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# Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador

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## COMMENT

# TRUTH AND RECONCILIATION COMMISSIONS: GENERAL CONSIDERATIONS AND A CRITICAL COMPARISON OF THE COMMISSIONS OF CHILE AND EL SALVADOR

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## I. INTRODUCTION

In the last quarter century many countries around the world have undergone major political change, namely transition from authoritarian regime to democratic rule, often in the wake of violent internal conflicts. In an effort to quench the enflamed tensions that customarily accompany such transitions, these democracies have attempted to come to terms with past atrocities by establishing investigatory commissions to uncover the truths of the past. Typically known as "truth and reconciliation commissions," these commissions have played a critical role in countries around the world that had to confront a past scarred by oppressive military regimes, civil strife, protracted violence, and gross human rights violations.

Since the early 1980's, Latin American countries have sought to heal the wounds of their nations after periods of widespread human rights violations through the use of investigatory commissions.<sup>1</sup> Investigatory efforts have been undertaken in Chile by democratically elected governments that replaced military dictatorships,<sup>2</sup> as well as United Nations (U.N.) sponsored commissions as part of a U.N. mediated peace process in El Salvador.<sup>3</sup> The nations of Chile and El Salvador established truth commissions in an effort to uncover the reality of past human rights violations, report the findings to the public, make recommendations for changes to avoid repeating the abuses, and ease tensions in their politically-charged countries. Though the assembly, methods, and results of each of these commissions varied greatly, both were notable successes in their own right and each serves as a distinct model to achieve the shared ultimate goal of all nations coming to terms with a history of human rights violations and national healing.

This comment presents a broad overview of what truth commissions are, why they are used, and what are the inherent advantages and disadvantages of this approach to meeting

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1. Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 600, 613 (1994). In 1982, Bolivia became the first Latin American Country to establish a truth commission. President Hernan Siles Zuaro created a "National Commission of Inquiry into Disappearances" just days after the return to democratic rule in October 1982. *Id.*

2. See generally, Jose Zalaquett, *Introduction to the English Edition of REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION*, at xxiii (Philip E. Berryman trans., 1993). [hereinafter INTRODUCTION TO CHILEAN REPORT].

3. *United Nations, El Salvador Agreements: The Path to Peace*, U.N. Department of Public Information, No. 1208-92614 (1992) [hereinafter Path to Peace].

nation's needs. The two distinct models of truth commissions established by Chile and El Salvador will be historically and critically examined. The processes and achievements of each model will be compared and contrasted, ultimately uncovering that though these two commissions share few similarities, they share the same ability to match the needs of the nation in which they were employed.

### A. *What is a Truth Commission?*

The term truth commission is used generically for a wide variety of bodies set up to investigate a past history of human rights violations in a given country.<sup>4</sup> Violations by the military or other governmental forces or by armed opposition forces are often included.<sup>5</sup> There is no fixed model for a truth commission; the system, staff, authority, and mission may vary significantly from one commission to the next.<sup>6</sup> Some truth commissions have been significantly limited from a full and fair accounting of the past – limited by mandate, by political constraints or restricted access to information, or by a lack of resources.<sup>7</sup> Because truth commissions have reported only a fraction of the “truth,” the title of “investigating commission” might be a more accurate reflection of what a commission does.<sup>8</sup> The investigations these commissions conduct are largely a product of their mandate and composition. Though no two commissions are identically composed, there are some elements that are common to almost all truth commissions.

Truth commissions are comprised of four primary elements according to Priscilla Hayner, an expert on truth commissions:

- (1) A truth commission focuses on the past; (2) a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time; (3) a truth commission usually exists for a set period of time, ceasing to exist with the submission of a report of its findings; and (4) a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it access to information, security, or protection to dig into sensitive issues, and a greater impact with its

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4. Hayner, *supra* note 1, at 600.

5. Hayner, *supra* note 1, at 600.

6. Hayner, *supra* note 1, at 607.

7. Hayner, *supra* note 1, at 600.

8. Angelika Schlunck, *Truth and Reconciliation Commissions*, 4 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 415, 417 (1998).

report.<sup>9</sup>

Hayner's four primary elements are a description of some common features; however, there may be a variation of other features. Commissions may be ad hoc sponsored by the executive or legislative branches of government,<sup>10</sup> international commissions under the U.N. or regional auspices,<sup>11</sup> or may operate under a more permanent national structure like an ombudsman's office.<sup>12</sup> Following the example of Argentina, at least twenty-five countries have used a combination of truth and reconciliation commissions and amnesties to facilitate the transition to a public order of human dignity.<sup>13</sup> The International Human Rights Law Institute at DePaul University in Chicago completed an empirical study in 1997 on international and non-international conflicts since World War II. The study found that from 229 international and internal conflicts, excluding the classic interstate armed conflicts, nine were the subject of a truth commission, while twenty-four were subject to domestic prosecution and two of international prosecution. The most widely known example is the Truth and Reconciliation Commission established in 1995 in South Africa to examine Apartheid-Era crimes.<sup>14</sup> Unfortunately, for most of these conflicts, unlike in South Africa, there were no redress mechanisms in place.<sup>15</sup>

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9. Hayner, *supra* note 1, at 604.

10. Hayner, *supra* note 1, at 613-16. For instance, in Bolivia, the National Commission of Inquiry into Disappearances was created by presidential decree, so was the Argentinean National Commission on the Disappeared in 1983. Uruguay established the Investigative Commission on the Situation of Disappeared People and its Causes through act of parliament in 1985. *Id.* at 613-16.

11. Belisario Betancur, Reinaldo Figueroa Planchart, & Thomas Buergenthal, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, at [http://www.usip.org/library/tc/doc/reports/el\\_salvador/tc\\_es\\_03151993\\_toc.html](http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html) (last visited February 12, 2001) [hereinafter FROM MADNESS TO HOPE]. The Commission on the Truth for El Salvador was created through the Peace Accord between FMLN and the Salvadoran government under the mediation of the United Nations, signed at Chapultepec Castle in Mexico City on January 16, 1992. *Id.*

12. Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79 (1995).

13. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 330-31 (1999).

14. NATIONAL UNITY AND RECONCILIATION ACT, No. 1111, (July 26, 1995), available at <http://www.truth.org.za/legal/act9534.htm> [hereinafter UNITY ACT].

15. Schlunck, *supra* note 8, at 416 (referring to Jennifer Balint, An Empirical Study of Conflicts (of an International and Non-International Character, Civil Conflicts and Tyrannical Regime Victimization) and Their Outcomes Since World War II, Report to The United States Meeting of Experts on Reigning in Impunity for

Most truth commissions are created at a point of political transition within a country, used to demonstrate an end to a past record of human rights abuses, to promote reconciliation among the people, and to stabilize political legitimacy.<sup>16</sup> Truth commissions, therefore, must be distinguished from formal legal accountability achieved through the prosecution of individuals' in legal tribunals. Prosecutions are very rare after a truth commission report, and in most cases there is no trial of any kind, even if the report has indicated the identity of the violators.<sup>17</sup> Often amnesty is granted to the perpetrators, such as any member of the military, before the commission begins its investigation in order to enable the commission to receive accurate information from persons who otherwise would be unwilling to reveal the truth of past crimes.<sup>18</sup>

In short, the indefinite nature of the truth commission allows it to range from elaborate multi-body commissions such as the 1995 Truth and Reconciliation Commission of South Africa<sup>19</sup> to one-man-commissions with very limited resources as in Honduras.<sup>20</sup> There need be no fixed model: in the unique circumstances of each nation, other new and innovative forms for a truth commission may yet be developed.<sup>21</sup> This allows each commission to

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International Crimes and Serious Violations of Human Rights (Apr. 13, 1997) held in Washington, D.C., International Human Rights Law Institute DePaul University College of Law).

