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To Name or Not to Name? The Commission for Historical Clarification in Guatemala, its Mandate, and the Decision Not to Identify Individual Perpetrators

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**TO NAME OR NOT TO NAME? THE COMMISSION FOR
HISTORICAL CLARIFICATION IN GUATEMALA, ITS
MANDATE, AND THE DECISION NOT TO IDENTIFY
INDIVIDUAL PERPETRATORS**

*Andrew N. Keller**

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* J.D., The University of Texas School of Law, 2001; B.A., Political Science, Swarthmore College, 1996. I would like to thank Professor Steven Ratner for his comments on this Article.

I. INTRODUCTION

During thirty-six years of civil war, Guatemalans suffered atrocious human rights violations. Finally, in 1996, the Agreement on a Firm and Lasting Peace ended the war between the State of Guatemala and the Guatemalan National Revolutionary Unity (URNG), a leftist guerilla group.¹ The signing of the final peace accord and the cessation of hostilities also marked a significant departure from state-sponsored human rights violations. Peace and increasing respect for human rights, however, have not entailed the end to the impunity that permeated Guatemala throughout its lengthy civil war. Perpetrators of human rights violations occupy leadership positions in the government, military, and political parties. A government lacking the will and resources to instigate controversial prosecutions and a corrupt and inefficient judicial system perpetuate the atmosphere of impunity.

Although many observers had hoped that a truth commission would help initiate efforts to hold perpetrators accountable for their crimes, this wish has not materialized. The Commission for Historical Clarification in Guatemala² produced a comprehensive report on the human rights violations that occurred during the war. Despite this account and the Commission's recommendations in favor of prosecuting both the material and intellectual authors of the abuses, holding perpetrators individually accountable for their crimes remains an exception to the rule of impunity.

In light of the disturbing impunity in Guatemala, one wonders whether the CEH could have done more to promote justice and accountability. Specifically, should the Commission have identified the names of individual perpetrators in its report? This Article advances the argument that, despite persuasive reasoning in favor of naming names, the Commission correctly decided against doing so. General structural limitations of truth commissions and specific restrictions in the CEH's mandate strongly militated against identifying individual perpetrators.

Although one might construe the Commission's decision as a blow to the goal of individual accountability, an examination of the circumstances that led to the decision reveals its validity. Part II, of this Article, details the report of the CEH, including its conclusions about the war and certain recommendations to deter future human rights violations. Part III considers the current reality of impunity in Guatemala, paying specific attention to the state of the judicial system, the current crime wave plaguing Guatemala, and the government's response to the crime wave. Part IV examines in depth the establishment of the CEH and its mandate. Finally, Part V analyzes the CEH's decision not to name names in light of

1. Agreement on a Firm and Lasting Peace, Dec. 29, 1996, 36 I.L.M. 274.

2. Hereinafter CEH or Commission.

its mandate, the structural confines of truth commissions, and the goal of individual accountability for human rights violations.

II. THE COMMISSION FOR HISTORICAL CLARIFICATION IN GUATEMALA

The Accord of Oslo of June 23, 1994, established the Commission for Historical Clarification to investigate and report upon the acts of violence and human rights violations that occurred during the civil war.³ The CEH, although an independent entity, received financial support from the European Union, several European countries, Japan, the United States, and the United Nations.⁴ It consisted of three members: Christian Tomuschat, a German professor and human rights expert, Otilia Lux de Coti, an indigenous Guatemalan education expert, and Alfredo Balsells Tojo, a Guatemalan lawyer.⁵ On February 25, 1999, after an eighteen-month investigation, the CEH fulfilled its mandate and presented its findings to representatives of the Guatemalan government, the URNG, the United Nations, and the public.⁶

A. *Conclusions About the War*

The CEH estimated that over 200,000 people disappeared or were killed during the thirty-six year war.⁷ It registered 42,275 victims, of whom over 23,000 were victims of arbitrary executions and over 6,000 were victims of disappearances.⁸ Of the fully-identified victims, eighty-three percent were Mayan and seventeen percent were Ladino.⁹

1. The State of Guatemala and Human Rights Atrocities

Although it did not commit all of the human rights abuses that occurred during the war, the State of Guatemala perpetrated the overwhelming majority of them.¹⁰ The Commission attributed to the State ninety-three

3. Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan Population to Suffer, June 17, 1994, 36 ILM 283 [hereinafter Oslo Agreement].

4. GUATEMALA: MEMORY OF SILENCE, REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSIONS AND RECOMMENDATIONS, ACKNOWLEDGMENTS (1999) [hereinafter MEMORY OF SILENCE]; Christian Tomuschat, *Between National and International Law: Guatemala's Historical Clarification Commission*, in LIBER AMICORUM GÜNTER JAENICKE 991, 1004-05 (Christiane Philipp ed., 1998) [hereinafter *Between National and International Law*].

5. *Between National and International Law*, *supra* note 4, at 994; Mireya Navarro, *Guatemalan Army Waged "Genocide," New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1.

6. *Id.*

7. MEMORY OF SILENCE, *supra* note 4, at 17.

8. *Id.*

9. *Id.*

10. The CEH considers the State responsible not only for human rights violations

percent of the human rights violations and acts of violence registered during the eighteen-month investigation.¹¹ Throughout the war, the State employed a strategy of terror against its enemies, committing human rights violations publicly and with extreme brutality.¹² Among the abuses attributable to the State are six hundred and twenty-six massacres of indigenous Guatemalans and myriad disappearances, arbitrary executions, and rapes.¹³ These abuses “resulted in the complete extermination of many Mayan communities, along with their homes, cattle, crops, and other elements essential to survival.”¹⁴

Not surprisingly, the CEH concluded that the State committed “grave violations of international human rights law.”¹⁵ The State violated international customary law by not adhering to the precepts of the Universal Declaration of Human Rights and the American Declaration of the Rights and Obligations of Man, both of which Guatemala approved in 1948.¹⁶ Furthermore, the Guatemalan State blatantly committed acts in violation of Common Article III of the Geneva Conventions, including “attacks against life and bodily integrity, mutilation, cruel treatment, torture and torment, the taking of hostages, attacks on personal dignity, and particularly humiliating and degrading treatment, including the rape of women.”¹⁷

In addition to its assessment of the human rights violations committed during the war, the CEH determined that the Guatemalan State committed genocide against its citizens between 1981 and 1983.¹⁸ Using the legal framework of the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁹ the Commission found that the State acted with the intent to destroy particular ethnic groups and committed genocide based on Article II(a), (b), and (c) of the Convention.²⁰ During these years, in particular, the Army operated with an extremely expansive definition of the enemy against whom it was fighting.²¹ This expansive definition

“perpetrated by its public servants and state agencies,” but also for “actions of civilians to whom it delegated, *de jure* or *de facto*, authority to act on its behalf, or with its consent, acquiescence or knowledge.” *Id.* at 33. This definition includes members of the military and “any other third party that may have acted under the direction or with the knowledge of state agents.” *Id.*

11. *Id.*

12. *Id.* at 26.

13. *Id.* at 34-35.

14. *Id.* at 34.

15. *Id.* at 37.

16. *Id.*

17. *Id.*

18. *Id.*

19. Guatemala ratified the Convention on the Prevention and Punishment of the Crime of Genocide on November 30, 1949. *Id.* at 38.

20. *Id.* at 39.

21. *Id.*

included civilian members of particular Mayan ethnic groups in the four geographical areas where the State committed genocide.²² In these areas, the Army targeted the Mayan communities for destruction because of their suspected sympathy or support for the guerillas.²³

Because the CEH interpreted its mandate as prohibiting it from assigning individual responsibility for the atrocities that occurred, it only assigned institutional responsibility.²⁴ The Commission assigned responsibility for the human rights violations and genocide to the highest levels of the Guatemalan Army and State.²⁵ It concluded that the majority of the human rights violations “occurred with the knowledge or by order of the highest authorities of the State,”²⁶ and that the genocidal acts “were the product of a policy pre-established by a command superior to the material perpetrators.”²⁷ Since the highest levels of the State developed and implemented these policies, the CEH claimed that responsibility for the atrocities reaches to the chiefs of staff for national defense and the Presidents of Guatemala.²⁸ By assigning responsibility to the presidents and chiefs of staff of the military, the CEH informed its readers of the identities of certain perpetrators, without actually naming names or violating the prohibition against assigning individual responsibility.²⁹

2. The URNG and Human Rights Atrocities

While the State of Guatemala committed the overwhelming majority of human rights abuses, the guerillas are not free of blame. The CEH attributed three percent of the violations to the guerillas.³⁰ Those violations include thirty-two massacres, arbitrary executions, forced disappearances, and kidnappings.³¹

The Commission asserted that the guerillas’ actions violated Common Article III of the Geneva Conventions.³² Since the violations often occurred either upon the explicit orders of the guerilla high command or with the knowledge of the highest ranking guerilla commanders, the CEH

22. *Id.*

23. *Id.*

24. Christian Tomuschat, *Lessons Learned from the Historical Clarification Commission in Guatemala* 8 (unpublished paper delivered at the 2000 meeting of the Latin American Studies Association) (on file with the Latin American Studies Association, University of Pittsburgh).

