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# Reconciliation in Guatemala: the role of intelligent justice

The Guatemalan civil war lasted from around 1962 until 29 December 1996 when the peace settlement was finalised between the PAN (National Advancement Party) government of President Arzu and the combined insurgent forces of the URNG (Guatemalan National Revolutionary Unity).<sup>1</sup> The years preceding the final agreement had seen the conclusion of a variety of specific agreements between the government and insurgent forces.<sup>2</sup> Among these was the signing of the Oslo Accord on 23 June 1994 for the establishment of a Commission for Historical Clarification (CHC). The CHC began its work in 1997 and submitted its final report in February 1999. In analysing aspects of the CHC's operation, conclusions and recommendations and the Guatemalan experience in relation to the issues of justice and reconciliation, it becomes clear that there are good grounds for believing that both the Arzu government and its successor<sup>3</sup> have been engaged in a cynical course of manipulation without evincing any real commitment either to the letter or spirit of the CHC report.

Before turning to these considerations however, some background information may be helpful to understand the context of the

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Guatemalan conflict and peace process. The CHC estimates that as many as 200,000 people died in the thirty-six year civil war.<sup>4</sup> Eighty-three per cent<sup>5</sup> of those victims belonged to the indigenous Mayan peoples of Guatemala.<sup>6</sup> The CHC also notes that as many as 626 massacres were committed throughout the war against Mayan communities, with more than half occurring between 1981 and 1983.<sup>7</sup> It concludes that 93 per cent of all serious human rights violations were carried out directly by the Guatemalan army or by other agents of the state, such as police or paramilitary groups<sup>8</sup>. Finally, the CHC finds that the army committed acts of genocide against the Mayan peoples of Guatemala, in particular during the years 1981 and 1982.<sup>9</sup>

If the CHC is correct in its estimated death toll, the Guatemalan conflict exceeds the death tolls of the conflicts and 'dirty wars' of El Salvador, Nicaragua, Argentina and Chile put together.<sup>10</sup> The figures cited for Guatemala do not take into account the policies of forced displacement which were a forerunner to what would become known internationally as ethnic cleansing. It is estimated that between half a million and one and a half million indigenous people were forcibly displaced, internally or externally, during the 1980s.<sup>11</sup> Why, then, does the Guatemalan conflict register so little in the general international consciousness, compared to the other four Latin American conflicts mentioned above? Whatever it started out as, the conflict became, in the early 1980s, a war of racial persecution. Perhaps the racism that allowed the genocide to occur was also one of the factors that allowed it to be kept quiet.<sup>12</sup> The CHC aptly called its report *Guatemala, Memory of Silence*. The CHC goes some way to breaking that silence, but recognises that the report itself is not enough.

José Zalaquett, the Chilean jurist who designed the methodology of the Rettig report, named after the chairman of the Chilean Truth and Reconciliation Commission, has noted that there are four general transitional categories for states. First, there is the situation in which a conflict results in an outright victor; second, there is the situation in which a regime loses 'legitimacy' but maintains control of armed power; third, there is the situation where 'military rulers allow for a civilian government to come to power following a negotiation or under their own terms'.<sup>13</sup> The fourth concerns the 'gradual transition from dictatorship to democracy'.

Which of these models fits Guatemala is not a simple question. Guatemala has rarely enjoyed anything other than military rule or militarily controlled rule since the end of Spanish occupation.<sup>14</sup> In 1982 and 1983, there were military coups against the existing 'elected' military leaders, thus subverting the foregoing model of rigged elections giving the military power, but a continuation of military dictatorship nonetheless. In 1986, however, there was a move towards democratisation of sorts and general elections returned the Christian Democrat

candidate Vinicio Cerezo to the presidency.<sup>15</sup> But with the war still ongoing and an attempted military coup against his government, Cerezo caved in to the military and ceded almost all operational powers directly to them. Experiences of elected democracy from Cerezo until the end of the war in 1996 were less than positive and hardly more than superficial. This should not be taken to imply that the regime was in Zalaquett's second category. The military regimes in Guatemala provoked very polarised opinion. The only regime that could be said to have lost 'legitimacy' was that of Lucas Garcia in 1982, when the military itself decided that he was losing the war and was simply too corrupt, even by relative standards. It could not be said, however, that by 1986 the military had lost any more support than throughout the war in general. The oligarchy and large sections of the urban Ladino communities continued to support it as they had done for many decades.

It seems that Guatemala occupies a space between the third and fourth categories noted by Zalaquett. While there was a superficial transition to democracy from 1986 onwards, the military were still running the country which continued in a state of civil war, albeit at a significantly lesser intensity than during the early 1980s. The state forces had not achieved outright military victory as the URNG continued to be a thorn in their side, yet without really threatening to take actual control of the state. The inability of the state forces to reach a definitive military victory was one of the factors that led to negotiations beginning in 1988. The general picture was affected by two developments in the 1990s. On the diplomatic plane and following the end of the cold war, the United Nations and other negotiating bodies were keen to conclude a number of historic settlements, in countries including El Salvador, South Africa and Guatemala. On the economic plane, Central America ceased to be seen solely as a strategic buffer-zone of the US, and the stabilisation of the area was considered necessary by all the major economic players, if investment and development were to become a reality. Notwithstanding the complex forces that led to and developed during the negotiations, the army remained in a position of real strength throughout. In these circumstances, while it is difficult to conclude that the military 'allowed' the transition, it is true that it remained able to control much of the content and timing of the changes.

### **The Commission for Historical Clarification and its mandate**

The CHC did not formally begin its work in Guatemala until 31 July 1997, some seven months after the signing of the peace accords, though it was meant to begin as soon as peace was signed. The agreement also laid down that the commission would work only for a

six-month period which could be extended for a further six months. This was an altogether unrealistic time-frame and was superseded by events.<sup>16</sup> Almost all of the CHC's fieldwork was carried out between September 1997 and April 1998.<sup>17</sup> From April 1998 until February 1999, the CHC analysed the information and prepared its report, which was presented on 26 February 1999. Notwithstanding the extended operational period of the commission, the amount of time available still presented an extraordinary challenge. The Rettig commission had been given a nine-month period to report on a much shorter period with a much more restricted focus. Seventeen months to investigate, analyse and report on thirty-six years of civil conflict demanded a superhuman effort on the part of many who worked within the CHC, and the quality of the report is a testimony to their professionalism and dedication.

One way in which the commission tried to make the task more feasible was, notwithstanding its mandate to investigate all human rights violations, to restrict the focus to violations of the right to life and physical integrity. It was an impossible task to cover so many violations in great detail. It is not surprising that what is most quoted in Guatemala from the commission's work are the statistics mentioned at the start of this article. While there was a good deal of sophisticated research on the history and causes of the conflict, time allowed for little more than the cataloguing of the violations prioritised by the CHC. A longer period might have allowed for deeper studies to be carried out in relation to particular violations, although it should be recognised that the more general parts of the report and, in particular, the historical analysis of the role of the oligarchy in the conflict are especially strong.

Christian Tomuschat, the CHC moderator, has noted the various arguments generally requiring truth commissions to report sooner rather than later. However, the speed at which the Guatemalan CHC had to work may have contributed to the negligible effect it has had on public life since its publication. Tomuschat hinted that a longer period than one year was necessary, while accepting that an extended period of operation ran the risk of inducing boredom. A longer investigation would almost certainly have produced a different kind of truth – not in terms of conclusions, but in terms of reactions and longevity. Above all, despite Tomuschat's clear desire for the opposite to be the case, participation, especially by rural victims and survivors, was generally brief and superficial. As anyone who has worked closely with the victims and survivors in Guatemala can testify, it takes an extremely long time to win their confidence, as many are still traumatised by the barbaric violence the state visited upon them or are simply unwilling to take the risk of opening up to strangers. The chance of teams of investigators, almost all entirely unknown to the

communities visited, managing to get all the relevant facts in an eight-month period needs little comment. The training of the investigators, while perhaps all that time allowed, was not entirely adequate to allow them to carry out or to understand the cultural and human complexities of the tasks before them. As a result, while activists in the city greeted the report with euphoria, it passed largely unnoticed in the rest of the country.

