Redefining Genocide: Memory, Jurisdiction, and Transnational Justice in the Guatemalan Genocide Trials

Alexander McCready

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Redefining Genocide: Memory, Jurisdiction, and Transnational Justice in the Guatemalan Genocide Trials

by

Alexander Read McCready

Under the Direction of J.T. Way, PhD

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

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Georgia State University

2021
ABSTRACT

On 10 May 2013, decades of grassroots activism culminated in the conviction of Guatemalan dictator Efraín Ríos Montt for genocide, the first former head of state to be found guilty of this crime by his own country. Through the grassroots effort to see Ríos Montt held accountable for genocide, indigenous Guatemalans not only found justice, they also took control of their own historical memory. This dissertation examines how various constituencies used the law to facilitate genocide, then peace, and ultimately justice. A close reading of the varied legal arguments, decisions, dissents, and commentary produced as a result of the Guatemalan Maya and grassroots social movements’ steadfast pursuit of justice in Guatemala, the US, Spain, and the Inter-American system of human rights reveals gaps, defects, and contradictions in international law. By both resisting and deploying various aspects of the law, indigenous Guatemalans shaped the transnational legal order. Through dialogical and multifaceted processes of resistance and acquiescence, this dissertation argues, indigenous Guatemalans reframed the power dynamics between the Global South and the Global North—by forcing the world to recognize the acts of genocide committed against them by internationally-supported forces in the Guatemalan civil war—and redefined accepted truths on the law of genocide to include the possible prosecution of “ideological genocide.”
INDEX WORDS: Legal History, Guatemala, Genocide, Global South, Transnational History, Justice, Subaltern Studies, International Law, Human Rights
DEDICATION

For the heroes that survived. Your perseverance is the very definition of the human spirit.
ACKNOWLEDGEMENTS

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<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>ACT</td>
<td>Asociación Contra la Tortura (Association Against Torture)</td>
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<tr>
<td>AJR</td>
<td>Asociación para Justicia y Reconciliación (Association for Justice and Reconciliation)</td>
</tr>
<tr>
<td>ALA</td>
<td>Asociación Libre de Abogados (Free Association of Lawyers)</td>
</tr>
<tr>
<td>ASC</td>
<td>Asamblea de la Sociedad Civil (Civil Society Assembly)</td>
</tr>
<tr>
<td>BDH</td>
<td>Bufete Jurídico de Derechos Humanos (Human Rights Law Firm)</td>
</tr>
<tr>
<td>CACIF</td>
<td>Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations)</td>
</tr>
<tr>
<td>CALDH</td>
<td>Centro de Acción Legal en Derechos Humanos (Center for Legal Action on Human Rights)</td>
</tr>
<tr>
<td>CDHG</td>
<td>Comisión de Derechos Humanos de Guatemala (Guatemalan Human Rights Commission)</td>
</tr>
<tr>
<td>CEH</td>
<td>Comisión para el Esclarecimiento Histórico (UN Historical Clarification Commission)</td>
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<tr>
<td>CERJ</td>
<td>Consejo de Comunidades Étnicas Runujel Junam (Ethnic Community Council “All Equal”)</td>
</tr>
<tr>
<td>CICIG</td>
<td>Comisión Internacional Contra la Impunidad en Guatemala (UN International Commission against Impunity in Guatemala)</td>
</tr>
<tr>
<td>CJA</td>
<td>Center for Justice and Accountability</td>
</tr>
<tr>
<td>CONAGRO</td>
<td>Coordinadora Nacional Agropecuaria (National Agrarian Coordinating Commission)</td>
</tr>
<tr>
<td>CONAVIGUA</td>
<td>Coordinadora Nacional de Viudas de Guatemala (National Coordinating Commission of Guatemalan Widows)</td>
</tr>
<tr>
<td>COPMAGUA</td>
<td>Coordinación de Organizaciones del Pueblo Maya de Guatemala (Council of Organizations of the Pueblo Maya of Guatemala)</td>
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<td>Abbreviation</td>
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<tr>
<td>CNR</td>
<td>Comisión Nacional de Reconciliación (National Reconciliation Commission)</td>
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<tr>
<td>CUC</td>
<td>Comité de Unidad Campesino (Peasant Unity Committee)</td>
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<tr>
<td>EGP</td>
<td>Ejército Guerrillero de los Pobres (Guerrilla Army of the Poor)</td>
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<tr>
<td>FAMDEGUA</td>
<td>Asociacion de Familiares de Detenidos-Desaparecidos de Guatemala (Association of Relatives of the Detained-Disappeared of Guatemala)</td>
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<tr>
<td>FAR</td>
<td>Fuerzas Armadas Rebeldes (Rebel Armed Forces)</td>
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<tr>
<td>FGEI</td>
<td>Frente Guerrillero Edgar Ibarra (Edgar Ibarra Guerrilla Front)</td>
</tr>
<tr>
<td>FRMT</td>
<td>Fundación Rigoberta Menchú Tum (Rigoberta Menchú Tum Foundation)</td>
</tr>
<tr>
<td>GAM</td>
<td>Grupo de Apoyo Mutuo (Mutual Support Group)</td>
</tr>
<tr>
<td>LOPJ</td>
<td>Ley Orgánica del Poder Judicial (Organic Law of the Judiciary)</td>
</tr>
<tr>
<td>LRN</td>
<td>Ley de Reconciliación Nacional (National Reconciliation Law)</td>
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<tr>
<td>MINUGUA</td>
<td>Misión de la Naciones Unidas en Guatemala (UN Verification Mission in Guatemala)</td>
</tr>
<tr>
<td>MR-13</td>
<td>Movimiento Revolucionario 13 Noviembre (November 13th Revolutionary Movement)</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>ODHA</td>
<td>Oficina de Derechos Humanos del Arzobispado (Archdiocesan Human Rights Office)</td>
</tr>
<tr>
<td>PAC</td>
<td>Patrulla de Autodefensa Civil (Civilian Self-Defense Patrol)</td>
</tr>
<tr>
<td>PDDHH</td>
<td>Procuraduría de los Derechos Humanos (Human Rights Ombudsman)</td>
</tr>
<tr>
<td>URNG</td>
<td>Unidad Revolucionaria Nacional Guatemalteca (Guatemalan National Revolutionary Unity)</td>
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<tr>
<td>UROG</td>
<td>Representación Unitaria de la Oposición Guatemalteca (United Representation of the Opposition)</td>
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1 INTRODUCTION

The eyes of the buried will close together on the day of justice, or they will never close.

—Miguel Angel Asturias

In 2013, a Guatemalan national court convicted General Efraín Ríos Montt, Guatemala’s military dictator from March 1982 to August 1983, of genocide against the Ixil Maya. This trial marked the first time that a head of state was prosecuted and convicted for genocide by his home country, rather than in the International Criminal Court. These acts resulted from Ríos Montt’s scorched-earth military campaign designed to eradicate perceived indigenous support for a Marxist insurgency in, among other areas, a remote region of the Western highlands known as the Ixil Triangle.

The Guatemalan genocide occurred against a backdrop of a brutal, 36-year civil war fought between guerilla forces and the right-wing military, lasting from 1960 to 1996, resulting in the displacement of roughly one-and-a-half million citizens and the death of over 200,000 people, 83 percent of whom were Maya. Although the war began in 1960, the most horrific period is widely considered to have been during the regimes of Ríos Montt and his predecessor, General Fernando Romeo Lucas García, from 1978 to 1983, a period characterized by escalating

3 Jennifer Schirmer, The Guatemalan Military Project: A Violence Called Democracy (Philadelphia: University of Pennsylvania Press, 1998), 45. The area draws its name from the indigenous people that make up region’s vast majority, the Ixil, and the triangular shape made its the three main towns, Santa María Nebaj (more commonly Nebaj), San Juan Cotzal, and San Gaspar Chajul (more commonly Chajul).
mass state terror, massacres, and, ultimately, genocidal counterinsurgency campaigns throughout the Mayan highlands.\(^5\) Of the 200,000 that died during the civil war, it is estimated that as many as 170,000 deaths were the result of genocidal acts, with up to 75,000 occurring during the Ríos Montt period.\(^6\)

Guatemala has long been described as a contradictory nation, one that “reveals the highs and lows of human interactions.”\(^7\) These highs and lows manifested, in simplified terms, through various systems of oppositional binaries: colonizer/colonized; military/insurgency; urban/rural; rich/poor; guilty/innocent. The prosecution of Ríos Montt and his co-defendant, former head of military intelligence José Mauricio Rodríguez Sánchez, reflected the tensions between these divides. Whether his regime was a genocidal one remained subject to public debate, and the military elite, who had long enjoyed deeply entrenched patterns of impunity, argued in concert with the upper echelons of power against any prosecution at all. Ultimately, decades of grassroots indigenous activism largely settled that debate in court even though the Guatemalan Constitutional Court overturned the verdict on a legal technicality after only 10 days.

Within the story of this trial lies a legal history that transcends jurisdictional boundaries and jurisprudential events. Despite seemingly insular as a Guatemalan trial, in a Guatemalan national court, with Guatemalan survivors and Guatemalan defendants, Ríos Montt’s domestic prosecution was a collision between national events and international law. Analysis of the Guatemalan genocide trials offers insight into how the Guatemalan indigenous grassroots forced different jurisdictions to intersect, interrelate, and, at times, cooperate through resistance and/or

\(^5\) Victoria Sanford, *Buried Secrets.*

\(^6\) Schirmer, *The Guatemalan Military Project,* 44; Commission for Historical Clarification, *Memory of Silence,* 76-78. *Memory of Silence* is the findings of the United Nations Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico or CEH).

acquiescence to both Guatemalan domestic policy and international law. These grassroots-led interactions and exchanges drove shifts in indigenous power in Guatemalan domestic spheres and prompted alterations to US foreign policy. Ultimately, the pursuit of justice by members of Guatemala’s indigenous population redefined from below the international community’s understanding of genocide to include forms of “ideological genocide,” the blanket extermination of political opposition. Simultaneously, Ixil Maya activists, with other Maya groups in solidarity, shifted the axis of power between the Global South and the Global North by using domestic and foreign legal spaces to ensure that the global memory of the Guatemalan genocide mirrored its collective, indigenous counterpart.

“Redefining Genocide: Memory, Jurisdiction, and Transnational Justice in the Guatemalan Genocide Trials” traces the legal history that culminated in the prosecution of Ríos Montt. As is often the case with significant trials, Ríos Montt’s genocide prosecution cannot be understood solely by using the facts litigated within the bounds of a courtroom. Legal issues that became key in his trial predate his genocidal orders by decades. The legal foundation for his prosecution goes back to at least the 1948 adoption by the United Nations General Assembly of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the “Genocide Convention”), ratified by Guatemala in 1950 and incorporated into domestic criminal law in 1973 amid the civil war, with the passage of a new penal code. Amoral interpretations of law, repression, and changing legislation that permitted the military’s horrific human rights

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abuses defined the legalities of Guatemala’s civil war and led the US to address the disjuncture between its foreign and human rights policies.

Members of the Guatemalan left—and within it, of the Mayan movement—leveraged these changes to facilitate the end of the civil war and expand the possibility of achieving justice for the atrocities committed by the armed forces. Indigenous actors did this despite legal systems of impunity, which were both sociolegal (an unofficial culture of judicial inaction toward the armed forces) and structural (official barriers to prosecution such as amnesty legislation and overlapping systems of immunity). Guatemala’s indigenous grassroots activists contested both these systems of impunity in various legal venues. Judicial inaction in Guatemalan national courts led survivors of Guatemala’s genocidal regimes to pursue justice in regional human rights courts and foreign national courts before finally making their case in Guatemala’s criminal justice system. Through these legal battles, indigenous Guatemalan activists challenged the interpretive and historical framework of international law and expanded concepts of transnational access to courts. In so doing, survivors of the Guatemalan genocide took control of their own historical memory while paving a path for other survivors to pursue justice by reshaping accepted concepts of genocide’s legal definition to include forms of ideological genocide.

1.1 Background

Roughly the size of the US state of Ohio, Guatemala is divided by two mountain ranges into three main geographic regions: the Pacific coastal piedmont; the mountainous highlands; and the northern limestone plateau of the Petén. The difficult terrain makes travel tedious and time consuming, and in some cases impossible in the rainy season. Humans settled in Guatemala approximately 10,000 to 15,000 years ago, and their descendants, known collectively today as
the “Maya,” make up roughly 50 percent of the country’s population. The other 50 percent are ladinos, essentially anyone who is not Maya, including light-skinned elites as well as darker-skinned mestizos (those of mixed Spanish and indigenous descent). But just as there are ladino elite, they have Maya counterparts, and neither ladinos nor Maya can (or should) be socio-politically grouped along racial lines.⁹

Nonetheless, race played a role in Guatemala’s development since the Spanish conquest. Early in the colonial period, Spaniards established a racial hierarchy that justified race-based systems of coerced labor. Exploitation of the Maya by the ruling class survived Guatemala’s 1821 independence from Spain and the “Liberal revolution,” where politicians such as Presidents Justo Rufino Barrios (1873-1885) and Manuel Estrada Cabrera (1898-1920) used brutal methods to modernize the country. Modernization came with costs, and to mitigate these costs political leaders oppressed the peasantry and granted vast concessions to the banana-growing United Fruit Company, an American corporation.¹⁰ In 1931, General Jorge Ubico (1931-1944) assumed the presidency after winning a “landslide” election (he was the only candidate). His regime continued the patterns of dictatorial rule over the Guatemalan populace while giving tax and other privileges to United Fruit, which by the 1950s was the single largest landowner in Central America and held almost half of Guatemala’s arable land.¹¹ Ubico’s policies helped the


¹⁰ The United Fruit Company is today known as Chiquita Brands, Int.

corporation to achieve this status. An example is seen in the wake of the Great Depression, which forced the company to lay off thousands of campesinos (peasants) despite the company’s ongoing need for laborers. To guarantee United Fruit and Guatemala’s great coffee planters a captive labor force, Ubico abolished debt peonage in favor of a new vagrancy law. This law forced men between the ages of 18 and 50 to work hard labor if they did not own a threshold level of land. Ubico also authorized landowners to use any levels of force they saw necessary to defend their property, freeing landowners to commit legalized murder of campesinos. The majority of those affected by the change were Maya.

Ubico’s control over the country lasted until 1944. That June, Ubico responded to a series of protests against his oppressive actions by suspending the constitution, inspiring a general strike. Public support for the strike grew after Ubico declared martial law, and by the end of the month he resigned the presidency. The military junta that replaced him tightened governmental restrictions, and in October 1944, progressives within the military joined with students to oust the junta.¹²

In October 1944, a group of army officers led by Jacobo Árbenz Guzmán and Francisco Javier Arana launched a coup against the military junta, beginning a ten-year period of democratic rule later to be remembered as the “Ten Years of Spring.” By the end of the year, in the country’s first free election, Guatemalans overwhelmingly elected Juan José Arévalo (1945-1951), a college professor living in Argentina, to the presidency. The new president increased funding for education and legalized organized labor while also cracking down on Guatemalan communists. Arévalo chose not to pursue reelection, and in 1951 the country chose Jacobo Handy, *Gift of the Devil*; Luján Muñoz, *Breve historia contemporánea de Guatemala*; Ralph Lee Woodward, Jr., *Central America: A Nation Divided* (New York: Oxford University Press, 1999).

¹²
Árbenz (1951-1954), one of the leaders of the 1944 coup, his successor. The CIA notably viewed Árbenz as controllable due to his military background.13

In fact, Árbenz proved more progressive than his predecessor. He continued the reforms begun under Arévalo, and in 1952 announced an aggressive policy of agrarian reform called Decree 900. Decree 900 permitted the Guatemalan state to expropriate unused land from large landholders. This exposed United Fruit to large potential losses of land, as only roughly 15 percent of its estimated 550,000 acres was cultivated. This seeming antagonism to US corporate interests raised concerns within the US government of Árbenz’s potential communist leanings, bolstering US fears of communism’s spread in the Western hemisphere.14

These fears ultimately led the CIA to back the overthrow of Guatemala’s democratically-elected leader. In June 1954, with CIA support, Coronel Carlos Castillo Armas led about 500 exiled Guatemalan soldiers into Guatemala from Honduras. Within weeks Árbenz lost the support of the military, and by the end of the month he resigned. Castillo Armas (1954-1958), the only candidate on the ballot, won the election to replace Árbenz and quickly set out the process of reversing the social and economic gains made since 1944. The Ten Years of Spring were over.15

Following the assassination of Castillo Armas, General Miguel Ydígoras Fuentes (1958-1963) assumed control of the government. Vast corruption marked the Ydígoras Fuentes regime. This corruption led a group of junior military officers to stage an unsuccessful coup against

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15 Luján Muñoz, Breve Historia Contemporánea De Guatemala, 293-95; Gleijeses, Shattered Hope, 56; Roddy Brett, The Origins and Dynamics of Genocide.
Ydígoras Fuentes in November 1960 after he allowed the US to train the Bay of Pigs invasion force in Guatemala. Those who survived the failed coup fled to the mountains and returned two years later, radicalized. In February 1962 the insurgent group attacked the local offices of United Fruit, calling itself the insurgent *Movimiento Revolucionario 13 Noviembre* (the November 13 Revolutionary Movement or MR-13), after the date of the failed coup. Workers and students supported the guerrilla organization, and MR-13 joined with other revolutionary fronts in 1962 under the common banner *Fuerzas Armadas Rebeldes* (the Rebel Armed Forces or FAR). The military government responded with predictable violence.\(^\text{16}\)

Throughout the 1960s and 1970s, more guerrilla groups joined the resistance to the Guatemalan state. Likewise, the use of state terror, forced disappearances, and death squad attacks against those perceived by the military as having leftist sympathies also increased. These repressive tactics had some success, and by the late 1960s the military largely defeated the FAR. US military assistance to the Guatemalan armed forces continued unabated during this period and escalated following the assassination of US Ambassador John Gordon Mein by the FAR in August 1968. Members of the FAR who survived the counterinsurgency push regrouped as the *Ejército Guerrillero de los Pobres* (the Guerrilla Army of the Poor or EGP) in the early 1970s.\(^\text{17}\)

On 4 February 1976, a 7.5 moment magnitude scale earthquake devastated the country. An estimated 23,000 Guatemalans died in the quake, with another 77,000 wounded and over one million left homeless. The military government used the disaster as an opportunity to fine-tune its counterinsurgency apparatus. Likewise, the quake prompted action in the countryside. In various places throughout the highlands, indigenous communities began to advocate for

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\(^{16}\) There is some debate as to which event marks the beginning of Guatemala’s thirty-six-year civil war, the 1960 failed coup attempt or the military’s 1962 response to the United Fruit offices attack.

structural reforms. These community organizations loosely joined in 1977 to form what on 12 April 1978, officially became the Comité de Unidad Campesino (the Peasant Unity Committee or CUC). Although the CUC was the first indigenous-led labor organization in Guatemala, it also counted students and ladinos among its members. Although not directly tied, the CUC was closely related to the EGP and the groups held similar values about the poor and social justice.18

State repression escalated throughout the 1970s. Death squads continued to act with impunity, and the state repeatedly announced “states of siege” (a kind of emergency martial law) that gave the premise of legality to its authoritarianism. The state used every apparatus at its disposal to effectuate state terror, and in 1973 passed a new criminal law code that shielded governmental repression from censure. Despite this underlying legality, however, foreign actors increasingly criticized the Guatemalan state’s use of repression and state terror. In the late 1970s, the US, under President Jimmy Carter, reevaluated its provision of military aid to the Guatemalan government due to the Guatemalan state’s continuing pattern of human rights violations.

In 1978, after a fraudulent election, the Guatemalan Congress appointed General Romeo Lucas García (1978-1982) as president. Under Lucas García, the state’s use of violence and murder drastically increased. As a response to this increased oppression, members of the CUC and EGP led a group of indigenous protestors to Guatemala City to address Congress. The protestors’ requests were denied, and after the group’s legal advisor was killed, the protestors

occupied the Spanish Embassy. The army burned the embassy, killing 36 people trapped inside when the military barricaded the doors. The attack left many Maya feeling that they had only one option, to join the guerrillas. This feeling solidified after the July 1981 military’s kidnapping and torture of the CUC’s leader, Emeterio Toj Medano, who was freed only after the EGP attacked the base where he was held captive. Indigenous participation in the insurgency increased, and in February 1982 the EGP joined with other revolutionary groups as the umbrella leftist organization Unidad Revolucionaria Nacional Guatemalteca (the Guatemalan National Revolutionary Unity, URNG-MAIZ, or just URNG).\textsuperscript{19}

While Mayan involvement with the guerrillas rose, Lucas García also forced civilian participation in the state’s terror apparatus. In 1981, General Benedicto Lucas García, then-President Lucas García’s brother, ordered the unofficial creation of Patrullas de Autodefensa Civil (Civil Defense Patrols or PACs), groups of campesinos forced into rural militia service. The military gave the PACs little-to-no training or equipment and often forced the PACs to participate in massacres and other atrocities. Although technically voluntary, the military often conflated refusal to join the PACs with support for the insurgency. Official creation of the PACs occurred after a group of young officers overthrew Lucas García on March 23, 1982, following more accusations of fraud in the 1982 presidential election.\textsuperscript{20}

A new three-person junta, led by the staunchly anti-Communist Ríos Montt (1982-1983), replaced the deposed Lucas García regime. The government quickly declared martial law and suspended the constitution. In place of the constitution, a new “fundamental law” gave the junta


full control of the entirety of government. With the judiciary under his authority, Ríos Montt created secret courts, issued the power to impose ad hoc death sentences, and remade the law in accordance with the actions of the counterinsurgency. This shift in legality rehabilitated Guatemala’s human rights record in the eyes of some foreign states, most notably the US under then-President Ronald Reagan. The Reagan administration, who saw a kindred ideology in Ríos Montt’s anti-Communist, Evangelical vision, used the Ríos Montt regime’s “letter-of-the-law” compliance to justify the resumption of military aid.21

US aid proved crucial for the military. The country’s topography made transportation of troops into mountainous and jungle regions difficult. Using the tools provided by the US (e.g., helicopters), Ríos Montt initiated a “scorched earth” military campaign against who the armed forces saw as the base of insurgent support, the Maya. While state violence in Guatemala City and other urban areas declined under Ríos Montt, the terror in the countryside exploded. Following Ríos Montt’s orders, soldiers (often accompanied by PACs) brutally massacred entire villages in brutal fashion. The murders and other violations were indiscriminate, with women, children, and the elderly among the victims. This campaign later served as the factual basis for prosecuting Ríos Montt for genocide. The scorched earth approach largely worked and weakened indigenous support for the guerrillas by December 1982. The 18-month-period that Ríos Montt controlled the country marked the bloodiest portion of the 36-year civil war. Of the 200,000 that were killed or disappeared during the conflict, an estimated 75,000 perished during the Ríos Montt regime.22

21 Ibid.; Brett, 133-34.
22 Schirmer, The Guatemalan Military Project, 29, 44; Commission for Historical Clarification, Memory of Silence, 76-78.
Ríos Montt’s short and deadly time in the National Palace, Guatemala’s equivalent of the US White House, ended as it began, with a coup. After indications that Ríos Montt had no intention to transition to popular elections, the military ousted its dictator on 8 August 1983. Although the refusal to allow popular elections justified the coup, varying theories account for the motivation for his removal. The desire to transition to public elections, rumors of agrarian reform that would threaten the oligarchic elite, concerns over his Evangelicalism, and his inability to maintain economic growth have all been offered as potential explanatories.  

General Óscar Humberto Mejía Víctores (1983-1986), then the Minister of Defense, led the coup and became *de facto* president of the country after deposing Ríos Montt. Mejía Víctores reversed the urban-to-rural shift of human rights abuses and increased the use of kidnappings and forced disappearances. Despite these human rights violations, in 1985 Mejía Víctores allowed the drafting of a new constitution and honored the public pledge he made for free democratic elections. The new constitution perhaps freed Mejía Víctores from potential concerns over the armed forces’ autonomy. The military successfully pushed for inclusion of the army as a constitutional guarantor of security and honor. The military’s mechanisms for social control not only remained intact, but they also now had constitutional protection. In the country’s first elections in decades seen as fair, voters elected a civilian Christian Democrat, Vinicio Cerezo (1986-1991) as president. As his last act before leaving office, Mejía Víctores issued a sweeping and controversial amnesty decree that washed away any potential criminal liability for all actions committed by the military from March 1982 to December 1986.

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While violence rose in urban areas during the Mejía Victores regime, indigenous activism also increased. In June 1984, approximately 25 relatives of kidnapped *ladinos* formed the *Grupo de Apoyo Mutuo* (Mutual Support Group or GAM). Although the GAM originally formed as a *ladino* group, it steadily gained indigenous members and involvement. Mayan engagement in the political sphere continued to increase, and 1988 saw the creation of both the indigenous human rights organization *Consejo de Comunidades Étnicas Runujel Junam* (Ethnic Community Council “All Equal” or CERJ) and the widow support organization *Coordinadora Nacional de Viudas de Guatemala* (National Coordinating Commission of Guatemalan Widows or CONAVIGUA). These groups paved the way for further Mayan activism and various groups formed over the next few years, including the hugely important *Coordinación de Organizaciones del Pueblo Maya de Guatemala* (the Council of Organizations of the Pueblo Maya of Guatemala or COPMAGUA).25

COPMAGUA became the main voice in the peace process for the Maya through its participation in the state-formed *Asamblea de la Sociedad Civil* (the Civil Society Assembly or ASC). The Guatemalan government created the ASC in 1994 as a formalization of the role for noncombatant civil society groups in the ongoing peace process, which gained steam following the election of pro-peace Jorge Serrano Elías (1991-1993). This trend continued under Ramiro de León Carpio (1993-1996), appointed as head-of-state by Congress following Serrano’s failed May 1993 attempted takeover of the government. The appointment of de León Carpio, the country’s former Human Rights Ombudsman, and the increased interest of the international

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community as expressed through vehicles such as the UN Verification Mission in Guatemala (MINUGUA) rejuvenated the peace process. The military and the URNG guerrillas made significant progress on multiple fronts toward peace, signing accords on issues including human rights, historical clarification, and indigenous rights. In these negotiations, the Maya mostly made their voices heard through COPMAGUA’s participation in the ASC, who gave consultative, non-binding proposals to the negotiating table. Importantly, powerful right-wing groups such as the Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (the Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations or CACIF) chose not to participate in the ASC.26

During this time, activist calls for the end of Guatemala’s long history of judicial impunity for its armed forces grew louder. In 1990, Frank La Rue, a Guatemalan attorney living in exile in Washington DC, founded the Centro para la Acción Legal en Derechos Humanos (Center for Legal Action in Human Rights or CALDH), an organization dedicated to fighting for basic human rights in Guatemala. Under La Rue’s direction, the CALDH focused on sending human rights cases to the Inter-American Court of Human Rights, the human right judicial institution of the Organization of American States. To facilitate indigenous access to justice, Maya communities created an umbrella plaintiff organization, the Asociación para Justicia y Reconciliación (Association for Justice and Reconciliation or AJR), with the help of the CALDH.27

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Peace negotiations successfully concluded during the presidency of de León Carpio’s successor, Álvaro Arzú (1996-2000). On 29 December 1996, representatives of the URNG and the Guatemalan government signed the Accord for a Firm and Lasting Peace, the culmination of years of negotiations that finally ended the 36-year civil war. The final accord incorporated the many prior agreements that addressed issues such as a comprehensive understanding on human rights, the terms of a ceasefire and the resettlement of refugees, the creation of a truth commission, the legal reintegration of revolutionaries into Guatemalan society, and establishment of protections for indigenous rights and identity. On this last point, the parties agreed to reform the Guatemalan constitution to recognize the nation as a multilingual and pluralistic society. Another amnesty served as the final piece of the negotiations. However, against the military’s wishes, this amnesty contained exceptions for crimes against humanity and genocide.\(^{28}\)

In addition to the truth commission created pursuant to the accords, a second parallel truth commission operated through the Catholic Church. On April 26, 1998, Auxiliary Bishop Juan José Gerardi announced the publication of *Guatemala: Nunca Más* (Guatemala: Never Again), the four-volume report of the *Recuperación de Memoria Histórica* (Recovery of Historical Memory) project created by the *Oficina de Derechos Humanos del Arzobispado* (Archdiocesan Human Rights Office or ODHA). The project essentially operated as a parallel truth commission to that enumerated in the Peace Accords. At the press conference, Bishop Gerardi announced that investigators found that terror and violence were staples of military

action against civilians. As an allegory to the dangers of speaking truth to power during this time (and others), two days later Bishop Gerardi was assassinated in his garage.29

The Peace Accords’ truth commission, the Comisión para el Esclarecimiento Histórico (the Commission for Historical Clarification or CEH), presented its work in 1999. Memoria del Silencio (Memory of Silence), as the CEH report was called, made clear that the military committed the majority of human rights violations, upwards of 90 percent. Additionally, investigators clearly stated that the military’s actions against the Ixil Maya constituted genocide. That same year held two more important developments. In a public referendum, the Guatemalan public voted against reforming the constitution in accordance with the peace deal, marking a setback for Mayan activists.30 However, Rigoberta Menchú Tum, daughter of one of the men killed in the 1980 Spanish Embassy fire and winner of the 1992 Nobel Peace Prize for her pro-Mayan activism, filed suit in Spain accusing Ríos Montt and other former officials of genocide after attempts in Guatemala went nowhere. After the Spanish case also failed to produce any criminal convictions, Guatemalan grassroots activists and indigenous survivors of Guatemala’s genocidal regimes again sought justice in Guatemalan national courts.31 Through these legal proceedings, grassroots social activists and indigenous Guatemalans preserved their historical memory, challenged accepted notions of international law, and redefined genocide from below to allow the prosecution of ideological genocide.


30 One of the rejected reforms involved recognizing the right to practice indigenous law, which gained in support because of the Mayan movement. Despite this setback, local judges and courts were generally accepting of the exercise of Mayan law, and at times worked with Mayan legal practitioners to facilitate Mayan legal mechanisms. Rachel Sieder and Carlos Flores Arenales, Vergüenza: Autoridad, autonomía y derecho indígena en la Guatemala de posguerra (Guatemala City: F&G Editores, 2011).

1.2 Historiography

The legal history of the Guatemalan genocide lies at the intersection of various fields. Sociologists, historians, legal scholars, and geographers have all investigated topics at play within the several proceedings. These topics include the definition of genocide (i.e., what genocide is); the issue of culpability in the Guatemalan civil war; the role of structural racism and its impact on both the genocide and Guatemalan society; the impact and relationship of the law to historical memory; and, importantly, the legal principle of universal jurisdiction.

Ríos Montt’s prosecution forced the genocide more fully into Guatemalan public discourse. While the public broadly accepts that the Guatemalan military and paramilitary death squads committed atrocities, whether or not they constituted genocide remains debated. The trials offered the chance to prove that genocide occurred according to the Genocide Convention, as adopted into Guatemalan law.\textsuperscript{32} Debates on genocide in Guatemala had deep historical precedents. Early genocide scholars considered the Genocide Convention’s definition to be too limiting, often due to how the lack of protections for cultural groups and political opposition prevented the prosecution of cultural or ideological genocides.\textsuperscript{33} However, in the early 1980s the


South African sociologist Leo Kuper rehabilitated scholarly views of the Genocide Convention.\(^34\) Although Kuper echoed the disapproval in previous works of the UN definition’s limitations, he called further attempts to redefine the term unnecessary because international recognition of the Genocide Convention offered the possibility of tangible legal action (in the form of a trial) and recourse (the potential for punishment).\(^35\) Both Lemkin’s and Kuper’s works inform this

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\(^{34}\) See Kuper, *Genocide* (noting that proper analysis of genocide occurs within the framework of the UN definition); see also Leo Kuper, *The Prevention of Genocide* (New Haven: Yale University Press, 1985) (arguing that UN favorance of state sovereignty over the rights of individuals inhibits the body’s ability to prevent genocidal acts by governmental bodies).

dissertation: whether or not the Ríos Montt regime ordered genocide according to its legal
definition was the question before the court in the genocide trials. As regards this critical issue,
this study argues that prosecuting the military’s genocidal actions in the Guatemalan highlands
expanded the accepted, legal definition of genocide by reconciling the space between ideological
motivation and genocidal intent, in effect creating a path for the prosecution of ideological
genocide.

Most commonly, analyses of the Guatemalan military’s genocidal actions occurred
within studies examining the larger Guatemalan civil war. These include works that address the
causes and origins of the civil war; the military, the ideology of the counterinsurgency; the use of
state violence; the impact of the civil war on indigenous people; and the end of the war through
the peace process. Roddy Brett argues that indigenous Guatemalans—the survivors of Ríos

36 Victoria Sanford suggested the import of legally-assigning a label of genocide when she noted that the
 genocide is “both veiled and revealed in its history and naming.” Sanford, Buried Secrets, 18.

37 From a legal perspective, intent, or mens rea, is often a necessary element of a crime (the “guilty mind”),
representing a conscious, deliberate purpose. In genocide, it is the “intent to destroy, in whole or in part, a national,
ethnic, racial or religious group.” Motive, however, is an explanation of why someone has performed a criminal act.

38 For works on the beginnings of the civil war, see Susanne Jonas, The Battle for Guatemala: Rebels,
Death Squads, and U.S. Power (Boulder: Westview Press, 1991) (noting the counterinsurgency was driven by both
class and race); Diane Nelson, A Finger in the Wound (noting that any analysis of the Guatemalan Civil War that
fails to incorporate both race and class is incomplete); Guatemala: Causas y orígenes del enfrentamiento armado
interno (Guatemala: F&G Editores, 2006); Victor Gálvez Borrell, Política y conflicto armado: Cambios y crisis del
regimen político en Guatemala (1954-1982) (Guatemala: FLACSO, 2008); Guatemala: Historia reciente (1954-
1996), Tomo I, Proceso político y antagonismo social (Guatemala: FLACSO, 2013). For works on the military and
state violence, see Schirmer, The Guatemala Military Project (noting the Guatemalan military used political
violence to repress the public and consolidate power while constructing a false image of democratization); Héctor
Rosada-Granados, Soldados en el poder: Proyecto militar en Guatemala, 1944-1990 (Amsterdam: Thela, 1998);
Patrick Ball, Paul Kobrak, and Herbert F. Spirer, State Violence in Guatemala, 1960-1996: A Quantitative
Reflection (Washington: AAAS, 1999); Gustavo Adolfo Díaz López, Guatemala en llamas: Visión política-militar
Montt’s genocidal regime—informally engaged the peace process in local and rural spaces.\textsuperscript{39}

This project, however, shows how the Maya also worked outside of Guatemala in their pursuit of peace and justice. Recently, research on the Guatemalan internal armed conflict has more directly engaged with Kuper’s work as efforts to prosecute Ríos Montt pushed the genocide into the international spotlight.\textsuperscript{40} This study expands on the connections between Kuper’s and other genocide scholars’ views of the Guatemalan genocide’s place within the broader context of the civil war, and demonstrates how the military’s manipulation of the law enabled the counterinsurgency’s transition to a genocidal regime as defined by law.


\textsuperscript{40} See, e.g., Sanford. Sanford observes that Rios Montt purposefully used Cold War rhetoric to justify the use of political terror that “must be understood … ultimately [as] genocide.” Ibid., 18. See also Elizabeth Oglesby and Amy Ross, “Guatemala’s Genocide Determination and the Spatial Politics of Justice,” \textit{Space and Polity} 13, no. 1 (2009): 21-39; Commission for Historical Clarification, \textit{Memory of Silence}. In fact, “Genocide” began to replace more morally-sanitized terms such as “human rights violations,” “abuses,” and “political violence.” A parallel linguistic shift occurred near the end of the Guatemalan civil war, as “\textit{La Violencia}” came to replace “\textit{La Situación}” within the Guatemalan sociopolitical lexicon. Sanford, \textit{Buried Secrets}, 15.
Scholars have sought explanations for why the massacres of the Guatemalan highlands occurred. In many cases, genocide has a strong racial component.\(^{41}\) Racism is all too present in Guatemalan society.\(^ {42}\) Its place within existing Guatemalan sociopolitical power structures contributed to extermination efforts against the Ixil Maya.\(^ {43}\) Marc Drouin notes that racism led the Guatemalan government to exclude the Maya from those same power structures, which in turn exacerbated the conditions that allowed the genocide to occur.\(^ {44}\) Roddy Brett argues that within this prevalent racist ideology, the Maya represented the combination of political subversion and a historical, ethnically-determined threat.\(^ {45}\) A consequence-free past of indigenous slaughter, Brett says, allowed state-led political violence to evolve into genocide. Building on Drouin and Brett’s work, this study reveals that systemic racism specifically within the Guatemalan legal system, not just within Guatemalan society, enabled the genocide.\(^ {46}\)

\(^{41}\) It must be noted that genocide is not, or is rarely, solely influenced by racism, and it would be remiss to fail to recognize that in most cases racism exists absent genocidal results. See, e.g., Israel W. Charny, *How Can We Commit the Unthinkable?: Genocide, the Human Cancer* (Westview Press: Boulder, CO, 1982) (arguing dehumanization, not strictly racism, is a necessary precursor to genocide).


\(^{44}\) Drouin, *Understanding the 1982 Guatemalan Genocide, State Violence and Genocide in Latin America*. Drouin builds on theories of the importance of sociopolitical exclusion first proposed by Fein. (Fein, *Accounting for Genocide*.)

\(^{45}\) Brett, *The Origins and Dynamics of Genocide*, 17.

\(^{46}\) This does not suggest that the sole factor in the genocide was race. As part of a war between a capitalist military oligarchy and Marxist revolutionaries that saw the weaponization of rape, at minimum class and gender also played important roles.
Perhaps nothing expressed the systemic issues within Guatemala’s justice apparatus as much as the overlapping amnesties that reinforced systems of impunity. Given their natures, scholarship on amnesty and impunity often overlap and are regularly subsumed into analyses of transitional justice systems.\textsuperscript{47} Early transitional justice scholars viewed post-conflict prosecutions for human rights violations as a threat to fragile newly democratic states.\textsuperscript{48} More recent scholarship, however, has sought less to protect fledgling democracies than to understand both the state of and the act of “transitioning” from internal conflict in an effort to determine a balance between peace- or justice-centric goals.\textsuperscript{49} Newer works suggest that amnesties throw this

\textsuperscript{47} The term transitional justice most commonly refers to the systems of formal and informal methods for administering justice to perpetrators and collaborators of war crimes that manifest following the end of oppressive or violent social orders, such as authoritarian regimes, dictatorships, or civil wars. Mark M. Kaminski, Monika Nalepa, and Barry O’Neill, “Normative and Strategic Aspects of Transitional Justice,” \textit{The Journal of Conflict Resolution} 50, no. 3 (June 2006): 295-302.

\textsuperscript{48} John Herz, \textit{From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism} (Westport, Conn.: Greenwood Press, 1982); Philippe Schmitter Guillermo O’Donnell, and Laurence Whitehead, eds. \textit{Transitions from Authoritarian Rule: Comparative Perspectives} (Baltimore: Johns Hopkins University Press, 1986); Samuel P. Huntington, \textit{The Third Wave: Democratization in the Late Twentieth Century} (Norman: University of Oklahoma Press, 1991). Notably, this view was not a new one: scholars as early as ancient Rome saw prosecution as antithetical to the formation of peace. See, e.g., Cornelius Nepos, \textit{Vitæ Excellentium Imperatorum}, trans., Gareth Schmeling, Twelfth ed. (London: Printed for J. and F. Rivington, L. Hawes, W. Clarke, and R. Collins, T. Longman [and 4 Others in London], 1773). Following the end of Peloponnesian War, Thrasybulus, an Athenian general, overthrew the Thirty Tyrants and their Athenian supporters, the group that had been installed by the Spartans to rule Athens. After this coup, Thrasybulus granted the first recorded amnesty, pardoning all those that supported the Thirty. Nepos, the first-century BCE Roman biographer, called the amnesty an “act of oblivion,” specifically noting that it was “honourable.” Ibid., 87-88. The word “amnesty,” in fact, comes from the Greek ἀμνηστία or \textit{amnestia}, meaning “oblivion,” “forgetfulness,” or “passing over.” Francesca Lessa and Leigh A. Payne, \textit{Amnesty in the Age of Human Rights Accountability} (Cambridge: Cambridge University Press, 2012), 3.

“Redefining Genocide” shows that Guatemala’s simultaneously overlapping and conflicting amnesties inhibited both peace and justice.


51 Arendt, Eichmann in Jerusalem, 232.

52 Schabas notes that one purpose of genocide prosecutions is to deter the crime from occurring by prohibiting and repressing genocidal behaviors. Schabas, Genocide in International Law; William A. Schabas,
because they establish a “legal memory,” concrete records of factual determinations that protect collective memory from appropriation, manipulation, or erasure. As Pierre Nora remarked, memory is constructed through a “dialectic of remembering and forgetting,” and therefore “vulnerable in various ways to appropriation and manipulation.” While Fournet focuses on the import of legal memory to preserving the historical record, “Redefining Genocide” instead addresses the significance of that legal memory to survivors, in both a personal sense and with regard to collective, historical memory.

The main discourse over the Guatemalan genocide remains, as Rachel Hatcher identifies, between two adversarial truths: sí, hubo genocidio (yes, there was genocide) and no hubo genocidio (there was no genocide). Opposing narratives support each of these truths: one framed through a lens of human rights and historical racism (sí, hubo) and one focusing on the justifiability of the military’s action (no hubo). The strength of Guatemala’s human rights community, Hatcher argues, allowed it to shape the post-conflict conversation inside a human rights framework. Accordingly, the “incessant process of negotiation and contestation” between these competing narratives continues to occur “within a discursive context where memory leads to non-repetition.” However, grounding her investigation solely within a human rights framework privileged against indigenous groups minimizes the role of Maya legal norms in


56 Ibid., 16-17.
establishing that framework. “Redefining Genocide” recenters the role of the Ixil Maya and the Mayan movement as a whole in the preservation of historical memory, both in Guatemala and internationally. Focusing on the part that indigenous survivors played (and continue to play) in Guatemalan memory discourse offers insight into how these actors exert agency and participate in broader debates in domestic, international, and transnational spaces.

In pursuing those debates, Maya activists used a controversial legal device called universal jurisdiction. In simplified terms, universal jurisdiction means that state and international courts can exercise legal authority over a crime committed anywhere in the world, regardless of where the crime was committed or who committed it. Calls for the use of universal jurisdiction have typically been a response to crimes considered so grave that they are affront to the entirety of humanity, justifying prosecution by any court in the world. Even generally favorable responses to the applications and implications of universal jurisdiction have been mixed. Others are highly critical of universal jurisdiction, noting that it infringes on state sovereignty and can potentially erode jurisdiction itself by blurring jurisdictional boundaries.

Harmen van der Wilt argues, though, that particulars of international law mitigate potential

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57 Hatcher often privileges the role of the human rights community over indigenous actors regarding the historical memory of the genocide. She called the historic genocide verdict that resulted from decades of indigenous struggle a “718-page boost” for the “human rights community’s memory of genocide.” Ibid., 207-08.


harm to state sovereignty. Additionally, Pamela J. Stephens says that rather than infringing on state sovereignty, states can use universal jurisdiction as a tool to shape international legal discourse.

In both national and international courts, Maya activists challenged a key principle of international legal theory called legal positivism. Primary to legal positivism is the belief that “law” can only come from the positive, structural creation of law. Accordingly, only people or entities (a legitimate lawgiver, such as a legislative body, a court, international treaties recognized by the state, etc.) can create positive law. Because of law’s structural, positive attributes, the law operates according to a set, logical form. Therefore, analogous sets of facts should produce analogous results. Finally, positivists argue that the law is an amoral space, and must be applied independent of any considerations of norms or morality. Legal positivism dominates international legal discourse, and it is a backbone theory for twentieth and (thus far) twenty-first century international law. A close reading of the use of legal positivism throughout the legal history of the Guatemalan genocide, though, reveals how the Guatemalan and US governments strategically used positivism in pursuit of morals-driven goals, at times to contradictory results. Additionally, Guatemalan activists successfully introduced natural law concepts, anathema to legal positivism, in international courts.


In addition to legal positivism, indigenous Guatemalans challenged another foundational aspect of international law: the primacy of individual rights. For the Maya, many rights pertain to the community rather than to the individual. Rachel Sieder and Carlos Flores Arenales observed that, despite the 1999 referendum rejecting constitutional reforms (including a constitutional right to practice customary indigenous law), practitioners of indigenous law found the relative freedom to “renormalize” Maya law and grow support for its regular use. “Redefining Genocide” bolsters this position by showing how indigenous Guatemalans encouraged the incorporation of their legal principles into international law.

Recently, legal scholars have turned a critical eye on the modern system of international law. Prominent among these scholars are those who subscribe to a new movement called Third World Approaches to International Law (or TWAIL). While TWAIL has no true core tenets other than concern for the Global South, most TWAIL scholars agree that modern international law contains intrinsic imperialist characteristics. One common criticism of the international system among TWAIL scholars is that the modern system privileges states and official, institutionalized spaces over the human actors who most often feel the ground-level effects of international legal decisions. Balakrishnan Rajagopal argues that this relationship further marginalizes Third World actors who most often engage with international systems of law.

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64 Sieder and Arenales, Vergüenza.

65 TWAIL scholars generally argue that international law developed as a means for European colonial metropoles to resolve disputes occurring at the periphery. This explains international law’s deference to both legal positivism, which privileges the lawmaking power of the state, and strict Westphalian notions of state sovereignty. Accordingly, international law developed in conjunction with imperial colonialism; the patterns of dominance created during colonialism still exist today. James Gathii, “International Law and Eurocentricity,” European Journal of International Law 9 (1998): 184-211.
through social movements that operate outside of institutionalized space. Because international law most often is privileged against social movements (in favor of state, corporate, and individual actors), these movements have traditionally engaged international law by resisting its effects. Rajagopal, however, only considers this resistance in relation to international development and, perhaps more importantly, focuses on extralegal forms of social mobilization, but does not address the actions of extra-institutional sociopolitical organization in traditional institutional spaces. This study expands on his theory by revealing how the simultaneous resistance to and use of international foreign aid law and international criminal law by Guatemala’s Mayan movement and its political allies forced the adoption of non-Western legalities into the international law apparatus.

In summary, “Redefining Genocide” responds to a variety of interdisciplinary positions within the literature on genocide, the Guatemalan civil war, and international law. This project shows how Guatemalan grassroots social movements successfully challenged the limitations of the Genocide Convention and carved out an exception for types of ideological genocide previously barred from prosecution, a source of consternation for generations of legal and genocide scholars. Recently, scholarship has increasingly criticized the use of postwar amnesties as an inhibitor of justice in furtherance of peace. Analysis of the Guatemalan genocide and the amnesties produced in its aftermath shows the possibility of amnesties preventing justice and peace. Rachel Hatcher argued that postwar activists leveraged Guatemala’s developed human rights framework to preserve the legal memory of the genocide. “Redefining Genocide,” however, turns the focus from internationally-supported human rights actors to the indigenous survivors of the genocide by looking at what the legal memory of the genocide means for

survivors in terms of individual pain and collective memory. Finally, this study bolster’s Balakrishnan Rajagopal’s paradigm to studying the resistance of social movements to international law by applying it to the criminal and international foreign aid legal arenas.

1.3 Sources

“Redefining Genocide” makes use of various types of sources, both digital and archival. Much of the primary research is focused on the prosecutions in Guatemala, Spain, and the Inter-American Court of Human Rights. These cases revolved around various statutes and constitutional laws and doctrines, as well as specific international precedents. This dissertation draws key insights from a close reading of the legislative histories of these statutes, laws, and doctrines. Finally, Guatemalan and international newspapers and, when available, interviews provided the perspectives of the general public, the international community, and important figures at various stages of legal developments and court proceedings.

Although this dissertation covers roughly 70 years from the UN adoption of the Convention to the prosecution of Ríos Montt, its primary focus begins in the 1970s. As a result, many necessary research materials were accessed online, as WestLaw, Lexis Nexis, and HeinOnline maintain legal databases that catalogue legal proceedings. This study used the University of Minnesota’s Human Rights Library’s extensive electronic copies of the decisions and judgments of the Inter-American Court of Human Rights.67 These judgments proved invaluable for their procedural content: they not only contain the judges’ legal analysis, but they also reprise arguments and evidence presented by litigants at various stages of the proceedings. The Spanish Constitutional Court’s official website likewise holds digitized verdicts, filings, and

proceedings for the Spanish Guatemalan genocide case.68 Additionally, the UN’s electronic treaty collection offers full text of the Genocide Convention and other international treaties.69 Many periodicals, such as the New York Times, the Washington Post, and Le Monde, maintain online databases of articles that were used in this study.70 The virtual reading room of the National Security Archive at George Washington University houses essential declassified primary sources, including evidence used in the Ríos Montt prosecutions, declassified U.S. documents covering the genocidal campaign and U.S. assistance, and recordings of expert testimony presented at trial.71

Although this study made extensive use of online source materials, research in physical archives proved vital. This project required multiple trips to the Centro de Investigaciones Regionales de Mesoamérica (CIRMA) in Antigua, Guatemala. CIRMA’s Archivo Histórico (Historical Archive) houses numerous collections that were essential for this study. The collections contain materials beyond the limited descriptions that follow. The Archivo de Inforpress Centroamericano (Central American Inforpress Archive) contains documents covering the internal armed conflict, human rights in Guatemala, the insurgency, the military, paramilitary forces, and weapons transfers. The Archivo de la Coordinadora Alemana de Solidaridad con Guatemala (Infostelle) (German Coordinator of Solidarity with Guatemala Archive (Infostelle)) holds sources collected between 1979 and 1996 on human rights groups, massacres, state terror, and peace initiatives. The recent history section of the Colección General

de Documentos (General Documents Collection) has documents on the civil war, the Peace Accords, and human rights issues from 1940 to 2015. CIRMA’s Colección de Robert H. Trudeau sobre Política de Guatemala (Robert H. Trudeau Collection on Guatemalan Politics) houses materials on extrajudicial executions, peace processes, massacres and insurgent activity. The Archivo del Comité Holandés de Solidaridad con Guatemala (Dutch Solidarity Committee with Guatemala Archive) also contains sources on the internal armed conflict. Finally, the Colección de Derechos Humanos – Caso Ríos Montt (Human Rights Collection – Ríos Montt Case) holds an extensive library on the Guatemalan prosecution of Ríos Montt; this collection quite literally made this dissertation possible.

1.4 Methodology

Successful completion of the project demanded the archival approach of a political historian paired with the methodology of legal historians. At the heart of this study is the historical method, based on close readings of hundreds of primary documents and their relation to one another. While many of these documents were found in topical collections, as described above, all were illuminated by being put in dialogue through time and space with numerous primary and secondary sources that address the political and legal issues at hand from a variety of perspectives in a number of contexts. In this regard, this study took inspiration from the new wave of transnational history, as many complementary sources exist outside the bounded frame of the nation-state.\(^{72}\)

This project adds to the understanding of how different events, wholly separated in time and geography, impacted each other through the contours of the law. The law, though, exists as a part of society. Accordingly, the law develops in response to or in conjunction with social phenomena. Recognition of this relationship has recently influenced legal scholarship, as Catherine Fisk and Robert Gordon note. Legal histories, then, are best framed not “between law and what lies ‘outside’ of it,” but instead by “imagin[ing] them as the same domain.” As such, looking at the creation of laws, changes to laws, and legal action offers insight into social structures and events, and the historical contexts in which they occur. In turn, overlaying legal elements with social presentations such as news and contemporary accounts highlights the links between the law and society. “Redefining Genocide” draws on this approach, analyzing both the social contexts of law and the ways that people respond to those contexts in and through the law.

As extra-jurisdictional events and jurisdictionally separate legal actions rarely directly meet, this project requires placing related source material in transnational, and at times cross-temporal, juxtaposition. For example, the application of Guatemala Penal Code Article 376, enacted in 1973, requires contextualization with the development and purpose of the Genocide Convention. A full understanding of how and why the law in various forms impacted the trajectory of the Guatemalan genocide cases calls for engagement with the relevant legal sources from both the top down (viewing law from its drafting and intent, and the social setting in which it was enacted) and the bottom up (viewing law from both its practical effects and the social response to those effects at the ground level). Taking this approach reveals that the search for

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74 Ibid, 524. By “outside,” Fisk and Gordon are not referring to what is illegal, but instead to what is not law (e.g., economics, society, international politics, etc.). They argue a better approach to traditional ways of looking at the law’s relationship to things (i.e., “the law and X…”) is to view the law as being a part of those things (“the law as X…”).
justice by Indigenous Guatemalans and the Guatemalan left for ongoing grave human rights abuses galvanized important changes to international legal systems. Through both engagement with and resistance to those systems, the Guatemalan Maya and grassroots social movements prompted the reevaluation of US foreign aid policy by appealing to the morality of US policymakers, the expansion of access to foreign courts through a broader use of universal jurisdiction, and a redefinition of the legalities of genocide to include ideological genocide.

1.5 Chapter Outline

In the broadest of senses, “Redefining Genocide” is a microhistory of grassroots resistance from the Global South as seen in Guatemalans’ grassroots struggles for justice. This resistance manifested in various ways and with varying degrees of success both throughout and after the Guatemalan civil war. While needing to draw on international law to achieve its aims, grassroots resistance also, and importantly, stood in opposition to international law and many of its mechanisms and manifestations. Through this antagonism to international law, the Guatemalan Maya challenged traditional relations of power and facilitated change in both Guatemalan and international spaces. Ultimately, these activists reframed the dynamics between the Global South and the Global North by influencing international law from within and dictating to the world the terms of their own remembrance. “Redefining Genocide” traces this history in five loosely chronological chapters. The first two address the transnational legalities that the Guatemalan military used to justify its genocidal acts and that Guatemalan grassroots activists later drew upon to facilitate peace. The following three chapters each deal with separate, yet connected, attempts to prosecute the genocide committed against the Ixil Maya in the 1980s.

