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SWALLOWING INJUSTICE TO BUILD COMMUNITY:
LATIN AMERICA AFTER THE ERA OF STATE TERROR

by

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INTRODUCTION

From the mid-1960's to the late 1980's (even later in certain countries), militarized governments in most of Latin America enforced their view of a desirable public order by terrorizing great numbers of citizens who happened to have different views and also their friends and relations and persons who, whatever their views or lack thereof, objected to terror as a means of governing. One Argentine general put the matter with admirable brevity. "First we will kill all the subversives," he said. "Then we will kill their collaborators, then their sympathizers, then those who remain indifferent and finally the indecisive."¹ To be sure, even many of his fellow senior officers and some of the civilians who supported them thought the General's views a bit excessive, requiring as they would a rather sharp contraction in the Argentine population. But Argentina is a sophisticated sort of place where people pride themselves on their urbanity. Had he spoken at a plantation-owner's dinner or in the officer's club in a country like Guatemala, where those who rule live closer to the bone, his remarks would have been unremarkable, hardly more than a gratuitous restatement of conventional wisdom.

As is always the case, local circumstances color the ideas and methods of like-minded people. As the former's heirs are quick to remind us, Mussolini's Italian fascism was not identical with Hitler's German Naziism. Variations on a theme doubtless matter. Mussolini and friends killed far fewer people and not only, one supposes, because they were less competent. As a percentage of the population, far fewer Chileans died at the hands of Augusto Pinochet and his merry men than Salvadorans at the hands of the armed forces and their paramilitary allies.² The Uruguayans had a bias in favor of detention and torture followed by psychological annihilation.³ The Argentines preferred the physical sort.⁴

¹ Various persons interviewed by the Inter-American Commission on Human Rights during its on-site visit to Argentina in September 1979 cited the statement attributed to General Saint Jean

² Chile's Truth Commission concluded that 4,000 people were killed or disappeared during Pinochet's rule (Report of the Chilean National Truth and Reconciliation Commission (May 1991)), while in contrast, more than 70,000 in political violence in El Salvador during the 1980s when the U.S. sponsored military and paramilitary death squads wantonly killed their fellow citizens.. Marjorie Miller, *A Rush to Judgment on Duarte of El Salvador*, L.A. Times, June 19, 1988, at E2.

³ Beginning in the 1960s the government of Uruguay engaged in a reign of terror as part of its efforts to repress the Movement for National Liberation, otherwise known as Tupamaros. The

For all their possibly interesting variations, terror states had a number of things in common and prominent among them was the withdrawal of immunity from the middle and upper classes. In less affluent times, it used to be said (perhaps first by Abraham Lincoln) that God must love the poor because he had made so many of them. There are many of them in Latin America, but other signs of God's love have long been missing. Independence from Spain in the early Nineteenth Century did not make life conspicuously less nasty for the Latin poor any more than the Universal Declaration of Human Rights did in the middle of the Twentieth. Towers of affluence continued to grow on their backs. They populated the prisons and hungered in the plains, strangers as much to due process as to the welfare state. Whether under the regime of tweedle-de-and-dum political parties or old-fashioned autocrats, they lived at the mercy of a state able at will to license the powerful or itself to beat, steal, starve, incarcerate and kill. The picture of the lives of ordinary citizens implied by the long lists of human rights embedded in national constitutions connected with reality, however loosely, only for members of the comfortable classes. Velasquez was the appropriate portraitist for the upper classes and perhaps Renoir for the middle. For the rest? Goya. But in the time of state terror, Goya would have found rich material in all classes, for ideological wars are great levelers.

In the name of Western civilization, governments in most of Latin America made the world unsafe for everyone, regardless of class, everyone, that is, who found fault with the goals and practices of governments or with the private interests they served or, as may happen when the dogs of terror are unleashed, who managed to offend some member of the apparatus of repression. Such was the fate of one suave Argentine diplomat, briefly home on leave, plucked one day out of his car on a Buenos Aires boulevard, by anonymous men in unlicensed vehicles,

military used torture as a method of breaking wider society by engendering fear in the general population. As a result, between 300,000 and 400,000 of Uruguay's 3 million people went into exile and one in every 50 of those remaining was detained for interrogation or imprisoned. Lawrence Weschler, *A Miracle, A Universe*, (1990), 88-89.

⁴ The Argentinean truth commission revealed that the military government - which ruled from 1976 to 1983 - systematically tortured, murdered, and disappeared almost 9,000 Argentine citizens. Finally, the military executed many of the disappeared by dropping them from airplanes over the ocean, so that their bodies would never be found. Commission Nacional Sobre la Desaparicion de Personas, *Nunca Mas* [National Commission on the Disappearance of Persons, Never Again] (Universitaria de Buenos Aires, 4th ed. 1984), at 235-36 and 479.

and never seen again. His widow, as by then she must have been, finally managed a meeting with President Videla, the retired General chosen by his colleagues to serve as head of state, a social acquaintance of the woman. "Please help me find my husband," she pleaded. Imperially slim, his long body twisting in apparent discomfort, Videla replies, by implication denying nothing: "In this matter, I am absolutely impotent."⁵

In the early 1980's, as the slaughter intensified in Central America, with the avid support of the Reagan Administration,⁶ repression began to ease in much of South America, most notably in Brazil and, above all, in Argentina where, following its abortive effort to wrest the Malvinas or Falkland Islands from Great Britain, the military withdrew in disarray from the heights of political power.⁷ In Chile, however, once the Latin American exemplar of stable democratic government, the military regime directed by Augusto Pinochet and supported by the upper classes maintained a harsh grip on civil society virtually to the end of the decade.⁸ So the restoration in Chile of a political order compatible with at least minimalist conceptions of human rights roughly coincided with the initiation of peace processes in Central America made possible by the end of the Cold War and the subsequent collapse of the Soviet Union.

⁵ Confidential communication from a trustworthy informant made to the author during his participation in the on-site observation of the Inter-American Commission on Human Rights in Argentina during the month of September 1979.

⁶ See, for instance, Mark Danner's account of its reaction to the now confirmed massacre at El Mizote in Danner, *The Massacre at El Mozote*, (1993) pp. 110-140; or U.N. Ambassador Jean Kirkpatrick's efforts to mitigate or exculpate the rape-murder of four churchwomen by members of the Salvadoran armed forces, claiming "They were not just nuns, they were political activists." Charles Austin, *Maryknollers Pursue Risky Paths in the Third World*, The New York Times, June 21, 1981, Section 4; Page 9, Column 1

⁷ See Geoffrey P. Miller, *Constitutional Moments, Precommitment, and Fundamental Reform: The Case of Argentina*, 71 Wash. U. L.Q. 1061, 1070-72 (1993); . Martin E. Andersen, *Dossier Secreto: The Myth of Argentina's "Dirty War"* (1993) at 299-301. 1000 Argentine lives were lost compared with 250 British lives, during Argentina's failed attempt to wrest the islands from British control.

⁸ Pinochet ruled Chile for 17 years from the 1973 coup that overthrew the Allende government until Patricio Aylwin was voted into power in the December 1989 presidential elections, following a plebiscite in which 54.7% of the people voting said "no" to continued military rule. Edward C. Snyder, *The Dirty Legal War: War" Human Rights and the Rule of Law in Chile 1973-1995*, 2 Tulsa J. Comp. & Int'l L 253, Spring 1995.

Before the era of state terror, one feature of the Latin left--and not only of the Marxist revolutionaries within it--was a tendency to devalue the importance of civil and political rights or at least of the power diffusing and often lumbering constitutional restraints and administrative procedures that liberals deem essential means for protecting those rights.⁹ Arresting inequalities and a long experience of state structures effectively colonized by the wealthy classes encouraged the view that the institutions and methods of liberal democracy were primarily instruments to inhibit the exercise of popular power on behalf of justice. At best they were luxuries not affordable until deep inequalities of opportunity and result had been addressed.

