

## ARTICLE

# FROM VILLA GRIMALDI TO GUANTÁNAMO BAY: REMEDYING HUMAN RIGHTS ABUSES IN CHILE AND THE UNITED STATES

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“The twentieth century was perhaps the deadliest in human history, devastated by  
innumerable conflicts, untold suffering, and unimaginable crimes.”

- Kofi Annan

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### I. INTRODUCTION

In his Nobel Lecture in Oslo, Norway, Kofi Annan made the above statement, noting that throughout the past century, “a group or a nation

inflicted extreme violence on another, often driven by irrational hatred and suspicion, or unbounded arrogance and thirst for power and resources.”<sup>1</sup> From the Holocaust during World War II to the genocide that occurred in former Yugoslavia and Rwanda in the 1990s, the world has not only seen mass atrocities, but has also attempted to redress the harm done. Countries have implemented several strategies in an effort to hold perpetrators accountable and help restore the dignity—and repair the injury—of victims.<sup>2</sup>

Transitional justice has been a primary tool in transforming societies to be more peaceful and democratic.<sup>3</sup> It has played an essential role in redressing mass human rights abuses in the past several decades.<sup>4</sup> Several transitional justice devices were used to rectify the violations that occurred under the dictatorships in South America.<sup>5</sup> Chile became a prominent example for its use of several transitional justice devices in order to remedy the ill treatment of victims.<sup>6</sup> The abuses committed under Augusto Pinochet involved detaining innocent individuals in detention facilities, such as Villa Grimaldi and Londres 38, and subjecting them to torture and other inhumane treatment.<sup>7</sup> To mend the abuses committed under the authoritarian regime, post-

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<sup>1</sup> Kofi Annan, U.N. Sec’y-Gen., Nobel Lecture (Dec. 10, 2001), *available at* [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2001/annan-lecture.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html). He continued, “In response to these cataclysms, the leaders of the world came together at mid-century to unite the nations as never before. A forum was created — the United Nations — where all nations could join forces to affirm the dignity and worth of every person, and to secure peace and development for all peoples. Here States could unite to strengthen the rule of law, recognize and address the needs of the poor, restrain man’s brutality and greed, conserve the resources and beauty of nature, sustain the equal rights of men and women, and provide for the safety of future generations.” *Id.* (emphasis omitted.)

<sup>2</sup> Joanna R. Quinn, *Transitional Justice*, in *HUMAN RIGHTS: POLITICS AND PRACTICE* 363, 365 (Michael Goodhart ed., 2008).

<sup>3</sup> *Id.* at 364.

<sup>4</sup> *See id.* at 369.

<sup>5</sup> *See id.* at 370 (highlighting truth commissions utilized in Bolivia, Argentina, Uruguay and Chile).

<sup>6</sup> *See infra* Part III.B (examining the post-Pinochet transitional justice mechanisms taken to remedy the human rights violations).

<sup>7</sup> *See infra* Part III.A (discussing the human rights abuses committed under Pinochet).

Pinochet Chilean governments created truth commissions and reparation programs for its victims, and prosecuted the military commanders who were responsible for committing the atrocities.<sup>8</sup>

Similar transitional mechanisms may be appropriate as a response to atrocities committed under the United States government. Since the post-9/11 “War on Terror” began, hundreds of individuals have been victim to inhumane and degrading treatment in detention facilities such as Guantánamo Bay.<sup>9</sup> Accused of being terrorists, they are detained indefinitely without being charged and without being given a trial.<sup>10</sup> For the past decade, these individuals have suffered from torture, waterboarding, and other “enhanced interrogation techniques” developed under the Bush administration.<sup>11</sup>

Despite differences in the political and legal contexts of their time, both Villa Grimaldi and the Guantánamo Bay detention facility saw hundreds of victims suffer similar human rights abuses. As such, the way in which the United States should deal with addressing human rights abuses should be largely comparable to Chile’s successful efforts. While the United States should adopt Chile’s model of truth commissions to gather evidence of abuses, provide support to victims through reparation programs, and follow Chile’s example of criminally prosecuting those responsible, these recommendations should also take into account the United States’ laws, the national sentiment, as well as the current international context.

Part II of this Article provides an overview of transitional justice and the different instruments involved. Next, Part III discusses the human rights abuses that occurred during the Pinochet regime, specifically in secret prisons like Villa Grimaldi. It then explores the different approaches that the Chilean government took to rectify human rights abuses. Subsequently, Part IV examines the human rights abuses that occurred under the United States government, particularly in the Guantánamo Bay detention facility. Finally, it considers both the benefits of and limitations in applying the Chilean transitional justice methodologies within the U.S. context.

## II. AN OVERVIEW OF TRANSITIONAL JUSTICE

Transitional justice refers to a “set of judicial and non-judicial

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<sup>8</sup> *Infra* Part III.B.

<sup>9</sup> *See infra* Part IV.A (scrutinizing the human rights abuses that are still being committed under the U.S. government).

<sup>10</sup> *See infra* Part IV.B.3.

<sup>11</sup> *Id.*

measures that have been implemented in order to redress the legacies of massive human rights abuses.”<sup>12</sup> It refers to how societies transition from repressive rule or armed conflict to overcome past atrocities and social divisions, and how they create justice systems to prevent future human rights atrocities.<sup>13</sup> Transitional justice initially drew on the development of international humanitarian law and efforts to prosecute war criminals, starting after World War II.<sup>14</sup> Over the past five decades, several initiatives have been developed in countries transitioning from war to peace that address different facets of transitional justice.<sup>15</sup>

The basic premise of transitional justice is to effectively respond to past abuses in ways that establish the truth about what happened, acknowledge victims’ suffering, hold perpetrators accountable, compensate for past wrongs, prevent future abuses, and promote social healing.<sup>16</sup> Mechanisms that have been used to respond to these challenges in the past include criminal prosecutions,<sup>17</sup> truth commissions,<sup>18</sup> reparation programs,<sup>19</sup> and systems for vetting abusive officials from public positions.<sup>20</sup>

#### *A. Criminal Prosecutions*

Criminal prosecutions target individuals who were personally responsible for committing criminal offenses during a period of conflict.<sup>21</sup> It is the most direct form of accountability.<sup>22</sup> Not only does it help to reaffirm legal order and encourage trust in public institutions,

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<sup>12</sup> *What Is Transitional Justice?* THE INT’L CTR. FOR TRANSITIONAL JUSTICE, <http://ictj.org/about/transitional-justice> (last visited Sept. 23, 2013).

<sup>13</sup> Charles T. Call, *Is Transitional Justice Really Just?*, 11 BROWN J. OF WORLD AFFAIRS 101, 101 (2004).

<sup>14</sup> *Id.* at 103.

<sup>15</sup> *Id.* Part of the legal basis for transitional justice is the 1988 decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras*, in which the court found that all states have four fundamental obligations in the area of human rights: (1) to take reasonable steps to prevent human rights violations; (2) to conduct a serious investigation of violations when they occur; (3) to impose suitable sanctions on those responsible for the violations; and (4) to ensure reparation for the victims of the violations. *Velásquez-Rodríguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988). These principles were explicitly affirmed in later decisions by the court. U.S. INST. OF PEACE, TRANSITIONAL JUSTICE: INFORMATION HANDBOOK (Sept. 2008), available at <http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf>.

<sup>16</sup> U.S. INST. OF PEACE, *supra* note 15.

<sup>17</sup> See Call, *supra* note 13, at 104-06; *infra* Part II.A.

<sup>18</sup> U.S. INST. OF PEACE, *supra* note 15; *infra* Part II.B.

<sup>19</sup> U.S. INST. OF PEACE, *supra* note 15; *infra* Part II.C.

<sup>20</sup> U.S. INST. OF PEACE, *supra* note 15.

<sup>21</sup> *What Is Transitional Justice?*, *supra* note 12; U.S. INST. OF PEACE, *supra* note 15.

<sup>22</sup> U.S. INST. OF PEACE, *supra* note 15.

but prosecuting perpetrators of mass crimes is also considered an international legal obligation.<sup>23</sup>

Prosecution of mass war crimes is a difficult task. Prosecutors must investigate large patterns of abuse, which involves establishing links between commanders who ordered the crimes and the soldiers who carried them out.<sup>24</sup> In many countries recovering from conflict, local courts may not be well equipped to handle the complexities of prosecuting mass crimes.<sup>25</sup> Additionally, many domestic courts are often viewed as politically biased after periods of dictatorships, and may not be seen as credible.<sup>26</sup> In cases like these, countries can pursue a “hybrid” model of prosecution, where international counterparts assist local courts, lawyers, and judges with trials.<sup>27</sup>

Given the limitations of using criminal prosecutions as a means of transitional justice, it is often more effective to combine this strategy with other mechanisms that focus more on the needs of the victims.<sup>28</sup> Because prosecutions mainly deal with the role of the accused, victims’ roles are limited to providing witness testimony.<sup>29</sup> Truth commissions and reparation programs can address victims’ needs more directly.<sup>30</sup>

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<sup>23</sup> *Id.* The Geneva Conventions established that states have a duty to prosecute the most serious international crimes, such as genocide, torture, or war crimes. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

<sup>24</sup> U.S. INST. OF PEACE, *supra* note 15. In order to ensure both the capacity and technical ability to investigate and prosecute crimes, several conditions are necessary, including: (1) prosecutors need to have a clear understanding of the relevant law; (2) experts must examine not only the law, but also the historical, political, and military details of the conflict; (3) sophisticated trial management techniques that can handle large amounts of complicated evidence; and (4) detailed rules of procedure and evidence that can handle a complicated trial. *Id.*

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

<sup>26</sup> *Id.*

<sup>27</sup> Call, *supra* note 13, at 106. The author discusses the well-known International Criminal Tribunals of Former Yugoslavia (ICTY) and Rwanda (ICTR), which were created as a response to the genocides committed in the 1990s. Other hybrid courts include the Special Tribunal of Lebanon, the Extraordinary Chambers of the Courts of Cambodia, the East Timor Tribunal, and the Special Court for Sierra Leone. *Id.* at 101. *See also* U.S. INST. OF PEACE, *supra* note 15. Each of these courts is temporary in nature, includes local and international staff working together, and uses a combination of national and international law. *Id.* The International Criminal Court (ICC) was created in 2002 to hold jurisdiction over crimes against humanity, genocide, and war crimes. The ICC was created in an effort to avoid creating more ad hoc tribunals in the future. Call, *supra* note 13, at 106.

<sup>28</sup> U.S. INST. OF PEACE, *supra* note 15.

<sup>29</sup> *Id.*

<sup>30</sup> *See infra* Part III.B.1 (discussing how truth commissions and reparation programs can help victims).

Combining prosecutions with these tools offers a more holistic approach in transitioning from conflict.<sup>31</sup>

### *B. Truth Commissions*

Truth commissions are “official investigative bodies made of independent experts that are responsible for investigating and reporting patterns of human rights abuses over a certain time period in a particular country or in relation to a particular conflict.”<sup>32</sup> Truth commissions are typically established for several reasons: to establish facts about past violations; to restore victims’ dignity and to respond to their needs; to prevent future abuses by recommending reparations or institutional reforms; to promote accountability and justice; and to reconcile the society.<sup>33</sup> Truth commissions are typically created during periods of political change, such as after the end of a dictatorship or armed conflict.<sup>34</sup> They are generally created by an official law or decree that

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<sup>31</sup> See U.S. INST. OF PEACE, *supra* note 15.

<sup>32</sup> *Id.*; See also Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600 (1994). Truth commissions are concerned with giving victims a voice, constructing historical narratives, and issuing recommendations for redress and future prevention. Lars Waldorf, *Ex-Combatants and Truth Commissions*, in *DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS* 108, 111 (Ana Cutter Patel, et al., eds., 2009).

<sup>33</sup> U.S. INST. OF PEACE, *supra* note 15; see Waldorf, *supra* note 32, at 111-12; AMNESTY COMM’N OF THE MINISTRY OF JUSTICE OF BRAZIL ET AL., *TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION* 9 (Eduardo González & Howard Varney eds., 2013). Traditionally, truth commissions have focused their investigations on serious crimes, such as torture, enforced disappearances, extrajudicial killings, forced displacement, and sexual violence. *Id.* at 11. Recent commissions, though, have investigated more serious abuses, such as war crimes and crimes against humanity. Some have even looked at economic crimes and corruption as part of broader authoritarian abuses. *Id.*

Truth commissions report on the context, causes, circumstances, nature, and extent of human rights violations. They investigate political strategies, specific cases, and consequences of abuse. The commissions document historical events by interviewing witnesses, survivors, and perpetrators, examining documents, and visiting places that may contain evidence, such as detention sites. It is important, though, for truth commissions to gather information in a manner that does not pose any danger to the personal safety or integrity of the victims. Victims should not be treated as sources, but as valued partners whose dignity is being recognized. The commission should create a safe environment for victims to speak about their experiences. Commissions should provide mental health support, physical protection, legal information and social services, if possible. Resources should especially be available to vulnerable groups, such as women, children, and indigenous people. Commissions can make recommendations that reform security, fight corruption, improve respect for human rights, and address the challenges faced by vulnerable populations. Finally, commissions can make recommendations to remove or bar perpetrators from public office or implement vetting programs. The information that commissions collect may ultimately be used as evidence to criminally prosecute these perpetrators. *Id.* at 23-24.

