
POST-CONFLICT PLURALISM

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ABSTRACT

A recurring debate, in the aftermath of mass atrocity, is whether states should pursue traditional justice through criminal prosecutions or promote peace through alternative mechanisms like truth and reconciliation commissions (TRCs). As scholars have increasingly recognized, however, a multitude of mechanisms meant to deal with past wrongdoings tend to emerge during periods of transition. Nonetheless, due to the legacy of this polarizing debate, additional research is needed on how their work can be mutually reinforcing in practice. Recent literature has explored whether the sequence of these mechanisms affects long-term outcomes, such as

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democratic consolidation and respect for human rights, but not how their interaction in practice might contribute to these goals.

This Article helps fill that void through an in-depth analysis of the interface between TRCs and traditional justice in the case of Guatemala, a country where over time both arose. In addition to being the first study to gather and analyze the sentences in the cases that resulted in convictions for grave crimes committed during Guatemala's thirty-six-year internal armed conflict, it bases its findings on over two dozen interviews with judges, prosecutors, and human rights attorneys who have firsthand knowledge of those cases. The study also includes critical insights from the leadership of the TRCs that documented the atrocities committed during that period.

What emerged from these primary sources is a compelling example of how these mechanisms can be complementary. On one hand, criminal justice proceedings, or the absence of them, can inform the work of TRCs. On the other hand, although TRCs have traditionally been portrayed as second-rate substitutes for justice, they can serve valuable functions that promote rule of law. For instance, TRCs can act as essential investigators and custodians of evidence in contexts where the state is complicit or directly involved in the underlying atrocities. Additionally, they can be vehicles for liberalization, creating opportunities for alternative voices, norms, and narratives to surface. Indeed, as the case of Guatemala shows, they can transform local judicial decision-making by diffusing international human rights norms and recasting the historical context in ways that influence how judges define and determine responsibility for crimes.

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1. INTRODUCTION

In the past, legal scholarship characterized transitional justice as a tug of war between the competing demands of “peace versus justice,” sometimes framed as “truth versus justice.”¹ Generally, advocates, who promoted “peace” as the top priority in times of transition, favored amnesties or truth and reconciliation commissions (TRCs) as justice substitutes, insisting that any greater accountability could upset fragile peace and lead to backlash.² Those who favored “justice” in the form of criminal prosecutions argued that international law required it and that the rule of law could not be established until wrongdoers were punished for their crimes.³

More recently, there is increased recognition that transitional justice solutions are not nearly so dichotomous.⁴ Instead,

¹ Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 81 (2002). Ruti Teitel, who coined the phrase “transitional justice,” defines it as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003). Naomi Roht-Arriaza critiques Ruti Teitel’s definition of transitional justice as unnecessarily abstract and legalistic. In addition, she argues that Teitel’s definition implies a clearly defined period of time, although oftentimes transitions are not so demarcated and can last for decades. Therefore, she defines transitional justice as a “set of practices, mechanisms, and concerns that arise following a period of conflict, civil strife, or repression, that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.” NAOMI ROHT-ARRIAZA, *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1-2* (Cambridge Univ. Press ed., 2006).

² See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5, 43 (2003/2004) (“Trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy.”); see also Max Boot, *When ‘Justice’ and ‘Peace’ Don’t Mix*, WALL ST. J., Oct. 2, 2000, at A34 (citing the post-World War II war crimes tribunals as an example of balancing justice and peace principles in a post-conflict context).

³ See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2540 (1991) (arguing that “the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes”).

⁴ See Chandra Lekha Sriran, *Remarks at ASIL Proceedings: Transitional Justice and Peacebuilding: Tensions and Complementarities*, in 107 AM. SOC’Y INT’L L. PROC. 83 (2013) (discussing the complementarities and tensions between justice and peacebuilding); Dustin N. Sharp, *Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique*, 14 CHI. J. INT’L L. 165 (2013);

transitional justice tends to be sequenced, with post-conflict societies over time resorting to a combination of mechanisms, often with overlapping goals.⁵ Indeed, in many post-conflict countries around the world, truth commissions have documented evidence of international crimes, which is later useful in criminal prosecutions.⁶

The use of multiple transitional justice mechanisms in post-conflict countries is not likely to abate. This trend has increased in part due to the proliferation of prosecutions in the last few decades, which is the result of a normative shift toward greater accountability for human rights violations.⁷ In the past, claims of sovereign rights effectively shielded egregious human rights abusers from liability for their crimes.⁸ Presently, the steady rise of trials, described by Kathryn Sikkink as the “justice cascade,” has meant that crimes that took place many years ago are being prosecuted for the first time years, even decades, after they were committed.⁹ Particularly with the increased resort to international criminal law, either through the International Criminal Court, foreign courts exercising universal jurisdiction, ad hoc tribunals created by the United Nations (UN), or hybrid tribunals, instances in which truth commissions and courts operate in the same space, simultaneously or in sequence, will likely grow.¹⁰ Thus, the appropriate interface between TRCs and courts

Laurel E. Fletcher, Harvey M. Weinstein, & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009).

