

# PROPOSALS FOR A TRUTH COMMISSION AND REPARATIONS PROGRAM FOR VICTIMS OF TORTURE BY US FORCES SINCE 9/11

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## I. INTRODUCTION

Since September 11, 2001, the United States has been responsible for well documented cases of torture and ill-treatment as part of its war on terror in Guantanamo, Iraq, Afghanistan and other secret sites. It is believed that there have been about eleven secret detention sites since September 2001 in various countries including the three listed above and Poland, Romania, Jordan and Pakistan.<sup>1</sup> The incidence of torture and ill-treatment have included beatings, deprivations of basic necessities, isolation, sensory deprivation, use of stress position, forced nudity and the list goes on.<sup>2</sup> There have also been reports of death caused by torture.<sup>3</sup> The

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1. Human Rights First, *Torture: Quick Facts 1* (2008), [http://www.humanrightsfirst.org/us\\_law/etn/misc/factsheet.htm](http://www.humanrightsfirst.org/us_law/etn/misc/factsheet.htm) (last visited Sept.30, 2009) [hereinafter *Human Rights First-Torture*].

2. See Physicians for Human Rights, *Broken Laws, Broken Lives* 4-9 (2008), available at [http://brokenlives.info/?page\\_id=69](http://brokenlives.info/?page_id=69) (last visited Sept.30, 2009); Human Rights Watch, *No Blood, No Foul, Soldiers' Account of Detainee Abuse in Iraq* 3-12, 17-24 (2006), available at

torture and ill-treatment was carried out by United States army personnel, the Central Intelligence Agency (CIA) and private contractors.<sup>4</sup> The assumption in this paper is that the United States committed acts of torture and cruel and inhuman and degrading treatment as defined by the Convention Against Torture (CAT)<sup>5</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>6</sup> This is based on the various reports cited above, as well, as the United Nation's (UN) assessment of U.S. practices<sup>7</sup> and the United States own assessment of the meaning of torture perpetrated by other states.<sup>8</sup> When the paper refers to torture, it also includes in the use of that word, cruel and inhuman and degrading treatment.

As the United States transitions away from the George W. Bush presidency, which has been characterized by violations of human rights such as the use of torture, detention without trial,<sup>9</sup> renditions and disappearances,<sup>10</sup> there is a window of opportunity for the new president to deal with these human rights abuses. President Barack Obama condemned the use of torture in questioning detainees.<sup>11</sup> During his campaign,

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<http://www.hrw.org/sites/default/files/reports/us0706web.pdf> (last visited Sept. 30, 2009) [hereinafter Physicians for Human Rights].

3. Human Rights First, *Command's Responsibility Detainee Death in US custody in Iraq and Afghanistan* 5 (2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf> (last visited Sept. 30, 2009) [hereinafter Human Rights First].

4. See Physicians for Human Rights, *supra* note 2, at 1; Human Rights First, *supra* note 3, at 9. Human Rights First, *Getting to Ground Truth Investigating U.S. Abuse in the "War on Terror"* 8 (2004), available at [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Getting\\_to\\_Ground\\_Truth\\_090804.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf) (last visited Sept. 30, 2009).

5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

6. International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 17.

7. Committee Against Torture, ¶ 13–28, U.N.Doc. CAT/C/USA/CO/2 (July 25, 2006), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf) (last visited Sept. 30, 2009) [hereinafter Committee Against Torture].

8. See generally U.S. State Department, Bureau of Human Rights, Democracy and Labor, Iran: Country Report on Human Rights Practices 2005 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm> (last visited Sept. 30, 2009) (includes sensory deprivation, isolation and stress positions as examples of torture).

9. Committee Against Torture, *supra* note 7, ¶ 22.

10. *Id.* at ¶ 18.

11. Mark Mazzetti & Scott Shane, *After Sharp Words on CIA, Obama Faces a Delicate Task*, N.Y. TIMES, Dec. 2, 2008, at A1, available at <http://www.nytimes.com/2008/12/03/us/politics/03intel.html?scp=1&sq=obama%20and%20torture&st=cse> (last visited Sept. 30, 2009).

President Obama stated that he would end the use of torture, extraordinary renditions, indefinite detention and close Guantanamo.<sup>12</sup> A poll taken in 2006 showed that sixty-three percent of Americans believed that foreign detainees should be given the same protections as American detainees.<sup>13</sup> In 2008, a poll showed that fifty-three percent of Americans believed there should be an outright ban on torture in all circumstances.<sup>14</sup>

This essay will argue that a truth commission should be set up to deal with violations relating to torture and define its mandate and procedures, as well as a program for reparations. Creating a truth commission and a program for reparations will enable the United States to discharge some of its international obligations in relation to victims' rights to truth and reparations. This essay will define what an ideal truth commission and reparations program should look like from a victim centered perspective although this may be impractical politically. The importance of a victim centered approach is to ensure that victims remain at the heart of the process as they are at risk of being forgotten as they are neither residents nor citizens of the United States and as such have no political power in the United States.

The reason that this is essay is dealing with both truth telling and reparations is that if a truth commission is established to be victim centered, it will be difficult to argue that this commission should not have the power to consider and make recommendations about reparations as they are intrinsically linked to victims. Without a mechanism for truth telling, victims may feel that reparations are pay-offs in exchange for their silence. Conversely, without reparations, victims may feel that truth telling is an empty exercise which will not materially affect their lives.<sup>15</sup>

Historically, only one truth commission-like mechanism has ever been created for victims who were not citizens of the perpetrator country. The Tokyo Tribunal dealt with the issue of "comfort women" during World War

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12. Obama-Biden, *Strengthening our Common Security by Investing in our Common Humanity*, [http://www.barackobama.com/pdf/issues/Fact\\_Sheet\\_Foreign\\_Policy\\_Democratization\\_and\\_Development\\_FINAL.pdf](http://www.barackobama.com/pdf/issues/Fact_Sheet_Foreign_Policy_Democratization_and_Development_FINAL.pdf) (last visited Sept. 30, 2009).

13. WorldPublicOpinion.org, *American and International Opinion on the Rights of Terror Suspects 7*, [http://www.worldpublicopinion.org/pipa/pdf/jul06/TerrSuspect\\_Jul06\\_rpt.pdf](http://www.worldpublicopinion.org/pipa/pdf/jul06/TerrSuspect_Jul06_rpt.pdf) (last visited Sept. 30, 2009).

14. WorldPublicOpinion.org, *World Public Rejects Torture*, [http://www.worldpublicopinion.org/pipa/pdf/jun08/WPO\\_Torture\\_Jun08\\_pr.pdf](http://www.worldpublicopinion.org/pipa/pdf/jun08/WPO_Torture_Jun08_pr.pdf) (last visited Sept. 30, 2009).

15. See generally Pablo de Greiff, *Justice and Reparations*, in HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006).