Attempts to disseminate the report, although well intentioned, have not met with great success. The United Nations, through UNOPS, has translated summaries into various Mayan languages, but this can have only a limited benefit as these languages are generally not read by those who speak them. Otherwise, this task has been carried out by NGOs with no assistance from the state and has been necessarily hampered by lack of resources and access.

Besides this first problem of time constraints, the mandate also created three other basic problems. In the first place, the CHC was not permitted to name names, as had been allowed in other situations – El Salvador, for example. Second, the mandate expressly prohibited the recommendations and the report from having ‘any judicial purposes or effects’. Exactly what this provision means is open to debate, but, in practice, it has been interpreted narrowly, to the extent that the commissioners of the CHC have refused to testify in cases that have sought to use the report as a source of evidence in certain trials.<sup>18</sup> And, third, the CHC could only invite parties to offer information; it had no powers to compel information to be handed over.<sup>19</sup>

I would argue that these posed the most difficult challenges for the CHC in terms of its mandate. However, the issue of naming names should be put in perspective. While this was allowed in the El Salvador report, names were not made public by either the Argentinian or Chilean commissions. The decision not to name names is not necessarily a bad thing. Such public naming usurps the functions of the courts and raises doubts, both moral and legal, in terms of guarantees of due process.<sup>20</sup> In the particular experience of Guatemala, as will be noted later, the lack of authority to name individuals perhaps allowed for a stronger report than might otherwise have been possible.

That the CHC report cannot be used ‘for legal purposes’ is not necessarily the setback that is sometimes alleged. The report is based, above all, on the anonymous testimony of victims. Any criminal investigation would, in any event, have to locate the witness and determine the quality of the evidence and his/her disposition to testify. The most that a report like the CHC’s could do, in most jurisdictions, is establish certain general patterns, with the authors of the report coming to speak to its methodology and conclusions. The provision that the report shall have no ‘judicial purposes or effects’ does not necessarily mean that it cannot be adduced as evidence for such general purposes. The Oslo

Accord is an agreement between the PAN government and the insurgent forces. Its legal position as regards the rules of evidence in the Guatemalan criminal law is extremely dubious.<sup>21</sup> In the final analysis, however, the evidential value of the report for the purposes of a prosecution is relatively small. While it is doubtful that the courts would rule that the report could not be adduced in relation to general matters, other reports and studies could achieve the same broad function. Even a negative decision regarding the admissibility of the report would not be a devastating blow to the prosecution.

The fact that the CHC could not compel witnesses was a feature shared with almost every other such body. The South African Truth and Reconciliation Commission is probably *sui generis* in relation to the trade-off between amnesty and declaration. This hardly amounted to the power to compel witnesses in the technical sense, but it did provide a compelling argument for many to testify. In relation to international legal standards, the legality of the amnesty provisions in South Africa is of doubtful standing<sup>22</sup> and, it is submitted, it was altogether positive that such amnesties were not provided for in the Guatemalan settlement. Nonetheless, it seems that, without the power to compel, the provisions that the CHC included, entitling it to reach conclusions on the information it received are about all that can be done to induce co-operation.

It has been suggested that, if truth commissions are to form a genuine alternative to prosecution, certain minimum requirements must be fulfilled.<sup>23</sup> The Guatemalan CHC bears six of the hallmarks that John Dugard, writing on the South African situation, identified as necessary: the commission was independent; it was established in explicit agreement with the executive; it had a broad mandate to cover the investigation of all gross violations of human rights; it had the competence to recommend financial compensation; it was required to present a comprehensive report aimed at preventing the repetition of similar abuses in the future; it was required to, and did, complete its report within a reasonable time.

Dugard's suggestion that amnesty should only be available to those who co-operated with the commission is somewhat irrelevant for Guatemala. Amnesty laws predating the CHC mandate and operation clearly covered gross human rights violations.<sup>24</sup> The Law of National Reconciliation, which came into effect in 1996 when the peace was being signed, excluded the crimes of genocide, forced disappearance, torture and other crimes recognised as imprescriptible from the ambit of amnesty.<sup>25</sup> The exclusion of gross human rights violators from amnesty therefore existed *de facto* but was not linked to the issue of co-operation with the commission.

Whether the Guatemalan commission satisfied the remaining four elements of Dugard's guidelines is debatable. Take the question of

the broad mandate first. The CHC, unlike most other commissions, was a hybrid of national and international members. It presented a model different from the totally national commissions of Argentina, South Africa and Chile, and the international body for El Salvador. By operating with only three commissioners, of whom one was international, its scope for embracing diverging political and ethnic experiences was so limited as to make this wellnigh impossible. Guatemala has a majority population of Mayan peoples in twenty-one groups. The rest of the population consists of mestizos (mixed indigenous and Spanish ancestry, also called Ladinos, around 40 per cent), Criolles (families of purely Spanish ancestry since the time of colonisation), Xinka (of Mexican descent) and Garifuna (of African descent). The commission included one renowned international expert, Christian Tomuschat, as moderator. The other commissioners were a respected (mestizo) male lawyer and a respected indigenous academic woman.<sup>26</sup> It is a matter of discussion whether real racial or political balance can be achieved in such circumstances. However, broad representation of different opinions might have led to impasse rather than impartiality<sup>27</sup> and the composition did fulfil the requirements as agreed by the parties to the Oslo Accord.<sup>28</sup> Besides, the model used in Guatemala was a novel one.<sup>29</sup> It could be argued that the hybrid approach of mixing national and international representation lessened the need for such an all-inclusive structure. On balance, it would seem that independence is a more important virtue than inclusiveness and there is little doubt that such independence was achieved.

Second, whether the CHC was adequately financed is a question beyond the scope of this paper. As has been noted, the investigation into serious abuses throughout the thirty-six years of the conflict was extremely ambitious. The tightness of the schedule was determined at least partly by the economic support available. Third, the CHC did not hold public hearings. And, finally, the CHC could not name names. Accusers and accused could not confront each other. These last two elements depend very much on the conception of truth commissions as a substitute for justice, considered in detail below.

In practice, the principal difficulty for the CHC resulted from the refusal of the military to co-operate fully with it. That was the military's choice, and the mandate expressly provided that failure to provide information would not impede the CHC from reaching a conclusion on the basis of the evidence obtained. In the absence of compulsion, the moral threat contained in this provision is all that can be hoped for. However, if the broader objective is to establish an enduring truth, the absence of an alternative version of events cannot but undermine the final product. This does not cast any doubt whatsoever on the legitimacy and accuracy of the conclusions reached. It merely highlights the necessarily partial nature of the exercise. That this was a

deliberate military strategy, allowing the report's conclusions to be undermined in the future, is beyond doubt and permits us to draw our own conclusions about the reason for the failure to co-operate.

### **The CHC and surrogate justice**

Recommendations 47 and 48 of the CHC report require the prosecution and punishment of those responsible for human rights violations and acts of violence, 'taking into account the various levels of authorship and responsibility . . . paying particular attention to those who promoted and instigated the said crimes'.

John Dugard has observed that 'there is wide support for truth commissions as an alternative to prosecution'.<sup>30</sup> It has also been noted that truth commissions are 'alternative justice mechanisms . . . operating as escape valves'.<sup>31</sup> The view that bodies like truth commissions offer an alternative to justice is one that requires careful scrutiny. In many of the commissions that have reported, it is either explicit or to be inferred that the report does not view itself as a surrogate form of justice. Apart from the Guatemalan case, this is perhaps clearest in the synchronicity between the publication of Argentina's *Nunca Mas* report and the beginning of a prosecutions programme.<sup>32</sup> In Chile, President Aylwin transmitted the Rettig report to the courts and called for 'extensive investigations for which the current amnesty law cannot be an obstacle'.<sup>33</sup> In Haiti, the mandate of the truth commission explicitly admits of the possibilities of trials and such trials were underway during 2000.<sup>34</sup> In Bolivia, the truth commission failed to report, but a six-year trial ended with a conviction *in absentia* for General Meza.<sup>35</sup> The Nigerian truth commission's mandate, established in 1999, asks the commission to 'recommend measures . . . whether judicial, administrative, legislative or institutional'.<sup>36</sup> Such a mandate is at least open to the possibilities of prosecution.

