

GUATEMALA :

First Steps to End Impunity Over

45,000

Cases of Enforced Disappearance

by Atty. Gabriella Citroni

Introduction

From 1960 to 1996, Guatemala was ravaged by a bloody internal armed conflict, which left almost 250,000 people arbitrarily killed, around one million of refugees and internally displaced people and 45,000 victims of enforced disappearance. The great majority of victims belonged to the Mayan population.¹

The conflict from which disappearances arose in Guatemala began in the sixties when a small group of young army officers rebelled against the military government, accusing it of corruption. The rebellion was put down, and the young officers fled to the mountains of eastern Guatemala where they began a guerrilla war. These guerrillas soon turned into a Marxist movement (*URNG – Unidad Revolucionaria Nacional Guatemalteca*) whose objective was to overthrow the government and take power. It is important to highlight that the Guatemalan armed conflict occurred in the framework of the Cold War². On 29 December 1996, the government and the URNG signed an Agreement on a Firm and Lasting Peace.³

The final report presented in 1999 by the Guatemalan Truth Commission⁴ known as "Commission for Historical Clarification" concluded that:

In Guatemala, forced disappearance was a systematic practice which, in nearly all cases, was the result of intelligence operations. The objective was to disarticulate the movements or organizations identified by the State as favourable to the insurgency, as well as to spread terror among the people. The victims of these disappearances were peasants, social and student leaders, professors, political leaders, members of religious communities and priests, and even members of military or paramilitary organizations that fell under the suspicion of collaborating with the enemy. Those responsible for these forced disappearances violated fundamental human rights.⁵ [...] The ultimate scope of enforced disappearance of persons is the destruction of something - an organization, the diffusion of a political idea - using someone - the victim.⁶

The subject of enforced disappearances in Guatemala had been included in the Comprehensive Agreement on Human Rights signed on 29 March 1994⁷, under Commitment III, Commitment against Impunity, in which the State undertook to promote the legal amendments to the Criminal Code to describe enforced



A human skull appears as if it were screaming. A total of 27 bodies were exhumed from clandestine sites in Chontala last summer. The exhumation was carried out with information gathered by Conavigua, an organization of widows of indigenous Guatemalans. (© www.aliciapatterson.org)

disappearance as a crime of particular gravity. The Government likewise undertook to support recognition in the international community of the definition of systematic enforced disappearances as a crime against humanity.

On 14 July 1995, Legislative Decree 48-1995 was enacted, whereby article 201-ter was added to the Criminal Code, thereby criminalizing the conduct of enforced disappearance. Article 201-ter of the Guatemalan Penal Code, as amended by Decree 33-96 of the Congress of the Republic, approved on 22 May 1996, stipulates that:

[t]he crime of forced disappearance is committed by anyone who, by order or with authorization or support of State authorities, in any way deprives a person or persons of their liberty, for political reasons, concealing their whereabouts, refusing to reveal their fate or recognize their detention, as well as any public official or employee, whether or not they are members of the State security forces, who orders, authorizes, supports or acquiesces in such actions.

The Criminal Code provides for a penalty of 25 to 40 years of imprisonment and, in the event of the death or serious physical or psychological harm of the victim of enforced disappearance, capital punishment is envisaged.⁸