II.<sup>16</sup> The Japanese military abducted young women from countries they occupied, including Korea, the Philippines and Taiwan and forced them into sexual slavery for the Japanese military. Public hearings were held in the early 1990s and culminated in the Kono statement made by the Japanese authorities in 1993, which acknowledged that sexual slavery existed during WWII.<sup>17</sup> Lawsuits were filed in Japan throughout the 1990s seeking compensation but in 2007, the Japanese Supreme Court ruled that Chinese victims were not entitled to any compensation from Japan as a treaty of friendship signed between the two countries in 1972 had extinguished any possible individual claims for reparations. The court nonetheless recognized that Korean and Chinese women had been forced to work as sex slaves.<sup>18</sup> Believing that these mechanisms were inadequate, the Tokyo Tribunal was set up by Non Governmental Organizations (NGO) in 2000 to function like a court and received evidence from victims and experts. The Tokyo Tribunal invited the Japanese government to participate, which it declined to do. The Tokyo Tribunal made findings of facts about comfort women and attributed blame to individuals. It has been argued that this was an important step towards creating a historical record and providing the victims with an official record of findings about what happened to them.<sup>19</sup> This tribunal was created as a result of Japan's unwillingness and inability to deal with this issue itself which would have been much more powerful. Absent that commitment from the country concerned, this process nonetheless created a historical record and a forum for victims to tell their stories. This paper advocates a formal process to ensure recognition by the state of its own wrongdoings. However, it is important to remember that if there is no political will to set up this truth commission there may be other ways to obtain some reparations for victims.

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16. Philip Brator, *Did NHK Balk at Covering War Tribunal*, Apr. 7, 2002, <http://search.japantimes.co.jp/cgi-bin/fd20020407pb.html> (last visited Sept. 30, 2009).

17. David McNeil, *Korea's 'Comfort Women': the Slaves' Revolt*, April 24, 2008, <http://www.independent.co.uk/news/world/asia/koreas-comfort-women-the-slaves-revolt-814763.html> (last visited Sept. 30, 2009).

18. Norimitsu Onishi, *World War II Sex Slaves Lose in Japanese Courts*, N.Y. TIMES, Apr. 28, 2007, at A8, available at <http://www.nytimes.com/2007/04/28/world/asia/28iht-web0428-japan.5484528.html> (last visited Sept. 30, 2009).

19. See Christine Chinkin, *Toward the Tokyo Tribunal 2000*, <http://www.iccwomen.org/wigidraft1/Archives/oldWCGJ/tokyo/chinkin.htm> (last visited Sept. 30, 2009).

## II. WHAT HAS BEEN THE US RESPONSE SO FAR TO ALLEGATIONS OF ABUSE?

The United States has commissioned a number of reports to investigate allegations of torture made. This includes an investigation and review into interrogation practices by the Department of Justice.<sup>20</sup> In 2004, an investigation was ordered into allegations of abuse by members of the 800<sup>th</sup> Military Police Brigade, including the abuse at Abu Ghraib Prison.<sup>21</sup> This did not recommend that anyone be held criminally accountable, but that various members of the army be reprimanded and various institutional reforms carried out.<sup>22</sup> Human Rights First reported that there had been nearly 600 criminal investigations into allegations of detainee abuse.<sup>23</sup> Despite this, there remains impunity for the perpetrators. For example, as a result of the investigations at Abu Ghraib, it was found that the chain of command and military leaders had failed to properly supervise soldiers and issue guidance about detention and interrogation policies.<sup>24</sup> Additionally, twenty-seven military intelligence personnel were found to either be involved in the abuse, solicited others to commit the abuse or violated interrogation procedures; yet only eleven were held criminally responsible.<sup>25</sup> In 2008, the conviction of the only officer who was court martialled was overturned on appeal.<sup>26</sup>

In addition, most of these investigations have not centered on victims. For example, an investigation conducted into abuses during interrogation at Guantanamo interviewed over 130 military and FBI personnel but no

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20. See U.S. Department of Defense, *The Church Report 1* (2005), available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (last visited Sept. 30, 2009).

21. Major General Antonio Tabuga, *Article 15-6 Investigation on the 800th Military Police Brigade 6-7* (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (last visited Sept. 30, 2009) [hereinafter Major General Antonio Tabuga].

22. *Id.* at 20-21; see also *id.* at 44-48.

23. Human Rights First-Torture, *supra* note 1.

24. Lieutenant General Anthony Jones and Major General George R. Fay, *AR15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade 15-18* (2004) available at <http://www.slate.com/features/whatistorture/pdfs/FayJonesReport.pdf> (last visited Sept. 30, 2009).

25. *Id.* at 42.

26. Guardian.co.uk, *US Army Rejects Court Martial of Abu Ghraib Commander*, Jan. 11, 2008, available at <http://www.guardian.co.uk/world/2008/jan/11/iraq.usa> (last visited Sept. 30, 2009).

victims.<sup>27</sup> The main exception to this has been the Taguba report which interviewed fifty detainees, witnesses and suspects.<sup>28</sup>

### III. WHAT ARE THE US'S INTERNATIONAL OBLIGATIONS IN RELATION TO THE RIGHT TO TRUTH?

The right to truth is a fundamental right of the individual, and as such "should be treated as a non-derogable right."<sup>29</sup> The International Committee of the Red Cross has stated that the right to truth is a norm of customary international law.<sup>30</sup> It has been defined in some detail in the Jointet Principles, which state that "every person has the inalienable right to know the truth about past events."<sup>31</sup> The right to truth has also been recognized in various international instruments, including resolutions of the General Assembly which reiterate the principles that victims are entitled to have information about human rights violations<sup>32</sup> and full public disclosure of the truth.<sup>33</sup> Most recently, the United Nations Human Rights Council drafted a resolution on the right to truth, although it has not yet been adopted by the General Assembly.<sup>34</sup> The right to truth is linked to the right to know which states that "victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which [the] violations took place."<sup>35</sup>

At the regional level, the Inter American Court of Human Rights has developed extensive jurisprudence about the right to truth. The United

27. Lieutenant General Randall Schmidt & BG John Furlow, *Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facilities 3* (2005), available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf> (last visited Sept. 30, 2009).

28. Major General Antonio Taguba, *supra* note 21, at 15.

29. U.N. Econ. and Soc. Council, Comm'n on Human Rights, Study on the Right to the Truth, ¶ 60, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter *The Right to Truth*], available at <http://www.unhcr.org/refworld/docid/46822b6c2.html> (last visited Sept. 30, 2009).

30. International Committee of the Red Cross, *et al.*, Customary International Humanitarian Law Vol. 1, 421 Cambridge University Press (2005).

31. U.N. Econ. and Soc. Council, Comm'n on Human Rights, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations*, U.N.Doc. E/CN.4/Sub.2/1997/20/Rev.1 (October 2, 1997) (prepared by Louis Joinet) [hereinafter *The Jointet Principles*], available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.sub.2.1997.20.Rev.1.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En) (last visited Sept. 30, 2009).

32. G.A. Res. 60/147, ¶ 11, U.N. Doc. A/Res/60/147 (Dec. 16, 2005).

33. *Id.* at ¶ 22.

34. See GAOR, Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic Social and Cultural Rights, including the Right to Development, Draft Resolution Right to Truth*, U.N. Doc. A/HRC/9/L.23 (Sept. 19, 2008).

