

**COMPARATIVE  
COUNTRY STUDIES  
REGARDING TRUTH,  
JUSTICE, AND  
REPARATIONS FOR  
GROSS HUMAN  
RIGHTS VIOLATIONS**

**BRAZIL, CHILE, AND GUATEMALA**

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# INTRODUCTION

This paper examines transitional justice initiatives undertaken in Brazil, Chile, and Guatemala to address the widespread human rights abuses perpetrated during the military dictatorships of the 1960s, 1970s and 1980s in those countries. The research presented here aims to inform the Armed Conflict Resolution and People's Rights Project (ACRes) in formulating proposals to redress human rights violations committed in areas that have experienced internal armed conflict or mass social unrest in India. The three countries considered in this paper serve as appropriate comparative cases as they share important features with the Indian context. In particular, Brazil and Chile enjoy similar levels of economic development as India. And, although by some measures Guatemala has not achieved a level of economic development comparable to India,<sup>1</sup> the persecution of ethnic groups and the gendered dimensions of the violence in Guatemala offer relevant points of comparison between the two countries. Importantly, all three Latin American countries share with India a history of state-sponsored torture and enforced disappearances perpetrated against suspected political opponents. Most importantly, the expenditures made on reparations in these three countries suggest the potential for India to undertake similar measures. Finally, this paper is best considered in conjunction with its companion piece addressing the international law on the right to remedy for enforced disappearances and its application in India.<sup>2</sup>

This paper is organized into five additional sections. The next section provides a succinct overview of the right to remedy in international law. The third section presents the three country case studies. Each case study addresses four primary

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<sup>1</sup> Guatemala (\$50.54b GDP) is not part of the BRIC countries and has a lower GDP than Chile (\$268.2b GDP) and Brazil (\$2.253t GDP). However, the World Bank categorizes both Guatemala and India (\$1.8t GDP) as "lower middle income" countries, while Brazil is categorized as an "upper middle income" country and Chile as a "high income OECD" country. See e.g., GDP Data, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

<sup>2</sup> *The Right to a Remedy for Enforced Disappearances in India: A Legal Analysis of International and Domestic Law Relating to Victims of Enforced Disappearances* (Int'l Human Rights Law Clinic, Working Paper No. 2, 2014), available at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-1-India-Right-to-a-Remedy-151027.pdf>.

dimensions: 1) an overview of the history of conflict that led to the development of a reparations scheme; 2) a description of the truth seeking mechanisms implemented; 3) identification of other transitional justice measures undertaken; and 4) a review of the reparation programs implemented as well as their legacies. The fourth section examines examples of truth seeking mechanisms in India: the 1984 Anti-Sikh Riots Commission, the Gujarat Commission, and the Orissa Commissions. The fifth section begins by making a comparative analysis of the Latin American case studies alone and then turns to a comparative analysis of the Latin American and Indian experiences. The section points to the lessons that ACRes and others can learn from this comparative analysis. The paper concludes with final observations that highlight the importance of Indian human rights advocates considering nationwide or thematic truth seeking mechanisms that are informed by the successes and failures of such mechanisms in Latin America, and responsive to the unique factors that will influence such an initiative in India.

## **THE INTERNATIONAL LEGAL FRAMEWORK OF A RIGHT TO A REMEDY**

This section provides a summary of the contemporary international legal framework for the right to remedy. The right to remedy encompasses three distinct rights: (1) the right to truth; (2) the right to justice; and (3) the right to reparations. The law in this area has evolved over time and, as much of human rights law, continues to develop. Many of the documents and instruments that interpret the international right to remedy have been drafted in recent years. These interpretations did not prevail at the time that Brazil, Chile, and Guatemala adopted many of their truth, justice, and reparation schemes. Rather, these states have undertaken initiatives over decades, as a result of political pressure from victims, their advocates, international organizations, and civil society groups. In light of this history, the transitional justice record in these countries is most accurately characterized as a series of ad hoc initiatives rather than the result of a comprehensive plan by the states concerned to comply with international law.

Nevertheless, scholars have observed a dynamic relationship between the

development of international legal norms and the trend toward prosecutions and democratization that post-conflict countries, particularly those in Latin America, have experienced.<sup>3</sup> In the process, states have engaged international actors to assist them in developing truth commissions and other transitional justice mechanisms to address past human rights violations.<sup>4</sup> Political scientist Kathryn Sikkink has examined justice as a norm of international human rights law, and traced the emergence of this norm through the interaction between domestic strategy and global activity.<sup>5</sup> In her research, she identified two streams—one focused on prosecution in domestic judicial systems, and the other focused on prosecution in international fora—that eventually merged and created a “cascade” effect.<sup>6</sup> In its “cascade,” the norm of justice garners increasing support and legitimacy, eventually becoming concretized in international and domestic law and institutions.<sup>7</sup> By tracing the emergence of this norm back to these two streams, one domestic and the other international, Sikkink demonstrates how the synergy between the domestic and international movements has led to the development of a norm of international law.<sup>8</sup> The domestic movements discussed in this paper provide concrete examples of this process demonstrating how states have grappled with complex histories of human rights abuses and

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<sup>3</sup> KATHRYN SIKKINK, *THE JUSTICE CASCADE* 97 (2011) (studying the impact of internal state developments in the field of justice and accountability, and arguing these informed international legal instruments and made their implementation possible); *see also* TRICIA D. OLSEN ET AL., *TRANSITIONAL JUSTICE IN THE BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 97 (2010) (“acknowledging a discernible increase in domestic and international demand for justice”).

<sup>4</sup> *See* PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 253 (2001) (“While the driving force to establish new [truth] commissions has come from within each country, we are also witnessing an increased internationalization of this area of work in a number of different respects. Each of these countries is reaching out for international assistance in thinking through options—from the United Nations, international nongovernmental organizations, or from individuals who were closely involved in past truth commissions.”).

<sup>5</sup> SIKKINK, *supra* note 3 at 5-6 (explaining the justice cascade as the convergence of domestic, foreign, and international prosecutions followed by a trend toward increasing accountability, and providing that, “[i]n this book, I explain why [the justice cascade] has emerged and evaluate its impact”); *but see* OLSEN ET AL., *supra* note 3 at 108 (finding the justice cascade “overstated”).

<sup>6</sup> *Id.* at 96.

<sup>7</sup> *Id.* (“The justice cascade did not have a single source. Rather, we can think of two main streams from different sources flowing in—streams that began to merge at the start of the twenty-first century. By 2010, individual criminal accountability had gained momentum and had been embodied in international law, international and domestic institutions, and in the global consciousness.”).

<sup>8</sup> *Id.* at 97 (“[U]nderneath these two streams of prosecutions, states and non-state actors worked to build a firm streambed of international human rights law and international humanitarian law that fortified the legal underpinnings of the cascade . . .”).

highlighting the interplay between domestic and international human rights movements and the international legal norms that develop from and guide their work.

Sikkink's "cascades" are evident to varying degrees in all of the countries explored in this paper. For example, in Guatemala, domestic movements received guidance from the United Nations on how to implement transitional justice mechanisms. In Chile, the exercise of universal jurisdiction to arrest General Augusto Pinochet prompted domestic courts to initiate further prosecutions for human rights violations that took place during his rule. Finally, in Brazil, favorable rulings from the Inter-American Court of Human Rights have pushed federal prosecutors in the country to file criminal cases in domestic courts for enforced disappearances, thus challenging Brazil's amnesty law.

While the primary focus of this paper is on the reparations initiatives undertaken by each country, it also reviews measures that have advanced the rights to truth and justice. Thus, a brief review of the relevant legal framework is in order to provide the backdrop against which the record set out in the case studies will be evaluated.

The right to a remedy is a well-established norm of international law.<sup>9</sup> In some

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<sup>9</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), at art.8 (Dec. 10, 1948). Though only a declaration, many provisions of the UDHR are seen as binding, authoritative sources of customary international law. Other widely ratified human rights treaties also contain the right to a remedy, including ICCPR, CED, CAT, Convention on the Elimination of all Racial Discrimination, and Convention on the Rights of the Child. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L COMP. L. 287, 340 (1995-96) ("[T]here would seem to be little argument that many provisions of the Declaration today do reflect customary law."). See, e.g., International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]; International Convention for the Protection of All Persons from Enforced Disappearance art. 2, G.A. Res. 61/177 (2006), reprinted in 14 Int'l. Hum. Rts. Rep. 582 (2007), entered into force Dec. 23, 2010 [hereinafter CED]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85, 113, entered into force June 26, 1987 [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 [hereinafter CERD]; Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990 [hereinafter CRC]. Regional bodies have also endorsed the right to a remedy in their charters. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sep. 3, 1953 (European system's codification of the right to a remedy); American Convention on Human Rights art. 25, Nov. 21, 1969, 1144 U.N.T.S. 143, entered into force July 18, 1978 (Inter-American system's codification of the right to a remedy); African [Banjul] Charter on Human and Peoples' Rights arts. 7, 21, June 27, 1981, 1520 U.N.T.S. 217, 245, entered into force Oct. 21, 1986 (African system's codification of the right to a remedy).



circumstances—namely, when the state is the perpetrator of a violation—the state must provide access to a legal remedy for the violation, whether the state or a nonstate actor was the direct violator.<sup>10</sup> The State is perpetrator of the human rights violations discussed in the country studies in this paper.

Authoritative interpretations of the right to a remedy have established that it consists of three dimensions: the right to truth, the right to justice, and the right to reparations.<sup>11</sup> These three dimensions are briefly discussed below.

### A. THE RIGHT TO JUSTICE (STATE DUTY TO PROSECUTE)

Individuals have the right to justice and the state has a duty to investigate, prosecute, and adequately punish perpetrators who are guilty of gross human rights violations.<sup>12</sup> The right to justice, and the complementary state duty to prosecute, arise from three sources. First, treaties that obligate states to prosecute certain crimes:<sup>13</sup> the Genocide

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<sup>10</sup> See U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, arts. 28-39, Aug. 1, 2000-July 31, 2001, U.N. Doc. A/56/10, GAOR, 53d Sess., Supp. No. 10 (2001) [hereinafter *ILC Draft Articles*]; See Hum. Rts. Comm., *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment No. 31*].

<sup>11</sup> The right to reparations has been substantially elaborated and more recently the UN is emphasizing the distinct nature of guarantees of non-recurrence, which is a type of reparation. See Hum. Rts. Council, *Resolution: Special Rapporteur on the Promotion of Truth, Just., Reparation and Guarantees of Non-Recurrence*, preamble, U.N. Doc. A/HRC/RES/18/7 (Oct. 13, 2011). The appropriate and required remedy may differ depending on the nature of the violation. In 2011, the Human Rights Commission mandated the appointment of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (SR on Transitional Justice). *Id.* at ¶1.

<sup>12</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, G.A. Res.60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter *Basic Principles*]. See also Special Rapporteur on the Promotion of Truth Justice, Reparation and Guarantees of Non-Recurrence, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 47, delivered to the General Assembly, U.N. Doc. A/67/368 (Sept. 13, 2012). The SR on Transitional Justice has noted that: “[t]rying cases for human rights violations strengthens the rule of law” both directly and indirectly and that while only a fraction of ‘outrageous acts’ ever get investigated, and even fewer proceed to prosecution, the benefits of prosecuting such violations are enormous. See *id.* at ¶ 57 (“criminal prosecutions in cases of [gross violations of human rights] give life to the principle of the sovereignty of law and of the related principle of equality. No one, regardless of rank or status, is above the law. Second, at a more practical level, given the complexities of criminal trials for systematic abuses, these processes help to develop transferable skills that contribute to strengthening the overall capacity of judicial systems”). When violations are criminally prosecuted, the investigation can help to deter future violations by creating a system of transparency.

<sup>13</sup> See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide arts. 4-5, Dec. 9, 1948, 78 U.N.T.S. 277, entered into force Jan. 12, 1951 [hereinafter *Genocide Convention*]; CAT, *supra* note 9, at arts. 4, 5, 7; CED, *supra* note 9, at arts. 3-7. These treaties generally require that states write the violation into their domestic criminal code, and assign an adequate corresponding punishment for perpetrators.

Convention,<sup>14</sup> the Geneva Conventions,<sup>15</sup> the UN Convention against Torture (CAT),<sup>16</sup> and the UN Convention for the Protection of All Persons from Enforced Disappearance (CED)<sup>17</sup> obligate states to criminalize and prosecute the respective crimes of genocide, certain categories of crimes committed during international armed conflict,<sup>18</sup> torture, and enforced disappearances.<sup>19</sup> Second, states party to the Rome Statute of the International Criminal Court undertake the commitment to prosecute international crimes including crimes against humanity, such as widespread and systematic enforced disappearances, and confer jurisdiction on the international court to prosecute such crimes when the state is unwilling or unable to do so.<sup>20</sup> Third, the Geneva Conventions, which codify crimes committed in international armed conflict, give rise to the state duty to prosecute those acts that are categorized as grave breaches.

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<sup>14</sup> Genocide Convention, *supra* note 13 at arts. 4-5, 9.

<sup>15</sup> The Geneva Conventions obligate states to investigate and prosecute certain conduct designated as grave breaches, which includes willful killing, torture, inhuman treatment, and the unlawful confinement of civilians. See Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59:4 LAW & CONTEMP. PROBS. 41, 43 (1996).

<sup>16</sup> CAT, *supra* note 9, at arts. 4, 5, 7.

<sup>17</sup> CED, *supra* note 9, at arts. 3-7.

<sup>18</sup> The duty to prosecute for grave breaches arises in international armed conflict, but not non-international armed conflict. Although enforced disappearances are not explicitly mentioned in the Geneva Conventions, some of their elements may invoke the duty to prosecute because they often include acts considered grave breaches. However, the conflict must have an international character for grave breaches to give rise to the duty to prosecute. See Section V(b) (discussion of grave breaches under IHL).

<sup>19</sup> See Scharf, *supra* note 15 at 43 (commenting “[i]t is noteworthy, however, that these Conventions were all negotiated in the context of the cold war and by design apply only to a narrow range of situations”). If states grant amnesty to perpetrators of the crimes established by these treaties, states are in breach of their treaty obligations. See *id.* (“[w]hen these Conventions are applicable, the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception”). India is not a party of the CAT or the CED, but has ratified the Genocide Convention and is thus bound to prosecute crimes of genocide.

<sup>20</sup> See Rome Statute of the International Criminal Court art. 7, Jul. 17, 1998, 2187 U.N.T.S. 3, *entered into force* July 1, 2002 [hereinafter Rome Statute]. States are called upon to prosecute these violations, as provided in the Rome Statute and the 2005 UN Declaration. See *id.* at art. 17(1); Basic Principles, *supra* note 12, at ¶14 (providing that states have a duty to investigate, prosecute, and punish those responsible for gross violations of international human rights law). In the absence of state action, the ICC has jurisdiction over crimes against humanity. Rome Statute, *supra* note 20 at arts. 5, 17(1)(1). However, India has not signed the Rome Statute to the ICC.

## B. THE RIGHT TO JUSTICE (STATE DUTY TO INVESTIGATE)

The right to truth is an emerging norm in international law.<sup>21</sup> The CED is the first binding instrument to explicitly codify the right to truth, and states party to the CED are bound to guarantee this right.<sup>22</sup> Under the CED, victims' right to truth arises upon the occurrence of an enforced disappearance.<sup>23</sup> Aside from the CED,<sup>24</sup> at least one human rights court has held the right to truth to apply when "serious crimes have been committed," such as enforced disappearances.<sup>25</sup>

Once triggered, the right to truth requires the state to undertake a rigorous investigation to reveal to the victims and their families "what really happened, why did it happen, and who is directly and indirectly responsible."<sup>26</sup> Such investigations are also meant to uncover the truth about the repressive structure(s) that led to the commission of the crimes,<sup>27</sup> and determine the fate of every single victim whose case is known.<sup>28</sup>

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<sup>21</sup> See, e.g., Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction?*, 88(862) INT'L REV. RED CROSS 245, 273 (June 2006) (asserting that "it may be argued that the right to the truth stands somewhere on the threshold of a legal norm and a narrative device . . . [t]he truth about the right to the truth is still a matter to be agreed upon").

<sup>22</sup> LISA OTT, ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW 269 (2011) ("the [CED] is the first international legally binding human rights instrument to enshrine this right").

<sup>23</sup> CED, *supra* note 9, at art. 24(2).

<sup>24</sup> See Naqvi, *supra* note 21 at 267 ("[c]umulatively, the effect of these decisions, taken together with the widespread practice of instituting mechanisms to discover the truth in countries where serious crimes have been committed, as well as some national legislation and the constant reiteration of the importance of knowing the truth by international and national organs, suggests the emergence of something approaching a customary right (though with differing contours)"); see also Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, ¶ 39, U.N. Doc. A/HRC/16/48 (Jan. 26, 2011) (making a general comment on the right to truth in relation to enforced disappearance and recognizing, as early as 1981, the right to the truth for enforced disappearance); U.N. High Commissioner for Human Rights, *Report: Study on the Right to Truth*, ¶¶55, 60, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) (recognizing the right to truth as "inalienable and autonomous" and asserting that "[a]mnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth").

<sup>25</sup> In 2006, the Inter-American court held that the duty to investigate enforced disappearances is a *jus cogens* norm of international law. *Goiburú & Others v. Paraguay (Merits, Reparations, and Costs)*, Inter-Am. Ct. H.R. ¶ 84 (Sept. 22, 2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_153\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf) ("...the corresponding obligation to investigate ... [has] acquired the character of *jus cogens*"). However, other mechanisms have not echoed the Inter-American Court's perspective; rather, the right to truth is increasingly recognized in persuasive, not binding, authority.

<sup>26</sup> Juan E Méndez & Francisco J. Bariffi, *Truth, Right to, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (Jan. 2011).

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 75 (2007) (discussing the formation of CONADEP in Argentina, which had the "mandate to investigate the thousands who disappeared during the junta rule").

Typically, these aims are achieved through the establishment of “extrajudicial commissions of inquiry” and measures to preserve archives that help to tell the broader story of patterns of violations.<sup>29</sup> Additionally, states must afford an opportunity for judicial truth to be established, where victims may be heard by a state entity, though not necessarily in a criminal law tribunal.<sup>30</sup>

### C. THE RIGHT TO REPARATIONS (STATE DUTY TO PREVENT, REDRESS, AND COMPENSATE)

The right to reparation is discussed in detail in the companion piece to this paper,<sup>31</sup> but, generally, scholars of international law recognize seven categories of reparations that states may be obligated to provide to those whose rights they violate: cessation, restitution, compensation,<sup>32</sup> satisfaction,<sup>33</sup> interest,<sup>34</sup> guarantees of non-repetition,<sup>35</sup> and rehabilitation.<sup>36</sup>

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<sup>29</sup> Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights (Civil and Political)*, ¶ 18, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997).

