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Denial in Other Forms

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Introduction

The study of denial as an element of genocide began after similarities had been noted in the ways in which the Armenian Genocide and Holocaust had been refuted. These similarities gave rise to classifications centered around verbal tactics, where the facts of a claimed genocide were disputed or called into question in one way or another. Spoken or written, these verbal devices ranged from outright and absolute rejections (nothing close to what you claim ever happened) to concessions of mass killing but denials of intent (the killing happened but not like you say). Between these two these poles the killing was justified by suggestions that the victims brought it on themselves and were somehow at fault, mitigated by arguing that a much smaller number were killed, re-characterized as relocation casualties, or excused as an unavoidable result of war or civil conflict. Subsequent episodes of mass killing; Cambodia, Rwanda, Srebrenica, were similarly refuted and provided more data for these classifications; definitionalism, revisionism, minimization, relativisation, obfuscation, etc.—and thus emerged the prevalent notion of denial as the use of language to negate the claim of a genocide occurrence.

In these analyses, little consideration had been given to denial in a form other than spoken or written refutations, or having consequences beyond the effect of words heard or read. Does denying the crime only require negating it orally or in papers and articles? And is denying the crime only concerned with refuting its occurrence? Is there more involved or at stake in denying genocide crimes other than a lack of agreement on whether it happened?

The denier denies not only to suppress truth but to suppress what the truth means must happen. It is not just the label of genocide he seeks to avoid, but the consequences of genocide criminality: accountability, penalty, reparation. When the listener finishes hearing a denial, the denial is over and its aftereffects are variable and subjective. When the reader finishes reading a denial he may call it rubbish and tear it up. Neither is bound in any way to the denier's words. This is not to say that there aren't lasting or psychological effects of verbal denials.¹ But when failures of duty to act toward genocide crimes obstruct prosecution, punishment, victim relief and reconciliation, then the victim is not making a choice about whether to let misrepresentations affect him. Then the denial has consequences beyond words and sentences, and society is prevented from penalizing the crime. The idea of justice for genocide does not necessarily involve or require recognition of the crime's occurrence by the perpetrator government or third parties who have a stake in whether or not it occurred. Justice, according to international law, comes in the adjudication and punishment of the crime. And yet when we speak of genocide denial we refer to acts of speech and the lack of mutuality over its occurrence. If the concept of denial is associated with the withholding of justice, then it must refer to all acts and behaviors that interfere with that justice, and not just to spoken rejections of the crime.

In acts by the Guatemalan state before, during and after its 2013 trial of former State officials for genocide crimes we see a wider range of denial behavior. In all other genocide trials the main prosecutorial action against perpetrators originated outside the state. In all other trials the proceedings were conducted by a convened UN delegation. State action is truncated when a third party convenes and conducts the trial. After a state has denied the crime verbally, there is nothing left for it to do. But when state agencies must play a role in the investigation and prosecution of genocide crimes, then we are exposed to another set of denial behaviors.

Denial as Acts

Guatemala's responsibility for prosecuting its massacre crimes² falls to its *Ministerio Público* (Public Prosecutor's Office³), which from the time of the massacres (1978-1983) until 2010 had been

¹ See, for example, Aida Alayarian, *Consequences of Denial: The Armenian Genocide* (London: Karnac Books, 2008).

² See *infra*, section entitled *Guatemala Background*.

³ The Public Prosecutor's Office, or *Ministerio Público*, in Guatemala, is equivalent to the US Department of Justice. The Public Prosecutor in Guatemala is equivalent to the Attorney General in the US.

largely dormant toward the crimes; avoiding investigations, losing case files, purposely delaying prosecutions, ignoring witness evidence, etc. These acts are documented in two important studies; *Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases*, published in 2001, and the American Bar Association's *Prosecutorial Reform Index for Guatemala*, an evaluation of Guatemala's progress toward prosecutorial reform, published ten years later.⁴ Both reports found an organization unwilling to act, with prosecutors who were incompetent, indifferent, affected by bribes, poorly trained, and otherwise deficient in their responsibilities. Guatemala's transition from a closed, private inquisitorial system of justice to a transparent adversarial system in 1994 had given the *Ministerio Público* (MP) full autonomy and authority in the investigation and prosecution of crimes against the people, to "see to the strict fulfillment of the country's laws,"⁵ to act "as soon as the [it] becomes aware of a punishable act,"⁶ where "no authority may give instructions to the head of the *Ministerio Público* or his subordinates regarding the way to carry out the criminal investigation or that limit the exercise of the action,"⁷ and where State officials are "legally responsible for their official conduct, subject to the law and never above it."⁸ With the transition came a *Código Procesal Penal* (Criminal Procedure Code) modeled after the US system of justice that established open procedures and protocols for adjudicating crimes, and defined roles and responsibilities for prosecutors, the accused, and the courts. Fifteen Section Prosecutor's Offices were established within the MP, including a special unit dedicated to prosecuting human rights crimes committed during Guatemala's 1960-1996 internal armed conflict. Notwithstanding these reforms, however, by early 2009—almost three decades after the massacres—the State had only convicted one civilian out of the thousands who participated in the 626 massacres identified by a UN-sponsored truth commission.⁹ No action had been taken by the MP against any of the soldiers or military commanders in place at the time of the massacres that had planned, ordered and overseen the killing. Because these failures to act suppress the acknowledgement, prosecution and punishment of genocide crimes, they deny the crimes and what is due victims under law given by Guatemala's Constitution, its Criminal Procedure Code, *Código Penal* (Penal Code), peace accord agreements, as well as its 1949 ratification of the United Nations Convention for the Prevention and Punishment of the Crime of Genocide (UNGC) law.¹⁰

The *Impunity in Guatemala* report also found acts of obstruction by the State's military. Much of Guatemala had been militarized during its armed internal conflict, and the pervasive power

⁴ Nathaniel Heasley, et al., "Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases," *American University International Law Review* 16, no. 5 (2001), 1115-1194; American Bar Association, *Prosecutorial Reform Index for Guatemala* (Washington, DC: American Bar Association 2011).

⁵ Republic of Guatemala Political Constitution of 1985, Article CCLI, "The Public Ministry is an auxiliary institution of the public administration and the courts with autonomous functions whose principal goals are to see to the strict fulfillment of the country's laws. Its organization and functioning will be regulated by its organic law."

⁶ Republic of Guatemala, *Código Procesal Penal*, Article 289, Purpose and scope of the criminal prosecution. "As soon as the Public Prosecutor's Office becomes aware of a punishable act, by denunciation or by any other means, must prevent the occurrence of further consequences or promote your research to require the prosecution of the accused. The exercise of the powers provided for in the three preceding Articles shall not relieve him of the research to ensure the essential elements of proof on the punishable act and its participants."

⁷ Republic of Guatemala, *Código Procesal Penal*, Article 8, Independence of the Public Ministry. "The Public Ministry, as an institution, enjoys full independence for the exercise of criminal action and investigation of crimes in the manner determined in this Code, except for the hierarchical subordination established in its own law. No authority may instruct the head of the Public Prosecutor's Office or his subordinates as to how to carry out the criminal investigation or limit the exercise of the action, except for the powers that this law grants to the courts."

⁸ Republic of Guatemala Political Constitution of 1985, Article CLIV, Public Function; Subjection to the Law, "Officials are depositories of authority, legally responsible for their official conduct, subject to the law and never above it."

⁹ Open Society Justice Initiative, *Judging a Dictator: The Trial of Guatemala's Ríos Montt* (New York: Open Society Foundations, 2013), 2.

¹⁰ See Heasley, et al., *Impunity in Guatemala*, for a more comprehensive discussion of the Guatemalan State's failure to act, and the domestic and international laws violated by this failure.

of the military and its influence over the country's institutions carried over after the cease-fire. Relative to prosecuting massacre crimes, this has manifested in two important ways. The first is the military's suppression of evidence. By law, all affairs of the State are public information except where national security is an issue, and the military, like all government agencies, is required cooperate with criminal investigations and furnish records and reports as requested. But the State's military has consistently refused requests for information about its operations in the regions where massacres occurred; denying that such information exists, maintaining that it exists but cannot be located, and deeming it information that if released would threaten national security. It also refused to cooperate with truth commission requests for information and interviews, despite this being a stipulation of peace agreements. What defines national security and what constitutes a threat to it is nowhere defined in Guatemala's laws, and so the term and the information it protects is effectively controlled by the military—the perpetrator of the massacres. Guatemala's Congress has the ability to define or clarify the term but has not done so, despite calls for such,¹¹ and to the extent that this State inaction toward clarification or declassification has stood in the way of a genocide inquiry, it denies the crime. But the more conspicuous act of denial is the military's withholding of evidence pertinent to and necessary for investigating, prosecuting and punishing the country's massacre crimes. There is little credence in the claim that records of army operations against non-combatant Maya in the 1970s and 80s contains information that would make present-day Guatemala vulnerable to external or even internal threats. These refusals to release records are open violations of Guatemala's Constitution ("All the acts of administration are public. The interested parties are entitled to obtain at any time reports, copies, reproductions, and certifications that they request and the display of the proceedings that they may wish to consult, except when military or diplomatic matters relating to national security [are] involved"¹²) and its Criminal Procedure Code ("All public authorities and entities will cooperate with the Public Prosecutor's Office, the courts and the police, and will promptly respond to the requests they receive from them"¹³). These refusals also violate provisions of Guatemala's peace accords: "The Guatemalan people are entitled to know the full truth about the human rights violations and acts of violence that occurred in the context of the internal armed conflict,"¹⁴ and "all State bodies and entities [will] provide the Commission with the support necessary for the accomplishment of its tasks."¹⁵ These acts withhold information necessary to establish facts and assess responsibility in genocide crimes, and thus deny truth, prosecution and punishment.

