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TRUTH COMMISSIONS IN EL SALVADOR AND GUATEMALA: A PROPOSAL FOR TRUTH IN GUATEMALA

GREGORY JOWDY*

I. INTRODUCTION

As states emerge from years of civil strife and military rule, they struggle with how to recover the rule of law and put an end to gross human rights violations.1 To accomplish this, governments are gradually recognizing the importance of addressing a past smeared with state-sponsored violence.2 Truth commissions are becoming an effective mechanism with which to address this past.3

In 1992, El Salvador established a truth commission as part of its peace process.4 This precedent-setting initiative has been praised for the accuracy and depth of its investigation.5 Future commissions can learn from the Salvadoran experience. Currently, Guatemala is proceeding through a peace process which is similar to that forged in El Salvador.6 In addition to various other provisions, the Guatemalan peace accords provide for a truth commission.7 The Guatemalan Commission should model itself after the strengths of the Salvadoran Commission and improve upon its shortcomings.

* Executive Editor, Boston College Third World Law Journal.
2 See Fifteen Commissions, supra note 1, at 597-98.
3 See id.
5 See Fifteen Commissions, supra note 1, at 599.
7 See id. at 2.
Uncovering the truth about the past, however, is only one phase in a nation’s reconciliation. A state should also seek justice for past human rights violations. This second component of peacemaking has been called the justice phase. At most, this phase involves the government prosecuting the perpetrators of past human rights abuses; at least, this phase includes the government and the perpetrators themselves formally acknowledging responsibility. However, the reconciliation process often fails to reach this point because governments often issue amnesty laws which effectively prevent the formal treatment of perpetrators and implicitly reject or deny the truth commission report. In El Salvador, after the Truth Commission publicly issued its report, the Government passed a blanket amnesty along with formal statements rejecting the Commission’s conclusions.

Actors in the Guatemalan peace process should take steps to prevent this likely reaction from the Government and the military not only because it stifles the effectiveness of the peace process and reconciliation, but also because international human rights law mandates that perpetrators of human rights abuses be prosecuted. Although prosecution may seem practically impossible and even adverse to national reconciliation, it should not be precluded by a blanket amnesty law. Alternatives to blanket amnesties exist which are neither stifling to the acknowledgment/justice phase of the peace process nor violative of international human rights law.

This Note makes proposals to the Guatemalan Commission based on arguments derived from policy, law, and the Salvadoran experience. Specifically, Part II introduces truth commissions as a peacemaking mechanism. Parts III and IV discuss the Salvadoran and Guatemalan Commissions, respectively, in their historical contexts. Part V explores issues surrounding truth commissions and makes proposals for the Guatemalan Commission. Part VI proposes that the Guatemalan Commission strive to preclude an amnesty. Finally, Part VII provides alternatives to an amnesty for Guatemala.

9 See id.
10 See id.
11 See id.; Accountability, supra note 4, at 14.
12 See Accountability, supra note 4, at 20-23.
13 See infra notes 357-85 and accompanying text.
14 See infra notes 386-408 and accompanying text.
II. TRUTH COMMISSIONS

A. Introduction to Truth Commissions

After years of military rule and civil strife, most incoming governments face a history of human rights abuses.\textsuperscript{15} Addressing these past abuses in some manner is imperative to the success of the new government.\textsuperscript{16} Victims and their families often demand reparations of some sort to help them heal, forgive, and satisfy a need for justice. This need, if not satisfied by the civil government, might inspire vigilantism that would inevitably fuel further conflict. Additionally, on a societal level, the success of the new government depends on an end to the climate of impunity and a return to a rule of law.\textsuperscript{17} These demands must be met by the new government in order to establish a sustainable peace and prevent further human rights abuses.\textsuperscript{18}

One mechanism used to meet these demands in recent years is the truth commission.\textsuperscript{19} Generally, a truth commission is a body established through internal or international processes for the primary purpose of investigating alleged past human rights abuses.\textsuperscript{20} They are growing as a means to reconcile a country in transition from civil strife to sustainable democracy.\textsuperscript{21} In the last twenty years, there have been fifteen truth commissions in thirteen different countries.\textsuperscript{22}

Truth commissions typically serve three functions which are vital to the successful transition from civil strife to a sustainable peace: they have a cathartic effect for populations who have suffered egregious human rights abuses; they demonstrate a break with the past for a new government which thereby promotes national reconciliation; and they

\textsuperscript{15} See Unearth Political Crimes, supra note 1, at 1. In this Note, human rights abuses are acts such as torture, disappearances, and extrajudicial killings. See id.

\textsuperscript{16} See id.

\textsuperscript{17} See Roht-Arriaza, supra note 8, at 8.

\textsuperscript{18} See Unearth Political Crimes, supra note 1, at 598.

\textsuperscript{19} See Fifteen Commissions, supra note 1, at 598.

\textsuperscript{20} See id. This definition should only be taken in the broadest sense given the short history and variability of truth commissions. See id. In fact, Priscilla B. Hayner remarks, “Outside of the attention given to the two or three more well-known commissions in Latin America, there has been little comparative research in this area . . . . No definition . . . of truth commissions [has] been identified.” Id. at 598.

\textsuperscript{21} See Unearth Political Crimes, supra note 1, at 1; see also Fifteen Commissions, supra note 1, at 598.

\textsuperscript{22} See Unearth Political Crimes, supra note 1, at 1.
manifest the new government’s respect for and commitment to human rights.23

M. Cherif Bassiouni, a DePaul University law professor and former United Nations chief investigator in Yugoslavia, explains that the motive behind truth commissions is not revenge but to bring the truth to light.24 These commissions are fueled by the belief that perpetrators of war crimes “must be brought to book, by history and an outraged world if not by a normal court.”25 If for no other reason, moral responsibility to bring out the truth demands that states account for past war crimes.26

Although truth commissions vary in structure, mandate, and success, which makes definition difficult, they are generally characterized by four parameters: (1) they focus on the past; (2) they try to paint an overall picture of rights abuses; (3) they exist for a temporary, pre-defined period of time; and (4) they are vested with authority from the sponsor which provides them with access to information and security.27

A truth commission can be evaluated based on certain standards which academics have distilled from practice and history.28 A successful commission is generally welcomed by survivors, victims, and human rights advocates. Furthermore, it produces a report that is widely read and distills a summary of the facts that is received by all parties as conclusive and fair.29 Beyond these general characteristics and standards, however, each commission is tailored to and evaluated by the particular circumstances of the conflict and country.30

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23 See id. at 2. Jose Zalaquett, a Commissioner on the Chilean Commission, remarks, The contact with so many families of victims convinced me of the paramount importance and cathartic power of seeking to establish the truth . . . . The families had refused to allow the previous government authorities to see them cry as they searched for their loved ones. But now they were being received with respect and offered a seat and a cup of coffee . . . . At first, we did not realize that the very process of seeking the truth was thus also a patient process of cleansing wounds, one by one.


25 See id.

26 See id.

27 See Unearth Political Crimes, supra note 1, at 2.

28 See id.

29 See id.

30 See id.; Fifteen Commissions, supra note 1, at 635.
B. Reasons for a Truth Commission

1. The Right to Truth

Although international law does not mandate truth commissions per se, it imposes on governments a duty to investigate human rights abuses. A truth commission is one means by which a government can fulfill this duty.

Professor Naomi Roht-Arriaza finds the duty to investigate in both treaty and nontreaty sources of international law. In treaty based law, for instance, Article 12 of The Convention Against Torture requires each party to promptly investigate alleged acts of torture. Meanwhile, comprehensive human rights instruments, such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, establish substantive rights that require investigation for their enforcement. In fact, the bodies created to monitor and enforce these treaties have made clear that states have a duty to investigate alleged violations.

These comprehensive human rights treaties have established the duty to investigate within customary nontreaty international law. Professor Roht-Arriaza asserts that treaties which are universal in character and which reflect the practice of states are sources of international customary law. Although a state may not be a signatory to a treaty, it is still subject to customary international law. Therefore, where treaties fail to impose the duty to investigate past human rights abuses on a particular state, customary international law fills the gap.

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31 See ROHT-ARRIAZA, supra note 8, at 24–32, 39–49.
32 See id. at 7; Fifteen Commissions, supra note 1, at 611. The more conventional mechanisms with which to fulfill this duty are properly functioning law enforcement and judicial systems. See ROHT-ARRIAZA, supra note 8, at 7; Fifteen Commissions, supra note 1, at 611. However, in countries where these systems are struggling with their past, exceptional measures such as truth commissions are sometimes necessary to both fulfill this duty and re-establish these conventional mechanisms. See ROHT-ARRIAZA, supra note 8, at 4; Unearth Political Crimes, supra note 1, at 1.
33 See ROHT-ARRIAZA, supra note 8, at 24–32, 39–49. Professor Roht-Arriaza teaches international human rights law at the University of California, Hastings College of the Law. See id. at xii.
34 See id. at 27.
35 See id. at 29.
36 See id. at 28.
37 See id. at 40–41.
38 See ROHT-ARRIAZA, supra note 8, at 39. Treaty-based law has a number of weaknesses in imposing a duty to investigate past abuses. See id. First, treaty obligations only apply to conduct that occurs after the treaty was signed by the state in question. See id. Second, a state that systematically violates human rights abuses may be particularly disinclined to adhere to human
2. Political Justifications

In addition to being mandated by international law, fulfilling the duty to investigate—particularly through a truth commission—has many practical and political justifications. Amnesty International advocates the investigation of past violations as a primary means to prevent future rights abuses.

Many states in transition from authoritarian rule to democratic rule face a general climate of lawlessness and impunity. This lawlessness disempowers ordinary citizens, "making them fearful to think or speak out [against the government] breeding cynicism and passivity." Therefore, the establishment of an effective democracy, which requires ordinary citizens to participate, demands the end of impunity and the recovery of the rule of law. Additionally, as a state moves from a period of lawlessness to the rule of law, it will often face a history of grave human rights abuses perpetrated by its government officials. Acknowledging the past abuses perpetrated by officials is many times a new or reformed government's first step towards recovering the rule of law. Truth commissions are an effective mechanism for acknowledging the past.

\[...\]

\[...\]
Acknowledgment implies that the state has admitted its misdeeds and recognized that it was wrong.\footnote{47 See ROHT-ARRIAZA, supra note 8, at 8; Fifteen Commissions, supra note 1, at 607. This is not to say that nongovernmental parties in a conflict are not investigated as well, nor does it imply that they should not be held accountable. See ROHT-ARRIAZA, supra note 8, at 8. In fact, a successful truth commission and well-received report necessarily include the whole, objective truth regardless of whom they implicate. See Fifteen Commissions, supra note 1, at 636.} This virtual apology promotes national reconciliation and prevents the past from being repeated.\footnote{48 See Fifteen Commissions, supra note 1, at 607. Providing "an honest account of violence prevents history from being lost or re-written, and allows a society to learn from the past . . . ." Id.} For a new regime, a truth commission distinguishes the new legitimate government from former abusive governments; it demonstrates a commitment to promoting human rights and respecting the rule of law; and it helps to legitimize the authority and strengthen the popularity of a new head of state.\footnote{49 See id. at 608.}