25. *MEMORY OF SILENCE*, *supra* note 4, at 38, 41.

26. *Id.* at 38.

27. *Id.*

28. *Id.*

29. *Between National and International Law*, *supra* note 4, at 1002.

30. *MEMORY OF SILENCE*, *supra* note 4, at 42.

31. *Id.* at 42-43.

32. *Id.* at 43.

assigned responsibility for the violations to the highest levels of the guerillas' organic structure.³³

B. Recommendations for Guatemala

In accordance with the OSLO Agreement, the CEH included various recommendations in its report. The recommendations concern the treatment of victims of human rights abuses, the need to promote the observance of human rights in Guatemala, the need to strengthen democracy in Guatemala, as well as other suggestions.

Most significantly for the purposes of this paper, the CEH made recommendations aimed at ending impunity in Guatemala. It advocated a strengthening of the judicial system and it urged the State to prosecute the perpetrators of crimes for which the National Reconciliation Law³⁴ did not extinguish liability, "paying particular attention to those who instigated and promoted these crimes."³⁵

III. THE REALITY OF IMPUNITY IN GUATEMALA

A. The Guatemalan Judicial System

Unfortunately, the impunity that prevented the wartime prosecution of human rights perpetrators remains a serious problem in Guatemala. The country's judicial system appears incapable of ending widespread impunity for the perpetrators of human rights abuses that occurred both during and after the civil war. Similar to its status during the thirty-six year armed conflict, the judicial branch remains a weak and ineffective component of the government. The domestic courts have repeatedly demonstrated an inability to ensure due process for defendants and fair trials for either party in both civil and criminal litigation.³⁶ The judicial system suffers notably from inefficiency, corruption, and insufficient funds and personnel.³⁷ Threats, intimidation, violence, and murder

33. *Id.* at 44.

34. The National Reconciliation Law is an amnesty law passed after the signing of the final peace agreement. It "extinguishes penal responsibility for crimes committed by both sides during the war, with the exception of forced disappearances, torture, and genocide." Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 851 (1998); Ley de Reconciliación Nacional, Decreto Numero 145-96, Dec. 18, 1996.

35. MEMORY OF SILENCE, *supra* note 4, at 58.

36. U.S. Department of State, Guatemala Country Report on Human Rights Practices for 1998, at 2, at http://www.state.gov/www/global/human_rights/1998/hrp_report/guatemala.html (Feb. 26, 1999) (last visited May 1, 2001).

37. U.S. Department of State, Guatemala, Country Report on Human Rights Practices for 2000, at 8, 15-16, <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/index.cfm> (Feb. 2001) (last visited

committed against judges, prosecutors, witnesses, and victims and their family members further impede the effective administration of justice.³⁸ Because of the weak condition of the judicial system, most perpetrators of human rights abuses face no current threat of prosecution for the crimes they committed.

The reality of impunity for past abuses exists on all levels of the judicial system and for almost all categories of perpetrators. Because of intimidation and corruption, prosecutors fail to indict many of those responsible for wartime atrocities.³⁹ Of the minority of perpetrators who are tried, many are found not guilty due to ineffective prosecution or threats and intimidation against witnesses.⁴⁰

Although there have been isolated cases of prosecutions of human rights violators, these prosecutions have often led to unsettling results. Most guilty verdicts are against former members of the civilian defense patrols (PACs), which the Army created as part of its anti-insurgency campaign in the indigenous areas.⁴¹ The PACs committed myriad human rights violations during the war, and those PAC members who committed the violations should be held accountable; however, one must remember that the PACs were an integral part of the State's broad counterinsurgency strategy. They typically committed violations on the orders of the military or in tandem with the military.⁴² Therefore, it is unjust that the elite members of Guatemala's military and political class continue to evade legal responsibility for the policies that they developed and implemented, while PAC members bear the brunt of prosecution. It appears that "[o]nce again, Guatemala's poor are paying the greatest price for the armed conflict, not just as victims, but also among those punished for carrying out the government campaign of terror."⁴³

Finally, even a guilty verdict does not necessarily entail the end to impunity for a perpetrator of human rights abuses. Because of perceived

May 1, 2001) [hereinafter U.S. Department of State — 2000]; U.S. Department of State, Guatemala, Country Report on Human Rights Practices for 1999, at 2, http://www.state.gov/www/global/human_rights/1999_hrp_report/guatemala.html (Feb. 25, 2000) (last visited May 1, 2001) [hereinafter U.S. Department of State—1999].

38. U.S. Department of State — 2000, *supra* note 37, at 8, 15-16; U.S. Department of State — 1999, *supra* note 37, at 10. Human Rights Watch, World Report 2000: Guatemala: Human Rights Developments, at <http://www.hrw.org/wr2k1/americas/guatemala.html> (last visited May 9, 2001).

39. U.S. Department of State — 1999, *supra* note 37, at 19.

40. U.S. Department of State — 1999, *supra* note 37, at 22.

41. Patrick Ball, AAAS/ CIIDH database of human rights violations in Guatemala, at <http://hrdata.aaas.org/ciidh/data.html> (last modified January 29, 2000) [hereinafter AAAS/CIIDH database]; Robert Trudeau & Lars Schoultz, *Guatemala, in CONFRONTING REVOLUTION: SECURITY THROUGH DIPLOMACY IN CENTRAL AMERICA* 41 (Morris J. Blachman, et al. eds., 1986).

42. AAAS/CIIDH database, *supra* note 41.

43. *Id.*

“technical deficiencies or procedural shortcomings,” Guatemalan courts have annulled or reversed convictions for wartime human rights violations with unsettling frequency.⁴⁴ Many observers believe that the abandonment of guilty verdicts is the result of intimidation and corruption in the judiciary.⁴⁵ This phenomenon erodes any confidence that Guatemalans have in their judicial system and enhances the atmosphere of impunity.

B. *The Crime Wave and the State's Reaction*

Despite an increase in threats and harassment of human rights activists and killings of community leaders in 2000,⁴⁶ human rights conditions in Guatemala have improved significantly since the end of the war. Unfortunately, the country currently suffers from widespread criminal activity. Unlike during the war, this crime wave is not a State-sponsored attempt to eliminate its enemies. Although different in nature from the wartime human rights abuses, one can trace much of the criminal activity that affects Guatemala today to the impunity that has and continues to shield criminals from liability.

The demobilization of thousands of Army soldiers, branches of the State's security apparatus, and the guerillas has directly contributed to the rash of violent crime plaguing Guatemala.⁴⁷ These former combatants came of age and fought in a thirty-six year civil war that fostered a culture of violence and impunity. It is not surprising, then, that organized gangs of former military, police, and guerillas contribute significantly to the alarmingly high rates of murder, kidnapping, and theft.⁴⁸ Because of the lack of sufficient resources for police and prosecutors and the paralysis of the judicial system, these criminals operate with the same impunity that existed during the war.⁴⁹

In addition to the loss of life and property, the wave of violent crime has had serious consequences on both the people's confidence in their government and the prospect of demilitarization in Guatemala. “Popular frustration with the inability of the Government to control crime, and of the courts to assure speedy justice, as well as a tradition of extrajudicial repression of crime during years of military rule” has led to eruptions of

44. U.S. Department of State — 1999, *supra* note 37, at 19.

45. *Id.*

46. U.S. Department of State — 2000, *supra* note 37, at 10; Human Rights Watch, World Report 2000; Guatemala: Human Rights Developments, at <http://www.hrw.org/wr2k1/americas/guatemala.html> (last visited May 9, 2001).

47. U.S. Department of State — 2000, *supra* note 37, at 10.

48. *Guatemala Wracked by Crime on Peace Pact Anniversary*, TORONTO STAR, Dec. 29, 1997, at A15.

49. *Guatemala: Unchecked Crime Undermines Peace Process*, ECOCENTRAL: CENTRAL AMERICAN ECONOMY, Feb. 5, 1998, LEXIS, IAC(SM) Newsletter Database.

mob violence.⁵⁰ Frequently, groups of outraged citizens lynch or burn alive suspected criminals.⁵¹ These outbursts reflect the people's belief that "popular justice" is the only option for combating impunity.

