

1994

The United Nations Truth Commission for El Salvador

Thomas Buergenthal

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Thomas Buergenthal, The United Nations Truth Commission for El Salvador, 27 *Vanderbilt Law Review* 497 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol27/iss3/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 27

OCTOBER 1994

NUMBER 3

The United Nations Truth Commission for El Salvador

Thomas Buergenthal*

ABSTRACT

From 1992 to 1993, the author served as one of three Commissioners of the United Nations Commission on the Truth for El Salvador. In this Article, the author describes the process the Commission followed in its investigation of acts of violence that occurred in El Salvador between 1980 and 1991. The Article explores how the Commissioners interpreted and applied their mandate, as well as the problems they encountered in gathering information for the Commission's report. The author relates how the Commission arrived at the important decision to include in its report the names of individuals found to have been responsible for violent acts. The author concludes by presenting lessons learned from the experiences of the Commission that may be valuable to future commissions charged with investigating human rights violations.

* Lobingier Professor of Comparative and International Law, The National Law Center, The George Washington University, Washington, D.C.; former President, Inter-American Court of Human Rights. This Article is an extensively expanded and updated version of a speech delivered by Professor Buergenthal as the Charles N. Burch Lecture at the Vanderbilt University School of Law in March 1993.

TABLE OF CONTENTS

I.	INTRODUCTION.....	498
II.	THE CONTEXT.....	502
III.	THE PROCESS OF GATHERING INFORMATION	504
	A. <i>Investigations in El Salvador</i>	506
	B. <i>Relations with the United States</i>	507
	C. <i>The Problem of Confidential Information</i>	510
IV.	GETTING TO THE TRUTH.....	513
	A. <i>The Obstacles</i>	513
	B. <i>The Wall Begins to Crumble</i>	516
V.	NAMING NAMES	519
VI.	THE DRAFTING PROCESS	523
VII.	THE REPORT.....	525
	A. <i>The Applicable Law</i>	526
	B. <i>The Cases</i>	528
	C. <i>The Recommendations</i>	533
VIII.	CONCLUSIONS	537
	A. <i>Follow-Up and Compliance</i>	537
	B. <i>The Commission's Role and Contribution</i>	539
	C. <i>Possible Lessons for Future Commissions</i>	541

I. INTRODUCTION

On March 15, 1993, the Secretary-General of the United Nations, Mr. Boutros Boutros-Ghali, made public the *Report of the Commission on the Truth for El Salvador: From Madness to Hope (Report)*.¹ The Commission on the Truth for El Salvador (Truth Commission or Commission) was formally established on July 15, 1992, pursuant to the provisions of the Salvadoran Peace Accords (Peace Accords),² a series of agreements negotiated between 1989

1. *Report of the Commission on the Truth for El Salvador: From Madness to Hope*, U.N. Doc. S/25500, Annexes (1993) (English version) [hereinafter *Report*]. Although the *Report* was made public on March 15, 1993, the official text was not released until April 1, 1993. Throughout this Article, *Report*, in italics has been used to refer to the document published by the United Nations. References to the work-in-progress appear capitalized as Report, without italics. General references to a report remain in lower case.

2. *El Salvador Agreements: The Path to Peace*, (Department of Public Information) U.N. Doc. DPI/1208-92614 (1992). The Salvadoran Peace Accords consist of a series of agreements, negotiated over a period of more than three years (1989-1992), between the Government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional (FMLN), a coalition of five Salvadoran rebel groups. Two of these agreements, published in the aforementioned volume and cited in this article, are: 1) the *Mexico Agreements*, April 27, 1991, at 13-31; and 2) the *Peace Agreement*, Jan. 16, 1992, at 46-145

and 1992 under the auspices of the United Nations. The parties to these negotiations were the government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN). The negotiations were enthusiastically promoted by Javier Pérez de Cuellar, then Secretary-General of the United Nations, and imaginatively spurred on by his personal representative and mediator, Alvaro de Soto. The governments of Colombia, Mexico, Spain and Venezuela—the four, so-called “friends of the peace process”—played a special role in assisting with the negotiations and in helping overcome deadlocks.³ The negotiations were formally concluded with the signing on January 16, 1992, in Mexico City of a comprehensive peace agreement,⁴ named the “Chapultepec Agreement” for the castle where the signing ceremony took place. This instrument incorporated by reference a series of earlier accords concluded by the Parties. The establishment of the Truth Commission is provided for in the so-called “Mexico Agreements,” which were signed on April 27, 1991.⁵ These agreements, amplified by one provision of the Chapultepec Agreement,⁶ spell out the functions and powers or mandate of the Truth Commission.

Pursuant to its mandate, the Commission was to consist of “three individuals appointed by the Secretary-General of the United Nations after consultation with the Parties.”⁷ After informing the Parties of the names of the individuals he intended to name to the Commission and encountering no objections from them, the Secretary-General designated the following individuals: Belisario Betancur, former President of Colombia, Reinaldo

[hereinafter, respectively, the *Mexico Agreements* and the *Chapultepec Agreement*]. For a review of the contents of these agreements, see *Report of the Independent Expert on El Salvador, Mr. Pedro Nikken, on Developments in the Human Rights Situations in El Salvador, Prepared Pursuant to the Commission on Human Rights Resolution 1993/93 and Economic and Social Council Decision 1993/284*, U.N. Doc. E/CN.4/1993/11, at 11-13 (Feb. 3, 1994) [hereinafter *Report of the Independent Expert*].

3. See generally Terry L. Karl, *El Salvador's Negotiated Revolution*, 71 FOREIGN AFF. 147 (1992). For a report on the evolution of the human rights provisions found in the Salvadoran Peace Accords by a member of the United Nations negotiating team responsible for this subject, see Pedro Nikken, *El Salvador: Los Derechos Humanos en la Antecala de la Guerra y de la Paz*, 84/86 BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 69 (Dec. 1992/May 1993). For an assessment of the role of the UN Secretary-General, see Thomas M. Franck & Georg Nolte, *The Good Offices of the UN Secretary General*, in UNITED NATIONS, DIVIDED WORLDS: THE UN'S ROLE IN INTERNATIONAL RELATIONS 143, 152-155 (Adam Roberts & Benedict Kingsbury, eds., 2d ed. 1993).

4. *Chapultepec Agreement*, *supra* note 2, at 46, 123.

5. *Mexico Agreements*, *supra* note 2, at 13, 18.

6. *Chapultepec Agreement*, *supra* note 2, ch. 1, para. 5, at 53.

7. *Mexico Agreements*, *supra* note 2, at 29.

Figueredo, former Foreign Minister of Venezuela, and myself, a former President of the Inter-American Court of Human Rights. The Commissioners, in turn, chose President Betancur to serve as the chairman of the Commission. The overall task of the Commission was to investigate the "serious acts of violence" that occurred in El Salvador between 1980 and 1991 "and whose impact on society urgently requires that the public should know the truth."⁸ In discharging its responsibilities, the Commission was to take account of two principal considerations: first, "the exceptional importance" attaching "to the acts to be investigated, their characteristics and impact, and the social unrest to which they gave rise;" and second, "the need to create confidence in the positive changes" to be effected by the peace process and "to assist the transition to national reconciliation."⁹ In other words, not all serious acts of violence were necessarily to be investigated. The main focus was to be on acts that had a special or broader impact on society in general. Moreover, in ascertaining the truth, the Commission was not to lose sight of the fact that the promotion of national reconciliation was an overarching aim of the investigation.

In addition to these general powers, the Commission was assigned a specific task under Article 5 of the Chapultepec Agreement, which reads in part as follows:

The Parties recognize the need to clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized. To that end, the Parties refer this issue to the Commission on the Truth for consideration and resolution.¹⁰

This provision, which required the Commission to address violations of human rights committed by El Salvador's armed forces, has tended to be overlooked by those in that country who have charged the Commission with an anti-military bias. In interpreting this clause, the Commissioners proceeded on the assumption that it was not possible to put an end to "impunity on the part of officers of the armed forces" without identifying the serious acts of violence some of them committed, describing the resulting cover-ups by them and their superiors, and assigning responsibility for these acts.¹¹

To understand the role and powers of the Truth Commission, it is important to note at the outset that in addition to investigating the serious acts of violence, the Commission was

8. *Id.*

9. *Id.* at 30.

10. *Chapultepec Agreement*, *supra* note 2, ch. 1, para. 5, at 53.

11. *See Report*, *supra* note 1, at 18.

also charged with the task of "recommending the legal, political or administrative measures which can be inferred from the results of the investigation," including measures designed "to prevent the repetition of such acts."¹² Moreover, the Parties undertook "to carry out the Commission's recommendations."¹³ In other words, by signing the Peace Accords, the FMLN and the government of El Salvador agreed to accept the recommendations as binding on them.

The Commission was given a period of six months within which to submit its report to the Parties and to the Secretary-General of the United Nations.¹⁴ It took the Commission eight months to complete its task. Obviously, this was not sufficient time to do justice to all the terrible injustices committed by both sides to the conflict in El Salvador, but that was not the objective of the Parties. They wanted an investigation that focused on some of the most egregious acts and a set of recommendations to help ensure that the past would not repeat itself.

The establishment of the Truth Commission marks the first time that the parties to an internal armed conflict, in negotiating a peace agreement, conferred on a commission composed of foreign nationals designated by the United Nations the power to investigate human rights violations committed during the conflict and to make binding recommendations. Similar institutions will probably be created in the future by the United Nations or some regional international organization.¹⁵ National reconciliation is often difficult to achieve in countries trying to overcome the consequences of a bloody, internal armed conflict or an especially repressive regime without an appropriate accounting for or acknowledgment of past human rights violations. To the extent that the Truth Commission as an institution met the demands of the Salvadoran peace process, it has become a model the

12. *Mexico Agreements*, *supra* note 2, at 30.

13. *Id.* at 31.

14. *Id.*

15. There existed some earlier national truth commissions, the most famous of these being those that were established by Argentina and Chile following their transitions to democracy. For articles dealing with these bodies, see Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455 (1992); Emilio F. Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984). Generally on this subject, see Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, HUM. RTS. Q. (forthcoming November 1994). See also LEO VALLADARES LANZI, *THE FACTS SPEAK FOR THEMSELVES: THE PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS* (Human Rights Watch/Americas (formerly Americas Watch) trans., 1994) (abridged English translation of LOS ECHOS HABLAN PRO SI MISMOS: INFORME PRELIMINAR SOBRE LOS DESPARECIDOS EN HONDURAS 1980-1993 (1994)).

international community is likely to draw upon in the years to come. Thus, although the conditions, problems, and needs of El Salvador are not likely to be duplicated in other countries where truth commissions of one type or another might be called for, much can nevertheless be learned from the experience of the Salvadoran Truth Commission. Therefore, this Article describes the manner in which the Commission sought to implement its mandate, reached its findings, and encountered problems in performing its functions. This Article concludes with some reflections on the Commission's experience and a very tentative assessment of its contribution.¹⁶

II. THE CONTEXT

The twelve-year Salvadoran civil war cost some 75,000 lives, an extremely high number considering that the country only has a population of about five million people. It was played out in the context of the Cold War, with the United States supporting the Salvadoran government. U.S. military and economic aid amounted to more than six billion dollars. The FMLN, an alliance of five leftist insurgent groups, received substantial assistance, especially weapons and military training, from Cuba, Sandinista Nicaragua, the Soviet Union, and other Soviet bloc countries.