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75 Care was taken in avoiding terming the results of resistance from the Global South successful throughout this study. The term “success” above refers to the achievement of the explicit and implicit goals of resistance to international legal regimes and structures.
Chapter One, “Ideology of Impunity: Legal Positivism, State Terror, and Genocide, 1973-1986” addresses the impact of legal positivism on the legalities of the Guatemalan civil war, arguing that the Guatemalan military state, abetted to varying degrees by the U.S. government, used positive law to develop an ideology of impunity that justified human rights atrocities and genocide. In the 1970s, the Guatemalan state used legal positivism to justify repression and deadly counterinsurgency campaigns. The Guatemalan left responded to this use of the law, and international states, particularly the US under Jimmy Carter, increasingly viewed the technically legal actions of the Guatemalan military as contrary to the moral aims of human rights. Faced with criticisms of illegality in its actions, the Guatemalan government adopted a positivist approach to adapt the law to what it was doing, giving a blanket of technical legality to ongoing human rights abuses. The Ronald Reagan administration leaned on this newfound “legality” to justify providing the Guatemalan military with equipment that it used to commit genocide, revealing the inadequacy of legal positivism as a guiding principle.

Chapter Two, “Reform from Below: Impunity, Immunity, and Transnational Grassroots Influence, 1986-1997,” focuses on the last ten years of the Guatemalan civil war, as peace was being negotiated, and shows the potential for grassroots activism in transnational space. During this time, Guatemalan grassroots groups worked against systemic military impunity for human rights violations and genocide. This fight led them to Capitol Hill, where they lobbied the US Congress to condition all forms of aid to Guatemala on human rights. When Congress threatened to do so, members of Guatemala’s economic elite ended their opposition to the ongoing peace negotiations, eliminating one large roadblock to peace. The final part of the peace agreement was an amnesty for all crimes committed by both sides during the armed conflict—but with exceptions for crimes against humanity, torture, and genocide. Through their transnational fight
against impunity, Guatemalan grassroots social movements furthered the peace process, preserved the opportunity to see justice for the victims of genocide, and shaped the foreign policy of a global superpower.

Chapter Three, “The Dialogical Nature of Law: Mayan Activism and Supranational Courts, 1996-2004,” concentrates on the efforts of survivors of the 1982 Plan de Sánchez massacre to find justice. After years of watching the case stall in Guatemalan courts, survivors took their case to the Inter-American Commission on Human Rights (the Commission), who then referred it to the Inter-American Court of Human Rights (the Inter-American Court). Thus began a dialogically multilateral discourse that challenged the limits of international law, through which indigenous Guatemalan’s conceptions of legality were incorporated into international law.

Chapter Four, “Grassroots Justice in Transnational Space: Universal Jurisdiction, Subsidiarity, and Neocoloniality, 1999-2014,” looks at the push by grassroots Maya activists to prosecute former Guatemalan officials in extraterritorial national courts. Calling for Spanish courts to exercise a legal mechanism called universal jurisdiction, Rigoberta Menchú and others filed suit against Ríos Montt and other members of the Guatemalan military for genocide. The use of universal jurisdiction required Spanish courts to judge the efficacy of their Guatemalan counterparts in a recreation of colonial power dynamics. However, indigenous Guatemalans used these dynamics to challenge the underpinnings of the international legal order by forcing the Global North to consider the failures of legal positivism in Guatemala in the 1970s and 1980s. Although Spanish courts could not physically bring the military officials to court, events in Guatemala finally opened the door for a domestic prosecution.

Chapter Five, “Redefining Genocide: The Ixil Maya Pursuit of Truth and Justice, 1999-2013” details how the historic prosecution of Ríos Montt came from indigenous activism and bravery.
After Ríos Montt lost his legislative immunity, courts began to pursue justice for his crimes. Due to the mechanics of the Guatemalan legal system, interested third parties can join a criminal case. Indigenous activists, arguing alongside state prosecutors, successfully challenged the structural prohibition of prosecution of “ideological genocide” and redefined general understandings of the law of genocide. In so doing, activists and survivors displayed the mutually shaping relationship between truth and justice. By necessity, survivors were forced to define their experiences according to Western legal tradition, and their adoption of discourse on genocide that was rooted in this tradition revealed the imperialistic nature of law. Ixil survivors did not just passively accept Western law, however; they also, and significantly, claimed the right to determine their own collective memory. By dictating to the world how they will be remembered, Ixil activists reframed the traditional dominant subordinate power dynamic between the Global South and the Global North. *Their* truth became *the* truth.

“The books will be law-books, I suppose, and it’s part of this legal system that one is condemned when one is not only innocent, but ignorant.”

—Josef K., The Trial.1

“So begins the prosecution of Josef K. in The Trial, Franz Kafka’s tale of individual frustration with a faceless, sinister legal system—a story that parallels perhaps too well with Guatemala in the 1970s and 1980s. K.’s experiences speak to the exasperation of attempting to navigate an ultimately futile path to justice. Despite his best efforts, K. is unable to access the judicial system, or even determine what crime he allegedly committed, despite varying attempts. Ultimately, having never appeared in court, K. is summarily executed in the street, his final words describing his dehumanization at the hands of the state: “Like a dog!”3

To those who lived through the 1970s and 1980s in Guatemala, K.’s experiences with the law should have a familiar feel. K. was expected to conform his actions to the law’s terms, despite being unable to ascertain what these terms were.4 Similarly, the law in Guatemala during this period had an element of fluidity, and the military governments were free to issue decrees as

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2 Ibid., 5.
3 Ibid., 165.
4 Ibid. This is perhaps best illustrated by the parable “Outside the Law,” told to K. by a priest. In it, a man from the country goes to a doorkeeper protecting the Law, who refuses to grant the man access. Told that he might eventually be given entry to the Law, the man waits. Tempted to enter the Law without permission, he is warned about the strength of this, and other, doorkeepers. He eventually dies of old age having never been granted access to the Law. Ibid., 153-55.
they saw fit, obfuscating any concreteness of legality: what was legal one day could be illegal the next and vice-versa. Importantly, this legal uncertainty did not end at the Guatemalan border, as the legalities of the Guatemalan civil war in the 1970s and 1980s existed in both domestic and international space.

Foreign states, particularly the United States, played a large role in the war by providing arms, equipment, and training to the Guatemalan armed forces. International law governed these arms provisions. Both the Guatemalan and international legal spheres at this time can be characterized according to a legal theory known as positivism. This theory holds that law is grounded not in principles of morality or natural law, but in the command of the sovereign. To put it another way, law is what the lawgiver says it is, no more and no less. Pursuant to the principles of legal positivism, law operates with a predictive, logical consistency: similar facts produce similar legal results. Positivism remains the primary mode of analysis of international legal discourse, as it legitimizes Westphalian concepts of sovereignty as the backbone of international legality.

This chapter analyzes the use of positivism as applied to a wide array of Guatemalan national laws, U.S. law and foreign policy decisions, and transnational legal discourse during the Guatemalan civil war. It argues that the Guatemalan military state, abetted to varying degrees by

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7 International law is based on the primacy of national sovereignty, which recognizes the exclusivity of the nation-state in promulgating international rules.
the U.S. government, strategically deployed legal positivism to develop an ideology of impunity that provided cover for human rights atrocities and genocide. The Guatemalan left did not take the military’s deliberate use of the law lying down, and instead planted the seeds of resistance, both to and through the law, that later would hold those in the highest echelons of the Guatemalan military government to account for war crimes and acts of genocide.

Legal positivism recognizes the supremacy of the lawgiver in determining legitimate law. Granting this power gives those in power sole discretion to establish legal validity, even when laws run contrary to accepted social norms and practices. Throughout the 1970s, repression, state terror, and human rights abuses continued in Guatemala unabated. The immorality of these abuses encouraged ground-level resistance within Guatemala, ranging from grassroots activism to an increase in outright insurgency. International forces reacted as well, and in 1978 the US stopped providing the Guatemalan military with weapons under its own foreign policy laws due to the moral disconnect between providing arms for use in a civil war and the protection of human rights. Guatemala’s military dictatorships then changed its law to comport with the actions of the armed forces. This newfound “legality” allowed the US to again provide the weapons that became the tools of genocide based on a different interpretation of the same US laws forbidding the provision of arms to human rights violators. Other international institutions condemned the legalities of the Guatemalan state, and by doing so challenged a traditionally fundamental aspect of legal analysis.

If actors can conform the law to their actions, rather than the reverse, concepts of legality lose any meaningful sense of right and wrong. This chapter shows that the law is not a morally sterile space. The first portion of this chapter uses the 1973 passage of a new Guatemalan

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criminal code to show the domestic legalities of the ongoing civil war. This new penal code illustrates the repression of the poor and the Maya by the Guatemalan state, racist juridical class warfare leading to the legal disempowerment of millions of marginalized Guatemalans.

Following this, the chapter turns to US efforts at the end of the 1970s to curtail the ongoing human rights abuses committed by the Guatemalan armed forces through laws regulating US foreign aid. The US used the law to compel morality into a legal space purportedly dominated by the ethical austerity of legal positivism. The third section focuses on the dictatorial regime of General Efraín Ríos Montt, who assumed control of the Guatemalan government via a March 1982 coup d’état. Once in power, Ríos Montt changed the legalities of domestic Guatemalan law, making the mass human rights violations, crimes against humanity, and genocide committed by the armed forces “legal” under the letter of Guatemalan law. This legality prompted a variety of responses in transnational space, which is the center of the fourth portion of the chapter. The US, under President Ronald Reagan, sought to aid Ríos Montt’s anti-Communist campaign and resume US arms provisions to the Guatemalan military through reinterpretations of the strict letter of the law. Ultimately, this ideological pursuit of anti-Communism facilitated genocide. Other international institutions saw the Ríos Montt regime for what it was, a brutal authoritarian dictatorship guilty of rampant war crimes and genocide. In declaring the guilt of Ríos Montt and those under his command, these institutions challenged the use of legal positivism by both Guatemala and the US. This chapter concludes with a brief discussion of the dictatorship of General Óscar Humberto Mejía Víctores, who ousted Ríos Montt by coup in August 1983. Mejia Víctores oversaw a return to civilian rule by 1986, but before handing over power, he issued a blanket amnesty for the army’s crimes against humanity committed during his and Ríos Montt’s
regimes. In so doing, he brought the military’s evolving ideology of impunity to its zenith, leaving a legacy that would be contested for decades to come.

2.1 Decree 17-73: The Unintended Effects of Criminal Law Reform

Josef K., during his attempts to address the potential charges against him, is denied the right to access legal texts. Standing in front of a stack of law books, he is told that looking at them is expressly not allowed. To this denial, K. observes that “It’s part of this legal system that one is condemned when one is not only innocent, but also ignorant.” K.’s condemnation applies well to Guatemalan criminal justice in the early 1970s, and particularly to the 1973 enactment of Decree 17-73, the nation’s new penal code. Analyses of this code have generally failed to look at the broader social implications of the law and instead have focused on technical defects, such as illusory definitions for criminal activity. But the lack of concrete definitions were not the cause of deteriorating human rights conditions in Guatemala; this trend preceded the passage of the 1973 criminal code. Rather, the law served as an expression of the social unrest and repression that characterized Guatemala in the 1970s and is symptomatic of the structural racism and classism that enabled oppression and state terror. The left pushed against the new

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10 Ibid.
12 Héctor Aníbal de León Velasco, and José Francisco de Mata Vela, *Derecho penal guatemalteco: Parte general y parte especial* (Guatemala City: F&G Editores, 1999) (a broad analysis of Guatemalan criminal law). De León Velasco and de Mata Vela argue that despite providing more concrete codifications than its predecessor, the 1973 criminal code’s vague language and lack of specific definitions nonetheless complicated its application to human rights standards. Ibid., 19-21. See also Raúl Figueroa Sarti, *Código penal: Concordado y anotado con exposición de motivos y la jurisprudencia de la Corte Suprema de Justicia y la Corte de Constitucionalidad* (Guatemala City: F&G Editores, 2009) (a description of currently codified Guatemalan criminal law with practical explanations, correlating laws, and judicial applications); Ana Lucía Barrios Pérez, “Historia Del Derecho Penal Guatemalteco” (Universidad Rafael Landívar, 2017) (an unpublished thesis briefly detailing the five historic Guatemalan criminal law codes). Sarti’s work more closely resembles a legal practitioner’s treatise than an academic text, providing more detailed practical explanations of particular provisions of the criminal code and correlating judicial interpretations, when available.
criminal code, and in so doing contested the use of legal positivism that provided shelter for the Guatemalan military.

The Guatemalan legislature billed the new criminal law as forward progress. Lawmakers called the reforms to Guatemala’s criminal code a response to changing norms in Guatemalan society. Accordingly, alterations to the country’s penal code were “necessary and urgent.” These reforms, the legislature claimed, would align the country’s justice system with advances in criminal justice science and theory. The new code incorporated language regarding human rights, and specifically incorporated the majority of the internationally recognized Genocide Convention into domestic law. Additionally, the code contained new protections for industrial property. In other respects, the new law accounted for technological advancements, making it illegal to interfere with the state communications apparatus and airlines.

For many, though, the new penal code held the potential for repression by the state, particularly for the poor. The 1936 code that the new code replaced used vagrancy as an aggravating factor for some crimes, meaning that the destitute often faced longer prison sentences. The 1973 law offered a new possibility for the poor: in addition to possible extended prison terms for some crimes, vagrants held for minor offenses could now be forced into agricultural or industrial work camps for at least one but not more than three years. Prostitution, while illegal under both codes, was made an aggravating factor in the 1973 reforms. Sentencing also underwent changes, as many of the mandatory prison terms were longer under

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13 Congreso de la República de Guatemala, Código Penal De Guatemala, Decreto No. 17-73.
14 Congreso de la República de Guatemala, Decreto 2164, Código Penal (Guatemala City: 1936).
15 Congreso de la República de Guatemala, Codigo Penal de Guatemala, Decreto No. 17-73.
Despite retrograde these provisions, the legislature maintained that the reforms more accurately reflected Guatemalan society.

Contemporary Guatemalan legal scholars saw through claims that the code was forward thinking and criticized the new law as draconic. Wilfredo Valenzuela, then the dean of the Faculty of Law at the Universidad de San Carlos de Guatemala, Guatemala’s oldest and most prestigious university, called the penal code repressive, violent, and classist. Valenzuela, a leading expert on criminal law who later authored multiple volumes on criminal rights and procedure, argued that the new penal code, rather than an effort at reducing crime, was a deliberate attempt to protect personal property. To those of the left, this only supported the assertion that there was no legislative or judicial protection of the lower class in Guatemala.

Decree 17-73 was, to Valenzuela, a form of statutory violence committed by the state against the dispossessed, the perfected culmination of class exploitation. Valenzuela was likely not alone in his beliefs. The reformed code protected private and industrial property and penalized poverty, precisely the sort of state action that insurgents already struggled against.

By the early 1970s, the military declared the country pacified in 1972 following the defeat of the Edgar Ibarra Guerrilla Front (FGEI) and Revolutionary Movement 13th November (MR-13), two prominent rebel groups. Despite this declaration, the government’s oppression of the people continued to rise. Decree 17-73 was a tool of this oppression. While the law was oppressive in substance (i.e., its text), implementation of the law also had oppressive elements.

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16 For example, under the 1936 penal code, homicide carried a ten-year prison term. Following the 1973 changes, the penalty for homicide rose to from 15 to 40 years. Congreso de la República de Guatemala, “Decreto 2164”; Congreso de la República de Guatemala, Codigo Penal de Guatemala, Decreto No. 17-73.
In tacit recognition of the code’s repressiveness, the government tried to preempt criticism by making it illegal to reproduce or reprint the new law. The government reserved the right to be the sole publisher of the law for one year by passing Decree 20-73. Congress said the penal code needed to be protected to ensure its authenticity, purity, and precision. But under Guatemalan law, once the code was published in the Diario de Centroamérica, the country’s official gazette, no subsequent author besides congress could change it.\footnote{Congreso de la República de Guatemala, Decreto No. 20-73, 13 April 1973, GT-CIRMA-AH-002/D1. Note that Decree 20-73 went into effect prior to Decree 17-73. The bi-numeric nomenclature for Guatemalan decree laws provides two pieces of temporal information. The first number expresses the order the bill was drafted and entered into the congressional voting schedule in relation to other bills (not necessarily the order legislation was voted on, signed by the Executive, or published into law). The second number tells the year in which the bill was proposed.} In fact, the government banned third-party publication of the new penal code before the government itself published it.\footnote{The government published Decree 20-73 nearly a full three months before it published Decree 17-73. This may have been intended by the government to mitigate the “plurality of resistances” prompted by expressions of legal power. Michel Foucault, The Hisory of Sexuality, Vol. 1: An Introduction, trans. Robert Hurley (New York: Pantheon Books, 1978), 96.} Nothing posed a credible threat to the content of the code, and it needed no protection. While the code did not need to be defended from alteration, Decree 20-73 had two important effects: it limited democratic debate on any inherent repressiveness in the penal code; and it enabled autocratic use of the judicial system by limiting access to the law, guaranteeing that people could not be certain what exactly the code prohibited.

Due to structural limitations in the Guatemalan legal system, those most likely to be touched by the terms of Guatemala’s new criminal law had no way to know what those terms were. In Guatemala, as in most Latin American countries, laws went into effect when published in its official gazette, a Spanish-language publication of laws and public legal notices. This process privileged access to the law at an intersection of race (by privileging Spanish-speakers) and class (by privileging the literate). Many of the Maya spoke only indigenous languages, while
poverty and illiteracy were (and continue to be) worse in Maya communities. The state had, effectively, recreated Josef K.’s predicament for not just the Maya, but all of those who found themselves existing in a legal community they were allowed to neither see nor understand. Even those who had the tools to access the penal code still faced barriers. In the 1970s, laws such as the penal code were not widely distributed, held in public libraries, or purchasable at bookstores. Decree 20-73, accordingly, advanced the process of limiting knowledge of the law by further inhibiting the ability for campesinos and indigenous Guatemalans to access it.

It follows naturally to ask why congress sought to legislatively safeguard access to the new penal code. While it may be impossible to know the specific reasoning, clues are left in the effect and contemporary context of the publication ban. The ban meant that only Congress could reproduce the criminal code, limiting the access to legal knowledge. Access to legal knowledge and institutions are essential components of what legal sociologists call legal empowerment, the ability to use the law to address problems and pursue justice. In the reverse, the denial of access to legal knowledge and institutions results in increased social and political exclusion of those already on the margins by denying them the basic, essential tools to effectuate legal power. When viewed in the context of a repressive, anti-Communist military state that was “disappearing” and torturing leftists of all sorts, this legal disempowerment takes on new dimensions.


22 Beginning in the mid-1960s, members of the former-counterrevolutionary coalition began operating as death squads. These death squads, either formed by the military or composed of its members, “disappeared” (a term common in Latin American countries with military dictatorships, where someone disappears and is never seen again), tortured, and summarily executed students, intellectuals, trade unionists, and members of leftist political organizations. By the time General Romeo Lucas García (1978-1982) took control of the country, paramilitaries left 800 bodies per month on Guatemala City streets. Schirmer, The Guatemalan Military Project, 18; Greg Grandin, The Last Colonial Massacre: Latin America in the Cold War (Chicago: University of Chicago Press, 2004), 87-89; Virginia Garrard-Burnett, Terror in the Land of the Holy Spirit: Guatemala under General Efrain Rios Montt,
The Guatemalan regime’s attempt to control and limit access to the criminal code should raise serious doubts about its integrity as a legal norm. To revisit Josef K., in one instance, while attempting to find the physical location of the court presiding over his prosecution, K. finds himself standing in front of a set of stairs leading to the attic of a tenement apartment labeled “Staircase to the Court Offices.” K.’s immediate thought at viewing the court’s tenement attic location is that this venue did not “instill much respect in people.” This suggestion that the people did not respect the court reflects an inclination to disregard the court’s commands. This disregard, this ignoring of legal obligation imposed by the court (negating any obligation at all), in turn correlates to a popular view of illegitimacy in law.

According to Weberian expressions of power, legal authority depends on its perceived legitimacy by those the law purports to regulate. When actors perceive the law as legitimate, they obey and comport their behavior to the obligations imposed by law. For legal positivists, laws come from legitimate authority (i.e., the lawgiver) and they impose an obligation to obey. Pursuant to positivist theory, legitimacy of law therefore comes from political legitimacy. Merely complying with the obligation is not enough, however, as behavior must be guided by obligation. As the political scientist Jennifer Schirmer notes, under positivistic theory, legislation and state actions “in accordance with the rule of law because their actions are covered by law” are viewed


Kafka, The Trial, 47.

Ibid.


Hart, The Concept of Law. Accepting political authority, and therefore establishing legitimacy, is done through consent of the governed.
as legal regardless of their morality.\textsuperscript{27} Therefore, the obligation to obey the law should drive public behavior.

Importantly, though, throughout Guatemala’s civil war, people stood against the force of law and the state. For those people in opposition to the state, the legal obligation to obey did not, as Argentine political philosopher Enrique Dussel observes, come from an external source such as the state. Rather, obedience resulted from people’s choices via their own subjective and normative systems of morals.\textsuperscript{28} These systems challenged positive concepts of Weberian legitimacy, whereby laws, procedures, and institutions legitimize the state, essentially, because they come from the state. The repressiveness expressed and legalized in Guatemalan criminal law was experienced in everyday life in the form of state terror and militarism. This repression, applying Dussel’s theory of political legitimacy, reduced if not outright eliminated any symmetrical citizen participation in the construction of public governing consensus. This imbalance alone served as a basis for resisting the government.\textsuperscript{29} Immorality of law, in this case, helped drive opposition to it. Thus, those in active opposition to the law did not view it as morally sterile.

If morality of law was of key import to those deciding to reject Decree 17-73, the natural question arises as to how these actors did view the law. Renowned legal scholar Ronald Dworkin perhaps provides some insight. Rather than viewing law and morality as separate, Dworkin argues they should be viewed within the same system.\textsuperscript{30} Under this approach, law ultimately

\begin{itemize}
  \item \textsuperscript{27} Schirmer, \textit{The Guatemalan Military Project}, 126.
  \item \textsuperscript{29} Ibid., 50.
\end{itemize}
comes from, and is a subset of, ethics. The law, therefore, manifests social morality rather than being distinct from it. Accordingly, it is important to view the law in conjunction with its own sociohistorical contexts, and to see the law and those contexts simultaneously inhabiting the same domain in a constant, dialogic renegotiation of sociolegal expression. Actors do not need to view the law and morality as distinct and look for connections between the two. In fact, Dworkin argues that analyzing law and morality as separate concepts is a “fatal flaw” in the field. Instead, law is either a reflection of social morality or it is not. Rejection of that law, then, is a statement that the law does not resonate with a society’s moral framework.

Through its response to the new penal code and other forms of state repression, the Guatemalan left rebuffed the new statutory foundation of the criminal justice system, as eloquently expressed by Wilfredo Valenzuela, the dean of Guatemala’s most prestigious law school. In so doing, the left implicitly did two things. The left’s rejection of the state and its laws, represented by the repressive nature of the new criminal code, acknowledged the inseverability of the law from broad social morality (or immorality). The social morality of Guatemala’s insurgent left struggled against the conceptions of private property and worker exploitation that historically disadvantaged the poor and the working class that were intrinsic to the reformed criminal code. The penal code arose as a manifestation of the very social repression that revolutionaries struggled against. Revolutionary opposition to the military-led state, political oppression, and the law itself were thus intrinsically interwoven. Although Valenzuela represented only the academic side of the Guatemalan left, such a public rejection by a

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31 Dworkin describes the relationship as a tree, with “ethics” being the principal tree and the law being a branch or a leaf. Ibid., 409.
33 Dworkin, Justice for Hedgehogs, 402-03.
prominent nonviolent leftist suggests a large overlap in morality among diverse leftist ideologies.
The Guatemalan left challenged the legitimacy of the nation’s legal system and the state itself.

This repudiation raises interesting questions regarding legal moralism and legal legitimacy. Under a positivistic approach, laws can only be legitimate when enacted by legitimate lawgivers. Accordingly, an illegitimate state cannot pass legitimate laws, and laws passed by illegitimate states therefore do no need to be followed. Presumably, though, Guatemalan leftists who saw the state as illegitimate did not view all aspects of the penal code as immoral. Rather, some of its prescriptions (e.g., the prohibition of unjustifiable homicide) resonated with the insurgency’s social morality and must have been followed. Importantly, these laws were followed not because of the Guatemalan state’s legitimacy (in fact, they were followed despite the state’s illegitimacy), but instead for some other reason. Given that social morality drove grassroots action and insurgent activity (i.e., as a response to the immoral repression of the state), it can be reasonably assumed that social morality likewise drove obeyance of the laws in moral resonance with revolutionary social fabric (i.e., the laws the guerrillas and their ideological allies viewed as moral and proper). Unknowingly, the Guatemalan left—arrayed in a broad and variegated popular movement—challenged the use of legal positivism in ways that would decades later push against the foundations of international law. In the moral economy that leftists articulated and struggled to make reality, legality and legal legitimacy did not stem from the political legitimacy of the state. Instead, legal legitimacy (and with it the sense of obligation to obey) came from the moral legitimacy intrinsic to the law.

Legal disempowerment of the Guatemalan poor in the early 1970s developed within a greater, authoritarian project of counterinsurgency marked by an increased use of oppression and state terror. Despite a steady decline in political violence from July 1971 to July 1972, the latter
half of 1972 saw a rise in “pro regime counterterror measures.” These repressive measures sparked resistance. “Marxist agitators” resurfaced in areas supposedly cleansed of leftist influence. The ranks of guerrilla factions increased, and labor organizations and unions organized national strikes. Union membership grew alongside the number of active labor unions, which rose from 188 in 1972 to 251 in 1974. This rise in labor activity, however, met hostility from the government. Repression continued, and by 1973 roughly one-third of unions formed between 1968 and 1972 were annihilated by judicial or extrajudicial (violent) means. Students at the University of San Carlos received explicit warnings from death squads. In September 1973, the legal adviser for the San Carlos students’ association received a letter “warning him he would be shot if he did not cease supporting a strike,” and in June of that year a leaflet was distributed on campus “promising to eliminate [sic] students linked with the guerrillas.” The military’s response to the people’s outrage over its repressive state terror was to ramp up military repression and state terror.

### 2.2 The Foreign Assistance Act: Inchoate Morality and Transnational Approaches to Human Rights

As we have seen, from below, state repression and terror instantiated challenges to the legitimacy of law at the grassroots. Significantly, the same dynamics played out from above, on the international stage. Despite being an internal armed conflict, the legalities of Guatemala’s

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38 Ibid., 102.
civil war played out in both domestic and international space. The patterns of human rights abuses prompted the US to temporarily end its provision of weapons to the Guatemalan military pursuant to US law on foreign policy. A moral repositioning in the US government that prejudiced anticommunism over human rights, however, soon facilitated the resumption of arms provisions despite the above regulation of international aid. These oppositional outcomes resulted from the different moral trajectories of human actors rather than from the text of the law. Providing the Guatemalan military with arms and equipment ultimately held moral and legal ramifications, as they were used to commit acts that would decades later be prosecuted as acts of genocide.

Although friction with the US government did not come to a head until late in the decade, Guatemala’s military state committed grave human rights abuses throughout the 1970s. The Guatemalan military captured leaders of the leftist insurgency in September 1972, an event that was followed by a period marked by severe political exclusion of opposition groups.40 Despite the military’s declaration of victory over the rebels, “death squad killings continued in 1973 and 1974,” and the number of killings and disappearances rose sharply after 1975.41 In 1977, the US State Department issued its first Country Report on Human Rights Practices, which covered potential human rights violations around the globe, including those in Guatemala.42 The second such report, issued in 1978, noted that “violations of human rights … still occur.”43 These human rights violations included the “torture of alleged subversives …[which] occurred with

41 Ibid., 19-20.
frequency,” and the report concluded that “torture, summary executions, and death-squad activities [remained] characteristic” in Guatemala. The report also cited cruel, inhuman, or degrading punishment, “particularly during interrogations of those suspected of subversive activity” as well as arbitrary arrest without due process, the denial of fair public trials, and home invasion by government forces as ongoing concerns. Governmental repression also continued, as only “some opposition parties [were] allowed to function” and “the Communist Party [was] illegal.”

The 1977 and 1978 human rights reports complicated the flow of military aid from the United States to Guatemala. In reaction to the Carter administration’s human rights policy toward Guatemala, the Guatemalan government preemptively decided in 1977 to reject any US military assistance were it to be offered, a status they maintained until 1982. The nation had been receiving military aid from Israel since 1971, and was also supported militarily by Argentina, making the direct flow of arms from the United States less crucial.

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44 Ibid.
46 Ibid., 168.

In the United States, the main legal issue at hand was the fact that the 1977 and 1978 State Department reports on human rights complicated the provision of US military aid to Guatemala pursuant to Section 502B of the Foreign Assistance Act of 1961.\(^{49}\) Section 502B(2) prohibits the provision of security assistance “to any country the government of which engages in consistent pattern of gross violations of internationally recognized human rights.”\(^{50}\) Accordingly, in 1978, the US, under the direction of both the Carter administration and the US Congress, conditioned the provision of military aid to Guatemala on its respect for human rights.\(^{51}\) However, the Carter administration made a fateful decision: it chose not to trigger Section 502B(2) by not officially declaring Guatemala a gross human rights violator. The administration did not want to bind future presidential administrations to its own decision and thus tie their hands.\(^{52}\)

The Carter administration’s failure to officially declare Guatemala a gross human rights violator held a few specific legal ramifications.\(^{53}\) First, it meant that military aid could be resumed at any time, provided there was no superseding act of Congress stopping the resumption of arms provisions. No legal requirement for the end of military aid was triggered. According to the State Department, this was the primary impetus for not branding Guatemala a gross violator. Second, it allowed for the continued provision of US arms to Guatemala through previously contracted deliveries by the US government or via commercial sales. Private commercial sales of


arms from US companies to either the Guatemalan government or Guatemalan companies was allowed provided the US company obtained a license for commercial export of arms, ammunition, or implements of war from the US State Department’s Office of Munitions Control; these items could then be sold to the Guatemalan armed forces.\(^{54}\)

Following the implementation of the non-binding embargo, commercial sales rose from 1977 to 1979, when US vendors sold US$860,019 in arms to Guatemalan purchasers, roughly 62 percent of which consisted of guns and ammunition.\(^{55}\) Between 1980 and 1981, Guatemala purchased nine Bell Helicopters from private contractors and quickly modified them for military use.\(^{56}\) Notably, the number of approved licenses for commercial sales of weapons to Guatemalan buyers dropped from 86 in 1979 to 10 in 1981.\(^{57}\) This drop in licensures suggests private exporters foresaw the market for private American arms sales to Guatemala coming to an end. That their foresight coincided with the end of Jimmy Carter’s presidency was not a coincidence.

Although the Carter administration frequently placed human rights at the forefront of its foreign policy, there were limits to its idealism. Had Carter desired, he could have stopped the private sale of weapons to the Guatemalan military. In fact, Carter’s refusal to officially name Guatemala as a gross human rights abuser was a main failure of his administration’s foreign policy in Guatemala. Pursuant to §502B(d)(2)(C), direct commercial sales, or rather the issuing of licenses authorizing international foreign weapons sales, are prohibited from US exporters once a purchasing nation is officially labeled as engaging in a pattern of gross human rights violations.

\(^{54}\) Ibid., 4.


violations.\textsuperscript{58} Although Carter ended the provision of weapons from the US government to Guatemala, doing so without ensuring the curtailing of commercial arms sales made his efforts to bolster human rights conditions less effective. With licensed commercial firms free to continue selling weapons to the Guatemalan military, Carter essentially created ideal conditions for arms exporters by removing the US government as a competitor. Carter’s actions here portrayed his administration’s compartmentalization of foreign policy. A full commitment to advancing human rights lost out to a combination of national security, stymieing communism’s spread in Latin America, maintaining friendly relations with the Guatemalan government, and preserving flexibility for future presidents.\textsuperscript{59}

Commercial sales were not the only American attempts to make an end run around the arms embargo of Guatemala. Although 1980 saw no requests to the US Congress for direct military aid, the US Department of Defense requested $250,000 for military training.\textsuperscript{60} Additionally, in May 1981, the US Commerce Department reworked its list of things interdicted for foreign aid due to human rights violations, enabling the Guatemalan military to purchase between US$3.1 and US$3.2 million in army jeeps and military vehicles.\textsuperscript{61} This came despite efforts to pressure the US Congress to pass H.R. 101, also known as the “Guatemala Resolution,” to prevent giving the Lucas García regime parts for Huey helicopters that were “being used as part of the increasing repression throughout the country, where the Army is

\begin{footnotes}
\item[58] “Foreign Assistance Act of 1961.”
\item[59] Under the Foreign Assistance Act, once a nation is officially labeled as one that “engages in a consistent pattern of gross violations of internationally recognized human rights,” that country cannot be given aid without US congressional approval and oversight. “Foreign Assistance Act of 1961.”
\end{footnotes}
destroying entire villages and indiscriminately massacring the rural population.” Nonetheless, the Guatemalan military remained a known human rights violator, complicating efforts for the armed forces to receive various forms of US military aid. Although the prohibition mechanism of 502B was never officially triggered, the ban on US military aid to Guatemala was grounded in the law, and the May 1981 reframing of prohibited equipment demonstrates the law’s relative fluidity in interpretation.

In fact, from 1981 and 1983, that fluidity manifested itself in both Washington, DC, and in Guatemala. In July 1981, joint hearings of the US House Subcommittee on Human Rights and Inter-American Affairs and the US House Subcommittee on International Development Institutions and Finance ended with Guatemala renamed a human rights abuser. This decision, coupled with overt objections from the Subcommittee on International Development Institutions and Finance, proved problematic for the Reagan administration’s efforts to influence passage of various assistance packages to the Guatemalan government. Section 701 of the International Financial Institutions Act required the US provide no aid to countries that “engage in a pattern of gross violations of internationally recognized human rights,” although certain dispensations were given to help countries meet “basic human needs.” The Subcommittee’s finding that Guatemala continued to engage in its pattern of human rights violations led the US to oppose an 11

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64 Coalition for a New Foreign and Military Policy and Commission on U.S.-Central American Relations, “Central America 1985.”
65 International Financial Institutions Act, 22 USC 262c (USA). The act in fact encourages the US to “channel assistance to projects which address basic human needs of the people of the recipient country.”
November 1981 loan for a hydroelectric dam in northern Guatemala as well as a 3 December 1981 loan of US$18 million for a rural telephone system.66

On 23 March 1982, the fate of the arms embargo took a turn. General Efraín Ríos Montt (March 1982-August 1983) led a coup against the oppressive regime of Fernando Romeo Lucas García. Following repeated allegations of fraud in presidential elections where opposition candidates were beaten and jailed, the corruption of the Lucas García regime eventually proved too much. Junior officers in the armed forces forced Lucas García to resign; he agreed on the condition that his successor be a general. These officers then chose Ríos Montt to lead the military junta and quickly installed him as the head of the Guatemalan government. Ríos Montt immediately suspended the constitution, replacing it with a framework that placed the military in charge of all aspects of government. Although initially seen as a savior from the corrupt regimes of the past, Ríos Montt escalated the use of state terror throughout the country. Consumed by an insatiable hardline animosity for Communism, Ríos Montt’s 18 months in power were the deadliest of the civil war, characterized by rampant human rights violations, war crimes, and genocide. However, due to his anticommunist passions, the US government saw Ríos Montt as a potential ally against Communism in the Western Hemisphere.67

Soon after what has come to be known as the “Palace Coup,” the US decided to end the embargo on arms sales to Guatemala to help the anti-Communist counterinsurgency, offering

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66 The Subcommittee rejected the loan on December 10, 1981, against the wishes of the Reagan administration. This pressure applied by the Subcommittee forced the administration to convince Guatemala to withdraw the loan request. *Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress, Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress* (1982), 1.

US$4 million in spare helicopter parts.\footnote{Alan Riding, “U.S. Is Said to Plan Aid to Guatemala to Battle Leftists,” \textit{New York Times}, 25 April 1982.} Although at the time of the decision Reagan had wanted to resume aid to Guatemala for 15 months, some in the US Congress felt more information was needed. Additionally, Thomas Enders, then the Assistant Secretary of State for Inter-American Affairs, argued that the Reagan administration’s distance from the Lucas García regime encouraged positive steps regarding human rights in Guatemala. Interestingly, Enders’ statement offered two potential and contradictory implications, given the continued violation of human rights in Guatemala. The first possibility is that the Reagan administration felt that Guatemala’s human rights situation had been resolved. The second, more likely possibility is that Reagan subrogated human rights to other concerns.

In fact, the Reagan administration was aware of human rights violations in Guatemala, and deliberately chose to look the other way. A letter to the administration from a Mayan activist in late 1981 made clear that “thousands and thousands of [Maya] have been and are being tortured and massacred while babies, children, and the elderly are being massacred in the most savage forms.”\footnote{Pascual Pop-Tun, Letter to President and Government of the United States, November 1981, GT-CIRMA-AH-037/C14/D32.} A continued desire to provide human rights violators with funding supports the contention that human rights were less important to the administration than other concerns. As has been well documented, Reagan’s main forays into Latin American affairs were to stop any spread of Communism into the western hemisphere.\footnote{Bureau of Public Affairs Office of the Historian, “A Short History of the Department of State: Reagan’s Foreign Policy,” U.S. Department of State, accessed 28 September 2018. https://history.state.gov/departmenthistory/short-history/reaganforeignpolicy.} Despite assurances that the Maya were not Communists (with many Maya not even knowing what Communism was), after meeting with Ríos Montt in December 1982, Reagan determined that Ríos Montt was “a man of great integrity
faced with a challenge from guerrillas armed and supported from those outside Guatemala.” 71

For Reagan, Ríos Montt was a kindred spirit, a devout Evangelical Christian who shared Reagan’s staunch anticommunist views.

It is in this regard that Carter’s declining to label Guatemala as a human rights violator is instructive. Carter’s administration had determined, with overwhelming supporting evidence, that Guatemala was, in fact, regularly committing gross human rights violations, and therefore US law required his administration to stop the flow of military aid into Guatemala. Recall, though, that the next US president easily ignored this and advocated for the resumption of military aid, only possible because the Carter administration had not applied the statutory label. Executive discretion, in particular this disregard of the law by the Reagan administration, frustrated § 502B’s positive statutory scheme to constrain and guide that discretion. Recall that, for positivists, morality is separate from the content of the law, which prominent positivist scholar Joseph Raz concluded “can be established without moral consideration bearing on the desirability or otherwise of any human conduct.” 72 If the law’s contents are independent of morality, it follows that the decisions that result from the law also do not require a moral lens. The effects of law, the outcomes of judicial processes, result regardless of moral considerations. However, the disparity between the use and interpretation of the Foreign Assistance Act by the Carter and Reagan administrations shows both administrations’ use of positivism to produce morals-driven results.

The two US presidential administrations applied the same law, the Foreign Assistance Act. Accordingly, they were subject to the same statutory mechanisms and limitations,

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72 Raz, Between Authority and Interpretation, 4.
particularly §502B’s restrictions on the donation of weapons to human rights violators. Importantly, they also faced essentially the same set of facts: the Guatemalan military regularly committed human rights abuses during each administration. Pursuant to positivistic theory, strict application of the same law to nearly identical circumstances should produce the same result. Despite these nearly identical conditions, the administrations produced oppositional results. The Carter administration determined that §502B prohibited the US government from giving arms to Guatemala due to the Guatemalan military’s constant human rights violations. Reagan, however, concluded the opposite and sought to resume weapons provisions to the Ríos Montt dictatorship. The inconsistencies between these conclusions draws the use of only positive forms of law law as the basis for these disparate legal assessments into question.

Accordingly, the administrations rooted their determinations outside the letter of §502B. Both administrations agreed that human rights violations were occurring in Guatemala. The Carter administration cut off direct military aid to Guatemala due to Carter’s commitment to the morality of human rights. However, a different moral orientation drove the Reagan administration. Reagan’s largest international, morals-guided commitment was stopping the spread of Communism, particularly in the Western hemisphere. This commitment entailed supporting those fighting against Communism, limited by the §502B restrictions. Although Reagan presumably shared his predecessor’s concern for human rights, anti-Communism took precedence in Reagan’s moral hierarchy. Following Carter’s moral concerns proved incompatible to the administration’s priorities. The Reagan administration soon applied a strict interpretation of law, freeing itself from any intrinsic ethics. Stanching the flow of Communism served as a

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rationalization to turn a blind eye on human rights violations and resume a government-led flow of arms from the US into Guatemala despite the surety that those arms would be used to further human rights abuses. Ironically, positivism provided the Reagan administration with the veneer of technical legality that justified the disregard of positive US foreign policy law in furtherance of the administration’s moral concerns.

The prominence of morality to the application of US foreign aid law represents another way the legalities of the Guatemalan civil war demonstrate the strategic application of legal positivism. Under positivistic analyses, the law is amoral. With morality removed, the focus becomes a cold, impartial reading of the law. This amoral interpretation allowed Guatemala’s military dictatorships to legalize the repression that the Guatemalan left struggled against from below throughout the internal armed conflict. Although this repression delegitimized the Guatemalan state in the eyes of the left, they nonetheless followed the laws they found moral.

At the same time, US application of foreign policy law undermined a positivistic interpretation of law from above. If two adjacent legal authorities apply the same law to closely analogous (and in places identical) situations, positivism prescribes that the outcomes look relatively the same. However, when the Carter and Reagan administrations both applied the Foreign Assistance Act, they produced oppositional results. Carter stopped providing the Guatemalan military with the tools of atrocity, whereas Reagan supplied Ríos Montt with the weapons used to crimes against humanity and genocide. This tragic difference between these interpretations of positive law did not come from the amoral application of law; it came through applications of the law negotiated by the moral trajectories of each administration.

Legal intersections in the 1970s in Guatemala revealed the depravity of an amoral approach to the law. When applied domestically, legal positivism provided the Guatemalan
government with justification to repress its people. Positive interpretations of law created even graver circumstances in Guatemala when they were applied in international space. The Reagan administration condoned providing Ríos Montt with the tools used to commit genocide through a specific and limited application of legal positivism. Ríos Montt aligned his regime fully with the goal of Reagan’s foreign policy—anti-Communism—and engaged in a scorched earth policy on both Guatemala’s rural population and its legal system.

2.3 The Ríos Montt Decrees: Legal Amorality in Guatemala

US efforts to restrict or provide military assistance were directly and indirectly related to the legalities of the Guatemalan civil war. The March 1982 coup drastically shifted those legalities. After Ríos Montt’s successful installation as the head of government, he initiated a series of executive decrees that brought drastic consequences. One of the earliest of the military junta’s reforms was to fully transform the relationship between the Guatemalan constitution and the state. On 27 April 1982, Guatemala repealed the Constitution of 1965 by passing Decree 24-82, otherwise known as the Fundamental Statute of Government (hereafter the “Statute”).

Under Decree 24-82, the country’s governmental apparatus was placed in the hands of Ríos Montt’s military junta, which “assumed the executive and legislative powers of the State.”

Having the full power of both the legislature and the executive branches of government afforded Ríos Montt the opportunity to act with extensive levels of legal impunity. With the suspension of the Guatemalan constitution pursuant to the Statute, the only check on Ríos Montt’s authority would be, presumably, the judiciary.

75 Decree Law 24-82, Fundamental Statute of Government, Decree Law 24-82 (as Amended by Decree Law 36-82) (Guatemala). In particular, Article 109 of the Statute repealed the entirety of the 1965 Constitution. Ibid., 36.

76 Ibid., 1.
Nominally, Decree 24-82 was drafted in contemplation of respect for the judicial branch. The Statute recognized the need for “the Supreme Court of Justice, courts, and judges [to] exercise their judicial independence in accordance with the law.”77 To ensure this, the Statute purportedly guaranteed that the administration of justice would be “exercised by the Supreme Court of Justice and other courts having ordinary or special jurisdiction” and would be “obligatory, gratuitous, and independent of the other functions of the State.”78 Given the incestuous nature of the lack of separation of powers in the Statute, however, this independence was, as will be seen, virtually impossible to maintain.

Decree 24-82 also authorized the military government to grant amnesties in certain circumstances.79 Under this authority, on 24 May 1982 the military government issued Decree 33-82, a decree offering amnesty for “political crimes and related common crimes” to members of “subversive factions” in order to “achieve social peace.”80 This amnesty decree was purportedly made to give revolutionaries “the option of reintegrating into society, free of criminal responsibility.”81 Those who wished to be amnestied for their crimes had 30 days from the law’s effective date to present themselves at a military facility and declare under oath that they had abandoned their subversive activities, while also giving up any weapons and munition. Although the Inter-American Commission on Human Rights reported that the official number of individuals that were granted amnesty under Decree 33-82 is unknown, it did note that it appeared that very few guerrillas were amnestied through its provisions.82

77 Ibid., 3.
78 Ibid., 28.
79 Ibid., 14.
81 Junta Militar de Gobierno, Decreto Ley 33-82.
As must be remembered with all laws, the state did not promulgate Decree 33-82 in the vacuum of a social void. Rather, its text offers insight into the goals of the law’s drafters and the issues they sought to address. The law’s preambles and recitals, the beginning portions of legislation that lay out the background of a law, state the law’s alleged purpose: to reintegrate subversive, Marxist-Leninist groups engaged in political violence into Guatemalan society.\textsuperscript{83} Some have taken this to mean that Decree 33-82 was “discursively positioning the players (military and state versus guerrillas) in a moral playing field that naturalized violence against traitors who were legally defined as both criminal and subversive” while presenting “the military junta as the public’s savior and as pushing the country onto the path of ‘constitutional legality.’”\textsuperscript{84} This analysis is not without merit.

However, this analytic approach ignores clues embedded within Decree 33-82’s text that the discursive morality between the state and the insurgency was not, in fact, entirely oppositional. The recitals note that living “without the fear of political violence” would occur if amnesty “is provided to the \textit{people and subversive groups} that are practicing it” (emphasis added).\textsuperscript{85} This suggests that political violence was not only perpetrated by revolutionaries, but also by individuals outside of the subversive sphere. In fact, Article 1 confirms this, as “the members of the State Security Forces who in the fulfillment of their duty have participated in counter-subversive actions are included in the amnesty referred to in this article.”\textsuperscript{86} A standard rule of statutory interpretation is that there is no superfluous text. Accordingly, if the Guatemalan

\textsuperscript{83} Junta Militar de Gobierno, Decreto Ley 33-82.


\textsuperscript{85} Junta Militar de Gobierno, Decreto Ley 33-82.

\textsuperscript{86} Ibid.
armed forces were not engaged in actions that merited amnesty, there would be no reason to include this clause. The granting of amnesty to the military itself begs the question of why amnesty for the military was necessary if it did nothing wrong.

Although presented as a general amnesty for both sides of the conflict, uncertainty in Decree 33-82’s procedure prompted concerns as to whether it even applied to insurgents. The vagueness of the statute regarding how it functioned could only have left revolutionaries wondering what awaited them were they to turn themselves in.\(^{87}\) One aspect of this lack of clarity, though, was plainly delineated in the law: the military government was not, in fact, the ultimate grantor of amnesty. Rather, Article 2 unambiguously provided that “the application of amnesty will be made by the Supreme Court of Justice.”\(^{88}\) Guerrillas who submitted themselves to the military government had no assurance the government would ultimately grant amnesty, as it was, pursuant to the law, outside of their purview, despite the Supreme Court being ostensibly under military control. Importantly, though, there was no doubt as to amnesty for members of the armed forces. Per the Inter-American Commission on Human Rights, for the military the law was “a cloak of immunity which protected them, with respect to human rights violations, from investigations and sanctions that the government of General Ríos Montt might have imposed on them.”\(^{89}\) Importantly, the submission conditions in Article 2 were only applicable to “those who are included in the first paragraph of Article One of this law,” the revolutionary left; for the armed forces, Decree 33-82’s amnesty was a cloak from which they “automatically benefited without discrimination.”\(^{90}\) Only the military was guaranteed forgiveness.

\(^{87}\) Norris, “Leyes de impunidad y los derechos humanos en as Americas,” 67.
\(^{88}\) Junta Militar de Gobierno, Decreto Ley 33-82.
\(^{90}\) Ibid.
Notably, the military government followed Decree 33-82 on 27 March 1983 with another amnesty law, Decree 27-83.\(^91\) Decree 27-83 echoed its predecessor, with parallel provisions regarding timeliness and place of submission to military authorities. One important difference, though, is the restriction in its Article 3, which provided that “the present law will not be applicable to those persons who are subject to criminal prosecution, nor will it be applicable to those who had already been sentenced,” providing that “the law will not be applicable to persons who are undergoing criminal proceedings before the corresponding courts and those for whom, in any case, sentence has been issued, and who have been convicted.”\(^92\) Naturally, the disparity seen in a side-by-side comparison of the two laws begs the question of what happened to necessitate the change, and of what defect in the original language prompted the restriction. The most likely scenario is that guerrillas who satisfied the conditions subsequently prohibited in Decree 27-83, Article 3 had begun to pursue amnesty under Decree 33-82, and the government saw this as a problem. By its own terms, Decree 33-82 was enacted to encourage an end to subversive political violence through reincorporation of revolutionaries into Guatemalan society. However, the government enacting subsequent legislation that barred some guerrillas from the chance of reintegration calls this motivation into question. The military government left clues in Decree 33-82’s text that make its goals clear.

Even if revolutionaries had trusted that they would be forgiven for their actions in the internal armed conflict, the law signaled that what was forgiven would not be forgotten. Rather, guerrillas would have entered a relationship with the state of voluntary surveillance. Article 3 of Decree 33-82 provides that the “Government Military Board will have the study of each case,

\(^{91}\) Ibid. Recall the bi-numeric system of nomenclature for degrees, wherein decrees with a lower “proyecto de ley” number may become law after decrees with higher such numbers, supra n20.

\(^{92}\) Ibid.
and will ensure that by the means deemed appropriate, work is provided consistent with the capabilities of each person who takes refuge in amnesty."⁹³ Although this clause was couched in a pretense of reintegration into society, the provision of work by the military government permitting integral reincorporation would have required persistent monitoring of former guerrillas’ lives. Even assuming a good-faith intent of providing employment, pragmatically it represented a Foucauldian logic of anonymous power. The mechanisms of the amnesty would place former revolutionaries under a constant regime of surveillance, but offered no certainty of when, where, how, or even if such surveillance occurred. This vagueness—as well as the ambiguity of what resulted should those who laid down their arms violate the terms of Decree 33-82—would ensure that ex-insurgents became an obeisant and self-regulating group. In fact, given that a basis for Decree 33-82 was to protect “the life and property of [Guatemala’s] inhabitants,” the imagined figure of the reformed guerrilla represented the safeguarding of Guatemalan economic elites. Considering the military’s control over the judicial system and its general alliance with trade and industry, the law expressed a linkage of military, legal, and economic power apparatuses culminating in the protection of Guatemala’s elite-dominated economy by ensuring a supply of reformed, docile workers. Coupling the practical outcomes of the law with this desired effect, the true purpose of Decree 33-82 becomes clear: amnesty for soldiers, supervision and self-subjection for revolutionaries. Unsurprisingly, relatively few of the guerrillas that the government wanted to participate actually submitted to Decree 33-82, and the military government responded accordingly.

On 1 July 1982, the day after Decree 33-82’s voluntary submission period ended, Ríos Montt issued Decree 46-82, a law situated oppositionally to the prior amnesty decree. Decree 46-

⁹³ Junta Militar de Gobierno, Decreto Ley 33-82.
82 created special tribunals, *fueros especiales*, for those who violated the portions of the Guatemalan penal code dealing with security measures, crimes against state security, and crimes against institutional order. Importantly, the Decree 46-82 tribunal justices were appointed directly by Ríos Montt and were required to be either active members of the bar or be officers in the armed forces. Ríos Montt was, accordingly, free to appoint military officers with no prior legal training as judges. Although records containing the identities of members of the special tribunals remain undisclosed (if they exist at all), it is most likely that Ríos Montt would have appointed justices that held similar anti-leftist views to his own. Other substantive aspects of the law are also problematic. The law increased the criminal penalty for a variety of crimes to death, with no possibility of a reduced sentence. Additionally, while defendants were required to be assigned legal counsel, this counsel was not guaranteed to be an independent lawyer, but instead was appointed by the tribunal; moreover, similar to the judges, the assigned defense could be someone void of legal training, as the requirement was merely that the defender merely be someone “qualified by the same Court.” Importantly, though, the problems associated with Decree 46-82 were not only substantive, but also were revealed in its implementation.

While Decree 46-82 contained many textual reasons for criticism and concern, the underlying structural problems with the law were more aptly revealed in its procedural application. As noted, Decree 46-82 guaranteed defendants the right to defense counsel if they

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95 This is discussed in more detail later in a case that came before the Inter-American Court of Human Rights.

