

**Transitional Justice in Guatemala:
Linking the Past and the Future**

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Living after genocides, mass atrocity, or totalitarian terror makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and the future for individuals and societies.¹

Introduction

In 1996, the Guatemalan civil war officially came to an end and Guatemalans were faced with rebuilding their war-torn society. The extent of state-sponsored atrocities committed during the country's 36-year-long civil war, which included genocide against the Maya population, ensured that peacebuilding efforts would be confronted by demands for transitional justice. Indeed, accords forbidding amnesty for past abuses and calling for the protection of human rights and indigenous rights were among the first to be negotiated, and provided the lens through which the remaining accords were viewed. Nine years after the signing of the peace accords, however, Guatemala is characterized by a lack of justice, the persistence of impunity, and a resurgence of violence that threatens the consolidation of peace.

There is a debate within the academic literature over the role of transitional justice in post-conflict reconstruction. Some academics and practitioners argue that efforts to promote forms of justice that focus on the past (e.g. trials, purges of the military and government, or reparations) serve to undermine peacebuilding efforts, and that future-oriented forms of justice (e.g., strengthening the rule of law and promoting reconciliation) should be emphasized instead.² In simple terms, the argument is that the past must be forgotten (or at least left alone) in order to construct a better future, because focusing on the past risks a return to violent conflict.

¹ Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), p. 119.

² See, for example, Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5-44; Gary Jonathan Bass, *Staying the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000); and Tonya Putnam, "Human Rights and Sustainable Peace," in Stephen John Stedman, *et. al.*, *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, CO: Lynne Rienner, 2002), pp. 237-270.

This paper tests the above hypothesis by analyzing the case of Guatemala and examining the question, “Have efforts to promote justice and reconciliation hindered peacebuilding efforts in Guatemala?” The first section analyzes the concept of transitional justice and its role in post-conflict reconstruction, focusing on the debate over whether retributive or restorative justice should be emphasized. The second section examines what transitional justice means in the context of Guatemala, given its particular history and characteristics. The third section evaluates attempts to address issues of justice in Guatemala’s post-conflict environment as well as the stability of the post-conflict transition. The paper concludes that in the case of Guatemala it is impossible to promote future-oriented forms of justice (and thus strengthen peacebuilding efforts) without also addressing past-oriented forms of justice. Contrary to the above hypothesis, it is the *failure* to promote retributive justice that has weakened peacebuilding efforts in Guatemala.

What Is Transitional Justice?

Transitional justice can be defined as the way in which “societies ‘transitioning’ from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek ‘reconciliation,’ and how they create justice systems so as to prevent future human rights atrocities.”³ Transitional justice is meant to serve as a bridge between the past and the future, reflecting the recognition that members of deeply divided societies must acknowledge and come to terms with the forces that have historically divided them in order to build a new, more unified and just society. As the above definition implies, transitional justice is comprised of both a social-psychological element, reflected in the notion of reconciliation, as well as a legal, structural element designed to restore the rule of law. These various aspects of transitional

³ Charles T. Call, “Is Transitional Justice Really Just?,” *Brown Journal of World Affairs*, Vol. 11, No. 1 (Fall 2004). p. 101.

justice – past, future, psychological, and legal – create a complex set of goals that can be summed up in the concepts of retribution and restoration.

The difficulties inherent in both addressing the past and building the basis for a just future has led to an acknowledgement that there are different notions of justice, each with different strategies that serve different purposes in the transitional justice process. These notions of justice are often referred to as “retributive justice” and “restorative justice.” Importantly, each of these concepts of justice concede the need to address both psychological and legal factors but pursue these goals in very different ways and reflect very different priorities.

At a basic level, retributive justice means holding the perpetrators of past abuses accountable by punishing them for their crimes. It is focused on the offender and on the past. It is legal in nature and provides the basis for a system of rule of law. Strategies for promoting retributive justice include national and international criminal trials and efforts to reform judicial and security structures to combat impunity and defend against the abuse of power. Perpetrator-focused strategies such as criminal trials serve a number of important functions in transitional societies. They help establish the basic principles of the rule of law, particularly the principle that all individuals who commit abuses will be held accountable, and thus hopefully serve as a deterrent in the future. Trials help establish the credibility of the courts as a venue where victims can get justice, encouraging citizens to pursue justice through the state rather than through vigilantism. By focusing on individuals, criminal processes also help make the important point that entire ethnic or political groups don’t commit atrocities, but rather specific individuals do. In theory, at least, the rest of society is therefore more easily able to reconcile.⁴ In addition to trials, retributive justice might include removing perpetrators from the institutions that comprised

⁴ See Neil Kritz, Director of the United States Institute of Peace’s Rule of Law Program, Remarks presented at the conference “Memory and Truth After Genocide: Guatemala” at the United States Holocaust Museum, Washington, DC, March 21, 2000.

the machinery of abuse - particularly the police, security forces, and judiciary – and revising the legal mandates of these institutions so as to guard against future abuses.