35. The Jointet Principles, *supra* note 30.

States does not recognize the jurisdiction of the Court and has not ratified the Inter American Convention on Human Rights but the jurisprudence of the court nonetheless shows that the right to truth is recognized in international law. The case of Velasquez Rodriguez sets out a state's obligations to investigate violations of human rights<sup>36</sup> and in the context of disappearances "to inform the relatives of the fate of the victims."<sup>37</sup> In addition, the Inter American Commission on Human Rights has stated that "the right to know the truth with respect to the facts that gave rise to the serious human rights violation . . . and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy."<sup>38</sup>

If it is not accepted that the right to truth has become part of customary International Law, then the United States still has an obligation to give effect to the right to truth under the ICCPR, which it ratified on June 8, 1992.<sup>39</sup> The ICCPR states that a party "undertakes to respect and ensure" and provide an effective remedy<sup>40</sup> for violations of the rights in the covenant, including the prohibition on torture at Article 7.<sup>41</sup> The Human Rights Committee has interpreted obligations under Article 2(3) as including an obligation for the State to investigate alleged violations of the covenant.<sup>42</sup> The obligation to investigate gives effect to the right to truth because it enables victims to find out what happened. Therefore, the United States duty under international law is to investigate the allegations of torture so that victims can be informed about what happened. The United States has similar responsibilities under Article 14 of CAT, ratified by the United States on October 21, 1994.<sup>43</sup> The Committee Against Torture has expressed concern that individuals have had difficulties in obtaining redress from the United States for violations under CAT.<sup>44</sup>

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36. Velazquez Rodriguez v. Honduras, Inter-Am. C.H.R. No. 4, ¶ 174 (1988), available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_12d.htm](http://www1.umn.edu/humanrts/iachr/b_11_12d.htm) (last visited Sept. 30, 2009).

37. *Id.* at ¶ 181.

38. Ignacio Ellacuría *et al.* v. El Salvador, Case No. 136/99, Inter-Am. C.H.R., ¶ 221, available at <http://www.derechos.org/nizkor/salvador/doc/jesuits.html> (last visited Sept. 30, 2009).

39. See ICCPR, *supra* note 6.

40. *Id.* at art. 2(1),(3).

41. *Id.* at art. 7.

42. ESCOR, Human Rights Committee, *The Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, ¶ 15, U.N.Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff6005333f5f?Opendocument> (last visited Sept. 30, 2009).

43. Convention Against Torture, *supra* note 5, at art. 14.

44. Committee Against Torture, *supra* note 7, at ¶ 18.

There are a variety of ways in which the United States can comply with its obligations under the right to truth, including the creation of a truth commission, international tribunals, domestic prosecutions, historical projects and civil or administrative proceedings.<sup>45</sup> It is generally accepted that truth commissions cannot and should not be the only mechanism for countries in transition because although their creation may ensure that the state complies with its international obligations in relation to the right to truth, it may not be enough and the state may violate other obligations under international law such as the duty to punish perpetrators, for instance where the truth commissions grant amnesty to perpetrators. Truth commissions are not meant to replace other forms of transitional justice mechanisms but instead complement them to ensure a holistic approach to transition. The Inter American Commission on Human Rights states that the value of truth commission is “that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.”<sup>46</sup> They are also often viewed as more flexible and practical for finding out the truth because they are not constrained by rules of evidence like criminal trials. It has been argued in specific context that truth commissions are better for dealing with systemic violations of human rights because it may be impossible in a particular country to prosecute everyone who in fact committed crimes. Therefore, because truth commissions can reach a larger amount of people, they may be preferable mechanisms in some instances.<sup>47</sup>

By creating a truth commission, the United States will start to comply with its international obligations in relation to the right to truth. It will of course need to ensure that the commission is set up in such a way as to ensure that the right is fully exercised.

#### IV. WHAT IS THE PURPOSE OF TRUTH COMMISSIONS?

About forty truth commissions have been created since 1974.<sup>48</sup> They are mechanisms which are used either when a government transitions from an authoritarian state to a democracy or where internal conflict has ceased. As such, truth commissions are mechanisms used for various reasons depending on the particular circumstances of a state and each mandate is likely to be different. Generally, it will be tasked with collecting information about types of crimes within a specific time period. For

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45. See *The Right to Truth*, *supra* note 29, ¶ 47–54.

46. Ignacio Ellacuria v. El Salvador, Case No. 136/99, Inter-Am. C.H.R. at ¶ 229.

47. Paul Van Zyl, *Dilemmas of Transitional Justice: The Case Of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L. AFF. 647, 667 (1999).

48. *The Right to Truth*, *supra* note 29, at ¶ 50.



example, in Chile the truth commission's mandate was limited to dealing with torture, killings, and disappearances.<sup>49</sup> In contrast, in Guatemala, the commission was tasked with clarifying "human rights violations and acts of violence that have caused the Guatemalan population to suffer."<sup>50</sup> Truth commissions receive evidence from victims, family members and other members of civil society and write reports about its findings.<sup>51</sup> It may or may not hear evidence in public.<sup>52</sup> It may also have the power to investigate allegations and sometimes has the power to compel witnesses to give evidence and information to be produced.<sup>53</sup>

The broad aims of a truth commission are also likely to be specific to particular historical occurrences. For example, in South Africa where a majority of the population's rights had been consistently violated under the Apartheid regime, one of the aims of the truth commission was to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."<sup>54</sup> In addition, truth commissions are often set up to establish accountability as it is believed this will "deepen and strengthen the prospects for peace, democracy, the rule of law and human rights."<sup>55</sup> Another purpose is to ensure that violations which have occurred do not happen again and to "recommend the legal and administrative methods which . . . should be adopted to prevent actions [such as torture, disappearance and extrajudicial executions] from being committed."<sup>56</sup> One purpose is also to promote awareness of what happened

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49. Report of the Chilean National Commission on Truth and Reconciliation, Supreme Decree No. 355, art.1, 5 (1993) [hereinafter National Commission for Truth and Reconciliation].

50. Commission for Historical Clarification Accord, *Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer*, art.1 (2004), available at <http://www.c-r.org/our-work/accord/guatemala/historical-clarification.php> (last visited Sept. 30, 2009).

51. National Commission for Truth and Reconciliation, *supra* note 49, at art. 4.

52. Supreme Decree, No. 065-2001-PCM (2001), art. 6(d).

53. *Id.* at art. 6; Cf. Indian Residential Schools, *Schedule "N-Mandate for the truth and reconciliation commission* art. 2(c), available at [http://www.residentialschoolsettlement.ca/SCHEDULE\\_N.pdf](http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf) (last visited Sept. 30, 2009) (the commission does not have subpoena power or power to ensure attendance or participation) [hereinafter Indian Residential Schools].

54. Promotion of National Unity and Reconciliation Act 34/1995 of 26 July 1995 Chp. 2 art. 3(1), available at [http://www.fas.org/irp/world/rsa/act95\\_034.htm](http://www.fas.org/irp/world/rsa/act95_034.htm) (last visited Sept. 30, 2009).

55. Preface to The Commission for Reception, Truth and Reconciliation, *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste* 209 (2005), available at <http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf> (last visited Sept. 30, 2009).