Formal acknowledgment of past human rights abuses not only helps to heal a country but also helps to heal individuals.\footnote{50 See ROHT-ARRIAZA, supra note 8, at 7–8.} For the victims and their families, formal recognition dispels any doubt about what occurred and subsequently puts the past to rest.\footnote{51 See id. at 8.} Only at this point can the healing begin. This formal acknowledgment is especially important for families of the disappeared, who live for years doubting whether or not their loved ones are still alive.\footnote{52 See id.}

Besides addressing the past, a truth commission can also help the new government by addressing the future.\footnote{53 See Fifteen Commissions, supra note 1, at 609.} Many commissions end their report with recommendations for the new government.\footnote{54 See id. at 609.} These recommendations are usually crafted as proposals for systematic reform which would prevent future periods of impunity and subsequent human rights abuses.\footnote{55 See id.} Although these recommendations are not al-
ways mandatory,\textsuperscript{56} they are at least persuasive in that they come from a quasi-governmental and formally recognized organ. As such, they provide points around which civil society can lobby.\textsuperscript{57}

\textbf{C. Truth Commissions in Latin America}

Arguably, truth commissions originated in Latin America. At the least, the most frequently cited or most well-established commissions are those formed during the Latin American peace processes.\textsuperscript{58} In response to the military dictatorships from the late 1960s to the early 1980s, Latin Americans searched for accountability for human rights abuses.\textsuperscript{59} These military dictatorships "systematically tortured, 'disappeared,' and murdered thousands of civilians in the name of national security."\textsuperscript{60} Although there were actual subversive groups in several South American countries, many civilians were unjustly persecuted by agents of the state for allegedly "subversive" activity.\textsuperscript{61} When new governments took over, civilians demanded truth and justice through an accounting of the victims, official acknowledgment, and even punishment of the perpetrators.\textsuperscript{62}

\textbf{III. El Salvador}

\textbf{A. Brief History of the Conflict}

El Salvador, with a population of five million,\textsuperscript{63} has suffered for centuries from a severe maldistribution of resources, particularly arable land.\textsuperscript{64} Land has been held by a very small liberal elite while thousands have suffered in poverty.\textsuperscript{65} Much of the Salvadoran civil conflict springs from this division between a landed elite and an impoverished peasantry.

\textsuperscript{56} See id. In the Salvadoran process, however, the parties did accept the recommendations as binding on them. See Buergenthal, supra note 23, at 533.

\textsuperscript{57} See Fifteen Commissions, supra note 1, at 609.

\textsuperscript{58} See id. at 598-99.

\textsuperscript{59} See id.; Accountability, supra note 4, at 4.

\textsuperscript{60} Accountability, supra note 4, at 4.

\textsuperscript{61} See id.

\textsuperscript{62} See id.

\textsuperscript{63} See NEW AMERICAN DESK ENCYCLOPEDIA 409 (1989). El Salvador's population consists of 89% Mestizo, 10% Indian, and 1% white. See id.

\textsuperscript{64} See John A. Booth & Thomas W. Walker, UNDERSTANDING CENTRAL AMERICA 36 (1993).

\textsuperscript{65} See id. at 36-37. This class is so notoriously small that it is sometimes referred to as the "fourteen families." See id.
El Salvador was ruled by a liberal elite during most of its first century as an independent state.\footnote{See id. at 36. El Salvador won independence in 1823. See id.} This class promoted a policy of modernization through increasing agricultural exports and expanding the country's infrastructure.\footnote{See id.} At this time, the indigenous Indian population was seen as both an obstacle and a cheap source of labor.\footnote{See id.}

The origins of popular movements are found in the late 19th century.\footnote{See Booth & Walker, supra note 64, at 36.} As the demand for coffee in international markets increased, the elites moved into the Indian held highlands, which were conducive to coffee production.\footnote{See id.} They established laws prohibiting communal ownership, which effectively transferred ownership of the valuable highlands to the ruling elite.\footnote{See id. at 36–37.} In response, popular groups began to organize and the conflict began to take shape.\footnote{See id. at 37.}

The first mass revolt occurred in 1932 in the wake of a grave depression.\footnote{See id. at 36.} In response, General Maximiliano Hernandez Martinez led a military massacre of 30,000 peasants, few of whom were actual insurgents.\footnote{See Booth & Walker, supra note 64, at 37.} The leader of the masses, Augustin Farabundo Marti, a Marxist intellectual who was captured and beheaded as a result of the uprising,\footnote{See id.} has become the apostle of the modern revolutionary movement.\footnote{See Saul Landau, The Guerrilla Wars of Central America: Nicaragua, El Salvador and Guatemala 67 (1993).}

During the next fifty years, El Salvador was ruled by “an uninterrupted series of military regimes” which succeeded the liberal elite.\footnote{See id.} However, the marriage between the landed class and the military would continue to mark Salvadoran history.\footnote{See Booth & Walker, supra note 64, at 37; Landau, supra note 76, at 68.} In the 1960s, mild democratic reforms were stifled when the ruling elite began to feel threatened and subsequently urged the military to crack down.\footnote{See Booth & Walker, supra note 64, at 38.} Attempts at reform continued into the 1970s with the election of reformist candidate Jose Napoleon Duarte.\footnote{See id.} President Duarte’s efforts, however, were suppressed
by the military. A popular revolt on the military barracks on behalf of Duarte led the military to arrest, torture, and exile him. The military then installed a rightist in Duarte’s place.

Popular movements grew throughout the 1970s. Widespread unrest among the working classes due to deteriorating economic conditions fueled mass mobilization as well as the dawn of liberation theology. Jesuit priests began working with the poor and using the Bible to heighten awareness of the pervasive economic and political injustices. This spurred protests, peasant organization, and social pressure for change. In response, the government “unleashed a wave of terror that was taking over 1000 lives per month by 1979.”

In 1979, El Salvador descended into civil war following an initially reformist coup d’état. A civilian-military junta came to power and brought together the military, businesses, and the Social Democratic and Christian Democratic parties. However, the junta’s disregard for human rights repelled many moderates who did not want to be puppets of this abusive regime. The dissenters joined with leftist parties to form the Revolutionary Democratic Front (Frente Democratico Revolucionario—FDR). Meanwhile, five Marxist guerrilla groups united to form the Farabundo Marti National Liberation Front (Frente Farabundo Marti de Liberacion Nacional—FMLN). Together the FDR and the FMLN formed the revolutionary movement.

The civil war proceeded throughout the 1980s resulting in approximately 70,000 deaths. Throughout the war, the right wing, supported in large part by the United States, refused to negotiate. In one attempt, the FMLN offered to participate in the upcoming 1989 elec-

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81 See id.
82 See id.
83 See id.
84 See Booth & Walker, supra note 64, at 39; Landau, supra note 76, at 74–75.
85 See Booth & Walker, supra note 64, at 39.
86 See Landau, supra note 76, at 77.
87 See Booth & Walker, supra note 64, at 39.
88 Id.
89 See id.
90 See id. at 40–42.
91 See id. at 42.
92 See Booth & Walker, supra note 64, at 42.
93 See id.
94 See id.
95 See id. at 103.
96 See id.
tions if the Government would postpone the elections for six months to install safeguards which would ensure a fair election.\textsuperscript{97} The Government refused.\textsuperscript{98} To demonstrate their commitment and strength, the FMLN intensified their ultimately successful offensive in San Salvador.\textsuperscript{99} In 1991, the two sides entered peace talks under U.N. supervision.\textsuperscript{100}

The peace agreement signed in 1992 provided that the FMLN would demobilize.\textsuperscript{101} In return, the Government would depoliticize and downscale the army, phase out many of the counter-insurgency armed forces, and create a new police force which included former FMLN members.\textsuperscript{102} Furthermore, this agreement set forth the terms of a truth commission.\textsuperscript{103}

\section*{B. The Salvadoran Truth Commission}

In 1983, Argentina, emerging from years of military rule, established a commission to report on thousands of disappearances.\textsuperscript{104} In 1990, Chile established a broader commission to investigate all human rights violations which occurred during the previous years of military dictatorship.\textsuperscript{105} In the shadow of these commissions, the Salvadoran Commission was established.\textsuperscript{106}

Human Rights Watch has hailed the Salvadoran Commission as unprecedented.\textsuperscript{107} Several factors have been cited as integral to its success. First, the Salvadoran Commission was forged from a negotiated peace. In this way, the Salvadoran Commission is in contrast to the Commissions of Chile and Argentina, for example, which were formed by a successor government’s investigation of its predecessor regime.\textsuperscript{108} Second, the Commission operated under international auspices rather than under the new Government.\textsuperscript{109} Finally, for the first

\begin{thebibliography}{99}
\bibitem{97} See \textit{Booth \& Walker}, supra note 64, at 103.
\bibitem{98} See id.
\bibitem{99} See \textit{id.} at 103-04.
\bibitem{100} See \textit{id.}; \textit{Landau}, supra note 76, at 145.
\bibitem{101} See \textit{Booth \& Walker}, supra note 64, at 105.
\bibitem{102} See \textit{id.}
\bibitem{103} See \textit{Accountability}, supra note 4, at 7.
\bibitem{104} See \textit{id.} at 4.
\bibitem{105} See \textit{id.} at 5.
\bibitem{106} See \textit{id.}
\bibitem{107} See \textit{id.} at 2-4, 24, 36.
\bibitem{108} See \textit{Accountability}, supra note 4, at 2-4; see also \textit{Pasqualucci}, supra note 38, at 336-40.
\bibitem{109} See \textit{Accountability}, supra note 4, at 7.
\end{thebibliography}
time since Nuremberg, internationals investigated past acts of violence in a sovereign country.\footnote{See id.}

The Salvadoran Commission provides an appropriate model for uncovering Guatemala’s past injustices. To begin with, the Guatemalan Commission arises in a similar context to that of the Salvadoran Commission, as the underlying civil conflict in both countries is comparable. Additionally, both Commissions were born of a negotiated peace\footnote{See id.} and involve international actors.\footnote{See id.} Finally, both Commissions face similar challenges in their goal of healing years of strife, death, and disappearances.

