

THE GUATEMALAN HISTORICAL CLARIFICATION COMMISSION FINDS GENOCIDE¹

Jan Perlin*

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*In those days they wanted to kill all the indigenous people. He was in charge of the country then - that Lucas García, is he in jail yet? What's happening with that?*²

* Jan Perlin teaches in the International Human Rights Law Clinic, American University, Washington College of Law. Ms. Perlin began her work as an international human rights lawyer when she began six years of service with the United Nations. She was a field investigator with the teams that verified compliance with the peace accords in both El Salvador and Guatemala, and ran projects to build the justice system in Guatemala. In her last assignment she provided legal counsel to the Guatemalan Historical Clarification Commission. Prior to her United Nations' service, Ms. Perlin was a public defender with the New York City Legal Aid Society.

1. Genocide is defined as: "... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group."

It should also be noted that under the Convention the attempt to commit genocide or complicity in genocide are also contemplated as punishable acts. *Convention on the Prevention and Punishment of Genocide.*

2. "En ese tiempo querían matar a los indígenas. El manda al país. "Este Lucas García estará ya preso? "Cómo va esa cosa?" Collective Testimony-Rabinal, in *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3362. Author's translation. All cites to the final report of the Historical Clarification Commission, *Guatemala: Memory of Silence*, refer to the complete Spanish-language version, unless otherwise specified. The cites contain Volume, Chapter, Section and paragraph numbers instead of page numbers because the paragraph numbers correspond to both the print and electronic versions of the complete report, which can be found online at <<http://www.hrdata.aaas.org/ceh>>. General Lucas García served as president from 1978 to March 1982, when he was unseated in a coup d'etat and replaced by General Ríos Montt, now Secretary-General of the FRG party and recently elected to a seat in the Guatemalan National Assembly. Ríos Montt was also unseated in a military-sponsored coup in August, 1983.

Well you know, they wanted to finish off all the villages, but we were lucky, thank the Lord, because we were able to get away, 'cause for them to finish the job meant not just frightening people, not just killing one, or two, or three - it meant finishing off everyone once and for all, because like I heard as I was leaving - escaping from under streams of bullets - I heard a soldier say, "come on men, lets go kill, kill them all - because now it's time to kill."³

On December 29, 1996 the Guatemalan government and the Unidad Revolucionaria Nacional Guatemalteca (URNG),⁴ signed peace accords bringing an end to thirty-four years of internal armed conflict. As part of the transition to peace it was agreed that a commission be created to document and clarify the history of the violence and the causes of the conflict. This commission would also be called upon to formulate recommendations about how to "encourage peace and national harmony."⁵

On the other hand, the Guatemalan truth and national conciliation package would permit criminal trial and punishment for persons found responsible for torture, forced disappearance and genocide. This position represented a compromise on the hotly debated issue of amnesty. By allowing these crimes, representing gross violations of human rights, to be exempted from the list of offenses whose prosecution could be suspended under the 1996 National Reconciliation Law,⁶ impunity for those violations would arguably be limited. On the other hand, the truth-telling function normally associated with criminal trials would be delegated to the Historical Clarification Commission,⁷ where

3. "Ellos pues quisieron terminar a las aldeas pero que suerte tenemos a nuestro Señor porque logramos escapar, porque ellos que para terminar no es para asustar a la gente, no es para matar a uno, dos o tres, sino que para terminar de una vez, porque según he oído cuando salí pues de escapar bajo chorros de tiros, entonces of que dijo un soldado que maten muchá, maten a todos porque ahora ya es tiempo de matar." Collective Testimony from Pexla Grande, Nebaj, Quiché, in *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3226. Author's English translation.

4. Unidad Revolucionaria Nacional Guatemalteca, a coalition of the four opposition guerrilla organizations, the EGP (Ejército Guerrillero de los Pobres), ORPA (Organización del Pueblo en Armas) FAR (Fuerzas Armadas Revolucionarias, formerly Fuerzas Armadas Rebeldes), and the PGT (Partido Guatemalteco de Trabajadores) that came together to form the URNG in 1982. Before that they operated independently with the PGT operating primarily in the political arena, albeit clandestinely. The other three organizations, formed at different historical moments had both a political branch and military units throughout the conflict.

5. 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, Oslo, 23 June 1994, reproduced in *The Guatemala Peace Agreements*, United Nations Department of Public Information, (1998.)

6. Decree Law # 145-96 was proposed on presidential initiative. Negotiated in the context of the peace talks, the law was a product of an agreement between the parties to the conflict with the aid of the United Nations moderator.

7. *Guatemala Peace Agreements*, *supra* note 5. [hereinafter *Oslo Accord*].

judgments about responsibility for human rights violations would take into account a broad historical context. The duty to discover and speak the truth in its final report was limited only by the prohibition against "individualizing responsibility" for the "human rights violations and incidents of violence"⁸ it documented.⁹ The Oslo Accord memorialized the agreement between the Guatemalan Government and URNG on the creation of the Historical Clarification Commission, and constituted an essential component of the overall peace process.¹⁰

While the Commission's role in the peace process did not contemplate criminal prosecutions, its mandate gave it the power to render judgments based on international human rights law applicable to the Guatemalan conflict. A legal framework had to be constructed that would underlie the Commission's judgments and shape its conclusions. A good deal of time was spent focusing on the scope and methods of information-gathering and on the determination of which sources of law should be applied and how. The Accord's call for the clarification of "human rights violations" and "incidents of violence" related to the conflict, provided the principal guidance on the scope of the inquiry. In addition, references contained in other agreements,¹¹ comprising the final peace

8. *Id.* ¶ 1.

9. Some argue that the Commission was further handicapped by his inability to subpoena witnesses and compel the production of documents. It is interesting to note in this regard, that the final report reproduces the correspondence reflecting the dialogue between the Commissioners and the Government on the issue of government collaboration in the production of information. Also noted are efforts to gather information from other governments. See *Guatemala: Memory of Silence*, Annex III and Vol. I, Methodological Considerations.

10. The *Oslo Accord* also stated that the Commission's work would have "no judicial effect." This declaration is largely moot, as the Commission points out, because it did not have the power to suspend the exercise of citizen rights to complain of past abuses or prosecutorial obligations to pursue those complaints in the national judicial system. Practically speaking, the Report and its conclusions are of limited evidentiary value without the presence of the underlying witnesses and documentation. The Commission's additional obligation to maintain confidentiality, ("The Commission's proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants." *Oslo Accord*), means that a prosecutor would have to discover the identity of witnesses through independent means. However, it is entirely possible that the Commission's factual analyses, legal arguments and the references to historical and social context will inspire a framework for victims and conscientious prosecutors to seek redress for the gross violations of human rights documented, without in any way violating this limitation on the Clarification Commission mandate. See the Report's discussion of the Commission's mandate, Vol. I, Mandate and Procedures, ¶ 68. In fact, some prosecutions relating to public officials' criminal responsibility for forced disappearances have already been filed. For instance, the accusation of Adriana Portillo against Donaldo Alvarez Rufz, Germán Chupina Barahona, Pedro García Arredondo, and Manuel de Jesús Valiente Téllez all of whom held positions of authority over security forces, for the disappearance of five family members in 1981. See *Acusación en MP*, Prensa Libre, 4 agosto de 1999.

11. The Comprehensive Human Rights Agreement called on the United Nations to verify the observance of human rights with "particular attention to the rights to life, integrity and security of persons, to individual liberty, to due process, to freedom of expression, to freedom of movement, to freedom of

accord, gave preference to monitoring breaches of fundamental human rights, such as the rights to life, liberty, security, expression, association, movement, and due process. This hierarchy of values was further defined by the United Nations' ongoing verification of the behavior of both State and opposition actors. While there would be no criminal sanctions imposed by this body, the force of the Commission's recommendations¹² depended on the strength of its investigations and the solidity of its historical and legal analysis.