Equally alarming is the Government's decision to use the Army, in conjunction with the National Civil Police (PNC), to maintain peace and security and control criminal activity.⁵² The remilitarization of police operations has led to the Army's construction of new bases and the reopening of bases that it had closed at the end of the war.⁵³ Human Rights Watch comments that "although the police were nominally in command of the joint patrols . . . the army truly controlled and numerically dominated the patrols."⁵⁴ With the Army in control again, renewed human rights violations will likely occur. Observers already fear that a high percentage of the murders were "actually extrajudicial assassinations of gangsters by security forces or paramilitary squads" involving both torture and "death-squad style" executions.⁵⁵ Given the state of impunity enjoyed by the military, it is only logical that past perpetrators of human rights violations have continued to commit similar abuses.

IV. REVISITING THE COMMISSION FOR HISTORICAL CLARIFICATION

A. CEH: *The Political Compromise*

Considering the serious lack of meaningful accountability for past abuses, the CEH's decision not to name names takes on added significance. Before passing judgment on its decision, one must first understand how the CEH came into existence and relevant details of the mandate that governed its actions.

At the time of a truth commission's establishment, the sponsoring parties provide the commission with a mandate that defines its goals, procedures, and powers.⁵⁶ Ideally, the parties will incorporate civil society,

50. U.S. Department of State — 2000, *supra* note 37, at 10; U.S. Department of State — 1999, *supra* note 37, at 14.

51. U.S. Department of State — 2000, *supra* note 37, at 10; U.S. Department of State — 1999, *supra* note 37, at 14.

52. U.S. Department of State — 2000, *supra* note 37, at 14. On March 21, 2000, the Congress of Guatemala enacted a law officially authorizing the army to support the police in crime fighting activities. "Under the new law, military personnel are not subordinated clearly to police control" during joint operations—we need source. *Id.* at 1.

53. *Guatemala: Unchecked Crime Undermines Peace Process*, *supra* note 48. U.S. Department of State — 2000, *supra* note 37, at 10.

54. Human Rights Watch, World Report 1999: Guatemala: Human Rights Developments, at <http://www.hrw.org/hrw/worldreport99/americas/guatemala.html> (last visited on Feb. 26, 2000).

55. *Guatemala: Unchecked Crime Undermines Peace Process*, *supra* note 48.

56. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS

including human rights NGOs and representatives of victims, into the process of creating the mandate.⁵⁷ For example, the South African Truth and Reconciliation Commission held public hearings and discussions to help determine how it should function.⁵⁸ Unfortunately, the public participation that occurred in South Africa is the exception rather than the norm. The public rarely plays a role in drafting a truth commission's mandate.⁵⁹ The agreement establishing the CEH and its mandate reveals a political compromise between the State of Guatemala and the URNG, with little or no public participation.⁶⁰ The resulting weaknesses in the CEH's mandate reflect both the military's powerful position and the exclusion of civil society from the negotiating process.

To a certain extent, the URNG could laud any agreement creating a truth commission as a political and diplomatic victory. Throughout the peace talks, the subject of a truth commission presented an extremely contentious issue. On several instances, the negotiations stalled because the Guatemalan military strongly opposed the URNG's demands for a truth commission.⁶¹ The Army opposed the creation of any truth-telling body, arguing that its actions in "clamping down on suspected subversives have been within the law, and its duty," and that any truth commission "would merely rekindle old hatreds."⁶² Although the State's position eventually became more flexible, Guatemala's Minister of Defense, General Enrique Morales, insisted that the military would not tolerate any truth commission that identified perpetrators by name. This prerequisite stifled any hope that a truth commission could substantially further the goal of individual accountability for human rights abuses.⁶³ If the URNG had not adamantly advocated the creation of a truth commission, the military would have ensured the absence of such a commission from the peace process.

ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 196 (1997).

57. Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L PROC. 313, 316 (1998).

58. *Id.*

59. Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 639 (1994).

60. Oslo Agreement, *supra* note 3; see Roht-Arriaza, *supra* note 57, at 316.

61. *Guatemalan Negotiator Says Human Rights Accord Near Signing*, UPI, Mar. 23, 1994, LEXIS, Nexis Library, UPI File.

62. *Guatemalan Guerillas Demand Swift Accord on Human Rights in Talks*, AGENCE FRANCE PRESSE, Mar. 4, 1994, LEXIS, Nexis Library, Agence France Presse.

63. George Lovell, *Guatemala Facing a Decisive Test: Prospects for Peace in 30-Year Civil War Hinge on President's Ability to Reduce the Army's Authority*, TORONTO STAR, May 31, 1994, at A15.

As in many political compromises, a truth commission's mandate usually reflects the balance of power among the respective parties.⁶⁴ For example, in El Salvador, the Farabundo Marti National Liberation front (FMLN) and the Salvadoran Army were mired in a military stalemate, with each force controlling certain parts of the country.⁶⁵ Having fought against the FMLN for eleven years, the Salvadoran military was keenly aware that the FMLN represented the "most effective guerilla force" in Latin America.⁶⁶ Furthermore, because the Salvadoran Army received significant military aid from the United States, it was vulnerable to pressure from the U.S. to negotiate with the guerillas.⁶⁷ The FMLN's military prowess and international support allowed it to negotiate a favorable peace settlement.⁶⁸ Predictably, the mandate of the UN Truth Commission for El Salvador reflects the bargaining power of the FMLN. Most significantly, it does not include a provision against identifying perpetrators and it calls for the commission to make binding recommendations upon the Salvadoran government.⁶⁹ Furthermore, in addition to the notable characteristics of the Salvadoran Commission's mandate, the FMLN also demonstrated its negotiating power by insisting upon the creation of a separate commission to purge the Salvadoran military of human rights violators.⁷⁰ Had the FMLN not proved itself to be a military equal of the Salvadoran Army, its chances of securing such a favorable peace agreement would have been significantly diminished.

In contrast to the Salvadoran example, the Guatemalan Army held an immensely stronger military position than the URNG. By the time the two sides began to negotiate seriously, the Army had largely destroyed the guerillas as a military force.⁷¹ Moreover, unlike the Salvadoran Army, the military in Guatemala no longer received American funding, so U.S. pressure, although influential, was not as persuasive as it had been upon the Salvadoran military leadership.⁷² While the Army eventually buckled under international and domestic pressure and agreed to the establishment

64. See Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1, 11-12 (2001).

65. Lovell, *supra* note 63, at A15; Hayner, *supra* note 59, at 628.

66. Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 86 (1995).

67. *The Guatemalan Will*, INTERNATIONAL HERALD TRIBUNE, Nov. 21, 1994, LEXIS, Nexis Library, International Herald Tribune (Neuilly-sur-Seine, France).

68. Popkin, *supra* note 66, at 87.

69. Thomas Buerghenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 520, 533 (1994).

70. Popkin, *supra* note 66, at 87.

71. Larry Rohter, *Guatemalans Negotiating Future Role of Military*, N. Y. TIMES, Aug. 27, 1995, at 6.

72. *The Guatemalan Will*, *supra* note 67.

of a truth commission, it did so reluctantly and ensured that the Commission would not have a powerful mandate and would not be a tool for individual accountability.

B. *Relevant Terms and Omissions in the Mandate*

Although observers viewed the establishment of a truth commission as a victory for the militarily weak URNG, the terms of the Oslo Agreement reflect the Army's pre-eminence at the negotiations. As Priscilla Hayner explains in her survey of fifteen truth commissions, "[t]he most significant limitations on truth commissions are those written into their mandates."⁷³ In Guatemala, the military ensured that the drafters of the Oslo Agreement included significant restrictions in the CEH's mandate.

The Oslo Agreement limited the CEH both by the Accord's terms and its omissions. The terms of the Agreement gave the CEH an extremely broad mandate and surprisingly little time in which to fulfill the mandate.⁷⁴ Furthermore, the Agreement restricted the CEH from attributing responsibility to individual perpetrators, and it clarified that the CEH's report would not have any "judicial aim or effect."⁷⁵ Besides the significant restrictions the Agreement placed upon the Commission, it also severely limited the Commission's power by failing to provide the Commission with certain capabilities. The Accord did not provide authority for the Commission to grant amnesty or subpoena witnesses, and it left the Commission without search and seizure powers or other effective means of procuring evidence.⁷⁶ If the URNG had occupied a stronger military position or if the civil society in Guatemala had had the opportunity for greater participation in the peace talks, it is unlikely that these terms and omissions would have shaped the CEH's mandate.

