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Featured Plenary Speaker: José Zalaquett

"New International Responses to Massive Human Rights Violations".

Thank you so much for this invitation to speak before you today.

Year after year, I am privileged to have foreign students, who are part of an exchange program, in my class. I have been able to learn from them. I know that they enjoy the exchange program, and that it gives them the opportunity to be exposed to another culture, relate to other students, and acquire language skills. The exchange program allows them to actively relate to others, to understand that diversity should be welcomed, not just tolerated. In the richness of our diversity, we all become more human.

My plenary topic today is "New International Responses to Massive Human Rights Violations and War Crimes". I will speak about three phases in the development of international responses to human rights violations. The first is the post-World War II years; the second is the 1960s, 1970s, and early 1980s; and the third is the post-Soviet era.

After WWII, the international community produced a number of important declarations, resolutions and treaties on human rights and humanitarian law. In this manner an international book of community values began to be written, chapter by chapter. It is a lay book, because it does not respond to any particular religious doctrine or vision, yet neither is it in contradiction with the teachings of the major religions. Moreover, it may be deemed a sacred - albeit lay - book, because in the manner of the great religious books, it reflects the shared values of human kind. Since WWII progress has been made, step-by-step, towards setting up common international values, particularly concerning the protection of the individual vis-à-vis the power of the State and the ravages of armed conflict.

The process of setting up common values and norms accompanies the birth and growth of communities which seek to assert the dignity of their members, affirm their rights and ensure justice. The overall goal is the attainment of the common good - the opportunity for all members of the community to benefit from arrangements which facilitate cooperation in the pursuit of personal and communal goals and the advantage to have well regulated, fair means of solving conflicts.

The striving for common values also takes place in the still incipient "international community". While it has been a

difficult, gradual and sometimes faulty process, it has continued to move on. The foundational impulse was provided by the lessons of WWII. Before the war there were efforts to establish some international values, but it was WWII which made all members of the international community keenly aware of their interdependence and of the extremes of inhumanity that lurk in our common humanity. What emerged from that conflict was a world ostensibly determined to stamp out war and State crimes.

During this first phase towards an international human rights movement, in the aftermath of WWII, four events stand out: (1) The Universal Declaration of Human Rights, in 1948; (2) The Geneva Conventions, of 1949; (3) The 1951 Convention Relating to the Status of Refugees; and (4) The Nuremberg and Tokyo Trials. I stress these four events (keeping in mind that there were other relevant developments in the aftermath of the War), as they mark this period as a foundational time for international ethics and values.

The fact that the aftermath of WWII was a foundational time for a new world order has been long recognized. Key components of this new order were, among others, international political institutions such as the United Nations, international economic institutions and major military alliances. Yet the humanitarian component of this new world order, namely the emergence of international norms and values, was not recognized as such until the 1960s and 1970s.

The emergence of this new international humanitarian order meant that now international law did not only regulate the relations among States but it also protected the rights of individuals beyond national borders. The sanctity of State sovereignty could no longer be invoked as a shield against the scrutiny of the international community concerning the basic rights of the individuals living within that State.

The lessons drawn from WWII led to the establishment of new norms in the field of human rights, international law and refugee law, together with the setting up of international human rights commissions, regional human rights courts and other such mechanisms. Regarding the horrendous crimes committed during WWII, there was a determination that they should not be left unpunished. The major measures taken were the establishment of the ad-hoc international Nuremberg and Tokyo tribunals.

In the 1950s, however, the Cold War took over and the initial post war humanitarian determination and spirit subsided. While a humanitarian machinery of norms and institutions was in place, there was not enough gas to run on and not enough nerve to move forward.

That missing energy came in the 1960s with the unfolding of a

second phase in the international human rights movement. Amnesty International was founded in 1961, followed by other international non governmental human rights organizations. This nascent non governmental movement was not composed of States but of ordinary people like us, men and women throughout the world who felt they ought to do something about the fate of their fellow men and women worldwide.

This new development was facilitated by the cultural and technological changes (particularly the advancements in communications) that took place in the 1960s. Soon the non governmental human rights movements spread all over the world and domestic organizations were created in many countries.

