic destruction of the traditional values of European civilization; for the intentional violation of human rights and freedoms; for the moral and economic decay that was accompanied by judicial crimes and terror against those who held views differing [from those of the state]; for the replacement of a functioning market economy by a command economy [and] by the destruction of traditional principles of ownership; for the abuse of education, science, and culture for political and ideological goals; [and] for the destruction of the environment.

Id. at 8.

208. *Id.*

209. *Taking Communists to Court: Road Strwn With Nettles, Czechs Say*, N.Y. TIMES, Jan. 24, 1992, at A11.

Stepan appealed and his sentence was reduced to two years. He was released in October 1991, having served less than half of his sentence.²¹⁰

President Havel has been ambivalent about decommunization. While decrying a "witch hunt," he has agreed that some measures against communist officials need to be taken,²¹¹ particularly when so many are currently among the economic elite of the country. Havel opposed the lustration law primarily because of its presumption of guilt and the fact that it will only affect the "small fry." Havel has also expressed reservations about the vetting of officials, but he ultimately supported proposals by the Federal Assembly and the Czech and Slovak National Councils that required the vetting of officials in the country's legislative and executive bodies.²¹² Finally, while supporting the prosecution of former communist officials in theory, Havel has opposed such proceedings for charges that allege only that the individual was a part of the old regime. One of the major concerns of the new government is to create an independent judiciary. Toward that end, the National Parliament has established a Constitutional Court to concern itself with determining the constitutionality of laws passed by the government of the new Czech Republic.

Finally, there has been a concerted effort to make restitution to the victims of communist rule. One measure has been the passage of the Law on Legal Rehabilitations that nullifies verdicts handed down by the communist courts.²¹³ In addition, the former Czechoslovakian government passed a series of reprivatization laws that seek to provide for the return of property confiscated by communist officials to the previous owners. Although the Czech Republic has been successful in returning a substantial number of businesses and properties that had been confiscated by the communists back to their previous owners, it now appears as if further restitution efforts will be halted.²¹⁴

It is quite unfortunate that the lustration law has come to dominate decommunization in the Czech Republic.²¹⁵ The same kinds of

210. *Id.*

211. Interview with Martin Butora, Assistant to the President for Human Rights, at Prague Castle, Czechoslovakia (Prague, June 12, 1992).

212. Jan Obrman, *Laying the Ghosts of the Past*, REP. E. EUR., June 14, 1991, at 4.

213. Actually, the law is slightly more complicated than that. One category involves "political crimes" for which the convicted are automatically exonerated. Crimes in this category include charges of high treason, espionage, sabotage, illegal emigration, illegal gathering, etc. The second class of crimes affects those who were sentenced under laws that have since been abolished, but who were charged with using violence or promoting fascism. Individuals convicted of this category of crimes must apply for a review of their cases within two years after passage of the act. Jan Obrman, *Rehabilitating Political Victims*, REP. E. EUR., Dec. 14, 1990, at 5.

214. Jiri Pehe, *Legal Difficulties Beset the Czech Restitution Process*, RFE/RL RES. REP., July 15, 1994.

215. Since the break-up of Czechoslovakia, decommunization has proceeded much

ends could be achieved by more subtle and fair means. As it stands now, decommunization is unlikely to meet many of its objectives because of the sharp resistance to the lustration law, both by those associated with the old order and those who were the harshest critics of communist rule. Prosecutions of former top communist officials should continue, but such trials need to focus on exposing the truth about the nature of communist rule. These are not, nor should they be, treated as the routine criminal proceedings brought to date.