By the time the Cold War had begun to wind down, it became clear that the government side would not be able to defeat the FMLN militarily, nor the FMLN the government, and that their respective patrons—the United States on the one hand, and the Communist bloc on the other—no longer had the requisite political interest or the economic resources to support their Salvadoran clients. At this point the notion of a negotiated peace gradually began to appeal to both sides. This change in the

16. For articles discussing the Truth Commission, see Cynthia Arnson, *El Salvador Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador*, AMERICAS WATCH-NEWS FROM THE AMERICAS, August 10, 1993, at 1; Douglass Cassel, Jr., *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 69 (1993); Margaret E. Crahan, *Truth Telling and Accountability: The Case of El Salvador in Comparative Perspective*, 4 INT'L PAPERS IN PASTORAL MINISTRY, May/June 1993, at 1; Symposium, *El Informe de la Comisión de la Verdad: Análisis, Reflexiones y Comentarios*, 48 ESTUDIOS CENTROAMERICANOS 333 (1993). For a conference report on the Truth Commission, see GARY BLAND, *EL SALVADOR: SUSTAINING PEACE, NOURISHING DEMOCRACY* (Woodrow Wilson Center/Washington Office on Latin America, Washington, D.C. 1993). This report contains comments by, *inter alia*, Pedro Nikken, Carlos Chipoco, Margarete Crahan, Iqbal Riza, and three Salvadoran political leaders. See also Hayner, *supra* note 15 (analyzing the role of the Truth Commission in El Salvador and the various national bodies that performed similar functions).

political climate provided the impetus for a UN-brokered, multi-stage process of negotiations that eventually produced the peaceful resolution of the Salvadoran armed conflict.¹⁷

The war was particularly brutal in its impact on the civilian population. Not surprisingly, both sides to the struggle accused each other of bearing responsibility for the numerous atrocities that had been committed over the twelve-year period. Some of the crimes attracted worldwide attention, particularly the assassination of Archbishop Oscar Arnulfo Romero, the killings of six Jesuit priests, the rape and murder of four American churchwomen, the assassinations of mayors in the so-called conflictive areas of the country, the Zona Rosa raid in which, among others, four off-duty U.S. Embassy guards were killed, the El Mozote massacre, the abductions and assassinations of important national figures, and the disappearance and torture-deaths of large numbers of civilian sympathizers of one or the other of the combatants.¹⁸

As the peace negotiations advanced, the charges and counter-charges relating to these and other atrocities threatened to become serious obstacles to any peaceful resolution of the conflict. It was soon recognized, therefore, that the hate and mistrust built up over the years required the inclusion in the peace agreements of various "confidence-building" arrangements, among them some mechanism permitting an honest accounting of these terrible deeds. The FMLN had no confidence in the Salvadoran judicial system, which had not been particularly eager or effective in solving any crimes attributed to the government side. In fact, one of the FMLN's main negotiating objectives was a thorough reform of the justice system. It considered such action a necessary guarantee to protect the FMLN leadership and its supporters against potential government abuses once the FMLN laid down its weapons. The Parties therefore concluded that a special body would have to be established to carry out the investigations. Gradually they recognized, however, that they would not be able to agree on any group of Salvadorans that they would trust to discharge that responsibility. A formula calling for a panel of distinguished foreigners to undertake the investigation

17. See generally, Karl, *supra* note 3 (discussing the negotiation process).

18. There is a vast body of literature on these and related cases. See, e.g., MARK DANNER, *THE MASSACRE AT EL MOZOTE* (1993); MARTHA DOGGETT, *DEATH FORETOLD: THE JESUIT MURDERS IN EL SALVADOR* (1993); AMERICAS WATCH, *EL SALVADOR'S TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP OF ROMERO* (1991); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *EL SALVADOR: HUMAN RIGHTS DISMISSED (A REPORT ON 16 UNRESOLVED CASES)* (1990).

proved less objectionable and was eventually accepted by the Parties.¹⁹ This, in short, is the origin the Truth Commission.

During the negotiations, both sides to the conflict drew up lists of specific atrocities or cases they wished to have investigated.²⁰ Usually a list presented by one of the Parties would be matched or "trumped" by the other until it became clear that this process would not produce ready agreement. The obvious solution was to avoid identifying the specific cases or events the Commission was to investigate. This explains why its mandate speaks merely of "serious acts of violence . . . whose impact on society urgently require that the public should know the truth,"²¹ thus leaving it to the Commission to draw up its own list.

III. THE PROCESS OF GATHERING INFORMATION

Before embarking on their mission, the Commissioners had to recruit a staff. In doing so, they decided that since the Parties to the Peace Accords had attached great importance to the international character of the Commission, its staff should also be international in composition. Consequently, no Salvadorans were hired to work for the Commission. Instead, its staff consisted largely of lawyers, sociologists, forensic anthropologists, and social workers drawn from other Latin American countries, the United States, and Europe. The total number ranged between twenty to thirty persons, including support personnel. Monies to finance the Commission's work—some two and a half million dollars—were contributed to a special UN fund by the United States, the European Community, the Netherlands, and the Scandinavian countries; the United States was the largest contributor with one million dollars. The Commissioners also decided that the staff should be located in El Salvador, where it in fact remained for approximately six months. The professional commitments of the Commissioners made their relocation to El Salvador impractical. They opted to travel there at least twice a month, usually remaining in the country for a week or more at any given time. This practice continued through January 1993, when the Commission as a whole transferred its operations from

19. Such a national commission was, in fact, established for the purpose of purging the Salvadoran armed forces of individuals guilty of corruption or serious violations of human rights. This body, denominated the Ad Hoc Commission, performed its functions with great courage, honesty, and integrity. See *infra* note 33 and accompanying text.

20. See Arnson, *supra* note 16, at 7-8.

21. *Mexico Agreements*, *supra* note 2, at 29.

El Salvador to the United Nations in New York to finalize its report.

At their initial meetings, the Commissioners studied the Commission's mandate and concluded that we should not draw up a list of cases or events to be investigated before we had an opportunity to gather more information. The notoriety of a number of cases—the assassinations of Archbishop Romero and of the Jesuit priests as well as the El Mozote massacre—left no doubt, of course, that they would have to be dealt with in the Commission's report. But there were many other very serious acts of violence that had not received comparable worldwide attention, and not all of them could possibly be fully investigated within the six-month deadline fixed by the Parties. Deciding upon which cases to focus was, therefore, very important and could not be made without a careful analysis of the relevant events, the allegations of the Parties, and the information provided to the Commission by victims, their next of kin, and other sources. The failure of the Peace Accords to list specific cases, and the Commissioners' belief that we needed to obtain a more thorough understanding of the extent and scope of the acts of violence that had occurred in El Salvador, prompted us to begin with a general fact-finding assessment before making any decisions regarding the types of cases or events to be covered in the Report. Of course, we also had to take account of the specific acts of violence that each side to the Salvadoran conflict accused the other of having committed and wanted to have investigated. Although the Commission was not strictly bound by this wish list, which did not appear in its mandate, it was not an irrelevant consideration in the deliberations on this subject.

The Commission's staff was initially instructed to undertake a broad investigation of the relevant events that transpired during the twelve-year civil war. Its members interviewed victims and witnesses and received vast amounts of testimony and evidence from individuals, governmental and non-governmental organizations. They examined court records and sought out personnel files of military officers. The Commission bought advertising space in newspapers, and time on radio and television, informing the public that we had an "open door" policy and urging the people to come forward with information, to tell their stories, and to file complaints. In addition to its headquarters in San Salvador, the Commission established additional offices in different parts of the country to make it easier for the population to contact us.

Beginning with the Commissioners' first visit to El Salvador, we scheduled a series of individual meetings with representatives of different sectors of Salvadoran society. Over time, we met on various occasions with officials of the government, the President,

members of the Cabinet, the President of the Supreme Court, the Minister of Defense, and the Military High Command. We spoke with the country's church hierarchy, with the leadership of the FMLN, with media representatives, with labor and rural community leaders, and with political party officials. We also made various trips outside of San Salvador to meet with people in the countryside and to inspect the sites of alleged atrocities. In short, we wanted to hear what people had to say, what their hopes and aspirations were, and what they expected from the Commission. There was no better way to feel the pulse of the country.

From these preliminary investigations and explorations there soon emerged an overview of events between 1980 and 1991 that enabled the Commissioners to make tentative decisions about the specific cases or situations that would have to be dealt with in the Report. While the list was longer at the beginning of the process, it shrank as time went on because of insufficient credible evidence or because we lacked adequate investigative resources to pursue certain leads. The short, six-month deadline established in the mandate also affected the number of cases with which the Commission could deal. Some of the "big" or better-known cases received the Commission's attention relatively early on in the process. The more we learned about El Salvador's civil war, moreover, the clearer it became that some cases were paradigmatic of a practice of violence that terrorized the country. That in itself was an important reason why these cases needed to be addressed.

A. *Investigations in El Salvador*

The next stage began with a thorough investigation of the cases. While the staff sifted through evidence and sought to identify individuals who might have information relating to a given matter, the Commissioners began to study the case files and to interview alleged perpetrators and individuals thought to have some relevant information. Here it is appropriate to recall that the Commission's mandate stipulated that "[t]he Parties undertake to extend to the Commission whatever cooperation it requests of them in order to gain access to sources of information available to them."²² On the whole, the Commission encountered few difficulties in interviewing any individual it wished to have appear before it. Most civilians, former FMLN combatants, and military personnel presented themselves at the Commission after being summoned by it. There were exceptions and delays in

22. *Id.* at 31.

appearances, but they were not significant and did not affect the Commission's work to any significant extent. Of course, it is one thing for individuals to appear for questioning; it is quite another for them to tell the truth or, for that matter, to provide information. More on that subject later.

The Commission encountered greater difficulty in obtaining relevant documents. Various requests by the Commission for service records or personnel files of military officers—information regarding their commands and the locations where they were stationed at different times during the war—tended more often than not to be answered with explanations that the files had been destroyed, could not be found, or were incomplete. Access to files of the security services could not be obtained. The FMLN was also not very forthcoming with information concerning the names and specific deployment of field commanders and related information that might have helped the Commission to identify an individual responsible for giving a particular military order. Here the task was made even more difficult because successive FMLN field commanders in a given sector apparently frequently used the *nom de guerre* of their predecessors. Thus, testimony by witnesses that "Commandante Gonzales gave the order," for example, did not necessarily help identify the specific person who served as Commandante Gonzales at the relevant time, and that information could not always be obtained.

B. Relations with the United States

The Commission received information from various Salvadoran and international non-governmental organizations as well as a number of foreign governments. The U.S. government, after congressional prodding,²³ established an inter-agency working group to assist the Commission with information. It was composed of representatives of various U.S. governmental entities, including the Departments of State, Defense, and Justice, as well as some intelligence agencies. Coordination of

23. It is quite clear that but for the efforts of a number of Members of Congress and Senators, led by Representative Joseph Moakley (D-Mass.), the Truth Commission would have received very little cooperation from the Bush Administration. Representative Moakley, who had chaired a very effective Congressional investigation of the Jesuit murders and was shocked to find the Salvadoran Military High Command directly implicated, and Jim McGovern, his astute and energetic aide, helped us overcome numerous obstacles and mobilize Congressional support to enable the Truth Commission to discharge its mandate. For Representative Moakley's important contribution to the struggle to improve the human rights situation in El Salvador, see CYNTHIA J. ARNSON, *CROSSROADS: CONGRESS, THE PRESIDENT, AND CENTRAL AMERICA, 1976-1993*, at 253 (2d ed. 1993).

this group was entrusted to the Bureau for Inter-American Affairs in the Department of State. My colleagues designated me as the Commission's liaison with the U.S. government. It was my task to submit requests for information to the U.S. government²⁴ and to negotiate the declassification of documents or to obtain access to classified materials. Halfway into the exercise, I was even given a limited security clearance that enabled me to examine some, but by no means all, relevant State Department files and a very small number of documents from other agencies. Access to these files proved particularly useful in verifying information received by the Commission from other sources. Although I tried to obtain the same type of clearance for my special assistant, a young U.S. lawyer with impeccable credentials, my requests were repeatedly denied. It is hard for me to believe that the denial was motivated by any reason other than a desire to limit the Commission's access to certain relevant documents. Alone, I could not possibly read all of these documents and discharge my other responsibilities as Commissioner.