96 Presidente de la República, “Decreto Ley Número 46-82.”
were being prosecuted in one of the special military tribunals. However, cases where defendants were assigned legal representation were uncommon, and the circumstances surrounding many Decree 46-82 proceedings remain elusive.97

These tribunals add to the list of problems with the strategic deployment of positivistic legal interpretation during the Guatemalan civil war. The *fueros especiales* presided over crimes against the state. Effectively this gave them jurisdiction over the entire insurgency (or those suspected of being insurgents). These tribunals also had the capacity to summarily sentence those they convicted. Accordingly, suspected insurgents could be arrested, tried, and sentenced—even to death—in secret. Imagine an unmarked car arresting a suspect from the street, that suspect then held in an undisclosed location until a secret trial, with a death sentence immediately performed. The issue is that the military *was already doing* these things. Suspected insurgents and those on the left regularly disappeared and were never seen again. Under positivistic theory, the government must act within the confines of the law. However, because positivism dictates that the law is what the lawgiver says it is, all the military state needed to do was say that the law was whatever it wanted it to be. When any party, especially the state, can change the law to comport with its actions rather than the other way around, legality loses all sense of meaning.

Although details pertaining to the *fueros especiales* are not readily available, the space adjacent to “typical” special military tribunal proceedings offers a glimpse of the makeup of “average” Decree 46-82 cases.98 Take the cases of Michael Glenn Ernest and Maria Magdalena

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*97 With the recent discovery and digitalization of the Guatemalan National Police Archives in Guatemala City, there is hope that documents contained therein could reveal a great deal on Decree 46-82 proceedings, especially those that were particularly clandestine.

*98 The term “adjacent to” is used to signify that some aspects of even exceptional cases would have, at minimum, trace elements of a typical proceeding. However, it must be noted that all cases before a special tribunal operate on a spectrum of atypicality; the tribunals are, after all, “special,” and by definition not an ordinary course of the justice system.*
Ascanio Monteverde Molenaar, for example. Ernest, an American, and Monteverde, a Spaniard, were arrested on 11 January 1983 on charges of having participated in guerrilla raids in San Lucas Tolimán. Both denied the charges and were given the opportunity to provide witness statements supporting their innocence, and on 16 January 1983 were provided with legal counsel, whom they met for only a few minutes prior to their first appearance before the *fuero especial*. This initial proceeding was before a panel of three “judges,” although Monteverde’s attorney believed them to be military personnel, given their apparent lack of legal training. The pair were regularly denied access to counsel over the next few weeks. Despite this, on 31 January 1983 they were presented to a television audience to attest to their well-being, declaring that they had been housed, fed, and treated adequately, and were given legal representation. The military eventually released them without explanation on 8 March 1983.\(^\text{99}\)

Importantly, some of Ernest’s and Monteverde’s experiences were typical of the *fueros especiales*, while other aspects of their treatment were not. It is in this gap between atypicality and normalcy that their cases are instructive. The pair benefited from legal representation, likely because they were foreigners. Although Decree 46-82 purportedly guaranteed access to appointed counsel, most defendants processed pursuant to Decree 46-82 were denied the right to counsel. Often, representation by appointed legal counsel only occurred after sentencing.\(^\text{100}\)

While this is problematic on its face, it becomes increasingly so with knowledge that under Decree 46-82’s draconic provisions sentencing could mean death without trial or contact with an attorney. The denial of legal counsel at trial only increased the likelihood that the state would execute innocent people. Decree 46-82 was contrary to international standards, as it was “flatly


inconsistent with human rights to punish except through procedures reasonably well calculated to protect the innocent.” In this sense, innocents can only be safeguarded by implementing proper legal protections.

A pattern of summary extrajudicial executions unfolded throughout the regimes of Lucas García and Ríos Montt. Between March 1982 and June 1982, at least 70 separate incidents of extrajudicial killings occurred, resulting in the death of more than 2,000 Maya and rural farmers. In this regard, the sentencing structure of Decree 46-82 fit the bill: it simultaneously expanded the list of potential death penalty offenses while limiting legal protections for the accused. On September 17, 1982, four prisoners were executed by a firing squad after conviction in a secret Decree 46-82 proceeding. And while Ernest and Monteverde awaited their freedom, six others were held on Decree 46-82 charges. These six had no contact with lawyers or their families, who only learned that legal representation was possible as a result of the Ernest-Monteverde press conference. This enabled the families to find lawyers to represent the six, who were sentenced to death by a special military tribunal in January 1983. Their lawyers were able to successfully stall the imposition of this sentence, but the six were ultimately

101 Dworkin, Justice for Hedgehogs, 337.
103 Ibid., 4.
105 Ibid.
executed on 3 March 1983.\footnote{Amnesty International, “Further Information on UA 24/83 (AMR 34/05/83 24 January, AMR 34/06/83 25 February, AMR 34/07/83 3 February and Telexes of 27 January, 2 February and 3 March) - Death Penalty,” 4 March 1983, GT-CIRMA-Colección de Derechos Humanos-Caso Ríos Montt/D162.} Amnesty International argued that the process by which the men were tried, convicted, and executed “did not conform to internationally recognized standards.”\footnote{Ibid.}

Although the Ríos Montt regime could not make its actions comply with international standards, they were able to bring their actions into accord with Guatemalan law without actually changing their actions. While the most obvious way to be in accord with the law appears simple (do not perform acts that violate the law), the military government took a different approach. Rather than changing its actions to conform to the law, the government changed the law to comply with its actions. Passed concurrently with Decree 46-82, on 1 July 1983 the military government enacted 45-82, placing the country into a legal “state of siege” that allowed the military to circumvent or eliminate many of the rights contained in Article 23 of the Fundamental Statute of Government, notably the right to freedom of association, to freedom of thought, the right to security in the home, the right against a warrantless arrest, the right to habeas corpus, and the right for the press to publish without censorship.\footnote{Inter-American Commission on Human Rights, “Report on the Condition of Human Rights in the Republic of Guatemala.” The state of siege was reauthorized monthly. Schirmer, The Guatemalan Military Project, 129.}

The concurrent passage of Decrees 45-82 and 46-82 did not happen by accident. Their complementary purposes are axiomatic: the armed forces arrest without warrant under 45-82 and try the accused in a special 46-82 court. With a goal of bringing heretofore illegal action within a framework of legality, Ríos Montt eroded protections from state intrusion in a way that justified further state repression. By revoking the right to security in the home, doors could legally be kicked in. By banning the “broadcasting [of] any unauthorized reports about leftist guerrilla
activity” the government echoed its attempts from nearly a decade before, when it prohibited reproduction of the Guatemalan penal code, as part of a greater attack on the freedom of access to information and the empowerment of the poor.110 Ending the rights to associate and think freely meant that potential arrest (and thereby torture, forced disappearance, and execution) did not apply solely to revolutionary activity, but also merely for associating or agreeing (or thinking about agreeing) with those suspected of engaging in terrorism.

The effect of these decrees was to excise traces of morality from what was legal in Guatemala. Stripping protections for the people allowed the government to act outside of traditional moral boundaries yet still within legal confines. Jennifer Schirmer observed that Ríos Montt was “reforming” the Guatemalan legal system around his actions.111 That it was Ríos Montt’s regime that did this serves as no surprise. Ríos Montt’s military career meant he had long had a front-row seat to the impact of morality in the law when the US used morality as a catalyst to both freeze and resume military aid to Guatemala. Morality, then, needed to be stricken from the law. The best confirmation of this came from Ríos Montt himself when he stated, “we declared a state of siege [and changed the law] so we could kill legally.”112

2.4 The Decree Laws in Transnational Perspective: Responses

Just as domestic US law did not exist solely within the jurisprudential boundaries of the US, Guatemalan law also prompted responses from outside its own borders. The changes to the Guatemalan penal process under Ríos Montt were met with doubt, and the restructuring of the Guatemalan death penalty under Decree 46-82 also garnered the attention of supranational

110 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress.”
governmental organizations. On 15 April 1983, the Organization of American States (OAS) Inter-American Commission on Human Rights submitted a request to the Inter-American Court of Human Rights (hereafter the “Inter-American Court”) for an advisory opinion on Guatemala’s actions as they pertained to the American Convention on Human Rights (hereafter the “American Convention”). The American Convention was drafted by Latin American countries, and their predominantly Catholic background is reflected in its text: the basis of the case before the court was Article 4, “Right to Life,” whose first portion states that “every person has the right to have his life respected … from the moment of conception.” Although Article 4 begins with this general statement, the remaining portions of Article 4 make clear that the application of the death penalty, in this context, most interested the American Convention.

The driving portions of the American Convention in this case were Article 4(2), whether a government could apply the death penalty for crimes that did not carry the death penalty when that country ratified the American Convention, and Article 4(4), whether a government could establish capital punishment for political or related common crimes. Article 75 of the American Convention allows member states to be excluded from certain provisions by making reservations from them, subject to the reservation’s legality under the Vienna Convention on the Law of Treaties (hereafter the “Vienna Convention”). Article 19 of the Vienna Convention provides that a nation may reserve exemption from provisions “when signing, ratifying, 

115 Inter-American Court of Human Rights, “Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83.”
accepting, approving or acceding to a treaty.”

Guatemala argued that it reserved exemption from both Articles when it ratified the American Convention. The nation said that provisions of the Guatemalan constitution that excluded capital punishment for political crimes (crimes against the state) but not for common crimes (everyday, non-political crimes) related to political crimes served as an implicit waiver. Accordingly, Guatemala argued that, since it had only limited application of the death penalty for political crimes, it remained free to allow capital punishment in all other instances that it had not previously specifically barred.

The court summarily rejected Guatemala’s view of both the process and substance of the law. Guatemala was arguing that a reservation from Article 4(4) applied equally to Article 4(2). But, the entire purpose of Article 4, the court reasoned, was to limit the death penalty’s current and future application. Guatemala misapplied the internal mechanics of the law, the court said. Moreover, in turning to the substance of Guatemala’s argument, the court noted that Guatemala’s implicit reservation itself contained large substantive flaws. Although the Guatemalan constitution did not prohibit the use of capital punishment for common, politically-related offenses, it did not require it, either. Guatemala was, therefore, free to further restrict the use of capital punishment. Ultimately, the court found that a country could not apply the death penalty for political crimes and that Guatemala’s implicit reservation was invalid.

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118 Inter-American Court of Human Rights, “Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83.” For example, pursuant to the Guatemalan constitution, a defendant could not be given the death penalty for crimes against the state but could be given the death penalty for everyday crimes committed in furtherance of a political crime (e.g., a murder committed to advance a terrorist act).

119 Ibid., 14.

120 Inter-American Court of Human Rights, “Restrictions to the Death Penalty, Advisory Opinion OC-3/83,” 15. Interestingly, the court did not go further in its rejection of the use of the Guatemalan constitution as a reservation for the expansion of capital punishment: recall that Decree 24-82 saw the repeal of the 1965 constitution.
penalty in an ex post facto fashion absent a concrete reservation made by a state when ratifying the American Convention.  

Although the case had multiple judicial opinions, the official ruling from the court only represented the most moderate interpretation. The two separate opinions were both concurrences. Judge Carlos Roberto Reina, the president of the court who would later become President of Honduras, joined in the majority opinion, but clearly felt it did not go far enough. Given the severity of the circumstances surrounding an advisory opinion, Reina felt that the court needed to provide further “clarity … in order that these decisions might serve increasingly as an example and strengthen the faith of the people in the international protection of human rights.” Accordingly, he opted to memorialize that it “was the intention of Guatemala” to circumvent the recognized human rights implications in the changes to its capital punishment laws.  

Judge Rodolfo E. Piza Escalante went further. His concurring opinion stated that the situation demanded a “more direct answer to the problems underlying the request,” and that he was speaking to “the many persons interested in forming an opinion on a serious situation concerning human rights in the Americas.” Piza Escalante rebuffed the limitation of the opinion to the “interpretation of the texts” of the American Convention and to its “hypothetical effects,” but instead chose to “refer concretely to … the reservation presented by the Government of Guatemala.” Effectively, Piza Escalante fully rejected all aspects of

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121 Ibid., 15-16.
122 Ibid., 16.
123 Ibid.
124 Ibid., 17.
125 Inter-American Court of Human Rights, “Restrictions to the Death Penalty, Advisory Opinion OC-3/83.”
Guatemala’s position, and noted that the American Convention prohibited Guatemala’s actions under Decree 46-82 “in absolute terms.”

For the US, the internal legalities of the Guatemalan armed conflict offered the opportunity to reevaluate its position on the provision of aid. On August 5, 1982, the US House of Representative Subcommittee on International Development Institutions and Finance, Committee on Banking, Finance and Urban Affairs met to discuss a potential loan from the Inter-American Development Bank to Guatemala for telecommunications equipment. At the subcommittee hearing, Deputy W. Bosworth, the Deputy Assistant Secretary of State for Inter-American Affairs, made clear the Reagan administration’s views on the sweeping legal changes that had occurred at the direction of the Ríos Montt regime.

Foreshadowing the shift he would soon detail, Bosworth began his subcommittee testimony by differentiating the human rights approach of the Ríos Montt regime from the views of Lucas García’s, which Bosworth positioned as “as abhorrent as they were counterproductive.” Despite recognizing that “serious human rights problems do remain in Guatemala,” Bosworth depicted the Ríos Montt regime as orchestrating “a very substantial improvement” to human rights conditions to the point “that Guatemala cannot be considered by any standard of measurement to be a country in which there is a pattern of gross violations of human rights.”

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126 Ibid.
127 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress.”
128 Ibid.
129 Ibid., 10.
130 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress,” 6-7.
political violence in urban areas, ignoring the increase in rural political violence because the administration labeled it “a guerrilla strategy, not a government one.”

The Ríos Montt regime’s use of the law was a specific area of improvement that Bosworth cited. The Reagan administration conceded that, prior to the Palace Coup, the Guatemalan government “had previously been characterized by lawlessness.” Under Lucas García, the military was “engaging in illegal entry, illegal detention, et cetera, but were doing it outside the law” (emphasis added). The Ríos Montt administration, Bosworth claimed, installed “a degree of law and process” by providing “a legal foundation for the antiguerrilla actions that they are taking.” By contrasting prior states of “lawlessness” and actions performed “outside the law” with the “legal foundation” used by the Ríos Montt regime to “install a degree of law and process,” the Reagan administration strategically deployed the façade of legality provided by positivism to pursue its own moral (i.e., anti-Communist) goals.

Bosworth also indicated that the administration looked at the amnesty of Decree 33-82 as a sign of human rights progress. However, as previously established, very few revolutionaries proceeded through the amnesty provision; in reality, it amnestied members of the armed forces, who committed roughly 97 percent of the human rights violations during the war. Notably, Bosworth recognized in pre-testimony communications that the Ríos Montt regime recently eliminated many rights and freedoms, declared martial law, and authorized summary

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132 Ibid.

133 Ibid.

134 Ibid.

135 Commission for Historical Clarification, Guatemala: Memory of Silence (1999).
extrajudicial executions, issues he called “areas of concern,” but not concerning enough to stop the resumption of aid. Bosworth’s testimony signaled that the Ríos Montt efforts to change the narrative away from one of morality were working.

Congressman John J. LaFalce (D-NY) questioned Bosworth on the merits of his analysis. Specifically, LaFalce focused on Bosworth’s position that improvement in human rights conditions validated the resumption of aid to the Guatemalan government, noting that legislation prohibiting aid to human rights abusers “does not deal with the issue of improvement,” but rather focused on “the issue of whether or not there is a pattern of gross violation of human rights.” As LaFalce highlighted, concepts of progress are themselves relative, potentially resulting in a “less terrible situation but still a situation in violation of human law, thus making the issue of improvement irrelevant under the criteria established by law.” As LaFalce demonstrated by pointing to the legal criteria needed for the resumption of aid, positive interpretations of law actually cut against Reagan’s position. Despite this, the administration justified the resumption of aid by noting that any improvement was a step forward, and good faith by the Ríos Montt regime was evidenced by an invitation extended by the military government to governmental and non-governmental human rights organizations, including Amnesty International, as well as repeated statements of a desire by the military government to end human rights abuses.

A representative from Amnesty International testified before the subcommittee. Much of the testimony of Ann Blyberg, the chairman for Amnesty International’s board of directors,

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136 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress,” 141.

137 Ibid., 24-25.

138 Ibid., 25.

139 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress.”
clarified that while press reports from the military government stated that Amnesty International had been invited to observe human rights conditions in the country, Blyberg noted that “we have received no official invitation from the Government of Guatemala to visit that country.”

Interestingly, discrepancies between the Guatemalan military government’s and Amnesty International’s positions on an invitation to the country did not cause Bosworth or others in the US State Department to question the credibility of the Guatemalan government’s assertions that the guerrilla left was the primary driver of human rights violations. It should have, though. Amnesty International noted that despite “the new Government’s stated commitment to human rights, … persistent reports of massive human rights violations” remained in “what appear … to be striking similarities in the policies and practices of previous governments and the present government of Gen. Ríos Montt.”

Additional testimony before the subcommittee further eroded both the Guatemalan military government’s and the Reagan administration’s credibility. Dr. Jonathan Fine, M.D., visited Guatemala on a joint mission with the American Association for the Advancement of Science, the American Public Health Association, the National Association for Social Workers, the American Anthropological Association, and the Institute of Medicine; the purpose of the mission was two-fold: (1) to verify the well-being of Dr. Juan José Hurtado, a distinguished pediatrician; and (2) to view the “general state of human rights in the country.” Dr. Fine testified that his group was, like Amnesty International, invited by the military government, but the government worked to frustrate the group. Most important to this study, though, was the

140 Ibid., 40.
141 Ibid., 45.
142 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress,” 81.
information provided by the military government regarding human rights. Dr. Fine attested that all official reports on human rights were directed by the government, given the state censorship authorized by Decree 45-82 and its progeny. These accounts conflicted with both unofficial reports and members of the private sector that provided that “the government continues to have responsibility or share complicity for large-scale killings in rural areas,” reflecting “a return toward repression and brutality and that the early pronouncements of the Ríos Montt government are far from being fulfilled.”  

Angela Berryman, a representative for the American Friends Service Committee, a religious organization dedicated to promoting peace and development, testified that any reports of improvement following the Ríos Montt-led coup should be viewed with suspicion, as they were “designed largely to change Guatemala’s tarnished international image (and thereby make the government appear eligible for United States military aid).”  

If shifting international perception in order to justify receiving US aid was the specific focus on the military government’s propaganda-like approach to human rights conditions in Guatemala, the operation should be considered mostly a success.

Remember that Reagan met with Ríos Montt in December 1982 and determined that the Guatemalan general was getting “a bum rap.”  

Reagan’s evaluation of Ríos Montt, a kindred spirit in the fight against Communism, led his administration to support the Inter-American Development Bank’s loan for the telecommunications system, although Chairman Jerry M. Patterson of the 1982 Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance, and Urban Affairs remained skeptical and expressed that he “would like to see [the US] not give any kind of foreign assistance to any country that does not

143 Ibid., 79.
144 Ibid., 120.
treat its own citizens right, and with human dignity.” In addition to supporting the telecommunications loan, the Reagan administration decided to lift the arms embargo on 8 January 1983, despite congressional opposition expressed in a multi-authored congressional letter that noted that the resumption of “military aid to Guatemala at this time would amount to an endorsement of [Ríos Montt’s] policies.” Notably, the Reagan administration made its decision re military aid for the Ríos Montt regime with its eyes open: multiple parties during the 1982 testified that they had informed the administration at various levels of the ongoing pattern of criminal behavior by the part of the Ríos Montt military government. Representative Michael D. Barnes, the Chairman of the Subcommittee of Inter-American Affairs of the House Foreign Affairs Committee, sensing the lifting of the embargo by the administration, issued a public statement, directly informing the White House of significant disapproval of any resumption of arms provision to Guatemala. This disapproval manifested in an inter-congressional letter from a group of congressional representatives seeking additional cosponsors for a resolution sponsored by Representative Tom Harkin that would have specifically barred the sale of military equipment, particularly spare parts for helicopters or A-37 aircraft, to the Guatemalan armed forces. Harkin may have recognized the import of that particular

146 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress,” 130.

147 Gwertzman, “U.S. Lifts Embargo on Military Sales to Guatemalans;” Tom Harkin et al to House of Representatives, 6 January 1983, GT-CIRMA-AH-037/C64/D8. Importantly, the 1982 subcommittee had no authority to effectively challenge the administration’s decisions on arms provisions.

148 “Inter-American Development Bank Loan to Guatemala: Hearing before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, Ninety-Seventh Congress,” 122-23. Rona Weitz, D.C. staff member of Amnesty International, testified that her organization had informed the US Congress and the Human Rights Bureau of the State Department; Berryman said that her group had informed the US Embassy in Guatemala City; and Fine noted that his mission had been in contact with both the State Department and the US Embassy.


150 Harkin et al to House of Representatives.
equipment to the *proyecto militar* and sought to mitigate US involvement. For international commentators, though, US complicity in genocide had already been established.

For five days in late January 1983, a group of jurists, academics, and experts from a diverse group of disciplines met in Madrid to discuss the meanings and consequences of Guatemalan legal developments in 1982 and early 1983. This was the tenth meeting of the Permanent Peoples’ Tribunal, a group founded in 1979 in Italy to give a voice to those who had been marginalized under international law. The Tribunal issued judgments on international “crimes against peace and humanity, any infringement of the fundamental rights of peoples and minorities, [and] grave and systematic violations of the rights and freedoms of individuals.”\(^{151}\)

The group heard from 26 witnesses and reviewed 24 reports as evidence prior to issuing its judgment.\(^ {152}\) The group’s voice did not speak highly of the Guatemalan military government.

On 31 January 1983, the Permanent Peoples’ Tribunal published its judgment on the state of affairs in Guatemala.\(^ {153}\) The Tribunal found vast deficiencies in Guatemalan law, resulting in patterns of serious repression and gross human rights violations. Moreover, the “indiscriminate massacres of indigenous peasants, including women, the elderly and children” were done in such a way to “highlight the intentionality in destroying, in whole or in part, the indigenous population of Guatemala.”\(^ {154}\) In the eyes of the Tribunal, the Guatemalan state was guilty of genocide.


\(^{154}\) Ibid.
Regarding the laws passed under the Ríos Montt regime, the Tribunal noted that the legal normative rules established by Decree 24-82 “serve[d] only as a façade,” that the amnesty provided by Decree 33-82 was simply an authorization of prior repression, and that the state of siege established by Decree 45-82, despite its purported purpose to allow the military government to transition Guatemalan society into a state of legality, in fact subverted the rule of law and compromised the recognition of internationally accepted *jus cogens* human rights, the fundamental principles of international human rights law that are so pervasively accepted that a state or actor cannot violate them.\(^{155}\)

For the Tribunal, the Guatemalan military government had moved so far beyond conformity with international law that insurrection against the state was no longer an illegal act. The Tribunal found that the Guatemalan state was in violation of Resolution 2625 of the UN General Assembly that guarantees the right to self-determination, through its armed actions against its own people. Revolutionary resistance was thus justified. Importantly, the Tribunal saw the actions of the Guatemalan military government as being facilitated by foreign actors, specifically the US, Israel, Argentina, and Chile. This facilitation came in the form of unconditional and unqualified economic aid to the Guatemalan state. Accordingly, US complicity was incorporated into Guatemala’s guilt.\(^{156}\)

The Tribunal’s judgment represented a wholehearted rejection of a legal positivistic realignment of an illegal state within the bounds of its own prescribed legalities. A state cannot bring about its own legality by shaping internal legal structures to comport with the state’s actions when those activities exist outside of *jus cogens* principles. In effect, the Tribunal

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\(^{155}\) Ibid.

\(^{156}\) Tribunale Permanente dei Popoli, “Guatemala.”
disregarded notions of legality that see it as determined solely by positive law. Instead, the
Tribunal ruled that fundamental normative principles override a state’s self-regulation when
those controls fall below generally accepted thresholds.

Additionally, in its treatment of US complicity, the Tribunal reflected on postcolonial
notions of responsibility: colonial powers historically viewed affairs occurring at the periphery as
the colony’s problem rather than the metropole’s. The Tribunal rejected this view, though, and
said that US aid to Guatemala placed events wholly bounded by Guatemalan jurisdiction and
performed by Guatemalan actors within the field of US affairs. The Tribunal ruled that the US
provided the tools necessary for “torture, massacres, and the disappearance of people.”\textsuperscript{157} With
these tools, the Guatemalan state unleashed genocidal terror against its indigenous population.
The Tribunal did not simply condemn Ríos Montt, but rather every Guatemalan head-of-state
beginning with the 1954 ouster of democratically-elected Jacobo Árbenz.

Also, the Tribunal ruled that guilt did not end at the water’s edge. Israel, Argentina, and
Chile were all guilty of giving aid and assistance to the Guatemalan army. But the Tribunal
recognized a greater degree of involvement on the part of the US. Accordingly, it stated that the
US government was as responsible as the Guatemalan military itself in all crimes—including
genocide—due to its “decisive interference in Guatemalan affairs.”\textsuperscript{158} The amoral distance that
the legal positivism strategically used by the Reagan administration provided to those that
wanted to arm the génocidaires could not shield the US from its own genocidal complicity.

Although the Tribunal declared a general US guilt, it was the Reagan administration that
pushed to resume all forms of aid to the Guatemalan military and used the legalities of the Ríos

\textsuperscript{157} Ibid.
\textsuperscript{158} Tribunale Permanente dei Popoli, “Guatemala.”
Montt regime to support that position. Ríos Montt shaped those legalities around his fervent anti-Communism. The “scorched-earth” approach to the civil war that Ríos Montt tragically ordered in the Guatemalan countryside was also paralleled in the law. Extrajudicial killings, disappearances, and other human rights violations and war crimes committed by the Guatemalan armed forces, now legalized under Guatemalan law, rose drastically under Ríos Montt, and nearly 40 percent of all casualties for the 36-year war came during his 18-month regime. Although various international organizations, including one branch of the US government, rejected Ríos Montt’s regime and proclaimed the dictator’s guilt and that of his international co-conspirators, the specter of impunity remained, and war criminals went unpunished for decades. But Ríos Montt found that the law could only bend so far.

2.5 Conclusion

As past is often prologue, Ríos Montt’s regime ended the same way it began, with a coup. One of Ríos Montt’s promises to the nation was that he would reform its electoral processes and hold open elections.\textsuperscript{159} The majority of the country waited anxiously for these reforms and a new constitution. But when Ríos Montt announced that at least seven more years were needed before elections could lead to a transfer to civilian governance, it proved to be the last straw.\textsuperscript{160}

On 8 August 1983, the military deposed Ríos Montt and installed General Óscar Humberto Mejía Víctores as head-of-state.\textsuperscript{161} Upon taking power, Mejía Víctores (1983-1986) began dismantling and reforming the still active parts of Ríos Montt’s legal project. The Special Military Tribunals established by Decree 46-82 were suspended by Decree 93-83 prior to being

\textsuperscript{159} Schirmer, \textit{The Guatemalan Military Project}, 28.
\textsuperscript{160} Jorge Luján Muñoz, \textit{Breve historia contemporánea de Guatemala} (Mexico City: Fondo de Cultura Económica, 1998), 352.
\textsuperscript{161} Schirmer, \textit{The Guatemalan Military Project}, 29; Luján Muñoz, \textit{Breve historia contemporánea de Guatemala}, 352.
fully abolished by Decree 74-84 on 18 July 1984. Directly prior to Rios Montt’s removal from power, the ongoing, habitually-renewed state of siege that eliminated large swaths of individual and collective rights was reduced to a less restrictive “state of alarm,” a condition that Mejia Víctores allowed to continue.

The most sweeping purge of the legal repercussions of Rios Montt’s genocidal regime, however, was Mejía Víctores’ final act in office. On 10 January 1986, just before stepping down as part of Guatemala’s transition to a civilian government, Mejía Víctores issued Decree 8-86, a blanket amnesty provision for the military for all crimes committed between 12 March 1982 and 14 January 1986, formalizing military impunity for the entirety of Rios Montt’s and Mejía Víctores’ dictatorships. Gone was the potential for legal reprisal for the human rights violations, state terror, and genocide that resulted from Rios Montt’s scorched earth policy.

The amnesty could not erase the prior judgement of international institutions, however. Both supranational courts and nongovernmental tribunals condemned the actions of the Guatemalan military and its international backers. These condemnations—like the challenges to amoral law at the grassroots—transcended the limits of textual, positive law. Importantly, challenges to the boundaries of positive law theories more broadly implicated the international system. Because legal positivism was (and still is) foundational to the modern system of international law, rejections of the amoral application of positivistic thought to international legalities implicitly called into question the international legal order itself.

In the face of jurisprudential wrangling and ongoing brutal oppression, left-leaning NGOs and indigenous rights groups maintained their pursuit of justice. The US government

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162 Torres, Engendering Violence, 75.
manipulated the Foreign Assistance Act of 1961 to arm the war criminals that committed acts of genocide against Guatemala’s indigenous people. In a remarkable twist of fate, the same law provided Guatemalan grassroots activists with an effective tool to resist the continuation of internationally-supported human rights violations. These activists leveraged US foreign aid policy to further peace and anti-impunity efforts, a struggle that echoed the brave resistance of activists during the deadliest period of the Guatemalan civil war.

For us, as the Ixil People, the Peace Accords are the continuation of the struggle of Guatemala’s indigenous populations and the continuation of the struggle of our ancestors. The Peace Accords were not the fruit of nothing, it was the fruit of the struggle of the Ixil people.

―Miguel de León Ceto, Indigenous Authority of Nebaj.¹

Guatemala transitioned to civilian rule in early 1986, and newly elected President Vinicio Cerezo (1986-1991) set out to end the ongoing civil war and established a framework for the peace process. After meeting with foreign leaders, in September 1987 Cerezo established the Comisión de Reconciliación Nacional (National Reconciliation Commission or CRN) to oversee peace talks with the Unidad Revolucionaria Nacional Guatemalteca (Guatemalan National Revolutionary Unity or URNG), the umbrella group of revolutionary leftist organizations. The CRN convoked a National Dialogue in August 1988, in which various parties could offer ideas to advance the peace process. Despite having taken this step, Cerezo left office in 1991 having never led substantive peace talks.²

The peace process came to a head in a rapidly changing world. The Guatemalan civil war, at its core, was a Cold War conflict. The war began after US fears of Communism prompted it to help overthrow Guatemala’s democratically elected government. Throughout almost the entirety of the conflict, the US saw Guatemala’s civil war as a proxy war with Communism and supported the Guatemalan military with weapons, training, and other military-use equipment.


But in 1989, the Communist system in Europe exploded. The next year, the Sandinista experiment in Nicaragua ended. By 1991, the Cold War was effectively over, and the Soviet Union dissolved that December.

Things were changing in Guatemala as well. In January 1991, Guatemalan voters replaced Cerezo as president with Jorge Serrano (1991-1993). Serrano supported a diplomatic solution to the war, and in April 1991 opened direct negotiations with the URNG, drastically speeding up the peace process. Military and economic elites remained in opposition to the peace, and the powerful *Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras* (Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations or CACIF) pressured the government to abandon negotiations. The peace process nearly broke down entirely after the May 1993 *Serranazo*, Serrano’s attempted *autogolpe*, or self-coup, whereby he suspended the constitution, dissolved Congress and the Supreme Court, and tried to take absolute power.³

From 1986 to 1996, members of the Guatemalan left struggled fervently against military impunity. Spurred on by the passage of amnesty provisions in 1986, 1987, and 1988, human rights activists, members of civil society, and guerrilla revolutionaries fought primarily for the opportunity to see their abusers brought to justice.⁴ The Maya constituted a large part of this struggle, having a history of political activism that notably included the formation of Guatemala’s first indigenous-led labor group, the *Comité de Unidad Campesino* (Peasant Unity


⁴ Although “civil society” is a contested term, for the purposes here the World Bank’s definition will be used, which provides that civil society includes “the wide array of non-governmental and not for profit organizations that have a presence in public life, express the interests and values of their members and others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.” World Bank, “Civil Society,” accessed 23 February 2020, https://www.worldbank.org/en/about/partners/civil-society/overview.
Committee or CUC) in the 1970s, and the blossoming in the 1980s of a variety of organizations that formed part of a larger pan-Maya movement.

Steadily, prospects began to move toward peace. Accelerating this, in 1990 the US cut off overt military aid to Guatemala after reports surfaced on the military’s involvement in the killing of a US citizen. Over time, threats to cut off US aid expanded beyond just support for the military. Guatemalan lobbying prompted consideration within the US Congress to limit all forms of economic aid, an outcome that would hurt the bottom line of the Guatemalan economic elite. This potential financial peril pushed the Guatemalan right’s economic elite to a new willingness to discuss peace. After the Serranazo crisis, which ended in Serrano’s resignation, Congress appointed the Human Rights Ombudsman, Ramiro de León Carpio (1993-1996), as president. Peace talks continued with international support under de León Carpio and Álvaro Arzú (1996-2000). Broader support for peace resulted in the 1996 peace accords, a historic agreement held together by another amnesty, one with carveouts for grave crimes such as genocide.

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5 Michael DeVine, a US American innkeeper disappeared in Guatemala. Carole DeVine, Michael’s wife, asked questions about him at the local garrison, but was turned away. His body was found the next day. It later came to light that the local military commander in the area that turned Carole DeVine away, Col. Roberto Alpirez, covered up the facts of DeVine’s murder and was, of course, a paid CIA informant. Sam Dillon, “Guatemala's Second Victim--Details Emerge,” *New York Times*, 28 March 1995.


7 The process was supported by the UN and the “Group of Friends:” Mexico, Norway, Spain, the US, Venezuela, and Colombia. Negotiations took place in (alphabetically) Madrid, Mexico City, Oslo, and Stockholm. Jonas, *Of Centaurs and Doves*, 39-54.

8 The peace accords are comprised of eleven agreements between the Guatemalan state and the *Unidad Revolucionaria Nacional Guatemalteca* (the Guatemalan National Revolutionary Unity or URNG). Although too lengthy to describe here in detail, note the Agreement on Socioeconomic Aspects and the Agrarian Situation (that criticized the privatization of industry and other neoliberal tendencies and provided for the redistribution of land); the Agreement on Identity and the Rights of Indigenous Peoples (that recognized Guatemala as a multilingual and pluricultural state); and the Agreement on the Basis for Legal Integration of the URNG (that provided for an eventual amnesty law). Ibid., 69-92.
Justice for the crimes against humanity committed during the armed conflict remained unreachable so long as the conflict continued.\(^9\) Pursuing this justice depended on peace. In many cases, like in Guatemala, amnesties are intended to facilitate peace, because prosecutions could further divide and threaten fragile post-conflict democracies. Amnesty leads to peace, and peace leads to justice. But amnesties quite plainly inhibit justice. Peace and justice, therefore, increasingly are perceived as adversarial ends: peace cannot be achieved without amnesties, yet justice is unobtainable with them.\(^10\)

The Guatemalan case, however, demonstrates that peace and justice are not irreparably separated by amnesties. Both sides of the civil war held concerns over potential prosecutions. The leftist insurgents in the URNG had taken up arms against the Guatemalan state, violating Guatemalan law. Guatemalan state actors had committed various atrocities and massacres, as had various rebel groups, although in smaller scale and scope than the military. Complicating matters, both sides wanted to see the other held accountable for their crimes. Negotiations over postwar amnesty preserved prosecutorial rights for grave war crimes.

By contextualizing the Guatemalan peace process in the inter and transnational space in which it resides, this chapter adds to the understanding of peace processes in a world interconnected by systems of international law. Susanne Jonas notes both the important role of indigenous groups and the effect of US foreign policy, particularly the provision of aid, on CACIF’s position vis a vis peace.\(^11\) This study builds on Jonas’ *Of Centaurs and Doves:*

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\(^9\) Certainly, the word “justice” has an elusive meaning, as justice can be many things to many different people. In this context, “justice” refers to justice sought by victims in a court of law.


Guatemala’s Peace Process by examining the intersection of these two factors (indigenous activism and US foreign aid). Examining the actions of indigenous actors otherwise marginalized by peace processes with international systems of law, such as foreign aid policy, shows that these actors can and do, in fact, create and exercise their own agency in these systems by strategically deploying resistance to them. Political scientist Roddy Brett focuses on the effects of indigenous Guatemalans on the peace process in Social Movements, Indigenous Politics and Democratisation in Guatemala, 1985-1996. Brett’s analysis, though, concentrates on the ways in which indigenous social movements navigated local and rural spaces within Guatemala to informally engage the peace process.12 “Redefining Genocide” adds to Brett’s work by looking at how these groups interacted with power brokers outside of Guatemala, particularly the US. Guatemalan social movements and grassroots actors engaged with legal decision makers and provoked change within international systems of law by pushing back against the domestic Guatemalan sectors they saw as responsible for their oppression—the elite, the government, the Guatemalan right—the very sectors supported by the international system. Through resistance, these actors participated in the formation of international law.

This chapter focuses on the last decade of the Guatemalan civil war, a time in which grassroots activists pushed for human rights amidst a backdrop of transition to both civilian rule and neoliberal capitalism. The first section focuses on the state’s efforts to entrench military impunity and legally erase the military’s war crimes through amnesty provisions, prompting indigenous activists and ladino rights groups call for an end to military impunity as part of the peace negotiations. After this, the chapter addresses the actions of indigenous activists who overcame systemic racism and opposition from Guatemala’s oligarchic ruling class to force the

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inclusion of their voices in the ongoing peace talks. The third section covers how, in order to circumvent opposition from the economic elite, grassroots activists took the fight abroad and appealed to members of the US Congress. Due to ongoing repression and human rights violations, US legislators threatened to cut off all economic aid until repressive conditions waned. This threat prompted the eventual (if begrudging) support for peace on the part of the Guatemalan oligarchy, as detailed in the fourth section. As the oligarchy came to support peace, negotiators addressed the entrenched judicial impunity for the Guatemalan military, settling on another amnesty, but one with exceptions for various human rights violations and, importantly, genocide. In turn, and over time, the peace process allowed for the potential insertion of morality into a legal system dominated by moral sterility. Grassroots activists clamoring for reform from below came to have transnational influence not only in their fight against impunity and immunity in Guatemala, but also in the crafting of peace.

3.1 Post-Esquipulas Guatemala: Inchoate Amnesties and Legal Amnesia

On 19 January 1984, while still under military rule, the country passed two important laws, one constructing the path to democratic elections and the other creating a constituent assembly to draft a new constitution. The assembly announced the new constitution on 30 May 1985, to go into effect 14 January 1986, alongside Decree 8-86 that granted amnesty to the armed forces for any crimes committed during the regimes of Efraín Ríos Montt (1982-1983) and Óscar Humberto Mejía Víctores (1983-1986). The 1985 Constitutional established three important institutions: the Office of the Human Rights Ombudsman; the Constitutional Court;
and the Supreme Electoral Tribunal. On 8 December 1985, Guatemala elected Vinicio Cerezo (1986-1991), Guatemala’s first non-military democratically elected president since 1966.\textsuperscript{14}

The civil war continued despite the January 1986 transition to civilian rule. The framework for the early stages of the peace process resulted from the series of talks that many hoped would end the ongoing civil war in Sandinista Nicaragua, which was under attack in the Contra War. Beginning in May 1986, the presidents of Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica began meeting to address the ongoing military conflicts in the area.\textsuperscript{15}

The meetings produced a regional commitment to work toward peace, codified in two documents known as “Esquipulas I and II” after the Guatemalan town in which they were signed. The Esquipulas II agreement outlined a series of mechanisms dedicated to ending ongoing hostilities.\textsuperscript{16} Those mechanisms included the establishment of frameworks dedicated to national reconciliation and democratization. The Esquipulas II negotiations, then, provided a potential scaffolding for the government and the military to approach peace in Guatemala.\textsuperscript{17} Importantly, those potentially most affected—the insurgent left, the rural poor, the Maya—were left out of forming this initial approach to peace. Borne top-down from a meeting of state elites, the

\begin{enumerate}
\item \textsuperscript{14} “Guatemala’s Constitution of 1985 with Amendments through 1993,” Constitute Project, accessed 7 July 2018. https://www.constituteproject.org/constitution/Guatemala_1993.pdf; Aguilera Peralta, \textit{La sociedad civil y el proceso de paz en Guatemala}, 223-33. In Guatemala, like many Latin American countries, candidates need a majority of votes to win without a runoff (the “first round”). If no candidate receives a simple majority, the top two candidates advance to a runoff (the “second round”). The first round of the 1985 presidential election was held on November 3, 1985. No candidate achieved a simple majority, and the election went to a second round, which Cerezo easily won.
\item \textsuperscript{15} Jonas, \textit{Of Centaurs and Doves}.
\item \textsuperscript{16} \textit{Procedure for the Establishment of a Firm and Lasting Peace in Central America (Esquipulas II)} (UN Peacemaker, 1987).
\item \textsuperscript{17} One main framework of the accords was for participant nations to issue amnesties to those who committed crimes against their respective governments. Jennifer G. Schirmer, \textit{The Guatemalan Military Project: A Violence Called Democracy}, (Philadelphis: University of Pennsylvania Press, 1998), 146-47.
\end{enumerate}
Esquipulas process foreshadowed the future marginalization of the subaltern in substantive peace negotiations.

In a move toward pursuing the Esquipulas II process, on 11 September 1987, President Cerezo created the *Comisión Nacional de Reconciliación* (National Reconciliation Commission or CNR). The CNR was “responsible for verifying genuine implementation of the process” outlined in the Esquipulas framework. This implementation advanced on 7 October 1987, when Ricardo Gómez Gálvez, the president of the Guatemalan congress, sent a letter to Cerezo beseeching him to consider passing an amnesty decree, which he attached for the president’s convenience. In fulfillment of his Esquipulas obligations, Cerezo proposed passage of the bill to congress. At the same time, the government publicly called for the guerrillas to abide by the provisions of the law, lay down their arms, and reintegrate into Guatemalan civil society through a law that echoed the amnesty decrees of the Ríos Montt regime. The decree was designated a general political amnesty, and contained a provision giving amnesty to revolutionaries for some crimes committed up to its passage.

On 24 October 1987, Decree 71-87 became law. Although the decree was touted as a general political amnesty, the bill specifically granted amnesty to “subversives” who submitted

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19 “Procedure for the Establishment of a Firm and Lasting Peace in Central America (Esquipulas II).”
20 Ricardo Gómez Gálvez to President Marco Vinicio Cerezo Arévalo, 7 October 1987, GT-CIRMA-AH-012/D1552.
22 Ibid.
themselves to authorities within 180 days of the law’s passage. For the revolutionaries, the idea of laying down their weapons and turning themselves over to the government had little appeal. To mitigate this response, the URNG could surrender at universities, churches, or the Red Cross in addition to government authorities and the military. This flexibility, according to the legislature, gave revolutionaries more opportunities to reincorporate themselves into Guatemalan society.

Regardless of legislative intent, reaction to the law was split. Alfonso Cabrera, the Minister of Foreign Affairs, called Decree 71-87 an end to future peace talks with the URNG. For Cabrera, the need for continued peace talks would end because the rebels would all opt for amnesty. However, for the URNG, the effect was, in fact, the opposite. The amnesty provision made the revolutionary group more optimistic about future peace talks, as the group previously anticipated that the government would not be open to their proposals. The URNG saw Decree 71-87 as a signal that the government might approach peace talks with a certain open-mindedness.

Decree 71-87’s operational term expired on 21 April 1988, so Congress replaced it on 8 July 1988 with Decree 32-88, a nearly identical amnesty, but this one with no expiration date. Interestingly, the Guatemalan left strongly criticized the amnesty in Decree 32-88, despite having seen its twin as an encouraging sign. Rather, the left maintained that Decree 32-88 was really an amnesty for the army, and ultimately generated conditions for violence rather than alleviate

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24 Gómez Gálvez to President Cerezo. This sort of temporary window of availability is referred to in legal spheres as a “sunset clause.”
25 Ibid.
27 “Amnistía única opción para el dialogo.”
28 Congreso de la República de Guatemala, Decreto No. 32-88, 8 July 1988, GT-CIRMA-AH-012/D2559.
them.\textsuperscript{29} The law offered a generalized amnesty to those who committed crimes against the political order, such as the guerrillas, but also to those who committed crimes that violated “social tranquility.”\textsuperscript{30} Social tranquility was such a broad catchall as to functionally offer amnesty to all actors in the civil war, including those who violated human rights.

Members of the guerrilla left worried that the law would be manipulated to benefit the military. Importantly, the left had already essentially seen it in effect in Decree 71-87. Their concerns over 32-88 strongly suggest the military also abused the previous amnesty. These fears quickly came to fruition as the main early beneficiaries of the amnesty were those members of the armed forces who attempted to oust Cerezo on 11 May 1987.\textsuperscript{31} Indeed, the law passed in the wake of the arrest of several members of the military who attempted the coup. The closeness in time of the law’s enactment and these arrests calls into question the government’s motives. Rather, these circumstances indicate that the goal was military impunity, severely hindering the potential to hold human rights violators accountable for their actions. As Jennifer Schirmer notes, “amnesty is the most unequivocal admission by the military of guilt” and “serves as an obstacle for justice” when applied primarily to the army.\textsuperscript{32}

In this way, the military was continuing its policy of manipulating legal positivism. During the Lucas García and Ríos Montt regimes, the government expressed its conceptions of legal positivism by changing the law to allow otherwise criminal military behavior. If the

\textsuperscript{29}“Porque no estamos de acuerdo con la nueva amnistía 32-88,” GT-CIRMA-AH-012.
\textsuperscript{30}Congreso de la República de Guatemala, Decreto No. 32-88. The relevant portion of the law reads that it “grants amnesty to persons who, in any form of participation, committed, as of 23 June 1988, political crimes and related common crimes against the internal political order, public order and social tranquility” (author translation). Importantly, judicial interpretation of “social tranquility” remains elusive.
\textsuperscript{31}“Entra en vigor nueva amnistía política,” 10 July 1988, GT-CIRMA-AH-012.
\textsuperscript{32}Schirmer, The Guatemalan Military Project, 145.
government wanted to commit an illegal action while maintaining a façade of legality, it simply needed to rewrite the law to allow that action.

The government’s manipulation of amnesty provisions continued this doctrine of ex post facto indemnification that characterized the military’s use of the law under Ríos Montt. This fact was not lost on the guerrillas. They saw a general amnesty as facilitating a historical whitewashing of mass atrocity in lieu of fostering collective remembrance and, in a nod to the left’s rejection of the military’s use of positivism, called it “lacking values and moral principles.” The amnesties did not operate by decriminalizing illegal activity after the fact, where what was illegal is now legal. Instead, the issuance of amnesties treated the military’s human rights violations like they had legally never happened at all; the acts remained illegal but could not be prosecuted. They were, effectively, erased from Guatemalan legal memory.

In place of this erasure, the left called on the state to pass a “selective amnesty,” one that did not absolve those who committed crimes unrelated to the conflict. Legal erasure encouraged historical erasure.

The State’s attempts to preserve impunity enraged more than just the guerrillas; Decree 32-88 triggered a general public backlash and united voices in protest against it. In February 1989, the Comisión de Derechos Humanos de Guatemala (Guatemalan Human Rights Commission or CDHG) made a presentation to the National Dialogue, the public forum for suggestions to the CRN regarding the peace negotiations.

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33 “Porque no estamos de acuerdo con la nueva amnistía 32-88.”
35 “Porque no estamos de acuerdo con la nueva amnistía 32-88.” The left also complained that the amnesty was the only aspect of Esquipulas II that the government embraced.
advocacy group proposed ordering a study to request the repeal of any legal mechanism that impeded basic human rights. In April 1989, the Representación Unitaria de la Oposición Guatemalteca (United Representation of the Opposition or RUOG) presented to the National Dialogue its proposals for the construction of a lasting peace.\textsuperscript{37} Included was a call for Guatemala’s congress to “revoke all laws that conduce impunity.”\textsuperscript{38} Also in April, the CDHG went beyond its previous appeal for a study on if particular laws interfere with human rights and requested that congress repeal Decree 8-86, the law that amnestied soldiers and their commanders for all actions from 1982 to 1986, and investigate and prosecute human rights violations.\textsuperscript{39} And in May 1989, the Catholic Church also joined the appeals to strike Decree 8-86 “in order to stop the real and legal concealment of violators of the right to life and its consequent impunity.”\textsuperscript{40} The following year, the Grupo de Apoyo Mutuo (Mutual Support Group or GAM), a human rights organization dedicated to helping families of the dead and disappeared, likewise called both for the prosecution of those in the armed forces responsible for crimes against humanity and for the direct repeal of Decree 32-88.\textsuperscript{41} Although these protests against Decree 32-88 had little result in Guatemalan congress, the Maya and their popular-sector allies were beginning to make their voices heard.

\begin{footnotes}
\item[37] Representación Unitaria de la Oposición Guatemalteca, “Ponencia a la Comisión para la Paz y Seguridad,” 28 April 1989, GT-CIRMA-AH-019/C188.
\item[38] Ibid., 5.
\item[39] Comisión de Derechos Humanos de Guatemala, “Ponencia ante la Comisión e Sectores Damnificados por la Violencia, Diálogo Nacional,” April 1989, GT-CIRMA-AH-019/C188.
\end{footnotes}
3.2 Coloniality Meets Post-Coloniality: Racism and the Guatemalan Peace Process

The GAM offered the Maya an opportunity for political involvement, and they took it. The increase of a Maya presence in national politics continued in 1988 with the formation of the indigenous rights organization *Consejo de Comunidades Étnicas Runujel Junam* (Ethnic Community Council “All Equal” or CERJ) and the *Coordinadora Nacional de Viudas de Guatemala* (National Coordinator of Guatemalan Widows or CONAVIGUA). In 1993, activists formed the *Defensoría Maya* (Mayan Defense League), which helped start the *Coordinación de Organizaciones del Pueblo Maya de Guatemala* (Council of Organizations of the Pueblo Maya of Guatemala or COPMAGUA) in 1994. COPMAGUA’s import to the peace process cannot be overstated, as it was the chief indigenous voice in the *Asamblea de la Sociedad Civil* (Civil Society Assembly or ASC), the state-created umbrella of private sector groups formed in 1994 to offer input into the peace negotiations.  

Not all private sector groups joined the ASC, however. Although some within CACIF supported the peace talks because an end of active hostilities offered a more favorable business climate, the negotiations lacked widespread support from the powerful alliance of members of Guatemala’s industrial oligarchy.  

In large part, this opposition was due to the possibility of amnesty for the guerrillas.  

According to Carlos Vielmann Montes, CACIF’s then-president,  

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rebel forces lacked adequate morality to discuss problems at the heart of Guatemala.\textsuperscript{45} CACIF and other elite economic groups were concerned with preventing the indemnification of guerrilla actions, stopping demands for agrarian reform, and maintaining the economic status quo.\textsuperscript{46} While couched in economic concerns, CACIF’s position expressed Guatemala’s long history of racism against its indigenous peoples in two important ways. First, the group continued its push against calls from indigenous groups such as the CUC for labor and economic reforms. Perhaps more importantly, CACIF had long considered such indigenous groups to be, effectively, criminal organizations.\textsuperscript{47} By equating the indigenous position with insurgent criminality, CACIF applied the same racist logic that the Guatemalan military used to justify acts of genocide in the 1980s.

Manifestations of Guatemala’s racial past were present in the peace discussions beyond the consternation of the oligarchic elite. The Maya continued to be largely omitted from the peace process despite being the most victimized group in Guatemala. By November 1994, the URNG and the government had already met twice to negotiate “indigenous matters,” COPMAGUA representatives were not invited to participate.\textsuperscript{48} In fact, the failure to include the Maya in peace talks caused the CONAVIGUA to label the peace process a “fourth Guatemalan


The peace talks, for the Maya, were a continuation of a centuries-long process of racial degradation. Although the Maya were not allowed at the negotiating table, the left continued to advocate for them. A key aspect of the peace talks was the URNG’s demand for constitutional reforms, particularly regarding the recognition of the rights of indigenous citizens. The URNG requested that the Maya be recognized as a vital constituency of a multicultural and multilingual Guatemala. This push to include the Maya by the URNG was a challenge to Guatemala’s deeply rooted power structures. Like many post-Independence structures, Guatemala’s modern sociopolitical power apparatuses had emerged from the colonial period with lasting vestiges of its past at the periphery. Anti-indigenous racism, stemming from the Spanish colonial sistema de las castas (system of castes), is a hallmark of Guatemalan history and has been used to justify varying forms of social control.

The ideologies implicit in Spanish colonial law continued to manifest in relevant ways despite Guatemala’s formal separation from Spain in 1821. This was not unique to Guatemala, as residual expressions of colonial legal structures are common in formerly peripheral spaces. In

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49 Guatemalan Human Rights Commission, “CONAVIGUA Refers to Present Period as Fourth Holocaust,” 10 January 1995, GT-CIRMA-AH-019/C193. The three prior Guatemalan holocausts, per CONAVIGUA, were: (1) the arrival of the Spanish in 1524; (2) the taking of indigenous land beginning in 1871 as well as the corresponding systematic attack on and destruction of Mayan political, economic, and social spheres, and the subsequent forced labor of the Maya on coffee plantations; and (3) the scorched-earth military policies of the 1980s. Coordinación de Organizaciones del Pueblo Maya de Guatemala, “Qasaqalaj Tziij: Propuesta para las negociaciones de paz gobierno-URNG,” 30 May 1994, GT-CIRMA-AH-019/C193.


52 Ibid., 38.

Guatemala, the postcolonial order continued to be expressed through internal exclusion.\textsuperscript{54} For the Maya, combatting this exclusion became a central tenet of grassroots organizing in the 1980s and 1990s.\textsuperscript{55} Although still denied a seat at the table, the Maya submitted their views to peace negotiators via COPMAGUA’s spokespersons in the ASC (the advisory Civil Society Assembly), which then relayed those requests to the URNG guerrillas. As the URNG incorporated these demands into their own, the Maya won a voice in the talks.\textsuperscript{56}

In the late 1980s and early 1990s, the Mayan movement became a major force in Guatemala. Despite political opposition to their goals and their exclusion from the peace negotiations, they made their voices heard.\textsuperscript{57} At first, they did this through coalition building with domestic activists before forming grassroots human rights organizations of their own. Through these grassroots organizations, Maya activists were building a foundation for grassroots activism that over the next few decades had profound impact in Guatemala, shaped controversial aspects of international law, and redefined international understandings of the crime of genocide.