If the terror regimes accomplished nothing else, they contributed to an adjustment of this attitude. Leftist intellectuals and political leaders who experienced unrestrained state power, albeit employed to maintain rather than reform the social order, discovered in hiding, exile or prison the real value of institutionalized restraints. One result was a pronounced tendency toward convergence in the value priorities of centrist and leftist political parties, helped along, of course, by the public autopsy performed on dead Marxist governments in the Soviet block which exposed the long accumulation of their internal rot. And although they did not attend the school of electrical shock, although terror served their ends, by the end of the period some part of the traditional political right--no longer united by the petrifying fear of revolution--also began moving to embrace liberal constitutionalist government with all its implicit compromises--agreeably constrained, to be sure, on questions involving the allocation of income, wealth and power. Changes in the calculus of value and interest internal to Latin countries coincided, of course, with Washington's calculation that U.S. interests in the post Cold-War era were best served by moving from a rhetorical to a substantive policy of democracy promotion, a policy that had among its several virtues the reduction of cognitive dissonance in the practice and discourse of American foreign policy.¹⁰

The condition precedent to promoting democracy in polarized and war-ravaged Central America was peace building, a complex project initially of cease fire, security guarantees, demobilization, integration of combatants, resettlement of displaced persons and development of

⁹ See Tom Farer, *The Grand Strategy of the United States in Latin America* (1988) chpt 4.

¹⁰ See, e.g. G. John Ikenberry, "Why Export Democracy?: The 'Hidden Grand Strategy' of American Foreign Policy" *The Wilson Quarterly*, Vol. 23, no.2 (Spring 1999)

understandings about at least the outline of post-war institutions and policies and the terms on which peaceful political competition would be waged.¹¹ In the southern cone of Latin America, where military governments had quickly shattered the spine of armed opposition, peace of a kind existed, but democracy (much less its consolidation) awaited a measure of reconciliation and a degree of consensus on the means and limits of electoral politics.

Whether in Central or South America, one widely but not universally accepted condition for advancing the democratic project was to face openly and in some way to redress the crimes and sins of the dictatorships. Peace and democracy, in other words, demanded some accounting, some measure of justice. But if justice was a necessity, so also, many people felt, it was a threat. For in no case was it clear just how much justice each fragile process of democratization could bear. Few imagined that anything approaching full justice could be done. The villains, after all, were not in chains and, quite apart from their commitment to self-defense, did not in most cases seem disposed to regard themselves as villains. That irrepressible enthusiast for tea with Mrs. Thatcher, General Pinochet, put the military view most publicly and succinctly when, on the eve of Chile's first free elections since his 1973 coup, he declared: "The day they touch one of my men, the rule of law ends. This I say once and will not say again."¹²

In Central America, doing justice could mean more than punishing those who had murdered and tortured in the name of the state and Western civilization, that all-purpose moral solvent. People had originally opposed the established order and thereby exposed themselves to the terror in a desperate effort to mitigate the structural injustice of mortal poverty and quotidian humiliation, either their own or of people with whom they sympathized. So at least for some who demanded justice as part of peace building in Central America, justice meant not only the punishment of criminals but also some positive action to alleviate the conditions that had led in the first place to war; that is, in the words of the Nobel Laureate Amartya Sen,¹³ to increase the life chances of the general population.

¹¹ For an examination of the relationship between democracy and the peace building process, see Luc Reyckler, Democratic Peace Building and Conflict Prevention, the Devil is in the Transition, (1999)

¹² See Tina Rosenberg, *Overcoming the Legacies of Dictatorship* Foreign Affairs, Volume 74, No. 3 at p. 134

¹³ Amartya Kumar Sen, Development as Freedom (1999).

I intend to look at two countries--Argentina and Guatemala--and in relation to them attempt two things. One is to recall, as vividly as I can, the crimes crying out for exposure, condemnation and restitution. For memory fades, one crime begins to blend into another until it becomes lost in a tranquilized undifferentiated sense, not even a memory any more, that bad things have happened in the course of the human adventure. The other is to sketch the outcome of the efforts in these countries to address past injustices in the course of processes aiming to construct or consolidate a liberal capitalist order.

ARGENTINA

Systematic state terror arrived in Argentina in 1976 when the armed forces displaced the disintegrating government of Isabel Peron and launched a carefully planned campaign of extermination against the two clandestine armed movements of the left, the Monteneros and the ERP.¹⁴ Three operational guidelines structured the campaign. It would be decisive and quick; the High Command would share strategic direction and responsibility, but tactical direction and responsibility would be decentralized; and it would not generate large numbers of detainees who could become subjects of international petition by liberal governments and human rights organizations.

By the time I arrived in Buenos Aires in September of 1979 as a member of the team dispatched by the Inter-American Commission on Human Rights, "The Dirty War" ("La Guerra Sucia"), as its executors often called it, was effectively over. Estimates of the number of persons, mostly young, who disappeared into the secret detention centers of the armed forces vary across a wide spectrum. The respected Sabato Commission, set up by the first post junta elected government, concluded that the minimum figure was nine thousand,¹⁵ but that it could be considerably higher. Some unofficial counts put the figure closer to 30,000.¹⁶

¹⁴ Report on the Situation of Human Rights in Argentina, Organization of American States, OEA/Ser.L/V/11.49 doc. 19 corr.1 11 April 1980.

¹⁵ Nunca Mas, supra, note 4

¹⁶ Encarta's on line encyclopedia, (entry on the history of Argentina) Online Encyclopedia 2000. <http://encarta.msn.com> © 1997-2000 Microsoft Corporation; Americas Watch and Amnesty International have cited figures between 12,000 and 15,000.

For 17 days and through the larger parts of many nights, the six Commission members, together with Commission legal staff, roamed the country, collecting evidence including eye witness testimony from the relatively few people who had come out of the detention centers alive. Among the witnesses were Mr. and Mrs. Samuel Falikoff. They had contacted us through an American Rabbi, Marshall Meyer, then serving as Director of South America's only Jewish seminary. An heroic figure, as large in courage as in size, he took me and two staff members one morning on a circuitous journey designed to expose any tailing vehicle, a journey that culminated at a school in an undistinguished Buenos Aires neighborhood. There awaiting us in a small room were a middle aged couple who struck me immediately as members of the professional classes. Quiet, conservatively dressed, soft-bodied, in appearance the epitome of people who lead a dignified, useful, mildly intellectual, undramatic life of impeccable propriety. Mrs. Falikoff's testimony, I don't recall her husband uttering a word, lasted several hours. Her husband had been a Doctor practicing in Cordoba, a city that had been a stronghold of left-wing agitation. Since the military takeover, it had been under the control of General Menendez, by reputation one of the hardest line figures and harshest regional commanders in the Argentine Army. Shortly after the repression began, they moved to Buenos Aires. On the 25th of November in 1976, she and her husband were abducted from their apartment and held thereafter for more than a month in a clandestine center. Here are a few excerpts from her account of their detention.