C. *The Other Eastern Bloc Countries*

The other Eastern bloc countries have attempted various forms of decommunization, and some have had more success in this regard than others. In Romania,²¹⁶ decommunization began with the summary trial and execution of Nicolae Ceausescu and his wife.²¹⁷ Immediately following, four of Ceausescu's henchmen²¹⁸ were convicted on charges of genocide and sentenced to life imprisonment.²¹⁹ For the first time in the nation's history, a public trial was broadcast live in its entirety. In addition, several relatives of the Ceausescus have also been prosecuted. One of Ceausescu's brothers was found guilty of murder,²²⁰ and the dictator's son was found guilty of shooting at demonstrators without warning, leading to a twenty year prison sentence.²²¹

Despite these efforts, there is a very real question of whether decommunization in Romania really is a change from the old order. Most notably, there is every indication that the brutal secret police apparatus — formerly named the Securitate — has changed in form but not in its method of operation.²²² Finally, decommunization will

further in the Czech Republic than in the Slovak Republic. Thus, the comments here are restricted to the former.

216. See generally *Truth and Justice: The Question of Accountability for Stalinist Crimes in Eastern Europe and the Soviet Union*, 9 N.Y. L. SCH. J. HUM. RTS. 599 (1992)(remarks of Adrian Nitoiu, General Justice, Military Section of the Supreme Court of Justice).

217. *Ceausescus' Last Request: "We Want to Die Together . . . We Want No Mercy"*; *3 Lottery Winners Get to Kill Them*, L.A. TIMES, Dec. 26, 1989, at P1.

218. Tudor Postelnicu, Minister of the Interior, Emil Bobu, Secretary of the Central Committee of the Romanian Communist Party, Ion Dinca, Vice Prime Minister, and Manea Manescu, Vice President of the State Council. See Steve Pagani, *Top Ceausescu Aides Face Trial for Genocide*, REUTERS, Jan. 17, 1990.

219. Charles T. Powers, *Ex-Romania Aides Get Life for 'Genocide' Role*, L.A. TIMES, Feb. 3, 1990, at A16.

220. Alec Russell, *Dictator's Brother Jailed for 15 Years*, DAILY TELEGRAPH, June 22, 1990, at 8.

221. *Nicu Ceausescu Sentenced to 20 Years in Jail for Murder*, REUTERS, September 21, 1990. On appeal the sentence was reduced to 16 years. *Around the World*, WASH. POST, June 4, 1991, at A19.

222. Dan Ionescu, *Romania's Public War over Secret Police Files*, REF/RL RES. REP., July 17, 1992, at 9.

only take on some real meaning to the population when the country's abject poverty is alleviated.

In Bulgaria, the continuing influence of communist rule continues to plague decommunization efforts. Revelations of the existence of concentration camps and the atrocities committed there during the past few decades have now been made public, but there has been very little action in prosecuting those responsible. The halting effort to prosecute former party and state leader Todor Zhivkov finally has been completed and the unrepentant Zhivkov has been sentenced to seven years in prison.²²³ One of the more puzzling aspects of this particular case is why, given the atrocities committed under Zhivkov's rule, charges of embezzlement were brought in lieu of crimes committed during the forced assimilation campaign of ethnic Turks or other examples of gross human rights abuses.

Criminal proceedings have also been brought against Petar Mladenov, the former longtime minister of foreign affairs who replaced Zhivkov after a coup in 1989; four former prime ministers, Stoyan Todorov, Grisha Filipov, Georgi Atanasov, and Andrey Lukanov; and a host of lesser communist officials. It is questionable whether any convictions will ensue. One major obstacle is the continuing influence of former communists and members of the Bulgarian Socialist Party (BSP), the successor of the Bulgarian Communist Party.²²⁴ Another is that the prosecutions will be barred by the statute of limitations.²²⁵ Finally, the people in this impoverished country exhibit little interest in continued rounds of seemingly endless litigation, particularly when members of the old order still seem to be firmly in control.²²⁶

Poland presents an interesting study because, until the elections in the fall of 1993, decommunization seemed to be gradually occurring without any kind of lustration law²²⁷ or trials of any note.²²⁸ Instead, certain occupations, such as the judiciary, have slowly been purged during the course of the past decade.²²⁹ Now that former communists have made substantial gains in the governing apparatus, it is

223. Kjell Engelbrekt and Duncan M. Perry, *The Conviction of Bulgaria's Former Leader*, RFE/RL RES. REP., Oct. 23, 1992, at 6.