C. Initiation and Structure of the Salvadoran Commission

The Salvadoran Commission was a three member U.N. delegation with a mandate to probe the 22,000 murders, kidnappings, and cases of torture that occurred during the eleven year civil war (1980–1991).\footnote{See O'Kane, \textit{supra} note 6, at 1.} After six months, as prescribed by the 1992 peace agreement, the Commission produced a report that highlighted well-known and typical cases.\footnote{See Longworth, \textit{supra} note 24, at 5.} The report found Government actors responsible for 5100 deaths and 1600 acts of violence and the FMLN responsible for 400 deaths and 300 disappearances.\footnote{See Accountability, \textit{supra} note 4, at 15.}

The report ended with a series of recommendations which included requiring “immediate action” and promoting “national reconciliation.”\footnote{See Buergenthal, \textit{supra} note 23, at 536.} Although the recommendations for immediate action called for the dismissal of certain Government and military officials, the Commission did not suggest prosecution or argue against an amnesty.\footnote{See id.} They reasoned that the Salvadoran justice system was not “capable of doing justice” and that an amnesty was an issue for the Salvadoran people.\footnote{See id. at 535–36.} Nevertheless, only five days after the report was released, an amnesty protecting those named in the report was pushed through the legislature. \textit{Id.}
the Commission proposed that the Government offer material compensation to the families of victims and build a monument to the victims of the civil war.\footnote{119}

As mentioned above, this Commission was established by a 1992 U.N.-sponsored peace agreement signed by the FMLN and the Government.\footnote{120} Negotiations leading to this final agreement began in April 1990 when the initial meeting took place.\footnote{121} From the initial meeting in April 1990, the FMLN, the Government, and the United Nations all expressed concerns about impunity and the investigation of past abuses.\footnote{122} The FMLN called for the investigation of a number of high-profile cases that would be exemplary of the Government's misdeeds.\footnote{123} The Government insisted that the FMLN enjoyed impunity and that they should be investigated as well.\footnote{124} Meanwhile, the United Nations recognized that a sustainable peace must address the human rights violations which were identified as a source of the conflict.\footnote{125}

These differences were finally resolved in late 1990 when the parties agreed, without setting forth details, to an investigative commission.\footnote{126} The Government finally assented because the creation of a commission allowed avoidance of formal military prosecution and because it won the concession that the FMLN would also be investigated.\footnote{127} The FMLN did not strongly object to being investigated because it viewed the Government as the perpetrator of "the vast majority of abuses."\footnote{128}

Once the idea was accepted, the first issue was whether the Commission would be comprised of Salvadoran nationals or internationals.\footnote{129} The FMLN argued that "any Salvadoran delving into notorious human rights cases would face mortal danger and therefore would avoid investigating cases in depth."\footnote{130} The Government argued that national sovereignty required that "the past be examined only by Sal-
vadoran citizens." 131 The United Nations favored a commission of internationals in order to protect the security, impartiality, and prestige of the Commission. 132 In the end, the Salvadoran Government conceded to an investigative commission of internationals. 133 However, the Government succeeded in insulating the military by placing a condition on its concession: the separate Ad Hoc Commission established to view the records of military officers would be composed of Salvadorans. 134

Next, the parties considered the Commission’s mandate and discussed exactly which cases it would investigate. 135 Initially, each side submitted a list of suggested cases. 136 Eventually, they accepted the U.N. recommendation that the Commissioners themselves decide which cases to investigate. 137

One year after negotiations began on April 27, 1991, the parties signed the accord formally establishing a Commission on the Truth. 138 This accord provided the terms of the Commission. 139 The Commission was mandated to “investigate grave acts of violence which have occurred since 1980 and whose impact on society demands most urgently public knowledge of the truth.” 140 It would be composed of three members designated by the U.N. Secretary General, with input from the parties. 141 Ultimately, the Commission was to issue recommendations “destined to prevent the repetition of violent acts and to foster national reconciliation.” 142 The Commission would not have judicial powers. 143 Instead, it would present a final report including its findings and recommendations six months after its installation. 144

131 Id.
132 See id. at 7.
133 See id. at 6–7.
134 See id. The Ad Hoc Commission was established as part of the negotiations to review the military regarding respect for human rights, professionalism, and democratic commitment. See id. at 8. At the end of its review, this Commission, composed of three Guatemalan civilians, called for the dismissal or transfer of 103 military officers. See id. The Truth Commission report named many of the same officers, which increased pressure on the Government to comply. See id. at 9–10.
135 See ACCOUNTABILITY, supra note 4, at 7.
136 See id.
137 See id.
138 See id.
139 See id.
140 ACCOUNTABILITY, supra note 4, at 7.
141 See id.
142 Id.
143 See id.
144 See id.
The three Commissioners, along with their staff of twenty lawyers, social scientists, and other human rights professionals from nongovernmental organizations, began work on July 14, 1992.\textsuperscript{145} The Commission operated a main office in San Salvador and three regional offices at which investigators heard testimony regarding human rights violations from anyone who came forward.\textsuperscript{146} The Commission attracted witnesses through an "extensive publicity campaign" advertising its purpose and presence on television and radio.\textsuperscript{147} In addition to collecting direct and indirect testimony, Commission staff and members searched for documentation inside and outside the country.\textsuperscript{148} On March 15, 1993, eight months after beginning investigations, the Secretary General of the United Nations released the report.\textsuperscript{149}

Generally, the Commission concluded that [t]he violence carried out by the government forces . . . originated in a political mind set that viewed political opponents as subversives and enemies . . . . Rural deaths were part of a deliberate strategy of eliminating or terrifying the peasant population in areas where the guerrillas were active, the purpose being to deprive the guerrilla forces of this source of supplies and information.\textsuperscript{150}

Furthermore, the “Commission reported that it was considered legitimate to physically eliminate people who were labeled military targets, traitors or orejas (informers), and even political opponents.”\textsuperscript{151}

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\item \textsuperscript{145} See Accountability, supra note 4, at 10.
\item \textsuperscript{146} See id.
\item \textsuperscript{147} See id.
\item \textsuperscript{148} See id.
\item \textsuperscript{149} See id. at 14. The report has five sections: Introduction, Methodology, a chronological overview of the history of violence from 1980 to 1991, report on the cases studied, and recommendations. See generally The Truth Commission for El Salvador, From Madness to Hope: The Twelve-Year War in El Salvador: Report of the Commission on Truth for El Salvador (1993) [hereinafter From Madness to Hope]. The Introduction describes the purposes and objectives of the commission. See id. at 11. The Methodology section describes the process or procedure used by the commission. See id. at 114–15. The cases studied section reports on the cases, which can be divided into six categories. See id. at 115–16. These categories include specific cases, such as the killing of six Jesuit priests, as well as generalized patterns of violence, such as forced disappearances. See id. at 116–17. The report ends with eight recommendations "aimed at removing human rights violators from public offices, reforming the justice system and the Armed Forces, as well as to promote human rights, democracy, and the rule of law and national reconciliation.” Id. at 117.
\item \textsuperscript{150} Accountability, supra note 4, at 14.
\item \textsuperscript{151} Id. at 14–15.
\end{itemize}
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D. Reaction to the Commission’s Report by the Salvadoran Government

The Salvadoran Government rejected the report through both official statements and legislative action.\(^\text{152}\) Numerous high officials in the executive branch, the military, the judiciary, and the ruling legislative party denounced the report as unresponsive to the demands of the majority, devoid of objectivity, and beyond its mandate.\(^\text{153}\) Americas Watch summarized the Government’s reaction as a “violent rejection of the report” which reflected the Government’s unwillingness to confront the past and seek reconciliation based on accountability.\(^\text{154}\)

Conversely, the FMLN unanimously accepted the report and seemed willing to abide by its recommendations.\(^\text{155}\) However, their compliance is conditioned upon commensurate acceptance by the Government.\(^\text{156}\) Norma Guevara, the spokeswoman for the FMLN, said, “We understand that our acceptance demands that all people mentioned in the report accept their responsibilities and that all the truth commission recommendations must be met.”\(^\text{157}\)

In violation of a law passed only one year prior, the Salvadoran Legislature took formal action to reject the Truth Commission’s report.\(^\text{158}\) Early in the peace process on February 1, 1992, the Salvadoran Legislature had passed the “Law of National Reconciliation.”\(^\text{159}\) This law was a limited amnesty which protected from punishment rebel combatants who laid down their weapons.\(^\text{160}\) Additionally, this law explicitly provided that more extensive amnesty action could not be taken until six months after the release of the Truth Commission report.\(^\text{161}\) Nevertheless, only five days after the publication of the report in 1993, the Salvadoran Legislature violated the Law of National Reconciliation by passing a general amnesty law which effectively barred the prosecution of anyone named in the report.\(^\text{162}\)
IV. GUATEMALA

A. Brief History of the Conflict

Guatemala has been described as two countries. One of these countries is composed of Mayan Indians who constitute fifty-five percent of Guatemala’s total population and who occupy the highlands and rural areas.\textsuperscript{163} The other country, which comprises the remainder of the population, generally consists of mixed-blood Ladinos.\textsuperscript{164} Guatemala’s history is characterized broadly as one of oppression and struggle.\textsuperscript{165} Beginning with the Spanish conquest in 1524, the indigenous people have struggled to reclaim their land and overcome oppression at the hands of the Ladino land-holding elite.\textsuperscript{166}

True representative government emerged in Guatemala for the first time in 1945.\textsuperscript{167} However, it ended in 1954 when the Government was overthrown by forces resisting a radical and progressive land reform policy.\textsuperscript{168} Years later, in 1962, armed resistance began to emerge in response to the oppression.\textsuperscript{169} A division in the army led “nationalist minded officers” to dissent and join the Communist party.\textsuperscript{170} These revolutionary groups evolved into the Rebel Armed Forces (Fuerzas Armadas Rebeldes—FAR), which eventually joined other guerrilla groups and the Guatemalan Workers Party to form the Guatemalan National Revolutionary Union (Unidad Revolucionaria Nacional Guatemalteca—URNG), the current political and military command of the rebel movement.\textsuperscript{171}

Since the formation of the rebel movement in 1962, Guatemala has been governed by a counterinsurgency policy.\textsuperscript{172} This policy resulted in the deaths of 23,000 people between 1966 and 1973 in rural areas under the presidencies of Julio Mendez Montenegro and Colonel Arana.\textsuperscript{173}

\textsuperscript{163} See Jean-Marie Simon, Guatemala: Eternal Spring Eternal Tyranny 19 (1987). Guatemala’s total population is approximately 8.5 million people. See id.
\textsuperscript{164} See id.
\textsuperscript{165} See Booth & Walker, supra note 64, at 109–12.
\textsuperscript{166} See Simon, supra note 163, at 20.
\textsuperscript{167} See id. at 18, 20.
\textsuperscript{168} See id. at 21.
\textsuperscript{170} See id.
\textsuperscript{171} See id. at 242.
\textsuperscript{172} See Simon, supra note 163, at 24.
\textsuperscript{173} See id. at 24–25.
Throughout the 1970s, the rebel forces, insurgency, and popular movements expanded.\textsuperscript{174} General Romero Lucas Garcia, in an effort to annihilate the resistance, initiated what is known as “the years of violence.”\textsuperscript{175} This period, from 1978 to 1984, resulted in 100,000 killed, 40,000 disappeared, 750,000 internally displaced, and 250,000 refugees in Mexico.\textsuperscript{176} This crack-down was justified as essential to the eradication of the violent communist uprising.\textsuperscript{177}

After he staged a coup in 1982, the counterinsurgency program developed by General Efrain Rios Montt shifted from one of brutal violence to rural pacification.\textsuperscript{178} The program now involved the forced relocation of thousands of indigenous peasants to military controlled areas called “model villages.”\textsuperscript{179} This control structure exists today in a modified form through the civil patrols and the militarization of the highland communities.\textsuperscript{180}

In 1986, the first civilian president in twenty years was elected by a constituent assembly.\textsuperscript{181} Human rights and grassroots organizations flourished during the early years of this presidency. However, growing military intolerance of the organizations led to increased assassinations, disappearances, and harassment of human rights and community activists.\textsuperscript{182}

The early nineties were marked by hope due to the peaceful civilian transfer of government to Jorge Serrano Elias, who initiated his “total peace plan” to end the Civil War.\textsuperscript{183} Unfortunately, his plan was ineffective against military impunity, and the human rights situation deteriorated. The Human Rights Ombudsman recorded 456 extra-judicial killings in 1992.\textsuperscript{184}