Restorative justice, on the other hand, is focused on the future, in particular the future relationship between the perpetrators and victims. It is focused on the victim and is designed to reduce the causes of hostility and division in society and repair social relationships. Strategies to promote restorative justice include reparations and compensation, restitution of property, public and official acknowledgement of past abuses, establishment of memorials for victims (including official days of remembrance), and providing victims of state abuse with preferential access to educational, medical and other benefits. In one sense, restorative justice can simply be a variation on retributive justice, for example when the perpetrator is asked to pay some kind of restitution to the victim. In this respect there is a concern with holding individuals accountable in a way that strengthens the rule of law. But there is another form of restoration that gets away from the question of wrongs inherent in retributive justice and focuses more on transforming social relations so that past atrocities will not take place again. This is the idea behind the concept of reconciliation.⁵

David Little argues that the role of reconciliation in restorative justice is rooted in the concept of forgiveness.⁶ He lists five features of forgiveness that are essential to restoring relationships and, thus, the process of reconciliation: 1) There must be a transaction between the “forgiver” and the “forgivee;” 2) There must be a common acknowledgement between the two parties regarding the wrongdoing and the penalty; 3) There must be contrition on the part of the “forgivee;” 4) The “forgiver” must annul the fitting punishment; and 5) The “forgivee” must

⁵ See David A. Crocker, “Reckoning with Past Wrongs: A Normative Framework,” *Ethics & International Affairs*, Vol. 13 (1999), pp. 43-64.

⁶ David Little, “A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies,” *Ethics & International Affairs*, Vol. 13 (1999), pp. 65-80.

accept the obligations of the “forgiver” by going out and restoring relations with others. The key to this model of restorative justice is that it is voluntary. It cannot be imposed by peace agreements, officials, or outside powers. Both the perpetrator and the victim must acknowledge the wrongdoing, accept the consequences that follow from it, and commit to moving forward together.

Over the past decade, increasing attention has been given to a new and innovative mechanism that arguably falls in between the purely perpetrator-focused and victim-focused approaches: truth commissions. Truth commissions were first established in Latin America in response to systems of state-sponsored terrorism that were based on suppressing and hiding the truth. The very nature of the abuses committed, such as the “disappearance” of victims, depended on hiding the truth in order to promote a sense of terror and provide deniability to the state and other perpetrators of the crimes. Thus, an important step in the post-conflict transition was to reveal the truth of what crimes were committed, who committed them, and what happened to the victims. In many conflicts there are also multiple versions of the truth. In such cases, these commissions serve the important role of establishing an official truth on which the future can be built.

Truth commissions come in many forms with a variety of mandates, but in general they provide a forum in which all victims and perpetrators can tell their story and have it publicly acknowledged. This is believed to have a cathartic affect on post-conflict societies. There is a growing recognition that, just like individuals who have suffered trauma, societies that have experienced atrocities need to develop mechanisms to come to terms with the past rather than repress it – otherwise the social trauma will manifest itself in destructive ways.⁷ Truth Commissions enable a process of social reflection that is key to the process of healing and

⁷ Kritz, *op. cit.*

reconciliation. This process helps victims to “see that what happened to them was not done in isolation; to understand why the killings, disappearances or massacres happened, and to realize that it was not their fault.”⁸ In this sense, truth commissions play a role in restorative justice.

Truth commissions are also important for enabling a society to look at its broader illnesses by highlighting roles that state and social institutions played in past abuses and the ways in which the political, economic, and social structures made the abuses possible. This task often proves instrumental in restructuring these institutions to strengthen the rule of law. By documenting atrocities, the commissions also collect and preserve evidence that, under the right circumstances, could be used to prosecute perpetrators. Indeed, the first truth commissions in Bolivia and Argentina were meant to be supplemented with prosecutions of at least the worst atrocities.⁹ In these ways, truth commissions can also serve to promote retributive justice.

Trials vs. Truth Commissions: A Necessary Choice?

Ideally, transitional justice should include both retributive and restorative justice. However, political realities rarely make this possible. The dilemma associated with transitional justice is that the various goals of the process – to find out and publicly acknowledge what happened, to punish the guilty, to unite the country and put the past behind, and to reform institutions in such a way as to prevent future abuses from occurring – are often fundamentally incompatible.¹⁰

This dilemma is perhaps best seen in the debate between critics and advocates of truth commissions. The debate is essentially over the proper balance between the pursuit of justice

⁸ David Lindstrom, “Putting the Pieces Back Together” (Chicago, IL: Foundation for Human Rights in Guatemala, 2001), pp 3-4.

⁹ Greg Grandin, “The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala,” *American Historical Review* (February 2005), p. 47.

