

# **Guatemala: Lights and Shadows on the Road to Truth, Justice and Reparation**

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## Introduction

After 26 years of democratic transition in Guatemala, and almost 15 years since the signing of the Peace Agreements and though some progress has been made, the democratic transformation foreseen in the Constitution and the peace making process has not been achieved yet.

During that period, Guatemala has neither made decisions nor implemented any measures to achieve the transition from a State controlled by the ruling elites to a modern State that responds to the needs of the Guatemalans. The economic, political, and military elites maintained and even increased their power during the internal armed conflict, and they did not modify their basic traits. Thus, the State continues to respond to the interests of those minorities while most of the population continues living in precarious conditions without the support of a democratic constitutional state or suitable institutions able to guarantee life, security, and well-being.

That *status quo* paired with corruption, influence peddling, and the use of public property for private benefit show that the political logic does not encourage the design and implementation of policies, programs, and projects for the country. This situation worsens with the violence used for the defense of the interests of minorities, particularly in the cases of groups linked to drug trafficking, weapon trafficking, human trafficking, smuggling, and other forms of organized crime.

Clearly, the space for the emergence, promotion, and achievement of initiatives in favor of the transitional justice is still totally conditioned. The failure of a transition to peace is closely related to the unwillingness of political and economic leaders and security agents to develop and implement substantial reforms of political, justice, and security systems.

Thus, during the post-conflict period, crucial institutional reforms have not been implemented yet, and little progress has been made to bring to justice the crimes perpetrated during the internal armed conflict or to comprehensively address the topic of historical memory and provide holistic reparation for human rights violations.

The lack of a serious transitional approach has caused both the impunity of the crimes that caused the conflict, and the emergence of new vicious dynamics. Guatemala continues enduring the same inequalities that caused the conflict, i.e., poverty, racism, and lack of access to land, water, education, and opportunities.

The growth and consolidation of clandestine criminal groups that emerged during the military dictatorships and the armed conflict are part of the issue that now pervades the state apparatus.

Although systematic human rights violations by the State are much less common now than during the internal armed conflict, attacks to judges, prosecutors, lawyers, witnesses, journalists still happen. These acts of violence and intimidation are not linked anymore to the highest ranks of state authorities, but rather to private death squads whose links with the State structures give them almost total impunity. Moreover, collective acts of violence like lynching and social conflicts associated with natural resources exploitation, land expropriation, and unlawful traffic still persist.

Violence and impunity have exacerbated. Guatemala is among the most violent countries in the world with a homicide rate of 48 homicides per each 100,000 inhabitants<sup>1</sup>, Impunity rates are also high since,

<sup>1</sup> Ministry of the Interior. *Gobernación traslada datos oficiales de incidencia criminal en el país* [Quoted on 06/05/2011]. Access date 10/08/2011. [Online]. Available at [http://www.mingob.gob.gt/index.php?option=com\\_content&view=article&id=1256:gobernacion-traslada-datos-oficiales-de-incidencia-criminal-en-el-pais&catid=71:eventos&Itemid=54](http://www.mingob.gob.gt/index.php?option=com_content&view=article&id=1256:gobernacion-traslada-datos-oficiales-de-incidencia-criminal-en-el-pais&catid=71:eventos&Itemid=54)

## INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

according to several reports, the Office of the Public Prosecutor only investigates about 5% to 15% of the cases<sup>2</sup> and only 2% of the cases are convicted.

Neither the structural problems that caused the internal armed conflict nor the policies on truth, justice, and reparation to manage confrontation are topics for a national debate. Notwithstanding the reorganization of the elites and their political actors, every four years on occasion of the presidential elections and related negotiations, those actors continue ignoring the topic of transitional justice.

Occasionally, despite such a distressing scenario, glimmers of hope emerge, but they have not been able to contribute to take the qualitative leap forward required by the country to achieve peace. In the last years, several laws have been enacted to modernize the legal system and the crime-fighting techniques, and to foster transparency<sup>3</sup>. Therefore, the International Commission against Impunity in Guatemala<sup>4</sup> (CICIG) was established, and the National Agreement for the Advancement of Security and Justice<sup>5</sup> (ANASJ), a broad agreement that includes several topics from weapon control to the police reform, was furthered. Moreover, the then President Alvaro Colom appointed Helen Mack, director of the Myrna Mack Foundation, Presidential Commissioner for Police Reform<sup>6</sup>. Nevertheless, each of those initiatives has faced difficulties. Thus, the CICIG has not made any progress regarding criminal investigations and prosecutions as expected by the citizens, and some of its proposals have been questioned at a technical level<sup>7</sup>. The ANASJ has not

2 See, for instance: Myrna Mack Foundation. (2009). *Informe de Monitoreo sobre la Gestión de Casos de Muerte Violenta de Mujeres y Hombres en el Departamento de Guatemala*. [Online]. Available at <http://www.myrnamack.org.gt/index.php/analisis/148-informe-de-monitoreo-sobre-la-gestion-de-casos-de-muerte-violenta-de-mujeres-y-hombres-en-el-departamento-de-guatemala>

3 Law Against Organized Crime, Law of Access to Public Information, Nominations Commission Law, Organic Law of the National Institute of Forensic Sciences of Guatemala.

4 The precursor of the CICIG is the proposed creation of CICIACS (International Commission for the Investigation of Illegal Armed Groups and Clandestine Security Organizations), an initiative by social organizations resumed by the Alfonso Portillo Administration through an agreement entered into with the United Nations, to address the unwillingness of the Office of the Public Prosecutor and the National Civil Police to deal with those illegal groups. The creation of the CICIACS was controversial because it was vested with investigation and prosecution powers which the Constitutional Court ruled unconstitutional. In December 2006, after several years of negotiations, the Government of Guatemala and the United Nations signed an agreement to establish the International Commission Against Impunity in Guatemala. The duty of the CICIG duty is to strengthen the country's capability to dismantle the clandestine networks that use state institutions to guarantee their impunity. As an investigation and prosecution body, its mandate slightly differs from the international courts created for Rwanda, former Yugoslavia, East Timor, Sierra Leone, and Cambodia. In addition, the Commission is entitled to dismiss or punish any public servants who, in its opinion, could be corrupt or hinder its course of action, and to suggest a new law.

5 It was signed on April 15, 2009 by the President of the Republic, Alvaro Colom, the President of Congress, Roberto Alejos, the President of the Supreme Court of Justice, Eliu Higueros and the Attorney General, Amilcar Velazquez Zarate. The National Agreement comprises 101 pledges for the incorporation of security and justice measures that the State of Guatemala shall adopt. The core themes are security policies and institutions, police reform, the penitentiary system, policies and institutions for criminal investigations and investigations against impunity, administration of justice, weapon control, private security businesses and services, social communication and participation, legislative agenda, joined action pledges with the signatories of the Agreement.

The Agreement is available online at: [http://www.iepades.org/acuerdo\\_de\\_seguridad\\_y\\_justicia.pdf](http://www.iepades.org/acuerdo_de_seguridad_y_justicia.pdf)

6 Government Agreement 361-2010 establishes the National Commission on Police Reform as part of the Executive Branch. Its mandate is to promote, propose, and monitor the compliance with the measures, strategies, plans, and programs related to the National Civil Police Reform to facilitate an ongoing process of institutional modernization to strengthen the democratic constitutional State.

7 See, for instance: Pro Justice Movement (2011). *La lucha contra la impunidad y la depuración del sistema de justicia*. Access date 08/10/2011. [On the Internet]. Available at <http://www.movimientoprojusticia.org.gt/files/PDF/lucha%20contra%20la%20impunidad%20y%20depuraci%C3%B3n%20sist%20justicia.pdf>

been properly followed up<sup>8</sup>, and the police reform has faced several obstacles for its strengthening as a State process<sup>9</sup>.

This chapter represents an effort to outline the advancements, stagnation, and obstacles to transitional justice in the last few years. Therefore, the chapter will review the most recent significant events related to the processes of truth, justice, and reparation in Guatemala. For that matter, a bibliographical review and a consultation process involving the civil society actors who have participated in transitional justice were implemented. Thus, this document renders an account of the comprehensive efforts aimed at overcoming and transcending the horrors of the internal armed conflict and related challenges.

## Truth

Guatemala had made long-term efforts with truth matters. Therefore, the Commission for Historical Clarification (CEH) was established pursuant to the provisions of the Peace Agreements. The CEH would investigate the events of the past and write a recommendation report<sup>10</sup>. Once its work was done, the CEH submitted the “Guatemala: Memory of Silence” Report which encouraged the State to take a series of actions<sup>11</sup>. Unfortunately, most of them have not been implemented yet. On the other hand, the Episcopal Conference of Guatemala implemented the Interdiocesan Project for the Recovery of Historical Memory (REHMI) whose contribution was the “Guatemala Never Again” Report containing recommendations for the State<sup>12</sup> which have also remained ignored.