\textsuperscript{174} See id. at 25.
\textsuperscript{175} See id. at 29.
\textsuperscript{176} See LANDAU, supra note 76, at 184.
\textsuperscript{177} See Booth & Walker, supra note 64, at 110.
\textsuperscript{178} See id.
\textsuperscript{179} See id.
\textsuperscript{181} See Booth & Walker, supra note 64, at 111; Closing the Space, supra note 180, at 7.
\textsuperscript{182} See Booth & Walker, supra note 64, at 113; Closing the Space, supra note 180, at 8.
\textsuperscript{184} See Getting Away with Murder, supra note 183, at 2.
After Serrano attempted a self-coup in June 1993, the military forced him to resign.185 This led to the election of Ramiro de Leon Carpio, the outspoken Human Rights Ombudsman under Serrano.186 Carpio was elected by Congress upon strong international and popular support.187 The promise that Carpio’s government appeared to bring to the human rights situation soon deteriorated.188 “And with the rise of both political and ordinary criminal violence in the latter part of 1993 and early 1994, the government’s failure in investigating and prosecuting crimes seriously eroded its legitimacy.”189

In March of 1994, after thirty-four years of civil war and six years of stop-start talks, Carpio’s government signed a peace agreement with the URNG.190 The March 1994 agreement on human rights was signed as part of U.N.-sponsored peace talks between the parties.191 This initial agreement set a timetable for further discussions which were to culminate in the signing of a comprehensive, final accord in December 1994.192 Although that date was not met, the parties proceeded with the scheduled four rounds of talks and signed subsequent agreements, including an agreement establishing a truth commission.193 In addition to providing a timetable, the initial agreement included the following provisions:

1. UN human rights verification mission which will monitor and report on the human rights situation and strengthen domestic human rights monitoring institutions.194

2. A promise by the government not to promote an amnesty for those who have violated human rights.195

185 See Human Rights Watch/Americas, Human Rights in Guatemala During President de Leon Carpio’s First Year 3 (1994) [hereinafter De Leon Carpio Report].
186 See id. at 2.
187 See id.
188 See id.
189 Id.
190 See O’Kane, supra note 6, at 1.
191 See id.
192 See id.
193 See id. Other issues discussed or scheduled to be discussed in the peace talks were indigenous rights, land reform, the role of the military, and demobilization of guerrilla forces by the end of the year. See id.
194 De Leon Carpio Report, supra note 185, at 8.
195 Id. at 9. This promise is probably limited to actions of the executive—amnesty is often issued as a law by the legislature. See infra notes 333–34 and accompanying text. This was the case
3. A promise to modify its penal code to include forced disappearances and extra judicial executions.\textsuperscript{196}

Although this initial agreement showed promise, its impact was negligible. As reported by the Human Rights Office of the Archbishop, human rights violations increased after the signing of the accord.\textsuperscript{197} Political killings and disappearances doubled in the first six months of 1994 as compared to the first half of 1993.\textsuperscript{198} As of November 1994, reports indicated that security controls continued to intimidate witnesses, judges, and even the police in an environment of lawlessness and impunity.\textsuperscript{199}

Throughout 1995, Civil Patrol and military intimidation, violence, and impunity continued.\textsuperscript{200} Early in 1995, "an association of armed civil patrollers attacked Guatemalans and took international officials hostage to stop refugee repatriation . . . ."\textsuperscript{201} Prior to this attack, the Government and refugees had signed an accord ensuring the safe return of the refugees.\textsuperscript{202} The attack, therefore, violated the accord.\textsuperscript{203} Nevertheless, the civilian authorities refused to prosecute the identified perpetrator and the military authorities refused to disarm the civil patrollers involved.\textsuperscript{204} On October 5, 1995, uniformed troops fired on a crowd of returning refugees in northern Guatemala, "killing eleven villagers, including two young children, and wounding more than thirty others."\textsuperscript{205}

in El Salvador. The issue of Amnesty in Guatemala following the report is still very contentious. \textit{See} Telephone Interview with Gretta Tovar, Human Rights Watch/Americas Guatemala Expert (Nov. 5, 1996). In fact, Americas Watch, a division of Human Rights Watch, held a conference in Guatemala which drafted a document proclaiming the importance of \textit{not} passing an amnesty law. \textit{See} id. This document is a listing of positions taken by the conference and policy arguments which the conference agreed will bring effective, lasting peace to Guatemala. \textit{See generally} \textit{Human Rights Watch/Americas, Amnesty Conference in Guatemala, Memorandum of Conference} (1995) [hereinafter \textit{Amnesty Conference}].

\textsuperscript{196} De Leon Carpio Report, \textit{supra} note 185, at 9.

\textsuperscript{197} See O’Kane, \textit{supra} note 6, at 1.


\textsuperscript{199} See O’Kane, \textit{supra} note 6, at 1.

\textsuperscript{200} See \textit{Human Rights Watch/Americas, Guatemala: Return to Violence, Refugees, Civil Patrollers, and Impunity 2} (1996) [hereinafter \textit{Return to Violence}].

\textsuperscript{201} Id.

\textsuperscript{202} See \textit{id}.

\textsuperscript{203} See \textit{id}.

\textsuperscript{204} See \textit{id}.

\textsuperscript{205} Id.
B. The Proposed Guatemalan Commission

The establishment of a truth commission was the largest obstacle in the peace talks. The initial round of talks was stalled because the URNG insisted on a commission while the military had strong objections. This impasse was not broken until the URNG accepted that the truth commission issue be set aside for later deliberation. The initial agreement does not mention a truth commission. As is typical of military regimes, the Army argued that a truth commission "would direct its attention only towards the security forces, disregarding abuses committed by the guerrillas, and . . . it would ‘polarize’ public opinion instead of aiding in reconciliation." In June 1994, the parties signed an agreement establishing a truth commission and defining its terms. The agreement provided that the Commission will:

1. investigate the estimated 100,000 deaths and 40,000 disappearances that occurred from the beginning of the armed conflict to the signing of the final accord;
2. begin operating immediately after the final accord is signed;
3. only identify institutions, not individuals, which are responsible for human rights violations;
4. operate for up to one year; and

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207 See id.
209 See id.
210 Talks to Await Geneva ‘Battle’; Reports of Coup-Mongering Persist Despite Denials, LATIN AM. WKLY. REP., Feb. 24, 1994, at 2. A question that arises here is why the military changed its position on the truth commission so suddenly. See id. Commentators cite three reasons: (1) the commission is not terribly threatening because it has no legal power and will not single out individuals; (2) the military personnel is slowly changing—a “modernizing faction” is ascending in the ranks of the armed forces which is looking to the future and is not responsible for the abuses; therefore, they can blame those who came before; and (3) there was strong international pressure to move forward with the talks. See id.
212 Stephen Baranyi et al., Guatemala at the Crossroads, JUNE’S INTELLIGENCE REV., Oct. 1, 1995, at 17. The armed conflict is said to have started in 1960, making the period of investigation approximately 36 years. See Panel Will Shake, supra note 206, at 1.
5. consist of three members, one of which will be appointed by Secretary General of the United Nations.\textsuperscript{213}

After the signing of the agreement, Rodrigo Asturias, the leader of the URNG delegation at the talks, said, "We have for the first time been granted the right to know the truth. That is the most important step in order to put an end to the abuse."\textsuperscript{214} Human rights activists, however, were disappointed with the agreement's compromise of not naming individuals.\textsuperscript{215} Rigoberta Menchu, a Guatemalan indigenous rights activist, criticized the Commission as being merely symbolic because "it falls short of naming individuals responsible for abuses and will not provide a moral sanction."\textsuperscript{216} A representative of the families of those who have disappeared accused the military of fooling the international community with "double talk" while "inside the country they still use threats and violence, and they do not respect the law."\textsuperscript{217}

Although the accord establishing the Truth Commission was signed in 1994, human rights organizations did not settle for the shortcomings of the proposed Commission.\textsuperscript{218} They scheduled a nongovernmental organization conference for December, 1996 for the purpose of discussing expansion of the Commission's mandate, including possibly granting the Commission the authority to name names.\textsuperscript{219} In addition to the issues regarding the mandate, a number of other issues surrounding the Truth Commission were scheduled to be resolved, including issues which are common to truth commissions in general and issues which should be viewed in light of the proximate Salvadoran experience.


\textsuperscript{214} Panel Will Shake, supra note 206, at 1.

\textsuperscript{215} See Orlebar, supra note 198, at 3.

\textsuperscript{216} Id. at 2. A leader of the Widows' council said, "We are not pleased with the truth commission agreement. We want the first and last names of those responsible for the violence." Panel Will Shake, supra note 206, at 4.

\textsuperscript{217} Panel Will Shake, supra note 206, at 4.

\textsuperscript{218} See Telephone Interview with Gretta Tovar, Human Rights Watch/Americas Guatemala Expert (Nov. 5, 1996).

\textsuperscript{219} See id.
V. ISSUES SURROUNDING TRUTH COMMISSIONS

A. The Commission’s Mandate

A fundamental issue that is determined during the formative stages of a truth commission is defining the commission’s mandate or terms of reference. The terms of reference of a commission are usually set forth in the agreement establishing the commission. By “terms of reference,” commentators usually mean the commission’s mission statement or mandate. Basically, the terms of reference answer the question of what the commission is established to investigate. Truth commissions primarily investigate human rights abuses, but their mandates often restrict their investigations to certain types of abuses or even to particular instances of abuse. For instance, an Uruguayan Commission was limited to investigating illegal detention and torture and a Chilean Commission was limited to investigating disappearances, executions, and torture leading to death. Those abuses which were not fatal were not reported.

Commentators suggest that the terms of reference be “sufficiently broad to allow investigation into all forms of rights abuses” because a flexible, broad mandate allows a more complete picture of the truth. The Salvadoran Commission provides an example of an effective mandate. The agreement forging the Salvadoran Commission provided the general guideline that “the commission should report on serious acts of violence . . . whose impact on society urgently demands that the public should know the truth.”