16. Hayner, *supra* note 1, at 604.

17. Hayner, *supra* note 1, at 604. Only in a few cases, such as in Bolivia, Argentina and Ethiopia, have there been trials in conjunction with or as a result of the truth commission investigations. *Id.*

18. FROM MADNESS TO HOPE, *supra* note 12. Witnesses are often reluctant to testify to courts because they fear reprisals. When state institutions have been notoriously unreliable and unable to protect the victims of human rights violations, far more than a state change in policy will be needed to overcome legitimate fears. Amnesty is often the only solution to this problem. *Id.*

19. UNITY ACT, *supra* note 13. According to chapter 2, section 3, paragraph 3 of the Act, the South African Truth and Reconciliation Commission consists of three separate commissions with different functions: the Commission of Human Rights (ch. 2, sec. 3, para. 3, sub-para. (a)), the Commission for Amnesty (ch.2, sec. 3, para. 3, sub-para. (b)), and the Commission for Reparation and Compensation (ch. 2, sec. 3, para. 3, sub-para. (c)).

20. Popkin & Roht-Arriaza, *supra* note 11, at 89-90. In 1992, President Callejas created an ombudsman office known as the Commissioner for the Protection of Human Rights. The President selected Leo Valladares from a list provided by a National Reconciliation Commission. Valladares could only be removed by a two-thirds vote of that commission. All civil and military authorities were to cooperate with, and could not suspend, the Commissioner's investigations. *Id.*

21. Hayner, *supra* note 1, at 607.

be molded to fit the particular circumstances and needs of the nation in which it is established.

### *B. Why a Truth Commission?*

A truth commission usually serves a myriad of purposes. Its main function is to investigate the past under the protection and authority of sanctioned fact finding.<sup>22</sup> In conducting its investigation it establishes an objectively accurate record of a country's past, providing an impartial history of a country and its government's part in disputed acts.<sup>23</sup> Another goal is to publish a report that provides the public with the truth. Such an account serves as an instrument of preservation and education, preventing history from being rewritten by possible subsequent oppressive regimes, and teaching its society valuable lessons from its past to circumvent repetition in the future.

The cathartic effect of such a report eases the heartache of many of the family members left suffering from past violence. It is generally true that the citizens, especially those who have suffered a loss at the hands of their own nation, have a general idea of who was responsible for what happened during periods of violence, yet still place high value on the findings of these reports. From this it can be deduced that the true value of the commission and its report is not in its findings of truth but in its acknowledgement of the truth.<sup>24</sup> "Acknowledgement implies that the state has admitted its misdeeds and recognized that it was wrong."<sup>25</sup> Juan Mendez, then director of Americas Watch, writes, "[k]nowledge that is officially sanctioned, and thereby made 'part of the cognitive scene'. . . acquires a mysterious quality that is not there when it is merely 'truth.' Official acknowledgment at least begins to heal the wounds."<sup>26</sup>

The psychological importance of recognizing involvement that has long been denied can play a key role in the healing process of a society marred by conflict. Finally, a key objective of many commissions is not simply to report misdeeds, but to propose how past wrongs should be reconciled.

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22. Hayner, *supra* note 1, at 607.

23. Hayner, *supra* note 1, at 607.

24. Hayner, *supra* note 1, at 607.

25. Aryeh Neier, *What Should Be Done About the Guilty?*, THE NEW YORK REV. OF BOOKS, 1 Feb. 1990, at 34.

26. Juan E. Mendez, *A Miracle, A Universe: Settling Accounts With Torturers*, 8 N.Y.L. SCH. J. HUM. RTS. 557, 583(1991)(citing Professor Thomas Nagel of New York University for his articulation of this distinction).

The commission is usually established during a time of reformation, which is why recommendations for reform can often play a crucial role in the effectiveness of the commission. Though not all commissions make recommendations, many do. These recommendations have covered military and police reform, the strengthening of democratic governments, measures to promote national reconciliation, reparations for the victims of violence, and reform of the judicial system.<sup>27</sup> Though these recommendations typically carry no legal obligation, they can serve as a catalyst for future reform and as goals that the people of the nation can point to in their quest for political reorganization.

### C. *Advantages and Disadvantages of Truth Commissions*

Most human rights organizations feel that the contributions of a truth commission outweigh any possible negative aspects that may accompany them.<sup>28</sup> One of the greatest advantages of a truth commission is its flexibility. It has the ability to adapt to the needs of each country in composition, authority, and mission. Furthermore, truth commissions hold the distinctly advantageous ability to be established almost instantly at a relatively low cost.<sup>29</sup> This is very important for many of the countries implementing a truth commission because they are often economically limited and in need of immediate reform. As a temporary organization with a limited mandate that is designed according to specific needs of a country, it meets the need for rapid resolution in a period of government transition.

Some human rights activists favor criminal prosecution, rather than investigatory commissions, as the best prohibitive action against future violations.<sup>30</sup> The use of criminal tribunals, however, poses many problems that often leave such an option inapt. First, creating an independent judicial tribunal to adjudicate these crimes requires constitutional provisions and both procedural and substantive codes of operations that would typically require years to implement.<sup>31</sup> It will similarly take time to rebuild a weakened domestic criminal justice system to the point where it

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27. Hayner, *supra* note 1, at 609.

28. Hayner, *supra* note 1, at 607.

29. Schlunck, *supra* note 8, at 419.

30. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

31. Popkin & Roht-Arriaza, *supra* note 12, at 82.



can undertake credible trials for war crimes or similar mass abuses.<sup>32</sup> Such delays would defeat the goal of promoting immediate healing. Second, mass atrocities can only be perpetrated by a large number of people. The multitude of participants and massive amounts of evidence concerning each case make it logistically and economically untenable to use a criminal court system.<sup>33</sup> Unlike the criminal court system, proceedings before a commission do not have to follow the rigid rules of evidence and criminal procedure.<sup>34</sup> With this time hindrance removed, a truth commission's ability to gather and evaluate evidence and to hear the testimony of witnesses is far more accommodating. Accordingly, more cases can be resolved with a better general picture of what happened in the past.

It is true, however, that with the removal of the rules of evidence and criminal procedure, the indicia of reliability sought after in the judicial process diminishes. In addition, the propensity for errors in fact finding increases. No matter which system is used, erroneous testimony is an inevitable danger due to such factors as lack of clear recollection or ulterior motives. With proper safeguards, truth commissions can reduce error in their fact finding and meet a level of reliability that rivals that of any average adjudicative process.

Third, though criminal prosecution at the international level may be a viable alternative for the most severe cases, e.g. prosecution for genocide, it is much less viable at the national level. The reality in most of these transitional democracies is that there is no desire to begin assigning individual blame to officials still in powerful positions for fear that it would disrupt the democracy that the new government is attempting to solidify. Also, many crimes committed by political forces were technically legal under the then existing regime creating an unfairness of imposing penalties *ex post facto*. The inadequate resources available at the local level to the government to hear cases and of the victims to bring the cases before the courts further compounds the problem of establishing criminal tribunals at the national level.

Finally, it is a common misperception that the use of truth commissions and the holding of trials are mutually exclusive.

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32. Neil J. Kritz, *Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 142 (1996).

33. *Id.* at 138-39.

34. Schlunck, *supra* note 8, at 419.

This is not necessarily the case. The first commission of note, established in Argentina in 1983, produced significant amounts of information, which was then utilized by the authorities in prosecuting members of the military junta that had ruled the country.<sup>35</sup> The two processes, therefore, can actually complement one another.