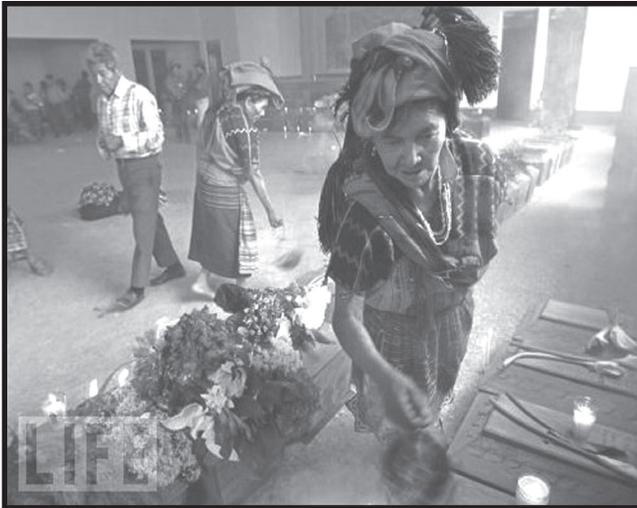
Ongoing Impunity

The Inter-American Court of Human Rights rendered a number of judgments⁹ on cases of enforced disappearance that happened during the Guatemalan armed conflict, where, besides declaring the international responsibility of the State for the violation of various human rights (right to life, right to humane treatment, right to personal liberty, right to a fair trial and right to judicial protection), the Court ordered the State, among other measures of reparation, to “exhaust all the procedures necessary in order to guarantee, within a reasonable period of time, the effective compliance of its duty to investigate, prosecute, and, if it is the case, punish those responsible for the facts [...], as well as ensure the victims’ right to a fair trial”¹⁰. The Court also added that “the result of the proceedings must be made public, so that the Guatemalan society can know the truth”¹¹.

Nevertheless, for almost 30 years, the majority of reported cases of enforced disappearance during the armed conflict remained unsolved.¹² Since enforced disappearance was codified as a separate crime under domestic penal law in 1996, the mentioned provision remained dead letter for more than 10 years. In fact, until 2007, there was not a single person arrested or tried for the commission of the crime of enforced disappearance. Only two cases made their way up to the stage of formulating an accusation. The two cases referred to enforced disappearances which had occurred between 1981 and 1984. The defendants invoked the principle of non-retroactivity of criminal law and claimed that they could not be charged with the crime of enforced disappearance as Article 201-ter had been introduced in the Criminal Code only in 1996 that is many years



Members of the URNG await to receive their certificates after completing a “demobilization” process, where they have obtained skills which prepared them for a civilian life on 1 January 1997. (© 1997 <http://www.unmultimedia.org>)



A Maya Indian woman burns incense over some of the coffins of massacred victims before their funeral on 18 April 2002 in Zacualpa, Guatemala. The remains of 100 Maya Indians who had been bludgeoned, shot or hacked to death were laid to rest 20 years after Guatemala's bitter 1960-1996 civil war. According to the Guatemalan Anthropology Forensic Foundation, the cemeteries where the bodies were found are part of 669 that have been located in the area as a result of the violence. (© Andrea Nieto/Getty Images)

after the events. The issue went to the Guatemalan Constitutional Court.

The Judgment by the Constitutional Court

In a groundbreaking judgment of 7 July 2009, the Guatemalan Constitutional Court found that, as the crime of enforced disappearance is a continuing (or permanent) one, it lasts until the fate and whereabouts of the disappeared person are established with certainty.¹³ Accordingly, there is no breach whatsoever of the principle of non-retroactivity of criminal law: as long as the perpetrators do not disclose the fate and whereabouts of the victim, the crime continues being committed, regardless of when the deprivation of liberty of the disappeared person originally occurred. The Court went on to find that in such cases, there is no retroactive application of the law even if the conduct commenced before the relevant article of the Criminal Code entered into force, given that it continued after that date.

The decision has, for the first time, opened the door to prosecutions for the tens of thousands of enforced disappearances in Guatemala and to an end to the impunity that has reigned to date.

The first Two Convictions for Enforced Disappearance

In 2003, relatives of six people¹⁴ who

were victims of enforced disappearance between 1983 and 1984 in the Choatalum village, filed a complaint against the former military commissioner Felipe Cusanero Coj, claiming that he was responsible for the mentioned crimes. He was charged with the crime of enforced disappearance as defined by Article 201-ter of the Criminal Code.