The second way in which the military has denied what is due victims and society according to UNGC law, is its interference with investigations through threats and bribes to judges, prosecutors and witnesses. *Impunity in Guatemala* found that intimidation by the State's military was a frequent and significant barrier to the prosecution of massacre cases: "Such threats affect the judicial process by reducing the will of prosecutors and judges to pursue cases vigorously and to adjudicate them impartially. Threats against witnesses deter them from testifying and from urging prosecutors to move cases forward."¹⁶ The report also found the use of bribery to deter prosecutions:

Corruption reportedly takes a variety of forms, all of which affect the resolution of massacre cases through improper influence by military personnel in both the judiciary and the *Ministerio Público*. The most obvious form is direct corruption through bribes to prejudice specific judgments and resolutions of cases. A more subtle form is the use of influence within the government to manipulate the assignment of prosecutors or judges, so that the officials

¹¹ *Ibid.*, 1172.

¹² Republic of Guatemala Political Constitution of 1985, Article XXX.

¹³ Republic of Guatemala, Código Procesal Penal, Article 157.

¹⁴ United Nations General Assembly Security Council, *Annex II: Agreement on a Firm and Lasting Peace*, February 7, 1997 (UN Doc. A/51/796-S/1997/114), 37, "The Guatemalan people are entitled to know the full truth about the human rights violations and acts of violence that occurred in the context of the internal armed conflict."

¹⁵ United Nations, *Annex II, 37*; United Nations, *Annex II: Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatemalteca*, December 12, 1996 (UN Doc. A/51/776-S/1997/51), Part III(A), Article 18.

¹⁶ Heasley, et al., *Impunity in Guatemala*, 1136.

most capable of handling complex massacre cases are not always assigned to such cases. Both kinds of corruption greatly undermine the State's prosecution efforts.¹⁷

These also are acts of genocide denial in that they block truth and prosecution.

Acts in Denial Literature

Only scant references to denial as something other than an act of speech are found in the literature on denial. Most scholarly writings on the subject deal with it as statement refutations. Perhaps to sum the writing that preceded him, Henry Theriault in 2013 wrote that the denial of genocide is a "verbal strategy consisting of assertions that events that constitute genocide are not happening or did not happen, or that the events in question are or were something other than genocide."¹⁸ Stanley Cohen's 2001 *States of Denial* deals with denial as variations on words that deceive; where the denial is literal, interpretive or implicative.¹⁹ Here again, denial is equated with using words to dispute facts in one way or another. Most all of Israel Charny's work also concerns the various verbalized arguments put forth to call into question genocide occurrence. However in a 2012 version of his "A Classification of Denials of the Holocaust and Other Genocides" Charny refers to denial as the obstruction of facts:

5.02 Denials as obstruction, distortion or misuse of information, evidence and research of facts of genocidal murder e.g., a dedicated liberal pacifist organization claimed that the reported brutal evacuation of Phnom Pen by the Khmer Rouge was part and parcel of a sincere agrarian revolution designed to improve the lives of the Cambodian people.²⁰

The example he uses leans more toward an interpretive verbal denial but his identification of the obstruction of information as a means of denial is a recognition of denial as something other than an act of speech. One assumes that by obstruction he means the act of withholding information or evidence as in what Guatemala's military has done. In the same document Charny makes another reference to denial as active suppression when he links denial with a failure to act toward the crime: "5.04 Denial as opposition, resistance and procrastination in activating meaningful interventions in ongoing genocidal events despite the fact that they have been identified as genocide."²¹ Here the reference is to intervention in an ongoing genocide but the connection between denial and a failure to act toward genocide crimes is established.

In *Remembrance and Denial*, Richard Hovannisian describes action taken by the Turkish government to suppress the production of a film about the Armenian genocide, and also to deter the US government from designating April 24 (the date that began the massacre of Armenians) as a day of remembrance for genocide victims.²² In both cases, Turkey engaged in acts to enlist the US State Department to perpetuate denial. These are acts of denial by the Turkish and US governments that block the recognition of a genocide, and are different both in method and effect than their verbal refutations.

Of course, the more familiar forms of denial are also found in the Guatemalan state's response to the prospect of genocide criminality. Otto Pérez Molina, Guatemala's then-president, told the

¹⁷ Ibid., 1147.

¹⁸ Henry C. Theriault, "Denial of Ongoing Atrocities as a Rationale for Not Attempting to Prevent or Intervene," in *Impediments to the Prevention and Intervention of Genocide*, ed. Samuel Totten (New Brunswick: Transaction Publishers, 2013), 47.

¹⁹ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (New York: John Wiley & Sons, 2013).

²⁰ Israel W. Charny, "A Classification of Denials of the Holocaust and Other Genocides—updated 2012," The Institute on the Holocaust and Genocide, accessed September 6, 2017, <http://www.ihgilm.com/a-classification-of-denials-of-the-holocaust-and-other-genocides-updated-2012/>.

²¹ Charny, *A Classification of Denials*.

²² Richard G. Hovannisian, *Remembrance and Denial: The Case of the Armenian Genocide* (Detroit: Wayne State University Press, 1998), 222-223.

public before,²³ during,²⁴ and after²⁵ Guatemala's 2013 genocide trial, "There was no genocide," despite also endorsing the trial. In an interview given during his presidential campaign he offered to prove that genocide did not occur.²⁶ Pérez Molina had been an army general stationed in the region where the massacres occurred, and during the trial a witness for the prosecution had placed him at the scene of the massacres.²⁷ (Pérez Molina was jailed in September 2015 after resigning the presidency on charges of corruption.) In defense testimony during the trial, Antonio Arenales Forno, then Secretary of Peace for President Pérez Molina, told the court "There was no genocide." Also while the trial was still in session, Guatemala's congress, by an 87 to 24 vote, approved a nonbinding resolution denying the possibility of genocide criminality, using the language: "the criminal offenses cited were legally impossible in Guatemala."²⁸ After the trial, in May 2014, Guatemala's Minister of Interior, Mauricio López Bonilla, told an audience at the Royal Institute of International Affairs in London: "There was no genocide. If we are clear about what it means to commit a crime against humanity, that did not happen in Guatemala."²⁹

But more than statements, or failures by the State's *Ministerio Público* and military, the Guatemalan state's rejection of genocide criminality was most resolute in rulings made by its Constitutional Court—Guatemala's highest legal authority—before, during and after the 2013 genocide trial. Guatemala's Constitutional Court, tasked with ensuring constitutionality in lower court rulings and other matters of law, issued twelve resolutions during the trial. Three in particular had direct bearings on the outcome of the case and resulted in the annulment of the verdict and trial testimony. One ruling prior to the trial and three after also favored deterrence of a genocide finding. Each of the seven rulings violated Guatemala's Constitutional law, its Criminal Procedure Code, and its commitments to UNGC law. These rulings, and the presence of denial in them, are the subject of this paper.

Guatemala Background

In 1999 La Comisión para el Esclarecimiento Histórico (the Guatemalan Commission for Historical Clarification or CEH) released the results of its three-year study of Guatemala's nearly three-decade internal conflict. The Commission had been formed as part of the 1996 peace accords that ended the conflict, on stipulation that the Commission's report would not name names and that its findings could not be used in a court of law. Its purpose was not necessarily to make a genocide determination, but to document the human rights abuses committed by both sides during the conflict.³⁰ But the Commission had been moved by the apparent intent of the State to annihilate groups of Maya. In a section titled Acts of Genocide, its twelve-volume report read in part:

²³ Martin Rodriguez Pellecer, "Quiero que Alguien me Demuestre que Hubo Genocidio," *Plaza Publica*, July 25, 2011, accessed September 22, 2017, <http://www.plazapublica.com.gt/content/quiero-que-alguien-me-demuestre-que-hubo-genocidio>.

²⁴ Agencia EFE, "Pérez Molina: Genocide Trial Endangers Peace," *Plaza Publica*, April 16, 2013, accessed September 22, 2017, <https://www.plazapublica.com.gt/content/perez-molina-tambien-afirma-que-el-juicio-por-genocidio-hace-peligrar-la-paz>.