Some important information in U.S. government hands was never provided to the Commission. For example, a cursory review of documents subsequently declassified and released by the Clinton Administration²⁵ indicates that the inter-agency group withheld information that could have greatly facilitated the Commission's truth-finding task without endangering U.S. national security or intelligence sources. These newly released documents suggest, moreover, that some of the information denied the Commission on national security grounds related to Salvadorans whom some U.S. officials may have wished to protect from investigation by the Commission.

The Commission's interaction with the inter-agency group evolved over time. Initially I submitted a list of cases and events to the group with a request to be provided with whatever relevant information the United States might have. This approach did not prove to be very productive because the United States either had too much or too little information, and much of it was dispersed among different agencies. A great deal of time and effort was thus wasted compiling and reviewing information which the Commission either already had or could have obtained more readily from other sources. Therefore, we abandoned this approach in favor of submitting specific questions concerning particular cases or events of interest to the Commission. While

24. In discharging this task, I had the very able assistance of a young lawyer, Theodore Piccone, who was for that purpose given a leave of absence from the law firm of Schnader, Harrison, Segal & Lewis in Philadelphia, Pennsylvania.

25. Clifford Krauss, *U.S., Aware of Killings, Worked with Salvador's Rightists*, *Papers Suggest*, N.Y. TIMES, Nov. 9, 1993, at A4.

this method was much more productive, many of our questions were answered only partially or not at all, and this was not always because the U.S. government lacked the information being sought.

Since my colleagues and I believed that some U.S. officials who had been stationed in El Salvador could provide us with useful information, I attempted to obtain permission from various U.S. agencies to interview these officials. Not surprisingly, some agencies were more forthcoming than others. The State Department was most cooperative, whereas at least two other departments put every possible obstacle in my way. One government agency waited until January 19, 1993—one day before the inauguration of the Clinton Administration—to deny my request, which had been pending for months. The incoming Administration eventually reversed the decision. However, a great deal of valuable time had been lost. Another agency, for example, carried the delaying technique to the extreme by stringing out the negotiations with me until one week before the due date of the Commission's Report. By that time it was no longer possible to verify or, for that matter, to make use of the information that was provided. I am convinced that what was at play here was not a U.S. government policy to impede the work of the Commission, but rather decisions of individual officials who disagreed with the role that the Commission was assigned to play and the formal decision of the United States to support it.

But even when I received high-level permission to interview U.S. officials, other obstacles were sometimes put in my way. In one case I was sent a draft secrecy agreement to be signed by me prior to the interview. After reading the draft, I concluded that if I signed it, I would not be able to use the information for any purpose whatsoever. I responded with a note suggesting that my analysis of the agreement led me to the sad conclusion that all I could possibly do with the information I might elicit was to immediately swallow it, which was hardly the reason why I sought the interviews. Eventually, we redrafted the agreement and some interviews were granted. In the process, more valuable time was lost playing silly games designed to prevent me from gaining access to U.S. officials who were often quite willing to talk to the Commission. Of course, there were other officials who did everything in their power to avoid being interviewed even after they were authorized to do so.

The private National Security Archive, located in Washington, D.C., also proved to be a very valuable resource. Besides providing us with many documents, access to its files enabled us to learn what other information the U.S. government might have, and to verify the answers provided to us by the inter-agency group. In a number of cases, documents denied me by the inter-

agency group on the ground that they were classified, turned out to have been previously declassified and released to the National Security Archive under the Freedom of Information Act. This meant that we often had to cross-check the information provided by the U.S. government against the holdings in the National Security Archive.

C. *The Problem of Confidential Information*

In El Salvador, the Commission began the process of interviewing witnesses who might have some information bearing on any case that had tentatively been placed on the list. There were basically three types of witnesses: victims or their next of kin, suspected perpetrators, and individuals who might have some useful information. As a rule, the Commissioners themselves interviewed the more important witnesses, particularly higher-ranking government officials, FMLN commanders, military officers, and business leaders. The vast majority of these individuals, whether or not they were suspected of having committed offenses within the scope of the Commission's jurisdiction, appeared without legal counsel despite the fact that they were free to have counsel present. All witnesses were advised that their testimony would be treated as confidential if they so desired, and most requested it. It should be noted, in this connection, that the Commission's mandate stipulated that "[i]ts activities shall be conducted on a confidential basis"²⁶ and that:

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

a. Gather, by the means it deems appropriate, any information it considers relevant. The Commission shall be completely free to use whatever sources of information it deems useful and reliable. It shall receive such information within the period of time and in the manner which it determines.

b. Interview, freely and in private, any individuals, groups or members of organizations or institutions.²⁷

The mandate also stipulated that "[t]he Commission shall not function in the manner of a judicial body."²⁸ An analysis of these provisions and of the reality confronting the Commission in El Salvador convinced the Commissioners that we would have to rely on confidential information despite the due process implications inherent in this approach. In reaching this conclusion, we took two considerations into account. First, the Commission's mandate authorized this procedure, and it did so precisely

26. *Mexico Agreements*, *supra* note 2, at 30.

27. *Id.*

28. *Id.*

because the Parties to the Peace Accords knew full well that any other approach would be doomed to failure. That is, the Parties proceeded on the assumption that few Salvadorans, if any, would come forward and testify in public for fear of reprisals from those they might accuse. Second, it did not take very long for the Commissioners to recognize that these fears were well-founded and that the Commission had no other way to protect those who provided information other than to keep their identities secret. In its *Report*, the Commission addressed this problem in the following terms:

The situation in El Salvador is such that the population at large continues to believe that many military and police officers in active service or in retirement, Government officials, judges, members of [the] FMLN and people who at one time or another were connected with the death squads are in a position to cause serious physical and material injury to any person or institution that shows a readiness to testify about acts of violence committed between 1980 and 1991. The Commission believes that this suspicion is not unreasonable, given El Salvador's recent history and the power still wielded or, in many cases, wielded until recently by people whose direct involvement in serious acts of violence or in covering up such acts is well known but who have not been required to account for their actions or omissions. . . .

The Commission can itself testify 'to the extreme fear of reprisals frequently expressed, both verbally and through their behavior, by many of the witnesses it interviewed. It is also important to emphasize that the Commission was not in a position to offer any significant protection to witnesses apart from this guarantee of confidentiality. Unlike the national courts, for instance, the Commission did not have the authority to order precautionary measures; neither, of course, did it have police powers. Besides, it is the perception of the public at large that the Salvadorian judicial system is unable to offer the necessary guarantees.²⁹

Hence, in examining those who were suspected of having committed acts falling within the Commission's jurisdiction, the Commissioners or staff members would inform them why they had been summoned to appear, offer them the opportunity to make whatever statements they deemed appropriate, and ask them specific questions. These individuals were not, however, confronted with or given the names of their accusers, nor could they cross-examine any witnesses against them. Because evidence received under such circumstances tends to be suspect and needs to be handled with great care, the Commission adopted the following safeguards:

In order to guarantee the reliability of the evidence it gathered, the Commission insisted on verifying, substantiating and reviewing

29. *Report, supra* note 1, at 23-24.

all statements as to facts, checking them against a large number of sources whose veracity had already been established. It was decided that no single source or witness would be considered sufficiently reliable to establish the truth on any issue of fact needed for the Commission to arrive at a finding. It was also decided that secondary sources, for instance, reports from national or international governmental or private bodies and assertions by people without first-hand knowledge of the facts they reported, did not on their own constitute a sufficient basis for arriving at findings. However, these secondary sources were used, along with circumstantial evidence, to verify findings based on primary sources.³⁰

In addition, the Commission established three categories of proof—overwhelming evidence, substantial evidence and sufficient evidence—for the purpose of assessing the evidence and making its finding accordingly.³¹ Serious charges against individuals were to be substantiated by overwhelming or substantial evidence. The Commission also adopted a policy of not charging anyone with serious acts of violence without giving the person an opportunity to be heard and to rebut the charges.

All in all, in gathering and evaluating the evidence, the Commission had to balance the safety of potential witnesses against the due process interests of those persons accused. At the same time, the Commission had to recognize that unless it protected the confidentiality of its sources, it would be unable to discharge its mandate. It is important to recall that the very governmental institutions and the individuals responsible for many of the most egregious acts of violence in El Salvador remained in place and in power, which explains the fear of the vast majority of individuals who appeared before the Commission. The situation would have been quite different had a transition government assumed power after the signing of the Peace Accords, or if a change had occurred in the leadership of the military and security forces as well as in the judiciary. But none of that happened in El Salvador while the Commission was exercising its functions. That explains, of course, why the Commission was appointed in the first place, and why it had to proceed as it did in order to discharge its responsibilities.

30. *Id.* at 24.

31. *Id.*

IV. GETTING TO THE TRUTH

A. *The Obstacles*

During the first two to three months of its stay in El Salvador, the Commission was able to gather very little useful information. Relatively few victims or their next of kin came forward to tell their stories, which was not all that surprising. The country had just come out of a brutal civil war and, as pointed out before, fear and suspicion were pervasive. That segment of the population which had been victimized by government forces had reason to fear reprisals. Similarly, the victims of FMLN violence, particularly those living in areas still controlled by the FMLN or its sympathizers, could expect no better from that side.

It should also not be forgotten that the average Salvadoran had no reason to assume that the Commission would in fact carry out an honest and serious investigation. There had been many so-called "investigations" in the past, principally domestic ones, and they produced little information and even less truth. More often than not, they were publicity stunts staged by the Salvadoran government, frequently as a result of U.S. pressure and timed so as to anticipate some action by the U.S. Congress. Given this experience, Salvadorans certainly had no reason to trust yet another commission, or three foreigners about whom they knew little. Moreover, merely being seen talking with the Commission could be dangerous. People had died for less in the past. So why put one's life or that of one's loved ones in danger to provide information to a commission that might have no genuine interest in establishing the truth? This attitude, borne of the population's sad experience, initially proved to be a very serious obstacle for the Commission.

The local human rights organizations, among them some that had done important and courageous work during the armed conflict, were surprisingly unprepared to assist the Commission. It took them a long time, given the short term of our mandate, to begin providing information. Initially at least, much of their assistance was not particularly useful. International human rights groups, on the other hand, had over the years prepared extensive reports on El Salvador in general or on particular cases or events. These provided useful background information and served as guideposts for the Commission's investigation. These reports and the other material that the organizations provided to the Commission could not, of course, be deemed to prove the truth of the allegations they described. They needed to be

independently verified and confirmed, but to the extent that they were carefully documented, they helped orient us.

Each side to the conflict—the government and the FMLN—accused the other of numerous acts of violence. However, these accusations were seldom accompanied by the type of proof the Commission needed to make a credible finding. After extensive prodding, the government and military authorities produced reams of documents relating to alleged FMLN crimes. To our great surprise, this material was for the most part useless for investigative purposes despite the impressive volume of paper it consumed. We assumed that, over the years, the government had undertaken serious investigations of terrorism and other acts of violence attributed to the FMLN. However, that appeared not to have been the case. At first we even thought that the government had that information but did not wish to provide it in order subsequently to be able to accuse the Commission of a pro-FMLN bias. Eventually, we concluded that the government simply had not bothered to undertake a serious effort to document the numerous charges it made against the FMLN. The FMLN, for its part, was by no means better prepared to substantiate its charges against the government and appeared to have relied almost exclusively on human rights organizations to do that work for it.

