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THE INTER-RELATIONSHIP BETWEEN THE GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION AND THE SEARCH FOR JUSTICE IN NATIONAL COURTS

In exploring how truth commissions and criminal justice can and should complement one another, we should investigate not only the technical problems arising from the simultaneous operation of truth seeking programs and prosecutions but also what this complementarity implies for the wider debate surrounding truth and justice as responses to massive human rights abuse. The automatic assumption that truth-seeking and/or criminal prosecutions are necessary in every transition to democracy is to be avoided. In situations where they are likely to bring benefits, it is essential that their distinct roles be preserved and their limitations appreciated. Analysing how truth-seeking and criminal trials can complement one another should also spark more discussion about their relationship to other equally important post-conflict responses.

Truth-seeking can work to address a variety of important needs – of victims, their family members, communities, wider society, politicians and state institutions. It may even provoke catharsis for victims, perpetrators and some sectors of society.[1] But what should we really expect from it? It is difficult if not impossible to evaluate whether a truth commission has achieved the objective of telling the truth about a certain historical period. Even if one sets more modest criteria for evaluating truth-seeking initiatives, say, contributing to the historical study of a country's past, expectations may be met but the point is often missed that truth commissions and traditional historical study

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[1] I am somewhat sceptical of the claim that a *national* catharsis can be provoked by truth-seeking initiatives, especially following non-international armed conflicts and situations of selective state repression.

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are very different in nature.[2] The work of truth commissions will generally take place in the public spotlight and the results will be more widely publicised at national and international level than most historical publications.[3] Added to this is the high level of resources which have been dedicated to truth-seeking in many countries as compared to academic historical study. Among the many possible outcomes of truth-seeking, future governmental and international policy decisions may be based in part on the facts uncovered and conclusions reached. The unintended result may be that the report of a truth seeking body comes to be considered by many as *the* definitive version of a stage in the nation's history.[4]

I therefore think we should ask more of truth-seeking exercises than simply that they contribute to our understanding of history, but without going so far as to claim that they can in themselves provide accountability. The success of truth-seeking (which one can only assess by ongoing and thorough study) may perhaps be better measured by looking at the extent to which it has increased public knowledge[5] about the past, informed national debate at a political level and increased the likelihood of victims' demands being met. In most post-conflict situations the choices, design and potential impact of activities such as truth-seeking, criminal trials and institutional reform should be linked to the possibility of implementing political, social, economic or other measures, which address the root

[2] For a detailed critical analysis of truth-seeking in a historical context see Tristram Hunt, *Whose Truth? Objective Truth and a Challenge for History*, in this issue.

[3] The book Nunca Más, the result of Argentina's truth seeking initiative, spent many months at the top of the national Bestseller list.

[4] A recent example serves to illustrate the danger of treating truth commission reports as definitive versions of "the truth". Towards the end of 2002, a person justifiably admired as a national leader who defends Guatemalan victims and indigenous rights, suggested to representatives of the state, victims and civil society groups who were then negotiating a National Reparations Plan, that the victims from four geographical districts of the country must have priority in receiving compensation since the Guatemala Commission for Historical Clarification had concluded that acts of genocide had occurred in these regions. The Commission's report clearly states that these four regions were in fact simply selected for in-depth study as examples indicative of the kind of violence which had been committed across the entire highland area of Guatemala.

[5] It cannot be overemphasised that any post-conflict initiative to deal with past abuses must aim first and foremost at the domestic population (as opposed to the international community), for example see Neil Kritz, *Progress and Humility: The Ongoing Search for Post Conflict Justice*, in POST-CONFLICT JUSTICE 777 (M. Cherif Bassiouni, ed., 2002).

causes of civic unrest or armed conflict and not only their consequences. Within these wider objectives, increased knowledge and dissemination of the information gathered by a truth commission can be a precursor to achieving some form of justice for international crimes or serious violations of human rights.

By "some form of justice" I do not mean simply criminal convictions. It should be borne in mind that not all victims desire criminal justice, for various reasons, and it is their right not to do so. Depending on the circumstances there may also be risks involved in carrying out criminal trials.[6] A wider concept of justice should encompass an adequate response by state or non-state actors responsible for human rights abuses or crimes, which creates positive effects both for victims and for the transition to democracy. As such, justice must include a component of accountability. Accountability is most commonly described in legal or moral terms: the fulfilment of state obligations to prosecute crime, or the necessity of providing a satisfactory response to victims and their families.[7] State obligations to prosecute clearly exist in relation to certain crimes and would preclude the granting of amnesty. Nonetheless, some would regard a purely legal analysis as unrealistic because it does not offer much room for political manoeuvre, for example during a negotiated peace settlement. Nor does it make allowance for a meaningful assessment of a legal system's capability, particularly if the legal obligation to prosecute is interpreted widely

[6] These have been widely debated elsewhere; for example, see CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996), who discusses the obstacles and risks related to prosecutions in certain circumstances as well as the benefits they can bring to transitions to democracy. He considers that Argentina benefited from the conviction of members of the military junta notwithstanding the subsequent pardons by President Menem, a view shared by at least one former Argentine General. Cf. JAIME MALAMUD, GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE (1996).

[7] On which, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). Even on a strictly legal view of things, the truth can form part of the state's obligations under human rights instruments to investigate but the serious nature of the violations which are examined by truth commissions, would demand criminal investigation as part of an effective remedy. See *X and Y* v. *The Netherlands* (App No. 16/1983/72/110, 25 arch 1985, the case of the massacre of fifteen people at Barrios Altos in Peru, Inter-American Court of Human Rights Series C, Case No. 75, 14 March 2001, and Paul Seils, *The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 5 at 775.

to cover a vast range of crimes or to demand prosecution of tens of thousands of perpetrators. As to the moral element, without venturing to discuss the content of such a norm, one can say that if we accept that a satisfactory response to massive human rights abuse or acts of violence may take a variety of forms,[8] then it is of extreme importance that victims (or family members in the case of the deceased) are consulted on the issue prior to setting up any transitional justice mechanism. This not only recognises the dignity of the victims and their moral and legal claims to recourse but is also an exemplary democratic exercise in itself. Consultation can if carried out properly, help to avoid the imposition of policies which turn out to be unpopular or misconceived, even if they have ostensibly been designed to satisfy victims' wishes. Conversely, a lack of participation by victims in the formulation of those policies can ultimately militate against their success.

This leads on to another justification of the need for accountability asides from legal and moral arguments. The benefits of accountability – including the application of criminal law – ought to be understood from the point of view of benefiting the transition to democracy. This view is premised on a concept of democracy which goes far beyond mere formalism. It requires a participatory model and aims for strong citizen–state relationships based on transparency, accountability and efficacy. The creation or reconstruction of public confidence in the political, military and legal institutions of an emerging democracy will be problematic if those same institutions are seen to be incapable or unwilling to function when faced with the most serious situations of lawlessness they will probably ever have to tackle. In those situations in which the state itself has failed to protect or has even attacked its own citizens, that task will be much more difficult to carry out but all the more important to the transition. Accountability is acutely necessary when the persons, institutions or sectors of society responsible for past crimes retain, or have consolidated, their power despite an end to armed conflict or repressive rule. They can continue to impose serious obstacles to consolidating the democracy, since they are likely to obstruct any efforts to hold them accountable for their actions or to otherwise reduce their power and influence.

[8] A state response could for example be acceptable to victims by including full state acceptance of responsibility, apology, adequate reparations and vetting of personnel linked to the offending institutions.

By accepting that criminal sanction may not be necessary or appropriate in all transitions to democracy, or in relation to all crimes, is not to say that the criminal law has no place in responding to mass atrocities unless all attempts to achieve accountability by other means have failed. The criminal law should be applied if crimes have been committed and if the possibility to apply it exists. Bypassing the application of criminal law should be considered a last resort, given that it not only subverts the rule of law but violates the individual rights of hundreds if not thousands of victims to seek protection and recourse through their legal institutions. If one sees the application of criminal law as the reassertion of accepted social norms of behaviour, it is difficult to argue that this is any less necessary when a society is confronted with violence of the utmost magnitude and gravity simply because it occurred during armed conflict or authoritarian rule.

