

TRUTH AND JUSTICE: THE DELICATE BALANCE

Documentation of Prior Regimes and Individual Rights

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The workshop discussed in this report, "Truth and Justice: The Delicate Balance. Documentation of Prior Regimes and Individual Rights," was held at the Central European University in Budapest, October 30 through November 1, 1992. The workshop was jointly sponsored by the Project on Justice in Times of Transition of the Charter 77 Foundation - New York and the Institute for Constitutional and Legislative Policy of the Central European University. Funding for the workshop was provided by the Central European University and grants to the Charter 77 Foundation - New York from the German Marshall Fund of the United States, the Charles Stewart Mott Foundation and the Rockefeller Foundation. The workshop was organized by Professor Ruti Teitel of New York Law School and Professor Andras Sajo, Dean of the Department of Legal Studies at the Central European University, with assistance from Wendy Luers, President of the Charter 77 Foundation - New York, and Tim Phillips of Energia Global, two of the co-chairs of the Project on Justice in Times of Transition; Ethan Klingsberg, Executive Director of the Institute for Constitutional and Legislative Policy; and Mary Albon, Program Officer at the Charter 77 Foundation - New York. Special thanks also go to Leszek Nowosielski, Gabor Sisak and Kinga Pétervári of the Institute for Constitutional and Legislative Policy.

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Communist Archives and Their Legacy

Though communism has collapsed throughout Eastern and Central Europe, the files of the former state security agencies still exist, silent witnesses to the paranoid repression of the old order. In virtually all of the former communist countries, it is too late to destroy or effectively seal the state security archives. The mere existence of these files poses dilemmas for post-communist governments and societies: What sort of access should be allowed to the files? Is there a moral prerogative to provide open access--or to severely restrict access--to the files? How can the interests of the new government and the individual's right to privacy be balanced? Can the politicization of the files be avoided? Can abuses such as blackmail or slander be prevented? Should the files be allowable as evidence in criminal prosecutions?

These and other related issues were the subject of discussions in a workshop on "Truth and Justice: The Delicate Balance. Documentation of Prior Regimes and Individual Rights" which was held at the Central European University in Budapest, October 30 through November 1, 1992. The workshop was jointly sponsored by the Project on Justice in Times of Transition of the Charter 77 Foundation - New York and the Institute for Constitutional and Legislative Policy of the Central European University. It was chaired by Professor Andras Sajó, Dean of the Department of Legal Studies at the Central European University; Professor Ruti Teitel of New York Law School and Tim Phillips, Co-chair of the Project on Justice in Times of Transition. Participants included high-level policymakers and specialists from 12 countries in Eastern and Western Europe and North and South America.

In a private meeting with the workshop participants, President Arpad Göncz of Hungary set the tone for the workshop. President Göncz observed that there were two possible uses for state security archives: evidence in criminal prosecutions and historical documentation. He was critical of the use of the files or lists of alleged agents and collaborators as evidence in criminal cases in light of their questionable authenticity. One of the features of totalitarian society was the state's attempt to draw everyone into its network of spies, creating a fearful and compliant populace. Informants in communist states may have been coerced or blackmailed into collaborating with the security apparatus. According to President Göncz, it is almost impossible to determine the degree of veracity in the reports of informants: some may have embellished the truth, others may have underreported, while others may have entirely

fabricated their reports. In the transition period, many dossiers may have been destroyed or stolen by former agents, and the new leaders may very well have removed their own files upon coming to power, he said. Files could be tampered in other ways as well. In his view, it was impossible to use the communist state security archives as credible sources.

President Göncz said that he would have preferred to have all the files destroyed; however, since it was too late for that, he advocated opening the archives as a way to help the post-communist societies come to terms with their past. Information in the archives could help researchers uncover and evaluate the motivations of the old regime. However, he cautioned that regulations governing access to the state security archives must respect the principles of the rule of law--including no retroactivity--and the rights of individuals.

Many of the workshop participants echoed President Göncz's views during the course of the workshop, recognizing, as Tim Phillips, Co-Chair of the Project on Justice in Times of Transition, noted, that the existence of the files still allowed communism to continue to control and divide society. However, the group did not reach agreement as to whether the best approach was to allow full access, restricted access or no access to the files.

Hungary: Increasing Public Access

In the communist period, a triple system of archives developed in Hungary, according to Janos Lakos, Director of the Hungarian National Archives. One category consisted of the files on party organizations maintained by the communist party and included the files on the sham trials of the 1960s (which he said the party later destroyed). Access to these files was strictly limited, restricted only to professional researchers. According to 1991 legislation, however, the communist party's files were transferred to the National Archives, and since September 1992 they had been treated on an equal footing with other files.

The second category included files gathered by the Ministry of the Interior, the police, the secret police and their agents and collaborators. According to Mr. Lakos, these files were totally inaccessible and not in any public archive. The third category included all other state-related documents; those with historical relevance were transferred to the public archive after ten, 15 or 25 years, depending on their classification.

In 1989, the Hungarian parliament passed a law that attempted to restrict the circle of inaccessible documents (i.e., "state secrets") and to simplify the access process. It introduced a new notion, based on Western models: classifying documents for fixed periods of time (such as 30 years), after which they would automatically be declassified. Previously in Hungary, only the agency that had originally classified a document could declassify it--and, according to Gabor Baczoni, Chief Archivist at the Ministry of Interior, this never happened. Currently, he said, the Ministry of Interior was in the process of declassifying huge amounts of material, and was turning over archival materials that it should not have held to the proper authorities (such as court rulings, which were being returned to local courts).