Though the advantages of truth commissions usually heavily outweigh the advantages of criminal proceedings, critics still have other legitimate concerns about the possible disadvantages of investigatory commissions. One consideration is that commissions set up by some governments might simply be seeking to manipulate the public perception of past misdeeds under the veil of disclosure. Particularly in situations where there is international pressure that the government, even the successor government, take action by accounting for crimes of the past, authorities may establish a commission but deny it the authority needed to conduct a sufficient investigation.<sup>36</sup> For example, a government can deny certain necessities of an effective investigation, such as, adequate funding, ample staffing, a reasonable time period within to work, authority to investigate certain types of crimes, and access to potentially incriminating documents. Depending on these factors, it is not always clear whether a government-sponsored commission is an actual sign of reformation or simply a tool of political distortion.<sup>37</sup> Given this dynamic, the flexibility that serves as such a strength of a truth commission also proves to be its salient weakness.<sup>38</sup>

Another weakness cited is that even if the truth commission produces a comprehensive report, those findings can only have an impact if the public has unconstrained access to them and if the government will allow for the changes recommended and endorsed

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35. Kritz, *supra* note 32, at 143.

36. Under international law, the successor government is responsible for the acts of the prior regime, even though it in fact had no control over them and was often the victim of the prior regime. The law does not provide for situations where, for example, the military is not under the actual control of the government. Additionally, international recognition that states have a duty to investigate, prosecute, and provide some form of redress for the victims of certain human rights violations such as widespread and systematic summary executions, disappearances, and torture has increased dramatically in the last decade. These crimes fall under a subset of crimes that must be prosecuted as they have been determined to fall outside the scope of political crime amnestiable under international law. See Orentlicher, *supra* note 29, at 2595; Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990).

37. Hayner, *supra* note 1, at 608.

38. Schlunck, *supra* note 8, at 420.

by the people.<sup>39</sup> The non-binding nature of the recommendations, however, allows the governing body to dismiss the findings as inaccurate.<sup>40</sup> Truth commissions, therefore, are inherently vulnerable to political disposition.

Despite the concerns some critics have of truth commissions, most critics are very positive overall about the ability of these commissions to maintain stability and promote healing in nations emerging from a period of sustained human rights violations. As domestic demands for answers are echoed by the international community, many governments have increasingly turned to the truth commissions as the most effective, expeditious, and relatively low-cost way to meet those demands.

## II. A TRUTH COMMISSION FOR CHILE: THE RETTIG COMMISSION

### A. *The Socio-Political Context*

After seventeen years of military rule, Chile returned to democratic government under President Patricio Aylwin in March 1990.<sup>41</sup> His election was part of a transitional process designed by the military government, which allowed elections in exchange for the political parties' agreement to adhere to the constitutional structure established by the military.<sup>42</sup> The former head of government, General Augusto Pinochet, remained as head of the military despite the election of a civilian president.<sup>43</sup> Furthermore, a number of seats in the Senate were reserved for Pinochet's exclusive appointment, rather than election, and military and judicial structures remained unchanged.<sup>44</sup>

The prior military regime had a history of repressive and violent acts including forced exile, torture, summary execution, kidnapping, and unlawful detention.<sup>45</sup> According to the Chilean military regime itself, between 1973 and 1975 there were at least 42,486 political detentions, with 12,134 individual and 26,431

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39. Schlunck, *supra* note 8, at 420.

40. See Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 HASTINGS CONST. L.Q. 607, 613 (1995). In El Salvador, after the submission of the UN report, the El Salvador Military rejected the report as illegal and only five days later, the legislature passed a general amnesty. *Id.*

41. Popkin & Roht-Arriaza, *supra* note 12, at 84.

42. Popkin & Roht-Arriaza, *supra* note 12, at 84.

43. Popkin & Roht-Arriaza, *supra* note 12, at 84.

44. Popkin & Roht-Arriaza, *supra* note 12, at 84.

45. Popkin & Roht-Arriaza, *supra* note 12, at 84.

political arrests.<sup>46</sup> The Latin American Institute on Mental Health and Human Rights ("ILAS") estimates that ten percent of the Chilean population in the 1980's was affected by the "repressive situation," defined as being subject to arrests and threats or having relatives in prison.<sup>47</sup> ILAS believed this to be a conservative estimate. Additionally, ILAS reported that at least 200,000 individuals were subject to situations of "extreme trauma," defined as forced exile, torture, execution, and detention of immediate family members.<sup>48</sup>

### *B. Creation Through Completion of the Rettig Commission*

Despite the authoritative military presence, President Aylwin established a "National Commission for Truth and Reconciliation" (*Comisión Nacional para la Verdad y Reconciliación*) to investigate the human rights violations resulting in death or disappearance under the military regime's seventeen year rule.<sup>49</sup> The commission's mandate was to "clarify in a comprehensive manner the truth about the most serious violations committed in recent years," and "to gather evidence that may make it possible to identify the victims by name and determine their fate or whereabouts."<sup>50</sup> Though the prior regime had a history of widespread torture, arbitrary detention, and forced exile, any violations not resulting in death were excluded from the investigation.<sup>51</sup> President Aylwin's advisors felt that inclusion of all such infractions would be too unmanageable an endeavor to be completed within the time allotted the commission to conduct its inquiry.<sup>52</sup> The investigation, therefore, only addressed cases of death or disappearance under a policy of "all the truth and as much justice as possible."<sup>53</sup> The belief was that justice was unattainable because

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46. Laura McHale, *The Case Against General Augusto Pinochet*, 27(3) A.B.A. LITIG. 49, 50 (2001). (citing Elizabeth Lira & Mara Isable Castillo, *Psicologa de la Amenaza Política y del Miedo*, ILAS (1991)).

47. *Id.*

48. *Id.*

49. 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 5-6 (Philip E. Berryman trans., University of Notre Dame Press 1993). [hereinafter 1 CHILEAN REPORT].

50. *Id.* at 6-7.

51. Popkin & Roht-Arriaza, *supra* note 12, at 84.

52. David Weissbrodt & Paul W. Fraser, *Report of the Chilean National Commission on Truth and Reconciliation*, 14 HUM. RTS. Q. 601 (1992).

53. Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313 (1998).

the military that perpetrated these heinous crimes yet remained a powerful presence.<sup>54</sup>

To maintain the integrity of the commission, President Aylwin created a well-balanced eight member commission headed by former Senator Raul Rettig.<sup>55</sup> The commission was evenly divided with four members from each of the opposing political sides, pro and contra the former military regime.<sup>56</sup> Members included both conservative scholars and jurists close to the military regime and human rights advocates who did not support the regime.<sup>57</sup> One notable commissioner, Jose Zalaquet, delivered the prestigious Tobriner Memorial Lecture in 1991 and served a useful role in South Africa's Truth and Reconciliation Commission.<sup>58</sup> The qualifications and diverse representation of the commission gave it much needed credibility during the ensuing investigation.

The commission investigated over 3400 cases, and determined 2920 were within its mandate.<sup>59</sup> The commission was allotted nine months to complete its task and provided with a substantial staff of sixty people to help accomplish this lofty goal. The staff was divided into teams of two legal experts (a lawyer and a law school graduate), each of which were assigned roughly 200 cases.<sup>60</sup> Unlike many truth commissions, this commission thoroughly investigated each case, and had nearly unlimited access to presidential records. The majority of disappearance cases were taken to court during the former military regime because of Chile's strong legal tradition.<sup>61</sup> The detailed records left from these proceedings allowed the commission to move swiftly through the investigation. The commission interviewed thousands of witnesses throughout the country and abroad. It also performed an in depth examination of the documents of domestic and international human rights groups. Forensic anthropologists aided the

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54. *Id.*

55. 1 CHILEAN REPORT, *supra* note 49, at 7.