<sup>34</sup> *Id.* at 9.

exist for a designated period of time.<sup>35</sup> They have a specific mandate identifying the actions and time period to be investigated, and examine patterns of abuse as well as institutional and societal factors that facilitated their occurrence.<sup>36</sup> They ultimately create a report that includes conclusions and recommendations on how to prevent future abuses.<sup>37</sup> Since they are established in different political environments, truth commissions vary among countries.<sup>38</sup>

Truth commissions as a transitional justice strategy drew international attention during the 1980s and 1990s as a result of events that had occurred in Argentina and Chile.<sup>39</sup> Both countries were transitioning from repressive military regimes and sought to create commissions to investigate executions, disappearances, and other human rights abuses.<sup>40</sup> While truth commissions began mainly in Latin America, many countries followed suit to respond to their needs.<sup>41</sup> Uganda implemented a truth commission to investigate human rights abuses within its borders.<sup>42</sup> In South Africa, President Nelson Mandela and Desmond Tutu established South Africa's Truth and Reconciliation Commission to investigate and reveal government wrongdoing during

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<sup>35</sup> Hayner, *supra* note 32, at 604. Truth commissions are usually sponsored by the country's national government, however truth commissions can be sponsored internationally, by the United Nations or other nongovernmental organizations. *Id.* at 600-04. Typically, the executive or legislative branch of government establishes a truth commission. AMNESTY COMM'N OF THE MINISTRY OF JUSTICE OF BRAZIL ET AL., *supra* note 33, at 9.

<sup>36</sup> *Id.*

<sup>37</sup> Hayner, *supra* note 32, at 604. Maintaining financial and operational autonomy is important to a truth commission's efficiency. This independence can be achieved if: (1) state agencies assist and protect the commission to ensure its impartiality, dignity, accessibility, and effectiveness; (2) commissions have properly trained staff, adequate facilities, and sufficient funds to perform its functions to the highest standards; (3) and commissioners and their staff are not tied to any political factions. AMNESTY COMM'N OF THE MINISTRY OF JUSTICE OF BRAZIL ET AL., *supra* note 33, at 17.

<sup>38</sup> Waldorf, *supra* note 32, at 114-19.

<sup>39</sup> Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. 313, 313 (1998); Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 LAW & SOC. INQUIRY 79, 81 (1995).

<sup>40</sup> *Id.* at 81; see Hayner, *supra* note 32, at 609.

<sup>41</sup> Call, *supra* note 13, at 103.

<sup>42</sup> *Id.* at 104. Over two-dozen countries have established truth commissions since 1990. *Id.* at 103. These entities have worked to establish and publish a record of human rights abuses where judicial trials cannot. *Id.*

Apartheid.<sup>43</sup> The first truth commission in the United States, the Greensboro Truth and Reconciliation Commission, was established as a response to the Greensboro Massacre in 1979.<sup>44</sup>

Truth commissions, however, are not without criticism. Considered a “second-best alternative” to criminal punishment, critics have argued that it does little more than expose perpetrators.<sup>45</sup> Without criminal trials to prosecute human rights abusers, truth commissions can do little more than publicly shame human rights abusers.<sup>46</sup> Additionally, perpetrators are often unwilling to cooperate without amnesty.<sup>47</sup> In South Africa, conditional amnesty was granted for suspects who fully confessed.<sup>48</sup> Furthermore, in many post-conflict transitions, the “truth” may be subject to intimidation and political pressure.<sup>49</sup> Given that some power may still be in the hands of perpetrators during these transitional periods, destruction of evidence

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<sup>43</sup> *Id.*; see Richard J. Goldstone, *Past Human Rights Violations: Truth Commission and Amnesties or Prosecutions*, 51 N. IR. LEGAL Q. 164, 166 (2000). The Truth Commission that influenced South Africa the most was the Chilean Model. *Id.*

The South African Truth and Reconciliation Commission identified what it called “four notions of truth”: (1) forensic truth based on objective facts and verifiable evidence; (2) personal narrated truth grounded in individual objectivity; (3) social truth achieved through intersubjective dialogue and debate; and (4) healing truth, or the state’s public acknowledgement of past human rights violations.

Waldorf, *supra* note 32, at 111-12.

[The truth commission] allowed victims to participate in amnesty proceedings where perpetrators confessed their crimes. The commission encouraged several instances of direct contact between victims’ groups and offenders in an attempt to foster dialogue and understanding. . . . [However,] direct contact between victims and perpetrators is controversial and risky.

AMNESTY COMM’N OF THE MINISTRY OF JUSTICE OF BRAZIL ET AL., *supra* note 33, at 12.

<sup>44</sup> JAMES E. BEITLER III, *REMAKING TRANSITIONAL JUSTICE IN THE UNITED STATES: THE RHETORICAL AUTHORIZATION OF THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION* 5 (2013). The Greensboro massacre occurred on November 3, 1979 in Greensboro, North Carolina, United States. Five protest marchers were shot and killed by members of the Ku Klux Klan and the American Nazi Party. The protest was the culmination of attempts by the Communist Workers Party to organize mostly black industrial workers in the area. *Id.* at 2-3.

<sup>45</sup> Call, *supra* note 13, at 103.

<sup>46</sup> See *id.*, at 103-04; see also Waldorf, *supra* note 32, at 113.

<sup>47</sup> Call, *supra* note 13, at 104; U.S. INST. OF PEACE, *supra* note 15, at 11.

<sup>48</sup> Call, *supra* note 13, at 104; U.S. INST. OF PEACE, *supra* note 15, at 11. While the “truth for amnesty” formula was used in South Africa, it was backed by a credible threat of prosecution of those who did not apply for amnesty or did not present the entire truth in their amnesty application. Amnesty for the most serious international crimes, however, such as crimes against humanity, and genocide, and certain war crimes, is prohibited by international law. If amnesty for lesser abuses is offered, it is typically offered only to individuals who have cooperated by giving specific, truthful information and not to an entire group of potential perpetrators. *Id.*; Waldorf, *supra* note 32, at 114.

<sup>49</sup> U.S. INST. OF PEACE, *supra* note 15, at 11.

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and intimidation of witnesses and victims are a concern.<sup>50</sup>

Still, truth commissions are widely acknowledged as being a crucial tool in investigating human rights abuses and acknowledging victims' suffering.<sup>51</sup> With enough political interest and pressure, as well as the proper resources, they can promote justice and prevent future abuses.

### *C. Reparation Programs*

Reparations are payments or services given to victims of past abuse as compensation for the harm they and their family members have suffered during a period of conflict.<sup>52</sup> They are intended to repair harm, restore victims' dignity, and rebuild trust among communities where abuses have occurred.<sup>53</sup> International law recognizes that victims of human rights abuses are entitled to prompt, adequate, and effective

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

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 16; *see generally* INT'L CTR. FOR TRANSITIONAL JUSTICE, TRANSITIONAL JUSTICE AND DISPLACEMENT (Roger Duthie ed. 2012).

<sup>53</sup> U.S. INST. OF PEACE, *supra* note 15, at 16.

reparations and states have a duty to provide them.<sup>54</sup>

Several complementary forms of reparations exist, namely restitution, compensation, rehabilitation, and symbolic measures.<sup>55</sup> Restitution includes taking measures to reestablish the situation before the violation occurred, such as the return of property.<sup>56</sup> Compensation

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<sup>54</sup> *Id.* *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* [hereinafter *Basic Principles*] states that remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms." G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim . . . Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. . . . Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) physical or mental harm [including pain, suffering and emotional distress]; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage [including harm to reputation or dignity]; (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services. . . . Rehabilitation should include medical and psychological care as well as legal and social services.

*Id.* ¶¶ 15, 19-21.

<sup>55</sup> U.S. INST. OF PEACE, *supra* note 15, at 16; Jemima García-Godos, *Victim Reparations in Transitional Justice – What is at Stake and Why*, 26 *NORDIC J. HUM. RTS.* 111, 115 (2008).

<sup>56</sup> U.S. INST. OF PEACE, *supra* note 15, at 16; LISA MAGARRELL & LORNA PETERSON, INT'L CTR. FOR TRANSITIONAL JUSTICE, *AFTER TORTURE: U.S. ACCOUNTABILITY AND THE RIGHT TO REDRESS* 22 (Aug. 2010); RHODRI C. WILLIAMS, INT'L CTR. FOR TRANSITIONAL JUSTICE *THE CONTEMPORARY RIGHT TO PROPERTY RESTITUTION IN THE CONTEXT OF TRANSITIONAL JUSTICE* 1 (May 2007). Restitution of rights in homes, land, and property for displaced persons has become important both as a formal legal remedy for displacement and as a practical means of allowing displaced people to return to their reclaimed homes—or sell them in order to finance a new life elsewhere. *Id.*

is monetary reparation, and typically includes the payment of assessable damages, such as material damages, and physical and mental harm.<sup>57</sup> Other forms of compensation include pensions and health benefits.<sup>58</sup> Compensation may extend to family members and, as such, may be in the form of education benefits.<sup>59</sup> Compensation, however, is limited to damage actually incurred as a result of wrongful acts and excludes indirect injuries or damage.<sup>60</sup> Rehabilitation involves the medical and psychological care of victims.<sup>61</sup> States may create rehabilitation centers with legal and social services.<sup>62</sup> Finally, symbolic measures include state apologies, guarantees of non-repetition, construction of memorials, and establishment of commemoration days.<sup>63</sup> Apologies are seldom extended by states, though they are most sought after by victims, as they offer “moral recognition or acknowledgement of their human worth and dignity.”<sup>64</sup> Similarly, guarantees that human rights violations will not occur in the future are intended to assure victims that the state’s reparation mechanisms are genuine.<sup>65</sup>

Countries seeking to implement reparations face several challenges. First, determining appropriate reparations is difficult.<sup>66</sup> There are often a large number of victims, each suffering from a different type of violation.<sup>67</sup> Since the nature of the crimes committed varies, determining the appropriate forms of reparation can be a challenge.<sup>68</sup> Second, collective reparations to large groups at a time may fail to recognize the intimate nature of each crime, and each individual.<sup>69</sup> Finally, compensation alone, without more meaningful accountability and acknowledgement of wrongdoing, may be seen as an attempt to silence the victims or reduce their irreparable losses to monetary payments.<sup>70</sup> Despite these limitations, however, reparations

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<sup>57</sup> MAGARRELL & PETERSON, *supra* note 56, at 21; TRANSITIONAL JUSTICE AND DISPLACEMENT, *supra* note 52, at 17; *see* García-Godos, *supra* note 55, at 124.

<sup>58</sup> U.S. INST. OF PEACE, *supra* note 15, at 16; García-Godos, *supra* note 55, at 124.

<sup>59</sup> U.S. INST. OF PEACE, *supra* note 15, at 16.

<sup>60</sup> MAGARRELL & PETERSON, *supra* note 56, at 21.

<sup>61</sup> U.S. INST. OF PEACE, *supra* note 15, at 16; García-Godos, *supra* note 55, at 124.

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

<sup>63</sup> U.S. INST. OF PEACE, *supra* note 15, at 16; Peter Van der Auweraert, *The Potential for Redress: Reparations and Large-Scale Displacement*, in TRANSITIONAL JUSTICE AND DISPLACEMENT, *supra* note 52, at 143.

<sup>64</sup> MAGARRELL & PETERSON, *supra* note 56, at 24.

<sup>65</sup> *Id.* at 25.

<sup>66</sup> U.S. INST. OF PEACE, *supra* note 15, at 17.

<sup>67</sup> *Id.*; MAGARRELL & PETERSON, *supra* note 56, at 21.

<sup>68</sup> U.S. INST. OF PEACE, *supra* note 15, at 17.

<sup>69</sup> *Id.* at 17.

<sup>70</sup> MAGARRELL & PETERSON, *supra* note 56, at 21.

can be successful in working towards justice and should be available to victims, since such a measure has a direct effect on victims' daily lives.<sup>71</sup> Reparations are most effective when combined with other transitional justice approaches, which include investigative bodies and prosecutions.<sup>72</sup>

#### *D. Vetting Abusive Officials*

Vetting is another effective process that involves removing abusive and corrupt employees from office.<sup>73</sup> This mechanism focuses on reforming systems where human rights violations occurred, such as police systems, prison services, the army, and the judiciary.<sup>74</sup> It is based on the assumption that the public's trust cannot be reestablished without ensuring just and competent public institutions.<sup>75</sup> Vetting is an easier transitional justice instrument to employ than criminal prosecutions, and provides a form of individual accountability for those who were responsible for human right abuses.<sup>76</sup> Even so, vetting should be used in collaboration with other legitimacy-building measures, such as memorials and public apologies, in order to truly reaffirm a commitment to overcome the legacy of systematic abuses.<sup>77</sup>

### III. TRANSITIONAL JUSTICE IN CHILE

In the past two decades, Chile has taken major strides towards becoming a leader in transitional justice. It has implemented several transitional justice measures in order to respond to human rights violations that occurred under its dictatorial government. This Part first discusses the human rights abuses that occurred during the Pinochet regime, specifically in secret prisons like Villa Grimaldi. It then explores the different mechanisms that the Chilean government

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<sup>71</sup> U.S. INST. OF PEACE, *supra* note 15, at 19; MAGARRELL & PETERSON, *supra* note 56, at 21.

<sup>72</sup> U.S. INST. OF PEACE, *supra* note 15, at 17.

<sup>73</sup> *Id.* at 12. Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transnational Reforms*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 482, 484 (Alexander Mayer-Rieckh & Pablo De Greiff eds., 2007).

<sup>74</sup> U.S. INST. OF PEACE, *supra* note 15, at 12. Mayer-Rieckh, *supra* note 73, at 501.

<sup>75</sup> U.S. INST. OF PEACE, *supra* note 15, at 12. Vetting on human rights grounds to exclude war criminals and other perpetrators from public service contribute to dismantling abusive structures. See Ana Cutter Patel, *Transnational Justice, DDR, and Security Sector Reform*, in DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS 262, 277 (Ana Cutter Patel, et al., eds., 2009); Mayer-Rieckh, *supra* note 73, at 484.

<sup>76</sup> U.S. INST. OF PEACE, *supra* note 15, at 13.

<sup>77</sup> Mayer-Rieckh, *supra* note 73, at 502-03.

implemented, namely prosecutions, truth commissions, and reparations, to respond to the human rights abuses.