However, both Mr. Baczoni and Mr. Lakos acknowledged that the 1989 law was only the first step, and that legislative revisions were pending. Although the law met Western standards, Mr. Lakos said, it was controversial because of high expectations for unlimited access. Currently, access is denied to registry files less than 90 years old, to court rulings less than 70 years old (except for local court penal rulings) and to foreign office and personal files less than 50 years old. These were only restrictions on access, not a total freeze, according to Mr. Lakos, and the law does not restrict access by foreigners. Although Mr. Lakos advocated greater access, he also said it was critical to observe the constitutional process of legally amending laws.

In Mr. Lakos's view, there were two major problems regarding the archives. First, a compromise was needed between the freedom of scientific research and the individual's right to privacy. According to a 1991 Constitutional Court decision, it was the obligation of the legislature to pass an act of law to protect personal data and access to public information. Until Hungary produced concrete legislation, the archives could not make all data accessible. Second, huge quantities of unnecessarily classified materials had to be reviewed and declassified, and this process, which only began in 1991, would take a long time.

The Ministry of Interior still housed files on the secret police, their agents and their reports, according to Mr. Barczoni, and these materials did not form part of the historical archives. They would remain sealed until some sort of parliamentary regulation governing them was passed. Mr. Barczoni also noted that some of these materials from the communist period had been damaged, lost or destroyed.

Romania: Need for Centralized Administration and Public Access

During the chaotic transition period after the overthrow of the Ceausescu regime, many files were lost, destroyed, stolen or used for political purposes, according to George Adamache, Chief of Methods and Controls at the Romanian State Archives. Until 1990, the State Archives held only historical documents from the pre-communist period (pre-1948) and no secret classified documents, but now they also held some classified documents, he said. Dossiers on individuals were held by the agencies that had created them.

The State Archives presently had a smaller staff and much less storage space than during the communist period, yet they held many more materials, Mr. Adamache said. They did not have the facilities in which to manage the huge quantities of documents they now possessed, and, as a result, many files had been jumbled together. For example, the State Archives now possesses 90 kilometers of files from the communist party archives. During the communist period, these files had been organized into three parts: 1) the files of the old, pre-communist parties; 2) documents from the police on anti-communist movements; and 3) files on party members. This last category contained huge amounts of material, Mr. Adamache said, because each time a party member (there were a total of four million) changed jobs, a new file was created which contained duplicates of everything in the earlier file, plus new materials. In Mr. Adamache's view, all of these files were created and maintained primarily for political purposes. Rather than holding criminal trials against individuals, Ceausescu organized civil trials and used these dossiers as evidence. Although these files would be useful to historians, Mr. Adamache questioned whether they presented a true picture of reality.

A new law on historical archives based on Western standards was currently under consideration in the Romanian parliament, Mr. Adamache reported. The proposed law would distinguish between historical and personal documents and protect the rights of individuals, he said. He emphasized the need for standardized criteria for classifying files, based on their practical, judicial and historical value. He said that according to the new law, there would be two commissions for classification of documents. The first would involve the participation of

those who produced the documents, who could determine their practical and judicial value. The second commission, at the State Archives, would decide on the historical value of the files.

George Ross, lecturer at King's College, London, and an expert on Romania's secret archives, argued strongly that the new law on the State Archives was seriously flawed. He pointed out that the range of documents and materials belonging to the State Archives was extremely broad and ambiguous, and that there were no detailed provisions for selecting documents by the central commission. The law also neglected to present criteria for the selection of documents. The commission would be governed by regulations issued by the Interior Ministry, he said, but the law gave no indication as to whether these regulations would be made public.

Like the existing Ceausescu-era law, the new law stated that documents must be turned over to the archives 30 years after their creation. However, documents produced by the Foreign Ministry and the Ministry of Defense were exempt from this requirement, Mr. Ross said. He further noted that the Directorate General of the State Archives could waive the right to request documents for permanent custody, presumably at the behest of the Interior Ministry.

Mr. Ross maintained that most documents produced since the communists took power in 1948 remained in the offices of the secret services. This included the documents of the Securitate (now called the Romanian Information Service), though he noted that many Securitate files had been destroyed. Other Romanian agencies that held secret files included the Foreign Information Service; the Protection Service of the Ministry of the Interior, which is deeply involved in political activity; the Guard and Protocol Service (a new organization created in 1990, which includes among its 1,500 members the Securitate's elite); and the Secret Service of the National Salvation Front.

Mr. Ross advocated centralized administration and responsibility for all of these archives in order to help make a complete break with Romania's criminal past. He made an impassioned plea for total openness and complete public access to all secret files, in Romania and elsewhere, immediately and without any restrictions. Such a policy would contribute to public accountability and trust, critical elements of political legitimacy. Opening the files, in

his view, was the only way to ensure that past wrongdoers would not escape justice, and that the full scope of the past would be known to everyone.

Bulgaria: Political Resistance to Opening Files

Georgi Panev, a member of the Bulgarian parliament representing the Union of Democratic Forces (UDF), and Katarina Boncheva, a journalist for Radio Free Europe in Bulgaria, said that Bulgaria was experiencing problems with the files similar to those of Romania. Many files had disappeared (though it was not known how many, or whether they had been destroyed or copied); individual dossiers were available for sale; and lists of alleged agents and collaborators appeared in the newspapers on a regular basis. The situation was further complicated because the secret service's files were spread among the state security service, the external secret service and the secret service for government security.