56. National Commission for Truth and Reconciliation, *supra* note 49, at art. 1(d).

to the victims and ensure that their experiences are commemorated.<sup>57</sup> Truth commissions are also often tasked with recommending plans for victim reparations.<sup>58</sup> Finally, they sometimes have the power to grant amnesties when certain conditions are met by perpetrators of crimes.<sup>59</sup>

Pervading through mandates of truth commissions is that they should be victim centered and their success “will be measured . . . against its approach to the victims and their families—the way in which it will provide an opportunity for them to tell their stories.”<sup>60</sup> Because truth commissions involve reconciliation of one part of the country with another, there is an emphasis on victims and their rights to know the truth of what happened. By having the violations of their rights acknowledged, the idea is that victims and perpetrators can continue to live together.

The situation in the United States is clearly different than in other countries. This is so primarily because victims are not United States citizens, do not live in the United States and have been portrayed in the last eight years as dangerous terrorists. The need for reconciliation is not present because the people who have been tortured do not live with the perpetrators of the crimes. It is unclear that Americans want or need to reconcile with victims and this may make a truth commission useless.<sup>61</sup> Reconciliation in this case could be defined as the need for the United States Government to reconcile with the World and with members of its own society who disagree with what has been done in their name. However, as soon as the scope of reconciliation is expanded, victims are no longer at the center of the process. The focus becomes about how others perceive the United States and how the United States perceives itself. Therefore, the main purpose of a truth commission in the United States would not be to bring reconciliation, but to provide victims with knowledge of what happened and reparations.

None of the main human rights organizations have called for the creation of a truth commission, but instead have called for an independent

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57. Indian Residential Schools, *supra* note 53, at 1–2.

58. National Transitional Legislative Assembly, *An Act to Establish the Truth and Reconciliation Commission of Liberia* (May 12, 2005) §26(j), available at <http://www.ictj.org/static/Africa/Liberia/liberiatract.eng.pdf> (last visited Sept. 30, 2009).

59. Promotion of National Unity and Reconciliation Act, *supra* note 54, at art. 2(c).

60. Amnesty International, *Truth, Justice and Reparation: Establishing an Effective Truth Commission 27* (2007), available at <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/7988f852-d38a-11dd-a329-2f46302a8cc6/pol300092007en-pdf> (last visited Sept. 30, 2009) [hereinafter Amnesty International].

61. See generally Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

commission,<sup>62</sup> a bipartisan commission,<sup>63</sup> and commission of inquiry.<sup>64</sup> These processes would help the United States regain its moral standing in the world. In addition, “the fear and suspicion that abusive interrogation and detention practices have engendered among Muslim populations have undermined United States efforts to gather intelligence, and to fight virulent insurgencies now underway.”<sup>65</sup> This has also increased the risk and threat of harm to United States soldiers and officials overseas.<sup>66</sup> There is also a suggestion that a commission could do a qualitative analysis of the practice of torture. Such analysis would assess whether or not torture has assisted in preventing attacks and how far it failed in collecting reliable information, undermining the rule of law and causing rifts with traditional allies.<sup>67</sup> In addition, the commission should deal with systemic violations and investigate and report publicly on the detention and interrogations methods at various detention facilities run by the U.S. government.<sup>68</sup> A truth commission may explain how and why policies of torture came about and make recommendations to prevent this from happening in future.<sup>69</sup> It would also deal with the question of accountability for the abuses.<sup>70</sup>

Most of these are premised on the fact that the United States has somehow lost its moral standing in the last eight years because of the violations it has perpetrated throughout the world. In order to regain this standing, the United States should investigate itself. This would also prevent enemies of the United States from using these violations as an example of United States hypocrisy in human rights practice.

It would however be unfair to say that the calls for truth commission have not dealt with victims at all. There have been calls for the government to establish a process for compensation and assistance to victims of abuse whilst in United States custody,<sup>71</sup> and for this to be done through a

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62. Physicians for Human Rights, *supra* note 2, at 115.

63. Human Rights Watch, *supra* note 2, at 4; *See also* Human Rights First, *supra* note 3, at 42.

64. *See* Human Rights Watch, *Fighting Terrorism Fairly and Effectively, Recommendations for President-Elect Barack Obama*, <http://www.hrw.org/en/node/75959/section/10> (last visited Sept. 30, 2009).

65. Human Rights First, *supra* note 3, at 41.

66. *Id.*

67. Human Rights First, *supra* note 4, at 6.

68. Physicians for Human Rights, *supra* note 2, at 115.

69. Human Rights First, *How To End Torture and Cruel Treatment, Blueprint For the Next Administration*, 7 (2008), available at <http://www.humanrightsfirst.org/pdf/etn-end-torture-blueprint.pdf> (last visited Sept. 30, 2009).

70. Human Rights Watch, *supra* note 64.

71. Physicians for Human Rights, *supra* note 2, at 115.

compensation fund, without the need for victims to engage in protracted litigation to obtain redress.<sup>72</sup> There have been further calls for legislation regarding state secret privilege to be amended to prevent the government from relying on this to stop any evidence from being produced in court in relation to the treatment of detainees. This would allow victims to meaningfully challenge government practices in court and to obtain redress.<sup>73</sup> Recommendations to ensure that these violations did not recur would also have some impact on victims, at least on future victims. Recommendations may also provide vindication for current victims that were mistreated. That this has been recognized by the U.S. government and that it will change the way in which it conducts future military operations.

However, none of this goes far enough. Victims in this case have suffered visible and material injuries as a direct result of United States actions. In 2005, it was estimated that since 2001, the United States held 83,000 people in custody abroad.<sup>74</sup> In July 2008, it was estimated that there were 21,000 people held in United States custody abroad.<sup>75</sup> The government must recognize this and must provide them with the necessary forum to express their grievances and obtain reparations. This should be firmly centered on the premise that victims suffered at the hand of individuals acting on behalf of the United States, due to policies institutionalizing torture. Victims should be at the centre of the truth recovery project. In order to do so, a truth commission should be set up. The proposals listed below deal with some but not all aspects of truth commissions and seek to set out how these various components could best be tailored to meet the needs of victims.

## V. WHY CALL IT A TRUTH COMMISSION?

There has been one "truth commission" in the United States to date. The Greensboro Truth and Reconciliation Commission was created by members of the Greensboro community in North Carolina to clarify events which led to the death of five anti-Klan activists. It was hoped this would help heal the community, prevent similar events from occurring and find out the truth about institutional and individual responsibility for what

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72. Human Rights Watch, *supra* note 64, at 22.

73. Human Rights First, *supra* note 69, at 9.

74. Associated Press, *US has Detained 83,000 in Anti-Terror Effort*, Nov. 16, 2005, <http://www.msnbc.msn.com/id/10071594> (last visited Sept. 30, 2009).