Almost immediately after assuming office, the Commission requested the U.S. government to provide it with information relating to the FMLN in general and specific acts in particular. Despite the fact that this request was reiterated on numerous occasions, the material ultimately provided was of little value and extremely slow in coming. Not unreasonably, the Commission assumed, given the long U.S. involvement in the Salvadoran conflict and its intelligence gathering capability, that the United States would have extensive information about the activities of the FMLN. Actually, to some extent, we were lulled into complacency in carrying out our own initial investigations into the role of the FMLN, believing instead that the promised U.S. material would save us a great deal of time. But what we eventually received on this subject was surprisingly disappointing. Although it is possible that more useful information was withheld to protect intelligence sources, what was provided and what I saw when examining various confidential documents makes me doubt that the United States had a great deal of solid information relating to the FMLN that would have been of value to us.

As a result of these problems, there were times during the first few months of our investigations in El Salvador when I was convinced that we would never be able to establish the truth with regard to many of the most egregious acts of violence that had been committed in that country. In addition to the general

mistrust that most Salvadorans harbored against the Commission and the fear that gripped many segments of the population, initially it appeared that none of the military officers we interviewed, whether or not they were implicated in any of the cases under investigation, would provide any useful information. For the most part, they lied when responding to our questions. Many of them made it quite clear, either by the manner in which they spoke or by their body language, that their careers or their lives were at risk if they told the truth. That was particularly the case with the lower-ranking officers. It was obvious to us that the military had built a defensive wall to protect itself. As we interviewed more officers, this wall appeared to become more formidable. Some of the officers appeared to have been coached. Even if they were not, they knew what the "Institution"—the military establishment—expected of them.

To understand this phenomenon, it is important to say a word about the Salvadoran officer corps as it existed at the time the Commission embarked on its investigation. Entry to the officer corps is attained through the national military academy, which a young man usually enters in his late teens after completing secondary school. He leaves the academy with the rank of second lieutenant and, if he does what he is told³² and meets the routine expectations of his superiors, he can expect to retire in his early or mid-fifties at the rank of lieutenant colonel or colonel which, with the exception of three or four generals, are the highest ranks in the Salvadoran military. Although these officers usually do not come from wealthy families and receive relatively low salaries and retirement pay, as a rule they end up owning expensive residences, spend their weekends in their vacation homes in the countryside, drive expensive cars, and otherwise enjoy high social and economic status. Some of them also acquire important positions in state-owned or operated enterprises after retirement.

These people have a great incentive to complete their careers and to stay in the service for the normal number of years. If they are dismissed early in their careers, they usually lack the education, social status, and economic resources needed to embark on a professional or business career. Consequently, they would face a very uncertain future. Also, the less time an officer stays in the service, the less time he has to acquire wealth, which he can usually only accomplish with the tacit acquiescence of his colleagues who are engaged in the same endeavor. Advancement

32. Salvadoran military law requires compliance with all orders by superiors and apparently does not recognize the right to refuse compliance with illegal orders.

is routine and by class or *tanda* in the military academy—again with minor exceptions. What we have here is a social structure in which each member knows that his opportunity to acquire the “benefits” of his rank is intertwined with that of his colleagues, particularly those in his *tanda*, rather than being dependent upon his professional integrity and ability as an officer. The result is an officer corps that is monolithic, in which everyone covers up for everyone else, where one’s principal loyalty is to his *tanda* and to the protection of the “system.” Departure from these norms is treated as disloyalty that can have serious consequences. Given this environment, it is not surprising that the Commission initially had little success in getting any information from the members of the officer corps, including those who were known to have had doubts about the behavior of some of their colleagues. All of them, moreover, seemed to have great faith in the ability of the system to cover up, to protect them, and to punish those who talked. As one officer put it, “most officers knew who had done what, but we also knew that none of us would tell on them, and that if we did, we would be dead.”

B. *The Wall Begins to Crumble*

Our investigation began to make progress some three months after we arrived in El Salvador. That is, towards the end of October and the beginning of November 1992, various people, including some military officers, began to talk. What happened? My own sense is that at least three interrelated factors played an important role. One was the report of the so-called Ad Hoc Commission. The second was the outcome of the 1992 U.S. presidential election. The third was the belief that the United States was providing the Commission with vast amounts of information.

The Ad Hoc Commission, also a creature of the Peace Accords,³³ was established to review the past performance of Salvadoran military officers by reference to their human rights record, their professional competence, and their capacity to function in a democratic society. Composed of three distinguished Salvadoran civilians, with two retired Salvadoran generals assigned to it as advisers, this body was empowered to recommend the dismissal, demotion, or retention of officers based on the above criteria. The government, in turn, was under an obligation to comply with these recommendations within a period of two months. There is strong evidence to suggest that the government and the military only agreed to the establishment of

33. *Chapultepec Agreement*, *supra* note 2, ch. 1, para. 3, at 49.

the Ad Hoc Commission because they were convinced that it would not dare to discharge its responsibilities honestly.³⁴ At most, they thought the Commission would call for the dismissal of a few low-ranking officers. That is what had happened in the past with similar bodies, and there was little reason to assume that this one would act differently. But, to the great surprise of many in El Salvador, it did. The result was a secret report presented to the Secretary-General of the United Nations and to the President of El Salvador. The report, which was eventually leaked to the press, charged more than one hundred officers, including the Minister and Deputy Minister of Defense as well as the Chief of the General Staff, with serious violations of human rights and called for their dismissal from the service.³⁵ The three members of the Ad Hoc Commission delivered their report in New York and, fearing for their lives, remained outside El Salvador for some time.

The report of the Ad Hoc Commission, coming some three months after the Truth Commission had begun its work, had a very perceptible impact on the work of the Truth Commission. It was the first clear indication—the first signal—received by the people of El Salvador that the days of “business as usual,” of military impunity and cover-ups, might be over. Suddenly people no longer looked at the Truth Commission with their accustomed cynicism. If three Salvadorans had dared to undertake an honest investigation despite the risks this action exposed them to, it was certainly more likely that three distinguished foreigners working under UN auspices could do no less. Thus, some individuals implicated in serious acts of violence no longer felt sure that they would be protected. Because the Truth Commission had the power to make recommendations concerning criminal trials and amnesties, and might be able to help implicated parties get asylum abroad, a few of them began to provide the Commission with important information. That information in turn elicited testimony from others who then realized that the protective dike they had constructed was beginning to leak. Moreover, the Ad Hoc Commission had proven to the country at large that the power and control of the government and the military was beginning to weaken, and that things were changing in El Salvador. Therefore, many more ordinary citizens also came forward to provide evidence, still very fearful, but now with greater confidence in the integrity of the process.

Salvadorans also perceived the following as harbingers of a major change in U.S. policy toward El Salvador: the defeat of U.S.

34. See Arnson, *supra* note 16, at 8.

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

President George Bush in the 1992 elections, the belief of many Salvadorans that the Republican Party in the United States was more likely than the Democratic Party to protect the Salvadoran military and its allies, and the fact that Democrats in the U.S. Congress had been less supportive of U.S. involvement in El Salvador. At the very least, Salvadorans expected that the Clinton Administration would be even more willing than its predecessor to support the work of the Truth Commission. These considerations convinced some more people to cooperate with us. Our efforts were also helped by the knowledge in El Salvador that I had received a security clearance to examine U.S. documents for the Commission. Of course, no Salvadorans knew how very limited my clearance was. Hence, the FMLN leadership, the Salvadoran government, and the military all assumed that the Commission knew much more than it actually did. We did not discourage that belief because it helped convince some individuals to come forward with information either against the government or the FMLN.

The more information we obtained, the more new information and leads came our way. Of course, that is usually what happens in any investigation. As the evidence accumulated, it had to be carefully verified. In trying to do so, we confronted a serious obstacle: the country was awash in rumors of all sorts. Moreover, trading in rumors had become a national pastime. They were often passed on with such self-assurance and conviction that uninitiated foreigners could easily mistake them for the truth. The witness usually believed the rumor, and if we did not immediately accept the information as true, he or she would assume either that we were protecting someone or that we were not serious about our investigation. Wars have this effect on people. Nonetheless, this state of affairs did not make our task any easier. We lost valuable time trying to find sources with first-hand information, ending up quite often with little to show for our effort. For example, one of our most frustrating experiences was trying to identify members of death squads and their patrons. Everyone in El Salvador supposedly "knew" who was involved with death squads. We were regularly told, "of course, it is well known that X provided the money." And, it was almost impossible to come up with real proof. That was particularly true with regard to the wealthy landowners and business people who allegedly financed these groups. Lacking the power to subpoena financial records or telephone logs, or to obtain information allegedly gathered by U.S. intelligence agencies monitoring telephone transmissions between Miami and El Salvador—some of the money was supposed to have been sent by Salvadoran expatriates living in the United States and Guatemala—the Commission had to rely on other evidence, which was seldom very

helpful. Some death squad members talked, but they were for the most part low-level operatives whose information regarding their civilian backers tended to be largely anecdotal. That was hardly good enough evidence for charging somebody with running or financing death squads. And, when such charges were not made, a new rumor surfaced: the Commission had made a deal to protect the wealthy civilians.³⁶

V. NAMING NAMES

From the very beginning of the investigation, the Commissioners assumed that our final report would identify the individuals who had committed the serious acts of violence to which the Commission's mandate referred. However, we did not formally discuss the subject in the first four months of our work. All three of us had quite naturally assumed that the investigation would not be complete unless those responsible for these acts were identified. That seemed too obvious to require much discussion and explains why, from the very beginning, we focused our inquiry on the following questions: what happened, which side of the conflict was responsible, who were the victims, and who were the perpetrators?

Until the issue became the subject of a heated debate in and outside of El Salvador towards the end of our investigation, it had certainly never occurred to me that the Report would not name names. On first reading the Commission's mandate, I concluded that one of our tasks was to identify those who had committed the serious acts of violence we were required to investigate. My colleagues, as I learned later, had reached the same conclusion. After all, the Parties to the Peace Accords wanted "the complete truth be made known."³⁷ For that purpose, they empowered the Commission to investigate the "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth."³⁸ How could we make known "the complete truth" about a murder or massacre, for example, without identifying the killers if we knew their identity?

36. Douglas Farah, *Assassinations, Threats of Reprisals Besiege Shaky Salvadoran Peace Process*, WASH. POST, Nov. 8, 1993, at A14. But see Thomas Buergenthal, *Investigating Salvadoran Death Squads, Letter to the Editor*, WASH. POST, Nov. 30, 1993, at A24 (rebutting Mr. Farah's allegations that the Commission withheld valid information regarding the Salvadoran death squads).

37. *Mexico Agreements*, *supra* note 2, at 29.

38. *Id.*

Of course, if the Parties had not wanted us to name names, they could easily have said so. However, the mandate for the Commission did not contain such a restriction. Moreover, our initial contacts with the Parties indicated that they assumed that we would identify individuals responsible for serious acts of violence. The government representatives, including President Alfredo Cristiani and members of the Military High Command, told us repeatedly during our initial visits to El Salvador that our task was to identify the "rotten apples" within the "Institution." The Institution itself had to be protected. The government representatives told us: "Individuals and not the 'Institution' were responsible for the violations that the government side had committed." The FMLN also repeatedly made it clear that the guilty had to be identified. Of course, neither side expected our investigation to be very thorough or to contain much evidence implicating the "big fish."