\textsuperscript{55} Brett, \textit{Social Movements, Indigenous Politics and Democratisation in Guatemala}.
\textsuperscript{56} Ibid., 48-50.
\textsuperscript{57} The largest group active in government to protest the proposed indigenous reforms was the Guatemalan Republican Front (FRG), the right-wing political party created in 1989 by Efraín Ríos Montt. Like CACIF, the FRG voiced their opposition primarily in economic terms, especially with regard to land reforms. In particular, the FRG objected to ratification of 1989’s Convention concerning Indigenous and Tribal Peoples in Independent Countries, more commonly known as C169, that recognized the historical ownership of land by indigenous groups. The FRG did not oppose indigenous reforms solely for economic reasons, however. The FRG refused to recognize the place of Mayan languages in Guatemalan society. By not recognizing the importance of these languages to the country’s social fabric, the FRG left open the possibility for further destruction of Mayan culture, an implicitly constitutionally-sanctioned cultural genocide hiding beneath a more obvious counterinsurgent one. Inter Press Service, “Guatemala: Mayans Demand Constitutional Change,” 4 November 1994, GT-CIRMA-AH-019/C193; Sector de Mujeres Asamblea de la Sociedad Civil, “Indentidad y derechos de los pueblos mayas,” Mujeres Mayas de Guatemala, June 1994, GT-CIRMA-AH-019/C193.
3.3 “US government tax dollars funding murder in Guatemala”: Grassroots Activism as International Change

By the early 1990s, the Mayan movement was in full swing. In 1992, the K’iche’ Maya activist Rigoberta Menchú won the Nobel Peace Prize, highlighting the ongoing human rights struggle for the international community. The Maya increasingly had a voice in the peace process through COPMAGUA’s participation in the ASC.\textsuperscript{58} In early 1994, the URNG and the Guatemalan state agreed to a comprehensive human rights accord.\textsuperscript{59} The accord authorized the United Nations Mission for the Verification of Human Rights and of Compliance with the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA, later shortened to United Nations Verification Mission in Guatemala) to verify the status of human rights in the nation and to oversee implementation of the accord.\textsuperscript{60}

Meanwhile, the country’s shift to neoliberalism was nearly complete. Because of this, securing access to foreign marketplaces and the whims of foreign capital became increasingly important to the oligarchy. Following Serrano’s attempted \textit{autogolpe}, though, many nations refused to grant this access without movement toward peace. The US, for example, again turned off the flow of military aid to Guatemala in 1993 and kept a close watch before its resumption.\textsuperscript{61} The elite in Guatemala knew that the US was paying attention and would follow through on threats to curtail support. Strategically, Guatemalan grassroots activists lobbied US congresspersons to go beyond cutting just military aid. When members of US Congress proposed

\textsuperscript{58} Brett, \textit{Social Movements, Indigenous Politics and Democratisation in Guatemala}, 167.
\textsuperscript{59} Jonas, \textit{Of Centaurs and Doves}, 44-45.
conditioning *all* aid on Guatemala’s human rights situation, it put pressure on both the oligarchy and the state.

Consider the actors and spaces at play. As Balakrishnan Rajagopal observes, dominant views of international law regularly place grassroots actors in the shadows by privileging official state spaces.\(^\text{62}\) Traditional, state-based analyses neglect to consider the roles of non-state actors who tend to operate in non-institutionalized spaces, such as the family or non-party political spheres. As social movements increasingly operate in transnational, non-institutionalized, or non-state spheres, the traditional statist paradigm offers less insight into shifting trends in international law. This impedes the understanding of how subaltern perspectives and social movements participate in the development of international law. Actions taken in the 1990s by the Guatemalan indigenous grassroots, however, illustrate how that participation can occur. By lobbying against existing channels of international aid, grassroots actors prompted amendments to foreign appropriation bills and the overall foreign aid policy of the world’s most powerful nation. These bills represent an important expression of the power of grassroots activism in international space.

On 24 February 1994, the US House of Representatives introduced a bill based on the recognition that “systematic human rights violations are committed with impunity against Guatemalan civilians, especially members of the indigenous population, by government security forces.”\(^\text{63}\) This resolution called on the Clinton administration “to condition all assistance to Guatemala, with the exception of humanitarian and development assistance, on … the

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continuation of the peace process;...[and] substantive improvement in the protection of human rights.”

The US Senate soon introduced a similar resolution. The vast majority of non-military US aid had historically been used to stabilize and strengthen the Guatemalan economy, and CACIF was one of the largest beneficiaries of this trend. Cutting off assistance threatened the economic gains made by CACIF members following the resumption of aid by Ronald Reagan in 1986.

The end of US aid became more likely on 22 September 1995, when Guatemalan grassroots lobbying convinced the US Senate to unanimously approve Amendment 2743 to its foreign appropriations bill. The amendment went further than the House and Senate resolutions that requested that the Clinton administration condition assistance on human rights protections. Instead, the proposed legislative change removed executive discretion and specifically mandated that neither bilateral nor military aid could be given to Guatemala without confirmation by the US president that Guatemalans on both sides of the internal armed conflict were cooperating with efforts to bring human rights violators to justice. In addition to the blanket restriction on aid to Guatemala due to human rights abuses, Amendment 2743 also focused specifically on particular actors: the amendment suspended travel visas to the US for military officials connected to human rights violations.

Guatemalan power players had already suspected that

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64 Ibid.
66 Dosal, Power in Transition.
67 The amendment, proposed by Senators Christopher Dodd and Patrick Leahy, is one of a series of appropriations amendments commonly referred to as the “Leahy amendments.” The amendments have been used to pressure human rights advancements in a number of countries. Bill Rodgers, “Guatemala / U-S Senate,” 26 September 1995, GT-CIRMA-AH-019/C176.
foreign aid was largely predicated on an eventual peace. De León Carpio stated that the peace would ultimately determine any increase in the amount of aid to Guatemala.\(^{70}\) For US policymakers, the resumption of aid depended on satisfying the changes brought by the amended appropriations bill.

After considering alternatives to top-down, state-based approaches to international law, it becomes clear that the inspiration for changes to US foreign policy toward Guatemala came from outside the confines of the US legislature. Guatemalan activists and social leaders, in fact, brought issues of human rights violations in Guatemala—violations that occurred with US backing—to the forefront of transnational dialogue through an extensive campaign of direct communications with US legislators.\(^{71}\) By leveraging a network of transnational human rights activists, advocates for human rights in Guatemala provided US congresspersons with personal accounts of human rights abuses and wanted US legislators to “signal to the [Guatemalan] army that the era of impunity is coming to an end, [and that] consequences will attach to … misconduct.”\(^{72}\)

Part of this transnational network was Coalition Missing, a group made up of US citizens that hoped to focus “world attention on the many, many … cases of missing or murdered Guatemalans.”\(^{73}\) Anne Manuel, then the Deputy Director of the Americas Division of the


\(^{72}\) Institute for Global Communications, “Urgent Action: Re; Dodd Leahy Amendment.”

\(^{73}\) One of these US citizens, an attorney named Jennifer Harbury, met and married Guatemalan indigenous activist and left-wing revolutionary Efraín Bámaca Velásquez in the early 1990s. Captured by the Guatemalan military in 1992, Bámaca was never seen alive again. This prompted Harbury to begin a years-long search for him. In 1995, declassified US documents confirmed that the Guatemalan military killed Bámaca, that the CIA knew his whereabouts prior to his killing and that he had been killed, and that the military officer who ordered his murder was CIA informant Col. Roberto Alpirez, the same military commander who oversaw the killing of another U.S. citizen,
international human rights research and advocacy organization Human Rights Watch, remarked that it was these activists, working in tandem with multiple groups at the Guatemalan grassroots, who raised awareness of US foreign aid policy, specifically “US government tax dollars funding murder in Guatemala.”

Activists sought more than awareness, however, and hoped to prompt US lawmakers to rethink their approach to aid to Guatemala. This resistance successfully steered the conversation on military and humanitarian aid to Guatemala, and by proxy to other countries in the Global South with similar histories of human rights abuses. Effectively, these activists were challenging the existing legal mechanisms that enabled human rights violations at the ground level. Any shift prompted by victims embodied, then, a successful grassroots censure of the imperial hegemonizing force of law.

The effects of grassroots resistance in the Global South to these international legal processes manifested in changes to legal practices themselves. The US House implicitly noted this in its February 1994 resolution, recognizing those movements “for their role in articulating the concerns of all sectors of Guatemalan society and for bringing critical issues onto the agenda of peace negotiators.” On the same day the US House introduced its resolution, the US Senate likewise commended these social activists. However, the Senate’s resolution went further than the House. The Senate resolution called for conditioning all non-humanitarian or development assistance to Guatemala on the strengthening of social activist and civil society groups, calling

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74 Weinraub, “Back from the Dead.”
them “essential to the establishment of genuine democracy.” In so doing, the Senate recognized that “numerous appeals by the families of victims of human rights abuses” prompted the human rights qualifications that Amendment 2743 added to the 1995 US appropriations bill.

These changes to the US approach to human rights and foreign aid reveal the inadequacy of traditional state-based paradigms of analysis of international law. Non-state actors, often existing in social movements, regularly engage with international legal structures and processes. Studies of international law (and international law itself) privilege states over individuals. Individuals, though, engage in conversation with the state through legal mediums. The state (or state decision makers), here, was not the agent of change. Guatemalan social activists, and not the US congress, catalyzed these changes to US foreign policy. Third World grassroots activism, by resisting the tangible implications of international law, changed international law from the ground up.

The activists’ victory, while significant, was not unchallenged. At the eleventh hour, the proposed changes in Amendment 2743 were significantly rewritten: gone were general economic sanctions, and in their place were the travel restrictions on the Guatemalan military officers suspected of having ties to human rights violations, as well as a prohibition of private military sales to the Guatemalan military. Although facially these changes appear to weaken the amendment, it is perhaps more accurate to view them as a form of burden-shifting. Rather than targeting the entirety of the Guatemalan populace, these new sanctions shifted focus entirely to the military, with the armed forces bearing the brunt of the amendment’s procedural and punitive

76 US Congress. Senate, S. Res. 64.
77 US Congress. Senate, “Dodd (and Leahy) Amendment No. 2743.”
78 Institute for Global Communications, “Urgent Action: Re; Dodd Leahy Amendment.”
mechanisms. The changes to the amendment were an important message, one that did not go unnoticed.

In Guatemala, both the government and the military saw the changes and quickly responded. President de León Carpio called the sanctions unjust and hasty, and publicly argued that they would complicate and impede the peace process. Focusing on the canceling of visas based on mere suspicion—a measure that sparked significant backlash in Guatemala—de León Carpio called the new legal standard “very generalized and drastic” and sent a delegation to the US congress to argue that the amendment was drafted without a true understanding of the realities on the ground in Guatemala. General Arturo de la Cruz, who would later be elected to congress, lamented that the US Congress had equated the Guatemalan army with the URNG. De la Cruz directly blamed URNG “manipulation” of US senators as being “behind the campaign” that “damages the image of [Guatemala] around the world.” Mario René Enriquez, Guatemala’s Minister of Defense, also blamed the URNG and accused the US congress of associating with “illegality” rather than the Guatemalan state. The outrage of de la Cruz and Enriquez presents an interesting dichotomy. On the one hand, Guatemalan officials cast the URNG as illegal, a label designed to delegitimize the changes to US-Guatemala aid policy. On

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81 Ibid.

82 Comisión de Derechos Humanos de Guatemala, “Sanciones de EUA son muy drásticas: Enriquez,” 26 September 1995, GT-CIRMA-AH-019/C176. Enriquez’s position that the army had always remained within the boundaries of the law soon lost credibility, as he was forced to resign his position as Defense Minister roughly two weeks after his comments on the “legality” of the armed forces on 9 October 1995, following the killing by members of the army of 11 refugees that had recently returned to Guatemala. “World in Brief: Guatemala: Official Quits, Officer Ousted over Killings,” LA Times, 10 October 1995, accessed 22 April 2018.
the other hand, by recognizing the URNG’s grassroots backing as catalyzing those changes, de la Cruz and Enriquez implicitly acknowledged the efficacy and power of these social movements.

Nonetheless, the efforts of Guatemalan officials to discredit the amendment gained traction inside the US senate. In fact, within a month of the de la Cruz and Enriquez statements, the amendment was gutted following negotiations between the Senate and House of Representatives External Operations subcommittees. Legislators removed the requirements that the Guatemalan army and government assist in grassroots justice pursuits and put in their place the stipulation that military aid was now contingent on certification by the US president of satisfactory efforts to end human rights abuses, accompanied by specific guarantees of the continuation of the training of Guatemalan military forces.83

Although the largest potential effects of Amendment 2743 did not survive the American legislative process, responses to it prompt a compelling comparison. Between 1977 and 1983, due to human rights abuses the US drastically curtailed the provision of military aid, equipment, and training to the Guatemalan military and unofficially named it gross human rights violator. Despite being labeled human rights abusers, which angered leaders of the armed forces, the drop in aid prompted no significant change in military behavior. The Guatemalan government responded by accusing the US of involving itself in domestic Guatemalan affairs and turned elsewhere for weapons. Unlike in 1995, it sent no delegations to Washington, DC and it gave no public criticism of legal standards or US legislative affairs.

While at first glance the disparity between Guatemala’s responses to the potential end of foreign aid in 1977-1983 and 1995 appears arbitrary, a closer look at who was involved shows it was anything but. The 1977 to 1983 cessation of military aid only had a potential direct impact

on the military itself despite American efforts in the late-1970s that showed that the law could be a tool to shoehorn morality into legally positive spaces. Guatemalan capital remained safe. However, similar attempts one-and-a-half decades later produced a more urgent response. Because the mid-1990s proposal to condition all US aid on human rights threatened the bottom lines of Guatemalan capital power players, it produced broader concern among the Guatemalan elite and encouraged private sector oligarchs to support peace. In this way, the Guatemalan grassroots activists changed more than US foreign policy ideals, they also prompted shifts within the discussion on peace in Guatemala.

3.4 National Irreconciliation: The Issue of Amnesty in the Forging of Peace

The 1995 threats by the US Congress to cut off aid of any kind came during a complex point in the peace negotiations. The state and the URNG had already begun to reach agreement on various principles. Having reached agreement on human rights, resettlement, and the truth commission in 1994, and the rights of indigenous Guatemalans in March 1995, negotiators then turned to socioeconomic concerns. The US threats to end aid, prompted from below by Guatemalan grassroots lobbying advocating for wholesale changes to US foreign aid policy, complicated these negotiations and put pressure on the economic oligarchy. Although no true consensus existed among the economic elite, under the pressure of the end of foreign aid the powerful CACIF turned to favor peace. The last sticking point in the negotiations remained the issue of human rights violations, war crimes, and the reincorporation of the guerrilla into Guatemalan society. Each side was forced into compromise, ultimately leading to another amnesty law that contained exceptions for human rights abuses and genocide, representing a potential end to the long history of military impunity.
In fact, the Guatemalan state was already under a contractual commitment to the fight against impunity through its March 1994 ratification of the Global Human Rights Accord, the first substantive agreement of the peace process. The Global Human Rights Accord guaranteed that both parties would respect human rights and offered financial redress from the Guatemalan state to victims of human rights violations.\textsuperscript{84} Despite this accord, the issue of justice for human rights victims remained one that threatened to ruin the entire peace process. Negotiators knew that peace was impossible without successfully reintegrating the URNG into Guatemalan society. Successful reincorporation, in turn, could not occur absent a legal disregard of crimes committed by the revolutionaries. Just as the military repeatedly passed amnesty laws during the 1970s and 1980s to insulate soldiers and generals from potential criminal liability, insurgents refused to stand down without assurances by the Guatemalan government that they would not be prosecuted for taking up arms against the state.\textsuperscript{85}

Political discourse on the topic of immunity showed both the power of the intransigent elite and the effect of reform from below. Initially, President de Léon Carpio had been resistant to combatting military impunity. Over the course of negotiations, however, de Léon Carpio’s opinion on impunity evolved to the point that he stated the peace negotiations were really a fight against impunity.\textsuperscript{86} CACIF, the commercial elite’s umbrella group that had generally opposed peace discussions with the URNG, meanwhile, remained vociferously opposed to amnesty for insurgents.\textsuperscript{87} Significantly, however, CACIF’s stance toward the peace process, like de Léon


\textsuperscript{85} Jonas, \textit{Of Centaurs and Doves}, 54.

\textsuperscript{86} By late-1994, de Léon Carpio said the peace negotiations were an avenue to address Guatemala’s “culture of terror and death with impunity.” Agence France Presse, “Guatemala President Ready to Negotiate Personally with Guerrillas,” 24 November 1994, GT-CIRMA-AH-019/C195

Carpio’s, quickly evolved in the mid-1990s. The reasons for which this happened show the intersections between grassroots organizing and international politics in an era of rapid neoliberalization.

Indigenous grassroots activism abroad successfully pushed the US to change its foreign aid policy. This change had an important effect on the climate surrounding the peace negotiations, particularly as regards CACIF, which unexpectedly changed its position. The vast majority of non-military US aid had historically been used to stabilize and strengthen the Guatemalan economy, and CACIF was one of the largest beneficiaries of this trend. Threats to cut off assistance, induced by grassroots activism, imperiled the economic gains made by CACIF members following the resumption of aid by Ronald Reagan in 1986 and incentivized the oligarchy to change directions on peace.

This incentive proved effective. In May 1995, CACIF presented its own proposal for peace. The oligarchy’s plan made no attempt to address the URNG’s positions on social inequality, and in essence CACIF sought to protect its own economic agenda under the guise of peace. Most significantly, in keeping with neoliberal reforms seen around the globe, the proposal focused on reducing the size and power of the central government. Tellingly, CACIF’s plan only sought to shrink the civilian-controlled side of the state, while leaving the military fully in place. CACIF’s apparent inconsistency is a textbook example of David Harvey’s point about

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89 Centro de Reportes Informativos sobre Guatemala, “Private Sector Promises Prosperity by the Year 2020.”

90 Crónica, “Entrevista: Pedro Miguel Lamport, Sin el CACIF, el proceso de paz encontrará dificultades,” 26 May 1995, GT-CIRMA-AH-019/C193; Centro de Reportes Informativos sobre Guatemala, “Private Sector Promises Prosperity by the Year 2020.” The desire to continue to fully fund the military represented an interesting shift for the oligarchic industrial group, as the relationship between CACIF and the military had been fraying for decades. Beginning in the late-1960s, the military government increasingly entangled its counterinsurgency policies with private sector economic development, echoing the entanglement of state-led development with anti-Communism beginning with the CIA-backed overthrow of democratically-elected Jacobo Árbenz in 1954. Way, *The Mayan in the Mall*, 126. Although this trend resulted in significant economic growth, it also led to greater state
neoliberals who support “strong individual private property rights, the rule of law, and the institutions of freely functioning markets and free trade,” but are completely in favor of preserving the state’s capacity to use violence and well-funded security apparatuses to keep the system functioning in their favor.\textsuperscript{91} Despite CACIF’s militarism, neoliberalism, and inattention to key social issues, however, the fact that the powerful and influential elite organization militated for a negotiated peace at all was yet another reform from below initially induced by Guatemala’s leftist and indigenous organizers.

CACIF was able to make this about-face in part because it had lost some of its most traditional, hardline members, who broke away in 1994 to form a rival organization, the *Coordinadora Nacional Agropecuaria* (National Agrarian Coordinating Commission, or CONAGRO).\textsuperscript{92} CONAGRO filed criminal charges in 1995 against Guatemala’s chief negotiator in peace talks, sociologist Hector Rosada Granados, due to socioeconomic concessions given to the guerrillas.\textsuperscript{93} These charges attacked both the discussions with the URNG and the procedure through which Rosada Granados was appointed.\textsuperscript{94} CONAGRO argued that negotiations with the URNG were illegal because it was an armed criminal group. In truth, CONAGRO felt threatened by the proposed land redistribution within the socioeconomic accord.\textsuperscript{95}

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\textsuperscript{91} David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005), 64 (citation), 82.


\textsuperscript{93} Comisión de Derechos Humanos de Guatemala, “Empresarios guatemaltecos del agro demandan a rosada por negociaciones con la URNG,” 18 October 1995, GT-CIRMA-AH-019/C193. Rosada Granados later served as a key witness in the 2013 genocide trial of Efraín Ríos Montt and Mauricio Rodríguez Sánchez.


\textsuperscript{95} Guatemala has a checkered-past with land reform, as many point to the issuance of Decree 900 in 1952, the proposed redistribution of unused land owned by the United Fruit Company, as a leading factor in the CIA-
In response, Rosada Granados called CONAGRO’s complaints evidence that the elite were “against anything that means change here.” Rodolfo Quezada Toruño, then the Bishop of Zacapa y Santo Cristo de Esquipulas, called the charges an absurdity. Quezada Toruño argued that following CONAGRO’s logic would dictate that charges be filed against any entity or individual that had spoken to the guerrillas, up to and including President de León Carpio. The Constitutional Court likewise found no merit in CONAGRO’s claims and rejected the charges outright. The unsuccessful attempt to remove Rosada Granados revealed both the lengths that the anti-peace elite would go to stop the talks and the growing effects of reform from below. It also previewed the way that aspects of the Guatemalan justice system would later be weaponized by the defense team in the Ríos Montt genocide trials.

The elite sectors in general were delighted by the victory of the presidential candidate Arevalo Arzú (1996-2000), whose run had been backed by CACIF. Arzú did not assume control in a stress-free time. On the contrary, Guatemala faced many challenges in early 1996, and finding a path to a signed peace agreement between the URNG and the government loomed large for the new president. Addressing military impunity remained a key component of the negotiations, and concern existed over the adequacy of Guatemala’s criminal justice system to tackle this impunity.


99 David Close, Kalowatie Deonandan, and Gary Prevost, eds. From Revolutionary Movements to Political Parties: Cases from Latin America and Africa (New York: Palgrave Macmillan, 2008), 55.

Debates and battles over amnesty and impunity show a further erosion of the distinction between morality and law in comparison to the 1970s and 1980s. The peace negotiations themselves were a juxtaposition of oppositional moralities: on one side, class-conscious egalitarianism, and on the other, national security and respect for the preservation of the existing economic hierarchy. Through these negotiations these moralities and the law became more intertwined. Accordingly, the legal positivism that defined the military dictatorships of the Guatemalan civil war was diminishing in Guatemalan legal expression. As they negotiated the terms of amnesty over the course of 1996, each side had their own moral constructs dictating their juridical perspectives: revolution as a right of natural law versus the sovereign right to legal primacy. Each party needed to make concessions to reach agreement.

The final results of this dialogue were embedded in the *Ley de Reconciliación Nacional* (the National Reconciliation Law, or LRN), which was signed on 18 December 1996. The terms of the LRN implied a cross-recognition: the insurgents recognized the soverainty of the Guatemalan state while the state admitted that sovereignty was not absolute, and that legality was not strictly what the state wanted it to be. The end result was a law that reflected neither and both of these moralities at the same time. This duality was particularly reflected in the terms of the LRN’s amnesty provision. While the LRN granted amnesty for both “political” and “common” crimes connected to the armed conflict, it included exemptions for genocide, torture, forced disappearance, and crimes for which the extinguishment of criminal liability is prohibited by international law. Notably, the amnesty that the Guatemalan congress decreed differed from that agreed upon at the negotiating table. Negotiators agreed that the potential prosecution of genocide, torture, forced disappearances, and other grave human rights violations would be

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101 Ley de Reconciliación Nacional, 18 December 1996, GT-CIRMA-AH-019/D2561. Political crimes are crimes against the state, while common crimes are typical criminal activity such as larceny or murder.
preserved, but conservatives in the Guatemalan congress amended the law to ensure that the amnesty also applied to extrajudicial executions.\textsuperscript{102} Despite this grant of amnesty for extrajudicial killings, Arzú praised the law, distinguishing it from others in Latin America because it was not a “full amnesty” due to the exceptions for heinous crimes. According to Gustavo Porras, the chief negotiator for the government in the peace talks, the presence of the exceptions meant that, “categorically, there will be no amnesty.”\textsuperscript{103} This did little to quell suspicions of the law.

While Arzú publicly assured the Guatemalan people that the provision was not a full amnesty, civil society groups and human rights activists remained wary. Rigoberta Menchú, Mayan rights activist and the winner of the 1992 Nobel Peace Prize, called the National Reconciliation Law “a general amnesty disguised as something else” and not a request for forgiveness, but rather to forget the things that happened to the victims.\textsuperscript{104} The Civil Society Assembly (ASC), the umbrella organization made up of non-governmental sectors of Guatemalan society that gave non-binding recommendations to negotiators in the peace process, opposed amnesty of any kind for all those who committed human rights violations and called for their prosecution regardless of the perpetrator.\textsuperscript{105} Importantly, however, the ASC supported amnesty for members of the military not connected to human rights abuses.\textsuperscript{106} One issue for this opposition was the malleability of the Guatemalan legal system: the judiciary traditionally

\textsuperscript{102} Jonas, \textit{Of Centaurs and Doves}, 54.


remained immobile absent action from those in power. Therefore, achieving justice was steadfastly elusive. Some analysts maintained that the absence of a desire to prosecute made the exceptions within the amnesty protocol largely meaningless, and the Alliance Against Impunity said that too much was left up to discretion to induce action against the military elite within the confines of Guatemala’s relatively weak justice system.\textsuperscript{107}

Despite any ambiguity as to the morality behind the LRN, the law’s purpose was clear: it held together the bundle of agreements collectively referred to as the peace accords. During December 1996, negotiators finalized the “operational” parts of the peace accords, such as a definitive cease fire, the process for reincorporating revolutionaries into society, and a timetable for implementation of the agreements. On 29 December 1996, the final accord, the Accord for a Firm and Lasting Peace, was signed by representatives from the URNG, the Guatemalan state, and the UN. This final agreement incorporated the points that negotiators had previously agreed to and began the implementation of the agreements that had not yet gone into effect.\textsuperscript{108} The accords addressed a wide range of issues in addition to the cessation of violence and the reincorporation of insurgents into society, including human rights, a reframing of civilian-military power dynamics, electoral and judicial reforms, the return of refugees, agrarian reform, and restitution to victims of the war.\textsuperscript{109} Speaking at the ceremony celebrating the signing of the final accord, President Arzú said that “this must be, above all, a time for forgiveness,” noting that “there will never be peace … if man does not embrace an attitude of sincere forgiveness.”\textsuperscript{110}


3.5 Conclusion

After 36 years, Guatemala’s civil war was officially over, but “sincere forgiveness” was elusive. Peace remained nominal, as extrajudicial killings and forced disappearances continued. Grassroots movements had spent decades pushing against the impunity that remains characteristic of the Guatemalan justice system even today. Through these challenges, ground-level actors helped prompt international changes to legal mechanisms that provided support for their opposition. Once these changes threatened the status-quo for Guatemalan capital, the oligarchic establishment reversed its position to favor peace. In this way, grassroots actors catalyzed changes to international law and facilitated the peace itself.

Although the accords received high international praise, localized implementation proved difficult due to political resistance and the often vague and illusory terms of the accords. These difficulties frustrated the URNG, who tellingly chose to travel with members of CACIF rather than the government when soliciting funds for the implementation of the accords. Adversity makes strange bedfellows, indeed. Any concerns among members of the left over how the amnesty would be implemented were justified.

More than just the former guerrillas felt this concern. On 13 June 1997, delegates from the eight areas most affected by the armed conflict met in Guatemala City to demand that the government issue the agreed upon compensation in the comprehensive human rights accord. Following these demands, the government agreed to provide “measures and programs of a

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111 Jonas, Of Centaurs and Doves, 93-113, 137-61, 167-86, 189-213.
112 In a statement faxed from its Mexico City offices, the group denounced the “policies being pushed (by the government)” for being “more and more in contradiction with the spirit of the accords.” Reuters, “Guatemalan Ex-Rebels Slam Gov't Economic Policies,” 15 April 1997, GT-CIRMA-AH-019/C202. See also Prensa Libre, “Gobierno espera recaudar mil 989 millones de dólares en reunión del grupo consultivo,” 9 January 1997, GT-CIRMA-AH-019/C203.
civilian and socioeconomic nature” to the victims of human rights abuses. But these terms were vague and malleable, and thereby effectively legally meaningless. Convergencia por la Verdad, an organization representing 27 victims’ groups that called for compensation for victims and their families one month prior to the new agreement, expressed pessimism that there was “will on the part of the official party (the government) to comply with the compromises of peace.” Still, they continued to request that the crimes that they survived be redressed.

Victims’ groups mainly sought collective recompence. They requested the repeal of all amnesties, the naming of those responsible for human rights violations, and for Guatemala’s history of human rights violations incorporated into its national school curriculum. Rather than improving the possibility of justice, the amnesty put forth in Guatemala was a “direct impediment” to justice and to “judicially-established truth and compensation.”

Importantly, though, Guatemala’s amnesty carved out exceptions, which opened the door for potential future prosecutions. For the social movements in pursuit of justice, the lucha did not stop. They continued to fight against the corrupt Guatemalan penal system. Activists soon realized that the peace did not end the war. Instead, the battlefield moved from the countryside to the courtroom. The LRN conflicted with prior amnesties issued during the war because it contained an exception for genocide and gross human rights violations. The disconnect between these amnesties needed resolution. Activists were forced to pursue this in court. For grassroots social movements, obtaining justice meant first turning to the very judicial system that had for

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114 Ibid.
116 Centro de Reportes Informativos sobre Guatemala, “War Victims Propose Compensation Package.” Requesting the integration of human rights and human rights violations into the nation’s history curriculum reflects the desire to preserve historical memory, a concept that will be more fully addressed in Chapter 5.
117 Freeman, Necessary Evils, 19.
decades either refused or been unable to hold the Guatemalan military accountable for networks of state terror. Given activists’ success in pursuing legal remedies in the international field, it was natural for social movements to soon look to international courts to resolve the largest obstacle to justice: Guatemala’s history of military impunity.
CHAPTER THREE: THE DIALOGICAL NATURE OF LAW: MAYA ACTIVISM IN SUPRANATIONAL COURTS, 1996-2004

But I don’t forgive him. How is it that a man who has blood on his hands can call himself a man of God? He wasn’t a man of God when he was murdering innocent men, women, and children. Now that he is a minister of God, he says that we must forget the sins of the past and concentrate on our life after death. I lost members of my family from this man of God. My family is buried underneath the earth while Lucas Tecú is above the earth, a free man. How is this fair? When will this man be called to testify? When will he face justice for his crimes?

—“María,” Survivor of Plan de Sánchez Massacre.¹

It is estimated that the Maya make up as many as 166,000 of the roughly 200,000 that were killed or disappeared during Guatemala’s civil war. “Maria” was just one survivor among thousands of Maya families seeking justice for violence committed or sanctioned by the Guatemalan government against their families and friends. On 20 March 2012, María got justice. Five men, including Lucas Tecú, the former Military Commissioner for the municipality of Rabinal, were each sentenced to 7,710 years in prison for their roles in the July 1982 massacre in the village of Plan de Sánchez.² The defendants appealed their sentence on 26 September 2012. They invoked the Nuremberg Defense, arguing that they were not the intellectual architects of the massacre.³ The orders for the massacre came from higher up in the chain of command. Men have argued, like Tecú and his accomplices, that therefore they should not be punished because


they were “just following orders.” The court disagreed, noting that Tecú supplied his commanders with information on the villagers’ support for the leftist insurgency. The military then used this information to mark the Plan de Sánchez villagers as internal enemies, justifying the massacre.

Justice is often elusive for those who survive human rights violations. This is particularly true in societies where the penal system is dominated by corruption and impunity. Guatemala excellently illustrates this type of system. Initially, Plan de Sánchez survivors sought justice in Guatemalan courts. These efforts failed because of the country’s longstanding pattern of impunity for military violations of human rights. After the failure to find justice domestically, survivors soon looked to international courts instead. Despite the systemic inadequacies and structural impediments that obstructed this path, survivors continued to fight against Guatemala’s entrenched impunity.

International law held its own implicit limitations for the Plan de Sánchez survivors. The inability to make progress toward justice domestically forced survivors to turn to what Karen Engle described as “a legal framework that had largely facilitated their conquest and subjugation.” As Seth Gordon has noted, because “the traditional international legal vocabulary places states and sovereign rights at the forefront of all international legal discourse,” it “fails to

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5 This label is significant, because Article 3 of the Geneva Convention, which provides for the humane treatment of prisoners of war, only protects those “persons taking no active part in the hostilities.” *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* (International Committee of the Red Cross (ICRC), 1949).

6 For a timeline of the Plan de Sánchez case, see Table 4.1

adequately effectuate indigenous peoples’ rights.”\(^8\) The grassroots efforts of Plan de Sánchez survivors, however, challenged this discourse and demonstrated how, through similar resistance, marginalized groups introduce their own conceptual legal lexicon into inhospitable juridical spaces. Helen Duffy, the former director of the *Centro Para la Acción Legal en Derechos Humanos* (Center for Legal Action in Human Rights or CALDH) that represented the survivors of the Plan de Sánchez massacre in the Inter-American system, remarked that the Plan de Sánchez case resulted in collective reparations and a “more expansive body of jurisprudence … showing a holistic approach to repairing massive violations.”\(^9\) However, analysis of the survivors’ legal reasoning, concepts, and norms remains scant in the scholarly literature, a point this chapter rectifies.

This chapter shows how the grassroots efforts of survivors of the Plan de Sánchez massacre revealed defects within systems of international law. The ongoing movement for justice in Guatemala sought for the Inter-American Court on Human Rights (Inter-American Court), the supranational human rights court established by the Organization of American States, to declare the Plan de Sánchez massacre an act of genocide. The Inter-American Court was unable to do so because the Court had no language regarding genocide in its governing text, despite the Guatemalan state explicitly accepting responsibility for the massacre. This case demonstrates a profound moral shortfall of legal positivism: a human rights court that was unable to determine if genocide occurred.

The disparity between what the survivors wanted and what the supranational court could (or would) do unmasked the top-down structure of international law and revealed the sociolegal

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influence of the international system. Social movements in the Global South, particularly grassroots or indigenous movements, often must adopt the language of a system originally designed to navigate and reinforce the core-periphery relationship established by colonial processes.\(^\text{10}\) For Plan de Sánchez survivors, the inherent coercive power of international law required labelling their suffering genocide and agreeing to have a supranational court determine the legitimacy of that suffering. By viewing the case solely through the prism of positive law, the Inter-American Court denied survivors the recognition of the past that Plan de Sánchez survivors wanted to help their wounds, and those of the country, to heal.

The grassroots efforts of the Plan de Sánchez survivors did more than draw attention to the inability of the Inter-American system to adequately respond to genocide. Rather, survivors’ efforts to find justice also highlighted the inadequacy of international law structures to accommodate for Global South social movements. The international legal system itself is prejudiced toward states and individuals, concepts not traditionally present in indigenous communities in the Global South such as those of the Guatemalan Maya. Working with the CALDH, the survivors of the Plan de Sánchez massacre, however, challenged notions of a top-down juridical flow—one in which the law flows solely from the lawgiver to the people—by introducing their values into the Inter-American system. While acceding to the demands of international law, Plan de Sánchez survivors resisted legal approaches counter to their juridical beliefs by advocating from within the Inter-American system for the adoption of Maya sociolegal values. These efforts introduced Maya legal norms into the Americas’ supranational human rights body and ultimately forced consideration by the Guatemalan government and the Inter-American Court, and both the state and the Court adopted Mayan sociolegal values in

various ways. Importantly, though, negotiations between the survivors, the state, the Inter-American Commission on Human Rights (the Commission), and the Inter-American Court show the dialogic nature of legal thought. Through the course of resisting the force of international law, Plan de Sánchez survivors adapted their arguments to the legal filings of the Commission and the Guatemalan state, showing that engaging in the international legal system results in a dialogic process of constant renegotiation whereby oppositional views and legal principles mutually shape each other.

In Guatemala, the legal discourse between Plan de Sánchez survivors and the state had significant lasting impact. Both in the courtroom and in the streets, it shaped popular conceptions of the massacre and of Guatemala’s genocidal period more broadly. Much of today’s ongoing public debate over whether genocide occurred in Guatemalan highlands during the internal armed conflict draws on the legal principles first established by the Plan de Sánchez survivors in their case before the Inter-American Court. Additionally, subsequent efforts to legally recognize the genocide in national courts, particularly Spain and Guatemala, have closely tracked the arguments laid out by survivors in supranational courts.

This chapter begins with the events for which the people of Plan de Sánchez such as María pursued justice: the brutal massacre of the village by the Guatemalan armed forces. Over a decade later, survivors of the massacre petitioned the Commission, the subject of section two, to review their case against the Guatemalan state. By filing their case in this foreign system, survivors were forced to adapt their view of the massacre into one defined by Western legal tradition. Despite this, Plan de Sánchez survivors challenged the boundaries of that system and forced it to adapt to them, rather than the traditional top-down flow of international law, as addressed in the third section. This influence of the law, however, was dialogical, as shown by
the ways that the survivors’ litigation before the Commission simultaneously influenced the survivors’ legal construction of events while survivors’ arguments likewise shaped the Commission’s views. Section four addresses how the Plan de Sánchez survivors revealed latent defects in the Inter-American system of human rights protection and how their challenges to these defects expanded the jurisprudential beliefs of members of the Inter-American Court. Ultimately, though, as detailed in section five, the final judgement and award for the Plan de Sánchez survivors illustrated the bifurcation produced by the law when the Inter-American Court concurrently refused to declare the massacre part of a larger genocide while incorporating Maya concepts of reparations beyond the normal limitations of international law.

4.1 18 July 1982: The Massacre

“If you are with us, we’ll feed you; if not, we’ll kill you,” remarked one anonymous officer in the Guatemalan army in July 1982. This officer succinctly captured the contemporary policy of the armed forces toward Guatemala’s civilian population. No group felt the brutality of this “with us or against us” more acutely than the Maya. In the mid-1960s, while in the midst of a decades-long civil war, the Guatemalan armed forces began a systematic use of state repression against the indigenous population. That state repression evolved into state terror. Patterns of forced disappearances and extra-judicial killings transformed into the massacres of entire Mayan villages because the military believed that the Maya universally supported the Marxist insurgency.

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12 This is a common fallacy called a “fallacy of bifurcation,” also known as an “either/or” fallacy, where the options available are incorrectly limited to two, with the presumption that one of the two must be accurate.
The Achi Maya villagers of Plan de Sánchez in the central Guatemalan department of Baja Verapaz found themselves in these crosshairs in 1982. The army accused every member of the town of being part of the guerrilla insurgency. Based on their belief, the Guatemalan military launched mortars into the village on the morning of 18 July 1982. Later that afternoon approximately sixty armed soldiers, civilian self-defense patrols (PACs), and paramilitary forces entered the village. Believing the military would not attack women and children, most of the men in the village fled into the jungle and hid. But soldiers shot, burned, or beat to death the remaining men, boys, and elderly after separating the girls and young women. Then they raped and murdered the women and girls. Those who survived were forced to bury the dead under threat of bombing. In all, roughly 268 people were murdered in the massacre. By 1987, approximately 20 families had returned to the site of the massacre and were allowed by the military to rebuild the town. However, the survivors remained under constant threat from the commander of the local garrison, Lucas Tecú, to keep silent about the massacre or face death.\textsuperscript{14}

The survivors did not keep silent, though. In 1992, they told judicial authorities of the location of the mass grave. In response, agents of the state increasingly harassed and threatened the survivors. Despite the constant threat of reprisal to their persons, on 10 December 1992, survivors of the massacre filed a petition with Guatemala’s Procuraduría de Derechos Humanos (Human Rights Ombudsman or PDDHH), informing the office of a clandestine gravesite. Following review, the PDDHH filed its own petition with the Public Prosecutor’s Office on 7 May 1993. This petition elicited the opening of criminal case No. 391/93 in Salamá, Baja

Verapaz. The formal opening of a criminal case led to a three-year series of filings and investigations by Guatemalan authorities, including the exhumation of the gravesite, which began on 6 June 1994.15

On 2 September 1996, the PDDHH issued a resolution on the Plan de Sánchez massacre. In this resolution, the PDDHH stated that members of the armed forces and the PACs were responsible for the massacre, which it called a crime against humanity.16 The resolution noted that the massacre formed one part of a “premeditated State policy.”17 The PDDHH determined that the perpetrators were not coerced, as the nature of the attack “presupposes a willingness to commit the [massacre].”18 It named every military and civilian authority who had exercised jurisdiction over Plan de Sánchez during the massacre as responsible and called on the government and the Minister of Defense to quickly provide all information to prosecutors to assist in any investigations.19

In the time between the opening of the criminal case in 1993 and the PDDHH’s September 1996 resolution, the Public Prosecutor’s Office expanded the criminal proceedings in Salamá following the discovery of a second clandestine grave. On 6 May 1996, prosecutors opened criminal case No. 344/95 to proceed jointly with the prior ongoing case. These actions led prosecutors to request exhumations, forensic analyses, eyewitness testimony, and the identification of members of the armed forces that participated in and/or ordered the massacre.

16 Procurador de los Derechos Humanos, Resolución sobre cementerios clandestinos (Guatemala: 1992), 69-70.
17 Inter-American Court of Human Rights, “Case of Plan De Sánchez Massacre v. Guatemala (Judgement on the Merits),” 15.
18 Procurador de los Derechos Humanos, Resolución sobre cementerios clandestinos, 70.
19 Ibid., 75-76.
Notably, though, the National Defense Ministry never responded to repeated prosecutorial requests. The case atrophied.

4.2 The Inter-American Commission on Human Rights: Maya in Supranational Space

As a response to the lack of movement in Guatemalan courts, survivors and lawyers from the Centro para la Acción Legal en Derechos Humanos (CALDH) held multiple meetings and workshops in 1995 in which the groups discussed potentially pursuing justice in international court. Part of these discussions involved lawyers, such as then-CALDH Director Helen Duffy, explaining to the survivors in detail what would likely happen in an international judicial system that was “completely alien” to the survivors. Survivors and their legal advisors eventually decided that the Inter-American Court was the best venue to pursue claims of human rights violations.

Plan de Sánchez survivors could not simply file a case in the Inter-American Court against the Guatemalan state, however, as the Inter-American system followed a strict procedure. A brief review of that procedure helps in following the mechanics of the survivors’ litigation. The Commission and the Inter-American Court, as distinct entities within the Inter-American System, each have their own protocols and procedures. The first step for a private (i.e., non-state) litigant in the Inter-American system is to file a petition with the Commission for an initial review of a potential case. Although the Commission engages in a wide variety of human rights activities, it has two main legal responsibilities: to mediate in an effort to have the parties amicably settle disputes; and to act as a doorman for the Inter-American Court. Petitioners must

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20 Inter-American Court of Human Rights, “Case of Plan De Sánchez Massacre v. Guatemala (Judgement on the Merits),” 16-17.
21 Duffy, Strategic Human Rights Litigation, 117.
22 Ibid., 116.
show that the allegedly offending state violated the human rights guaranteed by the American Convention of Human Rights (American Convention).23 The Commission then decides whether to admit the case, and if a case is admitted the Commission provides the alleged offending state with a copy of the petition. The state then can respond to the Commission in writing to the allegations in the petition, and the petitioners similarly can answer the state’s response. The Commission then reviews all case materials, and if it determines that the state has violated the American Convention, it provides the state with recommendations to correct the violations. If the state does not comply with the Commission’s recommendations, the Commission considers referring the case to the Inter-American Court.24

Once a case has been referred to the Inter-American Court by the Commission to the Inter-American Court, the Court’s internal rules govern the process. The Inter-American Court notifies the state, the Commission, and the victims that they received the Commission’s application. Plaintiffs then have two months to provide the Court with a brief that contains any pleadings and evidence that support those pleadings; the state then has two months from receipt of plaintiff’s brief to answer it in writing, including whether it accepts the facts and claims as depicted by the plaintiffs, any legal arguments against them, and any preliminary objections to the finding of the Commission or claims of the plaintiffs. The Commission and the plaintiffs each have 30 days to respond, in writing, to the state’s preliminary objections, if applicable. The Inter-American Court may order a hearing to resolve the state’s objections. The Court then sets the date for oral argument. The parties to the suit are required to submit witness lists and are given time to object to the other side’s witnesses. Oral argument then occurs before the Court,

23 Only states that have ratified the American Convention can be prosecuted for violations in the Inter-American system.

and afterwards the parties have one final opportunity to introduce written arguments. Following this, the Court deliberates the case and issues its judgment, including any dissents.\textsuperscript{25}

In order to navigate this foreign system, Plan de Sánchez survivors had to comport their legal expressions to a judicial system and body of law they were unfamiliar with. Additionally, Plan de Sánchez inhabitants spoke only Rabinal Achi, a Mayan language. However, the Commission only considered written petitions in Spanish, English, Portuguese, or French.\textsuperscript{26} These structural restrictions meant that the choice to pursue justice in the Inter-American Court required the Plan de Sánchez survivors to participate in a legal system that was not only alien to them, but also came from the same family of jurisprudence brought to Latin America through Western colonialism.

Filing in an inter- or supranational system structurally disadvantaged the Plan de Sánchez survivors in both venue and form. The first level of the Maya litigants’ conundrum stemmed from the nature of the Inter-American Court. The Court was founded “to promote and protect human rights in the American hemisphere.”\textsuperscript{27} The historical conceptualization of human rights is itself a Western legal invention.\textsuperscript{28} Actors from the Global South, accordingly, have shoehorned their experiences into one descended from European legalities when engaging in a human rights arena. Plan de Sánchez survivors had to fit their conception of the massacre into the language


\textsuperscript{26} Inter-American Commission on Human Rights, \textit{Petition and Case System: Informational Brochure}.

\textsuperscript{27} Inter-American Commission on Human Rights, \textit{What Is the IACHR?} (2020).

\textsuperscript{28} Mary Ann Glendon, \textit{A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights} (New York: Random House, 2001). The drafters of the Universal Declaration of Human Rights were either from Western nations or educated at Western schools.
and logic of a legal system that often marginalized voices from the Global South.\(^{29}\) The second factor disadvantaging the litigants came through the compulsory use of non-native language, which coerced the survivors into verbalizing their experience in unfamiliar terms. Having to translate their words only exacerbated the unfamiliarity that the Plan de Sánchez victims felt with the Inter-American Court itself, having been raised in an indigenous community whose grassroots legal system that “completely oral and conducted in the local language.”\(^{30}\)

Despite these disadvantages, on 25 October 1996, survivors of the Plan de Sánchez massacre, represented by the CALDH, petitioned the Commission and alleged violations of the American Convention. Recall the gatekeeping role of the Commission for the Inter-American Court; the Plan de Sánchez survivors first needed to convince the Commission that they had a valid case. Survivors stated that the massacre occurred within a systemic military strategy to eradicate the insurgency’s civilian support and was “on such a scale as to represent massive violations … of international humanitarian law and constitute crimes against humanity and genocide.”\(^{31}\) On 1 July 1997, the Commission opened case No. 11,763, between the Plan de Sánchez massacre survivors and the State of Guatemala.

The American Convention did not contain a genocide provision when survivors filed their petition. Despite that, the litigants nonetheless sought a declaration of genocide. The petitioners’ filing for a declaration of genocide in a supranational court had several important results. First, it revealed a potential latent defect in the American Convention as a body of human

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rights law because the American Convention did not define the intentional destruction of an entire group as a specific crime. Survivors forced the Commission and, eventually, the Inter-American Court into considering the inadequacy of their own governing instrumentation. By challenging this gap in the American Convention, Plan de Sánchez survivors became constructive agents of international legal change. Second, seeking a ruling outside of statutory text or judicial precedent challenged positivist juridical constructionism from within. Legal positivism remained (as it still remains today) the dominant theory of legal discourse in international legal spaces. Notably, though, survivors couched their arguments in both the American Convention—positive law—and the space beyond it—natural law. Survivors did this by introducing their own cultural conceptions of law into the Inter-American system. In Maya culture, law is a manifestation of “universe, nature, and human being” existing in “harmony and equilibrium.” Accordingly, Maya legal conceptions, unburdened by textual confines, could be called natural law. In their pursuit of justice, Plan de Sánchez survivors brought their indigenous normative constructs to the international arena and challenged the limitations of international law and the Western international legal interpretations upon which it is based.

The Guatemalan state contested the Commission’s jurisdiction over the suit on 9 October 1997, as victims had not yet exhausted all domestic remedies available pursuant to Article 46 of


33 Hessbruegge and Ochoa García, “Mayan Law in Post-Conflict Guatemala,” 87. As the authors note, “Mayan Law” only applies to intra-community cases, or cases where both parties are Maya. Accordingly, the Plan de Sánchez massacre is not one covered by articulations of Maya law. However, these views and attitudes remain informative as to Maya legal perspectives generally.

34 The irony in describing indigenous, non-Western legal views using Western legal philosophy is noted.
the American Convention. Article 46 requires that the Inter-American Court cannot exercise jurisdiction until all “remedies under domestic law have been pursued and exhausted.” However, the Commission ruled that the Guatemalan government prevented victims from pursuing domestic remedies by using amnesties to provide legal impediments to prosecution and by instilling fear of state reprisal. The Commission stated that potential domestic prosecution, which remained stagnated within Guatemala’s judicial system despite five years passing since initial filings, had been subject to an undue delay. It was the Guatemalan government and not the survivors, the Commission said, who prevented the domestic remedies from being adequately pursued.

Over the next several years, the Commission invited the parties to the case to present arguments regarding a potential settlement. Increasingly, circumstances made it difficult for the government to not at least consider it. On 25 February 1999, the UN Comisión para el Esclarecimiento Histórico (Historical Clarification Commission or CEH), the truth commission created pursuant to the 1996 peace agreement, declared that the Guatemalan state had committed acts of genocide during the war. Then, barely two weeks later, US President Bill Clinton apologized for “[US] support for [right-wing] military forces or intelligence units which engaged in violent and widespread repression” in an unscheduled speech while on a four-country Central American tour. On 9 August 2000, then-President Alfonso Portillo (2000-2004) acknowledged

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36 Ibid.

37 Ibid.


the institutional responsibility of Guatemala for the Plan de Sánchez massacre and in nine other cases of human rights violations. In his statement, the Guatemalan president not only made no substantive challenges to the Plan de Sánchez survivors’ allegations, he specifically accepted “the occurrence of the essential acts that gave rise to the filing of petitions before the Inter-American Commission on Human Rights.” Notably, Portillo’s failure to deny the claims of the survivors in his statement echoed the state’s response to the survivors, as the state only challenged the Commission’s jurisdiction over the suit rather than any substantive allegation.

The Commission filed an application with the Inter-American Court for the Court to open a case against the Guatemalan state for violations of multiple articles of the American Convention on 31 July 2002. The Commission based its application on the failure of the Guatemalan state to sufficiently address the three recommendations the Commission gave it on 28 February 2002. First, the Commission recommended that Guatemala make a “special, rigorous, impartial, and effective investigation” to identify and punish those responsible for the massacre. Second, the Commission suggested that the state “make reparations both individually and at the community level” for the violations of the American Convention, including properly identifying all victims and providing adequate compensation to survivors and next of kin. Third, the Commission advised the Guatemalan government act to ensure similar events did not occur in the future. The failure to implement any of these recommendations, the Commission found, showed that the Guatemalan state’s commitment to the advancement of human and indigenous

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41 Ibid.
44 Ibid.
rights was not serious, as the state had taken no steps to investigate and account for the Plan de Sánchez massacre since the Commission issued its recommendations five months earlier.\textsuperscript{45}

In its application to the Court, the Commission noted that “the massacre was perpetrated within the framework of a genocidal policy of the State of Guatemala made with the intention of destroying, totally or partially, the Maya indigenous people.”\textsuperscript{46} Importantly, the Commission recognized that the Plan de Sánchez massacre represented the systemic “denial of justice of the genocide committed against the indigenous Mayan people in Guatemala during the 80s.”\textsuperscript{47} In fact, the Guatemalan state did not disagree. On 1 July 2002, the Guatemalan government accepted the factual basis of the allegations in the plaintiff’s complaint and did not challenge any evidence presented by the Plan de Sánchez survivors.\textsuperscript{48} However, while Guatemala accepted responsibility, it failed to adequately address reparations for survivors and neglected to follow the recommendations of the Commission.

Agreement on the facts freed the Commission to focus on the law in its determination to refer the case to the Inter-American Court. The Commission cited the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), ratified by Guatemala on 30 November 1949.\textsuperscript{49} The Genocide Convention defines genocide as a specific

\textsuperscript{45} Inter-American Court of Human Rights, “\textit{Case of Plan De Sánchez Massacre v. Guatemala}, 3.
\textsuperscript{46} Inter-American Commission on Human Rights, “\textit{Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos en el caso 11,763 ‘Masacre de Plan De Sánchez’ contra la República de Guatemala}” (Inter-American Court of Human Rights, 2002), 1.
\textsuperscript{47} Ibid., 2.
\textsuperscript{48} Ibid., 9.
\textsuperscript{49} Ibid., 32-33. The relevant portion of the Convention on the Prevention and Punishment of the Crime of Genocide is found in its Article II, which reads: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” United Nations General Assembly, \textit{Convention on the Prevention and Punishment of the Crime of Genocide, No. 1021} (United Nations General Assembly, 9 December 1948).
intent crime; it delineates five types of external acts that can be considered genocidal (the *actus reus* or “guilty act”) and two intent components (the *mens rea* or “guilty mind”), the intent to commit the act and the intent to provoke the result.\(^{50}\) Importantly, both intent components need to be present to prove genocide. The Commission found that Guatemala had committed acts that satisfied three of the five *actus rei* that could constitute genocide: killing members of the group; causing serious bodily or mental harm to members of the group; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.\(^{51}\) In addition to killing residents of Plan de Sánchez, which satisfied the first and second examples types of qualified genocidal acts, the military forced “subhuman conditions” on the survivors, who had to flee to and survive in the mountains for two years.\(^{52}\)

The Commission relied on the findings of the CEH in making a determination as to intent. The general intent component, to kill Plan de Sánchez villagers, was patently evident. In even the most straightforward criminal cases where a finding of specific intent is necessary, establishing that intent, the desire to produce a particular result, is more complicated. The specific mental state required to sustain a charge of genocide, as originally established in the Genocide Convention, is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”\(^{53}\) The CEH based its analysis of intent on “the reiteration of destructive acts, directed systematically against groups of the Maya population, … demonstrates that the only

\(^{50}\) “Specific intent” is differentiated from general intent and carries a more difficult evidentiary burden. General intent is the desire to commit the act in question. Specific intent, however, requires the general intent component accompanied by a desire to produce a particular result.