²⁵ Laura Carasik, "Justice Postponed in Guatemala," *Boston Review*, May 28, 2013, accessed September 22, 2017, <http://bostonreview.net/world/justice-postponed-guatemala>, "When asked whether the guilty verdict changed his opinion that genocide did not occur in Guatemala, Perez Molina replied it did not."

²⁶ Rodriguez Pellecer, *Quiero que Alguien*.

²⁷ Shawn Roberts, "Day 10: Witness Implicates President Perez Molina in Massacres," *International Justice Monitor*, April 5, 2013, accessed March 27, 2018, <https://www.ijmonitor.org/2013/04/day-10-witness-implicates-president-perez-molina-in-massacres/>.

²⁸ Associated Press, "Guatemala's Congress Votes to Deny Genocide," *Daily Mail*, May 14, 2014, accessed September 22, 2017, <http://www.dailymail.co.uk/wires/ap/article-2628310/Guatemalas-congress-votes-deny-genocide.html>.

²⁹ Agencia EFE, "López Bonilla Afirma en Londres que "no Hubo Genocidio" en Guatemala," *La Noticia en Guatemala*, May 6, 2014, accessed September 22, 2017, <http://lanoticianguatemala.com/lopez-bonilla-afirma-en-londres-que-no-hubo-genocidio-en-guatemala/>.

³⁰ For more on the formation of the CEH, and its charter, see Elizabeth Oglesby and Amy Ross, "Guatemala's Genocide Determination and the Spatial Politics of Justice," *Space and Polity* 13, no. 1 (2009), 21-39.

...The reiteration of destructive acts, directed systematically against groups of the Mayan population, within which can be mentioned the elimination of leaders and criminal acts against minors who could not possibly have been military targets, demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed “with intent to destroy, in whole or in part” these groups (Article II, first paragraph of the Convention).³¹

... in light of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the killing of members of Mayan groups occurred (Article II.a), serious bodily or mental harm was inflicted (Article II.b) and the group was deliberately subjected to living conditions calculated to bring about its physical destruction in whole or in part (Article II.c). The conclusion is also based on the evidence that all these acts were committed ‘with intent to destroy, in whole or in part’ groups identified by their common ethnicity, by reason thereof, whatever the cause, motive or final objective of these acts may have been (Article II, first paragraph).³²

Preceding its conclusion that genocide had been committed by the State’s military in four regions of Guatemala between 1981 and 1983 were the following findings:

- The majority of human rights violations occurred with the knowledge or by order of the highest authorities of the State. Evidence from different sources (declarations made by previous members of the armed forces, documentation, declassified documents, data from various organisations, testimonies of well-known Guatemalans) all coincide with the fact that the intelligence services of the Army, especially the G-2 and the Presidential General Staff (Estado Mayor Presidencial), obtained information about all kinds of individuals and civic organisations, evaluated their behaviour in their respective fields of activity, prepared lists of those actions that were to be repressed for their supposedly subversive character and proceeded accordingly to capture, interrogate, torture, forcibly disappear or execute these individuals.³³
- These massacres and the so-called scorched earth operations, as planned by the State, resulted in the complete extermination of many Mayan communities, along with their homes, cattle, crops and other elements essential to survival. The CEH registered 626 massacres attributable to these forces.³⁴
- The Army destroyed ceremonial centres, sacred places and cultural symbols. Language and dress, as well as other elements of cultural identification, were targets of repression. Through the militarization of the communities, the establishment of the PAC and the military commissioners, the legitimate authority structure of the communities was broken; the use of their own norms and procedures to regulate social life and resolve conflicts was prevented; the exercise of Mayan spirituality and the Catholic religion was obstructed, prevented or repressed; the maintenance and development of the indigenous peoples’ way of life and their system of social organisation was upset. Displacement and refuge exacerbated the difficulties of practising their own culture.³⁵
- The aim of the perpetrators was to kill the largest number of group members possible. Prior to practically all these killings, the Army carried out at least one of the following preparatory actions: carefully gathering the whole community together; surrounding the community; or utilising situations in which the people were gathered together for celebrations or market days.³⁶

³¹ La Comisión para el Esclarecimiento Histórico, *Memory of Silence: Report of the Commission for Historical Clarification* (Guatemala: CEH, 1999), 39.

³² *Ibid.*, 41.

³³ *Ibid.*, 38.

³⁴ *Ibid.*, 34.

³⁵ *Ibid.*, 35.

³⁶ *Ibid.*, 39.

The CEH devoted significant time and space to understanding the roots of Guatemala's armed conflict, and found a society marked by exclusion and antagonism; an authoritarian state, racist in its precepts and practices, slanted toward protecting the interests of its privileged minority, and given to repression.³⁷

Chief among the causes of inequality in this agrarian society was land ownership. Independence from Spain in 1821 left Guatemala an agrarian feudal state, where seventy percent of its land was owned by two percent of the population, most of the land idle and inaccessible to its peasant masses. Not until 1945 did Guatemala have the political climate to take on the land issue, first through President Juan José Arévalo, whose Congress passed a law requiring large landowners to rent land to the landless, and then through President Jacobo Arbenz Guzmán, whose 1952 "Decree 900" required landowners to sell off a portion of their idle land. United Fruit Corporation, Guatemala's largest landowner and employer at the time, objected to the mandate, and petitioned the Eisenhower administration to intervene on claims of communism. On June 18, 1954 the CIA staged a coup, removing Arbenz and installing a US-loyalist dictator who repealed the land reform law. The overthrow kindled a reform solidarity among Guatemala's marginalized, which, without success through peaceful means, evolved into an armed insurrection. In the 1960s the rebellion gained momentum, and Guatemala's military, newly trained in communist insurgency warfare under the US Doctrine of National Security, began assassinating and disappearing students, intellectuals and labor leaders in the nation's urban centers. In the 1970s, in Guatemala's countryside communities where reformist ideology had spread, the military brutalized communities to make examples out of reform sympathizers, and recruited peasants into citizen patrol networks to augment and assist the repression.³⁸

By the early 1980s the military still hadn't been able to quell the reform movement, and in 1982 José Efraín Ríos Montt, a former army general, took power by coup and set his focus on ridding the country of reformists. Through offers of reconciliation and broadcasted messages of morality and solidarity, Ríos Montt appealed to the insurgents' duty as Guatemalans to fall in line with the healing and rebuilding of the country. But when these failed he launched a full offensive against insurgents and communities suspected of harboring them.³⁹ The 17-month period during which Ríos Montt commanded the military accounts for the most concentrated period of group killing in Guatemala's 1960-1996 internal conflict.⁴⁰ In the end, an estimated 250,000 Guatemalan citizens had been killed or disappeared; the result of brutal methods involving torture, rape, and dismemberment. A reported million more fled the country.⁴¹

Movement toward peace began in the early 1990s when the country's elites, feeling the effects of the conflict on their businesses, pressed the government to end the war.⁴² With the UN brokering conditions for surrender between the Guatemalan National Revolutionary Unity and the Guatemalan government, a peace agreement was signed by the parties in December 1996. The agreement promised fundamental changes in Guatemala, including accountability for the murdered and disappeared, recognition and respect for indigenous rights, labor reform, government

³⁷ Ibid., 17-20.

³⁸ For expanded accounts of this period in Guatemala's history see Greg Grandin, Deborah T. Levenson and Elizabeth Oglesby, ed, *The Guatemalan Reader: History, Culture, Politics* (Durham: Duke University Press, 2011), 1-9, 107-500; Piero Gleijeses, *Shattered Hope: The Guatemalan Revolution and the United States, 1944-1954* (Princeton: Princeton University Press, 1991); Stephen Schlesinger and Stephen Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala* (Cambridge: Harvard University Press, 1982).

³⁹ See Gleijeses, *Shattered Hope*.

⁴⁰ La Comisión para el Esclarecimiento Histórico, *Memory of Silence*, 24. According to the report, "More than half the [conflict's 626] massacres and scorched earth operations" occurred between 1981 and 1983. Ríos Montt held power from March 23, 1982 until August 8, 1983.

⁴¹ Ibid., 30.

