

David Crocker

Reckoning with Past Wrongs: A Normative Framework

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Reckoning with Past Wrongs: A Normative Framework

David A. Crocker*

Many nations and some international bodies today are deciding what, if anything, they should do about past violations of internationally recognized human rights. These abuses—which include war crimes, crimes against humanity, genocide, rape, and torture—may have been committed by a government against its own citizens (or those of other countries), by its opponents, or by combatants in a civil or international armed conflict.¹ Some of these societies are making a transition to democracy and some are not.

The challenge of “transitional justice,” a term increasingly used, is how an incomplete and fledgling democracy, such as South Africa, Guatemala, South Korea, the Philippines, Argentina, Chile, or El Salvador, should respond (or should have responded) to past evils without undermining its new democratic regime or jeopardizing its prospects for equitable and long-term development. This focus on new democracies has much to recommend it, for it is important that new democratic institutions, where they exist, be protected and consolidated and that reckoning with an evil past not imperil them.

However, nations other than new democracies also have occasion to decide what they “should do about a difficult past,”² and their choices are of intrinsic moral significance as well as relevant for new democracies. These countries, none of which are (now) making a transition to democracy, can be roughly divided into three types: post-conflict societies, such as Bosnia,

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¹ The best multidisciplinary collections on transitional justice are Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, D.C.: United States Institute of Peace Press, 1995); Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); and A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997).

² Timothy Garton Ash, “The Truth About Dictatorship,” *New York Review of Books* 45 (February 19, 1998), p. 35.

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Cambodia, and Rwanda, that aspire to make a democratic transition but are at present taken up with ongoing security issues following ethnic strife and massacres; authoritarian and conflict-ridden societies, such as Yugoslavia, Indonesia, and Peru, in which both an end to civil conflict and the beginning of democratization may depend on negotiated agreements between the government and its opposition with respect to treatment of human rights violators; and mature democracies, such as the United States, Germany, Japan, France, and Switzerland, that are reckoning with past evils, for example, slavery, war crimes, collaboration with the Nazi extermination efforts, or failures to prevent human rights abuses in their own or other countries.³ The fashionable focus on new democracies tends to limit what such societies may learn from other attempts to reckon with past rights abuses and to diminish the moral challenge facing nondemocratic and mature democracies as they reckon with an unsavory past.

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Even in the context of societies making a democratic transition, the term "transitional justice" may be misleading. This is because, like the term "accountability," transitional justice singles out one morally urgent feature from a complex that has many pressing goals or obligations.

Means and Ends

Societies and international bodies have employed many means in reckoning with human rights abuses that a prior regime or its opponents have committed. Many discussions assume that there are only two possible responses: trials and punishment or forgetting the past. For example, upon coming out of hiding and surrendering to the Cambodian government in late December 1998, Khieu Samphan, a former top leader of the Khmer Rouge, urged Cambodians to "let bygones be bygones." During its control of Cambodia from 1975 to 1979, the Khmer Rouge is estimated to have killed between 1.5 and 1.7 million people, including most of the educated class, and to have destroyed much of Cambodian culture. Although he was to backtrack a few days later, Cambodian Prime Minister Hun Sen initially agreed with Khieu Samphan and remarked that Khieu Samphan and another high-placed defector, Nuon Chea, should be welcomed back "with bouquets of flowers, not

³ For these broader issues, see Ash's essay and Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* 19 (1997), pp. 256-58, and "In Defense of Transitional Justice," in McAdams, ed., *Transitional Justice*, pp. 22-23, n. 4.

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with prisons and handcuffs" and that "we should dig a hole and bury the past and look ahead to the 21st century with a clean slate."⁴

When trials are judged as impractical and forgetting as undesirable, truth commissions have been advocated (and in some 20 countries employed) as a third way. However, in addition to these three tools there are a variety of other measures, such as international (ad hoc or permanent) criminal tribunals; social shaming and banning of perpetrators from public office ("lustration"); public access to police records; public apology or memorials to victims; reburial of victims; compensation to victims or their families; literary and historical writing; and blanket or individualized amnesty (legal immunity from prosecution).

To decide among the diverse tools, as well as to fashion, combine, and sequence them, a society, sometimes in cooperation with international institutions, ideally should (1) consider what lessons it might learn from other societies, (2) examine its own capabilities and limitations, and (3) set clear objectives for its efforts. The first task is best accomplished by those who will be key actors in their nation's attempts to reckon with an evil past. The second responsibility most obviously falls on historians, social scientists, and legal scholars who are adept at identifying a society's distinctive historical legacies, institutional strengths and weaknesses, and political constraints. The last task, that of identifying goals and standards of evaluation, must be taken up by philosophers and applied ethicists, but not by these alone; citizens, political leaders, policy analysts, and social scientists also have a responsibility to make moral judgments, engage in ethical analysis, and set forth ethically based recommendations.

Although philosophers and other ethicists have not entirely ignored the topic of reckoning with past wrongs, it is legal scholars, social scientists, policy analysts, and activists who have made the most helpful contributions. It is understandable that much of the work on transitional justice has been of an empirical and strategic nature. Fledgling democracies need effective institutions and strategies for addressing prior human rights violations; establishing such arrangements and policies requires a grasp of what works and why. Legal and human rights scholars have focused on what national and international law permits and requires with respect to prosecuting gross human rights violations.⁵ They have also reported and assessed the progress

⁴ Seth Mydans, "Under Prodding, 2 Khmer Rouge Apologize for the Reign of Terror," *New York Times*, December 30, 1998, p. A1, and "Cambodian Leader Resists Punishing Top Khmer Rouge," *New York Times*, December 29, 1998, pp. A1, A3.

⁵ See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights and Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (New York: Times Books, 1998).