Mr. Panev raised the moral problem of how to make public some files but not others. Should only selected files be made public, or should all the secret files be opened? What criteria should form the basis for this decision? The Union of Democratic Forces had put forward three proposals in parliament that were designed to make public the files of high government officials, including members of parliament, ministers, judges and the top officials of each political party, Mr. Panev said. However, each time such a proposal was put forward, it was voted down by the socialist party (formerly the communist party) and the Movement for Rights and Freedoms (commonly known as the Turkish party).

Ms. Boncheva noted that the Socialist Party had made two proposals in parliament similar to those of the UDF; however, they called for making public the files of the leading journalists of *Democracy*, an independent newspaper, as well as those of high-ranking government officials. The Movement for Rights and Freedoms had not put forth any similar proposals, she said, which had prompted rumors that this party was full of former secret agents.

Mr. Panev said these efforts and counterefforts demonstrated that the communists were surviving, thriving and successfully penetrating Bulgaria's fragile new democratic system. He asserted that the communists hoped to maintain a position of influence in Bulgarian society

and retain their financial resources, even as they attempted to avoid their responsibility for the abuses and problems of the past.

Yugoslavia: No Laws

In the former Yugoslavia, the secret police had not penetrated as deeply into society as in most other communist countries, according to Tanja Petovar, a Yugoslav lawyer at the Norwegian Institute of Human Rights. Although there had been a centralized mechanism for maintaining state security files, the state secret police apparatus was decentralized. Nevertheless, Yugoslavia's military secret police continued to play a significant role in all the republics of the former Yugoslavia.

Although the former Yugoslavia had had both state historical archives and military historical archives, Serbia currently had no laws or institutions that regulated or controlled the files, according to Ms. Petovar. She said that there existed a "stock market of secret police files" available for sale in Serbia; many files had been leaked to the press and used as weapons among political groups. Cronies of Slobodan Milosevic, president of Serbia, had occupied the federal police building, she said, and after their departure all the files were gone. Similarly, in Croatia, the secret police files were being used as weapons in internal political struggles.

Ms. Petovar reported that before the breakup of Yugoslavia all Slovenian files had been removed from federal sources and stored in new, Slovenian archives. In the early 1980s, Slovenia rehabilitated its victims of show trials, offering material compensation for prison time and other damages. The new parliament elected after Slovenia's secession from Yugoslavia established a commission to manage the secret police files, Ms. Petovar said, but the files disappeared and the commission was canceled. Victims of communist abuses have demanded the return of the missing files so as to prevent blackmail and other abuses.

In Ms. Petovar's view, it was critical to establish who controlled the files and who had access to them. She underscored the importance of respecting the rule of law, due process and statutes of limitations. Upholding democratic principles was much more important than carrying out any sort of political cleansing.

Russia: Trying to Avoid Catastrophe

Arseny Roginsky, a member of a Russian parliamentary commission on archives as well as a board member of Memorial, the foremost Russian human rights organization advocating public access to secret files, had concluded that unregulated access to secret materials would lead to catastrophe in Russia.

According to Mr. Roginsky, Russia had no laws on the state archives, state secrets, protection of personal files or access to information. Various ministries and agencies were adopting their own norms governing access. In January 1992 Russian President Boris Yeltsin issued a decree that all items classified as secret should remain so, but in June 1992 the Russian parliament declared that the decree would only cover items from the last 30 years.

Access to archival materials dating from before 1942 was currently quite good, Mr. Roginsky said, but for more recent material, the mechanism for declassification had been slow and uncoordinated. For example, secret documents in the archive of the Central Committee of the communist party were in the process of being reclassified, but there were more than 30 million documents to review. At the current rate, Mr. Roginsky said, it would take a century to accomplish this task.

In the Communist Party Archives, the situation was better, according to Mr. Roginsky; despite the lack of any regulations, documents were being declassified there. Individuals with connections were able to gain access to declassified documents, Mr. Roginsky said, and he noted that until recently it had been mainly Americans who had gained access to party documents.

The Politburo Archives, now called the Presidential Archives and directly subordinate to President Yeltsin, were closed to everyone. This archive was enormous, and, according to Mr. Roginsky, it contained the most significant information from 1917 to the present. He said that it took only ten minutes to find the file on the massacre of Polish officers in Katyn forest during World War II--once the order from above was given. The presidential archives also possessed so-called "closed packages," sealed envelopes with only dates written on them. These were beginning to be opened by an expert responsible to President Yeltsin, but the public knew nothing about them, Mr. Roginsky said.

In contrast to the above-described archives, the KGB archives were relatively small, containing only ten million documents covering the entire former Soviet Union. According to

Mr. Roginsky, there were three reasons for the small size of these archives. First, the number of KGB agents among the Soviet population had always been much smaller than in any other former socialist country. Second, the KGB had systematically destroyed files on a regular basis. Files that were not to be permanently preserved were kept for periods of ten or 20 years, and when the prescribed period had elapsed, they were destroyed.

Finally, many KGB files had been destroyed in the past three years. For example, in late 1989, all documents pertaining to individuals accused of anti-Soviet activities were ordered destroyed, which led to the destruction of a huge number of dossiers on dissidents. In late 1990, Vladimir Kryuchkov, then head of the KGB, ordered the destruction of all files on the activities of agents who were no longer active. Today, all that could be reclaimed were the names and code names of the agents, which were not sufficient to prove any accusations that might arise.

Mr. Roginsky also pointed out a special regulation that stipulated that the files of members of parliament had to be destroyed. As a result, 550 volumes on Andrei Sakharov were relegated to the flames, including manuscripts and tapes of private conversations that had been stolen from him.