I. LEGAL FRAMEWORK

The legal framework incorporated those international treaties ratified by Guatemala, among them the Convention on the Prevention and Punishment of the Crime of Genocide,¹³ Common Article 3 of the Geneva Conventions and Additional Protocol II.¹⁴ International customary law,¹⁵ particularly *jus cogens* norms, were also used to frame the legal inquiry, including the concept of "crimes against humanity,"¹⁶ which has eluded a uniform codification.¹⁷ While

association, and to political rights." Comprehensive Human Rights Agreement, Part X, International Verification by the United Nations, § 12, in *The Guatemala Peace Agreements*, United Nations Department of Public Information (1998), p. 30.

12. The Commission had as one of its purposes, to "formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process." *Oslo Accord*, *supra* note 5, at ____.

13. Guatemala ratified the Genocide Convention in 1949 and deposited its ratification in 1950. In the Guatemalan Criminal Code, genocide is punishable by a sentence of twenty to thirty years in prison. See Article 376 Criminal Code, Decree 17-73 as amended (1997).

14. Guatemala ratified the Additional Protocols to the Geneva Conventions in 1987, and the Geneva Conventions themselves in 1952. The Commission determined that Additional Protocols II "reflected the uses and practices universally accepted as customary international law and/or as juridical principles universally accepted based on common Article 3. This is reason why these norms should be considered as a valid and relevant point of reference." *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. VIII Legal Framework, ¶ 1685. Author's translation.

15. *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶ 1647-48.

16. While the Commission does not settle on a particular definition for crimes against humanity, the following analysis best reflects its understanding of the unique elements of those crimes: "The Tribunal in the *Justice Case* affirmed that crimes against humanity encompassed inhumane acts and persecutions that were "systematically organized and conducted by or with the approval of government." The implications of this aspect of its decision were not lost on the Tribunal, which observed "Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions," - that is, become international crimes. At the same time, those charged with crimes against humanity could not escape liability by claiming the traditional immunities extended by international law to acts of state and to individuals whose official positions ordinarily entitled them to claim immunity from the jurisdiction of other states." Diane Orentlicher, *Genocide and Crimes Against Humanity: Early Warning and Prevention, December 8-10, 1998, United States Holocaust Memorial Museum Genocide and Crimes Against Humanity: The Legal Regime*, Citations omitted. On file with author.

17. Crimes against humanity have been codified with varying terms and definitions in the post world-war two international tribunals, including most recently the ones approved by the Security Council for

the Commission makes note of the human rights protections contained in the Guatemalan Constitutions in force during the conflict, it also points out that these provisions were systematically violated by successive governments. Finally, contemporary interpretations of international human rights law were applied based on the understanding that the nucleus of fundamental rights framing the analysis of the violence were all derived from the essential principles contained in the Universal Declaration of Human Rights, and therefore part of binding customary international law or internationally recognized principles of law,¹⁸ from the time the conflict began in 1962.

II. ANALYSIS OF RESPONSIBILITY

This entire framework was applied to both the State and the guerrilla.¹⁹ However, the acts committed by the guerrilla were referred to as "incidents of violence" or violations of international humanitarian law, and not human rights violations, *per se*. The Commission was reluctant to find that the guerrilla had committed human rights violations in the strict sense of the word, inasmuch as the guerrilla did not have the same affirmative obligation to promote and guarantee human rights as do the States. Therefore, the concept of "incident of violence" referred to in the Oslo Accord became the relevant term.²⁰ However, it was determined that both the military and the guerrilla were obligated to comply with humanitarian law norms during the entire period of the conflict.²¹

Yugoslavia and Rwanda. The most recent codification is contained in the Rome Statute of the International Criminal Court, 1998. However, even the Rome Statute acknowledges that alternative definitions may be valid. See Article 10, Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

18. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. VIII Legal Framework, ¶ 1668.

19. The guerrilla actions were judged under the framework of International Humanitarian Law that, according to the Commission, included the fundamental principles underlying international human rights law generally. Thus, the guerrilla was not said to have committed human rights violations *per se*, because the guerrilla was not obligated in the same way as the State to provide certain affirmative guarantees. Rather the guerrilla was said to have violated international humanitarian law and through those actions offended fundamental principles of human rights. *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶ 1658. In order to achieve parity in the analysis and assure the most equal treatment of both parties, both sources of law were applied then, in principle, to both parties and regarded, in any event, as being mutually reinforcing and consistent in their goal of protection of fundamental rights such as life, security of the person, liberty, and due process. *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶ 1676.

20. *Id.* ¶ 1662.

21. There is one reservation expressed regarding the application of humanitarian law, in consideration that the threshold for establishing an internal conflict was not necessarily reached during every moment of its thirty-four year duration. The obstacles to consistent levels of documentation for a conflict that endured over such a long period of time is a significant one in an exercise designed to render specific judgments. However, it is interesting to note that laws embodying the essence of humanitarian law protections and perhaps implementing legislation for Common Article 3 and the Additional Protocol II, can

Thus, the guerrilla was evaluated on the basis of its compliance with humanitarian law obligations under Common Article 3 and Additional Protocol II to, for example, treat prisoners in a humane manner, refrain from summary executions, avoid injury to civilians, refrain from inflicting torture, from destroying private property, engaging in pillage, etc. Regarding forced disappearances commonly attributed to the State because of the peculiar requirement that the State have denied custody of the victim for the purpose of obscuring their fate,²² guerrilla actions that resulted in the disappearance of persons were said to constitute an infringement of the right to life, liberty and physical security and a violation of humanitarian law, but not a human rights violation. In contrast, Guatemalan State responsibility²³ was framed in terms of the direct commission of human rights violations and violations of international humanitarian law.

Due to the nature of its mandate, the Commission's analysis of responsibility under this broad human rights framework focused on institutional, rather than individual responsibility for human rights violations.²⁴ In addition to the acts of its own agents, violations were attributed to the State where individuals acted with the collaboration, consent, support, tolerance or acquiescence of State institutions, agents or public officials,²⁵ or where individual violent acts related to the armed conflict went uninvestigated and unpunished, even when there was no indication the State had prior knowledge of those particular acts.²⁶ In this way, the persistent impunity for human rights violations characteristic of the conflict was attributed to the State's systematic failure to act on behalf of victims or to investigate or punish violators. Additionally, patterns of

be found in the Guatemalan Penal Code. See, e.g., Penal Code Decree # 17-73 as reformed, 1997, Art. 378. Crimes against humanitarian obligations: Whomsoever violates or infringes humanitarian obligations, laws or agreements regarding prisoners or hostages of war, those wounded in battle or whomsoever commits any inhuman act against the civilian population or against hospitals or places designated for the wounded will be sentenced from twenty to thirty years in prison. Author's translation. The sentence for this crime is the same sentence provided for in the case of genocide. *Id.* at Article 376 (Genocide).

22. Guatemala has the dubious honor of being the site of the first documented mass disappearance in the Americas. The case of the "28 disappeared" document in the Commission's Report occurred in 1966. Recently released CIA documents affirm that the then Guatemalan government had the victims in custody and killed them, vowing to deny they had ever been held by the State. To date, there has been no official acknowledgement of this incident. See Illustrative Case No. 68 in Annex I, Vol. I of the Commission's Report.

23. *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. VIII, Legal Framework, ¶¶ 1656, 1658, 1659.

24. I will only refer to the analysis of State violence, given that only the State was found to have committed genocide and the State was found responsible for ninety-three percent of the violations registered by the Commission directly. The guerrilla was found responsible for three percent of the violent incidents registered.

25. The army, civil defense patrollers, military commissioners and police comprised the great majority of responsible institutions whose acts were attributed to the State.