¹⁰ See Jonathan D. Tepperman. “Truth and Consequences,” *Foreign Affairs*, Vol. 81, No. 2 (March/April 2002), p. 146 and Crocker, *op. cit.*, pp. 43-64.

through prosecution of human rights violators and the need to establish national unity through a cathartic process of testimony, forgiveness, and reconciliation.¹¹ Many truth commissions have found that without granting amnesty, it is virtually impossible to gain the participation of the perpetrators, which is essential to uncovering the truth.¹² As seen in the above description of restorative justice, the genuine participation of perpetrators is also key to the reconciliation process. Thus, truth commissions typically seek to find out what happened, unite the country, and make recommendations for institutional reform, recognizing that trying and punishing the guilty is often politically unrealistic. Indeed, it is the fact that truth commissions are able to pursue restorative justice without trials that has made them so frequently used and so controversial.

Critics of truth commissions often charge that without trying and punishing perpetrators of atrocities there can be no sense of justice in society. Paul Van Zyl and others, however, note that often the choice is not between truth commissions and trials, but between truth commissions and nothing at all.¹³ Amnesties against prosecution of high officials suspected of war crimes frequently prove necessary to attain settlement to a conflict.¹⁴ In these cases, forgoing retributive justice is seen as an unfortunate but necessary cost of peace. While it is unfortunate that the perpetrators of abuse are not held accountable, the alternative is believed to be a return to the battlefield, which would undoubtedly result in even more atrocities. In those cases where conflicts are ended by force and the perpetrators remain in power (as occurred throughout much of Latin America), trials simply become politically unrealistic.

¹¹ Grandin, *op. cit.*, pp. 63-64.

¹² See, for example, Tepperman, *op. cit.*, pp. 128-146 and Mark Freeman and Priscilla B. Hayner, "The Truth Commissions of South Africa and Guatemala," in David Bloomfield, *et. al.*, *Reconciliation After Violent Conflict* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), pp. 140 –144.

¹³ Paul Van Zyl, Remarks presented at the conference "Memory, Justice, and Reconciliation" at the Carnegie Council on Ethics and International Affairs, New York, NY, May 20, 1999. See also Putnam, *op. cit.* and Tepperman, *op. cit.*

¹⁴ Putnam, *op. cit.*, p. 240.

Even in cases where conflicts are settled by force and the victims emerge victorious (as in the case of Rwanda), trials have proved a far from perfect way to establish transitional justice. As Van Zyl says, “It’s not about whether you should have to punish or whether a more pressing social imperative trumps this obligation; it’s that you can’t punish, even if you have sufficient power to do so...In almost all transitional justice scenarios, you cannot punish more than a tiny fraction of those people responsible for gross violations of human rights.”¹⁵ Prosecution of past abuses tends to be applied unevenly, in part because of political realities, but also because of real limitations in economic and human resources. The resulting system is often “victor’s justice,” which is perceived by many citizens as a form of injustice that does little to promote confidence in the rule of law or unify the divided society.¹⁶

The trick to balancing the needs of retributive and restorative justice may be a question of sequencing. In the immediate aftermath of conflict, one has to set priorities and not only think about what is necessary, but what is possible. Transitional justice must be viewed as a multi-layered and long-term process. The first priority must be to consolidate the peace so as to stop atrocities from being committed in the future.¹⁷ This means reforming the institutions that allowed abuses to occur and healing the divisions within society. By focusing on restorative justice first, it may be possible at a later time to pursue retributive justice. This possibility is now being seen in Chile and Argentina, where senior military leaders are finally being tried, some twenty years after the conflicts in those countries ended.¹⁸ Importantly, the evidence uncovered by the truth commissions in those countries have ultimately proved valuable both to the healing

¹⁵ Van Zyl, *op. cit.*

¹⁶ Peter Uvin and Charles Mironko, “Western and Local Approaches to Justice in Rwanda,” *Global Governance*, Vol. 9 (2003), pp. 225. See also Andreas O’Shea, “Ad Hoc Tribunals in Africa,” *African Security Review*, Vol. 12, No. 4 (2003), pp. 17-24 and Call, *op. cit.*

¹⁷ Putnam, *op. cit.*

¹⁸ See, for example, Renwick Mclean, “Spain Sentences Argentine for ‘Dirty War’ Crimes,” *International Herald Tribune*, April 20, 2005, p. 4 and Danna Harman, “In Chile, Pace of Justice Quickens,” *Christian Science Monitor*, December 15, 2004, p. 6.

of society and the subsequent trials. The case of Guatemala, however, shows that in cases where the violence is structural in nature and the perpetrators remain in power, past- and future-oriented aspects of justice are linked in such a way that it is difficult, if not impossible, to achieve one without addressing the other.

The Guatemalan Civil War

The Guatemalan civil war officially occurred between 1960 and 1996, although some trace its roots to 1954, when the Guatemalan military led a CIA-backed coup against President Jacobo Arbenz Guzmán. At the root of the conflict were the inequities reflected in the country's semi-feudal political and economic systems. Arbenz was ousted after trying to carry out socio-economic reforms, including a land redistribution campaign that challenged the interests of Guatemala's wealthy landowners and U.S. business interests. Guatemala's inequities have a strong racial component, which greatly shaped the conflict. Indigenous groups, primarily the Maya, comprise roughly 44 percent of the population,¹⁹ and have historically suffered systematic discrimination. By 1960, when an insurgency was formally launched, there were various revolutionary groups, some with strong Maya involvement and others without, but all of whom were dedicated to achieving a socialist revolution and changing the socio-economic structure of the country. During the late 1970s the insurgency grew, and in 1982 the various groups united to form the Guatemalan National Revolutionary Unity (UNRG).