<sup>30</sup> See Naqvi, *supra* note 21 at 269-72. India has signed the CED, which signals India’s acceptance of the right to truth as an international norm.

<sup>31</sup> See, *The Right to Remedy for Enforced Disappearances in India: A Legal Analysis of International and Domestic Law Relating to Victims of Enforced Disappearances* (Int’l Human Rights Law Clinic, Working Paper No. 1, 2014), available at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-1-India-Right-to-a-Remedy-151027.pdf>.

<sup>32</sup> “Compensation” means to compensate for any financially assessable damages that the State caused. Dinah Shelton, *Reparations*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 25 (Aug. 2009). For a discussion of looking beyond economic compensation, see Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 400 (2007-08) (arguing for a remedy structure that focuses less on economic compensation and more on equitable, non-monetary, and forward-looking remedies).

<sup>33</sup> “Satisfaction” includes incalculable damages, to redress moral or legal injury (for example, an acknowledgement of the breach, an expression of regret, or an apology). Shelton, *supra* note 32 at ¶ 28. See also Antkowiak, *supra* note 32 at 373-74 (providing more examples of satisfaction and citing particular cases where courts granted satisfaction to the victim such as “revers[ing] criminal convictions, grant[ing] retrials, nullify[ing] death sentences, expung[ing] criminal records, and cancel[ling] fines imposed”).

<sup>34</sup> “Interest” is granted on a case-by-case basis, and awarded only to ensure full reparation. Shelton, *supra* note 32 at ¶ 26.

<sup>35</sup> “Guarantees of non-repetition” generally involve a promise (more than a mere statement) not to repeat the violation. Often this requires states to take preventative measures to avoid repetition. *Id.* at ¶ 27. See Antkowiak, *supra* note 32 at 362 (noting the diversity of forms that this category can assume, including “the establishment of effective civilian control over state security forces and human rights educational and training programs”).

<sup>36</sup> “Rehabilitation” provides for mental and psychological care, and legal and social services. Dinah Shelton, *Human Rights Remedies*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 9 (Jul. 2006). See Antkowiak, *supra* note 32 at 375-77 (providing an overview of the Inter-American Court’s approach to providing rehabilitation as a remedy, which has included “the establishment of special education and vocational assistance programs for former detainees,” “scholarships for higher education,” and provisioning future necessary medical and mental care from

Generally, the categories of cessation and restitution are frequent forms of reparation.<sup>37</sup> Cessation requires the state to stop committing human rights violations. Restitution involves the state restoring the victim to the circumstances she would have been in, had the violation not occurred. Others forms complement cessation and restitution to repair the victim's injury.<sup>38</sup> All of the countries studied in this paper instituted compensation as a method of reparation. Brazil and Chile have both instituted monetary programs to compensate victims of human rights violations, including life pension programs. Guatemala has also adopted similar programs. Chile serves as a noteworthy example of a country that instituted rehabilitation as a form of reparation, while Guatemala has engaged in restitution initiatives<sup>39</sup> in order to return to communities the property they lost during the armed conflict.

## COUNTRY CASE EXAMPLES

Using the international framework laid out in the preceding section, this section discusses the experience of Brazil, Chile, and Guatemala in realizing the right to remedy established in international law. These countries adopted a variety of mechanisms to provide individuals with access to a remedy for human rights violations committed by the state. Each country has had some form of a truth commission and a reparations program that addressed the right to truth and to reparations. However, as discussed below, the records of these countries on prosecuting those responsible for human rights violations has been much more mixed, largely due to amnesty laws that have often prevented prosecutions.

The three countries studied here share aspects of a common history. Throughout Latin America in the late 1950s, socialist movements gained popular support for their opposition to the widespread social inequalities, poor governance, and corruption in

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state facilities).

<sup>37</sup> Shelton, *supra* note 32 at ¶¶ 22-23; *see also* Antkowiak, *supra* note 32 at 372-75 (detailing the dimensions of cessation, such as releasing an individual who was arbitrarily detained, and restitution, such as recovering the missing corpse).

<sup>38</sup> Shelton, *supra* note 32 at ¶¶ 22-23.

<sup>39</sup> Most notably restitution has involved building homes. *See* PROGRAMA NACIONAL DE RESARCIMIENTO, MEMORIA DE LABORES 24 (2013), *available at* <http://www.pnr.gob.gt/archivos/PNR-ML2012.pdf> (data appears in Spanish).

government endemic to the region at the time. Although many of these movements posed little real threat to sitting governments, some factions advocated for armed revolution, particularly in the period following the Cuban revolution. The latter group in particular were seen as fomenting social unrest and political instability. As the Cold War increasingly polarized the world in the 1960s, the U.S. became progressively more involved in the region's politics and lent its support to regimes that promised to help control the spread of communism within their own borders and the region. This historical backdrop is instrumental in understanding the conditions that led to authoritarian rule and widespread, state-sponsored human rights violations throughout the region.

## A. BRAZIL

### 1. Brief Background of Conflict that Led to Reparation Schemes

By the early 1960s in Brazil, socialist movements had gained popular support and began to penetrate Brazilian politics. Civil unrest grew and ultimately resulted in a coup d'état against President João Goulart on March 31, 1964.<sup>40</sup> The coup led to a succession of military dictatorships that continued over a period of twenty-one years, until 1985.

During its rule, the military government committed human rights violations including targeting suspected political dissidents for violent attack. Though the levels of systematic torture, extra-judicial killings, and enforced disappearances did not reach the magnitude experienced by other Latin America countries, such as Chile, unofficial estimates of civilian victims of such crimes number in the thousands in Brazil.<sup>41</sup> The year 1967 marked the beginning of grave repression, with the military regime imposing a new constitution and enacting the National Security Law (LSN). The LSN superseded the federal constitution and gave the armed forces and police broad powers to fight all

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<sup>40</sup> Louis Bickford, *Unofficial Truth Projects*, 29 HUM. RTS. Q. 994, 1005 (2007) (discussing Brasil: Nunca Mais as an unofficial truth project).

<sup>41</sup> Ignacio Cano & Patrícia Salvão Ferreira, *The Reparations Program in Brazil*, in THE HANDBOOK OF REPARATIONS 102, 103 (Pablo de Greiff ed., 2006), [hereinafter *The Reparations Program in Brazil*], available at <http://www.oxfordscholarship.com/view/10.1093/0199291926.001.0001/acprof-9780199291922>.

political opposition to the regime.<sup>42</sup> Shortly thereafter, on December 13, 1968, through Institutional Act No. 5, the military censored cultural and social demonstrations, and suspended many constitutional rights, including habeas corpus protections.<sup>43</sup>

By 1973, the violent military repression succeeded in neutralizing armed urban groups.<sup>44</sup> Unexpectedly, this resulted in a period of “slow, safe and gradual opening.”<sup>45</sup> In March 1979, as the result of political compromise with the opposition, President Figueiredo issued a blanket amnesty for all political offenses committed between 1961 and 1979, leading the state to release political prisoners.<sup>46</sup> The 1979 Law of Amnesty (Amnesty Law) codified the political agreement, which gave amnesty to the members of the political opposition in exchange for an agreement that the state would not investigate or punish human rights violations committed during the dictatorship. The Amnesty Law shielded militants involved in political crimes from prosecution and, by preventing the state from investigating or prosecuting human rights violations committed by military and public officials, the law prevented criminal accountability for the state agents responsible for kidnappings, enforced disappearances, and torture through criminal prosecutions.<sup>47</sup> In order to be eligible for protection under the amnesty law, released political prisoners and other victims of state-directed political violence had to petition for amnesty. In the course of preparing such petitions, lawyers representing victims gained access to military archives.<sup>48</sup> An unforeseen consequence of this access was that, armed with information about military activities, groups of victims came together and organized to demand official truth telling about the state’s role in political assassinations and enforced disappearances.<sup>49</sup> Based on the information obtained through the process of preparing these amnesty petitions, victims and their advocates released the unofficial truth report,

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<sup>42</sup> ARCHDIOCESE OF SÃO PAULO, TORTURE IN BRAZIL: A SHOCKING REPORT ON THE PERVASIVE USE OF TORTURE BY BRAZILIAN MILITARY GOVERNMENTS, 1964-1979 66 (Joan Dassin ed., Jaime Wright trans. 1986, ) [hereinafter Archdiocese of São Paulo].

<sup>43</sup> *Id.*

<sup>44</sup> *The Reparations Program in Brazil*, *supra* note 41, at 103.

<sup>45</sup> *Id.* at 104.

<sup>46</sup> Lei No 6.683, de 28 de Agosto de 1979, Presidência da República Casa Civil Subchefia para Assuntos Jurídicos (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/Leis/L6683compilada.htm](http://www.planalto.gov.br/ccivil_03/Leis/L6683compilada.htm).

<sup>47</sup> Bickford, *supra* note 40, at 1006-07; *As Brazil’s Amnesty Law is Challenged, Accountability for Crimes of the Past at Stake*, INT’L CTR FOR TRANSITIONAL JUST. (April 4, 2013), <http://ictj.org/news/brazil%E2%80%99s-amnesty-law-challenged-accountability-crimes-past-stake>.

<sup>48</sup> *Commission of Inquiry: Brazil*, U.S. INST. OF PEACE, <http://www.usip.org/publications/commission-of-inquiry-brazil> (last visited Sept. 15, 2013).

<sup>49</sup> *Commission of Inquiry: Brazil*, *supra* note 48.

*Brasil: Nunca Mais*.<sup>50</sup>

## 2. Description of the Truth Report

### a) Mandate establishing the truth commission and contribution of human rights advocates and the international community

An unofficial commission of inquiry, *Brasil: Nunca Mais*, produced a report, which was chiefly the byproduct of the access victims had to military records through the amnesty application process.<sup>51</sup> There was no charter or official mandate establishing the commission, which operated in secrecy from the beginning of 1979 until the release of the report in 1982. The report would not have been possible if it were not for the efforts of the only two individuals, Cardinal Arns and Presbyterian Minister Jaime Wright, who disclosed their identity upon the release of the report and coordinated the photocopying of the military government's records on torture. Most of the lawyers, as well as civil society groups, who worked on the project, were associated with the Archdiocese of São Paulo.<sup>52</sup> While the research team of approximately thirty-five investigators was mainly comprised of local actors, the World Council of Churches provided financial support totaling approximately \$350,000.<sup>53</sup> The team also used the World Council of Churches headquarters in Geneva for their record storage: they continuously sent microfilms to Geneva of the borrowed original archives.<sup>54</sup> Eventually, with the support of the World Council of Churches, the researchers were able to systematically copy thousands of pages until all of the records of the Military Supreme Court had been duplicated.<sup>55</sup>

### b) Issues and human rights abuses covered

Through various investigative methods and testimonies drawn from official court proceedings, the 2,700-page report, *Brasil: Nunca Mais*, elucidates the human rights

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<sup>50</sup> *Id.*

<sup>51</sup> Lawrence Weschler, *I-A Miracle, A Universe*, THE NEW YORKER, (May 25, 1987).

<sup>52</sup> ARCHDIOCESE OF SÃO PAULO, *supra* note 42, at ix-x.

<sup>53</sup> Bickford, *supra* note 40, at 1006-07.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



abuses committed by the military dictatorships between 1964 and 1979. Approximately 1,843 political prisoners provided testimony to church-affiliated investigators, documenting 283 different torture techniques<sup>56</sup> employed by the regime, and 242 clandestine torture centers, and naming 444 individual torturers.<sup>57</sup> These testimonies provided evidence that the state targeted suspected “subversives” for interrogation and torture regardless of age or sex.<sup>58</sup> The report includes a chapter devoted to the torture of women and children, highlighting that they were not exempt from persecution.<sup>59</sup> Children were brutalized in front of their parents.<sup>60</sup> Women were especially vulnerable to abuses in prison where they were often raped by their military captors. Pregnant women had miscarriages and had “the fruit of their wombs ripped out.”<sup>61</sup> Married women were also “subjected to suffering” that was designed to make them incriminate their husbands.<sup>62</sup>

Further, the report documents “disappearances,” a common tactic used by security forces not only in Brazil, but throughout Latin America during that time period. *Brasil: Nunca Mais* estimates that around 125 individuals disappeared, a low number relative to other countries.<sup>63</sup> Nonetheless, the report estimated the overall number of victims of state-sponsored human rights violations to be 17,000.<sup>64</sup> While the number of documented disappearances is low when compared to those documented in the other country examples considered here, the report did not purport to be an exhaustive catalogue of all abuses. Rather, its primary purpose was to break the silence surrounding the crimes committed by the dictatorship.

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<sup>56</sup> Victims provided evidence of a variety of torture techniques involving physical assault, psychological pressure, and the use of instruments, such as the dragon chair, a barber shop style chair to which victims were tied and electrocuted. See ARCHDIOCESE OF SÃO PAULO, *supra* note 42, at 18-19.

<sup>57</sup> ARCHDIOCESE OF SÃO PAULO, *supra* note 42, at x.

<sup>58</sup> *Id.* at 16-32.

<sup>59</sup> *Id.* at 25.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 25-30.

<sup>62</sup> *Id.* at 25.

<sup>63</sup> *Id.* at 204-07.

<sup>64</sup> *Commission of Inquiry: Brazil, supra* note 48.

### c) Conclusions and reception of the report

The primary contribution of the *Brasil: Nunca Mais* report was to document and provide *prima facie* evidence of the military dictatorship's systematic use of torture to extract confessions and suppress opposition. Accordingly, the report recommended that Brazilian citizens be able to participate in the political process, enjoy the "right to disagree,"<sup>65</sup> and hold the state accountable for its actions. At the same time, the report called upon the citizenry to ensure "that the violence, [] infamy, [] injustice, and [] persecution of Brazil's [] past should never again be repeated."<sup>66</sup> However, the report failed to make specific recommendations for the new civilian government that had been inaugurated a few months before the release of the report. Additionally, reparations schemes, discussed further below, would not come to fruition until almost a decade later.

Nonetheless, *Brasil: Nunca Mais* had a strong impact on Brazilian society. More than 100,000 copies of the report sold within ten weeks of its release.<sup>67</sup> According to report's editor, Joan Dassin, the average nonfiction work sold three to five thousand copies.<sup>68</sup> The report prompted victims to form small organizations bearing the name, *Brasil: Nunca Mais*, to denounce torturers.<sup>69</sup> Even before the report's release, groups like the Women's Movement for Amnesty and Political Liberties had called for the release of political prisoners and worked to secure amnesty for former members of the political opposition who were imprisoned, in exile, or in hiding.<sup>70</sup> Relatives of deceased victims and the disappeared also took part in these efforts that were largely supported by sectors of the Catholic Church and civil society organizations.<sup>71</sup>

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<sup>65</sup> The "right to disagree" recommended is not a right per se, but a call to encourage democracy by allowing citizens to express their disagreements.

<sup>66</sup> *Commission of Inquiry: Brazil*, *supra* note 48.

<sup>67</sup> ARCHDIOCESE OF SÃO PAULO, *supra* note 42, at x.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at xii.

<sup>70</sup> ARCHDIOCESE OF SÃO PAULO, *supra* note 42, at 105.

<sup>71</sup> *The Reparations Program in Brazil*, *supra* note 41, at 105.

### 3. Identification of Other Transitional Justice Measures

#### a) Dossier on the Missing and Disappeared

*Brasil: Nunca Mais* gave hope to many victims' groups and kept the issue of state responsibility for enforced disappearances in the public view. Prior to the report's release in 1982, relatives of the disappeared and assassinated delivered a file regarding cases of deaths and disappearances to the president of the Amnesty Commission of the National Congress. The Commission of Relatives of the Dead and Disappeared<sup>72</sup> and the Brazilian Committee for Amnesty,<sup>73</sup> section Rio Grande do Sul, expanded the file, publishing it through the Legislative Assembly of Rio Grande do Sul in 1984 under the name of *Dossiê dos Mortos e Desaparecidos* (Dossier on the Missing and Disappeared).<sup>74</sup> The *Dossiê*, last updated in 1996, documents atrocities committed by state actors from 1964-1983 and includes information about a total of 369 victims; 217 of whom were victims of assassination, 152 were victims of enforced disappearance, and the rest were victims disappeared abroad.<sup>75</sup>

#### b) Civil society advocacy efforts

In 1985, family members and activists established a non-governmental organization (NGO) in Rio de Janeiro, *Grupo Tortura Nunca Mais* (Torture Never Again), to advocate for the truth about the political assassinations and enforced disappearances.<sup>76</sup> Similar groups followed suit in other parts of the country. According to researchers Ignacio Cano and Patrícia Salvão Ferreira, these organizations worked, in partnership with the Commission of Relatives of the Dead and Disappeared, to maintain and create awareness of these issues and to advocate for the creation of a reparations program.<sup>77</sup>

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<sup>72</sup> Formally titled: "Comissão de Familiares de Mortos e Desaparecidos," a civil society group.

<sup>73</sup> These were organizations created by relatives of the victims, organized by mothers, wives, and sisters of political prisoners, etc.

<sup>74</sup> *The Reparations Program in Brazil*, *supra* note 41, at 106.

<sup>75</sup> The *Dossiê* does not identify victims by gender. The *Dossiê* lists victims by name but does not distinguish between female and male victims. The names are listed, by year of disappearance, in first-name alphabetical order. A review of the preface of the report reveals that women were recorded in the *Dossiê*. COMISSÃO DE FAMILIARES DE MORTOS E DESAPARECIDOS POLÍTICOS E INSTITUTO DE ESTUDOS DA VIOLÊNCIA DO ESTADO, *Sumario*, DOSSIÊ DOS MORTOS E DESAPARECIDOS POLÍTICOS A PARTIR DE 1964 (1995).

<sup>76</sup> *The Reparations Program in Brazil*, *supra* note 41, at 106.

<sup>77</sup> *Id.* Research did not indicate that these groups made specific advocacy efforts around reparations for women. And the *Handbook of Reparations* does contain a "thematic chapter" on Reparation of Sexual Violence in Democratic

### c) Exhumations of mass graves

On September 4, 1990, a mass clandestine grave was discovered in the Dom Bosco Cemetery in São Paulo.<sup>78</sup> The grave, known as Perus Ditch, was mostly used to bury the indigent deceased, but official cemetery records revealed that at least sixteen political activists had been buried in three different cemeteries in Rio de Janeiro.<sup>79</sup> A year later, *Grupo Tortura Nunca Mais* obtained support from the city's mayor to exhume 2,100 remains from a mass grave in the Ricardo de Albuquerque Cemetery, where they believed that fourteen activists had been buried.<sup>80</sup> While it proved impossible to identify the bodies of the political victims among such a high number of indigent remains, in December 1991 these events led Nilmário Miranda, a member of the National Congress, to create the External Commission for the Search for the Victims of Political Disappearance.