26. *Guatemala: Memory of Silence*, Vol. II Ch. VIII Legal Framework, ¶ 1656.

deliberate obstruction of justice by State agents are amply documented in the report.²⁷ Impunity is a phenomenon that the United Nations Human Rights Verification Mission in Guatemala (MINUGUA),²⁸ pointed to in 1995 as the single largest obstacle to progress in the respect for human rights in Guatemala, and that fact continues to represent a major point of contention in evaluating advances in the peace process.²⁹

The process of investigation included not only the gathering and analysis of relevant testimony and documentation, but also involved an examination of the country's broader political and social history. The result was an understanding of the dynamics and *modus operandi* of the violence. Through the documentation of reiterated and similar practices over time and geographic locations, much was learned about the levels of planning and coordination involved in the perpetration of the human rights violations. Moreover, because the Commission's goal was historical clarification, that is to say, truth-seeking from the historical and human rights legal perspectives, the focus on institutional rather than individual actions became the most appropriate vehicle for substantiating concrete recommendations. By demonstrating how State institutions had become distorted in the service of undemocratic, destructive and violent ends in the past, the Commission's recommendations became directly relevant to the peace process. Thus, the focus became the implementation of measures designed to guarantee that the past would not repeat itself and that the promotion of fundamental human rights would be a priority for the future. The implementation of measures designed to guarantee that the past would not repeat itself as well as promoting the effective future enjoyment of fundamental human rights was demonstrated.³⁰

The Commission's overall conclusion on State responsibility observed that:

27. *Id.*, See especially the discussion on "Forced Disappearances" in Vol. II Ch. II, § XI, specifically regarding the element of official denial of custody and on impunity in Vol. III. Ch. XVI on "Denial of Justice," ¶ 2634.

28. Verification reports at MINUGUA's website at <<http://www.minugua.guate.net>> (visited Feb. 18, 2000.)

29. The still unsolved murder of Monseñor Juan Gerardi, head of the church's human rights office, two days after his presentation of the final report of the Historical Memory Project (Recuperacion de la Memoria Histórica-REHMI) on the conflict, was an important theme in the presentation of the Historical Clarification Commission Report ten months later. That case continues to highlight the difficulty of overcoming the intolerance, violence and impunity generated by the conflict. Witnesses, prosecutors and judges have left Guatemala, often with the aid of the international community, because of death threats related to their participation in helping carry that investigation and prosecution forward.

30. The recommendations are organized under the following categories: (1) measures for remembering the victims; (2) reparations; (3) measures for promoting a culture of mutual respect and observance of human rights; and (4) measures designed to strengthen the democratic process.

Most of the human rights violations made known to the Commission and which were perpetrated by State agents or allied para-military groups came about with the knowledge, or by order of the highest military authorities The results of our investigations demonstrate that, in general, the excuse that mid-level commanders acted with a wide margin of autonomy . . . is unsubstantiated and totally lacking any basis whatsoever.³¹

These findings, while attributing direct responsibility to the State for the overwhelming majority of the violence, pointed out the specific role of the executive, judicial,³² and legislative branches in committing human rights violations and, ultimately, in fashioning the counter-insurgency State. The Report also noted the active participation of various sectors of civil society, including political parties, economically powerful groups, churches, members of the university community, etc., in the counter-insurgency effort. On the basis of an overall historical analysis, the Commission concluded that the conflict had been more than a war between two armies, with the State on one side and the guerrilla on the other. Rather, it represented the consequences of employing the State machinery to carry out a policy of intolerance, exclusion, and racism.

The Oslo Accord, by authorizing the application of a broad human rights legal framework, gave Guatemala the opportunity to reorder its priorities and objectives and, in turn, create new expectations about the role of the State and its institutions in society. This combined focus on institutional action and historical context, was also the point of departure for the Commission's exploration of whether genocide had been committed.

31. Speech by Christian Tomuschat upon the occasion of the presentation of *Guatemala: Memory of Silence*, Feb. 25, 1998, on file with author. Author's translation. Tomuschat continued:

On the basis of having concluded that genocide was committed, the Commission also concludes that, without prejudice to the fact that the participants in the crime include both the material and intellectual authors of the acts of genocide committed in Guatemala, State responsibility also exists. This responsibility arises from the fact that the majority of these acts were the product of a policy pre-established by superior order and communicated to the principal actors. The State also failed to comply with its obligation to investigate and punish the acts of genocide committed within its territory.

Id. See also *Guatemala: Memory of Silence Report of the Commission for Historical Clarification Conclusions and Recommendations*, English Version p. 38-41, or ¶ 105-126 (visited Feb. 18, 2000) <<http://www.hrddata.aaas.org/ceh/report/english/>>.

32. The Report contains an entire section on the denial of justice, where it describes the complicity in and direct perpetration of human rights violations by the judicial branch during the conflict. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XVI, Denial of Justice. Later on in Vol. IV on the consequences of the conflict, there is a sub-heading discussing the phenomenon of impunity in Guatemala.

III. HISTORICAL ROOTS OF GENOCIDE IN GUATEMALA

The Commission's final report containing its analysis, conclusions and recommendations, *Guatemala: Memory of Silence*, was made public on February 25, 1999. The Commissioners attributed the roots of the conflict to the profound and historical divisions in Guatemalan society. Those divisions, at the same time, ideological, social, economic and political fueled the early and rapid formation of a counter-insurgency State under the auspices of a National Security Doctrine whose stated priority was the defeat of the "internal enemy." The Report, even while acknowledging that the United States played a role³³ in the initiation and development of the conflict through its hegemonic foreign policy, interference in Guatemala's internal affairs and sometimes "direct . . . support . . . [for] some of the State's illegal operations,"³⁴ nevertheless concluded that the diehard roots of the conflict were homegrown.³⁵

One of the most deeply rooted divisions in Guatemalan society is manifested in the extreme racism against the indigenous population, which comprises a significant portion of the nation's citizenry.³⁶ While that racism is

33. It has been suggested that a "truth commission" be formed to inquire into the United States role in Guatemala leading up to and during the conflict in Guatemala. This moral inquiry could likewise take the form of legal conclusions about the obligations of States in relation to the human rights of citizens of foreign nations. Given the increasing sensitivity to international obligations to protect human rights and the advancement of human rights law, such an inquiry would contribute a great deal to illustrating the way in which countries might confirm their commitment to protect those rights. The excuse that the cold war demanded drastic responses would put the United States on the same side of the debate as the Guatemalan security forces responsible for the atrocities and who have voiced those same arguments.

34. Speech, Professor Tomuschat, on occasion of the presentation of *Guatemala: Memory of Silence*, February 25, 1999, text on file with author. Author's translation.

35. The *Oslo Accord* mandated that the Commission consider both internal and external factors in its clarification of the causes of the conflict. The Commission also alluded to the provision of military training for the Guatemalan guerrilla by Cuba and noted that other than the United States declassified documents, other countries, like Argentina and Nicaragua failed to respond with information requested by the Commission. Israel responded that it had no information about official aid and that it could not control the private activities of its citizens abroad. *Guatemala: Memory of Silence*, Vol. I, ¶ 129. There is literature supporting allegations of direct training and involvement of intelligence specialists from Israel and Argentina aiding the Guatemalan military, particularly in urban counter-insurgency operations and during the period when the United States withdrew some of its military support in the late 70s. Clearly, however, the overwhelming aid and support for the development of the counter-insurgency apparatus came from the United States. See *Guatemala: Memory of Silence*, Vol. I, Annex 7, a graph detailing the international context of the conflict from 1962-96.