75. USA TODAY.COM, *U.S. Military: Iraqi Detainees Tortured, Killed Inmates*, July 26, 2008, [http://www.usatoday.com/news/world/iraq/2008-07-26-Iraqi-detainees\\_N.htm](http://www.usatoday.com/news/world/iraq/2008-07-26-Iraqi-detainees_N.htm) (last visited Sept. 30, 2009).

happened.<sup>76</sup> The commission was not created by any government body and as such had no official power to grant amnesties or recommend prosecutions although it did make a number of non-binding recommendations.<sup>77</sup>

As seen above, what has been called for is not a truth commission, but commissions of inquiry. The name truth commission is associated with countries like South Africa<sup>78</sup> or Liberia which used this mechanism as they emerged out of long periods of systemic human rights violations. As has been stated by a columnist when discussing the various memos legalizing torture, "it's astounding that we need some kind of truth commission in the United States of America, but we do."<sup>79</sup> This is precisely the purpose of calling it a truth commission and not a commission of inquiry. By calling it a truth commission, it recognizes that the violations it is seeking to deal with are serious human rights violations which warrant such a name. It may be more difficult for Americans to accept it if it is called a truth commission. However, calling it a truth commission will show the gravity of the situation and call for a real investigation into what happened.

## VI. PROPOSALS FOR A TRUTH COMMISSION MANDATE

The process and procedure of the commission must be defined. This essay will focus on victim involvement in the set up of the commission, selection of commissioners, powers of subpoena, and powers to hold hearings in public. These four issues have been selected because they are areas in which a victim centered approach can be furthered.

The first issue is how far victims should be involved in the process of setting up the truth commission. The victims in this context are not an easily definable entity or in a particular geographical area and it will be difficult to consult with them. The government, in setting up the truth commission and its components should nonetheless seek advice and consult with civil society groups in the United States but also outside to enable different viewpoints to be aired. By allowing civil society groups to be involved, it ensures that the government is not setting this commission up

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76. See Greensboro Truth and Reconciliation Project, *Mandate for the Greensboro Truth and Reconciliation Committee*, available at <http://www.greensborotrc.org/mandate.php> (last visited Sept. 30, 2009).

77. *Id.*

78. *Id.*

79. Eugene Robinson, *A Torture Paper Trail*, WASH. POST, July 29, 2008, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/28/AR2008072802465.html> (last visited Sept. 30, 2009).

without any involvement from anyone else and that victims are consulted.<sup>80</sup> Although it may be difficult to consult with victims in other countries, if the process is sufficiently advertised and if it can be done through written submissions, then it should allow people abroad to have a say in how the commission is set up. This should ensure that victims feel that their voices will be heard within the commission if they can have some ownership in the process of creating the commission. In addition, by involving actors within United States civil society, it may create awareness within the United States of what has happened and support for the commission. In light of the fact that many people involved have been portrayed as terrorists for the past eight years, it is unlikely that a truth commission for victims of torture will be acceptable to all members of the public. However, by involving civil society groups in the US, this may help educate people and create grass root support for the creation of the commission, as people learn of what has happened. It would be unhelpful for a truth commission to be set up which is perceived as providing assistance to people who do not deserve it or diverting away resources from people within the US who are in conditions of hardship.<sup>81</sup> By ensuring that there is a consultation process, this effect may be minimized.

The truth commission must also have particular characteristics in view of the peculiar circumstances surrounding these victims. Victims should be able to recount their stories and give evidence about what happened. As the victims are not in the United States, this may prove somewhat difficult. However, there is nothing preventing the commission in the first instance from receiving written testimony from victims and in the second instance from travelling to various countries to collect evidence directly from the victims. Bearing in mind the geographical difficulties, special measures will need to be taken to ensure that victims have access to the commission. This may involve financial measures to allow them to travel to places where the commission is meeting. In addition, practical measures such as provisions of interpreters and lawyers will need to be taken, as well as special measures for victims of sexual violence.<sup>82</sup>

The commission should also have the power to hold hearings in public, at least those taking place in the United States. Having public hearings is a very powerful way of bringing the truth to the people by allowing them

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80. See Comm'n on Human Rights, *Rule of Law Tools for Post Conflict States, Truth Commissions*, 7 U.N.Doc. HR/PUB/06/1 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf> (last visited Sept. 30, 2009) [hereinafter *Rule of Law*].

81. See LISA MAGARRELL, *Reparations in Theory and Practice* 9–10 (2007), available at <http://www.ictj.org/static/Reparations/0710.Reparations.pdf> (last visited Sept. 30, 2009) [hereinafter *Lisa Magarrell*].

82. Amnesty International, *supra* note 60, at 29.

access to the day to day work of the commission.<sup>83</sup> If the commission is empowered to travel abroad to take testimony, it may make holding public hearings in those countries more difficult both for security reasons and logistical reasons. If this is found to be an insurmountable problem then there is nothing preventing the commission from issuing regular press releases about the nature of the information it has collected to continue to engage with the public.

Another procedural issue is the selection of the commissioners. There are a variety of ways of selecting commissioners including processes which are more transparent than others. They can be selected by congress, by the President, through a consultative process as in South Africa or by the United Nations (UN), as in Sierra Leone.<sup>84</sup> Having a public selection process is more likely to give the commission national and international legitimacy and allow for a more even representation in terms of ethnicity and nationality.<sup>85</sup> In order to ensure impartiality amongst commissioners, it will be necessary to have a process of consultation for nominations of the commissioners which can be done as part of the general consultation process described above. By having a consultation process, victim groups and NGO's representing victim interests can nominate candidates in whom they trust to be commissioners.

In addition, half of the commissioners should be nationals from the countries of origin of some of the victims. Because the victims are foreigners, it may lend more legitimacy to the commission and instill more trust in it from the victims' point of view. It may re-assure them that the purpose of the commission is not simply to deal with how actions of Americans in last eight years have affected Americans, but how it has affected individual victims. Various commissions have had a mixture of nationals and non-nationals as commissioners, such as Sierra Leone<sup>86</sup> or have been composed exclusively of non-nationals as in the case of El Salvador.<sup>87</sup> This was criticized by Lawyers Committee for Human Rights (now Human Rights First) on the basis that Salvadorans were not involved in making decisions about what had happened to them in their own country and therefore it was unclear whether or not the commission had any

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83. Rule of Law, *supra* note 80, at 19.

84. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 216-217 (2001).

85. Rule of Law, *supra* note 80, at 13-14.

86. The Truth and Reconciliation Commission Act (2000), Part 3 (Sierra Leone).

87. See generally UN Security Council, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, S/2550/1993/5-8.

impact.<sup>88</sup> This argument could of course be flipped on its head in that without the participation of commissioners from victims' countries of origin; victims may be less likely to see the commission as legitimate and therefore capable of making real change. If the commission has an equal number of American and foreign commissioners, it symbolizes and recognizes that non-Americans have equal interest in the commission.

In addition, the commission will need full powers to investigate and subpoena both individuals to give evidence and production of documents or other materials. The purpose of having subpoena powers is that individuals may be unwilling to come forward and volunteer information, may have a duty which conflicts with giving evidence but which can be overridden by a subpoena, such as the duty of confidentiality between lawyer and client or may be barred by law from providing information without a subpoena, such as an official who has access to information dealing with national security and is not allowed to divulge it without a subpoena.<sup>89</sup> In order to ensure that the procedures before the truth commission are fair, the person being subpoenaed will need to have the right to challenge the subpoena as in normal judicial proceedings.<sup>90</sup> The importance of having powers to compel disclosure of documents is clear in this case because the commission will need to review the procedures by which all these violations have occurred some of which are likely to be included in government documents. Likewise, the power to subpoena people is also necessary because many people are likely to be reluctant to come forward bearing in mind that they may have perpetrated crimes or operated within a system which allowed for these crimes to be committed. Having the power to subpoena ensures that the process remains victim focused by compelling perpetrators to come forward to give evidence.