### d) Special Commission

Miranda further attempted to create a Parliamentary Commission of Inquiry, but was only able to create a Special Commission that operated from December 10, 1991 to December 31, 1994. The Special Commission had the power to request, but not to subpoena, documents or witnesses. It organized hearings at which relatives of deceased victims and victims of torture testified, as well as military officials. Some of the military officials who gave testimony before the Special Commission brought forward new information on the missing and assassinated.<sup>81</sup> Yet, while the Army and Air Force

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Transitions, but this chapter does not make specific mention of Brazil. However, it does make reference to other countries, such as Guatemala and Peru.

<sup>78</sup> *The Reparations Program in Brazil*, *supra* note 41, at 107-08.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> It is important to note that the military did not make an effort to help the Special Commission. The *Guerrilha do Araguaia* judgment noted, "the Army, the Navy and the Air Force reported that they do not have a single document in their archives from that period given that they have destroyed them pursuant to the regulations in force during that period. The Navy informed that specific documents disseminated via the media regarding the *Guerrilha*, had been extracted by unlawful means from the archives prior to their destruction. The Air Force also indicated that despite the fact that documents had been destroyed some documents that contained generic information were made available to the National Archive." Gomes-Lund et al. (*Guerrilha do Araguaia*) v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶186 (Nov. 24, 2010) [hereinafter *Guerrilha do Araguaia Case*], available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf) (deciding a case on the Brazilian military's counterinsurgency campaign against *Guerrilha do Araguaia*, a resistance movement made up

released a limited number of documents, none of them brought additional information to light.<sup>82</sup>

Additionally, the Special Commission visited seven different states in Brazil, taking testimony from relatives of the disappeared and killed. Most importantly, it was able to request information about the missing activists listed in the *Dossiê*. As a result, the Special Commission received a series of confidential documents from the armed forces which recognized, for the first time, the death of forty-three activists in the state of Araguaia.<sup>83</sup> Although the state had not denied the existence of the armed opposition (*guerrillas*), the disclosure led the state to officially acknowledge the existence of one group in particular, the *Araguaia Guerrilla*, a communist armed movement in Brazil that was active between 1966 and 1974.<sup>84</sup>

#### e) National Truth Commission (CNV)

On October 26, 2011, Congress approved a bill creating the National Truth Commission,<sup>85</sup> which President Rousseff signed into law on November 2011.<sup>86</sup> The truth commission was mandated to “examin[e] and clarify[]” executions, torture, disappearances, and other human rights abuses committed between 1946 and 1988.<sup>87</sup> The law establishing the Commission required government officials to cooperate with its work.<sup>88</sup> Additionally, the Freedom of Information Law passed in late 2011 aided the Commission, ensuring that information regarding human rights abuses would not be classified and, thus, providing a framework for making archives from the dictatorships

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of young militants of the Brazilian Communist Party, between April 1972 and January 1975; the 119-page ruling orders the Brazilian government to publicly accept responsibility for grave human rights violations committed during the military regime, open its archives to the families of victims of repression, and pay millions of dollars in reparations.) [hereinafter *Guerrilha do Araguaia Case*].

<sup>82</sup> *The Reparations Program in Brazil*, *supra* note 41, at 108.

<sup>83</sup> A report released by the Navy confirmed this incident; however, it is unclear whether the Navy intended to confirm this information or did so inadvertently, through the release of the report. *See Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Lei No. 12.528, de 18 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.11.2011 (Braz.), *available at* <http://www2.camara.leg.br/legin/fed/lei/2011/lei-12528-18-novembro-2011-611803-norma-pl.html>.

<sup>86</sup> *Brazilian Truth Commission Has Historic Responsibility*, INT’L CTR. FOR TRANSITIONAL JUST. (May 11, 2012), <http://ictj.org/news/brazilian-truth-commission-has-historic-responsibility>.

<sup>87</sup> *A Comissão da Verdade no Brasil*, NÚCLEO DE PRESERVAÇÃO DA MEMÓRIA POLÍTICA – SÃO PAULO, [http://www.dhnet.org.br/verdade/cartilha\\_nucleo\\_memoria\\_comissao\\_da\\_verdade.pdf](http://www.dhnet.org.br/verdade/cartilha_nucleo_memoria_comissao_da_verdade.pdf) (last visited Apr. 1, 2014).

<sup>88</sup> *Id.*

accessible.<sup>89</sup> Although the Commission had a broad mandate to investigate human rights violations, it did not have prosecutorial powers and, therefore, was limited to making findings that established patterns of abuse, which might serve as evidence for eventual prosecutions.<sup>90</sup>

The law did not make explicit reference to female victims.<sup>91</sup> However, in December 2013, the Truth Commission initiated 13 thematic groups, one of which focused on the dictatorship and gender.<sup>92</sup> The Dictatorship and Gender Working Group was tasked with researching violence against women and its consequences. The purpose of the Working Group was to shed light on sexual violence and make visible the human rights abuses and resultant suffering women experienced during this period, both those who participated in resistance movements and those whose relatives were victims of political persecution, death, or disappearance.<sup>93</sup>

At the time of this writing, the Truth Commission plans to incorporate the findings of the Working Group into its final report<sup>94</sup> that is set for delivery in late 2014.<sup>95</sup>

#### f) Accountability (trials)

Even after the release of *Brasil: Nunca Mais*, the 1979 Amnesty Law continued to shield those responsible for human rights violations from prosecution. In 2001, the NGO,

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<sup>89</sup> Joe Bateman, *Recent Corruption and Human Rights Trials in Brazil Could Signal Shift toward Just.*, WASH. OFFICE ON LATIN AM. (Oct. 26, 2012), [http://www.wola.org/commentary/recent\\_corruption\\_and\\_human\\_rights\\_trials\\_in\\_brazil\\_could\\_signal\\_shift\\_toward\\_justice](http://www.wola.org/commentary/recent_corruption_and_human_rights_trials_in_brazil_could_signal_shift_toward_justice).

<sup>90</sup> *Id.*

<sup>91</sup> Women have been involved in the process, most notably, the Women's Collective for Truth and Justice. This group, along with the Committee of Relatives of Political Deaths and Disappearances, has proposed amendments to the Truth Commission's mandate; however, none of the amendments focus on women's issues. See *Petição pela Comissão da Verdade e Justiça*, VIOMUNDO (May 27, 2011), <http://www.viomundo.com.br/voce-escreve/peticao-pela-comissao-da-verdade-e-justica.html>.

<sup>92</sup> See generally COMISSÃO NACIONAL DA VERDADE website, <http://www.cnv.gov.br/index.php/institucional-acesso-informacao/realizacoes-da-cnv>.

<sup>93</sup> Information on the Working Group can be found on the Truth Commission's website. See COMISSÃO NACIONAL DA VERDADE, <http://www.cnv.gov.br/index.php/2012-05-22-18-30-05/ditadura-e-genero>.

<sup>94</sup> Paulo Sérgio Pinheiro, *GT Ditadura e gênero* [Letter from the "Dictatorship and Gender" Working Group Coordinator], COMISSÃO NACIONAL DA VERDADE (Feb 25, 2013), [http://www.cnv.gov.br/images/pdf/grupos\\_trabalho/CNV\\_REUNIAO\\_AMPLA\\_Genero\\_250313.pdf](http://www.cnv.gov.br/images/pdf/grupos_trabalho/CNV_REUNIAO_AMPLA_Genero_250313.pdf).

<sup>95</sup> Lei No 12.528, de 18 de Novembro de 2011, Presidência da República Casa Civil Subchefia para Assuntos Jurídicos (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/l12528.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12528.htm).

*Grupo Tortura Nunca Mais*, presented the list of alleged perpetrators detailed in the *Brasil: Nunca Mais* report to the United Nations Committee Against Torture.<sup>96</sup> In response, the Brazilian government promised to investigate the cases, but no official action was taken even after the list was narrowed to name only those in high government positions.<sup>97</sup>

To this day, the 1979 Amnesty Law remains in effect in Brazil and continues to pose a major obstacle to the successful prosecution of enforced disappearance, torture, or political murder committed during the military dictatorships. However, this has not prevented such a case from being litigated in the Inter-American system. In *Guerrilha do Araguaia v. Brazil*, decided on November 24, 2010, the Inter-American Court of Human Rights found Brazil responsible for the enforced disappearance of at least 70 peasants and militants of the *Araguaia Guerrilla*.<sup>98</sup>

Civil society organizations, including the Center for Justice and International Law (CEJIL) working in cooperation with *Grupo Tortura Nunca Mais* and the São Paulo Commission of Family Members of the Persons Killed and Disappeared for Political Reasons, were instrumental in assisting the family members of the *Guerrilha do Araguaia* victims to successfully litigate their case before the Inter-American Commission, and later, the Inter-American Court of Human Rights.<sup>99</sup> The work of these organizations in the *Guerrilha do Araguaia v. Brazil* case highlights the continuing efforts of NGOs in pressing for acknowledgement and state accountability.

In the wake of the *Guerrilha do Araguaia v. Brazil* case, the Brazilian judicial system has begun to process criminal cases relating to the human rights abuses of the past. For example, in 2012, a federal judge in São Paulo accepted a case against former members of the military for their role in the enforced disappearance of several members

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<sup>96</sup> The UN treaty body of independent experts that monitors state compliance with the UN Convention against Torture.

<sup>97</sup> Bickford, *supra* note 40, at 1007.

<sup>98</sup> See Gomes-Lund et al. (*Guerrilha do Araguaia*) v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, (Nov. 24, 2010) [hereinafter *Guerrilha do Araguaia Case*]; see also *Brazil must investigate and punish crimes committed under military dictatorship*, CEJIL BRAZIL (Dec. 15, 2010), available at <http://www.cejil.org/en/categoria/pais/brazil>.

<sup>99</sup> See *Guerrilha do Araguaia Case*, *supra* note 100.

of the *Araguaia guerrilla* group during the 1970s.<sup>100</sup> Following a long line of precedent established by the Inter-American Court, the judge in the case ruled that the kidnappings that were the subject of the case represented ongoing crimes because the bodies of the victims had never been found, and, thus, they did not fall within the timeframe covered by the Amnesty Law.<sup>101</sup>

Most recently, federal prosecutors have made additional headway in filing criminal cases against former military officials. On December 9, 2013, federal prosecutors in São Paulo initiated Brazil's first criminal trial of state security agents.<sup>102</sup> Most of these cases are still in their early stages and how they will develop and the impact they will have remains to be seen.<sup>103</sup>

### g) Acknowledgement through public apologies and statements

Due to the Amnesty Law, acknowledgement of the military's engagement in torture and other wrongdoing committed against prisoners has been mixed.<sup>104</sup> There have been informal public apologies and statements of responsibility. A decade after the release of *Brasil: Nunca Mais*, the armed forces made statements admitting torture had taken

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<sup>100</sup> *Justiça Federal aceita denúncia contra major Curió*, VEJA (Aug. 30, 2012), <http://veja.abril.com.br/noticia/brasil/justica-do-para-aceita-denuncia-contra-major-curio> (quoted in Bateman, *supra* note 89).

<sup>101</sup> TRF-1, Ap. Crim. No. 0006231-92.2012.04.01.3901, Procurador: André Casagrande Raupp, 10.7.2012 (indictment charging Coronel Sebastião Curió Rodrigues de Moura with the enforced disappearance of five individuals), *available at* <http://www.prpa.mpf.mp.br/news/2012/justica-recebe-denuncia-contra-militar-por-sequestro-na-guerrilha-do-araguaia/?searchterm=Sebasti%C3%A3o%20Curi%C3%B3%20Rodrigues%20de%20Moura> (link at bottom of page); TRF-1, Ap. Crim. No. 0006232-77.2012.04.01.3901, Procurador: André Casagrande Raupp, 10.7.2012 (indictment charging Major Lício Augusto Maciel with the enforced disappearance of Divino Ferreira de Souza), *available at* <http://www.prpa.mpf.mp.br/news/2012/justica-recebe-denuncia-contra-militar-por-sequestro-na-guerrilha-do-araguaia/?searchterm=Sebasti%C3%A3o%20Curi%C3%B3%20Rodrigues%20de%20Moura> (link at bottom of page); *see also* Leonardo Jun Ferreira Hidaka, *Accountability for Gross Human Rights Violations in Brazil: The Araguaia Case and Its Repercussions*, 18 APORTES DPLF 18, 22 (2013) (discussing the charges brought against Curió Rodrigues de Moura and Maciel).

<sup>102</sup> The case concerns the 1973 disappearance of Edgar de Aquino Duarte, who was detained at the DOI-CODI and DEOPS torture centers in São Paulo. One of the defendants, Carlos Alberto Brilhante Ustra, has received a declaratory sentence from a civil court regarding his participation in torture and other human rights crimes. Prosecutors are using the argument that because the victims' bodies have never been found, the crimes are ongoing and the 1979 Amnesty Law does not apply. *See* Rebecca J. Atencio, *Brazil Initiates Its First Human Rights Trial*, TRANSITIONAL JUSTICE IN BRAZIL (Dec. 10, 2013), <http://transitionaljusticeinbrazil.com/2013/12/10/brazil-initiates-its-first-human-rights-trial/?blogsub=confirming#subscribe-blog>.

<sup>103</sup> *See* Bateman *supra* note 89.

<sup>104</sup> Martha K. Huggins, *Legacies of Authoritarianism: Brazilian Torturers' and Murderers' Reformulation of Memory*, 27 LATIN AM. PERSP. 89 (2000) (discussing the Brazilian historical memory of the military regime's security forces).



place.<sup>105</sup> However, the military never formally apologized for its actions.<sup>106</sup>

Important non-state actors also supported the military junta, but generally they have been reluctant to issue public apologies, with one important exception. On August 31, 2013, Brazil's main newspaper, *O Globo*, owned by the Brazilian media group, Organizações Globo, ran a 1,300-word piece admitting it had made "a mistake" by supporting the military dictatorships through its editorial bias and by acting as a propaganda tool between 1964 and 1985.<sup>107</sup> The editorial was released after mounting anti-government protests dating back to June 2013, during which protesters not only demonstrated against government corruption and low-quality public services, but also denounced Brazil's largest media conglomerate for its links to the dictatorships.<sup>108</sup> In fact, the editorial opens with a chant from protesters: "The truth is hard, Globo supported the dictatorship."<sup>109</sup> It goes on to say that the protests provided the necessary impetus for releasing the editorial, which had been the result of years of internal discussions regarding the newspaper's engagement with and portrayal of the dictatorships.<sup>110</sup>

#### 4. Initial Reparations Program and Legacy

##### a) Court-ordered reparations

While an official reparations program was not instituted until 1995, the first legal actions filed by the family members of victims against the state date back to 1978. Through

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<sup>105</sup> ARCHDIOCESE OF SÃO PAULO, *TORTURE IN BRAZIL: A SHOCKING REPORT ON THE PERVASIVE USE OF TORTURE BY BRAZILIAN MILITARY GOVERNMENTS, 1964-1979* xi (Joan Dassin ed., Jaime Wright trans. 1998, First University of Texas Press 1998) (1986).

<sup>106</sup> PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 47 (2d ed. 2002).

<sup>107</sup> *Apoio editorial ao golpe de 64 foi um erro*, O GLOBO (Aug. 31, 2013, 5:00 PM), <http://oglobo.globo.com/pais/apoio-editorial-ao-golpe-de-64-foi-um-erro-9771604>. See also Roy Greenslade, *Brazilian media group apologises for supporting military dictatorship*, THE GUARDIAN (Sept. 9, 2013, 9:15 AM), <http://www.theguardian.com/media/greenslade/2013/sep/09/brazil-newspapers>.

<sup>108</sup> According to several news sources, protesters in several cities targeted the broadcasting arm of O Globo, Rede Globo, defacing its headquarters in Sao Paulo with graffiti and throwing manure bombs at the building. See e.g., Janet Tappin Coelho, *Globo media organisation apologises for supporting Brazil's dictatorship*, THE INDEPENDENT (Sept. 2, 2013), <http://www.independent.co.uk/news/world/americas/globo-media-organisation-apologises-for-supporting-brazils-dictatorship-8795277.html>; Anderson Antunes, *Why Brazilians Oddly Blame The Globo Media Empire For The Country's Misfortunes*, FORBES (Aug. 01, 2013, 1:41 PM), <http://www.forbes.com/sites/andersonantunes/2013/08/01/why-brazilians-oddly-blame-the-globo-media-empire-for-the-countrys-misfortunes/>.

<sup>109</sup> O GLOBO, *supra* note 107.

<sup>110</sup> *Id.*

these legal actions, families typically sought monetary compensation and/or a declaration of responsibility by the Brazilian state.<sup>111</sup> For example, on October 25, 1978, federal judge Márcio José de Moraes declared Brazil responsible for the detention, torture, and death of journalist Vladimir Herzog, and ordered monetary damages for his widow.<sup>112</sup> A year later, another widow followed suit and was awarded a monthly pension.<sup>113</sup> In 1981, the family of activist Mario Alves, filed and won a legal action that did not seek monetary compensation but instead a declaration of state responsibility for Alves's illegal detention, torture, and disappearance.<sup>114</sup> Ten years later, in 1991, the courts issued a sentence declaring the state responsible for the detention of another missing activist and granted the family compensation equivalent to 169,410,000 rupees<sup>115</sup> for material and moral damages.<sup>116</sup> Notably, none of the reparation judgments of Brazilian courts identified for this paper revealed specific provisions addressing female victims.

Although such families won reparations judgments, these were limited to the petitioners and did not represent comprehensive national reparation scheme. Narrow in nature and not readily accessible to many, these isolated legal actions did not provide a systematic, formal mechanism for families of the disappeared or other victims to seek redress from the state.

In 1993, this led the Commission of Relatives, the *Tortura Nunca Mais* groups, human rights organizations, and the House of Representatives' External Commission for the Search for the Victims of Political Disappearance to begin a national discussion<sup>117</sup> on legal initiatives under which the State would acknowledge legal responsibility for the atrocities committed.<sup>118</sup> Two years later, on December 4, 1995, and after several failed attempts, President Cardoso signed the Federal Program of Reparations (Reparations

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<sup>111</sup> *The Reparations Program in Brazil*, *supra* note 41, at 110.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Equivalent to \$2,732,613 dollars (6,558,272.16 Reais) as of March 2014.

<sup>116</sup> The Federal Regional Tribunal confirmed the sentence in 1999, but the State appealed the amount to be paid. See *The Reparations Program in Brazil*, *supra* note 41, at 110.

<sup>117</sup> These groups held a national conference to discuss legal projects that would allow the recognition of State responsibility.

<sup>118</sup> *The Reparations Program in Brazil*, *supra* note 41, at 114.