Given the practical experiences of Argentina, Haiti and Bolivia, and the current efforts towards prosecutions in Chile and Guatemala, it is clear that a significant number of states which have had 'truth commission experiences' do not take the view that seeking the truth and seeking justice are necessarily mutually exclusive. Dugard's comments relate more to the South African experience, where the clear purpose of the commission was to act as an alternative to formal justice in the sense of criminal prosecutions. But South Africa is probably unique among the seventeen recognised truth commissions throughout the world in seeking to achieve this particular goal.<sup>37</sup> The South African experience, apart from the legal questions it raises, is one that requires careful scrutiny. The international interest in its commission, the struggle against apartheid and the personalities involved, made South Africa's the best known of all truth processes. The fact



that its report is one of the very few to be written and disseminated in English also helped to establish it in the international consciousness in a way that many others have failed to do. But one should be careful about raising the South African model to the status of a paradigm. Analysis of almost every other commission will show it to have been exceptional in many regards.<sup>38</sup>

The idea of the truth commission as an escape valve is more faithful both to the objectives of many other truth commissions and the historical realities that followed them. The escape-valve model reflects a number of factors, practical, fiscal, moral and legal. In most transitional societies, it would be an insupportable burden, in terms of financial and human resources, to carry out generalised programmes of prosecutions for human rights violations in preceding regimes. Generalised policies would almost certainly lead to low-level scapegoating rather than high level accountability, and such an outcome would also create a climate of vengeance rather than one of reconstruction. Truth as an escape valve allows victims in particular and societies as a whole to concentrate their efforts for justice on those who bear the principal responsibility for planning and carrying out serious human rights abuses. Such efforts will have the moral advantage of being premised on serious and objective investigations. This also means that truth commissions operate as an alternative to mass prosecutions but can facilitate particular ones. This is clearly the view taken by the Guatemalan Commission for Historical Clarification in its recommendations. Apart from the South African experience, there is relatively little hard evidence to suggest that truth commissions have been conceived of in theory, or played out in practice, as an absolute alternative to prosecution.

One other point on the issue of post-conflict justice seems to be worth making. It is estimated that there are between fourteen and seventeen countries with 'truth commission experiences'.<sup>39</sup> The conflicts experienced in all of these countries varied in levels of intensity and destruction of the state fabric. The pace at which justice is possible in such countries has to be calculated with a sense of realism. To state baldly that there have been few prosecutions in relation to mass violations of human rights hardly does justice to the complexity of the issue. If it is accepted, as I go on to argue, that the best approach to prosecutions is to target those with ultimate responsibility for the planning and execution of the crimes, we are talking about an immensely complex legal operation. In terms of time and talent, it may simply be true that some countries will struggle to meet that challenge. But it is also true that most peace processes take place in the more or less immediate aftermath of a violating regime. Justice necessarily follows later, and sometimes much later. How much later may indicate any number of things, from detailed professionalism to *de facto* impunity.<sup>40</sup> The lack

of prosecutions at the same time as, or in the immediate aftermath of, a peace process should not be taken as an indication of their immanent impossibility or implausibility. While many within Guatemala seem to despair at the dilapidated state of the administration of justice, it is worth considering that, since 1997 (the first time investigations could seriously be considered after the ending of the war), there have been two convictions for mass killings carried out by state officials or their agents in the context of the conflict.<sup>41</sup> One case concerned the massacre of 177 women and children. Three indigenous men were sentenced to life imprisonment for their role in leading the paramilitary patrol that, in the company of the Guatemalan army, carried out the atrocity. Another case dealt with a military reservist who was finally convicted for a number of killings carried out in late 1982. The fact that these two cases have gone to trial and resulted in convictions indicates that not all is hopeless. At the same time, only a fool would read into this the end of impunity.

The report and recommendations of the CHC far exceeded the expectations of civil society in Guatemala in general. In the first place, as has been remarked above, the recommendation that trials take place in Guatemala is one of enormous significance both in recognising the CHC's own limits and in terms of providing a challenge for the post-conflict society. Notwithstanding its limitations, the CHC did not shy away from concluding that acts of genocide had been committed against various indigenous groups, as well as other crimes against humanity; that the army was by far the greatest violator; and that the oligarchy of the country had materially contributed to the gross violation of human rights throughout the conflict. It may be argued, in fact, that the apparent shield of anonymity was turned to the benefit of the commission, freeing it from the complication of personalised or personal responses.

### **The reaction to the CHC report**

The greatest disappointment in the story of the Guatemalan truth experience has been the official reaction to the report. On the day it was presented, 25 February 1999, President Arzu elected not to take his seat at the podium to receive the report; instead, a low-ranking cabinet official received it on the state's behalf. An important element of any peace process is the discourse of symbols. While this may be mocked by outsiders, sometimes only those affected by the quotidian reality of constant conflict can understand the significance of such symbols, be it the changing of a street-name, the shaking of hands or the location of, or participation in, a meeting. Arzu, who had been garlanded the world over for the part he claimed in the peace process, seriously set back the cause of reconciliation through his actions. The

clear rejection of the report, the creation of an 'us and them' reaction and the simple churlishness of his behaviour derailed serious comment on its findings and set the tone for future discussion. Instead of the CHC report being embraced as a building block for the future of the state, it was downgraded to the status of a political football.

To compound this fundamentally damaging response, the Arzu administration refused to comment for several months on the eighty-four paragraphs of recommendations that the report contained. Finally, the administration announced that the state was already doing more than half of what had been asked for and that the rest was under serious consideration. However, President Arzu failed himself, the peace process and Guatemala most singularly when, on 30 June 1999, some four months after the CHC had reported, he declared that the commission was wrong to conclude that genocide had been committed.<sup>42</sup>

The word *genocide* has a particular resonance in Guatemala. Indigenous society recognises as genocide the acts committed by the Spanish invasion 500 years ago. The consciousness of that reality is one of the many elements that has allowed the indigenous population to survive five centuries of exploitation and exclusion, not to say humiliation and dehumanisation.<sup>43</sup> The massacres and forced displacement of hundreds of thousands of indigenous Mayans, in conditions designed to lead to the deaths of those fleeing, particularly in 1981 and 1982, would lead most objective lawyers to conclude that genocide had been committed.<sup>44</sup>

However, Arzu's comments have a significance that goes beyond the error in law that he committed. For he was continuing a discourse that sought to reject the CHC report, treating it as a rebuke to certain factions in Guatemala rather than as an opportunity for national reconstruction. Importantly, he chose to highlight the very issue that divides the country most deeply and most historically. The reaction manifests a deeper reality in Guatemala. Far from being at peace, Guatemala lives in a twilight zone between denial and triumphalism. Those who won the war, in general, do not want to acknowledge either its causes, their responsibility for those causes, or the role they played in the atrocities committed during it. Victory is not only victory. It is vindication over those who dared to challenge the order or presented, even momentarily, a real or potential threat. The oligarchy dominating the country shows no real perception of the need to address the core issues of racism or land and wealth distribution, and there remains a fundamental air of triumphalism among significant factions of the armed forces that they won the war and nothing more has to be discussed.

Despite Arzu's extremely negative and damaging reaction to the CHC report, his PAN government did make some headway with one

of the report's most significant proposals, namely that a Foundation for Peace and Concord should be established to follow on the work of the CHC. It should be noted, however, that such action was not taken within the sixty-day period expressly requested by the CHC. As a result of the delays, the general election at the end of 1999 suspended the creation of the foundation. In that election, the FRG (Guatemalan Republican Front) won both the presidency and a majority in Congress. In his inaugural speech, President Alfonso Portillo made a series of far-reaching commitments and declarations.<sup>45</sup> Among these, he declared that the peace accords negotiated throughout the peace process were to be considered as state undertakings and not merely the fruit of a negotiation between two opposing sides in the war. While he has done nothing to consolidate that position, the proposal that the accords become law was a politically significant gesture. More importantly, however, he also said that he accepted the report of the CHC and committed himself to carrying out the recommendations of the commission, again as a matter of state responsibility.