36. The data on the number of indigenous people in Guatemala is debated, as is the question of the criteria for determining ethnic identity. The estimates range from forty to sixty percent of the population. The present government has asserted that the indigenous population does not exceed forty percent while others claim that this group comprises 60-80% of the population. This difference of opinion not only reflects the unreliability of the censuses, but differing concepts of how to determine ethnic identity. The Commission relied heavily on the victims' self-attribution of identity as well as on information contained in national censuses. The national censuses relied on in the REPORT, contain data regarding numbers of Indigenous and Ladino population in each of the municipalities.

not often acknowledged publicly, there is a clear historic reality demonstrating that the indigenous peoples have not been treated as full citizens. Whether your measure is the level of investment of public monies in areas primarily populated by Mayans,³⁷ the overwhelming poverty, low life expectancy, among other measures of well-being, the absence of indigenous languages in the justice system, public education or other services, or whether it is the not-so-distant reality of compulsory forced labor for indigenous peasants, the message is clear. The deep-seated racial hatred and mistrust represented by a long history of repression and severe discrimination precipitated the grossly disproportionate levels of violence directed by the State against the Mayan-indigenous peoples within the overall context of this fratricidal conflict. The historic attribution of particular characteristics to the "indigenous masses," an integral part of the racist construct, determined the choice of military tactics against geographically defined portions of this group when it was determined that 'they' constituted a threat.

The ethnically Mayan-indigenous population suffered a full eighty-three percent of all of the violations registered directly by the Commission.³⁸ Without underestimating the brutality and intensity of the State-sponsored violence against the Ladino³⁹ or non-indigenous population,⁴⁰ the acts of

37. There are twenty-one separate ethnic identities that comprise the Mayan-indigenous population of Guatemala. The remaining indigenous groups are the Xinca and Garifona. They have historically inhabited primarily the Atlantic coast regions of the country.

38. "[T]he Mayan population has paid the highest cost for the irrational logic of the armed conflict, particularly during the years of heaviest violence from 1978-83 when, in various regions of the country the military identified groups of the Mayan peoples as natural allies of the guerrilla. This false conviction increased the number and aggravated the nature of the human rights violations that were perpetrated against the Mayans. This fact is evidenced by the aggressive, racist and extremely cruel nature of the violations that resulted in the massive extermination of defenseless Mayan communities." Presentation Speech, Professor Christian Tomuschat, Feb. 25, 1999, on file with author. Author's translation.

39. The "Ladino" population in Guatemala refers to the identity with group comprised by those descended from the Spanish conquerors. The large mestizo, or mixed Mayan-Spanish population, comprises the largest portion of the 'Ladino' group. This group identifies itself and is identified as separate from the Mayan-indigenous ethnic group. *Guatemala: Memory of Silence*, Vol. I, Ch. I, Sec. II, Historical Causes, ¶ 250. See also generally, Vol. III, Ch. II, Sec. XVIII *Violations of the Rights to Existence, Integrity and Cultural Identity of the Indigenous Peoples*.

40. There is no parallel among the documented abuses against the Ladino population. Members associated with particular professions or types of organizations, such as unions, peasant leagues, opposition political parties, law and humanities professors, schoolteachers, student organizations, the church and even the judiciary were singled out for attack. Indeed, based on the Commission's information if genocide against political groups was recognized, some of the political and union organizations would have had very credible claims that genocide had been committed against them. But, in neither of these cases is there a wholesale attack on entire towns, killing everyone and destroying homes and means of subsistence. Some may claim this reflects the difference between urban and rural guerrilla warfare tactics. I am unconvinced. As I see it, the ethnic identification among Ladinos meant that they could not entirely destroy the "other," because they would be destroying a part of themselves. The divisions among Ladinos were based primarily on class, although political association and other perceptions about "loyalty" also played a role.

genocide, the report concludes, reflect a strategy and approach that maximized the numbers of dead, tortured and disappeared, based on the ethnicity of the victims.⁴¹

There is a measure of justice in revealing the stark reality of a purpose behind the deaths of tens of thousands and the suffering of hundreds of thousands more human beings. In the end, the Commission's finding of State-sponsored acts of genocide against groups of Mayan-indigenous peoples placed squarely in the center of national debate one of the deepest fissures in Guatemalan society, the struggle over the recognition of Guatemala's multiethnic and multicultural national identity.⁴²

IV. THE TRUTH ABOUT GENOCIDE

Truth has many attributes, including an individual and social significance.⁴³ While individual truth may vary according to perspective, social truth demands the airing of multiple coexisting and often divergent, points of view. The truth about genocide in Guatemala, while determined by a legal definition, must take into account the experiences and perspectives of both the aggressors and the victims.

The truth of genocidal intent centers around the process of the construction of the "other," as the enemy. Statements by public officials, written references contained in military documents and testimonies from members of the military⁴⁴ indicated the choices of strategy and tactics at the command levels. Those references betray the belief that the indigenous population possessed certain inherent characteristics such as belligerency, unpredictability, gullibility, mistrust, and defiance of the State and its institutions. The group the Report refers to as "Mayan-indigenous peoples," was identified in military documents as the "indigenous highland peasants" or the "great masses of indigenous people."⁴⁵

41. *Guatemala: Memory of Silence*, Vol. III, Ch. II, §. XXI, *Genocide*, ¶ 3584-91.

42. As part of the peace package, an Accord on the Identity and Rights of Indigenous Peoples was negotiated. All of the Accords can be found at the United Nations Verification Mission website, (visited Feb. 18, 2000) <<http://www.minugua.guate.net>>. The constitutional reforms which related to the implementation of the Accords were defeated in a 1999 referendum.

43. The Report of South Africa's Truth and Reconciliation Commission [hereinafter *TRC Report*] identified types of truth: factual or forensic truth, narrative or individual truth, social or restorative truth. This last version of the truth, the TRC refers to as "the kind of truth that places facts and what they mean within the context of human relationships – both amongst citizens and the State and its citizens." *TRC REPORT*, Vol. I, Ch. 5 p. 113.

44. While secrecy was mandated around the identity of witnesses who spoke with the Commission, the testimonies themselves are quoted throughout the text. Cites are to cases or key witnesses by number. Occasionally, the cite refers to the quality of the witness, by referencing them as a former or actual member of the armed forces and according to their rank, e.g., soldier, official or high-level official.

45. See the discussion of the State's general policy perspective in ¶¶ 3226 to 3239, *Guatemala: Memory of Silence*, Vol. III, Ch. II Sec. XXI, *Genocide*.

The perceived propensity to sympathize with or to be part of the guerrilla, based on monolithic preconceptions, is repeatedly affirmed by military strategists. At the same time, references to the "great masses of indigenous people" and their general situation of poverty and oppression serve to enhance the stereotype of the Mayans⁴⁶ as natural enemies. Rather than deriving an obligation to address the poverty or marginalization identified as the source of disaffection, these elements become yet another justification for the perception of the "other," as enemy. The conclusion of a military intelligence manual is representative of this attitude when it asserts that, "[T]he enemy has the same sociological characteristics as the inhabitants of our highlands."⁴⁷ This clear allusion to the Mayans, given that they constitute the overwhelming majority of the inhabitants of the highland areas of Guatemala is characteristic of the double-speak that attempts to rationalize and, at the same time, obscure an entrenched sense of the "other."

The environment that permitted the creation of this construct is aptly summed up by Guatemalan anthropologist, Marta Casaus Arzú. Upon completing an empirical study about attitudes towards race and class among members of Guatemala's dominant classes, she reports that in addition to the expressed preferences for miscegenation or continuing segregation as a means of containing or resolving "the indigenous problem," some reported "preferring ethnic cleansing . . . between four and ten percent . . . indicating their choice of drastic and profoundly intolerant solutions for the indigenous population. This sector expresses on various occasions being in favor of the extermination of the indigenous population, of their disappearance both physically and culturally."⁴⁸

Alternatively, or perhaps additionally, the military tactic of destruction was motivated by a fear that the support of this large community-based rural population could result in a serious political and military challenge, including the possibility of international recognition for the guerrilla forces were they able to wrest control over a part of the national territory. In either event, the Commission concluded that at the time and in the regions under consideration, the enemy was conceived in ethnic terms, and that the violent acts constituting genocide comprised, in turn, the implementation of the stated military objective

46. The Commission resolved the issue of identity by reference to subjective and objective manifestations of this construct. The Constitutional recognition of the existence of Mayans, the allusions in official documents reflecting perceptions of Mayans or indigenous as essentially a single group and the self-identification of the Mayan-indigenous peoples based on a number of factors. (See Akayesu, shared language and geography).