They took me down a spiral staircase to a basement. There they told me to close my eyes and they put a very tight blindfold, with elastic in the back, on me, which immediately gave me an intense headache. They handcuffed me and shackled my feet together by a chain with padlocks on both shackles. They were very tight and had sharp edges . . . After a while, I began to hear, coming through one of the walls of pressed board, the sound of a lot of running water, and then the cries of my husband insulting them and repeatedly calling them "murderers." This is repeated approximately every hour, or perhaps less. Obviously the torture room is next door. . . . On the following day—I guess—they took me out and led me to a corridor on the same floor. My legs are so swollen that the shackles begin to cut into my skin . . . One of the ones who had been to my house approached me and put a hood of thick white cloth over my head. He explained that with that hood they would not bother me. That was because they were taking people to the torture room according to the order of their chairs [unless they had the white hood] . . . The door was nearby and every time they took someone out, the noise of running water and the desperate screams of pain could be heard, despite the

fact that a record player was constantly playing very loud music. There were certain songs that they played more frequently, and despite the fact that the tapes were worn, I could hear the lyrics which went roughly: “and now what are they? Where are they? What are their ideals?, etc.” . . . Afterwards I noticed that they brought my husband to the chair alongside me, because I recognized his pants and shoes. . . .

During the entire time I was there, I heard the same sound; the loud record player, screams of pain, running water. The guards wore rubber boots . . . asked [the young guard] why I was there, and he said it was a mistake. His only job was to see that the prisoners did not speak, did not take off their hoods, and those who did so, he could beat at will until he knocked them out. He and the others were taught karate and self defense.

They were made to . . . hate the prisoners, about whom the only thing they knew was that they “are enemies of the country, who want to destroy it, by destroying the army.” . . . This guard told me that some of them were taken on raids, and sometimes they were given special commendation or merit awards. They were very proud of that. For example, he told me that the previous day he has been assigned to go to a house that someone had denounced. It answered the description, and when the owners tried to escape, they had to shoot them: a young woman with a child two or three years old. Later they learned that the people were not involved. He had felt bad about that, but the persons who denounced innocent people were to blame . . .

I managed to see my husband, shirtless, with marks everywhere from the cattle prod. I realized that he had no more than two centimeters in a row of unmarked skin. He breathes heavily and asks for “water, water,” but his voice is very weak and it is hard for him to move his tongue so the words do not come out. A guard came, and told him not to bother them, that they could not give him water because if they did he would die . . .

They called one of the prisoners “peg-leg.” He was very near me, and by his voice seemed to be an older person and very weak. One night the guards got drunk and began to bet that they could make him stand on his peg-leg. They brought him into the middle of the room and ordered him to do it. He begged them, said it was impossible, that he was going to fall. They began to kick him, punch him, and they stood him up. Of course, he fell. They stood him up again, he fell again, and so on, throughout the night. It was a most macabre spectacle. The guards went crazy, they beat him without interruption and the poor man was begging them to stop. There was the sound of blows to the lungs, the abdomen, the noise of broken bones. They stopped when he fell unconscious. Afterwards he was delirious for two or three days until they called the doctor. The doctor said he had many broken bones and ordered him to be taken away. I didn’t hear him again. . . .

In early December, a transfer occurred. Apparently they were taking away those who had been there the longest; however, they included among them the lawyer who was next to me; in all, some 40 persons. They adjusted the handcuffs, the shackles and the hoods. They assembled them together, were taking them out when the noise of an airplane was heard that seemed to be landing nearby. After a time, the sound of an

airplane was heard again, then nothing more. A guard asked another where they were being taken, and he answered: "Fishfood."¹⁷

By the end of 1982 the military was splintering from the multiple blows of its military defeat,¹⁸ its disastrous stewardship of the Argentine economy,¹⁹ the ostentatious corruption permeating its administration of the state²⁰ and the authoritative exposure of its crimes by the Inter-American Commission Report.²¹ Its power lying more in its unity than in its guns, the military establishment decided to carry out an un-negotiated withdrawal to its barracks. To that end it terminated its ban on party politics and prepared the country for elections in the fall of 1983 that propelled Raul Alfonsin into the Presidency.²² Assuming power in December 1983, he almost immediately began to implement his campaign promise to investigate human rights violations and to indict both military chiefs who ordered the secret extermination of persons deemed subversive and the officers who committed the worst excesses in implementing that order and also guerrilla leaders found to have violated human rights, primarily through attacks on civilians. He secured Congressional ratification of the most important international human rights conventions and approval of legislation punishing the commission of torture with the same

¹⁷ Excerpts from case no. 2662 - Alberto Samuel Falicoff, Report on the Situation of Human Rights in Argentina, Organization of American States, OEA/Ser.L/V/11.49 doc. 19 corr.1 11 April 1980.

¹⁸ See Anderson, *supra*, note 7. The Argentine Military put out press releases claiming that it was winning the war until near the end.

¹⁹ During the Military's rule, Argentina's foreign debt ballooned from eight billion in 1976 to 40 billion in 1983. Donald B. Hodges, Argentina's "Dirty War": An Intellectual Biography (1991), at 7. By the time the military relinquished power, inflation was at an annual rate of 600%. William C. Smith, *Hyperinflation, Macroeconomic Instability, and Neoliberal Restructuring in Democratic Argentina*, in *The New Argentine Democracy* at 20, 26 in The New Argentine Democracy

The Search for a Successful Formula, (Edward C. Epstein ed. 1992)

²⁰ The National Commission of the Disappeared reported that during the military's rule that el , "the judiciary became a sham jurisdictional structure, a cover to protect its image," instead of being a "brake on the prevailing absolutism." Nunca Mas, *supra* note 4 at 387.

²¹ Report on the Situation of Human Rights in Argentina, Organization of American States, OEA/Ser.L/V/11.49 doc. 19 corr.1 11 April 1980.

²² Radical party candidate Raul Alfonsin was elected President and assumed office on December 10 1983. Carlos Nino, *The Duty to Punish Past Abuses of Human Rights put into Context: The Case of Argentina*, 100 Yale L.J. 618, 620 (1991) (hereinafter the "Case of Argentina")

penalty that applied in the case of murder. More significantly, he secured approval of legislation abrogating military jurisdiction over crimes against civilians committed by serving members of the military establishment.²³

At about the same time, President Alfonsín established a Commission composed of respected citizens armed with full powers to investigate the disappearance of persons during the dirty war. Within a year it produced the report “Nunca Mas” that laid out in even greater detail than the Commission’s 1980 expose the facts the military had struggled so hard to conceal. It did so without the cooperation of the armed forces from which no word of contrition was heard.²⁴ Meanwhile, the President, in the face of united opposition from the military establishment, prepared for criminal prosecution of the military high command during the dirty war. His strategy was one of *exemplary* trial and punishment, in other words he proposed to set sharp limits on the scope of accountability.²⁵

In order to effect any prosecution at all--at least to do so consistent with Argentina’s constitutional system and legal traditions--he and his legal advisors had to find their way around a plethora of procedural and practical obstacles including the amnesty the de facto military government had awarded to itself before leaving office²⁶ and the existing procedural norm granting military tribunals jurisdiction over acts of military service in military places. On his initiative Congress declared the amnesty null and void. It did so with the help of a theory novel in Argentina, namely that norms declared by an unelected authoritarian government did not enjoy the presumption of validity enjoyed by norms emanating from a democratic one. Hence,

²³ Nino, at 620.

²⁴ Nunca Mas, supra, note 4. The report is sometimes referred to as the “Sabato report,” after the commission’s chairperson, writer Ernesto Sabato.