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8 See, for instance: Foro de Organizaciones Sociales especializadas en Seguridad. (2010). *Primer Informe de Monitoreo del Acuerdo Nacional para el Avance de la Seguridad y la Justicia*. Access date 26/08/2011. [Online]. Available at [http://www.ipeades.org/INFORME\\_DE\\_MONITOREO\\_%20FOSSMAYO\\_2010.pdf](http://www.ipeades.org/INFORME_DE_MONITOREO_%20FOSSMAYO_2010.pdf)

9 For further information about the obstacles of the police reform process, see Mack, H. (2011). *Informe del estado de situación de la reforma policial*. Guatemala. Access date 19/08/2011. [Online]. Available at <http://es.scribd.com/doc/62685059/Informe-Reforma-Policial-Final-15-08>. This report points out that some of the obstacles can be easily overcome provided there is political willingness. Some others require a complex solution since they are rooted in ideological, political, historical and cultural mindsets that cause tension, rejection, and even sabotage. Moreover, a strong investment by the State and the convergence of the many institutions that should incorporate these issues in their agendas are required. All such elements have caused difficulties, and at different times, pessimism and optimism have even combined.

10 Advancing Science, Serving Society. Access date 10/5/2011. [Online]. Available at: <http://shr.aaas.org/guatemala/ceh/mds/spanish/>.

11 We should point out that the CEH suggested to take actions for the reparation, rehabilitation, and dignifying of victims. Moreover, it suggested some specific legal actions against officials responsible for the events during the conflict, especially against Army officers and members of the State security forces in those years. Furthermore, it made recommendations on the administration of justice, the role of the military and police forces, and the need to establish a new security force doctrine.

12 Human Rights Office of the Archiepiscopate of Guatemala. Access date 10/7/2011. [Online.] Available at <http://www.odhag.org.gt/>. In terms of reparation measures, the REMHI recommended the material restitution, indemnity, and humanitarian care for the victims and survivors concerning health and the psychosocial and legal reparation. Regarding collective memory, it recommended to issue a statement acknowledging the accountability of the State; to tell the truth of the acts committed during the internal conflict; to pursue investigations of case and the whereabouts of the disappeared through exhumations at illegal cemeteries and the opening of military files; to dignify the victims through symbolic reparation such as monuments and ceremonies, and the return of their historical memory. In addition, the REMHI made recommendations related to the role of churches, international organizations, and the URNG. It also advised on the prevention of human rights violations, justice, and the punishment of those who are responsible, and the prevention of social and community violence. Moreover, the REHMI suggested some legislative, judicial, and social changes such as demilitarization, the exercise of freedoms in terms of the identity and culture of the Mayan peoples, and the exercise of individual and collective rights, and to find a solution to the land problem.

Consequently, there has not been any progress in policy making for the search of disappeared people. Exhumations at illegal cemeteries have been mostly carried out by civil society organizations<sup>13</sup> with the advice and funding of the international community, but without any governmental efforts. Dissemination of the armed conflict history has been poor; the truth from the legal processes is limited both by legal system protocols and the few study cases targeted to establish the facts for the prosecution of the responsible parties.

Notwithstanding the State's disregard for the recommendations from the CEH and REMHI, there have been isolated initiatives and achievements concerning the right to truth in the last years.

In this regard, access to information is important in the exercise of the right to truth. Some noteworthy advances in that area have been the documentary evidence provided by the Historical Archive of the National Police and the enforcement of Law of Access to Public Information.

In 2005, during an inspection at the former National Police building, the Human Rights Ombudsman found the Historical Archive of the National Police. The documents provided useful information to explain the gross violations of human rights during the armed conflict. The Archive's<sup>14</sup> documents have provided valuable data which help to visualize and understand how security institutions work and their inter-institutional relationships. Moreover, they provide evidentiary documentation about the National Police's activity patterns and the alleged material and the masterminds of the many crimes perpetrated during the armed conflict.

In July 2009, the management of the Historical Archive of the National Police was transferred from the Ministry of Government to the Ministry of Culture and Sports, and specifically to the General Archive of Central America rectorship. The Archive started providing information during that year, and it is now open for public unrestricted consultation.<sup>15</sup> Furthermore, several reports have been published; for instance, "The Right to Know"<sup>16</sup> which describes the former police's operating model to perform the tasks entrusted by the Army during the internal armed conflict, and two other publications entitled "The Authenticity of the Military Logbook in Light of the Historical Documents of the National Police."<sup>17</sup> The Archive has provided the Office of the Public Prosecutor with documents related to some cases under investigation. On the other

13 Some of the organizations providing support for exhumations/inhumations are the Guatemalan Forensic Anthropology Foundation (FAFG), the Mutual Support Group (GAM), the Community Studies and Psychosocial Action Team (ECAP), Barefoot Doctors, the Association for Community Development and Promotion (CEIBA), the Guatemalan League for Mental Hygiene, Pro-Central American Boys and Girls (PRONICE), Mayan Saqbe' Center, Utz K'aslemal Association, Resilience Group, the National Coordinator of Widows of Guatemala (CONAVIGUA), the International Center for Human Rights Investigations (CIIDH), Biomedical and Psychosocial Research Center (CIBP), National Commission for the Search of Disappeared Children (CNBND), Departmental Collective Group for Psychosocial Care of Quiche Mayan Organizations (CODAP), Integral Development Association (ADI), Community Integral Development Association (ACODIN), the Center for Integrated Studies and Community Develo (CEIDEC), Movement of Uprooted People from the Ixil Area, Association of Community Health Services (ASECSA), National Movement of Healthcare Promoters and Midwives, Feet of the West Association, Refugee Children of the World, Departmental Network of Community Mental Health Promoters (Quiche), Association for Research and Integral Development (ASINDI-Rex We), National Association of Health Promoters and Integral Development (ANAPRODASI), the Center for the Attention of People with Disabilities of the Guatemalan Army (CADEG), and Guillermo Toriello Foundation (FGT).

14 The documents found are from 1882 to 1997 and they are composed of nearly 80 million pages.

15 On July 1, 2009, under article 24 of the Law of Access to Information, the Access to the Information Unit (UAI) of the Historical Archive of the National Police (AHPN), endorsed by the Ministry of Culture and Sports through Ministerial Agreement 1052-2009, December 30, 2009. Since May 3, 2011, the Office of Public Prosecutor has had a permanent office at the AHPN. By September 30, 2011, the Access to Information Unit of the AHPN had more than 13,000,000 documents, had addressed 5,882 injunctions for a total of 84,175 document images delivered to users, accounting for 285,973 pages.

16 Rights Ombudsman. Available at <http://www.pdh.org.gt/index.php?...19...derecho-a-saber>.

17 Secretariat for Peace (2009). *La autenticidad del Diario Militar, a la luz de los documentos históricos de la Policía Nacional. Guatemala.* Also Secretariat for Peace. (2011). *La autenticidad del Diario Militar, a la luz de los documentos históricos de la Policía Nacional. Guatemala.* The former includes 57 cases and the second edition includes 66 cases.

hand, the Law on Access to Public Information<sup>18</sup> was enacted in September 2008. The main issues contained in that Law are the obligation of transparency, access to public information, regulations on information units, establishment of classification and declassification criteria for confidential undisclosed information, the handling of personal data, public archives, and access to information procedures, the responsibility of the Human Rights Ombudsman as the guarantor of the enforcement of this law and the corresponding sanctions for noncompliance.

Despite the advances regarding the right of the victims and the population in general, there are still several obstacles to the right to truth such as the lack of political acknowledgment and inadequate dissemination of the Historical Clarification Commission Report, the validity of military secrecy, the weaknesses of the Law on Access to Public Information, the absence of effective State actions to search for the disappeared and the State neglect of the exhumation process.

Although the Historical Clarification Commission Report is a fundamental historical document to preserve the Guatemalan's memory of the past, the document has not been officially endorsed nor disseminated by any Administration after its publication. Although the topic of the history of the internal armed conflict must be included in the National Curriculum Base,<sup>19</sup> it is not being taught due, on the one hand, to the unavailability of teaching material, and on the other and, to the lack of trained teachers.

The restricted access to military files is one of the most serious obstacles to the right to truth. In fact, the Ministry of Defense has repeatedly refused to provide information on the Army's activities during the armed conflict in spite of court orders or the President's request for such information.

