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## The Case for A Permanent International Truth Commission

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# THE CASE FOR A PERMANENT INTERNATIONAL TRUTH COMMISSION

MICHAEL P. SCHARF\*

## I. INTRODUCTION

Supreme Court Justice Robert Jackson, the U.S. Chief Prosecutor at Nuremberg, said that one of the most important legacies of the international war crimes trials following World War II would be the documentation of the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."<sup>1</sup> Jackson said further that to establish an authoritative record of abuses to endure the test of time and withstand the challenge of revisionism, "we must establish incredible events by credible evidence."<sup>2</sup>

The international community has principally used two methods to establish the record of grave human rights crimes following an international conflict or civil war: international prosecutions such as those conducted at Nuremberg and Tokyo following World War II, and more recently at The Hague, Netherlands, and in Arusha, Tanzania, following the conflicts in the former Yugoslavia and Rwanda; and commissions of inquiry, now commonly referred to as "truth commissions," which investigate situations and submit reports of their findings but have no power to impose criminal fines or sentences.<sup>3</sup>

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1. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, Oct. 7, 1946 (on file with the *Duke Journal of Comparative & International Law*).

2. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, reprinted in 39 AM. J. INT'L L. 178, 184 (Supp. 1945).

3. See Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER

While the United Nations has recognized the need for a permanent international criminal court to supplant the current ad hoc approach,<sup>4</sup> until now, no one has made a similar proposal for a permanent truth commission. Although there are some advantages to the flexibility that an ad hoc approach provides, the truth commissions that have been established thus far have been plagued by a host of problems. Most of the truth commissions have been woefully underfunded. They have also been vulnerable to politically imposed limitations and manipulation: Their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases, and strength of final report have been largely determined by the political forces at play in their creation. In addition, most have lacked the power to impose sanctions on perpetrators or provide compensation to victims, have not provided those named as perpetrators with the basic rights available to a criminal defendant, and have lacked the transparency necessary for a credible proceeding. These problems could be avoided by the creation of a permanent institution.

This Article presents the case for the establishment of a permanent international truth commission as an adjunct to a permanent international criminal court or domestic prosecutions. Such a commission would be available to countries in the aftermath of situations involving grave humanitarian or human rights crimes. From the experience of the several international and national truth commissions established to date, this Article seeks to distill a framework for a proposed permanent international truth commission which would avoid the major problems that afflicted its predecessors. A draft statute for a permanent international truth commission is appended at the end of the Article with the hope that it will serve as a launching point for future consideration.

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REGIMES 225, 225-26 (N. Kritz ed., 1995).

4. See *Report of the International Law Commission on the Work of its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 258, U.N. Doc. A/48/10 (1993) (proposing a Draft Statute for an International Criminal Tribunal). See generally James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140, 140-42 (1994). In 1995, the General Assembly voted to establish a preparatory committee to revise the International Law Commission's Draft Statute for an International Criminal Court and prepare a widely acceptable consolidated text for adoption at a conference of plenipotentiaries in 1997 or 1998. Italy has offered to host the conference. For a discussion of the debate leading to the adoption of this resolution, see Virginia Morris & Christianne Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AM. J. INT'L L. 491, 496 (1996).

## II. THE NEED FOR A PERMANENT INTERNATIONAL TRUTH COMMISSION

### A. A Brief History of Truth Commissions

The first international truth commission in modern times was established by the Carnegie Endowment for International Peace to investigate alleged atrocities committed against civilians and prisoners of war during the Balkan Wars of 1912 and 1913.<sup>5</sup> After World War I, the Allies created the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which investigated German and Turkish atrocities committed during the war.<sup>6</sup> During World War II, the Allies established the United Nations War Crimes Commission to investigate German war crimes,<sup>7</sup> and the Far Eastern Commission to investigate Japanese war crimes.<sup>8</sup> In 1978, the parties to Additional Protocol I to the Geneva Conventions of 1949 set up an International Fact-Finding Commission to investigate serious violations of the Geneva Conventions.<sup>9</sup> During the 1990s, the international community via the United Nations established truth commissions for El Salvador,<sup>10</sup> Guatemala,<sup>11</sup> Somalia,<sup>12</sup> the Former Yugosla-

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5. See generally *Report of the International Commission to Inquire Into the Causes and Conduct of the Balkan Wars*, reprinted in *THE OTHER BALKAN WARS* (Carnegie Endowment for Int'l Peace, 1993).

6. See generally PAMPHLET NO. 32, DIVISION OF INT'L LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, reprinted in 14 AM. J. INT'L L. 95-154 (1920).

7. See U.N. WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 443-50 (1948).

8. See *Summary Statement by the Secretary-General: Apprehension, Trial and Punishment of War Criminals in the Far East*, 16 DEP'T ST. BULL. 799, 804-06 (1947).

9. See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 90, opened for signature Dec. 12, 1977, reprinted in 16 I.L.M. 1391, 1429-31 (1977) [hereinafter Additional Protocol I]. The seldom-used International Fact-Finding Commission has had limited utility since it is available only in international armed conflicts and only in situations in which the combatant countries have declared their recognition of the competence of the commission. See *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 342-44, 378-80 (Antonio Cassese ed., 1979).

10. See generally *Report of the Commission on the Truth for El Salvador: From Madness to Hope*, U.N. SCOR, 48th Sess., Annexes, U.N. Doc. S/25500 (1993) [hereinafter El Salvador Commission Report].

11. See *Accord on the Establishment of the Commission to Clarify Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer*, Signed in Oslo, Norway 23 June 1994, U.N. Doc A/48/954-S/1994/1751, 1 July 1994, reprinted in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 220 (N. Kritz ed., 1995). Under the Accord, the U.N. moderator for the peace negotiations serves as one of three members of the Guatemala Truth Commission and will name the other

via,<sup>13</sup> and Rwanda.<sup>14</sup> The United Nations is currently considering a proposal to establish another such commission to document the abuses of the Khmer Rouge in Cambodia.<sup>15</sup> Moreover, in the past ten years, a dozen states have set up their own domestic truth commissions to document atrocities within their borders and facilitate national reconciliation.<sup>16</sup>

In some cases, as in Argentina, the former Yugoslavia and Rwanda, truth commissions have functioned as a first step toward, and as a supplement to, national or international prosecutions.<sup>17</sup> In others, such as in El Salvador, Somalia, Haiti, Guatemala, and South Africa, the truth commissions served as a substitute for prosecutions, and were accompanied by *de jure*<sup>18</sup> or *de facto*<sup>19</sup> amnesties for the perpetrators.

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two Guatemalan members with the agreement of the parties. See Margaret Popkin & Naomi Font-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 1 TRANSITIONAL JUSTICE, *supra* note 3, at 262, 267-68.

12. See generally *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which led to Casualties Among Them*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/653 (1994) [hereinafter *Somalia Commission Report*].

13. See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674 (1994) [hereinafter *Yugoslavia Commission Report*].

14. See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/1405 (1994) [hereinafter *Rwanda Commission Report*].

15. See Leo Dobbs, *U.N. Official Calls for Cambodian Truth Commission*, Reuters News, Feb. 6, 1997 (reporting call for a truth commission by U.N. Special Representative on Human Rights for Cambodia).

16. See generally Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 225-61 (discussing the establishment of truth commissions in Argentina, Bolivia, Chad, Chile, Germany, Guatemala, Haiti, Honduras, the Philippines, Sierra Leone, South Africa, Uganda, and Uruguay).

17. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing Yugoslavia War Crimes Tribunal); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc S/RES/955 (1994) (establishing Rwanda War Crimes Tribunal). After the publication of the Argentinean Truth Commission's report, the government of President Raul Alfonsín undertook to prosecute members of the military responsible for some 9,000 disappearances of civilians. However, when the military rebelled, Alfonsín's successor as president, Carlos Saul Menem, pardoned the junta leaders and called off the prosecutions. See Tina Rosenberg, *Overcoming the Legacies of Dictatorship*, 74 FOREIGN AFF., May/June 1995, at 134, 146, 149.

18. A few days after the publication of the El Salvador Truth Commission's report, the government of El Salvador enacted an across-the-board amnesty for all individuals identified in the report as responsible for serious acts of violence. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 537 (1994).