Sadly, the rhetoric has been different from the reality. In the Congress, Portillo's party, the FRG, rejected the preparatory work of the previous Congress on the Foundation for Peace and Concord, requiring the whole process to be reworked. In July 2001, a few days before his first meeting with George W. Bush in Washington, DC, President Portillo announced the creation of a Commission for Peace and Concord (CPC). At first sight, such a step might be treated as positive. However, closer scrutiny gives little cause for hope. The CHC had recommended that the foundation be set up by congressional decree, that is, by Act of Parliament.<sup>46</sup> Instead, a commission has been set up by a governmental accord. Legally and politically, the message is clear. Congress has no mandate to monitor the efficacy of the CPC, which can, as it surely will, wither after it has satisfied some very short-term political and diplomatic goals.

There is no budgetary provision for the CPC. This, more than anything, is the surest sign that its creation is a public relations stunt, rather than a gesture of good faith. Almost all human rights NGOs have been unanimous in their rejection of Portillo's initiative, but perhaps more significant has been the attitude of the former truth commissioner, Alfredo Ballsels, who has dismissed the commission as a meaningless appendix to the already penniless Peace Secretariat.<sup>47</sup> The timing and manner of its creation, the much reduced mandate compared to the CHC's original proposal, and the somewhat questionable state of Portillo's credibility, rendered it still-born.

While it is true that President Portillo accepted and sought pardon on behalf of the state for the abuses committed in the conflict, as well as establishing a 'Day of dignity for victims', none of the other

symbolic recommendations have been adopted. In particular, the Congress, under the presidency of the ex-dictator Rios Montt, has not reaffirmed the dignity and honour of the victims. As to practical measures, the programme of reparations has not seen the light of day. In November 2000, the secretary for peace publicly admitted that his department simply had no money for the purposes of victim compensation. Budget proposals issued a few days later indicated that none would be forthcoming in the year 2001.

The CHC adopted the basic position in international law that reparation should be based on the principle of *restitutio in integrum*; that, as far as possible, the situation be returned to what it was prior to the violation and, where that is not possible, an economic value be put on the effect of the violation to compensate the victim. But there is no real prospect of financial compensation. There have been some minor efforts at offering development projects, such as water and roads, as part of compensation packages. While such projects are necessary components of compensation where the state has destroyed villages in their entirety, there seems to be little structure to the selection of areas targeted for these projects. The correlation between development and compensation has been confused in many cases and the moral function of the activity thereby obscured.<sup>48</sup>

The CHC also recommended a nation-wide programme of exhumations of the hundreds of clandestine cemeteries in the country. Guatemala has several NGO exhumation organisations. It is understood that the government has begun to develop its own forensic team to complement the three NGO teams already at work. Such a step is clearly positive, so long as it is attuned to the social, psychological and legal needs of the survivors and not an instrument of manipulation and propaganda.

It is worth remarking that sixteen of the CHC's eighty-four recommendations (almost 20 per cent) relate to the Guatemalan army, of which the most significant was the abolition of the presidential military staff (*Estado Mayor Presidencial*). This part of the army, supposedly created for the personal protection of the president, had been identified as one of the principal sources of human rights violations and Portillo had undertaken to carry out its abolition on assuming the presidency. A few months later he declared that he had changed his mind, a decision that showed him in his true colours as a hostage to the militarised past rather than a hope for the democratic future.

### **Truth, justice, reconciliation and reconstruction**

That reconciliation is the primary focus of all transitional efforts has become a given, but it is an idea which requires serious examination. Reconciliation in general terms connotes a series of complex moral

activities: recognition of wrongdoing, contrition on the part of the wrongdoer, forgiveness on the part of the wronged, a commitment to future harmony.

It is plain that reconciliation, even for the most minor of abuses, is an extremely demanding concept. The use of the word in transitional discourse wins many political points but what is the real content of the idea? In the normal course of events, the state does not ask the owner of a car to be reconciled with the person who stole his vehicle. Nor does it ask the assault victim to be reconciled with her assailant. Yet the more atrocious the crime, the more unrealistic the concept of reconciliation is. Wole Soyinka has noted that reconciliation requires the penitent mind of the violator as a precondition to reconciliation.<sup>49</sup> The alleged cynical abuse of amnesty legislation in South Africa and the outright denial of genocide in Guatemala are evidence enough of the lack of such a penitent mind among perpetrators. The truth of the matter is that, in practice, the burden of this model of reconciliation falls on the victim. Defenceless victims of state terror are made to feel somehow blameworthy if they do not show willingness to forgive and forget. The perversity of the situation is most clearly demonstrated in the shameful attempts to stigmatise as vengeful those who seek justice. Car theft and assault are suitable subjects of the justice system, but indiscriminate massacre and wanton destruction of life, property and history are not. Something is missing in this equation.

The commission of crimes against humanity or massive abuses has sometimes been referred to as a manifestation of 'radical evil', to borrow an idea from Kant.<sup>50</sup> Implicit in some of the arguments about radical evil is the idea that the normal rules of seeking redress either do not, or should not, apply. To some extent, this can be seen in the rather vague, almost hopeful discourse of reconciliation. It is supposed that the justice system is not designed to deal with a scale of evil that society's rules never imagined or contemplated; that another approach is needed. There is some truth in this idea, but there is also much wrong with it.

It is obvious that a civil war destroys the very fabric of the state in general. The degree of destruction may be exacerbated by other factors of oppression and racial discrimination, as happened in Guatemala. That something more imaginative than mere punishment is required hardly merits discussion. The application of justice on its own is certainly inadequate and possibly inappropriate in such circumstances. But the search for an intelligent application of justice forms a necessary part of the overall response. Such a view forms the guiding philosophy of the CHC. In its recommendations, it states that 'truth, justice, reparation and forgiveness are the pillars of the consolidation of peace and national reconciliation'.<sup>51</sup> (It is interesting that contrition

on the part of the perpetrators is not required, but forgiveness on the part of the victims is.)

The CHC, however, also indicates the necessity of a broad and imaginative response to radical evil. Truth clearly plays a part but, on its own, is as inadequate as any other of the elements suggested. Treating truth as a sufficient response 'offers as much potential for social good and healing as it does for abuse and the enthronelement of the cult of impunity'.<sup>52</sup> Truth is part of the solution. But it is not, in general terms, to be seen as capable of offering the whole solution. Such a view is clearly supported by the Inter-American Commission on Human Rights:

The value of truth commissions is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail.<sup>53</sup>

It has been said that the truth will set us free. But, at least as far as transitional societies are concerned, we should be clear. The truth can, if accepted, set us free from denial of the past. It does not set us free from the damage caused or the causes of the damage. It deals with the moral operation of recognition, not with contrition or reparation or forgiveness. Truth is almost certainly a precondition to a successful transition, but it is only a gateway to lasting solutions.

As stated above, justice is also a necessary part of the equation. But to understand what part it plays, it is necessary to define the objective. To talk of reconciliation in general, even hopeful, terms is a dangerous game. The lack of contrition is, in almost all transitional societies, a simple fact. Without such contrition, reconciliation in the normal sense is a non-starter. The easy option is, then, to transfer the onus on to the victim and parade forgiveness as the equivalent of reconciliation. Such a process is both morally repugnant and politically futile. When we talk of reconciliation, therefore, we should be clear and realistic. Reconciliation in transitional societies must be set in a structural, rather than a moral, context. This does not mean there is no moral content to the concept, but that the parameters are set in a different way. Seeing reconciliation as a structural concept requires asking what can be realistically achieved in a context where massive abuses have taken place and there is no genuine contrition. It appears that the most apposite concept of reconciliation in these circumstances is of a reconciliation that seeks to restore, above all, the structures that were destroyed by the abuses. It seeks to reconcile the citizen and the state, and restore the fundamental bonds of trust and confidence torn apart by the conflict and the atrocities. It does not seek to force what has been refused (contrition) or require what ought not to be asked for (forgiveness). It is essentially a concept of reconciliation as reconstruction (presuming that the structures of trust and confidence did

previously exist, which is not always the case). The essential structures of trust and confidence relate to the classic virtues of good government – transparency and accountability. The arch enemy of these twin pillars is impunity.