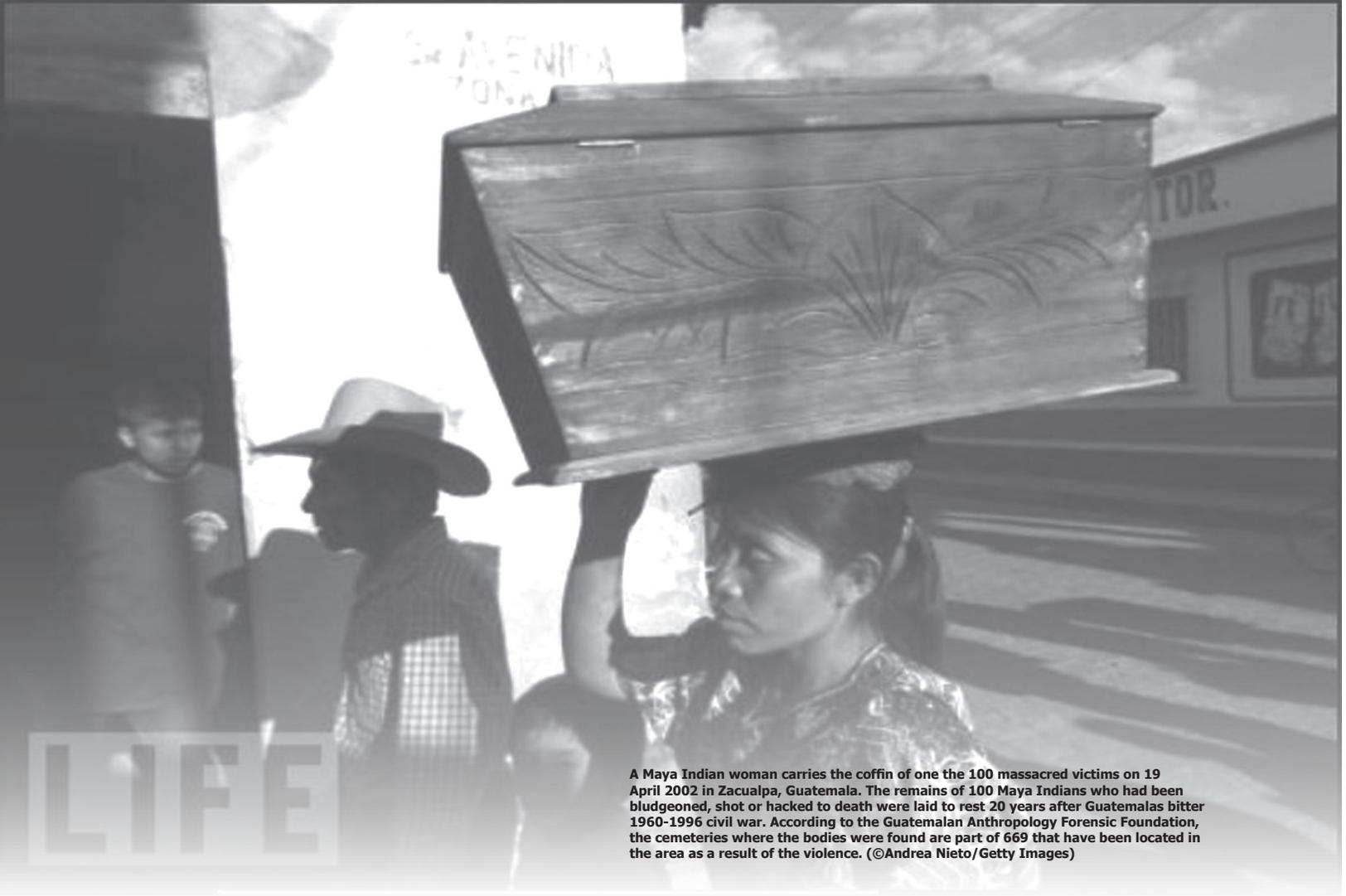
On 7 September 2009 the first conviction for enforced disappearance was eventually passed: Felipe Cusanero Coj was sentenced to 150 years jail (25 years of prison for every disappeared person).¹⁵ The sentence implied the immediate capture of Mr. Cusanero.

The judgment reiterated the permanent nature of the crime, which the Constitutional Court had already cleared up. Moreover, the judges based their decision on the evidence presented by the attorney for the government and the plaintiff. Amongst the pieces of evidence are the testimonies of the relatives who witnessed the arbitrary deprivation of liberty during those years; as well as forensic reports that proved the existence of a military detachment in the place; the Guatemala *Nunca Más* (Never Again) Report, the *Memoria del Silencio* (Memory of Silence) Report; and reports of the Inter-American Commission on Human Rights.¹⁶

Finally, the judgment refers to further prosecution proceedings that the public prosecutor shall institute, as names of two other allegedly involved military officials emerged during the trial.