The attitude of the government began to change dramatically as it became known that the Commission had gathered incriminating evidence against high-ranking government officials, particularly General René Emilio Ponce, the Minister of Defense, and General Juan Orland Zepeda, his Vice Minister, as well as other officers comprising the military establishment. Although many of the same officers had already been named by the Ad Hoc Commission, that body had merely prepared a list without specifying the offenses committed. On the other hand, the Truth Commission was going to present evidence and make public its Report, which posed a much more serious threat. Moreover, some of the officers, particularly General Ponce, had been instrumental in convincing his military colleagues to go along with the Peace Accords. He was not only the highest ranking military officer in El Salvador, but also the undisputed leader of his *tanda*, which was known as the *tandona* because it was the largest class ever to graduate from the military academy. The *tandona* controlled the military establishment. Most, if not all, brigade commanders were members of the *tandona*. Together, they had the power to make life very difficult for President Cristiani and to impede, if not scuttle, his efforts to proceed with the implementation of the Peace Accords.

The power and influence of the *tandona*, rumors that "naming names" would lead to a military coup in El Salvador, and claims by many well-intentioned individuals in El Salvador and outside the country that the publication of names by the Truth Commission would make national reconciliation very difficult—that it would be like pouring gasoline on a smoldering fire—prompted the government to mount a fierce diplomatic campaign to force us to omit names from the Report. President Cristiani led the campaign by urging various Latin American

leaders, the United States, and the UN Secretary-General to use their power and influence to prevent the publication of names. He also sent a ministerial delegation to meet with us in New York for the same purpose. The arguments against publication ranged from the danger to the peace process and national reconciliation, to intimations of imminent coups, and claims of the government's inability to prevent retaliation against those who provided information to the Commission. The government also attempted to convince the FMLN to agree with its position. The FMLN and the government together, as the Parties to the Peace Accords, presumably had it in their power to amend the Commission's mandate and to require us not to publish any names. Some in the FMLN leadership were quite sympathetic to this effort and implied as much in conversations with us; a majority was opposed. Eventually, after a lengthy and apparently acrimonious debate within the FMLN high command, the FMLN informed the Commission that the Peace Accords required the publication of names.

The diplomatic campaign mounted by the Salvadoran government against the publication of names by the Truth Commission made it necessary for the Commissioners to explain our position to government leaders in the United States, Europe, and Latin America who were being lobbied by the Salvadorans. The fact that one Commissioner was a former President of Colombia and another a former Foreign Minister of Venezuela gave us easy access to these foreign leaders. The Commission's stature also established the requisite credibility to explain why we believed that our mandate required us to name names and why in our judgment this action would promote rather than impede national reconciliation in El Salvador. It should be noted, in this connection, that all three of us were unanimous on this subject and never doubted that, unless both Parties decided to amend our mandate, we were legally and morally obliged to identify those we found to be guilty of the serious abuses we had been investigating. In the *Report*, we explained our decision as follows:

In the peace agreements, the Parties made it quite clear that it was necessary that the "complete truth be made known", and that was why the Commission was established. Now, the whole truth cannot be told without naming names. After all, the Commission was not asked to write an academic report on El Salvador, it was asked to investigate and describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts. This task cannot be performed in the abstract, suppressing information (for example, the names of person responsible for such acts) where there is reliable testimony available, especially when the persons identified [continue to] occupy senior positions and perform official functions directly related to the violations or the cover-up of violations. Not to name

names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.³⁹

It should also be pointed out that in El Salvador, unlike in some other countries with similar histories, it was known for the most part which side to the conflict had committed what acts and who the victims were. What was often not generally known and what engendered acrimonious debates was who committed the acts and who ordered them to be committed. The search for the "intellectual authors" of these offenses was a national obsession. Many of the intellectual authors were still holding influential positions. To refrain from exposing them would have amounted to yet another cover-up. In our view, national reconciliation would be harmed rather than helped by a Commission report that told only part of the truth. If there had been an effective justice system in El Salvador at the time of the publication of our Report, it could have used the Report as a basis for an independent investigation of those guilty of the violations. In these circumstances, it might have made some sense for the Commission not to publish the names and, instead, to transmit the relevant information to the police or courts for appropriate action. But one reason for establishing the Commission was that the Parties to the Peace Accords knew, and the Truth Commission had ample evidence to confirm, that the Salvadoran justice system was corrupt, ineffective, and incapable of rendering impartial judgments in so-called "political" cases.

We were also told to heed President Cristiani's warnings—that he knew the dangers facing his country and that the release of names would undermine national reconciliation. Those were the arguments made by his emissaries in various nations' capitals. Of course, we had high regard for President Cristiani—without his imaginative leadership the Peace Accords would never have been signed—and we certainly could not claim to know his country better than he did. But it was also public knowledge that he was under great pressure, including thinly veiled threats against him personally from the *tandona*, which wanted to protect its members. We were convinced, moreover, that the failure of the Truth Commission to produce an honest report would seriously undermine the peace process. The fact that the publication of the Report with names did not produce all the dire consequences prophesied by those who wanted us to leave them out would suggest that we were right in not caving in to the pressures to which we were subjected.

39. Report, *supra* note 1, at 25.

VI. THE DRAFTING PROCESS

The Commission's mandate required it to prepare a report containing findings on serious acts of violence that had been committed in El Salvador, as well as recommendations designed both to prevent the repetition of these acts and to encourage national reconciliation. The process of drafting the findings consisted of a number of stages. Usually one or more staff investigators were assigned to a case. Their draft would be supplemented by other staffers before being submitted to one of three senior lawyers, selected by the Commissioners to serve as their special advisers.⁴⁰ The latter would review the draft as well as all evidence that was relied upon to substantiate the findings. Depending upon the quality of the product, the special advisers would accept the case report, revise it themselves, send it back for further study or assign it to another investigator or group of investigators to check out additional evidence. The special advisers and selected staff members also met regularly with the Commissioners to discuss the drafts in progress. Once the special advisers were satisfied with a text, they would pass the "final version" to the Commissioners, who frequently revised it again in consultation with those who had worked on the draft. Since the Commissioners themselves often had interrogated many witnesses and guided the investigations, particularly in the major cases, they were very familiar with the evidence as well as the strengths and weaknesses of the case. The Commissioners also had access to some highly confidential sources which provided information that could not always be fully shared with all staff members.⁴¹ Their familiarity with the cases and the available evidence gave the Commissioners a sound and independent basis for reviewing and assessing the proposed findings. Their review of a draft often resulted in a request for further investigation, a decision to call or recall an additional witness, and yet another

40. Because of administrative problems relating to the operation of the Commission staff in the first few months of its stay in El Salvador, the Commissioners decided that each of us should name one highly experienced, outside lawyer to serve as our special adviser for the preparation of the Report. This decision produced a team of three outstanding lawyers consisting of Professor Douglass Cassel, Executive Director, International Human Rights Law Institute of DePaul University, Chicago, Illinois; Dr. Guillermo Fernandez de Soto, former Deputy Foreign Minister of Colombia and former Senior Attorney, Inter-American Commission on Human Rights; and Dr. Luis Herrera Marcano, former Legal Adviser of the Venezuelan Foreign Ministry and former Dean of the Law Faculty of the Universidad Central, Caracas, Venezuela.

41. To protect witnesses and confidential sources, access to some information was available to the staff only on a need-to-know basis.

draft. The final draft had to be approved by all three Commissioners.⁴²

The Commissioners did not focus on the subject of general recommendations until we had obtained a good understanding of the violence to which the people of El Salvador had been subjected and its causes. This was only natural because the general recommendations would have to address needed institutional and normative changes, which presupposed such understanding. The specific recommendations, on the other hand, grew out of the particular findings of each case. Once the Commissioners began to think about general recommendations, we designated a senior staff member to solicit and gather suggestions from different groups and institutions in and outside of El Salvador. Somewhat later, the Commissioners and some of the senior advisers discussed ideas for recommendations with representatives of various Salvadoran institutions, professional bodies, government officials, FMLN commanders, and foreign experts with experience in El Salvador. The general recommendations that ultimately found their way into the *Report* were the product of the ideas that emerged from these discussions and the Commissioners' analysis of the objectives reflected in the undertakings assumed by the Parties to the Peace Accords. The Parties, who knew their country and its problems better than we did, had in these agreements themselves presented a blueprint for a free, democratic, and peaceful El Salvador. These agreements focused on reforms of the judiciary, the armed forces, and the police, as well as on the protection of human rights and other areas of relevance to the avoidance of the abuses that characterized the old El Salvador. The Commission's own findings provided ample proof, moreover, that the changes and reforms that the Peace Accords sought to effect were indispensable for the desired transformation of El Salvador. The Commissioners consequently saw the Peace Accords as an authoritative guide and conceptual basis for the formulation of the Commission's general recommendation.

The most surprising fact about this drafting process is that the Commissioners never once disagreed among themselves with regard to any final decision concerning matters dealt with in the *Report*. While we sometimes had lengthy discussions regarding different aspects of a case, some piece of evidence, or the way in which a case was written up, ultimately all issues were resolved in a manner fully satisfactory to the three of us. In fact, we never had to take a vote. Despite our very different backgrounds, we

42. All references to confidential sources were removed from the final text to protect those who provided the evidence.

tended to see most issues confronting us in very much the same way and, if we did not at the outset, we always came together at the end. We did not have to work out difficult compromises because our basic agreement on most issues made voting or compromise solutions unnecessary.

VII. THE REPORT

The Commission's *Report*, entitled "From Madness to Hope," consists of one volume of findings and two volumes of annexes. The three volumes were published as UN Security Council documents.⁴³ Annex I contains, *inter alia*, the full findings of the forensic scientists retained by the Truth Commission to investigate the El Mozote massacre as well as the texts of the Salvadoran Peace Accords. Annex II is a compilation of statistical information of the testimony and complaints received by the Commission. It also contains a list of names of individuals who were identified as victims of acts of violence.

The Commission's findings are set out in Volume I. This volume consists of: an analysis of the Commission's mandate, a chronology of the violence that engulfed El Salvador from 1980 to 1991, the Commission's conclusions relating to the acts of violence it investigated, and its recommendations. An introduction to the volume sets out the Commissioners' reflections on the violence chronicled in the *Report* and our hopes for national reconciliation in El Salvador. We were profoundly moved by what we learned about the human suffering of the people of that small country, and by what we discovered about their resilience and their hopes for a peaceful future. These sentiments are reflected both in the introduction and epilogue of the *Report*.

The chronology of violence provides an historical overview of the relevant period. Designed to supply the context through snapshots of the conflict and its effect on the country, this year-by-year summary of events complements the main part of the *Report*. While the main section necessarily focuses on a small number of cases and events, the summary sketches the larger picture, setting the stage upon which the human tragedy played out. The summary also mentions some cases and events the Commission could not fully investigate but considered sufficiently important to place on record somewhere in the *Report*.