56. Wiessner & Willard, *supra* note 13, at 331.

57. Popkin & Roht-Arriaza, *supra* note 12, at 82.

58. Goldstone, *supra* note 40, at 612.

59. 2 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 899-900 (Philip E. Berryman trans., University of Notre Dame Press 1993[hereinafter CHILEAN REPORT]). The Commission received 508 cases that did not fit within its mandate and 449 in which only a name was provided; hence, there was no basis for carrying out an investigation. Of the 2,920 within the commissions mandate, 2,025 were determined to be human rights violations perpetrated by state security forces; ninety were the product of the armed opposition; 164 were the victims of political violence; 641 cases were found to be inconclusive due to lack of evidence. *Id.*

60. Hayner, *supra* note 1, at 621.

61. Hayner, *supra* note 1, at 621.

investigation by exhuming and identifying remains found in unmarked cemeteries.<sup>62</sup> Despite these efforts, the commission was unable to establish the whereabouts of most victims, having presumed those forcibly disappeared to have been killed. The commission had no power to subpoena witnesses,<sup>63</sup> and received little information in their attempts to interview the military or police.<sup>64</sup> Despite these challenges the commission was able to conduct a thorough investigation resulting in a lengthy final report.<sup>65</sup>

The commission's final, unanimous report was presented to the President in February 1991.<sup>66</sup> The report included an explanation of the origins of the violations, the entities responsible, and individual accounts of a substantial number of victims. In most cases, however, even if the commission knew the names of the individuals responsible, they had to refrain from naming those persons because they were still serving in the armed forces and were protected by their leader, General Pinochet.<sup>67</sup> Therefore, implications of the report were generally limited to branches of the military and security forces, or opposition groups believed to be responsible, instead of specific named parties.<sup>68</sup>

Additionally, the commission devoted a large portion of its efforts on reporting the effects of these crimes on the victims, their families, and society in general, and recommending future action.<sup>69</sup> It recommended reparations to the victims and the establishment of a "National Corporation for Reparation and Reconciliation" to follow up the work of the commission and to oversee the aforementioned reparations.<sup>70</sup> Based on fears surrounding a military threat of destabilization of the transitional democracy, the commission decided from the outset that the best that could be achieved was truth telling coupled with an extensive compensation program. The commission decided on this option rather than an attempt to attain "justice" by legal punishment.<sup>71</sup> Additionally, the report called for human rights education for both the military and civilians, greater judicial independence from the military, and

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62. Popkin & Roht-Arriaza, *supra* note 12, at 85.

63. 1 CHILEAN REPORT, *supra* note 49, at 14.

64. Popkin & Roht-Arriaza, *supra* note 12, at 85.

65. 1 CHILEAN REPORT, *supra* note 49, at 14. The English translation by Berryman of the CHILEAN REPORT is 907 pages in length.

66. Popkin & Roht-Arriaza, *supra* note 12, at 85.

67. Wiessner & Willard, *supra* note 13, at 331.

68. INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxxii.

69. Popkin & Roht-Arriaza, *supra* note 12, at 85.

70. Hayner, *supra* note 1, at 622.

71. Roht-Arriaza, *supra* note 53, at 313.

changes in the laws on states of emergency, military jurisdiction, and criminal procedure generally.<sup>72</sup> It recommended greater adherence to international human rights laws, and called for the creation of an ombudsman's office.<sup>73</sup> Finally, it suggested that the government honor the victims through monuments and support of cultural and artistic work.<sup>74</sup>

### C. *The Government and Public Respond*

President Aylwin presented the report to the public, one month after he had received it, through a nationally televised announcement.<sup>75</sup> He formally apologized to the victims and their families on behalf of the government, and asked the military to acknowledge its role in the past atrocities.<sup>76</sup> The army did not honor Aylwin's request, even though a grant of amnesty prevented most of the persons responsible from being brought to justice.<sup>77</sup> Despite this, human rights activists and the public alike met the report with much acclaim.<sup>78</sup> The report was reprinted and widely circulated amongst the public and reported on by the press.

Unfortunately, within three weeks of the report's release, there were three political assassinations diverting public and media attention from the commission's report, cutting short the public discussion of its findings.<sup>79</sup> After the assassinations the report did not resurface, and thousands of copies were kept out of circulation to prevent political divisions.<sup>80</sup>

Despite the unfortunate distractions surrounding the release of the Rettig report, the government eventually implemented

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72. Popkin & Roht-Arriaza, *supra* note 12, at 86.

73. Popkin & Roht-Arriaza, *supra* note 12, at 86.

74. Popkin & Roht-Arriaza, *supra* note 12, at 86.

75. Popkin & Roht-Arriaza, *supra* note 12, at 85.

76. Hayner, *supra* note 1, at 622.

77. INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxxii. The army and the navy publicly rejected the report, focusing mostly on a historical interpretation of the Allende administration and the role of the military government. INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxxii.

78. Hayner, *supra* note 1, at 614.

79. The third assassination was of prominent right-wing senator Jaime Guzman and, "effectively ended public discussion of the Rettig report." Americas Watch, *Human Rights and the "Politics of Agreements": Chile During President Aylwin's First Year*, 30 (1991).

80. In July 1992, Americas Watch reported, "the Rettig report with its deeply disturbing revelations and conclusions has not resurfaced since [the assassinations]," and "tens of thousands of copies of the report" were being withheld from the public, stored in warehouses, to "avoid the political divisions reflected in the issue of past abuses." Americas Watch, *Chile: The Struggle for Truth and Justice for Past Human Rights Violations*, 2 (1992).

many of its recommendations.<sup>81</sup> In February 1992, the government followed the commission's recommendation and established a "National Corporation for Reparation and Reconciliation."<sup>82</sup> The object of the corporation was "the coordination, execution, and promotion of the actions necessary for complying with the recommendations contained in the Report of the Truth and Reconciliation National Commission."<sup>83</sup> As a result, the corporation implemented reparations including a subsidy for the education of the victims' children, medical benefits, and a monthly pension plan for the families of the victims. Furthermore, the two year mandate<sup>84</sup> of the corporation included investigating cases unresolved by the commission, searching for the clandestine graves of the disappeared, and systematizing the records and files of the commission. Despite all of the challenges and limitations the Rettig commission faced, it did a remarkable job of finding the truth<sup>85</sup> and achieving its goals of uncovering past human rights violations, reporting these findings to the public, making recommendations

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81. Hayner, *supra* note 1, at 622.

82. Hayner, *supra* note 1, at 622.

83. The law creating the corporation qualifies it as "a decentralized public service subject to supervision of the President." Law Nr. 19,123, Ministry of the Interior, Chile, translated in 3 TRANSITIONAL JUSTICE: *How Emerging Democracies Reckon With Former Regimes*, Vol. III: LAWS RULINGS AND REPORTS (Neil J. Kritz, ed., Wash. D.C.: U.S. Institute of Peace).

84. An available one-year extension of the corporation was allowed.

85. In describing the work of the commission, its member Jose Zalaquet Daher analyzed the moving forces:

The truth was considered as an absolute, unrenounceable value for many reasons: In order to provide for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of its history, however differently the facts may be interpreted. The void would be filled with lies or with conflicting versions. The unity of a nation depends on a shared identity, which, in turn, depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from reoccurring. In addition, bringing the facts to light is, to some extent, a form of punishment, albeit mild, in that it provokes social censure against the perpetrators or the institutions or groups they belonged to. But although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice—it does not bring the dead back to life, but it brings them out from silence; for the families of the "disappeared," the truth about their fate would mean at last, the end to an anguishing, endless search. It was deemed further that a thorough disclosure of truth was feasible, although probably the whereabouts of the remains of most disappeared will remain unknown.

INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxiii, xxxi.



for changes, and ultimately, easing tensions in their politically charged country.

