Truth Commissions for Chile and El Salvador: A Report and Assessment

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1. INTRODUCTION

In the Americas, Chile and El Salvador have provided the most recent experiments with truth commissions. The Chilean Truth and Reconciliation Commission and the Salvadoran Commission on the Truth were formed in dissimilar political circumstances as means to recover the truth about decades of political violence, and to recommend reforms aimed to prevent its recurrence. A review of the work of the truth commissions is warranted because the human rights calamities in these two countries nearly came to symbolize the human rights situation in the Americas. More pertinently, the Chilean and Salvadoran experiences commend the concept of the truth commission to perform what should now be regarded as a critical human rights task in transitional situations: the internationally supervised recovery of the truth in the cause of justice and the protection and promotion of human rights.

In this article I argue for the customary utilization of truth commissions, perhaps as part of the work of the recently established United Nations office of the High Commissioner for Human Rights, by way of an assessment of the Chilean and Salvadoran experiences. First, I examine the mandates of the two commissions and indicate how the different political environments in which the Chilean Truth and Reconciliation Commission and the Salvadoran Commission on the Truth were created account for important differences between the two commissions—indeed, they constitute distinct,

1. Interviews related to this article were done in Chile in the fall of 1991 and summer of 1993, and in El Salvador and Costa Rica in the spring of 1993, with members of the legal staffs of both commissions, representatives of human rights organizations, the human rights offices of the Catholic Church, political parties, and the Farabundo Martí Front for National Liberation (FMLN). Interviews were also conducted in Santiago in the summer of 1994 with members of the Rettig Commission.
but equally useful, models of truth commissions. Then, I assess the contributions these truth commissions made in the performance of their investigatory and advisory functions. Finally, I identify normative and legal foundations for future truth commissions in international human rights law and international humanitarian law.

II. THE MANDATES: WHAT THE TRUTH COMMISSIONS WERE AND WERE NOT

The Truth and Reconciliation Commission and the Commission on the Truth were established in markedly different political environments, and it is important to recognize how those environments influenced their mandates and activities. It is equally important to appreciate that both were commissions for truth and reconciliation, but that neither was a commission for truth, reconciliation, and justice.

Chilean President Patricio Aylwin created the Truth and Reconciliation Commission (or Rettig Commission) by executive decree only a month after assuming power in 1990, in response to Chilean society's clamor to expose the truth about the brutality of the Pinochet regime which had seized power in a coup d'état in 1973.2 Once General Pinochet had been forced under the terms of his own constitution to step aside and permit civilian rule, some sort of investigation of human rights abuses became possible, but the mandate of the commission would be restricted due to the political realities of the "pacted" transition.3 By contrast, the Salvadoran Commission on the Truth (hereinafter the Truth Commission) came into being as a direct consequence of the United Nations brokered, negotiated settlement to a twelve year civil war.4 The creation of the Truth Commission reflected the

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3. In September 1988, General Pinochet was repudiated in a plebiscite on his continued rule as called for by the military's constitution. The following year Patricio Aylwin was elected president, but General Pinochet retained his role as commander of the Armed Forces, a position guaranteed to him by the Chilean constitution, and the Armed Forces' prerogatives were left almost unscathed.

recognition of the belligerents and powerful external actors that a commission to investigate the massive and systematic abuses committed during the conflict was a precondition for a peaceful settlement of a conflict stalemated on the battlefield. So, the two commissions were similarly mandated to perform important investigatory and advisory functions, but there were conspicuous differences between them. I begin with the similarities, then emphasize the dissimilarities.

The preamble of the presidential edict creating the Rettig Commission noted that the President considered it his obligation "to do all within his power to help bring this truth to light as quickly and effectively as possible," because "only upon a foundation of truth [is] it possible to meet the basic demands of justice and to create the necessary conditions for achieving true national reconciliation." The decree then assigned the Rettig Commission four tasks: to establish as complete a picture as possible "of the most serious human rights violations"; to gather evidence that may make it possible to identify the victims by name and their fate and whereabouts; to recommend reparations for the families of the victims; and to recommend legal and administrative measures designed to ensure that such violations would never occur again.

The rationale for the Truth Commission and its mandate are found in the peace accords. The preamble of the Mexico Agreements on the Commission on the Truth recounted that the parties to the peace negotiations recognized "the need to clear up without delay those exceptionally important acts of violence whose characteristics and impact, and the social unrest to which they gave rise, urgently require that the complete truth be made known . . . ." To that end, the commission was established to investigate "serious acts of violence that have occurred since 1980," and to recommend any legal, political, and administrative measures that might be indicated by the investigations.