47. *Guatemala: Memory of Silence*, Vol. III Ch. XXI, *Genocide*, ¶ 3229.

48. *Id.* at Vol. III *Genocide*, ¶ 3235, citing *Guatemala: Lineaje y Racismo*, Marta Casaus Arzú, 1995, p. 274. Author's translation.

to destroy the guerilla and its parallel organizations. However, this time the destructive intent was directed at a particular ethnic group.⁴⁹

In the Commission's view, the motive for these genocidal acts (*e.g.*, to win the war) was distinguishable from the intent with which they were carried out. Thus, it was concluded that in each of the four regions studied, the totality of the killings, torture, including rape and other forms of sexual violence, the destruction of entire villages and Mayan religious and cultural symbols, community and religious leaders among other atrocities "perpetrated by State agents or allied para-military groups with the knowledge, or by order of the highest military authorities,"⁵⁰ were all carried out with the intent to destroy a substantial part⁵¹ of the Mayan-indigenous peoples present in those areas of operations at the time of the attacks.⁵²

49. *Guatemala: Memory of Silence*, Vol. III, Ch. XXI, Genocide, ¶ 3256.

50. Speech of Professor Christian Tomuschat on occasion of the presentation of the Commission's Report, 25 Feb. 1999.

On the basis of having concluded that genocide was committed, the Commission also concludes that, without prejudice to the fact that the participants in the crime include both the material and intellectual authors of the acts of genocide committed in Guatemala, State responsibility also exists. This responsibility arises from the fact that the majority of these acts were the product of a policy pre-established by a superior command and communicated to the principal actors. The State also failed to comply with its obligation to investigate and punish the acts of genocide committed within its territory. Author's translation.

51. The author stated in *Guatemala: Memory of Silence* Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3225.

The destructive capacity of the aggressor is determined . . . by the physical scope of his actions, that is, the portion of the population capable of suffering the attack given the area within which the destructive acts occurred. So, for example, the genocidal acts committed by a single military unit that operated in a particular region can only be analyzed in relation to the overall population of a particular ethnic group inhabiting that particular region. Consequently, in determining whether a substantial portion of the group was affected, the analysis measured the destruction proportionally according to the numbers of people belonging to the ethnic group that fell within the physical scope of the operation.

Author's translation, original in Spanish follows.

La capacidad destructiva de la acción del autor está determinada, a su vez, por su área de dominio que es la parte de la población sobre la cual podría ejercer las acciones de exterminio. Por ejemplo, las acciones de genocidio que cometió una unidad militar que operaba en una determinada región, únicamente se pueden analizar con relación a la población de determinado grupo étnico que se encontraba en esa región. En consecuencia, para determinar si se afectó a una parte substancial del grupo, el análisis se realizó tomando en cuenta la proporción de población del grupo étnico que se encontraba bajo el área de dominio del autor."

52. The study analyzes the totality of acts and circumstances from 1980-83 in these regions, but concludes that acts of genocide occurred there during 1981 and 82, the period representing the crescendo of destructive violence. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI Genocide, ¶ 3586 and ¶ 3601.

V. THE LEGAL ANALYSIS

The International Criminal Tribunal for the former Yugoslavia (ICTY) in its Rule 61 Decision in the case against Karadzic and Mladic⁵³ provided the Commission with an important framework for the discussion of intent. That decision validated the idea that genocidal acts could occur even where the overall objective of the aggressor was not necessarily genocide. An ICTY Trial Chamber laid out three categories of analysis for interpreting the specific intent requirement for genocide:

1. the general political doctrine of the aggressor;
2. the repetition of discriminatory and destructive acts; and
3. the perpetration of acts which violate or are perceived by the aggressor as violating the foundations of the group, whether or not they constitute the enumerated acts prohibited in genocide definition, and so long as they are part of the same pattern of conduct.⁵⁴

This third category permitted the consideration of acts traditionally qualified as representative of the concept of "cultural genocide," and historically excluded from the genocide definition, which is limited to the construct of physical or mental⁵⁵ destruction. The Commission considered acts of cultural destruction as signposts of the subjective intent of the attackers, when they were committed together with the acts of physical destruction specifically proscribed in the Genocide Convention. Thus, incidents of bombing of sacred Mayan lands used for ritual worship or the deliberate burning of 'huipiles,' traditional dress reflecting both the geographic origin and ethnicity of the wearer, or the prohibition on ritual burial of the dead were indicative of an intent to destroy the group, as such.

53. ICTY Case No. IT-95-5-R61 & No. IT-95-18-R61, Karadzic and Mladic, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, July 11, 1996.

54. ICTY Case No. IT-95-5-R61 & No. IT-95-18-R61, Karadzic and Mladic, Decision of Trial Chamber I, Review of Indictment Pursuant to Rule 61, 11 July 1996, ¶ 94.

55. Art. II(b) of the Genocide Convention reflects this view when it prohibits acts "causing serious physical or mental harm to members of the group" when they are committed with the intent to destroy the group, in whole or in part, as such. See also Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* (1997). "The process of 'systematic human destruction is not only limited to physical extermination but also extends to other forms of dehumanization.' Genocide can be demonstrated by an intent to destroy, wholly or partially, physically or emotionally, an ethnic group." *Id.* at 338, (emphasis added), (citation omitted). See also Adrien Katherine Wing and Sylke Merchán, *Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

On the other hand, the religious and cultural significance that the Mayans attribute to the cultivation of the land, and particularly of maize, also weighed in on a second part of the analysis. The all-encompassing destruction represented by the 'scorched earth' tactics left fleeing survivors, who lived under marginal economic conditions in any event, with virtually no means of subsistence, including no access to food, water, or shelter. These devastated communities compelled to flee into unsettled mountain areas to seek refuge from attack, were especially prone to disease in their weakened state. This led to the conclusion that the destruction of homes and crops and entire villages that formed part of the military attack, in addition to demonstrating a genocidal intent, constituted the deliberate infliction of conditions of life calculated to bring about the partial physical destruction of the group.⁵⁶

The overall approach to the issue began through the evaluation of information contained in the database that registered the violations reported to the Commission directly. Measured by numbers of deaths, the years from 1981-83 were identified as constituting the most violent period of the conflict. An analysis of military strategies and patterns of violence leading up to and following that period, including levels of guerrilla activity, revealed three stages of military action that occurred in each of the four regions where acts of genocide were documented.

The first stage, beginning prior to 1980, demonstrated a pattern of selective repression⁵⁷ characterized by the military targeting of the local community, religious, and political leaders for death. These types of actions increased in frequency over time and continued appearing in the second stage as well. The second-stage violence reflected as its dominant mode, "indiscrim-

56. Art. III(c) Convention for the Prevention and Punishment of Genocide.

57. This region is comprised by three municipalities in the northern portion of the Quiché province, Chajul, Cotzal and Nebaj. What follows is a description of the pattern of selective massacres in the Ixil region. The security forces surrounded the community and gathered the people in the town square or church . . . :

- 1) The women and children are separated from the men, (separation);
- 2) One hooded person identifies the guerrilla collaborators, this person generally being from the same community; (selection);
- 3) Before the execution, biblical references are used, "Judgment day has come." "We are going to divide those who are going to heaven from those who are hellbound;"
- 4) The execution is carried out publicly, (killing).