### III. A TRUTH COMMISSION FOR EL SALVADOR: THE UNITED NATIONS INTERVENES

#### A. *A Bitter Civil War*

For over a decade El Salvador was engaged in a bloody civil war, claiming some 75,000 lives in the small nation of about five million people.<sup>86</sup> From 1980 until 1992, the conflict raged as a subtext to Cold War politics. The Salvadoran government, backed by a Republican led United States, had been unable to defeat the opposing forces of the *Frente Farabundo Marti para la Liberación Nacional* ("FMLN").<sup>87</sup> Outfitted by the Soviet Union, Cuba, and other Soviet bloc countries, the alliance of five leftist insurgent groups, better known as the FMLN, had fought vigorously but could not defeat the Salvadoran military. The Salvadoran government, however, could not quash the forces of the FMLN, as it was the most effective guerrilla movement on the continent and enjoyed substantial support inside El Salvador as well as international recognition.<sup>88</sup>

The fighting was particularly merciless on the civilian population. Both sides committed appalling acts of violence that attracted worldwide attention. Such accounts included the assassination of Archbishop Oscar Romero, the murder of six Jesuit priests, the rape and murder of four American church-women, the systematic assassination of mayors, the killing of four off-duty U.S. Embassy guards, the El Mozote massacre in which hundreds of innocent civilians were slaughtered, the kidnapping and execution of national figures, and the countless acts of torture-killings.<sup>89</sup> Of course, each side placed blame on the other for these atrocities.<sup>90</sup>

Finally, as the Cold War began to draw to an end in the early 1990's, it became apparent to both sides that neither was in a position to defeat the other. As Cold War countries lost political interest and the economic resources to back the hostilities, both

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86. Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 502 (1994).

87. *Id.*

88. Popkin & Roht-Arriaza, *supra* note 12, at 86.

89. Buergenthal, *supra* note 86, at 503.

90. Buergenthal, *supra* note 86, at 503.

sides began to lack the funds<sup>91</sup> and support<sup>92</sup> needed to carry on their campaigns. At this time, the concept of negotiating a peace agreement became a more plausible objective to both sides. This change in political climate led to the eventual resolution of the ruthless struggle of more than a decade.<sup>93</sup>

### *B. Agreement for Intervention*

Because the FMLN had not been defeated and maintained considerable support within the country, it was able to negotiate with the Salvadoran government on fairly equal ground to achieve a far-reaching peace accord in exchange for ending the war.<sup>94</sup> Under the auspices of the United Nations, the FMLN and the Salvadoran government negotiated a series of agreements, formally concluding with the signing of the Salvadoran Peace Accords on January 16, 1992, in Mexico City.<sup>95</sup>

The two sides engaged in three years of discussions in an effort to put an end to the violence. It became apparent, however, that neither side wanted to lay down its weapons until a satisfactory agreement could be met on implementing a system for an impartial accounting of the past abuses.<sup>96</sup> They soon realized that their mutual distrust would not allow them to agree upon any group of Salvadorans to conduct the investigation. The country remained highly polarized because neither side had won the war, making it impossible to create a truth commission staffed by Salvadorans.<sup>97</sup> The parties eventually concluded that a special body composed of a panel of distinguished foreigners would be the only investigators both sides could agree upon to conduct the sensitive inquiry.<sup>98</sup> Once this agreement was formed, the official

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91. Buergenthal, *supra* note 86, at 502. U.S. military and economic aid amounted to more than six million dollars. Buergenthal, *supra* note 86, at 502.

92. Buergenthal, *supra* note 86, at 502. The FMLN received substantial assistance in the form of weapons and training from Cuba, Sandanista Nicaragua, the Soviet Union, and other Soviet bloc countries. Buergenthal, *supra* note 86, at 502.

93. Buergenthal, *supra* note 86, at 502-03.

94. Popkin & Roht-Arriaza, *supra* note 12, at 86.

95. See generally *Path to Peace*, *supra* note 3. The Salvadoran Peace Accords consist of a series of agreements, negotiated over a period of more than three years between the Government of El Salvador and the FMLN. Two of these agreements are: 1) the *Mexico Agreements*, April 27, 1991, at 13-31; and 2) the *Peace Agreement*, Jan. 16, 1992, at 46-145 [hereinafter, respectively, the *Mexico Agreements* and the *Peace Agreement*].

96. Buergenthal, *supra* note 86, at 503.

97. Popkin & Roht-Arriaza, *supra* note 12, at 87. See also Hayner, *supra* note 1, at 628.

98. Buergenthal, *supra* note 86, at 503-04.

establishment of the Truth Commission was provided for in the "Mexico Agreements," which were signed on April 27, 1991.<sup>99</sup>

The U.N. was already present in El Salvador to oversee the negotiations, the demobilization of forces, the elections, and to monitor any further human rights violations.<sup>100</sup> It was only natural, therefore, that the U.N. oversee the Commission as well.<sup>101</sup> Pursuant to its mandate, the Commission was to be comprised of "three individuals appointed by the Secretary-General of the United Nations after consultation with the Parties."<sup>102</sup> The U.N. met no objections from either party to its choice of appointments. The three highly respected international figures chosen to direct the Commission were: Belisario Betancur, former President of Colombia; Thomas Buergenthal, Professor of Law at George Washington University and the former President of the Inter-American Court; and Reinaldo Figueredo Planchart, former Foreign Minister of Venezuela.<sup>103</sup> The staff consisted of fifteen professional staff and several administrators, none of whom were Salvadorans due to the neutrality concerns mentioned above.<sup>104</sup> To protect the integrity of the Commission, all funds and staff came from outside El Salvador.<sup>105</sup> It was the first time the U.N. sponsored an inquiry commission of this kind.<sup>106</sup> It was also the first time that the parties to an internal armed conflict had conferred power on a commission composed of foreign nationals designated by the U.N. to investigate human rights violations committed during the conflict and to make binding recommendations.<sup>107</sup>

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99. FROM MADNESS TO HOPE, *supra* note 18.

100. Hayner, *supra* note 1, at 628.

101. Hayner, *supra* note 1, at 628.

102. *Mexico Agreements*, *supra* note 95, at 29.

103. Hayner, *supra* note 1, at 628.

104. Buergenthal, *supra* note 86, at 504. The staff consisted largely of lawyers, sociologists, forensic anthropologists, and social workers drawn from other Latin American countries, the United States, and Europe. The total number of staff members ranged between twenty to thirty persons, including support personnel. Buergenthal, *supra* note 86, at 504.

105. The Commission's work was financed by some two and a half million dollars contributed to a special U.N. fund by the United States, the European Community, the Netherlands, and the Scandinavian countries; the United States was the largest contributor with one million dollars. Buergenthal, *supra* note 86, at 504.

106. Popkin & Roht-Arriaza, *supra* note 12, at 88.

107. Buergenthal, *supra* note 86, at 501.

### C. Formation Through Completion of the Commission

#### 1. The Mandate

The "U.N. Commission on the Truth for El Salvador" was created in April of 1991 through the peace accords between the Salvadoran government and the FMLN.<sup>108</sup> The Commission's mandate gave it authority to investigate "serious acts of violence. . . whose impact on society urgently requires that the public should know the truth" about what occurred between 1980 and 1991.<sup>109</sup> The mandate purposely did not charge the Commission with investigating all serious acts of violence. Rather, the main focus was to be on acts that had a special or broader impact on society in general.<sup>110</sup> The commission was further charged with addressing "the need to create confidence in the positive changes which the peace process [was] promoting and to assist the transition to national reconciliation."<sup>111</sup> Thus, the Commission was not to lose sight of the fact that the promotion of national reconciliation was an overarching goal of the investigation.<sup>112</sup> Finally, of great importance, the Commission recommended the legal, political or administrative measures to remedy the results of the investigation, including measures designed to prevent the repetition of the inhumane acts.<sup>113</sup> Not only was the Commission required to give formal recommendations, but those recommendations were also binding on both Parties because they had formally agreed to carry out the Commission's recommendations.<sup>114</sup>

#### 2. The Investigation

The Commission was given a six-month limit to carry out the immense task of investigating twelve years of protracted violence.<sup>115</sup> Unofficial preparation and a two-month extension gave the Commission just under nine months total.<sup>116</sup> Consequently, the Commission could only selectively investigate some of the tens of thousands of cases that occurred during the war.<sup>117</sup> Given the notoriety of a few cases that had received worldwide attention,

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108. *Mexico Agreements*, *supra* note 95, at 13, 18.