Finally, the scope of the inquiry should be limited to acts occurring after September 11, 2001 within the context of the war on terror. For the purpose of this essay, it would include acts of torture and other forms of cruel, inhuman or degrading treatment. The commission should investigate all acts committed both by U.S. army personnel and other government agencies (such as the CIA) as well as acts committed by private contractors.<sup>91</sup> It should also not be limited to official sites but also to so-

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88. MARK FREEMAN, LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMPROVISING HISTORY: A CRITICAL EVALUATION OF THE UNITED NATIONS OBSERVER MISSION IN EL SALVADOR* 141 (1995).

89. MARK FREEMAN, *TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS* 188–189 (2006).

90. *Id.* at 202–204.

91. Office of the High Commissioner for Human Rights, *CCPR General Comment No. 20*, ¶ 13, U.N. Doc. A/47/40 (1992) (states are responsible for criminalizing acts of torture by private individuals), available at <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument> (last visited Sept. 30, 2009).



called black sites which were acknowledged to exist by the government in 2006.<sup>92</sup> In addition, civilians and politicians have been involved in the conduct of the war on terror. For instance, various memos were written which redefined the United States obligations under international and national law in relation to torture,<sup>93</sup> redefined torture and provided defenses for it.<sup>94</sup> In addition, allegations of torture surfaced as early as 2002,<sup>95</sup> and it can therefore be safely assumed that members of the administration knew that torture was on-going and failed to stop it. For instance, despite the fact that standards were amended by the U.S. Army through the adoption of a new army field manual which prohibits torture and cruel, inhuman or degrading treatment and requires compliance in all interrogation methods with the Geneva Conventions,<sup>96</sup> President Bush nonetheless vetoed a bill in March 2008 that would have caused those standards to be applied to the CIA as well as to the U.S. Army.<sup>97</sup> Finally, the acts of other private civilians and individuals who may have been involved should also be investigated and they should be held accountable if their actions contributed to the human rights violations which occurred. For instance, doctors who may have assisted those who tortured by divulging private medical information or failing to provide medical care during torture should also be held accountable.<sup>98</sup> Therefore, the commission should be able to investigate how far civilians and politicians were involved in the torture through condoning and encouraging this behavior by U.S. Army and other personnel on the ground. By investigating individual complaints and apportioning individual responsibility, the truth commission will ensure that

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92. Dana Priest, *CIA holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1, available at <http://www.ijl.org/courses/documents/CIAHoldsTerrorSuspectsinSecretPrisons.pdf> (last visited Sept. 30, 2009).

93. See Memorandum for William J Hayes II General Counsel of the Department of Defense on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (2003) available at <http://media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo1-19.pdf?sid=ST200804102264> (last visited Sept. 30, 2009).

94. See Memorandum for Alberto R. Gonzales on Standards of Conduct for Interrogation Under 18 U.S.C §§2340–2340A (2002) available at <http://media.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (last visited Sept. 30, 2009).

95. Human Rights Watch, *United States: Report of Torture of Al-Qaeda Suspects*, Dec 26, 2002, available at <http://www.hrw.org/en/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects> (last visited Sept. 30, 2009).

96. See Headquarters, Department of the Army, *Field Manual 2-22.3: Human Intelligence Collectors Operation*, viii, Sept. 9, 2006, <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf> (last visited Sept. 30, 2009).

97. See Dan Eggen, *Bush Announces Veto of Waterboarding Ban*, WASH. POST, March 8, 2008, at A2.

98. Physicians for Human Rights, *supra* note 2, at 7.

it remains squarely focused on victims' needs. Whether or not findings of individual responsibility are made public and the standard of proof used to make those findings are beyond the scope of this paper. However, this should be dealt with by the commission's mandate. This paper assumes that in the setting up of the commission due regard will be given to the rights of those accused of committing crimes to ensure due process.

Finally, the commission's mandate should include the power to make various recommendations including but not limited to reparations, prosecutions and institutional reforms. The commission's mandate will have a bearing on whether or not the commission is victim centered. If it focuses on making recommendations for institutional reforms, then the need for victims to be involved in the process will be minimal, because members of armed forces and politicians can themselves testify as to the deficiencies in the system. However, if the purpose of the commission is to make recommendations for reparations of victims or prosecutions then victims will need to take a central role in the commission. This essay concentrates on making recommendations for reparations as part of a victim centered approach although clearly the commission will need to make recommendations for institutional reforms to prevent the use of torture in the future.

## VII. REPARATIONS

Reparations are defined in a variety of ways. One commentator has stated that reparations in the context of international law include restitution; to establish the position of the victim before the violation, compensation; which refers to a payment for a harm suffered, rehabilitation; which involves practical measures such as medical and psychological care, and satisfaction and guarantees of non-recurrence, which involves for example ending the violations, disclosure of the truth and institutional reforms.<sup>99</sup> A narrower definition of reparations is included in the term "reparations program" which seeks to provide benefits to the victims without the aim of achieving any of the other aspects of the broader definition of reparation including truth telling, etc.<sup>100</sup> Reparations can take many forms including compiling a historical record, recommending prosecutions, institutional reforms, disseminating its findings and ensuring compliance with its recommendations.<sup>101</sup> This essay attempts to define which types of reparations should be encompassed in a program for the United States

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99. See generally De Greiff, *supra* note 15.

100. See generally *id.*

101. Amnesty International, *supra* note 60, at 33–38.

which is victim centered. When using the word reparation, it is broadly inclusive of all types of reparations outlined above.

#### *A. Reparations in International Law*

There are divergent views on whether or not there is a duty on the part of the state under international law to provide reparations for individual victims of human rights violations. It has been argued that there is no norm of customary international law that individuals are entitled to reparations for grave violations of human rights. One of the bases of this argument is that there is no specific duty to provide individual reparations in any human rights treaty. Another is that the number of victims who actually receive compensation and reparation for grave human rights violations is so minimal that it shows that state practice does not follow an international norm on the individual right of reparation.<sup>102</sup>

Alternatively, it has been claimed that there are good prospects for the creation and emergence of obligations under international law that would allow victims a right to reparations for human rights violations perpetrated by the state.<sup>103</sup>

The duty of states to provide reparations to victims of gross or serious violations of international human rights attributable to the state has been dealt with by the UN Human Rights Committee in individual complaints. For instance, a state has a duty to provide compensation to a victim of human rights violations, in the case of torture, in light of a state's obligations under article 2(3) of the ICCPR.<sup>104</sup> In addition, the CAT provides that each state "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."<sup>105</sup> The Committee Against Torture has stated that in a case where the convention did not apply as it dealt with issues before the CAT came into force, states should nonetheless enact appropriate legislation to "render application for compensation viable."<sup>106</sup> In 1996, the

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102. See Christian Tomuschat, *Reparations for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 171-173 (2002).

103. ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 88-89 (2004).

104. Human Rights Committee, *Rodriguez v Uruguay*, Comm. No. 322/1988 ¶ 14 (1994), U.N.Doc. CCPR/C/51/D/322/1988; see also Human Rights Committee, *Zelaya v Nicaragua*, Comm. No. 328/1988 ¶ 12 (1994), U.N. Doc. CCPR/C/51/D/328/1988.

105. U.N. Convention Against Torture, *supra* note 7, at ¶ 14(1).

106. Committee Against Torture, *O.R., H.M. and M.S. v Argentina* ¶ 9 (1989), U.N. Doc. CAT/C/WG/3/DR/1, 2 and 3/1988, available at [http://www.bayefsky.com/pdf/100\\_argentinacat1\\_2\\_3.pdf](http://www.bayefsky.com/pdf/100_argentinacat1_2_3.pdf) (last visited Sept. 30, 2009).

UN Special Rapporteur on the right to restitution, compensation and rehabilitation of gross violations of human rights and fundamental freedoms stated "states have a duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations."<sup>107</sup> More recently, the UN General Assembly reiterated the principle that States are responsible for providing reparations for victims of gross violations of international human rights law which can be attributed either by action or omission to the state.<sup>108</sup>

In the Inter American System, the principles for reparations are laid out in article 63 of the American Convention which states that the court is entitled to decide that "the consequences of the measure or situation that constituted the breach of such right or freedom are remedied and that fair compensation is paid to the injured party."<sup>109</sup> The Inter American Court on Human Rights has said that "every violation of an international obligation which results in harm creates a duty to make adequate reparation."<sup>110</sup> The court has defined "fair compensation" in the case of a person who was disappeared as including "reparations to the family of the victim for the material and moral damages they suffered."<sup>111</sup> The court then went on to set a value to be paid to the family.<sup>112</sup> More generally, the court has said that a state has a duty to make reparations to victims.<sup>113</sup>

### B. Reparations under Domestic Law

There is a precedent for reparations to victims of systemic human rights abuses in the United States in the form of the Commission on Wartime Relocation and Internment of Civilians (CWRIC). This commission was tasked with reviewing the impact of Executive Order 9066 (to deport Japanese-Americans and intern them into camps during WWII),<sup>114</sup> review United States practices in relation to this and make

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107. U.N. Economic and Social Council, *Revised set of on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, ¶ 7, U.N.Doc. E/CN.4/Sub.2/1996/17 (May 24, 1996).

108. The Joinet Principles, *supra* note 31, at Principle 33.

109. American Convention on Human Rights § 63(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

110. Velasquez Rodriguez v. Honduras, Inter-Am. C.H.R., doc.7 ¶ 25 (1989).

111. Godinez Cruz Case, Inter-Am. C.H.R., Ser. C doc. 8 ¶ 37 (1990).

112. *Id.* at ¶ 55.

113. Ignacio Ellacuría *et al.* v. El Salvador, Case No. 136/99, Inter-Am. C.H.R. at ¶ 222.

114. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

recommendations for reparations.<sup>115</sup> As a result, a report was produced which acknowledged that the internment of Japanese Americans had not been justified by any military necessity.<sup>116</sup> Congress then enacted legislation adopting the findings of the commission and recommending payment of \$20,000 for every “eligible individual,” defined as anyone who was of Japanese ancestry and interned or arbitrarily detained as a result of U.S. government policy during WWII. This payment would have the effect of extinguishing all other claims for compensation against the U.S. government.<sup>117</sup> Although this provided some reparation, it took place more than forty years after the fact and cannot be said to have provided victims with reparations within an acceptable time frame.

Victims may be able to claim reparations under United States domestic law. Under the Alien Tort Statute, an alien can claim civil remedies in district court for a tort “committed in violation of the law of nations or a treaty of the United States.”<sup>118</sup> The court has held that torture is a crime amounting to a violation of the law of nations and is therefore actionable under the statute.<sup>119</sup> In theory, therefore it would be possible for victims of torture at the hand of agents of the state to bring a civil claim against the individual involved, provided they are in the United States and the court can assert personal jurisdiction over them. In practice however, this method has been tried and the U.S. government has repeatedly substituted itself for the defendants and invoked the State Secret Act or claimed immunity for actions of individuals<sup>120</sup> thereby blocking any recourse the claimants might have. In addition, the courts have applied the concept of qualified immunity for government employees, which exempts them “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>121</sup> Because the U.S. Constitution does not grant rights to aliens outside United States jurisdiction,<sup>122</sup> it follows that no one acting in an official capacity could ever be found liable under qualified immunity because under United States law they cannot be said to have violated

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115. Commission on Wartime Relocation and Internment of Civilians Act, 50 U.S.C. § 1981 (1980).

116. Report of the Commission on Wartime Relocation and Internment of civilians, *Personal Justice Denied*, 1, 23 (1997).

117. Wartime Relocation of Civilians Act, 50 U.S.C. § 1989–1989b-4 (1988).

118. Alien Tort Statute, 28 U.S.C. § 1350 (2003).

119. *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2<sup>nd</sup> Cir.1980).

120. Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 725–726 (2006).

121. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

122. *Boumediene v. Bush*, 476 F.3d 981, 991 (2007).

statutory or constitutional rights. It is therefore unlikely, that using the current system aliens will be able to recover damages and reparations from those responsible in the U.S. courts.<sup>123</sup>

There are also more general difficulties in pursuing reparations through the courts as victims may not have access to lawyers or there may be difficulty in presenting evidence which meets the standards of a court process.<sup>124</sup> It may also be difficult for them to produce independent evidence of torture as some forms of beatings and other violence often do not leave physical marks.<sup>125</sup> This would be especially true in this case as the victims are not U.S. citizens and do not reside in this country. It is likely to be difficult for them to have access to the court, even on the basis that they will need to be granted visas to attend their court hearings.

In addition, victims for the most part remain powerless against the perpetrators. Particularly, this is true in the case of foreigners who do not reside in the United States and as such have no political power to use. The reality is that victims “remain relatively or absolutely poor, are weak, and dependent in some measure on the perpetrators for welfare and reparation.”<sup>126</sup>

### C. Recommendations for Reparations

Although it has been said that truth commissions are sometimes not best equipped to make recommendations for reparation programs because they only receive testimony from a small number of victims, cannot at times obtain independent evidence of what happened<sup>127</sup> and should be opened to people who have not testified before the truth commission,<sup>128</sup> this paper will argue that a truth commission in this context would be best placed for deciding on the award of compensation to victims. That is not to say that the truth commission should be responsible for the implementation of the reparations program but for deciding the amount of reparation in each case. It would be responsible for recommending the creation of a reparations fund and for setting the levels for reparations according to the violation. Anyone who has not testified before the commission could apply for reparations to the entity managing the reparation fund and provided they meet the criteria

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123. See Bardo Fassbender, *Can Victims Sue State Officials for Torture*, 6 J. INT'L CRIM. JUST., 347, 367–369 (2008).