⁴² For more on Guatemala's peace process, see Jemima García-Godos and Luis Raúl Salvadó, "Guatemala: Truth and Memory on Trial," in *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability*, ed. Elin Skaar, et al. (Abingdon: Routledge, 2016), 205.

anti-impunity, education and healthcare programs, land redistribution, democratizing Guatemala political institutions, and army reform.⁴³

The Case Against Ríos Montt

In 1999, the year the CEH released its report linking him to genocidal massacres, Ríos Montt was elected president of Guatemala's congress. By law, his status as a member of Parliament exempted him from criminal prosecution. In 2009, a 359-page packet of military documents marked *secreto* surfaced. It contained original plans, directives, telegrams, maps, and patrol reports that ordered and documented the rounding up and killing of unarmed men, women and children as well as the burning of homes, destruction of crops, slaughter of animals and aerial bombing of those who tried to escape the violence. According to the US National Security Archive, to whom the packet was turned over, the documents establish firsthand chain-of-command "evidence of Ríos Montt's deliberate policy of repression and terror against the *Ixil* Mayans."⁴⁴ In 2010, Claudia Paz y Paz Bailey assumed control of the *Ministerio Público*, replacing a sitting Prosecutor General who resigned after he'd been linked to corruption. Paz y Paz brought experience litigating cases in the Inter-American Court of Human Rights to an MP function that had seen nine Prosecutor Generals in the sixteen years of its existence (giving an average term length of just over twenty-two months for the four-year post). Paz y Paz removed non-performing prosecutors and those with ties to the military, and made Guatemala's lingering human rights abuse cases a top priority. In 2012, after he had lost his seat in Congress, Ríos Montt was indicted along with his then-director of military intelligence on charges of genocide and crimes against humanity for the group killing of 1,771 *Ixil* Maya, the forced displacement of 29,000, sexual violence against at least eight women, and torture of at least fourteen.⁴⁵ Most believed politics would intervene and the case would not reach trial.⁴⁶ On March 19, 2013 opening arguments began before a three-member tribunal despite varied efforts by defense counsel to impugn and suspend the trial before it began. Ríos Montt's lawyer, who told the court he had been hired hours earlier, was ejected for obstruction on the opening day when he persisted with his demand for tribunal members to recuse themselves for bias against him.⁴⁷ In the coming days, multiple objections to the proceedings were filed by defense counsel for both accused in the form of *amparos* which required resolution by Guatemala's Constitutional Court. The trial was suspended for ten days when an evidence judge declared the trial annulled.⁴⁸ In all, 100 survivor eyewitnesses recounted family members who were shot at close range, hacked to death with machetes, bludgeoned with rocks and knives, strangled to death, burned alive, raped, and played with like toys and animals. Little was heard from the defense to directly refute their testimony. Instead counsel for both defendants focused on disqualifying the trial, tribunal judges, and prosecution expert witnesses.⁴⁹

⁴³ United Nations General Assembly Security Council, *Annex II*.

⁴⁴ From the author's February 2013 interview with Kate Doyle, senior analyst, US National Security Archive.

⁴⁵ Hugo Alvarado, "Ríos Montt Enfrentará Juicio por Genocidio y Delitos de Lesa Humanidad," *Prensa Libre*, January 28, 2013. First Instance Judge, Carol Patricia Flores, at the indictment: "We can establish that these are acts so degrading, so humiliating, that there is no justification. You, Señor Efraín Ríos Montt, could have prevented these crimes. We agree with the prosecutor's judgment that you, Señor Efraín Ríos Montt, probably participated in these acts of genocide and crimes against humanity."

⁴⁶ From author dialogue with transitional justice scholars and advocates in Guatemala and the US prior to the trial.

⁴⁷ Emi Maclean, "Trial Opens with Statements, Prosecution Witnesses, After Defense Challenges Rejected," *International Justice Monitor*, March 20, 2013, accessed March 22, 2018, <https://www.ijmonitor.org/2013/03/trial-opens-with-prosecution-witnesses-after-defense-challenges-rejected/>.

⁴⁸ Kate Doyle, "Day 20: Defense Attorneys Walk Out of Trial in Protest; Preliminary Court Judge Annuls Trial as Attorney General Calls Action Illegal and Promises Legal Challenge," *International Justice Monitor*, April 19, 2013, accessed March 22, 2018, <https://www.ijmonitor.org/2013/04/day-20-defense-attorneys-walk-out-of-trial-in-protest-preliminary-court-judge-annuls-sentence-as-attorney-general-calls-action-illegal-and-promises-legal-challenge/>.

⁴⁹ See Open Society Justice Initiative, *Judging a Dictator*, 7-12.

On May 10, the tribunal rendered a guilty verdict against Ríos Montt and sentenced him to an eighty-year prison term. His co-defendant, Jose Mauricio Rodríguez Sánchez, was absolved of charges. On May 20, Guatemala's Constitutional Court, without a verdict appeal by Ríos Montt, annulled the verdict and trial testimony.⁵⁰

Denial in Constitutional Court Rulings

In the course of its study on the causes of Guatemala's State-on-citizen violence, the CEH found the State's judiciary was largely idle in the decades of the conflict—deliberately failing to apply the law, “tolerating, and even facilitating, violence,” and sheltering State acts of repression.⁵¹ Even after reforms to Guatemala's judicial function brought by its 1994 Criminal Procedure Code, both the *Impunity in Guatemala* and *Prosecutorial Reform* reports found corruption common at all levels of the State's judiciary,⁵² where threatened judges “may dismiss cases, fail to issue arrest warrants, allow pre-trial release of suspects, make improperly favorable evidentiary rulings for the defense, or affect the prosecution through other administrative procedures of the court.”⁵³

A politicized process of judgeship inherently jeopardizes judicial independence in Guatemala, where judges are appointed through personal connections or as favors, rather than because of qualifications or experience.⁵⁴ This has created an inclination for judges to rule toward outcomes that favor the causes and positions of those responsible for their appointment.⁵⁵ Guatemala's Constitutional Court is comprised as such. Its five judges are appointed one-each by the Supreme Court, Congress, President, the Higher University Council of the University of San Carlos, and the Assembly of the Bar Association⁵⁶—each appointer with their own agenda and political interests.⁵⁷ The Constitutional Court's main function is to defend constitutionality in Guatemala's laws, trial proceedings and judgements, treaties and legislative bills, and jurisdiction conflicts.⁵⁸ Its formation in 1985 has played an important role toward the rule of law in Guatemala, but rulings in recent years have raised questions about its integrity.⁵⁹ A Court ruling in the year 2000 overturned first instance and appellate court verdicts to grant amnesty to defendants charged with crimes against humanity in the 1982 *Dos Erres* massacre, despite Guatemalan law that excludes crimes against humanity from amnesty and despite provisions in its Constitution that limit the Court's jurisdiction to the constitutionality of subordinate rulings and not the substance or merit of cases.⁶⁰ Here, the Court exceeded its constitutional mandate to rule that crimes against humanity had not occurred in *Dos*

⁵⁰ Guatemala Constitutional Court, Case File 1904-2013, May 20, 2013. See *infra* *May 20, 2013 Due Process Violation and Verdict Annulment Ruling*.

⁵¹ La Comisión para el Esclarecimiento Histórico, *Memory of Silence*, 24.

⁵² Heasley et al., *Impunity in Guatemala*, 1162.

⁵³ *Ibid.*, 1149.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Republic of Guatemala Political Constitution of 1985, Article CCLXIX, Organization of the Court of Constitutionality.

⁵⁷ From the author's 2012 email exchange with Daniel M. Brinks, law professor and co-director of the Rapoport Center for Human Rights and Justice at the University of Texas Austin. “The delegation of appointment powers to these outside entities has led to the politicization of those entities [and] a fair amount of contestation by the dominant political parties. The situation is exacerbated because the magistrates serve short, renewable terms, so that if they wish to be reappointed they must remain in the good graces of those who named them.”

⁵⁸ Republic of Guatemala Political Constitution of 1985, Articles CCLXXI and CCLXXII.

⁵⁹ García-Godos et al., *Guatemala: Truth and Memory on Trial*, 215. “On several occasions, the Supreme Court and, particularly, the Constitutional Court have gone beyond their mandates, intervening in lower courts' handling of human rights cases involving members of the armed forces.”

⁶⁰ Guatemala Constitutional Court, Case File 55-89, June 13, 1989, “[an appeal to the Constitutional Court] is not meant to replace the legal protection offered by the ordinary justice system ... and we must prevent the undue use of the constitutional justice with the aim of reviewing the decisions of ordinary courts on the merits, given that the role of the [Constitutional Court] is not to decide on the substantive claims of the parties to the proceedings, but rather to examine whether the rights guaranteed by the Constitutional and the statutes have been respected or not”

Erres. At times the Court has shown favor to Ríos Montt. A notable example is the Court's 2003 ruling to allow him to run for president despite Constitutional law that disqualifies any who took power by coup from ever seeking the presidency.⁶¹ In 2000, the *Frente Republicano Guatemalteco* party, presided over by Ríos Montt, was found to have manipulated nominations to the Court.⁶²

When rulings by Guatemala's highest legal authority consistently violate laws set forth by Guatemala's Constitution, its Criminal Procedure Code, and commitments to international treaties, there is reason for inquiry into the basis for that Court's rulings. Was there sound reason for the Court's deviations from what law provides and mandates? Were the rulings impartial and objective, or were they prejudiced toward denying the crime of genocide and inhibiting its prosecution? Were they proportionate toward a fair and just outcome, or did they unduly favor the defendants and a no-genocide finding? Here we examine seven Constitutional Court rulings⁶³ and their effect on Guatemala's inquiry into genocide criminality.