Before agreeing to this broad mandate, the parties unsuccessfully attempted to negotiate a more specific mandate. Each party submitted a list of cases for the Commission to investigate. After failing to agree on a list of cases, the parties accepted the compromise suggested

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220 See Fifteen Commissions, supra note 1, at 636.
221 See id.
222 See id.
223 See id. at 637.
224 See id.
225 Fifteen Commissions, supra note 1, at 636.
226 See id. at 637.
227 See id.
228 Id.
229 See Accountability, supra note 4, at 7; see also Fifteen Commissions, supra note 1, at 637.
230 See Accountability, supra note 4, at 7.
by the United Nations, which was to let the Commission decide which cases to investigate.\(^{231}\) This allowed the Commission great latitude in carrying out investigations.\(^{232}\) Consequently, the Commission formulated a report that provided representative cases which in turn composed a representative picture of the period investigated.\(^{233}\)

Although the Salvadoran Commission’s mandate was broad in that it allowed the Commission to choose which cases to investigate, it nevertheless suffered from inadequacies.\(^{234}\) The Commission’s emphasis on “serious acts of violence” led it to focus on two types of cases: those which “outraged Salvadoran society and/or international opinion” and those which were representative of a systematic pattern of violence.\(^{235}\) By focusing on numerous high profile cases, the Commission “[d]evoted much of its time to cases in which responsibility had already been established.”\(^{236}\) The issue of who committed these acts was not generally disputed. Therefore, the Commission spent much of its time investigating and reporting on a truth that was already known, thereby producing what some would call a narrow and incomplete truth that did not serve those most profoundly affected by the violence.\(^{237}\)

Margaret L. Popkin, a human rights attorney and proponent of victim-centered truth, explains that these shortcomings of the Commission and its mandate reflect their sources, which were political negotiations.\(^{238}\) Political negotiations tend to serve only those who are represented.\(^{239}\) The Salvadoran negotiations failed to effectively represent large sectors of Salvadorans affected by the violence.\(^{240}\) As a result, the Commission produced a report that represented the interests at the

\(^{231}\) See id.
\(^{232}\) See Fifteen Commissions, supra note 1, at 637.
\(^{233}\) See id.
\(^{235}\) See FROM MADNESS TO HOPE, supra note 149, at 19.
\(^{236}\) Popkin, supra note 234, at 5.
\(^{237}\) See id. at 4–5. More specifically, Popkin criticizes the Commission for reporting on a disproportionate number of cases involving foreign nationals—one-fourth of the 32 cases investigated. See id. at 5. Furthermore, the Commission, given its emphasis on representative cases, failed to pursue most statements it received, to assess the effects of the violence on survivors, and to suggest such follow-up be undertaken. See id.
\(^{238}\) See id. at 4.
\(^{239}\) See id. at 4–5.
\(^{240}\) See id.
negotiating table, a report that neglected large portions of Salvadoran society.\textsuperscript{241}

Popkin comments that other investigatory commissions have had a more holistic focus.\textsuperscript{242} Such commissions attempt to bring various viewpoints together, write an official history, provide an official forum for victims to speak, establish accountability, and develop mechanisms for compensation.\textsuperscript{243} Imperative to meeting these goals is a concern for the rights of the victims and for the establishment of ongoing mechanisms for truth.\textsuperscript{244} In El Salvador neither of the parties were focused on these concerns.\textsuperscript{245} The FMLN's goal seemed to be vengeance, given its emphasis on military impunity and prosecution of exemplary cases.\textsuperscript{246} The government's goal seemed to be trifocal: to avoid the past if possible, to avoid responsibility, and to quickly move on.\textsuperscript{247}

Like the Salvadoran Commission, the Guatemalan Commission is also a product of political negotiations in which no party truly or completely represented the victims of the violence. Therefore, given the similarity to the Salvadoran experience, the Guatemalan Commission should take precautions against investigating only notorious cases which are generally not in dispute. The Guatemalan mandate directs the Commission to "clarify fully and in detail cases of human rights violations."\textsuperscript{248} This mandate is sufficiently broad to provide the Guatemalan Commission with flexibility to implement its mandate so as to report a complete truth which serves the victims. It does not include limiting language like "serious acts of violence," as did the Salvadoran mandate. The Guatemalan Commission, however, must now actualize this potential and not limit itself. In El Salvador, the Commission's mandate did not necessarily force it to focus on notorious acts, but the Commission's own interpretation of the mandate led it to such a narrow result.

B. Investigation of International Actors

An important question that arises in determining the mandate of a truth commission is whether to investigate or consider the role of

\textsuperscript{241} See Popkin, \textit{supra} note 234, at 4–5.
\textsuperscript{242} See id.
\textsuperscript{243} See id. at 4.
\textsuperscript{244} See id. at 4–5.
\textsuperscript{245} See id. at 4.
\textsuperscript{246} See Popkin, \textit{supra} note 234, at 5.
\textsuperscript{247} See id.
\textsuperscript{248} AMNESTY CONFERENCE, \textit{supra} note 195, at 1.
international actors.\textsuperscript{249} Most cases of civil strife involve international actors, "usually foreign governments—that helped to fund, arm, train or otherwise aid and assist either or both sides of the conflict."\textsuperscript{250} Some commentators argue that in such circumstances a truth commission which does not address the involvement of foreign governments fails to paint a picture of the truth.\textsuperscript{251} Nevertheless, time limitations and the commission’s primary objective must be considered when making this decision.\textsuperscript{252}

The Salvadoran Commission only generally addressed the role of foreign actors when it described "how the United States government tolerated and apparently paid little heed to" a group of Salvadoran exiles in Miami who contributed financially to the death squads.\textsuperscript{253} The report, however, did suggest that further investigation into this case should be carried out to prevent such tolerance by the United States in the future.\textsuperscript{254}

In justifying the choice not to investigate foreign involvement, Commissioner Thomas Buergenthal stated that the Salvadoran Commission "would not have been able to fulfill its main mission: clarifying the circumstances and extent of the violence in the country."\textsuperscript{255} Therefore, the Commission’s time constraints would have prevented it from both meeting its primary objective and sufficiently investigating international involvement.

An Americas Watch Conference on the peace process in Guatemala concluded that the Guatemalan Truth Commission "should take into account" international forces "behind the mechanism of violence."\textsuperscript{256} This does not imply that the Commission should necessarily come to specific conclusions or conduct a complete investigation of international actors, however, it does suggest that the Commission address these issues in some manner. Failure to address the role of international actors in some manner would be such a deliberate avoidance of an important, contentious, and widely recognized issue that the Guatemalan Commission’s credibility in general would be called into question.

\textsuperscript{249} See Fifteen Commissions, supra note 1, at 637.
\textsuperscript{250} Id.
\textsuperscript{251} See id. at 637 n.96.
\textsuperscript{252} See id. at 638–39.
\textsuperscript{253} See id. at 638.
\textsuperscript{254} See Fifteen Commissions, supra note 1, at 638.
\textsuperscript{255} Id. at 638–39.
\textsuperscript{256} AMNESTY CONFERENCE, supra note 195, at 2.
The Commission's recognition of international actors is especially important in Guatemala because the United States Central Intelligence Agency (CIA) has historically supported the Guatemalan military. This relationship has become common knowledge due to a number of high-profile incidents in Guatemala involving United States citizens.\textsuperscript{257} Indeed, a Presidential investigative board reported that the CIA paid informants in Guatemala who "ordered, planned, or participated in serious human rights violations . . ."\textsuperscript{258} As this relationship between international actors and the Guatemalan military becomes firmly recognized, the Truth Commission must address this relationship in some manner. Otherwise, such apparent avoidance will leave the truth incomplete and raise doubt about the report's veracity.

C. Public Involvement

Another issue that has been raised is whether to engage the public in debate regarding the Commission. Human rights advocates support public involvement in crafting investigative commissions. Jose Zalaquett, a member of the Chilean Commission, calls for a public referendum or, at least, a body of popularly elected officials which approves the creation of a commission.\textsuperscript{259} Human Rights Watch agrees, stating that "[t]he will of the majority is of course important to consider when it comes to strategy choices, such as whether to conduct . . . [an] investigation into the truth of abuses."\textsuperscript{260} In criticizing the Salvadoran Commission, Margaret Popkin concurs that "the degree of truth and justice

\textsuperscript{257} See CIA Hired Alleged Killers in Guatemala but U.S. Report Can't Link It to Murders of U.S. Citizens, STAR-TRIB. (Minneapolis-St. Paul), June 29, 1996, at 1A [hereinafter CIA Hired]; Laura Myers, U.S.: Guatemala Hid Abuse of Americans, Papers Released on Innkeeper, Harbury Case, SEATTLE TIMES, May 7, 1996, at A11; Larry Rohter, U.S. Files Shed Little Light on Abuses in Guatemala; Human Rights Case Investigators Say CIA, State Department Still Not Forthcoming, AUSTIN AM.-STATESMAN, Aug. 11, 1996, at A27; Tim Weiner, Guatemalan Hierarchy Linked to Killing Paid to Keep Mum, U.S. Officials Say, ST. J.-REG. (Springfield, IL), Mar. 24, 1996, at 7. The high-profile cases referred to are the killing of Michael Devine, a U.S. citizen and inn-keeper in Guatemala; the torture and killing of Efrain Bamaca, a guerrilla commander married to a U.S. citizen; and the torture of Diana Ortiz, a United States citizen and Ursiline nun who was teaching in Guatemala. See CIA Hired, supra, at 1A; Myers, supra, at A11. Colonel Julio Roberto Alpirez, a Guatemalan Military Officer who was on the CIA pay roll, has been found to be involved in the cover-up of two of these cases. See Robert Cohen, Administration Is Prodded on Guatemala Rape-Torture of Nun, Sister Ortiz Continues Fast as Torricelli Demands Information from White House on Possible U.S. Role, STAR-LEDGER (Newark, NJ), May 3, 1996, at 10. However, involved individuals are not satisfied with this finding and they are pressuring the United States Government for further disclosure of classified documents. See id.

\textsuperscript{258} Peter Zirnite, U.S.-Guatemala: Victims Say Study on CIA Ties to Abuses Inadequate, INTER PRESS SERVICE, July 1, 1996, available in 1996 WL 10767935.

\textsuperscript{259} See Fifteen Commissions, supra note 1, at 639.

\textsuperscript{260} Id. at 640.
to be attained, are issues that require the involvement of those affected and should not be determined solely by political negotiations.\textsuperscript{261}

Typically, a direct public role in formulating a truth commission may seem logistically impossible, given time constraints and a fragile political environment. However, this is not the case in Guatemala.\textsuperscript{262} In fact, Guatemala provides a good opportunity to submit the Commission to public debate. Time has yet to be a factor, as the Commission’s findings are overdue.\textsuperscript{263} The accord stipulates that the Commission can run for as long as one year.\textsuperscript{264} This provides sufficient time for public participation, either informally in the news media, or possibly formally by referendum. Furthermore, the 1995 presidential election evinces the Guatemalan Government’s capacity to sustain a vote politically and logistically.\textsuperscript{265}

D. \textit{Staff Composition}

Another important question that every truth commission faces is whether the commission should be comprised of nationals or internationals.\textsuperscript{266} This question raises issues of national sovereignty and neutrality.\textsuperscript{267} An international commission may be more neutral in “a highly polarized environment.”\textsuperscript{268} This perceived or actual neutrality yields greater legitimacy.\textsuperscript{269} Furthermore, in such a polarized and defensive atmosphere, greater international pressure will encourage the parties to cooperate with the commission and follow through with its recommendations.\textsuperscript{270} Finally, internationals will be less likely to avoid sensitive issues or powerful figures out of intimidation or fear for their own

\footnotesize{\textsuperscript{261} Popkin, supra note 234, at 4. Popkin blames the failure of the peace process to include those affected by the violence for the Commission’s narrow investigation, which only served the interests of the government and the FMLN. See id.  

\textsuperscript{262} See Fifteen Commissions, supra note 1, at 640.  

\textsuperscript{263} See id.  

\textsuperscript{264} See id.  

\textsuperscript{265} See Greg McIvor, Guatemala: Agreement Reached on Human Rights Commission, INTER PRESS SERVICE, June 23, 1994, at 1. For public debate to be effective, however, it must truly be public and popular, representing the will of the people. See id. Otherwise, a referendum tainted with military intimidation or ballot stuffing would serve only those who benefit from a hidden past. See id.  