Law)<sup>119</sup> for persons disappeared<sup>120</sup> between 1961 and 1979, as well as those who died in violent ways at the hands of state agents.<sup>121</sup>

### **b) State-mandated reparations: implementation of compensation schemes**

The Reparations Law established a seven-person Special Commission on Deaths and Disappearances (Special Commission).<sup>122</sup> A list of 136 victims had been compiled from nongovernmental reports, press articles, and government investigations and was annexed to the law.<sup>123</sup> Victims were defined as: “missing persons killed due to involvement or alleged involvement in political activities and other measures in the period from September 2, 1961 to August 15, 1979.”<sup>124</sup> The law mostly centered on the issue of monetary reparations and established a period of 120 days for relatives, such as a spouse, common law spouse, descendants, ancestors, and collateral relatives up to fourth degree of kinship (in that order of priority), to present their claims to the Special Commission.<sup>125</sup> The original text of the Reparations Law does not contain specific provisions regarding reparations for female victims.<sup>126</sup>

The federal budget was amended to fund the payouts, with the annual reparation awards paid out nearly matching the amount provided for in the budget. The monetary compensation awarded to the victims consisted of 77,494.40 rupees<sup>127</sup> for every year of life lost, taking into account the difference between the age at death and the life expectancy for an average person of that same age and sex, as provided for in the actuarial tables in Annex 2 of the law. Families filing claims with the commission were not barred from pursuing separate legal claims in Brazilian courts.<sup>128</sup> The law

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<sup>119</sup> Formally known as the Law of Victims of Political Assassination and Disappearance.

<sup>120</sup> Those contained in the Dossiê.

<sup>121</sup> *The Reparations Program in Brazil*, *supra* note 41, at 114.

<sup>122</sup> The Special Commission met for the first time on January 9, 1996.

<sup>123</sup> *The Reparations Program in Brazil*, *supra* note 41, at 114.

<sup>124</sup> Lei No 9.140, de 04 de Dezembro de 1995, Presidência da República Casa Civil Subchefia para Assuntos Jurídicos (Braz.) (original text of law), available at [http://www.planalto.gov.br/ccivil\\_03/Leis/L9140.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9140.htm).

<sup>125</sup> *The Reparations Program in Brazil*, *supra* note 41, at 114.

<sup>126</sup> Lei No 9.14 *supra* note 124.

<sup>127</sup> \$1,284.25 dollars (3,000 Reais) as of March 2014.

<sup>128</sup> Law 9.140 does not establish any restrictions as to families who had presented a legal action in the courts, who could also petition the Commission. Likewise, petitioning the Commission did not preclude future legal actions against the State. The Law also prescribes that, in cases of court sentences condemning the State for political

established lump sum, nontaxable payment of no less than 2,742,830 rupees<sup>129</sup> and no more than 3,793,330 rupees.<sup>130</sup> Further, where there was a court judgment condemning the state for political assassination or enforced disappearance, an appeal by the state did not relieve it from its obligation to pay a reparation award granted by the Special Commission.

The Special Commission did not have a deadline to complete its work; however, it was required to issue quarterly progress reports and a final report, which it released in 1999, and which marked the dissolution of the commission. By 1999, with the exception of a few petitions awaiting resolution by the courts, all compensation claims had been paid. The commission received 373 petitions for reparations on behalf of 366 victims. The Annex of the Reparations Law contained 136 victims, 132 of which were automatically recognized, relatives of the remaining four did not file claims.<sup>131</sup> In addition to the victims detailed in the annex, the commission decided another 234 reparation petitions, of which 148 (63%) were granted and 86 (37%) were rejected.<sup>132</sup> Additionally, out of the 358 victims contained in the *Dossiê*, 298 submitted petition for reparations, of which the commission approved 262 victims (although 132 of these names appeared already in the Annex) and rejected 36. A summary of the petitions and their disposition before the commission follows.

After the dissolution of the Special Commission, reparations initiatives of the central government continued in other forms. For instance, in 2001, the federal government created the Amnesty Commission, which was officially part of the Ministry of Justice and was charged with granting reparations for victims of abuses not covered by the Special Commission, including torture, arbitrary imprisonment, and forced exile.<sup>133</sup> By mid-2010, the Amnesty Commission had awarded financial compensation in over 12,000 cases

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assassinations or disappearances during the dictatorship, any appeal by the State should not prevent it from paying the stipulated amount while the appeal is decided (Article 14). See *The Reparations Program in Brazil*, *supra* note 41, at 114.

<sup>129</sup> \$42,808.20 dollars (100,000 Reais) as of March 2014.

<sup>130</sup> \$59,203.74 dollars (138,300 Reais) as of March 2014.

<sup>131</sup> *The Reparations Program in Brazil*, *supra* note 41, at 124.

<sup>132</sup> *Id.*

<sup>133</sup> *Brazil's Amnesty Commission: Interview with Paulo Abrão*, TJ BRASÍLIA BLOG (July 8, 2011, 2:10 PM), <http://tjbrasil.blogspot.com/2011/07/during-conference-we-asked-national.html>.

and granted symbolic reparation in the form of an official apology.<sup>134</sup>

In 2002, Law 10,536/02 (2002 Amendments) was issued, amending several provisions of the Reparations Law. The 2002 Amendments addressed two primary the limitations of the Reparations Law: (1) the time period covered, and (2) the insufficient time for the submission of applications.<sup>135</sup> In addition, the law made further modifications including, expanding victims to include those who had died as a result of police repression during public demonstrations or during armed conflicts with public agents. It also covered those who committed suicide at the time of their arrest,<sup>136</sup> or were tortured by state agents and subsequently committed suicide.<sup>137</sup> While these new laws addressed some of the limitations in the original Reparations Law, other limitations regarding the burden of proof<sup>138</sup> and the inaccessibility of information by the State<sup>139</sup> have yet to be addressed.

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<sup>134</sup> See *Brazil*, INT'L CTR. FOR TRANSITIONAL JUST., <http://ictj.org/our-work/regions-and-countries/brazil> (last visited Sept. 15, 2013).

<sup>135</sup> The new application period made it possible to incorporate cases that occurred between 1979 and October 5, 1988 and all previous cases whose relatives had not known about the Law or had not had time to prepare the necessary documents to file a petition. See *The Reparations Program in Brazil*, *supra* note 41, at 140.

<sup>136</sup> "Suicide in the imminence of an arrest" is interpreted as a suicide taking place before an arrest and possibly the result of knowing that the arrest was about to take place.

<sup>137</sup> *The Reparations Program in Brazil*, *supra* note 41, at 140.

<sup>138</sup> Although the state had already accepted responsibility for victims enumerated in the annex to the Reparations Law, the law mostly placed the burden of proof with the relatives. Article 1 of the Reparations Law only requires that victims who were arrested by state agents remain missing at the time of application for redress in order to be eligible for relief under the act. In other circumstances not mentioned in the Annex, for example, cases of death of a victim which the state issued an official version of events that contradicted state responsibility (e.g., if the state denied taking the victim into custody prior to the death), the families bore the full burden of proof. Relatives also complained that the burden of proof remained entirely on them to clarify the circumstances of the deaths and disappearances and the location of the bodies, although most of this information was rarely ever in their possession. Article 8 of the Reparations Law determined that the commission act to locate the remains after an 'express request' of the relatives and only if there were indications as to the probable location. There is no provision for an initiative of the state to find evidence that might lead to the location of the bodies. See *id.* at 116.

<sup>139</sup> Inability to access information primarily is the result of sealed government documents, although this may be improving given the passage of Access to Information Laws in 2011.

**Table 1: Summary of petitions and victims<sup>140</sup>**

Petitions that requested death certificates or location of remains but no economic reparations: 2
Total number of petitions for reparations received: 373
Total number of victims in petitions for reparations: 366
From these: 132 were contained in Annex of Law 9,140 automatically approved
234 to be judged by the Commission
From these: 148 granted
86 refused
Total number of victims for which reparations was granted: 280

**Table 2: Amount budgeted and paid in compensation per year<sup>141</sup>**

Year	Amount budgeted (in reais)	Indian Rupee (1 BRL réis = 26.3395 INR)	\$US dollar (1 BRL réis = 0.43 \$USD)	Amount effectively paid (in reais)	Indian Rupee (1 BRL réis = 26.3395 INR)	\$US dollar (1 BRL réis = 0.43 \$USD)
1996	15,000,000.00	395,092,500.00	6,450,000.00	14,939,639.94	393,502,646.20	6,424,045.17
1997	17,360,400.00	457,264,255.80	7,464,972.00	17,247,974.93	454,303,035.67	7,416,629.22
1998	0	0.00	0.00	0	0.00	0.00
1999	1,068,670.00	28,148,233.47	459,528.10	1,068,670.00	28,148,233.47	459,528.10
2000	700,000.00	18,437,650.00	301,000.00	100,000.00	2,633,950.00	43,000.00
2001	744,000.00	19,596,588.00	319,920.00	0	0.00	0.00
2002	397,208.00	10,462,260.12	170,799.44	100,000.00	2,633,950.00	43,000.00
<b>Total</b>	<b>35,270,278.00</b>	<b>929,001,487.38</b>	<b>15,166,219.54</b>	<b>33,456,284.87</b>	<b>881,221,815.33</b>	<b>14,386,202.49</b>

<sup>140</sup> Data adapted from *The Reparations Program in Brazil*, supra note 41, at 124.

<sup>141</sup> *Id.*

**Table 3: Estimated total cost of the Special Commission's operation per year<sup>142</sup>**

Year	Compensations (in reais)	Travel expenses (in reais)	Salaries (in reais)	Total (in reais)	Total in Indian Rupee (1 BRL réis = 26.3395 INR)	Total in \$US dollars (1 BRL réis = 0.43 USD)
1996	14,939,639.94	34,106.20	124,800.00	15,098,546.14	397,688,156.05	6,492,374.84
1997	17,247,974.93	63,231.06	124,800.00	17,436,005.99	459,255,679.77	7,497,482.58
1998	0	10,998.78	124,800.00	135,798.78	3,576,871.97	58,393.48
1999	1,068,670.00	280.79	35,800.00	1,104,750.79	29,098,583.43	475,042.84
2000	100,000.00	0	18,000.00	118,000.00	3,108,061.00	50,740.00
2001	0	32,530.41	18,000.00	50,530.41	1,330,945.73	21,728.08
2002	100,000.00	9,414.48	32,900.00	142,314.48	3,748,492.25	61,195.23
<b>Total</b>	<b>33,456,284.87</b>	<b>150,561.72</b>	<b>479,100.00</b>	<b>34,085,946.59</b>	<b>897,806,790.21</b>	<b>14,656,957.03</b>

### c) Other reform efforts

In reaction to restrictions in the Reparations Law that limited payments to family members of victims who had died as a result of actions of agents of the federal government, several federal states in Brazil issued their own compensation laws.<sup>143</sup> Complementary to the Reparations Law, these laws benefitted surviving victims of human rights violations, chiefly victims of torture.<sup>144</sup> These laws represented the efforts of sympathetic states, victims groups, and leaders who wanted to address gaps in the federal Reparations Law. These state laws typically limit eligibility to victims who were held or tortured by agents of the particular state and not by federal agents or agents of other states. The minimum compensation available through these programs is set at 129,157 rupees,<sup>145</sup> with a maximum of approximately 774,944 rupees.<sup>146</sup> Based on data from 2002, the state of Rio Grande do Sul has award the highest total compensation. A total of 1,378 petitions were filed with the state's program of which 1,000 (72 %) were approved and 343 (25 %) were rejected. Total amount paid through the program is estimated at 469,100,000 rupees,<sup>147</sup> although many victims have yet to receive their

<sup>142</sup> *Id.*

<sup>143</sup> The state laws were modeled after the Reparations Law, with Special Commissions adjudicating the applications; however, unlike the Federal Law, the state laws do not include an Annex with victims already approved.

<sup>144</sup> *The Reparations Program in Brazil, supra* note 41, at 116.

<sup>145</sup> \$2,140.41 dollars (5,000 Reais) as of March 2014.

<sup>146</sup> \$12,842.46 dollars (30,000 Reais) as of March 2014.

<sup>147</sup> \$7,773,969.12 dollars (18,160,000 Reais) as of March 2014.

awards.<sup>148</sup>

In 2011, the Public Archive of the State of São Paulo and the Center for Research Libraries began to digitize and create an online platform, Brasil Nunca Mais Digital,<sup>149</sup> to preserve evidence and other documents related to more than 7,000 political prisoners tried before Brazil's Military Supreme Court, during the dictatorship.<sup>150</sup>

## B. CHILE

### 1. Brief Background of Conflict that Led to Reparation Schemes

In 1973, General Augusto Pinochet overthrew the socialist government of President Salvador Allende. Pinochet led the Chilean government as commander of the armed forces for seventeen years, until 1989, when he held and lost a national plebiscite on whether he should remain president.<sup>151</sup> Systematic repression of opposition groups characterized Pinochet's rule.<sup>152</sup> Unlike Brazil and Guatemala, the opposition in Chile was seldom armed and mostly involved nonviolent movements.<sup>153</sup> The government targeted those it perceived to be political opponents through torture, extra-judicial killings, and enforced disappearances. The government also attacked public demonstrators in the streets and conducted aggressive patrols in neighborhoods

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<sup>148</sup> *The Reparations Program in Brazil*, *supra* note 41, at 116.

<sup>149</sup> It is interesting to note that this archive contains correspondence between Jaime Wright and Columbia University regarding Jaime Wright's offer and wish that Columbia house the original project documents stored in Geneva. From June 1985-1987 Jaime Wright wrote letters to Anthony Ferguson at Columbia University (who is no longer at the University) in order to coordinate logistics. After several letters in which Columbia delayed the transfer with additional questions, the University of Texas-Austin proposed that it would immediately take the original documents if Jaime Wright so desired. Given the amount of time it took Columbia to decide how they would house the project documents, Jaime Wright eventually gave the documents to UT-Austin. Upon notice of this decision, Columbia wrote a letter offering to take the documents immediately. Jaime Wright replied noting Columbia's delayed responses and technical questions, which dragged his offer for two years and thus prompting him to instead donate the documents to UT-Austin. *See e.g.*, Letter from Jaime Wright, Coordinator of the "Brasil: Nunca Mais" Project, to Anthony W. Ferguson, Director of Library Resources Group at Columbia University (Nov. 17, 1987), [http://bnmdigital.mpf.mp.br/DocReader/DocReader.aspx?bib=DOC\\_BNM&PagFis=9327&Pesq=Columbia](http://bnmdigital.mpf.mp.br/DocReader/DocReader.aspx?bib=DOC_BNM&PagFis=9327&Pesq=Columbia).

<sup>150</sup> *New Online Archive Hosts Secrets of Brazil's Dictatorship*, INT'L CTR. FOR TRANSITIONAL JUST., <http://ictj.org/news/online-archive-brazil-dictatorship> accessed (last visited Oct. 20, 2013).

<sup>151</sup> Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in *THE HANDBOOK OF REPARATIONS [hereinafter Reparations Policy for Human Rights Violations in Chile]* (Pablo de Greiff ed., 2006), *available at* <http://www.oxfordscholarship.com/view/10.1093/0199291926.001.0001/acprof-9780199291922-chapter-3>.

<sup>152</sup> Most of the repression took place right after Pinochet took over, between 1974 and August 1977.

<sup>153</sup> Aryeh Neier & Cynthia Brown, *Pinochet's Way*, in *THE NEW YORK BOOK REVIEW* (1987) (book review).



considered hostile to the regime.<sup>154</sup>

After the plebiscite, in 1990, Chileans went to the polls and elected President Patricio Aylwin. The new president quickly initiated measures of reconciliation.

## **2. Description of the Truth Report**

### **a) Mandate establishing the truth commission and contribution of human rights advocates and the international community**

On April 25, 1990, President Aylwin issued Supreme Decree No. 355 to establish an eight person National Commission for Truth and Reconciliation known as the Rettig Commission. The members of the commission included four former Pinochet supporters, among them former officials in Pinochet's government, and four commissioners who had opposed the Pinochet regime.<sup>155</sup> The Rettig Commission was responsible for investigating and documenting human rights abuses that occurred during the 1973-1989 military rule of Pinochet.<sup>156</sup> Specifically, the mandate of the Rettig Commission called for the investigation of human rights abuses resulting in death or disappearance.<sup>157</sup> As such, torture and other human rights abuses that did not result in death fell outside the purview of the Rettig Commission's mandate. In February 1991, the Rettig commissioners delivered a 1,800-page report to President Aylwin. President Aylwin presented the report to the country and, to the shock of many, asked the victims for forgiveness on national television.<sup>158</sup>

### **b) Issues and human rights abuses covered**

Due to the efforts of the Vicaría de la Solidaridad (the human rights office of the Archbishop of Santiago), cases of disappearance were closely tracked throughout the

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<sup>154</sup> *Id.*

<sup>155</sup> HAYNER, *supra* note 106, at 47.

<sup>156</sup> *Truth Commission: Chile 90*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-chile-90> (last visited Sept. 15, 2013).

<sup>157</sup> Acts documented by the commission include, disappearance, torture resulting in death, executions by government forces, use of undue force leading to death, death of combatants and non-combatants in the firefight immediately after coup, and killings by armed opposition groups. See HAYNER, *supra* note 106, at 47.

<sup>158</sup> THOMAS C. WRIGHT, *STATE TERRORISM IN LATIN AMERICA: CHILE, ARG., AND INT'L HUM. RTS 184-89* (2006).

dictatorship.<sup>159</sup> The Rettig Commission benefitted from this information and the files served as the backbone of its database. Essentially, the files kept by the Vicaría allowed the Commission to identify family members of the disappeared and estimate the number of testimonies it would receive. The Rettig report documented 3,428 cases of disappearance, extrajudicial killing, torture,<sup>160</sup> and kidnapping.

The Rettig report noted that “[t]orture for women prisoners was sexual, and took many and bizarre forms,”<sup>161</sup> but it did not breakdown victims by gender, instead grouping victims by the type of human rights violations suffered (e.g., torture, use of undue force, etc). The report also mentions the experiences of women throughout the document. It notes, for instance, that their treatment in the infamous National Stadium, where mass torture took place, differed from that of men since women had mattresses where they slept as opposed to men who had no beds.<sup>162</sup> Some detention sites run by the secret service, DINA, also held men and women in separate rooms.<sup>163</sup> According to the Rettig report, in 1976, many women were victims of disappearance and imprisonment, but the vast majority of victims were men.<sup>164</sup> It appears that pregnant women were also victimized, as the Rettig report specifically cites nine women who were pregnant<sup>165</sup> when they were imprisoned.<sup>166</sup>

Following the report’s recommendations,<sup>167</sup> legislative action established the National Corporation for Reparation and Reconciliation to provide continuing assistance to victims who had testified and to continue investigations that the commission was unable to complete.<sup>168</sup>

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<sup>159</sup> HAYNER, *supra* note 106, at 225.

<sup>160</sup> While torture and other human rights abuses that did not result in death fell outside the purview of the Rettig Commission’s mandate, the Rettig Commission still investigated torture cases and noted in the Report’s Appendix that torture cases not resulting in death were outside the scope of the Commission.