It must be emphasized that neither commission was granted prosecutorial or judicial powers: both could investigate and advise, but neither could formally charge anyone with a crime, determine guilt or innocence in a strictly legal sense, or apply criminal penalties. President Aylwin's executive decree carefully noted that only the courts possessed the power to judge, and directed the commission to transmit to the appropriate tribunal any

6. Id. at 6–7.
8. Id. at 189.
evidence it developed as to the involvement of specific individuals in "crimes that may have been committed." The commission scrupulously adhered to this enjoinder, and even refrained from publicly naming members of the armed forces or security forces that it knew to have been involved in specific acts. Some members of the commission and its legal staff found that to be incompatible with the statement that knowledge of the truth was necessary, inter alia, "to meet the basic demands of justice." The Truth Commission was similarly prohibited from "function[ing] in the manner of a judicial body," but could refer any case to the Attorney-General of El Salvador "for handling through the judicial channel." In both countries, the stipulation that the commissions pass on their findings to the courts for appropriate legal action was moot for two reasons. Both commissions concluded that the respective judicial systems were either deficient or implicated in cover-ups, and amnesty laws in both countries blocked prosecution.

There were important differences in the composition, work, and reports of the two commissions. First, the Rettig Commission undertook a much broader investigation because of its mandate to "provide the most complete picture" of the serious acts of violence and to clarify the circumstances of the detained-disappeared. The Truth Commission did not specifically undertake the task of finding and identifying the disappeared. The Rettig Commission investigated approximately 3,400 cases (957 involving the detained-disappeared), and reached definitive conclusions on all but 641 of those. Still, the Rettig Commission's investigation was far from comprehen-

9. Report of the Chilean National Commission on Truth and Reconciliation, supra note 5, at 5. José Zalaquett, before being named to the Rettig Commission, had written that "[t]he truth must be complete, that is, the nature and extension of the violations committed should be disclosed, as well as how they were planned and executed, what is the fate of the victims, who gave the orders and who carried them out." José Zalaquett, Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints, 6(2-3) Persona y Sociedad 56 (1993). The article was originally published in 1989 in The Justice and Society Program of the Aspen Institute, State Crimes: Punishment or Pardon (1989). A staff attorney confirmed that the commission had solid evidence concerning specific individuals. Tape recorded interviews with Rettig Commission members Raul Rettig Guissem, Jaime Castillo Velasco, and Laura Novoa Vásquez, Santiago (5-7 June 1994).

Still, the armed forces charged in their official responses to the Report that the Rettig Commission had exceeded its authority by trespassing on territory reserved for the courts. See Respuestas de las Fuerzas Armadas y de Orden al Informe de la Comisión Nacional de Verdad y Reconciliación, 38 Estudios Publicos 450 (Fall 1990).

10. From Madness to Hope, supra note 7, at 150.

11. An amnesty enacted by Chile in 1978 prevented criminal prosecution in the vast majority of cases, although it did permit civil actions. In El Salvador, amnesties were enacted in 1987 and again in 1993 shortly after the Truth Commission report was made public. Hemisphere Initiatives, Justice Implied: the Salvadoran Peace Accords and the Problem of Impunity 7 (fn.24) (June 1993).
sive. It investigated only those cases involving deaths, with the result that
tens of thousands of cases of torture, forced exile, and other grave human
right violations were not investigated, omissions some of the commission-
ers and human rights activists would later lament.12

An exhaustive investigation of the innumerable human rights violations
committed during the twelve year Salvadoran civil war was obviously
impossible. Instead, the Truth Commission was specifically tasked to
investigate “serious acts of violence” which occurred after 1980, and which
“outraged Salvadoran society and/or international opinion,” or revealed a
“systematic pattern of violence or ill-treatment . . . .”13 Consequently, the
commission only reported findings with respect to thirty-three symbolic
cases, although more than 22,000 cases were brought to its attention. Worse
still, time limitations did not permit an adequate investigation of the death
squads which appear to be resurfacing. On both scores, human rights
activists and members of the FMLN have expressed deep concern.14

Second, the Rettig Commission’s advisory function was more pro-
nounced than the Truth Commission’s. The Rettig Commission was the only
official entity created to study and propose appropriate reforms.15 The Truth
Commission did not have to concern itself with studying and proposing
reforms because revolutionary reforms had been negotiated by the parties to
the peace accords. Generally, the Truth Commission recommended only

12. Interview with Rosemarie Bordard, Director of the Legal Department, Vicaría de
the limitations placed on the Commission, noted that the democratic government of
Chile “has the permanent obligation to . . . carry out exhaustive investigations of the
denunciations of violations of human rights by the previous government, including
denunciations of torture, to make public the results of the investigations and to bring
the responsible persons before the justice system.” AMNESTY INTERNATIONAL, CHILE: EL LEGADO DE LOS

13. FROM MADNESS to HOPE, supra note 7, at 19.

14. Tape recorded interviews with Maria Julia Hernandez, Director of the Legal Aid office of
the Archbishop of San Salvador (Tutela Legal), San Salvador (6 May 1993), and with
Roberto Rodriguez, Adjunct Director of the Human Rights Division ONUSAL, San
Salvador (7 May 1993). Tape recorded interviews were also conducted with Eduardo
Sancho (Comité, Fermin Cientuegos) General Command, FMLN (5 May 1993) and
Roberto Cañas, Political Commission, FMLN (6 May 1993). On the death squads, see
ONUSAL, “VII Informe del Director de la División de Derechos Humanos al Secretario
General Febrero 1993–Abril 1993” (United Nations) A/47/968 5/26033, 5-6; Gede
Palumbo, “Salvadorans Wary Peace Process is on the Verge of Unraveling” CHRISTIAN SCI.