\textsuperscript{266} See Fifteen Commissions, supra note 1, at 641–43.  

\textsuperscript{267} See id. at 642–43.  

\textsuperscript{268} Id. at 642.  

\textsuperscript{269} See id.  

\textsuperscript{270} See id.}
well-being. Therefore, the report they produce is likely to be more probing, telling, and accurate.

Although staffing a commission with internationals creates several benefits, there are a number of counterpoints that must be considered. First, an international commission may be rejected based on national sovereignty concerns. No matter how objective the report or the investigation, if the predominant mood in the country is anti-international and anti-intervention, the report will not be effectively embraced. Second, the international commission, by virtue of its foreignness, may lack familiarity with cultural and political nuances within the country. This may limit the investigation or even cause the commission to inadvertently neglect certain important issues.

The Salvadoran Commission was successful in part because it was staffed completely by internationals. This aided the Commission in practical matters. When the Salvadoran Government was not forthcoming with much-needed information, the Commission was able to solicit international sources. For instance, Commissioner Thomas Buergenthal, a United States citizen, was given limited security clearance by the United States Department of State, which allowed him to examine relevant files from a number of United States Government agencies. Furthermore, the Commission named powerful government and military officials which Salvadoran Commissioners may have prudently avoided out of fear for their lives. In sum, the Commission carried out a thorough, well-respected investigation in large part because they were free from intimidation and coercion which may have hushed a commission of Salvadoran nationals.

By the terms of the initial accord, the Guatemalan Commission is staffed by one international Commissioner and two Guatemalan Commissioners as set forth in the initial accord. Given the history in

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271 See Fifteen Commissions, supra note 1, at 642-43.
272 See id.
273 See id. at 643.
274 See id.
275 See id.
276 See Fifteen Commissions, supra note 1, at 643.
277 See id.
278 See Buergenthal, supra note 23, at 508. Nevertheless, this security clearance was limited and the State Department created a number of obstacles that put certain information beyond reach. See id.
279 See Fifteen Commissions, supra note 1, at 642-43.
280 See id.
281 See Agreement on the Establishment, supra note 213, at 13.
Guatemala of intimidation, harassment, and assassination of human rights activists, however, the Commission should be completely international. By including nationals, the Commission is risking failure. This risk was exemplified a decade ago when a Commission established by the Guatemalan government in 1986 disbarred itself precisely due to violence against its members.282

The Committee on International Human Rights for the Bar Association of New York City published a report in 1993 documenting three cases of high profile human rights activists who suffered intimidation, torture, and even death at the hands of the military.283 Those activists who survived only did so due to intense international attention and actual accompaniment by human rights officials. This protection, however, occurred only after the activists had been severely abused and tortured.284 In light of this history, the Guatemalan Commissioners will face unprecedented risk because Guatemala has never undergone an investigation with such grave consequences for the military.

On the other hand, an exclusively international commission is protected from such grave risk in part because the commissioners are not forced to live under the rule of those they investigate. Instead, they would leave Guatemala after the duration of the Commission. Nevertheless, this transience that offers protection also has disadvantages. Margaret L. Popkin argues that commissions should help initiate ongoing societal processes and encourage existing institutions to fulfill their obligations. This is difficult for an international commission because after the duration of the commission, international commissioners and staffers leave the country. Without their support, presence, and help, reformers may have difficulty carrying out the recommendations and establishing ongoing mechanisms. An international commission can pre-empt these shortcomings with strong and specific recommendations for reform around which national reformers can lobby. Then it can encourage the reform and protect the reformers by strongly recommending a follow-up commission. The follow-up commission would assess the degree to which the country has succeeded in instituting reforms. Although this suggestion may not be as effective as a national commission in establishing sustainable human rights

284 See id. at 687–707.
protection, it may be a necessary compromise when faced with the alternative risks.285

E. Naming Names in the Commission Report

Among the most contentious issues that a commission must face is whether to name names in the commission report.286 On one side of the debate, those against naming names argue that due process requires that individuals receive fair treatment and be allowed to defend themselves, which means that the accused individuals must be allowed to face their accusers before being pronounced guilty.287 Additionally, they maintain that due process is violated if a commission report names individuals responsible for certain crimes without providing the accused individuals the panoply of due process protections.288 Therefore, in order to guarantee due process, no names should be named.

Meanwhile, those in favor of including names compellingly argue that "[t]elling the full truth requires naming persons responsible for human rights crimes when there is absolute evidence of their culpability."289 They assert that naming names is required as part of the truth, especially when it is unlikely that they will be prosecuted formally in a court of law.290 Furthermore, they urge that it must be kept in mind that the Commission report is not a conviction, as the named individuals will not suffer state sanctioned, formal punishment. Therefore, those in favor of naming names conclude that high standards of due process are not required.291

Contrary to the demands of the government, the Salvadoran Commission did name names.292 For this it has been praised as providing a complete picture of the truth.293 The Commission required that before naming individuals, those individuals would have an opportunity to confront the evidence, but not the actual witness, against them.294

285 See id.
286 See Fifteen Commissions, supra note 1, at 647.
287 See id. at 647–48.
288 See id.
289 Id. at 648.
290 See id.
291 See id.
292 See Accountability, supra note 4, at 12.
293 See Fifteen Commissions, supra note 1, at 628.
294 See Peace Process Hearings, supra note 115, at 14 (testimony of Belisario Betancur, President of Truth Commission).
By the initial treaty, the Guatemalan Commission is not to name individuals responsible for crimes. This silence is a result of intense international pressure on the URNG to surrender its demand for names. The reaction from human rights activists and victims to this compromise has been severe. Many have claimed that avoiding names is not a complete, satisfying, or effective truth.

The Human Rights Watch Amnesty Conference concluded that individuals should be identified in the Commission report. The Conference reconciled the dilemma between a complete truth and due process rights by recommending that names should be included “whenever possible” and that a process guaranteeing the rights of the accused should be established. The Conference addressed the obvious contention that under the treaty, the Commission was not to name individuals. The Conference determined that the treaty was ambiguous in that it was internally inconsistent. Particularly, the Commission’s mandate “to clarify fully and in detail” contradicted the provision in the accord prohibiting the Commission from individualizing responsibility. Therefore, the Conference implicitly argued that the Commission was free to resolve the ambiguity on the side of naming names.

Furthermore, considering Guatemala’s history, a report that identifies institutions but not individuals is likely to make reform superficial and ineffective. In 1982, a military junta under General Efrain Rios Montt carried out what was called a “restructuring” of a security unit suspected of serious human rights violations. In that situation, the Government and the Truth Commission blamed an institution which the Government subsequently attempted to reform. However, a former security agent testified to Amnesty International that as a result of the attempted reform, “only the names of the agencies [were] changed [but] the personnel and their working methods remained essentially the same.” It follows that the Guatemalan Government will be able to meet the recommendations in the Truth Commission report by

295 See Agreement on the Establishment, supra note 213, at 13. “The work, recommendations and report of the Commission shall not individualize responsibilities, nor shall they have judicial objectives or consequences.” Id.
296 See Fifteen Commissions, supra note 1, at 644–46.
297 See id.
298 See Amnesty Conference, supra note 195, at 3.
299 See id.
300 See id. at 2.
301 See id.
302 See id. at 54–55.
303 Amnesty Conference, supra note 195, at 54–55.
merely changing the names and organizational structure of its institutions.\textsuperscript{304} This will amount to nothing more than the old military and Government under new titles.\textsuperscript{305}

F. Confidentiality of the Investigation

This issue of whether the investigation should be public or confidential breaks down into specific questions that address different components of the investigation. Should the identities of those who come forward be kept confidential? Should those accused have the right to cross-examine witnesses? Should the interviews be carried out in public?\textsuperscript{306} These important questions raise difficult issues of due process, fairness, credibility, and neutrality.\textsuperscript{307} If confidentiality is guaranteed to witnesses, then more individuals would be likely to testify because they will not be risking their personal well-being by coming forward.\textsuperscript{308} If the witnesses' identities are not revealed, however, then the accused are denied the opportunity to completely face the evidence against them. This situation would preclude cross-examination.\textsuperscript{309} Such a limitation may call the report's credibility into question, thereby jeopardizing its effectiveness. Given such a dilemma, the commission must ensure fairness in its process, precision in its investigation, and objectivity in its analysis in order to both protect the witnesses and preserve the effectiveness of its findings.\textsuperscript{310}

The Salvadoran Commission was able to ensure fairness, precision, and objectivity. The Commission "sustained the highest level of confidentiality" to protect witnesses from harassment while maintaining a high standard of due process to protect the accused.\textsuperscript{311} It did not name an individual unless the Commission met a high standard of proof and the individual had an opportunity to face the evidence.\textsuperscript{312} Furthermore, the Commission’s international composition protected it against suspicions of bias.\textsuperscript{313}

\begin{thebibliography}{9}
\bibitem{304} See \textit{Human Rights Record}, \textit{supra} note 282, at 55.
\bibitem{305} See \textit{id}.
\bibitem{306} See \textit{Fifteen Commissions}, \textit{supra} note 1, at 647.
\bibitem{307} See \textit{id}.
\bibitem{308} See \textit{id}.
\bibitem{309} See \textit{Peace Process Hearings}, \textit{supra} note 115, at 14 (testimony of Belisario Betancur, President of Truth Commission).
\bibitem{310} See \textit{Fifteen Commissions}, \textit{supra} note 1, at 647.
\bibitem{311} See \textit{id}.; \textit{Accountability}, \textit{supra} note 4, at 12.
\bibitem{312} See \textit{Peace Process Hearings}, \textit{supra} note 115, at 10 (testimony of Belisario Betancur, President of Truth Commission).
\bibitem{313} See \textit{supra} notes 287–88 and accompanying text.
\end{thebibliography}
The Guatemalan Commission will also face this dilemma. Protecting those who testify is especially important considering that the military has a history of intimidation and harassment and is still established in rural communities. The Guatemalan Commission must ensure the highest level of confidentiality to witnesses, otherwise few will come forward, and those who do will face grave repercussions. However, confidentiality raises difficulties with credibility and fairness. Given the domestic composition of the Commission, the report may be discredited for bias. Even the Salvadoran Commission, an international commission, was accused of being one-sided and its findings were subsequently rejected by the Government.

To ensure that the Government does not reject the final report and to guarantee the safety of the witnesses, the Guatemalan Commission must institute procedures that are at once confidential, objective, and fair. In this regard, the Salvadoran Commission is an effective model. The Salvadoran Commission very successfully carried out an investigation that ensured safety to the witnesses, evinced by the large numbers that came forward, while maximizing due process rights for the accused.

As mentioned above, notwithstanding such standards of fairness and objectivity, the Salvadoran Government did not hesitate to reject the report. The Commission was not successful in preventing that rejection. Merely five days after the release of the report, the Government issued an amnesty protecting from prosecution anyone identified in the report. The Guatemalan Commission, while emulating the Salvadoran lessons of confidentiality and objectivity, should act to prevent such a rejection by the Guatemalan Government.