224. Kjell Engelbrekt, *Bulgaria's Communist Legacy: Settling Old Scores*, RFE/RL RES. REP., July 10, 1992, at 6.

225. *Id.*

226. *Id.*

227. In the summer of 1992, the Polish Parliament passed a resolution that would have made public the names of communist informers, but this law was struck down a month later by the Constitutional Court. Alan Riding, *Polish Panel Rules Police-File Disclosures Illegal*, N.Y. TIMES, June 21, 1992, at A12.

228. An attempt to prosecute long-time President Jaruzelski was made in 1981 but with little apparent result. Stephan Engelberg, *Jaruzelski Facing Accusers, Or Is it Other Way Around?*, N.Y. TIMES, Dec. 13, 1992, at A23.

229. *Supra* note 3.

questionable whether decommunization efforts will continue.²³⁰ Certainly there is no doubt of this, particularly with the rather stunning acquittals of General Wladyslaw Ciaston and General Zenon Platek.²³¹ These two individuals had been charged with ordering the 1984 murder of Reverend Jerzy Popieluszko, an associate of the Solidarity movement. Despite the overwhelming testimony that led the presiding judge to remark that the generals "were probably responsible for the murder,"²³² the acquittal was based on the fact that no corroborating evidence could be obtained. The secret police had destroyed the evidence in 1984.

In Hungary, Parliament's first attempt to remove the statute of limitations on crimes committed during the communists' reign was overturned by the country's newly created Constitutional Court.²³³ In response, the Hungarian Parliament passed a new law in February 1993 that retroactively extended the statute of limitations for crimes committed during the 1956 uprising.²³⁴ In October 1993, the Hungarian Constitutional Court upheld the main part of the Act.²³⁵

In addition to these legislative efforts, the Hungarian prosecutor's office has initiated several "fact-finding" investigations into the crimes committed under the old regime.²³⁶ Finally, in February 1993, the government submitted a draft law to the parliament that would permit action to be taken against informers and agents of the communist regime.²³⁷ Under this law, those who served in the intelligence department (known as 3/3), and those who served on squads that assisted Soviet troops to quash the 1956 and 1957 rebellions, would not be allowed to occupy senior public positions.²³⁸

Like the other East European countries, Hungary has initiated a reprivatization program, but with limited success.²³⁹ Their program

230. Jane Perlez, *Ex-Communists Get Crucial New Role in Polish Election*, N.Y. TIMES, Sept. 21, 1993, at A1.

231. *2 Polish Generals Acquitted in Killing of Solidarity Priest*, N.Y. TIMES, Aug. 21, 1994, at A6.

232. *Id.*

233. Alajos Dornback, *Retroactivity Law Overturned in Hungary*, 1 E. EUR. CONST. REV. 7 (Spring 1992). The Court also has been active in the area of reprivatization, having struck down Parliament's first Compensation Law on the grounds that land could not be treated differently than other forms of property.

234. Dr. Krisztina Morvai, *Retroactive Justice based on International Law: A Recent Decision by the Hungarian Constitutional Court*, 2 E. EUR. CONST. REV. 32 (Fall 1993/Winter 1994).

235. *Id.*

236. *Id.* at 8.

237. *Id.* at 9.

238. *Id.*

239. Karoly Okolicsanyi, *Hungarian Compensation Programs Off to a Slow Start*, RFE/RL RES. REP., Mar. 12, 1993, at 49.

to indemnify former political prisoners has been more successful, but the \$15 per month compensation is essentially symbolic in nature.²⁴⁰

Two issues will dominate decommunization efforts in Hungary. The first involves the arrests in the spring of 1994 of some of those responsible — including Andras Hegedus, the former Hungarian Prime Minister — for reprisal murders following the Soviet invasion in 1956.²⁴¹ Juxtaposed alongside these efforts is the fact that former communists now comprise a legislative majority.²⁴²