The KGB archives encompassed central archives as well as archives in each region of the former Soviet Union. The central KGB archives included subsidiaries and special archives, such as the reconnaissance archive, containing 350,000 files to which no one had ever had access, according to Mr. Roginsky. Russia possessed less than five million of the KGB files, most of which were criminal files.

Access to the KGB archives remained limited; Mr. Roginsky was pessimistic about the chances for the parliamentary commission on archives gaining access to them. He harbored some hope, however, because democratic organizations and associations, democratic members of parliament and the media kept returning to the issue of access to the archives.

Gaining access to the KGB archives would pose certain problems, Mr. Roginsky said. Although a parliamentary act declared all files on agents state secrets, there was no such law covering files on citizens. Mr. Roginsky said he had seen some citizens' files, and that the information they contained was horrifying. He doubted that access would ever be granted, and if it were, the outcome would be catastrophic. Nevertheless, he maintained that these files

should be preserved because of their historical and cultural value. However, in Mr. Roginsky's view, the files should not remain with the KGB. He said that he had proposed the establishment of a special commission to take the files and place them in a special secret archive controlled by the president and the president of the parliament, though he said there was little likelihood that this would happen.

Regarding criminal files, Mr. Roginsky considered allowing access to researchers to be acceptable, but he opposed their use as evidence in criminal trials. Prisoners from the Stalin era generally wanted to close their criminal files and rehabilitate their reputations, and he supported giving these elderly victims the right to close this part of their personal history.

Mr. Roginsky agreed with President Göncz that many informants had acted under duress, or may have had incentive to embellish their reports, and said that there was a further level of complexity in the Soviet Union. To illustrate his point, he said that he had read reports on the famous anti-Stalinist poet, Anna Akhmatova, filed by an informant who was close to her. In the reports, the informant always maintained that Akhmatova was a great patriot who loved Stalin, claiming she had discussed with him writing a lengthy poem about Stalin. In 1946, Mr. Roginsky said, these lies saved Akhmatova's life.

When asked if a citizen could appeal to the courts to gain access to the archives, Mr. Roginsky replied that in the past if someone took that route, he or she would be imprisoned. Today, however, citizens might turn to the courts for help. The first step was to write to the minister of state security, who would respond with the status of the particular files. If the individual wanted more information, he or she could take the document to the court, and then a judge would write to the Minister to request more information. If more information was provided to the judge, the judge would then decide what to tell the citizen. However, the citizen would never see any files.

In closing, Mr. Roginsky appealed to the other participants for assistance. He wanted to learn about the regulations governing access to secret files and protection of individual rights in other countries, particularly in Eastern Europe.

Germany: The Most Reliable Files?

The archives of the former East German State Security Service, or Stasi, contained 200 kilometers of files, 20 kilometers of which were personal dossiers on Stasi agents and Stasi victims, according to Dr. Armin Mitter, a scientific aide to Alliance 90/The Greens. The Stasi maintained files on six million citizens of the former German Democratic Republic (GDR) out of a total population of only 17 million.

Individuals could now obtain access to their own files, and government officials could obtain access to the files of their colleagues and other personnel, according to Wolfgang Nowak, State Secretary for Science and Education of the eastern German state of Saxony. He also pointed out that, although the media did not have legal access to the Stasi files, the press could purchase files illegally from former Stasi agents.

Mr. Nowak and Dr. Mitter maintained that open access to the Stasi files was absolutely necessary, and that this offered the only hope for their society. Through the files, Germans could find out about their past, learn about their history and try to understand how the files were used by the repressive East German communist regime to manipulate society. Thomas Blanton, Executive Director of the National Security Archive in Washington, DC, supported their view, and asserted that sealing personal files would not prevent blackmail, but instead increased opportunities for abuse. He advocated the principle of transparency and individual response: both victims and collaborators should be allowed to add their own statement to their files.

According to Dr. Mitter, the Stasi apparatus was a crucial component in the communist party's systematic effort to gain complete control over the population of the GDR. Although he recognized that the interrogator-collaborator relationship could produce distortions of reality in the files, he believed the Stasi files were objective and reliable. Many workshop participants were skeptical, however, and questioned the credibility of the Stasi files.

Because the party was ultimately behind the Stasi's activities, Dr. Mitter emphasized that attention should move beyond the collaborators to focus on the former high party leaders, and that researchers should concentrate on party files rather than the dossiers of individuals to try to analyze how and why the GDR developed into a society of systematic denunciation. However, the personal tragedies revealed in the files of individuals had largely overshadowed this concern, he said.

The legislative commission of the Bundestag for which Dr. Mitter worked had been charged with investigating the former structures of the GDR communist state. The mandate of this commission was not so much to try to come to terms with the past, as to provide the Bundestag with an overview of GDR society and its institutions and to set an agenda for future inquiry. The legislative commission's first proposal to the Bundestag was a law prohibiting the destruction of any files.

The legislative commission had no criminal legal authority, and was not intended to investigate specific crimes or to seek justice for particular individuals. It employed social scientists and specialists to conduct research, and in addition to examining files, the commission heard voluntary testimony from victims, former GDR state functionaries and others; these hearings were open to the public. If the commission found evidence of crimes punishable today, it turned its findings over to the courts.

State Security Files and Screening Laws

In the aftermath of communism, legally-sanctioned screening of former communists, agents and alleged collaborators has been presented as one way to seek justice and to safeguard democracy by purging the worst offenders of the old regime. However, the line between justice and revenge can be blurry, and there is a tendency for the screening process to become highly politicized. So-called "lustration," or screening, laws have been criticized for sidestepping due process and relying instead on guilt by association and collective guilt, and for using state security files as primary evidence. In the view of Tanja Petovar, lustration employs totalitarian means that perpetuate the power of communism. According to Stephen Holmes, a professor at the University of Chicago Law School, lustration is contagious; it is difficult to contain the process to the political sphere.