Pursuant to an agreement between the Aristide Government and the *de facto* military leaders negotiated under the auspices of the United Nations, the Haitian parliament enacted an amnesty for the members of the military regime who had committed widespread human rights crimes. At the same time, Haiti established a seven-member truth commission to investigate

## B. The Function of a Truth Commission

Truth commissions serve four primary purposes: (1) to establish an historic record; (2) to obtain justice for the victims; (3) to facilitate national reconciliation; and (4) to deter further violations and abuses. Creating a credible account of human rights crimes "prevents history from being lost or rewritten, and allows a society to learn from its past in order to prevent a repetition of such violence in the future."<sup>20</sup> Justice is promoted by imposing moral condemnation and laying the groundwork for other sanctions. National reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past.<sup>21</sup> Further violations are deterred with specific recommendations for reform,<sup>22</sup> which can provide pressure points around which the civilian society or the international community can lobby for change in the future.<sup>23</sup>

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and document the human rights crimes committed in Haiti during Aristide's exile. See Michael P. Scharf, *Swapping Amnesty For Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 17-18 (1996).

19. After the submission of the Somalia Commission report identifying warlord Mohamed Farrah Aidid as responsible for the murder of 24 U.N. peacekeeping troops in 1993, the Security Council passed a resolution authorizing Aidid's "arrest, and detention for prosecution, trial and punishment." S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 83, U.N. Doc. S/INF/49 (1993). Later, the Council rescinded this order in an effort "to foster political dialogue which can lead to national reconciliation." *Statement of Ambassador Albright*, U.N. SCOR, 48th Sess., 3315th mtg. at 5-6, U.N. Doc. S/PV.3315 (1993); S.C. Res. 885, U.N. SCOR, 48th Sess., 3315th mtg. at 86, U.N. Doc. S/INF/49 (1993).

20. Hayner, *supra* note 3, at 225-62.

21. Studies of torture victims suggest that "production of a written document systematizing and summarizing their experiences was therapeutic because it helped the victims 'integrate the traumatic experience into their lives by identifying its significance in the context of political and social events as well as the context of their personal history.'" NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 19 (1995). In addition, psychologists have found that the process of producing testimony about the traumatic events before an investigative body can channel victims' anger into a socially constructive action and provides a form of catharsis. See *id.*

22. Past commission reports have included recommendations covering military and police reform, as well as strengthening of democratic institutions, measures to promote national reconciliation, or reform of the judicial system. See, e.g., *Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories, May 7, 1992*, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 51, 92; *Chile: Report of the National Commission on Truth and Reconciliation, February 9, 1991*, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 105, 152-166; *El Salvador Commission Report*, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 177, 204-215.

23. See generally Hayner, *supra* note 3.

In addition to these four primary purposes, truth commissions can also serve other secondary functions related to criminal prosecutions. Truth commissions can be an important precursor to judicial action, working as an intermediate step for states not yet ready to endorse full-scale prosecutions. As the commissions for the former Yugoslavia and Rwanda illustrate, the authoritative report of a commission can help muster the political will necessary for taking the next step toward bringing perpetrators to justice.<sup>24</sup> The work of the truth commissions also provided the basis for early indictments once the United Nations had decided to opt for international prosecutions.<sup>25</sup> Deterrence might be established through effective, selective prosecutions to demonstrate that abuses are subject to punishment and offenders subject to the rule of law, but such prosecutions would focus only on individual liability and thus fail to tell the whole story of abuses. A truth commission can supplement prosecutions by establishing a more complete historical record of abuses, victims, and perpetrators. Such a record would be useful especially where the sheer number of perpetrators, such as in Rwanda where over 100,000 Hutus participated in the killing of a half million Tutsis,<sup>26</sup> would render individual prosecution alone an insufficient response. And, by collecting and preserving evidence and testimony, a truth commission can help ensure that in cases where it may be necessary to defer prosecutions to promote an end to hostilities,<sup>27</sup> justice is merely postponed, not sacrificed altogether.

### C. The Advantages of a Permanent International Institution

There are four advantages to establishing a permanent international body rather than relying on ad hoc national truth commissions: (1) superior sufficiency of funding; (2) a greater perception of neutrality; (3) less susceptibility to domestic influences; and (4) greater speed in launching investigations. Each is discussed in turn below.

First, individual states recovering from an international conflict or civil war normally lack the financial resources to carry out a compre-

24. See S.C. Res. 827, *supra* note 17; S.C. Res. 955, *supra* note 17.

25. See M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, OCCASIONAL PAPER NO. 2 (International Human Rights Law Institute, DePaul University College of Law, 1996), at 68.

26. See 1 TRANSITIONAL JUSTICE, *supra* note 3, at xxi.

27. The experiences of Uruguay and Argentina suggest that aggressive efforts to prosecute members of a former regime may induce attempts to overthrow the incipient democratic government. See Dianne F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Former Regime*, 100 YALE L.J. 2537, 2545 (1991).

hensive investigation. The Bolivian and Philippine truth commissions lacked sufficient resources to complete their work, the Chadian truth commission was paralyzed for months by lack of funds, and the ongoing Ugandan commission has had to halt its work on several occasions due to a shortage of cash.<sup>28</sup> An international truth commission, in contrast, is more likely to have stable and adequate funding. For example, El Salvador's U.N.-sponsored commission enjoyed ample funding of about \$2.5 million,<sup>29</sup> and the U.N.'s Commission for the Former Yugoslavia received \$500,000 from the United Nations and an additional \$1.3 million in contributions from thirteen states and private foundations.<sup>30</sup>

Second, an international truth commission can guarantee neutrality in a highly polarized environment. Many of the past national truth commissions have been accused of partisanship, having commissioners politically beholden to the current administration, or being unabashedly pro-government or regionally biased.<sup>31</sup> To be perceived as fair, a truth commission should establish its independence from all the actors in a contested history. It must have the moral authority to examine and judge the acts and motivations of others. A geographically diverse international truth commission is much more likely to be perceived as objective and disinterested than a national truth commission.<sup>32</sup> Moreover, there would be a greater sense of legitimacy derived from the international community's involvement, as well as greater international attention to the work of such an institution, thus increasing pressure for the parties within the country to cooperate with the Commission's work and implement its recommendations.

Third, an international body would operate in a more secure environment and have access to greater security measures, which would facilitate the smooth and safe operation of the commission. The truth commission for El Salvador, for example, included permanent U.N. diplomatic security personnel assigned to protect the commissioners and the office.<sup>33</sup> The United Nations Protection Force (UNPROFOR)

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28. See Hayner, *supra* note 3, at 232-36.

29. See Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 69, 89 (1993).

30. See Bassiouni, *supra* note 25, at 9 n.24.

31. See generally Hayner, *supra* note 3.

32. However, it is important that a commission retain staff who are familiar with the culture, history, and politics of the country under investigation. Otherwise, the commission may encounter difficulties in perceiving the relative importance of certain cases, as well as the consequences of their decisions and recommendations.

33. See Hayner, *supra* note 3, at 250.



provided protection to the on-site investigations and mass-grave exhumations undertaken in Croatia and Bosnia by the commission of experts established by U.N. Security Council Resolution 780.<sup>34</sup> Moreover, an international commission would be less likely to be influenced by forces within the country and would be less susceptible to fear of reprisal. Commissioners who are outsiders are more likely to ask hard questions and push to get information in a way that would be difficult for those closer to the conflict.

Fourth, the existence of a permanent body with a flexible mandate would ensure a more rapid investigation. A recurring problem of past truth commissions has been the delay between their establishment and the initiation of investigations. It took over eighteen months for the commission of experts established by U.N. Security Council Resolution 780 to initiate investigative missions in the territory of the former Yugoslavia.<sup>35</sup> Just as it is often said that justice delayed is justice denied, so too can delays affect the efficacy of the search for truth. With time, memories fade and evidence disappears. The creation of a permanent commission would avoid the time consuming process of appointing commissioners, approving a budget, drawing up internal rules, and hiring a staff, thereby enabling the commission to proceed immediately with its investigation.

#### D. The Proposed Structure and Jurisdiction of a Permanent Truth Commission

As envisaged in the appended Draft Statute, a permanent international truth commission could be established in the same manner as a permanent international criminal court—by a treaty open to all interested states. No more than a small number of commissioners would be necessary, provided the commission is equipped with adequate administrative staff for its workload, including lawyers, analysts, interpreters, secretaries, security personnel, and investigators.<sup>36</sup> To ensure geographic diversity, the commissioners would be elected by an absolute majority vote of the state parties, with a caveat that no two commissioners may be nationals of the same state.<sup>37</sup> Moreover, provision would be made for recusal or disqualification of commissioners in

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34. See *Yugoslavia Commission Report*, *supra* note 13, paras. 36, 271-73.

35. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674 (1994).