15. The democratic opposition to Pinochet had consistently demanded reforms to the
regime’s constitution, in force since 1980. Even prior to the election of President Aylwin
and the formation of the Rettig Commission, a plebiscite on a number of reforms had
been conducted. The commission recommended additional reforms, but generally this
process involved negotiations between the outgoing dictatorship and the opposition
parties.
that the reforms already mandated by the accords be fully and promptly implemented, although in a few instances it suggested additional reforms.

Third, the Truth Commission was established under UN auspices. Indeed, the UN General Secretary named three foreign dignitaries rather than Salvadoran nationals to the Truth Commission in order to “preserve the Commission’s credibility,” reportedly after taking the Chilean and Argentine cases into account. The Rettig Commission could not directly claim a supranational mandate, making it easier for the Chilean military and its supporters to dismiss it as the creation of a victorious political coalition.

Fourth, the Truth Commission functioned as part of a broader, concerted effort to transform Salvadoran society; the Rettig Commission functioned in lieu of one. In fact, a synergism developed between the Truth Commission and other bodies created by the accords, namely, the United Nations Observer Mission (ONUSAL), the National Commission for the Consolidation of the Peace (COPAZ), a National Council for the Protection of Human Rights (Procurador Nacional de Derechos Humanos), and especially the Ad Hoc Commission. All were created to monitor and implement the transformation of Salvadoran society and the country’s political institutions. The Rettig Commission recommended the creation of a Corporation for Reparation and Reconciliation to continue the search for the disappeared, and a human rights ombudsman to denounce future violations, but neither was in place at the time the Rettig Commission conducted its investigation.

16. From Madness to Hope, supra note 7, at 12. The commissioners were former Colombian president Belisario Betancur, former Venezuelan foreign minister Reinaldo Figueredo, and former judge and president of the Inter-American Court of Human Rights, Thomas Buergenthal.

17. Secretary-General Boutros-Ghali may have been aware that the Chilean army had impugned the competence and impartiality of the Rettig Commission members, and that the army dismissed the report as “a simple opinion which can be shared or rejected.” Respuesta de las Fuerzas Armadas y de Orden, supra note 9, at 451 and 483.

18. The Mexico Agreements (27 Apr. 1991) also establish the Procurador Nacional de Derechos Humanos which would have “the essential mission of promoting human rights and watch that they be respected.” Acuerdos hacia una Nueva Nación, supra note 4, at 16. The final peace agreement (Mexico, 15 Jan. 1992) explicitly entrusts the Procurador with “identifying and eradicating any armed groups which engage in systematic violations of human rights,” a reference to the death squads. Id. at 82. Oversight responsibility is assigned to ONUSAL, and eventually the Procuraduría is to assume the functions of ONUSAL’s human rights division. The New York Agreement (Sept. 1991) created the National Commission for the Consolidation of the Peace, COPAZ, as a “mechanism for control and participation of civil society in the process of change resulting from the negotiations.” Id. at 35. Among its important responsibilities are oversight and the drafting of legislation related to provisions of the accords. The same agreement established the Ad Hoc Commission to identify military officers to be dismissed because of their human rights abuses. Id. at 38. The Truth Commission was permitted to designate an observer to the Ad Hoc Commission. See Acuerdos hacia una Nueva Nación, supra note 4, ONUSAL, “ONUSAL Como Mecanismo de Verificación Activa en Materia de Derechos Humanos” (n.d.).
Fifth, the Truth Commission’s recommendations were formally binding because of a provision contained in the Mexico Agreements that the Government of El Salvador and the FMLN were obligated to cooperate with the Commission and to carry out its recommendations. The Chilean military never explicitly consented to the formation of a truth commission before transferring power, and it cooperated with the commission only because it was constitutionally obligated to obey the chief executive who had established it. Obviously, implementation of the recommendations has not been without complications in either country, but assuming that the United Nations does not lose interest in the human rights situation in El Salvador, El Salvador’s next president (who was elected in March 1994) will possess critical leverage that the new Chilean president simply does not have.

Finally, and most distinctively, the Truth Commission was mandated to “clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized.” The issue of impunity had pervaded the negotiations, and the final accord recounted that the government and insurgent forces had recognized the need for “independent treatment” of the problem. The Chilean president, because of the tenuous position in which he found himself relative to the Chilean armed forces, chose not to frame the Rettig Commission’s mandate in such antagonistic terms. In fact, the Rettig Commission was cautious to the point of timidity: it reported that it “refrained from taking a stand on whether the use of force on September 11, 1973, and immediately thereafter was legitimate”; extolled the “fundamental role played by the armed forces and security forces in the history of the country”; and cautioned against using the subject of human rights “to attempt to sully these institutions, or to detract from their contribution to the country and the role they are called to play in the future.”