In the early 1980s, the Guatemalan military moved quickly and ruthlessly to crush the rebellion. It adopted a bloody counter-insurgency campaign designed around targeting civilians to limit rebel support. According to Guatemala's Commission for Historical Clarification (CEH), some 200,000 people were arbitrarily executed or "disappeared," 200,000 became refugees, and one million were internally displaced by the end of the conflict. The government

¹⁹ "Republic of Guatemala," *CultureGrams 2005* (Lindon, Utah: Brigham Young University, 2004), p. 250.

was found to have committed 93 percent of the abuses, with the URNG being responsible for three percent.²⁰ Many of the 626 massacres attributed to the government were carried out by civilian patrols (PACs) and clandestine death squads allied with the military. The systematic nature in which the state carried out the atrocities, as well as the fact that 83 percent of the victims were Maya, led the CEH to label the counter-insurgency policy as genocide.²¹

In 1996, Guatemala's 36-year-long civil war officially came to an end with the signing of the Agreement for Firm and Lasting Peace, which encompassed 13 peace accords negotiated between the government and the URNG. At last it appeared that Guatemala might be able to begin rebuilding its shattered society. Nine years later, the task has proved to be a monumental one due to the remarkably brutal nature of the war and the extent of the divisions within society. How successful has the process been? Answering this question first requires understanding what transitional justice might look like in the Guatemalan context.

Envisioning Transitional Justice in Guatemala

What does it mean to have justice in Guatemala? This is, of course, a complex question with subjective answers. Nevertheless, given the above definition of transitional justice and the particular Guatemalan experience, it is possible to identify some basic components.

Given the state's overwhelming complicity in human rights abuses, a fundamental element of justice must be to eliminate or restructure those institutions responsible for the atrocities to prevent them from occurring in the future. Specifically, this means eliminating the PACs, paramilitaries, and security units that carried out the Army's counter-insurgency policy in the countryside. It means changing the Army's mandate from one of internal security to defense of Guatemala's borders against external threats. It means placing the military under civilian

²⁰ Comisión para el Esclarecimiento Histórico, *Guatemala: Memoria del Silencio*, Vol. 5 (Guatemala City, 1999), p. 42.

²¹ *Ibid.*

control with provisions to ensure the protection of human rights. At the same time, insurgent groups must also be demobilized and a new civilian police force must be created to enforce the law and protect human rights. Perhaps most importantly, the judicial system must be reformed and strengthened to end the culture of impunity that has longed plagued the country. All Guatemalans must receive equal protection under the law and those who commit future abuses must be held accountable.

For many of Guatemala's victims, justice will not be served until the perpetrators of past abuses are tried and punished.²² Given that hundreds of thousands of atrocities were committed, it is simply not realistic to try every single perpetrator. Nevertheless, there is an expectation that at least those senior officials found responsible for the worst atrocities, including the policy of genocide, could be tried. At a minimum, they could be removed from their positions in the military and government and barred from serving in the future.

Justice also means taking a number of steps to begin healing the divisions within Guatemalan society. Publicly and officially acknowledging the nature and extent of the human rights abuses is an important first step in this process, in part because the experiences of victims were denied by the government for decades. Survivors must discover what happened to their "disappeared" loved ones in order to complete the grieving process. The importance of certain religious burial rites to the Maya gives this process an added importance. For them, justice involves exhuming the mass graves of their loved ones so that they can be properly buried. For others, justice might mean having their land and homes returned to them, or it might mean land reform or some other form of compensation that begins to address Guatemala's fundamental social inequalities.

²² See, for example, Victoria Sanford, "The 'grey zone' of justice: NGOs and rule of law in postwar Guatemala," *Journal of Human Rights*, Vol. 2, No. 3 (September 2003), pp. 393-405 and Raul Molina Mejia, "The Struggle Against Impunity in Guatemala," *Social Justice*, Vol. 26, No. 4 (Winter 1999), pp. 55 – 75.

The process of restorative justice is particularly difficult in Guatemala because there is no relationship to restore. That is to say, there has never been a time in Guatemala's history when there have not been stark social divisions. This is particularly true when it comes to relations between the Maya and the Ladino community (those of European or mixed descent). Although they have historically comprised a majority of the population, the Maya have more or less been erased from the official notion of what it means to be Guatemalan. The constitution does not recognize Guatemala as a multi-ethnic, multi-cultural, or multi-lingual society. The history of the Maya, to the extent it is told, is told from the Ladino point of view, and the Maya have historically been left out of Guatemala's political and economic institutions. As a result, the process of restorative justice in Guatemala arguably could better be described as "nation-building" rather than reconciliation, to the extent that it seeks to create a new, more unified, and more just society in which all Guatemalans have the opportunity to participate fully in the life of the country.