The practical problem however lies more with who decides whether criminal justice is possible or desirable, when, and on the basis of which criteria or advice. The perceived negative effects of criminal justice on stability are often exaggerated, in many cases by mistaken analogy to other countries' experiences or even on the basis of mere presumption. This can justify hasty wide ranging amnesty legislation or other measures of direct benefit only to the parties brokering power following the collapse of a regime or the end of armed conflict. Avoiding criminal trials, particularly against leading military and political figures, may give the impression of offering a fast-track to stability and hence speedier participation in the global economy. However, whatever the motivation, avoiding any prosecutions when they may in fact be possible can simply store up problems for the future. Decision-makers should instead analyse carefully whether longer term benefits could be gained by recognizing a potential convergence between victims' desire for accountability (whether through criminal sanction or other measures) and the promotion of democratic behaviour among state institutions and citizens alike.[9] If criminal trials are considered to be impossible in the short term, attempts should be made to create the conditions for their future feasibility, rather than formalising a current impossibility into a

[9] For a fuller discussion see Steven Ratner, *Democracy and Accountability: the Criss-crossing Paths of Two Emerging Norms*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 449 (GREGORY H. FOX & Brad H. Roth, eds., 2000).

permanent one.[10] Even if prosecutions are denied in the short term, that does not mean their utility for victims and for democratic consolidation diminishes over time.[11]

If tangible and serious obstacles to the possibility of obtaining criminal convictions do exist and cannot foreseeably be overcome in the short term, it is incumbent on the parties involved and the international community not to attempt to portray other measures such as truth-seeking as capable of filling that gap. To present truth-seeking itself as a challenge to impunity or as a form of accountability is not only to misunderstand its functions but is also to short-change victims. Even if a truth-seeking exercise results in the publication of clear allegations against named individuals, whether accountability follows will depend on the response to those allegations. Claiming that information about the past is itself a form of accountability can also easily strengthen the hand of those who oppose criminal sanctions, providing them with ammunition to justify their own impunity and to marginalize those victims who seek criminal accountability as out for revenge or as obstacles to "national reconciliation."

I. THE GOAL OF RECONCILIATION

Reconciliation is talked of as an objective of truth-seeking initiatives often in the absence of any clarity as to the definition of the concept and without a realistic view of whether and when it can be achieved. Some time after the publication of the report of the Guatemalan Commission for Historical Clarification (CHC), which recommended measures to promote reconciliation, the United Nations organised a series of meetings between Guatemalan governmental and non-governmental bodies to explore the meaning of reconciliation in the national context. The various concepts put forward ranged from the micro to the macro and of course did not by any means pretend to

[10] For example, in the situation of cease-fire or global peace negotiations, amnesty will generally be an unavoidable part of discussions as a condition imposed by a party or parties. While in many cases the imminent priority generally will and should be to prevent further loss of civilian life, efforts can be made to mitigate the "blanket" nature of amnesty laws. One important factor is to preserve the role of the judiciary in determining the authorisation of amnesty on a case by case basis; others often include limiting the protection by excluding certain crimes or by targetting commanders rather than enlisted troops.

[11] I agree wholeheartedly here with the comments of Neil Kritz on the need for domestic capacity building in the criminal justice sphere; see Kritz, *supra* note 5.

offer a definitive explanation. At the micro level (and in particular focussing on perpetrators and those who were complicit or were bystanders during the armed conflict) is reconciliation with oneself, with one's conscience and past actions or inactions *vis-à-vis* the mass atrocities which were going on. Moving outwards to victims, it can refer to reconciliation directly with the perpetrator if his or her identity is known, or with the group or institution responsible. For direct victims and others, reconciliation can also refer to the relationship with one's family, social group, professional group, church, political party and suchlike. Thereafter the matter widens further to a reconciliation of society with the state itself: the guarantor of rights and source of citizen protection, and it is this idea of reconciliation which is most directly linked to successful democratic transition. If the above scenarios are examples of reconciliation then one should, in the national context, analyse whether and how knowing the truth and acting upon it can contribute to achieving these goals. This analysis will be as different for each individual as for each transitional society, which leads me to another important factor.

The difficulties springing from identifying reconciliation as one of the goals of truth-seeking "and of post-conflict policies in general" not only have to do with the lack of prior debate as to what it means for each society (and the resultant difficulty in assessing its progress) but with the unfair demands which the discourse often makes on victims of the gravest of crimes to forgive those responsible, in the name of national reconciliation. There is insufficient space here to discuss the conditions which may be thought necessary to promote forgiveness but revealing information about the past is probably only the first step. Consultation and an imaginative approach towards accountability can be further steps.[12] As well as being an abuse of victims' dignity, it is an absurdity to expect them to forgive or to reconcile with the persons or institutions responsible for their suffering, if the latter have denied outright that the abuses occurred, failed to accept responsibility for their actions or have even blamed the victims themselves for their fate. To thereafter label victims as somehow inadequate because they cannot forgive is particularly cruel. We should therefore be wary of making exaggerated claims in relation to reconciliation, particularly in terms of the speed at which it can progress and what can reasonably be expected of victims.

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[12] The Timorese and Rwandan attempts to use local approaches to atonement and reinsertion of perpetrators into society and community are noteworthy in this respect.

II. RELATIONSHIPS BETWEEN TRUTH-SEEKING AND CRIMINAL PROSECUTIONS

The inquiry into the fate of the disappeared in Argentina and similar efforts in Chile took place in a context in which prosecutions were already on the agenda, notwithstanding the existing obstacles to criminal accountability. In the years since those efforts occurred, truth commissions have varied vastly from these two models, both in the scale and nature of the violence to be investigated and the scope and depth of study required of them.[13] Mandates have widened, expectations increased and the relationship to prosecutions has taken many forms. Perceptions of what that relationship should be now range from treating truth-seeking as a replacement for prosecutions at one extreme, to truth-seeking with an explicit goal of promoting prosecutions at the other. It is, as one would expect, in the grey area between these two positions where one finds most difficulties.

If a truth commission wishes to provide complex social and historical analyses and maintain a direct link to criminal justice, then it must make compromises. The wider but in-depth study of history does not easily coexist either conceptually or operationally with the role of identifying alleged individual perpetrators of crime. Taking on these dual roles can also tend to promote a perception of truth seeking as an alternative to criminal and other forms of accountability. The attendant risk is that once the truth commission has produced its report, a "move on" mentality will emerge, prioritising national reconciliation over demands for the very accountability which is crucial to achieving a prerequisite of that goal: democratic consolidation.

Some truth-seeking bodies do attempt to retain their discreet non-legal functions and operational autonomy from criminal justice bodies, while at the same time taking on a quasi legal function of investigating alleged individual criminal responsibility. The Peruvian Truth and Reconciliation Commission, PTRC, sought to marry the two roles by attempting a wide ranging historical investigation but also having an in-house "judicialización" team, which investigated certain individual crimes and named alleged perpetrators. The information was thereafter passed to state prosecutors. In this way, by

[13] For excellent analysis of the Argentine, Chilean and other experiences in Latin America see TRANSITIONS FROM AUTHORITARIAN RULE (Guillermo O'Donnell, et al., eds., 1986), volumes two and three on Latin America as well as the comparative perspectives volume.

effectively exercising discretion as to those cases which most urgently required prosecution, the PTRC had a direct effect in shaping criminal justice policy on these matters. It should therefore be noted that, if selecting key cases to promote criminal investigations, a truth commission has a historical responsibility to accurately reflect the various kinds and levels of violence suffered by many sectors of society.

The Peruvian experience illustrates the need to define the interrelationship between truth-seeking and criminal justice from the outset, with reference to the capabilities of state institutions and recognising the importance which investment and training for those institutions can have for a democratic transition. The PTRC was instructed to perform quasi legal functions notwithstanding the apparent willingness of the prosecutorial authorities to investigate past crimes. Many would consider that the naming of alleged individual perpetrators by a truth commission is more apt in those situations in which there is little short term prospect of the justice system investigating these crimes and prosecuting those responsible. In such situations, naming names can function as a catalyst for progress towards accountability in the future, including criminal accountability if possible. If, however, conditions exist in which a legal system is willing and able to act, then it is surely more logical that it should be that system, and not a truth commission, which carries out the investigation of individual criminal participation. National and international bodies which fund truth-seeking initiatives should support cooperative national prosecuting authorities with the funding and training needed to investigate the crimes in question, since these authorities will play a key role throughout the democratic transition and beyond, long after the truth seeking body has disappeared.

In determining the relationship between truth seeking and prosecutions, decisions will also have to be taken on whether to exclude or limit information-sharing with prosecutors.[14] I would argue that if promoting prosecutions is one of the mandated aims of a truth-seeking body then the general rule should be that the body provide such information to prosecutors as its mandate allows, rather than itself weighing the evidence and coming to conclusions about alleged individual guilt. It is true that valuable information can be obtained

[14] I have directed my comments on information-sharing to the provision of information by a truth commission to prosecutors and judges, although of course this sharing is a two-way street. The legal system can inform a truth commission about the progress in investigating and prosecuting abuses.

by a truth commission from perpetrators and informants if complete confidentiality is guaranteed. In practice however, confidentiality is rarely *the* overriding factor which motivates those persons or their institutions to cooperate with the truth-seeking exercise.[15] One should be wary of presuming that all informants will be opposed to cooperating with the legal system and consider consulting them as to the ultimate fate of the information they provide.

Truth-seeking can assist efforts to prosecute not merely in terms of information-sharing but also in shaping a social and political climate in which a range of responses to past violence, including prosecutions, have more chance of taking place. In any event, it must be defined at an early stage how best to structure the inter-relationship between truth-seeking and criminal justice. Among the many factors influencing the inter-relationship is the nature of the regime-change, the motivations of all interested parties to cooperate with both mechanisms, whether criminal justice programmes will coexist with truth seeking initiatives and whether those programmes will be in the form of international, hybrid or national tribunals.