#### *A. Human Rights Abuses in Chile*

Augusto Pinochet's military coup on September 11, 1973 came during a time when democracies were crumbling throughout South America.<sup>78</sup> In the early 1980s, Pinochet declared a state of siege and used emergency powers to suspend civil and political rights of Chilean citizens.<sup>79</sup> During that time period, widespread and systematic human rights violations occurred.<sup>80</sup> Insurgents and suspected dissidents were detained, tortured, exiled, or killed.<sup>81</sup> According to the Chilean military regime itself, there were at least 42,486 political detentions, with 12,134 individual arrests and 26,431 political arrests.<sup>82</sup> Thousands of individuals were victims of other crimes, which included rape, seizure of private property, imprisonment, and executions.<sup>83</sup> Most of the human rights violations occurred under Pinochet's secret police, the National Intelligence Directorate ("DINA").<sup>84</sup>

Villa Grimaldi, one of Pinochet's most infamous detention centers, was used to interrogate and torture political prisoners.<sup>85</sup> Under Pinochet's orders, the DINA carried out atrocious human rights abuses

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<sup>78</sup> Todd Landman, *Pinochet's Chile: The United States, Human Rights, and International Terrorism*, 4 HUM. RTS. & HUM. WELFARE 91 (2004). The "wave of democratic breakdowns" included Brazil in 1964, Argentina in 1966 and 1976, Peru in 1968, and Uruguay in 1973. *Id.*

<sup>79</sup> *Id.* at 92; Laura McHale, *Legal Lore: The Case against General Augusto Pinochet*, 27 LITIG. 49, 50 (Spring 2001).

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

<sup>81</sup> Landman, *supra* note 78, at 92.

<sup>82</sup> McHale, *supra* note 79, at 50.

The Latin American Institute on Mental Health and Human Rights (ILAS) estimates that 10 percent of the Chilean population in the 1980s was affected by a "repressive situation," defined as being subject to arrests and threats or having relatives in prison. . . . at least 200,000 individuals were subject to "situations of extreme trauma," defined as forced exile, torture, execution, and detention of immediate family members.

*Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The DINA was involved in several international assassinations, including: the car bombing of former General Carlos Prats and his wife in Buenos Aires in 1974, the car bombing of former Foreign Minister Orlando Letelier and his assistant. . . in Washington, D.C., in 1976, and the attempted assassination of Christian Democratic Party founder Bernardo Leighton and his wife in Rome in 1977.

*Id.*

<sup>85</sup> Mark Almborg, *Villa Grimaldi: Chile's [sic] memorial to victims of torture*, PEOPLE'S WORLD (June 8, 2007), <http://www.peoplesworld.org/villa-grimaldi-chile-s-memorial-to-victims-of-torture/>.

in an attempt to wipe out anyone that supported the Communist Party, Socialist Party, Movement of the Revolutionary Left, and other left-wing, progressive organizations.<sup>86</sup> From 1973 to 1978, about 5,000 detainees were brought to Villa Grimaldi, where they were detained and tortured.<sup>87</sup> Over 220 of the political prisoners “disappeared” during their detention; eighteen others were executed.<sup>88</sup>

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<sup>86</sup> *Id.* From 1973-1975, Pinochet targeted specific left-wing parties, initially the Communist Party and Socialist Party, and then the Movement of the Revolutionary Left, and other progressive organizations. Interview with Hugo Rojas Corral, Professor of Sociology of Law, Universidad Alberto Hurtado, in Santiago, Chile (Mar. 4, 2013).

<sup>87</sup> Almborg, *supra* note 84. In his article, Hugo Rojas shares the testimonies he collected from victims who were detained in places like Villa Grimaldi: “In general, the victim-survivors were transferred to centres controlled by the police . . . and the armed forces . . . some of them temporary (e.g., National Stadium, Chile Stadium), some permanent . . . and others clandestine (e.g., Villa Grimaldi, Londres 38).” Hugo Rojas Corral, *Torture in Chile (1973-1990): Analysis of One Hundred Survivors’ Testimonies*, 42 CAL. W. INT’L L.J. 353, 370 (2012).

Living conditions varied from place to place, with poor access to food or hygienic services. *Id.* at 371. One victim recalls having nothing to eat for seventeen days; another recalled receiving a piece of bread and some water only after five days of being detained. *Id.* Other torture victims “urinated in bags and placed excrements wherever space was available (on paper, clothes, books, etc.) so they could later throw it away through the cell’s windows.” *Id.* Overcrowding was a major issue; one victim recalled that “the overcrowding was unbearable . . . the smell was unbearable.” *Id.* Another mentioned, “around thirty prisoners slept overcrowded on the floor, some complained because they had swollen and infected wounds.” *Id.* at 372. Another victim remembered “staying fourteen days in a four square meter cell with six other people.” *Id.* Other detainees had to build the places where they remained as prisoners. *Id.*

Isolation was another method of torture, though the worst things that were mentioned were the cruelties in the interrogations. *Id.* at 373. Pinochet’s forces created false reasons to justify their use of repressive measures after the coup. *Id.* As well as propagandizing that left-wing supporters were “terrorists,” the Armed Forces created *Plan Zeta*, the false idea that radical left-wing sectors prepared a plan to assassinate political leaders of the right-wing movement. *Id.* at 373 n.88. Torturers consistently asked detainees about the “supposed” *Plan Zeta*, places where they hid the weapons, people’s names, meeting places, and forced them to sign confessions. *Id.* at 373. These methods were often combined with physical and psychological torture. *Id.* One victim was tortured for fourteen consecutive days with mock shooting executions, electric shocks to his genitals, and hangings. *Id.* Another victim, a child, was electrocuted on his head and genitals. *Id.* at 374. Rape and other sexual aggressions were used on a large number of women. *Id.* at 375. A five-month pregnant victim was held in solitary confinement for a month and a half and raped countless times. *Id.* Torturers used electricity on her, put mice and spiders in her genitals, and beat her while forcing her to eat excrements and simulated shooting her. *Id.* She ultimately suffered a miscarriage. *Id.*

Among the psychological tortures the victims mentioned, the most common were mock executions, torture threats to relatives, and listening to the torture of other prisoners. *Id.* at 376. Another form of psychological torture was being forced to witness crimes against other detainees. *Id.* A fourteen year old was taken to Villa Grimaldi to witness his father being tortured. *Id.* at 377. Other agents forced several youth to jump on a bonfire, causing them visible burns. *Id.* at 377. Victims shared their emotions they experienced during detention, often feeling “hatred, rage, pain, grief, fear, distress, frustration, resignation, powerlessness, bitterness, and disappointment.” *Id.*

<sup>88</sup> Almborg, *supra* note 85.

After the dictatorship, the military transferred the site in an attempt to demolish it.<sup>89</sup> Though the army demolished the center along with masses of evidence, many survivors, relatives of victims, and the Chilean community as a whole joined together to successfully establish the site's cultural heritage status.<sup>90</sup> In 2007, it was converted into a memorial and became known as Villa Grimaldi Park for Peace.<sup>91</sup>

Pinochet was able to commit these human rights violations with little legal consequence. The Chilean Supreme Court used the Self-Amnesty Law of 1978 to provide immunity to military leaders from being held accountable for the human rights violations committed between 1973 and 1978 (during the "state of siege").<sup>92</sup> Additionally, international organizations, including the UN, were not able to implement any recommendations, since it could not override Chile's national sovereignty.<sup>93</sup> Furthermore, in 1980 a new constitution was approved, which allowed Pinochet to consolidate his power.<sup>94</sup> Under its terms, Pinochet was appointed as president for eight years, a lifetime

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<sup>89</sup> Antonio Traverso & Enrique Azúa, *Villa Grimaldi: a visual essay*, 10 J. OF MEDIA PRAC. 227, 231 (2009). When prisoners were finally released, they were simply let go by the authorities without any explanation. Rojas Corral, *supra* note 87, at 378. Some authorities "took victims to different places around the city and abandoned them in the middle of the night." *Id.* In several instances, agents forced detainees to sign documents that stated the detainees received appropriate treatment during detention. *Id.* Still, even though many were released, often victims felt like agents were still following them. *Id.* at 379. There were also many victims who were given criminal sanctions, including the death penalty. *Id.* Since many survivors were militants and sympathizers of left-wing organizations, they experienced many difficulties post-detention. *Id.* at 381. Many of them were unable to find permanent jobs. *Id.* Those who did resume working often felt isolated from their work communities. *Id.* One victim stated, "They destroyed our professional careers and they changed our quality of life dramatically, causing us a permanent anguish . . . the dictatorship screwed our life projects." *Id.* at 382.

<sup>90</sup> Traverso & Azúa, *supra* note 89.

<sup>91</sup> VILLA GRIMALDI PARK FOR PEACE, <http://villagrimaldi.cl> (last visited Dec. 27, 2013).

<sup>92</sup> Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 IND. INT'L & COMP. L. REV. 409, 417 (2004).

<sup>93</sup> McHale, *supra* note 79, at 50.

The international community was aware of the systematic human rights violations in the aftermath of the coup. In December 1975, the United Nations General Assembly acknowledged state-organized torture, disappearance, and detention. G.A. Res. 3448. The U.N. Ad-Hoc Working Group on Chile, established in 1975, and the Inter-American Commission on Human Rights of the Organization of American States documented these human rights violations. In 1976, the Working Group concluded that the international community should prosecute cases of torture as crimes against humanity. U.N. Doc. A/31/253 ¶ 511 (1976). [However,] [i]n the absence of an international criminal court, it was not possible to comply with this recommendation without violating the national sovereignty of Chile.

*Id.*

<sup>94</sup> Sullivan, Jr., *supra* note 92, at 417.

senator, and commander-in-chief of the military.<sup>95</sup> Even when President Patricio Aylwin was elected in 1990, Pinochet still maintained control of the military and remained a senator for life. Since he still exerted considerable influence over the government for most of the 1990s,<sup>96</sup> there was little prospect of redress until his arrest.

### *B. Responses to Human Rights Abuses*

When Patricio Aylwin became president of Chile in 1990, the country was still in a state of conflict. Pinochet still held significant power, both as commander of the military and as a senator for life.<sup>97</sup> Aylwin, a staunch advocate of human rights, wished to expose the brutality that occurred during the Pinochet regime, and promised the Chilean people that the past would be uncovered.<sup>98</sup> Due to the power still maintained by Pinochet, politically and militarily, however,

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 417-18. Pinochet was arrested in 1998 in London at the request of Spanish authorities who sought his extradition to Spain on charges of human rights abuses while he ruled Chile. Jonathan Kandell, *Augusto Pinochet, Dictator Who Rule by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006), [http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/12/11/world/americas/11pinochet.html?pagewanted=all&_r=0). His arrest resulted from “a warrant issued by a Spanish investigator magistrate, Baltasar Garzón, who had been working for years to hold Latin American military leaders responsible for systematically using illegal detentions, abductions, tortures, murders, and disappearances in order to exterminate political opposition.” Rebecca Evans, *Pinochet in London—Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 HUM. RTS. Q. 207, 209 (2006). Pinochet was returned to Chile, though at that point he was no longer considered a powerful figure. *Id.* at 210. He found little support in conservative political parties. *Id.* The number of judges that he had named to the bench prior to the transition to democratic rule was few, and the courts began to challenge the Self-Amnesty law of 1978. *Id.* Pinochet was indicted by Judge Juan Guzmán Tapia and charged with numerous crimes. ELIN SKAAR, JUDICIAL INDEPENDENCE AND HUMAN RIGHTS IN LATIN AMERICA: VIOLATIONS, POLITICS, AND PROSECUTIONS 97, 104-05 (Palgrave Macmillan 2011). The first step in prosecuting Pinochet was to strip him of his senatorial immunity (“disafuero”). *Id.* at 104. Judge Guzmán requested that Pinochet’s immunity be lifted in connection with the so-called Caravana de la Muerte (“Death Caravan”), a killing spree that took place shortly after the 1973 coup, in which a special commission of military officers traveled to various locations in Chile, torturing and executing political activists under Pinochet’s direct orders. *Id.* at 105. In 2000, the Santiago Court of Appeals ruled in favor of disafuero of Pinochet in regards to the Caravana de la Muerta, and the Supreme Court upheld the decision. *Id.*; see also CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR 104-06 (The Pa. State Univ. Press 2010) (discussing the Caravana de la Muerta case). In 2002, the Supreme Court determined that he suffered from “moderate dementia,” though this status was revoked in 2004. See Evans, *supra*. He died in 2006 without ever being convicted. Kandell, *supra*.

<sup>97</sup> SKAAR, *supra* note 96, at 97.

<sup>98</sup> *Id.* Aylwin’s goal was to achieve reconciliation and to bring past human rights violations to light. *Id.* He promised to “bring to trial anyone who had committed particularly atrocious abuses under the old regime.” *Id.*

Aylwin's hands were "legally, constitutionally, and politically tied."<sup>99</sup>

This Part explores three main approaches that the post-Pinochet Chilean government, under the presidencies of Aylwin, Eduardo Frei, Ricardo Lagos, and Michelle Bachelet, employed in response to the past human rights abuses. The primary transitional justice mechanisms used included truth commissions, reparation programs, and criminal prosecutions.<sup>100</sup>

### *1. Truth Commissions and Reparations*

Aylwin sought to create a truth commission to investigate the human rights abuses that occurred during the Pinochet regime. He created the "Truth and Reconciliation Commission" (referred to as the "Rettig Commission") by executive decree a month after assuming power.<sup>101</sup> This commission was mandated to document human rights abuses of fatal torture, executions, and disappearances that occurred from September 11, 1973 to March 11, 1990.<sup>102</sup> The truth commission was limited in several respects. First, the commission was limited to fatal human rights violations and disappearances.<sup>103</sup> It could not

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<sup>99</sup> *Id.* During the time Aylwin was elected, the military was still intact. *Id.* Pinochet had barely lost the elections and enjoyed support among right-wing Chileans. *Id.* Pinochet orchestrated two staged outbreaks of military unrest, in an effort to prevent lawyers from speeding up court cases against the military. *Id.* This sent a strong message that the military was still able to exert its influence over Aylwin's democratic rule. *Id.* at 97-98.