109. *Mexico Agreements*, *supra* note 95, at 29.

110. Buergenthal, *supra* note 86 at 500.

111. *Mexico Agreements*, *supra* note 95, at 30.

112. Buergenthal, *supra* note 86, at 500.

113. *Mexico Agreements*, *supra* note 95, at 30.

114. *Mexico Agreements*, *supra* note 95, at 31.

115. Popkin & Roht-Arriaza, *supra* note 12, at 88.

116. Hayner, *supra* note 1, at 628.

117. Popkin & Roht-Arriaza, *supra* note 12, at 88.

these cases were obviously targets for investigation. The problem, however, was deciding which of the myriad other serious violations that had not received such publicity would be investigated.<sup>118</sup> The Commission bought advertising space in newspapers, and time on television and radio, encouraging those with information to come forward with their stories.<sup>119</sup> Most people would not speak to the Commission for fear of reprisals from the other side. The Commission then turned to the opposing parties, asking for documentation relating to the alleged crimes. To the surprise of the Commission, the government had not undertaken a serious effort to investigate acts of terror attributed to the FMLN.<sup>120</sup> The FMLN was found to be equally unprepared to substantiate its charges against the government. Turning to the United States for information gathered in its long involvement in the Salvadoran conflict resulted in the same disappointment of documentation.<sup>121</sup> Ultimately, the only useful background information provided the Commission in their initial investigations was from international human rights groups.<sup>122</sup> As a result of these problems, during the first few months of investigation the Commission felt that it "would never be able to establish the truth with regard to many of the most egregious acts of violence that had been committed."<sup>123</sup> This feeling of disappointment was, fortunately, premature.

In early November 1992, after about three months of investigating, the Commission began to make real progress.<sup>124</sup> According to member Thomas Buergenthal, three factors played an important role in jumpstarting their investigation.<sup>125</sup> First was the

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118. Buergenthal, *supra* note 86, at 505.

119. Buergenthal, *supra* note 86, at 505.

120. Buergenthal, *supra* note 86, at 514.

121. Buergenthal, *supra* note 86, at 514. The Commission had assumed that given its support of the Salvadoran government and its intelligence capabilities, the United States would have extensive information on the activities of the FMLN. Unfortunately, the "material ultimately provided was of little value and extremely slow in coming." *Id.*

122. Buergenthal, *supra* note 86, at 513. International human rights groups had, over the years, prepared extensive reports on El Salvador in general or on particular cases or events. These provided useful background information and served as guideposts for the Commission's investigation. *Id.*

123. Buergenthal, *supra* note 86, at 514. In addition to the lack of information obtained from the Salvadoran government, the FMLN, and the U.S., initial interviews with military officers resulted in little useful information and more frustrations. It was clear to the interviewers that the lives of those interviewed were at risk because of the defensive walls that the military had built to protect itself. Buergenthal, *supra* note 86, at 514.

124. Buergenthal, *supra* note 86, at 516.

125. Buergenthal, *supra* note 86, at 516.

report of the Ad Hoc Commission. Second was the outcome of the 1992 U.S. presidential election. Finally, there was the belief that the United States was providing the Commission with vast amounts of information. The Ad Hoc Commission was created by the Peace Accords<sup>126</sup> to review the human rights record of Salvadoran military officers, and given the power to make binding recommendations on the dismissal of such officers. Its report, to the surprise of the military, charged more than one hundred officers with violations, including the Minister of Defense, General Ponce, and other top officials.<sup>127</sup> Exposing the incipient weakness the military was experiencing due to the Peace Accords, the report convinced many that the changes in El Salvador were substantial. With greater confidence, the people began to provide evidence. Also, the belief that the Democratic Party would more fairly protect the Truth Commission and that the Clinton Administration had supplied the Commission with nearly unlimited clearance to examine documents on the conflict, convinced even more people to cooperate.<sup>128</sup> As more information was obtained, additional leads and information grew exponentially.<sup>129</sup> As a result, the Commission received more than 2000 testimonies about violations involving more than 7000 victims,<sup>130</sup> and registered more than 22,000 complaints of serious acts of violence that occurred in El Salvador between January 1980 and July 1991.<sup>131</sup>

The Commission received information that, upon corroboration, provided intimate details into past injustices because of the change in attitude surrounding its endeavors.<sup>132</sup> Now the Commission was in a position to give a valid report not only on what happened, but as to which side was responsible, and who were the individual perpetrators.<sup>133</sup> It became clear toward the end of the

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126. *Peace Agreement*, *supra* note 95, at 49.

127. Tim Golden, *Salvadoran Panel Calls for Purge of Defense Chief and 110 Officers*, N.Y. TIMES, Oct. 25, 1992, at A1.

128. Buergenthal, *supra* note 86, at 518.

129. Buergenthal, *supra* note 86, at 518.

130. Popkin & Roht-Arriaza, *supra* note 11, at 88.

131. FROM MADNESS TO HOPE, *supra* note 11.

132. Buergenthal, *supra* note 86, at 517. The Commission's power to make recommendations concerning criminal trials and amnesties also helped convince some perpetrators to come forward and provide the Commission with valuable information. Once these few spoke others quickly realized, "that the protective dike they had constructed was beginning to leak." This climate elicited more testimony from other previously unwilling persons. Buergenthal, *supra* note 86, at 517.

133. Buergenthal, *supra* note 86, at 520. The Commission had gathered enough incriminating evidence against even high-ranking government officials to feel they could name perpetrators individually. Buergenthal, *supra* note 86, at 520.

investigation that the Commission intended to follow its mandate quite literally and insure that "the complete truth be made known."<sup>134</sup> To facilitate that goal, the Commission identified those responsible by name.<sup>135</sup> This process, however, had implications for high-ranking military officials and rumors began to circulate that a military coup would take place if names were published.<sup>136</sup> The campaign against publishing names was headed by President Christiani, who warned the Commission that releasing the names would undermine the national reconciliation.<sup>137</sup> Despite these pressures the Commission maintained its neutrality and went forward with the publication of names.

### 3. The Report

On March 15, 1993, the Commission's final unanimous,<sup>138</sup> three-volume report [hereinafter the *Report*] entitled "From Madness to Hope," was made public by the Secretary General of the United Nations, Mr. Boutros Boutros-Ghali.<sup>139</sup> The *Report* details the results of the Commission's thorough investigation into thirty-two cases.<sup>140</sup> It describes the individual cases that gained international attention, as well as cases that were representative of the violent conduct of one side or the other during a given period of time.<sup>141</sup> In light of the Commissioner's belief that there would be equal numbers of reprehensible acts committed by both sides, they were surprised to discover that according to the investigation, no such balance existed.<sup>142</sup> Rather, the truth of the violent war was that "despite the massive wartime propaganda to the contrary, the government side had committed a substantially larger number of egregious acts than the FMLN."<sup>143</sup> In fact, of the 22,000 registered complaints, only five percent accused the FMLN.<sup>144</sup> The Commission found it far easier to identify the government mili-

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134. *Mexico Agreements*, *supra* note 95, at 29.

135. Buergenthal, *supra* note 86, at 519.

136. Buergenthal, *supra* note 86, at 520.

137. Buergenthal, *supra* note 86, at 520-21.

138. Buergenthal, *supra* note 86, at 524-25. Despite the very different backgrounds of the Commissioners, they tended to view most issues in much the same way. In fact, during the drafting process, the Commissioners never once disagreed among themselves with regard to any final decision included in the *Report*, and never took a vote on any issues. Buergenthal, *supra* note 86, at 524-25.