In summary, while there may be good reasons why a truth-seeking body should be charged with investigating alleged criminal activity, it should avoid overshadowing existing national institutions.[16] This is

[15] Clearly a complex combination of reasons may exist such as the perpetrator's emotional response to what he has done, family, peer or institutional pressures, his political views, his opinion on the impartiality, legitimacy and potential outcome of the truth-seeking exercise, whether he already been granted amnesty, among others.

[16] While it is true to say that international bodies will generally have greater access to expertise and resources, trials conducted in national courts have their own specific advantages as regards the needs and wishes of the population which, in certain circumstances, international bodies or universal jurisdiction based trials would not be best placed to address. There is insufficient space to discuss this point in detail but it is worth mentioning that national trials can create a different kind of pressure on national political and military institutions than would a decision from an international forum or foreign court, particularly if there is a history of scepticism or outright rejection of perceived international ''intervention'' and a strong if misguided, sense of sovereignty at play. Having civilian legal institutions investigating past abuses by the military is one example of how national prosecutions can contribute to transition by fostering democratic civil–military relations. There are also benefits to be gained from citizens who were victims using their own national institutions and demanding that those institutions recognise their equality and their suffering. Finally, the international community should be aware of what could be achieved in the local system if even some of the massive resources used to create and operate international or foreign legal processes were invested nationally.

all the more necessary if the truth-seeking body is an international one which will cease to exist and whose staff will depart once its work is done. Domestic legal systems need to be encouraged and supported as much as possible by the international community to take an active role in the post conflict period given that, over and above the need to respond to past abuses, an effective criminal justice system is essential to any new democracy.

III. THE GUATEMALAN EXPERIENCE

The Guatemalan, Commission for Historical Clarification, CHC demonstrated the benefits of truth-seeking under a wide mandate with less focus on individual responsibility. It did not seek to provide accountability but instead to make a vital step towards eventual accountability, national reflection and the implementation of measures designed to ensure non repetition.[17] The CHC did not consider itself an evidence-gathering exercise for prosecutors or an alternative to criminal prosecutions, nor was it perceived as such by the public. This allowed the CHC to take advantage of its many strengths, which are discussed in more detail below. Its weaknesses, in my view, lay in the lack of forward planning as to how to maximise the impact of the CHC report, and on how the report and the information gathered could later be of assistance in criminal prosecutions.

In 1945, a revolutionary liberal government came to power in Guatemala as a result of efforts by both the national armed forces and a population which was at breaking point after a series of undemocratic and repressive regimes. It was an attempt to set the country on a path of social and economic reform, countering a long history of dictatorship and political clientelism which had perpetuated massive economic inequality in the country. In 1954 however, with the armed assistance of the United States government, Guatemala's second revolutionary President was forcibly removed from office.

The coup was intimately linked to United States' economic interests in the country and fuelled by larger worries that the President had developed communist leanings. (Not long before, he had sanctioned a large scale land reform programme to benefit rural peasants living in poverty.) A series of military regimes was to follow,

[17] The peace agreement creating the CHC describes the purpose of truth-seeking exercise as "a contribution towards the aim of ensuring non-repetition".

prompting dissident soldiers and civilian Marxist groups to join in taking up arms against the state. The ensuing conflict, which would continue for more than three decades, began in 1962. The armed forces however began to shift towards a "democratic" form of governance in 1982, albeit by way of a project which began with a military coup and which would require a preliminary stage of "pacification." This would be achieved through mass violence and terror in order to annihilate the insurgents along with those civilians (particularly indigenous Mayan civilians) deemed to be communist sympathisers. I will mention later the current impact of the military-controlled democracy which was the ultimate aim of the armed forces.[18]

Due to an array of factors occurring nationally and internationally,[19] the Presidents of El Salvador, Guatemala and Nicaragua met in 1987 to sign the Esquipulas II agreement and thereby assume the task of securing peace in the region. This agreement was to be the key impetus towards ending Guatemala's armed conflict through negotiation. The negotiations took place between April 1991 and December 1996[20] and finally brought the conflict, which had left some 200,000 civilians dead or disappeared, to a close.

A truth commission for Guatemala was conceived of during the ensuing talks between the government and the leadership of the armed insurgent forces (which had by then formed a coalition called the URNG or Guatemalan National Revolutionary Unity). It is worth mentioning three important points relating to the peace negotiations which inform a current analysis of the search for truth and justice in post-conflict Guatemala.

First, the country had in theory experienced electoral democracy since 1986, long before the signing of the peace accords, but fraud was rife, participation low and the military clearly in control of the

[18] For more detail see JENNIFER SCHIRMER, THE GUATEMALAN MILITARY PROJECT (1998).

[19] It is said that these included intense international pressure on the regions leaders and that in Guatemala the military was swayed by the prospect of the continuing human, financial and political costs in a conflict which, although the state had by far the more powerful military position, it had little prospect of an outright and conclusive victory.

[20] For an overview of the negotiations and positions of the parties see HÉCTOR ROSADA-GRANADOS, EL LADO OCULTO DE LAS NEGOCIACIONES DE PAZ, (THE HIDDEN SIDE OF THE PEACE NEGOTIATIONS) (1998). Mr. Rosada was a member of the government negotiating team and is currently a respected military and political analyst.

civilian administrations. Notwithstanding, the armed forces entered the peace negotiations in 1991 firm in the view that Guatemala's democratic transition had fact begun back in March 1982 with the military coup which brought General Efraín Ríos Montt to power. The army still considers itself responsible for creating the Guatemalan democracy and this view shapes its current actions and attitudes towards that democracy. As guardian of democracy, the military's old definition of "internal enemy" has now been modified to "enemy of democracy." In the latter category, one will now find not only drug traffickers, mafia members and delinquents, but also human rights and popular organisations which, in the army's view, present a threat to public order. This is an obvious hang-over from the army's anti-communist doctrine of the cold war era.[21] The insurgency, the bulk of the population and international observers take a very different view of the emerging democracy. Even today, Guatemala is at best an electoral democracy and even then in name only; intimidation and bribery of many voters in the last two elections was commonplace, particularly in rural areas. For those who do not share the military outlook on democracy, the importance of truth-seeking and criminal justice in the Guatemalan transition is inextricably linked to the extent to which they can help break the cycle of military power over civilian government and state institutions.

Second, it is extremely important to see Guatemala's truth commission in the context of the global peace agreements. These agreements were designed not only to achieve a definitive ceasefire and address the effects of thirty-four years of armed conflict but also to deal with the original causes of that conflict. As a result, the agreements attempt to address such issues as land distribution, socio-economic provisions, the protection of human rights, equality of the indigenous peoples and fighting endemic racism, and, vitally, the reduction, reform and modernization of the armed forces. The work of the truth commission was therefore not seen as a gateway to the solution of a variety of social ills, or as a short cut to democracy and national reconciliation. This context is important because the public's expectations of the CHC were not unrealistic or exaggerated but necessarily bound up with its expectations of the peace agreements as a whole.

Third, during the peace negotiations the attitude of the state and guerrilla forces to truth-seeking was driven by their fear of future

[21] See Schirmer, *supra* note 18, chapter 11

criminal trials.[22] Both stressed that the only institution competent to ascribe individual criminal responsibility would be the national judiciary. The creation of a truth-seeking body was not proposed by either party to the negotiations. (Accounts given by two former peace negotiators differ as to who suggested it: one emphasises the role of civil society organisations joined together in the Civil Society Assembly, which made a range of direct proposals to the negotiating parties during the Oslo talks, while the other attributes the initiative to the intervention of international actors, in particular Norway and the United Nations, who were keen to repeat the earlier El Salvador peace package.) The United Nations offered to sponsor the initiative, giving the proposal international support. The army had instructed government negotiators that its initial position should demand that any truth commission would not publish its findings until fifty years hence, a position which, during the talks, was later lowered to five years. The five years would, in effect, be ten since the period would run from the date on which the report would be presented to the United Nations following a five-year investigation. Despite the final terms of the mandate, discussed below, current attitudes among military veterans, in whose ranks one finds most of those persons implicated in war crimes, revert to the same logic of the original army bargaining position: in the absence of any internal dialogue or policy on the matter, obstruction tactics are the norm in order to delay criminal prosecutions until such time as there are neither witnesses nor accused still living, and the evidence has deteriorated or been lost.[23]

The guerrilla groups meanwhile wanted the truth-seeking exercise to focus on state atrocities, including genocide. The massive level of state violence, as compared to the more sporadic but nonetheless serious abuses committed by the guerrillas, did give the insurgents

[22] This despite the fact that the military clearly had a greater capacity to delay or obstruct justice by non legal means than did the guerrilla groups.