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of the Bosnian and Rwandan international criminal tribunals, crafted the terms of an agreement on a permanent international criminal tribunal, and argued for the implementation of that agreement.⁶ Investigative reporters have described what particular countries and the international community have done and failed to do in their efforts to reckon with past human rights abuses.⁷ Principal actors or advisers have written about their experiences and assessed their achievements.⁸ Historians and social scientists have addressed the issue of why certain countries decided on particular approaches and the motivations for and consequences of those choices.⁹

However, there are also large and pressing ethical questions. How should "success" with respect to reckoning with past wrongs be conceived? Are the ends that societies seek to achieve and the means they adopt to achieve them consistent and morally justified? Questions such as these should not be overlooked or swamped by legal or strategic considerations.

To be sure, moral concerns are often *implicit* in the existing work on transitional justice, and moral norms of various kinds underlie the institutions and policies that societies already have established to reckon with an evil past. Indeed, one task of ethical analysis with respect to past human rights abuses is to identify and clarify those operative values for which reasonable justification can be given. Michael Walzer's attempt to fashion a new moral theory (with historical illustrations) concerning just and unjust wars between nations can be adapted to the forging of a normative framework to assess what should be done when a society reckons with human rights violations.¹⁰

⁶ Ruth Wedgwood, "Fiddling in Rome," *Foreign Affairs* 77 (November–December 1998), pp. 20–24.

⁷ Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (New York: Pantheon, 1990); Roy Gutman, *Witness to Genocide* (New York: Macmillan, 1993); Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* (New York: Random House, 1995) and "Defending the Indefensible," *New York Times Magazine*, April 19, 1998, pp. 45–69; David Rohde, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre since World War II* (Boulder: Westview Press, 1997); Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (New York: Oxford University Press, 1998); Roger Cohen, *Hearts Grown Brutal: Sagas of Sarajevo* (New York: Random House, 1997); Chuck Sudetic, *Blood and Vengeance: One Family's Story of the War in Bosnia* (New York: W. W. Norton, 1998); Bill Berkeley, "Aftermath: The Pursuit of Justice and the Future of Africa," *Washington Post Magazine*, October 11, 1998, pp. 10–15, 25–29; Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Farrar, Straus & Giroux, 1998).

⁸ See, for example, the essays by the following authors, in Kritz, ed., *Transitional Justice*, vol. 1, who took part respectively in attempts to reckon with past wrongs in El Salvador, Argentina, and Chile: Thomas Buergenthal, Carlos Nino, and José Zalaguet.

⁹ See McAdams, ed., *Transitional Justice*; and Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Books, 1997).

¹⁰ See *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2d ed. (New York: Basic Books, 1977), p. xxvii.

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When political actors or scholars do explicitly pose ethical questions with respect to addressing past wrongs, they usually do so in relation to only one goal, such as penal justice, truth, or reconciliation, or one tool, such as trials, truth commissions, or amnesties.¹¹ However, the full range of conceptual and moral issues underlying the many ends and means of transitional justice has not received the sustained analysis it deserves.¹²

Cross-Cultural Goals

To fashion and evaluate any particular tool to reckon with past evil in a particular society and to combine it with other tools requires not only knowledge of that society's historical legacies and current capabilities but also a grasp of morally important goals and standards of assessment. What goals and norms should be used, where should they come from, and how might they be promoted? In recent conference papers and writings, I have formulated eight goals that have emerged from worldwide moral deliberation on transitional justice and may serve as a useful framework when particular societies deliberate about what they are trying to achieve and how they should go about doing so.¹³

In the present essay I employ these eight goals to identify and clarify the variety of ethical *issues* that emerge in reckoning with past wrongs, widespread *agreements* about resolving each issue, leading *options* for more robust solutions

¹¹ See, for example, Donald Shriver, *An Ethic for Enemies: Forgiveness in Politics* (New York: Oxford University Press, 1995); Pablo De Greiff, "Trial and Punishment, Pardon and Oblivion: On Two Inadequate Policies for the Treatment of Former Human Rights Abusers," *Philosophy and Social Criticism* 12 (1996), pp. 93-111; "International Criminal Courts and Transitions to Democracy," *Public Affairs Quarterly* 12 (1998), pp. 79-99; and Lyn S. Graybill, "South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives," *Ethics & International Affairs* 12 (1998), pp. 43-62.

¹² One exception to this judgment is Ash, "The Truth About Dictatorship." Although he neither clarifies nor defends his ethical assumptions and although his particular assessments can be disputed, Ash insightfully considers four general measures—forgetting, trials, purges, and historical writing—with lots of variations and examples, especially from East and Central European countries.

¹³ David A. Crocker, "Transitional Justice and International Civil Society: Toward a Normative Framework," *Constellations* 5 (1998), pp. 492-517; "Civil Society and Transitional Justice," in Robert Fullinwider, ed., *Civil Society, Democracy, and Civic Renewal* (Lanham, Md.: Rowman & Littlefield, forthcoming); and "Truth Commissions, Transitional Justice, and Civil Society" (paper presented at the South African Truth and Reconciliation Commission Conference, World Peace Foundation, Somerset West, South Africa, May 28-30, 1998). My list of objectives has benefited from the work of Méndez and Zalaquett as well as from that of Margaret Popkin and Naomi Roht-Arriaza, who formulate and employ four criteria in "Truth as Justice: Investigatory Commissions in Latin America," *Law and Social Inquiry* 20 (1995), pp. 79-116, especially pp. 93-106.

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of each issue, and ways to weigh or *trade off* the norms when they conflict. My aim is both to show that there are crucial moral aspects in reckoning with the past and to clarify, criticize, revise, apply, and diffuse eight moral norms. The goals that I propose are not a recipe or "one-size-fits-all" blueprint but rather a framework for exploration by which societies confronting past atrocities can decide—through cross-cultural and critical dialogue—what is most important to accomplish and what are the morally best ways to do so.