A Maya Indian woman takes part in the wake for the 100 massacred victims on 19 April 2002 in Zacualpa, Guatemala. The remains of 100 Maya Indians who had been bludgeoned, shot or hacked to death were laid to rest 20 years after Guatemala's bitter 1960-1996 civil war. According to the Guatemalan Anthropology Forensic Foundation, the cemeteries where the bodies were found are part of 669 that have been located in the area as a result of the violence. (©Andrea Nieto/Getty Images)



A Maya Indian woman carries the coffin of one the 100 massacred victims on 19 April 2002 in Zacualpa, Guatemala. The remains of 100 Maya Indians who had been bludgeoned, shot or hacked to death were laid to rest 20 years after Guatemalas bitter 1960-1996 civil war. According to the Guatemalan Anthropology Forensic Foundation, the cemeteries where the bodies were found are part of 669 that have been located in the area as a result of the violence. (©Andrea Nieto/Getty Images)

On 3 December 2009, another Guatemalan tribunal handed down a second landmark judgment, sentencing Coronel Marco Antonio Sánchez Samayoa and the 3 military commissioners José Domingo Ríos, Gabriel Álvarez Ramos and Salomón Maldonado Ríos to 53 years in prison for the enforced disappearance of 8 people¹⁷ perpetrated in 1981 in the village of El Jute.¹⁸

Coronel Sánchez Samayoa, who was the Commander of the Military Zone of Zacapa, is the first high-ranking member of the military convicted for enforced disappearance committed during the internal armed conflict: the prosecutors successfully proved that, given his position and functions, he was aware of counter-insurgency activities carried out against suspected members of the guerrilla, including the disappearance of the 8 victims in the case.

This judgment is particularly important also because, in order to bring the case to trial, prosecutors and representatives of the victims successfully challenged a Court of Appeals decision of 2006, in which Coronel Sánchez Samayoa was granted an amnesty under the 1996 National Reconciliation Law. After a long legal battle, that decision was overturned, following a

Constitutional Court ruling which recognised that certain crimes, including enforced disappearance, are excluded from the ambit of the law.¹⁹

The judgment also orders to the public prosecutor to initiate an investigation against the former Ministry of the Defence Ángel Aníbal Guevara; the former Chief of Staff for the Defense Benedicto Lucas García; and other military personnel in service in the military base of Zacapa in 1981. Indeed, the judgment of December 2009 concretely opens the door to other significant results in the struggle against impunity. In fact, this historical achievement has not been welcomed by everyone: both the lawyers who represented the relatives of the disappeared people and the relatives themselves have been subjected to a harsh campaign of threats and harassment and are currently under a special regime of protection.

Conclusions

The judgments delivered after almost 30 years of impunity by Guatemalan tribunals as well as by the Constitutional Court provide a ray of hope for the families of the 45,000 victims of enforced disappearance from the



The former military man, Felipe Cusanero Coj, was condemned for 25 years of prison for each of the six women disappeared between 1982-1984. (© www.prensalibre.com)



The retired colonel Marco Antonio Sanchez Samayoa (at the background) together with three military personnel. (© www.prensalibre.com)

internal armed conflict, and set important precedents for prosecutors and judges to rely on in future cases to be brought before the courts, not only in Guatemala, but in all those countries where cases of enforced disappearance have occurred.

In fact, as a result of the continuing nature of the crime of enforced disappearance, those responsible for the crime can and must be subjected to legal proceedings and sanctions even if the law creating the separate crime of enforced disappearance is adopted after the initial act causing the disappearance, or if after the enactment of the law, the fate and whereabouts of the victim would continue to remain unknown.

It is still a long road towards accountability for these heinous crimes, but the Guatemalan experience shows that, even if it may take many years, impunity can eventually be defeated by truth and justice.

1 In its final report, the Truth Commission for Guatemala (Commission for Historical Clarification - CEH) concluded that in the context of the Guatemalan armed conflict acts of genocide were committed against members of Maya-Ixil, Maya-Achi, Maya-K'iché, Maya-Chuj and Maya-Q'anjob'al peoples. See Final Report of the CEH, *Guatemala: Memory of Silence*, Guatemala, 1999, Tome III, pp. 316-318, 358, 375-376, 393, 410, 416-423.