<sup>161</sup> See REP. OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION VOL. I, at 160 (English ed. 1993), *available at* [http://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf).

<sup>162</sup> *Id.* at 182.

<sup>163</sup> *Id.* at 638.

<sup>164</sup> *Id.* at 647.

<sup>165</sup> The Rettig report notes that it was not determined if any of their babies were born, or if so, what happened to them.

<sup>166</sup> See REP. OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION VOL. I, *supra* note 161, at 647.

<sup>167</sup> None of the recommendations centered specifically on women or gender issues.

<sup>168</sup> *Truth Commission: Chile 90*, *supra* note 156.

Chile, mainly through legislative action, adopted reparation schemes to address the demands of victims of abuses committed by the dictatorship. These schemes include a lifetime monthly reparations pension program<sup>169</sup> in the range of 20,826.4<sup>170</sup> rupees, per family, which is being provided to around 2,584 victims out of 5,794 identified beneficiaries.<sup>171</sup> Of those entitled to reparations, the board allocated reparation funds as follows: 40% to spouses; 30% to the mother or father of the victim; 40% to the mother or father of the natural son of a victim; and 15% to the victim’s children.<sup>172</sup> These percentages fluctuate depending on the year and whether beneficiaries claim their benefits.<sup>173</sup> None of the sources consulted revealed the gender breakdown of beneficiaries.<sup>174</sup>

In addition, a comprehensive physical and psychological health care system known as PRAIS was implemented. Ongoing financial support also has been provided to the families of victims named in the Commission’s report, at a cost totaling around 965,862,000 rupees<sup>175</sup> each year.<sup>176</sup> Most recently, in November 2009, the Chilean Congress created the Institute for Human Rights and re-opened the process for establishing which victims qualified for reparations.<sup>177</sup>

**Table 1: Annual pensions expenditures by the Chilean State<sup>178</sup>**

Year	1992	1993	1994	1995
Pesos	6,926,398,000	5,116,674,000	5,769,755,000	5,774,229,000
Dollars	2,582,370	1,711,327	1,719,415	1,458,263
Indian Rupee	764,743,603	564,931,976	637,038,650	637,532,624

<sup>169</sup> HAYNER, *supra* note 106, at 275.

<sup>170</sup> \$345-\$482 dollars as of March 2014.

<sup>171</sup> See *Reparations Policy for Human Rights Violations in Chile*, *supra* note 151.

<sup>172</sup> See *Beneficios de Reparación*, PROGRAMA DE DERECHOS HUMANOS MINISTERIO DEL INTERIOR Y SEGURIDAD PÚBLICA, [http://www.ddhh.gov.cl/social\\_beneficios.html](http://www.ddhh.gov.cl/social_beneficios.html).

<sup>173</sup> *Id.*

<sup>174</sup> Sources consulted include those previously cited as well as the Chilean government’s website on the reparation and human rights programs. See *supra* note 172.

<sup>175</sup> \$16 million dollars as of March 2014.

<sup>176</sup> HAYNER, *supra* note 106, at 275.

<sup>177</sup> See *Beneficios de Reparación*, *supra* note 172.

<sup>178</sup> See *Reparations Policy for Human Rights Violations in Chile*, *supra* note 151.

**Table 2: Annual expenditures by the Ministry of the Interior for memorialization projects<sup>179</sup>**

Year	2000	2001	2002	2003
Pesos	252,000,000	516,000,000	516,642,000	523,000,000
Dollars	400,000	748,000	735,000	756,875
Indian Rupee	27,823,320	56,971,560	57,042,443	57,744,430

Source: [www.dipres.cl](http://www.dipres.cl)

### c. Conclusions and reception of the report

While President Aylwin fully endorsed the report when it was released, the government halted implementation of recommendations shortly thereafter. In the spring of 1991, armed leftist groups carried out attacks against right-wing politicians, which resulted in the death of the right-wing leader Jaime Guzmán.<sup>180</sup> Nonetheless, that same year President Aylwin, via a national television program, apologized to victims and their families on behalf of the state even though Augusto Pinochet and other leaders of the armed forces rejected the findings of the report.<sup>181</sup>

## 3. Identification of Other Transitional Justice Measures

### a) Valech Commission

The Rettig Commission report did not document cases of serious violations that did not result in death, including non-lethal torture, illegal detentions (where the victim was released), and forced exile. In 2003, President Ricardo Lagos created the National Commission on Political Imprisonment and Torture, known as the Valech Commission, to further document these types of abuses.<sup>182</sup>

<sup>179</sup> In 2002, a registry was compiled of the 134 symbolic reparations projects that had been constructed up until then, including memorials, monoliths, parks, sculptures, and other public monuments and places. Adapted from *id.*

<sup>180</sup> *Truth Commission: Chile 90*, *supra* note 156.

<sup>181</sup> WRIGHT, *supra* note 158.

<sup>182</sup> *Commission of Inquiry: Chile 03*, U.S. INST. OF PEACE, <http://www.usip.org/publications/commission-of-inquiry-chile-03> (last visited Sept. 15, 2013).

In the decree establishing the Valech Commission, President Lagos named eight individuals to the commission: six men and two women, with Bishop Sergio Valech serving as its chair.<sup>183</sup> The Commission operated between September 2003 and June 2005, and investigated crimes that occurred between September 11, 1973 and March 10, 1990.<sup>184</sup> The Valech Commission took statements from 35,000 people and delivered a 1,200-page report to President Lagos on November 10, 2004. Lagos subsequently presented the report to the nation in a televised speech.<sup>185</sup> Because the Commission only operated for little over a year, President Lagos asked the Commission to produce an additional report regarding approximately 1,000 additional cases that were submitted by victims and their families, but which the Commission could not resolve within its original timeframe.<sup>186</sup> The Commission submitted this supplemental report in June 2005.<sup>187</sup>

The findings of the Valech Commission, including the supplemental report, revealed that, “torture and detention were used as a tool for political control by State authorities and perpetuated by decrees and laws that protected repressive behavior, implicitly supported by the judiciary.”<sup>188</sup> Also, it found that it was general practice of the Armed Forces and paramilitary police to engage in torture on a national scale. The report recognized 28,549 individuals as victims of political imprisonment and identified military, police, and intelligence units involved in torture, although it withheld the names of those responsible.<sup>189</sup>

While the Rettig report had made mention of some female victims, the Valech report found a higher incidence of such victims.<sup>190</sup> Between September 1973 and March 1990, out of 1,204 victims subjected to political imprisonment, 18.44% were women and

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<sup>183</sup> Decreto Supremo No. 1086, Noviembre 3, 2004, Biblioteca del Congreso Nacional (Chile), *available at* [http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chile03-Charter\\_decree1086.pdf](http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chile03-Charter_decree1086.pdf).

<sup>184</sup> HAYNER, *supra* note 106, at 274.

<sup>185</sup> *Commission of Inquiry: Chile 03*, *supra* note 182.

<sup>186</sup> *Id.*

<sup>187</sup> See VALECH COMMISSION'S COMPLEMENTARY REP., *available at* [http://www.archivochile.com/Derechos\\_humanos/com\\_valech/Informe\\_complementario.pdf](http://www.archivochile.com/Derechos_humanos/com_valech/Informe_complementario.pdf).

<sup>188</sup> *Commission of Inquiry: Chile 03*, *supra* note 182.

<sup>189</sup> HAYNER, *supra* note 106, at 61.

<sup>190</sup> See VALECH COMMISSION'S COMPLEMENTARY REP., *supra* note 187, at 9.

81.56% were men.<sup>191</sup> This compares to the 12.72%<sup>192</sup> of female victims found in the Rettig report.<sup>193</sup>

Unlike the military's rejection of the 1991 Rettig Report, in 2004, days before the release of Valech Commission's report, the commander of the army acknowledged institutional responsibility for "punishable and morally unacceptable acts in the past."<sup>194</sup> Immediately after the report's release, President Lagos committed to paying reparations to the identified victims of torture. Within a year, approximately 20,000 additional victims began to receive a monthly lifelong pension of 11,429.7 rupees,<sup>195</sup> free education, housing, and health care.<sup>196</sup> The law, which sets out the reparation benefits, does not distinguish between the benefits for which women and men are eligible.<sup>197</sup>

### **b) Accountability (trials)**

In 1978, Pinochet instituted an amnesty law absolving perpetrators of human rights violations from criminal responsibility for crimes committed between September 11, 1973 and March 10, 1978.<sup>198</sup> While courts have not applied the amnesty law in the past few years, the amnesty law is still part of domestic law and has thus impaired Chile's pursuit of justice and truth.<sup>199</sup>

Perhaps the most notable attempt at justice has been Spanish Judge Garzón's use of the international legal doctrine of universal jurisdiction, in 1998, to obtain the arrest and seek the extradition of Pinochet from Great Britain to Spain to face charges of torture and human rights abuses. This event invigorated civil society groups to keep the issue of impunity for human rights violations on the national agenda, thus creating the impetus for the filing of more than 300 criminal complaints against Pinochet and others.<sup>200</sup> The

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<sup>191</sup> *Id.*

<sup>192</sup> This is out of 28,459 victims from the Rettig and Valech commissions combined.

<sup>193</sup> See VALECH COMMISSION'S COMPLEMENTARY REP., *supra* note 187, at 10.

<sup>194</sup> HAYNER, *supra* note 106, at 61.

<sup>195</sup> \$190 dollars (415.528 Reais) as of March 2014.

<sup>196</sup> *Commission of Inquiry: Chile 03*, *supra* note 182.

<sup>197</sup> Ley 19.992 Biblioteca del Congreso Nacional (Chile), Diciembre 17, 2004 *available at* [http://www.usip.org/sites/default/files/resources/LEY-19992\\_24-DIC-2004.pdf](http://www.usip.org/sites/default/files/resources/LEY-19992_24-DIC-2004.pdf).

<sup>198</sup> HAYNER, *supra* note 106, at 47.

<sup>199</sup> *Chile: 40 years on from Pinochet's coup, impunity must end*, AMENSTY INT'L. (Sept. 10, 2013), <http://www.amnesty.org/en/news/chile-40-years-pinochet-s-coup-impunity-must-end-2013-09-10>.

<sup>200</sup> TRANSITIONAL JUST.: HANDBOOK FOR LATIN AMERICA 296-97 (Félix Reátegui ed., 2011) (on file with author).

amnesties of accused perpetrators were challenged, and in some cases, courts did not apply the amnesty law and prosecutions proceeded.<sup>201</sup> Eventually, the government created new spaces for discussion with civil society groups and the armed forces, resulting in a “Mesa de Diálogo” (Roundtable).<sup>202</sup> In 2000, the Chilean Supreme Court revoked Pinochet’s parliamentary immunity and he was placed under house arrest until his death in 2006. During this time, the state indicted other military officers for their roles in deaths following the 1973 coup.<sup>203</sup> Despite Pinochet’s arrest, the right to justice is still a work in progress in Chile. It was not until 2013 that the Inter-American Court of Human Rights ruled in favor of a survivor of the dictatorship that was forced into exile.<sup>204</sup>

### c) Acknowledgement: public apologies/statements

Aside from the televised public apology previously mentioned, President Aylwin sent signed copies of the Rettig Report to individuals who testified.<sup>205</sup> Also, in January 2010, the Museum of Memory and Human Rights opened its doors in Santiago, Chile.<sup>206</sup>

## C. GUATEMALA

### 1. Brief Background of Conflict that Led to Reparation Schemes

Guatemala’s long internal armed conflict, from the mid-1950s to 1996, has its roots in racial and social tensions between the indigenous majority and the *ladino* (the non-indigenous) minority population.<sup>207</sup> These racial and social issues spilled over into politics as a result of internal unrest amongst militant groups. In the mid-1950s, the

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<sup>201</sup> *Truth Commission: Chile 90*, *supra* note 156.

<sup>202</sup> See TRANSITIONAL JUST.: HANDBOOK FOR LATIN AMERICA, *supra* note 200.

<sup>203</sup> Naomi Roht-Arriaza, *The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction*, in INT’L PROSECUTION OF HUM. RTS. CRIMES VIII 113, 113-123 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein, & Peter Weiss eds., 2007).

<sup>204</sup> This is the case of Leopoldo Garcia Lucero (named in the Valech Commission’s Report), who was jailed and tortured from the start of the dictatorship in 1973 until 1975, when he was exiled to Britain. In 1993, Lucero sent a letter to Chilean authorities seeking exoneration—the letter went unnoticed and in 2011 he filed a complaint with the Court of Appeals in Chile that prompted officials to research Lucero’s claims. The Inter-American Court of Human Rights ruled that the delay of 16 years and 10 months violated Chile’s responsibilities to conduct and conclude an investigation within a reasonable amount of time under human rights conventions and other treaties. See Javier Cordoba, *Human Rights Court In Chile Rules In Favor Of Pinochet Torture Victim*, HUFFINGTON POST (Nov. 3, 2013, 9:13 PM), [http://www.huffingtonpost.com/2013/11/04/pinochet-victim-chile\\_n\\_4212085.html](http://www.huffingtonpost.com/2013/11/04/pinochet-victim-chile_n_4212085.html).

<sup>205</sup> HAYNER, *supra* note 106, at 60.

<sup>206</sup> *Commission of Inquiry: Chile 03*, *supra* note 182.

<sup>207</sup> CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 146-163 (2012).

government began a program of intense state repression against citizens, especially those belonging to popular movements, farmers, students, trade unionist, and left-wing sympathizers.<sup>208</sup> A CIA-sponsored coup in 1954 marked the beginning of a wave of military dictatorships that resulted in state persecution of left-wing sympathizers and the rural indigenous population. After 1954, *guerrilla* groups formed to fight the repressive governments that followed. While the roots of the Guatemalan civil war reach back over 500 years of violence and ethnic exclusion, the civil war between the *guerrillas* and the military dictatorships began in the 1960s.<sup>209</sup> The state employed several tactics to terrorize the civilian population and undermine support for the *guerrilla* groups including, death squads, paramilitaries comprised of indigenous youth who committed atrocities against their own communities, and scorched earth policies designed to exterminate whole indigenous villages. Eventually, the *guerilla* groups came together in 1982, to form the Guatemala National Revolutionary Unity (URNG).<sup>210</sup>

The international community put pressure on the government and the URNG to come to a resolution. In the early 1990s, the United Nations mediated the negotiation of the peace accords. The parties signed the Comprehensive Agreement on Human Rights in 1994. During the peace negotiations, groups like the Civil Society Assembly, formed to advocate for the social justice of peasants, unions, women, and similarly marginalized groups. Within the Civil Society Assembly, women formed the Women's Sector to ensure that the discrimination suffered by women was brought to light during the peace negotiations. The discussion of women's issues during the peace negotiations eventually laid the foundation for the later incorporation of proposals made by women on issues of rights and protection.<sup>211</sup>

A key feature of the post-conflict transition in Guatemala was the creation of a national truth commission. Established by a separate agreement between the Government of Guatemala and the URNG, the truth commission, formally known as the Commission for

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<sup>208</sup> *Id.*

<sup>209</sup> *Guatemala 'Silent Holocaust': The Mayan Genocide*, THE CENTER FOR JUSTICE AND ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=294> (last visited Nov. 19, 2014)

<sup>210</sup> *Truth Commission: Guatemala*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-guatemala> (last visited Oct. 10, 2013).

<sup>211</sup> Claudia Paz y Paz Bailey, *Guatemala- Gender and Reparations for Human Rights Violations*, in *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 101-03 (Ruth Rubio-Marin ed., 2006).



Historical Clarification (CEH) drew on information collected by the Catholic Church during the long-running civil war. The church anticipated that the CEH would face limits to its mandate to collect information and during the peace negotiations initiated its own efforts to investigate and document the conflict, the Recuperation of Historical Memory Project (REMHI).<sup>212</sup> Both the REMHI and CEH commissions are discussed in greater detail below.

## 2. The Recuperation of Historical Memory Project (REMHI)

### a) Mandate of the REMHI

The Human Rights Office of the Catholic Archdiocese created REMHI to investigate the human rights abuses during the conflict. The investigation began in October 1994, two years before the signing of the peace accords in Oslo.<sup>213</sup>

Monsignors and other members of the Guatemalan dioceses coordinated and directed the work of the REMHI commission. The Commission employed analysts, specialists, and over 600 multilingual interviewers from local parishes who oversaw more than 6,500 interviews.<sup>214</sup> As researcher Rachel Hatcher notes, through REMHI, the Catholic Church “sought to enable the work of the planned CEH by collecting the testimonies of those the CEH might have a difficult time interviewing, either because of the geography and inaccessibility of Guatemala’s [] rural villages or [] [due to the] inherent mistrust rural Guatemalans [felt] toward outsiders, especially those asking questions about [the violence].”<sup>215</sup>

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<sup>212</sup> Rachel Hatcher, *Truth and Forgetting in Guatemala: An Examination of Memoria del Silencio and Nunca Más*, 34 CAN. J. OF LATIN AM. & CARIBBEAN STUD. 131, 131-33 (2009).

<sup>213</sup> See Hatcher, *supra* note 212, at 131-33. See also Eric Brahm, *Summary of Proyecto Interdiocesano Recuperación de la Memoria Histórica (Guatemala)*, BEYOND INTRACTABILITY (1999) <http://www.beyondintractability.org/bksum/remhi-proyecto>.

<sup>214</sup> Hatcher, *supra* note 212, at 131-33.

<sup>215</sup> *Id.* at 143.

## **b) Issues and human rights abuses covered**

The 1,400-page REMHI report drew from 6,500 collective and individual interviews, 92% taken with victims and 8% taken with those responsible for the events.<sup>216</sup> Further, the report shed light on direct victims of the violence and estimated the conflict resulted in approximately 150,000 civilian deaths, 50,000 missing persons, 1 million refugees, 200,000 children orphaned, and 40,000 women widowed.<sup>217</sup> Like the CEH report, the REMHI report also documented the number of deaths, disappearances, torture, and victims of sexual violence.

## **c) Conclusions, developments after the report, and reception of the report**

The REMHI report, published in April 1998, reached conclusions similar to those presented in the CEH report, which was published in February 1999. The only notable distinction between the conclusions of these two reports is that the REMHI report did not make a categorical observation about the military's genocidal campaign against the indigenous population.

Two days after releasing and presenting the report to Guatemalans, two military officers, a colonel and a captain, bludgeoned Monsignor Gerardi to death outside a church. The assailants were subsequently convicted of Gerardi's murder.<sup>218</sup> Rachel Hatcher observes in this regard that "the Report[] must be seen as incredible successes, especially given the information [it] contained."<sup>219</sup> Even though the peace accord had been signed, the REMHI report confirmed the crimes the military had committed at a time when the military still exerted substantial control over the country, especially in the countryside where most of the indigenous population resided.<sup>220</sup>

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<sup>216</sup> Carlos Martin Beristain, *Guatemala: Nunca Más*, FORCED MIGRATION REV. 23, 24 (1998) (describing the most significant findings of the REMHI Report, the experiences of the victims, and issues related to the process of reconstruction).