For instance, in 2007, the Second Criminal Court of First Instance<sup>20</sup> requested the Ministry of National Defense for information about the plans of the campaigns called Victoria 82, Firmeza 83, Sofia 82, and Ixil 82, but the information was partially submitted<sup>21</sup> alleging that the plans had "disappeared."<sup>22</sup> The fact that the relevant authorities from the Ministry of Defense who refused to provide the requested information and disobeyed presidential orders have not been subject to sanction and the President of the Republic has not adopted any administrative actions to ensure compliance of the Ministry of Defense is an obstacle for the enforcement of the right to truth.

In February 2008, the then newly elected President of the Republic, Alvaro Colom stated that the military files<sup>23</sup> would be made available to the public. The first reaction against this statement was voiced by retired General Jose Luis Quilo Ayuso from the Association of Military Veterans of Guatemala (AVEMILGUA), who argued that national security documents could not be disclosed.<sup>24</sup>

18 Congress of the Republic (2008). Decree 57-2008 of September 23, 2008, in *Diario de Centro América*. (Vol. 285). Issue 45. October 23, 2008.

19 See, for instance, Ministry of Education. Available at [http://www.mineduc.edu.gt/recursos/images/7/75/Curriculum\\_Nacional\\_Base\\_-\\_Formacion\\_inicial\\_de\\_docentes\\_del\\_nivel\\_primario.pdf](http://www.mineduc.edu.gt/recursos/images/7/75/Curriculum_Nacional_Base_-_Formacion_inicial_de_docentes_del_nivel_primario.pdf).

20 The judge that, at that time, was in charge of the criminal proceedings for the crime of genocide against Efraín Ríos Montt, Manuel Mejía Victores and Mario López Fuentes.

21 Of the requested files, two were delivered: Victoria 82 and Firmeza 83.

22 Request by the Second Criminal Court of First Instance, Drug Trafficking, and Environmental Crimes of the Ministry of National Defense, January 31, 2007. Criminal Record 6665-2001.

23 During the celebration of the National Day for the Dignity of Victims, President Alvaro Colom apologized for the abuses perpetrated by the State during the internal armed conflict, and promised to make the Army files available to the public to clarify the whereabouts of the disappeared and do justice. In Alvarado, H., Rodríguez, L. (2008). *Alvaro Colom ofrece abrir archivos militares*, in *Diario Prensa Libre*. February 26, 2008.

24 *Ibid.*

During the second half of 2008, as a result of the statement made by the President, the Peace Archives Project was established to receive the files from different State departments to design a procedure to access the information contained in those records.<sup>25</sup>

As promised, President Colom established the Military Archive Declassification Commission in March 2009 to review the documents from 1954 to 1996 and to facilitate public access to the Army's<sup>26</sup> archives; however, the outcomes of the initiative outcomes were very limited. Thus, during the submission of its first report in December 2010, the Commission pointed out that it had identified 11,641 documents to which 599 more were added for careful review since they were considered partially secret documents, plus 103 other documents regarded as confidential. Moreover, we should point out that the Commission claimed that it had not found the documents for the period from 1980 to 1985.<sup>27</sup> On June 20, 2001, President Colom officially opened the Military Archives Declassification Center which comprises 12,287 documents. Other 55 documents were deemed confidential claiming that they breach the Army's<sup>28</sup> operational strategy.

The consultation of those documents should comply with the guidelines of the Center. The information is in digital format, but citizens should submit a written request to access the documents of interest. Then, they have to wait for notification of the date when they will be allowed to make online consultations. In addition, those who want the information on paper should request a certification pursuant to the Law for the Access to Information.<sup>29</sup>

That procedure clearly hinders an easy access to information since it demands detailed specification of the requested document, which is not feasible because the petitioner has not been able to previously browse the documentary collections or check tables of contents or databases. Therefore, accessing relevant information in the military archives is not guaranteed by any legal provision.

As stated above, the Law on Access to Public Information was finally passed in September 2008 thanks to media pressure and the public opinion demands for a more transparent use of the public treasury. Nevertheless, this law does not provide specific requirements about military secrecy or about the archives of the Ministry of Defense archives to allow the access to that information. Such situation is explained by the fact that neither the events of the past nor the human rights violations were included as debate topics. The legislation does not accurately describe the type of information that can be classified as "national secret." Therefore, the Ministry of Defense can continue unilaterally deciding which information is confidential.

Moreover, since April 2009 when the law entered into force, the progress regarding the access to public information has been slow, due to the opposition to a change in a governmental paradigm and to deficient technical training.

25 Secretariat for Peace (2008). *Informe sobre avances en el cumplimiento de los Acuerdos de Paz. 2008*. Guatemala..

26 Congress of the Republic. Government Agreement 64-2009, in *Diario de Centro América*. (Vol. 284). Number 42. March 5, 2009. Establishment of the Commission for the Declassification of Military Archives composed of seven representatives in charge of compiling and organizing the files, documents, proceedings, and any other information from 1954-1996. The Commission was extended by six more months by Government Agreement 2 2010, and it was extended again by six months by Government Decree 203-2010 in July 2010. See Government Agreement 2-2010, in *Diario de Centro América*. (Vol. 288). Number 65 of January 8, 2010, and Government Agreement Number 203-2010, in *Diario de Centro América*. (Vol. 284). Number 68. July 9, 2010.

27 Asier, A. (2010). *Archivos militares de los años 80-85 no aparecen*. In: El Periodico. December 14, 2010.

28 Calderon, R. (2011). *Ciudadanos tendrán acceso a 12 287 archivos militares desclasificados*, in *Diario de Centro América*. June 21, 2011. Access date 17/08/2011. [Online]. Available at <http://www.dca.gob.gt/es/20110621/Nacionales/1515/Ciudadanos-tendr%C3%A1n-acceso-a-12287-archivos-militares-desclasificados.htm>

29 Ramirez, A. *Gobierno abre más de 12 mil archivos militares*, in *Diario Prensa Libre*. June 20, 2011. [Online]. Available at [http://www.prensalibre.com/noticias/politica/archivos-desclasificacion-militares-ejercito\\_0\\_502749916.html](http://www.prensalibre.com/noticias/politica/archivos-desclasificacion-militares-ejercito_0_502749916.html)

Another issue that has further limited the right to truth is that the State has not advanced effective measures to search for the disappeared. Since the State of Guatemala is primarily held accountable for nearly 40,000 enforced disappearances perpetrated during the internal armed conflict, it has the obligation of clarifying the victims' whereabouts. The State's unwillingness to cooperate in the search for direct victims represents a serious violation of the right of victims, their relatives, and the Guatemalan society to know the truth of what happened during the internal army conflict. .

Although the Inter-American Court of Human Rights<sup>30</sup> instructed the creation of a unified registry of disappeared people, the Congress of the Republic has not passed a law to establish the Commission for the Search of the Disappeared. Its establishment could allow taking specific steps towards the creation of a unified data registry of the disappeared, give information to the relatives, and return the victims' remains. Likewise, that Commission could assist in finding evidence to start investigations and legal proceedings against those responsible for the crimes as well as reparation measures for the people affected.

We should point out that the "Law for the Commission for the Search for Victims of Enforced Disappearance and other Forms of Disappearance"<sup>31</sup> is still pending approval by the Congress<sup>32</sup>. The initiative represents "a measure to enforce the rights of the victims of gross violations, and particularly, of their right to truth."<sup>33</sup> This Commission would create a national registry of disappeared people. It would have a 15-year mandate and it would work in the development and implementation of search mechanisms, studies, and case follow-up.

Exhumations are emotionally and spiritually valuable for the victim's relatives. The remains recovery allows families to bury their loved ones according to their cultural and spiritual beliefs and, moreover to visit their graves<sup>34</sup>. Moreover, exhumations also pave the way to start criminal proceedings against the perpetrators of the crimes. Finally, exhumations also foster a favorable environment for society to understand the events that led to the internal armed conflicts.<sup>35</sup> Civil society's<sup>36</sup> forensic anthropology organizations have conducted 1,200 exhumations at illegal graveyards and mass graves.

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30 Inter-American Court of Human Rights. *Molina Theissen vs. Guatemala Case (Reparation and costs)*. Sentence of July 3, 2004. C Series Number 108.

31 Congress of the Republic. Bill 3590. Guatemala, January 18, 2007. Since 2006, a group of human rights and victims or victims' family organizations have worked on a bill specifically focused on the approval of the Commission for the Search for Victims of Enforced Disappearances and other Types of Disappearance. With the support of the Office of the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross, the Human Rights Ombudsman's Office, the organizations submitted the bill to the Congress of the Republic by the end of that year.