Before setting forth morally urgent ends, two opposing (but dialectically related) goals should be ruled out: vengeance, and disregarding the past in favor of the future. I will not repeat my arguments set forth elsewhere that countries should reject these goals.¹⁴ Two remarks about both goals and a new example about implementing them, however, are in order. First, various tools may be employed to realize each of these morally undesirable ends. Vengeance can be carried out privately (by individuals or groups) or officially (in reprisals and kangaroo courts). A nation can overcome an evil past and attempt to move to a better future by forgiving and forgetting (letting bygones be bygones), outright denial (for instance, that the Holocaust occurred), or rationalization of the past as a necessary evil. Second, attempts to realize each of these goals often lead—either precipitously or eventually—to efforts to achieve the other: the side that has wreaked revenge often attempts to protect itself from counterrevenge by calling for "forgive and forget"; silence about the past may incite revenge for both the original act and its burial.

Both tendencies are illustrated by the case of the thousands of atrocities committed by Croat Nazis (Ustashi) against Serbs, Jews, and Gypsies during World War II, especially in the Jasenovac concentration camp. There is good reason to believe that the breakup of Yugoslavia and the Serb violation of Croat rights during the war between Croatia and Serbia in 1991–92 can be partially explained (not justified) by the genocidal practices of the Croats during World War II and by the failure of postwar Croats and the Tito government to hold either investigations or trials. Serbian philosopher Svetozar Stojanović observes:

The communist victor [Tito] in Yugoslavia never seriously looked into Ustashi genocide as an issue or a problem. Instead of carrying out denazification through education . . . he limited himself to the liquidation of captured Ustashis. It is true that Pavelić and the other main criminals had, however, fled abroad, and the new authorities did not endeavor to organize their trial (at least in absentia) like the one in Nürnberg, although they more than deserved it. The karst pits into which Serbs

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¹⁵ Svetozar Stojanović, *Prometheus*.

¹⁶ Alex B. Aizawa, *Truth Commission*.

¹⁷ Rohde,

¹⁴ Crocker, "Transitional Justice and International Civil Society," pp. 495–96.

were thrown alive by Ustashis in Herzegovina remained concreted over, and their relatives were not allowed to remove the bodies and bury them. These "concreted pits" have become a metaphor for the communist illusion that enforced silence is the best way to deal with terrible crimes among nations. Perhaps that was why, not only due to his personal nonchalance, Tito never visited Jasenovac.¹⁵

TRUTH

To meet the challenge of reckoning with past atrocities, a society should investigate, establish, and publicly disseminate the truth about them. What Alex Boraine calls "forensic truth" or "hard facts"¹⁶ is information about whose moral and legal rights were violated, by whom, how, when, and where. Given the moral significance of individual accountability, the identity of individual perpetrators, on the one hand, and of moral heroes who sacrificed personal safety to prevent violations, on the other, should be brought to light.

There is also what has been called "emotional truth"—knowledge concerning the psychological and physical impact on victims and their loved ones from rights abuses and the threat of such abuses. The constant threat of such abuses, especially in contexts of physical deprivation, can itself cause overwhelming fear and, thereby, constitute a rights violation. David Rohde makes this point clearly in his agonizing account of the aftermath of the takeover of Muslim Srebrenica by General Ratko Mladić and his Bosnian Serb forces:

During the trek [the "Marathon of Death" in which thousands of male Bosnian noncombatants and a few soldiers fled Srebrenica], it quickly became clear that the threat to the column was as much psychological as it was physical. Shells abruptly whizzed overhead. Gunfire erupted with no warning. Corpses littered their route. A Serb mortar had landed ahead of them at 1 p.m. and killed five men. A human stomach and intestines lay across the green grass just below the intact head and torso of a man in his twenties. Mevludin [Orić, a Bosnian Muslim soldier] had seen such things before; the others hadn't. The image would slowly eat at their minds. Some men were already saying it was hopeless. It was better to kill yourself, they said, than be captured by the Serbs.¹⁷

¹⁵ Svetozar Stojanovic, *The Fall of Yugoslavia: Why Communism Failed* (Amherst, N.Y.: Prometheus Books, 1997), pp. 77-78; see also pp. 89-92.

¹⁶ Alex Boraine, "The Societal and Conflictual Conditions That Are Necessary or Conducive to Truth Commissions" (paper presented at the South African Truth and Reconciliation Commission Conference, World Peace Foundation, Somerset West, South Africa, May 28-30, 1998).

¹⁷ Rohde, *End Game*, p. 226.

Fear also had devastating consequences for the Muslim women and children, herded together in Srebrenica, whose husbands and fathers were taken away and tortured during the night of July 12, 1995:

She [Srebrenica resident Čamila Omanović] could see what was happening around her, but it was the sounds that haunted her. Screams suddenly filled the night. At one point, she heard bloodcurdling cries coming from the hills near the base. She later decided the Serbs must be playing recordings to terrorize them. Women gave birth or cried as their husbands were taken away. Men wailed and called out women's names. . . . Panic would grip the crowd. People would suddenly rise up and rush off in one direction. Then there would be silence until the cycle of screams and panic started all over again. Nearly hallucinating, Čamila could not sleep. . . . But it was the fear that didn't let her sleep. A fear more intense than anything she had ever felt. A fear that changed her forever.¹⁸

Finally, there is less individualized and more general truth, such as plausible interpretations of what caused neighbors to brutalize neighbors, governments (and their opponents) to incite, execute, or permit atrocities, and other countries or international bodies to fail to act in time or in the right way.¹⁹

Knowledge about the past is important in itself. One way to make this point is to say that victims and their descendants have a moral right to know the truth about human rights abuses. Moreover, without reasonably complete truth, none of the other goals of transitional justice (to be discussed presently) are likely to be realized. Appropriate sanctions are impossible without reasonable certainty about the identity of perpetrators and the nature of their involvement. Public acknowledgment must refer to specific occurrences, while reparations presuppose the accurate identification of victims and the kinds of harm they suffered. If reconciliation in any of its several senses is to take place, there must be some agreement about what happened and why. Former enemies are unlikely to be reconciled if what count as lies for one side are verities for the other.

Yet truth, while important, sometimes must be traded off against other goods. Since the truth can harm people as well as benefit them, sometimes it is

¹⁸ Ibid., pp. 230–31.