²⁵ The following account of Alfonsín’s strategy and tactics draws heavily on the lucidly incisive work of Carlos Nino. See, e.g., Nino, supra, note 22; Carlos Nino, Comment: *The Human Rights Policy of the Argentina Constitutional Government: A Reply* 11 Yale J. Int’l L (1985)

²⁶ Law of National Pacification, Law No. 22924, Sept. 22, 1983. The law granted immunity from prosecution to suspected terrorists and members of the armed forces for human rights violations committed between May 25, 1973 and June 17, 1982.

legislative acts of the military junta were to be deemed valid only if their content was found to be consistent with the demands of justice. The auto-amnesty was held not to pass that test.²⁷

Getting round the military jurisdiction law without being found to have violated prohibitions against ex post fact modification of procedural norms required greater creativity. Noting that the Constitution prohibited the President from exercising judicial functions and arguing that military courts (like the rest of the military) form part of the executive branch, he secured Congressional and ultimately judicial support for a compromise that gave initial jurisdiction to military tribunals but allowed the Federal Courts of Appeals to supersede them if they did not complete trials within six months. In the event, the initial trials, those involving the members of the successive military juntas that had governed during the dirty war and of the commanders of the region of Buenos Aires--had to be taken over by the Federal Courts where the prosecutions were successfully completed. Whereupon the previous masters of the Argentine Universe found themselves to be guests of the state although under conditions ineffably more benign than those their victims had experienced.²⁸ For the moment a fair measure of justice had been done and done without great risk of a military riposte perhaps because their failures in the realm of economic policy and of the Falklands war made the defendants responsible for the precipitate termination of military government and the huge loss of the armed forces' prestige.

But then things began to get complicated. To limit the potential number of middle rank officers, Alfonsín's legislation established a revocable presumption that those who committed crimes under orders, and without decision-making capacity, had believed that the orders were legitimate. But the legislation that emerged from Congress eliminated the presumption in the case of "abhorrent or atrocious" acts. Since practically everything that went on in the dirty war could be so classified (for example, participating in the original detention of persons and bringing them to the officers in charge of the interrogation centers), the risk of indictment now loomed for a large part of the officer corps of all ranks. If a number of cases had been tried expeditiously in the military tribunals, the latter might have given a relatively narrow definition to the statute and thus made clear that prosecution would be limited to the most gross and brutal participants. But instead the tribunals dallied whereupon the Federal Court of Appeals in Buenos

²⁷ Nino, *supra*, note 22 at 621.

Aires stepped in and asserted jurisdiction.²⁹ With military unrest growing, Alfonsín pushed a new law through Congress, the so-called “Full-Stop” Bill that established a 60-day statute of limitations for new indictments related to the war.³⁰

The result was disastrous on every count. Previous supporters of the government at home and abroad condemned what they saw as a pusillanimous and immoral sell-out to military pressure. The Appeals Courts of the interior, which had hitherto moved at a snails pace, suddenly sprang into action and seized jurisdiction in cases that had languished in military tribunals in their respective regions. Within weeks, more than 450 officers had been brought within civil jurisdiction.³¹ The military response was mutiny in Easter Week, 1987. A group of indicted officers holed up in a military garrison where comrades announced they would repel with violence any effort to enforce detention orders. Alfonsín learned that, while only a small part of the armed forces was directly involved, the military as a whole would not obey a command to suppress the mutiny. Literally millions of people poured into the streets of Buenos Aires and other major cities to defend the civilian government with their bodies. The President flew to the garrison by helicopter to obtain by himself the surrender of the rebels. After hours of high tension, he went on television to announce that the rebels had yielded to constitutional authority, that they were under arrest and that people should return to their homes. He wished everyone a happy Easter.³²

But the worst challenge was yet to come. For almost immediately the President learned that other indicted officers were preparing to resist court orders. At his request, the Supreme Court asked the appeals courts for the files in the cases before them, in effect suspending the process. But at the same time it became clear that the Court would not itself take responsibility for articulating limits to the due obedience law. Threatened with a rolling series of mutinies, believing that they would at a minimum abort the whole effort to end the military’s historic freedom from civilian control, rejecting a general amnesty that would have covered even the junta leaders, barred by the constitution from pardoning lesser officers who had not yet been

²⁸ Id. at 622.

²⁹ Id. at 622-623.

³⁰ Ley de Punto Final, Law No. 23492, December 24, 1986.

³¹ Nino, *supra*, note 22 at 623

convicted, Alfonsín pushed new legislation through Congress making irrefutable in all cases other than those involving very senior officers the presumption that officers had acted in the belief that orders were legitimate. This was the much excoriated “due obedience” law.³³

For this act a torrent of abuse poured over the President. He was condemned by the very human rights organization he had co-founded.³⁴ His party suffered at the poles. But as far as the military was concerned, the move worked. When incorrigible military elements rebelled again, Alfonsín called on the Commander in chief to act and the rebels were quickly repressed.³⁵

Alfonsín had sought to overcome the dense tradition of military impunity without aborting the process of democratic consolidation. He had to find his way without the compass of precedent. His successor, Carlos Menem, had other priorities. Shortly after assuming office, he granted presidential pardons to all those convicted or under trial for state and subversive acts of terrorism, for misconduct in the war, or for rebelling against democratic institutions. Even the members of the military juntas were covered.³⁶ Then he set about rejuvenating the super-inflated and yet moribund Argentine economy.³⁷

Two years ago I returned to Argentina for the first time since I had testified in the trial of the high command back in 1985. In the course of two weeks I interviewed prominent representatives of all sectors of society, including the President of the Association of Bankers and other important figures in the vibrant financial community, two leaders of the political party that has emerged to the Left of Alfonsín’s Radical Party (which is as radical as the Holy Roman Empire was Holy) and also the Commander-in-Chief of the Armed Forces. The one thing everyone agreed on was that for the first time in the modern history of Argentina, the military had disappeared from the political equation. No social group could envision calling on the

³² Id. At 623-624,

³³ Ley de Obediencia Debida., Law No. 23521, June 4, 1987

³⁴ See America’s Watch, *Truth and Partial Justice in Argentina*, (1987) at 83.

³⁵ Nino, *supra*, note 22 at 624

³⁶ Id. at 625.

³⁷ In 1995, inflation in Argentina was 2% for the year. Per annum growth of gross national product reached as high as 7% under President Menem. *Latin Realities*, Economist, Mar. 30, 1996, at 19. Between 1991 and 1993, Argentina’s economy grew by 25.5%. Stephen Fidler & John Barham, *Argentine Miracle Needs More Foreign Capital*, Fin. Times, June 22, 1994, at 8.

military to veto electoral outcomes and the military could no longer imagine itself assuming power. And so it appeared that at long last, Argentine society had tranquilized its Leviathan.

In this way as in others, Argentina is a different country although it still lives very far East of Eden. And the past is still a presence. The wall of silence that so long shielded the perpetrators of the dirty war has been leaking. Every few months there is another public confession.³⁸ And even the trials are not over. The disappeared children, born in the captivity of their mothers and placed years ago with families deemed to have the right sort of values, retain the character of disappeared persons inherited from their dead mothers. Hence the crime (in effect of kidnaping and illegal detention) is ongoing, not covered by Menem's pardon.³⁹ So life is not so good for Videla and the others who led the armed forces in those days, ordinary men much like Eichman,⁴⁰ who made a desolation and called it victory.

GUATEMALA

If Guatemala were the whole world, then one would have to agree with Washington Irving's dictum that "History is a register of the crimes and miseries that man has inflicted on his fellow man,"⁴¹ revised to reflect the fact that in Guatemala humiliation, mutilation and murder have been inflicted on men and women indiscriminately. Guatemala is the Rwanda of the Western Hemisphere. I noted earlier that the Sabato Commission in Argentina concluded that just under 10,000 people had been liquidated. That was out of a population of some 30 million. The Truth Commission established by the Guatemala Peace Accord of 1996, surveying the entire period of state terror--which extends back to the 1960s but which did not reach a shrieking pitch until about 1980--put the death toll at 200,000 out of a population of about 9 million, over 90

³⁸ See *Argentina purges "dirty war" guilt*, Guardian, Apr. 28, 1995, at 10, recounting the public confessions of senior military officers.

³⁹ The "full stop" or "punto final" law which established a sixty-day period beyond which no new charges could be brought for state-sponsored crimes committed during the "dirty war" contained an exception for crimes involving the theft and irregular adoption of the children of the disappeared. Law No. 23.492, art. 5, (1986).