32 During the legislative period of 2004-2008, lawmakers Myrna Ponce (FRG) and Victor Sales (URNG) submitted Bill 3590 to create the Commission to Search for the Disappeared which received a favorable opinion from the Public Finances and Currency Commission thanks, largely, to the extensive lobbying by social organizations. The Bill is still awaiting the opinion of the legislative and constitutional matters commission.

33 Bill 3590.

34 During the exhumation/inhumation process, after the forensic-anthropological work has concluded, and before or during the inhumation stage, the victim's relatives, the communities and supporting organizations prepare commemorative plaques and monuments for their loved ones to close their mourning process. Most of the time, the plaques are placed where the remains are inhumated prior to the ceremony according to their beliefs and customs.

35 Most of the exhumation cases are neither documented nor reported by either the CEH or REMHI. One example is that out of 579 exhumations in the department of Quiche, only 85 answered to the testimonies collected by REMHI or CEH. In Reyes, A. (et al.). (2009). *Mapeo de iniciativas nacionales e internacionales*, in *Reconciliación Social. Posguerra en Guatemala (1997-2008)*. Guatemala.

36 Ibid.

## INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

Although most exhumations have been conducted in rural<sup>37</sup> areas, since March 1, 2010, experts from the Guatemalan Forensic Anthropology Foundation (FAFG) started working at La Verbena Cemetery in Guatemala City to search for 900 missing people during the armed conflict.<sup>38</sup>

Another obstacle to the right of truth is that the State does not take responsibility for DNA tests and it is only the FAFG which carries them out. Social and technical-forensic organizations have been given little support and job protection. The State neither provides financial resources nor does it offer appropriate protection measures to technicians, experts, victims and witnesses. Victims and organizations constantly have trouble with the exhumation authorization procedure. Furthermore, although exhumations provide evidence, the Public Prosecutor's Office does not open the corresponding *ex officio* criminal investigation.

Since 2004, the National Day for the Dignity of Victims of the Internal Armed Conflict<sup>39</sup> is celebrated on February 25. Although the purpose of this celebration is honoring, acknowledging, and dignifying the memory of those persons who were the victims of violence during the armed conflict, and their relatives, the memorial celebrations are superfluous and meaningless for the victims contradicting the tribute initial objective since social participation spaces and an effective support to the victim's memory initiatives beyond some specific cases have not been provided.

Therefore, to comprehensively guarantee the right of truth, the State of Guatemala must take more assertive actions to ensure the dissemination of the events that occurred during the internal armed conflict, to help relatives of victims of enforced disappearance find out about the whereabouts of their loved ones, and to preserve and systematize the police archives, and to make military files accessible.

## Justice

Over the years after CEH, legal proceedings continue facing investigation and impunity obstacles. Regarding justice matters, it is worth pointing out that, particularly, during 2010 and 2011, the Public Prosecutor's Office increased efforts towards the criminal prosecution of emblematic cases of human rights violations which occurred during the internal armed conflict. It kept it open to plaintiffs and victims of such cases. Similarly, the courts were open-minded regarding the evidence and legal arguments that were put forward, and they convicted several people who were accountable for the crimes committed during the internal armed conflict.

For that matter, the declaration of enforced disappearance as a permanent crime by the Constitutional Court on July 7, 2009 pursuant to international standards is noteworthy. It was adopted by the Court of Criminal Trials, Drug-trafficking, and Environmental Crime of Chimaltenango on August 30, 2009 for its first conviction of a crime<sup>40</sup> of enforced disappearance. This was a conviction related to the case of the Choatalum village in the municipality of San Martín Jilotepeque, Chimaltenango. Between September 1982 and October 1984, Alejo Culajay Hic, Santiado Sutuj, Encarnacion Lopez Lopez, Filomena Lopez Chajchaguin, Mario Augusto Tay Cajti and Lorenzo Avila were victims of enforced disappearances perpetrated by the then Military Commissioner<sup>41</sup> and other Army officers and civilian patrols.

37 *Ibid.* Approximately, 90% of the exhumations are carried out in rural areas: Chimaltenango, Baja Verapaz, Alta Verapaz, and Huehuetenango which are regions of indigenous concentration where the CEH has reported the highest rate of human rights violations during the internal armed conflict.

38 Herrera, O. *Exhumaciones en La Verbena iniciarán el lunes*, in *El Periodico*. February 27, 2010. [Online]. Available at <http://wwwelperiodico.com.gt/es/20100227/pais/139817/>.

39 According to Decree 6-2004 of the Congress of the Republic.

40 Center for Human Rights Legal Action.

Available at [http://www.caldh.org/images/pdf/choatalum/sentenciadesaparicion\\_forzada.pdf](http://www.caldh.org/images/pdf/choatalum/sentenciadesaparicion_forzada.pdf)

41 Felipe Cusanero Coj.

Some aspects of this first conviction for a case of enforced disappearance are particularly remarkable. A positive achievement was that the Court accepted as admissible evidence the Guatemala Never Again Report, the Memory of Silence Report, and the Inter-American Commission of Human Rights Report which were issued in the eighties.

On the other hand, the conviction expressly acknowledges the Mayan's core belief in the active bond between the living and the dead, and the need for a burial as well as the implications of enforced disappearance within their cultural context: "For the Mayans, this situation is particularly important for the core relevance of the active bond between the living and the dead in the Mayan culture. The lack of a sacred place is a serious concern that is mentioned in testimonies by many Mayan communities."

The sentence addresses the right to truth, collective memory, and non-repetition by pointing out the important role of truth and memory within a society. It states that the "right to truth, from its collective dimension, is the direct realization of a democratic social rule of law since its exercise allows everybody to know how degenerate can human beings become either by using the public force or criminal groups of terror." The Court also stated:

The victims have the right to know, but also the duty to know what happened in our country to get back on track and strengthen the minimum necessary conditions required by a truly democratic society because of an effective exercise of the fundamental rights. (...) Behind those demands for access to investigation of human rights violations, of course, are not only the demands for justice for the victims and their relatives but also those of the State and the civil society's for the adoption of effective measures to prevent the occurrence of such acts in the future."

Finally, the Court stated "...the right to truth as a collective inalienable legal right."

In December 2009, the First Sentencing Court of Chiquimula handed down the second conviction for the crime of enforced disappearance in Guatemala. The perpetrators, including an army colonel and three military commissioners<sup>42</sup> were sentenced to 53 years in prison each. This was the first conviction of an army member for this crime. In addition, the Court decided to reclassify the offence of kidnapping as a crime of enforced disappearance, and urged the Public Prosecutor's Office to investigate the chain of command, including the role of the former Ministry of Defense<sup>43</sup> and the former Chief of the Combined<sup>44</sup> Armed Forces as well as other members of the Army who carried out activities in the military base in Zacapa en 1981.

In 2010, two former police officers of the extinct National Police<sup>45</sup> were found guilty and sentenced for the enforced disappearance of student and union leader Fernando Garcia in 1984. They were each sentenced to 40 years in prison. This case established enforced disappearance as a crime against humanity. The three sentences have been valuable tools to bring to justice all enforced disappearance cases pending prosecution.

Special mention should be particularly given to the role that the victims and human rights organizations have played in the promotion of justice. Several organizations have closely followed the legal proceedings of gross crimes of the past and have contributed evidence to clarify the cases. Thus, the legal achievements have been possible thanks to the effort and work of the victims and human rights organizations that provide accompaniment and support.

42 Marco Antonio Sanchez, Jose Domingo Rios Martinez, Gabriel Alvarez Ramos and Salomon Maldonado Rios

43 Angel Anibal Guevara

44 Benedicto Lucas Garcia

45 Hector Roderico Ramirez Rios and Abrahan Lancerio Gomez

Furthermore, Guatemalan victims and social organizations continue using the Inter-American System of Human Rights to focus international attention on human rights issues. The system has been effective to prosecute the State for human rights violations during the internal armed conflict.

Another important case is the recent massacre in the small village of *Dos Erres* on December 7, 1982. During a special session held in La Paz, Bolivia in July 2009<sup>46</sup>, the Inter-American Court of Human Rights found out that the obligation to provide justice had not been honored. As a result of the ruling, the authorities accused a former *Kaibiles* soldier for his participation in the massacre. His conviction was facilitated by his extradition by the Government of the United States, after standing for trial for lying on a naturalization application in that country.<sup>47</sup>

In September 2010, the Public Prosecutor's Office requested the Court for High Risk Crimes to open criminal proceedings against three former military officers for their participation in the massacre. On August 2, 2011, the Court of High Risk found the seventeen former soldiers guilty of the massacre at the *Dos Erres* village in the Department of Petén on December 7, 1982.<sup>48</sup> Manuel Pop Sun, Reyes Collin Gualip, and Daniel Martínez Méndez, former *Kaibiles*, were sentenced to 6,060 years in prison for participating in the massacre. The militaries were sentenced to 30 years each for the killing of each of the 201 victims plus 30 additional years for the crimes against humanity. However, as validated by the Court they will only serve 50 years each since it is the maximum time a convict serves in accordance with the Guatemalan Criminal Code. Nevertheless, the Court pointed out that the conviction was a tribute to the victims.