Because of its mandate to end impunity, the Truth Commission publicly named individuals about whom it developed incontrovertible evidence that they had committed crimes according to international human rights law and international humanitarian law. Here the commission came precariously close to becoming more prosecutorial than investigative. But according to one of the Truth Commission’s Special Legal Counsels, the commission’s findings should be construed only as an assertion of fact that a named individual committed a particular act (e.g., a homicide) and not a pro-

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19. From Madness to Hope, supra note 7, at 191.
20. Id., at 192.
announcement of guilt in a strict legal sense; the essential difference being that a pronouncement of guilt requires that the accused person be afforded the opportunity to defend himself on some legal ground before a court of law.\textsuperscript{22}

\section*{III. CONTRIBUTION TO THE CAUSE OF HUMAN RIGHTS}

The Rettig and Truth Commissions made substantial contributions to the cause of justice, and the protection and promotion human rights, by performing indispensable investigatory and advisory functions at a conjuncture in the democratic transitions of Chile and El Salvador when comparable entities were unable to perform them. That they were not endowed with prosecutorial or judicial powers does not diminish their accomplishments.

\subsection*{The Cause of Justice}

In fact, the commissions did contribute to the cause of justice in a number of ways. In Chile, where the commission attempted to clarify the situation of the detained and disappeared, the Rettig Commission's report removed families from a macabre legal and administrative limbo. The commission's finding that a disappeared person was deceased and was the victim of a human rights violation had force of a final, legal determination of that individual's situation. This, in turn, made it possible for surviving family members to resolve property and inheritance claims, to apply for social security and other benefits (some recommended by the commission as reparation), and affected the marital status of spouses. It may also have served as the basis for civil action even though criminal prosecution was barred by the 1978 amnesty.\textsuperscript{23}

Then there is the matter of reparations which both commissions strongly recommended because, as the Truth Commission aptly expressed it, justice demands "moral compensation" as well as punishment.\textsuperscript{24} The commissions suggested symbolic reparations (the construction of a public monument or park, or the establishment of a national holiday in remembrance of the victims and a symbol of national reconciliation) as well as material

\textsuperscript{22} For example, the assertion that someone was involved in a homicide does not preclude that the person might have acted in self-defense or was insane at the time. Author's conversation with Douglass Cassell, Jr., Special Legal Counsel to the Truth Commission, Dayton, Ohio, United States, 4 Nov. 1993. \textit{See also} D. Cassell, Jr., \textit{International Truth Commissions and Justice}, 5(3) \textit{Aspen Q}, 69–90 (Summer 1993).

\textsuperscript{23} \textit{See Amnesty International}, supra note 12.

\textsuperscript{24} \textit{From Madness to Hope}, supra note 7, at 185–86.
compensation. The Rettig Commission in particular recommended a set of creative measures encompassing social security, health, educational and housing benefits, and the provision of special medical care to those who have suffered physical and mental traumatization. Notably, it even called for psychological health care for those who were involved in torturing others. The Salvadoran Truth Commission did not elaborate in great detail on the issue of material reparations, but did recommend the creation of "an autonomous body with the necessary legal and administrative powers to award appropriate material compensation to the victims of violence in the shortest time possible," and even directed the FMLN to provide compensation where it is found to have been responsible for specific acts.

In both countries a measure of punishment has been meted out, either as a result of dismissal from positions of authority or as damage to personal reputation or institutional prestige. The Truth Commission recommended the dismissal of military officers, public officials, and judges specifically named in its report, or identified by the Ad Hoc Commission. Moreover, it directed that all military and civil officials subject to dismissal, and those already cashiered or retired, be disqualified from public office for no less than ten years, and that they be prohibited permanently from occupying positions related to public security and national defense. This recommendation also covered former high ranking members of the FMLN. In the same vein, the Truth Commission called on the current justices of the Supreme Court to resign and make way for a new generation of justices, noting that "the judiciary is still run by people whose omissions were part of the situation which now must be overcome, and there is nothing to indicate that their customary practices will change in the near future."

The revelation that senior members of the armed forces were involved in serious abuses appears to have hastened the implementation of the secret recommendations of the Ad Hoc Commission to purge military officers by generating adverse international pressure which the Cristiani government


26. From Madness to Hope, supra note 7, at 186. Notably, the Truth Commission placed considerable responsibility at the door-step of those countries "that showed most interest in the conflict and its settlement" and directed that a minimum of one percent of foreign assistance granted to El Salvador be set aside for reparations. Id.

27. Id. at 176.

28. The Truth Commission directed these recommendations to COPAZ for legislative action because it did not possess the authority to enact enabling legislation.

29. From Madness to Hope, supra note 7, at 176. Not surprisingly, the President of the Supreme Court in a public television address denounced the Report's recommendations which in his view "sabotage the order established by the Constitution, international treaties or legislation in effect in El Salvador." Hemisphere Initiatives, Justice Impugned, supra note 11, at 6.
could not ignore. Lamentably, the Rettig Commission shunned the matter altogether; it did not even endorse a proposal to amend the Chilean constitution to permit the president to dismiss senior military Advisors as many jurists had urged.