[23] Recently, information has been obtained which shows political back-up for such a strategy. Rural peasants reported that the Guatemalan Peace Secretariat (Secretaría de la Paz, or SEPAZ) had approached indigenous villages where military personnel are said to have massacred hundreds of civilians. It is alleged that SEPAZ promised survivors financial reparation on the condition that they themselves performed the exhumation of mass graves and that they immediately inter any human remains they discover. This obviously contaminated any forensic evidence which could be used in trials. In another example, corroborated information which the author has received implicates a local prosecutor in illegally obstructing exhumations.

something of an advantage here but to this day there remains a profound polarization of Guatemalan society as to what the "real truth" of the armed conflict is. Against a backdrop of state propaganda geared towards equivalence of blame, this polarisation revolves around the allegation that the guerrillas, having lost the war militarily and politically, are now seeking to vindicate themselves by using the "truth" as a propaganda weapon and criminal trials of former military personnel as revenge. In familiarly racist rhetoric, military veterans and their sympathisers accuse the guerrillas (and human rights organisations) of having "duped" rural indigenous victims into exhuming mass graves and bringing criminal law suits. But the polarisation does not exclude marriages of convenience. Some former fighters on both sides now appear to have more in common with each other than the needs of the population. Former guerrilla fighters and leaders, who have since moved into politics, some even joining the political parties of their old military enemies, remain all too aware that pushing for trials of military personnel is a double-edged sword.[24] Most commentators would safely say that the current political left cannot be relied upon to actively support victims seeking prosecutions for atrocities committed by the state, or to oppose a blanket amnesty if one was to be proposed.

3.1. *The Mandate of the Guatemalan Commission for Historical Clarification*

The peace agreement creating what was to be the CHC[25] was finally signed in Oslo on 23 June 1994. In the end, the state accepted immediate publication of the CHC report on the basis that it would not pronounce on individual responsibility[26] for any crime (that being the function of the courts), although it could make findings of institutional responsibility for human rights abuses and international crimes. The report was not to have judicial effect, that is to say, it is not a legal finding of guilt. The Commission was to collect and

[24] There have already been several attempts to prosecute former insurgent commanders although none have so far reached trial.

[25] The full title is The Commission for Historical Clarification of the Violations of the Human Rights and Acts of Violence which have Caused Suffering to the Guatemalan Population.

[26] The military were taking something of a belt and braces approach by demanding amnesty and anonymity in the truth commission report, their ultimate fear being prosecution.

analyse all available evidence within a period of six months, which could be extended to twelve. Its task was to investigate human rights abuses, acts of violence and violations of international humanitarian law[27] during the entire conflict, a very tall order in such a short time. Government negotiators were adamant however that fulfilment of the peace agreement establishing the CHC would be dependent upon a new amnesty law being passed before investigations began.

3.2. *Amnesty*

The Law of National Reconciliation was approved by the Congress in May 1996.[28] It repealed previous amnesty legislation and permitted the granting of amnesty to all those involved in "political crimes and connected common crimes." At the insistence of the mediators, however, it excluded the grant of amnesty to anyone accused of genocide, torture, forced disappearance or crimes considered not to be subject to statutory limitation.[29] The 1996 law is considered, even by many of those strongly opposed to such measures, as an acceptable example of legal and political compromise in the circumstances which preserves criminal accountability for the most serious of crimes.[30] Nevertheless, it could be strongly argued that the principal reason behind the state accepting the exclusions of the above crimes was because the military permitted it to do so, convinced as it was of

[27] This focused mainly on common article 3 to the Geneva Conventions of 1949, as Guatemala did not ratify Additional Protocol II until 1987, after the most intense period of armed conflict.

[28] At the time of the Esquipulas Agreement, interested foreign states encouraged the passing of amnesty laws to benefit armed insurgents in Central America. (In Guatemala, crimes perpetrated by the military were already amnestied under a 1986 law.)

[29] This is a somewhat problematic use of legal terminology since Guatemala is not party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Even if a cast-iron case were made for the existence of the norm in international customary law, it is by no means certain that domestic courts in Guatemala would be willing to apply it. Victims presenting cases for prosecutions have therefore erred on the side of caution and lodged them prior to the twenty-year statutory limit.

[30] This runs counter to the argument that the more serious the atrocity and more widespread the responsibility among the populace, the less adequate or appropriate the criminal law is as a forum to deal with it. Though some expected a flood of applications for amnesty, it did not happen and judges have on the whole acted fairly and reasonably in applying the legislation. One should add that however that those applying have thus far not included former heads of state or other high profile personalities.

its ability to manipulate the legal system.[31] That confidence may yet turn out to have been serious miscalculation.

3.3. *The Work and Report of the Commission*

The CHC began its work in September 1997. It was in fact the second national effort to investigate the Guatemalan conflict, the first having been an initiative of the Catholic Church (Recuperación de la Memoria Histórica or REMHI). The head of the church project, Bishop Juan Gerardi, was murdered in front of his home on 26 April 1998, days after he publicly presented the report which implicated the military institution in the large-scale massacre of civilians. Although an important and excellent resource which the church has made great efforts to publicise among the population, to date the REMHI report has unfortunately not had a significant effect on state policy regarding the prosecution of individuals for atrocities committed during the conflict.[32]

To head up the CHC, three Commissioners were appointed – two Guatemalans and one German.[33] The professional[34] staff was largely made up of non-Guatemalans. Funding was provided by foreign governments and the European Union and, as sponsor of the commission, the United Nations system provided experts, materials and logistics. The CHC used teams of investigators based in the capital city and in many regional offices to collect testimonies and documentary information during an eight-month period. It submitted its final report in February 1999, concluding that some 160,000 civilians had been killed and 40,000 disappeared.

As well as the scale of the atrocities, the impact of ethnicity distinguishes the conflict from many of its continental counterparts. Indigenous Mayans make up around 60% of the population but the

[31] It may have been the case that the higher ranks who, due to their level of knowledge and involvement in planning or ordering the atrocities, would be more likely be accused of the international crimes excluded from the amnesty law nevertheless knew they had the power and influence to protect their impunity regardless of the terms of the 1996 Amnesty Law. During the peace negotiations, they may have been concerned as to the possible reaction from the rank and file if hundreds of names were to appear in a truth commission report – even if the amnesty law was perhaps more likely to benefit lower ranking servicemen.

[32] It also stopped short of accusing the military of having committed genocide.

[33] Respectively, Otilia Lux Cotí, Alfredo Balsells Tojo – a longstanding proponent of human rights protection in Guatemala – and Prof. Christian Tomuschat.

[34] As opposed to administrative and back-up personnel such as interpreters, drivers and caretakers.

CHC estimated that 83% of all victims during the 34 years were indigenous. The majority of these people perished in the two-year "pacification", a genocidal campaign of massacres between 1981 and 1983, on which the conclusions of the CHC were more forthright than the REMHI report.[35] Finally, 93% of all atrocities recorded by the CHC were attributed to the state military and paramilitary forces. The minimal level of military cooperation with the CHC doubtless affected this percentage and it is thought by some analysts that the guerrilla committed a slightly greater number of acts of violence against civilians.

Despite the terrible track record of Guatemala's justice system, which was heavily criticised in the report for its complicity in human rights abuses, the CHC encouraged prosecution of those responsible for the most serious crimes. In accordance with the exceptions to the amnesty law, and unlike its Salvadoran counterpart, the CHC Report recommended that criminal trials take place in Guatemalan courts and that they focus on those who planned and instigated crimes against humanity and serious violations of international humanitarian law. This was a clear nod towards prosecuting those in positions of military command or political power, no doubt mindful of the scarce resources and limited capacity of the legal system, as well as the massive numbers of perpetrators spread throughout the population.

3.4. *The Commission and Prosecutions*

In assessing the impact of the CHC on criminal prosecutions in legal terms, there are several key characteristics of the Guatemalan truth commission which are relevant:

1. it could not name alleged individual perpetrators in its report,
2. the report would not have judicial effect,
3. witnesses and those who provided documents were given complete confidentiality,
4. none of the information gathered was shared with prosecutors or the public either during or after the Commission's investigation.

In order to analyse the impact of each of these factors on subsequent criminal justice initiatives it is necessary to take into account the legal framework relative to the CHC's creation, its mandate, operations, report and the evidence it gathered. One should

[35] It concluded that "acts of" genocide had been committed against the indigenous population of certain geographical areas studied.

also be aware of the national laws which applied to the criminal prosecutions which were already under way during the Commission's investigation and those which have since commenced. As Guatemala did not have an international or hybrid criminal tribunal, any criminal trials relating to crimes committed during the conflict would be carried out by national courts. During the last half of the 1990s the task of investigating the atrocities and bringing criminal complaints therefore fell largely on victims and human rights organizations, given the lack of action on the part of the state prosecution service (Ministerio Público).