Furthermore, the issuance of General Proceedings for the Investigation and Criminal Prosecution of Gross Violations of Human Rights during the internal armed conflict<sup>49</sup> was central to showing how important the transitional justice topic is for the Public Prosecutor's Office. The purpose and objective of the Proceedings is to provide prosecutors with a tool to conduct investigations by implementing political-criminal, methodological, and legal guidelines. Additionally, it establishes definitions, constitutional and international principles, an investigation methodology, management planning, legal assessment of the facts, and interpretation of the types of criminal offences.

However, despite these important breakthroughs, most of the violations perpetrated during the internal armed conflict still remain unpunished. Regarding justice matters, factual conditions and limitations particularly to the detriment of the victims have been practical obstacles for their participation.

Obviously, many obstacles that have favored impunity for the crimes committed during the internal armed conflict have not been overcome. Foremost among them are the unwillingness of the criminal justice system to investigate, prosecute, and judge the crimes of the past; the limited resources for criminal prosecution of the crimes committed during the internal armed conflict; malicious litigation, i.e., the abuse of procedures to delay and obstruct criminal proceedings; the limited independence of the judiciary and the prosecution system; the racism that still prevails within the criminal justice system; the inadequate

46 Inter-American Court of Human Rights. *The Massacre at Dos Erres vs. Guatemala Case. Preliminary Objection, Fund, Reparations and Costs.* Sentence of November 24, 2009. C Series Number 211.

47 See (Online). Available at <http://noticias.com.gt/nacionales/20110511-ex-kaibil-implicado-en-masacre-sera-deportado-de-los-estados-unidos.html>

48 During the massacre, the *kaibiles* executed acts of extreme cruelty against the population even against boys and girls. They raped women and girls at the beginning, during, and after the massacre; they subjected people to torture during interrogations before murdering them; they used weapons, grenades, and blunt instruments to murder people. The exhumations carried out between 1994 and 1995 allowed the identification of at least 171 people although witnesses and victims' relatives reported more than 201 murdered people.

49 Public Prosecutor's Office. (2011). *La Instrucción general para la investigación y persecución penal de las graves violaciones a los derechos humanos cometidas durante el conflicto armado interno.* Guatemala.

protection of witnesses and justice operators; the threats against them; errors in performance assessment and disciplinary measures for officials who work for the criminal justice system<sup>50</sup>, lack of full support to the Inter-American System of Human Rights.

In that sense, the Public Prosecutor's Office has neither started *motu proprio* investigations nor has it prosecuted any State officials or agencies for their unwillingness to support the investigations like the Ministry of Defense which has repeatedly refused to provide information related to the Army's activities during the internal armed conflict.

On the other hand, the National Civil Police does not have a special investigation unit for gross crimes resulting from the armed conflict. Consequently, its criminal investigation system is deficient.<sup>51</sup>

The Judicial Body and the Constitutional Court issue rulings very slowly thus delaying trials for months and even years. Moreover, they disregard the international humanitarian law and human rights in force in Guatemala. For instance, during the debate by the National Hearing of Spain<sup>52</sup> to discuss the validity of the universal jurisdiction, the Guatemalan Courts did not accept the victim's arguments. On December 12, 2007, the Constitutional Court ruled against the international criteria for criminal prosecution and proceedings of gross violations of human rights<sup>53</sup> as recorded in case file No. 3380-2007.

In that ruling, the Constitutional Court rejected the universal jurisdiction principle invoked by the Spanish Constitutional Court for the investigation and prosecution of acts of genocide in Guatemala. In so doing, the Constitutional Court not only ignored that, under international customary law and traditional international law, genocide is regarded a crime that any government should investigate and prosecute, but also that the international agreements on human rights matters ratified by Guatemala established the obligation to collaborate in the prosecution and sanction of the perpetrated violations.<sup>54</sup>

Concerning this resolution, Amnesty International pointed out that “the CC’s<sup>55</sup> verdict reasserts the impunity that prevails in Guatemala which is disguised with inadmissible legal remedies. Besides, it has guaranteed that alleged perpetrators of gross crimes will be neither deported to any third States nor locally prosecuted.”<sup>56</sup>

Three years after the decision of the Constitutional Court that dismissed the National Hearing of Spain request for the provisional detention for extradition purposes of several people accused of genocide and crimes against humanity, there are not any records of convictions of those cases in the Guatemalan Courts.

50 Since officials are not subject to controls to keep them in their positions, they are not interested enough in carrying out in-depth investigations and imposing sentences in accordance with the legal rules.

51 For a description of the situation, see Myrna Mack Foundation. (2009) Impunidad, Estigma y Género: Estudio de procesos penales por muerte violenta en el departamento de Guatemala (2005-2007). Documento para el debate. Myrna Mack Foundation. Guatemala.

52 In that case, the Fifth Court of Criminal Sentencing, Drug Trafficking, and Environmental Crimes ordered preventive detention of Angel Anibal Guevara Rodriguez, Oscar Humberto Mejia Victores, German Chupina Barahona, and Pedro Garcia Arredondo, before the official extradition requested by Spain for the crimes of terrorism, homicide, and illegal detention.

53 For an analysis of the technical relevance of this verdict, see Office of the United Nations High Commissioner for Human Rights (2011). *Tendencias jurisprudenciales de la Corte de Constitucionalidad de Guatemala en materia de derechos humanos*. Access date 30/08/2011. [Online]. Available at <http://www.oacnudh.org.gt/documentos/publicaciones/Tendencias%20jurisprudenciales.pdf>

54 Remember that Guatemala has the international obligation to prosecute and punish the crime of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.

55 It refers to the Constitutional Court.

56 International Amnesty. (2008). Guatemala; *The Refusal to Grant the Extraditions Requested by Spain for Crimes under International Law* (. Access date 7/07/2011. [Online.] Available at [www.amnesty.org](http://www.amnesty.org)

Undoubtedly, this situation compromises Guatemala's international responsibility under the principle of *aut dedere aut judicare*.<sup>57</sup>

On the other hand, the criminal justice system has invested few resources and capabilities in the investigation of gross violations during the internal armed conflict. Therefore, the lack of physical access to the legal institutions and the inadequate coverage in rural areas is evident. Indigenous populations which are mostly settled in rural areas do not have easy access to the institutions because these are usually located in urban areas. Although the proximity of legal institutions and population areas do not necessarily guarantee real access to justice, distance, however, does pose physical access limitations considering that commuting entails expenditures that some people cannot afford, and all the less when they are very poor.

Moreover, the Historical Clarification Unit of the Public Prosecutor's Office of Human Rights is centralized in the capital city although most of the victims live in rural areas. In addition, the Unit does not have bilingual staff or interpreters even though most of the victims are indigenous and many of them do not speak Spanish.

The Historical Clarification Unit does not have enough staff in comparison to the number of cases under its responsibility. Moreover, the staff has not been sufficiently trained to keep up with their work.

Other obstacles in the fight against impunity are malicious litigation and delays. The few cases that have advanced through the legal process in comparison to the huge number of violent crimes and human rights violations recorded during the internal armed conflict are delayed by legal appeals aimed to obstructing justice.

One of them is the remedy for the protection of constitutional rights. The extensive and abusive use of a remedy for the protection of constitutional rights is a dilatory tactic to delay the progress of the proceedings. Although the remedy for the protection of constitutional rights is a fundamental provision to protect human rights, it has been excessively and perniciously used to the detriment of the criminal proceedings as a mechanism to curb impunity.<sup>58</sup> Lawyers also file other types of appeals such as challenge, reversal, amnesty, unconstitutionality, appeals against sentences; all of them are intended to maliciously delay criminal procedures for the noncompliance with the court deadlines.

Moreover, in several proceedings, a petition to avail oneself of the National Reconciliation Law<sup>59</sup> has been accepted even though it does not apply in most cases and it is only used to delay the criminal proceedings. Regarding the enforcement of the National Reconciliation Law, in practice, discretion has characterized the interpretation of political crimes and related common crimes whose distinction is relevant for the benefits that this law provides for. The most immediate precedent is the judgment issued in case file 3380-2007 of the

57 Latin expression meaning "extradite or judge" used in International Law.

58 Sierra, J. (2004). *Propuestas para reducir los efectos dilatorios que provoca el abuso del amparo judicial*. Guatemala.