Even where guilty parties were not directly penalized with dismissal, the blow to personal reputation and to institutional prestige was appreciable. The reports constitute indictments of the Chilean and Salvadoran states and their institutions. For example, the unprecedented act of identifying those who had only been rumored to be involved with the Salvadoran death squads, like the trial of soldiers implicated in the November 1989 murder of six Jesuits, their housekeeper, and her daughter, has opened another breach in the wall of impunity. In one view, the Truth Commission took "[a] step towards justice—the truth, but not punishment." In Chile, where dismissal of military officers is not even remotely possible at present, the report forced the armed forces to defend publicly what they prefer to extol as a proud event in the history of their institutions. For example, in their official responses to the Rettig Report, each of the branches of the Chilean military and the national police went to great lengths to rebut the Rettig Commission's cogent argument that because a state of internal war did not exist at any time during the seventeen years of the dictatorship, the death sentences pronounced by the Courts Martial were illegal. But the armed forces failed to address, much less to rebut, the main thrust of the commission's indictment of the military; that even if a state of internal war had existed, virtually all of the Chilean military's actions violated international humanitarian law. The publication and dissemination of the Rettig Report ensures that the "official history" of the dictatorship


31. Article 93 of the Chilean constitution all but prohibits the president from dismissing the armed forces' chief of staff and service chiefs, a provision of the Pinochet constitution that opponents of the regime tried to amend. The Rettig Commission endorsed a number of constitutional amendments suggested by opposition jurists, including one for the creation of an ombudsman and one limiting executive powers in constitutional states of exception, but notably did not endorse this one. See Mark Ensalaco, In with the New, Out with the Old? The Democratizing Impact of Constitutional Reform in Chile, 26 J. of Latin Am. Stud. 409–29 (1994).


33. Cassell, supra note 22, at 69.

34. Report of the Chilean National Commission on Truth and Reconciliation, supra note 5, at 99; Respuestas de las Fuerzas Armadas y de Orden, supra note 9, at 457.
will be the product of a truth commission rather than the perpetrators of the crimes.

The Protection and Promotion of Human Rights

The most important contributions of these most recent truth commissions, given the manner in which they were constituted, derived from their advisory function. The commissions’ recommendations concerning the adaptation of the political constitutions and legal statutes to reflect international human rights standards, and institutional reforms of the judiciaries and militaries, consisted of the legal and institutional prerequisites of societies that are truly protective and promotive of human rights.

Both commissions strongly endorsed the ratification of any international human rights treaty to which either state had yet to adhere, and the thorough review of any reservations attached to previously ratified treaties. To encourage both states in the international system of the protection and promotion of human rights, the commissions specifically called on Chile and El Salvador to recognize the competence of the Inter-American Court for Human Rights. Lamentably, however, the Rettig Commission urged that Chilean courts heed the Inter-American Court’s consultative opinions without mentioning the Court’s contentious jurisdiction.\(^\text{35}\)

The Rettig Commission in particular undertook an invaluable review of the constitutional and statutory provisions pertinent to human rights, and urged the derogation of any provision of the constitution or any statute which would seem incompatible with the obligations derived from international human rights law. For example, it called for the further examination of the already amended constitutional provisions relating to the suspension of human rights guarantees in constitutional states of exception to determine if they were completely compatible with Article 27 of the American Convention on Human Rights.\(^\text{36}\) The commission identified serious problems with the military code of justice because, inter alia, it permitted the War Time Tribunals to order the execution of suspects without a previous legal process and underscored the negligence of the Supreme Court for not having exercised oversight over the courts martial.\(^\text{37}\)

Sweeping constitutional reforms were delineated in the Salvadoran

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35. 2 Report of the Chilean National Commission on Truth and Reconciliation, supra note 5, at 858; From Madness to Hope, supra note 7, at 183–84.
37. id. at 863.
peace accords, but the Truth Commission did call for the reaffirmation of the constitutional force of provisions of human rights conventions binding on El Salvador. And, it was able to detect additional constitutional and legal issues not settled in the negotiations.

Each commission gave meticulous attention to amparo and habeas corpus remedies, due process, criminal procedure, and administrative detention, and identified several serious deficiencies for correction. One was the need to make lower courts competent to hear amparo and habeas corpus remedies in urgent situations where delay would prejudice the rights of detainees, and for the rules of due process to remain in force during states of exception. A second problem related to extrajudicial confessions, which the commissions advised should either be rendered inadmissible as evidence or discarded if the suspect later recants. The Rettig Commission focused on the routine practice of secret indictments which compromised the right of the accused to an adequate defense, and the incommunicado detention of suspects for inordinate lengths of time without justification. The Rettig Commission urged that each of these problems be addressed and that government officials who deliberately disregard a prisoner's rights be dismissed or prosecuted. The Truth Commission addressed the length of administrative detention, and the authority of administrative officials, rather than magistrates, to impose penalties involving deprivation of liberty. It demanded that the right of suspects to a defense be guaranteed at the onset of legal proceedings, that the presumption of innocence be scrupulously respected, that the maximum period of detention be shortened, and that the authority of administrative officials to order detention be rescinded.