The combination of a mandate extremely broad in scope and insufficient time in which to fulfill that mandate placed severe restrictions on the CEH. While those who support accountability for human rights abuses would normally look favorably upon a truth commission with a broad mandate to investigate past abuses, the scope of the CEH's mandate was too broad. The Oslo Agreement, among other requirements, called for the Commission to clarify "the human rights violations and acts of violence that have caused the Guatemalan populations to suffer, connected with the armed conflict."⁷⁷ By itself, the expectation that the CEH could

73. Hayner, *supra* note 59, at 636.

74. Oslo Agreement, *supra* note 3.

75. *Id.*

76. Tomuschat, *supra* note 24, at 9, 10; Richard Wilson, *The Politics of Remembering and Forgetting in Guatemala*, in *GUATEMALA AFTER THE PEACE ACCORDS* 181, 184 (Rachel Sieder ed., 1998).

77. Oslo Agreement, *supra* note 3.

have investigated and reported on *all* human rights violations and acts of violence during almost four decades of war is preposterous.⁷⁸ CEH Coordinator Christian Tomuschat explains that from the very outset, this provision overburdened the Commission, “preventing it from discharging its mandate in a thorough fashion.”⁷⁹ The URNG advocated a more practical mandate, which would have required the CEH to investigate and report only upon human rights violations that occurred from 1980 onwards, the years in which the worst atrocities took place.⁸⁰ In contrast, the Guatemalan government and military “pushed for a time scale to include the whole period of the armed conflict so as to overwhelm an under-resourced investigation team, and this view won out.”⁸¹

Adding to the impossibility of complying with the scope of the mandate, the Oslo Agreement severely limited the CEH’s lifespan. It provided for the CEH to operate for only six months, allowing the possibility of an additional six months upon the Commission’s determination.⁸² While most truth commissions do not last for long periods of time, they also do not face the daunting task of clarifying all the violations that occurred during thirty-six years of war. For example, the Chilean and Salvadoran truth commissions, which only investigated certain types of violations or acts of violence, operated for eight and nine months respectively.⁸³ These Commissions investigated atrocities that occurred during an eleven year civil war (El Salvador) and a sixteen year dictatorship (Chile), both less than half as long as the armed conflict in Guatemala; however, they had almost as much time as the CEH originally had to complete their tasks.⁸⁴ It is no wonder that Coordinator Tomuschat claims that “[a]n almost incomprehensible contradiction lay in the exigency that ‘all’ human rights violations and acts of violence were to be investigated within a period as short as six months.”⁸⁵ The broad scope and insufficient duration of the CEH’s mandate were consistent with the military’s goal of creating a weak commission.

The Oslo Agreement’s prohibition against assigning individual responsibility for human rights abuses is the most obvious manifestation of the military’s desire to limit the scope of the CEH. This provision,

78. Tomuschat, *supra* note 24, at 5.

79. *Id.*

80. Wilson, *supra* note 76, at 184.

81. *Id.*

82. Oslo Agreement, *supra* note 3.

83. Marta Altolaquirre, *Alcances y limitaciones de la Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos y los Hechos de Violencia que han Causado Sufrimiento a la Población Guatemalteca*, in *GUATEMALA AFTER THE PEACE ACCORDS* 153, 157 (Rachel Sieder ed., 1998).

84. *Id.*

85. Tomuschat, *supra* note 24, at 6.

which also states that the CEH's report will not have "any judicial aim or effect," severely restricted the Commission as a vehicle for individual accountability.⁸⁶ By not allowing the CEH to identify perpetrators, the drafters of the Agreement ensured continued impunity for wartime human rights violations.

The omissions in the Oslo Agreement further confined the Commission. For example, unlike the South African Truth and Reconciliation Commission,⁸⁷ the CEH lacked both the power to subpoena witnesses and the capability to grant amnesty to perpetrators who confessed their violations.⁸⁸ This meant that the CEH could neither compel witnesses to testify, nor offer witnesses an incentive for their cooperation and testimony. Without the powers to subpoena or grant amnesty, the Commission did not have access to those who knew the most about the human rights violations — the perpetrators themselves and the intellectual authors of the crimes.

In addition to the Commission's inability to compel or entice the perpetrators to testify, it lacked power to procure evidence about the atrocities under investigation. The CEH, unlike the Truth and Reconciliation Commission in South Africa, did not have the capability to search for or seize pertinent documents,⁸⁹ nor did it have sufficient access to government and military archives.⁹⁰ This inherent weakness made it possible for the Guatemalan government, military, and State security apparatus to engage in a "deliberate strategy of obstruction" with regard to the investigation.⁹¹ With a choice between voluntarily providing inculpatory documents or refusing to cooperate with the CEH's investigation, members of the military and State security apparatus predictably chose the latter option.

C. Reactions to the Oslo Agreement

Reactions to the Oslo Agreement varied greatly depending upon the person or group's preference for or against holding the perpetrators

86. The Oslo Agreement states, "The Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect." Oslo Agreement, *supra* note 3.

87. See Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1, 18, 19 (1999); Chapman, *supra* note 64, at 15.

88. *Truth Commission Begins Its Work: Ten Months to Establish What Happened Over 36 Years*, LATIN AMERICAN REGIONAL REPORTS: CARIBBEAN AND CENTRAL AMERICA REPORT, Aug. 19, 1997, at 2.

89. Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 397, 398 (1999).

90. Wilson, note 74, at 184; Tomuschat, *supra* note 24, at 13.

91. Tomuschat, *supra* note 24, at 12.

accountable for their actions. Civil society inside Guatemala and many international observers harshly criticized the Commission's mandate.⁹² They predicted that the CEH's report would merely reiterate what everyone already knew — that the State committed heinous atrocities during the war.⁹³ Some went as far as asking why even have a truth commission “[g]iven that the Accord creates a truth commission with no legal powers to investigate, which cannot name names and which will produce recommendations which can be utterly ignored?”⁹⁴ The Agreement so enraged a group of Guatemalan bishops that they decided to set up the Recovery of Historical Memory project (REHMI), a truth commission run by the Catholic Church.⁹⁵ The Oslo Agreement bitterly disappointed many people who originally strongly supported the creation of a truth commission.

Ironically, those in the military and government who vehemently opposed the creation of a truth commission praised the Oslo Agreement. “[T]here was huge relief and celebration on the part of army commanders . . . ‘who were happy that there will not be any legal dimensions to the Commission.’”⁹⁶ Even then President of Guatemala, Ramiro de Leon Carpio reassured the military that they succeeded in creating a commission that could not individualize responsibility and could not make binding recommendations.⁹⁷ This rejoicing demonstrates the extent to which those opposing accountability for past abuses shaped the CEH's mandate.

Although less than the military, the URNG also benefited from the Oslo Agreement. The guerilla group received credit for insisting on the creation of a truth commission as a prerequisite for any final peace agreement. Furthermore, since the URNG was planning to demobilize and re-enter civil society as a political party, the leadership cadre benefited from the CEH's inability to name individual perpetrators.⁹⁸ Although it is easy to do so, one must not forget that the URNG, in addition to the Guatemalan military, committed human rights abuses during the war. Had the CEH named names, it might have damaged the budding political careers of former guerilla leaders.⁹⁹

92. Chapman, *supra* note 64, at 13.

93. Celina Zubieta, *Guatemala-Human Rights: Commission Has No Teeth, Critics Charge*, INTER PRESS SERVICE, Feb. 25, 1997, LEXIS, Nexis Library, Inter Press Service.

94. Wilson, *supra* note 76, at 185.

95. *Id.* at 189.

96. *Id.* at 188.

97. *President Welcomes Agreement with URNG on Forming a Truth Commission*, BBC SUMMARY OF WORLD BROADCASTS, June 27, 1994, LEXIS, Nexis Library, BBC Summary of World Broadcasts; *Oslo Agreement on 'Truth Commission': Findings Won't Be Binding; Culprits Won't Be Tried*, LATIN AMERICAN WEEKLY REPORT, July 7, 1994, at 299.

98. *Guatemala: Unchecked Crime Undermines Peace Process*, *supra* note 49.

99. For a discussion of the URNG's transition from a guerilla movement to a political party,

V. NAMING NAMES

A. *A Lost Opportunity for Individual Accountability*

Many of the critics of the Oslo Agreement changed their rhetoric from criticism to praise when the CEH presented *Memory of Silence*. The Commission, that they once characterized as having “no teeth,”¹⁰⁰ condemned the government and military of Guatemala for its tactics of repression and human rights violations. It unexpectedly found the State responsible for committing genocide during several years of the war.¹⁰¹ Regardless of the praise the report received, the reality of the CEH’s inability to significantly advance the goal of individual accountability remains. Therefore, one must examine the Commission’s decision against identifying individual perpetrators, in light of its mandate, and ask whether or not it erred in making this decision.