Sean McBride (former Minister of Northern Ireland, winner of the Nobel Peace Prize, and the first Chairman of Amnesty International) once called the non governmental human rights movement the "latest of the international actors". Throughout history, there have been international conquests, international religious proselytism, international unions and political parties, and international corporations. Now, in the last few decades we witness the emergence of international citizens -- groups and individuals who believe they should take an active part in the international protection and promotion of common values. These new citizens would no longer tolerate a fellow man or woman being mistreated, or their dignity trampled upon. Those that undertake such an active role are always a minority, but they are the ferment that livens the community from an ethical standpoint. They make a difference.

However, the emergence of the non governmental human rights movement coincided with the height of the Cold War, when ideological positions polarized the world community. People defined themselves by the sides they took. It was very hard to pursue universal values without being labeled as pro-imperialist or pro-communist. As a result, human rights organizations had to take very professional and impartial stances. They concentrated on the most basic rights -- the right to life, physical integrity and the right to not be tortured or ill treated, and the freedom of conscience. And they worked impartially in every country which violated such rights, without regard for their ideology or political system. In that manner they were able to gain credibility, to influence the world press and local politicians, to mobilize public opinion, and to make "human rights" a household term.

We are living now in a third phase, and that will be the main focus of my talk today. In the early 1980s, the Soviet system crumbled with the international consequences that we all know.

During this post-Soviet period, we have seen changes that we never expected to see in our lifetime. We are now moving into a new era, a new epoch whose definite form and shape we cannot predict. We are in the middle of a major transitional phase,

worldwide.

World values and international human rights movements are also affected by this transition. While the long term trends are difficult to predict, I shall try to focus on some of the main current trends.

Throughout the 1980s, there was political change in many countries, including countries that had lived under dictatorships in Latin America, Central and Eastern Europe, Africa, and East Asia. These countries underwent a process of political transition from dictatorship or civil war towards democracy (or at least towards a more benign form of government).

These transitions presented many problems. The past had to be reckoned with so as to repair, as much as possible, the harm done and to prevent human rights violations or war crimes from being repeated. Yet, unlike what happened in the aftermath of WWII, in many countries the perpetrators of the atrocities of the recent past remained a force to be reckoned with. In most of the countries which have gone through a process of transition to democracy in recent years, the old forces retained a measure of political power and were able to build barriers against justice, before being forced to leave office.

Let me give some examples of these difficult situations. In Argentina the military left power precipitously because they suffered a military defeat at the hands of Great Britain in the Falklands War. However, in mainland Argentina, they retained a monopoly on weapons. At first they were in disarray and demoralized, but eventually the military regained a measure of cohesiveness and applied pressure to curb policies on justice and accountability.

In other countries, such as my own (Chile) and Uruguay, the military rulers did not lose power in battle, but in the ballot boxes. They rationalized their political defeat. They said: "we always wanted to save the country from the threat of Communism and return it eventually to democratic rule, and this is what we are now doing". They were able to keep the cohesiveness among the ranks in the military and with their supporters. Before leaving power, they erected legal and institutional barriers against accountability and throughout the transition they remained in control of the armed forces; this certainly presented restrictions and challenges for the newly elected authorities.

In several African and Central American countries peace was achieved after an internal war came to a stalemate with both sides acknowledging that they could not defeat each other. Both sides had committed war atrocities and neither side wanted their men to be prosecuted. Both wanted impunity.

South Africa illustrates another situation. There is now a democratically elected government that represents the majority of the South African people, which for decades were denied their rights. The Mandela government faced a dilemma. He wished to build a united South Africa on the rubble of the old South Africa, not to throw white people into the sea or relegate them to a new kind of segregated "homeland". This meant building a true national community. What to do regarding the legacy of Apartheid? To prosecute thousands who were involved in the political, security or judicial enforcement of Apartheid, over many decades, was hardly feasible or conducive. On the other hand, to sweep under the carpet the dirt of those years would have been an offense to the memory of generations of people who suffered, day after day, the most odious kinds of racial segregation. The government chose to walk a third path, setting up a Truth and Reconciliation Commission and granting an amnesty to those who disclosed the truth about the political crimes they were responsible for.

In the totalitarian States of Central and Eastern Europe, the population did (except for a few hundred dissidents that can be admired as heroes) what human beings usually do under pervasively repressive regimes -- they tried to keep their head low and survive. This reality constrains how much truth and justice can be produced after the demise of the Communist regimes. Where to draw the lines between perpetrators and cooperators?