International or hybrid tribunals may have the capacity to create their own rules regarding admissibility and compellability of evidence gathered by a truth commission, and these can be agreed upon prior to the commencement of operations. Amendments to the national law may however be necessary to ensure there is no contradiction between the agreed framework of interrelations between truth seeking and prosecutorial bodies and the national law, for example on matters such as information sharing between the truth commission and the courts or issues of confidentiality *vis-à-vis* the public disclosure of testimonies or documents. If an international or hybrid tribunal does not have exclusive jurisdiction over the crimes to be investigated by a truth commission, and if national laws are not appropriately amended, then the potential exists for national tribunals to apply rules of disclosure of evidence which the truth commission may oppose but will be legally obligated to respect. In Guatemala's case, it was in the peace agreement between the government and the guerrilla forces that the CHC mandate was created, which specified that the report of the Commission would not name names, would not have judicial objectives or effects, and that the identity of witnesses and informants would be confidential. The legal effects of an agreement between a government and groups of citizens (in this case insurgent leaders) cannot however override the Constitution or the relevant national legislation.[36]

In addition to the peace agreement creating the CHC, one other document is particularly relevant – an Act of Congress[37] giving effect

[36] This has thus far been the prevailing legal interpretation in respect of all the peace agreements.

[37] This legislation was precipitated by a letter from the United Nations to the Guatemalan government in which it was proposed that the Convention on the Privileges and Immunities of the United Nations apply to the CHC commissioners and staff.

to an agreement between the United Nations and the Government to extend certain protections to the CHC. The CHC personnel would thereby enjoy immunity from arrest, detention, seizure of their equipment, legal actions resulting from their public statements and protection of documents. These safeguards were intended to ensure that the Commission could efficiently and safely carry out its work. The legislation also stated that the Secretary General of the United Nations has the duty to remove the immunity if it would obstruct justice. Notwithstanding this last possibility, it is important to note that the immunities did not in any event extend to protecting a person from prosecution in Guatemala if he or she fails to comply with a judicial order to disclose information. Such a scenario has not yet occurred but remains a real possibility. Under national law, Guatemalan judges have complete discretion to order the production of evidence of any nature and from any source[38] that is offered by the prosecution, the *querellante*[39] or the defence. The CHC's report and the information it gathered are therefore subject to the same rules as any other proof offered at trial.

3.4.1. *Naming Names*

That the CHC did not have the power to name names was not a significant disadvantage, for various reasons. On a purely practical level, given the positions of the negotiating parties it would have been practically impossible to reach agreement on the creation of a truth commission with such powers, and which could publish its findings in the short term.[40] Also, given that it is much easier to obtain positive identification and evidence against lower ranking members of the military and paramilitary groups, naming individuals could easily have directed attention away from the highest level planners and organisers of the atrocities. Despite keeping witness' details confidential, naming individual perpetrators could also increase the risk of

[38] Provided it has been not been obtained illegally and its disclosure would not violate Constitutional guarantees.

[39] A victim of a criminal act, together with various others individuals or groups, who may have *locus standi* such as a family member, or in certain cases a human rights organisation can petition the court to be a party to prosecutions proceedings. The *querellante* has wide powers, including petitioning judges to order investigative measures and lodging an alternative indictment if not satisfied with that offered by the state prosecutor.

[40] See comments, *supra* note 31.

reprisals against those people who are known locally as being the only eye-witnesses to the events, as well as against family members who have spoken out, for example by seeking exhumations of mass graves. The latter is one of the possible consequences which should be fully discussed between truth commission investigators and witnesses before testimony is taken.

On a legal level, the CHC report, even it had named individual perpetrators, could not be used as direct evidence of guilt because it would not constitute sufficient evidence under normal criminal standards. Although the report can suggest lines of inquiry, a full investigation of the crimes by prosecutors would always be necessary.[41] If a truth commission does not have the power to compel witnesses or evidence, and lacks mechanisms to provide the right of reply and rigorous forms of assessing the veracity of evidence received, it can run into variety of legal problems if it names alleged criminals, not least injunctions and defamation actions.[42] More seriously, it could prejudice victims who seek justice in future criminal cases if the accused successfully argues that he cannot have a fair trial due to negative pretrial publicity caused by a truth commission report.[43] These issues can understandably create frustration for a truth-seeking body which intends to name alleged perpetrators. Nevertheless, to regard due process guarantees as "obstacles" to the truth is to run a real risk of damaging the legitimacy and credibility of the body itself, thereby undermining the impact of its conclusions.

The absence of named perpetrators in the CHC report has not adversely affected those criminal prosecutions underway during the CHC investigations or those which have started since the report's publication. Naming accused in the CHC report may have led to more criminal complaints being lodged but the difficulties of finding witnesses to come forward and the lack of resources affecting human rights groups and the prosecution service would probably have mitigated against a massive increase in the number of prosecutions

[41] Particularly where the standard of corroboration accepted by truth seeking staff is not a criminal one.

[42] This type of legal action was often used by alleged perpetrators in South Africa and obstructed the work schedule of the Truth and Reconciliation Commission.

[43] This risk increases if, as in many transitions, judges are under pressure not to convict, are open to bribery or are partial due to political bias.

which could have resulted.[44] The outcome was that, instead of focusing on how many individual crimes could be linked to identifiable perpetrators, the CHC took full advantage of the function which in my view a truth-seeking body is much better placed than the criminal law to fulfil, that is gathering complex and wide-ranging information about historical patterns of conduct and the nature of the violence. The CHC report exposed massive levels of institutional responsibility or complicity in crimes against civilians. It analysed the destabilising impact of socio-economic marginalisation, racism and foreign interests before and during the armed conflict. It put into context the work of the popular peasant movement, student bodies, journalists, churches and trades unions. The CHC report provides a very rich and important source not only on these issues but also on the objectives, tactics and lines of command of the state and guerrilla forces. The report is therefore not only an excellent and important contribution to historical study but will also hopefully provoke reflection and re-assessment of institutions and social values far beyond the phenomenon of individual criminal conduct.

3.4.2. *Lack of Judicial Effect*

To date, extracts of the CHC report have been presented as evidence in two trials relating to the murder of Archbishop Gerardi in 1998[45] and the murder of anthropologist Myrna Mack in 1990. The extracts were lodged as indirect evidence and in both cases the most useful element of the report related to information on the chain of operational command and information flow within the Presidential Guard,[46] of which the majority of the accused were former members. The report also assisted the prosecution in outlining the policy followed by the Presidential Guard towards perceived opponents of the state. In their decisions, convicting some accused and acquitting

[44] At this stage of the transition, a flood of cases against former paramilitaries or low to middle ranking military or a serious possibility thereof, is not without risks. Although a military coup is very unlikely, the potential exists to ignite increased intimidation of survivors, forensic anthropologists, who exhume mass graves and human rights groups. Some fear that a flood of cases relating to widespread atrocities could provoke a new blanket amnesty although to desist from seeking any criminal accountability on this basis would achieve the same objective as such an amnesty.

[45] Which occurred after the peace agreements were signed and therefore fell outside the remit of the CHC investigation.

[46] Estado Mayor Presidencial.

others, judges did not exclude the CHC report as admissible evidence. Although one cannot argue legal precedent before a Guatemalan tribunal,[47] this acceptance of the report as a legitimate source of information was warmly welcomed by victims' groups and human rights organizations.[48]

The CHC report cannot be a direct evidentiary basis for a finding of guilt. Nor would a prudent prosecutor use any truth commission report as such. The strength of the report lies in its breadth, not in its findings on individual criminal acts.[49] It brings together and analyses information from many public sources of the era which, along with other evidence, can help to demonstrate the state of knowledge of accused who held positions of command at the time. Its analysis of the political, economic and military context can also point towards possible motives for the crimes. In addition, by bringing together information on thousands of atrocities, if crimes against humanity are charged the report could help demonstrate a context of widespread or systematic attack on the civilian population, thereby assisting the prosecutor in establishing the material elements of the crime.[50] In both the abovementioned cases however, sufficient testimonial and documentary evidence to justify conviction was produced by the prosecutor. As such, there was no need for the judiciary to use the report as its primary source of evidence, rendering the judgments

[47] Except in constitutional matters where three rulings of the Constitutional Court on the same point will generally be regarded as having crystallised a rule on the matter.

[48] The defense lawyers in the Gerardi and Mack cases objected to the CHC report being lodged but their argument was confused. After correctly stating that the peace agreement delimiting the CHC mandate could not override national criminal procedure rules, they then attempted to rely on the very provisions in that agreement as to the report's lack of judicial effect. Questions regarding the scope and effect of truth commission mandates and rules, insofar as they can affect criminal trials in national courts, are matters which will ultimately be decided by judges.

[49] Dates and locations of some massacres and details of the number and identity of victims do not always correspond in different sections of the CHC report. In certain cases, the narration of events contradicts eye witnesses and other evidence subsequently obtained by way of more detailed and long term investigation with communities.

[50] Using a truth commission report in these ways is likely to be significantly easier in civil jurisdictions in which the judge is not bound by such strict admissibility rules as are generated in most common law jurisdictions.

rather less controversial than they otherwise might have been as regards the CHC.[51] The cases currently pending prosecution will similarly not rely on the CHC report but on the results of criminal investigations.