<sup>100</sup> Pablo De Greiff, *Vetting and Transitional Justice*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 522, 529 (Alexander Mayer-Rieckh & Pablo De Greiff eds., 2007). No formal vetting procedures were established in Chile. *Id.* at 527. Archives of the Special Forces were destroyed in order to make it impossible to hold officials accountable before the courts. Adam Czarnota, *The Politics of the Lustration Law in Poland, 1989-2006*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 222, 249 (Alexander Mayer-Rieckh & Pablo De Greiff eds., 2007).

<sup>101</sup> Supreme Decree No. 355, April 25, 1990, DIARIO OFICIAL [D.O.] (Chile); SKAAR, *supra* note 96, at 99. The truth commission was referred to as the "Rettig Commission," named after Raúl Rettig, the chairman of the truth commission. COLLINS, *supra* note 96, at 62, 79.

<sup>102</sup> See Hayner, *supra* note 32, at 621.

The commission worked for nine months to investigate the 3,400 cases brought to it. . . . Unlike many truth commissions, this commission thoroughly investigated each case; with over sixty staff members, the commission was able to cover each case by assigning 200 cases to each team of two legal experts (a lawyer and law school graduate).

*Id.* The commission was comprised of eight commissioners, six men and two women. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 26 (1991), available at <http://www.usip.org/publications/truth-commission-chile-90>; COLLINS, *supra* note 96, at 79.

<sup>103</sup> Supreme Decree No. 355, April 25, 1990, DIARIO OFICIAL [D.O.] (Chile); SKAAR, *supra* note 96, at 99.

investigate other forms of human rights abuses.<sup>104</sup> Second, the truth commission could not publish the names of the perpetrators.<sup>105</sup> Third, a lot of witness testimony was kept secret and the military was promised little to no punishment in exchange for information regarding human rights violations.<sup>106</sup>

The commission released the "Rettig Report" in February 1991. The commission's final report documented 3,428 cases of disappearances, killing, torture, and kidnapping, including accounts of nearly all the victims whose stories were heard.<sup>107</sup> The commission recommended the establishment of a reparations program to provide continuing assistance to victims that testified.<sup>108</sup> It suggested that reparations should include symbolic measures as well as financial, medical, and legal assistance.<sup>109</sup> Finally, the commission recommended the adoption of human rights legislation, the creation of an ombudsman's office, and the strengthening of civilian authority in Chilean society and in the judiciary.<sup>110</sup>

As a direct result of the truth commission, the Aylwin administration established the "National Corporation for Reparation and Reconciliation."<sup>111</sup> This reparations program provided ongoing financial support for families of victims who were named in the commission's report, totaling approximately \$16 million annually.<sup>112</sup> Nonetheless, the reparations program was limited by the fact that the

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<sup>104</sup> SKAAR, *supra* note 96, at 100. Notably, the Commission did not document any incidents of nonfatal torture. *Id.*

<sup>105</sup> *Id.* at 100. It was only allowed to name the victims. *Id.*

<sup>106</sup> SKAAR, *supra* note 96, at 100.

<sup>107</sup> REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *supra* note 102, at 1122. There were 2,920 total cases investigated, plus an additional 508 cases received by the Commission that did not fit within its mandate. *Id.* Most of the forced disappearances committed by the government took place between 1974 and 1978 as a systematic strategy of the government. *Id.* at 8. The DINA was responsible for a significant amount of political repression during this period. *Id.* at 52.

<sup>108</sup> *Id.* at 1057.

<sup>109</sup> *Id.* at 1058-69.

<sup>110</sup> *Id.* at 1077-97; Gregory L. Smith, *Immune to Truth? Latin American Truth Commissions and U.S. Support for Abusive Regimes*, 33 COLUM. HUM. RTS. L. REV. 241, 255 (2001) ("...part of the purpose of describing the domestic institutions and policies responsible for such horrendous abuses is to educate in the hope that a forewarned citizenry will not permit the state to engage in similar acts in the future."). Both human rights organizations and the public commended the commission's final report. In presenting the 1,800-page report to the public, President Aylwin formally apologized to the victims and their families on behalf of Chile, and asked the army to acknowledge its role in the violence. TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, VOL. 1: GENERAL CONSIDERATIONS 236 (Neil J. Kritz, ed., Sept. 1995).

<sup>111</sup> Law No. 19.123, Enero 31, 1992, DIARIO OFICIAL [D.O.] (Chile).

<sup>112</sup> *Id.* at Title II.

Rettig Commission could not address victims of human rights violations outside of its mandate, namely victims of torture that did not result in death or disappearance.<sup>113</sup>

In September 2003, President Lagos appointed a second truth commission, called the “National Commission on Political Imprisonment and Torture,” often referred to as the “Valech Commission.”<sup>114</sup> The Valech Commission expanded the previous mandate to include investigation of additional abuses, including torture, political imprisonment, and other civil rights abuses committed under the military dictatorship.<sup>115</sup> The Valech Commission issued its report in November 2004.<sup>116</sup> Its initial report was based on the testimony of 35,868 people, with a complementary report including an additional 1,204 cases.<sup>117</sup> The commission recommended reparations for the identified victims of detention and torture, including pensions, educational and health benefits, as well as collective symbolic measures.<sup>118</sup> In 2005, the Chilean government provided 28,459 registered victims and their families with lifelong governmental compensation (approximately \$200 per month).<sup>119</sup> President Bachelet

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<sup>113</sup> Interview with Elizabeth Lira, Center for Ethics, Universidad Alberto Hurtado, in Santiago, Chile (Mar. 7, 2013).

<sup>114</sup> INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, Y REPUESTAS INSTITUCIONALES [REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE] (2004), available at <http://www.hpcresearch.org/mrf-database/pdf/valechreport.pdf>. THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN 97-98 (Jessica Almqvist and Carlos Espósito eds., 2012). Monsignor Sergio Valech was the chairman of the commission. COLLINS, *supra* note 96, at 94. Elizabeth Lira, an interviewee for this paper, was also a member of the commission. Interview with Elizabeth Lira, *supra* note 113.

<sup>115</sup> Interview with Elizabeth Lira, *supra* note 113; REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114, at 297.

<sup>116</sup> Interview with Elizabeth Lira, *supra* note 113; REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114.

<sup>117</sup> REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114, at 305. About two-thirds of the abuses documented in the Valech commission took place immediately following the coup. *Id.* at 334; SKAAR, *supra* note 96, at 114; Interview with Elizabeth Lira, *supra* note 113.

<sup>118</sup> Interview with Elizabeth Lira, *supra* note 113; REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114, at 493. One notable measure was memorializing Villa Grimaldi as a Park for Peace.

<sup>119</sup> Interview with Elizabeth Lira, *supra* note 113; *Commission of Inquiry: Chile 03*, UNITED STATES INST. OF PEACE, <http://www.usip.org/publications/commission-inquiry-chile-03> (last visited Jan. 8, 2014).

reopened the Valech Commission's work in 2009.<sup>120</sup> It added around 9,800 additional names to the already long list of victims.<sup>121</sup> Reopening the commission allowed the newly identified victims to also receive government reparations.<sup>122</sup>

The second truth commission, the Valech Commission, was particularly important in that it involved communication with the military.<sup>123</sup> While the Chilean military vehemently opposed and rejected the Rettig Report in 1991, the new military leadership in 2003 collaborated with members of the Valech Commission in order to distance itself from its past crimes.<sup>124</sup> However, one negotiated term agreed upon by the military and the Valech Commission was that the testimonies of the victims in the report would remain classified and kept secret for fifty years.<sup>125</sup>

## 2. Criminal Prosecutions

Even though Aylwin wished to bring to trial those who had committed abuses under the old regime, there were several laws in place that prevented criminal offenses from being prosecuted.<sup>126</sup> The Self-Amnesty Law of 1978 granted immunity for criminal offenses, including forced disappearances, extrajudicial executions, and torture committed by agents between September 1973 and March 1978 (the

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<sup>120</sup> Mariano Castillo & Ivan Carvajal, *Chile Adds Thousands to List of Dictatorship-era Victims*, CNN (Aug. 20, 2011, 3:18 PM), <http://www.cnn.com/2011/WORLD/americas/08/20/chile.valech.commission/index.html>. New victims discovered through judicial inquiries were also eligible for reparations. *Commission of Inquiry: Chile 03*, *supra* note 119.

<sup>121</sup> Castillo & Carvajal, *supra* note 120. Under President Bachelet's administration, Chile created the Instituto Nacional de Derechos Humanos (National Human Rights Institute) (INDH). The INDH was created in 2009 as an independent human rights body charged with promoting and protecting human rights in Chile. Laura Seelau & Ryan Seelau, *Indigenous Focus: Chile's National Institute of Human Rights to Hold Event Thursday, Release Report*, I LOVE CHILE (Dec. 14, 2011), <http://www.ilovechile.cl/2011/12/14/indigenous-focus-chiles-national-institute-human-rights-hold-event-thursday-release-report/42101>.

<sup>122</sup> *Valech Commission Accepts New Human Rights Case*, THE SANTIAGO TIMES (Feb. 18, 2010, 7:04 AM), <http://santiagotimes.cl/valech-commission-accepts-new-human-rights-case/>.

<sup>123</sup> Interview with Elizabeth Lira, *supra* note 113; REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114; COLLINS, *supra* note 96, at 94.

<sup>124</sup> Interview with Elizabeth Lira, *supra* note 113; *Commission of Inquiry: Chile 03*, *supra* note 119; COLLINS, *supra* note 96.

<sup>125</sup> REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE, *supra* note 114, at 313. This does not include testimony that is used as potential evidence. Interview with Elizabeth Lira, *supra* note 113.

<sup>126</sup> SKAAR, *supra* note 96, at 97-98.

“state of siege”).<sup>127</sup> Criminal prosecutions were legally limited to crimes committed after 1978.<sup>128</sup> As a result, the worst abuses, which occurred during the state of siege, were shielded from legal prosecution. Additionally, the statute of limitations for criminal cases involving murder was set at fifteen years.<sup>129</sup> This meant that the crimes committed at the height of the repression, beginning in 1973, reached their statutory limit in 1988. Crimes that were committed after 1978 began reaching their limits in 1993.<sup>130</sup> As a result, many of the crimes that were not protected by the amnesty law had already exceeded the time limit during Aylwin’s presidency.<sup>131</sup> Finally, although the Chilean Supreme Court was independent of the military’s power, Pinochet had packed the Supreme Court with his supporters.<sup>132</sup> As a result, Pinochet-friendly judges opted not to take on human rights cases, and also discouraged other judges on lower courts from doing so.<sup>133</sup>

In spite of these legal limitations, several shifts occurred in the 1990s that allowed a strong resurgence of criminal prosecutions. In 1994, under Frei’s presidency, the Supreme Court surprisingly upheld the appellate court’s verdict against Contreras and Espinoza, two prominent members of the DINA, in the Letelier case.<sup>134</sup> Additionally, Frei began a series of judicial reforms that changed the way the judiciary handled cases involving human rights violations.<sup>135</sup> He increased the number of Supreme Court members from 17 to 21, reserving five posts on the Court for lawyers from outside the judiciary.<sup>136</sup> He also set a compulsory retirement age of 75 and

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<sup>127</sup> *Id.* at 98. There were a few exceptions to the amnesty law, particularly the Letelier case. *Id.* at 101.

<sup>128</sup> *Id.* at 98.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 98-99. In Chile, judges are appointed based on judicial merit, and many may realistically aspire to become judges of higher courts. *Id.* at 98. Because the Supreme Court controls the promotion of lower court judges through the appointment system, lower court judges are discouraged from making unpopular decisions that could damage their careers. *Id.* These limitations curbed most appellate court judges from being active in pursuing human rights cases. *Id.*

<sup>133</sup> *Id.* at 99. A noted example is the suspension of Judge Carlos Cerda of the Santiago Court of Appeals for having taken on human rights cases. *Id.*

<sup>134</sup> The Letelier case refers to the assassination of Orlando Letelier, a Chilean political figure and appointed ambassador to the United States in 1971. The military vehemently opposed the prison sentences of Contreras and Espinoza, although there was no uprising. However, the Frei government compromised on the conditions that the two would serve their sentences. SKAAR, *supra* note 96, at 101-02.

<sup>135</sup> *Id.* at 102.

<sup>136</sup> *Id.* at 102-03.

shortened the term for the Supreme Court president from three to two years.<sup>137</sup> Frei also added another important new feature, requiring Supreme Court justice appointees to be approved by two-thirds of the Senate.<sup>138</sup>

Even though Pinochet's arrest in 1998 brought a multitude of legal actions against his military, President Frei's judicial reforms allowed for perpetrators of human rights abuses to be prosecuted prior to this event. In mid-1998, the Chilean Supreme Court held in the *Poblete-Cordoba* case that a disappearance where no body has been found amounted to kidnapping, which is considered a "continuing crime," and not covered by amnesty or the statute of limitations.<sup>139</sup> After Pinochet's arrest, separate cases were lodged in Chilean courts against hundreds of other military men, particularly from 1998 to 2001 when the most dramatic increase in the number of trials took place.<sup>140</sup> Several high-profile judges led the prosecutions of military commanders in the Santiago Court of Appeals, including Judge Juan Guzmán Tapia and Judge Milton Juica.<sup>141</sup> They oversaw the prosecutions of many involved in the DINA and CNI ("Centro Nacional de Informaciones"), which succeeded the DINA. The prosecution of military commanders continued throughout Lagos' presidential term, and into Bachelet's.<sup>142</sup> While Lagos seemed more ambivalent towards prosecuting Pinochet and the military, Bachelet, who herself was tortured at Villa Grimaldi, pushed to continue remedying past violations.<sup>143</sup> Her commitment to human rights continued throughout her presidency.<sup>144</sup>

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<sup>137</sup> *Id.* at 103.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (discussing Corte Suprema de Justicia [C.S.J.] [Supreme Court], 9 septiembre 1998, "Poblete-Cordoba," Rol de la causa: 469-98; REVISTA FALLOS DEL MES [R.F.M.] No. 478 p. 1760-69 (Chile). This became an extremely important precedent for future judgments in cases of forced disappearances. *Id.*

<sup>140</sup> *Id.* at 107.