Although there continues to be very little information emanating from Albania, its Constitutional Court has struck down in its entirety a "lustration law" that was aimed directly at advocates or private lawyers.²⁴³ Whether this ruling is evidence of continued communist influence or whether the court was relying on more noteworthy judicial principles remains to be seen. In addition, former Albanian President Ramiz Alia and nine of his ranking officials were charged and convicted of misappropriating state property and violating the rights and freedoms of Albanian citizens,²⁴⁴ despite little evidence of public interest or enlightenment from the trial.²⁴⁵

IV. EVALUATING DECOMMUNIZATION

Decommunization should have five major objectives: 1) to establish the truth about communist rule; 2) to in some way punish those responsible for the most egregious crimes; 3) to create institutions that will assist the process of democratization in the present and serve to guard against the re-emergence of repression in the future; 4) to acknowledge and compensate former victims; and 5) to begin the desperately needed healing process in these societies.

A. *Establishing the Truth*

A foremost objective of decommunization should be to establish the truth about the nature of communist rule publicly. The citizenry needs to be made aware of the crimes of communist rule, the ideological fixations that such regimes had, the means employed by communist

240. Celestine Bohlen, *Victims of Hungary's Past Press for an Accounting, but With Little Success*, N.Y. TIMES, Aug. 4, 1991, at A3.

241. Jane Perlez, *Hungarian Arrests Setting Off Debate: Should Oppressors of 1956 Be Punished?*, N.Y. TIMES, Apr. 3, 1994, at A6.

242. Jane Perlez, *Communists in Hungary Win Majority*, N.Y. TIMES, May 30, 1994, at A3. See generally Istvan Deak, *Post-post-Communist Hungary*, N.Y. REV. OF BOOKS, Aug. 11, 1994, at 33.

243. Kathleen Imholz, *A Landmark Constitutional Court Decision in Albania*, 2 E. EUR. CONST. REV. 23 (Summer 1993).

244. Louis Zanga, *Albania's Former President Remains Unrepentant*, RFE/RL RES. REP., July 22, 1994.

245. *Id.*

governments to achieve their ends, and finally, who the masterminds and key operatives behind the repression were.

Uncovering the truths of the nature of communist rule should not, however, stop here. In addition, the new governments need to expose the larger truths about the kind of "society" that communist rule created. These were societies that made every citizen a victim and any opposition was considered an enemy. Finally, these were societies in which duplicity became a way of life.

How can this be achieved? The first step is to create a Truth Commission representing the left and the right, the old order and the new. The premium here is on public testimony provided by victims of the old regime. As its name indicates, the purpose of a Truth Commission would not be to prosecute but instead to attempt to distill the truth and to present it to the public. Although it is important to look at the actions of individuals, it is far more important to understand the inner workings of the larger communist system of governance. As suggested below, public trials also should have these objectives. In many respects, however, this end will be easier to achieve through the vehicle of a Truth Commission.

B. *Punishing Masterminds and Egregious Human Rights Abusers*

Along with the public acknowledgment that communist rule corrupted virtually all aspects of society, the new governments also need to prosecute individuals who bear the most responsibility for the atrocities of the past. There are several things to note about such trials. One of the stark lessons that emerges from the Argentine example is that only the masterminds and the worst offenders should be brought to trial.²⁴⁶ In addition, the period during which prosecutions are to be brought should be limited. The new governments should also try to establish at the outset who will be subject to prosecution, and who will not be. Finally, no charges should be brought against subordinate officials unless and until the masterminds of these same crimes have been charged *and* convicted.

The new governments must also be aware of the symbolic nature and truth-telling functions of these trials. While on one level these are prosecutions against particular individuals for specific crimes, they really are indictments against the communist system itself. Moreover, such public trials should serve to bring about a greater understanding of communist rule and of how society reacted to it. The trials to date have been disappointing on all of these scores. Rather than using these trials to illuminate the nature of communist rule and of the society itself, all too often the prosecution of former communist officials has

246. See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991).

degenerated into common and petty proceedings.²⁴⁷ In this respect the model that could be followed are the trials of junta leaders in Argentina²⁴⁸ and Greece,²⁴⁹ as well as the recent trial against former Nazi collaborator Paul Touvier.²⁵⁰ In these cases, public trials of former national leaders served to greatly inform the public about the crimes of the junta. Unfortunately, none of the trials that have occurred in Eastern Europe to date has served either of these purposes.