139. Buergenthal, *supra* note 86, at 498.

140. Popkin & Roht-Arriaza, *supra* note 12, at 88.

141. Buergenthal, *supra* note 86, at 524.

142. Buergenthal, *supra* note 86, at 528.

143. Buergenthal, *supra* note 86, at 528.

144. FROM MADNESS TO HOPE, *supra* note 18.

tary officers who had committed or ordered serious acts of violence compared to their FMLN counterparts because of the massive amounts of information registered against the government.<sup>145</sup>

In fact, the Commission found it almost impossible to fix individual responsibility for acts of violence alleged against the FMLN.<sup>146</sup> The *Report*, accordingly, dedicates more space to violations by the government than to the FMLN. In the end, the *Report* named some forty military officers, many of whom were no longer in active service. Six leaders of the Peoples Revolutionary Army (ERP, one of the five leftist organizations composing the FMLN) were named in connection with the multiple assassinations of mayors.<sup>147</sup> Several judges and citizens were named, but otherwise the *Report* did not name others who may have been involved in planning or financing acts of violence.<sup>148</sup>

#### 4. The Recommendations

The *Report* contains a lengthy chapter setting forth the Commission's binding recommendations.<sup>149</sup> The recommendations centered on changes the Commission felt would facilitate change to a democratic form of government, where human rights are observed and opposing views tolerated.<sup>150</sup> Though the Commission could have recommended judicial action against those named in the *Report*, it forewent the option because it believed the existing justice system was incapable of doing justice.<sup>151</sup> It did not, however, make any recommendation for amnesties for those involved, leaving that decision to the people of El Salvador. The Commission felt those identified in the report necessarily needed to be immediately removed from the offices that provided them with the

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145. Buergenthal, *supra* note 86, at 531.

146. Buergenthal, *supra* note 86, at 531.

147. Popkin & Roht-Arriaza, *supra* note 12, at 88.

148. Popkin & Roht-Arriaza, *supra* note 12, at 88.

149. The mandate of the Commission included making legal, political or administrative measures recommendation. Such recommendations may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation. See generally FROM MADNESS TO HOPE, *supra* note 11.

150. Buergenthal, *supra* note 86, at 534. See also FROM MADNESS TO HOPE, *supra* note 18.

151. Buergenthal, *supra* note 86, at 535-36. Although the Peace Accords called for substantial reforms in the justice system, very few changes had actually taken place or were likely to take place in the near future. The same judges who presided during the war, including those accused by the Truth Commission of covering up various crimes, would therefore be the same judges to adjudicate the charges brought forth in the *Report*. Buergenthal, *supra* note 86, at 535-36.



authority to carry out the past acts.<sup>152</sup>

Consequently, the recommendations decreed were as follows: First, it called for all active military officers involved in the Commission or cover up of serious acts of violence against civilians to be removed from the armed forces.<sup>153</sup> Second, the Commission called for all those civilian government officials and members of the judiciary involved in acts of violence to be dismissed.<sup>154</sup> Third, it was recommended that legislation be adopted preventing those implicated in serious acts of violence from holding any public office for at least ten years.<sup>155</sup> Finally, and perhaps most controversially, the Commission called for the immediate resignation of all Supreme Court judges, and the appointment of new justices under a new constitutional formula.<sup>156</sup>

In addition to the recommendations made to ensure prevention of similar violations in the future, the Commission also made recommendations designed to promote national reconciliation.<sup>157</sup> It suggested a national holiday honoring the victims, as well as the creation of a forum, comprised of representatives of all sections of El Salvador, to address the conclusions and recommendations of the Commission.<sup>158</sup> Finally, it called for the creation of a victim's compensation fund financed by earmarking at least one percent of foreign aid.<sup>159</sup>

#### D. *A Divided Nation Reacts*

On the whole, the strongly worded *Report* naming over forty individuals found responsible for human rights violations has been well received by human rights activists and organizations both in El Salvador and around the world.<sup>160</sup> The *Report* was less well received by the Salvadoran government. When the *Report* was issued, the military responded with the presentation of a long written statement. The Minister of Defense presented the statement on national television, declaring the Commission's actions illegal under its mandate.<sup>161</sup> Within five days of the publication of

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152. Buergenthal, *supra* note 86, at 535-36.

153. FROM MADNESS TO HOPE, *supra* note 11.

154. FROM MADNESS TO HOPE, *supra* note 11.

155. FROM MADNESS TO HOPE, *supra* note 11.

156. FROM MADNESS TO HOPE, *supra* note 11.

157. FROM MADNESS TO HOPE, *supra* note 11.

158. Buergenthal, *supra* note 86, at 537.

159. Buergenthal, *supra* note 86, at 537.

160. Hayner, *supra* note 1, at 628.

161. Hayner, *supra* note 1, at 629.

the *Report* the legislature, controlled by President Christiani's party, passed a general amnesty to all those charged with political and related crimes of violence, regardless of whether the perpetrators were named in the *Report*.<sup>162</sup> This measure, however, did not disturb the Commission's report or recommendations because it was not recommended that these individuals be judicially prosecuted.<sup>163</sup> The justice sought did not lie in the courtroom; rather it was achieved in the imposition of moral punishment brought on by the exposition of individual perpetrators' names. Notably, regardless of the amnesty granted, part of the Commission's recommendations came to fruition with the retirement, within a short time of the *Report's* issuance, of all military officers identified by the Commission.<sup>164</sup>

Those resignations included Minister of Defense, General Ponce, and the "retirement" of Vice Minister Zepeda.<sup>165</sup> In fact, these officers would not have likely relinquished their power had there not been a general amnesty protecting them once they returned to civilian life. The continuation of impunity would have been a virtual certainty had the Commission caved in to external pressures and not identified names.<sup>166</sup> In essence, the amnesty actually facilitated the goal of the Commission. The diminished military control paved the way for general democratic elections, held less than two years later, in an atmosphere of freedom unparalleled in El Salvador's history.<sup>167</sup>

Along with the new sense of freedom, the most important contribution of the Commission was its psychological impact on the people of El Salvador.<sup>168</sup> Many Salvadorans had now heard the truth about what they believed, knew, or refused to believe occurred from a credible source. This had a profound effect on the Salvadorans who for over a decade had been unable to separate the truth from the lies and rumors.<sup>169</sup> To be able to tell their story to someone who listened to them after so many years of silence

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162. Hayner, *supra* note 1, at 629; See also Goldstone, *supra* note 40, at 613.

163. Buergenthal, *supra* note 86, at 538.

164. Buergenthal, *supra* note 86, at 538.

165. Douglas W. Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 69, 77 (Summer 1993). President Christiani also pledged to U.N. Secretary-General Boutros-Ghali that other senior officers would be placed on leave without pay, with no official duties, by the end of June 1993, and retired by the end of the year. *Id.*

166. *Id.* at 82.