43. See *Report*, *supra* note 1, Annexes I-II.

A. *The Applicable Law*

The discussion relating to the Commission's mandate deals, among other things, with the "applicable law."⁴⁴ Here the Commission addressed the fact that its mandate is silent on the question of the legal norms to be applied in determining what is meant by the "serious acts of violence" it was to investigate. Not all acts of violence committed in the civil war, however serious in terms of loss of life or limb, could be deemed to fall within that definition; in war as in peace there are legitimate and illegitimate, lawful and unlawful, uses of force that cause serious harm. Hence, despite the fact that its mandate did not spell out the applicable legal norms, the Commission concluded that "the concept of serious acts of violence . . . does not exist in a normative vacuum and must therefore be analyzed on the basis of certain relevant principles of law."⁴⁵

In the Commission's opinion, the legal principles that defined the scope of its mandate were to be found in those rules of international human rights law and international humanitarian law binding on the state of El Salvador, its government, and the insurgents seeking to defeat it. As far as human rights law was concerned, the Commission emphasized that El Salvador had assumed various human rights obligations as a member of both the United Nations and the Organization of American States. Additionally, it had obligations as a state party to the International Covenant on Civil and Political Rights⁴⁶ and the American Convention on Human Rights.⁴⁷ These treaties entered into force for El Salvador before 1980 and therefore were applicable during the entire conflict. As both treaties prohibit the suspension of certain fundamental rights, such as the right to life and the right not to be tortured, even in time of war or national emergency, their provisions were relevant to the Salvadoran conflict and needed to be taken into account by the Commission in discharging its responsibilities.⁴⁸

It is interesting to note, in this connection, that in analyzing the relevance of international human rights law to the task as-

44. *Id.* at 20.

45. *Id.*

46. International Covenant on Civil and Political Rights, *opened for signature*, December 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) (entered into force March 23, 1976).

47. The American Convention on Human Rights, *opened for signature*, November 22, 1969, O.A.S. Treaty Series, No. 36, *reprinted in* 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

48. See *Report, supra* note 1, at 20-21.

signed to it, the Commission reached the following conclusion, among others:

It is true that, in theory, international human rights law is applicable only to Governments, while in some armed conflicts international humanitarian law is binding on both sides: in other words, binding on both insurgents and Government forces. However, it must be recognized that when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding on the State under international law.⁴⁹

Because the FMLN claimed to control some regions of El Salvador, the Commission determined that in those areas the FMLN, as the de facto governing authority, was under a legal obligation not to violate those basic international human rights that were binding on the state of El Salvador even under the prevailing emergency conditions. Holding insurgent forces responsible for violations of human rights under these circumstances is an important precedent that might be applied to other internal armed conflicts.

The international humanitarian law provisions that the Commission found applicable to the Salvadoran conflict were Article 3, common to the four Geneva Conventions of 1949,⁵⁰ and Additional Protocol II of the Geneva Conventions.⁵¹ These instruments had been ratified by El Salvador before 1980 and applied to non-international armed conflicts. These treaties, together with the international human rights instruments referred to above, provided the Commission with the normative standards it needed to be in a position to assess the legitimacy and legality of the serious acts of violence that had been committed by both sides to the Salvadoran conflict. Despite the fact that the Commission was not a court, it had to draw on these legal principles to determine what cases and facts to investigate, how to evaluate the evidence, and what findings and recommendations to make.

49. *Id.* at 20.

50. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 35 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3318, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

51. Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1391.

B. *The Cases*

The acts of violence attributable to the government and those attributable to the FMLN are treated in separate sections of the *Report*. Before analyzing them, it is relevant to note that the Commission concluded that its findings revealed the following two types of cases falling within the scope of its mandate:

(a) Individual cases or acts which, by their nature, outraged Salvadorian society and/or international opinion;

(b) A series of individual cases with similar characteristics revealing a systemic pattern of violence or ill-treatment which, taken together, equally outraged Salvadorian society, especially since their aim was to intimidate certain sectors of that society.⁵²

In other words, the Commission's *Report* describes some notorious individual cases that had shocked public opinion, as well as cases that were paradigmatic of a practice or pattern of violence which characterized the conduct of one side or the other in a given period of time and, in their totality, had the same disturbing effect on the public. Sometimes, notorious individual cases also exemplified more generalized patterns of violence. Since cases illustrative of patterns of violence tended to be quite numerous—extrajudicial executions, tortures, and forced disappearances—the Commission could only deal with one or two of them as examples.

The Commissioners had assumed and hoped that we would find a more or less equal number of serious acts of violence attributable to each side to the conflict. That would have made our task politically easier and given us the credibility that derives from the public's perception of even-handedness. None of us was so politically naive as to be unaware of this reality, nor was there one among us who had a special interest or desire to favor or protect either side to the conflict. We were convinced, moreover, that the success of our mission and our personal and collective reputations depended on our ability to write a completely honest and impartial report. We soon found, however, that our hope for a quantitatively balanced report could not be realized. Despite the massive wartime propaganda to the contrary, the government side had committed a substantially larger number of egregious acts than the FMLN. Moreover, some of these acts—among them the El Mozote massacre in which hundreds of innocent civilians were slaughtered—had no comparable counterparts among the crimes committed by the FMLN. The complaints received by the Commission provided some revealing statistical evidence of this

52. *Report*, *supra* note 1, at 19.

imbalance. This is how the Commission summarized the information:

The Commission . . . registered more than 22,000 complaints of serious acts of violence that occurred in El Salvador between January 1980 and July 1991. Over 7,000 were received directly at the Commission's offices in various locations. The remainder were received through governmental and non-governmental institutions.

Over 60 per cent of all complaints concerned extrajudicial executions, over 25 per cent concerned enforced disappearances, and over 20 per cent included complaints of torture.

Those giving testimony attributed almost 85 per cent of cases to agents of the State, paramilitary groups allied to them, and the death squads.

Armed forces personnel were accused in almost 60 per cent of complaints, members of the security forces in approximately 25 per cent, members of military escorts and civil defence units in approximately 20 per cent, and members of the death squads in more than 10 per cent of cases. The complaints registered accused FMLN in approximately 5 per cent of cases.⁵³

Elsewhere in the *Report*, the Commission notes that it "registered more than 800 complaints of serious acts of violence attributed to FMLN,"⁵⁴ and that "[n]early half the complaints against FMLN concern deaths, mostly extrajudicial executions. The rest concern enforced disappearances and forcible recruitment."⁵⁵ Considering that the Commission registered more than 7,000 first-hand complaints altogether, it is not surprising that more space is devoted in the *Report* to violations by the government than the FMLN.

In the section of the *Report* describing the serious acts of violence committed by the government side,⁵⁶ the Commission treated the 1989 murders of six Jesuit priests as a case that was "illustrative" of the violence used against perceived opponents of the state. The Commission found that these individuals, all administrators and faculty members of a Jesuit university in El Salvador, were executed on orders of a small group of military commanders, including the then Chief of Staff, General René Emilio Ponce, who later became Minister of Defense. Further, a much larger number of officials were involved in the subsequent cover-up. The victims' only crime was that they spoke out against the policies of the government and were perceived as FMLN sympathizers.⁵⁷ This section of the *Report* also deals with other cases of extrajudicial executions, forced disappearances, massacres of peasants, and death squad executions. The 1980

53. *Id.* at 43.

54. *Id.* at 44.

55. *Id.*

56. *Id.* at 43-147.

57. *See id.* at 45.

assassination of Archbishop Romero⁵⁸ by a death squad organized by Roberto D'Aubuisson, a former major in the Salvadoran army and the founder of the ARENA Party, receives considerable attention. The *Report* singles it out as a case illustrative of the operations of death squads in El Salvador and the impunity with which they carried out their activities.⁵⁹ Among the extrajudicial executions attributed to the military, which were common in El Salvador at different periods, the Commission describes the killings of four American churchwomen⁶⁰ and a group of Dutch journalists,⁶¹ as well as various other assassinations. Among these, the most notorious are the executions committed in San Francisco Guajoyo in 1980,⁶² Las Hojas in 1983,⁶³ and San Sebastian in 1988.⁶⁴

In the early 1980s, the Salvadoran military committed a number of large-scale massacres of *campesinos*. The massacres took place in the course of military campaigns designed to deprive the FMLN of civilian support in certain areas of the country that the insurgents sought to control. The Commission's *Report* deals with three of these massacres: El Mozote,⁶⁵ Sumpul River,⁶⁶ and El Calabozo.⁶⁷ While the El Mozote massacre has become the most notorious of these atrocities, hundreds of people died in the other two as well. Despite claims by the Reagan Administration that these massacres, particularly El Mozote, never took place,⁶⁸ the Commission found overwhelming evidence of the Salvadoran military's responsibility for them.

The Commission also found overwhelming evidence that the FMLN engaged in assassinations and other serious acts of violence against those it perceived as opponents. It should be emphasized, in this connection, that the FMLN, like the government, murdered certain political opponents on the theory that "he who is not with us is against us." The *Report* also deals with the FMLN's summary execution of a large number of mayors, which took place between 1985 and 1988, as illustrative of this practice.⁶⁹ It is worth noting that although the FMLN did not

58. *Id.* at 127.

59. *See id.* at 127-38.

60. *Id.* at 62-66.

61. *Id.* at 69-75.

62. *Id.* at 54-57.

63. *Id.* at 76-80.

64. *Id.* at 80-86.

65. *Id.* at 114-21.

66. *Id.* at 121-24.

67. *Id.* at 125-26.

68. *See* U.S. DEPARTMENT OF STATE, REPORT OF THE SECRETARY OF STATE'S PANEL ON EL SALVADOR 20-21 (1993).

69. *Report, supra* note 1, at 148-53.

deny that it had ordered these executions, it claimed that they were justified on the ground that the officials were involved in counter-insurgency activities and in helping to recruit paramilitary forces. As such, they were legitimate military targets. The Commission rejected this argument on two grounds. First, it found no evidence for the claim that the mayors were combatants or, even if they were, that they had lost their lives in combat operations. Second, even if the mayors were government spies, as the FMLN claimed, it was illegal to execute them without a proper trial. On the latter point, the Commission recognized that although international humanitarian law and international human rights law do not "prohibit belligerents from punishing, in areas under their control, individuals who commit acts that, according to the applicable laws, are criminal in nature," both sources of law "expressly prohibit the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted independent and impartial tribunal attaching [sic] all the judicial guarantees generally recognized as indispensable."⁷⁰ The Commission found that these requirements were not met in any of the cases it examined.

Among the other extrajudicial executions involving the FMLN that the Commission considered were the 1985 Zona Rosa case,⁷¹ and the 1991 killing of two wounded U.S. military advisers who had survived a helicopter crash.⁷² The Commission determined that both of these acts constituted serious violations of international humanitarian law.

As previously noted, the Commission found it much easier to identify the government military officers who had ordered or committed serious acts of violence than FMLN commanders responsible for comparable practices. In the case of a government military officer, once we knew the date and place of an event, we would often be able to identify the military unit and its commanding officers. This information enabled us to fix individual responsibility after some follow-up investigation. Since the FMLN did not provide this information and our other sources frequently did not have it, the Commission found it almost impossible to fix individual responsibility for many acts attributed to the FMLN. A combination of factors and lucky breaks allowed us to hold some FMLN commanders individually responsible for

70. *Id.* at 151-52.

71. *Id.* at 153.

72. *Id.* at 167. The Zona Rosa case involved an indiscriminate attack by FMLN urban guerrillas on a restaurant in San Salvador in which four off-duty U.S. Embassy guards, nine civilians, and one of the assailants were killed.

the murder of a number of the mayors.⁷³ To our great regret, we simply did not have the requisite evidence with regard to others.

It is also appropriate to say a word about the failure of the Truth Commission to deal with the role of the United States and its responsibility for some of the acts of violence that were committed in El Salvador. The Commissioners decided very early on that we would identify all persons—whether U.S. military or intelligence officers or any other foreign nationals—if we concluded that they had engaged in serious acts of violence falling within the Commission's mandate. However, we did not believe that our mandate authorized us to embark on an analysis of the policies of the United States or of any other country that may have contributed to the violence visited upon the people of El Salvador. If the Parties to the Peace Accords had wanted us to undertake this task, they should have said so, but that they did not do. Moreover, had we adopted a different approach to this question, we would have been compelled to embark on an investigation of the policies and practices of the Cold War adversaries in Central America—the United States, Cuba, Nicaragua, and the Soviet Union—for which we were not equipped and lacked the requisite resources, let alone the time. Although the American public and news media were preoccupied with the role of the United States in El Salvador, we concluded that this was an issue the people of the United States and their duly elected representatives were better equipped than we were to investigate and to resolve within the framework of their own democratic system.⁷⁴ It is also worth noting that the Commission did not find sufficient credible evidence—there were of course many rumors and allegations that were investigated—tying U.S. military or intelligence officers to any specific act of violence. If we had had that evidence, we would have made it public in the *Report*.