VI. Amnesty

A. Amnesties and the Peace Process in General

There is a growing consensus that past human rights abuses cannot go ignored in a transition to democracy. Yet, governments in transition can acknowledge past abuses to varying degrees. A new

314 See generally Bar of NYC, supra note 285.
315 See Accountability, supra note 4, at 20–23.
316 See Roht-Arriaza, supra note 8, at 4; Fifteen Commissions, supra note 1, at 598–600. “Without the establishment of the rule of law, there is no hope that any president—no matter how well intentioned—will be able to make democracy succeed in Guatemala.” Bar of NYC, supra note 283, at 708.
317 See Roht-Arriaza, supra note 8, at 4.
government can choose to completely ignore and deny past abuses by granting a blanket amnesty, seek truth, or seek justice. Some human rights experts believe that both truth and justice are necessary to end human rights abuses, establish the rule of law, and ultimately install lasting democracy.

States in transition to democracy are increasingly accepting the importance of truth in the process of reconciliation. This growing acceptance is reflected by the increasing use of truth commissions. Nevertheless, truth commissions are merely one step in overcoming a long silenced past. They bring the past to light, but they are not tantamount to "formal legal accountability through the prosecution of individuals." This justice stage of formal accountability must not be avoided by states attempting to end human rights abuses and establish democracy.

Although truth commissions do not sufficiently satisfy the justice phase of peacemaking, they can help in the transition to this phase. Often the justice phase is stifled by the granting of a blanket amnesty after commission reports are issued. For example, the amnesty passed following the Salvadoran report is regarded as the Government's complete rejection of the report. Although the report was heralded for its effectiveness, the Government stifled its potential success by avoiding complete acknowledgment via the amnesty. In anticipation of a similar reaction from the Guatemalan Government, the Guatemalan Commission, in order to maximize its efficacy, should

318 See id. at 4-5.
319 See AMNESTY CONFERENCE, supra note 195, at 1.
320 See ROHT-ARRIAZA, supra note 8, at 3.
321 See Fifteen Commissions, supra note 1, at 598 (supporting increasing use of truth commissions).
322 See id. at 604-05.
323 Id. at 604.
324 See ROHT-ARRIAZA, supra note 8, at 8-9.
325 See id. at 4. But see Fifteen Commissions, supra note 1, at 605 (contending that whether to prosecute is a political decision in which the truth commission should not interfere).
326 See ACCOUNTABILITY, supra note 4, at 23.
327 See id.

In enacting another amnesty so close on the heels of the Truth Commission report, however, the ruling ARENA party and its supporters in the Assembly seemed deliberately to want to undercut the report. Vice-president of the Assembly and opposition leader Ruben Zamora . . . charged that [the amnesty] "open[ed] the doors for the government to escape fulfillment of the Truth Commission's recommendations."

328 See Fifteen Commissions, supra note 1, at 607, 629 (discussing importance of acknowledgment and discussing rejection, amnesty, and military report).
strongly recommend against a blanket amnesty. There are legal and policy arguments supporting this position in the Guatemalan peace accords, Guatemalan history, and international law.

B. Arguments Against Granting an Amnesty in Guatemala

1. The Peace Accords

In the Comprehensive Agreement on Human Rights, the Guatemalan Government made a measured commitment to end impunity. In Section 3, Paragraph 1, the Government agreed not to propose legislation designed to interfere with the prosecution of human rights violators. The Government made a further promise to sponsor legislation criminalizing involuntary disappearance and extrajudicial executions. Paragraph 3 of that section explicitly barred any special law invoked to uphold impunity in respect to human rights violations.

Although these provisions seem to completely prohibit an amnesty law, they leave room for legislative action protecting past human rights violators. Paragraph 1 is merely a negative duty binding the “government.” “Government” here may be read to include only the executive. Therefore, this paragraph only prohibits the president from “sponsoring” an amnesty law. Under this provision, the legislature is still free to grant an amnesty as long as it is not initiated by the president.

Paragraph 3 is somewhat more comprehensive than Paragraph 1 in prohibiting the protection of human rights violators, as it provides that no such law shall be passed. This language can be read to include both the executive and the legislature. Whether Paragraph 3 applies to amnesties protecting past human rights abusers, however, is questionable. The Paragraph prohibits any law which would “uphold impunity in respect of human rights violations.”

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330 See id. at sec. 3, para. 2.
331 See id. at sec. 3, para. 3.
332 See id. at sec. 3, para. 1.
333 See id. In the alternative, if “government” is read to include the executive as well, the provision still leaves room for an amnesty. See id. The provision only bars the government from “proposing” an amnesty. See id. It does not bar the government from “passing” one. See id. Therefore, the spirit of the provision can be easily circumvented by a government with the political will. See id.
334 See Comprehensive Agreement, supra note 329, at sec. 3, para. 3.
335 See id.
336 Id. at sec. 3, para. 3.
nity” may be read to suggest that no law can be granted which would contribute to continued impunity. Under this reading, the legislature is still free to pass an amnesty protecting those who have committed human rights violations in the past. By passing a blanket amnesty law, the legislature would not violate Paragraph 3 because its legislation would only affect past impunity rather than upholding continued impunity.

Although the commitment against impunity is somewhat deficient because of these ambiguities, the Truth Commission can clarify the ambiguities and thereby hold the Government, including the legislature, to the spirit of its commitment. In its recommendations, the Truth Commission can emphasize the importance of prosecutions, and furthermore, explicitly denounce an amnesty for past human rights abuses. As a result, the legislature could not pass an amnesty which would allow the Government to stifle the peace process by avoiding acknowledgment of past human rights violations while holding out to the international community an appearance of cooperation and compliance with the peace accords.

2. Guatemala’s Amnesty History

Given Guatemala’s amnesty history, the Government is particularly likely to attempt to avoid acknowledgment by issuing an amnesty law. Based on this likelihood, the Commission should be especially vigilant and should take affirmative measures to block a blanket amnesty.

In recent history, a number of amnesty laws have been issued by various Guatemalan regimes. These amnesties generally were constructed for the benefit of the Government rather than for some broader salutary societal effect. For example, one amnesty was granted after the international pressure of the Arias peace plan. In the peace plan, the purpose of the amnesty was to open up political space for opposition groups to join political life. On October 28,
1987, the Guatemalan National Assembly passed a law granting amnesty to civilians who would turn over their weapons to the Government. 342

Given the volatile human rights climate and the continuing civil war, this amnesty was suspicious. Because those who came forward would be incriminating themselves as subversives in the context of a civil war, they could hardly be guaranteed protection from military reprisals. 343 Additionally, since no peace settlement had been reached, the amnesty seemed to be merely a strategic attempt to reduce the ranks of the rebel forces without conciliation from the Government.

Not surprisingly, very few individuals voluntarily came forward. Nevertheless, the Government reported that thousands accepted amnesty. 344 To achieve these high numbers, the military entered the rural highlands and forced peasants to accept the amnesty. 345 In June 1988, the Government exploited the amnesty further by extending it to civilians and the military personnel who were involved in the May 11, 1988 coup attempt. 346 Therefore, the Government not only used the amnesty to exploit civilian highlanders, but also to protect its own agents from prosecution.

Another earlier amnesty was granted in 1982 after the coup led by General Efrain Rios Montt. 347 Montt offered freedom from prosecution to any guerrillas who would come forward and "lay down their arms." 348 Newspapers reported that large numbers of "subversives" turned themselves in. 349 However, Amnesty International spoke with "other sources" that suggested that the Government tortured suspected sub-

342 See id. at 103.
343 See id. supra note 180, at 104. In fact, the statute did not even attempt to protect those who came forward. The Guatemalan Bar Association criticized the law for not guaranteeing freedom and security to those who came forward. See id.
344 See CLOSING THE SPACE, supra note 180, at 104.
345 See id.
346 See id.
347 See HUMAN RIGHTS RECORD, supra note 282, at 54. This amnesty and the 1986 amnesty, discussed immediately below, were promulgated by the Executive with approval by the Cabinet. See id. at 10 n.1. The process was legitimized by the Fundamental Statute of Government which was instituted by the military coup in 1982. See id. This statute governed the law-making process until the popular election of President Cerezo in 1986. See id. President Cerezo governed under a new constitution which granted the law-making power to the Congress. See id.
348 Id.
349 See id.
versives until they agreed to admit to the press that they had voluntarily accepted the amnesty.  

In 1986, yet another amnesty was promulgated only four days before the popularly elected president Vinicio Cerezo Arevalo came to power. This amnesty barred the initiation of prosecution against perpetrators of political crimes which occurred between 1982 and 1986. Amnesty International concluded that this amnesty, like the others, was “clearly intended to prevent the prosecution of military personnel for human rights abuses.” After a Supreme Court investigation which implicated those responsible for numerous instances of secret torture and detention, President Cerezo contended that he could not prosecute the perpetrators because the amnesty prevented him from doing so.

The events surrounding the 1986 amnesty provide yet another example of the Guatemalan Government’s tendency to manipulate amnesty laws to serve its own political ends. The amnesty did not categorically bar President Cerezo from prosecuting those identified in the Supreme Court investigation. Additionally, the Guatemalan Constitution provides that acts promulgated by military regimes can be annulled by Congress. Because the amnesty was promulgated by a military regime, it could have been annulled, thereby allowing the president to prosecute.

These prior amnesties suggest a number of things for Guatemala’s future. It is very likely that the Government will continue to grant amnesties without hesitation, despite its promises in the Human Rights Accord. A future amnesty probably would not promote reconciliation, as the military now suggests. Rather, an amnesty likely would be used as a political tool with which the Government could protect the military from prosecution, exploit civilians, and thereby maintain its disproportionate power. Therefore, the Truth Commission and the international community should firmly resist a general amnesty, which is likely to follow the Commission report.

350 See id. at 55–56.  
351 See id. at 10.  
352 See HUMAN RIGHTS RECORD, supra note 282, at 10.  
353 Id.  
354 See id. at 11–12.  
355 See id. at 10 n.1.
3. International Law

a. International Treaties Regarding Amnesties

Various international and regional treaties implicitly prohibit the granting of an amnesty in Guatemala. These treaties explicitly establish both substantive human rights for individuals and a corollary duty upon states to provide a remedy for the violation of such substantive human rights. The duty to provide a mechanism for redress in most treaties requires each signatory to maintain an effective mechanism through which victims can seek redress. This duty implicitly prohibits a state from granting an amnesty for perpetrators. Such an amnesty would be inconsistent, violative, and preclusive of the victim’s right to redress.

The American Convention on Human Rights is one treaty that implicitly prohibits the granting of an amnesty. Guatemala has been a signatory of the Convention since 1969. In two separate articles, the Convention guarantees an individual’s procedural rights. First, Article 8 provides the right to a fair hearing before a “competent, independent and impartial tribunal” to determine one’s civil rights. This provision protects a victim’s right to a civil remedy for a violation of his or her human rights. Any amnesty interfering with the right to a civil remedy would be prohibited by this provision. Second, Article

356 In arguing against the granting of amnesty, one must first face the contention that interference with a government’s treatment of its own citizens is beyond the reach of the international community and international law. See Roht-Arriaza, supra note 8, at 24. Such interference by international mandates violates a nation’s sovereignty. See id. However, Nuremberg has established firmly that “certain grave human rights violations by a government against its citizens are a matter of international concern and action.” Id. Thus, certain abuses carried out internally by a government fall within the jurisdiction of international law. See id. at 24, 50.