Some human rights organizations encouraged the CEH to name names of perpetrators in its final report. These groups creatively vented their frustration with the Oslo Agreement’s prohibition against assigning individual responsibility. They advocated a “strict construction” of the provision, which would have allowed the CEH to interpret the individualization of responsibility as requiring a legal assessment.¹⁰² Had the Commission adopted this interpretation, it could have included the names of perpetrators in purely factual accounts of the violations that occurred.¹⁰³ The human rights NGOs argued that, if the CEH adopted their interpretation, naming names in a factual account would not equal a judicial determination of guilt; and, therefore, it would not violate the prohibition against assigning individual responsibility.¹⁰⁴

Those in favor of naming names proposed persuasive arguments that the Commission should have adopted the human rights organizations’ interpretation of the Oslo Agreement and named names in its final report. The future of democracy and the rule of law in Guatemala, as well as respect for the legal and moral rights of the victims and their families, require holding perpetrators accountable for their abuses. Accountability,

see Anna Vinegrad, *From Guerrillas to Politicians: The Transition of the Guatemalan Revolutionary Movement in Historical and Comparative Perspective*, in *GUATEMALA AFTER THE PEACE ACCORDS 207* (Rachel Sieder ed., 1998).

100. Zubieta, *supra* note 93.

101. Mireya Navarro, *Guatemalan Army Waged “Genocide,” New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1.

102. Tomuschat, *supra* note 24, at 8.

103. *Id.*

104. *Id.*

in turn, probably depended upon the CEH having identified the perpetrators in its report.

1. Deterrence of Similar Crimes

Many observers consider impunity to be the greatest obstacle facing Guatemala as it moves from armed conflict towards democracy and the rule of law.¹⁰⁵ Failure to make accountability a priority “seriously weakens subsequent efforts to reform such crucial institutions as the police and the judiciary.”¹⁰⁶ It does so by eliminating one of the principal purposes of accountability — deterrence. Identifying perpetrators, even without lustration or prosecution, can achieve a significant degree of deterrence.¹⁰⁷ “Specific deterrence refers to inhibiting the previous offender from again committing similar crimes.”¹⁰⁸ By naming names, the CEH would have placed perpetrators under intense public scrutiny. Therefore, even if they remained in the government or military, their future behavior and compliance with the law would become a matter of public concern, which could serve as an effective deterrent against criminal behavior.

Specific deterrence is essential in the case of Guatemala since the perpetrators of wartime human rights violations occupy many positions on all levels of the Guatemalan government and military. General Efraín Ríos Montt’s return to Guatemalan politics clearly demonstrates the rampant impunity for wartime human rights abuses and the need for specific deterrence of perpetrators. Ríos Montt was President of Guatemala from June 1982 to August 1983, the time period in which the Guatemalan State committed acts of genocide.¹⁰⁹ Although human rights groups have long blamed Ríos Montt for orchestrating the worst of the wartime atrocities, the Guatemalan government has not attempted to prosecute him.¹¹⁰

Taking full advantage of the atmosphere of impunity in Guatemala, Ríos Montt has become a force in national politics. He founded and remains the leader of the right-wing Guatemalan Republican Front (FRG), the political party whose candidates won the presidency and the majority

105. Laura N. O’Shaughnessy, Commentary, *Despite China’s Meddling, Guatemala May Give Peace a Chance*, CHI. TRIB., Jan. 28, 1997, at N13.

106. *Id.*

107. See Joe M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT’L L.J. 321, 351-52 (1994).

108. *Id.*

109. MEMORY OF SILENCE, *supra* note 4, at 80.

110. *Report Unveils Pattern of Genocide; Big Question is Whether Culprits Will Face Trial*, LATIN AMERICAN WEEKLY REPORT, Mar. 2, 1999, at 98. Members of several Mayan communities recently filed suit in Guatemala against Ríos Montt, accusing him of presiding over the genocide perpetrated against Mayan groups during the civil war. T. Christian Miller, *Guatemalans to Sue Top Lawmaker Over Genocide*, L.A. TIMES, June 6, 2001, at A1.

of congressional seats in the first elections held since the end of the war.¹¹¹ In the November 1999 elections, Rios Montt won a seat in Congress and now serves as the President of the Congress of Guatemala.¹¹² Even though the CEH assigned responsibility for the genocide and gross human rights violations to the highest levels of the Guatemalan government, Rios Montt denies all allegations against him and remains free from any serious threat of prosecution by the Guatemalan government.¹¹³ Had the Commission named names, it could have placed Rios Montt under intense scrutiny, which arguably could help deter him from committing atrocities in the future.

In addition to specific deterrence, general deterrence is equally necessary to prevent future human rights abuses. "General deterrence refers to inhibiting others from committing similar crimes" to those committed by the named perpetrators.¹¹⁴ The impunity that permeated Guatemala during several decades of civil war set the unfortunate precedent that one could commit heinous crimes and never be held accountable. Identifying perpetrators can help reverse this precedent, demonstrating that both criminals and intellectual authors of certain crimes cannot keep their identities secret. The fear of public exposure would deter the commission of future abuses.

2. Transition to Democracy and Closure for Victims

In addition to deterring future atrocities, identifying perpetrators may enhance the transition to democracy and the rule of law by infusing a sense of justice into a victimized population. While the mere identification of

111. Lorena Prez, *Politics-Guatemala: First General Elections Since Peace Accord*, INTER PRESS SERVICE, Nov. 4, 1999, LEXIS, Nexis Library, Inter Press Service; *Portillo Sworn in as President*, FACTS ON FILE WORLD NEWS DIGEST, Feb. 3, 2000, at 68, LEXIS, Nexis Library, Facts on File World News Digest; *The Boggy Road to Peace*, THE ECONOMIST, Feb. 24, 2001, available at 2001 WL 7317746.

112. *Portillo Sworn in as President*, *supra* note 107. Rios Montt's presence continues to be a destabilizing force in Guatemalan politics. The Constitutional Court recently stripped him and five other FRG congressmen of their immunity because of their alleged involvement in the fraudulent alteration of a congressional act. Although immunity is a prerequisite for serving in Congress, Rios Montt refused "to step down despite the court's ruling." On April 24, 2001, a judge dismissed the charges against the ex-dictator in a decision that civic groups consider to be a "national embarrassment." Several groups, including Movement for Justice and Democracy, plan to appeal the judge's decision. Oscar Rene Oliva, *Guatemala-Congress Rios Montt, Constitutional Court Face Off in Guatemala*, EFE NEWS SERVICE, Mar. 23, 2001, LEXIS, Nexis Library, Global News Wire on April 24, 2001; *Guatemalan Judge Dismisses Case Against Ex-Dictator Rios Montt*, Apr. 25, 2001, LEXIS, Nexis Library, Agence France Presse at the time of publishing.

113. *Guatemala: Pending Justice*, THE ECONOMIST, Mar. 13, 1999, at 46, available at 1999 WL 7362064.

114. Pasqualucci, *supra* note 107, at 351-52.

perpetrators in a truth commission report does not have an effect equally as powerful as criminal prosecutions, this form of accountability may provide the only possibility for justice.¹¹⁵ Indeed, Thomas Buergenthal, one of the Commissioners on the UN Truth Commission for El Salvador, explains that the Salvadoran Commission premised its decision to name names on the knowledge that the “Salvadoran justice system was corrupt, ineffective, and incapable of rendering impartial judgments in so-called ‘political’ cases.”¹¹⁶

The CEH’s decision not to identify perpetrators assumes added significance in light of the lack of potential for meaningful prosecution in Guatemala. Instead of naming names, the Commission recommends prosecution of the crimes “for whose commission liability is not extinguished” by the National Reconciliation Law.¹¹⁷ This strategy is risky for any truth-telling body because prosecutions after a truth commission publishes its report are extremely rare.¹¹⁸ One can argue that the strategy was particularly misguided in the Guatemalan context, considering the obvious inability of the Guatemalan courts to provide a legitimate forum for confronting perpetrators. More than two years had passed between the signing of the Peace Accords and the publishing of the CEH’s report, giving the Commission ample opportunity to note the dismal state of the judicial system and the near certainty that impunity would remain the norm in Guatemala. Even with its awareness of this situation and the knowledge that identifying perpetrators could partially accomplish some of the goals of prosecution, the CEH opted against naming names.¹¹⁹

This decision had dire consequences for Guatemala. It deprived Guatemalans of a desperately needed opportunity for “self-scrutiny.”¹²⁰ Had the CEH named names, Guatemalans could have decided whether to allow those named to continue to occupy positions in State institutions and remain upstanding members of their respective communities. Just as naming names forces perpetrators “to face their societies and their victims,” it also gives whole societies an opportunity to scrutinize themselves.¹²¹ Throughout this process, political futures and personal reputations can be altered.¹²² The political resurgence of General Rios Montt, suspected author of the State’s policy of genocide and current

115. *Id.*

116. Buergenthal, *supra* note 69, at 522.

117. MEMORY OF SILENCE, *supra* note 4, at 58; see generally Roht-Arriaza & Gibson, *supra* note 34 (explaining the National Reconciliation Law).