This is not the place to enter into the already detailed debate on the rights and wrongs of prosecutions. It is simply submitted here that the debate on whether to prosecute has now moved on to ‘how to prosecute’. Such a view is supported by a glance at events in the last ten years: the ad hoc tribunals for Yugoslavia and Rwanda; the signing of the Rome statute for the creation of the International Criminal Court; the assertion of the legal rights and duties to prosecute Pinochet by Spain, France and Belgium. Even more recently, the successful extradition of Milosevic to the International Criminal Tribunal for Former Yugoslavia evidences the resolve to prosecute, at least in certain high-profile cases. All these examples, however, are to do with transitional justice that is dealt with at either an international or extra-territorial level. It has to be recognised that the pursuit of justice within a country ravaged by civil war and repression presents many challenges not faced by the ‘external’ initiatives. ‘Intelligent justice’ is the central axis of transparency and accountability in the concept of reconciliation as reconstruction.

Intelligent justice seeks to find a way in which the application of justice for massive abuses fits with the overall package of necessary responses and enhances the possibilities for the reconstruction of the relationship between state and citizen. It seeks to make strategic choices about justice that are morally and legally defensible, guaranteeing the rights of the victims to justice while at the same time assisting in strengthening the state and the relationship of trust and confidence with the citizen. There are those, of course, who say that you cannot seek justice without creating division. But this misstates the problem. What is true is that you cannot seek justice in these situations without manifesting the division: it already exists. The denial and lack of contrition are the source of the division, not the right of the victim to moral and legal reparation.

### **The content of intelligent justice**

Intelligent justice is the central axis of reconciliation as reconstruction. It is premised on three central tenets. First, it is categorically victim-centred. It rests upon the victim’s legal and moral right to justice. It depends absolutely on the victim’s understanding of and desire for justice. Second, intelligent justice seeks to be historically faithful. It attempts to meet the victim’s desire for justice in a way that reflects something of the historical truth of the conflict. Third, it seeks to strengthen, not embarrass, the state and the rule of law.



*The victim-centred approach*

Much has been written in the last fifteen years on the issues raised by transitional justice. A great deal of the debate on justice has been held at what might be called the policy level. The policy debate on transitional justice tends to focus on two points of view: a pro-prosecution lobby which sees trials as a policy instrument for deterrence and an anti-prosecution lobby which sees judicial processes as self-defeating and destabilising. The pro-prosecution lobby, with some notable exceptions,<sup>54</sup> has tended to focus largely on the idea of the duty to prosecute. Relatively little has been said about the right to justice.<sup>55</sup> This is not a pedantic legal point. It betrays what seems to be an unfolding reality. If truth is the first casualty of war, it seems that victims are the first casualties of peace. Their views, needs and feelings tend to be relegated in the flurry of diplomacy and posturing that goes on in negotiations. Above all, decisions are made about their rights, often without consultation.

The first step of intelligent justice is to talk to victims. As a matter of dignity and empowerment, intelligent justice seeks to provide victims with information about their rights and duties and those of the state. It seeks to advise on the implications and risks of seeking to invoke certain rights. It leaves, as a matter of dignity, the decision of whether or not to seek prosecutions entirely in the hands of those victims.<sup>56</sup>

*Historical fidelity*

The idea of historical fidelity is twofold. If victims decide to seek justice, I would argue that it is in the legal interests of the victims and the historic interests of the country that any putative trial presents, as far as possible, cases that demonstrate the broader realities of the abuses committed. In other words, the cases to be brought should, if possible, demonstrate the patterns and intentions of the massive rights abusers, rather than demonstrating a random selection of incidents.

Intrinsically linked to this question is the issue of whom to prosecute. What is agreed now by many scholars is that trials should not be sought against huge numbers of individuals but rather against those who can be said to have held special or particular responsibility for atrocities committed. The very real moral dilemma that this creates has been well documented by the architects of the Argentinian prosecution strategy in 1984.<sup>57</sup>

As a matter of morality and pragmatism, the prosecution of the highest ranks is preferable for several reasons. If we accept that it will be neither fiscally nor politically sensible to embark on an exhaustive prosecution policy, historic fidelity requires that those who were responsible for drawing up plans, issuing orders – essentially, those responsible for conceiving the radical evil – be the ones prosecuted. Interest and money will probably run out if one seeks to target low-

level ranks in the first place. Such prosecutions also create the possibilities for low-level scapegoating, on the one hand (by the higher ranks) and a climate of witch-hunts and vengeance, on the other. All of these can be avoided by sensible selective planning of those who should be prosecuted.

### *Capacity building*

The long-term aim of intelligent justice is the reconstruction of the rule of law and the mechanisms of transparency and accountability. It seeks to engage the state rather than to confront it. The processes and initiatives entailed seek to strengthen the knowledge and abilities of all those involved. This includes empowering not only the victims but other state actors, such as prosecuting agencies, and those connected to the application of the rule of law. It identifies the central actors in the processes concerned and seeks to work with them in a co-ordinated strategy which includes assisting positively in processes that might prevent future abuses. Concrete examples will include helping with technical training for the weak actors (in Guatemala, the prosecuting agencies) and promoting discussion and reflection with those who may feel most threatened (in Guatemala, the military).

Apart from these aspects of engagement, the issue of national and international lobbying cannot be underestimated. Intelligent justice requires the international community consciously to support its aims, in the context of the struggle against impunity, and to facilitate the entry of the transitional society into the family of law-respecting nations.

There will be those who say that, far from being a destabilising factor, in many transitional societies the search for justice will be futile in the face of institutional impunity. Should the efforts of intelligent justice fail in any given society, it will have been demonstrated that, at best, there is a long way to go, or at worst, that the transition is a political chimera. Either way, the search for justice is not only valid, it is essential.

### **The movement for prosecutions in Guatemala**

The theoretical principles of intelligent justice set out above have guided the attempts of a Guatemalan NGO<sup>58</sup> and several communities – which suffered massacres in 1981 and 1982 – in the search for justice. On 3 May 2000, nine communities came together to form the Association for Justice and Reconciliation and brought a criminal complaint against the three members of the military high command of the period for the crimes of genocide and crimes against humanitarian duties (war crimes and crimes against humanity). The nine communities lost more than 1,000 people as a direct result of massacres

committed between December 1981 and March 1982. All the victims were civilians. Almost all were indigenous Mayans. On 6 June 2001, the nine communities were joined by another eleven which brought a similar complaint against the military high command responsible for massacres between April and October of 1982, in which approximately 1,300 Mayan civilians also lost their lives. That high command was led by Efraim Rios Montt, now president of the Guatemalan Congress and general secretary and founder of the governing FRG party.

As a result of these twenty massacres, it is estimated that at least 50,000 people were forcibly displaced. Many of them died from disease, hunger and further army attacks, including aerial bombardment as they sought shelter. Many fled internally, while others began a long life of exile in refugee camps in southern Mexico. The massacres in the two cases presented to date represent probably no more than 7 or 8 per cent of all those committed during the 'scorched earth' period of 1981 and 1982.<sup>59</sup> The 50,000 displaced are only a fraction of the estimated one and a half million who suffered internal or external displacement. But the cases do represent a significant attempt to put the theory of intelligent justice into practice. Both cases accuse the high commands of genocide and crimes against humanitarian duties as specified in the Guatemalan Criminal Code.