<sup>141</sup> *Id.* at 108-09.

<sup>142</sup> *Id.* at 115. COLLINS, *supra* note 96, at 85.

<sup>143</sup> SKAAR, *supra* note 96, at 115. Lagos refrained from making Pinochet's fate a platform during his election, and instead opted to focus on employment and poverty. He openly stated that he would leave that to the courts, stating, "the election was not so much about recriminations concerning the past but much more about policies for the future." *Id.* at 112. Despite this ambivalence, there were several high-profile human rights cases during Lagos's presidency. Additionally, a notable achievement during the Lagos presidency was a better relationship with the military. This benefited subsequent prosecutions as well as the second truth commission. *Id.*

<sup>144</sup> *Id.* at 115. Many human rights organizations hoped that Bachelet would be more likely to understand and support their demands when she took power. During her term, she visited Villa Grimaldi Park of Peace, announced plans for a national Museum of Memory and a state Human Rights Institute. A major milestone during Bachelet's term, however, was Pinochet's death. COLLINS, *supra* note 96, at 96.

By the end of Bachelet's presidency in December 2009, there were "325 active investigations underway into past human rights violations, 293 of which concerned deaths and disappearances, covering 1,021 victims."<sup>145</sup> A total of 779 former regime agents had been indicted, charged, or sentenced for human rights violations.<sup>146</sup> "Since 2000, 280 former security agents had received a total of 493 guilty verdicts."<sup>147</sup> There were 3,105 formal investigations and indictments pending against 563 former regime agents.<sup>148</sup>

Even though Chile has taken dramatic steps in improving its criminal prosecutions since its transition to a democratic government, disappearances have continued to be a prevalent legal issue in recent years, and many challenges remain in terms of ensuring that justice is served.<sup>149</sup> In August 2012, a panel of U.N. human rights experts urged Chile to make sure that people convicted for involvement in the forced disappearance of Chilean citizens were serving their sentences.<sup>150</sup> Due to the light penalties imposed and other benefits that were granted, very few of the convicted perpetrators were effectively serving their sentences.<sup>151</sup> The U.N. Working Group on Enforced or Involuntary Disappearances ("WGEID") also recently called on Chile to speed up its judicial process.<sup>152</sup>

Despite political and legal limitations in criminally prosecuting perpetrators of human rights abuses, Chile's steps to ensure effective

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<sup>145</sup> SKAAR, *supra* note 96, at 117. This amounts to roughly a third of all known victims of these crimes. *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Max Slater, *Chile Urged To Ensure Justice For Victims Of Enforced Disappearances*, JURIST (Aug. 23, 2012, 12:35 PM), <http://jurist.org/paperchase/2012/08/chile-urged-to-ensure-justice-for-victims-of-enforced-disappearances.php>.

In October 2010, a Guatemalan judge sentenced two former national police officers to 40 years in prison for the 1984 forced disappearance of Fernando Garcia. In June 2010, a Colombian judge issued a landmark judgment against army colonel Luis Alfonso Plazas Vega for the forced disappearance of 11 people after the 1985 hostage situation at the Palace of Justice in Bogota, sentencing him to 30 years in prison. In November 2009 the Argentine Senate approved a law that authorizes the government to obtain DNA samples from individuals suspected to have been born to forced disappearance victims of the 1976-1983 "Dirty War." In September 2009 a Guatemalan paramilitary was convicted and sentenced to 150 years in prison for the enforced disappearance of six indigenous persons during the Guatemalan civil war.

*Id.* (internal citations omitted).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* The Declaration on the Protection of all Persons from Enforced Disappearances requires that acts of forced disappearances be sanctioned in accordance with the gravity of the crime. *Id.*

<sup>152</sup> *Id.*

truth commission and reparation programs to investigate the truth and provide reparations for the victims of human rights abuses became a model not only for Latin America, but the rest of the world. Chile's model of complementing truth commissions with criminal trials provided a more effective means of investigating the truth and pursuing justice.<sup>153</sup>

#### IV. TRANSITIONAL JUSTICE IN THE UNITED STATES

In the past decade, the United States' counterterrorism policies have become notorious for their systematic human rights violations under national and international law.<sup>154</sup> This Part first discusses the human rights abuses that continue to occur in detention facilities like Guantánamo Bay detention center. It then explores how mechanisms that Chile used can be implemented in this situation to appropriately address past human rights violations and prevent future abuses.

##### *A. Human Rights Abuses under the United States Government*

As a response to the September 11 terrorist attacks, the Bush administration declared a "national state of emergency" on September 14, 2001.<sup>155</sup> Following that declaration, a series of laws and executive orders were enacted that severely curtailed the freedoms of the

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<sup>153</sup> Call, *supra* note 13, at 104.

<sup>154</sup> CTR. FOR CONSTITUTIONAL RIGHTS, CURRENT CONDITIONS OF CONFINEMENT AT GUANTÁNAMO: STILL IN VIOLATION OF THE LAW 3 (2009), available at <http://www.amnesty.org.au/hrs/comments/20595> (describing the torture the detainees experience, including solitary confinement, sensory deprivation, physical attacks, force feeding, and abuse of psychologically ill detainees).

<sup>155</sup> David Badash, *9/11: Obama Extends U.S. National State of Emergency One More Year*, THE NEW CIVIL RIGHTS MOVEMENT (Sept. 9, 2011), [http://thenewcivilrights\\_movement.com/911-obama-extends-u-s-national-state-of-emergency-one-more-year/politics/2011/09/09/26714](http://thenewcivilrights_movement.com/911-obama-extends-u-s-national-state-of-emergency-one-more-year/politics/2011/09/09/26714). A national state of emergency cannot continue for more than two years without being renewed by the President. In September 2011, President Obama notified Congress that he would be extending the U.S. national state of emergency with respect to the September 11 terrorist attacks for one more year. *Id.* The United States has been in a state of national emergency continuously over the past thirty years, since President Carter declared it during the Iran hostage crisis. Most recently, President Barack Obama extended the national emergency with respect to Iran (Executive Order 12170 on November 14, 1979) in November 2012. Exec. Order No. 22742, 77 Fed. Reg. 219 (Nov. 9, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-11-13/pdf/2012-27742.pdf>.

American people.<sup>156</sup> As the War on Terror progressed, detention camps

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<sup>156</sup> Six weeks after 9/11, Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,” known as the “USA PATRIOT Act.” Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). While the Patriot Act was an attempt to combat terrorism and protect the American people, it curtailed many civil liberties expressly protected in the Constitution. It attempted to deter and punish terrorist acts both domestically and internationally by strengthening law enforcement investigatory tools. The Act had the greatest impact in four key areas: “(1) enhancing the federal government’s capacity to share intelligence; (2) strengthening the criminal laws against terrorism; (3) removing obstacles to investigating terrorism; and (4) updating the laws to reflect new technology.” U.S. DEP’T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 2-3 (July 2004), available at [http://www.justice.gov/olp/pdf/patriot\\_report\\_from\\_the\\_field0704.pdf](http://www.justice.gov/olp/pdf/patriot_report_from_the_field0704.pdf). The Act mainly curtailed electronic communication and financial privacy in an attempt to protect national security. *USA PATRIOT Act*, FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, [http://www.fincen.gov/statutes\\_regs/patriot/index.html](http://www.fincen.gov/statutes_regs/patriot/index.html) (last visited Jan. 8, 2014).

The Patriot Act reduced civil liberties in relation to electronic communication. It revised the National Security Act of 1947, the Foreign Intelligence Surveillance Act (FISA), Wiretap Act, and the Electronic Communications Privacy Act (ECPA), and created agencies to specifically fight terrorism, including the Department of Homeland Security. The National Security Act of 1947 reorganized the U.S. Armed Forces, foreign policy, and counterintelligence after World War II. It created a comprehensive program for U.S. security through creating military, intelligence, and national security agencies, including the National Security Council and the Central Intelligence Agency (CIA). The Patriot Act amended this statute, as well as many others pertaining to national security and intelligence. Title IX of the Patriot Act amended the National Security Act to require the Director of Central Intelligence to organize requirements for foreign intelligence under FISA and assist the U.S. Attorney General to ensure that information derived from electronic surveillance or physical searches are distributed efficiently. U.S. DEP’T OF JUSTICE, *supra*; JAMES G. MCADAMS, DEP’T OF HOMELAND SECURITY, FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA): AN OVERVIEW (Mar. 2007) [hereinafter *FISA: An Overview*], available at <http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/foreign-intelligence-surveillance-act.html>.

FISA was created to provide oversight of the government’s surveillance activities of foreign entities and individuals in the United States, while maintaining the secrecy needed to protect national security. FISA typically requires a court order permitting surveillance; to use FISA, the government must show probable cause that the surveyed target is a foreign power or agent of a foreign power. However, the President may authorize electronic surveillance without a court order within the United States for up to one year, provided that it is only for foreign intelligence information targeting foreign powers or their agents, and there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party. If it turns out that a United States person is involved, judicial authorization is required within 72 hours *after* surveillance begins, which raises Fourth Amendment issues of citizens’ privacy. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* (2012).

were set up in various places, including Iraq and Afghanistan.<sup>157</sup> In January 2002, the Bush administration established a detention facility in Guantánamo Bay, Cuba.<sup>158</sup>

The United States authorized and fostered systematic human rights violations towards suspected terrorists in its detention facilities.<sup>159</sup> The CIA and Department of Defense (“DOD”) developed specific abusive interrogation techniques to be used on detainees.<sup>160</sup> Several Department of Justice (“DOJ”) lawyers produced memoranda that argued that the Geneva Conventions did not protect detainees, applying a drastically

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The Patriot Act created the Department of Homeland Security to investigate and prosecute terrorist acts and protect economic security. It also monitored relations between terrorism and other crimes, such as illegal drug trafficking. The Department shares control over intelligence information governed by the Patriot Act and FISA. With blurred lines and shared powers, the Director of the Office of Homeland Security is connected to electronic surveillance, as well as the President and Attorney General. Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH. L. REV. 1, \*28-\*29 (2004).

<sup>157</sup> Michael J. Strauss, *The Creation and Evolution of the Legal Black Hole At Guantánamo Bay*, 20 ASS'N FOR THE STUDY OF THE CUBAN ECON.: CUBA IN TRANSITION 286 (2010), available at <http://www.ascecuba.org/publications/proceedings/volume20/pdfs/strauss.pdf>. The U.S. decision to use its naval station at Guantánamo Bay, Cuba, as a detention center for alleged terrorists was based largely on the fact that the site was a “legal black hole.” *Id.* Guantánamo Bay is part of Cuba’s sovereign territory but is not covered by the Cuban legal system. While it is controlled by the U.S., it is covered only partially by the U.S. legal system. As a result, there is a gap where no jurisdiction is exercised by either state, and where no jurisdiction can be imposed by outside sources under international law. Thus, Guantánamo Bay is “an area where a certain range of activities may occur in the absence of any legal framework.” *Id.* A series of court cases has recently refined the U.S. jurisdiction over Guantánamo, as it relates to the constitutional rights of non-U.S. nationals being held as asylum seekers, or as prisoners in the fight against terrorism. *Id.* at 289. In the 2008 case *Boumediene v. Bush*, the Supreme Court ruled that the U.S. Constitution does apply to the territory. *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>158</sup> CAROLYN PATTY BLUM ET AL., INT’L CTR. FOR TRANSITIONAL JUSTICE, PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS 8 (Nov. 2009). At first, the Bush administration asserted that detainees were not entitled to any of the protections of the Geneva Conventions. *Id.* at 11. However, the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* held otherwise. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>159</sup> BLUM ET AL., *supra* note 158, at 3. There is abundant evidence to prove that serious abuses occurred across U.S. detention facilities in Guantánamo, CIA prisons, and detention facilities in Iraq and Afghanistan. The evidence includes reports and investigations by the DOJ, DOD, CIA, Congressional committees, the International Committee of the Red Cross (“ICRC”), NGOs; interviews with former detainees, guards, and interrogators; academic studies; legal filing documents; accounts of U.S. service men and women; and declassified U.S. government documents. *Id.* at 7. The systematic nature of these crimes qualifies as them as “system crimes,” which are characterized by a “division of labor between planners and implementers, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish.” *Id.* at 14. Government agents commit these system crimes with the approval of powerful commanders. *Id.*

<sup>160</sup> *Id.* at 11.

narrow definition of torture.<sup>161</sup> These memoranda were used to justify techniques, such as waterboarding, sleep deprivation, stress positions, and physical force, as appropriate interrogation tools under a broader interpretation of Presidential authority during the “War on Terror.”<sup>162</sup>

The United States’ counterterrorism policies permitted the unlawful detention and the enforced disappearances of many prisoners.<sup>163</sup> A number of deaths occurred in facilities in Iraq and Afghanistan.<sup>164</sup> In early 2004, a number of photographs exposed the abuses that took place in Abu Ghraib.<sup>165</sup> The human rights violations in Abu Ghraib became known throughout the world, which included rape

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<sup>161</sup> Memorandum from the Office of the Deputy Assistant Attorney Gen. to the Gen. Counsel of the Dep’t of Def. 16 (Mar. 14, 2003), *available at* [http://gulcfac.typepad.com/georgetown\\_university\\_law/files/march.14.memo.part1.pdf](http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf); BLUM ET AL., *supra* note 158, at 11. The memo’s narrow definition of torture allowed interrogators and policy-makers from being prosecuted for the crimes of torture. *Id.* Also referred to as the “torture memos,” the set of three legal memoranda were written by John Yoo, Deputy Assistant Attorney General of the U.S. and signed by Assistant Attorney General, Jay S. Bybee, head of the Office of Legal Counsel of the United States Department of Justice. The controversial memo included the arguments that neither Congress nor international treaties could limit the President’s authority. *Id.* at 19. “Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.” *Id.* Yoo further added, “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.” *Id.* Finally, he notes, “Any presidential decision to order interrogation methods that are inconsistent with the [Convention Against Torture] would amount to a suspension or termination of those treaty provisions.” *Id.* at 47; BLUM ET AL., *supra* note 158, at 11.