59 The National Reconciliation Law, Decree 145-96 of the Congress of the Republic, set up its application limits by specifically pointing out: accomplices who are entitled to request amnesty benefits, the application requirements, the court with jurisdiction to hear it, the special procedure that should be applied whenever it is invoked in a particular case and the crimes which are susceptible to be subject to its application, listed as political, which damage the legally protected rights exclusively affecting the State. Likewise, this law expressly states the crimes in which requesting the exemption of criminal liability is not appropriate, that is, the crimes of genocide, enforced disappearance, and torture. The National Reconciliation Law is not limitative in itself in relation to limits of its application, as stated, but it is also restricted by other factors. Thus, for instance, the international commitments of the Guatemalan State through the approval and ratification of international instruments in human rights matters which incorporate the obligation to investigate and prosecute human rights violations without any obstacle that might cause impunity, and Article 27 of the Vienna Convention that establishes that States may not invoke the provisions of their internal law as justification for their failure to perform a treaty.

Constitutional Court which ruled in favor of defending those people accused of participating in extrajudicial executions arguing that, among other things, the alleged facts are related to political crimes.<sup>60</sup>

It is important to point out that although the National Reconciliation Law is part of the Guatemalan legislation, it contains the provision that extinguishes criminal responsibility for political crimes and related common crimes, the same legal entity establishes the exception to the enforcement of the legal extinction of criminal action for the crimes of genocide, torture, and enforced disappearance, and also for crimes with no statute of limitation or those which do not admit extinguishment in accordance with the internal law or any international treaties ratified by Guatemala.

The attacks against legal independence and prosecution autonomy in cases of human rights violations during the internal armed conflict are another obstacle to achieving justice. Congressional and Executive manipulation of appointments is one of the factors affecting the independence of the Judiciary and the Constitutional Court and the autonomy of the Public Prosecutor's Office.

Congress has the authority to appoint justices to the Supreme Court of Justice and the Appeals Court and half the members of the Council of the Public Prosecutor's Office. It also decides on budget allocation for these institutions. The President of the Republic is responsible for the appointment or dismissal of the Attorney General. Although the selection processes for these positions are based on a list of candidates proposed by a Nominations Committee,<sup>61</sup> vicious acts still affect the authorities' independence and autonomy.

According to the procedure pursuant to the Law of Nominating Commissions, this regulation, which was first enforced in 2009 for the election of justices of the Supreme Court of Justice and the Appeals Court, provided citizens with the opportunity to finger-pointing the candidates. Thanks to that, the infiltration of power groups<sup>62</sup> and their mechanisms to affect the appointments were made public. Likewise, the permeability to external influences and the resultant absence of legal independence was also evident.

During this process, the control mechanisms provided in the Law of Nominating Commissions were ineffective since the technically formulated vetoes by civil society organizations to the election of some candidates were disregarded. Therefore, the CICIG raised objections against eight justice candidates to the Supreme Court of Justice;<sup>63</sup> however, the Congress of the Republic appointed six of them.

As a result of the remedy for the protection of constitutional rights granted by the Constitutional Court which stipulated the revision of that nomination<sup>64</sup> on October 7, 2009, Congress voted again and substituted three of the elected justices to the Supreme Court of Justice who had been harshly questioned. In addition, Congress provided the Public Prosecutor's Office with all the available information.<sup>65</sup>

60 See footnote 56.

61 Since 2009, these are governed by the Law on Nominating Commissions that is aimed at developing the constitutional and legal regulations that creates them, and establish enforceability, publicity, objectivity and transparency as its guiding principles.

62 See, for instance, the points raised by the International Commission against Impunity in Guatemala against some candidates for justices, in CICIG. (2009). CICIG. (2009). *La Corte Suprema de Justicia 2009: Los Magistrados no idóneos para representar a Guatemala*. Access date 12/10/2011. [Online].

Available at <http://cicig.org/uploads/documents/Presentacion%20candidatos%20a%20CSJ%20Octubre%206-09.pdf>

63 International Commission against Impunity in Guatemala. (2009). *Informe proceso de elección de magistrados a la Corte Suprema de Justicia y Cortes de Apelaciones y otros tribunales colegiados de igual categoría*. Guatemala.

64 Resolution issued in file 3690-2009, submitted to the Constitutional Court.

65 For further information about the weaknesses in judicial independence matters, see Myrna Mack Foundation. (2010). Challenges *Desafíos a la independencia y transparencia del Organismo Judicial en Guatemala*. Myrna Mack Foundation. Guatemala.

## INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

For the election of the Attorney General and the Chief of the Public Prosecutor's Office, the CICIG and other social organizations suggested to exclude candidates who caused concern regarding their independence from political parties and lobbying groups or those who had been part of any illegal or clandestine security organizations.<sup>66</sup>

That Nominations Commission appointed six candidates as part of the list that was sent to the President of the Republic who, on May 25, 2010 elected Conrado Arnulfo Reyes Sagastume as Attorney General.<sup>67</sup> According to the CICIG, Reyes Sagastume included in his team people who were linked to illegal groups and clandestine security systems. His appointment was contested causing the Constitutional Court to annul the process and carry out a new<sup>68</sup> one. As a result, Dr. Claudia Paz y Paz Bailey<sup>69</sup> was elected.

Some other obstacles to justice are harassment, threats, and attacks against justice operators. Similarly, the Office for the Protection of Witnesses and People Subject to Trial Proceedings of the Public Prosecutor's Office does not offer appropriated protection measures and lacks the resources and capability to fulfill that task.

The persistence of racism within the criminal justice system is reflected by the fact that legal proceedings are in Spanish. This is a limitation to the exercise of the right to legal guarantees and legal protection in one's own language. Some actions have been promoted in the last years to overcome the linguistic barrier within the legal proceedings such as hiring interpreters. However, they have not been enough.<sup>70</sup> Such persistence is also reflected in the discriminatory attitudes towards justice operators.

The lack of mechanisms to assess performance and an effective disciplinary system are also obstacles to justice. For instance, concerning case management by the Public Prosecutor's Office, a monitoring process<sup>71</sup> was conducted in 2008. It revealed several organizational dynamics like the failure to fulfill inspection duties and control of the work performed by the Prosecutor's offices, administrative and institutional leadership weaknesses. Moreover, it also showed that prosecutors relied upon personal criteria in case management due to the lack of supervision and discipline mechanisms. In addition, there was an outdated file control that has even caused the lost of files.<sup>72</sup>

Concerning this topic, the United Nations Special Rapporteur on the Independence of Judges and Lawyers recommended to the State of Guatemala that the assessment process of the performance of the judges should be transparent to avoid bias allegations.<sup>73</sup>

Finally, another obstacle to justice is that the Inter-American Systems of Human Rights has not been given full endorsement. For instance, in August 2010 the Constitutional Court definitely revoked the

66 International Commission against Impunity in Guatemala. (2010). *Informe de la Comisión Internacional contra la Impunidad con ocasión de la elección de Fiscal General y Jefe del Ministerio Público*. Guatemala.

67 International Commission against Impunity in Guatemala. (2010). *Tercer año de labores*. Resumen Ejecutivo. Guatemala.

68 *Ibid.*

69 Paz y Paz was, at that point, a prominent figure of the human rights movement in Guatemala.

70 For further information, see ASIES. (2008). *Proceso de Fortalecimiento del Sistema de Justicia: avances y debilidades*. (5th Study of the Justice System). Guatemala.

71 Myrna Mack Foundation. (2009). Guatemala. This monitoring included the Crimes Against Life Prosecution Unit and Municipal Prosecution Units of the Department of Guatemala, with the exception of the Villa Canales Prosecution Unit between January 2006 and June 2008.

72 See a) *Ibid.* b) Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, October 1, 2009. c) Impunity Watch. (2008). *Investigation Report “Recognising the Past Challenges in the Combat of Impunity in Guatemala.”*

73 Report of the Special Rapporteur on the Independence of Judges and Lawyers. Mission to Guatemala. (2009). United Nations Document A/HRC/11/41/Add.3, May 27, 2009. Paragraph 27.

resolution issued by the Criminal Chamber of the Supreme Court of Justice in December 2009 recognizing the self-executing character of the sentence issued by the Inter-American Court of Human Rights in February 2002. In that case, US lawyer and activist Jennifer Harbury, Efrain Bamaca's widow, whose enforced disappearance was the subject matter of that criminal proceeding, along with several human rights organizations unsuccessfully requested the Constitutional Court to revoke the resolution that ordered that revocation.

However, the State of Guatemala did not implement the decisions by the Inter-American Court of Human Rights to overcome legal or practical obstacles that prevent crime investigation, prosecution, and sanction and, consequently, the case was closed. That created significant gaps in the fight against impunity for human rights violations during the internal armed conflict.