These examples give an idea of the type of difficulties involved with human rights issues during the process of democratization. Once we leave behind a traumatic past of massive human rights violations and/or war crimes, and we want to build a democratic regime or better government, how to settle accounts with that past? The past cannot simply be buried because it will come back to haunt us. On the other hand, the difficulties involved with facing the past must be acknowledged. This is not only an ethical dilemma but a political one as well. It is not only a problem of deciding what ought to be done, but also how to increase the chances of attaining what ought to be done, which is not easily determined.

During the second stage of development of the international human rights movement (the 1960s, 1970s, and early 1980s), Amnesty International and other groups addressed governments invoking norms that cannot be disputed because most States have proclaimed their legitimacy. They told these governments to stop committing abuses. It was in their power to comply. In contrast, new governments which have come to power after a period of dictatorship or civil war and who are not responsible for the atrocities of the past, are asked to do something positive (reveal the truth, mete out justice...)

rather than something negative (not to continue to kill or torture). Truth and justice are important objectives but to accomplish them it may not be sufficient to have the required political will and to be on the right side morally. It is also a matter of political feasibility. Governments must somehow reconcile and harmonize political realities and ethical goals in order to progressively maximize what is best for the nation.

How have different countries responded to this particular challenge?

Many countries have sought to reveal the truth about past human rights violations by establishing what are known as "Truth Commissions". Granted, there is a kind of Orwellian sound to this expression. But these commissions are not really attempting to establish an official interpretation of past history. Rather they have a narrower focus: to establish the truth concerning specific crimes and their circumstances.

Did the nazis use gas chambers? Was there a State practice of "disappearances" in Chile and Argentina? Was torture widely practiced in this or that country to suppress dissent? It is possible and necessary to establish an official, honest, credible truth about such facts which impinge upon fundamental values that no society cannot ignore.

If national unity is to be pursued, it is essential to establish the truth about the human rights violations of the past. Most people who feel loyal to a government (for instance, because they believe that it saved the nation from Communism or from other major danger) would not acknowledge that such government did terrible things. In order to live in peace with their conscience, they need to believe their government. "We never knew", they would say, later on. It happened in nazi Germany, it happened in fascist Italy and it happens in most countries where people are politically polarized. People don't want to believe that their government or their own ethnic, religious or social group committed atrocities, because they cannot stand a situation in which their conscience and their loyalties will be in open conflict.

Therefore, it is necessary to openly proclaim the truth or the country will remain divided. Imagine a Germany where half the people deny that the Holocaust ever happened; it would be very difficult to live together in such circumstances. It would be a schizophrenic country because values and memory are part of our identity, and if we have two different, radically opposed versions of major events which affect fundamental values, the country can never put itself back together. So, it is essential that the truth be proclaimed.

However, these Truth Commissions are not courts of law. They cannot decide which individuals are guilty of committing a crime. That would be against basic principles of law. The

Truth Commissions do not aim at a legal truth, but at a moral truth -- to account for human rights violations, to establish the responsibility of the State, to identify the victims. The truth Commissions cannot determine that such or such individual pulled the trigger and should go to prison; that is up to the courts to decide.

Yet the courts cannot perform the task of establishing an overall account of human rights violations during a period of the nation's history, because the criminal procedures are designed to determine the guilt or innocence of concrete individuals who are accused of specific crimes. They are not designed to reconstruct societies that have broken down. Courts may play an important role in the transitional process of leaving behind the past and building up a just political order political, but such objective calls also for other tasks that courts of law cannot perform.

It is important that the truth established by Truth Commissions be widely acknowledged within the respective country. Such acknowledgment is an expression of a national resolve never to allow such things to happen again.

Acknowledgment of atrocities by certain sectors of the community is especially important. For example, in Chile, after a series of round-table discussions held in 1999 and 2000, a new generation of military people (they were lieutenants or cadets when Pinochet took over power in 1973), acknowledged that grave human rights violations were committed during the military government, that they should not have occurred, and that they should never happen again. That's an important step. In Argentina, in 1995, the Commander in Chief of the Army did the same.

