Transitional Justice and the Rule of Law in New Democracies

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A. James McAdams

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Dedicated to Rev. William M. Lewers, C.S.C.,
who knows what it means to do justice,
love tenderly,
and walk humbly with God.

Preface

IT IS NOT SURPRISING that new democracies have frequently become engulfed in controversy when they have sought to bring their former dictators to trial. Due to long-standing legacies of oppression and injustice, passions are deeply rooted, and the stakes of any decision are high for perpetrators and victims alike. Moreover, it says something about the uncertain legal terrain on which these regimes have acted over the last few decades that we are still far from reaching a consensus about either the utility or the advisability of using national courts as instruments to right the wrongs of the past.

On the one hand, it is easy to sympathize with the compelling arguments that have been made on moral grounds in support of accountability trials. A half century after the convening of the international tribunals at Nuremberg and Tokyo, the advocates of trials contend, states can no longer afford to be indifferent to the plight of the victims of despotic regimes. As Justice Robert Jackson elegantly stated in his oft-cited opening remarks for the prosecution at Nuremberg, "The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[1] For the proponents of trials in new democracies, the situation is no different in the contemporary era. Those who have suffered unspeakable acts of torture and abuse, who have lost loved ones and associates, and who have had their lives torn apart by capricious and uncaring governments must be able to feel that their losses have been addressed and that their new leaders have taken seriously the

necessity of restoring the moral order of a damaged world. This attention, it is felt, is owed to the victims simply by virtue of their humanity.

But in addition to providing legitimacy for their practitioners, accountability trials may have a very specific relevance to the needs of new democracies. Unlike the Nuremberg and Tokyo tribunals, which were imposed from without, the primary impetus for these trials comes from within, and it is frequently bound up with the task of democratization. This is in no small part due to the fact that those who are called to make the choice about pursuing criminal prosecutions are simultaneously engaged in the act of founding a new political order. For this reason, the supporters of trials contend, the decision to act upon past abuses will amount to more than simply finalizing the break with authoritarianism. Assuming they are properly conducted, these proceedings should provide tangible evidence of the guiding principles—equality, fairness, and the rule of law—that are meant to define the new order of things. What better way can there exist of demonstrating that radically different legal and political norms are in effect than by showing that the García Mezas, Erich Honeckers, and Chun Doo Hwans of the old world are no longer immune to prosecution for their offenses, and that they will be held accountable to the same standards of behavior as any other citizens?

Furthermore, the proponents of transitional justice argue, the seriousness with which these states act upon the crimes and abuses of their former leaders today will go a long way toward winning popular credibility tomorrow and instilling confidence in democratic norms and values. In this vein, scholars frequently cite the failure of West German authorities to pursue prominent war criminals and remove former Nazi officials from key judicial and administrative positions in the 1950s and 1960s as an example of underestimating the consequences of inaction. In the Federal Republic, this neglect of the obligation to seek retribution for past crimes promoted widespread cynicism among the German population about its government's commitment to making a full break with authoritarianism, and from the perspective of some observers, it ultimately contributed to the violent rejection of German democracy by many young people after 1968.

On the other hand, it is equally easy to appreciate the arguments

that have been made against involving the courts in the quest for retrospective justice. Like the Allied tribunals at Nuremberg, which seemed at times (e.g., in the case of "crimes against humanity") to stretch established legal standards in order to justify the prosecution of the leaders of Nazi Germany, new democracies often find themselves on uncertain jurisprudential ground in seeking to bring their former dictators to justice. In their rush to judgment, the critics of such proceedings contend, these states run the risk of abusing a cardinal principle of the rule of law, *nullem crimen nulla poena sine lege.* That is, individuals should only be held accountable to laws that were in effect at the time they acted. Should states lose sight of this principle and subject the accused to ambiguous and ill-defined legal standards, the law will lose its uniquely democratic quality of applying consistently and fairly to everyone. Bringing this problem into even sharper focus is the fact that in many new democracies, such as Poland in the early 1990s, electoral politics and naked political ambitions have often gotten the upper hand in crusades to "root out the dictators" and punish the leaders of old. In these instances, democratic regimes have allowed themselves to become caught up in processes that have little, if anything, to do with the realization of justice per se. For the skeptics, the result of these campaigns has invariably been to cheapen the currency of democracy and weaken public faith in government.

The critics of accountability trials also point out that new democracies face a concrete challenge that was never at issue at Nuremberg. In the latter case, the Allied powers had one unquestionable advantage over domestic courts in their quest for justice. They were able to impose their judgments upon a completely defeated enemy. In contrast, in many of the former states, from southern Europe in the 1970s to Latin America and Africa in the 1980s and 1990s, emerging democratic regimes have enjoyed, at best, only a tenuous hold on political power. All too often, these governments have inherited societies that are fractured and divided as a result of the experience of authoritarian rule. In many instances, the same representatives of the old regime whom they would most like to bring to trial—the leaders of the military, for example—are watching and waiting in the wings for the first democratic misstep that will allow them to rally their forces

for a return to power. Under these circumstances, even forceful advocates of trials have conceded that the fledgling democracy may have no choice but to temper its hopes of holding its former oppressors accountable for their misdeeds and concentrate instead on the immediate challenge of political survival. As human rights activist Aryeh Neier has observed, "Permitting the armed forces to make themselves immune to prosecution for dreadful crimes seems intolerable; yet it also seems irrational to insist that an elected civilian government should commit suicide by provoking its armed forces."[2] As a consequence of such situations, states as diverse as Spain, Chile, Brazil, and South Africa have opted on prudential grounds to confine their efforts to settle accounts with their predecessors to approaches to the past—political proclamations, truth commissions, reparations, and even amnesties—that seem more likely to lessen political and social divisions than to give rise to new tensions.