124. See *id.* at 359.

125. Physicians for Human rights, *supra* note 2, at 38.

126. Elazar Barkan, *Introduction: Reparations: A Moral and Political Dilemma*, in *Reparations: Interdisciplinary Inquiries* 15, 1 (Oxford University Press), 2007.

127. Hayner, *supra* note 84, at 172.

128. *Id.* at 181.

set out by the commission they would be entitled to reparations as if they had testified.

The reparations program should be individualized because they “should uphold the status of victims as bearers of rights, and convey the sense that it is on this basis that are owed reparations.”<sup>129</sup> There are precedents for collective reparations for classes of people or areas that were particularly affected by certain actions. For instance, the commission in East Timor recommended that communities which had been particularly affected by the conflict should be able to apply for reparations for the community as a whole.<sup>130</sup> In the present case, this will have no practical resonance, bearing in mind that the victims are not located in any one particular country or area. It would be impossible to design a collective financial reparation program that made sense and instead the financial reparations should be individualized. However, this is not to say that there cannot be collective reparation of a symbolic nature, such as memorials in location of notorious prisons or monuments to the victims.

In dealing with individual reparations, the difficulty will be for the commission to assess the amount of damages that each individual is entitled to. There is likely to be different degrees of suffering and long term harm. The question is whether or not the commission should make differentiations on an individual basis and recognize that some people have suffered more than others or simply agree on a sum for each person it considers to have been the victim of torture. For example, the Chilean Commission decided that it could not decide on individual circumstances and instead assumed that everyone who had been held in custody was subject to torture and as such awarded the same compensation to all.<sup>131</sup> In looking at the problem through a victim centered lens, the advantage of having to make individual determinations about the level of harm suffered is that it will allow every victim to have his case decided on the basis of his individual circumstances. The disadvantage is that it may be difficult for victims to show by independent means the extent of their injuries. Clearly, victims will be able to testify about what happened but how are they to show through medical records and other means what happened to them if that is contested, as they were being held in custody and had no access to independent doctors. This can be remedied if the commission is able to make findings to a civil

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129. Lisa Magarrell, *supra* note 81, at 2.

130. The Commission for Reception, Truth and Reconciliation, *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste* 208 (2005), available at <http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf> (last visited Sept. 30, 2009).

131. Comisión Nacional sobre Prisión Política y Tortura, *Informe de la Comisión 524* (2005), available at [http://www.comisiontortura.cl/filesapp/12\\_cap\\_ix.pdf](http://www.comisiontortura.cl/filesapp/12_cap_ix.pdf) (last visited Sept. 30, 2009).

standard of proof which is unlikely to require the same access to information as the criminal standard.

A scale of reparations should be set for various degrees of violations such as the amount of time someone has spent in custody and the type of abuse he has suffered (sexual or physical violence). Once the commission makes a finding of fact about a particular detainee that for instance he was tortured by being sleep deprived or was sexually assaulted twice, the commission can then apply the scale of reparation to determine how much that person is owed. There are obvious problems with this approach in that it puts a monetary value on human rights violations and for instance a sexual assault should lead to a higher level of compensation than a beating. That is clearly a value judgment and others may disagree but if the commission can set up a framework with a monetary value for all types of violations then it will not only be easier to administer the reparations fund but also it will create some certainty for victims who will be able to know how much money they may be entitled to. The other problem is that a victim may not remember all the instances when he was beaten. However, if the commission finds that he was beaten at least once, then he will still be entitled to reparations thereby ensuring that as long as there is a finding of a violation once, the person is entitled to something. If the person was in custody for over a year and alleges that he was beaten "repeatedly," then it should be open to the commission to make findings based on the evidence given before it about how often that may have happened and to award compensation for having suffered about fifteen to twenty beatings. By allowing for different amount of compensation for each individual, the commission will allow for individual recognition of the harm suffered.

The next issue is financing the reparations program. As set out above, there may be opposition in the United States to diverting resources away from the population. This opposition may come from society but also from politicians who may not be willing to divert resources away from domestic programs. This is especially true when beneficiaries are groups traditionally marginalized by society.<sup>132</sup> Although this assessment refers to a national process, the analogy also works in this case as the victims involved have no political power in the United States. Therefore, these victims are seen as marginalized because they are not members of United States society. However, one way of dealing with this issue would be to give the truth commission power to seize assets of perpetrators or require them to pay damages. This would have the second aim of ensuring that perpetrators are held responsible for their actions. There is no reason why

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132. PABLO DE GRIEFF, *THE HANDBOOK OF REPARATIONS*, 651 (2006).



this should not happen<sup>133</sup> and in fact the statute of the International Criminal Court provides that the court “may make an order directly against a convicted person specifying appropriate reparation to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>134</sup> This statute of course reflects a situation where someone has been found guilty of a crime to a criminal standard. However, perpetrators without being held to be criminally responsible could be held to be responsible to a civil standard.<sup>135</sup> This is not much different from a finding of liability to a civil standard in a domestic court. The UN General Assembly has said that in cases where an individual has been found liable for a violation of international human rights, that person should pay reparation to the victim or to the state if the victim has already been paid by the state.<sup>136</sup> The commission for Timor-Leste recommended that Indonesian companies and other multinationals who benefited from the war and who sold weapons to Indonesia during the war should pay money into the reparations fund.<sup>137</sup> As discussed above, individuals could be found responsible by the commission to a civil standard within safeguards and standards of due process (the right to defend yourself, be represented by a lawyer, etc). As a result of this, the commission could make orders for recovery of money from those individuals, even if these orders are kept confidential. There are no precedents for this but there is no reason why this strategy could not be used in combination with financial support from the government. That money would then go into a common fund to be allocated by the truth commission in accordance with its findings in terms of the victims.

### VIII. CONCLUSION

In order to be victim centered, a truth commission in the United States should therefore have a consultation process to ensure that victims are able to participate in setting it up, should have an equal number of international and national commissioners and should have strong powers to compel disclosure of documents and compel people to testify.

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133. *But see* Christian Tomuschat, *supra* note 102, at 181.

134. Rome Stat. of the Int’l Crim. Ct. art. 75(2), July 1, 2002, *available at* [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) (last visited Sept. 30, 2009).

135. *See* Christian Tomuschat, *supra* note 101, at 182 (citing CHRISTIAN DOMINICE, *La Question de la Double Responsabilite de l’etat et de son agent* in LIBER AMICORUM MOHAMMED BEDJAOUI 143, 147 (Emile Yakpo & Tahar Boumedra eds., 1999).

136. U.N. High Commissioner for Human Rights, *supra* 32, at ¶ 15.

137. The Commission for Reception, Truth and Reconciliation, *supra* note 130, at 208.

It should also recommend a reparations program which is individualized in accordance with the harm suffered and financed both by the U.S. government and through individual recovery orders from perpetrators.

This is an ambitious project which is unlikely to be adopted by the U.S. government, even under new leadership because there is unlikely to be political will to create it. The particular difficulty these victims face is that they are not members of United States society and as such have no political power. Without a truth commission which puts them at the forefront of the process, they and the harm they suffered are at real risk of being forgotten.