*December 12, 2007 Ruling to Reject Audiencia Nacional Jurisdiction*⁶⁴

Under the provisions of universal jurisdiction law, the Rigoberta Menchú Foundation in 1999 brought a case against Ríos Montt and five other ex-high-level commanders to the *Audiencia Nacional* in Madrid, accusing them of genocide, torture, and forced disappearance in the 1982-83 massacres of *Ixil-Maya*. The plaintiffs cited Article 23.4 of the Judicial Power Organization Act (LOPJ) which provides *Audiencia Nacional* with jurisdiction in crimes of genocide and terrorism committed outside of Spain. In March 2000, the *Audiencia Nacional* accepted the case after concluding that Guatemala's legal system had failed to investigate the crimes. In July 2006 the *Audiencia Nacional* issued international arrest warrants for the accused followed by extradition requests, citing a 1895 Extradition Treaty between Spain and Guatemala as basis along with LOPJ law. In November 2006, a Guatemalan trial court executed four of the six warrants, and rejected warrants for Ríos Montt and a former army chief-of-staff. Two of the accused were arrested and detained for extradition. The arrests were appealed but Guatemalan courts found the warrants proper and binding. Lawyers for the two detained then challenged the authority of the warrants by appeal to Guatemala's Constitutional Court. On December 12, 2007 the Court ruled the warrants invalid and nonbinding, and ordered the detainees' release. No further action was taken by the *Audiencia Nacional* against the other defendants.⁶⁵

In its sixty-page ruling the Court accepted the Spain-Guatemala treaty but reasoned that the treaty's extradition requirement is specific to asylum-seekers and does not apply to nationals living in the country where the crimes were committed, and that therefore it does not apply to crimes committed in Guatemala.⁶⁶

With regard to LOPJ Article 23.4, the Court argued that it cannot recognize the jurisdiction of an extraterrestrial court because to do so would be to allow a state to judge another state's ability or willingness to prosecute its own crimes, that *Audiencia Nacional* does not have that power or right,

⁶¹ Republic of Guatemala Political Constitution of 1985, Article CLXXXVI, Prohibitions Against Running for the Positions of President or Vice President of the Republic. The following cannot run for the positions of President or Vice President of the Republic: a. The leader or the chiefs of a coup d'état, armed revolution or similar movement, who have altered the constitutional order, or those who as a consequence of such events have assumed the leadership of the government.

⁶² Siri Glopín, Roberto Gargarella, and Elin Skaar, *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004), 105.

⁶³ More than other rulings by Guatemala's Constitutional Court, these seven, in the author's view, provide the best opportunity for observing Court behavior toward the question of genocide criminality.

⁶⁴ Guatemala Constitutional Court, Case File 3380-2007, December 12, 2007.

⁶⁵ For an expanded discussion of events and rulings related to the Menchú Foundation case against Ríos Montt and others see Amy Ross, "The Ríos Montt Case and Universal Jurisdiction," *Journal of Genocide Research* 18, Nos. 2-3 (2016), 361-376; Naomi Roht-Arriaza, "Criminal Prosecutions for Genocide in Guatemala: Advances and Obstacles in Transnational and Domestic Cases," in *Quiet Genocide*, ed. Etelle Higonnet (New Brunswick: Transaction Publishers, 2009); and Naomi Roht-Arriaza, "Guatemala Genocide Case. Judgment, No. STC 237/2005," *American Journal of International Law* 100, 1 (2006), 207-213, doi:10.2307/3518840.

⁶⁶ See Roht-Arriaza, *Criminal Prosecutions for Genocide*, 147.

and therefore its extradition order has no authority.⁶⁷ But it is precisely this scenario that LOPJ law seeks to address. The language of Article 23.4 explicitly recognizes and requires extradition: “... this concept of universal jurisdiction allows criminal proceedings to be brought even where the accused is not present in Spanish territory; this requires the subsequent initiation of extradition proceedings.” Therefore there is no logic in this aspect of the Court’s ruling.

The Court rejected extradition on other grounds, citing Article 27 of Guatemala’s Constitution which, the Court argued, prohibits the handing over of Guatemalans to foreign governments. But the language of Article 27 makes an exception where international treaties call for such extradition: “The extradition of Guatemalans will not be initiated for political crimes who in no case will be handed over to a foreign government, except for what is agreed upon in treaties and conventions regarding crimes against humanity or against international law.”

The Court further argued that the genocide, torture, and forced disappearance crimes charged by the Menchú Foundation were “common crimes connected to political crimes” and as such, not subject to Guatemala’s UNGC extradition obligations.⁶⁸ But UNGC law expressly forbids the characterization of genocidal acts as political crimes for the purpose of avoiding extradition: “Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”⁶⁹ Here the Court exceeds what it was asked to rule on by the lower court (whether *Audiencia Nacional*’s extradition requests violate Guatemala’s Constitution) to publish an opinion on the nature of the armed conflict and make a ruling based on that opinion. This is a clear overstep of the Court’s constitutional charter limiting the Court to protecting constitutionality in the State’s legal affairs.

The Court’s liberal interpretation of the intent of the Spain-Guatemala Treaty, its disregard for exceptions to the laws it cites as the basis of its ruling, and its improper judgement of the conflict to deny extradition, all suggest a Court intent on deterring a genocide inquiry by *Audiencia Nacional*. UN and Constitutional law make clear Guatemala’s obligation to comply with extradition. But the Court seems to go out of its way to interpret law in ways that avoid those obligations, and thus “implicitly rejects the charge of genocide.”⁷⁰

*April 3, 2013 Defense Evidence Admissibility Ruling*⁷¹

On April 3, twelve days into the Ríos Montt trial, the Constitutional Court, in response to an appeal filed by Ríos Montt’s defense, issued an order for the tribunal to incorporate into trial proceedings defense evidence that had been ruled inadmissible. The Court’s ruling overturned a ruling made by pretrial judge Miguel Ángel Gálvez, who found that Ríos Montt’s counsel hadn’t provided foundation for expert witnesses it planned to call; that it had submitted only names without anything to substantiate or demonstrate their expertise, and that in place of documentary evidence, counsel had provided only requests for that information that it had filed with the holders of the evidence.⁷² According to the rules of evidence in Guatemala’s Criminal Procedure Code, Gálvez was correct and had just cause in rejecting the evidence in question. Article 183 of the Code

⁶⁷ Guatemala Constitutional Court, Case File 3380-2007, December 12, 2007.

⁶⁸ Roht-Arriaza, *Criminal Prosecutions for Genocide*, 148.

⁶⁹ United Nations, *General Assembly Resolution 260 - Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948 (UN Doc. A/RES/260(III)), Article VII, accessed March 21, 2018, <http://www.refworld.org/docid/3ae6b3ac0.html>.

⁷⁰ Roht-Arriaza, *Criminal Prosecutions for Genocide*, 149. “By so labeling the conflict, the Court implicitly rejects the charge of genocide.”

⁷¹ Guatemala Constitutional Court Case File 1097-2013, April 23, 2013.

⁷² See Kate Doyle, “Update on Guatemalan Genocide Trial,” *Unredacted* (blog), *The National Security Archive Blog*, February 5, 2013, accessed May 3, 2017, <https://nsarchive.wordpress.com/2013/02/05/update-on-guatemalan-genocide-trial/>. “Gálvez pointed out that [the defense] had submitted the names of experts (such as retired general José Luis Quilo Ayuso) without providing their analysis or expert reports, rendering them invalid. The judge also explained that rather than enter documents into evidence, Ríos Montt’s attorneys had submitted last-minute requests for Ministry of Defense records, which they hoped to obtain through a court order. In effect, the judge was pointing out the failure of the defense team to do the work that the case required.”

(Proof of Inadmissibility) requires that evidence submitted has substance related to the discovery of truth: "A means of proof, to be admitted, must refer directly and indirectly to the object of the inquiry and be useful for the discovery of the truth."⁷³ Submitting names only ignores and fails this requirement. Article 186 (Evidence Valuation) requires that evidence must be present and have been submitted into the trial according to Code procedure: "Any evidence to be valued must have been obtained by a permitted procedure and incorporated into the process in accordance with the provisions of this Code. The elements of evidence thus incorporated shall be valued, according to the system of sound reasoned criticism, and may not be subject to other legal limitations other than those expressly provided for in this Code."⁷⁴ Submitting notices of evidence sought or filed for thus have no value. The Court's override of Gálvez' ruling is an abandonment of these criminal procedure laws to favor the defense, which, by ignoring evidence rules, shows disregard for the laws and the court. While the evidence in question had no bearing on the case, and the ruling posed no interference with a genocide inquiry, the ruling again shows the Court's willingness to vacate law, and to overlook the defense's show of disrespect toward the proceedings.