Reference to the report can also link a trial to the plight of other victims given that each case which goes to trial is often emblematic of thousands of other similar atrocities. Using the report in trials (held in packed courtrooms in the presence of the national and international media) can also link the prosecutions to the wider armed conflict and therefore to everyone in society. In this way the trial is not just a formal matter between a judge, a victim and a perpetrator but an opportunity for public reflection, a high profile test for civilian institutions and a measure of the rule of law. Being internationally sponsored report, reference to the CHC also emphasises international concern regarding the Guatemalan justice system and the legitimacy of recourse to criminal justice. As such it can raise the awareness of the international community and increase the political pressure on the justice system to act impartially.

3.4.3. *Confidentiality of Sources*

The above comments relate to the use of the CHC report itself in criminal proceedings. There is however no way of knowing whether the CHC obtained information that could have been of great use to prosecutors or defence lawyers in the Gerardi and Mack murder trials, or which could help demonstrate guilt or innocence in future prosecutions of persons accused of committing atrocities against Guatemalan civilians. The confidentiality afforded to persons who gave testimony or documents to the CHC and whose personal safety was at risk was of course entirely justified,[52] but there is an important distinction to be drawn between revealing the names of witnesses or informants who have testified or provided documentary information,

[51] It will be interesting to see how Spanish judges deal with the CHC Report in processing the criminal complaint lodged in Spain by Nobel Peace Prize winner Rigoberta Menchú which relies strongly on the findings of the CHC.

[52] As regards many victims who gave information, confidentiality was clearly necessary given the level of intimidation suffered by those who had previously publicly denounced military violence. The decision to make public declarations or initiate criminal prosecutions must always be an informed one. In the experience of the Centro para Acción Legal en Derechos Humanos (CALDH), a Guatemalan human rights groups working with massacre survivors, fear of reprisal has been the major reason cited by those who do not wish to participate in criminal justice initiatives.

and revealing those statements or documents whether wholly or partially. If disclosure would implicate the source and put his or her safety at risk, then confidentiality is obviously crucial. (In Guatemala, existing law would generally protect against such disclosure.[53]) However it is important to appreciate that there may be circumstances in which certain documents can be made public without revealing or implying the identity of the person who provided them.

Truth commissions can be given the power to ask each person who offers testimony or documents whether or not they would agree to its future complete or partial publication. This could allow important information, which could not be linked to an individual source, to enter the public domain. It will depend as much on individual motive as on the national circumstances whether confidentiality will elicit cooperation and accurate information. In Guatemala, the blanket guarantee of confidentiality to all interviewees did not alter the position of the overwhelming majority of military personnel and veterans who had decided not to cooperate with the CHC. Finally, the risk attached to revealing certain information may lessen with time. Decisions to prohibit access to information on the basis of confidentiality should therefore be reviewed in order to promote knowledge and empowerment of the population as regards its own past.

3.4.4. *No Information Sharing*

The ultimate fate of the information gathered by the CHC was left up to the parties to the peace agreement and as a result is apparently now held in secure storage in the United States. A vast amount of open-source information gathered by the CHC and referred to in its report was and is unavailable to the public – meaning that prosecutors, victims and human rights groups must

[53] In addition to professional privilege, if the information is in the hands of the state, the Constitution includes certain guarantees based on confidentiality; a forthcoming Freedom of Information Act will attempt to balance public interest with non disclosure rules. It remains to be seen however what the outcome would be if a Guatemalan prosecutor or defence lawyer were to successfully request that a judge order the production of documents gathered by the CHC. What one can say with relative certainty is that the legal framework within which the judicial decision would be taken, would not be the peace agreement defining the CHC mandate (due to its legal status) nor the Act of Congress allowing immunities (as it does not extend to such situations), but the Constitution, Criminal Procedure Act and the relevant legislation of each profession governing professional privilege.

repeat the same time consuming and often expensive research. There were plans to permit access to parts of the information for academic research but these appear to have been shelved. Since this article went to press, the United Nations decided to donate the public documents gathered by the Commission for Historical Clarification to the newly inaugurated Peace Library at University of San Carlos in Guatemala City. The Head of Mission for Guatemala, Tom Koenigs, explained that the 5 year delay in granting public access to this information was due to the failure of the Congress to comply with the CEH recommendation to create a Foundation for Peace and Harmony, to which Mr Koenigs said the UN intended to donate the documents. The details of the arrangement said to exist between the Guatemalan government and the United Nations as to how long the information it gathered will be kept secret are unclear and the issue does not seem to be addressed in any of the relevant formal and publicly known agreements. Aside from the risk of break-ins if the documentation were held in Guatemala, it is possible that the physical removal of the information from the country was also an attempt to avoid it falling prey to petitions for discovery in national courts. The matter of information sharing should have been openly debated and publicly presented before the CHC began its work. If prosecutors are not even to have access to the open source information gathered, then the consequences must be accepted. What is clear is that, without having seen the information gathered by a truth commission, no prosecutor should speculate that the information is unlikely to be of use to him in criminal proceedings.

Justifications for the secrecy of all information gathered by a truth commission must therefore be robust, transparent and have clearly defined objectives.

There is an important distinction to be drawn here on the matter of information sharing and that is between the situation, in which a truth commission provides prosecutors with some or all of the evidence it has gathered – a proactive role – and the situation, where there is already a prosecution under way and the parties request the judge to order the truth commission to hand over certain information – a reactive role. At the time the CHC was gathering evidence, only a handful of criminal prosecutions relating to the conflict were under way, all of which had been initiated and pursued by victims represented by local human rights organisations. In future trials however, if disclosure of documentation collected by the CHC were to be judicially ordered the matter would be subject only to the fol-

lowing rules. In the Guatemalan Constitution there are two limitations on disclosure of information: the first prohibits disclosure if it would damage national security interests; the second allows preservation of confidentiality to protect the source of the information. The latter has been interpreted to mean that the information should not be disclosed if it would lead to the person's physical integrity being threatened. The only other legislative limits of confidentiality relate to professional privilege (principally lawyers, clergy, doctors and journalists). Even in cases in which these limitations are argued, the information must in any event be handed over to the judiciary, who will then decide whether or not to disclose it.

3.5. *Recent Obstacles and Successes in the Search for Truth and Justice in Guatemala*

In recent years, the focus of the discourse in sharing lessons learned from post-conflict truth commissions has focussed largely on how to create mandates, relationships with amnesty laws and matters of operations, information management and logistics. This has had positive effects for those areas but effort is also required on the "before and after" if truth seeking is to have the desired impact; the same applies to prosecutions and other transitional initiatives. In the 'before', category are the above mentioned technical issues of the inter-relationship if both truth seeking and prosecutions are contemplated. But the question should still always be asked whether a truth seeking program, prosecutions or other initiatives are appropriate. Adequate consultation with the public and especially with victims[54] should be the ideal to be achieved – even if in practice continued hostilities and insecurity, language, poverty or funding will shape the reality of the exercise. Too often, speed is an overriding factor which serves the interests of the new authorities and the international community more than the needs of the population itself.

[54] This does not mean simply representatives of non governmental organisations or civil society groups unless one is sure that these organisations do in fact consult regularly with the population which they speak for.

As to efforts after a truth commission has published its findings, the follow-up will be central to maximising impact.[55] Since 2000, the United Nations Mission – which was distributing the CHC report – has been annually reducing its national staff by half. Dissemination and follow-up efforts by the Human Rights Ombudsman and non-governmental organisations (NGOs) have been erratic: in addition to finding suitable staff and funding to carry out this work, the already overstretched Ombudsman's office and NGOs, face vast logistical problems in reaching the rural highland population. The Catholic Church has been disseminating the REMHI report with more success through its network of local pastoral offices since 1998. This, together with the notoriety of Gerardi's murder, has had the result that the REMHI report is probably more widely known in rural areas than the CHC Report. Scores of requests for exhumations of clandestine graves from villages are pending before local prosecutors, but this has largely been the result of word of mouth from neighbouring villages or outreach by churches and concerned forensic teams.

While it is true to say that both the REMHI and CHC initiatives have had an effect in legitimising demands for exhumations, justice and reparations made by some Mayan and human rights groups, one should not assume that the same applies to the rural peasant class of Guatemala. The focus of the "popular movement", comprised of organised peasant groups with a very large rural Mayan membership nationwide, remains firmly on economic and land rights. It is in essence a continuation of their struggle of many decades if not centuries. In a country suffering extreme poverty and, in recent years, famine, it is not a surprise that these matters are the priority for thousands of Guatemalans who, while being victims of genocide or other wartime atrocities, cannot feed themselves or their families.

[55] The CHC Report was presented in the capital city and first published in Spanish. Parts of it were then translated into some indigenous Mayan languages. Although this is a laudable exercise, it is of limited utility particularly in the short term because the vast majority of speakers of those languages do not read. Efforts to have the report taught in schools and universities have so far been piecemeal and without governmental backing. Little use was made of local radio to publicise the conclusions and recommendations of the report, although this is the most effective way of reaching the Guatemalan rural population. Some civil society groups produced "popular" graphic versions. The United Nations mission to Guatemala MINUGUA, the Human Rights Ombudsman's office (Procuradoría de Derechos Humanos, or PDH), and human rights organisations undertook local workshops to disseminate the report but without central coordination, planning or sufficient funds to mount medium to longer term activities.