It is clear that before Guatemala can build a more unified society, it must confront and come to terms with its violent past. A major step in this process is developing an official historical memory. Some Guatemalans fear the past, and argue that it should be forgotten, for dredging up the past will only harden divisions and perpetuate conflict. Not surprisingly, this view is typically held by the country's Ladino elite, who have historically benefited from and shaped the national narrative. By forgetting the past, they are able to continue shaping the future narrative of the country in a way that excludes the memories of others. Patrick Smith calls this condition "history without memory."²³ For the Maya, who have been excluded from official history, memory is all they have. For them, "the act of remembering becomes all-important – a

²³ Patrick Smith, "Memory with History: Who Owns Guatemala's Past?," *The Washington Quarterly*, Vol. 24, No. 2 (Spring 2001), p. 63.

matter of self-preservation,” a condition Smith calls “memory without history.”²⁴ Whether as “rememberers” or “forgetters,” all Guatemalans are trapped by the past. It is clear that they will not be able to find a common way forward without first reconciling with the past. For this reason, the processes of developing a common historical memory that reflects all Guatemalans and building a more unified future for Guatemala are arguably one in the same.

Efforts to Promote Justice in Guatemala: The Peace Accords

The Guatemalan peace accords contained many provisions that were meant to address issues of justice – both retributive and restorative. The importance given to issues of justice by Guatemalans is illustrated by the fact that the human rights accord was the first accord to be negotiated and signed (March 1994), long before the demilitarization accord. Indeed, the issue of human rights framed all the other issues in the peace process. The human rights accord was important primarily for establishing a truth commission (the CEH) to clarify past human rights violations (discussed in detail below) and creating a UN Verification Mission (MINUGUA) that was charged with monitoring respect for human rights and holding the government and rebels accountable for future abuses.

Unlike previous peace accords in Latin America, the Guatemalan accords clearly addressed the issue of impunity. The human rights accord expressed opposition to any sort of amnesty, stating, “The Government shall not sponsor the adoption of legislative or any other type of measures designed to prevent the prosecution and punishment of persons responsible for human rights violations...No special law or exclusive jurisdiction may be invoked to uphold impunity in respect to human rights violations.”²⁵ This view was reinforced by the Agreement on the Strengthening of Civilian Power, which stated, “The reform and modernization of the

²⁴ *Ibid.*

²⁵ Quoted in Mejia, *op. cit.*, p. 63.

administration of justice should be geared to preventing the judiciary from producing or covering up a system of impunity and corruption.”²⁶

However, just before the signing of the peace accords in December 1996, the URNG and government negotiators agreed to amnesty provisions that were subsequently enacted by Congress in the Law of National Reconciliation. The law was highly controversial since it contradicted the accords and contained provisions for extinguishing culpability for war-related crimes, including extra-judicial killings. To their credit, the negotiators of the amnesty law took into consideration the requirements of international human rights law regarding what kinds of crimes could not be amnestied.²⁷ As a result, the law did prohibit amnesties in cases of forced disappearance, torture, and genocide, leaving open the possibility of some prosecution. But these crimes are relatively difficult to prove and the law clearly opened a way for members of the security forces and armed opposition groups to be granted immunity from prosecution.

The structural nature of the violence stemming from the state’s counter-insurgency policy highlighted the need to fundamentally alter many of Guatemala’s state institutions, particularly the military and the judiciary. As a result, the peace accords required extensive constitutional reforms to restructure and limit the functions of the army and other security forces in order to protect against future human rights abuses. Under the 1985 constitution the military is sanctioned to be involved in every aspect of Guatemalan life, from internal security to health campaigns. The accords called for the military to be restricted to one mission: defense against external threats to guarantee the country’s territorial integrity. The accords also required the elimination of the PACs and other paramilitary counterinsurgency security units, a reduction of

²⁶ *Ibid.*

²⁷ Margaret Popkin and Nehal Bhuta, “Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?,” *Ethics & International Affairs*, Vol. 13 (1999), p. 116.

the army's size and budget by a third, and the creation of a new civilian police force to guarantee citizens' security.

The accords also mandated reforms of the judicial system (including updating criminal codes and reducing military jurisdiction in criminal matters) to eradicate corruption, guarantee free access to the justice system, and ensure impartiality in the application of the law. In addition to establishing a more professional corps of judges appointed by merit, the accords proposed constitutional amendments that would guarantee citizens "free access to the system of justice in a person's own language; respect for the multi-ethnic, multi-cultural and multi-lingual nature of Guatemala; legal assistance to those who cannot afford their own counsel; [and] the impartiality and independence of judges."²⁸