⁴⁰ See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (1994)

⁴¹ Webster's New World Dictionary of Quotable Definitions, by Eugene E. Brussell (Editor).

percent of which are attributable to the armed forces and paramilitary death squads collaborating with them.⁴² In proportion to the national population, the Argentine military government would have had to kill about 600,000 people in order to compare with its Guatemalan peer.

Kurtz's tortured epiphany in Joseph Conrad's *Heart of Darkness*--"The horror! The horror!--would be a fitting epitaph for this country where even today 60 percent of the population is unassimilated Mayan Indian. As late as 1940, the Mayans were subjected to forced labor in the plantations of the country's land holding oligarchy and the United Fruit Company.⁴³ That is almost a century after the liberation of the serfs in Russia.

Comprehensive Terror in Guatemala stems in a literal sense from the failed effort by nationalist modernizers in the period between 1944 and 1954 to moderate the bestial conditions of rural life and generally to drag Guatemala into the 20th Century. The 1954 coup against the country's elected government, organized, financed and orchestrated by the U. S. ended, as intended, the prospect of reform by political means. Purged modernizers within the military establishment, including a number of young officers trained by the United States, initiated the first insurrection against the primitives confirmed in power by the Eisenhower Administration's intervention. The response was state terror that ebbed and flowed, depending on how long it took for a new generation of wildly courageous dissidents to replace their liquidated predecessors. Even in ebb, it never ceased to take its toll of victims: First because the military establishment and its oligarchic allies believed in the prophylactic virtues of exemplary horrors that could perpetuate the memory of unspeakable suffering. Secondly, because prophylaxis was seen to require atomization of the potentially disaffected classes, hence all organizational efforts-

⁴² See Report of the Guatemalan Historical Clarification Commission, February 25, 1999.

⁴³ For a discussion of the relationship between United Fruit and its Guatemalan workers, see Texas Papers on Latin America Paper No. 95-01: Alejandra Batres *The Experience of the Guatemalan United Fruit Company Workers 1944_1954: Why Did They Fail-* ILAS Distinguished Paper Award University of Texas at Austin (1995).

-however meliorative their objectives--were latently subversive. And third, because capital preferred that labor be servile.⁴⁴

The experience of the employees of the Coca Cola bottling plant in Guatemala City, owned by a gentleman from Houston, was atypical, if at all, only in its dramatic intensity. The OAS Commission on Human Rights' 1981 Report on Guatemala records a chronology of events at the plant between October 1978 and April 1979. On October 16, 1978, following a discussion between union representatives and plant managers at which the former were warned of what could happen to them, Israel Marquez, Secretary General of the Union at the plant was attacked with machine guns while driving home. He survived. In November, three former lieutenants in the army assumed personnel positions in the plant. Early on the morning of December 12, eight members of the military police arrived on the premises for no apparent reason. Shortly after noon, Pedro Quevado, the union's financial secretary, while seated in a company truck on his distribution route, had twelve bullets pumped into his face and throat by persons unknown. He did not survive. All members of the union's executive committee began receiving threatening notes at their homes, notes encouraging them to cease union activities. Some stepped down. But others took their place. On January 16, two bus loads of men from the so-called Police Model Squad attempted to arrest Israel Marquez when he entered the premises. He escaped and ultimately found sanctuary with his wife and son in the Venezuelan Embassy. Manuel Lopez Balan replaced him as Secretary-General. On April 5, 1979, while on his distribution route for the company, Balan was beaten with an iron tube and his throat was slit. He did not survive. On May 1, four union members were abducted. Of the four, two disappeared altogether, the bodies of the other two, one showing unmistakable signs of torture, were found respectively on the 2nd and 3rd of May.⁴⁵

During the murderous reign of General Romero Lucas, terror was more prominent in the cities. Leaders of centrist and democratic socialist political parties, including the former mayor of Guatemala City and distinguished former foreign minister, Fuentes More, were machine-

⁴⁴ For a discussion of the genesis of the Guatemalan conflict, see Report on the Situation of Human Rights in the Republic of Guatemala, OEA/Ser.L.II.53doc.21 rev.21 October 13, 1991, pp 19-22, (hereafter Commission report)..

gunned to death on main streets in the city. The faculty of the leading university, San Carlos, and educators generally were decimated. In 1980, 226 elementary school teachers and 89 university professors were murdered. When General Rios Montt and his oligarchal faction seized power in 1982, the main burden of repression moved to the countryside where guerrillas had for some years been quietly working among the Mayans of the highlands, and once there it assumed almost holocaustal proportions as entire villages, literally hundreds, were wiped out.⁴⁶

Part of the world view that allowed this to happen was encapsulated for me early one morning in the officer's mess of a fort in the Guatemalan highlands not far from the scene of reported massacres my Mexican colleague and I had come to investigate. It was a large room with long tables, most of them filled at that hour, not long after dawn, with men just back from night patrols. Their faces still striped with black camouflage paint, their confident rough chatter reminiscent of a football team at ease after a tough practice, they worked their way through bowls of thick, hot cereal, large plates with high stacks of sweet rolls and toast on which they swabbed thick lumps of butter topped with honey or jam from a great assemblage of clay pots. Stunted Mayan women hardly taller than the children of the middle classes moved ceaselessly among the tables refilling plates and pouring steaming coffee and mate. If testosterone had a smell, the room would have reeked of it. In the front of the room on two giant television screens a big band clothed in white, satin-labeled jackets played the jazz of another era, the sax and trumpet sections rising alternatively to twist to the rhythm of their obsolete songs.

Our host is the Deputy Commander of the region, a physical parody of a Guatemalan officer with his bull neck, almost wider than his head, and his thick wrists and heavy-knuckled hands. He raises one of those hands and points at the Mayan women moving silently, with closed faces, among the tables. "Estos Inditos, [These little Indians]," he begins in an expansive, didactic tone. "Un pueblo muy humilde," [A very humble people]," he says as if tendering us a lapidary insight. "Pero?" [But] and now his tone changes histrionically: "But they have been penetrated by the virus of Marxism. And we must cut it out as you would cut out a cancer." He

⁴⁵ Id. at 94-111, discussing the chronology of violence at the Coca Cola Bottling company between October 1978 and April 1979, and attacks against union members.

⁴⁶ Id. pp 24-27 and 84-89.

looks at us expectantly, perhaps waiting for a remark that will justify tossing us out of the helicopter on the ride back to Guatemala City.

So when, in 1987, the recently elected Christian Democratic Government of Vinicio Cerezo opened negotiations with the leadership of the ravaged guerilla movement, meeting his obligations under the Esquipulas Agreement of Central American Heads of State requiring every conflicted country to initiate dialogue leading to peace, the prospects for positive results seemed bleak. When the Guerrillas tabled a proposal calling for a “Truth Commission” to investigate human rights violations and the demilitarization of the countryside, along with full freedom of speech and association, application of the Geneva Conventions to the conflict and a formal dialogue between the major economic and social forces in the country, the military successfully demanded suspension of official contacts.⁴⁷ But under the sponsorship of friendly governments in Europe and Latin American, and with the aid of elements of the Guatemalan Catholic Church, the guerrillas began contacts with political parties and social and economic groups, even, finally, with the organizational expression of the industrial and landed elite, CACIF. It, however, flatly rejected negotiation of socio-economic reform.⁴⁸