Some will be members of both popular organisations and Mayan groups that seek accountability for past crimes but vast numbers of rural war victims (including survivors who gave testimony to the CHC) remain unaware not only of the report but, according to national polls, of the Guatemalan Peace Accords as a whole[56] and therefore there is much work ahead in publicising these documents.

As to the political impact, in the public ceremony to hand over the report, then President Alvaro Arzú refused to receive it personally. There followed complete silence from the government on the matter for four months. The first public statement made by President Arzú regarding the CHC flatly rejected its conclusion that acts of genocide were perpetrated by the state army.[57] Since then, there has been no real demonstration of government commitment to actively take up the CHC recommendations or the content of the peace agreements as

[56] Following the conclusion of the CHC's work, it would have been preferable to have had regional formal presentations of the final report, especially in the rural areas which suffered the brunt of the violence and where the testimonies of victims demonstrated the immense scale and cruelty of the army's counterinsurgency methods. There was a clear necessity to implement a structured "post truth-seeking programme" assisted by the United Nations and the international community, in coordination with human rights groups across the country. This would have allowed the CHC report to be shared and debated with the victims who made it possible. Crucially, in order for the truth to empower and lead to real effects for victims, they must not only have access to the report, but also be in a position to make informed decisions regarding their options in the light of that truth. Such options could include exhumations, criminal trials, mental health provision, seeking reparations, pushing for education regarding the past, further investigations into the truth of what happened to relatives, action combating racism and social exclusion, and seeking responses from perpetrators and the state. In order to take up any of these options, victims need long term sustained support from organised civil society and the international community. One must carry out detailed research with a wide base of consultation to determine impact. As yet there has been no such research carried out in Guatemala which has canvassed the opinions of the general public, including the rural indigenous population.

[57] President Alvaro Arzú's first public comment following the presentation of the Commission's report in February 1999 was to the newspaper EL PERIÓDICO on 30 June 1999. After his protracted silence, he said he did not believe genocide had occurred in Guatemala. I would regard Arzu's attitude and comment as openly critical of the CHC; cf. Rachel Seider, *War, Peace and Memory Politics in Central America*, in THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 177 (Alexandra Barahona de Brit et al., eds., 2001). President of Congress Efraín Ríos Montt (leader of the Guatemalan Republican Front (FRG) party who presided over a genocidal campaign against indigenous civilians in 1982) accused the United Nations truth commission of an "emotional rather than legal" analysis of the conflict, PRENSA LIBRE, 1 April 2000.

a whole. It is hoped that the statements in February 2004 by current President Oscar Berger to the effect that he will "re-launch" the peace agreements will be followed up by concrete actions toward their implementation. Recent efforts at cabinet level to persuade Mr. Berger to publicly accept the conclusions of the CHC report are currently stalled.

Had the state, and particularly the armed forces,[58] accepted responsibility for the atrocities attributed to it,[59] moved to implement the CHC recommendations, carried out the removal of those responsible from office, and offered reparations to victims, many victims might not have felt it necessary to seek criminal trials. Following presentation of the CHC report, in the face of outright denial and obstruction of any attempt to restore their dignity, criminal justice was a clear option. Only in 2002 did the current government begin negotiating a national reparations plan, yet to be implemented, which was in fact forced upon it by a powerful state paramilitary lobby seeking "back-pay".[60]

How did the CHC initiative affect the armed forces and veterans? The vast majority of those implicated in wartime atrocities have now retired, although the internal factionalism currently being experienced within the armed forces on a range of issues is related closely to the trafficking of influence by still powerful retired officers. The scope of this influence is not restricted to the armed forces, stretching to political parties and even delimiting government policy; as such healthy civil–military relations are still a long way off. It is likely that the political manipulation of ex paramilitaries during the 1990s will be now replaced by military manipulation for the purposes of social

[58] The URNG, now a political party but with little congressional representation, accepted responsibility for those abuses detailed in the report.

[59] In mid-2000, the state publicly accepted responsibility in some cases before the Inter-American Human Rights Commission, although many of those cases remained unresolved for years and the victims without compensation, leading to severe criticisms that it was simply window dressing for the benefit of the government's international image.

[60] Former President Alfonso Portillo thanked these paramilitary groups for their services to the fatherland despite the CHC finding that they were responsible for 11% of all human rights violations committed during the conflict: Presidential speech, Chiquimula, 10 July 2002, Diario de Centro América 11th July 2002. Current President Berger has pledged to honour the payments of "compensation" to these paramilitaries promised by Portillo. Retired General Efraín Ríos Montt, has had an agreement with these former paramilitaries since the mid nineties to financially compensate them in return for their votes and assistance in intimidating their local communities into voting for his party, the FRG.

control, putting back on track the original intention of the armed forces.

The current leadership of the institution has not pronounced on the CHC's findings but it is clear from the statements of the more vocal veterans that the content of the CHC Report is hotly disputed by those who served during the conflict. The creation, composition, financing, investigation and conclusions of the report have been variously criticised or rejected by military sympathizers in the national press. United Nations staff, truth commissioners and foreign donors have been accused of communist bias. Victims, relatives and human rights lawyers are routinely portrayed by veterans and their supporters as having leftist leanings, seeking self enrichment from foreign donors and being bent on revenge and obstructing peace and reconciliation.[61] On prime time television an army veteran attacked CHC supporters who "think they are the owners of the only truth".[62] While there are some former military officers, who have recognized that "excesses" were committed by rogue troops, this has not yet had any discernible effect on military or governmental policy regarding prosecutions. The strongest sign of military and veteran opinion regarding the truth-seeking exercise is that after the publication of the CHC Report they backed their own publications detailing what they consider to be the "real" truth of the Guatemalan armed conflict.[63] In terms of truth-seeking being a catalyst for changes in the military, be it in outlook or in concrete reforms, the current signals are not positive although longer-term analysis will permit a more thorough understanding.

Turning to criminal trials, despite entrenched views on the ideology and motives of victims and their lawyers, it has become more difficult for the military, veterans and those sectors of society

[61] In a statement typical of this phenomenon, one of the three soldiers convicted in the Gerardi case labelled the Catholic Church lawyers communist guerrillas (Siglo XXI, 9th October 2002).

[62] On the live television debate programme Libre Encuentro (similar in format to the British "Question Time") in September 2002, the Chairman of the veterans groups Asociación de Veteranos Militares de Guatemala (AVEMILGUA) accused the United Nations, foreign countries who financially assisted the CHC and Christian Tomuschat, Commissioner of the CHC, of communist leanings.

[63] See for example "Venganza y Juicio Historico" (Revenge and Historical Judgment) by former officer Mario A. Merida, a book regarded by his supporters as setting the record straight and by his detractors as revisionist polemic.

who continue to support them, to dismiss the national legal system as an illegitimate arbiter of responsibilities for past atrocities.[64] This is in part due to a combination of the Guatemalan public's reverence for the law and a strong sense of nationalism and sovereignty. This is particularly prevalent among the military which, during and after the armed conflict, continually used or abused the law as its frame of reference and justification for its actions.[65] Former military personnel accused of human rights abuses regularly invoke the Constitution in regard to the duties of the armed forces and to assert their rights to due process. The armed forces also harbour a long-standing and somewhat contradictory suspicion of what they see as international intervention in Guatemalan affairs, one expression of which is the position only national courts have the necessary authority to determine the truth of the past and the guilt or innocence of individuals.[66] Although the army usually refuses to produce documents when asked to do so by a judge, military accused have generally responded positively to court citations and participated fully with defence counsel in criminal trials. Several have been remanded in custody prior to or jailed following trial and pending appeal.[67] Recent events demonstrate that today's battle is less between two versions of the "truth" than between a legal system slowly finding its feet and a military institution seeking to retain the control it had over that system throughout the armed conflict.

[64] Whether they would consider a written judgment as the "truth" of the matter is a discussion beyond the scope of this comment.

[65] See Schirmer, *supra* note 18, chapter 6.

[66] Until early 2004, the Guatemalan Presidential human rights commission (COPREDEH) charged with representing the state before the Inter-American Commission on Human Rights (IACHR) took this view to particularly confused lengths due to misunderstanding the difference between human rights obligations and criminal law. In a case in which the author represented a victim of abduction and torture, COPREDEH advised the IACHR that it could not negotiate any friendly settlement which would involve accepting state responsibility for the conduct until such time as a national court had convicted an individual state agent. The reason given was protection of the exclusive jurisdiction and impartiality of national criminal courts.

[67] A notorious exception was the freeing of former military officer Juan Valencia Osorio pending his appeal against conviction for the murder of Myrna Mack. When his appeal was rejected, specialist police officers arrived at his home to return him to custody only to find an army unit blocking the street. After the unit had left, police gained access to the area to discover that Valencia had absconded. Prosecutors are now investigating military personnel for their role in assisting a fugitive.