<sup>217</sup> Beristain, *supra* note 216, at 24.

<sup>218</sup> Hatcher, *supra* note 212, at 143.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

### 3. The Commission for Historical Clarification (CEH)

#### a) Mandate establishing the truth commission and contribution of human rights advocates and the international community

The CEH was created to cover and clarify human rights violations between 1960 and 1996 when the parties signed the final UN peace agreement. The purpose of the truth commission was to issue a report that “clarif[ied] with all objectivity, equity and impartiality the human rights violations and acts of violence that [] caused the Guatemalan population to suffer, connected with the armed conflict.”<sup>221</sup> Further, the commission was charged with generating recommendations for preserving the memory of victims in order to foster mutual respect and observance of human rights, and democracy in Guatemala.<sup>222</sup>

Guatemalan civil society groups actively lobbied for a truth commission prior to the commencement of the peace negotiations. Before its establishment, these groups, including the Catholic Church, had collected documentation of abuses, which they presented to the CEH when it began its work.<sup>223</sup> The Commission operated from 1997 to 1999. It was comprised of Edgar Alfredo Ballsells Tojo, a Guatemalan lawyer; Otilia Lux de Cotí, an indigenous educator<sup>224</sup> and a Guatemalan woman of Maya descent whose participation was the result of advocacy by civil society and indigenous organizations;<sup>225</sup> and Christian Tomuschat, a German law professor at Berlin’s Humboldt University, who was appointed by the Secretary-General of the United Nations as chair of the commission.<sup>226</sup> The Commission did not name individual perpetrators<sup>227</sup> partly because the leadership of the Guatemalan armed forces insisted that Guatemala not follow El Salvador’s model of naming individuals.<sup>228</sup>

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<sup>221</sup> See COMMISSION FOR HISTORICAL CLARIFICATION: CHARTER, at 1(1994), *available at* <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf>.

<sup>222</sup> *Id.*

<sup>223</sup> HAYNER, *supra* note 106, at 208.

<sup>224</sup> Hatcher, *supra* note 212, at 133.

<sup>225</sup> HAYNER, *supra* note 106, at 133.

<sup>226</sup> *Truth Commission: Guatemala*, *supra* note 210.

<sup>227</sup> Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & Soc. INQUIRY 79, 79-110 (1995).

<sup>228</sup> HAYNER, *supra* note 106, at 32-34.

The final report was titled “Guatemala: Memory of Silence.”<sup>229</sup> On February 25, 1999, the report was presented to the Guatemalan government, the URNG, and the U.N. Secretary General.<sup>230</sup>

### b) Issues and human rights abuses covered

After conducting 7,200 interviews with 11,000 persons, the Commission found that a total of approximately 200,000 civilians had been killed or disappeared—over 80% of the victims were Maya, and about 17% were *Ladino*.<sup>231</sup> State forces were found as the perpetrators in well over 90% of all the cases and insurgent actions were found responsible for about 3% of the human rights violations.<sup>232</sup> The report also found that in the four regions most affected by the violence during the 1981-83 dictatorship of General Efraín Ríos Montt, “agents of the state committed acts of genocide against groups of Mayan people.”<sup>233</sup>

The CEH report also devoted a chapter to sexual violence suffered by women. It found that the acts of sexual violence were not isolated or sporadic, but part of a strategic plan targeting Mayan<sup>234</sup> women.<sup>235</sup> Pregnant women were often killed and fetuses were “destroyed.”<sup>236</sup> According to the CEH report, sexual violence caused women to flee and dispersed entire communities, severing familial, marital, and social ties.<sup>237</sup> As a result, women became social outcasts subjected to communal shame. The chapter also mentions that while women and girls were most often the targets of sexual violence,<sup>238</sup>

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<sup>229</sup> The Memory of Silence report was preceded by the church-sponsored report “Nunca Mas.” See Popkin & Roht-Arriaza, *supra* note 227.

<sup>230</sup> *Id.*

<sup>231</sup> EVANS, *supra* note 207, at 152-55.

<sup>232</sup> See Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT’L L. 79 (2008).

<sup>233</sup> *Truth Commission: Guatemala*, *supra* note 210, at ¶ 122.

<sup>234</sup> Data shows that of the women that sustained violence 89.39% were Mayan, 10.02% Ladino, and 0.59% other. See INFORME DE LA COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, GUATEMALA: MEMORIA DEL SILENCIO TOMO III 24 (1999) [hereinafter MEMORIA DEL SILENCIO] (on file with author), *available at* <http://www.edualter.org/material/guatemala/segnovmemoria.htm>.

<sup>235</sup> HAYNER, *supra* note 106, at 87.

<sup>236</sup> MEMORIA DEL SILENCIO, *supra* note 234, at 13.

<sup>237</sup> *Id.*

<sup>238</sup> Violence against women is estimated to be 99% of cases registered. See MEMORIA DEL SILENCIO, *supra* note 234, at 19.

men and boys were also targeted.<sup>239</sup>

The CEH chapter on sexual violence against women was particularly important because, as the former Guatemalan attorney general Claudia Paz y Paz Bailey observed, other chapters of the report “downplayed” the gendered dimensions of the violations discussed.<sup>240</sup> None of the report recommendations addressed the sexual violence documented in the volume.<sup>241</sup> According to scholars Alison Crosby and M. Brinton Lykes, gender-based violence was “severely underreported and under-examined”<sup>242</sup> in the CEH report, especially given the scale of gender-based crimes during the conflict.<sup>243</sup>

**Table 1: Summary of human rights violations against women (1962-1996)<sup>244</sup>**

	Arbitrary executions	Torture	Arbitrary detentions	Sexual Violence	Forced displacement	Death due to forced displacement	Other
Percentages	33%	19%	18%	14%	6%	4%	5%

### c) Conclusions and reception of the report

The report’s conclusion that the Guatemalan government had committed acts of genocide against the Mayan people was arguably its most noteworthy and controversial.<sup>245</sup> The post-accords elections brought a conservative Guatemalan government to power, which attempted to diminish the report’s importance and findings.<sup>246</sup> For example, the Commission recommended that the government build monuments to memorialize the victims as well as to provide them financial compensation. The state has failed to fully implement these reparations measures, in

<sup>239</sup> *Id.* at 13-14.

<sup>240</sup> Paz y Paz Bailey, *supra* note 211, at 102.

<sup>241</sup> *Id.*

<sup>242</sup> See Alison Crosby & M. Brinton Lykes, *Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala*, 5 INT’L JOURNAL OF TRANSITIONAL JUSTICE 456 (2010).

<sup>243</sup> Approximately a quarter of the direct victims of human rights violations and acts of violence were women. See *e.g.*, MEMORIA DEL SILENCIO, *supra* note 234.

<sup>244</sup> *Id.* at 22.

<sup>245</sup> Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1, 1-40 (2001).

<sup>246</sup> See EVANS, *supra* note 207, at 152-54.

part due to lack of monetary resources. Additional recommendations of the Commission included wide dissemination of the report, translated into the indigenous languages.<sup>247</sup> The report also called for the prosecution of crimes not covered by the amnesty law, known as the Law on National Reconciliation of 1996.<sup>248</sup> The crimes arguably eligible for prosecution included genocide, torture, enforced disappearances or other crimes covered by international treaties which prevent the state from granting relief from criminal liability.<sup>249</sup>

The publication of the CEH report also resulted in the formation of the “First Forum of Women’s Consciousness,” a civil society initiative that gathered testimonies on the many forms of violence against women committed during the conflict in order to bring more attention to the issue and catalyze the discussion around reparations for women.<sup>250</sup>

#### d) Developments after the report

While there have been limited prosecutions and public acknowledgement of state wrongdoing in Guatemala, a National Reparations Commission (PNR) was finally established in 2003.<sup>251</sup> A further setback occurred in 2005, when the state changed the composition of the PNR from equal representation between government and human rights actors to strictly government officials. This reform created distrust between the government officials and civil society organizations involved in the reconciliation process.<sup>252</sup>

Further, in 2005, human rights activists uncovered a trove of National Police files documenting the involvement of the agency in anti-insurgency crimes. The discovery led

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<sup>247</sup> *Id.*

<sup>248</sup> The Guatemalan Congress passed the National Reconciliation Law on December 18, 1996 based on the UN-brokered peace agreement, which legalized the status of URNG members and established provisions for “extinguishing criminal responsibility” for crimes committed by members of the military, civil patrollers, and politicians between the start of the armed conflict and passage of the law. See Margaret Popkin, *Guatemala’s National Reconciliation Law: Combating Impunity or Continuing it?*, 24 REVISTA HDH 175 (1996).

<sup>249</sup> See EVANS, *supra* note 207, at 152-54.

<sup>250</sup> Paz y Paz Bailey, *supra* note 211, at 102.

<sup>251</sup> Ruth Rubio-Marín, Claudia Paz y Paz Bailey & Julie Guillerot, *Indigenous Peoples and Reparations Claims: Tentative Steps in Peru and Guatemala*, INT’L CTR. FOR TRANSITIONAL JUST. (June 2009), available at <http://www.ictj.org/sites/default/files/ICTJ-Identities-Reparations-ResearchBrief-2009-English.pdf>.

<sup>252</sup> See EVANS, *supra* note 207, at 152-54.

to the implementation of a national project to organize the archive and make it available to the public. Documents from the archives have been used in court cases on disappearances.<sup>253</sup> Additionally, the Guatemalan Forensic Anthropology Team, a civil society organization, has conducted hundreds of exhumations, and established a DNA bank to help identify remains so they can be returned to families.<sup>254</sup>

#### 4. Identification of Other Transitional Justice Measures

##### a) Accountability (trials)

While only a few cases have been prosecuted since the release of the report—mainly due to institutional neglect, lost evidence, and judicial delays—there have been several successful cases before the Inter-American Court of Human Rights that have highlighted these problems in the national justice system.<sup>255</sup> The Inter-American Court has adjudicated approximately 200 cases against Guatemala and has issued judgments in 11 contentious cases,<sup>256</sup> with record awards for collective reparations of nearly \$8 million.<sup>257</sup> Simultaneously, the discrepancy between the awards of the Inter-American Court, which range around \$25,000 per person for extrajudicial executions versus the awards from the national scheme, ranging around \$5,000, has created additional challenges for Guatemala in its attempt to adopt a uniform national policy.<sup>258</sup> The discrepancy between awards has also encouraged the Guatemalan government to make strides in the implementation of the PNR.<sup>259</sup>

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<sup>253</sup> See *Guatemala*, INT'L CTR. FOR TRANSITIONAL JUST., <http://ictj.org/our-work/regions-and-countries/Guatemala> (last visited Sept. 15, 2013).

<sup>254</sup> FUNDACIÓN DE ANTROPOLOGÍA FORENSE, <http://www.fafg.org/> (last visited Sept. 16, 2013).

<sup>255</sup> See *Guatemala*, *supra* note 253.

<sup>256</sup> See Marcie Mersky & Naomi Roht-Arriaza, *Guatemala Case Study*, in VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 7, 7-32 (2007) (discussing some of the important cases coming out of the Inter-American Court addressing Guatemalan state responsibility and reparations), *available at* <http://www.dplf.org/en/resources/victims-unsilenced-inter-american-human-rights-system-and-transitional-justice-latin>.

<sup>257</sup> This amount refers to the *Plan de Sánchez* case where Guatemala was ordered to pay \$25,000 for each of 236 victims and survivors, for a total of \$7.9 million.

<sup>258</sup> EVANS, *supra* note 207, at 160.

<sup>259</sup> *Id.* at 157-58.

In 2009 national prosecution succeeded in convicting a retired colonel along with three former paramilitaries<sup>260</sup> for the enforced disappearance of peasants during the armed conflict.<sup>261</sup> Additionally, and most importantly, in May 2013, a national court delivered a 718-page judgment, convicting and sentencing former dictator, Efraín Ríos Montt, to 80 years in prison for the deaths of 1,771 Ixil Indians between March 1982 and August 1983.<sup>262</sup> The case was widely considered Guatemala's most important trial of the last 50 years, because it was unimaginable to many that Ríos Montt would ever be prosecuted for his crimes. However, ten days after the judges ruled, Guatemala's Constitutional Court overturned the verdict, effectively setting Ríos Montt free, and annulling part of the trial.<sup>263</sup>

#### **b) Acknowledgement: public apologies and statements**

A few months before the Commission's report was released in 1999,<sup>264</sup> President Alvaro Arzu issued an official apology on behalf of the state for its role in the human rights violations perpetrated during the armed conflict. The *guerrillas* formally apologized in March 1999, via a full-page article in the major daily newspapers.<sup>265</sup> Five years later, in 2004, President Oscar Berger offered an additional public apology to the victims of the armed conflict. At the same time, he went further and accepted state responsibility for several key massacres, and called for the recommendations of the Commission to be fully implemented.<sup>266</sup>

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<sup>260</sup> Leah Barkoukis & Charles Villa-Vicencio, *Truth Commissions: A Comparative Study, Guatemala*, INST.FOR JUST. & RECONCILIATION (Aug. 2011), available at <http://www.ijr.org.za/img/trc/Guatemala.pdf>.

<sup>261</sup> *Truth Commission: Guatemala*, *supra* note 210, at ¶ 122.

<sup>262</sup> *Guatemalan court opens door to amnesty for Rios Montt.*, INT'L CTR. FOR TRANSITIONAL JUST, <http://ictj.org/news/guatemalan-court-opens-door-amnesty-rios-montt> (last visited Oct. 15, 2013).

<sup>263</sup> The Constitutional Court ordered that case be retried from April 19th, when the tribunal had heard all prosecution witnesses, but awaited the presentation of some of the defense witnesses, closing arguments, and the final verdict and sentence. See Emi MacLean, *Guatemala's Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to April 19*, INT'L JUST. MONITOR (May 21, 2013), <http://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/> (contains full analysis on the details of the trial).

<sup>264</sup> EVANS, *supra* note 207, at 157-58.

<sup>265</sup> *Id.*

<sup>266</sup> HAYNER, *supra* note 106, at 281.



## 5. Initial Reparations Program and Legacy

### a) PNR reparations program

The PNR's reparation program consists of five types of reparations measures: 1) material restitution, 2) financial compensation, 3) psychosocial reparation and rehabilitation, 4) measures to honor civilian victims, and 5) cultural reparation.<sup>267</sup> Initially, the program lacked teeth and did not specify the violations that were to be compensated, the priority of beneficiaries, or the kinds of reparations to be distributed.<sup>268</sup> The government revised the framework in 2005<sup>269</sup> to cover a wider range of human rights violations, including enforced disappearance, executions, torture, and forced displacement.<sup>270</sup> However, the compensation offered for sexual violence violations extended only to female victims.<sup>271</sup> The revised 2005 decree also defined the priority of groups to receive compensation based on those identified by the CEH, and added categories for orphans and the disabled.<sup>272</sup> The PNR is slated to last for thirteen years.

Further, due to demands from victim organizations, the revisions also prioritized individual compensation over collective compensation.<sup>273</sup> Eligible beneficiaries included survivors of torture and sexual assault, as well as relatives of victims of illegal executions, massacres, and enforced disappearances. Since 2006, the reparations program has issued payments to individual beneficiaries ranging from 91,183 to 151,972<sup>274</sup> rupees.<sup>275</sup> Awards have ranged from 200,603 rupees<sup>276</sup> for a deceased

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<sup>267</sup> PROGRAMA NACIONAL DE RESARCIMIENTO, <http://www.pnr.gob.gt/index.php> (last visited April 16, 2014) (official web page of the Guatemalan National Reparations Program).

<sup>268</sup> EVANS, *supra* note 207, at 157-58.

<sup>269</sup> Acuerdo Gubernativo Número 258-2003, 7 de mayo de 2013, Programa Nacional de Resarcimiento (Guat.), available at <http://www.pnr.gob.gt/archivos/transparencia/Acuerdo%20gubernativo.pdf>.

<sup>270</sup> EVANS, *supra* note 207, at 158-59.

<sup>271</sup> Margaret Urban Walker, *Gender and Violence in Focus: A Background for Gender Justice in Reparations*, in GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 18, 18 (Ruth Rubio-Marin ed., 2011).

<sup>272</sup> EVANS, *supra* note 207, at 158-59.

<sup>273</sup> Lieselotte Viaene, *Life Is Priceless: Mayan Q'eqchi' Voices on the Guatemalan National Reparations Program*, 4 INT'L JOURNAL OF TRANSITIONAL JUSTICE 4, 9-10 (2010).

<sup>274</sup> \$1,500 to \$2,500 dollars as of March 2014.

<sup>275</sup> Anne-Marie O'Connor, *Payments and Apologies for Victims of Guatemala's Civil War*, THE WASHINGTON POST, May 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2%2709/05/05/AR2009050503809.html?hpid=artslot>.

<sup>276</sup> \$3,300 dollars (24,000 quetzals) as of March 2014.

relative to between 83,280 and 167,169 rupees<sup>277</sup> for sexual assault and/or torture.<sup>278</sup> The PNR compensated 12,126 beneficiaries between 2005 and December 2007, most of whom were elderly women.<sup>279</sup> By 2008, the total number of annual recipients increased to 10,477 individuals. In the first five months of 2009, the PNR compensated approximately 10,500 beneficiaries. Most recently, from 2012 to 2013, the PNR has issued 26 collective compensation awards, hundreds of individual awards,<sup>280</sup> with women comprising 74% of monetary recipients.<sup>281</sup> The PNR has also built more than 800 houses for war victims.<sup>282</sup>

While compensation data remains scarce, the Guatemalan government's mandate called for the initial allocation of 533,842,000 rupees<sup>283</sup> for the reparations program along with an annual budget of a minimum of 2,287,890,000<sup>284</sup> rupees<sup>285</sup> per year.<sup>286</sup>

As noted above, there have been several challenges to the reparations program. Currently, most of the financial compensation has been awarded on an individual basis, causing some uncertainty among victims in at least one community who are not clear whether those with pending applications will receive equivalent awards to those already compensated.<sup>287</sup> Further, some have criticized the framework of the PNR for clashing with fundamental local norms and values.<sup>288</sup> For example, many of the Spanish terms the PNR employs to convey the concepts of truth, justice, and reparations do not translate to the local Q'eqchi' language. Beyond the question of language, there is the larger issue of whether the concept of monetary compensation is culturally appropriate. This sentiment is captured by the words of a Q'eqchi' man who described his distaste

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<sup>277</sup> \$1,370–\$2,750 dollars (10,000–20,000 quetzals) as of March 2014.

<sup>278</sup> Viaene, *supra* note 273.

<sup>279</sup> *Id.*

<sup>280</sup> The PNR report does not specify how the funds were spent or how the collective awards differed from the individual awards.

<sup>281</sup> PROGRAMA NACIONAL DE RESARCIMIENTO, *supra* note **Error! Bookmark not defined.** (data appears in Spanish).