¹⁹ For investigations of what the United States and other Western powers could and should have done to prevent the Holocaust, see Richard Breitman, *Official Secrets: What the Nazis Planned, What the British and Americans Knew* (New York: Hill and Wang, 1999); and Istvan Deak, "Horror and Hindsight," a review of *Official Secrets* by Richard Breitman, *The New Republic*, February 15, 1999, pp. 38–41. For consideration of the same issues with respect to the failure of the United States, the UN, and the European Union to intervene militarily in Croatia and Bosnia in 1991–95, see Mark Danner, "The US and the Yugoslav Catastrophe," *New York Review of Books* 44 (November 20, 1997), pp. 56–64.

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better that some facts about the past remain unknown. By deepening ethnic hostility, too much or the wrong kind of truth might impede democratization and reconciliation. Disclosures that satisfy a victim's need to know may incite violence when publicly revealed. The most effective methods for obtaining the truth might violate the rule of law, personal privacy, or the right not to incriminate oneself. Or such methods might be too costly in relation to other goals. Some truths about the past would be irrelevant to reckoning with past injustices. The general point is that apparently justified efforts in limiting the pursuit or the disclosure of truth imply the need to balance truth against other goals.

Even given that truth is one important good that can be traded off in relation to other goods, many issues remain to be resolved. First, can one plausibly argue that there is one truth about the past and, if so, how should we understand this ideal in relation to the frequently diverse views about the content of this truth? How should a truth commission address diverse interpretations of the past when they emerge in the commission's work or in public reaction to it? My own view is that disagreements should be reduced as much as possible and those that remain should be clearly identified as topics for further public deliberation.²⁰ Second, to whom and at what cost should the truth be made known? Third, how should we assess truth commissions and other investigative bodies, investigative reporting and historical writing, national trials, international criminal tribunals, and the granting of public access to police files? Given their different standards of evidence and proof, how much and what sort of truth can be reasonably expected from each of these approaches? What are the merits of each method both in reducing disagreement and accommodating or respecting remaining differences? To what extent, if any, might a truth commission impede rather than promote international and domestic judicial determination of individual guilt and innocence? What ethical issues emerge from the various methods of collecting and interpreting information about past abuses?²¹

My general belief, which I cannot develop or defend in this essay, is that there are many different but complementary ways of obtaining reasonable knowledge about the past and that no one means should be overemphasized. Trials, for example, owing to subpoena power and adversarial cross-examination, are usually superior to truth commissions in establishing truths relevant to the guilt or innocence of particular individuals; truth commissions tend to be

²⁰ See my "Truth Commissions, Transitional Justice, and Civil Society."

²¹ See, for example, Patrick Ball, *Who Did What to Whom? Planning and Implementing a Large Scale Human Rights Data Project* (Washington, D.C.: American Association for the Advancement of Science, 1996).

better than trials in describing the larger institutional patterns contributing to rights violations; historical investigations—often with the advantage of fuller documentation, more ample opportunities to check sources, and greater hindsight than is possible in either trials or truth commissions—are best at sifting evidence and evaluating explanatory hypotheses. Not only can these tools complement each other, but each one can make use of others. Truth commissions often make recommendations to legal proceedings. Historians provide expert testimony in trials and sometimes are members of truth commissions. Investigative reporters and forensic experts have been enormously important in uncovering atrocities and dispelling rumors and false propaganda.²²

PUBLIC PLATFORM FOR VICTIMS

In any society attempting to reckon with an evil past, victims or their families should be provided with a platform to tell their stories and have their testimony publicly acknowledged. When victims are able to give their accounts and when they receive sympathy for their suffering, they are respected as persons with dignity rather than—as before—treated with contempt. This respect enables those once humiliated as victims to become empowered as citizens. Those once reduced to screams or paralyzing fear now may share a personal narrative. The public character of the platform is essential, for secrecy about human rights abuses, enforced through violence and intimidation, was one of the conditions that made possible extensive campaigns of terror.

Among the unresolved questions that remain is the weight to be given to this goal when the public character of testimony would put former victims, perpetrators, or reporters at substantial risk. After disclosing to the press that the Argentine military did indeed kill some suspected “subversives” and their children by pushing them from airplanes into the sea, a military officer was brutally attacked and his face carved with the initials of the reporters to whom he revealed the truth. Another problem surfaces when a victim’s public testimony is not followed up by efforts to heal wounds and compensate for harms.²³ Finally, unless

²² See Mark Danner, “Bosnia: The Turning Point,” *New York Review of Books* 45 (February 5, 1998), pp. 34–41, for a compelling argument that rejects Serb claims that it was Muslims themselves who were responsible for the mortar attack that killed 68 Muslims in a Sarajevo market on February 5, 1994.

²³ Suzanne Daly, “In Apartheid Injury, Agony Is Relived But Not Put to Rest,” *New York Times*, July 17, 1997, pp. A1, A10.

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there is independent investigation or cross-examination of accusers, alleged perpetrators may be treated unfairly and due process compromised.

ACCOUNTABILITY AND PUNISHMENT

Ethically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment. Punishment may range from the death penalty, imprisonment, fines, international travel restrictions, and the payment of compensation to economic sanctions on an entire society and public shaming of individuals and prohibitions on their holding public office.