In addition to the retributive forms of justice outlined above, the accords also pursued restorative justice, primarily in the form of the 1995 Accord on Identity and Rights of Indigenous Peoples. The accord mandated a constitutional amendment redefining Guatemala as a multi-ethnic, multi-cultural, and multi-lingual nation. If fully implemented, it would require a number of profound reforms that would officially recognize indigenous languages and promote their use in schools and the courts, outlaw discrimination against indigenous people, recognize and permit the application of indigenous customary law, recognize indigenous beliefs and practices, provide indigenous groups a greater role in local governance, and address past grievances regarding usurped lands and other resources. Significantly, the accord would, for the first time, create a legal basis for indigenous groups to make claims upon the state. It would also change social interactions in such a way as to force Guatemalans to re-examine their national character, hopefully contributing to a process of reconciliation. Other examples of restorative justice

²⁸ William Stanley and David Holiday, "Broad Participation, Diffuse Responsibility: Peace Implementation in Guatemala," in Stephen John Stedman, *et. al.*, *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, CO: Lynne Rienner, 2002), pp. 449-450.

reflected in Guatemala's peace accords include provisions for reparations to those harmed by the armed conflict, such as the right of refugees to recover their land.

Unfortunately, virtually none of the steps to promote justice outlined in the accords have been taken. Many provisions of the accords are opposed by powerful members of the military, conservative political parties, and the business elite, who have worked to block their implementation. One stumbling block is that the main elements of the accords require constitutional reforms, which must be ratified in a popular referendum. Weeks before the May 1999 referendum, conservative forces launched a massive media campaign to sow confusion and doubt about the accords. The effort was successful; voter turnout was only 18 percent and the referendum failed. Since that time, government efforts to pursue implementation have been feeble. The two parties that came to power in the 2000 and 2004 presidential elections, the FRG and GANA respectively, were not signatories to the accords and have demonstrated little commitment to implementation.

As a result, justice in Guatemala remains elusive. Although the military was reduced in size, it was not significantly restructured; no officers were expelled for any reason and there were no new recruits. A civilian police force was formed, but it is overwhelmed by rising crime and hindered by a lack of resources. Consequently, the military remains heavily involved in internal security. There are regular reports of security forces committing human rights abuses such as politically motivated killings, "social cleansing," kidnappings, and torture.²⁹ Few steps have been taken to reform the judicial system, and impunity is pervasive. Before withdrawing from Guatemala in late 2004, MINUGUA reported attacks, death threats, and other acts of intimidation against journalists, prosecutors, and judges who were involved in the investigation

²⁹ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "Guatemala: Country Reports on Human Rights Practices 2003," February 25, 2004, <http://www.state.gov/g/drl/rls/hrrpt/2003/27900.htm>.

of government security forces.³⁰ There have been virtually no trials for past abuses. The few that have occurred have mainly involved Mayan members of the civil patrols, rather than Ladino members of the military or government. While Mayan victims welcome the justice brought by the trials, many also find the trials morally unsettling, since they see it as yet another form of discrimination.³¹ The worst offenders often escape justice by seeking shelter within the political system. For example, General Rios Montt, who is accused of genocide for presiding over the worst atrocities between 1982-1983, received immunity between 2000 and 2004 as President of Congress. Official recognition has not been given to Guatemala's indigenous groups and their rights are not constitutionally protected. While reparations are not contingent on constitutional reforms, they also have not been forthcoming.

Guatemala's Truth Commissions: CEH and REMHI

One provision within the accords that was implemented was the truth commission. The question of how past human rights violations and war crimes would be addressed during the transition process was one of the most controversial issues on the table during the peace negotiations. In June 1994, the government and URNG agreed to handle the issue by establishing an internationally sponsored truth commission, the Historical Clarification Commission (CEH). Its mandate was threefold: to clarify human rights violations and acts of violence, collect findings on the sources and effects of the civil war in a report, and to make recommendations for promoting justice and reconciliation in the future. It would be more than three years, however, before the CEH would begin its work, since it was postponed until after the signing of the final peace accords.

³⁰ Roland Paris, "Peacebuilding in Central America: Reproducing the Sources of Conflict?," *International Peacekeeping*, Vol. 9, No. 4 (Winter 2002), p. 57.

³¹ Sanford, *op. cit.*

Compared to other truth commissions of the time, particularly South Africa's, the CEH was very weak. It had no search-and-seizure power and no ability to subpoena witnesses. Furthermore, the CEH came into effect after the Law of National Reconciliation, which offered blanket immunity for all but the most serious crimes. Thus, perpetrators had no incentive to appear before the commission (since no additional amnesty could be gained), and the commission had no power to force them to appear. Perhaps most controversial was the prohibition against naming perpetrators. In addition, the CEH had no right to hold public hearings, so perpetrators were protected from public opinion as well as prosecution. As a result, the larger society had little involvement with or knowledge of the commission's work, and there was little opportunity or motivation for perpetrators to express remorse. Arguably, these factors greatly hindered the ability of the CEH to serve as a conduit for national reflection and reconciliation. A further limitation was that the commission was officially given a mere six months to carry out its monumental task, although in the end it operated for 18 months.