<sup>282</sup> EVANS, *supra* note 207, at 152-54.

<sup>283</sup> \$8,857,974.94 million dollars (70 million quetzals) as of March 2014.

<sup>284</sup> \$37,962,749.74 million dollars (300 million quetzals) as of March 2014.

<sup>285</sup> The government is disclosing information on the program via a website that hosts many of the important documents of the program. See PROGRAMA NACIONAL DE RESARCIMIENTO, <http://www.pnr.gob.gt/archivos/transparencia/Acuerdo%20gubernativo.pdf> (last visited April 15, 2014).

<sup>286</sup> *Id.*

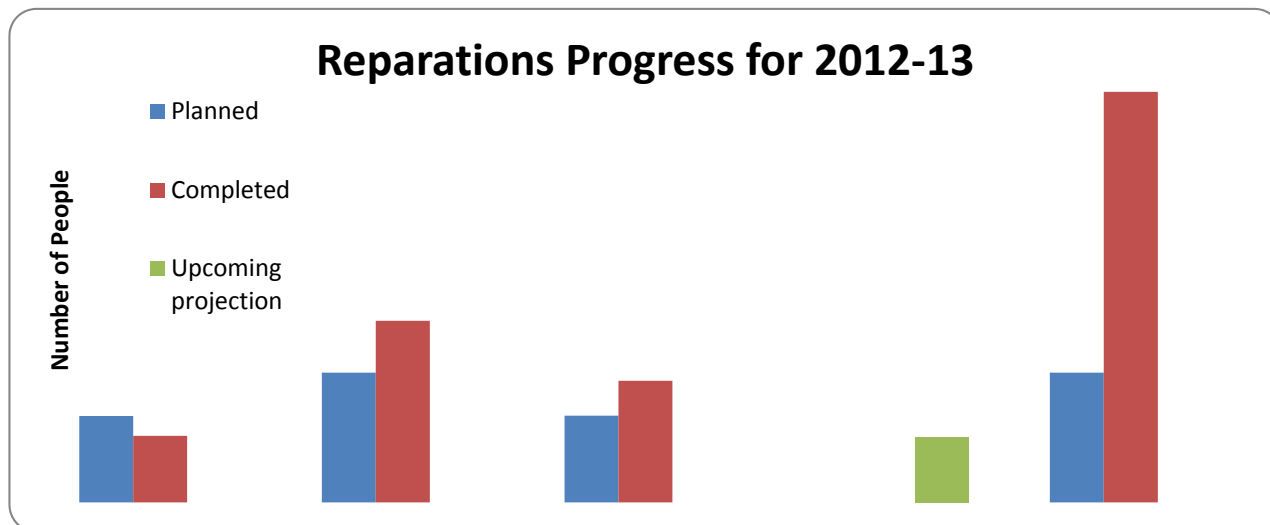
<sup>287</sup> This is based on observations from one Mayan community. See Lieselotte Viaene, *supra* note 273.

<sup>288</sup> See Viaene, *supra* note 273.

for monetary compensation by saying, “[it is] only paying for the dead. It is like for my mother, they are going to pay me for her, I will eat my mother, I will chew my mother.”<sup>289</sup>

**Table 1: Summary of reparations progress for 2012-13<sup>290</sup>**

	Monetary	Cultural reparation	Psychosocial reparation and rehabilitation	Material restitution	Dignifying Measures <sup>291</sup>
Planned	3348	5033	3359	0	5033
Completed	2577	7038	4712	0	15923
Upcoming projection	0	0	0	2544	0



**b) Death Squad Dossier and domestic access to information laws**

In May 1999, the National Security Archive<sup>292</sup> released a document—the “*Diario Militar*” (Death Squad Dossier)—that was obtained from a former Guatemalan Army employee. The *Diario* contained entries that registered the personal data and passport photograph of 183 persons who had been unlawfully arrested, tortured, and put to death by a unit of

<sup>289</sup> See *id.* at 16.

<sup>290</sup> Data taken from PROGRAMA NACIONAL DE RESARCIMIENTO, *supra* note 39 (data appears in Spanish).

<sup>291</sup> *Id.* at 25 (describing dignifying measures as the “linchpin” of the implementation of all other reparation measures and “an important element for reconciliation, a culture of peace and the reconstruction of the social fabric and driving forces for improved quality of life, the full exercise of citizenship and a culture of peace.”). Examples of such measures have included the exhumation, identification, reburial and memorialization of victims of human rights violations. *Id.* at 25-26.

<sup>292</sup> This is a U.S.-based NGO.

the security forces between August 1983 and March 1985.<sup>293</sup> The *Diario* contradicted the state's prior statements that official files related to the armed conflict had been destroyed, and it generated new demands from advocates for the state to release such information.<sup>294</sup>

Thereafter, the government passed new laws requiring access to public information and declassified several military archives.<sup>295</sup> In 2011, the government opened a military archives declassification center which contained 2,287 files.<sup>296</sup> Increased access to state records has allowed advocates to pursue new cases in the Inter-American human rights system. The most notable result has been a judgment in November 2012,<sup>297</sup> in which the Inter-American Court of Human Rights found Guatemala responsible for enforced disappearances and ordered the state to pay reparations to the victims of the case.<sup>298</sup> It remains to be seen whether and how Guatemala will comply with this judgment.

### c) Acknowledgement as reparation

Finally, in 2004, the Guatemalan Congress approved Decree 06-2004, establishing a "Day of Dignity." This national day of remembrance for victims of the conflict is

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<sup>293</sup> See *Gudiel Alvarez ("Diario Militar") v. Guatemala*, Merits, Inter-Am. Ct. H.R., Judgment of November 20, 2012, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_253\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_253_ing.pdf).

<sup>294</sup> In 2005, in Guatemala City, the Ombudsman's Office discovered, by accident, police archives containing, videos, photos, and about 80 million folios recording the actions of the police from 1882 to 1997. The archives have become known as the "Historical Archive of the National Police" and confirm and complement information found in the *Diario*.

<sup>295</sup> In September 2008, the Law on Access to Public Information was enacted, establishing that, "[i]n no case may information concerning investigations of violations of fundamental human rights or crimes against humanity be classified as confidential or secret." See *Gudiel Alvarez ("Diario Militar") v. Guatemala*. Merits, Inter-Am. Ct. H.R., Judgment of November 20, 2012, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_253\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_253_ing.pdf).

<sup>296</sup> *Id.*

<sup>297</sup> The *Gudiel Alvarez* case was filed in 2010.

<sup>298</sup> See *Gudiel Alvarez*, Merits, Inter-Am. Ct. H.R., Judgment of November 20, 2012, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_253\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_253_ing.pdf).

commemorated annually<sup>299</sup> on February 25th.<sup>300</sup>

## 6. Gender-Specific Civil Society Initiatives

### a) Actors for Change Consortium<sup>301</sup>

Civil society groups have initiated efforts to address the experiences of women during the civil war. The work of two groups in particular, Actors for Change Consortium and the Tribunal of Conscience for Women Survivors of Sexual Violence, is highlighted here.

Founded in 2003, the Actors for Change Consortium (Consortium) is comprised of two groups, the Guatemalan National Women's Movement (UNAMG), the Community Studies and Psychosocial Action Team (ECAP), as well as individual feminists. The consortium was created to promote awareness and understanding among its members of the sexual violence that occurred during the armed conflict in Guatemala and to initiate a process of support for the female victims of this violence. Members of the Consortium conducted workshops and support groups to provide women with safe spaces in which they could talk about their experiences. Eventually, the Consortium documented these oral histories of the conflict, especially accounts of rape, sexual assault, and sexual slavery, publishing *Weavings of the Soul: Memories of Mayan Women Survivors of Sexual Violence during the Armed Conflict*.<sup>302</sup> Alison Crosby and M.

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<sup>299</sup> Several sources indicate that this day is still observed, but most of the events seem to be initiated by victim groups, grade schools, civil society organizations, and churches. See *Guatemala commemorates victims and 15 yr anniversary of truth commission*, NISUA BLOG (Feb. 27, 2014), <http://nisgua.blogspot.com/2014/02/guatemala-commemorates-day-of-dignity.html>; Aisling Walsh, *Reclaiming historic memory and public space in Guatemala*, TROCAIRE BLOG (Feb. 27, 2014), <http://www.trocaire.org/blogs/reclaiming-historic-memory-and-reclaiming-public-space-guatemala>; *A 15 años de la presentación del Informe de la CEH: Un mensaje de solidaridad*, GUATEMALA HUMAN RIGHTS UPDATE BLOG (Feb. 25, 2014), <http://ghrcusa.wordpress.com/2014/02/25/a-15-anos-de-la-presentacion-del-informe-de-la-ceh-un-mensaje-de-solidaridad>; *Guatemala conmemora el Día Nacional de la Dignidad por las Víctimas*, NOTICIAS MUNDO FOX (Feb. 25, 2013, 6:45 PM), <http://www.mundofox.com/noticias/guatemala-conmemora-el-dia-nacional-de-la-dignidad-por-las-victimas-10686>; *Día de la Dignidad de las Víctimas del Conflicto Armado*, PRENSA LIBRE, [http://www.prensalibre.com/noticias/Dignidad-Victimas-Conflicto-Armado-Interno-Guatemala-masacre-violencia\\_5\\_872362760.html](http://www.prensalibre.com/noticias/Dignidad-Victimas-Conflicto-Armado-Interno-Guatemala-masacre-violencia_5_872362760.html) (last visited Oct. 15, 2013).

<sup>300</sup> See *Truth Commission: Guatemala*, *supra* note 210.

<sup>301</sup> See Crosby & Lykes, *supra* note 242, at 466; *Grant Results*, GLOBAL FUND FOR WOMEN, <https://grants.globalfundforwomen.org/GFWSearch/index.php?id=27924> (last visited Oct. 15, 2013); Cynthia Cockburn & Yolanda Aguilar, *Guatemalan women's struggle for justice*, OPEN DEMOCRACY (Dec. 4, 2006), [http://www.opendemocracy.net/blog/guatemalan\\_women\\_s\\_struggle\\_for\\_justice](http://www.opendemocracy.net/blog/guatemalan_women_s_struggle_for_justice).

<sup>302</sup> See Crosby & Lykes, *supra* note 242, at 466 (quoting Amandine Fulchiron, Olga Alicia Paz, and Angelica Lopez in *TEJIDOS QUE LLEVA EL ALMA: MEMORIA DE LAS MUJERES MAYAS SOBREVIVIENTES DE VIOLACION SEXUAL DURANTE EL CONFLICTO ARMADO* (Guatemala City: Community Studies and Psychosocial Action Team, National Union of Guatemalan Women and F&G

Brinton Lykes describe the book as the “first in-depth study of sexual violence committed against women during the war’ and, as such, it can be considered ‘the third historical memory report undertaken in Guatemala,’ following the CEH and REMHI.”<sup>303</sup>

**b) 2010 Tribunal of Conscience for Women Survivors of Sexual Violence during the Armed Conflict in Guatemala<sup>304</sup>**

After participating in the 2000 Tokyo Tribunal (an NGO-led effort to provide a public accounting of rape of “comfort women” by Japanese military during the Second World War),<sup>305</sup> one of the founders of the Actors for Change Consortium had the idea to form The Tribunal of Conscience for Women Survivors of Sexual Violence during the Armed Conflict in Guatemala<sup>306</sup> (Tribunal of Conscience).<sup>307</sup> Similar to the Tokyo Tribunal, several Guatemalan civil society groups organized the Tribunal of Conscience with the goal of creating a public space for “women survivors to tell their truths and be heard by their fellow citizens and the state, and to lay the groundwork for a paradigmatic case of sexual violence as a weapon of war to be presented for prosecution in the Guatemalan courts.”<sup>308</sup>

The tribunal was structured as a mock trial.<sup>309</sup> Women survivors and activists from Guatemala, Peru, Uganda, and Japan served as the judges. The executive director of *Mujeres Transformando el Mundo*<sup>310</sup> presided over the proceedings and two prominent Guatemalan and Spanish lawyers acted as prosecutors.<sup>311</sup> Additionally, there were approximately fifty international, “honorary witnesses.”<sup>312</sup> The mock trial took place over

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eds., 2009)).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> In December 2000, the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery was convened through the efforts of non-governmental organizations throughout Asia to ensure some form of accountability for the aging former ‘comfort women,’ those women forced into sexual slavery by the Japanese Imperial Army during World War II. This massive system of enslavement had gone unpunished for more than 50 years. See TOKYO TRIBUNAL 2000 & PUBLIC HEARING ON CRIMES AGAINST WOMEN, <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.htm> (last visited April 4, 2014).

<sup>306</sup> At the date of this writing the website for the Tribunal of Conscience was under construction; the site is available at <http://unamg.org/>.

<sup>307</sup> See Crosby & Lykes, *supra* note 242, at 464.

<sup>308</sup> See *id.* at 457.

<sup>309</sup> This means there were prosecutors, judges, victim testimonies, and expert witness reports.

<sup>310</sup> Translation: Women Transforming the World.

<sup>311</sup> See Crosby & Lykes, *supra* note 242, at 457.

<sup>312</sup> See *id.* at 467.

two days in March 2010. The first day, nine Mayan and ladina female survivors testified;<sup>313</sup> the second day centered on discussion of expert witness reports that provided the broader context for making the case that sexual violence was used as a weapon of war during the conflict. Essentially, the exercise previewed the type of evidence available for use in a legal case.<sup>314</sup> Approximately 800 people filled the venue where the Tribunal of Consciousness was held, including women victims, members of Guatemalan civil society, state officials, and a cross-section of the international community.<sup>315</sup>

The two-day event culminated in a report that made fifteen recommendations to the Guatemalan government, among them the elimination of impunity laws, the implementation of reparation measures, the promulgation of laws respecting women's human rights, and the ratification of the Rome Statute of the ICC.<sup>316</sup>

## INDIAN TRUTH SEEKING MECHANISMS

The truth commissions and other measures Brazil, Chile, and Guatemala adopted to respond to past periods of civil war and repression all emerged from a particular historical context and timeframe. The extent to which these case examples can offer meaningful models that could be applied in the Indian context remains to be seen. Local actors will be in the best position to identify the key features and components that might be appropriately adapted to serve their needs. Nevertheless, this evaluation will be enriched by the following brief review of the truthseeking mechanisms that have been used in India.

India has utilized several commissions of inquiry to examine instances of mass violence. Three of these, the 1984 Anti-Sikh Riots Commission, the Gujarat Commission, and the Orissa Commissions, offer important examples of state-initiated truth seeking

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<sup>313</sup> *Tribunal de Conciencia contra la Violencia Sexual hacia las Mujeres*, COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA, <http://www.cicig.org/index.php?page=tribunal-de-conciencia-contra-la-violencia-sexual-hacia-las-mujeres> (last visited Feb. 18, 2015).

<sup>314</sup> See Crosby & Lykes, *supra* note 242, at 467.

<sup>315</sup> See *id.*

<sup>316</sup> The Tribunal's recommendations dated March 5, 2010 are available at <http://pdf2.hegoa.efaber.net/entry/content/677/PronunciamientoTribunal-1.pdf>.

mechanisms. All three were established under the Commissions of Inquiry Act, 1952. This act authorizes the central or a state government to appoint a commission of inquiry to examine a matter of public importance.<sup>317</sup> The executive branch of a particular level of government appoints the members of the commission.<sup>318</sup> Set forth below is an analysis of each of the three above-mentioned commissions.

## A. 1984 ANTI-SIKH RIOTS COMMISSION

In May 2000, the central government established the Anti-Sikh Riots Commission, also called, the Nanavati Commission of Inquiry to investigate riots that had taken place more than 15 years prior in Dehli. The charge of the commission was to examine the 1984 anti-Sikh riots, the sequence of events leading to the violence, and the response of the administration, and to identify those responsible for the violence.<sup>319</sup> The commission issued a notice inviting groups of persons, associations, institutions, and organizations to provide statements about the riots.<sup>320</sup>

The commission received 2,557 affidavits<sup>321</sup> and examined additional sworn statements that had been filed before two previous commissions that had investigated the riots but had not reached final conclusions: the Justice Misra Commission<sup>322</sup> and the Jain Benerjee Committee.<sup>323</sup> The Nanavati Commission examined about 197 witnesses,<sup>324</sup>

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<sup>317</sup> The Commissions of Inquiry Act, §3 (1), No. 60 of 1952 (India). The central government may appoint a commission on a matter that is enumerated in the subject list for the center under the constitution, and state government can appoint a commission on a matter that is enumerated in the subject list for the states under the constitution. Commissions of Inquiry Act, §2(a). The central government cannot constitute a commission into a matter, pertaining to which, a commission has already been appointed by the state, Commissions of Inquiry Act, *Proviso*, §3 (1).

<sup>318</sup> Commissions of Inquiry Act, §3(2).

<sup>319</sup> Nanavati Commission of Inquiry, Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report, Vol. 1. p.7, Terms of Reference, *available at* [http://mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/Nanavati-I\\_eng.pdf](http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Nanavati-I_eng.pdf) (accessed on Mar. 22, 2014).

<sup>320</sup> *Id.* at 10. This notification was published in leading Hindi and English newspapers and a three-month period was given to everyone filing their statements before the commission.

<sup>321</sup> Nanavati Commission of Inquiry, Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report, Vol. 2., Annex II *available at* [http://mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/Nanavati-II\\_eng.pdf](http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Nanavati-II_eng.pdf) (accessed on Mar. 24, 2014).

<sup>322</sup> *Id.* at Annex III.

<sup>323</sup> Nanavati Commission of Inquiry, *supra* note 321, at Annex IV. The Justice Misra Commission was set up right after the riots by the Government of India under the commissions of inquiry act and it recommended an investigative commission under a high authority to look into police involvement in the riots. The Banerjee Commission was set up after the recommendations of the Mishra Commission to look into cases of riots but the Delhi High Court later quashed it.

<sup>324</sup> Nanavati Commission of Inquiry, *supra* note 321, at Annex VI.



including two former prime ministers of India.<sup>325</sup> The commission also examined cases that were registered against police officers for dereliction of duty during the riots.<sup>326</sup> The Delhi Sikh Gurudwara Committee, the November '84 Carnage Justice Committee, and Shiromani Akali Dal (Badal Group) were allowed to appear before the commission as representative bodies of the riot victims.<sup>327</sup> The proceedings of the commission were held in Delhi and open to the public.<sup>328</sup> The commission recommended criminal prosecution of some police officers and some senior congressional leaders and officials who were involved.<sup>329</sup> It also recommended payment of compensation to the families of victims.<sup>330</sup> The 185-page report was finished in February 2005.