Guatemala: *Memory of Silence*, Vol. III, Ch. XXI, Genocide, ¶ 3284. Author's translation.

inate massacres"⁵⁸ and "scorched earth" tactics, where survivors were compelled to either face starvation in the mountains or turn themselves in to suffer death, torture or mistreatment. During the third stage, military efforts reflect a focus on measures to consolidate the control gained through the campaign of terror that resulted in the destruction and displacement of large portions of the population. Offers of amnesty were made, based on the idea that the fleeing population was somehow guilty of offenses. Effectively, the offer of amnesty constituted an exchange of relative safety for signing a loyalty oath and submitting to military control. The entrenchment of total military control over the rural areas was achieved through the consolidation of the system of military commissioners,⁵⁹ Civilian Defense Patrols and the organization of model villages under the auspices of national and local "reconstruction" committees. During this final period, rapes, killings, disappearances, and torture continued on a diminished scale against this captive population.

The selective repression characteristic of the first stage debilitated the communities⁶⁰ and left them without resources to organize their own defense. During this stage, apart from spreading terror, the military gathered information for intelligence assessments aimed at destroying the capability for local communities to organize among themselves. The army often used its intelligence capabilities, including masked informers, to forcibly recruit, torture, or other wise single-out religious and political leaders, health workers, and teachers, etc. Often members of these same communities were compelled to participate in or witness the humiliation, torture, and death of respected members of their own communities. The act of targeting leaders was

58. In my view the use of the word "indiscriminate" is somewhat misleading given the argument that indigenous peoples were specifically being targeted. The idea being conveyed is that there was no effort to separate out people as targets based on some objective criteria. Rather, the fact of ethnic affiliation was sufficient to determine that they were a target, even if, as in the case of infants and young children, they could not be said rationally to pose any possible military threat.

59. The numbers of military commissioners increased greatly in the 1960s. Previously, apart from military recruitment, the commissioners were used as middlemen to enforce the system of compulsory seasonal labor imposed on the indigenous peasants and at other times as the middlemen in the business of supplying seasonal agricultural laborers to the large-scale plantations, found primarily in Guatemala's southern coast. The REPORT talks about the role of military commissioners and civil defense patrollers in the conflict and as part of the military strategy. See *Guatemala: Memory of Silence*, Vol. II, Ch. II, Sec. V and VI, respectively.

60. Based on an interpretation of references contained in various Guatemalan Constitutions since 1945, the following is a definition of the designation "community:" "(a) the terms 'groups' or 'communities' allude to entities that have a collective existence. It is not just a matter of individuals. It is the collectivity that is the subject of rights and has the right to exist as such; (b) the concept of 'community' supposes the existence of a collective identity and of an historical and socio-cultural identity that gives it cohesion. It does not refer to a recently formed group. One is born and lives in the community." *Guatemala: Memory of Silence*, Vol. III, Ch. II, Section XVIII, Violations of the Rights to Existence, Integrity, and Cultural Identity of the Indigenous Peoples, ¶ 2861.

considered by the Commission to be directed at destroying the foundations of the Mayan communities under attack. While the Commission refers to the deliberate singling-out of leaders as an indication of intent to destroy the group, it is the second-stage violence that exposes the determination to destroy the group. During this stage the attacks became more generalized, targeting not only leaders but also all members of the community, including men, women, children, infants, and the elderly. As one declassified CIA document put it: "The army's well-documented belief⁶¹ that the indigenous-Ixil population is almost totally in favor of the EGP, has created a situation where you can expect that the army will give no quarter to combatants and non-combatants alike."⁶²

Not only did the scope of the violence broaden, but also the mobilization of forces reflected high-level coordination and planning in the attacks. For example, the Ixil region and the northern strip of the Huehuetenango Department (Maya-chuj and Maya-q'anjobal) where different military units were mobilized even included the use of air support. In the municipality of Zacualpa, Quiché (Maya-k'iché) the Commission identified a force of three platoons aided by civil patrollers, with possible collaboration from a special military strike force.⁶³

In other regions where there was a less apparent showing of military might, deliberate actions were taken to exploit local tensions between the Ladino-controlled municipal township and the primarily indigenous villages, over local resources. In the municipality of Rabinal (Maya-achí) in Alta Verapaz, the Commission's information indicates the violence was primarily perpetrated by a local military detachment together with Civil Defense Patrols.⁶⁴

61. The constituted violations that represent the predominant mode of destruction in the period when genocide occurred were, by definition, attacks on defenseless civilian population. Defenseless is defined by the Commission's Report as a situation of total or relative defenselessness, given that in some communities they tried to defend themselves with machetes and stones against attacks by armed soldiers. Thus, whether the Mayan-Ixiles sympathized or not with the EGP faction of the guerrilla, is irrelevant for determining whether the attacks were massacres. This is consistent with the perspective of human rights and humanitarian law.

62. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3253, citing a partially declassified CIA document released to the Commission by the United States Government.

63. The Gumarcaj Strike or Task Force took its name from the seat of the Quiché government destroyed by the Spanish as part of its conquest of Guatemala. Gumarcaj is on the outskirts of the City of Santa Cruz del Quiché and Mayan ritual ceremonies are still celebrated there.

64. The Civilian Self-Defense Patrols were formed as part of the military strategy to control the local population and prevent the entrenchment of the guerrilla in the countryside. The patrollers were obligated to patrol regularly and report their observations to the military commissioner or local military commander. Often the patrols resulted in the capture of a person or persons to be handed over to the military or other authorities or they were attacked directly by the patrollers for suspected guerrilla activity. The patrollers were also victims of the violence when they were obliged to commit acts of violence against others, or when they were themselves attacked or killed by the military. Patrolling was one form of demonstrating fealty but accusations also made patrollers themselves targets. They were considered by the Commission as

This modality was also used in areas where larger numbers of troops were deployed. For example, the Ixil region and the northern strip of Huehuetenango Department (Maya-chu and Maya-g'anjobal) different military units were mobilized and included the use of air support. The methods used to promote attacks by members of the Mayan-indigenous ethnic group against members of their own ethnic group, were interpreted as a deliberate strategy directed at destroying the group's very foundations.

In each of the four regions, the report explores the strategic location as a transport corridor for the guerilla and an area where the guerilla had the political sympathy of members of the local population because of organizing work with peasant leagues that had been formed under the Arbenz Government in the 1950s, in conjunction with land reform efforts. In Rabinal, it is not unlikely, according to the Commission's account, that one of the factors that determined the target group was the Achí communities' reluctance to give up communal lands to a large dam project which was considered beneficial to other local interests. On the other hand, Rabinal also represented a geographically-strategic location as a transport corridor for the guerrilla and an area where the guerrilla had the political sympathy of members of the local population because of organizing work with peasant leagues formed under the Arbenz Government in conjunction with land reform efforts under that government. These additional layers of motive, all of which were related to the conflict and its underlying causes, did nothing to dissipate the Commission's conviction that the acts under consideration in each of the four regions during the 1981-83 period, demonstrated the same pattern of genocidal intent and action. The determination to enter the second stage of the violence was a deliberate military decision in the Commission's view.

At the same time that the attacking group's general political doctrine identified members of the group, "Mayan-indigenous peoples" as the target, the similarities in the patterns of violence within and among the four regions and the disparate impact of the violence on the Mayans as opposed to the Ladino population inhabiting the same geographic areas, reflected a pattern of repetitive and discriminatory⁶⁵ acts of violence.

agents of the State responsible for acts of violence, however, the obligatory nature of the patrols also constituted a violation of the patrollers' right to freely exercise their rights of association, as well as an illegal delegation of State police powers. The specific section of the PACs, explores the operation of the patrols, their formation, training, structure, functions, and their role in the overall counter-insurgency strategy.

65. The conclusion that the acts were discriminatory is supported in two ways. One, the statistical conclusion showing a disparate proportional impact between numbers of Indigenous and Ladino victims from among the population in each of the areas studied. Second, the narrative portion relates instances where the Ladino population was specifically excluded from attack or warned to leave the area in advance of the attack.