The idea of a truth commission attracted intense interest from civil society and victims' groups that were excluded from the peace negotiations. Many were angry about the CEH's weaknesses and saw it as inadequate for dealing with the scale of violations in Guatemala. But they still believed in the importance of uncovering Guatemala's collective memory and using it as a tool for social reconstruction. As a result, the Catholic Church established the Recovery of Historical Memory (REMHI) Project, which was a private truth commission meant to facilitate the work of the CEH, by working outside the official peace process. Its purpose was simply to break the silence and to provide a space where people could tell their story. This served an important purpose since fear of further repression meant that many Guatemalans had no context in which to grieve and begin healing. While REMHI was unencumbered by political constraints,

it also lacked significant resources. Nevertheless, REMHI began operating in 1995 and worked for more than two years before the CEH came into being.

Utilizing the Church's extensive reach into local communities, the REMHI team was able to interview nearly 7,000 victims and document the stories of some 55,000 victims. REMHI's unofficial status gave it several advantages. By using local people from each parish, REMHI had access to people who spoke local languages and were able to gain the trust of community members. The Church was also able to use the media, often quoting biblical scripture, to promote the REMHI project and the truth process in general. With support from the Argentine Forensic Anthropology Team, a Guatemalan forensic anthropology team formed and began exhuming graves at massacre sites.

On April 24, 1998, Bishop Juan Gerardi, the head of REMHI, issued the project's 4-volume report, entitled *Nunca Mas* (Never Again). The report contained extensive detail regarding the social context of the violence, the methods and strategies used, and, unlike the CEH report, the names of government and military officials responsible for crimes. It also made recommendations for structural and social reforms to promote reconciliation. Two days after the report was issued, Gerardi was brutally assassinated by members of the Presidential General Staff, a military intelligence unit with a long history of human rights abuses.³² Gerardi's murder graphically illustrated the continuing problem of state terror and extent to which Guatemala's powerful elite were willing to go to keep the past hidden and resist reform.

The CEH finally began its work on July 31, 1997, two and a half years after the start of the REMHI project. It ultimately operated for 18 months. During this time, CEH staff visited nearly 2,000 villages, many of them remote, and registered 7338 testimonies, including 500

³² Raúl Molina Mejía and J. Patrice McSherry, "Justice in the Gerardi Case, But Terror Continues," *NACLA Report on the Americas* (July 2001), pp. 8-11.

collective testimonies.³³ Most were from victims or relatives of victims; very few perpetrators of crimes appeared before the commission. Given the short period of time available to the commission, the work of the REMHI project proved instrumental. The CEH drew upon REMHI's thousands of testimonies, many of them audio-taped and transcribed, as well as its detailed database of cases and published reports. The CEH also requested and received thousands of declassified documents from the U.S. government, which proved crucial to overcoming the lack of support provided by the Guatemalan government.

Since the perpetrators of the worst crimes remained in power, the work of the commission was greatly hindered by the government and military. There was no congressional involvement, and the commission was given no budget. Thus, it was forced to solicit funds from international donors (ultimately receiving U.S. \$11 million). More importantly, de-classified CIA and Pentagon documents show that within months of the signing of the human rights accord in mid-1994, the Guatemalan military had implemented a strategy of deception and denial to subvert the commission's work. In one 1994 document, senior Guatemalan military commanders ordered officers to destroy "any incriminating evidence, whether written order or other information, which could be used to identify or help trace individuals who might be viewed as responsible for any activity that could be deemed illegal in any way."³⁴ Another document reports that torture chambers used during the 1980s "have been totally demolished and pits which existed to bury guerillas in have been filled and covered over with cement."³⁵

The CEH completed its work and issued its 12-volume report in February 1999. Despite its limitations, the CEH produced a thorough and scathing indictment of the Guatemalan

³³ Freeman and Hayner, *op. cit.*

³⁴ Quoted by Kate Doyle, Director of the Guatemala Documentation Project at the National Security Archive during remarks presented at the conference "Memory and Truth After Genocide: Guatemala," at the U.S. Holocaust Memorial Museum, March 21, 2000.

³⁵ *Ibid.*

government and military. The commission concluded that the military was responsible for 93 percent of human rights abuses, including some 200,000 political murders and 626 massacres.³⁶ By contrast the guerrillas were blamed for three percent of abuses. Ironically, the prohibition against naming names had an unintended consequence that, in some ways, strengthened the final report. By not focusing on individuals, the commission focused instead on the broad structural sources of conflict, the role of institutions in committing the abuses, and recommendations for reform. The report stated “the violence was fundamentally directed by the state against the excluded, the poor, and above all, the Mayan people, as well as those who struggled in favor of a just and more equitable society.”³⁷ The systematic way in which the state perpetrated the violence, along with the documented strategy of wiping out entire Mayan villages as a means of dampening rebel support, led the commission to determine that the government’s scorched-earth campaign between 1981-1983 constituted genocide. The commission cited Guatemala’s obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, “which specifies that those who have committed genocide, whether they be heads of state, public officials or private individuals, be judged by the competent courts of the State where the act was committed.”³⁸

The results of the two truth commissions in terms of promoting justice and reconciliation are mixed. On the one hand, there is no doubt that testifying before the commissions was cathartic for at least some of the victims. Creating the political space for truth-telling was particularly important for the Maya, who previously had not been given the opportunity to tell their story and have it officially recorded. In addition, acknowledging the institutionalized nature of the violence as well as the state’s

³⁶ Comisión para el Esclarecimiento Histórico, *op. cit.*, p. 42.