118. Hayner, *supra* note 59, at 604.

119. See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

120. Francisco Goldman, *In Guatemala, All Is Forgotten*, N.Y. TIMES, Dec. 23, 1996, at A15.

121. *Id.*

122. *Id.*

President of the Guatemalan Congress, demonstrates the consequences of Guatemala's missed opportunity for self-scrutiny.

Switching from a societal-based perspective to a victim-centered perspective exposes further ramifications of the decision not to identify perpetrators in *Memory of Silence*. First, some scholars argue that one can interpret international law to require states to publicly disclose perpetrators' identities.¹²³ Based on this interpretation and the improbability of the Guatemalan government's compliance with this obligation, one can argue that CEH had a legal duty to name names. Aside from the possible legal "right to know," victims of human rights abuses and their families have a moral right to information such as the identity of the person who committed the crime. After all, "[p]unishment of the violator may be an essential element of an effective remedy for the victim."¹²⁴ Although mere knowledge of the perpetrator's identity might not satisfy the victim's desire for retribution to the same extent as a guilty verdict and jail sentence, it can help the victim obtain closure. As one Guatemalan mother lamented, "[t]he assassins are alive, with their families, and I lost two children. I want to know the face of the assassins."¹²⁵ Out of respect for the thousands of victims, many people claim that the CEH should have named names.

Finally, human rights advocates simply argue that, although not ideal, identifying perpetrators in the CEH's report would have been the best alternative. Since the CEH was not a judicial body, the naming of perpetrators would not have resulted in their loss of liberty.¹²⁶ Furthermore, since the Commission could only make non-binding recommendations, had it named certain perpetrators and recommended their removal from positions of power, it could not have compelled the State or the URNG to comply with the recommendations. While less preferable than criminal prosecution, the Commission's report could have represented the only viable option for individual accountability in Guatemala.

B. *Justifying the Decision Not to Name Names*

Despite the existence of strong arguments in favor of naming names, the CEH wisely decided against imposing this form of individual accountability. Initially, one must understand that the duty of states to identify and hold perpetrators accountable does not necessarily apply to

123. Pasqualucci, *supra* note 107, at 331-32.

124. *Id.* at 355.

125. Mireya Navarro, *Pain of War for Guatemalans Isn't Over*, N.Y. TIMES, Mar. 1, 1999, at A10.

126. See RATNER, *supra* note 56, at 198.

truth commissions. Furthermore, truth commissions in general, and the CEH specifically, are poor mechanisms for holding individuals accountable for human rights violations. Had the Commission identified perpetrators, it would have acted beyond its practical capabilities and would have risked violating the due process rights of the people named in the report. Finally, in the specific case of the CEH, identifying perpetrators would have constituted an *ultra vires* act of the Commission. Such action would have had the potential to seriously undermine the credibility of the CEH and its report, as well as MINUGUA¹²⁷ and subsequent UN peace mediation efforts.

1. The Duty of Accountability and Its Application to the CEH

While human rights scholars do not necessarily agree on the extent to which states must hold perpetrators accountable for their actions, most scholars argue that current international law has created a duty of accountability for states.¹²⁸ Increasingly, "international law requires states to punish certain crimes committed in their territorial jurisdiction."¹²⁹ This requirement stems from the terms of human rights treaties, such as the Genocide and Torture Conventions, authoritative interpretations of the International Covenant on Civil and Political Rights and the American Convention on Human Rights, as well as customary international law.¹³⁰

Although, in many instances states must comply with the requirements of international law regarding the punishment of perpetrators, this obligation does not necessarily pertain to truth commissions. One may argue that international law requires certain types of truth commissions to name names as part of the state's duty to identify and punish perpetrators. For example, a state-run truth commission in a country that has signed the American Convention on Human Rights (ACHR) could face some of the same obligations under the ACHR as those that the state, itself, faces. In its 1988 *Velasquez-Rodriguez* decision, the Inter-American Court of Human Rights interpreted the ACHR to require state parties to ensure the substantive rights in the Convention.¹³¹ Among other obligations, the Court

127. MINUGUA is the UN mission for the verification of human rights in Guatemala. See Minugua, Mision de Verificacion de las Naciones Unidas en Guatemala, at <http://www.minugua.guate.net/> (last visited May 5, 2001).

128. Orentlicher, *supra* note 119, at 2551.

129. *Id.*

130. *Id.* at 2551-552, 2564, 2566, 2568, 2576-577, 2582; see generally Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 24 (Naomi Roht-Arriaza ed., 1995).

131. Roht-Arriaza, *supra* note 130, at 30.

found the Convention to obligate states to identify perpetrators and “impose the appropriate punishment.”¹³²

Under *Velasquez-Rodriguez*, the ACHR may require a state-run truth commission, investigating human rights abuses that occurred within a jurisdiction bound by the ACHR, to name names. This obligation would be most obvious in situations in which the members of the truth commission believed that the state lacked either or both the capability and will to prosecute perpetrators. In such situations, naming names would allow the truth commission to fulfill the state’s obligation to identify perpetrators; and, it would allow partial fulfillment of the state’s obligation to punish perpetrators, based on the negative consequences that could befall those people named in the report.

In the case of Guatemala, however, neither the duties stemming from *Velasquez-Rodriguez*, nor those originating in international treaties or customary law binding upon the State of Guatemala apply to the CEH. These duties apply to states and, arguably, to state-run truth commissions. Although the State of Guatemala contributed money to the Commission, the CEH was a neutral, independent entity.¹³³ Since the CEH did not act on behalf of the State, one cannot argue that it bore the responsibility of fulfilling the State’s obligations under international law.¹³⁴ While one might still argue that the CEH had a moral duty to name names, especially considering the members’ acute awareness of the impunity that plagues Guatemala, the independence of the Commission from the State of Guatemala also entailed independence from the State’s legal duties.

2. Truth Commissions: Poor Vehicles for Individual Accountability

Regardless of the existence of a duty of accountability under international law, truth commissions, by nature, are poor vehicles for individual accountability. Their main utility revolves around providing a neutral, accurate, and timely accounting of the facts that led to the outbreak of violence in a specific conflict and of the nature of the violence. “The goal of any truth commission should be to establish the overall picture of political violence during the period specified” in its mandate.¹³⁵ In light of this goal, sponsoring entities create truth-telling bodies with short life spans and relatively few procedural safeguards. Because the

132. *Velasquez-Rodriguez* case, Inter-Am. Ct. H.R. No. 4 (1988), Judgement of July 29, 1988, para. 174, available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm (last visited May 9, 2001); see also Roht-Arriaza, *supra* note 130, at 30.

133. MEMORY OF SILENCE, *supra* note 4, Acknowledgements.

134. “The Commission has no responsibility vis-à-vis the Government or the Congress of Guatemala.” See *Between National and International Law*, *supra* note 4, at 1007.

135. Hayner, *supra* note 59, at 653.

CEH shared these general characteristics of truth commission, it wisely decided against naming names.

Attempting to identify individual perpetrators would have significantly increased the burden on the Commission. Naming names potentially “exposes the accused to public condemnation, perception of guilt, and possibly even security risks”;¹³⁶ therefore, because of due process concerns, if a panel intends to identify perpetrators its proceedings should resemble judicial proceedings.¹³⁷ It should allow or provide the accused legal representation, explain the accusations against the accused, and give him an opportunity to confront witnesses and defend himself against the accusations.¹³⁸

In addition to the prohibition against assigning individual responsibility in the Oslo Agreement, several other terms in the CEH’s mandate militated against naming names by limiting the CEH’s ability to ensure due process. First, the procedural safeguards that ensure fairness and accuracy require significant amounts of time and resources, both of which the CEH lacked.¹³⁹ Even without identifying individual perpetrators, the Commission had a daunting task. With only one year to determine the roots of conflict in a complex society, investigate thirty-six years of atrocities, and recommend steps to avoid the recurrence of those atrocities, the CEH had an overwhelming mandate.¹⁴⁰ Fulfilling this mandate within the one year originally allotted to the CEH proved impossible, as evidenced by the eighteen months that the Commission ultimately needed to complete and publish its report.¹⁴¹ Furthermore, financial constraints posed a serious threat to the Commission.¹⁴² Coordinator Tomuschat explains that the CEH was “under the threat of financial collapse” throughout its existence.¹⁴³ Considering the financial and time constraints imposed upon the Commission by the Oslo Agreement, providing adequate procedural safeguards would have been extremely difficult, if not impossible.