These discussions occurred within the context of a rapidly changing international environment. The Cold War ended and the Soviet Union disintegrated. In Nicaragua, the Sandinistas relinquished office after losing an open election and, with U.S. support, the Contra was demobilized. In a radical change in stance, the U.S. also threw its support behind a negotiated settlement in El Salvador managed by the United Nations which during the Cold War had been forced by the U.S. to treat Latin American as a no-go zone. Concluded finally in 1992, the Salvadoran Accords provided for a UN-funded Truth Commission constituted by three distinguished foreign experts to be selected by the Secretary General, a commission authorized to make recommendations the Salvadoran Government would be obligated to implement. While requiring the demobilization of the FMLN, it envisioned a parallel process whereby the military would be downsized, stripped of internal security functions and purged of officers found by an ad hoc committee of respected Salvadorans to have engaged in major violations of human rights. Meanwhile, a new national police force, independent of the military, would assume internal

⁴⁷ James Dunkerley, The Pacification of Central America (1994) pp 79-80.

security functions. The accords also contained specific government commitments to provide land for ex-combatants.⁴⁹

When the accords were signed, they were dismissed by persons known to speak for the Guatemalan military and agro-industrial elite as irrelevant to Guatemalan reality since in Guatemala the guerrillas had been defeated and Guatemala was not dependent on U. S. support.⁵⁰ Writing a year later, James Dunkerley concluded that the failure of the guerrillas on the battlefield “makes it unlikely that any eventual Guatemalan Peace Settlement will go much further than the rebels’ demobilization, re-reincorporation into the legal sphere, and, if conditions were propitious, some judicial consideration of the violation of human rights since the late 1970’s.”⁵¹

At the time, it seemed less a prediction than a statement of fact. Yet, beneath the surface there was already movement in the tectonic plates of this volcanic society. Within the elite-dominated economy, the long dominant plantation-export sector with its commitment to feudal labor practices was losing ground proportionately to a modern export-oriented manufacturing and assembly sector in which somewhat more educated workers and less repressive labor practices could arguably contribute to productivity. It was, moreover, a sector more subject to boycott threats directed at its partners in the U.S. and other developed countries. In addition, it was a sector whose future would depend largely on Guatemala’s inclusion in any extension of the North American Free Trade Agreement.⁵²

A second source of movement was the elite’s previous decision in the mid 1980’s that its interests would be served better by a more orderly constitutional and nominally civilian political system. Consistent with that move, limits began to appear in the scope of urban repression. As limits became manifest, popular organization began anew. Among the groups that began to organize were Mayans, hundreds of thousands of whom had been driven into Guatemala City by

⁴⁸ Id. See Table 6, the Guatemalan Peace Process 1987-92, p. 81

⁴⁹ Id, at 65 et seq, the Chapultepec Accords (named after the Mexico City castle in which they were signed) January 16, 1992.

⁵⁰ Dunkerley, *supra*, note 47, 76-77

⁵¹ Id. At 78.

⁵² The large non-agricultural sectors such as the textile industry favored free trade agreements.

the poverty and terror in the countryside. Relaxation of terror in the City also allowed middle-class leaders to return from self-exile and help provide leadership.⁵³

Even what at first glance appeared to be an ugly side to civilianization, metastasizing corruption in politics and public administration, constituted a force for peace in that it seemed to encourage some of the civilian and military elite to seek a more normal, more modern and efficient political order, one with elements of popular accountability. Corruption produced deterioration in services like light and power necessary to tube elite as well as the rest of society. Deterioration together with the gradual meliorization of the climate of fear led to large scale protests and even riots uniting workers, students, the floating proletariat and even the lower middle class. The broadening support for modernization of Guatemala suddenly cohered when, in 1993, President Serrano attempted to consolidate autocratic power by suspending the Congress and declaring a state of emergency⁵⁴. Popular organizations and trade unions found themselves in alliance with the CACIF⁵⁵ in determined opposition. Influencing the agro-industrial hierarchy was a threat from the U.S. to cut Guatemalan access to the U. S. market for its manufactured goods. The OAS, speaking for the democratic regimes now proliferated in the Hemisphere, threatened to request bi-lateral sanctions. European states suspended economic aid. Under this pressure, the military withdrew support first from Serrano and then from his ally who tried to succeed him.⁵⁶

Though awful in many respects, Serrano did restart peace negotiations but without observable progress. Negotiations continued fitfully under his successor, the former human rights ombudsman, Ramiro de Leon Carpio who proved profoundly disappointing once in

⁵³ See Dinorah Azpuru, *Peace and Democratization in Guatemala* noting that “the increasing participation, organization and consciousness among the Mayan population . . . is one of the greatest contributions of the peace process to democratization in Guatemala” p 111; and Robert Plant, *Indigenous Identity and Rights in the Guatemalan Peace Process*, discussing the role of indigenous organizations in the peace process, both in Comparative Peace Processes in Latin America, (Cynthia Arnson ed. 1999).

⁵⁴ Dunkerley, *supra*, note 47 at 84.

⁵⁵ Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations. The CICAFA disavored negotiations with the guerillas. Susanne Jonas, Of Centaurs and Doves, Guatemala’s Peace Process, (2000), pp41-42.

⁵⁶ Jonas, 42 et seq.

office.⁵⁷ Until 1994, perhaps the most useful efforts were those outside the official process, so-called Second Track Diplomacy in which Norway, but also the U. S., Spain and Mexico played a useful role. It allowed confidence building contact between guerrilla leaders and some officers of the armed forces, an institution which gradually began to appear a bit less monolithic.⁵⁸ Then, in 1994 at the request of both the guerrillas and the government, the United Nations assumed the role of moderator and the parties agreed to an agenda-setting accord which included establishment of a civil society institution, the Assembly of Civil Society (“Asamblea de sociedadada civil”) in which popular, indigenous, labor, and business groups would be urged to participate.⁵⁹ The Asemblea was charged with making consensus recommendations to the negotiators and to evaluate the accords with which the negotiations would hopefully conclude. Beginning with a comprehensive agreement on human rights, calling for UN verification of compliance, one by one the accords emerged, always painfully, until the 29th of December, 1996, when the final accord was signed and in a scene bordering on mass ecstasy, the end of 35 years of civil war was declared.⁶⁰ The accords would have been remarkable in many Latin countries; in Guatemala they seemed almost to imply some behind-the-scenes Divine Intervention. These were their main elements:

THE ACCORDS

The first and what many regarded as the breakthrough accord was the one on human rights. Its substance would have been unremarkable in many countries. It consisted largely of the government’s commitment to do all of the things it was theoretically obligated to do under international human rights and humanitarian law which included decent treatment of captured combatants and effective guarantees of freedom of movement and association. A bit more striking, perhaps, were the explicit commitments in effect to eliminate secret security units and to professionalize and purge existing security forces. What was remarkable was the agreement to

⁵⁷ Id. At 124, noting that the de Leon government was presiding over a worsening human rights situation.

⁵⁸ Id. At 43 et seq.

⁵⁹ Id. At 140.

⁶⁰ Id. At 92.

invite the United Nations to deploy a human rights verification mission inside the country empowered to look into accusations of human rights violations, to issue periodic reports assessing the general situation as well as commenting on specific cases, to disseminate those reports through the mass media, to move freely about the country and to make visits without notice to state institutions and guerrilla camps in order to collect information for its reports, to make recommendations to the parties concerning measures to promote human rights and guarantee compliance with the accord and to assure that national organizations charged with the defense of human rights were autonomous and effective. All this from a military/oligarchic regime that had furiously rejected U.S. military aid with human rights strings attached as an unacceptable interference in the country's internal affairs. This from the most articulately xenophobic government in Central America was indeed a breakthrough.⁶¹

Next in time came the agreement on the resettlement of population groups uprooted by the conflict. The government committed itself either to return land to refugees (whose abandonment of it had hitherto been taken as evidence of guilty involvement with the insurgency) or to compensate them. The guerrillas demanded and the government agreed that representatives of the uprooted peoples would be able to participate in decision making, both general and specific, about their resettlement. And, evidencing epochal change in Latin American culture, the government agreed to eliminate all forms of discrimination in the allocation of benefits under the accord.⁶²

Equally if not more surprising in the Guatemalan context and the military's triumphalist claims was the third accord establishing what amounted to a truth commission. Having less than two years previously said in effect--"never here in Guatemala"--in June 1994 the Government signed an accord that called for the establishment of an Historical Clarification Commission. To be constituted in part by two Guatemalan citizens, by implication acceptable to both sides, the chair would be a distinguished foreign expert whom the Secretary General of the United Nations would select. Again the Guatemalan elite was accepting the kind of international involvement in

⁶¹ Comprehensive Accord on Human Rights (March 1994). For a discussion of the main provisions of this accord, see Jonas, *supra*, note 55 at 71 et seq.