Institutional reforms figured prominently in the commissions' reports. The commissions were profoundly concerned about the quality of the judges and the independence of the judiciary, and about the role of the armed forces. The Rettig Commission expressed hope that the next generation of Chilean judges would possess "the will and moral force needed to prevent the violation of [human] rights, no matter who the violator may be." The commission urged the law schools to incorporate a human rights track (catedra) and to abandon a formalistic approach to legal education that produces judges and lawyers who will be "willing to set aside their role of

39. FROM MADNESS TO HOPE, supra note 7, at 183.
40. 2 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, supra note 5, at 865; FROM MADNESS TO HOPE, supra note 7, at 181. Extra-judicial confessions are statements made during interrogation to the police, who frequently resorted to coercion to extract them. See HOMELAND INITIATIVES, supra note 11.
41. FROM MADNESS TO HOPE, supra note 7, at 183.
simply applying the law mechanically." The Truth Commission concentrated on a new Judicial Training School mentioned in the peace accords because of the "short-term need to train new, sound human resources to staff new courts or to replace members of the judiciary who, according to the evaluation which the Commission [had] recommended, should not remain in the judiciary." 

To enhance judicial independence, both commissions counseled changes in the procedures for appointing judges and prosecutors. In Chile the recommended reform was minor: the number of candidates identified by the Supreme Court for possible presidential appointment simply would be increased. In El Salvador, the Supreme Court's excessive powers and prerogatives were at fault, so the Truth Commission recommended that lower court judges be named by (and be accountable to) a new National Council of the Judiciary rather than the High Court.

To enhance the integrity and accountability of judges, the Rettig Commission called for the publication of clear standards of judicial qualification, and recommended that serious consideration be given to a constitutional amendment which would make judges subject to dismissal in the same kinds of circumstances in which it is currently possible to impeach legislators and even the president. The Truth Commission advised that judges of the lower courts be given greater control over budgetary matters, the number of judges be increased, and salaries be raised to curb corruption.

With respect to the Chilean and Salvadoran Armed Forces, respectively, the tone of the reports and the substance of the recommendations reflect the discernible differences between a pacted transition and a negotiated revolution. Whereas the Truth Commission's task was explicitly the democratization of Salvadoran society, the Rettig Commission could only call for a commitment of the armed forces and security forces to respect human rights in the performance of their duties.

Again both commissions viewed education and training as critical. The Rettig Commission framed the issue in starkly basic terms: "Each member of the armed forces must be clearly aware of being a person . . . [e]ach must feel that he or she has human rights and must respect those rights in others." The respective recommendations are nearly identical and encom-

42. 2 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, supra note 5, at 859, 860.
43. FROM MADNESS TO HOPE, supra note 7, at 162.
44. 2 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, supra note 5, at 862.
45. Id. at 869.
46. Id. at 870.
pass the incorporation of human rights courses, taught by civilian consultants, into curricula of military academies, general staff courses, and all professional training programs. The Rettig Commission strongly suggested that the instructional materials used in such courses gain the approval of international human rights groups. The Truth Commission directed a veiled criticism at the intensive training programs sponsored by the United States, noting that “[i]n selecting advanced training courses for officers of the armed forces to follow abroad, care will have to be taken to ensure that such courses are based on a doctrine of democracy and respect for human rights.”

The commissions’ recommendations regarding the reorientation of the militaries’ missions, the role of the intelligence services, and the restructuring of the armed forces and police, are otherwise very similar and quite logical—all are intended to achieve the strict subordination of soldiers to civilian authorities. In the case of Chile, no civilian body had ever ventured to analyze, much less recast, the prevailing scheme of civil-military relations or the military’s national security doctrine. A civil war had necessitated that in El Salvador. Notably, both commissions addressed the so-called principle of due obedience, or the requirement that soldiers comply with orders regardless of their content. The Rettig Commission was circumspect: it did not discount “the validity and importance of this principle,” but recommended careful scrutiny of the principle to ensure that it does not lend itself to the violation of human rights. The Truth Commission called for the repeal of the article of the military code containing the principle, and for the implementation of “a simple and practical mechanism . . . to resolve the situation of subordinates who receive illegal orders, so that they are protected if they refuse to obey.”

Concerned that the most be made of a historic opportunity to demilitarize Salvadoran society, the Truth Commission went further than the Rettig Commission in several other respects. It recommended the introduction of a strict system of discharge for officers who violate human rights and the codification of legal penalties to which they would be subject. And, it insisted that the Armed Forces Honor Commission, created by the peace accords, eradicate all vestiges of a relationship between active duty and retired members of the armed forces and the death squads. Finally, it

47. From Madness to Hope, supra note 7, at 180.
49. From Madness to Hope, supra note 7, at 179.
50. El Tribunal de Honor de la Fuerza Armada is mentioned in the Final Accord, Ch. 1, § 12(e). Such a commission, called the Comisión de Honor, had been set up hastily by the Ministry of Defense in January 1990, to handle the investigation of the murder of the six Jesuits and their domestic employees the previous November. The Observer for Latin
called for the creation of a special commission of the legislative assembly to ensure that "[t]he transition to the new model of the armed forces outlined in the peace agreements" be accomplished.\textsuperscript{51}

Finally, the commissions concurred with respect to the need for a human rights ombudsman. The Rettig Commission was quite detailed in its recommendations as to the composition and functions of the office. The Truth Commission was able to identify potential weaknesses in the Office of the National Counsel for the Defence of Human Rights already established by the peace accords, including its information system, budgetary problems which prevent it from having a national presence, and its inspection of detention centers. It also creatively proposed that the Procuradoría join with COPAZ and all interested sectors of Salvadoran society to review the Truth Commission Report, and to undertake an assessment of the human rights situation in El Salvador after the dissolution of the Truth Commission.\textsuperscript{52}