To sum up, to make progress in the fight against impunity and the attainment of justice, certain conditions and limitations related to the weaknesses of the Guatemalan legal system should be overcome. Some of them are investigation weaknesses, delays in the criminal proceedings due to multiple remedies for the protection of constitutional rights, appeals, and the slowness and negligence to address enforcement demands for the National Reconciliation Law. In addition, the external pressure from individuals and groups interested in keeping impunity for the crimes during the internal armed conflict through harassment, threats, and attacks against the victims, their relatives, and justice operators should be removed. Finally, the international obligations of the State of Guatemala should be honored.

## Reparation

The State of Guatemala does not have a reparation policy in place, something that is reflected in the constant changes that the National Reparations Commission and the National Reparations Program have undergone. The first National Reparations Commission (CNR) was established on July 16, 2003 according to Government Agreement 258-2003. What might be called the second CNR (2004) was established when Oscar Berger became President of the Republic. This CNR increased the number of its members to six representatives from state institutions and seven from civil society organizations according to Government Agreement 188-2004. The third CNR (2005-2007) was established according to Government Agreement 619-2005. This CNR was given a new organizational structure which excluded civil society representation and reduced the number of representatives of state institutions to five. At this point, economic reparation became a priority. In 2006, a group of independent victim's organizations requested the Human Rights Ombudsman to investigate the National Reparations Program. Then, the fourth CNR (2008) was established during the Alvaro Colom Administration and it is composed of five governmental representatives.<sup>74</sup>

Housing,<sup>75</sup> economic reparation,<sup>76</sup> and tribute ceremonies<sup>77</sup> are some of the positive reparation measures for the victims of the internal armed conflict.

<sup>74</sup> A delegate of the President of the Republic, the Minister of Public Finance, the Secretary of Planning and Programming of the Presidency (SEGEPLAN), the Secretary of Peace of the Presidency (SEPAZ), and the President of the Presidential Coordinating Commission of the Executive Policies on Human Rights (COPREDEH).

<sup>75</sup> For instance, in 2010, within the framework of the cooperation agreement entered into by FONAPAZ, the Secretariat for Peace and the National Reparations Program that includes the construction of 2,372 houses, 342 houses were delivered.

<sup>76</sup> For instance, in 2010, Q.32,354,666.66 were paid.

<sup>77</sup> For instance, in 2010, tributes included "Women and Memory" during the International Women's Day and the 28 years of the Massacre of Cuarto Pueblo, Ixcan.

Within the framework of the inter-institutional cooperation agreement entered by the National Fund for Peace (FONAPAZ), the Secretariat for Peace,<sup>78</sup> and the National Reparations Program on June 22, 2009 and amended in November 2009, and it included the design, provision of materials and construction of 2,372 houses in the amount of Q.90,271,479 By November 2010, 456 houses mainly located in Quiche, Solola, Peten, and Suchitepequez<sup>79</sup> had been already delivered.

In 2009, economic reparation in the amount of de Q.77,051,649 were paid to 3,725 people. In 2010, the National Reparations Program invested Q.32,762,324.16. It was distributed among 1,505 beneficiaries<sup>80</sup> from sixteen municipalities from the western plateau.

However, an adequate legislation to strengthen and stabilize the State's reparations policy still needs advancement. Inter-institutional continuity and coordination and the total incorporation of international reparations standards including those related to gender and no discrimination have to be guaranteed.

Until now, the National Reparations Program created at the request of the Commission of Historical Clarification has failed to develop and implement a comprehensive reparations policy for the victims and their relatives. The program is restricted to providing monetary payments to the survivors and the victims' relatives, but the Program has not even been truly successful at least in that area. Since the beginning, the creation the program and financial resource allocation lacked political will. Structuring the program was also problematic because it encouraged confrontations between the victims and victim's organizations.<sup>81</sup>

Some obstacles to reparation in Guatemala are its distortion as a link to justice measures, the lack of cultural relevance, the National Reparations Program's institutional weakness, organizational instability, bureaucratization, and the lack of comprehensive reparation measures.

The National Reparations Program filed 10,118 cases to the Public Prosecutor's Office,<sup>82</sup> in 2008 and 2009, and in 2010, it filed 4,075 complaints.<sup>83</sup> Such large number of cases will only overcrowd the prosecution office, which, in turn, will slow or hinder the resolution of those cases and those that had been previously filed.

Although the National Reparations Program acknowledges respect for cultural identity as one the principles for reparation matters, it evidently does not thoroughly understand the meaning of that principle. For instance, in 2009, the National Reparations Program considered the printing, recording, and distribution of an ethnographic research on Garifuna<sup>84</sup> music as moral symbolic reparation. Although those initiatives are meritorious, establishing them within the context of reparation for the internal armed conflict is difficult especially considering that the Garifuna people were not victims of political violence and repression.

78 The Secretariat for Peace is under the supervision of the Executive branch. It was created in 1997 under Article 9 of the National Reconciliation Law (145-96) by Legislative Decree 17-1997. The Secretariat is aimed at ensuring the compliance with the Peace Agreements covenants by the Executive bodies and their policies. That decree was substituted by Government Agreement 115-2001 that defines the Secretariat as "a body to provide support, counsel, and coordination for the compliance with governmental commitments under the Peace Agreements."

79 Secretariat for Peace. (2010). *2010 Report. Avances sobre el cumplimiento de los Acuerdos de Paz*. Guatemala.

80 *Ibid.*

81 Ideas presented by Helen Mack, President of the Myrna Mack Foundation, during the panel "The Impact of Transitional Justice on the Construction and Consolidation of Democracy," during the regional conference "The Legacy of Truth: The Impact of Transitional Justice on the Construction of Democracy in Latin America." Bogota, Colombia, June 19-21, 2007.

82 Secretariat for Peace. (2009). *Informe 2009. Avances sobre el Cumplimiento de los Acuerdos de Paz: 13º Aniversario de la Firma de los Acuerdos de Paz*. Guatemala.

83 Secretariat for. (2010). *Informe 2010. Avances sobre el cumplimiento de los Acuerdos de Paz*. Guatemala.

84 Secretariat for Peace. (2009). *Informe 2009. Avances sobre el cumplimiento de los Acuerdos de Paz: 13º Aniversario de la Firma de los Acuerdos de Paz*. Guatemala.

The National Reparations Program's institutional weakness is the result of a fragile legal basis and budgetary shortcomings<sup>85</sup> which limit the implementation of a more comprehensive reparation policy.

Regarding budget matters, the National Reparations Program was given Q.270,000,000 and Q.220,000,000<sup>86</sup> in 2008, 2009, and 2010, whereas the budget allocated by the end of the fiscal year only amounted to Q.164,978,519.26, Q.95,628,002.75 y Q.37,039,954.75, respectively.<sup>87</sup> According to that information, the National Reparations Program is not able to design projects or perform activities aimed at using the allocated resources.

The current regulation to the National Reparations Program prevents and hinders the development of its work; as provided in a government agreement, the President of the Republic is entitled to modify the program at any time with no need to consult or request authorization from any other state body. Since its creation in 2003, the creation agreement of the National Reparations Program has undergone three substantial amendments which have contributed to its legal instability.

The lack of a comprehensive reparations policy in Guatemala can be explained by the fact that Congress has not yet passed the laws to provide that policy with some foundation. Consequently, the National Reparations Program operates alone instead of relying upon the effective coordination of initiatives among ministries, secretariats, funds of the Executive Branch, and local governments.

There have also been accusations related to the null budget allocation of the National Reparations Program.<sup>88</sup> Thus, it has been stated that during the first quarter of 2010, no budget allocations were made; therefore, none of the victims were paid at least once. Conversely, Q.3,600,000 were allocated for Program management and coordination. Such a situation might be explained by the lack of clear objectives regarding the reparation orientation which does not allow the Program to allocate resources to activities.

Frequent turnover is another obstacle to the structuring process of the Commission. The staff working for the Program is also frequently changed. Consequently, the National Reparations Commission according to Government Agreement 619-2005 amended its structure to include the participation of representatives of civil society organizations. Besides, it only left five state organization representatives. The officials from the Secretariat for Peace and the National Reparations Program who wanted to limit the program to a check issuer hindered its management. As previously mentioned, the fourth National Reparations Commission established during the Alvaro Colom Administration is still composed of five State representatives.

After constant modifications, the result was a transition from the National Reparations Program which was managed almost exclusively by representatives of civil society organizations like Rosalina Tuyuc until 2004, to the creation of the political governing body of the Program, that is, the National Reparations Commission which is exclusively composed of representatives of the Executive Branch. Due to the lack of representatives of victims' organizations in the Advisory Board, reparation measures and policy design have not included the opinion of the victims.