Many questions about responsibility and punishment remain to be answered. How, for example, can accountability be explained and fairly assigned? How should we understand the degrees and kinds of responsibility with respect to the authorization, planning, "middle management," execution, provision of material support for, and concealment of atrocities? Consider also journalist Bill Berkeley's observation about a Hutu *bourgmestre* found guilty (by the International Tribunal for Rwanda) of "nine counts of genocide, crimes against humanity, and war crimes, including rape":

Jean-Paul Akayesu was neither a psychopath nor a simpleton. He was not a top figure like the former defense minister, Theoneste Bagasora, Rwanda's Himmler, who is now in custody [of the International Tribunal for Rwanda] in Arusha, nor a lowly, illiterate, machete-wielding peasant. He was, instead, the link between the two: an archetype of the indispensable middle management of genocide. He personified a rigidly hierarchical society and culture of obedience, without which killing on such a scale would not have been possible.²⁴

Should those who actually commit (minor) abuses be ignored or pardoned in favor of holding their superiors accountable, or should the moral guilt and cumulative impact of those who "merely" followed orders also be recognized? What is needed is a theory—relevant to judging past rights abusers—that identifies those conditions that make an agent more or less blameworthy (and praiseworthy). Recent work suggests that a perpetrator's moral guilt is proportional to what he knew (or could reasonably know) and when he knew it; how much freedom (from coercion) or power (in a chain of command) he had to commit or prevent evil; and

²⁴ "Aftermath: Genocide, the Pursuit of Justice and the Future of Africa," *Washington Post Magazine*, October 11, 1998, pp. 14, 28.

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what personal risks he ran in performing or forgoing a rights violation.

For which crimes should people be held accountable when a country or the international community is reckoning with past evil?²⁵ Is it morally justifiable to hold people accountable either for an act that was not illegal at the time it was committed or for one that a government subsequently pardons?²⁶ Further, an ethics of reckoning with past wrongs would address violations such as war crimes, crimes against humanity, genocide, torture, and rape. This list implies both that Chile erred in restricting its official truth commission to investigating only killings and disappearances and that the International Criminal Tribunal for the Former Yugoslavia achieved moral progress when it convicted persons of rape in the wars in Croatia and Bosnia.

Should the list of human rights violations be extended further than "physical security rights"? Should it include civil and political rights, such as the right of free speech and the rights not to be discriminated against on the basis of race, ethnicity, religion, or gender, and economic rights, such as the right not to be hungry or the right to employment? I return to this issue when I address what long-term economic and political development should aim for so as to protect against a recurrence of past atrocities.

Two additional questions with respect to accountability must be addressed. How should "sins of commission" be morally compared to "sins of omission"? How does the United Nations' failure to bomb the Serbs attacking Srebrenica in July 1995 compare with the atrocities committed by the Serbian forces? To what extent are *groups*—particular police units, political parties, religious bodies, professional associations (e.g., of doctors or lawyers), independence movements (e.g., the Kosovo Liberation Army), governments, and alliances (e.g., the UN, NATO)—and not solely individuals responsible for rights violations?²⁷ Without a suitably nuanced and graded view of accountability or responsibility, a society falls into the morally objectionable options of, on the one hand, whitewash or social amnesia²⁸ or, on the other hand, the demonization of all members of an accused group.

²⁵ See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustration* (New York: Basic Books, 1977), pp. 304–27; Neier, *War Crimes*, pp. 229–45; Mark J. Osiel, "Obeying Orders: Atrocity, Military Discipline, and the Law of War," *California Law Review* 86 (October 1998), pp. 943–1129.

²⁶ Peter Quint, *The Imperfect Union: Constitutional Structures of German Unification* (Princeton: Princeton University Press, 1997), pp. 194–215. Cf. Anne Sa'adah, *Germany's Second Chance: Trust, Justice, and Reconciliation* (Cambridge: Harvard University Press, 1998).

²⁷ Larry May and Stacey Hoffman, eds., *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Lanham, Md.: Rowman & Littlefield, 1991).

²⁸ See Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), pp. 210–28; Neier, *War Crimes*, pp. 210–228; Peter A. French, ed., *The Spectrum of Responsibility* (New York: St. Martin's Press, 1991).

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Similar questions may be asked with respect to sanctions, whether criminal (punishment), civil, or nonlegal (social shaming, individual lustration, or economic sanctions on an entire society). What types of sanctions are appropriate for what violations, and on what bases? Can justice be achieved through social shaming and moral censure rather than imprisonment? If trials and legal punishments are to be pursued, what purposes can or should they serve? Should a theory of criminal punishment include a retributive element and, if so, how should it be understood, and can retribution be distinguished from revenge?

Legal philosophers and scholars who have addressed reckoning with past political wrongs, such as Carlos Nino and Jaime Malamud-Goti, have tended to reject retributivism in favor of a deterrence or rehabilitation approach.²⁹ Retributivism, however, is having something of a revival, and I believe that it captures some important intuitions about penal justice. One task facing ethicists is to consider which retributive theory is best in itself and in reckoning with past atrocities. This inquiry would also consider whether the most reasonable approach to punishment would be a "mixed theory" in which a retributive principle, however understood, is coupled with other justifications or functions of punishment, such as protection, deterrence, rehabilitation, and moral education.³⁰

RULE OF LAW

As they reckon with past wrongs, democracies—whether new or mature—should comply with the rule of law, and societies (or their democratic oppositions) that aspire to become democratic should lay the groundwork now for eventual rule of law. The rule of law is a critical part of Nuremberg's complex legacy and is important for any society dealing with an evil past. I here follow David Luban's analysis of rule of law, which itself draws on Lon Fuller.³¹

²⁹ Nino, *Radical Evil on Trial*, and "A Consensual Theory of Punishment," in A. John Simmons et al., eds., *Punishment: A Philosophy & Public Affairs Reader* (Princeton: Princeton University Press, 1995), pp. 95–111; and Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?" in Kritz, ed., *Transitional Justice*, vol. 1, pp. 193–202.

³⁰ See, for example, Simmons et al., eds., *Punishment*; Lawrence Crocker, "The Upper Limit of Punishment," *Emory Law Journal* 41 (1992), pp. 1059–1110; and Michael Moore, *Laying Blame* (Oxford: Clarendon Press, 1997).

³¹ David Luban, "The Legacies of Nuremberg," in *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), pp. 335–78. Cf. Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, 1977), pp. 33–39.

The rule of law includes respect for due process, in the sense of procedural fairness, publicity, and impartiality. Like cases must be treated alike, and private revenge must be prohibited. Rule of law is especially important in a new and fragile democracy bent on distinguishing itself from prior authoritarianism, institutionalized bias, or the "rule of the gun."