36. See Appendix, *infra*, art. 5.

37. See *id.* art. 6.

situations in which their impartiality might be in doubt.<sup>38</sup> To keep costs down, between investigations commissioners and staff could be paid a prorated salary "on an as when actually employed basis."<sup>39</sup>

A precedent for this approach would be the International Fact-Finding Commission created by Additional Protocol I to the Geneva Conventions of 1949. That body has had limited utility because it is only available in international armed conflicts and only in situations in which the combatant countries have declared their recognition of its competence.<sup>40</sup> In contrast, the jurisdiction of the proposed permanent truth commission would include the following:

- (a) the crime of genocide;<sup>41</sup>
- (b) serious violations of the laws and customs applicable in both international and internal armed conflicts;<sup>42</sup> and
- (c) crimes against humanity,<sup>43</sup> including enforced disappearances,<sup>44</sup> extra-legal executions<sup>45</sup> and acts of torture.<sup>46</sup>

38. See *id.* art. 9.

39. *Id.* art. 12. The Rwanda Tribunal employed this cost-saving measure with respect to its judges prior to the commencement of trials. See *Report of the Advisory Committee on Administrative and Budgetary Questions*, U.N. GAOR, 50th Sess., Agenda Item 160, at 3, U.N. Doc. A/50/923 (1996).

40. See Additional Protocol I, art. 90, *supra* note 9.

41. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

42. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Additional Protocol I, *supra* note 9; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12 1977, *reprinted in* 16 I.L.M. 1442.

43. To constitute crimes against humanity, the acts must be inhumane in character; widespread or systematic; directed against a civilian population; and committed on national, political, ethnic, racial or religious grounds. See Scharf, *supra* note 18, at 32; M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 248-50 (1992).

44. See *Declaration on the Protection of All Persons From Enforced Disappearances*, G.A. Res. 47/133, in UNITED NATIONS, PRESS RELEASE, RESOLUTIONS AND DECISIONS ADOPTED BY THE GENERAL ASSEMBLY DURING THE FIRST PART OF ITS FORTY-SEVENTH SESSION, U.N. Doc. GA/8470 (1992).

45. See *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, annexed to UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, RESOLUTION 1989/65: EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS (1989).

The commission's jurisdiction over such acts would be triggered by a request from the U.N. Security Council or a majority of state parties to the statute.<sup>47</sup> In so doing, the requesting entity would designate the dates and geographic location which are to be the subject of the commission's investigation.

To ensure a balanced treatment of parties involved in the investigation, unlike some of the past truth commissions,<sup>48</sup> the proposed commission would investigate the acts of all sides to a conflict, including both government-initiated or sponsored violations and acts committed by opponents of the ruling regime. The commission could also investigate the role of international actors (usually foreign governments), who may be involved in the funding, arming, training or otherwise assisting those responsible for serious human rights crimes.

For each situation the commission would be given twelve months to complete its investigation and submit a report.<sup>49</sup> The expenses of the commission would be borne by the parties to its statute, or, in any case referred to the commission by the Security Council, by the United Nations.<sup>50</sup> In addition, the commission would be authorized to accept voluntary contributions from interested states, including funds, materials, and personnel.<sup>51</sup>

### III. ADDRESSING THE DEFICIENCIES OF PAST TRUTH COMMISSIONS

#### A. Rights of the Accused

To create an authoritative history, a truth commission's work must be detailed enough to convince skeptics that the facts it finds are true, while at the same time providing overall patterns and explanations to shape historical accounts of the atrocities. Creating such a history requires naming persons responsible for human rights crimes when there

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46. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984) (entered into force June 26, 1987) [hereinafter Torture Convention].

47. In many cases, this request would be in response to the request of a new regime.

48. See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 1 TRANSITIONAL JUSTICE, *supra* note 3, at 262, 273.

49. See Appendix, *infra*, art. 16.

50. See *id.* art. 12.

51. See *id.*

is compelling evidence of their culpability. While public identification is not a penalty per se, it can adversely effect the reputation, career and political prospects of individuals. For this reason, most of the truth commissions to date have avoided naming names so as not to violate the due process rights of such individuals. As Jose Zalaquett, a Commissioner on the Chilean Truth Commission, explained:

To name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. This would have been in contradiction with the spirit, if not the letter, of the rule of law and human rights principles.<sup>52</sup>

The El Salvador commission of 1992 was the first truth commission to publicly identify persons responsible for violations. It identified some forty-odd officials, including the minister of defense and the president of the supreme court. In the introductory chapter to its report, the El Salvador commission explained its rationale:

It could be argued that, since the Commission's investigation methodology does not meet the normal requirements of due process, the report should not name the people whom the Commission considers to be implicated in specific acts of violence. The Commission believes that it had no alternative but to do so.

In the peace agreements, the Parties made it quite clear that it was necessary that the "complete truth be made known," and that was why the Commission was established. Now, the whole truth cannot be told without naming names. After all, the Commission was not asked to write an academic report on El Salvador, it was asked to describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts. This task cannot be performed in the abstract, suppressing information . . . where there is reliable testimony available, especially when the persons identified occupy senior positions and perform official functions directly related to violations or the cover-up of violations. Not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.<sup>53</sup>

While the El Salvador commission identified certain individuals as culprits and recommended administrative sanctions, it did so without

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52. 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION xxxii (Philip E. Berryman trans., 1993).

53. *El Salvador Commission Report*, *supra* note 10, at 25.

according those identified an opportunity to confront their accusers.<sup>54</sup> A critic of such a one-sided process asked, "What is the quality of the truth that is established? Will one be forced to make negative comparisons between the Commission's truth and judicial truth or historical truth?"<sup>55</sup>

When this issue arose with respect to the recently established South Africa Truth Commission, the South African Supreme Court ruled that the commission must provide persons "proper, reasonable and time[ly] notice" of hearings if evidence detrimentally implicating them is to be heard.<sup>56</sup> Similarly, the statute of the Uganda Truth Commission contains a provision which states that "any one who in the opinion of the Commissioners is adversely affected by the evidence given before the Commission shall be given an opportunity to be heard and to cross-examine the person giving such evidence."<sup>57</sup> This provision of basic due process rights is a positive development, which should be included in the statute of a permanent international truth commission.<sup>58</sup> The credibility of truth commissions would be enhanced immeasurably by following this example and allowing persons who are implicated in their investigation to appear in person, or through a representative, to present their side of the story and to confront their accusers.

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54. See Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 69, 69 (1993). The U.S. Supreme Court has expressed the importance of the right of the accused to confront the witnesses against him or her as follows: "Face-to-face confrontation generally serves to enhance the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person." *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

55. Anton Ferreira, *South Africa's Road to Healing Paved with Problems*, REUTERS, Apr. 11, 1996, available in LEXIS, News Library, CURNWS File.

56. *South Africa Truth Commission Seeks Clarification of Accused Rights*, AFRICA NEWS SERV., May 28, 1996, available in LEXIS, News Library, CURNWS File. While this ruling was later reversed, the South African Truth Commission nonetheless decided to adopt the recommended procedure. See Alexander Boraine, *Alternatives and Adjuncts to Criminal Prosecutions*, Remarks at the Justice in Cataclysm Conference, Brussels, Belgium, July 20-21, 1996, at 5 (on file with the *Duke Journal of Comparative & International Law*).

57. The Commissions of Inquiry Act, Legal Notice No. 5 (May 16, 1986) (Cap. 56), reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 255-57.

58. See *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Question of the Impunity of Perpetrators of Violations of Human Rights: Final Report Prepared by Mr. L. Joinet Pursuant to Subcommission Resolution 1995/35*, Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Agenda Item 10, at 12, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996) (recommending that "the person implicated shall have the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the commission, to submit a document equivalent to a right of reply for inclusion in the file.").

## B. Transparency

Most of the truth commissions have operated privately, only releasing a final report to the public,<sup>59</sup> out of concern that "public investigations risk scaring away witnesses that otherwise might testify, or putting in danger those that do."<sup>60</sup> However, such closed proceedings have undermined the integrity of the process, for it is human nature that people do not trust what they cannot see. In this way, past truth commissions have been susceptible to the criticisms levied on the infamous "Star Chamber" of seventeenth century England.<sup>61</sup> As the U.S. Supreme Court observed in a related context, "[t]o work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it."<sup>62</sup>

The South African Truth Commission has recognized the value of conducting its work in a manner that allows public observation. According to Dr. Alexander Boraine, the Vice Chairperson of the Commission, "There is the enormous advantage of the nation participating in the hearings and the work of the Commission from the very beginning through radio, television and the print media and the right of anyone to attend any of the hearings," which, he concludes, provides a "strong educative opportunity so that healing and reconciliation is not confined to a small group but is available to all."<sup>63</sup> In a similar vein, Richard Goldstone, the Chief Prosecutor of the Yugoslavia War Crimes Tribunal, said that "people don't relate to statistics, to generalizations. People can only relate and feel when they hear somebody that

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59. Prior to the South African Truth Commission, the only partial exception to this trend was the Argentinean Truth Commission, which, upon completion of its work in private, produced a two-hour synopsis of the testimony taken by the commission shown on national television. See Hayner, *supra* note 3, at 232.