167. Buergenthal, *supra* note 86, at 538.

168. Buergenthal, *supra* note 86, at 539.

169. Buergenthal, *supra* note 86, at 540.

and repressed anger truly brought reconciliation to countless lives.<sup>170</sup> To see the results of their brave contributions in the departure of some of the most powerful impetuses of violence in their nation provided a much-needed feeling of vindication. The moral redress and end to the distortion of truth allowed the divided country to heal and move forward into a new democratic era. The "veil of impunity had finally been pierced" and "the denial of a terrible truth that divided a nation and haunted its consciousness" had finally been removed, paving the way to national reconciliation.<sup>171</sup>

#### IV. COMPARISON OF COMPOSITION AND EFFECT OF THE COMMISSIONS IN THEIR RESPECTIVE COUNTRIES

As illustrated by the experiences of Chile and El Salvador, there is no single formula for creating an effective tribunal to investigate a violent past and promote a united future. The speed and flexibility with which the truth commission operates allows it to fit the mold of almost any nation in transition.<sup>172</sup> It is the chameleon-like nature of these organizations that allows them to effectively ease the tensions in a politically charged nation and move towards reconciliation. The different historical and political backgrounds, and the immediate needs of each nation necessitate that truth commissions differ in almost all levels of organization and investigation.<sup>173</sup>

In Chile, the end of a military regime gave way to a newly-elected president bent on reconciliation. There the commission was formed internally, composed of eight commissioners and a staff of sixty fully funded by the new democratic government.<sup>174</sup> In contrast, El Salvador, arriving at a civil war stalemate, agreed to foreign intervention and the formation of an independent U.N.-sponsored truth commission.<sup>175</sup> The Commission was conducted by three foreign commissioners, who were widely known and respected in Latin America, in an effort to maintain the integrity

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170. Buergenthal, *supra* note 86, at 539.

171. Buergenthal, *supra* note 86, at 540-41.

172. See generally Hayner, *supra* note 1 (exploring how fifteen nations from around the world have all used somewhat different forms of truth commissions in attempt to help reconcile past injustices).

173. See generally Schlunk, *supra* note 8. (pointing out that truth commissions vary from case-to-case, depending on such factors as set-up, design, responsibilities, and mandate).

174. Popkin & Roht-Arriaza, *supra* note 12, at 85.

175. Buergenthal, *supra* note 86, at 501.

of the process and the confidence of the people.<sup>176</sup> It was operated by an international staff no more than half the size of Chile's and was funded exclusively through international efforts.

In electing their new leader, the people of Chile entrusted President Aylwin to fairly conduct the investigation into the past without need of international assistance.<sup>177</sup> El Salvador, however, remained controlled by the same government that had perpetrated many of the abuses to be investigated.<sup>178</sup> The need for objectivity and integrity to overcome the legitimate fears of abuse of power could only be alleviated by the creation of a completely independent tribunal.

These factors, context and immediate needs, also caused the objectives of each commission to differ in scope corresponding with the needs and fears of each country. For example, Chile did not identify individuals by name, while the Commission for El Salvador chose to name the individuals responsible. These decisions reflected the government-controlled nature of Chile's commission. Under an entrenched military regime with many officials responsible for past injustice, Chile's commission did not attempt to reveal individual identities. El Salvador's commission, however, was able to withstand a major diplomatic offensive by the government to rid the report of names because it was completely independent of the government.<sup>179</sup>

In addition, Chile aimed to investigate all past cases of human rights abuses, some 3000 in total. El Salvador, on the other hand, chose only to investigate "serious acts of violence. . . whose impact on society urgently requires that the public should know the truth,"<sup>180</sup> some thirty cases as found by the Commission. This was due to several factors. First, the commission for Chile had a substantially larger commission than the Salvadoran Commission. Second, Chile had extensive judicial records of the past crimes to facilitate a speedy investigation, whereas El Salvador had almost no official documentation of past atrocities. Finally, and most importantly, the scope of Chile's investigation was much broader because it did not seek to isolate individual responsibility while the Salvadoran commission did. Identifying the entity responsible was almost common knowledge, but discov-

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176. Buergenthal, *supra* note 86, at 543.

177. *See generally*, INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxiii.

178. Popkin & Roht-Arriaza, *supra* note 12, at 86.

179. Cassel, *supra* note 165, at 89.

180. FROM MADNESS TO HOPE, *supra* note 11.

ering with certainty the names of the individuals responsible was a painstaking task. The transition to a new democratic government was well underway in Chile when the Rettig Commission was formed, and Chile had no desire to begin assigning individual blame to officials still in powerful positions for fear that it would disrupt the democracy it was attempting to solidify.<sup>181</sup> For El Salvador, however, identifying individuals by name was of the utmost importance for true political change. In that small nation, the people had seen so-called "investigations" in the past, and more often than not they were publicity stunts staged by the Salvadoran government that produced "little information and less truth."<sup>182</sup>

Thus, an independent commission that would investigate in great depth the most serious acts of violence and name those individuals responsible was imperative for the authenticity of the investigation. Confidence in the integrity of the Commission would have been shaken if the investigation had not named names because of a perception that the Commission had given into political pressure.<sup>183</sup> Furthermore, the political pressure imposed upon government officials named in the *Report*, and the moral redress of public vindication afforded the victims in exposing the individuals responsible, provided an impetus of change in the existing government to allow a truly democratic governance to take root.

The need for diversity of organized efforts to reunite nations torn by past human rights abuses is exemplified in the comparison of the nations of Chile and El Salvador. These two nations established truth commissions in an effort to uncover the reality of past human rights violations, report the findings to the public, make recommendations for changes to avoid repeating the abuses, and ease tensions in their politically charged countries. Each nation was able to uncover the truth and report it with legitimacy, making recommendations that were for the most part sufficiently attained. Abuses have been curbed into civil, tolerant societies as the tensions of decades have given way to democratic peace. In the end, the commissions for truth established by these nations varied in nearly every facet but one, their success.

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181. See generally, 1 CHILEAN REPORT, *supra* note 49 at 7; See also, INTRODUCTION TO CHILEAN REPORT, *supra* note 2, at xxxii.

182. Buerghenthal, *supra* note 86, at 513.

183. Buerghenthal, *supra* note 86, at 541.

## V. CONCLUSION

The Salvadoran and Chilean experiences suggest that an external authority fulfills a somewhat different function than does a national commission. While the Chilean version of the truth commission may be more adept at promoting national reconciliation and acceptance by new government leaders of the state's role, the Salvadoran method allows a greater measure of accountability where internal political conditions might not otherwise permit.<sup>184</sup> The advance agreement by both sides in El Salvador to cooperate with the investigation and to comply with its recommendations gave it a great advantage. Though the resulting cooperation did not exactly live up to the agreement, it did help accomplish far more than if there were no agreement.<sup>185</sup> Chile, on the other hand, had no agreement, as it was unnecessary because the existing government had created, funded, and controlled the commission. Though this arrangement has potential for abuse, in the case of Chile the power over the commission was necessary to preserve the unity that had been attained. Ultimately, the Chilean state publicly accepted responsibility and offered its apologies though it had no agreement to do so.

In the end, whether the names of perpetrators are revealed, whether trials are held, sentences imposed, reparations awarded, or amnesty granted, it is not of great importance to a truth commission. These are but considerations that fully depend upon the political context, the nature of the compromise to end the conflict, and the character of the nation.<sup>186</sup> Rather, the crucial task of a truth commission is to tell the story of what happened and to insure that story is told truthfully. Only then can the wounds of a nation begin to heal.

The truth commission is not the only measure necessary for peaceful reconciliation and respect for human rights. Rather, it is part of an overall institutional change that should be accompanied by political, military, and judicial change, just to name a few.<sup>187</sup> Far more than a truth commission will be necessary to heal the wounds and create the conditions for a just society.<sup>188</sup> A change in culture, expectations, and institutions are all required.<sup>189</sup>

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184. Popkin & Roht-Arriaza, *supra* note 12, at 115.

185. Cassel, *supra* note 164, at 90.

186. Buergethal, *supra* note 86, at 544.

187. Hayner, *supra* note 1, at 655.

188. Popkin & Roht-Arriaza, *supra* note 12, at 115.

189. Popkin & Roht-Arriaza, *supra* note 12, at 115.

The truth commission may not conform to traditional norms of reconciling past transgressions, but in the atmosphere of protracted violence it does achieve partial justice when the traditional institutions of justice are incapable of providing it. In doing so it can help begin to bring together the people of a nation divided by civil war and murderous regimes to create a climate in which other necessary changes may take place.

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