April 23, 2013 Rulings to Transfer Case to Judge Flores⁷⁵ and to Reinstate García Gudiel⁷⁶

On April 18, almost a month after the Ríos Montt trial began, pretrial judge Carol Patricia Flores held a hearing pursuant to the Ríos Montt genocide case in which she declared the trial annulled and ordered the case returned to its November 23, 2011 pretrial status. Flores was the original pretrial judge who indicted Ríos Montt on the genocide charge. She had been recused from the case and replaced by Judge Gálvez after a bias claim by Ríos Montt's defense. On appeal the Supreme Court had found her recusal improper, and with her April 18 hearing, Flores, without notice to the trial court, had reassumed the role of the evidence judge assigned to the case and was calling it back to its November 23, 2011 status, the day she had been recused. On April 19 the trial court suspended trial proceedings pending Constitutional Court instructions on the constitutionality of Flores' order.⁷⁷

On April 22 the Court issued a ruling instructing the trial court to transfer to Judge Flores the Ríos Montt case file, and for Flores to issue an order to the court to allow the contested defense evidence into the proceedings consistent with its April 3 ruling.⁷⁸ In and of themselves, these elements of the ruling pose no interference with a genocide inquiry. The role of the pretrial judge is complete when a case reaches trial, and he or she can have no bearing on the case beyond that point. Guatemala's Criminal Procedure Code does not address reinstating a pretrial judge during an active trial, though it seems incongruous that the Court, without a strong reason for doing so, would insert this disruption into proceedings rather than maintain Gálvez as the pretrial judge of record.

But the Court's April 22 ruling went beyond what the Court was asked to rule on; the constitutionality of Flores' order, and further instructed the trial court to reinstate Francisco García Gudiel as Ríos Montt's defense counsel.⁷⁹ García Gudiel had been ejected for obstruction on the trial's opening day and replaced by counsel of Ríos Montt's choosing the next day.⁸⁰ The Court

⁷³ Republic of Guatemala, Código Procesal Penal, Article 183, "Proof of inadmissibility. A means of proof, to be admitted, must refer directly and indirectly to the object of the inquiry and be useful for the discovery of the truth."

⁷⁴ Republic of Guatemala, Código Procesal Penal, Article 186, "Valuation. Any evidence to be valued must have been obtained by a permitted procedure and incorporated into the process in accordance with the provisions of this Code. The elements of evidence thus incorporated shall be valued, according to the system of sound reasoned criticism, and may not be subject to other legal limitations other than those expressly provided for in this Code."

⁷⁵ Guatemala Constitutional Court Case File 1097-2013, April 23, 2013.

⁷⁶ Guatemala Constitutional Court Case Files 1248-2013, April 22, 2013 and 1326-2013, April 23, 2013.

⁷⁷ See Doyle, *Day 20*.

⁷⁸ Guatemala Constitutional Court Case File 1097-2013, April 23, 2013.

⁷⁹ Guatemala Constitutional Court Case File 1248-2013, April 23, 2013.

⁸⁰ García Gudiel had announced himself as new counsel for Ríos Montt on the trial's opening day and immediately asked the tribunal for a 5-day suspension to allow him to prepare a defense. This was denied. He then

reasoned that the reinstatement of García Gudiel was the restoration of Ríos Montt's rights under due process of law.

Article 358 of the Criminal Procedure Code gives justification for the tribunal's expulsion of García Gudiel: "The president of the court shall exercise the power of discipline" and can "expel the [disruptive] offender from the courtroom," where offenders may be a "representative of the Public Prosecutor's Office, the defendant, his defense counsel." Article 11 provides further basis: "The procedural subjects must comply with the decisions of the court and can only challenge them by the means and in the form established by law."

Here again the Court seems to abandon Criminal Procedure Code law, and overlook behavior that disrespects the court, to favor and reward the defense. Ríos Montt had been defended during the preceding thirty days by counsel he chose, and it is not clear that his right to counsel of his choosing had been violated, as the Court said it had. García Gudiel had appeared impromptu as counsel for Ríos Montt, told the court he had not prepared a defense, and had shown intent to interfere with the proceedings. It is incongruous that the Court would depart from procedure law to restore defense counsel ill-equipped to serve its client or the proceedings. While this element of the Court's ruling poses no interference with a genocide inquiry, the effect and implementation of the reinstatement became the basis for the Court's future claimed due process defect and trial annulment.

*May 20, 2013 Due Process Violation and Verdict Annulment Ruling*⁸¹

On May 20, ten days after the trial court declared Ríos Montt guilty of genocide and crimes against humanity, the Court, without any verdict appeal by Ríos Montt, issued a ruling that overturned the verdict and annulled parts of the trial. The Court ruled that the trial court had "ignored" its April 23 order to reinstate García Gudiel and instead proceeded with the trial, and that this "improper continuation" had "compromised the legal certainty of the criminal proceedings."⁸²

There are multiple aspects of the ruling that bear consideration with respect to intent to deny a genocide inquiry:

1. Logic.

The basis for the Court's procedure fault ruling was that the trial court hadn't sufficiently complied with the Court's April 23 ruling to reinstate García Gudiel. The Court conceded that García Gudiel had been reinstated but found fault with the trial court's procedure in complying with the order; that the trial court hadn't suspended the trial for the specific or sole purpose of reinstating García Gudiel, or waited for an appellate court to issue a ruling on whether the remedies given by the Court's April 23 ruling had sufficiently restored due process. Nor, according to the Court, had the trial waited for an appellate court to rule on the merits of a tribunal recusal petition filed by García Gudiel.⁸³

But the trial was already in a suspended status from April 19 to April 30, and reinstatements of counsel cannot occur when a trial is in a suspended state. The first opportunity to reinstate García Gudiel was on April 30—the date when he was in fact reinstated. On that

challenged the tribunal's legitimacy in hearing the case. When this challenge was rejected, García Gudiel petitioned the court for the recusal of two of the three tribunal judges for bias from previous cases. This also was rejected. When García Gudiel continued to demand a suspension of the trial, the tribunal informed García Gudiel that he had exhausted the limits of permissible arguments and ejected him from the courtroom for obstruction. The tribunal offered Ríos Montt three options for replacing his defense counsel: name prior counsel as his counsel of record (Ríos Montt had been previously represented by Francisco Palomo and Danilo Rodríguez in matters concerning genocide charges), arrange for new counsel, or be represented by the counsel for his co-accused for the remainder of the day. When Ríos Montt chose neither, the tribunal assigned to him counsel for his co-accused. The next day, when Ríos Montt appeared without counsel and the tribunal proposed a public defender, Ríos Montt arranged for Marco Antonio Cornejo Marroquin as his counsel, who arrived within the hour. On March 25 Ríos Montt had added Danilo Rodríguez to his defense.

⁸¹ Guatemala Constitutional Court Case File 1904-2013, May 20, 2013.

⁸² *Ibid.*

⁸³ See Open Society Justice Initiative, *Judging a Dictator*, 17-19.

day, the court re-read the indictment against Ríos Montt and excluded evidence that had been presented during the hours that Ríos Montt was without counsel of his choosing. Thus, the trial had not resumed prior to or without the reinstatement of García Gudiel. There is therefore no rationality in this defect claim because it is procedurally impossible to require or implement a suspension when a suspension was already in effect. Judge Gloria Patricia Porras, one of two Court judges who opposed this ruling, argued that the trial court had already sufficiently responded to the due process issue and that it was therefore not necessary to stop the trial. She argued that there was no due process violation given the remedies already ordered and implemented, and that the Court's ruling "abandons all procedural logic." Porras: "It makes no sense for the trial court to suspend the trial once these acts had been carried out and the claimed rights had been restored."⁸⁴ On May 20, the same day as the Court's annulment ruling, an appeals court issued a ruling confirming that the trial court had sufficiently remedied the claimed due process violation.⁸⁵

With respect to the tribunal's failure to wait for an appellate court to evaluate the merits of García Gudiel's tribunal recusal petition, Ríos Montt's defense failed to challenge the tribunal's refusal to disqualify judges within the allowable period, and under Criminal Procedure Code law the defense cannot later appeal the refusal. The issue of García Gudiel's tribunal recusal petition is therefore moot.

2. Procedure.

Under Guatemala's Criminal Procedure Code, trial-procedure defect claims must be routed through a "Special Appeal" procedure, which does not involve the Constitutional Court.⁸⁶ The Court's ruling therefore disregards procedures for hearing and deciding due process matters, and preempts any decisions an appeal court would have made on this matter. Further, the Court's May 20 ruling grants a remedy never requested by Ríos Montt or his defense. Ríos Montt's lawyers at no time protested the tribunal's implementation of the García Gudiel reinstatement. Further, under Criminal Procedure Code Article 282, defective procedure claims must be made "while the act is fulfilled or immediately after it has been fulfilled." With its ruling, the Court abandoned these provisions and intervened when it had no call to.