<sup>162</sup> BLUM ET AL., *supra* note 158, at 11; CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 154. The organization described the inhumane conditions that detainees suffer from. *Id.* at 3. It notes that most of the detainees have never been charged nor had an opportunity to challenge the legality of their detention in a habeas corpus hearing. *Id.* Detainees have consistently reported sensory deprivation; they are often prevented from sleeping due to conditions in the camp. *Id.* at 7. Fluorescent lights are continuously on in some camps, bed sheets are considered a privilege, and guards often kick the cell doors. *Id.* An attorney for one detainee recalled, “bright lights are kept on 24 hours a day. [The detainee] is given 15 sheets of toilet paper a day, but because he used his sheets to cover his eyes to help him sleep, his toilet paper—considered another comfort item—has been removed for ‘misuse.’” *Id.* That detainee was released on March 31, 2007, after four years in prison, without ever being charged or tried for any crime. *Id.* Another detainee recalls being shackled and beaten by several guards. *Id.* at 8. They blocked his nose and mouth until he felt like he would suffocate, and subsequently repeatedly beat him in the ribs and head. *Id.* A guard urinated on his head. *Id.* Detainees suffer from psychological abuse as well. *Id.* at 9. “Prisoners have been denied information about their test results, existing diseases, and the nature and the risk of drugs and procedures to which they were subjected.” *Id.* at 10. The detainees forcibly receive unwanted medical care, and suffer from a lack of proper food, water, sanitation, as well as isolation, fear, and mistreatment. *Id.*

<sup>163</sup> *Id.* at 14.

<sup>164</sup> BLUM ET AL., *supra* note 158, at 9.

<sup>165</sup> Seymour M. Hersh, *Chain of Command*, THE NEW YORKER (May 17, 2004), [http://www.newyorker.com/archive/2004/05/17/040517fa\\_fact2](http://www.newyorker.com/archive/2004/05/17/040517fa_fact2).

and torture.<sup>166</sup> Despite the worldwide criticism that the United States government received regarding conditions at the Abu Ghraib prison, Vice President Dick Cheney defended the legality of the counterterrorism policies of “enhanced interrogations” and blamed the abuses on “a few bad apples.”<sup>167</sup>

Even though the Obama administration intended to close the Guantánamo Bay detention facility by January 2010, delays and opposition have led the facility to remain open.<sup>168</sup> Several concerns have been raised in terms of transferring detainees to the United States or other countries.<sup>169</sup> A large bipartisan opposition to transferring Guantánamo prisoners to American prisons exists.<sup>170</sup> Additionally, some prisoners are considered too dangerous to be released, although there is not enough evidence to prosecute them.<sup>171</sup> A large number of detainees have been cleared for release, but have nowhere to go.<sup>172</sup> Furthermore, many prisoners that have been convicted in military tribunals are currently serving sentences at Guantánamo Bay.<sup>173</sup>

As the transfer of detainees remains at a standstill, human rights abuses continue.<sup>174</sup> In April 2013, the International Committee of the

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<sup>166</sup> Hersh, *supra* note 165. Domestic and international legal obligations require that these crimes be prosecuted. The Torture Convention requires domestic prosecution of torture, which the U.S. has signed and ratified. Investigations should include the illegality of “enhanced interrogation techniques.” BLUM ET AL., *supra* note 158, at 17, 19.

<sup>167</sup> *Id.* at 14. Cheney remarked that the “few sadistic guards” who were involved in the Abu Ghraib abuses were different from the “lawful, skillful, and entirely honorable” work of the CIA agents. *Id.* In total, only twelve people were prosecuted through military justice at Abu Ghraib. Seven soldiers pled guilty. Many officers raised a defense of “superior orders.” The officers involved received a variety of penalties, including demotions, fines, prison sentences, and dishonorable discharges. While the Abu Ghraib prosecutions set an example of criminal accountability for abuses, they indicated a broad failure to engage a systematic investigations and the prosecution of direct perpetrators and command involvement. *Id.* at 21-22.

<sup>168</sup> Q & A: *Closing Guantánamo*, BBC (Nov. 10, 2010), <http://www.bbc.co.uk/news/world-us-canada-11623753>. See also Lalit K Jha, *US Monitoring The Situation In Guantánamo Bay*, MSN NEWS (Apr. 16, 2013), <http://news.in.msn.com/international/article.aspx?cp-documentid=252761370>.

On January 22, 2009, President Obama issued several key executive orders concerning Guantánamo and U.S. policies on executive detention. The executive order required the closure of Guantánamo within one year, and mandated a review of all people held there. The order also required “humane standards of confinement” during the review and detention “in conformity with all applicable laws governing the conditions on such confinement, including Common Article 3 of the Geneva Conventions.” CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 154, at 3.

<sup>169</sup> Jha, *supra* note 168.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

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

<sup>174</sup> Ben Fox, *Prisoners, Guards Clash Over Guantánamo Bay Raid*, YAHOO! NEWS (Apr. 13, 2013), [news.yahoo.com/prisoners-guard-clash-over-guantanamo-bay-raid-214116253.html](http://news.yahoo.com/prisoners-guard-clash-over-guantanamo-bay-raid-214116253.html).

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Red Cross finished a three-week visit to Guantánamo to meet with prisoners and assess conditions.<sup>175</sup> The visit was prompted by a hunger strike that began on February 6, 2013 in protest of indefinite confinement, tighter restrictions, and intrusive searches.<sup>176</sup> The military has battled these hunger strikes with force feedings, resulting in the physical abuse and humiliation of detainees.<sup>177</sup> To this day, detainees remain at the Guantánamo Bay facility, many of whom have neither been charged with a crime nor given a trial.<sup>178</sup>

### *B. Recommendations*

In order to suggest suitable transitional justice mechanisms for the United States government, a unique approach must be taken. There are several concerns to take into account when attempting to implement transitional justice mechanisms in the United States. This Part first explores how the United States can implement truth commissions, reparations, and criminal prosecutions to address human rights abuses in detention facilities. It then discusses the concerns that need to be addressed before transitional justice mechanisms can be implemented in the United States.

#### *1. Truth Commission and Reparations*

The United States should follow Chile's model of truth commissions and providing reparations to victims of serious human rights abuses. The United States has not only been a leader in providing

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Samir Naji al Hasan Moqbel, *Gitmo is Killing Me*, N.Y. TIMES (Apr. 14, 2013), [http://www.nytimes.com/2013/04/15/opinion/hunger-striking-at-guantanamo-bay.html?\\_r=1&](http://www.nytimes.com/2013/04/15/opinion/hunger-striking-at-guantanamo-bay.html?_r=1&).

The author, a prisoner at Guantánamo Bay since 2002, told his story to his lawyers. He has been detained at the detention facility for eleven years and three months. He has never been charged with any crime, nor has he received a trial. For the past two months, he has been on a hunger strike, refusing to eat until "they restore [his] dignity." In the past month, he has been force fed regularly, passing feeding tubes through his nose and stomach. He recalls being tied to a chair, with his arms, legs, and head strapped down. "I just hope that because of the pain we are suffering," he states, "the eyes of the world will once again look to Guantánamo before it is too late." *Id.*

In contrast to Guantánamo, the Bureau of Prison regulations for individuals convicted of crimes provide guidelines for force-feeding hunger strikes, requiring the humane force-feeding of inmates. Additionally, the World Medical Association has stated that "force-feeding is a violation of medical ethics," and force-feeding "accompanied by threats, coercion, force and the use of physical restraints is considered inhuman and degrading treatment." CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 154, at 12.

<sup>178</sup> Moqbel, *supra* note 177; CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 154.

compensation to victims of torture in other countries, but it is also internationally obligated to provide redress for victims of human rights abuses that have occurred under the supervision of the United States government.<sup>179</sup> This Part will discuss how the United States should approach creating truth commissions and reparations programs for detainees.

The International Center for Transitional Justice argues that a full investigation could be undertaken through a task force or truth commission. The United States has experience with truth commissions, and creating such a commission would aid in the efficiency of prosecutions as well.<sup>180</sup> The task force should either be created by an independent American agency or an international organization. Because the DOJ has been affiliated with the “enhanced interrogation techniques,” it is vulnerable to allegations of bias. Thus, any investigative commission should be independent of the United States government.<sup>181</sup> Similar to Chile’s truth commissions, the investigative task force should strive to be honest in their investigations, be committed to reporting the truth about the large-scale violations of human rights, and be supportive of those victims who tell their stories.<sup>182</sup> Because a truth commission’s success is heavily reliant on its resources and staff, a task force dedicated to investigating the human rights abuses in Guantánamo should be well funded, well staffed, and well supported by other agencies.<sup>183</sup>

In addition to creating a mechanism for investigation, the United States has an obligation to provide some form of reparations to victims of human rights abuses. The Convention against Torture, which the United States ratified, states, “Each state party shall ensure in its legal

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<sup>179</sup> MAGARRELL & PETERSON, *supra* note 56, at 8. The U.S. is a signatory to both the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, which require states to provide redress to victims of series rights violations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT]; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. In the past, the U.S. has supported this principle as it applies to other countries and has offered financial and political support to torture victims of other regimes. When the U.N. asked about providing redress to torture victims, the U.S. responded that victims could file claims under the Foreign Claims Act, where the military provides compensation for hams to civilizations. However, this has not proven successful within the current political context. *Id.* at 14-16.

<sup>180</sup> BLUM ET AL., *supra* note 158, at 26; BEITLER, *supra* note 44, at 5-6. *See generally* discussion *supra* note 44.

<sup>181</sup> BLUM ET AL., *supra* note 158, at 26.

<sup>182</sup> *Supra* Part II.B.

<sup>183</sup> *Supra* Part II.B.

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system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”<sup>184</sup> Additionally, the International Covenant on Civil and Political Rights (“ICCPR”) holds that the United States, a signatory, must provide “an effective remedy” for rights violations, which include “torture, cruel, inhuman, or degrading treatment, arbitrary detention, and enforced disappearance.”<sup>185</sup>

As the United States has offered significant support for victims of torture from other countries, the United States should similarly provide reparations for victims of torture under the abuse of its own government. The Foreign Claims Act (“FCA”) provides compensation to individuals harmed by the American military, including acts of negligence.<sup>186</sup> However, the FCA has been criticized for its inefficiency. Award amounts often vary without an explanation.<sup>187</sup> Despite a review of all claims that Iraqi detainees filed based on the mistreatment at Abu Ghraib prison, only two of the thirty-three detainees who filed claims were offered compensation, in the amounts of \$350 and \$5,000 respectively.<sup>188</sup> Haidar Muhsin Saleh, the plaintiff in *Saleh v. Titan* who received \$5,000 under the FCA, noted that the payment was made despite an Army finding that he was never interrogated or abused.<sup>189</sup>

Because the United States system already has compensation programs in place through the FCA and civil court actions, these programs should continue to function as a key reparations program.<sup>190</sup> However, the FCA needs to be more effective in order to adequately

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<sup>184</sup> CAT, *supra* note 179, art. 14. “State parties . . . must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of the . . . reason for which the person is detained, including persons accused of political offenses or terrorist acts.” CAT General Comment 2, ¶ 21, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

<sup>185</sup> ICCPR, *supra* note 179, art. 2; MAGARRELL & PETERSON, *supra* note 56, at 8.

<sup>186</sup> *Id.* at 14. The FCA provides compensation for death, personal injury, and loss or damage to property. Once a claim has been filed, the Foreign Claims Commission adjudicates it.

FCCs may award compensation up to \$50,000 while the U.S. Army Claims Office or Judge Advocate General’s Office processes claims exceeding that amount; claims for more than \$100,000 require approval by the Army General Counsel. Upon settlement, the claimant must agree to accept payment in full satisfaction of the claim. [However,] only a few incomplete records are available on the adjudication of detainee FCA claims in Iraq and Afghanistan.

*Id.* at 15.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

provide victims with the dignity and compensation they need.<sup>191</sup> Partnering with the investigative task force will provide the United States system with the resources to determine who the victims are and how they should be compensated.<sup>192</sup> Moreover, the reparations programs should not be limited to compensation. Compensation alone can be seen as an attempt to buy silence or diminish the degree of the person's losses or suffering.<sup>193</sup> While compensation may replace lost property, it cannot replace the indefinite detentions or the irreparable physical and emotional harm.<sup>194</sup> Providing medical or psychological care as well as legal services, along with compensation, can provide well-rounded support in addressing human rights violations.<sup>195</sup> The United States government should also provide funding for an independently run victim-centered organization or for an NGO that provides support and assistance to victims.<sup>196</sup>

Finally, the United States government should take measures to ensure that the abuses of detainees do not continue. While President Obama has acknowledged the mistreatment of detainees in Guantánamo

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

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 21.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 22. International law is concerned with “the process of restoring the individual’s full health and reputation after the trauma of a serious attack on one’s physical or mental integrity” in an effort to achieve psychological and physical fitness by addressing not only the individual, but the family, local community, and society as well. *Id.* (internal citation omitted).