Since the end of the armed conflict there have been several convictions in domestic courts of military and paramilitary personnel for wartime atrocities. The first conviction in relation to mass civilian deaths at the hands of the military was secured in the case of the massacre of Río Negro, only one of more than 600 massacres which the CHC estimates occurred during the conflict. In Río Negro in March 1982, soldiers and paramilitaries killed 177 women and children, raping many beforehand, one month after murdering their menfolk near the same village.[68] In another similar case, a conviction was obtained in 1999 and upheld on appeal, against a slightly higher-ranking paramilitary[69] for the massacre of civilians in the village of Tululche. More recently, following the conviction of a lower ranking member of the Presidential Guard, an army colonel[70] was convicted in October 2002 of the murder of Myrna Mack. Although the murder of Bishop Gerardi occurred post-conflict, the crime itself was typical of earlier extra-judicial executions. Three army officials[71] and a priest were convicted in 2001 of the murder of the Bishop. The case is currently at appeal.[72] Currently, state prosecutors are investigating eight Military High Command members accused of genocide, crimes against humanity and violations of international humanitarian law. Former military President Mejía Víctores is also under investigation in relation to mass forced disappearances.

These gains have been largely made possible by the efforts of determined victims, who have managed to secure the backing of human rights NGOs and other civil society groups. They have taken place amidst severe intimidation of judges, prosecutors, witnesses, forensic scientists and lawyers. Judges' homes have been the subject of machine gun and grenade attacks and state prosecutors forced into

[68] The first trial, which took place before the CHC report was published, also resulted in a conviction. Paramilitary members are currently serving long periods of imprisonment and the local Prosecutor is seeking to bring indictments against others involved, including the local army commander.

[69] Candido Noriega, who was in direct command of local peasants organised by the armed forces from 1981 onward into community level paramilitary groups originally named Civil Self Defence Patrols (Patrullas de Autodefensa Civil).

[70] Col. Juan Valencia Osorio, Chief of the Security Department, Presidential Guard (Estado Mayor Presidencial). He is currently a fugitive, see above.

[71] Col. Disreal Lima/Capt. Lima Oliva and José Obdulio Villanueva.

[72] The State Prosecutor is challenging the competence of the appeal court ruling on the basis that it revisited witness credibility, an issue which is outside appeal court jurisdiction.

exile. A former Attorney General was the subject of a shooting attack in which he escaped injury.[73] It is clear nonetheless that prosecutors and judges are making headway in some cases and are trying to overcome a long history of intimidation and corruption as well as the serious obstacles in their path relating to resources and training. The fact that the CHC recommended criminal trials[74] was perhaps the most important aspect of the relationship between truth and justice in Guatemala. It legitimised victims' demands, brought a degree of international pressure to bear on prosecutors and also helped NGOs persuade some donors to assist them in investigating crimes and bringing prosecutions. That said, the recommendations of the CHC and the enthusiasm with which they were initially met by the international community[75] and donor organisations have not translated into the financial and moral support necessary in the medium and long-term for the prosecutions initiatives to reach their conclusion. The truth-seeking exercise having been completed, civil society organisations are often advised that their projects should now "concentrate on reconciliation".[76]

[73] It is likely that this attack was related to former Attorney General Mr. Carlos De León's United States-backed attempts to prosecute former high ranking military intelligence figures for drug and contraband related activities, rather than his institution's investigation of crimes committed during the armed conflict, although one cannot be sure. The State Department and U.S. Embassy in Guatemala issued a number of damning statements during the week of 7 October 2002 regarding the alleged criminal activities of former army generals. The Attorney General then initiated investigations against five of them. The United States also publicly denounced the use of clandestine units linked to army intelligence to attack human rights defenders seeking justice for past military crimes, which may yet be investigated by a UN backed special commission.

[74] Recommendations 46 and 47.

[75] The European Parliament issued two Resolutions supporting prosecutions on 18 May 2000 and 14 June 2001 and a further Resolution condemning acts of intimidation against victims, witnesses and lawyers involved in prosecutions initiatives: P5_TA(2002)0189, European Parliament.

[76] How this reconciliation can occur when the state has not only refused to accept responsibility for the atrocities attributed to it by the CHC but has awarded former military personnel directly implicated in mass atrocities with high level political office is difficult to see. Perversely, the idea that prosecutions might rock the boat and lead to instability for the emerging democracy comes at a time when Guatemalan military and political analysts consider criminal accountability more vital than ever to break the cycle of military control of democratic activity.

3.6. *Conclusion*

Despite the obstacles, the Guatemalan experience follows Argentina and Chile in showing that it is important not to underestimate the capacity for long-term struggle for accountability. This is particularly notable in societies that have suffered extended periods of repression. Accountability is understood as a lengthy but necessary process, which can also bring its own benefits along the way, such as empowerment of citizens to mobilise, articulate demands and to lobby government on many other issues. Accountability has become more not less crucial in Guatemala with the passage of time. While President Berger makes efforts to prosecute corrupt officials and to improve Guatemala's image with investors and the international community, the massive underlying obstacles to democracy remain untouched. Military power and economic exclusion survived the conflict and the peace intact. In fact, one could characterise the current government as a modernised version of the traditional oligarchy–army coalition which never really loosened its grip on political and economic power in the Republic. Military power, whether official or exercised by retired officers, continues to actively delimit democratic participation and is bolstered further by impunity for past crimes.[77] The tentacles of organised crime, in particular drug trafficking, have extended to public administration, official and clandestine security forces and powerful former and current military figures. In many rural areas, the drugs trade offers many a dangerous escape from severe poverty.

Impunity in Guatemala is a tangible barrier to healthy civil–military relations and to building trust between the populace and the military. The difficulties of combating this situation are compounded by the demands made on the justice system both by victims of war crimes and victims of today's unprecedented levels of common and organised crime. As high profile politicians and civil servants are prosecuted daily for stealing public money, whether and how the state will respond to the genocide will be a true test of Guatemala's commitment to racial equality, democracy and the rule of law. If the

[77] Mr. Berger recently announced budget and personnel cuts in the armed forces. This is an important aspect of the peace agreements, however in reality, although it will infuriate hard liners, it is something of a no-cost decision for the government. Many retired military figures who support the continuance of the controlled democracy project are in fact now part of the political scene, and can therefore manage the project from their new positions rather than having to engage in factional fighting within the institution and among influential veterans.

legal system cannot respond to the worst atrocities of the past and hold state agents accountable, then it is failing and that bodes ill for any emerging democracy. The Guatemalan legal system has produced unexpected and brave convictions in a small number of cases. More than legal ability, resources or countering intimidation, experience in Guatemala shows that it will be international pressure on the government and prosecuting authorities which will determine if the legal system will rise to the occasion regarding the highest level military personnel currently under investigation for wartime atrocities.

NOTE: *About CALDH and the Prosecution of Genocide in Guatemala*

The Centro para Acción Legal en Derechos Humanos (CALDH) is a Guatemalan non-profit organisation based in the country's capital city. Since 1994, it has worked with rural indigenous victims of the armed conflict, giving free legal advice[78] and is the legal representative of The Association for Justice and Reconciliation (AJR). Founded in May 2000, the AJR is a grass-roots group of indigenous communities, where state troops carried out massacres of civilians during the Guatemalan military's counter-insurgency campaign of 1981–1983. In 1996, CALDH's legal team began an extensive criminal investigation and preparatory work for a domestic prosecutions initiative. This led to the presentation by AJR in 2000 and 2001 of the first and currently the only criminal complaints (querellas) of their kind in national courts. The accused are eight members of the Guatemalan Military High Commands of 1981 and 1982 and include former Presidents, Ministers of Defence, Army Chiefs of Staff and Junta members. The allegations relate to genocide, crimes against humanity and violations of international humanitarian law, which are proscribed by the national criminal code of 1973 and were excluded from the 1996 amnesty law. To date, over 100 eyewitnesses have given statements to Special Prosecutor Mario Leal, who is heading the state's investigation into these crimes. Three of the accused have voluntarily given extensive statements and documents

[78] The organisation also represents some 400 other victims of a range of human rights abuses before national courts and the Inter-American Commission on Human Rights. Until 1998, CALDH's forensic team carried out exhumations of mass graves. Its lawyers represented the above mentioned Rio Negro community, assisted the prosecutor in the Tuluche case and represented the village of Plan de Sánchez and Maritza Urrutia in ground-breaking cases before the Inter-American Court of Human Rights.

to Mr. Leal. CALDH continues to gather evidence to assist the official investigation, including forensic reports, expert testimony and military documents. With backing from the author provided the prosecutors: The International Centre for Transitional Justice in New York, with ongoing technical assistance. Invited specialists from the International Criminal Tribunal for the Former Yugoslavia have also carried out training with Guatemalan prosecutors and judges. The first petition for arrest warrants is expected to be issued towards the end of 2004. For more information consult www.justiceforgeno-cide.org