2 United Nations Working Group on Enforced or Involuntary Disappearance (UNWGEID), *Report on the Mission to Guatemala*, doc. A/HRC/4/41 of 20 February 2007, para. 9. In 1987 the UNWGEID had carried out another mission to the country: see doc. E/CN.4/1988/19/Add.1 of 21 December 1987.

3 The text is available at: <http://www.c-r.org/our-work/accord/guatemala/firm-lasting-peace.php>.

4 While the Commission for Historical Clarification was carrying out its mandate, a similar initiative was undertaken also by the Guatemalan Archbishop. For the final report of this other Truth Commission, see Archbishop of Guatemala, Human Rights Office, Guatemala: Never Again - Report of the Inter-diocesan Project of Recovery of Historical Memory, Guatemala City, 1998.

5 CEH, *Guatemala: Memory of Silence*, supra note 1, "Conclusions", chap. IV, para. 89.

6 *Ibid.*, para. 2061.

7 The text is available at: <http://www.c-r.org/our-work/accord/guatemala/human-rights-agreement.php>.

8 On the compatibility of the Guatemalan Criminal law on enforced disappearance with international human rights law, see UNWGEID, *Report on the Mission to Guatemala*, supra note 2,

paras. 28-34 and 99.

9 Inter-American Court of Human Rights (IACHR), Case *Blake v. Guatemala*, judgment of 24 January 1998; Case *Bámaca Velásquez v. Guatemala*, judgment of 25 November 2000; Case *Molina Theissen v. Guatemala*, judgment of 4 May 2004; and Case *Tiu Tojín v. Guatemala*, judgment of 26 November 2008.

10 IACHR, Case *Tiu Tojín*, supra note 9, para. 72.

11 *Ibid.*

12 See, inter alia, Inter-American Commission on Human Rights, Justice and Social Inclusion: the Challenges of Democracy in Guatemala, OEA/Ser.L/V/II.118 Doc.5 rev.1, 29 December 2003.

13 Constitutional Court of Guatemala, judgment of 7 July 2009. See also, *inter alia*, Constitutional Section of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, judgment of 10 August 2007; Supreme Court of Justice of Peru, judgment of 20 March 2006 (Exp. 111-04, *D.D. Cayo Rivera Schreiber*); Constitutional Court of Peru, judgment of 18 March 2004 (Exp. 2488-2002-HC/TC), para. 26; Supreme Court of Justice of Mexico, judgment of 20 July 2004 (P./J.49/2004); Constitutional Court of Peru, judgment of 9 December 2004 (Exp. 2798-04-HC/TC), para. 22; and Constitutional Court of Colombia, judgment of 31 July 2002 (No. C-580/02).

14 Lorenzo Ávila, Alejo Culajay Ic, Filomena López Chajchaguin, Encarnación López López, Santiago Sutuj and Mario Augusto Tay Cajt.

15 *Tribunal for Criminal Act, Narco-activity and Crimes against the Environment of the region of Chimaltenango*, Judgment No. C-26-2-2006, Of. III, 7 September 2009.

16 Inter-American Commission on Human Rights, *Report on the Human Rights Situation of Human Rights in the Republic of Guatemala*, doc. OEA/Ser.L/V/II.53 Doc. 21 rev. 2 of 13 October 1981 (Chapter II, Missing Persons); and doc. OEA/Ser.L/V/II.61 Doc. 47 of 3 October 1983 (Chapter III, Abductions and Disappearances).

17 Jacobo Crisóstomo Chegüen, Miguel Ángel Chegüen Crisóstomo, Raúl Chegüen, Inocente Gallardo, Antolín Gallardo Rivera, Valentín Gallardo Rivera, Antolín Gallardo Rivera and Santiago Gallardo Rivera.

18 Tribunal of Chiquimula (Tribunal Primero de Sentencia), judgment of 3 December 2009. More precisely, the accused were sentenced to 40 years of imprisonment for enforced disappearance and to 13 years and 4 months of imprisonment for illegal deprivation of liberty.

19 Constitutional Court of Guatemala, judgment of 23 December 2008. See <http://www.impunitywatch.org/en/publication/36>.



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