\(^{52}\) Ibid.

common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes evident that these acts were committed ‘with intent to destroy, in whole or in part’ these groups." This pattern of behavior, the CEH said, showed that the only explanation was the intent to destroy the Maya. The Commission agreed with the CEH’s evaluation.

In plain terms, the Commission stated that the massacre was a genocidal act. However, the Commission fell short of asking the Inter-American Court to share in that determination. In its final petition, the Commission requested that the Inter-American Court make various findings and declarations. Based on its analysis, the Commission argued that Guatemala had violated five provisions of the American Convention. First, that Guatemala denied the right to humane treatment not just during the massacre but also through later displacement and repeated acts of persecution. Second, consistent with Guatemala’s history of impunity for the military, the state denied the right to a fair trial to victims of the massacre. Third, the freedom of association, free thought, and religion was denied to the inhabitants of Plan de Sánchez. Fourth, Guatemala violated the Plan de Sánchez villagers’ right to private property. Finally, the state violated the right to judicial protection. Accordingly, the Commission asked for the Inter-American Court to declare that Guatemala had denied equal protection pursuant to Article 24 by discriminating against victims and survivors of the massacre. The Commission requested that the Inter-American Court require the State to make adequate reparations both individually and collectively, while also indemnifying survivors from any harmful repercussions. Despite this, the Commission made no mention that violations of the freedoms of thought and religion occurred.

56 Ibid.
within the context of “genocidal practices.” It did not request any explicit determination as to what those practices were. The Commission’s failure to call for an official recognition by the Inter-American Court of the massacre as genocide, the most serious charge made by the survivors against the Guatemalan state, tacitly denied the survivors’ account of their experiences. Survivors chose specifically to pursue a charge of genocide and the Commission did not, a decision that constituted a procedural disregard of their voices.

However, the Commission did not entirely abandon the survivors’ views and incorporated important particulars from the Maya position. Although the Commission did not request a charge of genocide, it was influenced by the survivors’ argument. The Commission noted that violations of the freedoms of thought and religion occurred both “individually and collectively (emphasis added).” This distinction is important because international human rights law has traditionally favored individuals over collectives. However, Maya residents of Plan de Sánchez conceived of rights in a communal sense. Knowingly or unknowingly, the Commission incorporated the survivors’ recognition of collective rights, brought it into the Inter-American system, and incorporated indigenous legal perspectives that ran contrary to international law and its positivist underpinnings.

The case of the Plan de Sánchez massacre also illustrated potential difficulties for post-conflict societies as they attempt to advance beyond eras categorized by violence while

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57 Ibid., 58.
58 Inter-American Commission on Human Rights, “Demanda de la Comisión Interamericana de Derechos Humanos ante la Corte Interamericana de Derechos Humanos en el caso 11,763.”
reintegrating both victims and victimizers. Members of the PAC who helped commit the Plan de Sánchez massacre asked the government for payment.\textsuperscript{60} The civilian patrollers claimed that they, too, were victims of the massacre, noting that they were forced to work alongside the armed services. Groups like the Plan de Sánchez PAC felt “abandoned to poverty” in post-conflict Guatemala, Cold War-era pawns cast aside to economic hardship following a de-escalation from violence.\textsuperscript{61} Although former PAC members may have felt discarded by the military, they at least met with regional leaders of the Guatemalan Republic Front to discuss payments, and various politicians proposed recompense. Plan de Sánchez survivors, however, viewed efforts by the Guatemalan state to amicably settle PAC claims for restitution unfair. The state continued to resist calls to compensate Plan de Sánchez survivors following the Commission’s recommendations to Guatemala of its recommendations. This resistance must have been particularly insulting when viewed in comparison to the state compensating perpetrators of the massacre. For survivors like Hermenegildo Jerónimo Sánchez, the disparity was untenable: “If there is nothing for the victims, then [the PAC] should have nothing, too.”\textsuperscript{62}

4.3 The Inter-American Court: Hegemony, the Ongoing Effect of Genocide, and the Dialogical Nature of the Law

On 22 August 2002, the Inter-American Court notified both the Guatemalan government and the Plan de Sánchez victims that it accepted the Commission’s application and gave the

\textsuperscript{60} David Gonzalez, “Fighters' Demands Open Old Wounds in Central America,” \textit{New York Times}, 19 August 2002. PAC demands for payment were not limited to only the Plan de Sánchez massacres. Spurred on by Portillo’s admission, ex-PAC, first in the department of El Petén but soon across the country, demanded restitution from the state. Nelson, \textit{Reckoning}, 212-13.

\textsuperscript{61} Gonzalez, “Fighters' Demands Open Old Wounds in Central America.”

\textsuperscript{62} Ibid.
victims thirty days to submit a brief with pleadings and evidentiary support.\textsuperscript{63} Survivors filed this brief on 27 September 2002.\textsuperscript{64} While the survivors influenced the Commission’s assessment of the case, as expressed in its 31 July 2002 application to the Inter-American Court, the Commission likewise shaped the survivors’ approach to the case. In their 27 September 2002 response to the Commission’s application, the victims endorsed the Commission’s views and adopted the Commission’s pleas.\textsuperscript{65} Additionally, survivors asked for a declaration that the State violated their rights to dignity, free expression, and free association. While survivors asked the Commission for a finding of the massacre as an act of genocide in their October 1996 petition, they had abandoned those requests by the time they made their 27 September 2002 response to the Inter-American Court.

Just as the Commission’s validation of collective rights represented a bending of the law in response to the worldview of the Plan de Sánchez survivors, the petitioners’ strategic decision to eliminate the charge of genocide from their filing shows how international human rights law was dialogically constructed. The survivors’ influence on the Commission’s approach to restitution in the international system can be seen in the Commission’s application to the Inter-American Court when the Commission incorporated survivors’ request for the recognition of collective rights. But interactions between the Commission and survivors of the massacre likewise affected the survivors’ legal arguments. Instead of continuing with their request to have the massacre recognized as an act of genocide, survivors followed the Commission and

\textsuperscript{63} Inter-American Court of Human Rights, “Case of Plan De Sánchez Massacre v. Guatemala (Judgement on the Merits),” 3-4.

\textsuperscript{64} Inter-American Court of Human Rights, “Case of Plan De Sánchez Massacre v. Guatemala (Judgement on the Merits),” 3; Inter-American Court of Human Rights, “Escríto de solicitudes, argumentos y pruebas presentado por los representantes de la presunta víctima y sus familiares” (Inter-American Court of Human Rights, 2002).

\textsuperscript{65} Inter-American Court of Human Rights, “Escríto de solicitudes, argumentos y pruebas presentado por los representantes de la presunta víctima y sus familiares.”
abandoned this request. At the same time that the survivors pushed for change within the Inter-American apparatus, their interactions with the Inter-American system shaped the juridical approaches of survivors.

Although survivors abandoned their initial call for a full declaration of the massacre as genocide in their September 2002 brief to the Inter-American Court, they nonetheless maintained their position that Guatemala committed genocide. A fulcrum of the victims’ case was President Portillo’s recognition of Guatemalan culpability for the massacre. In it, Portillo acknowledged state responsibility for more than just the Plan de Sánchez massacre itself, but also for the pattern of state terror that enabled the massacre.66 Importantly, Portillo recognized the “institutional responsibility” of the Guatemalan state for human rights violations committed during the armed conflict.67 This recognition, the victims argued, went beyond accepting responsibility for violations of the American Convention. In fact, they argued that Portillo’s acceptance of responsibility on behalf of the Guatemalan state also constituted admitting to violating the UN Convention for the Prevention and Punishment of the Crime of Genocide, which Guatemala ratified on November 30, 1949, via passage of Decree 704.68

Survivors made clear in their September 2002 filing that that their case legally challenged the pattern of impunity that shielded those who massacred Maya communities during the 1980s. For the victims, this pattern was more than merely a representation of entrenched power. Rather, survivors saw the failure to even begin legal proceedings (much less succeed in them) for the crimes committed by the military against the Plan de Sánchez villagers as an extension of the

66 Inter-American Court of Human Rights, “Escrito de solicitudes, argumentos y pruebas presentado por los representantes de la presunta víctima y sus familiares,” 37.
67 Inter-American Court of Human Rights, “Case of Plan De Sánchez Massacre v. Guatemala (Judgement on the Merits),” 2.
68 Inter-American Court of Human Rights, “Escrito de solicitudes, argumentos y pruebas presentado por los representantes de la presunta víctima y sus familiares,” 37.
systematic destruction of Maya societies during the 1980s. Survivors lamented that there had been no serious investigation into any of the mass murderers or those who designed the genocidal policy. These survivors argued that the lack of even a basic accusation or indictment embodied a “continuation of the genocidal policy that the State deployed in the 80s.” In the minds of survivors, the genocide was not a past event, but rather continued to persist, inchoate, until the regime behind it was challenged.

The Plan de Sánchez plaintiffs defined “acts of genocide” not solely within the confines of immediate wartime state terror, and included the aftereffects and ongoing harms caused by the genocide. It is important to remember, as scholars such as Rachel Sieder, Carlos Fredy Ochoa, and Carlos Flores Arenales have established, that Maya legal norms focus on maintaining or reestablishing social and communal harmony. Reconstructing this harmony demands compensation to victims and using public confessions to discourage the repetition of criminal behavior. The innate patterns of impunity in Guatemala inhibited this process. For the Plan de Sánchez survivors, these patterns created a “lack of access to justice” that continued the genocidal policies of the 1980s. This lack of justice produced ongoing “psychic … and psychological damage in addition to that caused by” the massacre itself. Psychological suffering of this type seemingly runs afoul of the Genocide Convention, which prohibits acts

69 Inter-American Court of Human Rights, “Escrito de solicitudes, argumentos y pruebas presentado por los representantes de la presunta victim y sus familiares.” 5, 6.
71 Hessbrügge and Ochoa García, “Mayan Law in Post-Conflict Guatemala.”
72 Inter-American Court of Human Rights, “Escrito de solicitudes, argumentos y pruebas presentado por los representantes de la presunta victim y sus familiares.” 19.
“causing serious bodily or mental harm to members of the group.” The Guatemalan government’s safeguarding of impunity had a multi-directional effect. On the one hand, this impunity impacted the past by providing a safe harbor for the rhetoric of denial consistently employed by the Guatemalan elite. On the other hand, this effect impacted the present and future by preserving the suffering of Plan de Sanchez survivors and ensuring the massacre’s repetition in the minds of the survivors.

The survivors again brought their legal concepts to the international system by suggesting that the Inter-American Court consider legalities outside of the text of the American Convention on Human Rights. As noted above, in their September 2002 requests to the Inter-American Court, the survivors argued that Portillo admitted that the country violated the Genocide Convention. Although the Genocide Convention was outside the scope of the Inter-American Court’s technical subject-matter jurisdiction (limited to the text of the American Convention), survivors argued that the Inter-American Court could, in fact, consider it in their deliberation. The Plan de Sánchez plaintiffs noted that the Inter-American Court had the power to apply the “general context of international law” and “international standards beyond those contained in the instruments of the Inter-American system,” particularly as they pertain to humanitarian issues.

To this end, survivors cited US law as informative for their case. In particular, survivors noted that according to the US Restatement (Third) of Foreign Relations Law of the United States, it was a violation of customary international law not only to commit or attempt to commit genocide


74 Inter-American Court of Human Rights, “Escríto de solicitudes, argumentos y pruebas presentado por los representantes de la presunta víctima y sus familiares,” 48.
or genocidal acts, but also to fail to punish those who have committed or attempted to commit
genocide.\textsuperscript{75}

The victims’ strategy outlined an argument that prosecutors in the case against Efrain
Ríos Montt later echoed. The survivors noted an important silence in the Genocide Convention
when proving their case. The statute limited who could be considered victims of genocide to
“national, ethnic, racial or religious groups.”\textsuperscript{76} Therefore, the Genocide Convention’s intent
requirement was also limited to the destruction or attempted destruction of these specifically-
delineated types of groups.\textsuperscript{77} Importantly, however, the Genocide Convention did not restrict
various theories of motive. The CALDH lawyers that represented the survivors argued,
accurately, that motive is different from intent. Intent can be simply defined as the immediate
goal of an act (e.g., stabbing someone in order to kill them). Motive, though, is \textit{why} someone
commits such an act (e.g., for revenge). Motive, survivors argued, was not limited to named
groups. This silence, therefore, opened the door for the genocide statute to apply to the
Guatemalan military. If the goal of the scorched-earth policy was the destruction of the Maya,
the survivors’ case would not be defeated simply because massacres like that of Plan de Sánchez
were committed “for other reasons such as, for example, national security or economic need.

\textsuperscript{75} Ib\textsuperscript{id}, 53. “Restatements of the Law” are legal treatises in US American jurisprudence, published by the
American Law Institute, that articulate the general principles of law for a specific area (\textit{e.g.}, contracts; torts;
international law; etc.).

\textsuperscript{76} United Nations General Assembly, \textit{Convention on the Prevention and Punishment of the Crime of
Genocide}.

\textsuperscript{77} Inter-American Court of Human Rights, “Escríto de solicitudes, argumentos y pruebas presentado por los
representantes de la presunta víctima y sus familiares,” 55. 
The justification or impetus that one party had for acting (motive) had no bearing on a legal analysis of the intention to commit an external act (intent).

The Guatemalan state responded on 3 October 2002, to the requests that the Plan de Sánchez massacre survivors submitted to the Inter-American Court. The government countered the victims’ filing on three grounds. First, the state called the survivors’ view of Portillo’s recognition of responsibility a misinterpretation. Second, the state argued that survivors had improperly modified their complaint before the Commission. And third, the government said that the victims had failed to properly exhaust all domestic remedies.

While the victims argued to the Inter-American Court in September 2002 that Portillo’s statement represented an admission by the state that it committed genocide, the Guatemalan government took a more limited view. Rather, the state said in its October 2002 response that Portillo only recognized a failure to guarantee and protect the rights covered in Article 1 of the American Convention and Articles 1, 2, and 3, of the Guatemalan Constitution. Article 1 of the American Convention obligated member states to provide, guarantee, and protect the rights delineated within the American Convention. Articles 1, 2, and 3 of the Guatemalan Constitution provided that the Guatemalan state exists to protect people and achieve the common good; that Guatemala must guarantee “the life, the freedom, the justice, the security, the peace,

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78 Inter-American Court of Human Rights, “Escrito de solicitudes, argumentos y pruebas presentado por los representantes de la presunta victimita y sus familiares.”
79 To revisit the analogy of someone using a knife to murder someone else (their intent), that his person killed the other for revenge does not impact their intent. In fact, an intent to murder can be present with no motive whatsoever.
80 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado” (Inter-American Court of Human Rights, 2002).
81 Ibid.
82 Ibid., 2.
and the integral development of the person;” and that the state must protect the integrity and safety of its people.  

The Guatemalan government, accordingly, drew an important distinction, and categorized Portillo’s admission as one of “omission.” Survivors asserted that Portillo acknowledged the massacres as part of an overall genocidal policy, meaning that the violations occurred within the context of overt acts. The government, however, countered by saying that Portillo solely recognized the government’s failure to properly guarantee people’s constitutional rights. Nothing in Portillo’s statement, the government argued, amounted to an admission as to overt acts committed by the armed forces, particularly as they related to a genocidal pattern, but rather only applied to a recognition of “the existence of this type of events during the internal armed conflict.” The victims’ interpretation of the government’s admission could potentially be attributed to bias confirmation.

However, the Commission sided with the people over the state, and took the view that the government recognized that its security policy directly resulted in overt genocidal acts. As the Commission stated in its 31 July 2002, application requesting that the Inter-American Court try the case, Guatemala had accepted the Commission’s conclusions on 1 July 2002. One of these conclusions, the Commission said, was that the “massacre of Plan de Sánchez was planned and executed within the genocidal policy directed by the Guatemalan State against the Mayan people.”

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85 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 2.
86 Ibid., 3.
87 Ibid., 4.
American Court on 3 October 2002. In its response, the state disagreed that it consented to this interpretation of Portillo’s recognition of responsibility and argued that the Commission based its interpretation on “inaccuracies.” These inaccuracies, the government said, compromised the Commission’s objectivity. Accordingly, Guatemala said that the Commission could not have fairly reviewed the case.

The survivors replied to the government’s response to the application on 11 November 2002, and quickly noted the inherent contradiction in the government’s position. Essentially, the government argued that the Commission failed to maintain a veil of impartiality in its application to the Inter-American Court. The Commission’s bias, Guatemala argued, would effectively poison the Court against the state. The victims responded to this argument by noting that any application by the Commission to the Inter-American Court must present any state in an unfavorable light. Because the Commission serves as a gatekeeper to the Inter-American Court, the Commission only refers cases to the Court once it has determined, in its view, that human rights protected by the American Convention were violated. Accordingly, this bias was a necessary procedural byproduct: if the Commission saw no human rights violation by a state, it would have no reason to transfer the case to the Inter-American Court. Addressing this logical disconnect was only a small component of survivors’ response, however.

Importantly, the plaintiffs also focused on the Guatemalan government’s claim in its October 2002 answer that it had not admitted to responsibility for the massacres. In that October 2002 filing, the government argued to the Inter-American Court that Portillo only recognized the

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89 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 1.

90 Ibid., 4.

91 Centro para la Acción Legal en Derechos Humanos, “Alegatos escritos a las excepciones preliminares interpuestas por el estado, presentadas por los representantes” (Inter-American Court of Human Rights, 2002), 1-2.
institutional responsibility of the Guatemalan state for its failure to guarantee the rights delineated in the American Convention. Accordingly, the state said, interpreting Portillo’s statement to attach an assumption of guilt beyond the rights governed by the American Convention required an improper inference. The victims, though, said in their November 2002 response to the government’s filing that this position was not logical, and relied on the government’s own language in reaching this conclusion. In the statement recognizing responsibility, survivors said, “the Guatemalan government accept[ed] the occurrence of the constitutive facts that led to the presentation of the complaints before the Inter-American Commission on Human Rights.”

In fact, Portillo stated that he made the statement of recognition as a response to a 1997 petition to the Commission, filed before he became president, which clearly delineated the military’s involvement in state terror and massacres. Survivors argued that the government “acknowledged the existence of these types of events during the armed conflict” in its preliminary objections. Accordingly, the victims claimed that the disconnect between the government’s interpretation of Portillo’s acknowledgment and its own preliminary exceptions could not be reconciled.

The Commission also took Portillo’s statement at face value. The Commission rejected the idea that the Portillo’s acknowledgement did not apply to the military’s actions in and around the massacre in its 27 November 2002 response to the state’s preliminary objections. Rather,

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92 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 4.
93 Centro para la Acción Legal en Derechos Humanos, “Alegatos escritos a las excepciones preliminares interpuestas por el estado, presentadas por los representantes” 5.
94 Ibid.
95 Ibid., 4; Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 3-4.
the Commission noted that the Guatemalan state clearly accepted all the of the Commission’s conclusions, including that the “Plan de Sánchez massacre was planned and executed as part of the Guatemalan state’s genocidal policy against the Maya.” The Commission based its understanding of the Guatemalan government’s endorsement of the Commission’s finding of genocide on the government’s acceptance of the Commission’s recommendations “without objection.” The government effectively agreed with the Commission’s interpretation of the massacre.

The implications of the Guatemalan state’s failure to object were larger than immediately apparent. When the state accepted the Commission’s filing without objection, it adopted the Commission’s position as its own. The Commission largely accorded its position with the survivors’ and based it at least in part on the survivors’ reasoning. In doing so, the Commission incorporated Maya legal perspectives, perspectives based on a worldview of the collective, balance, and harmony. Maya legal values informed the Commission’s decision and were accordingly integrated into the state’s response when it adopted the Commission’s views. In achieving a victory in which the government acquiesced to their claims, the Plan de Sánchez survivors forced the Guatemalan state—whose judicial system was based in Westphalian legal positivism—to adapt its position to their communitarian, Maya legal norms. This was a historic achievement. The genocide itself had been predicated on the alleged support of Maya communities for subversive Marxists. It is more than a little ironic, then, that communitarian Maya legal norms forced the state to subvert its own defense against charges of genocide.

97 Ibid., 6.
98 Ibid., 7.
Plan de Sánchez survivors argued that the government’s criticism of the Commission’s “bias” was not its only contradiction. Rather, survivors said that the government’s assertion that the Plan de Sánchez victims had failed to adequately address their grievance in Guatemalan courts could not support the weight of its own logic. On the one hand, the government said that proclamations of genocide and human rights violations can only be made in a formal court ruling. On the other, survivors accurately noted that the Guatemalan government made resolving the case impossible in the Guatemalan domestic court system through years of delay and stagnation. This logic created a catch-22 of sorts, wherein the Guatemalan government would not admit to having committed genocide without a court ruling, but the government’s actions made a court ruling impossible. Accordingly, the survivors said, the Guatemalan government gave them no other choice but to turn to the Inter-American system.

The government, however, argued that domestic criminal proceedings had not stalled. Rather, the government stated that concerns for the survivors’ well-being led to what the Commission deemed an undue delay in the judicial process. The government said that the failure to adequately pursue and respond to Case No. 344/95 in its domestic courts resulted from a desire not to subject the survivors of Plan de Sánchez to “double victimization.”

The survivors stated that they did not need to be protected from revictimization and blamed the Guatemalan judicial system for victimizing them a second time by keeping them from court. Survivors saw the case as an opportunity “to break with impunity,” despite the state’s

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99 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 4.
100 Centro para la Acción Legal en Derechos Humanos, “Alegatos escritos a las excepciones preliminares interpuestas por el estado, presentadas por los representantes” 6.
101 Inter-American Court of Human Rights, “Escrito de contestación a la demanda e interposición de excepciones preliminares presentado por el estado,” 4.
claims “that victims would be harmed by participating” in court.\textsuperscript{102} If the state truly wanted to not victimize survivors again, survivors argued that “they would not have been forced to wait for so many years without justice or reparations, nor would the willingness to negotiate a friendly settlement be compromised.”\textsuperscript{103} The state’s concern for survivors conflicted with its historical relationship with the Maya.

The government’s arguments were inherently opportunistic. The state had not cared about the victimization of the Maya, had abdicated its responsibility to protect them, and was now claiming that obtaining justice for them would be a form of double victimization. A much simpler explanation would be that the state wanted to avoid the uncomfortable and disruptive process of actually doing justice. But their argument was not just opportunistic, it was decidedly paternalistic. They claimed to know not only what was best for the survivors, but to know better than the survivors themselves what was best for them. In reality, the government’s failure to prosecute the perpetrators of the massacre worked against the express will of those survivors who spent years attempting to accomplish the very “revictimization” from which the government claimed to protect them. In a sense, the survivors were accurate when they asserted that the Guatemalan government’s failure to prosecute the planners and perpetrators of the Plan de Sánchez massacre was a continuation of the hurt that survivors felt at the hands of the military.

The Plan de Sánchez survivors’ challenge of the government’s failure to exhaust domestic remedies defense found support in the Inter-American system. In its response to the government’s November 2002 objections, the Commission included an explanation for it having granted the survivors an exception to the domestic remedies exhaustion requirement because of

\textsuperscript{102} Centro para la Acción Legal en Derechos Humanos, “Alegatos escritos a las excepciones preliminares interpuestas por el estado, presentadas por los representantes” 3.

\textsuperscript{103} Ibid., 6.
the delay caused by the Guatemalan state. In it, the Commission noted that the Guatemalan government only stated that the possibility to prosecute genocide in Guatemalan courts did technically exist, and that this possibility had yet to be exhausted when it argued the point before the Commission. Importantly, Inter-American system rules placed the burden of proving that domestic remedies remained available on the alleging party; simple allegations were not enough. However, in its opposition to the exception, Guatemala provided no supporting facts and failed to even note which general types of remedies remained available for the victims to pursue, much less a particular procedure. Although the Commission would have been legally justified granting the exception based solely on the government’s inadequate evidentiary support for its position, it turned to the real world application of the exception. The Commission noted that the events being litigated, the Plan de Sánchez massacre itself, occurred 20 years prior to the instant case. It additionally remarked that any Guatemalan domestic criminal proceedings, despite having been initiated 10 years before, remained in an investigatory stage with no intellectual authors of the massacre arrested, tried, or convicted. Accordingly, the Commission said this delay easily surpassed a reasonable time to investigate and prosecute those responsible.

104 Inter-American Commission on Human Rights, “Observaciones de la Comisión Interamericana de Derechos Humanos a las excepciones preliminares opuestas en el caso Masacre de Plan de Sánchez.”
105 Ibid., 4.
108 In criminal law contexts, the term “intellectual author” refers to one who plans a crime (an indirect perpetrator), as compared to a “material author,” one who commits the criminal acts (a direct perpetrator). Chantai Meloni, “Fragmentation of the Notion of Co-Perpetration in International Criminal Law?,” in The Diversification and Fragmentation of International Criminal Law, Larissa van den Herik and Carsten Stahn, eds. (Boston: Martinus Nijhoff Publishers, 2012), 492.
109 Ibid.
The parties’ inability to reach a settlement—or even to agree on what each side had agreed to—made it appear increasingly likely that the case would proceed to trial before the Inter-American Court. On 22 December 2003, the Court requested that the Commission provide a list of witnesses for potential testimony if the case proceeded to trial, and the Court notified both the victims and the Guatemalan government. On 19 February 2004, Antonio A. Cançado Trindade, the president of the Inter-American Court, issued a judicial order that gave the parties a final list of witnesses and experts that would testify at a public hearing addressing the government’s preliminary objections, the merits of the case, and potential reparations. Although the order contained nothing not already known, it produced one important and unexpected effect.  

On 24 April 2004, the Guatemalan government stunningly reversed its position, publicly reiterated Portillo’s statement recognizing the responsibility of the Guatemalan state in the Plan de Sánchez massacre, and withdrew its preliminary objections. In this public address, the state’s representative, Herbert Estuardo Meneses Coronado, admitted that the Guatemalan state violated the Plan de Sánchez survivors’ rights to personal integrity, judicial protection, judicial guarantees, equality before the law, freedom of religion, and freedom of association and expression. Importantly, while the state explicitly named which articles of the American Convention it violated, it chose not to address accusations of genocide, and instead called them “not a matter of the American Convention on Human Rights.”

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112 Ibid., 2.
The response to the government’s recognition of responsibility was swift and positive. The Commission noted that it “value[d] very positively the declaration,” and accepted the withdrawal of the government’s preliminary objections.\textsuperscript{113} Despite the government’s assertion that accusations of genocide did not apply, the Commission viewed the state’s recognition as an implicit acknowledgement of “the facts … as in the brief of arguments and evidence of the representatives of the victims.”\textsuperscript{114} Accordingly, the Commission viewed the state as having admitted to “a genocidal policy directed against the Mayan people” and asked the Inter-American Court to include those facts in the judicial record.\textsuperscript{115} Survivors also accepted the government’s recognition, calling it “one more step in the search for the elimination of impunity.”\textsuperscript{116} They echoed the Commission’s belief that the recognition “implie[d] acknowledgment of the merits of the facts alleged by the … Commission” that the massacre occurred “in the framework of a genocidal policy.”\textsuperscript{117} The victims also rejected the state’s offer for an amicable settlement, noting instead that they preferred for the Inter-American Court to solicit expert and witness testimony. This choice reflects the Maya legal values that drove their litigation. Survivors viewed the opportunity to be heard in court as “a form of reparation and integral restitution for the whole community [emphasis added]” previously denied in domestic Guatemalan courts.\textsuperscript{118} Rather than accepting the offer of guaranteed payments to individuals, the survivors remained consistent with Maya legal and cultural values and sought collective

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\item \textsuperscript{113} Inter-American Commission on Human Rights, “Posición de la Comisión Interamericana de Derechos Humanos en relación a la declaratoria del ilustre Estado de Guatemala realizada en la audiencia pública celebrada el 23 de abril de 2004 en el caso no. 11,673 sobre la masacre de Plan de Sánchez” (2004), 1.
\item \textsuperscript{114} Ibid., 1-2.
\item \textsuperscript{115} Ibid.
\item \textsuperscript{116} Ibid.
\item \textsuperscript{117} Ibid.
\item \textsuperscript{118} Ibid.
\end{itemize}
restitution. The Inter-American Court accepted the state’s acknowledgment and entered it, along with the facts as determined by the Commission, into the judicial record. The case could now proceed on its merits.

4.4 The Inter-American Court of Human Rights: Limitations of Law

The admission by the Guatemalan state of its involvement in the massacres facilitated a quick decision from the Inter-American Court. One week after the Guatemalan government again accepted responsibility for the Plan de Sánchez massacre, on 29 April 2004 the Inter-American Court issued its judgment on the case. The government’s admission, the Inter-American Court declared, removed “the controversy with respect to the facts.” The government’s statement of recognition served as a key piece in the final outcome of the case.

Based on the Guatemalan state’s recognition of responsibility, the Inter-American Court held that Guatemala violated the victims’ rights guaranteed by the American Convention. In particular, the Inter-American Court ruled that the state violated the following: the right to humane treatment; the right to a fair trial; the right to privacy; the right to freedom of conscience and religion; the right to freedom of thought and expression; the right to freedom of association; the right to property; the right to equal protection under the law; and the right to judicial protection. The Inter-American Court said that the Guatemalan state violated these rights by failing to respect and protect them as mandated by the American Convention. Although the Inter-American Court did not name the Plan de Sánchez massacre a genocidal act, this nonetheless


120 Inter-American Court of Human Rights, “Case of Plan de Sánchez Massacre v. Guatemala (Judgement on the Merits).”

121 Ibid., 21. In legal terms, a “controversy” is an ongoing dispute over the violation of rights that can be adjudicated in court.

122 Ibid.
represented a very important win for the survivors. A full picture of this ruling requires proper contextualization. Often, the text and meaning of judicial opinions merit contextualization with what might be termed “negative space.” This is to say, the words of a ruling can acquire meaning when read in the in context of what remains unsaid. Under the blanket of legal positivism, though, there were things that the Inter-American Court could not say.

In the Inter-American Court’s view, the Guatemalan state validated the facts as presented by the Commission by reissuing its recognition of culpability. These were the same facts that led the Commission to call the state’s scorched-earth counterinsurgency policy against the Maya genocidal in the Commission’s answers to the state’s preliminary objections to the Court.123 The Inter-American Court, however, agreed with the Guatemalan government on procedural grounds, and ruled that “with respect to the issue of genocide … the Court notes that in adjudicatory matters it is only competent to find violations of the American Convention and of other instruments of the inter-American system for the protection of human rights that enable it to do so.”124 Despite Guatemala’s status as a signatory to the Genocide Convention, the Genocide Convention was not (and still is not, as of the writing of this dissertation) controlling law for the Court. Rather, the Court is bound by the confines of the American Convention and other governing statutes. The American Convention had no genocide provision (and still does not), and therefore the Inter-American Court determined that it lacked the authority to make a legal determination of genocide. However, while the Inter-American Court had no legal ability to make a finding of genocide, it did note that “the facts such as those stated [in the Commission’s


application] … took place within a pattern of massacres [that] constitute an aggravated impact” that “this Court will take into account when it decides on reparations.” The survivors exposed an internal inconsistency of the Inter-American Court in that the court could not consider the merits of a claim of genocide but could use the actuality of that genocide in awarding damages.

The Plan de Sánchez survivors’ case revealed a number of problems inherent in the international legal framework. Guatemala had a statutory mechanism, Article 376 of the Guatemalan Penal Code, that criminalized genocide. Purportedly, this allows Guatemala to meet its domestic obligation as a signatory of the Genocide Convention to prosecute anyone who commits or orders genocide. However, attempts to see Ríos Montt and others prosecuted for genocide in Guatemalan courts went nowhere. Survivors then turned to the Inter-American human rights system, on the basis of violations of the system’s guiding legislation, the American Convention. Practically speaking, genocide always occurs in conjunction with other human rights abuses. In the Plan de Sánchez case, the presence of human rights abuses within the underlying genocidal pattern permitted the survivors to pursue justice in the Inter-American system when Guatemala’s domestic judicial system failed to prosecute the massacre despite the clear illegality of genocide in the Guatemalan penal code. However, the substantive gap between Article 376 of the Guatemalan Penal Code—and therefore the Genocide Convention itself—and the American Convention left the Court unable to declare that a genocide occurred. This gap exposed the limits of the Inter-American Court as a human rights court. Many consider genocide to be the gravest of human rights violations. However, the majority of the court declared it was

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125 Ibid.
127 Notably, under the American Convention, Article 63, the Court has no criminal jurisdiction, and can only order that “fair compensation be paid to the injured party.” Organization of American States, “American Convention on Human Rights.”
unable to even say that a genocide potentially occurred, let alone implement a judicial process to adjudicate such claims.

Not all on the Inter-American Court agreed that the court lacked the capacity to rule on whether the Guatemalan government committed genocide. Judge Sergio García Ramírez noted that the government’s recognition of the facts presented by the Commission invited the Inter-American Court to rule on the suit’s merits. García Ramírez said that the Guatemalan state effectively reiterated this invitation when it acquiesced to the facts in the Commission’s recommendations, both in writing to the Inter-American Court on 24 April 2004 and also in public statements on the same day. Despite this, the state simultaneously argued that the Inter-American Court lacked authority to rule on the facts. Additionally, while García Ramírez agreed that the Inter-American Court lacked the statutory authority for a formal determination of genocide, he said that the Inter-American Court remained free to look to other bodies of international law. Importantly, though, the Inter-American Court prohibits the direct application of law originating outside of its substantive jurisdictional limitations, but can be used “as elements of interpretation, assessment or judgment for a better understanding” of the intricacies of a case. In this regard, García Ramírez agreed with the Inter-American Court’s determination to consider the genocidal pattern when determining adequate reparations for the victims, even while it refused to consider if genocide occurred.

García Ramírez’s disagreement with the Inter-American Court’s determination in its 29 April 2004 judgment to solely apply the American Convention to the Plan de Sánchez case appears minor in comparison with that of another jurist on the court. In his ruling, Judge Antônio

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129 Ibid., 5.
Augusto Cançado Trindade said that the Inter-American Court could rule on genocide despite not having subject-matter jurisdiction under the American Convention.\(^{130}\) Noting that “the Inter-American Court has consistently invoked the general principles of law,” Cançado Trindade posited that contemporary international law condemns genocide and grave human rights violations in both general and treaty-based conceptions of law.\(^{131}\)

Rejecting a narrow, legally positivistic analysis, Cançado Trindade instead based his view on natural law theories, in particular what he called the “principle of humanity,” a belief that all people possess basic human dignity and are therefore entitled to human treatment. If, as Cançado Trindade said, “the human conscience is the material source of all law,” then “the laws of humanity and the requirements of the public conscience continue to be applicable, irrespective of the emergence of new situations.”\(^{132}\) Ultimately, it was the Maya survivors of Plan de Sánchez that convinced Cançado Trindade of this with their “eloquent testimony” on how they live in a “spiritual, individual and collective existence.”\(^{133}\) If “the fate of each one of them is inescapably linked to that of the other members of their communities,” why would it be any different for everyone in a global community? Cançado Trindade stated, therefore, that the prohibition of genocide remained an absolute principle of *jus cogens*, the “virtually universal” beliefs and normative practices that exist in international space from which no derogation is permitted.\(^{134}\)

Cançado Trindade’s opinion foreshadowed the results of other transnational efforts to see those responsible for the genocide prosecuted. He argued for the universality of the principle of humanity. This universality meant that the right to human dignity existed for everyone in all


\(^{131}\) Ibid., 4-5.

\(^{132}\) Ibid., 7.

\(^{133}\) Ibid., 13.

\(^{134}\) Ibid., 5.
places. It does not follow that all violations of this principle would likewise run afoul of the law. However, in many instances the law and the principle of humanity overlap, such as statutory prohibitions on rape, murder, and other heinous crimes. In some instances, though, legal principles and mechanisms serve to bridge the gaps between statutory schemes and/or procedural results, such as the gap between the Guatemalan legal system’s failure to meaningfully pursue charges of genocide and the textual limitations of the American Convention. The concept of *jus cogens*, that there are some norms so pervasive and accepted that deviating from them is an international crime, is one of these principles. Following Cançado Trindade’s reasoning, the *jus cogens* prohibition of genocide intersected with *erga omnes* obligations, the obligations that individual states and international courts have toward the international community as a whole. Effectively, Cançado Trindade argued that states and international courts are obligated to pursue claims of violations of *jus cogens* peremptory norms. Accordingly, a judicial determination of genocide was not only permitted in the Plan de Sánchez case, Cançado Trindade suggested. It was required.

### 4.5 Reparations? Judicial Silence and Collective Recompense

When it came time for the Inter-American Court to issue its ruling on reparations, it again had the opportunity to make a legal determination of genocide. At the reparation award stage of a case, the Inter-American Court considers the requests of the Commission and the plaintiffs. The Inter-American Court spent the first portion of its award going over pecuniary damages, essentially granting a bulk of funds to be paid to victims and their relatives. Neither party nor the Commission made any requests for money damages for genocide; accordingly, the Inter-
American Court did not address genocide in its pecuniary award. Additionally, although the victims sought direct redress for non-pecuniary injuries, such as continued mental distress, suffering, anguish, and the ongoing destruction of the social fabric of the Maya community, they again made no request for a finding of genocide. However, when the Inter-American Court turned to what it called “other forms of reparation,” both the Commission and the victims directly requested a legal verdict of genocide. The Commission said that the Inter-American Court, in determining proper reparations for the victims, could only do so by “recognizing the magnitude of the genocidal acts” committed by the state. Accounting for the past remained impossible so long as the refusal to fully account for it persisted.

Survivors continued to pressure the Guatemalan state to atone for that past. Unsurprisingly, the survivors were more direct than the Commission in their demands for a recognition of governmental responsibility. Survivors asked the Inter-American Court to declare that “the people of the municipality of Rabinal … were the direct victims of genocidal acts during the internal armed conflict.” Part of their compensatory request entailed the construction of a monument in Rabinal’s central square in memory of the victims, made in consultation with civil society organizations. This request indicated a recognition by the survivors of the import of the Inter-American Court’s ruling to the future memory of the events in Plan de Sánchez.

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136 Ibid., 77-89.
137 Ibid., 89.
138 Ibid.
139 Ibid., 91.
After the Inter-American Court ruled in favor of the Plan de Sánchez survivors, it addressed the issue of proper damages. The Inter-American Court weighed the various injuries and losses from the plaintiffs, ultimately awarding payments to individual survivors totaling nearly US$8 million.\footnote{Inter-American Court of Human Rights, \textit{Case of Plan de Sánchez Massacre v. Guatemala (Reparations)} (2004), 73-93.} In considering a supplemental award, the Inter-American Court opened by noting that “the extreme gravity of the facts and the collective nature of the damage produced” by the massacre resulted in “public repercussions.”\footnote{Ibid., 93.} The redress for those public repercussions, as requested by the victims, was for the Inter-American Court to say that the Plan de Sánchez massacre occurred through and within a scorched-earth, genocidal counterinsurgency policy. The Court, however, avoided just that. Rather, it listed the facts, and in great detail described the Guatemalan state’s failure to prosecute any individuals for the Plan de Sánchez massacre.\footnote{Ibid., 93-94.} After ordering that the state begin another investigation and prosecutorial effort, the Inter-American Court made a number of correlative rulings: the translation of the judgment into Achi Maya; the publication of portions of the ruling; the establishment of a fund dedicated to creating a public space to pay homage to victims; the provision of housing and medical care to victims; and the establishment of health, education, and infrastructure programs.\footnote{Ibid., 95-97.} Nowhere in the Inter-American Court’s ruling did it even remotely address the victims’ request to have the genocide be named.

Despite this failure to address the central issue of the case—was it genocide?—the Inter-American Court’s concurring opinions reflected, at least in part, the position of the survivors. Judge Cançado Trindade viewed the failure to label the massacre part of a genocidal pattern as a
serious failure of the court. In beginning his concurring opinion, Cançado Trindade focused on
the fact that the state deliberately committed the massacre. This view conflicted with the Inter-
American Court ruling that held that the state negligently failed to protect the rights of the
residents of Plan de Sánchez.\textsuperscript{144} Guatemala not only breached its duty to act as a human rights
provider and protector, but also acted “conclusively” with the “intention to cause damage” to the
Mayan people.\textsuperscript{145} To this end, Cançado Trindade ruled that the overall pattern of behavior by the
Guatemalan state against the Plan de Sánchez Maya was “part of a state policy” that was
“conceived, planned and authorized … and brutally executed … in order to ‘destroy an ethnic
group.’”\textsuperscript{146} For Cançado Trindade, this policy was further exemplified by the fact that “the Plan
de Sánchez massacre was \textit{but one} of the 626 State massacres that comprised an explicit pattern
of extermination, executed over a brief period of time [emphasis added].”\textsuperscript{147} Cançado Trindade
viewed the “explicit pattern of extermination” as a genocidal one, but he remained unable to
overcome the structural inadequacies produced by the Inter-American system’s reliance on and
deference to positive law.

Another concurring opinion more closely adopted the views of the survivors. Despite
noting that the crimes alluded to by the victims and the Commission lay outside the scope of the
American Convention, Judge Sergio García Ramírez accurately stated that the provision of
“adequate protection” for both collective and individual rights “do[es] not arise from recent laws,
which merely recognize such rights.”\textsuperscript{148} Rather, the bedrock of these rights rests in natural law

\begin{itemize}
\item \textsuperscript{144} Antônio Augusto Cançado Trindade, “Separate Opinion of Judge A.A. Cançado Trindade.”
\item \textsuperscript{145} Ibid., 2.
\item \textsuperscript{146} Ibid., 5.
\item \textsuperscript{147} Ibid., 6.
\item \textsuperscript{148} Sergio García Ramírez, “Separate Concurring Opinion of Judge Sergio García Ramírez in the Judgment
\end{itemize}
concepts that “constitute a timeless basis for the social relationships of a large part of the
Americas.” These rights do not have to be legislated into existence, as “community rights”
have “significant legal, ethical, and historical value,” justifying them as “human rights with the
same ranking as any treaty-based rights.” Survivors brought the case that required the
international human rights apparatus to account for the notions of collective rights that are still
contrary to the foundational underpinnings of the international system. García Ramírez noted
that one objective of the Inter-American system is “to restore social peace and tranquility based
on … justice.” Pursuant to this belief, reparations for the survivors of human rights violations
should facilitate their sense of justice. But the Plan de Sánchez survivors clearly stated that, for
them, justice meant calling what happened to them what they said happened: genocide.

4.6 Justice Inspired: The Lasting Impact of the Plan de Sánchez Case

Despite the 2004 groundbreaking ruling for the Plan de Sánchez survivors, implementation of that ruling produced mixed results. As of 2007, the state had paid roughly
two-thirds of the compensation awarded to the survivors. However, in early 2011, the Inter-
American Court observed that the state had yet to initiate any investigation that resulted in any
criminal prosecution of those involved with the massacre. Just over one year later, Lucas
Tecú, the commander of the army garrison at Plan de Sánchez at the time of the massacre, and
his four co-defendants were found guilty in Guatemalan courts. In 2015, Guatemalan informed
the Inter-American Court that it had outstanding arrest warrants for two others who remained at

149 Ibid.
150 Ibid.
151 Ibid.
152 Duffy, Strategic Human Rights Litigation, 128.
153 Inter-American Court of Human Rights, “Supervisión de cumplimiento de sentencias respecto de la
obligación de investigar, juzgar y, de ser el caso, sancionar a los responsables de las violaciones a los derechos
humanos” (2015).
large. One of these suspects filed an *amparo* proceeding, a constitutional mechanism native to Latin American courts for the protection of constitutional rights.\textsuperscript{154} This *amparo* attempted to force the application of the National Reconciliation Law, an action the Inter-American Court called a stalling tactic. The Inter-American Court commended the state for the five convictions and two ongoing investigations, which it said “contributed to the eradication of impunity.”\textsuperscript{155}

The Plan de Sánchez case began with the goal of opposing the deeply entrenched pattern of impunity in Guatemala. Helen Duffy, one of the survivors’ original attorneys in the 1990s, noted that the obligation of the Guatemalan government to investigate, prosecute, and punish those responsible for the massacre exposed the state’s failure to pursue justice for events that occurred during the internal armed conflict.\textsuperscript{156} With an international spotlight highlighting the ongoing abuses of the Guatemalan state, the government quickly reached “amicable” settlements in other cases of massacres and human rights abuses.\textsuperscript{157} Additionally, the prosecutorial framework established by Plan de Sánchez survivors unfolded alongside the efforts of Nobel Peace Prize winner Rigoberta Mechú Tum to prosecute Gen. Efraín Ríos Montt in Spain under the controversial doctrine of universal jurisdiction. Both the Plan de Sánchez case and the Spanish case later informed Guatemala’s domestic prosecution of Ríos Montt, the first such prosecution for genocide of a former head of state in his or her own country.

\subsection*{4.7 Conclusion}

At every stage, Plan de Sánchez survivors navigated the space between their sociolegal values and the principles governing international legal institutions. While in this space, survivors

\textsuperscript{154} This same type of constitutional challenge served as the basis for Efraín Ríos Montt’s appeal of his 2012 conviction for genocide.
\textsuperscript{155} Ibid., 33.
\textsuperscript{156} Duffy, *Strategic Human Rights Litigation*.
\textsuperscript{157} Ibid., 130.
pushed back against the differences between their views and those imposed by Western legal structures. On one side, the survivors based their legal values on the paradigms and customs that had structured indigenous community governance since the 1500s. The law, as an extension of these norms, existed to maintain order, balance, and harmony between humans, nature, and the cosmos. Rights were given by nature and belonged to groups. On the other side, the Inter-American system, a Westphalian structure, viewed rights through a western prism of legal positivism and recognized the primacy of the rights of the individual. Survivors refused to accept the positive limitations of the Inter-American system and forced it to account for and at times adopt their sociolegal beliefs through resistance to the substantive legal differences between their views and those embedded in the Inter-American Court. By repeatedly contesting an otherwise foregone conclusion—that notions of rights are defined by the governing structural mechanisms of international law alone—survivors changed jurisprudential perspectives within the supranational system and challenged broader understandings of international law.

Importantly, changes brought through these negotiations between legal orientations were dialogical, not unilateral. While survivors forced the Inter-American system to engage with their sociolegal attitudes, they also had to confront and contend with the oppositional views advanced by the supranational body. These views similarly encouraged changes in the perspectives of the Plan de Sánchez survivors. Actors, indigenous groups, and social movements from the Global South impacted and changed broader legal institutions through resistance to them. However, this resistance made possible the simultaneous opposite flow of legal influence on resistors from the Global South resistors and facilitated the shaping of sociolegal attitudes at the periphery.

The Plan de Sánchez survivors’ resistance and legal activism are an excellent example of how humble historical actors from the Global South can shape international legal structures and
their underlying laws, and in the process rehabilitate these structures from their historical imperial roots. In their filings, the Plan de Sánchez survivors eased the limitations of textual interpretation from within the international system, encouraging the recognition of collective rights. One common, and not inaccurate, criticism of international legal structures is that they marginalize indigenous and Global South actors, forcing them to adapt to western notions of legality. However, the Plan de Sánchez case shows how social movements and indigenous groups shape international legal structures from within. Importantly, grassroots efforts to prosecute those involved in the Guatemalan massacre continued this process of challenging legal institutions outside of Guatemala, most notably in Spain.
Table 4-1 Timeline: Plan de Sánchez Massacre v. Guatemala

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 July 1982</td>
<td>Guatemalan army attacks civilian population in village of Plan de Sánchez, Baja Verapaz Department</td>
</tr>
<tr>
<td>1992</td>
<td>Survivors inform judicial authorities of location of clandestine mass grave</td>
</tr>
<tr>
<td>10 December 1992</td>
<td>Survivors file petition with Guatemalan Human Rights Ombudsman (PDDHH)</td>
</tr>
<tr>
<td>7 May 1993</td>
<td>PDDHH petitions Public Prosecutor’s Office to open criminal investigation, leads to case No. 391/93 in Salamá</td>
</tr>
<tr>
<td>1995</td>
<td>Survivors meet with CALDH lawyers to determine strategy</td>
</tr>
<tr>
<td>6 May 1996</td>
<td>Public Prosecutor expands case after second mass grave discovered</td>
</tr>
<tr>
<td>2 September 1996</td>
<td>PDDHH names armed forces and PAC responsible for the massacre</td>
</tr>
<tr>
<td>25 October 1996</td>
<td>CALDH files Petition 11.763 with Commission</td>
</tr>
<tr>
<td>1 July 1997</td>
<td>Commission opens case No. 11.763</td>
</tr>
<tr>
<td>9 October 1997</td>
<td>Guatemalan state contests Commission’s jurisdiction</td>
</tr>
<tr>
<td>25 February 1999</td>
<td>CEH released Truth Commission report</td>
</tr>
<tr>
<td>9 August 2000</td>
<td>President Portillo acknowledges Guatemalan responsibility for Plan de Sánchez massacre</td>
</tr>
<tr>
<td>11 November 2001</td>
<td>Meeting for parties to present their case</td>
</tr>
<tr>
<td>28 February 2002</td>
<td>Commission provides recommendations for Guatemalan state to remediate human rights violations</td>
</tr>
<tr>
<td>1 July 2002</td>
<td>Guatemalan state accepts facts as presented in survivors’ complaint</td>
</tr>
<tr>
<td>31 July 2002</td>
<td>Commission files application to Inter-American Court to open Plan de Sánchez massacre case against Guatemalan state</td>
</tr>
<tr>
<td>22 August 2002</td>
<td>Inter-American Court notifies the parties it accepted the case</td>
</tr>
<tr>
<td>27 September 2002</td>
<td>Survivors file brief with pleadings and evidentiary support to Inter-American Court</td>
</tr>
<tr>
<td>Date</td>
<td>Event</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>3 October 2002</td>
<td>Guatemalan state responds to plaintiff’s brief with objections</td>
</tr>
<tr>
<td>11 November 2002</td>
<td>Survivors issue reply to state response</td>
</tr>
<tr>
<td>27 November 2002</td>
<td>Commission issues reply to state response</td>
</tr>
<tr>
<td>22 December 2003</td>
<td>Inter-American Court requests list of potential witnesses from Commission</td>
</tr>
<tr>
<td>19 February 2004</td>
<td>Inter-American Court issues final list of witnesses and experts</td>
</tr>
<tr>
<td>24 April 2004</td>
<td>Guatemalan state publicly restates recognition of responsibility and withdraws objections</td>
</tr>
<tr>
<td>29 April 2004</td>
<td>Inter-American Court issues judgment</td>
</tr>
<tr>
<td>2011</td>
<td>Inter-American Court notifies state that it had not abided by order to pursue prosecution of massacre perpetrators</td>
</tr>
<tr>
<td>20 March 2012</td>
<td>Former Plan de Sánchez garrison commander Lucas Tecú and four others sentenced to 7,710 years in prison</td>
</tr>
<tr>
<td>2015</td>
<td>Guatemalan state informs Inter-American Court it has two outstanding warrants for at-large suspects</td>
</tr>
</tbody>
</table>
5 CHAPTER FOUR: GRASSROOTS JUSTICE IN TRANSNATIONAL SPACE:
UNIVERSAL JURISDICTION, SUBSIDIARITY, AND NEOCOLONIALITY, 1999-
2014

We have learned that change cannot come through war. War is not a feasible tool to use in fighting against the oppression we face.

—Rigoberta Menchú.¹

The Achi Maya survivors of Plan de Sánchez who turned to the Inter-American human rights protection apparatus due to inaction within the Guatemala’s justice system were not the only Guatemalan victims of human rights violations looking for justice. Survivors of massacres from across the country, such as Dos Erres in the northern Petén Department, similarly took the Guatemalan state to court. Meanwhile, thousands of people descended upon the various regional offices of MINUGUA, the UN mission created to verify progress in human rights in Guatemala following the 1996 finalizing of the peace accords, and to provide firsthand accounts of human rights violations committed by the armed forces. Increasingly, indigenous survivors, like those who lobbied the US Congress during the close of the civil war or those who filed suit in the Inter-American system, used inter and transnational legal practices and procedures to hold the Guatemalan state accountable for its crimes.²

¹ Mildred Alejandra Ortiz Martinez, “El turismo en Putumayo como una herramienta de construcción de paz territorial: Aportes desde la Reseva Paway” (National University of Colombia, 2019).