Justice is another central part of the process of confronting the past; reparations in favor of the victims or their families are also a key part.

What about forgiveness? All major religions and humanist traditions emphasize that pardon is possible and desirable, but one thing is the forgiveness that individuals may grant or deny and a different thing is the amnesty or pardon bestowed by the community. For the latter to take place, the perpetrator must go through certain steps: to acknowledge what he did, to atone, to resolve to not do it again, and to make reparations. In this way, the community can be assured that the values that were violated are now recognized by the same perpetrator, who may then be forgiven. But facile forgiveness, blanket impunity, or a cynical attitude on the part of the perpetrator who insists that he will do it again, certainly does not help the necessary process of moral reconstruction.

Transition to democracy and the efforts to reveal the truth,

to have it acknowledged, to mete out justice, to compensate the victims and to strive for national reconciliation are all part of a painstaking process that may drag on for years. Many countries have gone or are still going through this process. This is one of the three responses to massive human rights violations that have developed in the last phase of the international human rights movement, from the 1980s onwards. It is a response that has taken place mostly within each of the countries concerned. However, the international community has attentively followed these events. International human rights organizations pressure governments into trying to do their best, and if they fall short, they are criticized. The U.N. has sometimes intervened to help in creating a Truth Commission or otherwise assisted local governments with these complicated situations, for example, in El Salvador, Guatemala, and Cambodia.

There are two other recent international developments in response to massive human rights violations. One is known as "international humanitarian intervention". This refers to armed intervention in other countries in order to stop massacres and other violations of human rights being committed on a gross scale, and to try to re-establish a basic situation of protection for the people there. Some examples are the situation of the former Yugoslavia (particularly in Kosovo), Haiti, Somalia, East Timor and Rwanda. In all these cases, there has been much debate about the legitimacy and advisability of intervention.

Let me quote from two U.N. Secretary-Generals who have spoken on this matter. They have done so because a strong consensus has emerged in the international community that massive human rights violations and war crimes ought not to be tolerated.

In 1991, U.N. Secretary-General Pérez de Cuéllar stated, "An irresistible shift seems to have emerged in public attitude towards the belief that the defense of the oppressed, in the name of morality, should prevail over frontiers and legal documents". In 1992, Secretary-General Kofi Annan spoke about two types of sovereignty. First, he refers to the old-fashioned kind of sovereignty, meaning that within our borders we mind our own business and that international affairs is the field where governments or States relate to each other. Concerning the second type of sovereignty, Annan said, "States are widely understood to be instruments at the service of their people, and not vice-versa. This calls for a new definition of sovereignty, and a broader definition of national interest which would induce States to find greater unity in the pursuit of common goals and values". (Of course this idea was already developed in the aftermath of WWII, when international crimes were defined and ad hoc courts such as Nuremberg and Tokyo were set up. But now it is voiced again in a louder way). What Annan means is that to care about what's going on in other countries, where people are

massacred, is not only right. It is a duty as well, for every member of the international community.

Today, the international community openly discusses the possibility of international intervention for humanitarian considerations. Why? The 1945 U.N. Charter prohibited the use of force in international relations, except in self-defense or when authorized by the U.N. Security Council to confront a threat to peace. That limited authorization was understandable; the terrible memories of the recent war were vivid, and peace was a major goal to strive towards. To leave any opening for the possibility of justifying war other than defensive wars, could be dangerous. Later on, when the superpowers acquired strategic nuclear capabilities, this fear increased because of the possibility of international conflicts leading to escalation and a nuclear holocaust.

In recent years, two developments have opened the way for a more frank debate about humanitarian intervention. The first is the increased international determination not to stand idly by in the face of massive human rights violations. The second is the end of the Cold War, which allowed the fears of nuclear confrontation to subside. Yet, humanitarian intervention is not a matter that can be treated lightly. Many are concerned that, in the name of humanitarianism, major powers may seek to intervene unduly in other people's affairs.

Lloyd Axworthy, Canada's Foreign Minister, announced on September 14, 2000, that he was putting together an international committee to discuss the limits of State sovereignty. He invited people from Australia, Chile, and elsewhere, to prepare a U.N. resolution that would set the framework to justify armed intervention in extreme cases when there is no other way to prevent a situation like the one in Rwanda, or other major humanitarian disasters.