Besides the problematic issues of time and money, the nature of the CEH’s proceedings, as set out by the Oslo Agreement, further limited the CEH’s ability to provide due process guarantees for those perpetrators that

136. RATNER, *supra* note 56, at 198.

137. *Id.* at 201-02.

138. *Id.* at 202.

139. See Tomuschat, *supra* note 24, at 6, 11.

140. See Chapman, *supra* note 64, at 7, 8.

141. Tomuschat, *supra* note 24, at 6; *Guatemalan Government Embarrassed by “Truth Commission” Proposals*, in *LATIN AMERICAN REGIONAL REPORTS: CARIBBEAN AND CENTRAL AMERICA REPORT*, Mar. 30, 1999, at 1.

142. Tomuschat, *supra* note 24, at 11; see also *Between National and International Law*, *supra* note 4, at 1004-1005.

143. *Id.*

the Commission could have named. The Oslo Agreement states that “[t]he Commission’s proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of informants.”¹⁴⁴ Without this provision witnesses and informants would have been justifiably reluctant to provide information to the CEH. Even after the war ended, Guatemalans still feared that “the former power wielders . . . would take revenge measures against any witnesses daring to talk about the injustices they had suffered.”¹⁴⁵

While this provision aided the Commission significantly in its daunting task of gathering information on the thousands of atrocities that had occurred, it also would have prevented the CEH from ensuring a central tenet of due process — allowing the accused to confront his or her accuser. Similarly constrained, the UN Truth Commission for El Salvador manoeuvred around this impediment to due process by only naming names of individuals against whom charges were “substantiated by overwhelming or substantial evidence.”¹⁴⁶

Although unclear whether or not this self-imposed evidentiary standard provides an equivalent to the due process right of confronting an accuser, the situation in Guatemala posed challenges to the CEH that the Salvadoran Commission did not face. For example, whereas the Salvadoran civil war lasted eleven years,¹⁴⁷ the Guatemalan civil war dragged on for over three and one half decades. Not surprisingly, the Salvadoran Commission registered over 22,000 cases, barely half of the number of cases that the CEH registered.¹⁴⁸ Furthermore, the Salvadoran Commission’s mandate was significantly narrower than that of the CEH. The result of this difference was that the Salvadoran Commission reported findings on only thirty-three of the 22,000 cases brought to its attention.¹⁴⁹ The CEH, on the other hand, published a 3,500 page report describing atrocities committed against thousands of Guatemalans.

The significant differences between the mandates of the two commissions and the number of cases reported are particularly relevant in the context of due process. The Salvadoran Commission registered fewer cases than the CEH, and could fulfill its mandate by reporting on only thirty-three of the cases it registered; therefore, it had the luxury to spend more time “verifying, substantiating and reviewing” the evidence presented to it, in an effort to ensure evidentiary reliability and accurate

144. Oslo Agreement, *supra* note 3.

145. Tomuschat, *supra* note 24, at 10.

146. Buergenthal, *supra* note 69, at 512.

147. *Id.*

148. Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656, 660 (1994); MEMORY OF SILENCE, *supra* note 4, at 17.

149. Ensalaco, *supra* note 148, at 660.

documentation of atrocities.¹⁵⁰ Considering the immensely larger task undertaken by the CEH, meeting an evidentiary standard sufficient to allay due process concerns of named perpetrators would have significantly increased the burden on the Commission.

Moreover, the thirty-six year time period that the CEH investigated raises due process concerns in a manner more pressing than does the eleven year time period that the Salvadoran Commission investigated. With the passage of time, witness' memories fade and become less reliable, and charges of crimes become increasingly difficult to verify.¹⁵¹ Had the CEH decided to name names, these phenomena would have posed serious due process concerns. The Commission would have been investigating atrocities and trying to establish guilt for crimes committed over three and a half decades before the Commission's existence and genocide committed almost two decades before the Commission began work. This time factor suggests that any identification of individual perpetrators would have been unjust unless it met the strictest procedural safeguards. Since several provisions in the Oslo Agreement, as well as factors relating to the Guatemalan civil war, would have prevented the CEH from meeting due process requirements, the CEH wisely decided against naming names.

3. Avoiding Illegitimate Action

Even in the unlikely scenario that the CEH could have implemented procedures sufficient to ensure due process, naming names would have constituted an *ultra vires* act on behalf of the Commission. As discussed above, "[t]he most significant limitations on truth commissions are those written into their mandates."¹⁵² The mandate sets forth the commission's "goals, powers, and procedures."¹⁵³ Like other bodies that derive their purposes and powers from charters, truth commissions have the power to interpret the terms of their mandates; however, this power of interpretation is not as great as that of a permanent, charter-created body such as the United Nations.

Because the UN is an enduring institution, its various organs are constantly interpreting the UN Charter. Since the Charter has "formally remained almost unchanged as a legal basis for the acts of its organs . . . and its member states for more than 45 years now, the need arises for adapting the Charter to the changing tasks by way of an evolutionary

150. Buergenthal, *supra* note 69, at 511-12.

151. Chapman & Ball, *supra* note 64, at 5, 6.

152. Hayner, *supra* note 59, at 636.

153. RATNER & ABRAMS, *supra* note 56, at 196.

dynamic interpretation.”¹⁵⁴ Over time and in light of and response to changing conditions throughout the world, it is only natural that interpretations of the UN charter shift, to a certain degree, away from the framers’ original intent. The changing conditions and passage of time that make evolutionary interpretation of the Charter necessary also affect the specific “language and meaning of words” in the constituent instrument.¹⁵⁵

Thus, the answer to a question concerning the meaning of a word may differ, depending on whether the answer is based on the meaning of the term at the time of the conclusion of the treaty (static-subjective interpretation based on the original will of the parties) or on the linguistic usage of the term at the time of interpretation (dynamic-evolutionary, objective interpretation).¹⁵⁶

If those involved in the interpretation of the Charter refrained from using a “dynamic-evolutionary” method of interpretation, it would hamper the UN’s ability to adapt to new situations and the Organization’s effectiveness would quickly decline.

In contrast to its value for interpreting the constituent instruments of long-lasting international organizations, evolutionary interpretation is less appropriate in interpreting and applying the mandates of truth-telling bodies. Unlike organizations such as the UN, most truth commissions have mandates that limit their existence to two years or less. Because of the usual brief duration of truth commissions, these bodies do not have to adapt to changing conditions to the same extent as enduring international organizations. Since they do not face the same complexities that arise from interpretation of a constituent instrument written many years prior to the date of interpretation, they have less need to use an evolutionary interpretative method. Members of truth commissions are empowered to interpret the commissions’ mandates and are not mere mouthpieces for the parties that created the commissions. They do not have to rigidly adhere to the specific will of the parties on each and every issue in question. However, because of the short duration of most truth commissions, the necessity for broad interpretative powers is non-existent. Without the need for broad interpretative powers, members of a commission should not usurp them; doing so can lead to *ultra vires* action on behalf of a truth commission.

Since the Oslo Agreement only provided for the Commission to exist for, at most, one year, the members of the CEH had neither the need

154. BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 28 (1994).

155. *Id.* at 35.

156. *Id.*

nor the justification to adopt an evolutionary interpretative approach to the Agreement.¹⁵⁷ Sufficient time had not passed for changes in language or external conditions to affect the meaning of the provisions in the CEH's mandate.

Instead of the evolutionary method, the CEH and other truth commissions facing interpretative difficulties should look to the Vienna Convention on the Law of Treaties (VCLT) and fundamental tenets of treaty law and general law. The interpretation of a charter or mandate created by a treaty differs in certain aspects from normal treaty interpretation. Despite these differences, the Vienna Convention on the Law of Treaties and certain tenets of general law and treaty interpretation still apply to charter or mandate interpretation.¹⁵⁸ For example, Article 31(1) of the VCLT requires "that treaty provisions are to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty.'"¹⁵⁹ "A special meaning may only be given to a term . . . if the parties intended to do so at the time" the treaty was made.¹⁶⁰ Furthermore, the *bona fides* rule, a general principle of law, calls for "interpretation according to the principles of good faith."¹⁶¹ This rule obliges a "non-arbitrary interpretation of treaties and forbids deviation from its 'true' substantial meaning."¹⁶²

Applying Article 31(1) of the VCLT and the *bona fides* rule to the CEH's decision against naming names demonstrates that the Commission acted appropriately. The Oslo Agreement specifically states that the Commission's work "shall not attribute responsibility to any individual."¹⁶³ With sufficient imagination, one could create myriad interpretations of this provision. In contrast, if one looks to Article 31(1) for guidance in interpreting the provision, the meaning becomes relatively clear. Since naming names is an obvious form of assigning individual responsibility, an unbiased reader, no doubt, would interpret the term to forbid the Commission from naming names. Devising any interpretation that would have allowed the CEH to identify individual perpetrators would have entailed giving the term a special meaning contradictory to the parties' intent at the time of the Oslo Agreement. As discussed earlier, the Guatemalan State's dominance on the battlefield led to dominance at the negotiating table. The Army never would have accepted the creation of a

157. Oslo Agreement, *supra* note 3.

158. SIMMA, *supra* note 154, at 31.

159. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331; SIMMA, *supra* note 154, at 31.