Rather than prosecuting a wide range of communist officials, the new governments should instead purge those whose behavior during communist rule was "not what it should have been," to use the rough standard employed by several countries that had been occupied by the Nazis during World War II.²⁵¹ This could occur in a variety of ways, either through demotion or the loss of one's job, or the removal of certain civil, political, and economic rights, depending upon the circumstances. Because the questionable reports in secret police files will be heavily relied upon, individuals should be given any benefit of the doubt. In this process, it also is important to differentiate between varying levels of complicity. As objectionable as collaboration with the secret police is, it is different from being a member of the secret police. It is vital to maintain this distinction. As a final point, the period for which individuals are to be purged should not be onerously long. Instead, it should be long enough to make its point but not so long that it serves as a festering wound that prevents all citizens from working toward a better and more decent future.

C. *Creating Institutions to Assist the Move to Democracy*

Each country must implement measures to prevent a dictatorship from coming to power again. The institutionalization of a parliamentary form of government is only one step in that direction. Another is the creation of a truly independent judiciary and a Constitutional Court. It is also vital that the former secret police apparatus be dismantled as quickly and as thoroughly as possible.

Institution building in form is one thing; creating institutions that function properly is a different matter. The mere "appearance" of democracy will not suffice. In this regard, lawyers, journalists, and politicians have spent considerable time and energy providing assistance to East European countries in terms of drafting constitutions and the

247. For a discussion of this, see *supra* notes 193-194 and accompanying text.

248. For a discussion of this, see *supra* note 153-54 and accompanying text.

249. For a discussion of this, see *supra* notes 97-99 and accompanying text.

250. For a discussion of this, see *supra* note 54. One of the most noteworthy aspects of the Touvier trial was how it provided for a "day in court" for the victims of French collaboration.

251. Vermeylen, *supra* note 44, at 77.

like, giving far less time and attention to the actual functioning of these newly created institutions and/or laws.

D. *Acknowledging and Compensating Victims of the Old Order*

Thus far, we have only been looking at punishing communist officials and some collaborators. It is equally important for the new governments to assist the victims of the old regime in whatever way possible. One means of accomplishing this has been mentioned above: to make a concerted effort to give voice to the victims' suffering, either through the proceedings of a Truth Commission and/or in the course of public trials. In addition, the new governments should make every effort to enable the families of the victims to learn about the fate of their loved ones, no matter when the events in question occurred. Tens of thousands of individuals died at the hands of communist authorities, yet far too little is known about the circumstances surrounding most of these murders. Finally, each of the new governments ought to provide some form of compensation or indemnification to those who suffered the most from the old order. Given the poverty of the East European countries, this will not be an easy task. On the other hand, there is no reason why international lending institutions and foreign governments could not assist in this process.²⁵² Furthermore, the new governments have not been particularly aggressive in pursuing those who benefitted economically under communist rule, an important source of funding for restitution programs.

E. *Understanding and Healing*

The most essential task facing the new governments in Eastern Europe is to assist the populations in these countries to understand the insidious nature of communist rule. People must come to understand how the former dictatorship was able to set person against person and the state against all, under the guise of a new and more unified social order.

In closing, it would be well to heed the views of Czech author Milan Kundera: "It seems to me that all over the world people nowadays prefer to judge rather than to understand, to answer rather than to ask . . ."²⁵³ What is needed in Eastern Europe, then, is much less judgment and far fewer answers, and in their place, far more questions and a much greater capacity for understanding.

252. For a further discussion of this, see Gibney, *supra* note 5.

253. Interview with Philip Roth, in MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* (The Afterword) 237 (1980).