Again, however, there is an ongoing debate on what rule of law should mean and how it should be valued in relation to other goals. Can "victor's justice" be avoided and legal standards applied impartially to both sides in a former conflict? If so, at what cost? Can those suspected of rights abuses justifiably be convicted when their acts—even though prohibited by international law—were permitted by local law, covered by amnesty laws, or performed in obedience to higher orders? In what way, if any, does the ideal of procedural fairness apply to truth commissions, when alleged perpetrators have no right to cross-examine their accusers? (In South Africa, for example, an investigative arm of the TRC determined the reliability of all testimony—whether by victims, alleged perpetrators, or those seeking amnesty.) What if violations of due process result in fuller disclosures or more accurate assignment of responsibility?

Some advocates of due process, skeptical that victor's justice can be avoided, contend that the only ethically justified way to reckon with past political wrongs is to bury the past and move on to a better future.³² But rule of law, like other ideals, is capable of more or less institutional embodiment. Safeguards fairly protecting both defendants and victims have been developed in local and national jurisdictions and in jurisdictional decisions. Upon learning that one British Law Lord had failed to disclose a relationship to the human rights group Amnesty International, the British Law Lords set aside their initial decision to permit Pinochet's extradition to Spain to stand trial on charges of genocide and other rights abuses. The Pinochet case also shows the lack of both international and Chilean consensus on the issue of when, if ever, a court in one country has the moral or legal right to prosecute alleged human rights violators who are citizens or (former) leaders of other countries. Apart from the question of its impact on Chile's development achievements, international and Chilean opinion is divided about whether Chile's sovereignty would be violated if Pinochet were brought to justice in a foreign country.³³ This question cannot be answered mere-

³² See, for example, Stephen Holmes, "The End of Decommunization," in Krititz, ed., *Transitional Justice*, vol. 1, pp. 116–20; and Jon Elster, "On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution," in *ibid.*, pp. 556–68.

³³ Warren Hoge, "Law Lords in London Open Rehearing of Pinochet Case," *New York Times* January 19, 1999, p. A1.

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ly by appealing to international law and therefore requires moral reflection, for international law points in different directions and is itself evolving in relation to the Pinochet case.

The International Criminal Tribunals for both Rwanda and the former Yugoslavia have slowly developed and improved the fairness of their procedures. An enormous challenge in implementing the plan for a permanent international criminal court will be to devise fair procedures, including procedures for determining whether international or national courts have jurisdiction.

COMPENSATION TO VICTIMS

Compensation, restitution, or reparation, in the form of income, property, medical services, or educational and other opportunities, should be paid to individuals and groups whose rights have been violated. One way of reckoning with past wrongs is by "righting" them—by restoring victims to something approaching their status quo ante.

But if compensation is pursued, pressing questions abound. Who should provide the compensation? Is it fair to use general taxes, when arguably many citizens were not responsible for violations? Or does mere citizenship in a nation that violated rights imply liability? Do German (and U.S.) corporations that used slave labor during World War II owe compensation to the victims or their survivors? What moral obligations, if any, do foreign governments and international civil society have in making reparations to victims of rights abuses? Might requiring guilty perpetrators to provide reparations to their victims be a means for punishing perpetrators or promoting reconciliation between violator and victim?

What form should reparation take and how should compensatory amounts be decided? Is compensation more justified in the form of cash, giving the victim the freedom to decide on its use, or as goods and services related to basic needs? Should compensation be the same for all, even though victims suffered in different degrees and ways, have different numbers of dependents, and have differential access to services depending on where they live? Given the other goals of reckoning with past wrongs, what portion of public resources should be devoted to compensatory justice? What should be done about those victims (or their descendants) the nature or extent of whose injuries—whether physical or psychological—does not become apparent until years after their rights have been violated?

Should groups—for instance, specific Mayan villages in Guatemala or Muslim villages in Bosnia's Drina Valley—as well as individuals be recipients? Is

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South Africa justified in considering public memorials, such as museums and monuments or days of remembrance, "symbolic compensation" for damage done to the entire South African society.³⁴

Recent events suggest that nations and the international community are beginning to answer these questions. Following Chile's example, South Africa is implementing a nuanced "reparation and rehabilitation policy" that defends reparation on both moral ("restoration of dignity") and legal grounds and provides several types of both individual and communal reparation. Individuals are compensated both through monetary packages that take into account severity of harm, number of dependents, and access to social services and through services such as reburials and providing of headstones.

There is widespread approval of recent agreements to compensate Holocaust victims and those who worked as slave laborers for German companies during World War II. Early in January 1999, two Swiss banks—but not the Swiss government—signed an agreement for \$1.25 billion in payments to resolve all class action suits and individual claims against the banks. (To be sure, some Swiss claim that they are being unfairly singled out.) The fund will compensate Holocaust victims for a variety of harms, including the loss of bank deposits and insurance policies and the looting of assets by the Nazis.³⁵ Similarly, the German government has agreed to set up a "compensation fund" (the Remembrance, Responsibility and the Future fund) of \$1.7 billion, to be financed by German banks and other corporations (and perhaps by the government), to compensate Holocaust survivors for the companies' role in stealing assets, financing the building of the Auschwitz concentration camp, or making use of slave labor.³⁶ While these agreements are also prudent ways for the banks and companies to terminate the legal claims against them, the basic principle of the agreements reflects considered judgments about compensatory justice. As German Chancellor Gerhard Schröder remarked, the fund is to fulfill "the moral responsibility of German firms with regard to such issues as forced laborers, Aryanization and other injustice during the Nazi regime."

³⁴ *Report of the [South African] Truth and Reconciliation Commission*, vol. 5, chap. 5, para. 27–28 and 85–93.

³⁵ David A. Sanger, "Gold Dispute with the Swiss Declared to Be at an End," *New York Times*, January 31, 1999, p. A1.

³⁶ Roger Cohen, "German Companies Adopt Fund for Slave Laborers Under Nazis," *New York Times*, February 17, 1999, p. A1. Cohen observes that "since World War Two the German government has paid out about \$80 billion in aid, most of it to Jews who survived concentration camps or fled."