In 1999, K’iche’ Maya activist Rigoberta Menchú Tum, winner of the 1992 Nobel Peace Prize for her human rights work, filed a suit in Spanish national courts against the Guatemalan military for acts of genocide committed during the civil war. Menchú was the daughter of Vicente Menchú, a leader of the CUC, the indigenous-led labor organization formed in the late-1970s. In 1980, members of the CUC, including Vicente Menchú and his son, occupied the Spanish Embassy in Guatemala City to draw attention to the plight of the rural poor. The government responded with the military, who barricaded the doors to the embassy. The embassy soon caught fire, killing 39 people trapped inside when police chief Pedro García Arredondo ordered policemen to prevent anyone from exiting the building. Among those who perished in the fire, including Rigoberta Menchú’s father and brother, were the Spanish consul and two Guatemalan politicians, former-Vice President Eduardo Caceres Lenhoff and former Foreign Minister Adolfo Molina Orantes.

Rather than looking toward the Inter-American system, Rigoberta Menchú and allied activists turned to foreign national courts. Nineteen years after the burning of the embassy, Menchú filed suit in Spain and accused eight former Guatemalan officials, including three former heads of state, of committing genocide and other crimes against humanity during Guatemala’s civil war. The suit listed among the victims those that died in the Embassy fire, including Menchú’s father and brother. Despite occurring outside of Spain’s jurisdictional

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3 For a timeline of the Guatemalan genocide case in Spain, see Table 5.1.


5 The defendants were former heads of state Efrain Ríos Montt, Fernando Romeo Lucas García and Óscar Humberto Mejía Victores, Ángel Aníbal Guevara Rodríguez (former Minister of Defense), Donaldo Álvarez Ruiz (former Minister of Interior), Manuel Benedicto Lucas García (former Chief of the Armed Forces General Staff), Chupina Barahona (former Director of National Police Germán) and Pedro García Arredondo, a police captain.
boundaries, Menchú applied Spain’s statute of universal jurisdiction that gave Spain authority over certain extraterritorial crimes.\(^6\) Through her suit, Menchú and the Guatemalan grassroots used this mechanism of international law to challenge the right-wing Guatemalan dictatorships propped up by international support.

Some academics, despite recognizing the benefit that international legal systems can have, have criticized international law for its latent power disparity and privileging of First World nations over the Global South. According to these scholars, this disparity results from the way that the international system developed.\(^7\) Likewise, universal jurisdiction elicits similar criticism and praise. Some prominent foreign policy and international relations practitioners argue that universal jurisdiction threatens state sovereignty.\(^8\) However, scholars such as Harmen van der Wilt contend that the realities of international law mitigate any harm to state sovereignty produced by the use of universal jurisdiction.\(^9\) Van der Wilt argues that the principle of subsidiarity, whereby spaces exercising original jurisdiction take priority over those with

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\(^6\) Universal jurisdiction is a legal doctrine “based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.” Stephen Macedo, ed., *The Princeton Principles on Universal Jurisdiction* (Princeton: Princeton University Press, 2001), 16. This doctrine is used by the International Criminal Court to prosecute war crimes and crimes against humanity, but only recently has been applied to various domestic courts. Although traditional notions of criminal jurisprudence dictate that jurisdiction is determined by where a crime was committed, universal jurisdiction grants authority to try a case “based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” Ibid., 28.


universal jurisdiction, eliminates the threat that universal jurisdiction poses to state sovereignty. Additionally, Pamela J. Stephens argues that states can use universal jurisdiction to allow their national courts to change international legal discourse through decisions that other nations can use in creating their own doctrines.

Scholars who view international law from the perspective of the Global South tend to view universal jurisdiction with suspicion. These academics view it as a potential form of legal colonialism, whereby prosecution through universal jurisdiction exists on an international axis of power. For these scholars, universal and extraterritorial jurisdiction allow powerful nations to exercise dominance over the Global South, and rarely if ever the reverse. Menchú’s suit, however, represented a departure from this pattern. The particulars of Spanish law allowed Menchú to file charges with relative independence from the coercive implications of international law.

The allegations in the Guatemalan suit in Spain did more than merely threaten dictators and members of their internationally supported regimes. Rather, Menchú’s suit challenged accepted notions of international law. Grassroots resistance to the structural limitations of the Genocide Convention paved a pathway to the potential prosecution of political genocide and revealed the ongoing trauma that indigenous groups and survivors still bravely faced. Notably, these challenges came through the application of Spain’s universal jurisdiction statute. The Guatemalan genocide case in Spain revealed that international law forces Global Southern actors to often accept and work within its framework to simultaneously resist its implicit coerciveness.

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10 Van der Wilt also notes the physical limitations of universal jurisdiction: a nation cannot ever exercise jurisdiction over a subject that is not corporeally within the territory of the prosecuting state. Ibid., 1050.


and hegemonic processes that facilitate dominance of the Global North over the Global South. As Amy Ross notes, international and domestic pursuits of justice are increasingly linked by networks of legal actors. These links, Ross argues, prompted discursive change in both Spanish law and Guatemalan attempts to obtain justice.\textsuperscript{13} However, the legalities of the Guatemalan genocide case in Spain did more than prompt legal change or facilitate the international flow of law. Rather, by choosing to pursue justice via mechanisms of international law, indigenous Guatemalans turned the hegemonic international legal apparatus on itself. In so doing, this chapter argues, grassroots Mayan activists not only challenged the international power structures that facilitated the genocidal acts committed against the Mayan people, but also the dominant-subordinate relationship between the Global North and the Global South.

This chapter opens by exploring the initial arguments that Menchú and the CALDH made in their effort to present a \textit{prima facie} case of genocide under Spanish law.\textsuperscript{14} In making the case, Menchú’s legal team successfully argued the distinction between motive and intent first established by the Plan de Sánchez survivors in the Inter-American system. Additionally, Menchú showed how Ríos Montt manipulated the Guatemalan legal system in ways that were necessary to facilitate the genocide. The second section of the chapter addresses the attempt to try the former Guatemalan officials in Spanish courts using Spain’s universal jurisdiction statute. Just as other survivors acquiesced to the requirements of the Inter-American human rights protection apparatus to seek justice (see Chapter 3), Menchú and her team challenged the international legal framework from within by submitting to international law while also resisting it. Section 3 focuses on the effects of Guatemala’s long history of judicial impunity on the

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\textsuperscript{14} In legal terminology, a \textit{prima facie} case exists when the evidence presented to the court is sufficient to justify a ruling in the party’s favor should the other side fail or refuse to rebut any evidence or arguments.
Spanish application of universal jurisdiction. In arguing for the use of universal jurisdiction, Menchú needed to prove to Spanish courts that the Guatemalan legal system had deliberately neglected to pursue her case. Implicitly, though, this recognized the authority of the Spanish judiciary to render judgment on the efficacy of Guatemala’s criminal justice system, recreating the metropole-periphery power dynamics from the two countries’ colonial relationship. The court ruled against Menchú, and her team’s appeal of the ruling is the subject of Section 4. This appeal resulted in a tightening of the requirements for the use of universal jurisdiction after the court ruled against Menchú. However, the CALDH team’s arguments resonated with many members of the court, who based their reasoning on grounds outside of the legal positivism that characterized the judicial practices of Guatemalan, international, and supranational courts, and instead ruled based on principles that more closely echoed Maya legal values. The fifth section addresses Menchú and her team’s final appeal to the Spanish Constitutional Court. The Constitutional Court largely rejected the legal reasoning of the lower courts and instead embraced the legal arguments made by indigenous Guatemalans. The court’s analysis applied natural law principles to the case, expanding universal jurisdiction in a way that recognized the growing import of social movements in transnational space.

5.1 Making a Case – Indigenous Movements in a Foreign Court

On 2 December 1999, Rigoberta Menchú Tum, through her non-profit Fundación Rigoberta Menchú Tum (Rigoberta Menchú Tum Foundation or FRMT) filed a criminal complaint in the Criminal Chamber of Spain’s Audiencia Nacional, Spain’s centralized, national court system with jurisdiction over Spanish territory.¹⁵ A group of other survivors joined the

lawsuit, as did a number of NGOs such as the *Asociación Libre de Abogados* (Free Association of Lawyers or ALA) and the *Asociación Contra la Tortura* (Association Against Torture or ACT). The *Audiencia* had “original” jurisdiction over a variety of subjects including international criminal cases under the protection of the Spanish constitution. Menchú’s legal team relied on the findings of the *Comisión para la Esclarecimiento Histórico* (Commission for Historical Clarification or CEH, the Guatemalan “Truth Commission”) in formulating her complaint. In it, Menchú accused the three Guatemalan dictators who ruled Guatemala from 1978 to 1986, Generals Fernando Romeo Lucas García (1978-1982), Efraín Ríos Montt (1982-1983), and Óscar Humberto Mejía Víctores (1983-1986), and four other former cabinet and military officials, of planning and orchestrating acts of genocide, torture, and state terror.

The case that the Menchú team made before the *Audiencia Nacional* had several important implications. The defendants relied, as they would again later in Guatemalan national courts, on the exclusion of ideological genocide from the Spanish codification of the Genocide Convention. Menchú’s lawyers, though, successfully argued around this and laid the foundation for future challenges of this restriction. The legal team challenged principles of international law by calling for an expansive jurisdictional precedent, but doing so required simultaneous acceptance of the law’s reach. The *Audiencia*, however, rejected Menchú’s approach and instead

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17 “Original jurisdiction” means that a court has the right to preside over a case at the initial trial level, as compared to appellate jurisdiction, where a higher court rules on an appeal of a lower court decision.
18 Menchú Tum, *Al juzgado central de instrucción de guardia de la Audiencia Nacional*, 1. The Commission for Historical Clarification (CEH) operated from 1997 to 1999 and investigated and reported the facts of the Guatemalan internal armed conflict with objectivity, equity, and impartiality. The CEH paid particular attention to human rights violations and massacres.
applied a legal principle whereby Spain affirmed its ability to judge legal systems of the Global South, echoing the legal dominant-subordinate relationships of Spain’s colonial past.

Menchú bore the burden of showing that genocide occurred as defined by Spanish law in order to pursue a charge in Spanish court.\textsuperscript{19} The Spanish genocide statute largely conformed to the text of the Genocide Convention and allowed the prosecution of those who commit a series of specific types of acts “aiming to fully or partially exterminate a national, ethnic, racial, religious or specific group determined by the disability of its members.”\textsuperscript{20} In any genocide allegation, establishing the underlying criminal intent remains the most elusive aspect of criminal prosecution. Notably, the statute did not contemplate the mass murder of political groups or opponents as genocide. Accordingly, the purpose of the massacres of the Maya became a key point for the case.

Menchú distinguished the requisite criminal intent from any claims of political genocide. During the civil war, the Guatemalan military viewed the Maya as a “collective enemy of the State” and grouped them with insurgent Marxists.\textsuperscript{21} Accordingly, Menchú contextualized assaults on the Maya within the Cold War, acknowledging that anti-leftist political ideology largely drove the military’s genocidal acts.\textsuperscript{22} However, the Spanish genocide statute, like its

\textsuperscript{19} Notably, under Spanish law a civilian can file a criminal complaint over the objection of Spanish prosecutors.

\textsuperscript{20} \textit{Criminal Code of the Kingdom of Spain, 607} (Spain: 1995). Compare this with the UN Convention for the Prevention and Punishment of the Crime of Genocide, ratified by Guatemala by Decree 704 on November 30, 1949. It provides that genocide is “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; [and/or] (e) forcibly transferring children of the group to another group.” United Nations General Assembly, \textit{Convention on the Prevention and Punishment of the Crime of Genocide, No. 1021} (United Nations General Assembly, 9 December 1948).


\textsuperscript{22} Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 23.
international forebear, did not include political groups in its list of potential victims. Menchú’s, however, lawyers argued that “this does not mean that political motivations have been excluded as reasons for the commission of genocide.”

Rather, Menchú reasoned that when motives drive actions with a desired result—the total or partial destruction of a group—those motives do not negate culpability for genocide. As Menchú noted in court documents, political ideology often motivated the destruction of various groups, but this fails to negate the potential for genocide. Instead, political motives produce potentially genocidal acts when they manifest against a national, ethnic, racial, or religious group.

Mayan victims were killed independent of any membership in Guatemala’s insurgent left, and instead were murdered solely due to membership in an ethnic group.

The military’s policy toward the Maya during Ríos Montt’s regime was to view the entire indigenous population as subversive. Ríos Montt, countering the Mao Tse-Tung statement that “the guerrilla must move amongst the people as a fish swims in the sea,” described his strategy as “removing the water from the fish.” By eliminating indigenous support (the sea), the insurgency (the fish) could not survive. Pursuant to this counterinsurgency strategy, the Guatemalan military led a “reiteration of destructive acts, directed systematically against groups of the Mayan population.”

This pattern of attacks against the Guatemalan Maya had “only [one] common denominator, … the fact that they belonged to a specific ethnic group,” not that

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23 Ibid.


they belonged to particular political ideology.\textsuperscript{27} The social character of the pattern of violence further evidenced that the military acted with the intent to destroy the Maya. The army, Menchú’s filing showed, deliberately attacked in situations of high relative indigenous population density, in particular during village celebrations or on market days where large numbers would be gathered together.\textsuperscript{28} Additionally, the army attacked displaced persons who posed no risk, some of whom were “minors who could not possibly have been military targets,” and continued physical and sexual assaults on those already captive and under supervision.\textsuperscript{29} Menchú argued that the systematic scope of the violence—particularly in the Ixil region where between 70 and 90 percent of villages were razed—resulted in the “destruction of social cohesion.”\textsuperscript{30} This destruction “correspond[ed] to the intent to annihilate the [Maya], physically and spiritually,” the true goal of the armed forces.\textsuperscript{31}

The scope of Rigoberta Menchú’s complaint went beyond genocide, however. She detailed the systematic practice of torture by the Guatemalan armed forces on political and social detainees.\textsuperscript{32} This torture fractured social cohesion. When detainees returned to their communities with marks of torture, marks also seen on corpses, they became bearers of “messages of torture” designed to provoke psychological terror.\textsuperscript{33} Torture resulting in psychological terror and mental harm often overlaps the prescribed acts of the genocide statute.

In fact, torture represented only one aspect of the systemic use of state terror by the Guatemalan state. Notionally, a standard definition of state terrorism is terrorist acts committed

\textsuperscript{27} Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 14.
\textsuperscript{28} Ibid., 15.
\textsuperscript{29} Ibid., 14-15.
\textsuperscript{30} Commission for Historical Clarification, \textit{Memory of Silence}, 40.
\textsuperscript{31} Ibid.
\textsuperscript{32} Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 28.
\textsuperscript{33} Ibid.
by one state against another state, its citizens, or acts of cruelty committed against its own people.\textsuperscript{34} Torture, internal displacement, kidnapping, rape, and mass killings traditionally are among the acts referred to in shorthand as state terror. These atrocities were prevalent in the civil war. However, focusing solely on overt examples of state terror ignores the systematic complexity of its use by the Guatemalan military.

Analysis of state terror beyond superficial levels reveals more subtle expressions of violence. In Guatemala, terror generated by the state became so pervasive that manifestations of terror at times did not appear violent at all. Recognizing that legitimate governments result from legal constructs that purportedly represent the people, state terror can include governmental actions outside of the law against other sectors of government designed to frustrate the actions of those sectors.\textsuperscript{35} The Guatemalan military did this through its legal schemes enacted during the early stages of Ríos Montt’s regime first by issuing Decree 24-82, also called the Fundamental Statute of Government (as discussed in Chapter 1).\textsuperscript{36} This statute replaced the Constitution of 1985 as Guatemala’s organizing law, and authorized full military control of the state. Ríos Montt quickly established secret courts and legalized extrajudicial executions.

Additionally, this law, the Fundamental Statute of Government, allowed the military to mount its “invasion” of the judiciary through the passage of Decree 33-82. These actions left “the essential norms of the legal organization in the basket of useless things” and effectively circumscribed the legal system.\textsuperscript{37} The Menchú team argued that Decree 24-82’s suspension of

\textsuperscript{34} Anthony Aust, \textit{Handbook of International Law}, 2nd ed. (New York: Cambridge University Press, 2010), 265.

\textsuperscript{35} Menchú noted that military awareness for most targets of state terror came through extralegal means. Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 31 (noting that information gathering existed in the purview of intelligence services and the PACs, but never was the product of judicial action).

\textsuperscript{36} For a more detailed discussion of the Decree Laws passed in the 1970s and 1980s, see Chapter 1.

\textsuperscript{37} Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 31.
constitutional guarantees did not truly free members of the armed services to commit atrocities until it was coupled with the judicial inaction that resulted from the military’s takeover of the judiciary. The Guatemalan public’s experience with this “terror was not reduced to violent acts or military operations, … [but] also depended on … the impunity of the executioners.” Knowing that no meaningful possibility of punishment existed for the perpetrators of atrocities meant that “terror [did] not automatically end when levels of violence decrease[d].” Judicial impunity, therefore, both encouraged acts of terror and prevented survivors and victims from moving past them.

In fact, military cooptation of the judiciary enabled terror and precluded societal reconciliation. Public peace, Menchú argued, could not exist alongside “the systematic violation of fundamental rights and guarantees.” The state’s role in facilitating the absence of the rule of law only made the incompatibility of public peace and systemic violations of fundamental rights more acute. The military’s takeover of the justice system, though non-violent, constituted an act of terror against the Guatemalan people.

Menchú also challenged the military’s justification for their acts of terror. The military argued, both during and after the internal armed conflict, that repressive actions were a necessary response to threats posed by armed insurgent guerrillas. Menchú, however, posited that governmental repression and state terror constituted a rupture of “the dialectical relationship between the government and the governed.” For Menchú, Guatemala’s use of state terror was not reactive, as the state argued, but rather was “the instrument to ensure compliance.”

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38 Ibid., 29.
39 Ibid.
40 Menchú Tum, Al juzgado central de instrucción de guardia de la Audiencia Nacional, 33.
41 Ibid., 32.
42 Ibid.
state terror cannot have peace as a legitimate goal. Ending violence, Menchú argued, remains impossible so long as violence itself is the objective.

5.2 Extraterritorial Jurisdiction and the Limits of Modern Universality

Satisfaction of the statutory components of genocide, torture, and state terror did not alone allow prosecution in Spanish courts. Rather, Menchú needed to show that the Audiencia Nacional was competent to try her case, that the court had jurisdiction. However, filing the complaint against Guatemalan officials in Spain rather than in Guatemala generated the most controversy of any aspect of the suit. In broad strokes, national courts have jurisdiction over cases involving their people or occurring in their territory. Accordingly, Menchú needed to convince the court that it had the authority to administer justice for events that happened thousands of miles outside of its territorial jurisdiction.

Past precedent supported the locale of Menchú’s filing despite the legal controversy. On October 10, 1998, a Spanish court issued an international arrest warrant for Chilean General Augusto José Ramón Pinochet Ugarte for crimes against humanity and human rights violations committed during his 17-year regime from 1973 to 1990. The court issued the warrant pursuant to Article 23.4 of the Ley Orgánica del Poder Judicial (Organic Law of the Judiciary or LOPJ), providing Spain jurisdiction over “acts perpetrated by Spanish citizens or foreigners outside Spanish territory … where they can be categorized as … genocide, crimes against humanity, … crimes of torture or against moral integrity … [and] terrorism.” The charges against Pinochet included 94 counts of torture of Spanish citizens. One week later, while visiting the United Kingdom to seek medical treatment, Pinochet was arrested in London by British police pursuant

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to the Spanish arrest warrant. He later returned to Chile and died in 2006 without ever standing trial for his accused crimes.\textsuperscript{45}

Menchú adopted a similar approach to the Pinochet case in her argument for Spanish jurisdiction. She applied the same law that provided Spanish courts with jurisdiction over Pinochet, LOPJ Article 23.4.\textsuperscript{46} Specifically, the complaint argued that Article 23.4 gave Spanish national courts jurisdiction over genocide, crimes against humanity, torture, and terrorism even when committed by “foreigners outside Spanish territory.”\textsuperscript{47} According to this belief, the court could exercise jurisdiction through domestic Spanish statutory means.

International legalities, while not binding on Spanish prosecutors or Spanish courts, also suggested approval of Spanish jurisdiction. Prior international standards related to genocide indicated a general openness within the international community to the possibility of extraterritorial prosecution.\textsuperscript{48} Additionally, international agreements, while not explicitly

\textsuperscript{45}Roht-Arriaza, \textit{The Pinochet Effect}.

\textsuperscript{46}Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 27, 30, 33; Roht-Arriaza, \textit{The Pinochet Effect}, 6. Menchú went beyond Article 23.4 of the LOPJ and argued that codification of the spirit of laws against genocide held a longstanding place in Spanish law. Tracing Spanish legal authority back to Article 336 of 1870, Menchú noted that the law granted jurisdiction to Spanish courts for “crimes committed outside of Spain against the security of the State.” Article 336, which later was incorporated into Article 23.4 of the LOPJ, patently applied to the 1980 burning of the Spanish Embassy in Guatemala City, which served as one basis for the suit. Importantly, a charge of genocide could not have been brought in Spain prior to the 1971 incorporation of a genocide statute into the Spanish penal code, despite Spain’s 1968 ratification of the Convention for the Prevention and Punishment of the Crime of Genocide. Menchú Tum, 22, 26.

\textsuperscript{47}Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 27-29, 34.

\textsuperscript{48}United Nations General Assembly, \textit{Resolution 3074 Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity} (1973). On 3 December 1973, the UN General Assembly issued Resolution 3074, which stated that persons that committed “war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes” (emphasis added). The phrase “as a general rule” indicated an implicit acceptance of deviation from such rule, opening the door for prosecution outside of sovereign territory where genocide occurred. Menchú Tum, \textit{Al juzgado central de instrucción de guardia de la Audiencia Nacional}, 27.
obligating Spanish prosecution, suggested the appropriateness of Spanish legal action against the former Guatemalan officials.\footnote{Article 7 of the 1966 UN International Covenant on Civil and Political Rights, ratified by Spain on 27 April 1977, provided that “no one should be subjected to torture,” a right that no “State, group or person [had] any right” to violate. United Nations Office of the High Commissioner for Human Rights, \textit{International Covenant on Civil and Political Rights} (1966). Any doubts as to whether Spain felt that protection from torture via prosecutorial means, even when that torture occurred outside of Spanish jurisdiction, were laid to rest on October 21, 1987, when Spain ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”). Articles 1 and 5.1(c) of the Convention against Torture require a signatory state to “take such measures as may be necessary to establish its jurisdiction over … any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” when the purpose of such act is to obtain information or a confession, to punish, to intimidate or coerce, or for any discriminatory reason, when “the victim is a national of that State if that State considers it appropriate.” United Nations Office of the High Commissioner for Human Rights, \textit{Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} (1984).}

Universal jurisdiction exists to allow states to punish heinous crimes against international law that harm the international community or threaten the entire international system. This conceptualization reveals the inherent privilege that international law grants to states and state actors operating in institutional spaces. Nations can exercise universal jurisdiction to protect the international community or international systems. As Balakrishnan Rajagopal notes, however, interactions between the Global South and international law are such that exploring them solely through a statist paradigm of western modernity is inadequate.\footnote{Balakrishnan Rajagopal, \textit{International Law from Below: Development, Social Movements, and Third World Resistance} (New York: Cambridge University Press, 2003), 3.} Rather, many (if not most) of those in the Global South interact most directly with law in non-institutionalized spaces. Analysis of the Spanish case supports Rajagopal’s call for a shift from this paradigm.

Unlike most interactions within international law, such as world trade, disputes over borders, and development, Menchú’s suit did not represent any state or aspect of modernity. Rather, the filing of her suit resulted from indigenous social activism. This activism represents well the ways that actors from the Global South demonstrate a need to reframe how international law is viewed in relation to the Global South. Increasingly, indigenous activists advocate for
“alternative conceptions” of international law that conflict with prevailing notions of structural legalities.\textsuperscript{51} Ultimately, Menchú’s complaint represented a push against the hegemonic discourse of international systems of military support. Notably, this push came from within the international framework rather than without. Universal jurisdiction, despite legitimate criticisms as a neocolonial mechanism, facilitated indigenous resistance to the international legal apparatus.

An initial glance at Menchú’s use of universal jurisdiction suggests that Menchú coopted this mechanism for purposes contrary to international law, effectively fighting the hegemonic impulses of the international system with its own weapons. However, even a brief consideration reveals the inadequacy of this assumption. Only once universal jurisdiction was established in Spain could Menchú manifest legal opposition to the established international framework. Rather than solely bending the international machine to her own will, Menchú needed first argued for its authority over her and other survivors.

For some, this acquiescence to international law potentially revealed indigenous Guatemalan views toward universal jurisdiction. Antony Anghe and B.S. Chimni, prominent Third World Approaches to International Law (TWAIL) scholars, note that “resistance to, or acceptance of, international rules and practices … offers strong evidence” as to whether Third World actors find those rules just or unjust.\textsuperscript{52} Challenges to international law, therefore, suggest

\textsuperscript{51} Ibid., 263.

\textsuperscript{52} Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts,” \textit{Chinese Journal of International Law} 2, no. 1 (January 1 2003): 78. Third World Approaches to International Law (TWAIL) is a body of legal scholarship that seeks to refocus discussions of international law on actors in and from the Global South. While this recentering is TWAIL’s main tenet, most TWAIL scholars argue that the current international legal system is ultimately dominated by vestiges of colonial imperialism. The international system developed, they argue, as a means for European colonial powers to deal with each other, and therefore Western socilegal constructs dominate international legal thought. See James Gathii, “Twail: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography,” \textit{Trade Law and Development} 3, no. 1 (2011): 26-64. See also James Gathii, “International Law and Eurocentricity,” \textit{European Journal of International Law} 9 (1998): 184-211.
that resistors reject the law and potentially view it as unjust, while voluntary submission to international law implies acceptance of the law.

Menchú, however, did not choose between resistance or acceptance. Instead, she engaged in a process of simultaneously accepting and resisting international law. In fact, by arguing firmly in favor of Spanish use of universal jurisdiction, Menchú’s active and deliberate acceptance of the international system operated within a dialogical process that facilitated the Guatemalan grassroots proxy resistance to that same international system. Dating back to the colonial era, indigenous people throughout Spanish America accepted the colonial legal system and litigated within it. Survivors of the genocide in this way took the 500-year longue durée of oppositionally-oriented indigenous responses (i.e., acceptance and resistance) to imposed legalities to the global stage.\(^5\) Menchú’s actions illustrated how Global South resistance to international law does not function according to constant structural states (i.e., either resisting or accepting). Rather, this resistance (and at the same time acceptance) waxes and wanes in such a way that Global South and indigenous actors constantly renegotiate the hegemonic effects of international law through a continuing discourse between resistance to and acceptance of the international legal regime.

5.3 Questions of Jurisdiction and Power: Stagnation and the Subsidiarity Principle

Spain’s universal jurisdiction statute contained its own limitations. Spanish jurisdiction over allegations of genocide in Guatemala, like other extra-Guatemalan courts, held a

“subsidiary status” to Guatemalan jurisdiction. This meant that Spain could not exercise jurisdiction until Guatemalan courts first had the opportunity to do so. However, these restrictions did not apply when such a state refused to pursue a bona fide prosecution. Menchú argued that “the lack of justice, the deliberate ineptitude of officials, in short, the nourishment of impunity” that characterized the Guatemalan criminal justice system made bona fide prosecution of genocide impossible in Guatemalan courts. This impunity rendered both the military justice system and the ordinary justice system unable to meaningfully prosecute even those responsible for the most heinous crimes, a reality still in full effect at the time of filing of the complaint. Additionally, Menchú noted that the National Reconciliation Law, “a law of disguised amnesty,” required interpretation by the same tainted judiciary that, essentially, could not be trusted to facilitate the honest prosecution of human rights violators. From Menchú’s perspective, the law inhibited, rather than fomented, actual reconciliation.

The actions of Guatemalan authorities, moreover, cast doubt on the sincerity of their wishes for national reconciliation. On 22 December 1999, defense attorney Julio Cintrón Gálvez filed a lawsuit in Guatemala against Menchú, accusing her of treason, omission of denunciation,

54 Article 23.5 of the LOPJ provided that Spain could not prosecute a crime “where proceedings to investigate and try a crime have been initiated in the State where the acts took place.” “Organic Law on the Judiciary,” Article 23.5. However, these restrictions did not apply when such a state refused to pursue a bona fide prosecution. Spanish law considered non-bona fine prosecution to be domestic prosecution intended to shield a defendant from criminal responsibility; proceedings subjected to an unjustified delay; or where a lack of independence or impartiality by the prosecution or judiciary posed a risk to justice. For other courts, see Chapter 3.

55 Spanish law considered non-bona fine prosecution to be domestic prosecution intended to shield a defendant from criminal responsibility; proceedings subjected to an unjustified delay; or where a lack of independence or impartiality by the prosecution or judiciary posed a risk to justice. Ibid.

56 Menchú Tum, Al juzgado central de instrucción de guardia de la Audiencia Nacional, 7.

57 Ibid., 8. As the CEH found, a lack of meaningful justice “took control of the very structure of the State” and “sheltered and protected the repressive acts of the State.” Commission for Historical Clarification, Memory of Silence, 19.

58 Menchú Tum, Al juzgado central de instrucción de guardia de la Audiencia Nacional, 9.
and violation of the Guatemalan constitution. Cintrón had previously defended the military in their responses to lawsuits brought by Jennifer Harbury, a US American attorney whose husband, Mayan revolutionary Efraín Bámaca Velásquez, was tortured and killed by members of the Guatemalan military connected to the CIA (see Chapter 2). The timing and subject matter of Cintrón’s complaint against Menchú left a clear impression that it was in retaliation for the Spanish complaint. Menchú denied the accusations and Cintrón’s case ultimately went nowhere. The complaint, according to the Observatory for the Protection of Human Rights Defenders, had only one intended effect: to prevent Menchú and others from being able to continue pursuing Spanish prosecution, preserving the impunity of human rights violators in Guatemala. Menchú, however, did not end her efforts and soon faced opposition from within Spain.

In addition to making the case that the Guatemalan justice system was impotent, Menchú needed to overcome resistance from Spanish authorities. On 13 January 2000, the Spanish Public Prosecutor asked the court to dismiss the case because Spain lacked proper jurisdiction. The prosecution argued that Spanish national courts lacked legal authority to try the case for three reasons. First, because the alleged events occurred outside of Spain. Second, because Spanish nationals did not commit the alleged crimes. Additionally, torture and terrorism became crimes

59 “Guatemala: Menchú acusada de traición,” Inter Press Service, 23 December 1999, http://www.ipsnoticias.net/1999/12/boletin-de-radio-guatemala-menchu-acusada-de-traicion/. Cintrón would go on to later defend the killers of Guatemalan bishop and human rights defender Monsignor Juan José Gerardi Conedera. The prosecution for the 1998 murder of Bishop Gerardi, which occurred two days after he publicly presented a report blaming the Guatemalan military for the vast majority of deaths during the Guatemalan civil war, was the first civilian court prosecution of members of the Guatemalan military in the nation’s history.


under Spanish law in 1984 and 1985, respectively, after the incidents in Menchú’s complaint. Accordingly, any Spanish prosecution amounted to an *ex post facto* one. Finally, the prosecution complained that Menchú did not adequately provide objective elements that connected the defendants to the alleged actions.  

Judge Guillermo Ruiz Polanco largely rejected the prosecution’s concerns and instead ordered a close review of the case. This judicial examination focused only on issues of jurisdiction and competence of the court to hear the case. In so doing, Ruiz Polanco concluded that Spain had jurisdiction under Article VI of the Convention on the Prevention and Punishment of Genocide (also commonly known as the Genocide Convention). Ruiz Polanco noted that the prosecution correctly stated that no Spanish national had committed the alleged crimes in question and the events occurred outside of Spanish national territory. Nonetheless, Guatemala failed to abide by the 22 September 1984 bilateral prosecutorial agreement between Spain and Guatemala to determine responsibility for the 1980 Spanish embassy fire, another potential reason for Spanish courts to exercise jurisdiction over the Guatemalan case. In keeping with the focus on jurisdiction, Ruiz Polanco refused to make any determination as to the veracity of Menchú’s factual allegations or of any criminal responsibility therein. Further, while Ruiz Polanco accepted that Menchú failed to denote specific actions by the defendants that would result in criminal culpability, the allegations satisfied a low evidentiary burden of having the

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64 Audiencia Nacional, “Auto del Juzgado Central de Instrucción N°,” 1. The court noted that “the veracity of the facts that are the subject of the complaint” were not in dispute, and the court had already accepted “the facts as constituting the crimes of genocide, terrorism, and torture.”

65 Audiencia Nacional, “Auto del Juzgado Central de Instrucción N°.” Article 6 of the Genocide Convention provides that those “charged with genocide … shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.” United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, Article VI.
appearance of genocide, as it could be reasonably inferred that the Guatemalan state took genocidal actions against the Maya.\textsuperscript{66}

Ruiz Polanco judged the Guatemalan justice system in dereliction of its own prosecutorial duty. Effectively, Ruiz Polanco determined that Guatemala did have the first opportunity to prosecute grave human rights violations that occurred within its own borders according to what is known as the subsidiarity principle, discussed in further detail below. However, if the Guatemalan state neglected this opportunity, then Guatemalan courts “must be replaced by courts that … [support] universal prosecution of the serious violation of basic human rights.”\textsuperscript{67} Here, Article VI of the Genocide Convention established no international criminal court. Guatemala failed to prosecute the acts of genocide in question despite having opportunity to do so. Accordingly, Ruiz Polanco held that any ethereal possibility of Guatemalan prosecution should not impede an inquiry into Spanish jurisdiction.\textsuperscript{68} This ruling suggests that, in an increasingly globalized world, even domestic law, legal processes, and legal systems lack true sovereignty and insularity.

Allowing the inquiry to move forward required Ruiz Polanco to find that the Guatemalan justice system had not adequately attempted to prosecute Menchú’s allegations. However, the implications of Ruiz Polanco’s ruling reached further than that. Because of the forces that shaped

\textsuperscript{66} Ruíz Polanco rejected the prosecution’s concerns of ex post facto justice. The crimes of torture and terrorism were not crimes as argued by Menchú at the time of the alleged acts but were promulgated in 1984 and 1985 respectively. Accordingly, he subsumed the torture and terrorism claims into a single review of genocide, which in 1982 and 1983 was a codified crime. Ruíz Polanco also drew an important distinction between substantive and procedural law. Although the Public Prosecutor argued that, as the LOPJ was not written into law until 1985, the court could not try the defendants after the fact, Ruíz Polanco differentiated the LOPJ from that argument. The LOPJ, he said, was a procedural law, rather than a substantive one. Determination of jurisdiction, he ruled, is not a retroactive application of substantive law. Therefore, the LOPJ could be used to determine jurisdiction over cases and controversies that occurred prior to its enactment

\textsuperscript{67} Audiencia Nacional, “Auto del Juzgado Central de Instrucción Nº.” Ruiz went on to say that rhetoric supporting the inactivity in Guatemalan national courts would be “unforgivable and prevaricating babble.”

\textsuperscript{68} Audiencia Nacional, “Auto del Juzgado Central de Instrucción Nº.”
it, international law reproduces the effects of Western colonial and imperial legacies. These effects commonly manifest in the disempowerment and subordination that is characteristic of the power imbalances between peripheral spaces and their metropoles. Subsidiary universal jurisdiction recreates this subordination. A subsidiary system only exercises jurisdiction after ruling on the efficacy of the primary jurisdictional system. Although a subsidiary system technically defers to the primary system, the procedure accorded to universal jurisdiction calls this into question. A declaration of the ineffectiveness of a judicial system requires the power to judge that system. Merely having the institutional power to make such a declaration, much less exercise it, creates a dominant-subordinate relationship. Napoleon, after all, crowned himself. When Ruiz Polanco ruled that no meaningful possibility of prosecution existed in the Guatemalan justice system, he implicitly acknowledged the capacity of a Western judicial system to judge a Global Southern postcolonial one. In this way, the ruling duplicated the metropole/periphery power dynamics of Guatemalan coloniality.

One important distinction differentiates Menchú’s suit from examples of international law duplicating colonial patterns of dominance. Many TWAIL analyses regard international law as a hegemonic force through which First World nations exert power over the Global South. The Mayan case does not challenge that. However, the prosecution of former Guatemalan officials in Spain did not originate with the spontaneous employment of coercive First World power. On the contrary, indigenous grassroots activism, through Rigoberta Menchú’s case, forced the hands of Spanish prosecutors. By embracing universal jurisdiction, the Guatemalan grassroots compelled indigenous agency into international space. They used this agency to pursue justice for the genocidal acts that occurred in the Guatemalan highlands during the civil war.

The Spanish prosecutorial team quickly appealed Ruiz Polanco’s ruling. After Ruiz Polanco declined a prosecution request for dismissal, prosecutors asked the appellate chamber of the Audiencia Nacional, the judicial body that hears appeals of Audiencia criminal cases, to review the decision. Eight months later, the court ruled that Article 6 of the Genocide Convention did not preclude the possibility of member states giving national courts the authority to address extraterritorial genocide through procedural means such as universal jurisdiction. Rather, the court said that any state where alleged acts of genocide did not physically occur could not prosecute until after the country in which the crime occurred first had the opportunity to prosecute. Accordingly, the court then looked to the status of any domestic Guatemalan genocide prosecution to determine if the Spanish legal system prematurely exercised universal jurisdiction.

The Audiencia Nacional viewed the allegations in Menchú’s claim as not ripe for Spanish adjudication. Per the court, Guatemala’s Decree 145-96, the National Reconciliation Law that provided a qualified amnesty to crimes committed during Guatemala’s internal armed conflict, did not bar Guatemala from prosecuting acts of genocide because it contained an express carveout that preserved the right to pursue actions for genocide and crimes against humanity. Additionally, the Audiencia did not find Guatemala’s judicial inactivity compelling. Rather, it looked at the closeness in time of the Spanish suit to of the issuance of the CEH’s final report. The court saw this as an indication that the Guatemalan justice system had not, in fact, failed to pursue judicial action for crimes contained therein. The Audiencia distinguished the Guatemalan

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72 Ibid.
case from prior cases of universal jurisdiction, Argentina and Chile, by noting that in the Argentine and Chilean cases the virtue of the passage of time enabled the court to construct a narrative of inactivity. The court found no proof that the Guatemalan judiciary had rejected prosecutorial attempts, and therefore the principle of subsidiarity did not apply. For the court, the two decades between the genocide and the Spanish trial was not enough time to show that Guatemala had not prosecuted the genocide.\(^73\)

The Guatemalan case before the *Audiencia Nacional* had important subtext. The Menchú legal team pushed against the widely accepted prohibition of ideological genocide. Importantly, in order to resist this prohibition, Menchú first had to acknowledge the *Audiencia*’s authority over the case and argue directly for Spanish jurisdiction over events that occurred in Guatemala—in fact, her legal team advocated this very point directly to the *Audiencia*. The *Audiencia* did not accept Menchú’s arguments, and instead chose to defer to Guatemala’s history of impunity. However, this deferral itself implicitly recognized Spain’s ability not to defer, acknowledging the ability of nations in the Global North to pass judgement on those in the Global South, recreating colonial legalities.

### 5.4 The *Tribunal Supremo*: Sovereignty and the Legitimization of Neocoloniality

Rigoberta Menchú and her legal team appealed the *Audiencia Nacional*’s appellate ruling to the *Tribunal Supremo*, the Spanish Supreme Court. The *Tribunal* stated out loud what the *Audiencia*’s decision regarding Spain and Guatemala’s past colonial relationship only implied. The *Audiencia* expressed hesitation at judging another legal system, of particular import due to Spanish colonialism in Guatemala. The *Tribunal*, however, affirmed that relationship and held that Spain could only exercise jurisdiction over its former colonies. While the *Audiencia*’s

\(^73\) Audiencia Nacional, “Rollo Apelación No. 115/2000.”
decision suggested the reestablishment of colonial power relationships, the Tribunal’s ruling expressly created a direct path to legal neocolonialism.

On 25 February 2003, the full 15-member banc of the Criminal Division of Spain’s Tribunal Supremo issued its ruling on the future disposition of the case. The Tribunal noted that the case did not revolve purely around basic criminal procedure, but rather spoke to larger issues of the “reach and interpretation” of universal jurisdiction. The issues spoke to legalities that existed beyond the scope of the Spanish judicial system. The majority of the Tribunal defined these legalities as historical linkages between Guatemala and Spain that legitimized Spanish jurisdiction over the case. These linkages replicated the former relationship of colonial-era domination and subordination between the two countries.

In addressing the possibility of Spanish extraterritorial jurisdiction over genocidal acts committed during course of the Guatemalan civil war, the Tribunal Supremo’s majority focused on concepts of sovereignty. In particular, the court recognized that allowing extraterritorial jurisdiction had broader implications for state sovereignty through multiple channels. With the principle of subsidiarity as a guideline, the Audiencia Nacional found that Spain could not proceed until Guatemala had been given ample time to initiate prosecution against state actors for the potential genocide. This ruling implied that Western states had the authority to judge peripheral ones, an idea the Tribunal explicitly recognized. However, the Tribunal expressed a reluctance to embrace this authority. The Tribunal noted that any effort to judicially establish

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74 Sala de lo Penal Tribunal Supremo, Sentencia del Tribunal Supremo, Sts 327/2003 (2003).
75 Ibid.
76 Ibid.
77 Audiencia Nacional, “Auto del Juzgado Central de Instrucción N°.”
that another state had failed to adequately prosecute required a “judgment by one sovereign State 
on the judicial capacity of similar judicial bodies in another sovereign state.”  

Nonetheless, the Tribunal acknowledged that the Genocide Convention did not expressly 
prohibit universal jurisdiction. Rather, the Tribunal Supremo viewed universal jurisdiction as 
most appropriate when determined on a case-by-case basis. Despite the Tribunal’s seeming 
antagonism to universal jurisdiction, it found that universal jurisdiction “is justified by the 
existence of the particular interests of [any] State” extending its reach beyond traditional 
jurisdictional boundaries. For the Tribunal, these interests needed “some point of connection” 
that validated the extension of jurisdiction to extraterritorial space. While the Tribunal viewed 
jurisdictional expansion as justified for crimes of a particularly heinous nature that violated 
ternational norms, the court explicitly stated that a potential prosecutorial state could only 
properly exercise universal jurisdiction when the crimes contained a “legitimizing link” to the 
potential prosecutorial state. This requirement, per the court’s opinion, limited a state’s ability to 
use universal jurisdiction to defendants physically present in the prosecutorial state and that have 
refused extradition. None of the Guatemalan defendants were in Spanish territory. Accordingly, 
the Tribunal ultimately rejected Menchú’s appeal of the Audiencia Nacional’s denial of 
jurisdiction.

Importantly, though, seven of the Tribunal Supremo’s 15 members viewed universal 
jurisdiction mechanisms in a more favorable light. In fact, the seven-member minority described 
the majority’s ruling against universal jurisdiction as “overly restrictive” and “incompatible”

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78 Tribunal Supremo, Sentencia del Tribunal Supremo, Sts 327/2003, 9.
79 Ibid., 10.
80 Ibid., 11.
81 Ibid., 14 (citation).
with the treatment of genocide in domestic and international law.\textsuperscript{82} In their dissent, these judges argued that the majority based its opinion on theories contrary to the purpose of the Genocide Convention itself. The dissenters described perpetrators of genocide as “common enemies to all of humanity.”\textsuperscript{83} When they called the majority opinion “overly restrictive,” the dissenters disagreed with the majority’s view on the textual limitations of Spain’s universal jurisdiction statute. This dismissal represented more than simply the rejection of the boundaries of one jurisdictional law. The dissenters based their opinion on humanity’s “most profound values.”\textsuperscript{84} Values and morality do not necessarily dictate outcomes in legal systems governed by positivistic thought. Instead, structural sources of law determine these outcomes.\textsuperscript{85} However, the dissenters directly engaged with moral reasoning in reaching their conclusion. Effectively, Mayan grassroots activists forced a Western post-imperial court to consider the moral implications of structural interpretations of law. In so doing, these activists also forced an implied reflection on legal positivism, itself the basis for traditional approaches to international law.

For the dissenters, the Genocide Convention contained the moral authority that provided the force behind the Spanish statute. Citing the fact that many nations had incorporated the Genocide Convention into their domestic penal codes (as Guatemala did in 1973), the dissenters noted that the Genocide Convention specifically did not bar the establishment of universal jurisdiction. Rather, the Genocide Convention encouraged it. The Convention itself was designed to prevent and punish genocide. Therefore, legal mechanisms helping punish or prevent genocide

\textsuperscript{82} Tribunal Supremo, \textit{Sentencia del Tribunal Supremo, Sts 327/2003}, 16.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid. E.g., statutes, treatises, judicial precedent, etc. In this instance, the source of law was the text of the Spanish jurisdictional statute.
were consistent with it, “given that its precise purpose is to prevent impunity.” Accordingly, in cases where “extraterritorial jurisdiction constitutes the only means of preventing impunity,” domestic legislation underwritten by the principle of universal jurisdiction remained an effective tool to combat genocide. In those instances, the dissent saw the use of universal jurisdiction as not subject to the principle of subsidiarity. Instead, universal jurisdiction provided states with the simultaneous right to prosecute alongside the territory where the crime occurred, and the principle of subsidiarity did not apply. In cases of genocide (or other crimes against humanity) where local courts were unwilling or unable to prosecute acts that occurred in their country, universal jurisdiction remained the only guarantee that survivors had for justice. Extraterritorial jurisdiction as a supplementary principle, the dissent stated, remained inconsistent with a state that refused to prosecute. A prosecution could not be complementary when there was nothing to be complementary to.

While the dissent dismissed the applicability of the subsidiarity principle to the case, it treated the majority’s requirement for a legitimizing link between the Guatemalan genocide (and, by proxy, any genocide) and Spain to warrant a prosecution even more hostilely. For the minority, this requirement, as promulgated judicially rather than through the legislature, frustrated the purpose of the law unless used to exclude reasonably excessive or abusive prosecutions. However, the restriction established by the majority went further and barred any case from prosecution absent this validating nexus. This, the minority argued, constituted a substantive change to Spain’s law against genocide: jurisdiction would be established via the

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86 Tribunal Supremo, Sentencia del Tribunal Supremo, Sts 327/2003, 17.
87 Ibid.
nationality of the victim rather the nature of the crime itself.\textsuperscript{88} Even so, for the minority the evidence in fact established a valid connection between Spain and the alleged genocidal acts. The minority found the cultural and historic links convincing. In particular, it recognized the 1980 burning of the Spanish Embassy and the number of Spanish national victims as such a clear connection that a denial of universal jurisdiction on the basis of a lack of a connection showed that this requirement was merely a pretext to suppress the application of universal jurisdiction.\textsuperscript{89} Effectively, if the Guatemalan genocide case could not establish an adequate link to Spain, no set of facts could.

5.5 The Constitutional Court: Indigenous Justice in Transnational Space

Menchú did not accept the Tribunal Supremo’s majority decision, and her legal team appealed to the Spanish Constitutional Court, the supreme interpreter of the Spanish constitution with the ability to rule on the constitutionality of any act or law promulgated by any Spanish public body. The Constitutional Court agreed with Menchú’s arguments and rejected the Tribunal’s ruling. Rather than the Tribunal’s restrictive, neocolonial interpretation of Spain’s universal jurisdiction statute, the Constitutional Court expanded the legal mechanism’s reach. By disregarding the national requirements of the Tribunal’s opinion, the Constitutional Court recognized the right of any national court to try any crime against humanity. By bringing this suit to the Constitutional Court, indigenous Guatemalans reframed the privileging of the Global North over the Global South in international law.

\textsuperscript{88} Tribunal Supremo, Sentencia del Tribunal Supremo, Sts 327/2003, 22. The minority noted that an appropriate application of the “legitimizing link” principle would be to use it as a factor to consider in support of use of universal jurisdiction, rather than as a strictly necessary qualifier.

\textsuperscript{89} Ibid., 22-23.
Following the ruling of the Tribunal Supremo, the CALDH team quickly filed an *amparo* proceeding, an extraordinary appeal for the protection of constitutional rights, with the Spanish Constitutional Court.\(^{90}\) While the Tribunal is Spain’s supreme court, the Constitutional Court has the final say on any issue of constitutionality and can overrule any other Spanish court. Menchú argued that the Tribunal’s refusal to grant universal jurisdiction denied her access to the judicial system itself, a violation of her right to effective judicial protection as guaranteed by the Spanish Constitution.\(^{91}\) In response to Ríos Montt’s *amparo*, the Constitutional Court declared access to courts a fundamental “legally-configured social right” under Spain’s constitution that makes up the primary content and substance of effective legal protection. Accordingly, the Constitutional Court’s decision somewhat echoed the minority dissent issued by the Tribunal Supremo.\(^{92}\)

The Constitutional Court first addressed the extent of Spanish universal jurisdiction. As Menchú argued, universal jurisdiction provided the framework for her fundamental right to the Spanish justice system. The Court recognized that, rather than being restrictive in nature, Spain’s universal jurisdiction statute gave a “broad scope … without being subject to restrictive criteria” to its use of extraterritorial jurisdiction. The Court also stated that the reach of universal jurisdiction could be restricted without contradicting LOPJ Article 23.4, Spain’s universal jurisdiction statute. Despite this, the Court found that both the majority rulings from the lower courts erred in their treatment of the subsidiarity principle and agreed with the Tribunal Supremo dissent’s view regarding the appropriateness of concurrent jurisdiction.\(^{93}\)

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\(^{90}\) *An amparo*, native to Mexico but since spread to other Spanish-speaking jurisdictions, is a legal remedial mechanism for the protection of one or more constitutional rights. As will be seen, because of the importance of protecting constitutional rights, *amparos* are often used to stall court proceedings in legal systems with judiciaries characterized by corruption, such as Guatemala.


\(^{92}\) Ibid.

\(^{93}\) Ibid.
A brief summary of the judicial reasoning of the lower courts is useful here. According to the *Audiencia Nacional*’s view of the subsidiarity principle, a potential plaintiff needed to prove that the courts of the state in which alleged genocide or human rights violations occurred cannot or would never respond with appropriate judicial action.\(^{94}\) In application, this standard blocked a state attempting to exercise universal jurisdiction from doing so provided an allegedly genocidal state had a prominent culture of judicial impunity.\(^ {95}\) The *Tribunal*, however, viewed the *Audiencia*’s ruling as too lenient. In addition to the limits of the subsidiarity principle, the *Tribunal* ruled that universal jurisdiction only applied to instances explicitly authorized by conventional sources of law, such as treaties. Additionally, the *Tribunal* noted the Genocide Convention’s silence as to extraterritorial jurisdiction. This silence, in the *Tribunal*’s view, implied a rejection of extraterritorial prosecution.

The Constitutional Court, however, could not reconcile the *Tribunal Supremo*’s logic with the spirit of the Genocide Convention. The Genocide Convention’s titular objectives remain the prevention of and punishment for genocide. The Court viewed the *Tribunal*’s demands for conventional legal authorization (e.g., a treaty) to be oppositional and contradictory to those objectives. Additionally, the Court threw out the *Tribunal*’s use of international legal precedent and norms. While the *Tribunal* indicated that decisions by German and Belgian courts supported a restrictive use of universal jurisdiction, the Court expressly agreed with the minority dissent. In particular, the Court found that the case law cited by the *Tribunal* had either since been overturned by rulings supportive of the principle of universal jurisdiction or did not sufficiently

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\(^{94}\) This amounted to a *probatio diabolica*, or “Devil’s proof,” an evidentiary standard that is impossible to meet and draws its name from attempting to disprove the existence of Satan.

\(^{95}\) States may exercise universal jurisdiction on their own or at the behest of a plaintiff.
parallel the facts of the Guatemalan case. In fact, the Court noted that other jurisdictions passed legislation allowing for universal jurisdiction untethered to national interests.\textsuperscript{96}

Finally, the Constitutional Court turned to the \textit{Tribunal Supremo}’s requirement for a connective link between Guatemala and Spain that justified Spanish jurisdiction over the genocide. The \textit{Tribunal} held that Spain’s application of universal jurisdiction over any set of facts required sufficient connections between Spain and the state in which the alleged crime occurred. Only an extraordinarily compelling link placed prosecution of the alleged crime under the umbrella of Spanish national interests. The Constitutional Court, however, disagreed. In fact, the Court called even the points of connection mentioned by the \textit{Tribunal} problematic. After quickly dismissing the “connection” of the presence of alleged perpetrators in Spanish territory as an axiomatic necessity for prosecution in Spain, the Court turned to two other potential links—first, the Spanish nationality of the victim or victims, and second, extraterritorial events based on “other relevant Spanish interests.” Both of these, the Court found, were based on international custom, as the \textit{Tribunal} cited the use of these factors by “national courts” without providing details as to the evaluation or weight of these factors, or even which courts were using them. Additionally, the Court held that basing jurisdiction on the victims’ nationality frustrated the purpose of both Spain’s domestic genocide provision and the Genocide Convention. Essentially, genocide could only be relevant to Spanish courts if it had Spanish victims, an effect clearly not contemplated by the legislation.\textsuperscript{97}

Genocide, though, has often been described as a crime whose harm affects more than direct victims, but rather the entire international community. Here, the Constitutional Court

\textsuperscript{96} Tribunal Constitucional, \textit{Sentencia 237/2005}.

\textsuperscript{97} Ibid.
pointed to the shared interest of all states in stemming genocidal activity. Universal jurisdiction merely evidenced that shared, rather than individual, interest. National interests, therefore, do not control in cases of genocide. Accordingly, for the above reasons, the Court found that Menchú’s right to effective judicial protection had been violated and fully overturned both the Audiencia Nacional’s and the Tribunal Supremo’s rulings, remanding the suit to the Audiencia.