73. It is simply not true, as some of these commanders have claimed in public pronouncements, that they were identified by name only because they cooperated with the Commission more fully than other units of the FMLN. We were able to identify them principally because they were more careless than the others in covering their tracks.

74. Although various statements by officials of the Reagan Administration were quoted in at least one case which was examined by the Commission, they were designed to show that the Salvadoran authorities reacted to U.S. pressure in conducting investigations into serious acts of violence. See *Report*, *supra* note 1, at 62 (discussing the case of the American churchwomen).

C. *The Recommendations*

The Parties to the Peace Accords—the government and the FMLN—accepted as binding on them the recommendations of the Truth Commission. The relevant provisions of the Commission's mandate are Articles 3 and 10. They read as follows:

3. The mandate of the Commission shall include recommending the legal, political or administrative measures which can be inferred from the results of the investigation. Such recommendations may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.⁷⁵

....

10. The Parties undertake to carry out the Commission's recommendations.⁷⁶

The *Report* contains a lengthy chapter setting out the Commission's recommendations.⁷⁷ The chapter begins with a short analysis of the causes and conditions which, in the opinion of the Commission, contributed to or made possible the many serious acts of violence described in the *Report*. More than any part of the *Report*, these few pages capture the Commissioners' overall perceptions of the "reality" that was the El Salvador they were asked to investigate. The most telling paragraph reads as follows:

The internal armed conflict between opposing forces grew in intensity and magnitude. . . . The more bloody the conflict became, and the more widespread, the greater the power of the military hierarchy and of those who commanded armed insurgent groups. The outcome of that vicious circle was a situation in which certain elements of society found themselves immune from any governmental or political restraints and thus forged for themselves the most abject impunity. It was they who wielded the real power of the State, expressed in the most primitive terms, while the executive, legislative and judicial branches were unable to play any real role as branches of government. The sad fact is that they were transformed, in practice, into mere facades with marginal governmental authority.⁷⁸

The notion of a government as a mere "facade" behind which hid the ugly reality of a state hijacked by a vicious criminal enterprise best described the phenomenon and the many things we saw and heard.

75. *Mexico Agreements*, *supra* note 2, at 30.

76. *Mexico Agreements*, *supra* note 2, at 31.

77. *Report*, *supra* note 1, at 172.

78. *Id.* at 173.

Another paragraph in the *Report* points to the factors that made these conditions possible:

None of the three branches of Government—judicial, legislative or executive—was capable of restraining the military's overwhelming control of society. The judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption; since it had never enjoyed genuine institutional independence from the legislative and executive branches, its ineffectiveness steadily increased until it became, through its inaction or its appalling submissiveness, a factor which contributed to the tragedy suffered by the country. The various, frequently opportunistic, alliances which political leaders (legislators as well as members of the executive branch) forged with the military establishment and with members of the judiciary had the effect of further weakening civilian control over the military, police and security forces, all of which formed part of the military establishment.⁷⁹

The gradual perversion of governmental authority by the military, with the willing or unwitting collaboration of civilian authorities, and the military's total immunity for its acts, however criminal, was the cancer that invaded the fabric of Salvadoran civil society and eroded its ability to protect itself against this evil disease. The death squads thrived in this climate. Their evolution and transformation is at once sadly ironic and typical of the civilian-military alliances that were forged in the early 1980s and of their consequences.⁸⁰ These armed groups were initially organized and financed by wealthy civilians to protect themselves against real or imagined enemies and to silence political opponents. The death squads' operatives tended to be mainly active or retired military personnel, usually drawn from the security forces, who were brought in to carry out the killings, tortures and disappearances. The military officers gradually wrested control of the death squads away from their civilian masters. Integrated into the military security apparatus, the death squads were then used to extort money from wealthy families—apparently including some of their former masters—and to kill and torture individuals they deemed "subversives."

To ensure that the past would not repeat itself, the Commission recommended a series of changes designed to transform El Salvador into a country having a democratic form of government, where the rule of law and human rights are observed, and where there is tolerance for opposing views.⁸¹ The Commission observed, in this connection, that "[t]he consolidation of the supremacy of civilian authority in Salvadorian society and

79. *Id.* at 172-73.

80. *See id.*

81. *Id.* at 174-75.

necessary subordination of the armed forces to it stem directly from the democratic concept of the rule of law, the primordial value of the dignity of the human person and, hence, full respect for his rights."⁸² To this end, the Commission recommended reforms in the administration of justice system, focusing on the need to develop an independent judiciary, changing the process of training and selecting judges, and limiting the power of the Supreme Court in general and its president in particular. The Commission also strongly supported the establishment of the National Civilian Police, a new entity provided for in the Peace Accords, and urged that this police force assume various criminal investigatory functions which, in the past, were the exclusive domain of police units subject to military jurisdiction. To ensure that the massive violations of human rights so characteristic of El Salvador's past not be repeated, the Commission recommended a whole series of specific measures involving new laws and institutions relating to human rights and their guarantees.⁸³

In its recommendations, the Commission also addressed the revival of death squad activities. The Commission was convinced that these groups had merely suspended their operations, that their command structure was still largely intact, and that they could be reactivated on short notice. Because the Commission's own investigations had been largely ineffective in piercing the veil of secrecy that shielded these groups, it recommended that the government continue the investigations with the help of foreign police authorities. This recommendation was prompted by the conclusion of the Commissioners that our own investigation of death squads had been greatly hampered by a lack of modern criminal investigative techniques available to the police of certain countries, and that the only way to root out the death squads was to seek the assistance of these police agencies.⁸⁴

The Commission could have recommended that the individuals identified as responsible for the serious acts of violence described in the *Report* be tried by Salvadoran courts. However, such a recommendation would have made sense only if the Commissioners believed that the justice system of that country was capable of doing justice, which we did not. Although the Peace Accords had ended the armed conflict and called for substantial reforms in the justice system, very few of these changes had been implemented or were likely to be implemented in the near future. This meant that the same judges who were in office during the war, including some accused by the Truth

82. *Id.* at 174.

83. *Id.* at 182-84.

84. *Id.* at 180.

Commission of covering up various offenses, would be the ones to adjudicate these charges. As stated in the *Report*:

These considerations confront the Commission with a serious dilemma. The question is not whether the guilty should be punished but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.⁸⁵

Taking this reality into account, the Commission decided not to call for trials, nor for that matter to recommend amnesties. The former made no sense until the full implementation of the Peace Accords. The latter seemed worthwhile only, if at all, after a national consensus that an amnesty would promote the goal of reconciliation in El Salvador. Ultimately, the decision whether to grant amnesty was one for the people of El Salvador to make after an appropriate dialogue on the subject.

At the same time, it was clear that the Commission's findings required some recommendations for immediate action. In the Commission's view, those identified as responsible for serious acts of violence had to be removed from the offices that had enabled them to commit these acts. To this end, the Commission made a series of recommendations. First, it called for the dismissal from the armed forces of those active military officers who had committed or covered up serious acts of violence. Second, the Commission recommended the dismissal from their positions of those civilian government officials and members of the judiciary who committed or covered up serious acts of violence or failed to investigate them. Third, the Commission declared that "[u]nder no circumstances would it be advisable to allow persons who committed acts of violence such as those which the Commission has investigated to participate in the running of the State."⁸⁶ Therefore, we recommended that appropriate legislation be adopted to ensure that all individuals found by the Commission to have been implicated in serious acts of violence—whether active or retired military officers, civilian officials, FMLN members or military commanders, judges, or civilians—should be disqualified from holding any public office for a period of no less than ten years. The Commission added that these persons should also be "disqualified permanently from any activity related to public security or national defence."⁸⁷ Finally, the Commission

85. *Id.* at 178.

86. *Id.* at 176.

87. *Id.* The Commission was aware, of course, that while the President of El Salvador had the power to dismiss military officers and government officials, he

recommended that all Supreme Court judges should resign from office to permit the designation of new judges untainted by illegal conduct.⁸⁸

The Commission made a series of recommendations designed to promote national reconciliation.⁸⁹ It proposed, *inter alia*, the construction of a national monument listing the names of all victims of the Salvadoran conflict; a national holiday honoring them; and the creation of a Forum for Truth and Reconciliation, comprising representatives of all sectors of Salvadoran society, to address the conclusions and recommendations of the Truth Commission with a view to promoting their implementation. The Commission also recommended the establishment of a fund to compensate all victims of serious acts of violence. Calling on foreign governments to assist El Salvador with these payments, the Commission urged that at least one percent of all international assistance received from abroad be earmarked for such compensation.

VIII. CONCLUSIONS

It will take years to fully assess the work and achievements of the United Nations Truth Commission for El Salvador. After all, its success and failure can only be meaningfully judged in the context of long-term developments in that country. At this point, therefore, it is not really possible to do more than offer some very tentative observations concerning its contribution to the Salvadoran peace process.

A. Follow-Up and Compliance

A few days after the publication of the *Report*, the government of President Cristiani and the national legislature controlled by his party granted an across-the-board amnesty to all individuals charged with serious acts of violence. This measure did not, however, nullify the Commission's work or have a serious effect on it. The amnesty merely prevented those identified by the

lacked that power as far as judges were concerned and, hence, that the recommendations applicable to them and to civilians might require legislative or even constitutional changes. In short, the Commission's recommendations were binding on the Government and, for that matter, on the FMLN high command, and it was up to them to implement the recommendations within the sphere of their respective jurisdictions.

88. *Id.* at 177. Since these judges could not be removed from office until their terms expired, the Commission merely called on them to resign.

89. *Id.* at 184-87.

Commission as responsible for acts of violence from being tried in Salvadoran courts and resulted in the release from prison of a few others who had been convicted earlier in that country on similar charges. Since the Commission did not recommend the trial of those it named, the amnesty cannot be said to violate its recommendations. However, while amnesties after a civil war may be a legitimate way to put an end to the conflict, the manner in which this amnesty was rushed through the Salvadoran legislature—a legislature in which the FMLN was not represented—with no time or opportunity for a full national debate on the subject, was unseemly at the very least, indicative of a lack of respect for democratic processes, and thus incompatible with the spirit of the Peace Accords. It should be emphasized, however, that the amnesty did not affect the Commission's recommendations or override those calling for the dismissal from their positions of individuals named in the *Report*. Particularly noteworthy in this connection is the fact that all military officers identified by the Commission were retired from the service not long after the *Report* was issued.

Many of the legislative and administrative measures recommended by the Commission remain to be fully implemented, although some progress has been made in transferring major police power to the National Civil Police and in reforming the justice system. Efforts to strengthen various national institutions to better protect human rights are also on the way. However, much still remains to be accomplished, and progress has been much slower on all fronts than one might have hoped.⁹⁰ On the other hand, general elections were recently held in an atmosphere of freedom never before witnessed in El Salvador. The FMLN, the Christian Democrats, the government's ARENA Party, and a number of other smaller political groups peacefully vied for votes. And while there was some evidence of election fraud, it was not substantial enough to have a major effect on the outcome or to rupture the political peace of the country. In short, there is reason for hope. The elections and the climate in which they were held suggest that few in El Salvador want a return to the past and that a majority across the political spectrum is eager to resolve its differences by political means rather than by violence.