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These cases illustrate "the quest," as journalist Roger Cohen puts it, "to find a balance between remembrance and forward-looking themes."³⁷

INSTITUTIONAL REFORM AND LONG-TERM DEVELOPMENT

An emerging democracy fails to make a sustainable transition unless it identifies the causes of past abuses and takes steps to reform the law and basic institutions—government, economic life, and civil society—in order to reduce the possibility that such violations will be repeated. More generally, reckoning with past political wrongs requires that societies be oriented to the future as well as to the past and present; they must take steps to remedy what caused human rights violations and protect against their recurrence. Basic institutions include the judiciary, police, military, land tenure system, tax system, and the structure of economic opportunities. One temptation in postconflict or postauthoritarian societies is to permit euphoria—which comes with the cessation of hostilities and the launching of a new democracy—to preempt the hard work needed to remove the fundamental causes of injustice and guard against their repetition.

In both Guatemala and South Africa, for example, among the fundamental causes of repression and human rights abuses were racism and deep disparities in economic and political power. A society, whether it already is or whether it aspires to be democratic, must try to remove such fundamental causes of human rights abuses, and to do so in a way that will consolidate its democracy and promote equitable development in the future.

Questions remain, however, with respect to how democratic consolidation and economic development should be conceived. Are free and fair elections sufficient (or necessary) for the former?³⁸ Are increasing rates of per capita GNP necessary or sufficient for the latter? What should be the fundamental goals of economic and social development?³⁹ How might past injustices be addressed such that democratic and just development may be promoted and protected? What role, for example, might compensatory transfers to victims play in increasing social equity?

³⁷ Ibid.

³⁸ See Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), especially chaps. 8, 17, and 18; and Larry A. Diamond, "Democracy in Latin America: Degrees, Illusions, Directions for Consolidation," in Tom Farer, ed., *Beyond Sovereignty: Collectively Defending Democracy in the Americas* (Baltimore: Johns Hopkins University Press, 1996), pp. 52–104.

³⁹ See, for example, David A. Crocker, "Development Ethics," in Edward Craig, ed., *Routledge Encyclopedia of Philosophy*, vol. 3 (London: Routledge, 1998), pp. 39–44; and Martha C. Nussbaum and Jonathan Glover, eds., *Women, Culture, and Development* (Oxford: Clarendon Press, 1995).

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When reckoning with *past* injustices does not coincide with or contribute to ameliorating present ones, how much should be spent on the former at the expense of the latter? Development ethicists should join scholars of transitional justice to explore the links between addressing past wrongs and advancing future rights.

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RECONCILIATION

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A society (or an international community) seeking to surmount its conflictual or repressive past should aim to reconcile former enemies. There are, however, at least three meanings of reconciliation, ranging from "thinner" to "thicker" conceptions. In the most minimal account, which almost everyone agrees is at least part of what should be meant by the term, reconciliation is nothing more than "simple coexistence,"⁴⁰ in the sense that former enemies comply with the law instead of killing each other. Although this *modus vivendi* is certainly better than violent conflict, transitional societies can and arguably should aim for more: while former enemies may continue to disagree and even to be adversaries, they must not only live together nonviolently but also respect each other as fellow citizens. Mark J. Osiel calls this kind of reconciliation "liberal social solidarity,"⁴¹ while Amy Gutmann and Dennis Thompson term it "democratic reciprocity."⁴² Among other things, this implies a willingness to hear each other out, to enter into a give-and-take about matters of public policy, to build on areas of common concern, and to forge principled compromises with which all can live. The process of reconciliation, so conceived, may help prevent a society from lapsing back into violence as a way to resolve conflict.

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More robust conceptions of reconciliation have sometimes been attributed to the truth commissions of Chile and South Africa—reconciliation as forgiveness, mercy (rather than justice), a shared comprehensive vision, mutual healing, or harmony.⁴³ (Both of these commissions include the word "reconciliation" in their name.) Given the depth of hostility between past opponents and objections to coerc-

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⁴⁰ Charles Villa-Vicencio, "A Different Kind of Justice: The South African Truth and Reconciliation Commission," *Contemporary Justice Review* (forthcoming).

⁴¹ Osiel, *Mass Atrocity, Collective Memory, and the Law*, p. 17, n. 22; see also pp. 47–51; 204, n. 136; 263–65.

⁴² Amy Gutmann and Dennis Thompson, "Moral Foundations of Truth Commissions" (paper presented at the South African Truth and Reconciliation Commission Conference, World Peace Foundation, Somerset West, South Africa, May 28–30, 1998).

⁴³ See David Little, "A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies," in this volume.

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ing mutuality or contrition, these thicker conceptions of reconciliation are more difficult to defend than the thinner notions. An essential task of the ethics of transitional justice is to consider the advantages and disadvantages of going beyond the first or second conceptions of reconciliation to some version of the third notion.⁴⁴

PUBLIC DELIBERATION

Any society reckoning with past atrocities should aim, I believe, to include public spaces, debate, and deliberation in its goals, institutions, and strategies. It is unlikely that in any given society there will be full agreement about the aims and means for dealing with past abuses. And, even if there were agreement, trade-offs would have to be made. All good things do not always go together; sometimes achieving or even approximating one end will come at the expense of (fully) achieving another. Legal sanctions against former human rights violators can imperil a potential or fragile democracy in which the military responsible for the earlier abuses still wields social and political power. In order to protect witnesses or secure testimony from alleged perpetrators, a truth commission's interrogation of witnesses or alleged perpetrators sometimes may have to take place behind closed doors. Testimony by victims and confessions by perpetrators may worsen relations among former enemies, at least in the short run.⁴⁵ What is spent on a truth commission or on high-profile trials and punishments will not be available to eradicate infrastructural causes (and effects) of rights violations. A truth commission's exchange of truth for amnesty may preclude achieving penal justice.