The patterns in the way the massacres⁶⁶ were conducted reflected planning on the one hand and measures designed to maximize the number of victims, on the other. They were carried out on market days when people from outlying areas would gather in the towns, or the community would be called to gather in the town center, only to be surrounded and attacked. Women and children were often separated from the men in order to begin the macabre ritual of torture, killing, and destruction. Sixty-four percent of the massacres occurring during the thirty-four year conflict took place between June 1981 and December 1982.

Of particular relevance to the Commission was the observation that:

When faced with all the available alternatives to combat the insurgency, the State opted for the one that was most costly in human lives from among the civilian non-combatant population. Ruling out other options, such as political struggle to arrive at agreements with the non-combatant civilian population it considered disaffected, their relocation to areas outside the conflictive zones, or the arrest of insurgents, the State opted for the annihilation of those it considered to be its enemies. The State made this determination despite the fact that it had access to the sources of information necessary to identify the insurgent combatants, assess their military capacity, and enable them to distinguish the insurgents from civilian non-combatants.⁶⁷

66. The Commission defined massacre as an attack on the defenseless. In the cases where there was resistance, if it was so disproportional to the attack that the resistance was futile, the incident was still qualified as a massacre.

“... What characterizes the majority of the massacres, apart from the executions, is an accumulation of grave violations of human rights, such as torture, cruel and inhuman treatment, forced disappearances and rape, and also aberrant acts such as the mutilation of cadavers, and the destruction of personal, communal, and religious property.

The CEH [Historical Clarification Commission] has defined a massacre as the arbitrary execution of more than five people, committed in a single place and as part of a single operation, when the victims are in a state of absolute or relative defenselessness.”

“... Lo que caracteriza a la mayoría de las masacres, además de las ejecuciones, es una acumulación de graves violaciones de derechos humanos, como torturas, tratos crueles, desapariciones forzadas y violaciones sexuales, y también hechos aberrantes, tales como la mutilación de cadáveres, y la destrucción de bienes de personas, comunitarios y destinados al culto.

“La CEH ha definido una masacre como la ejecución arbitraria de más de cinco personas, realizada en un mismo lugar y como parte de un mismo operativo, cuando las víctimas se encontraban en un estado de indefensión absoluta o relativa.”

Guatemala: Memory of Silence, Vol. III, Ch. II, Sec. XX, Collective Violence against the Collective Population, ¶ 3058-59.

67. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3600.

The means of the violence, its extreme barbarity and deliberately public nature, were other indicators of the intent to destroy the group by causing serious physical or mental harm to members of the group. These extremes, representing the nuance captured by the third category of acts, designed to attack the very foundations of the group, included: the display of mutilated, tortured, and sexually violated victims; obligating members of the group to commit acts of violence against one another and in full view of the entire community; the killing of girl-children, infants, women, and the elderly; systematic, public and gang rapes of women; including girls and pregnant women; and the gouging of fetuses from women's bodies. The sexual mutilation and display of cadavers and similarly horrific acts were the kinds of brutality that the Commission opined was designed to not only physically destroy members of the group, but to destroy any basis for social cohesion within the group. The dehumanization of the victims by their aggressors was both another layer in the construction of the enemy "other," and a means of attacking the group's very foundations.

The tactic of turning members of the group against one another was also a way of inflicting serious mental harm on members of the group.⁶⁸ It varied in its modality. Different shades of "obligation" were represented, from direct threats on life to inciting mistrust among neighbors or neighboring communities. In both cases the Commission determined they were borne of a conscious decision to compromise the loyalties of the members of the group as one avenue of its destruction. Those people who were obligated, upon threat of death or serious physical harm to themselves or others, to either perpetrate atrocities against members of their own communities or to witness them, had been caused "serious mental harm" as proscribed under the Genocide Convention. They were included, if not statistically, then in principle, as among the victims of the genocidal attacks.⁶⁹

Similarly, the accounts of sexual violence took on particular importance for the Commission beyond constituting a cause of death or serious physical and mental harm. Eighty-nine percent of the rape victims registered by the Commission were indigenous women and girl-children, the latter constituting thirty-five percent of the victims. The sexual violence against women during the height of the violence was most often a prelude to their murder. The rapes were inflicted in a way that the entire community would share the shame and terror. Like the obligation to participate in the torture and murder of neighbors or community leaders, these occurrences, in addition to damaging the women

68. Art. III(b) Convention for the Prevention and Punishment of Genocide.

69. The effect of destroying the social cohesion of the group characteristic of these acts [causing physical and mental harm to members of the group] corresponds to an intent to annihilate the group physically and spiritually. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3592.

themselves altered the relationship between them and other members of their communities. This form of violence, almost exclusively directed against women and girl-children, was an act of violence not only against individual women as women or girl-children as girl-children, but also an attack against their ethnic group as a whole. In Mayan society, as in many others, women play roles of significance both to the biological reproduction and social continuity of the group. For the commission, the systematic, public, massive and graphic perpetration of sexual violence against Mayan-indigenous women and girl-children betrayed an intent to destroy both individual members of the group and the social ties that bound it together.

While the Commission does not reach the explicit conclusion that these practices constituted the “imposition of measures intended to prevent births within the group,” as prohibited by Art. III(d) of the Genocide Convention, the section on sexual violence against women does contain testimonies attesting to the effects of these types of violence on the physical and psycho-social ability of the women affected to form intimate relationships or exercise their reproductive prerogative in the context of their communities. The only explicit references to “measures that impeded births within the group” allude to the reported cases where fetuses were ripped from their mother’s wombs or of sexual mutilation.⁷⁰

The special section on Sexual Violence against Women⁷¹ reveals much about the effects of the violence on the indigenous communities as a whole. The vast majority of testimonies about the rapes came from persons other than the direct victims of these acts, demonstrating a reluctance of the surviving victims to speak about how they were attacked.

In most cases the suffering of women rape victims is unknown by even their closest family members, children, husband, or parents, and in the cases where the whole community knows, it is silenced or denied, a fact which demonstrates the extreme shame that rape survivors and their communities feel.⁷² This fact also demonstrates the extent to which the victimized women are compelled to suffer from the effects of rape alone and in silence.

While it is recognized that rape was used on a massive and systematic scale as part of the overall insurgency attack and despite the Commission’s acknowledgment that rape can constitute a crime against humanity under international criminal law, it does not state a general determination with regard to rape in the Guatemalan conflict. Instead, the findings on genocide assert that the sexual violence causing serious physical or mental harm to members of the

70. There are accounts of rape and other forms of sexual violence against men, but they constituted less than one percent of the sexual violence reported.

71. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XIII.

72. *Id.* ¶ 2382.

group and committed in the context of the violence in the four regions studied, were constituent acts of genocide and, at the same time, indicia of the intent to destroy the group. The Commission clearly relies on the record of the systematic use of brutal and often public sexual attacks against women and girl-children as evidence of the intent to destroy the group, as such.⁷³

The conclusion that genocidal acts had been committed in all four regions was reached on the basis of the analysis I have just described. There are additional facts and circumstances not specifically mentioned which are similar to some of the ones discussed here. There are also attendant circumstances which were not specifically factored into the analysis. For instance, the massive and forced military recruitment of indigenous youths. These troops, wrested from the heart of their communities, may have participated in brutal attacks against their own or other indigenous communities.

Nevertheless, the effects of violence are amply explored in both the section on Violations of the Rights to Existence, Integrity, and Cultural Identity of the Indigenous Peoples⁷⁴ and in the fourth volume of the Report that documents the consequences of violence for indigenous communities.⁷⁵ Reference is made to the consequences of the violence for traditional Mayan forms of authority and organization, including religion, community values, and other expressions of cultural identity. Implicitly, these consequences were foreseeable and go far towards explaining what we mean when we say that there is an intent to destroy an ethnic group. However, they do not form part of the specific genocide analysis that concludes that the military, as an agent of the State, was directly responsible for acts of genocide and that the State was also responsible for genocidal acts in failing to investigate and punish those crimes under international and Guatemalan law.