A third development regarding international responses to massive human rights violations is the establishment of new institutions of criminal justice. This has taken three forms. The first is the creation of ad hoc courts charged with judging and prosecuting the crimes of former Yugoslavia and Rwanda. The U.N. Security Council created them respectively in 1993 and 1995. These ad hoc courts were set up more than 40 years after Nuremberg and Tokyo (the ad hoc courts that dealt with the crimes of WWII).

The second new initiative regarding international criminal justice is the creation of a permanent international court that will have jurisdiction to try crimes against humanity, war crimes, genocide and crimes against peace. The respective treaty was signed in 1998 in Rome, but needs 60 ratifications to come into force; at last count, there were 22 ratifications. Therefore, within 3 or 4 years, we may have this court in place. Major countries have stayed out of it,

such as the United States, China and India.

The third recent form of international justice is called "universal jurisdiction". In 1979, the Convention Against the Taking of Hostages included a universal jurisdiction clause. Later, in 1984, the Convention Against Torture also included such clause. Other treaties have subsequently incorporated it.

What does this clause say? Universal jurisdiction generally means that States may establish their jurisdiction over certain grave international crimes, such as torture and the taking of hostages. There are four criteria: (1) when the crime is committed within their territory; (2) when the supposed perpetrator is a national of that State, even if the crime was not committed within its territory; (3) when the victim is a national of that State; and (4) when the supposed perpetrator happens to find himself in the territory of the State concerned, in which case that State is obliged either to prosecute him or to extradite him to a country fitting any of the previous three criteria.

The leading case, of course, has been that of the detention of Augusto Pinochet in London, although technically speaking the case was not treated by the U.K. courts under the universal jurisdiction clause. At any rate, this was the major case which energized this new machinery of universal jurisdiction.

Since then, there have been more than 20 attempts to follow up on the Pinochet Case. Now people are talking about "The Pinochet Precedent", "The Pinochet Effect", and so forth. There were efforts to prosecute Hissene Habre, the former dictator of Chad now living in exile in Senegal, but the Supreme Court of Senegal rejected the case; however, he was duly scared. Mengistu Haile Mariam, the former dictator of Ethiopia now living in exile in Zimbabwe showed up in a South African hospital seeking treatment; local lawyers initiated legal action against him and he had to quickly leave the country. So far the effect may have been largely circumscribed (as stated by Judge Richard Goldstone) to the fact that travel agencies have lost the business of former dictators. However, fear is being instilled in them and that may have a preventive value.

Yet, these developments should also be treated with care. Of course it gives us all glee to think that bloodstained dictators are consulting their lawyers and thinking twice about taking a shopping trip abroad. But we should not forget that justice should be served through just means. The pursuit of these new avenues of international justice should be enthusiastic and determined, but at the same time, rightful and rigorous.

In the case of Pinochet, he was returned to his country after the British Minister of the Interior found him unfit to stand

trial. In Chile, his senatorial immunity has been lifted. He became a senator by virtue of his own Constitution that determined that former presidents automatically become senators for life. Under Chilean law, members of Congress cannot be prosecuted unless the Court of Appeals determines that there are serious grounds to lift their immunity. No one believed that the court would dare to lift Pinochet's immunity, but it did. There are now more than 200 criminal cases brought against him. At this moment doctors are examining him, and if they conclude that his health does not allow him to stand trial, he should be let go. This is not about vengeance. This is about justice, and justice does not necessarily mean punishment alone. It also means observing all the complex aspects of the rule of law, including the rights of the accused person - even if he is deemed to be the worst monster - to have a fair trial. But it is up to the doctors to determine the state of his health. Politics should not interfere.

We are making progress in this complex process of moving towards affirming an international rule of law and the effective enforcement of the international bill of rights. We should proceed with determination but also with rigor and care, inspired by a sense of justice more than by a sense of vengeance. In the building of a new era and a new order, there is one component that is vital and should always be vital: the component of values. We need values and laws that guarantee our rights, that affirm our dignity, that allow us to live together in peace, respecting each other, accepting diversity, and that may allow the world community to become what we want to see in each of our own countries. We should strive not for a motley association of States that can do whatever they please within their borders, but for a community that has its values, respects these values, and has its citizens prepared and determined to have these values respected.