358 See Weiner, supra note 357, at 860–61.

359 See id.

360 See id.

361 See id.

362 See id.; Roht-Arriaza, supra note 8, at 29 (further discussing the American Convention).


364 See id. at 678; Weiner, supra note 357, at 862–63.

365 See American Convention, supra note 363, at 678.

366 See Weiner, supra note 357, at 867. “One cannot state more clearly that governments have an obligation to ensure a formal remedy for their victims.” Id. at 864.
25 establishes a right to judicial protection for the individual and places a duty on the state to ensure that right.\textsuperscript{367} Paragraph 1 of Article 25 provides that the individual has a right to recourse in front of a competent court for violations of fundamental rights which are recognized by the state constitution or by the Convention.\textsuperscript{368} This Paragraph specifies that this right to recourse encompasses transgressions carried out by the state or its agents.\textsuperscript{369} Thus, Article 25 not only prohibits an amnesty, but also explicitly broadens the right to recourse by including the right to recourse against the state.\textsuperscript{370}

b. Judicial Interpretations in the Inter-American System

In their decisions and reports, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights\textsuperscript{371} have interpreted the American Convention on Human Rights to impose a duty on member states\textsuperscript{372} to investigate and prosecute human rights abuses.

i. The Velasquez-Rodriguez decision

The Velasquez-Rodriguez decision\textsuperscript{373} is one such instance in which the Inter-American Court interpreted the Convention to establish the state’s duty to investigate and prosecute abuses of human rights. This 1988 case involved a Honduran student-activist who was arrested, tortured, and executed by the Honduran military.\textsuperscript{374} Along with violations of substantive rights, the court found that the Honduran government

\textsuperscript{367} See id. at 863; American Convention, \textit{supra} note 363, at 682.
\textsuperscript{368} See American Convention, \textit{supra} note 363, at 682.
\textsuperscript{369} See id.
\textsuperscript{370} See id.
\textsuperscript{371} Robert Weiner explains the relationship between the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights:

The Commission is an international quasi-judicial body that can hear cases, make findings of facts and conclusions of law, and issue reports publicizing the results. It can also issue recommendations to governments, but it has no additional enforcement power. The Commission can, however, refer cases to the Inter-American Court of Human Rights, which has binding authority over those state parties that have accepted its jurisdiction.

Weiner, \textit{supra} note 357, at 862.

\textsuperscript{372} Guatemala is a member of the Inter-American System. See American Convention, \textit{supra} note 363, at 678.

\textsuperscript{373} See ROHT-ARRIAZA, \textit{supra} note 8, at 30–32. Weiner calls Velasquez-Rodriguez, along "with two other cases, the first test of the Courts' contentious jurisdiction." See Weiner, \textit{supra} note 357, at 869 n.43.

\textsuperscript{374} See ROHT-ARRIAZA, \textit{supra} note 8, at 30–32; see also Weiner, \textit{supra} note 357, at 865.
violated its general obligation of Article 1(1) of the American Convention to ensure these rights. 375

The court asserted that the obligation of article 1 to “ensure” rights places an affirmative duty on the state parties to organize the governmental apparatus and in general all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights. 376

Part of this duty is the duty “to identify those responsible, [and] impose the appropriate punishment . . . .” 377

ii. The Argentina and Uruguay reports

The Inter-American Commission on Human Rights has gone further than the Inter-American Court in ruling against amnesties. 378 In recent years, the Commission has ruled explicitly against amnesties, finding that they violate the American Convention on Human Rights. 379 Specifically, in 1992 cases involving El Salvador, Uruguay, and Argentina, “the commission ruled that laws restricting or prohibiting prosecutions of the military . . . violate the American Convention.” 380 The Commission reasoned that the Convention gave rise to a duty to prosecute which cannot be overruled by domestic law. 381 This conclusion was based on the right to a remedy provided by Article 25, the right to life and physical integrity provided by Article 1, and the obligation to ensure rights provided by Article 1. 382

In the Uruguayan case, the Commission rejected the primary argument in support of amnesties. 383 Basically, the Uruguayan Government argued, as has the Guatemalan Government, that amnesty is a political mechanism which is necessary for reconciliation in democratic

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375 See Roht-Arriaza, supra note 8, at 30. Article 1(1) of the American Convention on Human Rights provides: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . .” American Convention, supra note 363, at 675.

376 Roht-Arriaza, supra note 8, at 30.

377 Id.

378 See id. at 60–61; Weiner, supra note 357, at 862–64.

379 See Roht-Arriaza, supra note 8, at 60–61; Weiner, supra note 357, 867–68.

380 Roht-Arriaza, supra note 8, at 60–61.

381 See id.

382 See id. at 60.

383 See id. at 61.
transitions because “investigating facts that occurred in the past could rekindle the animosity between persons and groups [and thereby obstruct] the strengthening of democratic institutions.” Nevertheless, the Commission rejected this contention after weighing the political and ethical dimensions of the amnesty provisions.

VII. ALTERNATIVES TO AMNESTIES

Although “emerging declaratory law holds that blanket amnesties for certain grave human rights violations are illegal under international law,” they are often used even by U.N.-sponsored peacemaking as an incentive to settle civil conflict. The United Nations suggests that amnesties may be effective in reconciling a divided state and overcoming the past when supported by a “broad degree of national consensus.”

In this light, it seems that an international prohibition on amnesties would be wholly impractical when the choice is between ensuring a peaceful settlement and prosecuting war criminals. However, there are alternatives to blanket amnesties which settle the dilemma between peace and prosecution. Among these alternatives are pardons and plea bargains.

A. Pardons

There is an important distinction between pardon and amnesty. Amnesty implies no investigation or acknowledgment of responsibility, whereas pardon comes after investigation and acknowledgment. Nevertheless, pardon acknowledges a victim’s civil rights—acknowledgment that would be lost by an amnesty—without obliterating the con-

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384 Id.
385 See Roht-Arriaza, supra note 8, at 61. For a thorough discussion of amnesties in the context of truth commissions, international human rights, and the Inter-American system, see generally Pasqualucci, supra note 38.
386 See Roht-Arriaza, supra note 8, at 300.
387 Accountability, supra note 4, at 23.
388 See Roht-Arriaza, supra note 8, at 299–302. Furthermore, these alternatives may be more effective than amnesties in establishing lasting peace because they meet the primary concerns of both parties. See id. They meet the government’s concern of avoiding the incarceration of its agents while also meeting the victims’ concern of having the wrongs committed against them formally recognized by the perpetrators. See id.
389 See id. at 300–01.
390 See id. at 300.
391 See id.
392 See id.
viction. It merely “remits the penalty” or “suspends punishment.” Furthermore, amnesty is categorical, while pardon requires “individualized consideration.” Most importantly, a pardon incorporates many of the procedures of a criminal prosecution, including the acknowledgment of responsibility and “public delegitimation,” without imposing a questionable punishment. In addition, this alternative satisfies victims, because they primarily demand acknowledgement and recognition, not vengeance.

B. Plea Bargaining

Plea bargaining is another mechanism which offers advantages over amnesty. In the instance of an amnesty, individuals who possess incriminating evidence against those most responsible for the violence do not have an incentive to come forward. Since prosecuting authorities do not have leverage over those who hold information and have amnesty status, prosecutors are handicapped in investigating even those without amnesty. Amnesty not only insulates foot soldiers who were “merely following orders,” but also makes convicting commanders virtually impossible.

If plea bargaining is employed as it is in the United States criminal justice system, it may solve this shortcoming of amnesties. The authorities can bargain with rank and file perpetrators for evidence against those commanding the violence. This possibility of bargain-

394 Id.
395 Id. Some courts hold that a pardon “blots out” the conviction as if it never happened. See id. However, this view is not unanimous. See id. In fact, “the majority of cases hold that a pardon does not obliterate the conviction or restore the defendant's good moral character.” Id.
396 See ROHT-ARRIAZA, supra note 8, at 300-01.
397 See id. at 300.
398 See id. In regard to the victims and affected families who came forward, Thomas Buergenthal, a Commissioner of the Salvadoran effort, remarked, “One could not listen to them without recognizing that the mere act of telling what had happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution.” Buergenthal, supra note 23, at 539. Similarly, Jose Zalaquett, a member of the Chilean commission, observed, “The relatives of the victims showed great generosity. Of course many of them asked for justice. Hardly anyone, however, showed a desire for vengeance.” Jose Zalaquett, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations, 43 HASTINGS L.J. 1425, 1437 (1992).
399 See ROHT-ARRIAZA, supra note 8, at 301.
400 See id.
401 See id.
402 See id.
403 See id.
ing provides an incentive to those with information to come forward, and arms the authorities with leverage against them. Plea bargaining may be enough to break the oppressive code of silence and thereby enable prosecutors to convict those most responsible.

Furthermore, plea bargaining meets the competing concerns of reconciliation and accountability that amnesty does not. Proponents of amnesty contend that prosecution of past abuse is divisive in part because foot soldiers will not tolerate jail sentences for acts committed under orders. The country becomes factious as individuals re-ally rather than reconcile. Meanwhile, opponents of amnesty contend that amnesty allows those responsible to avoid accountability and does not satisfy the victims need for acknowledgement. They maintain that while plea bargaining allows those minimally responsible to go free, it does not sacrifice the acknowledgment that the victims deserve or allow evasion of the prosecution of those ultimately responsible.

VIII. Conclusion

After years of civil strife and military rule, the URNG and the Guatemalan Government have begun to forge a lasting peace. However, before them stands the obstacle of their past and the thousands of victims that have suffered through the years of violence. The parties must face this past and provide relief to their victims.

The URNG and the Guatemalan Government signed the final peace accord in December 1996. This is an important step toward lasting peace. Integral to this lasting peace is the work of the Truth Commission. This Commission faces challenges similar to those of the Salvadoran Commission, in whose wake it follows. In only a few months, the Commission must produce a thorough accounting of the truth, covering years of strife, death, and disappearances.

In order to meet this challenge the Commission must produce a complete and objective report. The report must serve the needs of the victims, unlike the Salvadoran Commission’s report, which some argue failed in this undertaking. If possible, the Commission should seek to

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404 See ROHT-ARRIAZA, supra note 8, at 301.
405 See id. at 9.
406 See id.
407 See id at 8–9.
408 See id. at 301.
engage the public in its most crucial decisions and investigate not only the most notorious cases, but also the cases where the perpetrators have yet to be recognized. The Commission is also called to protect those who testify and the rights of those investigated. It must investigate all parties without bias while withstanding domestic and international pressures.

In addition to producing a complete and objective report, the Commission faces an even greater challenge. It must ensure that the report is fully recognized by those groups it finds responsible for the abuse. This acknowledgement is vital to the healing of individual victims and society at large. To ensure such acknowledgement, the Commission must strongly oppose and even argue against a blanket amnesty.

Once again, Guatemala can learn from El Salvador, where the Government failed to acknowledge its past and the victims continue to suffer. Fourteen years after her family was killed in a 1981 government-conducted massacre, Salvadoran Rufina Amaya remarked:

They have never even come to ask our pardon . . . . They have never come to explain why they did what they did, or in any way ever accepted the responsibility for what happened here, and until they do, there cannot be true reconciliation or a just peace here.410