⁶² Resettlement of Population Groups uprooted by the Armed Conflict (June 1994). See Jonas, *supra*, note 55 at 73 et seq.

its affairs to which it had hitherto been reflexively hostile. Acceptance, however, came only after great pressure from the most interested European and Latin governments and on the basis of a compromise condemned by human rights groups, namely that, unlike the Salvador Report, this one would name no names and have no judicial consequences.⁶³

If the third was striking, the fourth accord on the identity and rights of indigenous peoples probably has to be called miraculous. Guatemala is, after all, a country in which the indigenous majority had been virtually enslaved for four hundred years, a period extending into practically the middle of the 20th century, and thereafter had been excluded from the political process and incorporated into the national economy largely as beasts of burden might. The accord's taproot, from which all of its detailed provisions stemmed, was a government commitment to seek a constitutional amendment redefining the Guatemalan Nation as "multiethnic, multicultural and multilingual. The accord itself explicitly recognized and identified the various Maya peoples and also the two non-Maya indigenous groups. The Government's branching commitments included securing legislation making ethnic discrimination a crime, decentralizing the educational system in accordance with the needs of indigenous peoples, including protection of heir linguistic heritage, officially recognizing and respecting indigenous languages in the provision of public services, incorporating customary law into the legal code, and amending the Municipal Code so that local organization in predominantly indigenous areas could conform with indigenous norms and traditions for group action. In addition the government committed to adopt or seek Congressional adoption of measures that would institutionalize indigenous representation in decision-making at every level of government. Furthermore, the accord provided for the immediate creation of several joint commissions, composed of an equal number of governmental representatives and representatives of indigenous organizations to guide implementation of educational reforms and land tenure arrangements. This accord was ratified in 1996 by the Guatemalan Congress albeit with an amendment specifying that it was subordinate to the still unamended constitution which defined the nation in unitary terms.⁶⁴

⁶³ Historical Clarification Commission (June 1994) see Jonas, *supra*, note 55 at 74.

⁶⁴ Identity and Rights of Indigenous Peoples (March 1995). See Jonas, *supra*, note 55 at 75.

Equally remarkable if not downright miraculous was the 1996 socioeconomic accord. Here was a regime, in recent decades probably the most socially retrograde in Latin America, committing itself, among other things, to:

- to encourage the formation and legal recognition of grassroots organizations as to facilitate broader citizen participation in a decentralized development-planning process;
- to adopt certain detailed mechanisms to assure the participation of women in the process and to eliminate all forms of gender discrimination embedded in existing laws
- to increased state spending on health, education, housing and social security and specifically to increase the proportion of spending on education and health in relation to GDP by at least 50 percent of 1995 levels;
- to insure that the literacy rate would be increased to 70 percent (up from 55 percent), the second lowest in Latin America) within four years;
- to provide vocational training for at least 200,000 people by the year 2000;
- to create a land trust fund that would acquire land and make it available to peasants at affordable prices;
- and in a country where elite views about progressive taxation and the welfare state generally would make Malcolm Forbes a centrist and Prince Otto von Bismark, founder of the German welfare state a communist, a commitment to raise the ratio of taxes to GDP by 50 percent, from under 8 percent to at least 12 percent also by the year 2000 and to do so in a way consistent with the principal that the tax system should be 'fair, equitable, and on the whole progressive, in keeping with the constitutional principle of ability to pay.'⁶⁵

Chronologically the last substantive accord was the one on what had till then been the ultimate "no-go" issue area, namely the strengthening of Civilian Power and the Role of the Armed Forces in a Democratic Society.⁶⁶ This remarkable document's main elements were the following:

⁶⁵ Socio and Economic Aspects and Agrarian Situation (May 1996). See Jonas, *supra*, note 55 at 78.

⁶⁶ A fifth set of agreements (The Operational Accords, December 1996), were strictly operational in nature and established the specific conditions of the cease-fire and the separation of forces. See Jonas, note 55, 88 et seq.

--A commitment to redefine the army's role by means of a constitutional amendment limiting that role to external defense;

--Concomitant transfer of internal security responsibilities to a new national civilian police force. Existing police forces would be disbanded or integrated into the new force which would also acquire supervisory authority over all private security forces. The new force would fall under the administrative responsibilities of the Minister of the Interior rather than the Army or its traditional cabinet proxy, the Minister of Defense.

--Recruitment of members of the new force so as to reflect the multi-cultural and multi-ethnic composition of the national population and training of its members in a new police academy designed to enhance the professional capacities and self-image of force members.

--Reduction by a third of the army's size and budget.

--Amendment of the constitution to confirm the President of the Republic as the commander-in-chief of the army

--Dissolution of the Special military units that had evolved during the decades of civil conflict, in particular the unit based in the Presidential Palace ostensibly to protect the President but in fact to plan and implement secret operations against persons and groups deemed subversive

--Subjecting crimes committed by military personnel to the jurisdiction of the civilian courts.⁶⁷

An accord with such revolutionary dimensions, particularly one negotiated between parties of markedly unequal strength, was bound to be marked by ominous omissions and conditions. At least three are notable. First, many of its key elements could not be implemented without amendment of the national constitution. Under the existing constitution, which the Accords did not purport to displace, every amendment requires a two-thirds affirmative vote in the Congress followed by a majority vote in a national referendum.⁶⁸ The accords, indeed even the decision to negotiate with the armed opposition, did not enjoy the unanimous support of the

⁶⁷ Strengthening of Civilian Power and Role of the Armed Forces in a Democratic Society, (September 1996). See Jonas, *supra*, note 55 at 81 et seq.

⁶⁸ Jonas, *supra*, note 55, 85-86.

traditional parties and the elite-military establishment whose several elements the parties reflected. On the contrary, some establishment factions and figures condemned the accords from the moment they were announced and insisted that they constituted commitments only of the then President and his coalition rather than of the state. That was one very serious problem, hugely compounded by a political culture that had discouraged mass electoral participation and by the murderous repression that had decimated the ranks of potential leaders for the effectively disenfranchised majority of Guatemalans. Repression had also inhibited efforts to build ties among the multiple indigenous groups or even to provide them with the lingua franca of Spanish. In short, it was hard to feel confidence that the requisite amendments would be passed in the near future. Threatening ultimate defeat of the military accord and, indeed, of all the others was a circle of irony. The accords were intended to create conditions for the effective incorporation of the Guatemalan masses into the national political system, to give them real citizenship. Yet, until incorporation occurred, it would be difficult to get the accords implemented and thus to established the conditions seemingly required for incorporation.⁶⁹

With respect to the military accord itself, there were two additional problems. One was the absence of any commitment to or specific mechanism for purging the military of persons guilty of the most heinous human rights violations.⁷⁰ In this respect, as in certain others, the Guatemalan accords differed profoundly from the Salvadoran which had established an investigative body with a mandate to identify the worst delinquents for the very purpose of triggering their forced retirement.⁷¹ This difference was intended by the Guatemalan military who, it is reported, viewed the Salvadoran accords with a bitter conviction that it could and would not happen to them. If the army was not to be cleansed but simply removed from internal security duties, the composition of the new force that would assume those duties had to be a matter of the highest consequence. One evident danger was that the army would retain de facto control of internal security operations by insinuating its most intractable unreconstructed

⁶⁹ See Jonas, *supra*, note 55, Chapter 6 for a discussion of the roadblocks to implementation of the Accords.