What can be aspired to, especially but not exclusively in a new democracy, is that disagreements about ends, trade-offs, and means will be reduced if not eliminated through public deliberation—both national and international—that permits a fair hearing for all and promotes both morally acceptable compromises and tolerance of remaining differences.⁴⁶ This public dialogue may be one of the ingredients in or conditions for social reform that replaces a culture of impunity with a culture of human rights. In nondemocratic Cambodia, for exam-

⁴⁴ See Susan Dwyer, "Reconciliation for Realists," in this volume.

⁴⁵ See Gilbert A. Lewthwaite, "In South Africa, Much Truth Yields Little Reconciliation," *Baltimore Sun*, July 30, 1998, p. 12; and Phylcia Oppelt, "Irreconcilable: The Healing Work of My Country's Truth Commission Has Opened New Wounds for Me," *Washington Post*, September 13, 1998, pp. C1, C4.

⁴⁶ See James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 1996); and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996).

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ple, many citizens are disclosing what they suffered under Khmer Rouge tyranny, debating what should be done, and agreeing that Khmer leaders should be tried:

Countless unburdenings . . . are taking place among Cambodians today as the country seems to be embarking, spontaneously, on a long-delayed national conversation about its traumatic past. . . . The comments also suggest an emerging political assertiveness among people better informed and more aware of their rights. . . . The seemingly near-unanimous view is that Khmer Rouge leaders should be put on trial, if only to determine who is really to blame for the country's suffering—and even if any convictions are followed by an amnesty. . . . With popular emotions stirring, he [Kao Kim Hourn of the Cambodian Institute for Cooperation and Peace] said, "internal pressure on the government has begun to build up." He added: "National Reconciliation at all costs? Bury the past? Forgive and forget? No. I don't think that is the case now." . . . Despite the violent power politics that has persistently stunted the establishment of democracy and human rights, a fledgling civil society has begun to emerge, addressing everything from education to flood control.⁴⁷

Contextualizing Goals and Tools

Although each of the eight goals specified above has prescriptive content, each also allows considerable latitude in devising policies sensitive to specific historical and local facts. Different means may be justified for achieving particular ends, and the selection of means—constrained by local institutional capacities—will have consequences for the priority ranking that any given society assigns to the goals overall. In particular circumstances, the achievement of one or more of the goals would itself be a means (whether one that is helpful, necessary, or the best) to the realization of one or more of the others. For instance, truth may contribute to just punishment, fair compensation, and even reconciliation. When perpetrators are judicially directed to compensate their former victims, steps may be taken toward both retribution and reconciliation.

In summary, I have employed the eight goals to identify the moral aspects of reckoning with past wrongs, the areas of emerging international agreement, and the topics for further cross-cultural reflection and deliberation. Moreover, I propose that the eight goals be employed—and in turn evaluated—as criteria for evaluating the general "success" of various kinds of tools, such as truth commis-

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⁴⁷ Seth Mydans, "20 Years On, Anger Ignites Against Khmer Rouge," *New York Times*, January 10, 1999, p. A1.

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sions,⁴⁸ and designing and assessing a package of tools for attaining transitional justice in particular countries.

I recognize that different local conditions have a crucial bearing on the best that can be done in particular contexts. For example, it matters what a given transition is *from* and what it is *to*. Were prior violations perpetrated or permitted by a dictatorship, or did they occur in the context of a civil war, ethnic conflict, or attempted secession? If one of the latter, has the previous conflict been brought to a negotiated end, or was one side unilaterally victorious? How long was the period of violations, and how many people were perpetrators and victims (or both)? Does the particular society have a history of democratic institutions, or was it a long-standing dictatorship? Does the emerging society perpetuate, albeit in a new form, the ruling party, judicial system, and military apparatus of the old regime? What are the strength and potential of democratic governance, the market, and civil society? What is the general level of well-being among citizens, and are there continuing ethnic conflicts or radical economic disparities between segments of society? Each of these factors highlights the dangers of supposing that there is a recipe or single set of policies for reckoning with past wrongs that will be ethically defensible and practically feasible. These factors also indicate that sometimes the best that can be done is to approximate one or more of the eight goals initially or postpone attempts to realize them until conditions are improved. And sometimes excruciatingly difficult trade-offs will have to be made.

Concluding Remarks

It might be claimed that—regardless of its structure and content—it is neither possible nor desirable to formulate a general, cross-cultural normative framework and that the best that a society can do is to generate various tactics of its own for reckoning with past evil. However, policies and strategies that are designed and implemented solely under pressure of immediate circumstances and without proper attention to the relevant ethical questions are likely to be ad hoc, ineffective, inconsistent, and unstable. Moral questions have a habit of not going away. They may be trumped in the short term by certain strategic and prudential imperatives, and some measure of peace can be established without paying close attention to them. Long-term peace, however, cannot be realized if resentment, bitterness, and

⁴⁸ See, for example, Priscilla B. Hayner, "The Past as Predator: The Role of Official Truth-Seeking in Conflict Resolution and Prevention," in National Research Council, *International Conflict Resolution: Techniques and Evaluation* (Washington, D.C.: National Research Council, forthcoming).

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moral doubts about the just treatment of perpetrators and victims of human rights abuses linger in the minds of citizens. A general framework inspired and shaped by lessons learned from a variety of contexts can encourage each society reckoning with an atrocious past to realize in its own way as many as possible of the goals that international dialogue agrees are morally urgent.

It might also be argued that much more is needed than a normative framework or "vision." This is correct. But, while far from sufficient, it is essential to get clear on morally based objectives as we reckon with a society's past wrongs. The eminent Costa Rican philosopher Manuel Formosa nicely puts the general point: "It is clear that the new society will not come about just by thinking about it. But there is no doubt that one must begin by setting forth what is important; because, if we do not, we will never achieve it."⁴⁹

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⁴⁹ Manuel Formosa, "La alternativa: Repensar la revolución," *Seminario Universidad*, Universidad de Costa Rica, October 23, 1987, p. 5.

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