The Constitutional Court’s ruling represented an important expression of Global Southern agency. Menchú’s appeal to the Court forced a restructuring of the relationship between “developed” nations and the Global South. The Audiencia Nacional saw universal jurisdiction through the perspective of subsidiarity. This principle gave the Audiencia justification to rule on the efficacy of Global Southern legal systems. By granting itself the ability to rule on the failed status of a foreign judiciary, the Audiencia placed Spanish juridical practices over those of its Global Southern counterparts. This elevation of Spanish legalities attempted to recreate the colonial power constructs defined by a dominant-subordinate relationship, even as it created the opportunity for Maya historical actors to continue to press their case on the international stage.

If the Audiencia Nacional alluded to the colonial relationship between Spain and Guatemala, the Tribunal Supremo embraced it. The Tribunal rejected the Audiencia’s approach based on the subsidiarity doctrine in favor of a narrower path based on what it termed “legitimate links.” These links themselves, however, contained echoes of the Spanish-Guatemalan colonial past. Intended victims needed to be of Spanish descent or Spaniards themselves, an element potentially satisfied by the colonial legacy of Guatemalan bloodlines and the ongoing proselytizing of a religion brought to the Maya via imperial conquest.

Maya survivors of the genocide, though, rejected the lower courts’ holdings and demanded a constitutional review. The Constitutional Court sided with the survivors and issued a
ruling containing a broader view than perhaps anyone expected. By establishing Spanish jurisdiction as simultaneous over heinous international crimes and removing requirements based on victims’ national origin or other colonial-historic connections, Guatemalan grassroots activists successfully moved approaches to human rights away from one that privileged nations over social movements. In its place, indigenous Global South actors created a path to justice in an international, globalized world.

5.6 Conclusion

The Spanish Constitutional Court ruling induced by indigenous Guatemalan activism quickly opened the door for the prosecution of Guatemalan dictators in Spain. In February 2006, the Audiencia Nacional exercised universal jurisdiction and assumed control over Menchú’s case. Three months later, Helen Mack Chang, a Guatemalan woman who became a human rights activist following the 1990 assassination by the Guatemalan military of her sister Myrna Mack Chang (a human rights activist herself), contacted the US-based non-profit Center for Justice and Accountability (CJA) and asked them to join the case. In June 2006, the Audiencia’s Judge Santiago Pedraz, CJA director Almudena Bernabeu, CALDH director Susan Kemp, and US law professor Naomi Roht-Arriaza traveled to Guatemala to question the former members of the military accused by Menchú. The entrenched impunity that had characterized

98 That the Constitutional Court recognized discarded the Tribunal Supremo’s national interest requirement based on the concept of shared international interest in stopping and punishing genocide can be easily lost. However, it should be noted that even this basis itself privileges the shared interest of nations over the shared interests of non-institutional spaces.


the Guatemalan justice system for decades soon impeded the group’s efforts. The former military
officials filed writs of *amparo* against the Guatemalan Constitutional Court, and the Court barred
Pedraz from taking statements from any of the accused or conducting any interviews until the
completion of the appellate process.\(^{102}\)

Judge Pedraz returned to Spain without having obtained the testimony he traveled for.
Nonetheless, in November 2006 the judge issued arrest warrants and extradition requests for
Ríos Montt and the others named by Menchú in her complaint, citing the ample evidence of the
crimes and the accused’s obstructionist behavior. The Guatemalan Constitutional Court initially
accepted the validity of Pedraz’s orders. Then, in December 2007, the Constitutional Court
suddenly shifted its opinion and denied the Spanish arrest warrants and extradition requests. As a
response to the Constitutional Court’s newfound antagonism to the warrants, in February 2008,
Pedraz began hearings in Madrid to obtain voluntary statements from victims and survivors of
the Ríos Montt regime. Over five days in both February and May 2008, witnesses bravely
recounted the breadth of tragedy and sorrow they endured and survived.\(^{103}\)

Despite this moving testimony, a new structural barrier to the use of Spain’s universal
jurisdiction statute arose. In 2014, following international political pressure, conservative
Popular Party members of the Spanish parliament reformed LOPJ 23.4 to conform with the
“legitimate linkage” requirement initially promulgated by the *Tribunal Supremo* in the
Guatemalan genocide case.\(^{104}\) Nonetheless, Guatemalan activists remained undeterred in their

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\(^{103}\) Naomi Roht-Arriaza, “Prosecuting Heads of State in Latin America,” in *Prosecuting Heads of State*, ed.
Ellen L. and Caitlin Reiger Lutz (Cambridge: Cambridge University Press, 2009); Center for Justice &
Accountability, “Justice in Guatemala;” Kate Doyle, *The Guatemala Genocide Case: The Audiencia Nacional,
Spain* (National Security Archive, 2008).

\(^{104}\) This pressure followed the February 2014 issuance of arrest warrants by the *Audiencia Nacional* for
former Chinese President Jiang Zemin and former Prime Minister Li Peng for alleged human rights abuses in Tibet.
That this pressure resulted in changes to Spain’s universal jurisdiction statute supports the common TWAIL
efforts to see Ríos Montt and members of his regime brought to justice in Spanish courts, and Judge Pedraz vowed to proceed with the case.  

While the Spanish case did not result in the convictions of those accused by Menchú, it did produce an important result. The facts, testimony, and evidence generated by Guatemalan grassroots activists directly informed the actions of the domestic Guatemalan prosecutors who were already working to bring Ríos Montt and members of his genocidal government to justice. Working in parallel with the Spanish suit (and with a little luck), domestic authorities soon brought renewed charges against the leaders of the genocidal regime. In the landmark case that resulted, Guatemalan prosecutors became the first in the world to convict a former head-of-state for genocide in his or her own country.

criticism of universal jurisdiction that extraterritorial jurisdiction favors “powerful” countries, such as China, over those with less geopolitical influence. Whether Global Southern pressure could produce the same result remains unknown.


<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tr>
<td>10 October 1998</td>
<td>Spanish arrest warrant issued for Chilean General Augusto Pinochet</td>
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<td>2 February 1999</td>
<td>CEH releases Truth Commission report</td>
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<td>2 December 1999</td>
<td>Rigoberta Menchú files criminal complaint against seven former Guatemalan military officials</td>
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<td>22 December 1999</td>
<td>Julio Cintrón Gálvez files suit in Guatemalan accusing Menchú of treason and constitutional violations</td>
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<td>13 January 2000</td>
<td>Spanish public prosecutor seeks dismissal of Spanish case for lack of jurisdiction</td>
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<td>27 March 2000</td>
<td>Audiencia Nacional (trial court) rejects prosecution calls for dismissal</td>
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<td>27 April 2000</td>
<td>Prosecution appeals rejection of dismissal to appellate branch of Audiencia Nacional</td>
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<tr>
<td>13 December 2000</td>
<td>Appellate branch of Audiencia Nacional rules in favor of dismissal for lack of jurisdiction; Menchú et al appeal to 15-member Tribunal Supremo (Spanish Supreme Court)</td>
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<td>25 February 2003</td>
<td>Tribunal Supremo issues ruling (8-7 decision) restricting use of universal jurisdiction</td>
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<tr>
<td>26 March 2003</td>
<td>Menchú et al file amparo challenging Tribunal Supremo on various constitutional grounds</td>
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<tr>
<td>26 September 2005</td>
<td>Constitutional Court overrules Tribunal Supremo, expanding the reach of Spanish universal jurisdiction</td>
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<tr>
<td>June 2006</td>
<td>Transnational delegation travels to Guatemala to obtain testimony from military officials; impeded due to pending amparo in Guatemalan Constitutional Court</td>
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<td>November 2006</td>
<td>Spanish court issues arret warrants and extradition requests for Ríos Montt and other defendants</td>
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<tr>
<td>December 2007</td>
<td>Guatemalan Constitutional Court rejects Spanish warrants and extradition requests</td>
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<tr>
<td>February 2008</td>
<td>Survivors of Ríos Montt regime begin offering voluntary testimony in Spanish hearings</td>
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<tr>
<td>February 2014</td>
<td>Spanish parliament reforms universal jurisdiction statute to restrict its use in conformity with Tribunal Supremo decision</td>
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6 CHAPTER FIVE: REDEFINING GENOCIDE: THE IXIL MAYAN PURSUIT OF JUSTICE AND TRUTH, 1999-2013

Y decir: aquí no lloró nadie, And to say: here no one cried, 
Aquí solo queremos ser humanos Here we just want to be human 
Comer, reír, enamorarse, vivir, Eat, laugh, fall in love, live, 
Vivir la vida y no morirla. To live this life and not to die.

―Otto René Castillo.¹

“If you insist in taking out those bones from the graves, then take them. But don’t worry…yours are going to be there shortly.”

―Anonymous threat, 2004.²

On 10 May 2013, former-President and General Efraín Ríos Montt became the first former head-of-state convicted of genocide in their home country. As Judge Yasmín Barrios read the sentence, she struggled to hold back tears as she recounted the events of the charges: rapes, forced displacements, extrajudicial killings, psychological trauma resulting in intergenerational damage, and systematic death. “Sí,” Judge Barrios stated, “hubo genocidio” (“Yes, there was genocide”). The room broke into cheers, cries, and applause, and a chorus of voices soon engulfed the courtroom, chanting an antiwar song written by Guatemalan revolutionary poet Otto

¹ Otto René Castillo, Poemas (Havana, Cuba: Casa de las Américas, 1971), 166.
René Castillo: “Sólo queremos ser humanos” (“We only want to be human”). The relief and joy demonstrated in the reaction of spectators in Guatemala City on 10 May 2013 shows how deeply Guatemalans were invested in the outcome of the trial.

Decades of grassroots activism, coupled with international support, resulted in the Ríos Montt verdict. An important step came in 1999, when survivors of early-1980s state terror in the Guatemalan highlands and the Centro de Acción Legal en Derechos Humanos (Center for Legal Action on Human Rights or CALDH) created a joint organization called the Asociación para Justicia y Reconciliación (Association for Justice and Reconciliation or AJR), established to provide indigenous Guatemalans with legal representation as they pursued justice for war crimes committed by the Guatemalan military during the 36-year civil war. On 6 June 2001, indigenous Guatemalans, through the AJR, filed a criminal complaint alleging genocide, war crimes, and crimes against humanity against former-President Ríos Montt and generals. The complaint addressed actions committed under Ríos Montt’s command in the Ixil region during Ríos Montt’s 18 months in power from 1982 to 1983. As discussed in Chapter 4, investigation into the case quickly stalled and survivors took their case abroad to foreign national courts. Ultimately, efforts to try Ríos Montt for genocide in Spain resulted in no criminal convictions. Undeterred, survivors continued their attempts to attain justice and resumed efforts focused on Guatemalan courts. Guatemalan impunity, however, threatened to derail this pursuit of justice.

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3 Olga Rodríguez, “Guatemala, un primer paso contra la impunidad,” El Diario, 14 May 2013, https://www.eldiario.es/internacional/guatemala-primer-paso-impunidad_1_5674782.html. In 1967, Guatemalan special forces caught Otto René Castillo. He and one of his comrades were taken to a military base in Zacapa, where they were interrogated and tortured for four days before being burned alive. A stanza from Solo queremos ser humanos opens this chapter.

4 For a timeline of the domestic genocide trial in Guatemala, see Table 6.1.

5 See Chapter 4.

This impunity ultimately protected Ríos Montt, and the country remains bitterly and at times violently divided as to whether the armed forces committed genocide. The génocidaire would never spend time in prison for his crimes. Although years of indigenous activism resulted in Ríos Montt’s conviction for genocide, ten days later Guatemala’s Constitutional Court overturned the verdict on a constitutional technicality and remanded the case back to trial.\textsuperscript{7} The former dictator died in 2018 at the age of 91, roughly a year into his retrial.\textsuperscript{8} For those who define justice as execution or time spent in a jail cell, justice was forever denied. Justice, though, at times has an amorphous malleability, ranging from retributive measures, designed to give solace to victims by punishing perpetrators, to restorative methods that seek to repair the harm caused by the crime. Legal systems, in turn, operate as a medium to facilitate this goal. Some scholars, such as Hannah Arendt, have argued that justice is the sole purpose of a trial.\textsuperscript{9} Others, however, posit that trials have sociolegal and historical functions that extend beyond a courtroom or the intricacies of the law.

Trials are also often described as a search for truth. Systems of discovery, testimony, and preservation of an “official” judicial record, what Caroline Fournet termed “legal memory,” all support such a finding.\textsuperscript{10} Records produced at trial, Fournet argued, constitute “priceless and unprecedented historical archives.”\textsuperscript{11} In Guatemala, these archived pasts collide in the present with other events in a kaleidoscopic, transmogrified process whereby the memory of that past is

\textsuperscript{7} Miranda Louise Jasper, Guatemala: 2007 Elections and Issues for Congress (2008); International Justice Monitor, “Timeline.”


\textsuperscript{11} Ibid., 126.
constantly made and remade. All aspects of the genocide trials (the testimonies, the specific criminal law delineations in judicial records, and the outcomes) are already and will continue to be used in the discourse over the Guatemalan civil war. This constant renegotiation of the past is part of what Diane Nelson calls Guatemala’s “Janus-faced” postwar, characterized by collective and individual bifurcation where issues prompt stark conflicting positions and people project two different façades. In this regard, the genocide trials fit well into Nelson’s two-faced paradigm: while they close one wound (the ongoing suffering of nonrecognition), they open another (the sí, hubo genocidio or no hubo genocidio public debate).13

This Guatemalan sense of duality extends to spaces often thought of as one-sided. For example, theoretical discussion about trials often implies that they have a singular purpose. Trials exist either to pursue justice or to pursue truth. Analysis of the Guatemalan genocide trials, though, suggests they more closely follow Nelson’s dual-sided reading: survivors repeatedly call for both justice and truth. But consider that the distance between these ends is perhaps not so great after all. When Nelson discusses the duplicity articulated in Guatemala, she does not describe outward manifestations of randomly juxtaposed expressions. Rather, each of the faces presented are interrelated. For example, the Guatemalan state both gave benefits and created suffering; members of the Patrullas de Autodefensa Civil (Civilian Self-Defense Patrols or PACs) were often both victims and perpetrators of human rights violations. Trials do serve a truth finding purpose, but the nature of that truth has its own multidimensionality: truth is negotiated, determined, and inscribed in legal proceedings while also being negotiated and memorialized in popular and historical memory. In this way, truth and justice exist in a similar

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13 Diane M. Nelson, Reckoning.
relational dynamic: subjective determinations as to whether justice occurred first require subjective determinations as to what is “true.” For those concerned most with the preservation of historical memory, can the finding and protection of that truth itself be a form of justice? The voices of survivors and the families of victims after Judge Barrios read the Ríos Montt sentencing suggest that it can.

Survivors sang their hopes for justice: to be able to love, laugh, and live life; to be human, and therefore to be seen by others as human. Ríos Montt’s guilty verdict, accordingly, affirmed the ultimate truth shown by the trial, that of Ixil humanity. This humanity, however, exists in more than just a future or present tense. Rather, as an intrinsic aspect of the human condition, the humanity of survivors and victims never changed. The recognition of Ixil humanity moving forward requires the acknowledgement of their humanity in 1982. This chapter argues that the Ixil survivors and victims of Ríos Montt’s genocidal counterinsurgency campaign that pursued justice in Guatemalan courts ultimately sought to preserve the collective historical memory of what occurred in the Guatemalan countryside during the 1970s and 1980s. Protection of this memory—que sí, hubo genocidio—required challenging Guatemala’s long history of military impunity in court.

This chapter tells the narrative of the trial. The first section provides necessary background on the events leading up to the proceedings. To obtain justice in court, survivors of Ríos Montt’s genocidal regime first needed to overcome Guatemala’s structural impunity. Section 2 discusses how overcoming this impunity allowed indigenous survivors, widely marginalized within Guatemalan society, to use Guatemalan courts to preserve their historical memory over one that negated and othered them. As events addressed in court nearly always occur outside of court, likewise the contestation over Guatemala’s historical memory existed
beyond the confines of the courtroom. The third section of the chapter focuses on the inner workings of the courtroom, using the elements of the crime of genocide to demonstrate the historical antipathy of the Guatemalan ruling class against the country’s indigenous population. This antipathy manifested in Ríos Montt’s defense, the focus of the next portion of the chapter, and his legal team abandoned the foundational limits of legal positivism in making its racist argument. However, as shown in this chapter’s fifth section, indigenous arguments against this defense ultimately redefined the international crime of genocide and in the process eliminated barriers to prosecution for the blanket extermination of political groups. By challenging internationally-accepted restrictions on genocide prosecutions, indigenous Guatemalans helped rewrite the law of genocide from below and created a framework for other indigenous communities or political groups to force accountability for those that commit the unthinkable.

6.1 Preceding Prosecution: Victory Over Impunity

The domestic trial of Ríos Montt represented the culmination of decades of struggle. In 1973, Guatemala’s congress passed a new penal code that not only criminalized genocide under Guatemalan law, it also provided the military government with another tool in its arsenal of repression. This repression prompted the US government under Jimmy Carter to end the direct supply of weapons to the Guatemalan state. After Ríos Montt took over the country in a military coup, his government changed the laws to “legalize” the military’s otherwise criminal behavior. This legalization was enough for Ronald Reagan to justify resuming the flow of military equipment to the Guatemalan armed forces despite explicit knowledge on the part of the US presidency that that equipment would likely contribute to ongoing human rights violations. In
fact, the military used US-provided equipment to commit genocide against its own indigenous population.\(^\text{14}\)

Despite the various amnesties passed by the Guatemalan military dictatorships to limit criminal liability for war crimes, Guatemalan grassroots actors continued to work in domestic and international arenas to end the war and facilitate their pursuit of justice for those crimes. This led grassroots activists to call for justice beyond Guatemalan borders. By lobbying members of the US Congress to end their support for the Guatemalan state, these activists highlighted US complicity in the military’s crimes and ultimately pushed Guatemala toward peace, and in December 1996 the country finalized its historic peace accords.\(^\text{15}\) The linchpin of those accords was the Ley de Reconciliación Nacional (National Reconciliation Law or LRN), which provided a limited amnesty to both sides for crimes committed during the course of the war, excluding crimes against humanity and genocide. Despite claims from the Guatemalan right that the amnesty applied to the Guatemalan military’s scorched-earth, anti-Communist campaign, indigenous Guatemalans sought justice in Guatemalan courts. When these efforts proved fruitless, social activists and the Guatemalan Maya left Guatemala and looked for justice elsewhere, first through the Organization of American States’ human rights protection apparatus and then in Spanish national courts. These departures from Guatemala’s domestic legal space in the end challenged the very foundation of the international legal system.\(^\text{16}\) By utilizing the crimes against humanity and genocide exceptions in the LRN, indigenous Guatemalans began to crack the wall of impunity that protected Guatemalan war criminals.

\(^{14}\) See Chapter 1.
\(^{15}\) See Chapter 2.
\(^{16}\) See Chapters 3 and 4.
This wall of impunity has taken many forms within Guatemala’s justice system. Historically, judges loyal to the military inhibited prosecution of former members of the armed forces. Public prosecutors with ties to the military likewise neglected to pursue cases against the military. The easy money brought by bribes proved too much for some others. Those judges and prosecutors who did prosecute were often subject to intimidation, threats to themselves or their family, or assassination. Alongside these clandestine forms of impunity exists an official state form: elected officials cannot be prosecuted during their electoral terms. Although activists called for the prosecution of Ríos Montt for decades, structural limitations continued to protect him. From 1994 to 1996 and again from 2000 to 2004, Ríos Montt served as President of Congress. And on November 4, 2007, Ríos Montt successfully ran again for a seat in Guatemalan Congress.17 The congressional immunity that came with these victories effectively curtailed any potential prosecution of Ríos Montt for the length of his congressional terms.18 As long as Ríos Montt remained in Congress, he could not be touched even if sociopolitical will for prosecution existed.

Despite the protection afforded by periods of legislative impunity, shifts within Guatemala’s legalscape following the 1996 peace agreement likely drew Ríos Montt’s concern. In 1999, representatives of the Centro para Acción Legal en Derechos Humanos (CALDH) met with members of 70 Maya communities to discuss pursuing justice for state terror committed against them during the civil war. Many of these communities found the proposition too risky and feared that challenging the state in court could lead to more violence and more deaths. 22 of

17 Notably, the winner of the presidential race, former-Gen. Otto Peréz Molina, had ties to Ríos Montt who led a Kaibil team in the Ixil region during the genocidal period, won the presidency in the same electoral cycle. The Kaibiles are an elite special forces team known for its brutality, cruelty, and bloodthirst. The Kaibiles allegedly committed many human rights violations during the civil war. Guatemala Human Rights Commission/USA, Guatemala’s Elite Special Forces Unit: The Kaibiles.

18 It should be noted that in 2007 Guatemalan prosecutors still resisted calls for Ríos Montt’s prosecution.
those communities, very diverse groups from across the country, decided to take the initial steps toward justice. They began exhuming mass graves, and the evidence showed patterns despite the vast distance between communities. That same year, survivors of these 22 communities, from five areas of the country, met in Nebaj to launch the Asociación para Justicia y Reconciliación (AJR), an umbrella organization formed to represent indigenous communities in court. Initially, the group drafted two cases, one against the regime of Romeo Lucas García (1978-1982) and the other against Ríos Montt. On June 6, 2001, the AJR took the first steps toward challenging the Ríos Montt regime in Guatemalan courts, filed a criminal complaint against Ríos Montt and members of his military command for genocide, crimes against humanity, and war crimes committed against the Ixil Maya.19

This complaint offered two oppositional lessons. First, the complaint spoke to Guatemala’s culture of impunity. Despite a clear criminal allegation, government prosecutors made no meaningful investigation or progress in the case.20 Secondly, the complaint reflected the determination and desire by indigenous survivors to see justice fulfilled. Roughly twenty years after indigenous activists began calling for legal recognition of the genocide in the 1980s, the struggle for justice continued undeterred.21

This struggle began to bear fruit in the 2000s. In 2008, prosecutors successfully brought Guatemala’s first charge of forced disappearances. Marco Antonio Sánchez Samayoa was charged with the 1981 forced disappearance and illegal detention of civilians. Sánchez argued

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20 Recall that this served as the basis for Spain’s justice system exercising jurisdiction over inaction. See Chapter 4.
that the LRN’s amnesty provision discharged any potential criminal liability for the crimes. However, the Court held that Sánchez’s actions fell within the genocide and human rights violations exceptions to the 1996 amnesty law. The wall of impunity was beginning to crack.\textsuperscript{22}

One of these cracks involved reforming the judiciary. In 2009, Congress recognized that the country’s history of violence against judicial actors put judges, lawyers, and witnesses at grave risk. To mitigate this, Congress passed Decree 21-2009, a judicial reform law that removes “high risk” cases from ordinary criminal courts and moves them to the newly created \textit{Juzgados de Mayor Riesgo} (Courts of Major Risk). Rather than the standard model where one judge presides over all forms of criminal cases, these new courts were three-judge panels with jurisdiction over cases involving the state (\textit{i.e.}, state officials, current or former), corruption, gangs, narcotrafficking, human rights, violence against women, money laundering, and terrorism. Under the new system, ordinary courts retained their status as “courts of first impression,” judiciary bodies that adjudicate initial questions of law, such as the admissible of testimony or other evidence.\textsuperscript{23} Perhaps most importantly during Ríos Montt’s time in office, the Guatemalan Attorney General’s office itself underwent a fundamental shift.

In May 2010, President Álvaro Colom (2008-2012) selected Conrado Arnulfo Reyes Sagastume to be the next Attorney General. Carlos Castresana, the head of the UN \textit{Comisión Internacional contra la Impunidad en Guatemala} (International Commission against Impunity in


\textsuperscript{23} \textit{Ley de competencia penal en procesos de mayor riesgo}, Decreto Número 21-2009 (Guatemala: Diario de Centro América, 2009).
Guatemala or CICIG), recommended that Reyes be removed from his position and accused him of involvement with illegal adoption operations and connection to narcotrafficking. When President Colom did not remove Reyes, Castresana abruptly resigned in protest and presented evidence connecting Reyes to an ongoing political scandal revolving around the killing of attorney Rodrigo Rosenberg Marzano. The political uproar prompted President Colom to ask the Constitutional Court to annul the election of Reyes as Attorney General.24

In December 2010, President Colom appointed human rights lawyer Claudia Paz y Paz as Reyes’ replacement, making her Guatemala’s first female Attorney General. The appointment of Paz y Paz caught many off guard. For most of her career, she worked to transform the Guatemalan justice system. A relative political outsider, Paz y Paz did not have the backing of influential special interest groups that for so long pulled the strings of power in the justice system. Despite this, the corruption scandal bolstered Colom’s resolve to change views of the nation as systemically corrupt. Accordingly, Colom chose Paz y Paz as the nation’s chief prosecutor.25

Paz y Paz quickly established protocols to reform the Attorney General’s office and seek justice for victims of the armed conflict. The new Attorney General decided to pursue charges of genocide for the military’s actions against the Maya during the war. Although the killings occurred throughout the country to diverse Maya groups, Paz y Paz adopted the AJR strategy of focusing on the region where the crimes were most thoroughly documented: the Ixil Triangle, an


area populated primarily by the Ixil Maya in the western highlands of the Quiché Department, bounded by the villages Santa María Nebaj, San Juan Cotzal, and San Gaspar Chajul.\textsuperscript{26} In June 2011, Judge Carol Flores of the Juzgado Primero de Alto Riesgo (First Court of High Risk), as the court of first impression, ordered the arrests of two former generals for genocide: Hector Mario López Fuentes and Oscar Humberto Mejía Víctores (who became president after leading the coup against Ríos Montt).\textsuperscript{27} López Fuentes and Mejía Víctores served respectively as the second and third in the chain-of-command under Ríos Montt.\textsuperscript{28} Later that year, prosecutors brought similar charges against José Mauricio Rodríguez Sánchez, the head of military intelligence under Ríos Montt. Judge Flores then proceeded to determine preliminary matters. However, on 23 November 2011, the First Court of Appeals of the Criminal Branch removed Judge Flores from the proceedings due to allegations by the defendants of bias against López Fuentes and transferred the case to another member of the High Risk court, Judge Miguel Ángel Gálvez. The CALDH filed an \textit{amparo}, a constitutional mechanism appealing one or more alleged violations of constitutional rights three weeks later. Since the \textit{amparo} process moves slowly, they often result in injunctions and are commonly used to stall proceedings.\textsuperscript{29} Although

\textsuperscript{26}Martínez, “Impunity’s Eclipse.”

\textsuperscript{27}It is important to remember that, despite the similarities in nomenclature (\textit{i.e.}, “High Risk” and “Major Risk”), the High Risk and Major Risk courts are separate and distinct legal entities within the Guatemalan judiciary.

\textsuperscript{28}The Public Ministry prosecuted López Fuentes in separate proceedings, although he died before standing trial. The prosecution of Mejía Víctores ended when judges found him unable to stand trial following a stroke. “Tribunal rechaza clausurar proceso por genocidio a López Fuentes,” \textit{Prensa Libre}, 31 May 2012.

Ríos Montt remained immune from prosecution while in Congress, the protections afforded him did not last forever.

Less than one year after the appointment of Paz y Paz, in November 2011 Ríos Montt lost his bid for reelection. Facing the possibility of arrest, the former dictator/president asked around the Office of the Human Rights Ombudsman, the government agency in charge of pursuing human rights violations, to see if he was under investigation. Ríos Montt’s concerns soon came to fruition. On 14 January 2012, Ríos Montt’s electoral term, and with it his congressional immunity, ran out. Not even two weeks later, prosecutors added Ríos Montt to the case against Rodríguez Sánchez.\textsuperscript{30} Ríos Montt made one last effort to preserve his pretrial impunity.

Throughout the civil war (and after), the Guatemalan government/military used the law, legal constructs, and legal authority as both positivistic expressions of permission—state actions are performed because they are legal—and structural erasure of consequences—state actions performed because there will be no punishment. By using the law in this manner, the armed forces attempted to sanitize the public’s memory of the civil war since at least the early 1960s by creating legal distance between the military and the human rights violations it committed.\textsuperscript{31} In this case, however, the ongoing push for justice from indigenous actors stopped the military’s use of the law as a means to produce this distance.

In late February 2012, Ríos Montt’s defense team filed a motion to have the charges against him dropped pursuant to the LRN’s amnesty provision. Judge Gálvez, however, rejected this argument and ordered the trial to proceed. Although this ruling only applied directly to Ríos Montt, Rupert Colville, the spokesperson for the UN Office of the High Commissioner for

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Human Rights, noted that it “open[ed] the door to striking down amnesty for anyone accused of genocide related to the country’s 36-year civil war.” Judge Gálvez’s ruling only occurred because of indigenous pursuit of justice, and through the ruling indigenous survivors took a small but important step toward ending impunity in Guatemala.

The struggle to obtain justice by Ixil survivors and those who testified against Ríos Montt signified more than an attempt to convict one man of a heinous crime. Rather, the trial was but one expression of Guatemala’s constantly negotiated discourse of power. In this instance, Ríos Montt’s prosecution opened the possibility to (re)determine who had the power to control the future memory of both the Ixil and other genocides. Trial testimonies revealed that for many survivors one of the most important potential outcomes of the prosecution was protecting the memory of what they had been through.

For many witnesses, safeguarding this memory secured the past from repetition. Recall from Chapter 2 the belief common to pan-Mayan ideology of the cyclicity of the universe; remembrance of their survival, and the acts that they survived, would prevent similar suffering from happening again. The Mayan view of remembrance as protection against the cycle repeating again complements Caroline Fournet’s view that the absence of judicial resolution (i.e., a trial) serves as a warrant for collective amnesia. Forgetting, Rachel Hatcher argued,

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33 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015 (Guatemala: 2013).

effectively killed victims a second time.\textsuperscript{35} Memory exists in a tripartite temporality: a past that is remembered, a present that remembers, and a future that will remember. Hatcher largely credits the strength of Guatemala’s human rights activist for shaping “post-Peace conversations and narratives about the past so that those who promote forgetting must do so within a discursive context where memory leads to non-repetition.”\textsuperscript{36} Crediting only the human rights community ignores one important element of the trial, though. While human rights activists did play an important role in the construction of narratives of Guatemala’s past, analyses focused only on a human rights framework overlook the profound contributions of indigenous survivors to that construction, particularly those that bravely challenged the country’s lengthy record of judicial impunity. Through their testimony—their remembrance of the past—indigenous survivors shaped the future memories of the events of the early 1980s.

The courtroom fight for control over the memory of the genocide began before the trial officially started. On 4 February 2013, before a date for trial had been set, Judge Gálvez again met with prosecutors, legal representatives of survivors, and the defense teams, to discuss the admissibility of evidence.\textsuperscript{37} At the hearing, Judge Gálvez ruled to allow all prosecution and survivor evidence, witnesses, and experts. This gave a significant amount of control to survivors. Additionally, Gálvez excluded much of the evidence offered by the defense due to procedural defects.\textsuperscript{38} The proceeding effectively shifted evidentiary control largely to the prosecutorial


\textsuperscript{36} Ibid., 17.

\textsuperscript{37} In Guatemala, as in many civil law jurisdictions (i.e., a legal system defined by a civil code, rather than a common law system), interested third-party complainants can join criminal suits. These are called \textit{querelantes adhesivos}, or “attached complainants.”

\textsuperscript{38} Defense counsel failed to follow proper guidelines in their submissions. For example, the team submitted names of experts without necessary attached expert reports. Also, the team failed to submit actual documents into the evidentiary record, instead offering evidence of recent requests for government records (essentially asking the court to build a case for them). Kate Doyle, “Update on Guatemalan Genocide Trial,” (5 February 2013), accessed...
team. Attorneys for the defendants called it a “lynching” and vowed to appeal. In fact, the defendants filed multiple *amparos* that challenged the admission of evidence and the trial itself. On 11 March, the Constitutional Court sustained the defendants’ motions, but only in part: it ordered the defense evidence admitted to trial but refused to cancel the trial. Despite a nearly even divide in public opinion as to whether genocide occurred, the AJR and CALDH, the NGOs representing the survivors, released a joint statement asking all Guatemalans to support survivors on their path to justice. Prosecution of Efraín Ríos Montt for genocide formally began in Guatemalan national courts on 19 March 2013.

### 6.2 ¿Cual verdad es verdad?: Survivors, Soldiers, and Differences in Social Memory

The trial opened with the atmosphere of a *feria*. The courtroom overflowed with people. In a last-ditch effort to stall the proceedings, Ríos Montt fired his lawyer at six o’clock that morning, and his new counsel requested a five-day suspension to prepare the case. In what would later have large repercussions, Judge Barrios denied this request. Edgar Pérez, the founder and leader of the *Bufete Jurídico de Derechos Humanos* (Human Rights Law Firm or BDH) that helped represent the survivors, made the stakes of the trial immediately clear. “Lies and silence

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39 Doyle, “Update on Guatemalan Genocide Trial.”
40 MacLean, “Trial to Start Despite Last Minute Legal Challenges.”
both destroy the truth.” Pérez said. Survivors came to confront both of those potential destroyers of truth. First, by refuting lies that what they survived did not, in fact, happen. Secondly, by speaking their truth, survivors established the factual basis of an undeniable evidence-backed judicial decision.

Accessing the Guatemalan legal system offered Ixil witnesses the opportunity to both take and cede personal authority over their testimonios. As María Luz García observes, though, the courtroom required survivors to present testimony only through “certain types of discursive participation.” Ixil witnesses largely testified in forms that they found appropriate, such as the use of terms that are semantically-related in the Ixil Mayan language, much to the frustration of attorneys on both sides who had trouble eliciting specific testimony. In addition to these structural disconnects, most of the witnesses did not speak Spanish. The court, therefore, appointed official interpreters to translate from Ixil. In fact, witnesses needed interpreters to relay their testimony beginning on the first day. Although this meant having someone else speak for them, in one way this helped to mitigate the power imbalance that resulted from a ladino-tilted playing field. Effectively, interpreters operated as surrogates fluent in the medium of exchange, limiting the structural disadvantages of the court. Survivors may have recognized this power

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45 For example, in Ixil burial ceremonies, the words oksa’m (clothing) and txu’xi’ (blankets) are semantically paired to signify the totality of one’s belongings. These sorts of semantic pairings are used in the Ixil language in both ceremonial and formal speech (which would be used in a trial setting). When a prosecutor attempted to elicit testimony about rape, a witness reverted to discussing how her oksa’m and txu’xi’ were removed, meaning that the soldiers took everything from her and her family. The prosecutor, unfamiliar with the Ixil language, was then unprepared for the witness to not address issues of sexual violence, who instead moved on to discussing the killing of livestock. Ibid., 318-320. These “miscommunications,” García argues, reveal both the gap between the Ixil as subaltern and the state and the gap between the Ixil and those in solidarity with them. Ibid., 321.

46 MacLean, “Trial Opens with Statements, Prosecution Witnesses, after Defense Challenges Rejected.”
disparity. Judge Barrios ruled that witness Tómas Chávez Brito spoke enough Spanish to testify of his own accord, but he quickly opted for a court interpreter.\(^47\) This mechanism of power became an item of contestation as both the prosecution and the defense employed their own team of interpreters and challenged the narratives offered by their official state counterparts.\(^48\)

For many survivors, the preservation of truth, in this case defining and protecting the historical memory of Ríos Montt’s scorched earth policy, was the ultimate goal of the trial. Gabriel de Paz Pérez lived in Vicalamá in 1982 when soldiers arrived with bombs and helicopters, forcing survivors to flee to the mountains. Nonetheless, de Paz gave his testimony without fear or anger, grateful for the opportunity to relate what happened in Vicalamá. His request was for “justice, investigation, and clarification” of what occurred.\(^49\) This appeal did not differ greatly from that of María Cavinal Ródriguez, from nearby Tibatotiosh. Despite the gang violation she suffered at the hands of soldiers and the disappearance of her brother, who she never saw again, Cavinal Ródriguez pleaded primarily for the judge to record what happened.\(^50\) Justo López Corio, who lost his nine-year-old son in the genocide, explained the importance of testifying, because he found justice simply by relating what occurred.\(^51\) For others, though, such as Francisco Velasco Marroquín, the act of testifying on its own did not offer catharsis. Instead,


\(^{49}\) Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia del proceso C-01076-2011-00015*, 410.

\(^{50}\) Ibid., 447.

\(^{51}\) Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia del proceso C-01076-2011-00015*, 499.
Velasco Marroquín said that the Ixil, collectively, sought “true justice,” the recognition of the Guatemalan government of what happened. This, Velasco Marroquín thought, would free the Ixil from the past, enabling them to prosper and guarantee a lasting peace.\(^5^2\)

While testifying offered hope to witnesses such as Francisco Velasco that they would be able to shape the future justice, for others testifying shaped their conceptions of the past and implicit views of the law. Tiburcio Utuy testified that the army came to Chajul multiple times, burned houses, and massacred 14 families, leaving many sitting in the blood of their loved ones. Near the end of his testimony, noting that he himself suffered, Utuy asked the court what it would mean if the court found that the military did not commit genocide. What would it mean for his suffering? For his memory? Importantly, although massacres had long occurred in Guatemala, Utuy sought a specific finding of genocide—not atrocity, horror, or massacres. Instead, Utuy couched his understanding of what occurred in Western legal tradition. Utuy’s questions and his appeals for a judicial determination of genocide suggest that an acquittal would change how he viewed his experiences—only a guilty verdict could confirm what he lived through. Utuy, like other witnesses, incorporated the concept of genocide, a legal doctrine of purely Western origins, to such a degree that it became the prism through which he viewed his experiences. One of these witnesses, Jacinto Velasco Corio, described the burning of houses and murder of family members by the armed forces. He requested that the court use the law of genocide to define what happened in Chajul. Velasco Corio viewed his personal experience through the lens of the Global Northern legal construct of genocide. In fact, the incorporation of the concept of genocide, as reflected in Velasco Corio’s testimony, revealed another incorporation. By requesting that the court use the law of genocide in defining, he unwittingly

\(^{52}\) Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia del proceso C-01076-2011-00015*, 565.
asked the court to resort to legal positivism to declare the events he survived to have been illegal and immoral.  

Ironically, Velasco wanted the court to use the same legal theory that the Guatemalan state used to justify the genocidal scorched-earth campaign.

In addition to first-hand witnesses, experts throughout the trial sought to preserve the memory of the dead. Social anthropologists worked to reconstruct the lives of the remains found in the clandestine graves, often through interviews with family members, visits to villages, and crime scene analysis. One of these anthropologists, Juan Ramón Donado Vivar, spoke of exhuming remains from mass, clandestine graves.  

Donado Vivar, and forensic social scientists like him, examined human remains to “recover the history and testimony” of those killed. Combining social reconstructions with scientific forensic analysis allowed experts to both identify particular remains and develop profiles of those who could not be identified. This process had two very important effects. First, it offered families and relatives of the deceased the opportunity to attain closure. Many survivors finally knew what happened to their loved ones. Secondly, reports generated from forensic activities entered into the judicial record, simultaneously preserving the memory of events in the Quiché Department while hearing what might be called the postmortem testimonios of those who lost their lives at the hands of the Guatemalan military. Effectively, the trial allowed the dead to speak. The combined testimony of the deceased—delivered by forensic anthropologists who described what happened to the military’s victims—and the testimonios of survivors who bravely told their stories despite the

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53 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015, 547-49. For a more in-depth discussion of legal positivism, see Chapter 1.


55 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015, 271.
fear of deadly retribution for doing so represents ongoing indigenous resistance to internationally-supported systems of state terror. Further, these testimonios, of both survivors the dead, underscore the importance placed on the preservation of memory within Ixil sociocultural values. Ixil values continued to be revealed during the trial.

The second day of trial began much like the first. Efraín Ríos Montt arrived with his legal team in disarray. On the first day, Judge Barrios ejected Ríos Montt’s attorney (who Ríos Montt had just hired that morning), Francisco García Gudiel, after García Gudiel repeatedly demanded Barrios recuse herself from the case. When García Gudiel did not arrive on day two of the trial to represent Ríos Montt, Judge Barrios informed the former dictator that the court did not tolerate stall tactics, and that if necessary she would appoint him a public defender. Members of Ríos Montt’s original defense team were seated at the defense table within the hour. This obstruction fit well within the overall pattern of legal obfuscation and delay that characterized Ríos Montt’s approach.

Testimony from the end of the day shows that patterns and historical repetition were of paramount concern for survivors. Pedro Chávez Brito closed testimony for the day. Following Chávez Brito’s account of having fled and hiding after his pregnant sister and her two children were burned alive, prosecutors asked what outcome he hoped to see emerge from the trial. Chávez Brito answered that all he wanted was justice “so that my children do not see such things.”

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56 MacLean, “Trial Opens with Statements, Prosecution Witnesses, after Defense Challenges Rejected.”
57 Intentionally or not, by appointing a new attorney, Judge Barrios reduced the likelihood of success for an amparo challenging the denial of Rios Montt’s constitutionally guaranteed right to counsel.
58 MacLean, “Day Two: Rios Montt Representation, and Prosecution Testimony.”
59 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015, 522.
60 MacLean, “Day Two: Rios Montt Representation, and Prosecution Testimony.”
expressed similar concerns. Diego Santiago Cedillo told the court that he “does not want that life
again,” and that “if it comes again, he cannot bear the pain.” 61 Francisco Matóm, like Chávez
Brito, worried the genocide would repeat for his remaining children. 62 Clemente Vásquez Mateo
and Cecilia Baca Gallego both stated that justice would prevent a recurrence of the genocide. 63
Others, such as Francisco Velasco Marroquí, based their fears of repetition on tripartite
identities: as indigenous people, as Ixiles, and as survivors. 64 Preserving their truth would ensure
that the massacres would never happen again.

Not everyone sought to prevent that repetition through the preservation of Ixil truth,
though. On the day the trial opened, the powerful economic oligarchy CACIF issued a press
release denouncing the proceedings. The group called for justice to be applied “without
ideological bias” to preserve the independence of the judiciary. 65 To make this argument, CACIF
took out a full-page advertisement signed by twelve prominent politicians and public figures in
various Guatemalan newspapers. The advertisement argued that even beyond a potential guilty
verdict, the mere accusation of genocide tainted the country and jeopardized what they viewed as
lasting peace and successful reconciliation. 66 In fact, the press release said that, in the years since
the signing of the 1996 Peace Accords, Guatemalans achieved their main goal: the end of
political violence. According to the release, no reason existed to believe that political violence

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61 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del
proceso C-01076-2011-00015, 480.
62 Ibid., 478.
63 Ibid., 370, 448.
64 Ibid., 565.
65 Comerciales Comité Coordinador de Asociaciones Agrícolas, Industriales, y Financieras, “A la opinión
66 Luis Flores Asturias, Eduardo Stein Barillas, Gustavo Porras Castejón, Raquel Zelaya Rosales, Richard
Aitkenhead Castillo, Rodolfo Mendoza Rosales, Adriana Zapata, Arabella Castro de Paiz, Marta Altolaguirre
Larraondo, Marco Tulio Sosa Ramírez, Traicionar la paz y dividir a Guatemala (Guatemala: 2013).
might return. However, while the advertisement noted that even though political violence stopped, the possibility it could resume remained.\textsuperscript{67} In fact, an official recognition of genocide, the advert said, placed the relative peace in “imminent danger.”\textsuperscript{68} In this regard, the release reads less like a statement of concern that political violence \textit{could} return following a guilty verdict and more like a threat that political violence \textit{would} return.

Despite the seeming altruism behind the statement, it insisted that the nation did not need or want a trial. Accusations of genocide only nominally focused on members of the armed forces. The true defendant, the group said, was the entirety of the Guatemalan state. A trial, the advertisement warned, served no practical purpose other than to reverse what had been achieved and further the social and political polarization that gripped the country. In fact, the advertisement stated, victims groups, their relatives and loved ones, and survivors did not want to see the prosecution proceed.\textsuperscript{69} Rather, victims and survivors preferred to move beyond the past, to move beyond “unfinished mourning” and instead focus on transforming the structural conditions that negotiators intended the Peace Accords to address.\textsuperscript{70} Likewise, the majority of

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\textsuperscript{68}Flores Asturias et al, \textit{Traicionar la paz y dividir a Guatemala}.

\textsuperscript{69}Ibid.

\textsuperscript{70}Ibid. The drafters of this press release saw no irony in the concerns over the lack of structural transformation in Guatemala, although what impeded that change was that “the private sector has never been willing to let go of any power.” Elizabeth Oglesby, “‘We’re No Longer Dealing with Fools’: Violence, Labor, and Governance on the South Coast,” in \textit{War by Other Means: Aftermath in Post-Genocide Guatemala}, ed. McAllister, Carlota and Diane M. Nelson (Durham: Duke University Press, 2013).
Guatemalans preferred to put the past behind them and work towards national reconciliation.\textsuperscript{71} Such suggestions that Guatemalans simply wanted to move on openly contradicted the lived reality of thousands of survivors seeking justice.

However, some Guatemalans agreed that there should be no trial. Even days before the trial began, \textit{no hubo genocidio} protestors already gathered in front of the courthouse. These protests lasted the duration of the trial. Protestors carried signs with varying messages:

- “We demand fair trials.”
- “We demand respect for military dignity and historic truth.”
- “Freedom for those who fought for our freedom.”
- “There was no genocide here.”\textsuperscript{72}

Commonly, protestors had ties to the armed forces, either as participants in Ríos Montt’s counterinsurgency campaign or as a loved one of someone who did. One such person told the press that soldiers were “proud of what we did during the civil war.”\textsuperscript{73} This protestor, Victor Manuel Argueta, had served as Ríos Montt’s presidential chief-of-staff. The personal interest of Argueta and former soldiers like him in preventing a trial was thus based on their own guilt.

Notably, a number of Ixil participated in one \textit{no hubo} protest. During this protest, at least 50 busloads of Ixiles marched from the US Embassy to the Constitutional Court, stopping along the way at the Public Ministry (the public prosecutor’s office) and the Supreme Court. At the march, the former indigenous mayor of Nebaj, Diego Rivera Santiago, blamed victims of the massacres for their deaths, noting that the dead were not “tame pigeons.”\textsuperscript{74} Rivera announced

\textsuperscript{71} This conflicts with public polling at the time, which indicated that 54 percent of Guatemalans believed that what occurred in the Ixil area under Ríos Montt’s clenched fist was genocide. MacLean, “Legal Challenges and Public Debates Mount in Guatemala While the Constitutional Court Deliberates.”


\textsuperscript{74} “Manifestaciones en la capital por juicio,” \textit{Prensa Libre}, 23 April 2013.
that the no hubo marchers came on their own volition under no outside influence, and that they only wanted to relate what they had experienced. However, many Ixiles abandoned the no hubo protest and instead held a sit-in in the Plaza de la Constitución, stating that they had been tricked. Samuel Raymundo, for example, said that a former mayor of Nebaj had told him and others that they were traveling to Guatemala City not to protest the trial, but instead to demand fertilizer from the government. Organizers of the march waited until they had already left for Guatemala City to inform Ixil protestors that they had to express their support for Ríos Montt and to tell the press that no hubo genocidio in the Ixil area.75

The wartime alliances that had left some Ixiles split on the question of genocide were seen in society more generally. Various academics, writers, and public intellectuals in Guatemala and internationally also disputed the charges of genocide. As previously discussed, the group that wrote the advertisement against the proceedings, what sociologist Edelberto Torres Rivas called “the document of the 12,” called the trial a “judicial fallacy.”76 Author and former infantry major Gustavo Adolfo Díaz Lopez, who notably led a coup attempt to end Guatemalan civilian rule in the late-1980s, echoed this language in his report used by the defense team. In this report, titled “The Fallacious Accusations of the Public Ministry,” Díaz Lopez accused “extreme left Marxist-Leninists” who wanted to continue the civil war by other means of coopting the Public Ministry.77 Mary Anastasia O’Grady, a Wall Street Journal editor who focused on Latin America, called the genocide charges “a form of revenge” for the far left.78 And anthropologist

76 Flores Asturias et al, Traicionar la paz y dividir a Guatemala.
David Stoll, who controversially and unrepentantly dedicated his career to branding indigenous activist and Nobel Peace Prize winner Rigoberta Menchú a liar, said that the vast majority of the Guatemalan public (including roughly half the Ixil) did not believe that the armed forces engaged in genocidal acts.79

Despite claims of the innocence of the armed forces and of the frivolity or vexatiousness of the prosecution, no hubo advocates generally did not seek to prove their claims in the courtroom by testifying and instead sought to preserve a “no genocide” status quo by simply calling for an end to the trial. Nonetheless, the trial continued, giving each side the opportunity to prove that acts of genocide did (or did not) happen. Survivors wanted desperately to testify in court, and si, hubo activists marched in large demonstrations holding signs with messages such as “I am Ixil and I want to be a witness” and “We, the Ixil, want to testify in this trial.”80

Meanwhile, the Ríos Montt defense team called zero firsthand fact witnesses in presenting its case. As trials establish an “official and definitive version” of what happened, the lack of witnesses begs the question of why the defense would cede its ability to influence that version.81

There were witnesses ready and available to testify for the defense, such as Victor Argueta, Ríos Montt’s chief-of-staff. Argueta stated that he wanted to see “a fair trial according to the law” where he and others could “prove there was no genocide here.”82 A very real possibility was that

79 David Stoll, “¿Fue genocidio?,” ContraPoder, 22 November 2013. It is worth noting that Stoll formulated this opinion based on anecdotal conversations he had, rather than on any form of official public polling. Stoll theorized that the Ixil do not consider the counterinsurgency campaign a genocidal one because the army allowed them to return to work their lands after the massacres and because they were allowed to work in the “model village” concentration camps that many Ixil survivors were relocated to.


82 Fox News, “Former Guatemalan Dictator's Supporters Defend Him against Genocide Charges.”
the defense lawyers chose not to call witnesses that could expose the attorneys to charges of presenting false witnesses. Suborning perjury would subject an attorney to between six months and two years in jail. Articulo 461, “Presentación de testigos falsos,” Congreso de la República de Guatemala, Codigo Penal de Guatemala, Decreto No. 17-73, 5 July 1973, GT-CIRMA-AH-012.

In fact, the defense team notably offered very little substantive defense throughout the trial, but instead used delay tactics to stall and derail the proceedings. In all likelihood, the defense knew it could not prove its case based on the facts.

In all likelihood, the defense knew it could not prove its case based on the facts.

6.3 “How Many Acts of Genocide Does it Take to Make a Genocide?”

On 10 June 1994, Christine Shelley, then a spokesperson for the US State Department, held a press conference discussing events that were occurring in Rwanda. Under specific instructions from the White House not to call the mass killings genocide, she stated that the Clinton administration had evidence that “acts of genocide” had taken place but would not label it a genocide. This prompted one reporter to ask, “How many acts of genocide does it take to make a genocide?” Shelley was unable to answer. The Rwandan Genocide was not the only time the Clinton administration struggled with these semantics. In 1993, administration officials debated how to handle the growing crisis in Bosnia. Describing the crisis as “ethnic cleansing” gave the administration cover to declare that the crisis was not a “never again” moment. However, in 1995 the Srebrenica massacre resulted in global condemnation of the ongoing

83 Suborning perjury would subject an attorney to between six months and two years in jail. Articulo 461, “Presentación de testigos falsos,” Congreso de la República de Guatemala, Codigo Penal de Guatemala, Decreto No. 17-73, 5 July 1973, GT-CIRMA-AH-012.


actions of the Bosnian Serbs against ethnic Muslims as a genocide and emboldened the Clinton administration to directly intervene in the war.\textsuperscript{87} The lasting memory of Rwanda and Bosnia as genocides (and not as crimes against humanity, ethnic cleansing, or massacres) speak to the impact of these terms.

Accordingly, proving the Ixil case as a genocide would have a profound effect on the future historical memory of the civil war. As Caroline Fournet observes, trials help delineate the specific boundaries of collective memory (\textit{i.e.}, the terms established or rejected at trial significantly impact future remembrance of events). In fact, Fournet writes that when genocides “are qualified as crimes against humanity [in judicial proceedings], they will be remembered by society as a whole as crimes against humanity and not as genocides.”\textsuperscript{88} Trials can, therefore, confuse rather than elucidate the memory of atrocity when those proceedings are marked by multiple, overlapping charges. The stakes of the Ríos Montt prosecution, then, was the memory of what happened in the highlands during the war. For Maya survivors to protect the memory of the genocide as genocide, they needed to prove that a genocide occurred in conformity with Guatemalan Penal Code Article 376, Guatemala’s incorporation of the Genocide Convention into its domestic criminal law as described in Chapter 1.\textsuperscript{89} Pursuant to Article 376, the Guatemalan Congress adopted virtually identical language to that within Article II of the internationally-

\begin{itemize}
\item \textsuperscript{88} Fournet, \textit{The Crime of Destruction and the Law of Genocide}, 134.
\item \textsuperscript{89} Artículo 376, “Genocidio,” Congreso de la República de Guatemala. Article 376 provides, in pertinent part, that “anyone committing the crime of genocide, with the purpose of totally or partially destroying a national, ethnic or religious group, commits any of the following acts: 1°. Death of members of the group; 2°. Injury that seriously affects the physical or mental integrity of members of the group; 3°. Submission of the group or members of the same, to conditions that may produce their physical destruction, total or partial; 4°. Compulsive displacement of children or adults from the group to another group; or 5°. Measures intended to sterilize members of the group or in any other way prevent their reproduction.
\end{itemize}
accepted Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the “Genocide Convention”), with roughly the same legal requirements and evidentiary burdens of proof.\(^90\) Most of the standards established under international law applied similarly in Guatemala.