Allan Ryan, General Counsel for Harvard University, maintained that lustration laws will not work because they are anti-democratic and based on false, incomplete and contradictory information. Both informers and agents had motivation to exaggerate and distort their reports. Mr. Ryan said that there was no agreement on what lustration was supposed to accomplish, and that the absence of such societal consensus highlighted the problems with the policy.

Czechoslovakia: Lustration

In Czechoslovakia, the fall of communism came quickly. However, once the euphoria of sudden freedom had passed and the sobering realities of post-communist life became clear, the public directed its ire toward those who had repressed society. According to Jaroslav Bašta, Chairman of the Independent Commission of the Czechoslovak Interior Ministry responsible for reviewing charges of collaboration under the lustration law of 1991, Czechs and Slovaks realized that the communists had been able to stay in power in part because of the lack of personal courage among the populace. Virtually everyone had been forced into some degree of complicity with the old regime. In the search for someone to blame, the public demonized the State Security Agency (StB) and turned on its collaborators.

The lustration process in Czechoslovakia began in 1990 under the auspices of the Commission for the Investigation of the Events of November 17, which was established by the Federal Assembly and charged with investigating the violence against peaceful protesters during the so-called "velvet revolution" of 1989. The Commission examined the Interior Ministry files and interviewed many witnesses, most of whom were former StB officers. All the registers of the StB files were transferred to computer databases, and government officials, their deputies, parliamentarians and officials in the ministries of defense, interior and foreign affairs were screened for past collaboration with the StB. The Czechoslovak lustration law of October 1991--the first and most publicized screening policy among the former communist countries--developed out of this process.

Czechoslovakia's lustration process, in Mr. Bašta's view, represented an attempt to find easy, universal solutions to difficult problems. According to Jan Urban, a prominent dissident under the communist regime, one of the leaders of the Civic Forum movement and now a freelance journalist, the lustration law was just a substitute for the real truth about Czechoslovakia's past, "the silent collaboration of the absolute majority with the communist regime."

The 1991 lustration law was designed to prevent all former high-ranking communists, former members of the People's Militia (the party's private army), StB agents and their collaborators from holding government offices and other influential positions in Czechoslovak

society for a period of five years. Although the ostensible purpose of Czechoslovakia's lustration law was the purification of the institutions of the new democratic state, according to Mr. Urban, implementation of the law contributed to the destruction of the foreign service and the weakening of the civil service. He also asserted that the politicization of the lustration process contributed to the dissolution of the Czechoslovak state.

The StB files were used as the principal evidence in determining whether someone had collaborated. The lustration law defined two types of collaborators: secret collaborators, who were actual agents; and conscious collaborators, who were candidates for secret collaboration. All those who were listed in the StB registries of agents and collaborators fell into the first category, and they had no means of appealing their designation. Mr. Bašta pointed out that according to StB regulations, high party officials were not listed in the StB registers as agents or collaborators--but that did not prove that they had not cooperated with the StB.

The StB files were used to determine which individuals would be listed in the second category. Individuals named in this category had the right to appeal to the Independent Commission which Mr. Bašta headed. The Independent Commission would decide whether the individual in question was a conscious collaborator based on information in the files and the testimony of witnesses. The Commission was entitled to demand all available materials in the archives of the Federal Interior Ministry, the Federal Security and Information Service and the Federal Ministry of Defense. Although the Commission's decision could be appealed in court, there was no provision for compensating individuals who had been wrongly named as collaborators. Many individuals on the lists of alleged agents and collaborators that were leaked to the press--ultimately, some 70,000 names were published--lost their jobs, even when the lists were proven inaccurate.

All Czechoslovak citizens could apply to be lustrated, but only those designated in the second category had the right to see their files. Unlike in Germany, where individuals had access to their own files, Czechoslovakia's files were considered classified property of the Federal Interior Ministry. Files could only be declassified and made public in two cases, when approved by the Federal Interior Minister, or when approved by the individual citizen according to a specific procedure of the Independent Commission.

Mr. Bašta questioned the reliability of the StB files, noting that the lustration law did not take into account the possibility of forgery, distortion or mistakes in the files. Despite the many legal and ethical problems with the lustration law, Mr. Bašta said that as a legal norm for dealing with the past, the law revealed the level of legal awareness in post-communist Czechoslovakia. Also, it was the only legislation that even partially regulated the use of the StB files.

Both Mr. Bašta and Mr. Urban objected to the politicization of the lustration process. Mr. Urban remarked that "the politicians of the first post-totalitarian generation have not yet discovered that it is not the parliament's job to write history or make justice." In his view, Czechoslovakia's new democratic state had taken over from its communist predecessor the role of "owner and only entitled interpreter of the past." Mr. Urban advocated both the depoliticization and the "de-etatization" of the examination of the past; in his words, "to leave it to the state's will or to the political parties to decide which part of the truth the citizens are allowed to know--this would unambiguously mean not wanting to know the truth." He called for the creation of an independent commission of inquiry into the past, modelled on those adapted in Chile and Argentina, which would explore the methods and mechanisms of the communist regime. Following the completion of the commission's work, the StB files should be sealed for 30 years. In this way, Mr. Urban said, Czechoslovakia could come to terms with and overcome the tragic legacy of its communist past.