60. *Id.* at 254.

61. The Court of Star Chamber was controlled by the monarch and was so named because its seat was in the royal palace of Westminster in a room with stars painted on the ceiling. In the seventeenth century, the court was used by sovereigns James I and Charles I to suppress opposition to their authority. The court met in secret and dealt out excessive and cruel punishment. The Star Chamber was finally abolished in 1641. For a history of the Star Chamber, see G.R. ELTON, *STAR CHAMBER STORIES* (1958); JOHN A. GUY, *THE CARDINAL'S COURT: THE IMPACT OF THOMAS WOLSEY IN STAR CHAMBER* (1977); WILLIAM HUDSON, *A TREATISE OF THE COURT OF STAR CHAMBER* (Francis Hargrave ed., 1986).

62. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980); see also *Joint Anti-fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by secret one-sided determinations of facts decisive of rights.").

63. See Boraine, *supra* note 56, at 5.

they can identify with telling what happened to them. That's why the public broadcasts of the proceedings can have a strong healing and deterrent effect."<sup>64</sup>

While there are complications and risks attendant to open proceedings,<sup>65</sup> these can be addressed in less draconian ways than by completely closing the proceedings to the public and press. For guidance in this regard, one has only to turn to the recent experience of the Yugoslavia War Crimes Tribunal, which has developed an innovative proceeding similar to a "mini" truth commission, known as a Rule 61 hearing. When the prosecution has been unable to secure the presence of the accused for a full blown trial, the Rule 61 hearing allows the prosecutor to present its case to the Tribunal in a public, televised proceeding.<sup>66</sup> To protect rape victims and other witnesses from possible danger, the Tribunal employs a variety of means such as expunging names and identifying information from public records, giving of testimony through image- and voice-altering devices or closed circuit television, and assigning pseudonyms.<sup>67</sup> The use of such protective measures would allow a truth commission both to protect witnesses and to avail itself of the benefits of a public proceeding.

### C. Victim Compensation

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the Torture Convention all recognize the right of victims of human rights abuses to receive compensation for their injury.<sup>68</sup> Compensable injuries include loss of life, physical or psychological injury, loss of liberty, loss of or damage to property, loss of opportunity, and other injuries

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64. Interview with Richard Goldstone, Chief Prosecutor of the Yugoslavia War Crimes Tribunal, in Brussels, Belgium (July 20, 1996) (on file with author).

65. See *supra* note 54 and accompanying text.

66. See *Rules of Procedure and Evidence of the Yugoslavia War Crimes Tribunal*, Rule 61, reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 66 (1995).

67. See *id.* Rule 75.

68. See Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 425, 448-49 (Louis Henkin & John Lawrence Hargrove eds., 1994); *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, United Nations Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, *Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990), reprinted in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 505, 515.

proximately caused by the abuses.<sup>69</sup> Compensation can either be monetary or in the form of non-monetary reparation such as provision of new employment, pension rights, medical and educational services, social security, and housing.<sup>70</sup> A truth commission can play an important role in the provision of such compensation.

The most obvious method of obtaining victim compensation is for the injured party, or their next of kin, to bring suit in the courts of the state involved. However, victims of human rights abuses often do not know the identity of those who perpetrated the abuses against them. Even when the identity of the persecutors is known, the victims frequently lack evidence of the persecutors' participation, as there are rarely written records of abuses and witnesses are generally reluctant to come forward. A truth commission could assist in the attainment of compensation through the judicial process by transmitting to the competent judicial authorities the commission's findings that a victim has suffered injury due to the acts of a specific individual or governmental entity. Yet, even with the findings of a truth commission, there are likely to be other obstacles to obtaining victim compensation through domestic courts: The individuals directly responsible frequently lack sufficient resources for adequate compensation; amnesties often extinguish the possibility of civil compensation;<sup>71</sup> and the limitations of national law often deprive victims of any cause of action.<sup>72</sup>

Some countries, such as the United States, have opened their courts to foreign citizens wishing to bring suit for human rights abuses committed in a foreign country. The Alien Tort Claims Act provides the U.S. courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"<sup>73</sup> and the recently enacted Torture Victim Protection Act provides a private right of action against "an individual who, under actual or apparent authority, or color of law, of any foreign nation,"

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69. Ellen L. Lutz, *After the Elections: Compensating Victims of Human Rights Abuses*, in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 551, 559.

70. Theo van Boven et al., *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Summary and Conclusions*, in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 500.

71. The week after the El Salvador Truth Commission report was published, the El Salvador legislature adopted an amnesty law that provided for the extinction of civil as well as criminal responsibility. See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 262, 283.

72. See Orentlicher, *supra* note 68, at 458.

73. 28 U.S.C. § 1350 (West 1993).



subjects another individual to "torture" or to "extrajudicial killing."<sup>74</sup> If hurdles such as Foreign Sovereign Immunity,<sup>75</sup> the Act of State Doctrine,<sup>76</sup> and the Political Question Doctrine<sup>77</sup> can be overcome, a plaintiff armed with the findings of an international truth commission that the defendant is responsible for the plaintiff's injuries is likely to achieve success on the merits.<sup>78</sup> Unfortunately, such suits ordinarily represent little more than symbolic justice, as few of the defendants would have assets in the United States that could be attached in execution of the judgment.<sup>79</sup>

Another scheme for victim compensation would involve the payment of compensation by the government, rather than by the individual perpetrators. When, as is usually the case, the offender is a government authority or a private person acting as the agent of a government, it should be the duty of the state itself to redress the injury.<sup>80</sup> Under the broad international law principles of state responsi-

74. *Id.*

75. Under the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1602.(1994), a foreign official or agent cannot be sued in the United States for tortious conduct abroad. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 433-39 (1989); *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1474 (1993).

76. Under the Act of State doctrine, a U.S. court will not question the validity of the official acts of a foreign government done within its own country. Compare *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (holding that unlawful detention by a foreign military commander was a nonreviewable act of state), with *Filartiga v. Peña-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (holding that unauthorized torture by a state official, in violation of the law of the foreign state, might not properly be characterized as an act of state), and *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544-45 (S.D.N.Y. 1984) (holding that the alleged unauthorized approval of a massacre by a general is not an act of state).

77. Under the political question doctrine, a U.S. court will not decide an issue where there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962). Compare *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1457 (S.D. Fla. 1990) (holding that suit against Contras for the wrongful death of U.S. citizen in Nicaragua presented a nonjusticiable political question), with *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990) (holding that determining liability for a terrorist act on a cruise ship in the Mediterranean Sea did not implicate the political question doctrine).

78. Cf. *Kadic v. Karadzic*, 70 F.3d 232, 250 n.10 (2d Cir. 1995) (noting that the defendant's acts are "being investigated by a United Nations Commission of Experts.").

79. See *Taking Tyrants to Court*, AM. LAW., Oct. 1991, at 56.

80. See Benjamin B. Ferencz, *Compensating Victims of the Crimes of War*, 12 VA. J. INT'L

bility, the state is also responsible for failing to prevent or respond adequately to human rights violations in its territory committed by purely private parties or agents of a foreign government.<sup>81</sup> In accordance with the "principle of the continuity of the State in international law," the duty of the state to pay compensation applies even to a new government that has replaced the government responsible for the abuses.<sup>82</sup> Recognizing this principle, after World War II the Federal Republic of Germany provided individual compensation amounting to over \$10 billion to over three million victims of Nazi persecution.<sup>83</sup> More recently, Albania,<sup>84</sup> Bulgaria,<sup>85</sup> Czechoslovakia,<sup>86</sup> and Russia<sup>87</sup> have enacted laws providing compensation and other relief to the victims of political repression under their former totalitarian governments.

Unfortunately, very few other states have ever voluntarily agreed to pay compensation to the victims of a prior regime.<sup>88</sup> There is precedent, however, for an outside entity to compel a government to pay victim compensation. For example, the European Court of Human Rights has ordered governments to pay compensation to victims of

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L. 343, 344 (1972); *Organization of American States, Inter-American Court of Human Rights: Valasquez Rodriguez Case*, Judgment of July 29, 1988, Series C No. 4, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 586, 588.

81. See *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, United Nations Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1990/10, July 26, 1990, reprinted in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 505, 518.

82. *Organization of American States, Inter-American Court of Human Rights: Valasquez Rodriguez Case*, *supra* note 80, at 586, 590. In the Valasquez Rodriguez case, the Inter-American Court of Human Rights held the new Honduran government responsible for compensating the victims of human rights abuses perpetrated by the prior regime. See *id.*

83. See Ferencz, *supra* note 80, at 353; Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U. L. REV. 479, 489-520 (1972).

84. Albania: Law on Former Victims of Persecution, Law No. 7748, July 29, 1993, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 661-66.