Clearly, powerful arguments can be made both for and against using the courts to redress past wrongs. Yet as the essays in this book suggest, this does not mean that new democracies are necessarily reduced to an either-or choice between undertaking criminal prosecutions with abandon or, conversely, turning a blind eye to the human rights abuses of their predecessors. Quite frequently, the decisive issue is not whether justice should be pursued but rather *how* it is to be sought. According to what legal standards should former dictators be held to account for their crimes? And under what circumstances might transitional justice be considered both possible and desirable in light of the aims of a new democracy?

For example, it would certainly be a grievous error for any democratic regime to give short shrift to due process in its desire to punish past dictators. Given the abuses inflicted upon the rule of law under authoritarianism, it is reasonable to expect that the legal practices of a democratic government will be beyond reproach. Nevertheless, it would also be incorrect to think that all new democracies are therefore bereft of the legal resources and precedents required to bring the perpetrators of egregious human rights violations to justice. In the mid-1980s and early 1990s, both Argentina and Germany, respectively, were provided with the opportunity to conduct Nuremberg-style accountability trials, in which they could have achieved speedy

convictions on the basis of sweeping pronouncements about the immorality of the dictatorial regimes that preceded them. However, rather than take this option and risk providing their critics with evidence that they were interested only in imposing "victors' justice" upon their one-time adversaries, both states chose instead to base their prosecutions on preexisting, codified laws that would have been known to the accused at the time they committed their crimes. This approach resulted in fewer convictions, but arguably, it was well worth the sacrifice. Each of the governments was able to send its population a more valuable message about the benefits of the rule of law in a democratic society.

In addition, the democratizing regimes of the contemporary age are privileged to draw upon a substantial body of *international* legal precedents that was not available to the courts at Nuremberg. Human rights scholar Tina Rosenberg has captured this revealing difference in circumstances by pointing out that the new democracies of the 1980s and 1990s enjoy the blessing of having come late in history. "Paradoxically," she has written, "Nuremberg's weaknesses, not its strengths, have proven most enduring. Even Nuremberg's most vociferous supporters admit that the prosecutions had only the shakiest foundations in existing law; prosecutors at the International Military Tribunal and in later U.S. tribunals in Nuremberg and international tribunals in Tokyo improvised as they went along. But Nuremberg's principles have now been codified and accepted by most nations of the world and form the basis for much of current international and human rights law."[3]

We are still some distance away from achieving an effective international regime to enforce these principles. Still, there can be no doubt that the currency of international law has grown enormously over the past fifty years. On this basis, the parties to such international accords as the Geneva Conventions, the Genocide Convention, the International Covenant on Civil and Political Rights, and the UN Convention Against Torture would seem bound to abide by the norms contained within these agreements and are, therefore, obliged to take some kind of action against the violators of such standards. Of the cases under consideration in this volume, South Africa might appear at first glance to be an obvious exception to this rule, due to

its long-standing isolation from the world community. But even in this instance, one should not rush to judgment. The South African government was not only a party to the Charter of the United Nations, but as we shall see later, the case can be made that its former leaders were also required to abide by customary international-law rules governing crimes against humanity and torture.

Finally, the chapters in this volume provide much cautionary evidence about the importance of avoiding seemingly easy solutions to the tough decisions that are involved in conducting or, conversely, eschewing accountability trials. There may be times when the most responsible way of dealing with a legacy of human rights abuse is, in fact, to pass over the crimes of a former dictatorship in silence, that is, to forget and if possible, to forgive past offenses in the interest of national reconciliation. By the same logic, the most sensible choice at other times may be to turn instead to less divisive means of wrestling with the past, such as those availed by truth commissions and other fact-finding agencies. However, one should always be circumspect about arguments that too readily dismiss calls for justice and accountability by appealing to an all-encompassing "political realism."