Germany: Disqualification and the Stasi Files

In contrast to the Czechoslovak experience, the German experience with screening former communists and their collaborators had not been widely known outside Germany. Germany had no single, comprehensive lustration law like the Czechoslovak law; instead, there were numerous regional and local laws that excluded former communists, former Stasi agents and their collaborators from holding various public positions as well as other employment. In some instances, people had been purged on the basis of positions they held in the GDR; in other cases, individuals had been ousted because of reports in the Stasi files or after screening by citizens committees.

Wolfgang Nowak, a West German, had spent the greater part of the last two years reorganizing the educational system of Saxony, and was responsible for firing 12,000 of Saxony's 65-75,000 teachers. The teachers were disqualified by citizens committees, relying on the teachers' own credibility and character witnesses. Ute Kruse, Mr. Nowak's assistant in Saxony's Ministry of Science and Education, who had served on one such citizens committee, explained how the process of screening teachers in Saxony worked. Each teacher accused of collaboration appeared before the local citizens committee, whose members included at least one representative of the local school administration. The teacher was given the opportunity to talk about his or her past, and was entitled to bring along a supporting character witness. The commission members could ask the teacher questions, but the teacher was not obligated to answer. The Stasi files were not used in this process because before the GDR fell, all the teachers had been given their files and were able to purge them of anything incriminating.

Ms. Kruse said that some of the citizens committees sought revenge, though the committee on which she served tried to find objective criteria for disqualification. Committee members deliberated over whether they were satisfied that the teacher had told the truth about the past--whether the past the teacher presented would have been plausible in the GDR. Ms. Kruse said that although she believed the teachers were tried fairly, she did not feel totally at ease because it was not possible to be just without any evidence. Although ultimately the committees fired many teachers, she said that they learned nothing about the past.

Many of the workshop participants objected strongly to this mechanism of disqualification, finding the lack of due process and utter subjectivity of the process unjust. Although agreeing that the process was not entirely just, Dr. Mitter, a former citizen of the GDR, said that, as a parent, one of the worst things he could imagine for his children was that their school would have held sway over them. The GDR education system was far more political and ideological than even that of the Soviet Union, he said, perhaps because of the existence of two German states. In many cases, some of the best teachers were collaborators, and often children were more willing than their parents to forgive and retain them in the schools.

According to Mr. Nowak, those teachers who were retained were being retrained to teach according to West German norms. For those who had been fired, unfortunately there

was "no money or time to care." In Mr. Nowak's view, eastern Germans who had been disqualified from jobs formed a silent, waiting opposition that posed a significant danger to democracy in Germany. Though not directly linked to recent outbreaks of xenophobia in Germany, these people were disoriented and afraid of the future, and could easily join in the search for scapegoats to blame for eastern Germany's current economic, political and social crisis.

Poland: The Lustration Debate

Despite the fact that Poland underwent a negotiated transition to democracy initiated by the historic roundtable talks of 1989 between Solidarity and the communists, pressure for lustration began to develop among both politicians and the Polish public in 1992. According to Andrzej Rzeplinski of the Polish Helsinki Foundation for Human Rights, as public resentment toward people with economic power (who in many instances had been members of the communist elite) grew, there was greater interest in lustration as a means of achieving "social justice." In Mr. Rzeplinski's view, lustration was also used as a political weapon; it divided society, created new victims and hindered reconciliation and the rule of law.

According to Wiktor Osiatynski, law professor at the University of Warsaw and a member of the Polish Helsinki Foundation for Human Rights, there are three key issues that must be addressed in any political transition: 1) what to do with the former leaders; 2) what to do with the former apparatchiks; and 3) what to do about frustrated expectations after the initial euphoria wears off. The pressure for lustration was one manifestation of these challenges.

In 1992, six screening bills were introduced in the Polish parliament, each of which would have required individuals to apply to the Ministry of Interior for a certificate stating whether or not they had been members or informers of the SB, the Polish security services. According to Mr. Rzeplinski, the most liberal bill, proposed by the Liberal Democratic Congress, had the most restrictive categories for screening, providing for lustration only of individuals at the highest levels of political and state functions. Some of the bills penetrated society more deeply, covering university heads, members of the Academy of Sciences and even school teachers. Most of the bills stipulated that individuals who were found to be agents or

collaborators were to be banned from the specified positions for a period of ten years. The Liberal Democratic Congress bill would allow individuals to appeal their lustration status to a state lustration commission, and eventually to the courts; only one other bill included the right to appeal to the courts. Depending on the severity of the law, according to Professor Osiatynski, the number of individuals potentially affected ranged from 200,000 to two million.

After analyzing all six of the lustration bills under consideration by the Polish parliament, a group from the Polish Helsinki Foundation for Human Rights found an incredible inconsistency between the bills' stated and unstated goals. The group concluded that the SB archives were useless, and that a comprehensive and honest process of lustration was not possible in Poland.

Though opposed to lustration in principle (not only because of the difficulties in collecting evidence, but because collaborators were also victims) and recognizing that a lustration law was likely to be enacted anyway, the Helsinki Foundation group advocated making any screening law as restrictive in its coverage as possible, and developed what it considered the minimum standards for such a law (see Appendix 1). According to the group's recommendations, all candidates for high office should be required to state whether or not they were collaborators; it would be up to others to prove otherwise. If a candidate was proven to have lied about his or her past, he or she could then be found guilty of perjury. The aim of this approach was not to punish former collaborators, but to reveal the truth about who was or was not a collaborator.