<sup>196</sup> *Id.*

several times,<sup>197</sup> acknowledgment alone is not enough.<sup>198</sup> A guarantee to cease continuing violations would be more valuable when combined with investigating the truth about what happened, and acknowledging the victims' experiences, effectively prosecuting high-level officials that

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<sup>197</sup> President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

There is also no question that Guantánamo set back the moral authority that is America's strongest currency in the world. Instead of building a durable framework for the struggle against al Qaeda that drew upon our deeply held values and traditions, our government was defending positions that undermined the rule of law. In fact, part of the rationale for establishing Guantánamo in the first place was the misplaced notion that a prison there would be beyond the law—a proposition that the Supreme Court soundly rejected. Meanwhile, instead of serving as a tool to counter terrorism, Guantánamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantánamo likely created more terrorists around the world than it ever detained. So the record is clear: Rather than keeping us safer, the prison at Guantánamo has weakened American national security. It is a rallying cry for our enemies.

*Id.* In the same remarks, he also discussed the infamous "Torture Memos" and the Abu Ghraib photos.

I released memos issued by the previous administration's Office of Legal Counsel. I did not do this because I disagreed with the enhanced interrogation techniques that those memos authorized, and I didn't release the documents because I rejected their legal rationales—although I do on both counts. I released the memos because the existence of that approach to interrogation was already widely known, the Bush administration had acknowledged its existence, and I had already banned those methods. The argument that somehow by releasing those memos we are providing terrorists with information about how they will be interrogated makes no sense. We will not be interrogating terrorists using that approach. That approach is now prohibited. In short, I released these memos because there was no overriding reason to protect them. And the ensuing debate has helped the American people better understand how these interrogation methods came to be authorized and used. On the other hand, I recently opposed the release of certain photographs that were taken of detainees by U.S. personnel between 2002 and 2004. Individuals who violated standards of behavior in these photos have been investigated and they have been held accountable. There was and is no debate as to whether what is reflected in those photos is wrong. Nothing has been concealed to absolve perpetrators of crimes. However, it was my judgment—informed by my national security team—that releasing these photos would inflame anti-American opinion and allow our enemies to paint U.S. troops with a broad, damning, and inaccurate brush, thereby endangering them in theaters of war.

*Id.* A month later, President Obama mentioned Guantánamo Bay in another speech in Cairo. Nine-eleven was an enormous trauma to our country. The fear and anger that it provoked was understandable, but in some cases, it led us to act contrary to our traditions and our ideals. We are taking concrete actions to change course. I have unequivocally prohibited the use of torture by the United States, and I have ordered the prison at Guantánamo Bay closed by early next year.

President Barack Obama, Remarks by the President on a New Beginning, Cairo University (June 4, 2009).

<sup>198</sup> MAGARRELL & PETERSON, *supra* note 56, at 23.

were responsible for establishing the system under which human rights abuses occurred, and providing victims with reparations in an effort to restore their dignity and compensate them for their losses.<sup>199</sup>

The United States, like Chile, should take steps not only to investigate human rights abuses in Guantánamo and other detention facilities, but to also create effective programs to provide reparations to victims. The United States is internationally bound to provide victims harmed by the United States military with redress, under the Convention against Torture and the ICCPR.<sup>200</sup> Similarly, the FCA provides support to individuals harmed by the United States military. However, the FCA should collaborate with truth commissions and other supportive services in order to identify the appropriate victims and effectively provide compensation and other supportive services for them.<sup>201</sup> Most importantly, all these steps should ensure that human rights violations under the United States government cease.

## 2. *Criminal Prosecutions*

Similar to Chile's method of prosecuting those involved in the torture and disappearances of thousands of individuals, the United States should pursue criminal prosecutions of those who committed human rights abuses in detention facilities in Iraq, Afghanistan, and Cuba. This Part discusses how the U.S. should approach criminal prosecutions, whom the United States should prosecute, and the bases for jurisdiction.

The United States is legally obligated to prosecute perpetrators of human rights abuses under the international laws it has agreed to be bound by, including the Geneva Conventions and the Torture Convention.<sup>202</sup> Additionally, the United States has been a long-time leader in pursuing justice and criminal accountability.<sup>203</sup> It has supported the establishment of international criminal tribunals and

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<sup>199</sup> *Id.*

<sup>200</sup> *See generally, supra* note 179.

<sup>201</sup> MAGARRELL & PETERSON, *supra* note 56, at 30. The International Center for Transitional Justice suggests that the Inspector General of the Department of Defense should review and publicly report on all claims filed under the CFA that involve detention and detainee treatment, and make recommendations for further action to improve procedures and rectify abuses. *Id.*

<sup>202</sup> ICCPR, *supra* note 179; CAT, *supra* note 179. "Not only does the Torture Convention require state parties to criminalize any act of torture . . . [but] it also provides that each state party must either prosecute an offender domestically or extradite him to the appropriate country for prosecution." BLUM ET AL., *supra* note 158, at 17. The International Court of Justice ("ICJ") has held that Geneva Conventions Common Article 3 is customary law and is considered a minimum standard for all conflicts. *Id.*

<sup>203</sup> *Id.* at 19.

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played a key role in financially contributing to them.<sup>204</sup> It played a vital role in handing over Charles Taylor to the Special Court for Sierra Leone in 2006.<sup>205</sup> Furthermore, the United States has prosecuted foreign perpetrators within the United States.<sup>206</sup> The Alien Torture Statute and Torture Victims Protection Act allows U.S. judges and juries to rule on the liability for crimes against humanity and torture.<sup>207</sup> Finally, the United States has recognized that criminal prosecutions acknowledge the suffering of victims, restore their dignity, and provide a sense of justice.<sup>208</sup> Because the United States has been at the forefront of prosecuting perpetrators of human rights abuses, it should hold itself to a similarly high standard of justice.

A strategic and effective response to human rights violations is possible for the United States. Since in many cases of systematic human rights abuses a policy or system is in place to allow for widespread abuses, several approaches can be taken to criminally prosecute perpetrators.<sup>209</sup> A vertical approach involves investigating and indicting perpetrators from different levels of command and building cases against the commanders at the top.<sup>210</sup> A horizontal approach, on the other hand, focuses on the top of the chain, directing resources towards investigating and prosecuting those with the greatest responsibility.<sup>211</sup> In this situation, those that formulated the policies and oversaw the crimes would be held most responsible.<sup>212</sup> With strategic challenges that include the large number of crimes and the inability to fully prosecute all of those involved, the United States would be most effective in channeling its efforts in prosecuting those that established the systems in which the human rights abuses took place.<sup>213</sup> A horizontal approach would target military and intelligence commanders in addition to lawyers and politicians who aided these systems with their legal advice.<sup>214</sup> This approach would also prevent the scapegoating of low-level perpetrators, which was prevalent in the Abu Ghraib

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 20.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* The U.S. was able to prosecute Charles Taylor for the torture he committed in Liberia between 1999 and 2003. *Id.*

<sup>208</sup> *Id.* at 19.

<sup>209</sup> *Id.* at 25.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 25; MAGARRELL & PETERSON, *supra* note 56, at 5-6.

prosecutions.<sup>215</sup>

Since the United States has not ratified the Rome Statute and is not a party to the International Criminal Court, its military commanders and legal advisors could not be prosecuted outside the United States.<sup>216</sup> However, United States courts provide adequate jurisdiction to prosecute those most responsible for human rights abuses.<sup>217</sup> The War Crimes Act and the Torture Act contain provisions that grant jurisdiction to acts that occur outside of the United States.<sup>218</sup> The United States legal system thus has the tools needed to prosecute system crimes, which are often complex and require a multitude of resources.<sup>219</sup> As a result, its courts provide a realistic option for prosecutions. These provisions allow those responsible to be prosecuted within the United States.<sup>220</sup>

Not only is the United States legally obligated to prosecute those that were involved in committing atrocious human rights violations, but the United States has also been at the forefront of prosecuting human rights abuses and promoting justice. Because the United States is adequately equipped to deal with the complexities of prosecuting system crimes, military officers and members of the DOJ, DOD, and CIA can be tried domestically for detainee abuse under the appropriate jurisdiction.

### 3. Concerns

Despite a need to implement similar transitional justice mechanisms for human rights abuses in both Chile and the United States, there are several differences that prevent the U.S. from implementing Chilean strategies. Additionally, there are several concerns that prevent the United States from redressing human rights abuses at all. This Part first discusses the major difference between transitional justice mechanisms in the United States and Chile. Next, it will discuss the roadblocks in attempting to hold United States military commanders accountable. Then it will suggest several methods to overcome the roadblocks to successfully hold perpetrators within the

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<sup>215</sup> BLUM ET AL., *supra* note 158, at 25. Prosecuting those with the greatest amount of responsibility will most effectively highlight the nature of the crimes that occurred. *Id.*

<sup>216</sup> *Id.* at 27; MAGARRELL & PETERSON, *supra* note 56, at 31 n.13.

<sup>217</sup> BLUM ET AL., *supra* note 158, at 27; MAGARRELL & PETERSON, *supra* note 56, at 31.

<sup>218</sup> BLUM ET AL., *supra* note 158, at 27. The Torture Act provides for a fine and/or imprisonment up to twenty years, for committing or attempting to commit torture outside the United States. *Id.*

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

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

United States government accountable.

Contrary to Chile's post-Pinochet responses, the United States has not transitioned from repressive or military rule. The United States has been a stable democracy for centuries, and its people have not been subjected to an oppressive dictatorship. Additionally, while many Chilean people were subject to political imprisonment and torture, the American people as a whole were not victims of human rights abuses under their government. Those at detention facilities in Iraq, Afghanistan, and Guantánamo Bay are suspected terrorists, and most of them are foreign nationals.<sup>221</sup> While Pinochet used media propaganda to falsely label the members of left-wing parties as "terrorists,"<sup>222</sup> individuals who were arrested and transported to Guantánamo Bay detention center under the Bush administration were allegedly terrorists working with Al-Qaeda and under the direction of Osama bin Laden.<sup>223</sup>

There are several major concerns that prevent the United States from being held accountable for its human rights abuses. Because Guantánamo Bay holds suspected terrorists, one major concern is lack of political will.<sup>224</sup> After September 11, the United States government and its people were determined to bring those accountable for the attack to justice. Though the maltreatment of detainees has become well known through the declassification of the "Torture Memos" and the photos from Abu Ghraib, most American people are hesitant to be sympathetic to protecting the rights of suspected terrorists, particularly those who were allegedly involved in the 9/11 attacks. As a result, the public sentiment remains a key obstacle in creating an effective truth commission and prosecuting those U.S. officials involved.<sup>225</sup>

Similar to the obstacles in prosecuting Pinochet's military, legal limitations may prevent the prosecution of United States officials who

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<sup>221</sup> *Id.* at 8-9.

<sup>222</sup> Interview with Hugo Rojas, *supra* note 86.

<sup>223</sup> BLUM ET AL., *supra* note 158, at 11. However, there still remain hundreds of innocent people arrested and indefinitely detained who had no connection with Al-Qaeda or Osama bin Laden. Often, these victims were in Iraq and Afghanistan after 2001 during the War on Terror and were incorrectly associated with terrorist groups. Conor Friedersdorf, *Former State Department Official: Team Bush Knew Many at GitMo Were Innocent*, THE ATLANTIC (Apr. 26, 2013), <http://www.theatlantic.com/politics/archive/2013/04/former-state-department-official-team-bush-knew-many-at-gitmo-were-innocent/275327/>. See also, Mark Pope, *How Did So Many Innocent People End Up in Guantánamo Bay?*, REPRIEVE (Aug. 30, 2012), [http://www.reprive.org.uk/publiceducation/2012\\_08\\_30\\_Public\\_Education\\_Innocents\\_Guantana mo/](http://www.reprive.org.uk/publiceducation/2012_08_30_Public_Education_Innocents_Guantana mo/).

<sup>224</sup> BLUM ET AL., *supra* note 158, at 32. "The challenges of lagging political will and of public sentiment—which generally has tremendous sympathy for soldiers who were 'doing their duty' in a difficult situation—remain." *Id.*

<sup>225</sup> *Id.* at 33.

were involved in authorizing human rights abuses. The defense of “superior orders” may be applicable.<sup>226</sup> Under both United States and international law, an order to commit an unlawful criminal act should not be obeyed and will not relieve the person carrying out the order of criminal responsibility.<sup>227</sup> However, the 2005 Detainee Treatment Act (“DTA”), though it prohibits the degrading treatment of detainees, protects defendants accused of any misconduct in the interrogation and detention of counterterrorism suspects, relying on the fact that the defendant’s actions were “officially authorized and determined to be lawful at the time that they were conducted” as long as the defendant “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”<sup>228</sup> The DTA also allows for the provision of legal assistance to U.S. personnel engaged in “authorized” detentions and interrogations of individuals believed to be associated with international terrorist activities.<sup>229</sup> Additionally, the 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect.<sup>230</sup> As a result, inhumane treatment of detainees could no longer be charged as war crimes under the statute.<sup>231</sup>

Moreover, the statute of limitations prevents the prosecution of various crimes. Most federal criminal charges, such as assault, battery, maiming, and war crimes that do not result in death, fall under a five-

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<sup>226</sup> *Id.* at 21.

<sup>227</sup> *Id.* at 31; LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 29 (A.W. Sittjoff Int’l Pub. Co., 1976).

<sup>228</sup> Department of Defense Appropriations Act 2006, H.R. 2863, 109th Cong. § 1004(a) (2006). It also removed the federal courts’ jurisdiction over detainees who chose to challenge the legality of their detention, stating that “no court, justice or judge shall have jurisdiction to hear or consider” applications on behalf of Guantánamo detainees. *Id.* § 1005(e).

<sup>229</sup> *Id.* at 1004(a).

<sup>230</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2633 (2006).