\section*{IV. THE NORMATIVE BASIS OF TRUTH COMMISSIONS}

The truth commissions for Chile and El Salvador indicate the utility of the truth commission in transitional situations.\textsuperscript{53} The argument for the customary utilization of truth commissions has interactive normative and empirical aspects. It invokes international human rights law and international humanitarian law in connection with the substantive rights which a truth commission would make effective in the performance of its investigatory and advisory functions, and it takes as its point of reference the disturbing fact

\footnotesize
America of the International Commission of Jurists, present to observe the trial of the accused officers, noted that, "proceeding in an inexplicable manner and using methods that have no basis in judicial procedure, [the Comisión de Honor] came up with nine culprits." \textit{A Breach of Impunity}, supra note 32, at 34. The eradication of the death squads is also to be entrusted to a National Council for the Defense of Human Rights discussed below.\textsuperscript{51}


53. The value of a truth commission can also be inferred from cases where one was not created, e.g., Nicaragua, where violence continues in part because there was no official investigation of charges that the defense minister was implicated in human rights abuses. Tape recorded interview with Mateo Guerrero, Director, Asociación Nicaragüense Pro-Derechos Humanos (ANPDH), Managua (14 May 1993). The ANPDH has called for a truth commission, but the Sandinista Popular Army (FSLN) has rejected it. Col. Ricardo Wheelock, Office of Public Relations, Sandinista Popular Army, denied the necessity of clarifying any cases that might have involved abuses by the FSLN during its conflict with the US-backed insurgents, or Contras, stating "we will never accept that." Tape recorded interview with Col. Ricardo Wheelock (13 May 1993). See also, Asociación Nicaragüense Pro-Derechos Humanos, \textit{Comisión de la Verdad para Nicaragua}, 2(5) REPORTE I (Apr. 1993).
which the Chilean and Salvadoran truth commissions reported: there did
not exist in either country the "competent judicial, administrative, or
legislative authorities" or "other competent authorities" demanded by
international human rights law.\footnote{54}

Competent judicial, administrative, legislative, or other competent
authorities are demanded by international human rights law as the sine qua
non of the rule of law. Article 8 of the Universal Declaration on Human
Rights instructs that "[e]veryone has the right to an effective remedy by the
competent national tribunals for acts violating the fundamental rights
granted him by the constitution or by law."\footnote{55} The basis in treaty law for this
right is found in the International Covenant on Civil and Political Rights
(ICCPR) which states the obligation of States Parties "[t]o ensure that any
person whose rights or freedoms as herein recognized are violated shall
have an effective remedy" and that "any person claiming such a remedy
shall have his right thereto determined by competent judicial, administra-
tive or legislative, or by any other competent authority provided for by the
legal system of the State."\footnote{56} The American Convention on Human Rights
(ACHR) closely parallels the ICCPR.\footnote{57}

These and other instruments refer to competent authorities in a number
of other contexts.\footnote{58} Only some of these are pertinent because a truth
commission is intended for ex post facto involvement, whereas some

[hereinafter ICCPR]. On the judicial systems in both countries see, Informe de la
Comisión, Chapter IV; From Madness to Hope, supra note 7, at 172, 177-78. Independent
corroboration of the reports’ findings can be found in Lawless Committee for Human Rights,
Underscoring Justice: AID and El Salvador’s Judicial Reform Program 3 (1989); Amnesty
International, Elecciones Extrajudiciales en El Salvador: Informe sobre una Misión de Amnistía
Internacional para Examinar los Procedimientos Post-Mortem de Investigación en Casos de
Homicidios Políticos 1-6 de julio de 1983 31 (1984) A/AMR. 29/14/84/S.}

\footnote{55}{Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217 A (III),
U.N. Doc. A/810, at 71, art. 8 (1948)[hereinafter Universal Declaration].}

\footnote{56}{ICCPR, supra note 54, art. 2, § 3.}

\footnote{57}{American Convention on Human Rights, signed 22 Nov. 1969, O.A.S.T.S. No. 36, at 1,
O.A.S. Off. Rec. OEA/Ser. LVII/23, doc. 21, rev. 2, art. 25, § 2 (English 1975) [herein-
after ACHR] states that:

The States Parties undertake:
(a) to ensure any person claiming such remedy shall have his rights, determined by
the competent authority provided for by the legal system of the state;
(b) to develop the possibilities of judicial remedy, and
(c) to ensure that competent authorities shall enforce such remedies when granted.

\footnote{58}{The right to a fair and public hearing by competent, independent and impartial tribunal
(Universal Declaration, supra note 55, art. 10; ICCPR, supra note 54, art. 14, § 1; ACHR,
supra note 57, art. 8, § 1); Habeas Corpus (ICCPR, art. 9, § 4; ACHR, art. 7, §§ 6, 8, 25),
the right of an individual who alleges he has been subject to torture to a prompt and
impartial hearing (Convention Against Torture and Other Cruel, Inhuman or Degrading

provisions require timely intervention (e.g. habeas corpus). But others clearly support a special investigatory and advisory body and go to the activities of both the Rettig and Truth Commissions.