Carlos Nino, former human rights advisor to President Raul Alfonsón of Argentina, noted that at first glance the emphasis on perjury seemed to avoid the question of punishment because ostensibly the group's recommendations focused on the truth. The group had to recognize, however, that there still were punitive consequences, he said, even without criminal punishment. Although collaboration was not a crime, individuals could still be punished, such as by losing their jobs. People were not free, he said, because they had to say something about their past or risk harm to themselves or their families.

Thomas Blanton, Executive Director of the National Security Archive in Washington, DC, agreed that the courts were the best route for dealing with lustration, but he maintained that the law must take into consideration in its definition of agent status the complexities of the

recruitment process. He also wondered whether an extensive lustration review process would not overburden the judicial system. Although due process and the right to appeal were extremely important, Mr. Blanton said that the mere accusation of collaboration was damaging in and of itself.

Istvın Rev, Academic Director of the Budapest College of the Central European University, said that even when informants were forced into their activity through fear or blackmail, collaboration represented moral weakness and untrustworthiness. However, in his view, this was only relevant in the public sphere. Rather than advocating either punishment or justice, Mr. Rev called for transparency in public servants.

Commissions of Truth and Reconciliation: The Argentine and Chilean Experiences

People cannot free themselves of the past unless they first understand it and come to terms with it, according to Jamal Benomar, Director of the Human Rights Program at the Carter Center of Emory University. Of greatest importance in this regard, he said, was conveying the message to society that there should be no impunity for violators of human rights. Although it was important to bring past violators to justice, it was not always possible, such as when human rights abusers retained control of the military during the transition process, as was the case in Chile and Argentina. When criminal justice for past human rights violations was not possible, the best alternative was telling the truth about the past. According to Mr. Benomar, the process of truth-telling helped to heal society's wounds, and restored dignity to the victims of the prior regime.

After 13 years of military dictatorship marked by extensive violence and abuses of human rights, Argentina began the transition to democracy with the election of President Raul Alfonsn in 1983. According to Carlos Nino, who served as President Alfonsn's human rights advisor, the nature of Argentina's transition posed certain obstacles to the pursuit of justice. Argentina experienced transition by collapse rather than by force or negotiation; the military lost its credibility after its defeat in the Falklands/Malvinas War, and subsequently lost its political power. However, the military retained control of the means of force, and enacted an amnesty law for all violators of human rights before ceding power. Although the new,

democratically-elected parliament declared the amnesty null and void, the military's control of force discouraged criminal prosecutions of human rights abusers.

According to Professor Nino, President Alfonsín's first objective as president was to preserve democracy, for extensive human rights abuses were not as likely to occur in a democracy. His second objective was to overcome Argentina's tradition of unlawfulness. To this end he established the Commission for the Disappeared, which was charged with investigating the more than 9,000 cases of disappearance that had occurred under the previous regime. The Commission's main aim was to prevent the recurrence of similar abuses in the future.

The Commission was granted six months (extended to nine months) to produce a report that officially documented what had happened to Argentina's "disappeared." To accomplish this task, the Commission was granted full investigative powers, which obliged military and government officials to testify and present evidence. The Commission's report, called *Nunca Mas* ("never again"), was widely distributed throughout Argentina. The Commission's investigations also served as the basis for the subsequent trial of the generals who had led the military dictatorship. Although the abusers were later pardoned by President Carlos Menem, Professor Nino said that this did not nullify the Commission's accomplishments. The Commission's work had helped the victims by validating their suffering.

Chile, which was ruled by the authoritarian government of General Augusto Pinochet between 1973 and 1989, returned to democracy in 1990 with the election of President Patricio Aylwin. However, the military retained control over the means of force and remained a political player. Thus, although the Pinochet regime had committed massive violations of human rights, legal recourse was significantly restricted.

According to Jorge Correa, former director of the Chilean National Commission of Reconciliation and Inquiry, President Aylwin had three moral objectives during the transition process: 1) to publicly establish as soon as possible an official truth about the past that could be commonly accepted; 2) to provide a starting point for rebuilding institutional mechanisms in order to prevent the repetition of the abuses in the future; and 3) to use truth-telling as a starting point for healing society.

President Aylwin's National Commission for Truth and Reconciliation was composed of representatives of both the right and the left, giving it broad credibility. Like Argentina's Commission, the Chilean Commission was established by the president rather than by parliament in order to give it greater independence. The Chilean Commission had no power to subpoena witnesses or to pass judgment. Its mandate was twofold: to establish a general truth about the conditions enabling the previous regime to gain power and about its methods of abuse; and to establish a specific truth about the victims of the worst abuses. The Commission based its work on the findings of previous investigations by independent human rights organizations, the church and others, and on the voluntary testimony of victims and past collaborators with the secret police. Like the Argentine Commission, the Chilean Commission produced and widely distributed a report that described the country's recent history and detailed the fates of the victims. Although the Commission did not name the perpetrators of human rights abuses because this would have violated their right to due process, it sent any evidence of crimes to the courts.

According to Mr. Correa, the Commission helped bring about national reconciliation when punishment of the violators was not possible. Although truth-telling was not the best option, in his view, it was still remarkably effective. The Commission's efforts served as a starting point for the moral revitalization of Chilean society and helped build the institutions of democracy without jeopardizing the transition process.