<sup>231</sup> *Id.* However, in the 2008 case *Boumediene v. Bush*, the Supreme Court held that the Military Commissions Act was unconstitutional because of its restrictions on detainee rights. *Boumediene v. Bush*, 553 U.S. 723 (2008).

year statute of limitations.<sup>232</sup> Torture and conspiracy to commit torture have an eight-year statute of limitations.<sup>233</sup> However, torture with foreseeable risk of death or serious bodily injury, as well as capital crimes, such as murder or other war crimes resulting in death, and the use of “enhanced interrogation techniques” do not have a limitations period.<sup>234</sup>

Other barriers to prosecuting perpetrators of human rights abuses

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<sup>232</sup> Offenses not Capital.

(a) In general.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. (b) DNA profile indictment— (1) In general.—In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile; (2) Exception.—Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—(A) the limitations period described under subsection (a); and (B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment. (3) Defined term.—For purposes of this subsection, the term “DNA profile” means a set of DNA identification characteristics.

18 U.S.C. § 3282 (2012).

<sup>233</sup> Extension of statute of limitation for certain terrorism offenses.

(a) Eight-year limitation.—Notwithstanding section 3282, no person shall be prosecuted, tried, or punished for any noncapital offense involving a violation of any provision listed in section 2332b(g)(5)(B), or a violation of section 112, 351(e), 1361, or 1751(e) of this title, or section 46504, 46505, or 46506 of title 49, unless the indictment is found or the information is instituted within 8 years after the offense was committed. Notwithstanding the preceding sentence, offenses listed in section 3295 are subject to the statute of limitations set forth in that section; (b) No limitation.—Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

18 U.S.C. § 3286 (2012) (internal citations omitted).

<sup>234</sup> Capital Offenses. “An indictment for any offense punishable by death may be found at any time without limitation.” 18 U.S.C. § 3281 (2012).

Torture.

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. (b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if— (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender. (c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2012).

include confidentiality and immunity.<sup>235</sup> Courts have long recognized “presidential authority to keep some executive communications confidential.”<sup>236</sup> The Classified Information Procedures Act (“CIPA”) regulates the use of classified documents, knowledge and testimony for trial.<sup>237</sup> CIPA allows the government to request that the court issue a protective order prohibiting the defendant’s disclosure of classified information if he or she has obtained it.<sup>238</sup> The government also may seek to bar the disclosure of certain classified information in discovery.<sup>239</sup>

Additionally, public officials regularly assert immunity.<sup>240</sup> The Westfall Act provides a defense of absolute immunity to federal officials, protecting them from personal liability for torts committed within the scope of their employment.<sup>241</sup> Under the Westfall Act, the United States is substituted for the individual official, and the Federal Tort Claims Act (“FTCA”) governs this aspect of the litigation.<sup>242</sup> Absolute immunity under the Westfall Act is available only when the tort falls within the scope of official employment.<sup>243</sup> Plaintiffs have argued unsuccessfully that torture or cruel, inhuman, or degrading treatment can never be within the scope of employment.<sup>244</sup> Officials are also covered by qualified immunity, where they are protected from liability if they could not have reasonably known their actions amounted

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<sup>235</sup> BLUM ET AL., *supra* note 158, at 30.

<sup>236</sup> *Id.*

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

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* As an example, Sgt. Michael Smith was charged as one of the Abu Ghraib dog handler defendants. A higher-ranking officer, Col. Thomas Pappas was granted immunity in exchange for his testimony against the lower ranking soldier. Despite Pappas’ greater responsibility in Abu Ghraib, he was never tried. *Id.*

<sup>241</sup> CAT, *supra* note 179, arts. 2, 4, 14, 16; ICCPR, *supra* note 179, arts. 7, 9(5).

<sup>242</sup> G.A. Res. 60/147, *supra* note 54 (“Recognizing that, in honoring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field.”).

<sup>243</sup> Elizabeth A Wilson, *Is Torture All in a Day’s Work? Scope of Employment, The Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J. L. & PUB. POL’Y 175, 176 (2008).

<sup>244</sup> According to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force), enforced disappearance is the deprivation of liberty by the state or its agents, along with a refusal to acknowledge the detention or concealing the individual’s whereabouts, effectively placing him outside the protection of the law. International Convention for the Protection of All Persons from Enforced Disappearance (ICCPEP), *opened for signature* Feb. 6, 2007, U.N. Doc.A/61/448 (entered into force Dec. 23, 2010) (United States is not a party); *See also* Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994) (United States is not a party); *Cf.* Rome Statute, U.N. Doc. A/CONF.183/9, art. 7.1(i) (July 17, 1998).

to constitutional violations.<sup>245</sup>

Despite these hurdles, it is essential that the U.S. government hold itself accountable to the same standards it holds other countries to. Several European countries have already filed actions against the United States, since the Torture Convention allows private citizens to file formal criminal complaints for investigation.<sup>246</sup> Ineffective prosecutions in the U.S. thus far are evidence of an inability to hold itself accountable. This will encourage foreign actions to continue and further international pressure that the United States conduct its own investigations.<sup>247</sup> Though it may be difficult for Americans to support the idea of protecting the rights of suspected terrorists, commitment to justice is essential. As previously noted, the United States has always been at the forefront of promoting truth and justice in its criminal investigations and prosecutions.<sup>248</sup> Failing to remain consistent with its previous positions will tarnish its justice system's reputation as a world leader in this respect.<sup>249</sup>

Likewise, rules of confidentiality do not prevent cases from

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<sup>245</sup> Ryan J. Reilly, *Holder: Review of CIA's Treatment of Detainees Nearly Complete*, MAIN JUSTICE (June 18, 2010, 10:51 AM), <http://www.mainjustice.com/2010/06/18/review-of-cias-treatment-of-detainees-nearly-complete/>; Attorney General Eric Holder, Regarding a Preliminary Review of the Interrogation of Certain Detainees (Aug. 24, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>; Prime Minister of United Kingdom David Cameron, Statement on Detainees to the House of Commons (July 6, 2010), available at <http://www.number10.gov.uk/news/statements-and-articles/2010/07/>. In *Rasul v. Bush*, the D.C. Circuit Court held that the defendants were entitled to qualified immunity because at the time the harms occurred they were unaware of any constitutional protections that extended to the plaintiffs. *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>246</sup> BLUM ET AL., *supra* note 158, at 34.

In Germany, a complaint was filed in 2004 by the U.S.-based Center for Constitutional Rights and other human rights groups seeking criminal charges against then-Secretary of Defense Donald Rumsfeld for abuses at Abu Ghraib. A second complaint was lodged in 2006 against former CIA director George Tenet, and other named and unnamed officials, including former attorney general Alberto Gonzales and OLC attorney John Yoo, for ordering, aiding and abetting, and/or failing to prevent or punish subordinates' commission of war crimes at Abu Ghraib and Guantánamo. In France, a private prosecution complaint was filed alleging that Rumsfeld, who was in France at the time, had ordered and authorized torture. In Spain, two cases were filed in 2009 relating to abuses at Guantánamo. One complaint alleges that six former high-level Bush administration lawyers violated the Geneva Conventions and the Torture Convention by crafting a legal framework purportedly to justify torture of detainees in Guantánamo.

*Id.* at 34-35.

<sup>247</sup> *Id.* at 5.

<sup>248</sup> *Id.* at 20.

<sup>249</sup> *Id.*

moving forward.<sup>250</sup> U.S. courts have a proven track record of dealing with complexities in other sensitive proceedings, including trials of accused terrorists.<sup>251</sup> A vast amount of potential evidence is already available to the public, including documents illustrating the inhumane treatment of detainees.<sup>252</sup> Classified information would not necessarily be the basis of any criminal prosecution.<sup>253</sup>

Moreover, there are several exceptions to these defenses. A “superior orders” defense is only available to subordinates, and its application may be limited in prosecutions for detainee abuses.<sup>254</sup> Since this defense is only applicable to low-level officials, it is not available when holding high-level officials accountable for developing, implementing, and justifying enhanced interrogation techniques.<sup>255</sup> The superior orders defense is an imperfect defense, evidenced by the fact that “there were individuals who refused to enforce enhanced interrogation techniques, protested them, or indicated concern to superiors about possible liability.”<sup>256</sup> Additionally, the Torture Convention states, “An order from a superior officer or a public authority may not be invoked as a justification of torture.”<sup>257</sup>

Similar to the concerns in prosecuting Pinochet’s military, victims of human rights abuses must grapple with obstacles such as expired statute of limitations and immunity defenses. While there are several conventions that hold that statute of limitations defense cannot be used

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<sup>250</sup> *Id.* at 30 (citing RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008) to illustrate the successful use of CIPA in trials of alleged terrorists).

<sup>251</sup> BLUM ET AL., *supra* note 158, at 30.

<sup>252</sup> *Id.* at 14.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 32.

<sup>255</sup> *Id.* at 4.

<sup>256</sup> *Id.* at 32. For example, Master-at-Arms First Class William J. Kimbro, U.S. Navy Dog Handler, refused to participate in improper interrogations despite significant pressure from the MI personnel at Abu Ghraib. 1LT David O. Sutton, 229th MP Company, took immediate action and stopped an abuse at Abu Ghraib, then reported the incident to the chain of command. *Id.* at 32 n.449. The FBI interrogator Ali Soufan was successful in early rapport-based interrogations of Abu Zubaydah who was imprisoned and interrogated in secret CIA detention. Despite Soufan’s success, a CIA contractor, James Mitchell, was brought in and introduced mistreatment when Zubaydah failed to answer questions. Soufan repeatedly objected to the CIA techniques. The situation came to a head when Soufan discovered a coffin-like box that the CIA contractor, intended to use to confine Zubaydah. Soufan reported the abuses to his superior Pasquale D’Amuro, then the FBI assistant director for counterterrorism, who, in turn, informed then FBI Director Robert Mueller. Shortly thereafter, Mueller made the decision to pull the FBI out of CIA interrogations entirely. Michael Isikoff, ‘We Could Have Done This the Right Way:’ How Ali Soufan, an FBI Agent, Got Abu Zubaydah to Talk Without Torture, NEWSWEEK (May 4, 2009), <http://www.newsweek.com/ali-soufan-breaks-his-silence-77243>.

<sup>257</sup> CAT, *supra* note 179, art. 2(3).

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for serious human rights violations, the U.S. has not ratified them.<sup>258</sup> Despite this, there is room for the judiciary to interpret whether a statute of limitations applies to war crimes and crimes against humanity.<sup>259</sup> As Pinochet and the military gradually lost their influence and truth commissions were able to investigate and report about past human rights abuses, courts were more likely to rule in favor of disregarding laws protecting perpetrators. Likewise, when international pressure to prosecute perpetrators grows and investigations by truth commissions reveal the inhumane treatment of detainees, so will the requisite for American courts to hold perpetrators accountable. Ultimately, the courts have the power to determine whether to uphold the statute of limitations as it relates to war crimes and crimes against humanity; the current approach in upholding limitations to shield defendants may change.<sup>260</sup>

#### V. CONCLUSION

Both the Chilean and the United States governments have committed human rights violations in recent years, particularly seen through the use of torture and degrading treatment in the detention facilities during the Pinochet regime in Chile, and U.S. facilities in Iraq,

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<sup>258</sup> BLUM ET AL., *supra* note 158, at 29 n.410. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity has held that statute of limitations cannot be used for war crimes, crimes against humanity, and genocide. However, the United States is not a state party to that Convention, nor has the practice escalated to customary international law so as to be enforceable without a treaty. 754 U.N.T.S. 73 (Nov. 1968). Additionally, the American Convention on Human Rights has held that state parties that bar prosecution of serious human rights violations by statutes of limitation violate that regional human rights pact. While the U.S. has signed this convention, it has not ratified it. BLUM ET AL., *supra* note 158, at 29 n.410.

<sup>259</sup> 18 U.S.C. §§ 3281-83, 3286 (2012) and accompanying text (noting how war crimes and torture sometimes have an extended statute of limitations of eight years and, in other circumstances, have no statute of limitations).

<sup>260</sup> MAGARRELL & PETERSON, *supra* note 56, at 32-35.

The following are several cases where detainees have unsuccessfully brought cases against government officials to court: *El-Masri v. United States*, 552 U.S. 947 (2007) (the court held that El-Masri could not establish a prima facie case without exposing sensitive, privileged information about the CIA's structure and organization of intelligence operations); *Arar v. Ashcroft*, 130 S.Ct. 3409 (2010) (the court dismissed the case, holding that, among other things, U.S. officials were not acting under the color of foreign law); *Al-Shimari v. CACI Premiere Tech. Inc.*, 657 F. Supp.2d 700 (E.D. Va. 2009) (four Iraqi torture victims brought this case, and the court held that CACI was a private actor and that the government was not a party in the action, so the case was dismissed on political grounds); *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp.2d 85 (2007) (the court dismissed the case, holding that the Constitution does not apply to nonresident aliens injured extraterritorially while detained by the U.S. military in countries where the U.S. is engaged in war).

Afghanistan, and Cuba. Consequently, the Chilean model of remedying such abuses through the use of transitional justice measures can be largely replicated in order to address the current treatment of detainees in Guantánamo Bay detention center. These mechanisms include establishing a truth commission to investigate human rights violations, providing reparations to the victims through compensation or medical, social, and legal services, and prosecuting those involved with implementing and overseeing these violations. Several difficulties exist in duplicating Chile's method in the U.S., including the lack of political will to investigate and prosecute human rights crimes, legal limitations such as immunity, confidentiality of classified files, and statutes of limitations. Even with these obstacles, implementing these transitional justice devices is not only possible, but is necessary. The U.S. has been a leader in promoting justice through its criminal investigations and prosecutions. By holding itself accountable to the mistreatment of detainees, just as it has held other countries accountable for their own abuses, the United States can secure its position and remain a world leader in defending human rights.