85. Bulgaria: Law on Political and Civil Rehabilitation of Oppressed Persons, June 15, 1991, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 672-74.

86. Czech and Slovak Federal Republic: Law on Extrajudicial Rehabilitation, February 21, 1991, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 704-17.

87. Law on Rehabilitation of Victims of Political Repression, October 18, 1991, as amended December 17, 1992, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 797-805.

88. By way of direct contrast to the German experience, one might look to the Japanese treatment of the so-called "comfort women." In August 1993, the Japanese government formally acknowledged that during World War II the Imperial Army forced thousands of women, most of whom were Korean, into sexual slavery. Japan has not taken any steps to provide compensation to these victims or their families. See Orentlicher, *supra* note 68, at 458-59.

violations in well over one hundred cases.<sup>89</sup> A few of the established domestic truth commissions have put pressure on the national government to provide appropriate victim compensation. For example, the Chile Commission for Truth and Reconciliation recommended that the government award victims various social benefits, such as health care (both physical and psychological), and financial support for the education of children of persons killed or missing.<sup>90</sup> The El Salvador truth commission concluded that "justice does not stop at punishment; it also demands reparation. The victims and, in most cases, their families, are entitled to moral and material compensation."<sup>91</sup> Its report called for a special fund to be established for this purpose, to be funded by the government, and urged foreign governments to allocate one percent of their aid to El Salvador to the fund as well.<sup>92</sup>

In recommending foreign contributions, the El Salvador commission recognized a limitation to the approach of direct government compensation. After an internal or international conflict, depleted national resources often render significant financial compensation by a state responsible for massive violations an unlikely prospect. Sometimes, the authorities of the prior regime have spirited away large portions of the government's assets to secret bank accounts abroad.<sup>93</sup> Yet neither of these would be an insurmountable problem if the Security Council were to freeze the assets of the target country's government or of the members of the responsible regime.<sup>94</sup> For example, on August 2, 1991, the Security Council established a compensation commission to create a fund and oversee the payment of compensation for claims against Iraq "for any direct loss, damage, including environmental damage and the depletion of natural resources, or any injury to foreign

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89. *See id.* at 454.

90. *See id.* at 457. Thereafter, the Chilean Parliament enacted the Law Creating the National Corporation for Reparation and Reconciliation, Law No. 19, 123 (January 31, 1992), reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 685-95, to implement the recommendations contained in the Chile Truth Commission Report.

91. *El Salvador: Report of the Commission on Truth*, reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 11, at 177, 213.

92. *See id.*

93. *See, e.g., In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (effort by Philippine government to lay legal claim to millions of dollars worth of foreign assets and accounts controlled by former President).

94. *See, e.g.,* S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993) (freezing assets of the Haitian military regime and its principal supporters); S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg., U.N. Doc. S/RES/820 (1993) (freezing assets of Serbia-Montenegro); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., U.N. Doc. S/INF/46 (1990) (freezing assets of Iraq).

Governments' nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."<sup>95</sup>

A victim compensation fund from frozen assets was contemplated for the Yugoslavia War Crimes Tribunal. Although the statute of the Tribunal does not give it the power to award victim compensation, a clause was included in Security Council Resolution 827 (which approved the statute of the Tribunal), declaring that the creation of the Tribunal was without prejudice to the future establishment of a victim compensation program.<sup>96</sup> However, the Security Council later unfroze the assets of Serbia and the Bosnian Serbs,<sup>97</sup> thereby ending any possibility of such a program for the victims of ethnic cleansing in the Balkans.

Considering these experiences, this Article proposes a three-tiered compensation scheme for the permanent international truth commission. In the first tier, the commission would transmit to the competent authorities of the state(s) concerned its findings that a victim has suffered injury because of the acts of a specific individual or governmental entity.<sup>98</sup> Pursuant to relevant national legislation, a victim or persons claiming through him or her may bring an action in a national court or other competent body to obtain compensation.<sup>99</sup> The second tier would involve the establishment of a victim's compensation fund for each situation under the commission's jurisdiction. Resources for the fund would be supplied by the government of the state in whose territory the violations were committed and by foreign governments, who would be urged to allocate a small percentage of their aid to that state for the victim compensation fund.<sup>100</sup> The third tier would be available in cases in which the assets of the responsible authorities have been frozen in accordance with a Security Council Resolution under Chapter VII of the United Nations Charter.<sup>101</sup> In those cases, states would

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95. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶ 18, U.N. Doc. S/RES/687 (1991). The Iraqi Compensation Commission has received over 2,335,000 claims submitted by 78 governments on behalf of their citizens. *Letter Dated 17 January 1994 From the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/107 (1994); see also John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility?*, 87 AM. J. INT'L L. 144 (1993).

96. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

97. See S.C. Res. 1074, U.N. SCOR, 50th Sess., 3700th mtg., U.N. Doc. A/RES/1074 (1995).

98. See Appendix, *infra*, art. 21, para. 2.

99. See *id.* art. 21, para. 3.

100. See *id.* art. 21, para. 2.

101. See *supra* note 94.

be authorized to release such frozen assets to the victim compensation fund. The frozen assets could also be released pursuant to domestic judicial awards for damages in favor of the victims of abuses against the responsible authorities.<sup>102</sup>

#### D. Imposition of Sanctions

While the very publicity of the truth about an individual's responsibility for human rights crimes exposes the perpetrator to public ignominy and is therefore a form of punishment, the imposition of administrative sanctions can have additional deterrent effects over both the whole of society and the individual subject to the penalty. Those violators who hold political positions could be impeached or publicly censured, and those with administrative authority, such as judges, civil servants, soldiers, and police, could be removed, demoted, censured, or lose their pension rights or other benefits.<sup>103</sup> As has been recognized in the context of the conflict in Bosnia, the barring of perpetrators of human rights crimes from holding influential public positions is an important part of the transition from a repressive regime to democracy.<sup>104</sup>

The idea of barring perpetrators from office was the rationale behind the recommendations of the El Salvador truth commission calling for the dismissal from the armed forces of those active military officers who had committed or covered up serious acts of violence. The commission also called for the dismissal of those civilian government officials and members of the judiciary who committed or covered up serious acts of violence or failed to investigate them, and recommended that legislation be adopted barring all individuals found by the Commission to have been implicated in serious acts of violence from holding any public office for at least ten years.<sup>105</sup>

It is critical that such sanctions not be implemented in a way that imposes collective guilt by association. The so-called lustration laws in Germany and the Czech Republic<sup>106</sup> have been criticized because they

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102. See Appendix, *infra*, art. 21, para. 5.

103. See *Set of Principles for the Protection and Promotion of Human Rights*, *supra* note 58, at 21-22.

104. See *Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. Doc. A/50/790, S/1995/999 (1995), at 4 (General Framework Agreement for Peace in Bosnia and Herzegovina), 63 (Constitution of Bosnia and Herzegovina).

105. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 536 (1994).

106. "Lustration is the disqualification and, where in office, the removal of certain categories of office-holders under the prior regime from certain private or public offices under the

purge people based on party membership or official position without evidence of any individual wrongdoing or responsibility for ordering, perpetrating, or significantly aiding in perpetrating serious human rights abuses.<sup>107</sup> Procedural fairness and due process are especially important when collective guilt is imposed. Such a determination should be made on the basis of a more stringent standard, such as clear and convincing evidence, rather than preponderance of the evidence, the lesser standard used for awarding compensation.

Moreover, lustration and other non-criminal penalties are not possible unless the government in question has agreed in advance to implement the sanctions recommended by a truth commission, as El Salvador had done.<sup>108</sup> By virtue of ratifying the treaty establishing the permanent truth commission, parties would make such a pledge, and nonparties could agree to cooperate with the truth commission on an ad hoc basis. Thus, in the context of a negotiated end to a civil or international conflict, it is important that international mediators press parties to agree to cooperate fully with a truth commission as part of the settlement. International verification of compliance with the accord should include an assessment of the degree to which the parties have implemented the recommendations of the truth commission. Further, in a case referred to the permanent truth commission by the United Nations Security Council, all states would be required to implement the commission's prescriptions by virtue of their obligation under Chapter VII of the U.N. Charter.<sup>109</sup> In this way, international pressure can substitute for political will in assuring that the recommendations of a truth commission are fully carried out.

This does not mean, however, that there is no value to a truth commission established in the absence of such a commitment from the

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new regime." Herman Schwartz, *Lustration in Eastern Europe*, in 1 TRANSITIONAL JUSTICE 461, 461 (N. Kritz ed., 1995).

107. See *id.* at 464.

108. The parties to the El Salvador Peace Accords—the government and the FMLN—agreed to be bound by the recommendations of the Truth commission. See Thomas Buergenthal, *The United Nations Truth Commission Truth Commission in El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 533 (1994). The commission called for the dismissal from the Armed Forces of those active military officers who had committed serious acts of violence and dismissal from the government and judiciary of those persons who committed or cover up serious acts of violence or failed to investigate them. See *id.* at 536.