Over a six-year period, the Centre for Human Rights Legal Action has worked with over seventy of the communities which suffered massacres in 1981 and 1982 (that is, more than 20 per cent of all communities that experienced massacres during that period). During those years, detailed workshops were carried out on the role of the state, locally and nationally, regarding the duties of investigation and prosecution. Similarly, there has been a long and serious conversation about the risks and advantages of seeking criminal justice inside Guatemala. In some instances, the communities made it clear early on that they did not want to be part of the search for justice. Other communities took more time to come to the same conclusion. In these communities, work continued to help advance the procedures for exhumations and to obtain the necessary documentation and death certificates to help widows and other survivors establish titles to property, and so on. It should be noted that almost all of the forty or so communities that decided not to proceed as members of the Association for Justice and Reconciliation did so largely on the basis that they were too scared to confront the same state that had committed the massacres. Only about five of those which decided against the pursuit of justice did so on the basis that they thought this was simply not the right way to proceed in terms of how they wanted to deal with the past. The cases of the other five which are not participating fell short of what were considered the basic legal criteria to sustain those cases in court. This does not mean that there is any doubt that the massacres occurred,

but that exhumations were not possible and no direct eyewitness accounts existed.

The role of the participation of the victims has grown, and is intended to grow. Every six months, all of the witnesses from the twenty communities meet for special encounters where the progress of the cases is discussed and other social and technical activities undertaken. These encounters have not only proved a source of great inspiration to those working with the communities but have also been a source of great solidarity, learning and strength among the witnesses themselves. In addition, the affected communities are visited at least once every two months to discuss general issues, carry out workshops in specific fields of human rights education or advance the investigative process into the cases themselves. Given the geography and resources of Guatemala, such communication is an uphill struggle, but is the backbone of the cases as a whole. It is equally important to note that those communities which did not want to participate were not simply abandoned but were, and continue to be, assisted over other legal matters.

Both cases under way target the military high commands for 1981 and 1982. It was clear, following an analysis of Guatemalan criminal and military law, that many people beyond the eight now accused were legally and morally responsible for many of the acts that occurred, but the focus on the two high commands emphasised that the massacres were the fruit of a co-ordinated strategy designed and ordered by the accused. It was also fascinating to note the responses of the communities involved when discussing who should be prosecuted. Almost every community took the view that it was far more preferable to prosecute those responsible for the design and ordering of the massacres than the soldiers who carried out the acts. Such a decision gives the lie to the idea that the driving force of the cases is vengeance in any form.

Limiting the number of accused has also had important strategic effects for the cases. By targeting the high commands, it can be fairly said that the object of the exercise is not to shame the army *per se*, but, rather, to highlight its criminal leadership at that particular time. At the same time, it curtails the possibility for the accused to delay the justice process by clogging the system with a variety of well-worn techniques.

There will always remain a certain degree of moral doubt over how far one should go in such prosecutions. What is important is that those who have been accused have been accused as a result of a consultation exercise with victims and survivors. Those accused, furthermore, represent the institutional design of the massacres and their historical significance. Extending the list of accused would provoke all of the problems

already mentioned in the discussion on general principles. It should also be added that, in legal terms, the accusation against these members of the high command has the benefit of satisfying the core elements of the right to justice. The right to justice does not necessarily imply that all of those responsible for a particular crime be brought to justice. Widespread practices in almost every jurisdiction over plea bargaining and other deals demonstrate this. What is essential is that someone, especially the person or persons most responsible, be brought to justice. While the strategy of restricting the list of the accused to a narrow few necessarily implies allowing many guilty people to go free, the right to justice can still be satisfied.

To date, in the first case brought against the Lucas Garcia regime, fifty-seven of just under seventy eyewitnesses to the massacres have had their statements taken by the *Ministerio Público* (Public Prosecution Service). A special prosecutor has been named to handle the investigation into both cases. This is eminently sensible, as the matters at issue will, in many cases, be subject to the same elements of proof in both cases – for example, institutional practices of racism, the causes of the conflict, military discipline and structures, and so on. As for the issue of institutional strengthening, a specialist course has been organised in the Netherlands for members of the *Ministerio Público* about war crimes and crimes against humanity. This is a matter of great importance. On the one hand, it denudes the authorities of the excuse that they lack appropriate expertise, but more importantly, it allows them to see that the object of the exercise is not embarrassment or revenge, but strengthening their capacity.

Whether these two cases result in the convictions of the accused, only time will tell. What is clear is that the work already done with communities and witnesses makes the cases far more feasible than they would have been if the *Ministerio Público* had had to start from scratch. The most difficult element in this type of case is fear among the witnesses. That more than one hundred eyewitnesses are prepared to testify is a major advance in the preparation of these cases. It is estimated that the investigations and taking of statements will go on for about another year. However, much will depend on the political will of the authorities to pursue the cases and on the physical safety of the witnesses. If that political will does exist, there is no reason that trials cannot begin within two years. If there are no trials, the witnesses, communities and the international community at large will know that, while the survivors were prepared to forgive their individual assailants, their state was not prepared to allow justice to be done in relation to the few who took so many thousands of lives. And that equality before the law and the reign of the rule of law remain as far away as it ever was.<sup>60</sup>

## Conclusion

The experience of the Guatemalan CHC offers many valuable lessons in the study of transition and some fascinating pointers to the debate on the roles of truth and justice in reconciliation. I have tried to demonstrate that there is very little hard evidence, apart from the singular circumstances of the South African process, to justify the idea that the values of truth and justice are locked in a trade-off in transitional societies. The Guatemalan experience, perhaps more clearly than some, identifies the necessary link between truth and justice.

The need for justice, like truth, is simply one of many elements required in the imaginative response needed to move from radical evil to the rule of law. I have questioned some of the presuppositions about reconciliation and offered a more practical and feasible conception. Within that conception of reconciliation as reconstruction, especially of the bonds of trust and confidence between citizen and state, justice is the principal vehicle for the manifestation of the virtues of transparency and accountability. Given the difficulties in most transitional societies, a mix of ethics and prudent politics will be necessary to further those aims of justice. The model of intelligent justice is an attempt to inform that debate.

The Guatemalan experience has been a mixed one. While the report was enthusiastically received by civil society, it is hard to deny that, in practical terms, much of the fruit has withered on the political vine. The Guatemalan truth commission did not see itself as the embodiment of reconciliation but as an instrument in reconstruction. The truth it told was crucial, but only part of the process. The disappointing, if foreseeable, reactions of those who rejected the CHC's conclusions and recommendations vindicate the realism shown by the commission.

The CHC's sensitivity to the development of international legal trends in the last fifteen years allowed it to break new ground in explicitly finding the balance between law and politics, justice and truth. An intelligent application of the commission's recommendations will do justice to the victims and strengthen Guatemala as a whole for the future. It will also show that truth and justice are necessary partners, rather than mutually exclusive options.

Intelligent justice is a concept that tries to place the role of justice within a feasible and realistic conception of reconciliation. It specifies clearly the role of justice within the variety of responses that are needed to effect a successful transition. It demonstrates that justice is an integral part of a reconciliation process and not a matter of naked vengeance. As Wole Soyinka eloquently notes, justice 'goes beyond mere rites of vengeance, it is a process of vindication – vindication of the prolonged agony of society whose end product is restoration of its violated integrity'.<sup>61</sup>