³⁷ Comisión para el Esclarecimiento Histórico, *Guatemala: Memoria del Silencio*, Vol. 1 (Guatemala City, 1999), p. 86.

³⁸ *Ibid.*, p. 41.

commission of genocide provided a source of pressure and a legal obligation to prosecute responsible parties. Significantly, evidence of many crimes are documented and preserved for future trials. In this way, the CEH may have created the possibility for the concepts of truth and justice to be successfully combined.

On the other hand, the truth commissions do not appear to have fostered a national reconciliation process. Even today many Guatemalans remain unaware of the two commissions' work, a testimony to their lack of publicity and outreach. As a result, it is not clear that Guatemalans can be said to have accepted and acknowledged the truth of their history. The government and military continue to deny many of the commissions' findings and dismiss their reports as leftist propaganda. Certainly there has not been sufficient contrition on the part of perpetrators to allow a national process of reconciliation. Guatemalans remain as divided as ever, with many unwilling to address the past. As a result, they are finding it difficult to make the structural changes necessary to build a more peaceful and just future.

Is Justice Necessary for Peacebuilding in Guatemala?

Nine years after the end of the war, transitional justice – both retributive and restorative – remains elusive. In its final report before withdrawing in late 2004, MINUGUA stated that “the vast majority of serious crimes still go insufficiently investigated and unpunished. Judicial impunity remains today the rule rather than the exception, which has contributed to a lack of public confidence in the justice system and the persistence of lynching in rural areas where justice is particularly weak.”³⁹ And, indeed, this may be somewhat of an understatement. In the first five years following the signing of the peace accords, the number of violent assaults on judges, witnesses, and prosecutors tripled.⁴⁰ The rise of vigilantism is shown through the more than 300 mob lynchings – previously unknown in Guatemala – that occurred during the same

³⁹ MINUGUA, “MINUGUA’s 9th and Final Report on Fulfillment of the Peace Accords in Guatemala,” August 30, 2004, http://www.nisgua.org/articles/minugua_Final_Report_Aug2004.htm, p. 7.

⁴⁰ June Carolyn Erlick, “The Sorrows of Peace in Guatemala,” *World Policy Journal* (Summer 2001), p. 66.

period.⁴¹ The lynchings are frequently instigated by locals who in the past enjoyed power through their involvement with the army and civil patrols. Rather than random acts of mob violence, evidence suggests that the lynchings are politically motivated and used to instill fear and exert control.⁴²

A strong argument can be made that the lack of justice has weakened peacebuilding efforts in Guatemala. The greatest barrier to peacebuilding efforts is the failure to implement the peace accords. Experience has shown that until the perpetrators of past abuses are removed from power (if not tried and punished), it will be very difficult if not impossible to implement the accords. The structural changes called for in the accords are also key to the process of restorative justice. Without them, particularly given the lack of contrition shown by perpetrators of past atrocities, the prospects for national reconciliation are bleak.

Meanwhile, the conditions that originally gave rise to the conflict still exist, and a return to violent conflict is already occurring. The lynchings are one example of how the mechanisms of state repression still function even though the state no longer has an official repressive policy. The danger of failing to deal with the past can also be seen in the way politically motivated violence has evolved into criminal violence. Some former and current members of the security forces have turned to organized crime and use the state's extensive counter-insurgency infrastructure to commit drug-trafficking, car thefts, kidnappings for ransom, and slave trading.⁴³ The expansion of crime often provides a cover for political repression, as seen in the case of the Gerardi murder. Whether the violence is economically or politically motivated, the end result is the same for the majority of Guatemalans; their quality of life has changed little since the end of the civil war. The fact that much of the violence continues to be committed by those responsible

⁴¹ *Ibid.*

⁴² Mejía and McSherry, *op. cit.*, p. 10.

⁴³ Mejía, *op. cit.* p. 67.

for past abuses further illustrates how dealing with past abuses and strengthening the rule of law to promote peacebuilding efforts are inextricably linked.

The notion that retributive justice should be avoided during the early stages of a transition from civil war out of fear of threatening the consolidation of peace seems unfounded in the case of Guatemala. The various characteristics of Guatemala – the structural nature of the violence, the fact that the main perpetrators remain in power, and the polarization of Guatemalan society – create conditions in which the failure to promote justice has simply perpetuated the conditions of violence common during the civil war. In contrast to the situation of “victor’s justice” found in Rwanda, Guatemala suffers from “victor’s injustice.” Guatemala is trapped by the past. Until Guatemalans find a way to come to terms with their past, they will remain a divided nation of “rememberers” and “forgetters,” and the future will continue to look very much like the past.

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