For one thing, reasonable individuals may differ about whether there is cause for a trade-off between demands for retribution and the requisites of political order. One person's fears that trials will promote political strife and instability in a given setting may be matched by another's equally well-grounded conviction that lasting peace will only be achieved by addressing the issue of accountability. Thus, some form of transitional justice could be perfectly compatible with a fledgling democracy's requirements for survival. By the same token the argument for realism can also become, whether intentionally or not, an unhealthy pretext for sidestepping the difficult moral choices that any democratic regime is called to make. Hence, what appears to one observer to be a measured act of sobriety may represent to another a fundamental misreading of actual political circumstances. As former Americas Watch director Juan Méndez noted in 1991 about the controversial 1989 and 1990 decisions of Argentina's president, Carlos Menem, to pardon the high-ranking officers behind his country's military dictatorship (including individuals who had already been convicted for their crimes), Menem may have thought he was acting in

the interest of forgiveness and national reconciliation, but the former junta leaders had other ideas: "It would be easier to understand the reconciliation rationale if there were any sign that the military is genuinely contrite about its role during the 'dirty war,' and is ready to seek reconciliation with their victims. In fact, the opposite is true: the armed forces view the pardons as a step in the direction of full vindication for their victory in 'defeating subversion.'"[4]

The contributors to this book have different, and sometimes even sharply contrasting, views on when and how democratizing regimes should address the issue of transitional justice. This is to be expected, given the fact that the authors are dealing with such diverse countries and political settings. The experiences of these states with dictatorship are quite dissimilar, as even a cursory examination of the differences between the bureaucratic authoritarianism of many Latin American dictatorships and the complex history of Marxism-Leninism in Europe will reveal. Accordingly, the requisites of democratic consolidation in these states are likely to be dissimilar as well. Nevertheless, in two essential respects, the authors of the following chapters are of one mind. They all believe that the legacy of human rights abuse in these countries cannot be simply ignored. They are also convinced that the responses that the leaders of these states devise to this challenge will be directly relevant to the quality and sustainability of democracy.

This study originated as an interdisciplinary symposium on "Political Justice and the Transition to Democracy," which was held at the University of Notre Dame on April 28, 1995. The symposium was sponsored by the Helen Kellogg Institute of International Studies and the Center for Civil and Human Rights of the Notre Dame Law School and included three of the contributors to this volume (Carlos Acuña, Jorge Correa Sutil, and myself) and three others (Paulo Sergio Pinheiro and Oscar Viera of Brazil and the late Etienne Mureinik of South Africa). However, the book that has resulted from this meeting has gone far beyond its modest beginnings. In preparing this volume, I felt that it was essential to have a representative international sample of the many cases in the postwar period in which new democracies have sought, with varying degrees of success, to involve their courts in the quest for retrospective justice. To this end, I was

extremely fortunate in being able to locate a remarkably devoted group of contributors from a wide variety of intellectual traditions, ranging from political science to international law. These scholars were not only willing to take the time to write original essays for this book, but they also shared my conviction that this was a project whose time had come. I am particularly grateful to them for their patience and diligence in adhering to my entreaties that we never lose sight of the central theme of this study: the complex relationship between the uses of the law to pursue transitional justice and the founding of new democracies. It is a tribute to them that we have lived up to this all-important task.

This book has been long in coming, and I have incurred many debts in the process of bringing it to fruition. Without the financial support of the Center for Civil and Human Rights, the Kellogg Institute, and the Institute for Scholarship in the Liberal Arts, the project would never have been possible in the first place. But as is always the case, the help and encouragement of specific individuals were what counted the most. Of my many scholarly colleagues at Notre Dame and our visiting fellows program at the Kellogg Institute, I am especially thankful to Michael Francis, Donald Kommers, Albert Le May, Scott Mainwaring, Garth Meintjes, Juan Méndez, Guillermo O'Donnell, Paulo Sergio Pinheiro, Timothy Scully, Jennifer Warlick, and John Yoder for their gracious support at many stages of this endeavor. On numerous occasions, Mainwaring and Meintjes provided crucial insights into the content and organization of the book. Additionally, I would like to thank Martha Sue Abbott, Bettye Bielejewski, Caroline Domingo, Dolores Fairley, Nancy Hahn, Tina Jankowski, Vonda Polega, and Joetta Schlabach. Without their patient and expert assistance, I would never have mustered the resources necessary to complete this project. I am grateful to Gabriela Ippolito, Marianne Hahn, Erin Joyce, Charlie Kenney, Marcelo Leiras, Eva Rzepniewski, Carol Stuart, and Elizabeth Yoder, who helped me with countless research and editorial tasks along the way. I am also indebted to Rebecca DeBoer, Jim Langford, Jeannette Morgenroth, and Carole Roos, all of the University of Notre Dame Press, for generously supporting this project from its inception and producing it in record time.

Finally, I extend a special word of thanks to Bill Lewers, to whom I dedicate this volume. Fr. Lewers' contributions to the life of the mind and the soul at Notre Dame have been enormous. His inspiration transformed the idea for this book into a reality.

A. James McAdams
November 1, 1996

NOTES

1. Cited in Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992), p. 167.

2. Aryeh Neier, "What Should be Done about the Guilty?" *The New York Review of Books*, February 1, 1990, p. 34. Yet Neier also insists that this concession to reality should *not* become an excuse for doing nothing. "[I]f the new civilian governments are to evolve into genuine democracies," he writes in the same paragraph, "it is essential that the rule of law should prevail and that the armed forces should be subordinated to democratic rule."

3. Tina Rosenberg, "Tipping the Scales of Justice," *World Policy Journal* (Fall 1995): 55.

4. Juan E. Méndez, *Truth and Partial Justice in Argentina: An Update* (New York: Human Rights Watch, 1991), p. 69.

Contributors

CHAPTER 1

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