## References

- 1 While the date of the beginning of the war is a matter of conjecture in some quarters, that given here is accepted by the Commission for Historical Clarification (CHC). *The Unidad Revolucionaria Nacional de Guatemala* combined the forces of the four Guatemalan left-wing insurgents, ORPA (*Organización Revolucionaria de los Pueblos Armados*, Revolutionary Organisation of Peoples in Arms), FAR (*Frente Armado Rebelde*, Armed Rebel Front), EGP (*Ejército Guerrillero de los Pobres*, Guerrilla Army of the Poor) and PGT (*Partido Guatemalteco de Trabajadores*, Guatemalan Workers' Party).
- 2 Seven different agreements, known as the peace accords.
- 3 The FRG (Guatemalan Republican Front) came to power in January 2000, winning both the presidency and the congressional majority. The founder and secretary-general of the FRG is Efraín Ríos Montt, military dictator from March 1982 until August 1983. He is accused of genocide and other crimes against humanity committed during this time. The current president is Alfonso Portillo.
- 4 'Conclusions and recommendations', in *Guatemala, Memory of Silence* (Report of the Commission on Historical Clarification, 1999), p. 17, para. 2. Although the CHC gives the dates of the conflict as 1962–96, most other commentators talk of a thirty-six-year war.
- 5 *Ibid.*, para. 1. It is believed that around 132,000 of these 200,000 occurred between 1978 and 1984. (Conversation between author and Patrick Ball, responsible for statistical analysis of the CHC database, February 2001.)
- 6 Guatemala has twenty-one groups of Mayan peoples. According to many anthropological studies, they constitute the majority although official government figures have consistently put their total at less than 50 per cent of the population.
- 7 'Conclusions and recommendations', *Guatemala, Memory of Silence*, op. cit., p. 35, para. 86 and p. 24, para. 33.
- 8 *Ibid.*, p. 85.
- 9 *Ibid.*, paras 108–26.
- 10 See Jennifer L. Balint, 'Conflict, conflict victimization and legal redress', in M. Cherif Bassiouni (ed.), *Law and Contemporary Problems* (Vol. 59, 1996), pp. 239–43.
- 11 'Conclusions and recommendations', *Guatemala, Memory of Silence*, op. cit., p. 31, para. 66.
- 12 There are many complex reasons for the relative silence on the atrocities that were committed. In the first place, the military did an excellent job of not allowing any serious coverage of the events in the field. Although there is clear intelligence evidence that the US was fully aware of what was going on, it can be supposed that it remained silent because, already enmeshed in El Salvador and Nicaragua, it was happy to see the Guatemalan military maintain control by themselves, whatever the cost, if it did not imply a military or political cost for the US. Besides, the victims had no means of access to articulate the atrocities. They were all extremely poor, most had no education and very few spoke Spanish.
- 13 See Weissbrodt and Fraser, 'Book review on report of the Chilean National Commission on Truth and Reconciliation', *Human Rights Quarterly* (Vol. 14, 1992), p. 613.
- 14 See George Black, *Garrison Guatemala* (New York, Monthly Review Press, 1984), p. 43; 'Chronology', in Fried et al (eds), *Guatemala in Rebellion* (New York, Grove Press, 1983), p. 326–32.
- 15 Some respected commentators believe that this change came about at the US's bidding in particular. The Reagan administration, having placed some hope in the Ríos Montt coup of 1982 had finally concluded that capitalism and dictatorships were incompatible. See Mario Monteforte Toledo in *El Periodico* (11 March 2001).

- 16 The CHC had its mandate extended on the basis that the one-year period originally agreed was for the purposes of investigation and that the drafting of the report was a separate matter.
- 17 'Mandate and operational procedure', *Guatemala, Memory of Silence*, op. cit., paras 34–6. The bulk of the operational field work consisted of taking more than 20,000 testimonies. More than 2,000 communities were visited, some only once, others more than ten times.
- 18 The author attempted to persuade the Guatemalan jurist, Alberto Ballsels Tojo, to testify in the 1999 trial of three state paramilitaries for the massacre of 177 women and children in 1982, but the ex-commissioner felt the mandate did not allow him to do so. He did feel able, however, to present his testimony to the Spanish authorities investigating the complaint brought by Rigoberta Menchu in December 1999. This strict interpretation is at odds with the view of the CHC moderator, Christian Tomuschat, who stated that 'it would be totally inappropriate to maintain that the report can never serve as evidence if and when its findings may determine the outcome of proceedings. It is the relevant rules of procedure that must be used to determine whether such indirect proof can be relied upon in a case.' (C. Tomuschat, 'Clarification commission in Guatemala', *Human Rights Quarterly* (Vol. 23, no. 2, May 2001).)
- 19 Oslo Accord, see *Guatemala, Memory of Silence*, op. cit., p. 3. 'The Commission will invite those who may be in possession of relevant information to present their version of the facts, the non-appearance of interested parties shall not prevent the Commission from pronouncing on the cases.'
- 20 Weissbrodt and Fraser, op. cit., p. 609. See also C. Tomuschat, 'Human rights and national truth commissions', in *Innovation and Inspiration: fifty years of the Universal Declaration of Human Rights* (1999), 991–1011.
- 21 See the Guatemalan Criminal Procedure Code, articles 182–5.
- 22 See John Dugard, 'Reconciliation and justice, the South African experience', *Transitional Law and Contemporary Problems* (Vol. 8, Fall 1998), p. 277; Diane Orentlicher, 'Settling accounts, the duty to prosecute human rights violations of a prior regime', *Yale Law Journal* (Vol. 100), pp. 301–8. Dugard, writing in reference to the South African experience opposes the conclusions reached in Orentlicher's seminal work on the topic. Dugard's conclusion that the amnesty laws are consonant with internationally accepted standards is not shared by the author.
- 23 Many efforts have been made to offer basic principles for the efficacious functioning of a truth commission: see P. Hayner, 'International guidelines for the creation and operation of truth commissions: a preliminary proposal', in Bassiouni (ed.), *Law and Contemporary Problems*, op. cit., p. 173; Chapman and Ball, 'The truth of truth commissions', *Human Rights Quarterly* (Vol. 23, 2001), give a more detailed analysis of the internal mechanics of truth bodies. While the focus of Dugard's paper, op. cit., is on South Africa, the guidelines appear to be for general application.
- 24 Various amnesty laws were created during the Guatemalan conflict, the most notorious being a law of 1986 which seeks to prevent even the investigation, much less the bringing to trial, of human rights violations.
- 25 Law of National Reconciliation, 1996, article 8, see also recommendations 47 and 48 of *Guatemala, Memory of Silence*, op. cit.
- 26 Alfredo Balsells Tojo and Otilia Lux Coti, respectively.
- 27 Tomuschat, 'Human rights and national truth commissions', op. cit., p. 159.
- 28 See *Guatemala, Memory of Silence*, op. cit., p. 3 for the qualifications of the two Guatemalan members of the commission. One change was made in that Tomuschat was named instead of, as originally intended, the UN moderator of the peace process.
- 29 The Haitian model of seven commissioners with four nationals and three foreigners had similar aspects, but sought a broader sweep in political terms. See Fanny



- Benedetti, 'Haiti's truth and justice commission, the human rights brief', 1996, at < <http://www.wcl.american.edu/pub/humright/brief/v3i3/haiti33.htm> > .
- 30 Dugard, 'Reconciliation and justice', op. cit., p. 287; see also Priscilla Hayner, 'Fifteen truth commissions, a comparative study', *Human Rights Quarterly* (Vol. 16, 1994), p. 600. The exact opposite seems to be suggested by the Inter-American Commission on Human Rights. See its report on the case of *Ignacio Ellacuria et al v El Salvador*, case 10.488 of the Inter-American Commission, para. 229.
  - 31 Jan Perlin, 'The domestic application of international human rights law: the case of the Guatemalan Historical Clarification Commission' in Carey and Pritchard (eds), *International Humanitarian Law: origins, challenges and prospects* (2000).
  - 32 See Jaime Malamud-Goti, *Game without End* (University of Oklahoma Press, 1996).
  - 33 See Weissbrodt and Fraser, op. cit., p. 620.
  - 34 See Benedetti, op. cit.
  - 35 See Hayner, 'Fifteen truth commissions', op. cit.
  - 36 See < [www.usip.org/library/truth.html](http://www.usip.org/library/truth.html) > .
  - 37 See Hayner, op. cit.
  - 38 It is interesting to note the content of para. 52 of the South African Truth and Reconciliation Commission's final report: 'The road to reconciliation requires more than forgiveness and respectful remembrance. It is, in this respect, worth remembering the difficult history of reconciliation between Afrikaners and white English-speaking South Africans after the devastating Anglo-Boer/South African War . . . Despite coexistence and participation with English-speaking South Africans in the political system that followed the war, it took many decades to rebuild relationships and redistribute resources . . . Reconciliation requires not only individual justice, but also social justice.' While no one would sensibly argue that social justice is not essential in the search for reconciliation, the question will always remain whether the South African model managed to treat the quest for individual justice as equally essential in the context of reconciliation.
  - 39 Dugard, op. cit., accepts the figure of seventeen, while a narrower definition would put it at fourteen. See Chapman and Ball, op. cit.
  - 40 For a sense of the complexity involved in such cases, one ought to consider the example of the International Criminal Tribunal for Former Yugoslavia. Operational in the Hague since 1993, it has concluded ten trials. It has had an annual budget of around \$94 million each year and has hundreds of lawyers, policemen, analysts and investigators working on the investigation and prosecution of war crimes and crimes against humanity committed since 1993. The fact that an organisation with so much money and with unlimited political support from its backers can only achieve ten trials, almost all of relatively low standing in the military sense, ought to be a lesson to those seeking a quick fix in countries of much more limited resources and talent and with much more significant political pressures to deal with.
  - 41 These cases are known respectively as the Rio Negro massacre and the Tuluque Killings (or the Noriega Case). It is also worth noting that three military personnel have been convicted for the killing of Bishop Juan Gerardi. Although this occurred after the end of the conflict, it should be seen as closely related to it, given that he was murdered two days after presenting the Catholic Church's report into the atrocities of the conflict. Three members of the military were sentenced to life imprisonment for the crime of extra-judicial execution. The conviction is under appeal at the time of writing.
  - 42 '*No creo que en ese episodio macabre de 36 anos haya sido genocidio.*' ('I do not believe that in this sad episode of 36 years there was genocide.') Quoted in *El Periodico* (30 June 1999).
  - 43 Much has been written on the plight of the Guatemalan Mayan peoples. See for example, Carol Smith, *Guatemalan Indians and the State: 1540 - 1988* (Austin,