90. For an analysis of this subject, see *Report of the Independent Expert*, *supra* note 2, at 29.

B. *The Commission's Role and Contribution*

Of course, the Truth Commission cannot take credit for all the progress that has been made in El Salvador, nor should it be blamed for the slow pace with which the country has moved to transform itself into a modern democratic state. The real contribution of the Truth Commission is at once more profound and much less concrete. The release of the *Report* had a very significant psychological impact on the people of El Salvador. While the Peace Accords ended the armed conflict, the *Report* put the country on the road to healing the emotional wounds that had continued to divide it. The *Report* told the truth in a country that was not accustomed to hearing it. To be restored to normalcy, El Salvador needed to hear the truth from a source that had legitimacy and credibility. The Commission met this standard and performed its functions in a way that achieved this objective.

The war in El Salvador not only pitted the combatants in the armed conflict against each other, but also totally polarized the population. It became a country in which there was no room for moderation or tolerance for peaceful political debate. Political opponents were treated as enemies and acts of violence against them rationalized as necessary or denied as propaganda. Political allegiance rather than basic human decency determined one's actions and reactions to the crimes that both sides committed. El Salvador was a country in which many lived in fear, and where few wished to know the truth. In this atmosphere the victims or their next of kin often did not dare to denounce publicly what had been done to them or even speak about it lest their claims expose them to further abuse. People kept their suffering to themselves, hoping for justice—a very human instinct—but not really expecting it.

The efforts of the Truth Commission to get at the truth and the release of its *Report* had a cathartic impact on the country. Many of the people who came to the Commission to tell what happened to them or to their relatives and friends had not done so before. For some, ten years or more had gone by in silence and pent-up anger. Finally, someone listened to them, and there would be a record of what they had endured. They came by the thousands, still afraid and not a little skeptical, and they talked, many for the first time. One could not listen to them without recognizing that the mere act of telling what had happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution. It is as if they felt some shame that they had not dared to speak out before and, now that they had done so, they could go home and focus on the future less encumbered by the past.

A particularly telling interview described by a Commission staff member involved two mothers, one Salvadoran, the other Scandinavian, who came to the Commission together to tell their story. The son of one and the daughter of the other had met in Europe and fallen in love. The couple traveled to El Salvador, became involved in leftist activities and were murdered by rightist death squads. The two mothers had not met until they decided to tell their story together to the Truth Commission. They could barely speak a common language, but they appeared in the Commission's offices in San Salvador, sharing their grief and honoring the memory of their children by telling the story of these two young people.

The *Report* and its findings about many cases that had encumbered the nation's conscience had a dramatic effect. The findings confirmed what many suspected, some knew, and others refused to believe. Before the release of the *Report*, few Salvadorans knew the whole story and many more could not separate the truth from the lies and rumors that were rampant even after the signing of the Peace Accords. The result was a never-ending acrimonious debate and the exchange of inflammatory charges and counter-charges by the former combatants and their allies. The *Report* put an end to this debate, and thus allowed the country to focus on the future rather than on the cruel and divisive past. It removed the biggest obstacle on the way to national reconciliation: the denial of a terrible truth that divided the nation and haunted its consciousness.

How and why did the Commission succeed in bringing about this result? Much of it had to do with the credibility the Commission was able to establish for itself. Here the Commissioners were convinced from the outset that we had to achieve two objectives. First, we had to come up with a fact-finding process that inspired confidence in the sense that the public was convinced—it had to see—that the Commission really wanted to know and tell the truth. Second, we had to do everything in our power to ensure that the truth of our findings could not be impugned. If our *Report* were found to contain many inaccuracies, no matter how insignificant, this would undermine confidence in all of its findings. That would have been the case too if the Commission were to do or say things that demonstrated a bias in favor of one side or the other.

It would appear that the Commission met the credibility test. We were criticized, of course, particularly by some who were named in the *Report*. However, there were no serious allegations of factual error. That so many people came forward with their testimonies suggests that the Commissioners gradually gained the confidence of the population and that after a while people no

longer assumed the investigation to be rigged. A number of factors helped the Commission to gain the trust of the Salvadoran population, including: our "open door" policy of inviting testimony from anyone having information, our nation wide publicity campaigns urging the public to come forward, our young staff members who radiated a genuine commitment to their task and empathy for the victims, and finally, the public and private pronouncements of the Commissioners.

Not naming names would not necessarily have affected our credibility had the Commission's mandate expressly denied us that power, for then the failure to name names could not have been blamed on our lack of integrity. The situation would have been different, however, if no individual perpetrators were identified despite the fact that we had the power to do so and had raised expectations during our investigation that names would be made public. Here, confidence in the personal integrity of the Commissioners would have been shaken because of a perception that we were giving in to political pressure.

It was also important that the people named in the *Report* were not only the "small fry." Some very "big fish" were identified, proving what many in El Salvador thought impossible, namely, that the veil of impunity had finally been pierced. True, there were other big fish who escaped our net, among them the financiers of death squads and some FMLN commanders who were alleged to have committed serious acts of violence. But to have named individuals when the evidence was not convincing would have been terribly unjust and an abuse of our power. It also carried with it the risk that our findings would be proven to contain serious errors, thus affecting the credibility of the *Report* as a whole. Here the best we could do was hope that the people of El Salvador, after evaluating the *Report* as a whole, would have to recognize that we did not act out of some improper motive.

C. Possible Lessons for Future Commissions

As noted earlier, El Salvador's population was deeply polarized by the armed conflict and by life in a climate of distrust and suspicion. In this environment, the Commission gained immediate credibility from the decision of the Parties that the Commissioners should be foreign nationals. As such, we could not be accused of having some domestic Salvadoran political stake or motive in reaching a particular decision. No three Salvadorans, however honorable and apolitical, could possibly have escaped such an accusation. The country was too small for that, the conflict too bitter, and the domestic political culture too immature. Moreover, many of the witnesses we interviewed were willing to provide us with information they never would have

divulged to a Salvadoran commission for fear that their identity would not have remained confidential, or that at some point in the future their testimony would be used to harm or put pressure on them. El Salvador, because of its small size, is a country where everybody knows everybody else and where secrets are hard to keep. The Commissioners, being foreigners with no ties to the country, were less likely than Salvadorans to have an opportunity or reason to divulge the source of information obtained by them in confidence. In countries not facing these problems, a national or mixed commission, comprised of nationals and foreigners, might serve the same purpose.

The Commission received very valuable help from the United Nations and from the representatives of the governments that served as "Friends of the Peace Process." The presence in El Salvador of ONUSAL—the Spanish acronym for the United Nations Observer Mission in El Salvador—served the Commission as more than an important source of logistic support. For one thing, it would have been practically impossible for the Commission to establish itself and begin working in El Salvador without any significant loss of time had ONUSAL not been there. Moreover, the fact that ONUSAL's military, police, and civilian personnel had offices and could be seen all over El Salvador also had an important pacifying effect on the country. It kept the combatants and their supporters apart, it diffused dangerous situations, and gave both sides a feeling of relative security. By the time the Commission arrived in El Salvador, ONUSAL had succeeded in creating a political and social climate that greatly facilitated the task of the Commission. The absence of a transition government in El Salvador made the presence of ONUSAL critical to the Commission's ability to discharge its mandate. Therefore, it appears to me that without a significant international presence in a country, or a new government, a truth commission will find it extremely difficult to discharge its mandate.

The Four Friends' ambassadors to the United Nations and to El Salvador provided the Commission with invaluable diplomatic assistance and political advice. In El Salvador and in New York, they often served as our intermediaries and counselors, as well as our eyes and ears. Their special relation to the Parties to the Peace Accords, their experience at the United Nations, and their individual and collective knowledge of El Salvador's rapidly changing political climate enabled us to avoid many mistakes that might have adversely affected our work. In short, the role the Four Friends performed was very important to the success of our mission. International truth commissions will, in my opinion, always need some diplomatic support or intermediaries to run interference for them and to provide political advice. A "friends"

system can be extremely helpful.

The fact that the three Commissioners were widely known and respected in Latin America contributed to instilling confidence in the integrity of the process both inside and outside of El Salvador. In that regard, it was also most helpful that the chairman of the Commission was the former President of one of the most populous Latin American countries and that the other two also had held important positions in the region. Our backgrounds gave us easy access to government officials throughout the Americas; enabled us to obtain the assistance of numerous individuals, governmental and nongovernmental groups, and institutions; and made it very difficult for the Parties to the Peace Accords to deprecate our views or to discredit us. We were able to use our status and personal connections to overcome a variety of obstacles that were placed in our way, to anticipate problems, and to diffuse potential crises—the dispute over naming names being but one example—all of which could have impaired our effectiveness. The more difficult the job a truth commission faces, the more important it is, in my opinion, for at least one or more members of such a body to be distinguished and internationally respected personalities with political, military, diplomatic, or judicial experience.

Another important factor that greatly facilitated the work of the Truth Commission and contributed to its success was the good personal rapport that developed among the Commissioners. When I was first named to the Commission, some of my friends warned me that I was there as its token human rights person and that the two other members, both politicians, might force questionable political compromises on me. These concerns proved to be totally unfounded. There developed among us an unusually strong trust in and respect for the personal integrity, judgment, and professionalism of our colleagues and a bond of friendship. All of these made for an easy and fruitful collaboration. As noted before, all of our decisions were made by common agreement. We never put any issue to a vote, and despite our different backgrounds, we usually approached an issue in much the same way. Although it is never easy to predict the likely personal interaction between individuals, no truth commission should be established without serious thought being given to the ability of potential members to work together amicably and in the interest of a common objective.

The three Commissioners were shocked to find that the terror, brutality, and suffering inflicted on the people of El Salvador between 1980 and 1991 was much worse and more pervasive than we had imagined. What is more, those responsible for these acts of violence were protected by a fail-safe system of impunity that gradually corrupted all institutions of the State,

leaving it defenseless against the onslaught of extremists from the left and the right who, under the banner of conflicting ideologies, justified conduct and policies that can never be justified. It may well be that the unexpected horrors we uncovered brought the Commissioners closer together and strengthened our resolve to do the best and most honest job we possibly could.

My experience on the Truth Commission has convinced me that the most important function such a body can perform is to tell the truth. That may sound obvious and trite, but it needs to be said because it has tended to get lost in the discussion about national reconciliation. The assumption that bringing out the truth will rub salt into the nation's wounds and make national reconciliation more difficult to achieve has a certain superficial logic to it, but it is wrong in my opinion. A nation has to confront its past by acknowledging the wrongs that have been committed in its name before it can successfully embark on the arduous task of cementing the trust between former adversaries and their respective sympathizers, which is a prerequisite for national reconciliation. One cannot hope to achieve this objective by sweeping the truth under the rug of national consciousness, by telling the victims or their next of kin that nothing happened, or by asking them not to tell their particular story. The wounds begin to heal with the telling of the story and the national acknowledgment of its authenticity.

How that story is told is less important than that it be told truthfully. Hence, whether the names of the perpetrators are revealed, whether trials are held, sanctions imposed, compensation awarded, or amnesties granted,⁹¹ these are all considerations that may well depend upon the nature of the conflict, the national character of the country, the political realities, and compromises that produced the end of the conflict. But if the basic truth about the past is suppressed, it will prove very difficult to achieve national reconciliation. The wounds left behind by the past will continue to fester and endanger the peace. The truth may be strong medicine, but there is, in my opinion, no other way if the goal is to bring together a people divided by a civil war or a murderous regime.

91. On this subject generally, see José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 425 (1992); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. REV. 2537 (1991); Naomi Roht-Arriaz, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451 (1990).