Alternatively, a high staff turnover prevents the building of trust relationships between the victims and their organizations, which is particularly important in rape cases. Besides, it hinders the strengthening of the capabilities within the Program and interferes in the improvement of performance that comes from accumulated knowledge and lessons learned from experience. The Program does not have any staff

<sup>85</sup> Secretariat for Peace. (2010). *Informe 2010. Avances sobre el cumplimiento de los Acuerdos de Paz*. Guatemala.

<sup>86</sup> In 2009 and 2010.

<sup>87</sup> Secretariat for Peace. (2010). *Informe 2010. Avances sobre el cumplimiento de los Acuerdos de Paz*. Guatemala.

<sup>88</sup> Resolution by the Mutual Support Group. Guatemala, March 25, 2010.

specialized in psychosocial reparation, memorials, or exhumations. Furthermore, constant staff rotation does not encourage specialization. In addition, the staff is hired according to state budget line No.029 which violates the labor rights of people working for the National Reparations Program by denying them job stability.<sup>89</sup> It jeopardizes the feasibility of establishing a continuity mechanism for the Program's<sup>90</sup> medium and long term strategies.

The bureaucratization of the National Reparations Program is another obstacle to reparation. Actually, the Program does not take responsibility for the burden of proof, instead, victims are urged to demonstrate their condition by gathering documentation to proof their cases and gain approval for reparation. In December 2010, the National Reparations Program reported the registration of 70,404 victims.<sup>91</sup>

Similarly, the Program has not encouraged efficient coordination with local governments and the National Register of People (RENAP) to expedite the procedures that victims and organizations have to follow. In addition, the Program grants precedence to provisions of Civil Law regarding the principles of the Public Administration which are simple, fast, and formalism-free. That increases the risk of revictimization of the target population requesting economic reparation.<sup>92</sup>

Although the National Reparations Program's mandate is to provide comprehensive reparation measures, the truth is that it has been limited to providing individual economic reparation. Moreover, the payment, after the completion of lengthy paperwork, is similar to other direct cash payment programs such as the compensation given to former Civil Defense Patrols (PAC) to whom the Government has made monetary payments since 2003 for services rendered during the internal armed conflict, as well as the "My Family is Making Progress,"<sup>93</sup> conditional cash transfer program created by the Alvaro Colom Administration. Economic reparation as a restitution mechanism is not questioned here; however, we should pay attention to the fact that its implementation, as an exclusive measure, is troublesome.

Psychosocial and rehabilitation reparation measures have not been provided by the State yet. For example, although the Ministry of Public Health and Social Assistance implemented a protocol to provide mental health care to the population who has been a victim of human rights violations and political violence during the internal armed conflict,<sup>94</sup> and it is supposed to become a tool to strengthen human resources in the provision of comprehensive psychosocial care both from institutions and the health system network, the results in that area are scarce.<sup>95</sup>

Concomitantly, institutionalism neither promotes public psychological attention initiatives nor fosters coordination and dialogue opportunities among communities, social organizations and state institutions. At a state level, neither does it identify the Ministry of Health and Public Social Assistance strategy to strengthen mental health staff nor its territorial coverage and qualification of that mandate.<sup>96</sup>

89 Solís, M. E. (2008). El Resarcimiento: Una deuda más pendiente con las mujeres en Guatemala, in *Sin tregua: Políticas de reparación para mujeres víctimas de violencia sexual durante dictaduras y conflictos armados*. Regional Center on Human Rights and Gender Justice.

90 The employees hired in this area are not considered public servants; therefore, they cannot be held liable nor can the State be held liable in a solidary manner, if they do not fulfill their duties properly.

91 Secretariat for Peace. (2010). Informe 2010. Avances sobre el cumplimiento de los Acuerdos de Paz. Guatemala.

92 UNDP and PCON-GIZ. (2007). Report on the Joint Assessment of the National Reparations Program and Support Programs to the PNR. Guatemala.

93 See My Family is Making Progress, at: [www.mifamiliaprogres.gob.gt](http://www.mifamiliaprogres.gob.gt).

94 Available at the Ministry of Public Health and Social Assistance:

<http://mspas.emaginacion.net/images/files//Salud%20Mental/Violencia%20Politica.pdf>.

95 Inter-American Court of Human Rights. *Case of Plan de Sanchez Massacre vs. Guatemala*. Supervision of compliance with the judgment February 21, 2011. [Online]. Available at [http://www.corteidh.or.cr/docs/supervisiones/sanchez\\_21\\_02\\_11.pdf](http://www.corteidh.or.cr/docs/supervisiones/sanchez_21_02_11.pdf)

96 Reyes, A. (et al.) (2009). Mapping of National and International Initiatives, in *Social Reconciliation. Postwar in Guatemala (1997-2008)*. Guatemala.

Therefore, the National Reparations Program does not have a comprehensive reparation strategy that includes the psychosocial perspective. Therefore, work should be focused on building new social relationships within frameworks that acknowledge the present condition of each community, including, if relevant, the victim-victimizer relationship that still takes place in many communities.

Gender is another topic that needs to be also addressed. Most feminist organizations that are currently focused on violence against women (domestic, sexual, and violent deaths) have not considered the reparations issue a priority and have failed to link it to human right violations against women during the internal armed conflict.

On the other hand, victim's organizations give priority to the search for justice for the disappeared or murdered relatives, and indigenous women organizations include topics such as widowhood, land access, and the demand for recognition by the State of the acts of genocide against the Mayan communities. Therefore, violence against women is included but almost concealed in more general<sup>97</sup> ethnic and political issues.

Consequently, the initiatives to obtain reparations for women have had to face several particular obstacles. First, the State's unwillingness to compensate the victims in general; second, the existing differences among civil society organizations; third, the minimization, by the political actors, of the magnitude of the human rights violations against women during the conflict; and, finally, the fear and social embarrassment experienced by women who have been the victims of violence and, in particular, sexual violence that prevents them from reporting those crimes.<sup>98</sup>

Therefore, the main obstacle to the right to reparation is that the State of Guatemala does not have a comprehensive transitional justice policy. Moreover, the National Reparations Program is separated from the government structure; then, reparations have been limited to specific actions aimed at the victims but they can hardly be linked to the rights to reparation, truth, justice, and non-repetition. This contradicts the commitments of the State and of the victims who have the tendency to perceive reparation as a more comprehensive task.

## Conclusion

Some conclusions may be drawn from the issues discussed in this chapter. In Guatemala, during the last four years, important progress has been made in the promotion of the rights of the victims of the internal armed conflict victim to truth, justice, and reparation. Some of the main achievements related to the right to truth are the creation of the Historical Archive of the National Police, the exhumations conducted by civil society organizations, the initiative to create a victim's registry, and a regulation to the access to public information and archives. Regarding justice, the first convictions for enforced disappearance and the work of social organizations which accompany the criminal proceedings are signs of progress. As to reparation, some victims have been given economic compensation.

Nevertheless, beyond those important though isolated achievements, the processes of political transition and reconciliation in Guatemala have not made any progress at all. There is not a public policy aimed at acknowledging the past and transforming the current political and social relations. A state with the same excluding attitudes of the past governs today threatening the process and fostering a social relations framework far removed from the provisions of the Peace Agreements signed in 1996 between the URNG

97 Paz y Paz, C. (2010). Guatemala: *Género y reparaciones para las violaciones de derechos humanos*, in R., Rubio-Marín. (Ed.) *¿Y qué fue de las mujeres? Género y reparaciones de violaciones de derechos humanos*. International Center for Transitional Justice. Bogota.

98 *Ibid.*

INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

and the Government and which are no longer a political benchmark for the country. Access to military archives is not available either; criminal prosecution of cases from the past is still very limited and the continuity of the actions depends largely on keeping the current Attorney General in place; the National Reparations Program has lost direction and it is more disintegrated than ever; therefore, not only has it had little impact on the concerned communities but, in many cases, it has also been counterproductive.

Along with those structural weaknesses that have become an obstacle for a comprehensive tackling of truth, justice, and reparation policies, the State of Guatemala is a victim of threats and attacks from the drug trafficking and organized crime which have contributed to increasing violence and impunity.

Accordingly, a dialogue between the State and the society should be pursued to encourage understanding and to find a better approach to deal with social conflicts and those problems that caused the internal armed conflict and which have not been solved yet. Although the new types of violence are pushing to new dynamics, peace agreements should become the platform for any effort aimed at promoting a better social coexistence. Thus, encouraging compliance with those agreements is relevant to foster the reconciliation process and meet the victims' demands for truth, justice, and reparation.