- University of Texas Press, 1990); Robert Carmack, *Harvest of Violence* (University of Oklahoma Press, 1988); Susan Jonas, *The Battle for Guatemala* (Boulder, Westview Press, 1991); Ricardo Falla, *Masacres de la Selva* (Nicaragua, Latino Editores CRIES, 1992).
- 44 See Ben Whitaker, UN Special Rapporteur on Genocide, 1985 Report; Ratner and Abrahams, *Accountability in Human Rights Atrocities in International Law: beyond the Nuremberg legacy* (Oxford, OUP, 1997).
- 45 Inaugural speech (14 January 2000).
- 46 'Recommendations', *Guatemala, Memory of Silence*, op. cit., para. 84.
- 47 See interview with Alfredo Balsells Tojo in *El Periodico* (30 June 2001). 'The government wants to present the fulfilment of the recommendations of the CHC, but in no way does it comply with the spirit or the objectives. This is another document for export . . . The CHC recommended the establishment of an entity responsible for the support, promotion and vigilance over the fulfilment of the recommendations, by means of a law to endow it with security and permanence. It is more difficult to reform or repeal a legislative decree than a presidential accord, as this will always be subject to the personal whim or convenience of the president.' (free translation)
- 48 As a result of the state's failure to take the quest for either criminal or civil justice seriously, the petitioners in the case of the Plan de Sanchez massacre announced, on 18 July 2001, that they would withdraw from the still-born negotiations with the government over a possible settlement and ask the Inter-American Commission to remit the case to the Inter-American Court. The case deals with the massacre of 268 indigenous civilians by the Guatemalan army on 17 July 1982 and will be the first case of a massacre committed under the genocidal strategies of the military to be considered by the Inter-American Court. The issue of compensation for violation to the right to an effective remedy will be of significance to tens of thousands of Guatemalan families who may seek to pursue the same course of action.
- 49 Wole Soyinka, *The Burden of Memory, the Muse of Forgiveness* (Oxford, OUP, 1999), p. 28.
- 50 See Carlos Nino, *Radical Evil On Trial* (Yale University Press, 1996), p. vii. 'Massive human rights abuses involve what Kant called "radical evil" – offences against human dignity so widespread, persistent and organized that normal moral assessment seems inappropriate.'
- 51 'Conclusions and recommendations, section III', *Guatemala, Memory of Silence*, op. cit., p. 49.
- 52 Soyinka, op. cit., p. 8.
- 53 *Ignacio Ellacuria et al v El Salvador*, op. cit.
- 54 See Orentlicher, op. cit..
- 55 This is not the place for a detailed treatment of the legal arguments in relation to the differences between a right to justice and the duty to prosecute. It is, however, worth noting the following: all principal international human rights treaties incorporate an explicit right to 'an effective remedy' or to 'judicial protection'. The Inter-American Court of Human Rights has also ruled that there exists an implicit obligation on all states to investigate, prosecute and punish those who violate human rights. Neither the explicit right nor the implicit duty categorically require the idea of criminal prosecutions. It is precisely here that the matter becomes legally debatable. To what extent does the right to an effective remedy allow a victim to demand a criminal prosecution? While it is true that those bodies charged with ensuring treaty compliance tend to allow states a wide discretion regarding the implementation of their obligations, it is also true that, on occasion, the same bodies have expressed precisely what measures would be necessary to constitute an effective remedy. Given the case-law that exists on this subject, it is difficult to believe that any such body would rule that a state can provide an effective

remedy for the victims of crimes against humanity committed by the same state by anything other than criminal sanctions. Furthermore, where a state has ratified the Genocide Convention, and genocide is alleged to have been committed within its territory, the duty of that state to prosecute is clear and uncontroversial in terms of Article 6 of the Convention.

- 56 The decision to seek prosecutions by the victims or survivors is distinct from the public role of prosecuting authorities in most countries. Such authorities will, of course, have the right to seek prosecutions independent of the wishes of victims and survivors, should they feel they have sufficient evidence and that it is in the public interest. In practical terms, if such prosecutions are sought against the wishes of the victims or survivors, this leaves prosecutors at an immense disadvantage in terms of unwilling key witnesses and calls into question certain public interest concerns. In general terms, the crucial factor will be the willingness of victims to testify and take risks. To date very few, if any, prosecuting authorities have been the prime movers in such cases. Even the case of Argentina in 1984 responded to a movement generated during Alfonsín's election campaign.
- 57 See Nino, *Radical Evil on Trial*, op. cit., and Malamud-Goti, *Game Without End*, op. cit.
- 58 The Centre for Human Rights Legal Action (CALDH), <[www.caldh.org](http://www.caldh.org)>. The author has been the legal director of CALDH since July 1997 and is responsible for the legal and strategic planning of the prosecutions programme.
- 59 For information on the two cases, see <[www.justiceforgenocide.org](http://www.justiceforgenocide.org)>.
- 60 It is perhaps useful to mention briefly the case brought by Nobel Prize Winner Rigoberta Menchu before the Spanish courts on 2 December 1999, in relation to the crimes of genocide and terrorism under Spanish criminal law. That case was not admitted by the Spanish legal authorities on the basis that they were not satisfied that there was no possibility of justice being obtained in Guatemala. While the Menchu case achieved a great deal of international coverage, it seems that it has foundered on the rocks of realpolitik. The case was presented on the back of the Pinochet case at a time when it was too early to talk of precedents. Events have gone on to show how very few countries are prepared to mire themselves in the politics of high-profile extraditions. The invocation of 'universal justice' must be done on the basis of a full understanding of the details of international legal rules on extra-territorial jurisdiction and the political limits that circumscribe its practice. Otherwise, the quest for such justice may, in the long term, be less than helpful to the struggle against impunity. Any such efforts must be co-ordinated with national initiatives for justice and must be linked to serious consultation with all parties who have an interest as victims or survivors. The idea that extra-territorial prosecutions avoid the problems of intimidation and political obstruction requires careful scrutiny. Co-operation from originating states is essential for a successful prosecution. The political obstruction may simply also become a diplomatic headache which few states are prepared to take on. The issue of intimidation cannot simply be avoided by the foreignness of proceedings. The witnesses have to return home at some stage. Unless all witnesses are given asylum, it seems that phenomenal courage is the only guarantee of witness participation.
- 61 Soyinka, op. cit., p. 31.