109. Article 2(6) and Article 25 of the U.N. Charter establish the respective obligations of non-Member and Member States to comply with Security Council decisions made under Chapter VII of the Charter. The obligation to comply with the prescriptions of the truth commission in a case referred to the commission by the Security Council would be analogous to the obligation of states to comply with the orders of the International Tribunals for the former Yugoslavia and Rwanda.

government in question or action by the Security Council. Indeed, a government's response can range from active opposition to total support of the work of a truth commission, with most cases falling somewhere in between. For example, a government might consent to allow the truth commission to conduct interviews in-country, but refuse to release government documents or provide other active assistance. Under such circumstances, the truth commission might still be able to establish a record of victims and perpetrators of abuses. But pressure from foreign governments and international organizations is needed to obtain more ambitious results.

### E. The Granting of Amnesty

Truth commissions have all too frequently been viewed as an alternative to prosecutions because many have been accompanied by grants of amnesty to the major perpetrators of human rights crimes. For example, the same day that the Haitian parliament established a seven-member truth commission to investigate and document the human rights crimes committed in Haiti during Aristide's exile, it enacted an amnesty for the members of the military regime responsible for these abuses.<sup>110</sup> Following the publication of the El Salvador truth commission's report, El Salvador's government enacted an amnesty preventing the prosecution of those named in the report.<sup>111</sup> Similarly, the South African truth commission itself is empowered to grant amnesty as an inducement for the giving of testimony before the commission.<sup>112</sup>

Viewing truth commissions as a substitute for prosecutions causes two problems. First, in some situations, the granting of amnesty may be in violation of international legal instruments such as the 1949 Geneva Conventions,<sup>113</sup> the Genocide Convention,<sup>114</sup> the Torture Conven-

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110. See Scharf, *supra* note 18, at 18.

111. The week after the El Salvador truth commission report was published, the El Salvador legislature adopted an amnesty law that provided for the extinction of civil as well as criminal responsibility. See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 TRANSITIONAL JUSTICE 262, 283 (N. Kritz ed., 1995).

112. Victims's Families Demand End to Amnesty for Human Rights Abusers, Agence France-Presse, May 30, 1996, at 1, available in LEXIS, News Library, CURNWS File. The South African scheme avoids some of the problems associated with a general amnesty by (1) requiring that amnesty be applied for on an individual basis; (2) requiring applicants to make full disclosure of their human rights violations in a public proceeding; and (3) providing amnesty only for acts associated with a political objective and not for personal gain or out of personal malice. Remarks of Alexander Boraine, *supra* note 56.

113. Parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of "grave breaches" of the Geneva Conventions unless they choose to hand

tion,<sup>115</sup> and, in the case of South Africa, the Apartheid Convention,<sup>116</sup> which contain an absolute obligation to prosecute the crimes enumerated therein.<sup>117</sup> In addition, a blanket amnesty may violate general human rights conventions such as the International Covenant on Civil and Political Rights,<sup>118</sup> the European Convention on Human Rights,<sup>119</sup> and the American Convention on Human Rights,<sup>120</sup> which obligate states to "ensure" or "secure" the rights enumerated therein.<sup>121</sup> As Article 27 of the Vienna Convention on the Law of Treaties provides, "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."<sup>122</sup> Second, even when amnesties do not run afoul of these treaties,<sup>123</sup> the creation of impunity through an am-

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over such persons for trial by another state party. See The Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 51, 6 U.S.T. 3114, 3148, 75 U.N.T.S. 31, 64; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, art. 52, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116; The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 131, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135, 238; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 148, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388.

114. Article 4 of the Genocide Convention states: "Persons committing genocide or any of the acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Article 5 requires states to "provide effective penalties" for persons guilty of genocide. Genocide Convention, *supra* note 41, at 280.

115. The Torture Convention requires each state party to ensure that all acts of torture are offenses under its internal law, establish its jurisdiction over such offenses in cases where the alleged offender is a national of the state, and if such a state does not extradite the alleged offender, submit the case to its competent authorities for the purpose of prosecution. See Torture Convention, *supra* note 46.

116. The International Convention on the Suppression and Punishment of the Crime of Apartheid, which entered into force in July 1978 and to which 99 states were party on December 31, 1993, obligates states party to prosecute the crime defined therein. See Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 7 (1994). Although South Africa is not a party, Nelson Mandela's African National Conference was one of the driving forces behind the creation of the Apartheid Convention and it is therefore morally, if not legally, committed to honor its mandate.

117. See Scharf, *supra* note 18, at 1-42.

118. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

119. European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222, Europ. T.S. No. 5.

120. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

121. See Scharf, *supra* note 18, at 25-28.

122. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 55 (1995).

123. For example, the obligation to prosecute under the Geneva Conventions applies only to acts committed in international armed conflict, not to acts committed in a civil war. The obligation to prosecute the crime of genocide applies only to persecution of ethnic, national, racial, or religious groups, not to acts directed against political opponents. See *supra* notes 113,



nesty can have the effect of encouraging future violations of the law. The granting of such impunity erodes the rule of law by blurring the norms of right and wrong and encourages the victims to resort to vigilante justice; and, most worrisome of all, an amnesty that has the imprimatur of the international community encourages a repetition of similar abuses by perpetrators throughout the world.

While the deterrent value of prosecutions of international crimes may be subject to debate,<sup>124</sup> the granting of amnesty has been shown empirically to foment future abuses. For example, history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity.<sup>125</sup> Similarly, the U.N. Human Rights Commission has concluded that the granting of amnesties is one of the main reasons for the continuation of grave violations of human rights throughout the world.<sup>126</sup> Recent fact-finding reports from Chile and El Salvador lend support to this conclusion.<sup>127</sup> The evidence strongly suggests that the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein, and Mohammed Aidid, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes.<sup>128</sup>

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114.

124. Those who commit crimes under emotional stress (such as murder in the heat of anger) or who have become expert criminals (such as professional safebreakers and pickpockets) are less likely than others to be deterred by the threat of criminal punishment. See J. ANDENAES, *PUNISHMENT AND DETERRENCE* 45-46 (1974). Grant Niemann, one of the prosecutors of the Yugoslavia War Crimes Tribunal, told this author in an interview, "deterrence has a better chance of working with these kinds of crimes [war crimes, genocide, crimes against humanity] than it does with ordinary domestic crimes because the people who commit these acts are not hardened criminals; they're politicians or leaders of the community that have up until now been law abiding people." Interview with Grant Niemann, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, in The Hague, Netherlands (July 25, 1996) (on file with author).

125. Indeed, in a speech to his Commanding Generals, Hitler dismissed concerns about accountability for acts of aggression and genocide by stating, "Who after all is today speaking about the destruction of the Armenians?" Adolf Hitler, Speech to Chief Commanders and Commanding Generals, Aug. 22, 1939, *quoted in* BASSIOUNI, *supra* note 43, at 176 n.96.

126. See *United Nations Commission on Human Rights: Report on the Consequences of Impunity*, U.N. Doc. E/CN.4/1990/13, *reprinted in* 3 *TRANSNATIONAL JUSTICE*, *supra* note 11, at 19.

127. See Scharf, *supra* note 18, at 12 n.81.

128. Interview with Richard Goldstone, Chief Prosecutor, International Criminal Tribunal for the Former Yugoslavia, in Brussels, Belgium (July 20, 1996) (on file with author).

Rather than condoning or endorsing such amnesties as a short-term solution to international or internal conflicts, a more appropriate response would parallel official U.S. policy with respect to terrorism, which prohibits the government from "making concessions of any kind to terrorists" on the ground that "such actions would only lead to more terrorism."<sup>129</sup> Thus, the preamble of the proposed statute for a permanent international truth commission emphasizes that the commission is intended to be complementary to national and international prosecutions, not a substitute for them.<sup>130</sup>

This is not to suggest that a country should rush ahead with prosecutions at the cost of political instability and social upheaval or that every single perpetrator must be brought to justice—an admittedly impossible task in most countries that have experienced widespread human rights abuses.<sup>131</sup> By documenting abuses and preserving evidence, a truth commission can enable a country to delay prosecutions until the international community has acted, or the new government is secure enough to take such action against members of the former regime.<sup>132</sup>

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129. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988 at iii (1989). It is sometimes argued that leaders responsible for grave human rights crimes are "madmen," infected by ethnic-nationalism and xenophobia, and as such, are unlikely to be deterred by the threat of criminal sanctions. There seems to be a close parallel between such individuals and terrorists, who are often willing to die for their cause. And yet, based on the advice of leading experts in the fields of psychology, sociology, and psychiatry, the United States Government has concluded that the best way to deal with terrorists is to subject them to criminal prosecution. As Attorney-Adviser for Law Enforcement and Intelligence and Counsel to the Counter-Terrorism Bureau at the U.S. Department of State, this author participated in the formulation of this policy.