Additionally, a statistical study was performed to determine the percentage of the indigenous population killed in each region. The results indicated that sixteen percent of the Maya-Achí indigenous group in the Rabinal Municipality

73. This conclusion is not novel. In July 1996, a trial chamber in the International Criminal Tribunal for the former Yugoslavia gave ample support for this view in its affirmation of the indictments against Karadzic and Mladic for genocide, *supra* note 50. Scholars have echoed this view as well: When all surrounding circumstances point to the conclusion that women (or men) were sexually assaulted with an intent to destroy their particular protected group by physical destruction or mental anguish, a charge of genocidal rape should be sustained. Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 276 (1997). See also Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN'S L.J.* 243 (1994). Likewise, the International Criminal Tribunal for Rwanda found defendant Akayesu guilty of genocide based on acts of sexual violence. See Akayesu Judgment, September 2, 1998 at <<http://www.ict.org>> (visited Feb. 18, 2000.)

74. *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XVIII, ¶ 2889-2903.

75. *Guatemala: Memory of Silence*, Vol. IV, Ch. III, Sec. IV, Rupture of the Social Fabric, ¶ 4325-4413.

were killed. In Zacualpa, 8.6% of Maya-K'ichés were killed and in the Ixil region, 14.5% of the Mayan-Ixiles, while in the northern strip of Huehuetenango, 3.6% of the Maya-Chuj and Maya-Q'anjobal peoples residing in that area were assassinated.⁷⁶ These statistics do not take into account the members of the group who survived, having suffered from serious physical or mental harm as a result of the violence or who were compelled to live under conditions of life calculated to bring about their destruction.

While the statistics confirm high numbers of deaths, they do not resolve issues that may arise around the definition of the targeted ethnic group. Nor do they clarify what we mean when we refer to "the foundations of the group," that is, the essential values underlying the concept of a human group that is protected by the Genocide Convention. Nor do they rule out the logical defense to these findings, that the acts were committed with the intent to subjugate and control, but not to destroy.

VI. CONCLUSION

The Commission's conclusion that the Guatemalan State, through the direct acts of its military and para-military forces committed acts of genocide against the Mayan-indigenous peoples, and that the State was also responsible for those acts by virtue of its failure to investigate and punish them as required under Articles IV⁷⁷ and VI⁷⁸ of the Genocide Convention, has generated its own polemic. On the date of the celebration of Army Day, June 30th, 1999, President Arzú was reported in the Guatemalan press as making the following statements:

The President denied that there was genocide during the armed conflict, disagreeing for the first time with the Historical Clarification Commission Report that affirms the opposite position. 'Genocide represents the extermination of an ethnicity and that didn't happen in Guatemala,' he said . . . Arzú, gave his personal opinion that he, 'doesn't believe that there was genocide because that was not the motive for the brutal conflict that we lived through and that tore apart

76. See respective conclusions for each region in *Guatemala: Memory of Silence*, Vol. III, Ch. II, Sec. XXI Genocide, and Vol. XII, Annex III, Methodology Document Elaborated by The American Association for the Advancement of Science (AAAS), Graphs 3 and 4.

77. Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals. Art. IV, Genocide Convention.

78. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. Art. VI, Genocide Convention.

the social fabric of the country.”⁷⁹

In its recommendations, the Clarification Commission had called on the State to vigorously apply the National Reconciliation Law by criminally prosecuting and convicting the perpetrators of genocide, torture, and forced disappearances.⁸⁰ The Presidential denial, albeit a “personal” opinion, fails to address the obvious alternative. Whether or not those acts documented by the Commission constitute genocide or not, they are certainly war crimes and crimes against humanity. Once that is conceded, it becomes important to ask the question of whether the extreme barbarity of those acts and their scope preclude any rational interpretation of these coordinated attacks as a means of achieving control.

The inquiry into the subjective intent of the perpetrators must necessarily rely on all the manifestations of intent, whether they are found in the reasonably foreseeable consequences of the acts themselves, statements that reveal the intent with which they were committed, or the overall context in which they occurred. It would be artificial to eliminate from the radar of genocide-prevention those cases where more subtle forms of discrimination translate into acts intended to destroy one of the protected groups, under the pretext of a cold war, civil war, or any other pretense. The classic examples of genocide, represented by the Holocaust and the killings in Rwanda in 1994, do not make less apparent efforts to destroy a social, racial, ethnic, or national group in whole or in part, any less pernicious.

The Guatemalan Historical Clarification Commission’s conclusions are instructive in this regard. In the analytical summary referring to the Ixil region, the Commission stresses that the intent to partially destroy the Maya-Ixil ethnic group emanates from a tactical military decision that was reached, based on particular pre-conceptions:

In the Commission’s judgment, the totality of violent acts perpetrated by the State against the Maya-Ixil population from 1980-1983,⁸¹

79. “... el presidente negó que haya habido genocidio durante el conflicto armado, discrepando por primera vez con el informe de la Comisión para el Esclarecimiento Histórico... que afirma lo contrario. ‘El genocidio representa el exterminio de una etnia y eso no se dio en Guatemala’, dijo. Arzú opinó ayer, a título personal, que ‘no creo’ que haya habido genocidio porque ‘ese no fue el motivo del brutal conflicto que nos tocó vivir y que desgarró el tejido social del país,’” in Arzú Aboga por Espinoza, *Prensa Libre*, Wednesday June 30, 1999. Author’s translation.

80. The 1996 NATIONAL RECONCILIATION LAW, Decree 145-96, also makes reference to the possibility of prosecuting crimes that are not capable of being prescribed according to domestic law or international treaties ratified by Guatemala. Genocide is, in any event, a criminal offense under Guatemalan law. See GUATEMALA’S CRIMINAL CODE DECREE 17-73 as reformed (1997) Art. 376.

81. The use of the 1980-83 time period refers to the totality of circumstances that led to the conclusion that acts of genocide have been committed. However, the overall conclusion in this section refers

permits the conclusion that acts of genocide were committed. These acts were inspired by a strategic determination of a genocidal character. The objective of the counter-insurgency military campaign was the partial destruction of the victim group, based on the consideration that this would ensure the enemy's defeat.⁸²

In the discussion about the definition of the crime of genocide, what continues to be lacking is a dialogue about the characteristics of a human group that give definition to its existence. In the case of Guatemala, there is no doubt that the Mayan-indigenous peoples experienced the attacks against them as an attempt to destroy them and their way of life. This sentiment is repeatedly expressed in the testimonies gathered by the Commission and reproduced in the text of the report. It is equally clear that criminal law focuses on the aggressor's intent in carrying out these atrocities, especially when culpability for a specific intent crime such as genocide is at issue. As questions begin to be addressed, the overall query that remains is how the collective Guatemalan community, Indigenous and Ladino together, will meet the challenge of forging a peace based on mutual respect and the adherence to fundamental principles of human rights.

Will a Commission be sensitive to the word "truth"? If its interest is linked only to amnesty and compensation, then it will have chosen not truth, but justice. If it sees truth as the widest possible compilation of people's perceptions, stories, myths and experiences, it will have chosen to restore memory and foster a new humanity, and perhaps that is justice in its deepest sense.⁸³

to acts of genocide having occurred between 1981 and 1982, in consideration of this period as representative of the all-encompassing indiscriminate violence. The discussion of each region refers more specifically to the massacres and surrounding acts it considers genocidal.

82. *Guatemala: Memory of Silence* Vol. III, Ch. II, Sec. XXI, Genocide, ¶ 3357.

83. Antjie Krog, *COUNTRY OF MY SKULL* 16 (1998), referring to the process of the Truth and Reconciliation Commission in South Africa.