## B. GUJARAT COMMISSION

In March 2002, the Government of Gujarat appointed Justice K.G. Shah as the single member of a commission formed under the Inquiry Act to investigate the Godhra Train<sup>331</sup> burning incident and subsequent violence. Justice Shah was charged with determining whether the incident at Godhra was pre-planned and whether there were administrative lapses that could have mitigated the ensuing violence.<sup>332</sup> The commission was initially given a three-month period to complete its report.<sup>333</sup>

In May 2002, the Government of Gujarat amended the mandate of the commission to appoint Justice G.T. Nanavati as the Chairman of the commission and to change Justice Shah's appointment to that of a member.<sup>334</sup> The government also extended the

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<sup>325</sup> *Id.* at Annex VIII.

<sup>326</sup> *Id.* at Annex Annex IX.

<sup>327</sup> Nanavati Commission of Inquiry, *supra* note 319, at 11. The Shiromani Akali Dal is a political party in Punjab. The Delhi Sikh Gurudwara Committee is an elected body of the Sikhs that manages the Gurudwaras in Delhi. The November '84 Carnage committee is a loose group of civil society advocates who are following the 1984 trials.

<sup>328</sup> *Id.* at 13.

<sup>329</sup> *Id.* at 179.

<sup>330</sup> *Id.*

<sup>331</sup> Dionne Bunsha, *The Facts From Godhra*, FRONTLINE (Jul. 20, 2002), <http://www.frontline.in/static/html/fl1915/19150110.htm>. The Godhra train incident refers to the fire inside Sabarmati Express near Godhra Railway station in which 59 people died. Most of the victims were Hindu pilgrims.

<sup>332</sup> G.T. Nanavati & Akshay H. Mehta, Report by Commission of Inquiry, Annex I (Sept. 18, 2008), *available at* <http://www.home.gujarat.gov.in/homedepartment/downloads/godharaincident.pdf> (accessed on Mar. 24, 2014).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* Some media reports claim that Justice Nanavati was appointed because there allegations about Justice Shah's closeness to minister Modi, *see also id.* at p. 4, ¶ 6. Justice KG Shah passed away during the tenure of the commission and was replaced by Justice Akshay H. Mehta.

timeframe for the commission repeatedly.<sup>335</sup> The scope of the commission was also expanded in July 20, 2004 to include investigation of the role of the Gujarat state chief minister Narendra Modi and his cabinet ministers in the riots that broke out after the Godhra incident.<sup>336</sup>

The commission received 4,495 affidavits,<sup>337</sup> 1,098 of which were filed by government officers with private persons filing another 3,397.<sup>338</sup> The inquiry sessions were open to the public.<sup>339</sup> After the terms of reference of the commission were expanded, it received a further 41,999 affidavits.<sup>340</sup> The commission held hearings at most district headquarters.<sup>341</sup> To date, the commission has only investigated the Godhra incident. In its final comments, the commission exonerated the chief minister, his council of ministers, and the police authorities of any criminal wrongdoing in connection with their response to the riots and the Godhra carnage.<sup>342</sup>

### C. ORISSA COMMISSIONS

The Panigrahi Commission was a judicial commission set up by the Orissa state government after the 2007 Knadhamal Riots. According to news reports, the commission was set-up in 2008 and was slated to complete its report in four months.<sup>343</sup> It was headed by retired High Court Judge Basudev Panigrahi.<sup>344</sup> By August 2010, the commission had received 488 affidavits of which it had examined 180.<sup>345</sup> The state approved the commission's request to extend its mandate in August 2011,<sup>346</sup> and the term of the commission has been extended on a number of occasions since.<sup>347</sup> Despite

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<sup>335</sup> *Id.* at Annex I.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 5, ¶ 7.

<sup>338</sup> *Id.* at 7, ¶ 12.

<sup>339</sup> *Id.* at 6, ¶ 9.

<sup>340</sup> *Id.* at 7, ¶ 12.

<sup>341</sup> *Id.* at 7, ¶ 13.

<sup>342</sup> *Id.* at 179, ¶ 230.

<sup>343</sup> Lalmohan Patnaik, *Rights Panel Seeks Time*, TELEGRAPH, Aug. 28, 2011, [http://www.telegraphindia.com/1110828/jsp/orissa/story\\_14432605.jsp](http://www.telegraphindia.com/1110828/jsp/orissa/story_14432605.jsp).

<sup>344</sup> *Id.*

<sup>345</sup> Press Trust of India, *Panigrahi Commission begins Hearings on Kandhamal Riots*, DAILY NEWS ANALYSIS (Aug. 02, 2010), <http://www.dnaindia.com/india/report-panigrahi-commission-begins-hearing-on-kandhamal-riots-1417955>.

<sup>346</sup> Patnaik, *supra* note 343.

<sup>347</sup> *Id.*

these extensions, the head of the commission stated that people refused to testify before the commission out of fear, despite police protection.<sup>348</sup>

Another commission<sup>349</sup> was set up to look into the Orissa riots in September 2008.<sup>350</sup> This commission is tasked with examining the killing of Swami Laxmananda,<sup>351</sup> and was initially headed by Justice S.C. Mohapatra.<sup>352</sup> After Justice Mohapatra died, Justice A.S. Naidu, a retired judge of the Orissa High Court took over the judicial commission.<sup>353</sup> At the time of this writing the commission is expected to submit an interim report by mid-2014.<sup>354</sup>

## DISCUSSION

This section is organized in three parts. Part A contrasts the Indian truth-seeking mechanisms of the 1984 Anti-Sikh Riots, the Gujarat Commission of 2002, and the Orissa Commission of 2007 to the Latin American cases. Part B presents some of the common themes and differences among the cases studies of Brazil, Chile, and Guatemala as well as lessons that can be drawn from them. Finally, Part C offers observations regarding the strategy Indian human rights advocates may wish to consider going forward.

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<sup>348</sup> *Kandhama Riots: People not Deposing out of fear*, ZEE NEWS, [http://zeenews.india.com/home/kandhamal-riots-people-not-deposing-out-of-fear\\_550025.html](http://zeenews.india.com/home/kandhamal-riots-people-not-deposing-out-of-fear_550025.html) (last updated Jul. 24, 2009).

<sup>349</sup> The commission was earlier called the Mohapatra Commission, and then after Justice Mohapatra died, it was called the Naidu Commission.

<sup>350</sup> *Kandhamal Riots Probe: Commission issues notice to former DGP's*, ZEE NEWS, [http://zeenews.india.com/news/odisha/kandhamal-riots-probe-commission-issues-notice-to-former-dgp-s\\_806896.html](http://zeenews.india.com/news/odisha/kandhamal-riots-probe-commission-issues-notice-to-former-dgp-s_806896.html) (last updated Oct. 21, 2012).

<sup>351</sup> Ashok Pradhan, *RTI reveals Odisha Judicial probes continuing endlessly*, TIMES OF INDIA, June 02, 2013, <http://timesofindia.indiatimes.com/india/RTI-reveals-Odisha-judicial-probes-continuing-endlessly/articleshow/20387799.cms>.

<sup>352</sup> Press Trust of India, *Two Judicial Commission hearing Orissa Riots Cases*, DAILY NEWS ANALYSIS, July 26, 2010, <http://www.dnaindia.com/india/report-two-judicial-commissions-hearing-orissa-riot-cases-1414998>.

<sup>353</sup> Press Trust of India, *supra* note 351.

<sup>354</sup> *Kandhamal Commission likely to submit interim report in mid-2014*, ZEE NEWS, [http://zeenews.india.com/news/odisha/kandhamal-commission-likely-to-submit-interim-report-in-mid-2014\\_881650.html](http://zeenews.india.com/news/odisha/kandhamal-commission-likely-to-submit-interim-report-in-mid-2014_881650.html) (last updated Oct. 7, 2013).

## A. DIFFERENCES BETWEEN THE INDIA COMMISSIONS OF INQUIRY AND TRUTH COMMISSIONS IN BRAZIL, CHILE, AND GUATEMALA

Taken as a whole, there are striking differences in not only the form, but also in the substance and driving forces behind the three Indian commissions on the one hand, and those of the Latin American case examples, on the other. These differences can be explained in part by the difference between the types of truth seeking mechanisms adopted in India as compared to Latin America: commissions of inquiry vs. truth commissions. In terms of form, the Indian commissions have been commissions of inquiry. Smaller in scale, with fewer victims, and examining incidents of episodic violence, commissions of inquiry have relatively limited mandates. Essentially, the Indian commissions have been established to address a single event by a government that retains power as opposed to part of a series of mechanisms undertaken during a regime change with the aim of consolidating democracy.

In terms of substance, the commissions in Latin America were truth commissions established as part of the political transitions in these countries from military dictatorships to democratic rule. Because the operation of state violence had been shrouded in secrecy, establishing an authoritative account of the abuses perpetrated by the state was considered necessary to turn the page on the past and establish the commitment of the new democratic government to rule of law. Thus, central to each of the truth commission mandates in the three Latin American countries was the charge to establish the truth about state-sponsored political violence carried out under military dictatorships or civil war. Irrespective of whether any particular commission identified wrongdoers by name, each was mandated to provide a public record of “who did what to whom.” These commissions investigated patterns and practices of violence that targeted mass numbers of victims—in some cases reaching nearly 200,000, as was the case in Guatemala.

Another glaring difference between the Indian commissions and those in Latin America is the lack of influence from the international community in shaping the mandates and operation of the Indian commissions. For instance, in Guatemala, the United Nations heavily influenced not only the peace treaties, but also the way in which the truth commission would operate. India’s truth commissions have been shaped by national

influences, but not by the involvement of international actors.

Finally, the 1984 Anti-Sikh Riots Commission, the Gujarat Commission, and the Orissa Commissions have been plagued by criticisms of political interference. The number of commissions that were formed to investigate the 1984 anti-Sikh riots and the controversy over overlapping commissions to examine the Godhra Train burning in Gujarat indicate the weaknesses of these mechanisms.<sup>355</sup> The truth commissions in Brazil, Chile, and Guatemala have enjoyed greater legitimacy, perhaps due to their legal groundings and broad political support. Both Chile's and Brazil's truth commissions were established by presidential decrees, while a UN-brokered peace accord established Guatemala's truth commission. In the Latin American cases, the truth commissions were a part of a nation-building exercise and, therefore, the integrity of these processes were critical to the legitimacy of the states themselves.

## **B. COMMON THEMES AND DIFFERENCES AMONG LATIN AMERICAN CASE EXAMPLES**

The primary themes from the case studies include the presence of truth commissions, justice, amnesty laws, reparation programs, and the role of civil society groups in transitional justice initiatives. The experiences of the countries studied here necessarily vary, for example in how long the conflicts lasted or how the truth commissions were implemented. Guatemala's truth commission covered thirty-six years of conflict, while Chile's covered seventeen years, and Brazil's covered fifteen years.<sup>356</sup> In terms of human rights violations, Guatemala had the largest numbers, followed by Brazil and, then, Chile. Justice has been limited in all three countries due to amnesty laws that have greatly hindered the successful prosecution of wrongdoers.

Truth commissions have played a key role in the transition of each country. They were all created differently: Brazil's unofficial commission, *Brasil: Nunca Mais*, was largely the result of the Catholic Church and civil society groups working together in secrecy to

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<sup>355</sup> Ashish Khaitan, *Manufacturing a Conspiracy*, TEHELKA (Oct.11, 2008), [http://archive.tehelka.com/story\\_main40.asp?filename=Ne111008coverstory.asp](http://archive.tehelka.com/story_main40.asp?filename=Ne111008coverstory.asp).

<sup>356</sup> This refers to "Brasil: Nunca Mais." The current national truth commission is mandated to investigate human rights violations over a forty-two year period, between September 18, 1946 and October 5, 1988.

produce a report documenting the atrocities of the military dictatorships.<sup>357</sup> Both of Chile's truth commissions were established by Presidential decrees; and Guatemala's CEH was created by the UN-brokered peace agreement. Regardless of the legal basis for their creation, all of the truth commissions were responsible for producing reports that documented the human rights violations that had plagued the countries during the armed conflicts. These reports made recommendations on how to remedy the wrongs uncovered, including through the implementation of reparation schemes. In Chile and Guatemala, the respective reports led the government to offer long-awaited public apologies and make other gestures of formal acknowledgement of the wrongs committed by agents of the state.

Amnesty laws adopted in the immediate aftermath of these armed conflicts have compromised the record on prosecutions. However, some key figures, such as Chile's former President Pinochet and Guatemala's former President Ríos Montt, eventually faced criminal charges for their crimes. And while the highest-ranking military officials in Brazil have yet to be tried, the country has recently begun to see progress in initiating and moving criminal cases forward in the courts.

The degree to which the gender and ethnic dimensions of the human rights abuses were explored in each of the case examples has varied. Guatemala's truth commission report addressed these issues head on, finding that there was a state campaign targeting women, specifically Mayan women. On the other hand, the truth commission reports in Chile did not single out these issues. In Brazil and Chile, the truth commission reports acknowledge that women and children were the victims of enforced disappearance, extrajudicial execution, torture, or sexual violence; however, the findings do not link these violations to a systematic effort to target these groups, as was found in Guatemala.

Finally, all three case studies demonstrate the importance of civil society groups in bringing about a transition to democratic rule and promoting justice, truth, and reparations. Along with the Catholic Church and the family of victims, the work of civil society groups served as important catalysts for change. Brazil's civil society groups not

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<sup>357</sup> This ignores the newly 2011 National TRC, which has yet to issue a full report.

only helped produce the unofficial truth report, but they also kept the issue of reparations and the need for an official national truth commission on the national agenda. Similarly, thanks to pressure from civil society groups, Chile’s record on prosecutions began to improve shortly after Pinochet’s arrest. In Guatemala’s case, civil society groups also shaped the implementation of transitional justice measures, from influencing the peace negotiations to ensuring that sexual violence against women was specifically acknowledged in the truth report and later in reparation programs.

The following table illustrates the common human rights violations that characterized the conflict in each country and indicates which of these entitled victims and beneficiaries to reparations under the programs implemented in each country. The table demonstrates that reparations for enforced disappearances and extrajudicial execution/political assassination were available in all three countries, while reparations for rape and other forms of sexual violence appear limited. The authors were not able to identify data on this point for Brazil. Chile provided reparations for rape only in connection with illegal imprisonment and torture. Guatemala provided reparations for the rape of women and girls, which follows from the truth commission’s attention to sexual violence against women.

**Table 1: Summary of Human Rights and Humanitarian Law Violations Entitling Victims and Beneficiaries to Reparations**

	Brazil	Chile	Guatemala
Enforced disappearance	X	X	X
Extrajudicial execution/political assassination	X	X	X
Torture	–	X	X
Rape and other forms of sexual violence	–	X [Only in connection with illegal imprisonment and torture]	X
Arbitrary detention/illegal imprisonment	–	X	–
Internal forced displacement	–	X <sup>358</sup>	X
Forced recruitment	–	–	X
Exile	–	X	–

<sup>358</sup> This includes peasants expelled from their land, along with *Relegados*, people who were forced to live in a confined region and subject to periodic control by the police instead of being imprisoned. Adapted from Ruth Rubio-Marín, Clara Sandoval & Catalina Díaz, *Repairing Family Members: Gross Human Rights Violations and Communities of Harm*, in *GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 215, 270 (Ruth Rubio-Marín ed., 2011).

## C. LESSONS LEARNED

Brazil, Chile, and Guatemala offer important lessons for activists seeking to initiate transitional justice measures. One general lesson is evident from all the countries studied in this report: there is no perfect model. As the record of each country demonstrates, the process for implementing transitional justice measures and their success in meeting their objectives varied greatly given local conditions. Transplanting a successful model without focusing on local history and norms will, at best, superficially address the problem.

One important lesson that can be extracted from Brazil is that an amnesty law can impair a country's move toward truth and justice by stalling the successful implementation of transitional justice measures. In the case of Brazil, it took more than twenty years after the release of its unofficial truth report for the government to create an official national truth commission. Additionally, given the piecemeal approach to reparation, two parallel systems evolved—one at the judicial level and the other through the executive branch—leading to overlap and disparities in compensation.<sup>359</sup> For example, higher court-ordered reparation awards that include moral damages, as compared to those paid by the federal executive branch in accordance with Law 9,140. Chile, like Brazil, underscores the detrimental effects amnesty laws can have on pursuing accountability, since it was not until Pinochet's arrest that pressure from civil society groups to hold perpetrators accountable began to resonate with the Chilean courts. Unlike Brazil, Chile adopted a robust and comprehensive physical and psychological health care system (PRAIS) to help rehabilitate those who were most severely affected by human rights violations. Even though more than 80% of the Chilean population receives health care from public systems, the prioritization of benefits to victims and their relatives through PRAIS has yielded positive feedback from these individuals, particularly in the area of mental health care.<sup>360</sup>

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<sup>359</sup> Paulo Abrão & Marcelo D. Torelly, *The Reparations Program as the Lynchpin of Transitional Justice in Brazil*, in *TRANSITIONAL JUST.: HANDBOOK FOR LATIN AMERICA*, *supra* note 200, at Part IV 443, 443-71.

<sup>360</sup> *Reparations Policy for Human Rights Violations in Chile*, *supra* note 151, at 70.



## FINAL OBSERVATIONS

No single case study can serve as a blueprint for a successful strategy to implement the right to a remedy in India. At best, the experience in each of the countries studied highlights what has and has not worked well. Given the economic similarities between India and Brazil, one might be inclined to believe that it is economically feasible to replicate Brazil's model in India. Although feasible, it is also important to realize the limitations of the Brazilian model and the lengthy period of time it took Brazil to institute measures that are still works in progress. Chile's transitional justice measures, while well-established and robust, have failed to adequately provide a forum for accountability, much like those in Brazil and Guatemala. The gender and ethnic dimensions of the Guatemalan conflict provide a valuable perspective on how to address such violence in post-conflict settings; however, the slow implementation of reparation schemes in Guatemala also serves as a point of caution to other countries that might look to their experience.

The Latin American case studies suggest that the most productive approach for a country like India would be to draw upon and adapt these case studies to the particular circumstances of the Indian context, rather than attempting a wholesale replication of one of these models. It is also important to note that while the Latin America truth commissions largely have looked at widespread patterns of human rights violence, the Indian commissions have had limited mandates to investigate discrete incidents. Human rights advocates in India might consider pushing for the establishment a national truth commission with a broad mandate to consider violations that have occurred over time or press for the establishment of multiple, thematic commissions to investigate the particular patterns of human rights violations prevalent in the country. For example, advocates could call for one truth commission on communal violence, another on enforced disappearances, and one more focused on gross human rights violations in the context of armed conflict in particular zones. As the case studies demonstrate, transitional justice initiatives can provide meaningful remedy to human rights violations; however, no ideal process exists. Instead, advocates will be best served by setting out clear goals in the areas of truth, justice, and reparations and, then, making a thoughtful assessment of which mechanisms and modalities are best suited to the particular

circumstances in their country, taking into account relevant case studies such as those of Brazil, Chile and Guatemala discussed here.