The normative and legal basis for a truth commission investigation, aiming in part to end the anguished uncertainty of the families of the disappeared, has been identified by Rodolfo Mattarollo in Protocol I Additional to the Geneva Convention: the right of families to know the fate of their members. 59 The Rettig Commission accomplished much in this regard by conducting the investigation and proposing that its report serve as a legal basis for determining the legal status of disappeared persons.

The Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also provides a basis for a special investigatory body in that it obliges States Parties to take into custody any person accused of torture after an examination of the facts. 60 It then calls for "a preliminary inquiry into the facts" 61 and a prompt report of the findings of that preliminary inquiry. 62 Moreover, it directs that "[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed . . . ." 63

These two conventions, then, provide for a competent authority, conceivably of a special nature, to conduct investigations after the fact. There are also bases for special commissions to proffer recommendations based on the findings of the investigations. Both the Rettig and Truth Commissions recommended compensation as a matter of justice, provided that the commissions' official findings supported an individual's claim. The ICCPR, ACHR, and the Convention Against Torture are relevant here:

Supp. (No. 51) at 197, U.N. Doc. A/39/51, art. 13 (1985) [hereinafter Convention Against Torture]; and compensation for illegal detention (ICCPR, art. 9, § 5); miscarriage of justice (ICCPR, art. 14, § 6; ACHR, art. 10) or for torture (Convention Against Torture, art. 14).

59. "In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and the international humanitarian organizations mentioned in the Convention and this Protocol shall be prompted mainly by the right of families to know the fate of their relatives." Protocol I Additional to the Geneva Conventions of August 12, 1949, U.N. Doc. No. A/32/144, Sec. III, art. 32 (1977). See Rodolfo Mattarollo, Impunidad, Derechos Humanos y Defensa Jurídica Internacional: Conferencias del Dr. Rodolfo Mattarollo, 2 Congresos Centroamericanos de Derechos Humanos 7 (1991).

60. Convention Against Torture, supra note 58, art. 6. Article 6 states:

"Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence."

61. id., art. 6, § 2.

62. id., art. 6, § 4.

63. id., art. 12.
Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (ICCPR).\footnote{ICCPR, supra note 54, art. 9, § 5. See also ICCPR, art. 14, § 6.}

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgement through a miscarriage of justice (ACHR).\footnote{ACHR, supra note 57, art. 10.}

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of a death of the victim as a result of torture, his dependents shall be entitled to compensation (Convention Against Torture).\footnote{Convention Against Torture, supra note 58, art. 14.}

In the wake of prolonged human rights calamities, when some measure of justice is expected from a democratic government in the midst of transition, it is probable that only a special body could provide such a remedy.

A provision unique to the ACHR is the right to reply.\footnote{ACHR, supra note 57, art. 14. Article 14 states:}

\begin{quote}
Anyone injured by inaccurate or offensive statements or ideas disseminated to the public, in general by a legally regulated medium of communications has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.
\end{quote}

See also Inter-American Court of Human Rights, Enforceability of the Right to Reply or Correction, Advisory Opinion OC 7/86, 29 Aug. 1986.

Arguably, only a published report of a truth commission could begin to provide the remedy envisioned in Article 14 of the ACHR because of the systematic nature of the violations carried out by the state under the guise of sovereign authority over a prolonged period of time.

Finally, there is the important contribution of truth commissions in the area of studying and proposing constitutional and statutory changes to ensure the rule of law. The obligations of states to undertake all necessary measures to make effective recognized human rights is unequivocal. The ICCPR directs that “[w]here not already provided by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with
the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Present Covenant." 69 Similarly, the ACHR stipulates that "where the exercise of any of the rights or freedoms referred to in Article 1 [of the American Convention] is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." 70 The Convention Against Torture parallels the ICCPR and the ACHR by demanding that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent such acts of torture . . . ." 71 Moreover, it makes it incumbent on states to "ensure that all acts of torture are offences under its criminal law" 72 and to "make these offences punishable by appropriate penalties." 73 Finally, the Convention mandates exactly the sort of systematic policy and statutory reviews undertaken by the two commissions. Specifically, the Convention mandates that States Parties promote human rights education for state agents and the systematic review of "interrogation rules, instructions, methods and practices." 74

V. CONCLUSION

The two most recent truth commissions established in the Americas made appreciable contributions to the cause of justice and the protection and promotion of human rights; the investigatory and advisory functions performed by those commissions find echo in international human rights law and international humanitarian law, and; democracies can only be

69. ICCPR, supra note 54, art. 2, § 2.
70. ACHR, supra note 57, art. 2.
71. Convention Against Torture, supra note 58, art. 2, § 1.
72. Id., art. 4, § 1.
73. Id., art. 4, § 2.
74. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Convention Against Torture, supra note 58, art. 1, § 1.

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Id., art. 11.
consolidated on the basis of the truth, and where attention has been given to the transformation of political institutions to ensure that they effectively protect and promote human rights—these three points summarize the argument for the customary utilization of truth commission in emerging democracies on the model of either the Commission for Truth and Reconciliation or the Commission on the Truth.