3. Proportion.

Even if Ríos Montt's defense had filed a non-compliance complaint with the Court relative to the trial court's reinstatement of García Gudiel, there was never any evidence that the claimed non-compliance had caused due process harm such that it would justify the effects of the ruling. The Court seems to wholly ignore the weight and significance of the evidence presented by the prosecution, and takes issue with minor, ambiguous procedural infractions that had no bearing on the evidentiary imbalance in the case. The Court must refrain from an opinion on evidence in lower court cases but its overriding duty under Criminal Procedure Code Article 477 is to see that State provisions of justice are upheld, and specifically that judgements "do not violate constitutional precepts and international treaties in the field of human rights."⁸⁷ By any measure of objectivity, the prosecution had

⁸⁴ For a full reading of Porras' dissent statement see, Guatemala Constitutional Court Case File 1904-2013, Dissenting Opinion of Justice Gloria Patricia Porras Escobar, May 20, 2013.

⁸⁵ *Judgment of Constitutional Court of Guatemala in Case of State v. Ríos Montt and Rodriguez Sanchez*, Case File 1904-2013, Decision of May 20, 2013, Part II, Judgment of Amparo Court of First Instance, May 9, 2013, Section III, in which the said court found that the trial court "indeed complied with the orders ... to give leave to proceed with the recusal and abstention motions filed by attorney Francisco García Gudiel and against the members of this Court, just as it was ordered to do in the aforesaid judgment...").

⁸⁶ Republic of Guatemala, Código Procesal Penal, Articles 49, 281, 282, 394, 398, 399, 404, 406, and 415- 434.

⁸⁷ Republic of Guatemala, Código Procesal Penal, Article 477 and Republic of Guatemala Political Constitution of 1985, Article CCIV.

presented overwhelming evidence of genocidal killing, none of it substantively refuted.⁸⁸ García Gudiel did little defending against the charges, and his absence was of little consequence to Ríos Montt's defense. Constitutional Court judge Mauro Chacon, who also opposed the ruling, wrote in his dissent statement that Garcia Gudiel⁸⁹ had enjoined the case with the purpose of forcing the recusal of tribunal judges on an unfounded bias claim, and that Garcia Gudiel had intentionally obstructed the proceedings.⁹⁰

Inasmuch as it "abandons all procedural logic,"⁹¹ unduly interferes with criminal proceedings by ruling when the it had no call to, preempts an appeals process mandated by Guatemala's Criminal Procedure Code, and is "manifestly disproportionate"⁹² in its effect, this ruling by the Court goes to untenable lengths to deny a genocide criminality finding, in violation of both Guatemalan law and UNGC obligations.

*May 29, 2013 and June 6, 2013 Amnesty Rulings*⁹³

Prior to the trial, amnesty protection sought by Ríos Montt under a 1986 general amnesty decree⁹⁴ had twice been rejected by lower courts based on superseding 1996 law⁹⁵ that explicitly excludes crimes of genocide from amnesty. On May 29, nine days after its verdict annulment, the Court held a public hearing to hear amnesty arguments. Ríos Montt's lawyers argued that their client is entitled to protection from prosecution provided by 1986 amnesty law, and that no court or superseding law can remove it. Following the hearing, the Court issued an order for the lower court to provide foundation for its rejection of 1986 amnesty for Ríos Montt. On June 6, the Court held another public hearing, in response to a separate and previous Ríos Montt challenge of amnesty rejection

⁸⁸ Prosecution testimony had detailed a pattern of deliberate killing. Some 100 eyewitnesses recounted family members who were shot at close range, hacked to death, bludgeoned with rocks and knives, strangled to death, burned alive, tortured and raped. Witnesses described the burning of houses and villages, and the destruction of crops and livestock. Forty-six expert witnesses testified that civilians died in a defenseless state, that the Army's kill-rate during the time in question was consistent with execution-style killing, and that the number of indigenous killed was eight times higher than that of non-indigenous. Prosecution evidence included references to orders and objectives contained in the Military's *Victoria 82*, *Firmeza 83*, and *Sofia* operating plans. The defense produced eight witnesses who failed to materially refute or challenge prosecution evidence. Said UC-Hastings Law Professor Naomi Roht-Arriaza in a video statement from Guatemala during the trial, "There's been a lot of pressure from the defense, saying that the trial isn't fair. The sense that I've got is that the trial is basically fair, the problem is that the defense isn't doing a very good job defending, and I think that part of that is because they never thought this was going to come to trial, and so they really didn't prepare very well. Really, their strategy is about delay, their strategy is about either trying to get the Constitutional Court or the political process to halt this thing, rather than to carry out a defense."

⁸⁹ In response to a May 16, 2013 complaint lodged by Ramon Cadena, the director of the International Commission of Jurist regional office, the bar association suspended García Gudiel for one year, finding him in violation of ethics codes. The association found that he lacked respect in addressing the tribunal, offending the honor and prestige of the judges and the credibility of the justice system, fined him (US\$ 660) and ordered a public reprimand.

⁹⁰ For a full reading of Chacon's dissent statement see, Guatemala Constitutional Court Case File 1386-2013, Dissenting Opinion of Justice Mauro Roderico Chacon Corado.

⁹¹ Guatemala Constitutional Court Case File 1904-2013, Porras Dissent Statement, May 20, 2013.

⁹² Guatemala Constitutional Court Case File 1904-2013, Chacon Dissent Statement, May 20, 2013.

⁹³ Guatemala Constitutional Court Case File 1386-2013.

⁹⁴ Republic of Guatemala Political Constitution of 1985, Decree VIII- LXXXVI; "General amnesty is hereby granted to all persons responsible or accused of having committed political crimes and related common crimes, during the period from March 23, 1982 to January 14, 1986. Therefore, no sort of criminal persecution or action might be taken or followed against authors and accomplices of such crimes, nor against those who might have committed the crime of concealing them; nor against those who might have intervened in any form in their repression or persecution."

⁹⁵ Republic of Guatemala Political Constitution of 1985, Decree CXLV- XCVI, forming Guatemala's 1996 National Reconciliation Law. Article 8 limits the Law's amnesty protection for crimes committed during the internal armed conflict: "exemption from criminal responsibility will not apply to crimes of genocide, torture or forced disappearance."

by a lower court, whereupon the same arguments were made, and the same order for foundation was made.⁹⁶

Guatemala's 1996 National Reconciliation Law voids the 1986 law,⁹⁷ and holds that "the extinction of the criminal responsibility referred in this law will not be applicable to crimes of genocide, torture and forced disappearance." Further, Guatemala had ratified the UNGC well before the 1986 law, and UNGC obligations outweigh any protection provided by any domestic law. Reopening or maintaining the amnesty debate in the presence of both domestic and international law that specifically prohibits amnesty seems to suggest an attempt by the Court to preserve criminal exemption for a genocide offender, and thus deny genocide criminality. Both Judge Porras and Judge Chacon, the same Court judges who opposed the Court's verdict overturn ruling, opposed the Court's action to reopen the amnesty issue. In his dissent statement, Chacon argued that the law is clear-cut and that there's no reason for the Court to further entertain the issue.⁹⁸ Porras argued the 1986 amnesty was never valid to begin with because it contradicts Guatemala's commitments under UNGC. Thus, she argued, the 1986 decree could not have created any reasonable expectations of protection, and therefore maintaining the debate is improper.⁹⁹

Here again, Guatemala's Constitutional Court had opportunity to rule consistent with Guatemalan and international laws but chose instead to rule counter to laws that are very clear and straightforward, and it is difficult to consider these deviations from law as anything other than efforts to protect Ríos Montt and Guatemala from a genocide charge.

*February 5, 2014 Ruling on Claudia Paz y Paz' Term*¹⁰⁰

Claudia Paz y Paz Bailey, who had brought the genocide case against Ríos Montt, had been appointed to replace Conrado Reyes in 2010 as Prosecutor General, after Reyes resigned on charges of corruption seven months into his term.¹⁰¹ Following the trial, a petition was filed with Guatemala's Constitutional Court arguing that Paz y Paz' term ends in May 2014 and not December 2014 since she had replaced a Prosecutor General seven months into an existing term. The petition named transitory constitutional articles that if applied would consider her term a fill-in assignment rather than a full 4-year appointment.¹⁰² On February 5, 2015 the Court unanimously granted the appeal.¹⁰³

The ruling is a violation of Article 251 of Guatemala's Constitution, which establishes the Prosecutor General's term as four years, and that only by the President and for "duly established

⁹⁶ See Emi Maclean, "One Month After Guatemala's Constitutional Court Intervenes to Challenge Rios Montt Genocide Conviction: Amnesty Back on the Table, New Trial Court Booked Till Mid-2014, and Rios Montt Back Home," *International Justice Monitor*, June 18, 2013, accessed March 22, 2018, <https://www.ijmonitor.org/2013/06/one-month-after-guatemalas-constitutional-court-intervenes-to-challenge-rios-montt-genocide-conviction-amnesty-back-on-the-table-new-trial-court-booked-till-mid-2014-and-rios-montt-back-home/>; Emi Maclean, "One Week After Overturning Former Dictator's Genocide Conviction, Guatemalan Constitutional Court Considers Whether Rios Montt Should Benefit from 1986 Amnesty," *International Justice Monitor*, May 20, 2013, accessed March 27, 2018, <https://www.ijmonitor.org/2013/05/one-week-after-overturning-former-dictators-genocide-conviction-guatemalan-constitutional-court-hears-claim-that-rios-montt-should-benefit-from-1986-amnesty/>.