⁷⁰ Jonas, *supra*, note 55 at 85.

⁷¹ For an overview of El Salvador's peace accords, see Antonio Canas and Hector Dada, *Political Transition in El Salvador*, in Comparative Peace Processes in Latin America, (Cynthia Arnson, ed. 1999).

delinquents into the new national police force and reenforcing them with killers from paramilitary groups often staffed with former army members. For the unreconstructed members of the army and its civilian allies, the ideal would be a force packed with their friends and off limits to persons who had served in or been sympathetic to the armed opposition. Despite this danger's salience, the accord did not specify whether ex-army and security force members or ex-guerrillas could serve.⁷²

POST-CONFLICT GUATEMALA

Perhaps societies do experience redefining moments when some unique conjuncture alters their historical path. Perhaps the accords evidence such a shift in Guatemala. Perhaps. But at any moment in time, societies are clusters of patterned and deeply rooted behaviors, behaviors corresponding to powerful individual and group interests and mentalities. Hence a moderately cautious observer will assume that, except where the *ancient regime* is either destroyed or at least challenged by forces it cannot repress, the new path will not immediately and sharply diverge from its predecessor. Until they change in the face of the altered circumstances encountered on new terrain, interests and identities erect quotidian barriers pressing social forces back toward the familiar way.

Certainly any deviation, unless it is illusory, increases over time. Meanwhile, societies inch forward in the face of entrenched resistance. Such has been the experience of Guatemala. Let's begin with the very specific commitment on tax reform. It had to be a central feature of any sustained program for poverty alleviation. For decades prior to the accords, Guatemala had trailed the rest of Latin America in the percentage of gross domestic product available for the production of public goods. Its system of taxation, markedly regressive, generated relatively exiguous revenues. In other words it was both unjust and feeble. Despite the letter of the accord and pressure from the international donor community, the government failed to get the requisite legislation through Guatemala's Congress in the face of quiet but unambiguous hostility from the economic elite acting through CACIF, its main organ for collective action. A level of

⁷² Jonas, *supra*, note 55 at 85.

progressive taxation that would simply make Guatemala an average Latin country in this respect remains unacceptable to the agro-business interests that still rule Guatemala in cooperation with the military establishment.⁷³

As action to enhance government revenues was a condition precedent for sustainable poverty reduction, so constitutional reform was essential for extending true citizenship to the indigenous majority. First the Arzú administration delayed pushing the substance of the accord on multiculturalism and indigenous rights through the Congress. In this and other ways it implied a low priority for executing the relevant agreements. Finally, in May 1999, Congressional approval having been achieved, the requisite constitutional amendments were submitted to a national referendum. Opponents dominated the media, particularly television.⁷⁴ The traditional parties of the center and left were either lukewarm or hostile. The government failed to disseminate any clear account of the amendments much less to campaign on their behalf or markedly to ease the economic and logistical as well as educational obstacles to voting by the amendments' beneficiaries, the indigenous majority. True, they were no longer liable to be murdered for the delinquency of organizing and attempting to vote. But after decades of pitiless decimation, a new infrastructure of emancipatory political organizations was not yet in place. In the event, only eighteen and one-half of the eligible voters participated in the referendum. The amendments were defeated by a vote constituting six percent of all theoretically eligible voters.⁷⁵

A third important statement of the obstacles to social, economic and political transformation was the murder of Bishop Juan Gerardi. The Catholic Church's leading advocate of reform and a central figure in promoting the peace process, Bishop Gerardi was found on the 27th of April, 1998, with his skull smashed by a cement block and its contents spread over the floor of his garage. Two days previously, on behalf of the Archbishop's human rights office which he directed, he had presented to the nation a monumental report on violations of human

⁷³ See *Id.* At 169 et seq for an analysis of Guatemala's failed tax reforms.

⁷⁴ For example, two days before the vote on the reforms, the CACIF published a newspaper ad pronouncing its strong opposition to the reforms. *Id.* at 196.

⁷⁵ *Id.* at 199.

rights during the decades of state terror. The report laid the overwhelming majority of those violations at the door of the military institution.⁷⁶

He died struggling for justice in a society where less than one-third of the work force held formal jobs paying at least the exiguous minimum wage, where only 27 percent of the population lived above the poverty level and where 2.4 million people, about a quarter of all Guatemalans living in Guatemala (perhaps as many as a fifth live in the United States), survived (to the extent they did) in conditions defined by intergovernmental organizations as “extreme poverty.”⁷⁷

As we look back to the ecstatic moment in 1996 when hundreds of thousands of people poured into the center of the capital to celebrate the appearance of peace, what can we say about this tortured, pitiable country? Because life without hope is unbearable, we at this safe distance can eulogize the space that has been opened for political mobilization and the incipient struggle to construct a national society that might, someday, be pocked by no more than the normal quotient of poverty and inequality and injustice in the application of the law. But between hope and reality falls the shadow of contemporary Guatemala. In the realm of economic misery and public action to alleviate it, I note the Year 1999 Human Development United Nation Development Programme. It reveals that Guatemala, with a per capita gross domestic product nearly three times greater than Bolivia and Honduras, ranks below them on the human development index, ranks lower, indeed than any country in the Hemisphere with the single exception of Haiti.⁷⁸ In the realm of justice, I cite the Year 1999 World Report of Human Rights Watch, in particular the following two items in its report on Guatemala. One deals with the investigation into the Assassination of Father Gerardi. Every material witness has found it prudent to leave the country. So has the investigating magistrate and also the second prosecutor in the case who, unlike his predecessor, was willing to consider the hypothesis that Gerardi’s murder was politically motivated. Previously, despite the uncanny coincidence of Girardi’s report and his death (carried out with the sort of horrific dramaturgy frequently used in the past

⁷⁶ Id. at 146-147.

⁷⁷ Id. at 182.

⁷⁸ 1999 Human Development Report prepared by the United Nations Development Programme, p 260.. Out of 174 countries, Guatemala ranked 117 while Haiti ranked 152. The Human Development Report measures development on components of education, longevity and income per head.

by the Guatemalan armed forces and its paramilitary allies), the official investigators operated exclusively on the assumption that the death was no more than a common crime.⁷⁹

A second suggestive criminal process was the prosecution of members of a military patrol accused of murdering eleven persons in a rural community. All of the victims had recently been repatriated from refugee camps outside the country, camps to which they had fled during the terror campaign waged by the armed forces. After a process characterized by the presiding

judge's dilatory tactics, intractable resistance from the military and anonymous threats to prosecutors, the second lieutenant who had led the patrol and ten soldiers were found guilty of manslaughter. Another fourteen soldiers were found guilty of complicity. The presiding judge sentenced the two groups respectively to five and four years imprisonment, then declared each sentence commutable to a fine of 5 quetzels for each day of the sentence. At the time of the sentence, five quetzels equaled 67 U.S. cents. In other words, each soldier found guilty of multiple manslaughter was required to pay a total of 1,218 dollars, slightly over \$100 per dead peasant.⁸⁰

Summing up post-peace-accords Guatemala in the apt idiom of New Orleans blues, one would have to say: "Justice? He not be comin' to Guatemala anytime soon."

⁷⁹ Human Rights Watch, 2000 World Report 130 et seq.

⁸⁰ Id.