130. See Appendix, *infra*, pmbl.

131. In Rwanda, for example, it is estimated that hundreds of thousands of Rwandans participated in the genocide of the Tutsis in 1994. See Gerald Gahima, *Rwanda: The Challenge of Justice in the Aftermath of Genocide*, (unpublished paper) (on file with author). For a discussion of the atrocities that took place in Rwanda, see Madeline Morris, *Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997).

132. In the case of Rwanda, prior to the decision to establish an international criminal tribunal, "a special investigations unit [under the auspices of the U.N. High Commissioner for Human Rights] was established to gather evidence that might otherwise have been lost or destroyed, to be turned over to the Prosecutor, if and when an international criminal court was brought into existence." *Report of the U.N. High Commissioner for Human Rights on the Activities of the Human Rights Field Operation in Rwanda*, U.N. Doc. W/CN.4/1996/111, April 2, 1996, at para. 15. This investigative body, similar to a truth commission, took pains to ensure that the evidence it gathered could be used at trial. According to the Report of the High Commissioner for Human Rights, this investigatory unit

carried out special investigations into acts of genocide, including a comprehensive survey by forensic experts of massacre and mass grave sites, interviews of surviving victims and witnesses and collection and preservation of documentary and other tangible evidence . . . . While this work did not involve investigations for the direct purpose of prosecutions, it nevertheless required the highest standards of confidentiality

International law recognizes the legitimacy of prosecutorial discretion, both in terms of the selection of defendants and the timing of prosecutions, so long as the selection criteria are not arbitrary.<sup>133</sup> Through eventual "exemplary" prosecutions, especially of the most culpable perpetrators and the leaders responsible for planning or supervising their abuses, together with the publication of a comprehensive truth commission report, authorities can educate the population about what the law is, deter future violations, and ensure a sense of justice for the victims.

#### IV. CONCLUSION

After an international conflict or civil war in which grave human rights abuses have been committed, the truth must be told before there can be a successful reconciliation. Unfortunately, past truth commissions, with their secret and one-sided deliberations, have not been able to produce as authoritative a record as can be generated in a public trial. Criminal prosecutions, however, which by their nature focus on individual liability, also fail to tell the whole story of abuses. The establishment of a permanent truth commission employing fair and open procedures would be able to create the authoritative and comprehensive account of atrocities which is a necessary prerequisite for the healing process to begin.

The establishment of a permanent international truth commission would have many advantages over the current ad hoc approach. By virtue of its international structure, it would be seen as more impartial and independent than nationally created commissions. As a permanent commission it would have greater resources, and could move much more rapidly than its temporary counterparts. Moreover, because of the continuing involvement of the international community, there would be a greater likelihood that its recommendations would be given serious consideration by national authorities.

Truth commissions are most useful when they are an adjunct or a precursor to, rather than a substitute for, prosecutions. To that end, a

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and integrity of evidence-gathering because of its potential probative value before a court of law.

*Id.* at para. 16.

133. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, in 1 TRANSITIONAL JUSTICE, *supra* note 3, at 408-09 (noting that appropriate selection criteria might, for example, reflect distinctions based upon degrees of culpability); see also Press Statement by Justice Richard Goldstone, Chief Prosecutor, International Criminal Tribunal for the Former Yugoslavia, in Conjunction with the Announcement of Indictments (July 25, 1995) (describing strategy of targeting top leaders for prosecution).

truth commission must be careful not to interfere with on-going domestic or international criminal investigations or prosecutions. In this regard, Cherif Bassiouni, former Chairman of the Yugoslavia War Crimes Commission, has suggested that "instead of creating an institution separate from a permanent international criminal court, why not establish a truth commission as an agency of the Court?"<sup>134</sup> After the Yugoslavia War Crimes Tribunal had been established, Bassiouni had similarly proposed that the Commission be "folded into the Tribunal."<sup>135</sup>

While the Yugoslavia War Crimes Commission was terminated when the Tribunal's Office of Prosecutor was established,<sup>136</sup> there is precedent for imbuing a prosecutor with the additional functions of a truth commission. Consider, for example, the statutory mandate given to Lawrence Walsh, Independent Prosecutor for the Iran/Contra investigation.<sup>137</sup> Walsh was responsible for the investigation of the conspiracy among high-ranking Reagan Administration officials to divert the proceeds from the sale of U.S. arms to Iran to the Nicaragua Contras in violation of U.S. law. His three volume, 2,500 page report provided a comprehensive "account of the Independent Counsel's investigation, the prosecutions, the basis for decisions not to prosecute, and overall observations and conclusions on the Iran/contra matters."<sup>138</sup> Similarly, the Office of the Special Prosecutor for Ethiopia established in 1992 was given the mandate to create a publicly available computerized "historical record of the documentable abuses of the Mengistu regime" in addition to prosecuting individual cases.<sup>139</sup> Although the statute appended to this Article envisages a stand-alone commission, its provisions for jurisdiction, functions and powers, victim compensation, and

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134. Interview with M. Cherif Bassiouni, former Chairman of the Yugoslavia War Crimes Commission, in Brussels, Belgium (July 19, 1996) (on file with author).

135. Iain Guest, *On Trial: The United Nations, War Crimes, and the Former Yugoslavia* 90 (Sept. 1995) (unpublished report of the Refugee Policy Group) (on file with author).

136. *See id.*

137. The Ethics in Government Act of 1978, Pub. L. No. 95-521, § 595(b)(2), 92 Stat. 1824 (codified at 28 U.S.C. § 595(a)(2) (1994)) "establishes a stand-by mechanism for the appointment of a temporary special prosecutor when needed." S. REP. NO. 95-170, at 1 (1978). Its purpose is "to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government." *See id.*

138. LAWRENCE E. WALSH, 1 *FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS* xvi (United States Ct. of App. for the Dist. of Columbia Cir., Aug. 4, 1993).

139. *See Ethiopia: Report of the Office of Special Prosecutor*, reprinted in 3 *TRANSITIONAL JUSTICE*, *supra* note 11, at 559, 574.

penalties could easily be adapted and incorporated into the statute for a permanent international criminal court or of an ad hoc tribunal.

Unfortunately, we are likely in the years ahead to see many more civil wars and international conflicts marked by grave human rights abuses.<sup>140</sup> To paraphrase George Santayana, history's mistakes are bound to be repeated unless the international community can ensure through the development of a credible record that States learn the lessons of the past.<sup>141</sup> The creation of a permanent international criminal court and a permanent truth commission could be the twin pillars of establishing such a record that can endure the test of time and the challenge of revisionism.

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140. See generally DANIEL PATRICK MOYNIHAN, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* (1993).

141. See GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 316 (1953).

## APPENDIX

### DRAFT STATUTE FOR A PERMANENT INTERNATIONAL COMMISSION OF INQUIRY

*The States parties to this Statute,*

*Recognizing* the need in the aftermath of international and internal conflicts for an impartial, fair, and authoritative record of grave human rights crimes and serious violations of international humanitarian law;

*Desiring* to establish a permanent international mechanism for achieving such a record as situations arise;

*Emphasizing* that such a mechanism is intended to be complementary to national and international prosecutions, not a substitute for them;

*Have agreed as follows:*

#### PART 1. ESTABLISHMENT OF THE COMMISSION OF INQUIRY

##### *Article 1*

##### *The Commission*

There is established an International Commission of Inquiry ("the Commission"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

##### *Article 2*

##### *Relationship of the Commission to the United Nations*

The Chairperson of the Commission, with the approval of the States parties to this Statute, may conclude an agreement establishing an appropriate relationship between the Commission and the United Nations.

##### *Article 3*

##### *Seat of the Commission*

1. The seat of the Commission shall be established at \_\_\_\_\_.
2. The Chairperson, with the approval of the States parties to this Statute, may conclude an agreement with the host State establishing the relationship between that State and the Commission.

3. The Commission may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

#### *Article 4*

##### *Status and Legal Capacity*

1. The Commission is a permanent institution open to States parties to this Statute in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Commission shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

### PART 2. COMPOSITION AND ADMINISTRATION OF THE COMMISSION

#### *Article 5*

##### *Composition of the Commission*

1. The Commission shall consist of five members, including a Chairperson and a Vice Chairperson as provided in article 8.

2. The States parties to this Statute may temporarily or permanently increase the number of Commissioners by two-thirds vote if warranted by the Commission's workload.