⁹⁷ Republic of Guatemala Political Constitution of 1985, Decree CXXXIII-CXCVII, issued December 1997, repealed all amnesty laws prior to 1996.

⁹⁸ Guatemala Constitutional Court Case File 1097-2013, April 23, 2013.

⁹⁹ Ibid.

¹⁰⁰ Guatemala Constitutional Court Case File 461-2014, February 5, 2014.

¹⁰¹ Asier Andrés "Presidente Juramenta a la Nueva Fiscal General," *El Periodico*, December 10, 2010, <https://web.archive.org/web/20140222044140/http://www.elperiodico.com.gt/es/20101210/pais/185734>.

¹⁰² See Paul N. Avakian, "Guatemala's Praised Attorney General To Step Down Under Controversy," *Truthout*, March 17, 2014.

¹⁰³ Constitutional Court: "Circumstances make it advisable to grant the interim relief requested, and [with] the positive effects of constitutional protection now granted, Congress should immediately, from the moment notified, hold a meeting, continuously and without interruption, in order to issue the call for the formation of the Nominating Committee."

cause”¹⁰⁴ can the Prosecutor General be removed from office. Further, there is no basis for invoking transitory articles against Article 251 because transitional provisions regulate an event at a specific time, and once they accomplish the purpose for which they were enacted, they become void. Paz y Paz had made unprecedented strides in reducing crime in Guatemala and in dismantling its organized crime networks, and had gained international recognition for human rights justice.¹⁰⁵ The want for her early removal would only have come from those hurt or threatened by her work¹⁰⁶ or those who wish to punish her for prosecuting the Ríos Montt genocide case.

Other actions against Ríos Montt trial participants were:

- On May 14, Moises Galindo, a Ríos Montt trial defense attorney, filed to impeach Judge Yasmin Barrios, who presided over the Ríos Montt trial, after she was observed having breakfast with three people said to have been from NGOs who supported the genocide trial.¹⁰⁷
- On June 20, 2014, Judge Gisela Reinoso issued a ruling that froze Claudia Paz y Paz’ financial assets and barred her from leaving Guatemala pending the outcome of a civil dispute between the *Ministerio Público* and Globalcorp International, a computer vendor, where Globalcorp charged Paz y Paz with abuse of authority, dereliction of duty, violations of Constitutional resolutions, default, malicious delay, obstruction of justice, and conspiracy.¹⁰⁸
- On April 4 Judge Barrios was fined and disbarred by Guatemala’s bar association for a year after a complaint was filed by Moises Galindo, a Ríos Montt trial defense attorney, who felt she disrespected him during the Ríos Montt trial.¹⁰⁹
- On April 13, 2015, Judge Darwin Porras issued a ruling that prohibited *Ministerio Público* prosecutor Orlando López from leaving Guatemala pending the outcome of a criminal investigation into public statements López made in Spain in 2014. The complaint was brought by Ricardo Mendez Ruiz, the son of Ríos Montt’s former interior minister and the sponsor of a series of anti-trial newspaper advertisements published during the trial. In Spain, López had spoken about the trial and impunity in Guatemala. The complaint sought an investigation into López’ associations, and into whether there are “other employees with totalitarian ideological tendencies which jeopardize the criminal and constitutional rights of defendants.”¹¹⁰

These also appear to be politically motivated punishments meant to discredit, remove or in some way hamper prosecutors and judges who had protagonist roles in the Ríos Montt genocide trial. Inasmuch as these punishments inhibit or interfere with the prosecution of genocide crimes, they deny the crime.

¹⁰⁴ American Bar Association, *Prosecutorial Reform*, 42.

¹⁰⁵ In 2012, Paz y Paz was named by Forbes Magazine as one of the “five most powerful women changing the world.” In 2013, she was awarded US Berkley’s Judith Lee Stronach Human Rights Award, and that same year was nominated for the 2013 Nobel Peace Prize.

¹⁰⁶ Only two Prosecutor Generals have served out their full term. Most have been removed for political reasons. See American Bar Association, *Prosecutorial Reform*, 20, 21, 42, 43.

¹⁰⁷ “Abogado Interpone Solicitud de Antejudio Contra Jueza Jazmín Barrios,” *Emisoras Unidas*, May 14, 2013.

¹⁰⁸ See Emi MacLean, “Judge Imposes Travel Ban on Prosecutor Following His Public Statements About Historic Genocide Trial,” *International Justice Monitor*, April 14, 2015, accessed March 23, 2018, <https://www.ijmonitor.org/2015/04/judge-prohibits-imposes-travel-ban-on-prosecutor-following-his-public-statements-about-historic-genocide-trial/>.

¹⁰⁹ On April 4, 2014, Guatemala’s Bar Association issued a resolution dated January 9, 2014 suspending Judge Yassmin Barrios from practicing law for one year based a complaint filed by an attorney Moisés Galindo, defense counsel for José Mauricio Rodríguez. Moisés Galindo was ordered to assume the defense of Ríos Montt when Ríos Montt’s sole counsel was expelled for disruption. Galindo accused Judge Barrios of disrespecting and publicly humiliating him. See NISIGUA, Interview with Judge Yassmín Barrios, “The Door to Impunity and Corruption is being Opened,” April 8, 2014, accessed March 23, 2018, <https://nisgua.org/interview-with-judge-yassmin-barrios-the-door-to-impunity-and-corruption-is-being-opened/>.

¹¹⁰ MacLean, *Judge Imposes Travel Ban*.

In each of these seven rulings by Guatemala's Constitutional Court laws and procedures established by Guatemala's Constitution, Criminal Procedure Code, and its commitments to international treaties were consistently violated, abandoned, vacated, or disregarded. In each case the ruling favored a no-genocide finding. Where it did explain its rulings, its logic was faulty, incorrect or inadequate. In some cases, the Court's constitutional mandate was exceeded, and the Court ruled on matters it was not petitioned to rule on—in each case impeding the inquiry into whether Ríos Montt and his co-accused had committed genocide in the *Ixil* massacre. If indeed the denial of genocide is concerned with the denial of what is due victims and society when the crime has been or may have been committed, these rulings by Guatemala's Constitutional Court and the failures of duty by Guatemala's MP and military demonstrate a new category of denial behavior that arises when states investigate and prosecute their massacre crimes.

Conclusion

The prevailing notion of genocide denial as an act of speech stands to broaden when we consider the full range of what is withheld in denying the crime. Words that reject outright, re-characterize, confuse, or shift blame bring harm on an emotional level, but the real omissions associated with denial come when the crime goes unpunished. To deny a crime is to deny what is owed those harmed by the crime, and that involves punishment and restitution according to relevant law. Corruption is always a factor in denial. In verbal denials truth is corrupted. But denial also manifests itself as a corruption of duty to investigate and prosecute the crime, corruption in the interpretation and application of law, in the obligation to punish and prevent—and the examples in this paper demonstrate that the will to avoid a genocide finding is a more powerful force than any duty of truth, fairness or integrity.

Had the country not taken steps to institutionalize transparency and separations of power in its criminal justice system twenty-three years before the trial, we might say Guatemala was not yet ready to process a genocide charge. Had it not the laws, procedures and protocols in place for adjudicating such a crime we might say that a capability was not yet present to hold accountable those responsible for Guatemala's massacres. But the necessary elements were present, and had been for over two decades, and so it is hard to say that the system was inadequate.

The fact that each of the seven Constitutional Court rulings analyzed here deterred an inquiry into genocide criminality does not in and of itself make them refutations of genocide occurrence by the Court. Not every failing of a justice system is a denial of the crime at hand. To assess denial we must examine intent, and to examine intent we must make deductions based on behavior. Had the Court followed law in its rulings we would have no reason to question denial intent in them. Had it provided sound reasoning for deviating each time from constitutional and criminal code law, and from its requirements under international law, we might have less basis for considering whether the Court was predisposed to a no-genocide result. Where the Court did justify and give basis for its rulings, its reasoning was illogical and counter to protocol given by law. Had the Court demonstrated a history of independence in its rulings, and in particular, rulings concerning military accountability for human rights crimes, we might not pause to consider what transpired in Guatemala. But we know that Guatemala's Constitutional Court is comprised of judges who have been placed there for reasons less to do with merit and impartiality, and more to do with political favors. We know that Guatemala is a country with a long history of impunity and institutional corruption, and studies have shown that Guatemala's judiciary is susceptible to bias. We cannot know the mind of Court judges at the time of their rulings. We can only observe their actions and compare them to what law provides. In each case discussed in this paper, Guatemala's Constitutional Court had every opportunity to rule according to law, and in each case ruled counter to it.

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