According to Mr. Benomar of the Carter Center and other experts present, the experiences of Chile and Argentina illustrated the important healing role an independent commission can play. Based on these two examples, he listed points of reference for establishing similar commissions elsewhere:

- o The commission should have a very clear mandate.**
- o There must be consensus in society that the commission is needed and that its membership is appropriate. The commission's membership should be balanced, representing all political sectors, including both the left and the right, so that it will be accepted as an impartial, independent moral authority.**
- o The commission's work should be publicized, including announcing its formation and clarifying its mandate to the public. This will also encourage cooperation with the commission.**

- o The commission should conduct a very professional, systematic investigation.**
- o The commission should have the power to subpoena witnesses and guarantee their rights and safety.**
- o The commission should be allocated sufficient resources to be effective (Mr. Benomar noted that some foundations provide financial assistance to commissions of this sort).**
- o The commission's work should be transparent; its findings should be made public. Published reports or hearings broadcast on radio or television were effective means of educating the public.**
- o The commission's methodology should take into consideration problems posed by the documentation of most security agencies (i.e., unreliable files) and try to find other sources of information. Well-formulated questionnaires could be helpful in this regard.**
- o The commission should employ scientists and specialists (like forensic anthropologists) able to determine the cause of death, and sometimes even methods of torture.**
- o Specialists in documentation are a useful addition to the commission's staff.**
- o The security of the commission's members should be guaranteed.**
- o The commission should be given a specific period of time in which its mandate is in effect.**
- o The cooperation of human rights organizations with the commission can be extremely helpful.**
- o The commission should not only document the past, but also submit evidence of crimes to the courts for criminal prosecutions. It should also consider making recommendations about how best to protect human rights in the future (e.g., passing new legislation; establishing a permanent commission; providing compensation and rehabilitation to the victims).**
- o The commission should also protect the rights of the violators themselves through the due process of law.**

In Eastern Europe, Mr. Benomar suggested that it would be important to have an independent body control the state security files to prevent their political manipulation and

abuse. He also said that a commission in Eastern Europe would need a full-time secretariat and a relatively long mandate period because the communists had been in power for over 40 years.

Tina Rosenberg, American author and journalist, agreed that commissions could be useful in Eastern Europe, but also pointed out some important historical and political differences between Eastern Europe and Latin America that influenced their transitions to democracy. Whereas in Latin America the military still had considerable power during the transition and were able to hinder criminal prosecutions, in Eastern Europe the military traditionally had been subordinate to the civilian government. In Latin America, the human rights abuses were crimes when they were committed; in Eastern Europe, however, some of the most outrageous activities of the communist period had not been crimes then and were not crimes now. It was clear in Latin America who the perpetrators were, but much less clear in Eastern Europe. Thus, in Latin America, Ms. Rosenberg said, it was a question of finding out what "they" did, whereas in Eastern Europe it was a question of finding out what "we" did.

Jan Urban agreed with Ms. Rosenberg that commissions could be tremendously useful in exploring the general complicity of society with communism in Eastern Europe. Mr. Urban maintained that commissions offered the best way to break the state's control over the past (and thus over the present and the future) in Eastern Europe and provided an opportunity for society to come to terms with its past. Mr. Urban asked for a bibliography on commissions and how various countries have dealt with the crimes of the past, and suggested developing a set of legislative norms to provide guidance in these areas.

Wiktor Osiatynski strongly disagreed with Ms. Rosenberg and Mr. Urban, maintaining that any such commission would inevitably become politicized. In his view, the only effective arena in which to address the abuses of the past was the judicial system.

Jorge Correa differed with Mr. Osiatynski, asserting that commissions could be kept relatively apolitical if a lot of time were put into fact-finding and carefully choosing members. Noting that abuses have deep historical, political and social roots, Mr. Correa emphasized the importance of clarifying exactly what society wanted to condemn. In his view, condemning the ideology of communism was not the real issue; rather, it was the acts committed under

communism that should be condemned. The political and social structures and the political culture that encouraged abuses should be condemned rather than individuals.

Conclusion

The workshop participants agreed that societies making the transition to democracy need to come to terms with the past in order to be able to move forward. Though they recognized certain legacies of the past as the sources of potential problems on the path to democracy, the participants failed to reach a consensus on the best approaches to defusing these problems.

Although the group generally agreed that the files compiled by the state security apparatus of the old regime constituted a divisive element in post-communist society, there was no agreement on what to do with the files. While recognizing the need to regulate the files, participants differed over the most effective method of control; some advocated sealing the files, whereas others called for unlimited access.

The issue of lustration was similarly controversial. Whereas many participants saw a need for some sort of screening of public officials and other influential members of society, this view was far from unanimous. Many participants considered the lustration process politically and socially divisive. Like the files, lustration could easily be manipulated for political purposes. A number of participants viewed the lustration process as a totalitarian means of dealing with the legacies of communism, which perversely only served to strengthen communism's residual hold over society.

The suggestion of establishing independent commissions of inquiry into the past in Eastern Europe based on the Chilean and Argentine examples was welcomed by some participants, while others flatly rejected it as an inappropriate model to follow. Though there was general recognition that the experiences of other countries could provide insights into how best to deal with the past, many East European participants considered the Latin American experiences to be too different from their own.

Some participants questioned the possibility of achieving justice for past abuses. According to Wolfgang Nowak, it came down to a simple formula: in good times, there are

good people, and in bad times, there are bad people. He thought that, at best, society could try to learn from those who had resisted in hopeless times what it was that had enabled them to resist. However, Jan Urban and others disagreed with his view, arguing that people became dissidents--as well as collaborators--largely by chance. Wiktor Osiatynski pointed out that under communism, in order to lead normal lives and care for their families, individuals were virtually forced into some degree of collaboration. He said that it was not appropriate to use the moral standards of the opposition to judge everyone, and asserted that people should have the right not to be heroes.

All the participants agreed on the need to respect democratic principles and the rule of law. Many participants considered the search for justice far less important than the establishment of democratic institutions and communicating to society the truth about the past, no matter how painful.