Genocide, like most crimes, requires the establishment of a prohibited external act (the *actus reus* or “guilty act”) coupled with the intent to produce an illegal result (the *mens rea* or “guilty mind”). Importantly, in genocide prosecutions, prosecutors or plaintiffs must prove that a criminal actor performed the guilty act with what is called “specific intent,” the goal of producing a particular result.\(^91\) Both the Genocide Convention and Guatemalan Penal Code Article 376 list five categories of potential acts and dictate that genocidal intent means the intent to destroy a particular “national, ethnical, racial or religious group.”\(^92\) The prosecution’s first step, then, was to prove the guilty act requirement.

Prosecutors and third-party representatives (the AJR and CALDH) had little difficulty proving that the armed forces committed atrocities under Ríos Montt. From the first day of trial, witnesses recounted the horrors that they survived. Ultimately, over the course of the proceedings, the court heard from 105 prosecution witnesses and 45 prosecution experts, reviewed the skeletal remains of 1,176 people, and discussed 314 exhumations carried out by

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\(^90\) United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide, No. 1021* (United Nations General Assembly, 9 December 1948). The Genocide Convention provides that “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”


forensic anthropologists. Forensic anthropologist Freddy Peccerelli testified that the type of wounds found among the remains would only result from execution-style killings. One witness, sociologist Héctor Rosada Granados, found the military’s practices so axiomatically genocidal that when asked if he thought that the state had a policy of genocide, he responded, “actions speak for themselves.” That the massacres occurred was, to be sure, indisputable.

The crux of a genocide prosecution is proving intent. Very rarely do perpetrators of genocides leave behind smoking gun documents or voice recordings revealing their intent to commit genocide. Rather, a finding of genocidal intent often demands inference from a perpetrator’s actions. Destructive and discriminatory acts performed repeatedly against a particular group can prove the presence of genocidal intent. In particular, international tribunals use circumstantial evidence to infer intent from a “pattern of purposeful action.” While the inclusion of cultural genocide was specifically excluded by drafters of the Genocide Convention, international tribunals on atrocities in the former Yugoslavia had recently looked at attacks on culture, in particular the deliberate destruction of material expressions of that culture, as

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evidence of an intent to destroy the group. These principles guided the findings of the Ríos Montt verdict.

When making determinations as to intent in the case of circumstantial evidence, arbiters of facts often must weigh the totality of evidence in full, and no single piece or category of evidence is itself dispositive. The three judges presiding over the Ríos Montt prosecution, accordingly, balanced all the evidence in making their determination as to the presence of genocidal intent. They found that indigenous, eyewitness testimony revealed patterns of actions that resulted in the partial destruction of an ethnic group, the Ixil. In particular, witnesses proved that the armed forces engaged in repeated acts of “mass murder, … massacres, torture, degradation, rape, mass sexual violence, forced displacement, [and the] transfer of children from one group to another.” The court also used various laws and military operations manuals in their intent analysis.

The court relied heavily on government documents in its discussion of the requisite intent, in particular military manuals and plans. The army’s 1978 Counterinsurgency War Manual established the policies, directives, and objects of the military’s overall counterinsurgency plan, which explicitly applied to any members of the public seen as subversive. These policies intersected the objectives of Plan Victoria 82 (Victory 82), the military campaign dedicated to identifying and eliminating subversive groups, as well as

100 *Prosecutor v. Krstic* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 2001), 203 (taking into account the destruction of mosques and houses belonging to group members as evidence of the intent to destroy a group).

101 The court’s 718-page judgment, used extensively here, contained descriptions of every witness’ testimony and the legal theories of the prosecution, third-party plaintiffs, and the defense. Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia del proceso C-01076-2011-00015*.

102 Ibid., 698.

103 Ibid., 699.

104 Ibid.
physically and psychologically controlling the population. Importantly, *Victoria 82* established the regular transfer of information up and down the chain of command. *Victoria 82*, therefore, established Ríos Montt’s awareness of the military’s actions in the Quiché Department.¹⁰⁵

Other military operations buttressed the actions dictated by *Victoria 82*. *Plan Firmeza 83* (Firmness 83) meant to prevent any surges in the ranks of subversive groups. *Firmeza 83* specifically incorporated the objectives of *Victoria 82* into its goals of isolating and eliminating insurgents. The plan authorized local military commanders to use their own discretion in determining the use of lethal force. Also, *Firmeza 83* established the use of air support in the area, which expert witness Rodolfo Robles Espinoza noted signified a level of planning that did not support suggestions of spontaneous killings.¹⁰⁶ The government likewise supported *Victoria 82* with *Operación Ixil*, dedicated to studying and observing the Ixil population. Through *Operación Ixil*, the government and Ríos Montt were aware of the location of Ixil villages and the ethnic dominance of the Ixil in the area between Nebaj, Cotzal, and Chajul.¹⁰⁷ The final plan considered by the court, *Plan Sofía*, allowed the use of paratroopers and helicopters in counterinsurgency efforts.¹⁰⁸ The goal of *Sofía*, like the other plans, was the complete extermination of subversive elements. *Sofía*, like *Firmeza 83*, also gave a degree of ad hoc autonomy to kill: it stated that soldiers “should respect the lives of women and children, when possible.”¹⁰⁹ At least six massacres, with over 1,200 dead, resulted from *Sofía*.¹¹⁰

¹⁰⁵ Ibid., 650-51.
¹⁰⁶ Doyle, “‘With One Order from Him, He Could Have Changed the Entire Situation.’”
¹⁰⁸ The four counterinsurgency plans hereafter referred to collectively as the “*Plans*.”
¹⁰⁹ Ibid., 655.
The court also examined the legal means used by the Ríos Montt regime to facilitate the genocide.\textsuperscript{111} In addition to the Guatemalan military documents, the judges saw probative value in structural changes made to domestic positive law during Ríos Montt’s 18-month regime. First, the court noted that the government did not comply with its 25 March 1982, promise to respect the constitutional rights of the Guatemalan people after Ríos Montt had taken over the government. Ríos Montt then used the law to dissolve the Guatemalan Congress and establish the military as the head of government (Decree 24-82), now freed of the responsibility to act within constitutional limitations. Decree 24-82, also known as the Fundamental Statute of Government, put the military in control of all branches of government, included the judiciary. The freedom from constitutional restraint extended further for Ríos Montt following the passage of Decree 36-82, which displaced the military junta and appointed Ríos Montt as head-of-state. The court also noted that the repeated amnesty decrees of 1982 and 1983 signaled to both commanders and the rank-and-file that previously illegal actions could now occur with impunity: if soldiers committed illegal acts, the military government would absolve them of criminal liability. Finally, the court recognized that by passing Decree 46-82, which created special courts that could immediately apply the death penalty, the regime stripped Guatemalans of their right to fair, impartial, and independent trials.\textsuperscript{112} As provided in Chapter One, these laws gave the Ríos Montt regime’s actions a legally positive veneer of legality that Ríos Montt and others used to defend state terror and genocidal acts as not technically illegal.\textsuperscript{113}

\textsuperscript{111} Recall that positivism, the approach to law employed by the Guatemalan military, provides that legality is determined by lawgiver. \textit{i.e.}, the only requirement for an act to be “legal” is if the lawgiver says so.

\textsuperscript{112} Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, \textit{Sentencia del proceso C-01076-2011-00015}, 590-96.

\textsuperscript{113} This raises an interesting possibility. Although the Genocide Convention, and its progeny, recognize only five categories of legally prosecutable genocidal acts, conduct enabling or in furtherance of those acts may not be legally responsible, but they can be morally responsible. As such, those who enact legislation, such as the Ríos Montt decrees, likely also hold moral culpability for genocide.
Ríos Montt’s use of terror was known outside of Guatemala. Relying on declassified documents from the US government, the judges remarked that foreign intelligence was aware of Ríos Montt’s plans for the Ixil area. These plans, per the US government, included the complete destruction of all towns and villages that cooperated to any degree with the EGP. The fact that the government believed that the entire Ixil populace aided the EGP and labeled them an internal enemy bolstered the case against Ríos Montt. Although the Ríos Montt defense team maintained that the dictator was unaware of what his officers were doing on his behalf, the court found that in actual fact he was intimately familiar with *Plan Victoria 82* and regularly encouraged those down the chain-of-command to embrace it. The judges agreed with the prosecution that this encouragement demonstrated Ríos Montt’s ultimate goal: the destruction of the Ixil.

The court ruled that the potential destruction of the Ixil people occurred through means other than killing every Ixil. If the goal of the *génocidaires* is the destruction of an ethnic, national, or religious group, this can be accomplished by the elimination of cultural identity. For these groups, maintaining their group identity requires the propagation of the cultural elements that define that group from one member to the next. This most commonly occurs through inter-generational transmission. Belonging to a cultural group, says historian Ángel Váldez Estrada, does not come necessarily from self-identification but rather from the identity that is shaped by absorbing culture that is transmitted from elders to younger generations and from daily activities. Eliminating elder generations of a cultural group, in turn, aids in the elimination of that group.114 Accordingly, when Julio Velazco Raymundo witnessed a group of soldiers decapitate an old

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114 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, *Sentencia del proceso* C-01076-2011-00015, 162.
woman and then use her head to play soccer, he saw one less ancestor to teach her
descendants.\textsuperscript{115}

Stopping the transmission of cultural identity can occur not just through killing the source
of transmission, the elders, but also by killing the recipients. Angel Váldez Estrada said that the
armed forces had a policy of killing Ixil children, even those in utero. When Gaspar Velasco
asked the judges, “What fault did three-month-old babies have?” the question was rhetorical. He
already knew the answer: none. But because the army said otherwise, because the \textit{Plan} said
otherwise, this innocence offered no refuge.\textsuperscript{116} For the military, an indigenous child was “a seed
that has to be killed.”\textsuperscript{117}

Children need not necessarily be killed to stop the spread of a culture. This also can occur
by removing children from the group, preventing their absorption of cultural knowledge. For
example, Jacinto Lupamac Gomez and his two younger brothers were abducted after soldiers
killed his parents when he was eight years old. The children were given new identities and
Spanish names, and they lost their ability to speak Ixil. They reunited with aunts and uncles only
22 years after the attack, and they could not communicate with their family and had forgotten all
their native culture.\textsuperscript{118} According to psychologist Nieves Gomez Dupuis, the trauma suffered
permanently altered the identity of child survivors.\textsuperscript{119}

\begin{flushright}
\textsuperscript{115}Shawn Roberts, “Day 10: Witness Implicates President Perez Molina in Massacres,” \textit{International

\textsuperscript{116}Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, \textit{Sentencia del
proceso C-01076-2011-00015}, 552.

\textsuperscript{117}Ibid., 690.

\textsuperscript{118}Shawn Roberts, “Prosecution Witnesses Describe Forced Adoptions and Assimilation, and Forced
Conscription,” \textit{International Justice Monitor} (4 April 2013), accessed 17 March 2021,

\textsuperscript{119}Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, \textit{Sentencia del
proceso C-01076-2011-00015}, 692.
\end{flushright}
The trauma felt by child survivors shines light on the suffering experienced by victims of sexual violence, which also can constitute a genocidal act. Magdalena Matom Raymundo was six months pregnant when the soldiers arrived in Cotzol. They took turns violating her and her 12-year-old daughter, and two weeks later her son was stillborn. Sociologist Marta Elena Casaus Arzu called this the “protocolization of rape,” through which the army made systematic sexual violence a regular weapon of war. By targeting women, children, and the elderly, in ways that prevented or inhibited the spread of social fabric, the army worked to systematically destroy the Ixil in the long-term.

The military also targeted the social fabric itself. Many witnesses testified that when the army arrived in Ixil villages, they burned crops. For agricultural societies in general, crops represent life. Not only do the Ixil rely on maize as a primary food staple, but maize holds a prominent position in the pan-Mayan worldview. The ancient gods crafted the first men from maize. Maize represents fertility, rebirth, and the Ixil still use maize in religious ceremonies. Therefore, the destruction of the milpa, the cornfields, by the armed forces represented a destruction of Ixil culture. As Juan Raymundo testified, “They ended our culture.” Not surprisingly, Rios Montt’s defense team took a very different view.

6.4 Defending Genocide: Rios Montt Makes his Case

Rios Montt maintained his innocence before, during, and after trial. Recall that Judge Miguel Galvez excluded the defense’s witnesses on during a pretrial hearing on 4 February 2013

120 Ibid., 558-59.
121 Ibid., 253.
123 MacLean, “‘They Viewed Us as If We Were Not People.’”
because the defense team filed their witness list after the statutory deadline had passed. This had prompted Ríos Montt’s legal team to file an *amparo*, arguing that the legal system denied his constitutional right to a defense by excluding these witnesses. The Constitutional Court agreed, and the defense presented witnesses stating that the massacres committed by the military against the Ixil were based on indigenous support for the guerrillas. Ixil survivors, however, successfully rebutted this by distinguishing between the legal definitions of motivation and intent.124

The defense based their position on two principles. First, the exclusion of ideological genocide from the Genocide Convention and Article 376 meant that genocide did not include targeting groups for ideological (i.e., political) purposes.125 The defense argued that military action in the Ixil area during Ríos Montt’s regime targeted people on the basis of their support for the Marxist insurgency. The intent of military action against the Ixil was to eliminate support for the insurgents rather than to kill the Ixil. Also, the defense said that as head of state Ríos Montt had very little to do with military operations.126

Nearly two months after the pretrial hearing in which Judge Gálvez excluded defense witnesses, the trial took a turn. On 4 April 2013, the Constitutional Court ruled that the defense witnesses must be allowed to testify and ordered the trial court to return the case to Judge Gálvez so that he could admit the defense’s evidence.127 Interestingly, this finding required both the

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127 On the same day, former *kaibil* Hugo Ramiro Leonardo Reyes described his experience as a soldier in El Quiché during the Ríos Montt regime. He said he had been under the command of Major Tito Arias, who participated in and ordered the crimes against the population, including the burning of villages. Tito Arias, Leonardo Reyes revealed, was the *nom de guerre* of Otto Pérez Molina, the then-president of the country and a staunch denier of the genocide. This development had been a concern for many involved, as Pérez Molina had indicated that if he
judiciary and the military defendants to shift from positivistic legal thought. Judge Gálvez had determined that the defendants failed to submit their witness list for consideration before the legal deadline. Pursuant to legal positivism, the deadline established by Congress for a defendant to offer evidence in preliminary hearings could not be deviated from, regardless of the relative weight or merit of that evidence. But when the Constitutional Court ignored the statutory time limit and ruled to allow defense witnesses, it deviated from rules of legal positivism by subverting the legal authority of the legislature.

The Constitutional Court’s ruling freed the defense to call their witnesses. However, on 17 April 2013, Judge Flores, who an appeals court removed from presiding over the proceedings for bias against the defendants, notified the parties that the *amparo* that the CALDH filed challenging her removal in November 2011 had finally worked its way through the appeals process. She replaced Judge Gálvez as the preliminary magistrate. The next day, Judge Flores annulled the trial, ruling that because she never should have been removed from the case, the trial needed to revert to before the date of her removal. This sent the case into a legal limbo. The CALDH, AJR, and the *Asociación Familiares de Detenidos Desaparecidos de Guatemala* (the Association of Relatives of the Disappeared detainees of Guatemala or FAMDEGUA) jointly filed a complaint challenging Judge Flores’ annulment. Benjamín Manuel Jerónimo, the

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128 The *amparo* had originally been successful, but the courts declined to reappoint Flores to the trial pending a defense appeal. A three-judge panel affirmed the decision on 13 March 2013 and Flores received notification of the final decision the next month.

129 In the Guatemalan judicial system, a preliminary judge makes initial rulings on the admissibility of evidence and whether a case meets jurisdictional or evidentiary threshold requirements to constitute a justiciable case.
president of the AJR and a survivor of the Ríos Montt scorched-earth campaigns, called for the judge to not “disrespect the deaths” and “innocent blood that cries out for justice.” Judge Flores, he said, had been bought. The Constitutional Court rejected calls to overrule the annulment, which pursuant to Judge Flores’ ruling would set the case back to before her removal, effectively forcing all witnesses to testify again. Instead, they ordered the case back to Judge Flores to follow their precise instruction (and only those instructions) regarding the admission of defense witnesses. The case returned to Judge Barrios on April 29 but went through various stoppages until 7 May 2013. Despite the regular interruptions to the proceedings and a rotating door of counsel, the defense strategy remained remarkably consistent: delay, delay, delay.

Notably, the defense did not offer fact witnesses to bolster its claims. Instead, Ríos Montt’s lawyers only presented opinion testimony from “experts” whom the three-judge panel of

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130 Vásquez, “Víctimas arremeten contra jueza Flores.”


the trial court found lacked reliability. These so-called experts simply echoed the opinion that the motivating factor for the genocide was the political ideology of the victims.\textsuperscript{133} The prosecution and indigenous third parties, however, solicited testimony that showed that Ixil identity played a profound role in the military’s use of state terror against them. The survivors’ legal team argued against the defense’s interpretation of intent, noting that the defense conflated two separate legal concepts—motive, the reason for an act, and intent, the desired result of that act. Therefore, even accepting Ríos Montt’s defense as true, that political ideology motivated the genocide, this would not have precluded a finding of genocidal intent.

Ixil survivors had previously attempted to make this argument in Spanish national courts but were denied access to the judicial apparatus. By making this argument in Guatemalan courts, though, the Ixil survivors accomplished something subtle yet very important. The distinction between motive and intent, applied specifically to Ríos Montt’s genocidal regime, was initially argued in the Plan de Sánchez case before the Inter-American Court of Human Rights. By incorporating the argumentation of Plan de Sánchez survivors, the Ixil Maya signified a fuller legal expression of indigenous agency. In this way, the Ixil case became not about just representing themselves, but instead grew into a legal articulation of the Mayan movement as a whole.\textsuperscript{134}

6.5 The Ruling – Genocide Redefined

On 10 May 2013, the trial court issued its ruling. The court rejected the defense’s insistence that the military targeted the Ixil due to their support for the insurgency. Likewise, the defense strategy of procedural obfuscation and delay failed to prevent the trial proceedings from

\textsuperscript{133} Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015.

\textsuperscript{134} See Chapters 3 and 4.
concluding that under Ríos Montt the armed forces conflated race and imputed political ideology. The court recognized as an established fact that the military initiated a policy of population and territorial control that it used to target what it saw as the social base of the guerrillas. Part of this plan included the treatment of the Ixil as supporters or members of the insurgency, even in the case of obviously non-combatant civilians.

The military created a clear linkage between Ixil ethnicity and a perceived ideological belief. According to Casaús Arzú’s testimony, these connections between race and political ideology complemented Guatemala’s long history of anti-indigenous racism and opened the door for the repeated routine of state terror, state violence, and state sexual violence against the Maya. This racism and view of the Ixil as inferior revealed an intentionality to target them as an ethnic group. In fact, the linkage between race and ideology became so strong that the armed forces assumed ideological tendencies solely based on outward manifestations of ethnic culture, such as patterns of clothing and language.¹³⁵

The court ruled that the Ixil were routed into refugee camps, where the government could reeducate them and modify or outright eliminate their culture. Dr. Beatriz Manz, an anthropologist, testified that, according to a classified CIA communiqué, the Guatemalan army decided that the entirety of the Ixil population sympathized with the EGP. The CIA viewed this as problematic because it knew that the Guatemalan military treated Ixil civilians as if they were armed combatants.¹³⁶ Perhaps the clearest line between race and a perceived ideology was drawn by former military man Hugo Ramiro Leonardo Reyes, who testified that the army’s policy in

¹³⁵ Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015, 693.
¹³⁶ Ibid., 105, 166, 470.
the Ixil region was “indio visto, indio muerto” (“Indian seen, Indian dead”).

It made no difference if an Ixil actually supported the rebels or not, the army killed them just the same. Not because they were insurgents, but because they were Ixil. For the armed forces, the lines between a racial, ethnic identity and an ideological perspective became increasingly blurred until they effectively did not exist.

The court found that the defense’s argument applied incorrect legal standards when it argued that the Ríos Montt regime’s intent was to eliminate subversive support. The defense relied on the exclusion of ideology as a potential victim group from the Genocide Convention. However, the court ruled that the military incorporated race into its view of ideology. Through this ruling, indigenous Guatemalans reshaped the crime of genocide for the international community. Although the defense said that the Ixil were targeted for their support for the guerrillas rather than their race, the court ruled that, for the above reasons, race and ideology became more-and-more intertwined to the armed forces. This reached a point where the military elite made no effort to distinguish between race and political support in their implementation of the counterinsurgency campaigns in the Ixil area.

Eventually, the government criminalized simply being Ixil. As such, the defense’s argument that Ríos Montt implemented the Plans, the tripartite military strategy designed to eliminate the insurgency’s social base, on a purely ideological basis held little, if any, influence on the court. Rather, eliminating the base of support for the insurgents served as a “prior motivation” for the Plans. The court differentiated the intent of the counterinsurgency Plans from their underlying motive. The goal of the acts

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137 Ibid., 458, 461.

138 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia del proceso C-01076-2011-00015, 684.

139 Ibid., 694.
delineated in the *Plans*, rather than the justification for those acts, signified Ríos Montt’s true legal intent. Essentially, for criminal law purposes: what someone wants to do or have happen defines intent; why someone wants to do that defines motive.

Indigenous testimony proved to the court, and the world, that Ríos Montt was guilty of genocide, incitement of genocide, and crimes against humanity. However, the court acquitted Mauricio Rodríguez Sánchez, the head of military intelligence under Ríos Montt, despite his leadership of the military’s intelligence apparatus that was essential to implementing the *Plans*, finding that he had no true operational control. The court sentenced Ríos Montt to 80 years in prison, effectively a death sentence for the 86-year-old génocidaire. Additionally, pursuant to Article 124 of Guatemala’s code of criminal procedure, the court awarded various reparations requested by survivors.

Notably, the reparations that the survivors requested amounted to no individual pecuniary gain. Instead, they sought measures of non-repetition: education, the promotion of social integration, and preservation of collective memory. The defense challenged requests for reparations as outside of the agency of their client, as reparations needed to be made by the Guatemalan state, rather than from Ríos Montt or his estate.140

Despite these protests, the court mandated the following reparative awards. First, the Guatemalan government had to apologize publicly for genocide and crimes against humanity and apologize again separately for state sexual violence against women. Second, the judges ordered

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140 Garcia Gudiel noted that even arguing against the reparations order was technically beyond his scope of employment, as he represented Ríos Montt and not the State of Guatemala. Nonetheless, he saw the responsibility of providing the government with some degree of legal protection an aspect of his duty as a patriotic Guatemalan citizen. Raquel Aldana, “Court Orders Reparations Following Rios Montt Conviction on Genocide and Crimes against Humanity Charges,” *International Justice Monitor* (14 May 2013), accessed 17 March 2021, https://www.ijmonitor.org/2013/05/court-orders-reparations-following-rios-montt-conviction-on-genocide-and-crimes-against-humanity-charges/.
the establishment of memorials and educational reforms acknowledging the crimes and ensuring their instruction as part of the national curriculum. Third, the court required the military to create training programs on human rights for soldiers. Fourth, the court ordered the construction of public schools in the Ixil area. Finally, it mandated that the government needed to include Ixil survivors in the National Reparations Program established in 2003. This was a significant but partial victory for the Ixil survivors. The court refused to grant survivors the restoration of their lands, the establishment of programs for sustainable development in the Ixil area, the creation of a law criminalizing genocide denial (as the CALDH highlighted repeated, continuing denials), or an order forcing the government to apologize to the international community.  

6.6 Conclusion

The full impact of this decision remains undetermined as of the date of this writing. However, the court made an important contribution to international understandings of genocide. As noted previously, the drafters of the Genocide Convention specifically omitted political ideology as a protected group. In Latin America, the intersection of this omission and the targeting of political groups has fostered cultures of impunity and allowed the orchestrators of mass atrocity to avoid accountability. Accordingly, activists and academics long noted the need to reassess the ability for prosecutors to adequately respond to ideological or political genocide. The Ríos Montt decision, however, carved out a path to do so under certain criteria.

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144 Pieter N. Prost, *Genocide: United Nations Legislation on International Criminal Law* (Leyden: A.W. Sythoff, 1959) (arguing that protecting culture belongs under arguing that the lack of inclusion of political ideology as a basis for genocide prosecution is ultimately a failure); Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization During the Holocaust* (Free Press: New York, 1979) (arguing that political
When an actor commits or instigates the commission of genocidal acts based on political ideology, in the past that actor could hide behind the exclusion of politicide from the Genocide Convention. The court’s ruling, however, showed that political genocide can fall within the purview of the Genocide Convention. If, as in the case of the Guatemalan genocide, perceptions of race, ethnicity, or religion become so associated with political support or involvement that they become effectively synonymous for the génocidaire, prosecutors may pursue charges of genocide despite the political motivation. Essentially, indigenous Guatemalans helped rewrite the Genocide Convention from below.

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<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>1999</td>
<td>CALDH meets with members of 70 Maya communities to discuss options for pursuing justice in court</td>
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<td>1999</td>
<td>AJR created to represent indigenous communities in court</td>
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<td>6 June 2001</td>
<td>Indigenous survivors of Ríos Montt regime file criminal complaint</td>
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<td>4 November 2007</td>
<td>Ríos Montt wins congressional seat, giving legislative immunity</td>
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<td>4 August 2009</td>
<td>Guatemala creates Courts of Major Risk to address “high risk” criminal cases</td>
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<td>December 2010</td>
<td>Claudia Paz y Paz named Attorney General of Guatemala</td>
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<td>June 2011</td>
<td>Judge Carol Flores of First Court of High Risk orders arrests of former Generals Hector Mario López Fuentes and Oscar Humberto Mejía Víctores for genocide</td>
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<tr>
<td>23 November 2011</td>
<td>First Court of Appeals of the Criminal Branch removes Judge Flores due to allegations of bias; case transferred to Judge Miguel Ángel Gálvez; Judge Flores files <em>amparo</em> challenging transfer of the case</td>
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<tr>
<td>November 2011</td>
<td>Ríos Montt loses reelection campaign, ending his legislative immunity</td>
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<td>14 January 2012</td>
<td>Ríos Montt leaves office</td>
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<td>19 January 2012</td>
<td>Prosecutors add Ríos Montt to López Fuentes and Mejía Víctores case</td>
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<td>February 2012</td>
<td>Ríos Montt defense team files motion for dismissal of charges on basis of National Reconciliation Law (LRN)</td>
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<td>1 March 2012</td>
<td>Judge Gálvez overrules motion for dismissal</td>
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<tr>
<td>4 February 2013</td>
<td>Judge Gálvez meets with legal representatives of all parties to discuss admissibility of evidence; rules that prosecution can introduce all witnesses and rejects most defense evidence due to procedural defects; defense files <em>amparo</em> over the exclusion of their witnesses and evidence</td>
</tr>
<tr>
<td>11 March 2013</td>
<td>Constitutional Court rules trial can proceed, defense evidence must be admitted</td>
</tr>
<tr>
<td>19 March 2013</td>
<td>Trial of Ríos Montt begins; Ríos Montt fires legal team, requests suspension to prepare new case</td>
</tr>
<tr>
<td>19 March 2013</td>
<td>CACIF issues press release in various newspapers denouncing the trial</td>
</tr>
<tr>
<td>20 March 2013</td>
<td>Judge Yassmín Barrios ejects Francisco García Gudiel, head of new Ríos Montt defense team, following repeated demands for her recusal</td>
</tr>
<tr>
<td>21 March 2013</td>
<td>Ríos Montt arrives without legal team; original defense team replaces new team</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>4 April 2013</td>
<td>Constitutional Court rules defense witnesses must be allowed to testify, orders case returned to Judge Gálvez for admission of defense evidence</td>
</tr>
<tr>
<td>17 April 2013</td>
<td>Judge Flores informs court the amparo challenging her November 2011 removal is successful, replaces Judge Gálvez as presiding judge</td>
</tr>
<tr>
<td>18 April 2013</td>
<td>Judge Flores annuls the trial on basis of reverting case to its status before her November 2011 removal</td>
</tr>
<tr>
<td>April 2013</td>
<td>Constitutional Court rules Judge Flores to only rule on admissibility of defense witnesses</td>
</tr>
<tr>
<td>29 April 2013</td>
<td>Case returned to Judge Barrios; stoppages occur through 7 May 2013</td>
</tr>
<tr>
<td>10 May 2013</td>
<td>Ríos Montt convicted of genocide and crimes against humanity, sentenced to 80 years; co-defendant José Mauricio Rodríguez Sánchez acquitted</td>
</tr>
<tr>
<td>20 May 2013</td>
<td>Conviction of Rios Montt overturned by Constitutional Court</td>
</tr>
<tr>
<td>January 2015</td>
<td>Retrial of Ríos Montt and Rodríguez Sánchez postponed</td>
</tr>
<tr>
<td>13 October 2017</td>
<td>Retrial of Ríos Montt and Rodríguez Sánchez begins</td>
</tr>
<tr>
<td>1 April 2018</td>
<td>Ríos Montt dies and charges against him dropped</td>
</tr>
<tr>
<td>26 September 2018</td>
<td>Rodríguez Sánchez acquitted by 2-1 decision despite unanimous decision that the Guatemalan state committed genocide against the Ixil Maya</td>
</tr>
</tbody>
</table>
7 CONCLUSION: “I FEEL FREE OF MY NIGHTMARES”: THE LASTING EFFECTS OF THE TEN DAYS OF SPRING

I am the lie of all real things, the reality of all fictions.

—Miguel Ángel Asturias.¹

Against all odds, the Maya had won. The historic guilty verdict prompted domestic elation and international applause for the Guatemalan justice system. The US Embassy in Guatemala quickly congratulated the country for both the trial and the sentence, calling it a victory for the rule of law and evidence of Guatemala’s capacity to administer justice through the judicial process.² Navi Pillay, the High Commissioner for Human Rights at the UN, publicly praised the verdict, weeks after expressing concerns over Guatemala’s ability to provide justice for victims and survivors.³ Additionally, headlines from around the world suggested clear recognition of the Ríos Montt regime as a genocidal one.⁴ Spanish papers called the verdict a first step in Guatemala’s fight against impunity.⁵

¹ Miguel Ángel Asturias, El Señor Presidente (Mexico City: Costa-Amic, 1946), 25.
This one step forward was followed by another step back. In a parallel to Guatemala’s ten-year break from dictatorial oppression from 1944 to 1954 known as the Ten Years of Spring, the indigenous legal victory over centuries of impunity could be called the Ten Days of Spring. On 20 May 2013, ten days after Ríos Montt’s conviction, the Constitutional Court overturned the trial court’s verdict on a legal technicality. The court based its 3-2 ruling on Ríos Montt’s *amparo* challenging the expulsion of his attorney Francisco García Gudiel. When Judge Barrios failed to grant Ríos Montt’s requested five-day delay, the slim majority ruled, she violated the génocidaire’s constitutional right to counsel. According to the Constitutional Court, Judge Barrios should have provisionally suspended the trial on 19 April 2013, when they said Ríos Montt received a protective order staying further proceedings pending appeal. Accordingly, the court annulled all proceedings that took place after the April 19 date, ordered the case to return to trial and resume from that point on, and released Ríos Montt from jail.  

The defense strategy of delaying and obstructing the judicial process with burdensome *amparos* and spectacular theatrics worked.

The ruling prompted blistering dissents from Judges Gloria Patricia Porras Escobar and Mauro Roderico Cacón Corado. Porras Escobar argued that granting the *amparo* hindered, rather than facilitated, due process. She noted that the rights that Ríos Montt alleged that the trial court violated, his right to counsel, had already been restored. In addition to inhibiting the trial itself, the Constitutional Court’s ruling, she said, interfered with the survivors’ right to obtain justice. Cacón Corado noted that the court lacked the jurisdiction to override a verdict that had already

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7 This reversal delighted the right-wing elite, which had criticized the sentence as a product of international interference. CACIF had already asked the Constitutional Court to annul the verdict, asserting its concern for the legitimacy of the judicial process in the face of withering criticism from the left. Álvaro Montenegro, “El CACIF le pide a la CC la anulación de la condena contra Ríos Montt,” *El Periódico*, 13 May 2013.
proceeded through sentencing. A proper appeal, he argued, would challenge the sentence, not the verdict. Additionally, Cacón Corado stated that he felt the ultimate purpose of Ríos Montt’s revolving door of legal representation and abundance of *amparo* filings solely occurred to obstruct normal juridical procedure.\(^8\)

Like the dissenting judges, the international community also excoriated the Constitutional Court’s May 20, 2013, annulment of the verdict. The *New York Times* editorial board, for example, published a column highly critical of Guatemalan criminal (in)justice and called for prosecutors to quickly resume efforts to convict Ríos Montt.\(^9\) The column urged the US government to apply pressure on the Guatemalan state to see justice done. When Rita Claverie de Sciolli, Guatemala’s then-Vice Minister of Foreign Affairs, responded to the editorial board, she argued that the justice process needed time to fully play out. She expressed confidence that Guatemala’s courts would handle it, while noting that President Otto Pérez Molina (2012-2015) disagreed with assessments of genocide. Interestingly, she concluded with a statement that looked eerily similar to the country’s approach to legality under the military dictatorships, stating that “it is important that others — both within and outside Guatemala — also respect that decision, along with Guatemala’s right to follow its own judicial proceedings according to its own laws.”\(^10\)

### 7.1 A History of Redefining Genocide

The Vice Minister of Foreign Affairs echoed a tenet of legal positivism that had been under debate in the legislation relating to the Ríos Montt genocide case for decades. In the 1970s,

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the Guatemalan state used legal positivism to craft an ideology of impunity that enabled state terror and legitimized genocide. The Guatemalan left rejected the state’s positivistic, morally sterile view of the law. The US, under Jimmy Carter, tried to push morality into Guatemalan legal spaces by stopping the direct provision of weapons from the US government to the Guatemalan military. Rather than changing its behavior to comply with international human rights standard, the military government passed new laws that legalized the state’s human rights violations. The Reagan administration unknowingly revealed the insufficiency of Guatemala’s use of legal positivism when it began providing the Guatemalan military with equipment—that the military used to commit genocide—because the military’s actions now complied with strict, amoral lawfulness.

Grassroots activism began to chip away at the system of impunity over the last ten years of Guatemala’s civil war. Guatemalan grassroots groups, increasingly comprised of the Maya, pushed against various amnesty laws that furthered military impunity. To this end, grassroots activists pushed from below for reform to the US’ foreign aid policy. Member of the US Congress responded favorably to this lobbying, and when they threatened to end all aid to Guatemala, the country’s oligarchic elite, who had resisted peace efforts, quickly shifted in favor of peace. Their support freed negotiators to reach agreement, and they sealed the peace agreement with an amnesty law that eliminated criminal liability for every crime connected to the armed conflict other than human rights violations and genocide. The Guatemalan grassroots, through their struggle against military impunity, successfully ushered in peace and furthered the moral, humanitarian ends of US foreign policy.

Due to the inefficacy of the Guatemalan justice system, indigenous Guatemalan sought justice for human rights violations and genocide in supranational courts. Survivors of the 1982
Plan de Sánchez massacre filed suit against the Guatemalan state in the Inter-American system of human rights protection. Their case showed the dialogical nature of legal processes, as survivors incorporated the views of the Inter-American Commission on Human Rights into their own legal arguments. Through this process, though, survivors also introduced Maya legal concepts into the Inter-American system and challenged the boundaries of international law.

Mayan activists did not only seek justice outside of Guatemala in supranational courts. These activists built on the case established by Plan de Sánchez survivors to confront military impunity in foreign national courts. Using Spain’s universal jurisdiction statute, Rigoberta Menchú and other activists charged eight former military officials, including Ríos Montt, with genocide. This meant ceding the power to judge wholesale the Guatemalan criminal justice system to the Spanish judiciary, recreating the power dynamics from the colonial relationship between Spain and Guatemala. However, by giving Spain the authority to cast judgment on the Guatemalan legal system, indigenous Guatemalans were able to challenge the international legal system from within.

While Menchú fought for justice in Spanish national courts, other indigenous survivors of Ríos Montt’s genocidal scorched earth operations fought in Guatemalan courts for control over their historical memory. Maya activists and state prosecutors expanded the theories initially expounded in the Inter-American system and in Spain, and defied the traditionally accepted ban on the prosecution of ideological genocide. By adopting the law of genocide into their views on their experiences, Ixil activists unwittingly continued demonstrating the dialogical aspect of the law. Importantly, through this process these activists seized power over their own historical memory.
The Ríos Montt trial shows the culmination of a years-long dialogical process in which Maya activists and witnesses acceded to, drew on, and incorporated the tenets of Western law in order to change and bend it to their own conceptions of the world, of society, and of justice.11 Even the Maya’s adoption of and ultimate insistence upon the Global-Northern, legal term “genocide” to describe their experience of counterinsurgency, torture, slaughter, and rape—an experience that they felt to be an attempt to annihilate their culture and their existence as a people—speaks to the complex process of “give and take” that ensued from the multiple encounters between grassroots indigenous constituencies and a wide array of legal systems in which they had played no role in crafting.12 “Genocide” may have been a Global Northern construct, but it penetrated the indigenous Guatemalan psyche and identity.

11 The Maya acceptance of judiciary bodies and laws foreign to their own conception involved their being “socialized into accepting a view of their interests as propagated from above,” from the dominant ladino ruling class whose colonial subordinate experiences in turn informed its views. James Scott calls this process of adopting dominant narratives in discourse “hegemonic incorporation.” Domination and the Arts of Resistance: Hidden Transcripts (New Haven: Yale University Press, 1990), 19-20. In effect, the Maya activists and litigants made what Scott calls their “hidden transcript” a part of the official public record, what Scott calls the “public transcript.”


There is an emerging anthropological literature on the adoption and inclusion of foreign words and concepts in Guatemalan indigenous communities. On the use of scientific/legal language to describe victim’s deaths during inhumation ceremonies (ceremonies when the dead were properly reburied after having been exhumed from mass graves by forensic anthropologists), see María Luz García, “The Long Count of Historical Memory: Ixil Maya Ceremonial Speech in Guatemala,” American Ethnologist 41, no. 4 (10 November 2014): 664-680. On a more quotidian level, the anthropologist David Stoll observes that expressions of Ixil collective memory have shifted over time. Before indigenous survivors and activists began their pursuit of justice, Stoll said that locals in Nebaj did not use the term genocide to describe what they survived. Now, however, a large sector of nebanjenses say that “Genocide is the truth” of what happened. David Stoll, “¿Fue genocidio?,” ContraPoder, 22 November 2013.
Ixil survivors, activists, witnesses, and their representatives preserved the memory of the Guatemalan genocide. Importantly, the memory they preserved was their own, which stood in stark contrast to the “official” history as provided by the Guatemalan state. While the trial focused on Ríos Montt and Rodríguez Sánchez, in many ways the true defendant was the State of Guatemala (just as in many ways, the true litigants were not only the Ixil Maya, but rather all the Maya people of Guatemala). Recall the reparative award mandated: that the state apologize; that the state create memorials; that the state implement training and educational programs. These remedies did not occur organically, but rather resulted from indigenous engagement with the justice system. In the end, the survivors’ memories were the memories that survived.\footnote{13}

Survivors did not only have success in shaping the domestic Guatemalan narrative. Rather, survivors also effectively changed international views of Guatemalan history, making it clear that genocide had occurred. This process of transnational influence by the Guatemalan grassroots had begun years before, as Guatemalan social movements increasingly brought the military’s war crimes into the international spotlight and forced the Guatemalan elite both to defend itself and to make moves toward peace. Although Andreas Huyssen notes that “discourses of lived memory remain tied primarily to specific communities and territories,” the expressions of memory and memorialization of the indigenous survivors of the Guatemalan genocide reached beyond departmental or national borders.\footnote{14}

As we have seen, the Maya also worked on a transnational stage to dialogically shape international law, forcing it to take their communitarian values into consideration even as they

\footnote{13}{For anthropological accounts of debates on genocide and the war from before and after the genocide verdict, see Diane M. Nelson’s works, \textit{Reckoning: The Ends of War in Guatemala} (Durham: Duke University Press, 2009) and \textit{Who Counts? The Mathematics of Death and Life after Genocide} (Durham: Duke University Press, 2015).}

used it to achieve their goals. Importantly, however, while Maya activists—and particularly here the Ixil litigants—challenged and shaped accepted notions of international law, they also challenged and shaped their place in Guatemalan society. In so doing, they initiated and accelerated a still-ongoing, historic process of dismantling, or at the very least undermining, systems and attitudes of anti-indigenous racism that had been evolving since the Spanish conquest. By forcing the Guatemalan justice system to recognize genocide, indigenous survivors forced the state to see them as humans. Significantly, when Judge Barrios read Ríos Montt’s guilty verdict, she told Ixil survivors that the state saw them as human beings. In a reversal of roles, after 500 years, a subordinate indigenous group helped force its dominant oppressor to admit its own inhumanity.

### 7.2 Epilogue/Epitaph

For genocide, Ríos Montt spent a total of one night in jail. The génocidaire remained under house arrest for the duration of the trial. Following his conviction, he was transferred to prison, but was moved to a military hospital the next day. Following the annulment of the verdict, he returned to house arrest. Due to a congested judicial docket, the court rescheduled Ríos Montt’s retrial to begin in January 2015. For those in Guatemala, the Ríos Montt trial fit into the country’s historical pattern of judicial impunity. This pattern continued to manifest even after trial. Ríos Montt’s defense team filed challenges to the panel of judges presiding over the

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15 For an analysis of this phenomenon in popular culture and everyday life, see J. T. Way, *Agrotropolis: Youth, Street, and Nation in the New Urban Guatemala* (Berkeley: University of California Press, 2021). Way traces the influence of poor and working-class Maya and mestizo youth on idioms of national identity and also places their communities and cultural expressions at the center of both national and planetary urban history.

case. Edwin Canil, an Ixil survivor, said, “this was to be expected.” Despite this, Canil maintained that this “was not the end, but only the beginning.”

While waiting for Ríos Montt’s retrial to begin, the Guatemalan congress introduced Punto Resolutivo No. 3-2014, a congressional resolution stating unequivocally that genocide did not occur. Per the resolution, prosecutors failed to prove their case. Congressional representatives said they passed the resolution to consolidate peace, maintain the spirit of reconciliation, and avoid social conflict. It did not have the intended effect. The Council of Mayan Authorities of the Ixil People rejected the act, which was not legally binding. They said that the congress did not know Guatemala’s history, lacked historical memory, and did not represent the Maya because its members had been bought. The resolution, they said, favored the large companies and members of the armed forces that brought about the genocide. And they were not alone. Various indigenous women’s groups released a statement in support of the Ixil. They said they stood in solidarity with the brave members of the Ixil people who spoke truth to power during Ríos Montt’s trial and thanked them for offering the true history of Guatemala. They noted their respect for those that fight for memory, truth, and justice, and called on Congress to retract the irresponsible resolution. Finally, they invited human rights organizations and the international community to join them and the Ixil in their continued fight for justice and peace in Guatemala.

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18 Congreso de la República de Guatemala, Punto Resolutivo No. 3-2014, 24 April 2014, GT-CIRMA-Colección de Derechos Humanos-Caso Ríos Montt.
19 Consejo de Autoridad Mayas, “El pueblo Ixil rechaza la ofensa del Congreso y los diputados que niegan el genocidio cometido por el Estado de Guatemala,” May 17, 2014, GT-CIRMA-Colección de Derechos Humanos-Caso Ríos Montt.
It would be easy to dismiss the prosecution of Efraín Ríos Montt as a failure. After all, he spent just one night in jail. But this would be a mistake. The Ríos Montt trial resulted from decades of indigenous social activism and prompted global recognition of and support for their struggle. With Guatemala’s long history of impunity and violence against the Maya, the mere act of testifying signified success. Additionally, although Ríos Montt died in 2018 during his retrial, and despite the acquittal of his co-defendant José Mauricio Rodríguez Sánchez, the court unanimously ruled that the Guatemalan state committed genocide against its indigenous population.

The Guatemalan cases offer hope for other parts of the world that likewise seek justice. Survivors, lawyers, judges, international human organizations, members of the diplomatic community… the indigenous struggle for justice brought all these people together and inspired a movement that truly represented justice from below. At minimum, these brave Ixil survivors showed that justice is possible. Edwin Canil said that the movement knew this would happen; they knew that one appeal after another after another inevitably would hamper their efforts. Despite that knowledge, despite the resignation that justice may never come for the butcher who oversaw the slaughter of the people, the continuing dedication of these indigenous activists is a


testament to the human spirit. Canil vowed to continue his struggle. As one survivor said on the witness stand when asked how it felt to testify, “In my body and my heart, for the moment, I feel free…. My heart is already free of my nightmares.”²⁴

### APPENDIX

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1821</td>
<td>Guatemala declares independence from Spain</td>
</tr>
<tr>
<td>1871</td>
<td>“Liberal” revolution begins process of modernization</td>
</tr>
<tr>
<td>1931</td>
<td>General Jorge Ubico (1931-1944) becomes president</td>
</tr>
<tr>
<td>October 1944</td>
<td>Coup ousts military junta, begins “Ten Years of Spring”</td>
</tr>
<tr>
<td>1945-1951</td>
<td>Presidency of Juan José Arévalo</td>
</tr>
<tr>
<td>1951-1954</td>
<td>Presidency of Jacobo Árbenz</td>
</tr>
<tr>
<td>1952</td>
<td>Árbenz issues Decree 900, a plan of agrarian reform</td>
</tr>
<tr>
<td>June 1954</td>
<td>CIA-supported coup led by Carlos Castillo Armas ousts Árbenz, ending the Ten Years of Spring</td>
</tr>
<tr>
<td>1954-1957</td>
<td>Presidency of Carlos Castillo Armas</td>
</tr>
<tr>
<td>1958-1963</td>
<td>Presidency of Miguel Ydígoras Fuentes</td>
</tr>
<tr>
<td>1960</td>
<td>Coup attempt against Ydígoras Fuentes unsuccessful; surviving military officers that led coup flee to Mexico</td>
</tr>
<tr>
<td>February 1962</td>
<td>Officers return as Movimiento Revolucionario 13 Noviembre (the November 13 Revolutionary Movement or MR-13); attack offices of United Fruit Company</td>
</tr>
<tr>
<td>1962</td>
<td>MR-13 joins with other revolutionary groups as Fuerzas Armadas Rebeldes (the Rebel Armed Forces or FAR)</td>
</tr>
<tr>
<td>August 1968</td>
<td>FAR assassinates US Ambassador John Gordon Mein</td>
</tr>
<tr>
<td>1970-1974</td>
<td>Presidency of Carlos Arana Osorio</td>
</tr>
<tr>
<td>January 1972</td>
<td>Ejército Guerrillero de los Pobres (the Guerrilla Army of the Poor or EGP) formed</td>
</tr>
<tr>
<td>5 July 1973</td>
<td>Guatemalan congress enacts new criminal code</td>
</tr>
<tr>
<td>Year</td>
<td>Event/Description</td>
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<tr>
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</tr>
<tr>
<td>1974-1976</td>
<td>Presidency of Kjell Eugenio Laugerud García</td>
</tr>
<tr>
<td>4 February 1976</td>
<td>7.5 magnitude earthquake hits Guatemala; estimated 23,000 dead, 77,000 wounded, and over 1,000,000 homeless</td>
</tr>
<tr>
<td>12 April 1978</td>
<td>Community organizations form Comité de Unidad Campesino (the Peasant Unity Committee or CUC)</td>
</tr>
<tr>
<td>1978</td>
<td>Jimmy Carter administration conditions military aid to Guatemala on human rights conditions</td>
</tr>
<tr>
<td>1978-1982</td>
<td>Presidency of Romeo Lucas García</td>
</tr>
<tr>
<td>29 May 1978</td>
<td>Panzós Massacre</td>
</tr>
<tr>
<td>31 January 1980</td>
<td>Members of CUC and EGP occupy Spanish Embassy in Guatemala City; embassy burned in police attempt to forcibly expel occupiers, leading to 36 deaths</td>
</tr>
<tr>
<td>September 1981</td>
<td>Military orders creation of Patrullas de Autodefensa Civil (Civil Defense Patrols or PACs)</td>
</tr>
<tr>
<td>January 1982</td>
<td>EGP joins other revolutionary groups to form Unidad Revolucionaria Nacional Guatemalteca (the Guatemalan National Revolutionary Unity, or URNG)</td>
</tr>
<tr>
<td>23 March 1982</td>
<td>Lucas García ousted in coup; General Efraín Ríos Montt (1982-1983) chosen to lead the country</td>
</tr>
<tr>
<td>April 1982</td>
<td>Ronald Reagan administration resumes US provision of equipment to Guatemalan military</td>
</tr>
<tr>
<td>18 July 1982</td>
<td>Plan de Sánchez Massacre</td>
</tr>
<tr>
<td>6 December 1982</td>
<td>Dos Erres Massacre</td>
</tr>
<tr>
<td>8 August 1983</td>
<td>Ríos Montt ousted in coup; General Óscar Humberto Mejía Víctores (1983-1986) becomes de facto president</td>
</tr>
<tr>
<td>31 May 1985</td>
<td>Guatemala adopts new constitution</td>
</tr>
<tr>
<td>1986-1991</td>
<td>Presidency of Vinicio Cerezo</td>
</tr>
<tr>
<td>31 August 1987</td>
<td>“Esquipulas II,” peace initiative for Central America, signed by region’s presidents</td>
</tr>
</tbody>
</table>
1990
Frank La Rue founds Centro para la Acción Legal en Derechos Humanos (Center for Legal Action in Human Rights or CALDH)

1991-1993
Presidency of Jorge Serrano

1992
K’iche’ Maya human rights activist Rigoberta Menchú wins Nobel Peace Prize

25 May 1993
President Jorge Serrano (1991-1993) suspends constitution and dissolves Congress and the Supreme Court in attempted autogolpe; Serrano resigns the presidency and flees the country 1 June 1993

1993-1996
Presidency of Ramiro de León Carpio

1996-2000
Presidency of Álvaro Arzú

29 December 1996
Final aspect of Guatemalan peace accords signed, formally ending 36-year civil war

1 July 1997
Inter-American Commission on Human Rights opens case on Plan de Sánchez Massacre

26 April 1998
Auxiliary Bishop Juan José Gerardi announces publication of archdiocese truth commission report

28 April 1998
Bishop Gerardi assassinated in his garage

1999
CALDH and AJR formed

25 February 1999
CEH presents UN Truth Commission report

2 December 1999
Rigoberta Menchú et al file criminal complaint in Spain against seven former Guatemalan military officials, including Ríos Montt

2000-2004
Presidency of Alfonso Portillo

9 August 2000
President Portillo acknowledges responsibility of Guatemalan state for Plan de Sánchez Massacre et al

13 December 2000
Appellate branch of Audiencia Nacional (Spanish national court) rules to dismiss Menchú et al criminal complaint

6 June 2001
Indigenous survivors of Ríos Montt regime file criminal complaint in Guatemalan justice system
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>22 August 2002</td>
<td>Inter-American Court of Human Rights accepts case on Plan de Sánchez Massacre (<em>Plan de Sánchez Massacre v. Guatemala</em>)</td>
</tr>
<tr>
<td>25 February 2003</td>
<td><em>Tribunal Supremo</em> (Supreme Court of Spain) rules to restrict universal jurisdiction and dismisses Menchú et al complaint</td>
</tr>
<tr>
<td>24 April 2004</td>
<td>Guatemalan state publicly restates responsibility for Plan de Sánchez Massacre et al</td>
</tr>
<tr>
<td>29 April 2004</td>
<td>Inter-American Court of Human Rights issues judgement on <em>Plan de Sánchez Massacre v. Guatemala</em></td>
</tr>
<tr>
<td>26 September 2005</td>
<td>Spanish Constitutional Court overrules Tribunal Supremo, expands reach of universal jurisdiction</td>
</tr>
<tr>
<td>4 November 2007</td>
<td>Ríos Montt elected to congress, granted legislative immunity</td>
</tr>
<tr>
<td>2008-2012</td>
<td>Presidency of Álvaro Colom</td>
</tr>
<tr>
<td>February 2008</td>
<td>Survivors of Ríos Montt regime begin voluntary testimony in Spain</td>
</tr>
<tr>
<td>December 2010</td>
<td>Claudia Paz y Paz named Attorney General of Guatemala</td>
</tr>
<tr>
<td>November 2011</td>
<td>Ríos Montt loses reelection campaign, ending legislative immunity</td>
</tr>
<tr>
<td>2012-2015</td>
<td>Presidency of Otto Pérez Molina</td>
</tr>
<tr>
<td>20 March 2012</td>
<td>Former Plan de Sánchez garrison commander Lucas Tecú and four others sentenced to 7,710 years in prison</td>
</tr>
<tr>
<td>19 March 2013</td>
<td>Guatemalan trial of Ríos Montt begins</td>
</tr>
<tr>
<td>10 May 2013</td>
<td>Ríos Montt convicted of genocide and crimes against humanity; Rodríguez Sánchez, co-defendant of Ríos Montt, acquitted</td>
</tr>
<tr>
<td>20 May 2013</td>
<td>Conviction of Ríos Montt overturned by Guatemalan Constitutional Court</td>
</tr>
<tr>
<td>February 2014</td>
<td>Spanish parliament restricts reach of universal jurisdiction statute</td>
</tr>
<tr>
<td>13 October 2017</td>
<td>After years of delay, retrial of Ríos Montt begins</td>
</tr>
<tr>
<td>1 April 2018</td>
<td>Ríos Montt dies, charges against him dropped</td>
</tr>
<tr>
<td>26 September 2018</td>
<td>Rodríguez Sánchez, co-defendant of Ríos Montt, acquitted for second time; court unanimously declares that the Guatemalan state committed genocide against Maya population</td>
</tr>
</tbody>
</table>
BIBLIOGRAPHY

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University of Minnesota Human Rights Library

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Newspapers and Magazines

Boston Globe

Christian Science Monitor

ContraPoder

Crónica

Diario de Centroamérica

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El Imparcial
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