3. The Commission shall appoint an administrative staff commensurate with its workload, including lawyers, analysts, interpreters, secretaries, security personnel, and investigators.

#### *Article 6*

##### *Election of Commissioners*

1. Each State party may nominate for election not more than two persons, of different nationality, who are willing to serve as may be required on the Commission.

2. The Commissioners shall be elected by an absolute majority vote of the States parties by secret ballot.

3. No two Commissioners may be nationals of the same State.

4. Commissioners hold office for a term of five years and, subject to paragraphs 5 and 6 of this Article, are not eligible for re-election. A Commissioner shall, however, continue in office in order to complete the investigation of any situation which has commenced before the expiration of his/her term.

5. At the first election, one Commissioner chosen by lot shall serve

for a term of one year and be eligible for re-election; two Commissioners chosen by lot shall serve for a term of three years and are eligible for re-election; and the remainder shall serve for a term of five years.

6. In the event of a vacancy, a replacement Commissioner shall be elected in accordance with article 6 to fill the remainder of the predecessor's term, and shall be eligible for re-election.

### *Article 7*

#### *Officers of the Commission*

1. The Chairperson and the Vice-Chairperson shall be elected by an absolute majority of the Commissioners. They shall hold office until the end of their terms as Commissioners.

2. The Vice-Chairperson may act in place of the Chairperson as appropriate.

3. The Chairperson shall be responsible for:

- (a) preparing the Commission's annual budget and supplemental budgets for the investigation of each situation referred to it, to be approved by the States parties to this Statute or the United Nations in accordance with article 12 of the Statute;
- (b) hiring and firing of the Commission's staff;
- (c) the due administration of the Commission; and
- (d) the other functions conferred on it by this Statute.

### *Article 8*

#### *Independence of the Commissioners*

1. In performing their functions, the Commissioners shall be independent.

2. Commissioners shall not engage in any activity or hold any official position which is likely to interfere with their functions as a Commissioner or to affect confidence in their independence.

3. Any question as to the application of paragraph 2 shall be decided by the Chairperson, or by the Vice-Chairperson if it concerns the Chairperson.

### *Article 9*

#### *Excusing and Disqualification of Commissioners*

1. For good cause, the Chairperson at the request of a Commissioner may excuse that Commissioner from participating in a particular investigation undertaken by the Commission.

2. Commissioners may not participate in the investigation of any



situation in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent, or potential conflict of interest.

3. Any question as to the disqualification of a Commissioner shall be decided by an absolute majority of the members of the Commission.

#### *Article 10*

##### *Loss of Office*

1. A Commissioner who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot by a majority of the Commissioners.

#### *Article 11*

##### *Privileges and Immunities*

1. The Commissioners and the staff of the Commission shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. Counsel, experts and witnesses called before the Commission shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

#### *Article 12*

##### *Allowances and Expenses*

1. The members of the Commission and its staff shall be paid a salary on an as when actually employed basis in accordance with the schedule annexed to this Statute. [The schedule is not included in this Appendix.]

2. The salaries of the Commissioners and their staff and other expenses of the Commission shall be borne by the parties to this Statute in accordance with the annexed schedule or, in any case referred to the Commission by the Security Council, by the United Nations.

3. The Commission is authorized to accept voluntary contributions from interested States, including funds, materials, and personnel.

### *Article 13*

#### *Working Languages*

The working languages of the Commission shall be English and the language of the State which is the subject of an investigation.

### *Article 14*

#### *Rules of the Commission*

1. The Commission may by an absolute majority make rules for the functioning of the Commission, the conduct of investigations, and any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Commission shall be drafted by the Commissioners within six months of the first elections for the Commission, and be submitted to a conference of States parties for approval. Subsequently, additional Rules or amendments to the Rules shall be transmitted to States parties to this Statute and are considered to be approved unless, within six months after transmission, a majority of the States parties have communicated in writing their objections. A proposed rule will apply provisionally pending the expiration of the six-month period.

## PART 3. JURISDICTION OF THE COMMISSION

### *Article 15*

#### *Situations Within the Jurisdiction of the Commission*

The Commission has jurisdiction in accordance with this Statute with respect to situations involving the following international crimes:

- (a) the crime of genocide;
- (b) serious violations of the laws and customs applicable in international and internal armed conflict; and
- (c) crimes against humanity, including enforced disappearances, extra-legal executions and acts of torture.

### *Article 16*

#### *Preconditions for the Exercise of Jurisdiction*

1. The Commission shall exercise its jurisdiction over a situation with respect to a crime mentioned in article 15 if the situation is referred to it by the United Nations Security Council, or a majority vote of States parties to this Statute.

2. In referring a situation, the relevant entity shall designate the dates and geographic location which are to be the subject of the investigation.

## PART 4. FUNCTIONS AND POWERS OF THE COMMISSION

*Article 17**Functions*

1. The Commission shall have the task of undertaking investigations, making determinations, and issuing recommendations, with respect to situations within its jurisdiction in accordance with articles 15 and 16.

2. The Commission's proceedings shall be held in public and open to the media, except as required for the protection of victims and witnesses or confidential information.

3. The Commission shall present its findings and recommendations in a final report in English and the official language of the country in question, which shall:

(a) be submitted within one year of the conferral of jurisdiction over a situation, unless extraordinary circumstances make a longer period necessary;

(b) be adopted unanimously if possible, otherwise by a majority of its Members;

(c) include an analysis of the nature and extent of violations, how they were planned and executed, the fate of individual victims, and on the basis of clear and convincing evidence the names of persons primarily responsible for violations;

(d) include recommendations as to individual victim compensation;

(e) include recommendations as to appropriate non-criminal penalties for perpetrators including partial or complete forfeiture of government pensions and temporary or permanent bans from military or public office;

(f) include recommendations as to steps that will help avoid a repeat of such atrocities in the future; and

(g) be transmitted to the authorities in the relevant State, the media, as well as to the Secretary-General of the United Nations, who shall take steps to ensure its widespread public dissemination.

4. The Commission may, at its discretion, bring individual cases to the attention of relevant national or international judicial authorities.

5. The Commission will endeavor to conduct its investigations so as not to interfere with ongoing domestic or international criminal investigations and/or prosecutions.

### *Article 18*

#### *Powers*

For the purposes of the investigation, the Commission shall have the power to:

- (a) gather, by the means it deems appropriate, any information or evidence it considers relevant to its mandate.
- (b) interview any individuals, groups or members of organizations or institutions.
- (c) hear testimony of victims, witnesses, and other relevant parties.
- (d) employ measures for the protection of victims and witnesses, including such means as
  - (i) expunging names and identifying information from the Commission's Report;
  - (ii) giving of testimony through image- and voice-altering devices or closed circuit television; and
  - (iii) assignment of a pseudonym; and
- (e) carry out any other measures or inquiries which it considers useful to the performance of its mandate, including requesting reports, records, and documents from the relevant State authorities or making on-site inspections.

### *Article 19*

#### *Rights of Persons Adversely Affected*

A person who in the opinion of the Commission is likely to be adversely affected by the evidence given before the Commission shall receive an opportunity to be heard in person or through a representative and to cross-examine the person giving such evidence.

## PART 5. OBLIGATIONS OF STATES

### *Article 20*

#### *Cooperation*

1. The States parties undertake to extend the Commission whatever cooperation it requests of them in order to gain access to sources of information available to them.

2. In any case referred to the Commission by the United Nations Security Council, all States are obligated to extend the Commission whatever cooperation it requests of them in order to gain access to sources of information available to them.

*Article 21**Victim Compensation*

1. The victims of the human rights abuses within the jurisdiction of the Commission are entitled to compensation for loss of life, physical or psychological injury, loss of liberty, loss or damage to property, loss of opportunity, and other injuries proximately caused by the abuses.

2. The Commission shall transmit to the competent authorities of the State(s) concerned its findings that a victim has suffered injury due to the acts of a specific individual or governmental entity.

3. Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

4. A fund shall be established for the compensation of victims, which will be given resources by the government of the State involved in the violations and by foreign governments, who are urged to allocate \_\_\_\_\_ percent of their aid to that State for the victim compensation fund.

5. When the assets of responsible authorities have been frozen in accordance with a Security Council Resolution under Chapter VII of the United Nations Charter, States may release such frozen assets to the victim compensation fund. Such frozen assets may also be released pursuant to judicial awards for damages in favor of the victims of abuses against the responsible authorities.

*Article 22**Penalties*

1. The State parties undertake to carry out the Commission's recommendations for non-criminal penalties of persons found responsible for violations of the crimes within the Commission's jurisdiction.

2. In any case referred to the Commission by the United Nations Security Council, all States are obligated to carry out the Commission's recommendations for non-criminal penalties of persons found responsible for violations of the crimes within the Commission's jurisdiction.