160. SIMMA, *supra* note 154, at 31.

161. *Id.*

162. *Id.*

163. Oslo Agreement, *supra* note 3.

truth-telling body that named names, and it successfully insisted that the CEH did not have the power to do so.¹⁶⁴ If the Commission had adopted an interpretation of this controversial provision that allowed it to name names, it would have flouted both the plain meaning of its mandate and the intent of the drafters of the Oslo Agreement.

Adopting an illegitimate interpretation of the mandate and, accordingly, acting *ultra vires* would have had severe ramifications. First, it would have damaged the CEH's credibility and its appearance of neutrality which, in turn, would have undermined the legitimacy of its report. An impartial accounting of the violations that occurred is one of the central purposes of all truth commissions, including the CEH.¹⁶⁵ Arguably, such an accounting can help both victims and perpetrators move beyond the bitter division of the war years and begin to create a more peaceful, democratic society. A decision to identify perpetrators in *Memory of Silence* would have undermined this goal. Instead of the report helping to heal past divides, it would have only exacerbated those already there. The Guatemalan government and military immediately would have protested the report. They would have accused the Commissioners of violating the terms of the Oslo Agreement and catering to the wishes of human rights NGOs. They would have claimed that, considering the influence that those organizations had upon the Commission's work, all the CEH's conclusions were suspect. In turn, victims and their family members would have become embittered once again, having lost the opportunity for an officially-sanctioned body to legitimately inform the world of their tremendous suffering. Whether the State would have lodged well-founded protests or grossly exaggerated accusations is irrelevant. In either case, the result would have compromised the legitimacy of the CEH and *Memory of Silence* and frustrated the goal of reconciliation.

Besides compromising the CEH's credibility, a decision to identify perpetrators would have also jeopardized the role of both MINUGUA, the UN mission for the verification of human rights in Guatemala, and that of the UN in negotiating peace settlements elsewhere in the world. Although an independent entity, the CEH originated from a UN-sponsored agreement and it enjoyed financial and logistical support from the UN.¹⁶⁶ The UN was an official recipient of the report and paid to publish it.¹⁶⁷ Despite its official independence, the connections between the CEH and the UN create the impression of a quasi-affiliation.¹⁶⁸

164. Lovell, *supra* note 63.

165. Hayner, *supra* note 59, at 607; Oslo Agreement, *supra* note 3.

166. Navarro, *supra* note 5; MEMORY OF SILENCE, *supra* note 4, Acknowledgements.

167. Navarro, *supra* note 5; Tomuschat, *supra* note 24, at 1.

168. See *Between National and International Law*, *supra* note 4, at 997-98, 1001.

Therefore, the resentment that naming names would have caused could easily have become general resentment of MINUGUA. The role of MINUGUA is central to the peace process. It investigates and reports upon human rights violations, and monitors the government's compliance with the Comprehensive Agreement on Human Rights that both the State and URNG signed during the peace process.¹⁶⁹ The continued efficacy of MINUGUA depends upon cooperation from its host, the Guatemalan government. If the government refused to cooperate or, even worse, forced MINUGUA to abandon its mission, it would be a tremendous setback to the peace process.

The negative effect of a decision to name names could also have damaged the UN's reputation and ability as a peacemaker. Members of other governments and militaries are not oblivious to events outside their countries. For example, Guatemalan generals likely noted and learned from events in El Salvador, where a truth commission identified over forty perpetrators who had committed human rights violations.¹⁷⁰ To avoid this type of accountability, the Guatemalan military insisted that the CEH not have the power to identify individual perpetrators.

Just as Guatemalan generals learned from the Salvadoran example, government and military leaders in other war-torn countries will learn from the Guatemalan peace process. If the Commission, established during a UN-brokered peace process, had ignored its mandate and named names, it would make a strong, negative impression upon any leader trying to avoid accountability. He or she would be less trusting of the UN and less willing to cooperate for peace. Although individual accountability should remain the preferred response to human rights abuses, an end to hostilities is usually a prerequisite to reaching this goal. If the Guatemalan example had made leaders more recalcitrant, it would have thwarted efforts for both peace and individual accountability.

169. See Minugua, *Mision de Verificacion de las Naciones Unidas en Guatemala*, (explaining how Minugua operates), at <http://www.minugua.guate.net/> (last visited May 5, 2001); see *Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala*, GA. Res. 48/267, U.N. GAOR, 48th Sess., U.N. Doc. A/48/267 (1994) available at <http://www.un.org/documents/ga/res/48/a48r267.htm>.

170. Hayner, *supra* note 59, at 629.

VI. CONCLUSION

In making the inevitably controversial decision over whether to name names in its final report, the CEH correctly opted against doing so. This decision prevented the CEH from acting outside the scope of its mandate and from violating the due process rights of potentially identified perpetrators. Although legally and technically justified, the decision limited the Commission's ability to serve as a vehicle for individual accountability for human rights violations.

Legal scholars and human rights activists will continue to analyze the Oslo Agreement, the CEH, and the decision not to identify individual perpetrators. While further analysis can help members of future truth commissions make similarly difficult decisions, for Guatemala, one must ask, "What next?"

In answering this question, it is useful to consider Guatemala's recovery from its history of human rights abuses in the context of two phases: the truth phase and the justice phase.¹⁷¹ The public presentation of *Memory of Silence* constituted the crowning achievement of the truth phase. The Commission assessed and documented a previously hidden and obscure past of human rights violations and genocide.¹⁷² Its report will serve as a lasting testimony to the atrocities that occurred during the Guatemalan civil war, and its recommendations will hopefully help prevent future violations from occurring.

Although the truth phase plays a significant role in the initial stages of a society's transition from a state of impunity and lack of respect for human rights to a state in which human rights are valued and honored, this phase is insufficient by itself. The truth, without more, does not satisfy the goals of retribution against individual perpetrators or deterrence of future crimes; and, in many cases it will not suffice to create a sense of closure for victims.

Ideally, the justice phase would occur immediately after (or possibly simultaneously with) the truth phase. The fact-finding and documentation in the truth phase can serve as a valuable precursor to the justice phase.¹⁷³ The justice phase, in its most robust form, entails investigation and prosecution of individual perpetrators and redress for victims and their families.¹⁷⁴ More realistically, however, the truth phase often represents both the beginning and end of a society's attempt to

171. *Id.* at 605.

172. Tomuschat, *supra* note 24, at 14, 15.

173. RATNER & ABRAMS, *supra* note 56, at 193.

174. Peter A. Schey et al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325, 333-36 (1997).

grapple with a history of human rights abuses. While a truth commission report should facilitate the initiation of the justice phase, "in practice, many states treat truth commissions as a substitute to prosecution."¹⁷⁵

Unfortunately, Guatemala seems prepared to continue the trend of halting the recovery process after the completion of the truth phase. As discussed above, perpetrators of wartime abuses still enjoy widespread impunity. Those prosecutions that have occurred were usually against low-level, former PAC members, which raises issues of scapegoating and selective prosecution. The criminal justice system suffers from corruption, inefficiency, lack of sufficient financial resources, and susceptibility to threats, intimidation, and violence.

Admittedly, the possibility of holding perpetrators accountable for their human rights violations seems remote in Guatemala; however, the international community should receive partial blame for this reality. The UN, EU and several nations encouraged the creation and work of the CEH and cooperated in funding the Commission. Since the CEH published its report, these countries have largely turned their attention elsewhere, prematurely sending a message to the State of Guatemala that it has completed its attempt to make amends for abuses that occurred during the civil war. While myriad governments voiced their collective outrage when Joerg Haider, a politician with suspected Nazi sympathies, gained prominence in Austria,¹⁷⁶ the world community has largely failed to criticize General Rios Montt's return to power as the President of the Congress of Guatemala. Unless Guatemala faces international pressure to conduct domestic prosecutions and receives significant financial support to help defray the costs, impunity for wartime human rights abuses will continue.

175. Theresa Klosterman, *Note: The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833 (1998).

176. William Drozdiak, *Outcast Status Arouses Austrian Anxiety*, WASH. POST, Mar. 16, 2000, at A18.