⁵ Geoff Dancy & Eric Wiebelhaus-Brahm, *Timing, Sequencing, and Transitional Justice Impact: A Qualitative Comparative Analysis of Latin America*, 16 HUM. RTS. REV. 321 (2014).

⁶ See generally TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH (William A. Schabas & Shane Darcy eds., 2004) (studying the use of truth commissions in a number of post-conflict countries); see also ROHT-ARRIAZA, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 1, at 3 (noting that both the Argentine Sábato Commission and Chile’s Truth and Reconciliation Commission turned over their findings to the courts).

⁷ KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 3 (2011) (highlighting the increase in prosecutions worldwide).

⁸ BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 3 (2009) (“The most striking change is the fact that it is no longer acceptable for a government to make sovereignty claims in defense of egregious rights abuses.”).

⁹ SIKKINK, *supra* note 7.

¹⁰ Since states that have ratified the Rome Statute have expressly agreed to either punish the perpetrators of international crimes or cede jurisdiction to the International Criminal Court to do so, criminal justice will be an inevitable component of any transitional justice process in these countries. See William A. Schabas,

will continue to be a central question in transitional justice debates.

Emerging scholarship addressing this trend has tended to focus on optimizing the order of transitional justice mechanisms.¹¹ The emphasis has been on *whether* the various sequencing of these mechanisms affects long-term outcomes, such as democratic consolidation and respect for human rights, but not on *how* their interaction in practice might contribute to these goals.¹²

In an effort to fill that gap, as a Fulbright Scholar, I engaged in original field research in Guatemala and Spain examining the interplay between the transitional justice mechanisms that were a response to Guatemala's internal armed conflict. Over a span of six months, I interviewed over two dozen judges, prosecutors, human rights attorneys, and staff from the two Guatemalan TRCs. I also obtained and reviewed the full record of the case brought in Spain against the Guatemalan generals who were the alleged engineers of numerous mass atrocities against the Mayan population in Guatemala. Most significantly, I am the first researcher to have collected and analyzed the sentences in the cases before Guatemalan courts that resulted in convictions for grave crimes committed during the armed conflict. I reviewed all of these decisions with an eye toward assessing how the findings and evidence from TRCs influenced judicial decision-making.

The Guatemalan transitional justice experience is illuminating on this question because Guatemala employed a variety of transitional justice mechanisms to address the gross human rights violations that occurred during its thirty-six-year armed conflict. In the immediate aftermath of the conflict, Guatemala opted for a UN-backed truth commission coupled with an amnesty law, which some

Introduction to TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH, *supra* note 6, at 1–2 (discussing the potential influence of international institutions on TRCs in the post-conflict environment).

¹¹ See, e.g., Tricia D. Olsen, Leigh A. Payne, & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980, 1005 (2010) (claiming that “delayed justice, or sequencing trials after amnesties, allows for the justice balance that improves human rights and democracy”).

¹² Elin Skaar, Cath Collins, & Jemima García-Godos, *Analytical Framework*, in TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 25, 28 (Elin Skaar, Jemima García-Godos, & Cath Collins eds., 2016) (“In particular, although few countries have employed only a single transitional justice in isolation, the existing literature rarely considers interaction effects explicitly. Another key issue, often flagged but rarely explored fully in the literature, is precisely how, rather than simply whether, timing and sequencing in the adoption of TJMs affects medium- and long-term outcomes.”).

believed were designed to ensure everlasting impunity. Skeptical of the restrictive mandate of this truth commission, the Catholic Church established its own independent truth commission that, unlike the UN-backed commission, named those responsible for grave international crimes. At the same time, victims who viewed these truth commissions as inadequate substitutes for justice continued to push for prosecutions. Although a few low-level paramilitary officials were successfully convicted, the power that the perpetrators still held in Guatemala made prosecutions of the high command of the military politically infeasible.¹³ With time, however, prosecutions of the planners and organizers of crimes committed during the armed conflict began to take place, first in Spain and now, strikingly, in Guatemala; such prosecutions would have been unthinkable when the crimes occurred some thirty years prior.

The Guatemalan experience illustrates the interdependence of the two post-conflict strategies in practice: once thought to be antithetical to justice, “truth” has played a surprisingly important role in these prosecutions. A close examination of the sentences in Guatemala reveals that justice has actually been “truth full,” with the reports and other materials from truth commissions often being admitted into evidence. However, the normative force of truth commissions’ work in judicial decision-making has largely been overlooked in the context of transitional justice.¹⁴ Notably, the “truth”

¹³ Andrew N. Keller, *To Name Or Not To Name? The Commission for Historical Clarification in Guatemala, Its Mandate, and the Decision Not to Identify Individual Perpetrators*, 13 *FLA. J. INT’L L.* 289, 297–301 (2001) (discussing the political compromise of the CEH). The National Reconciliation Law provided some exceptions to the amnesty. For example, enforced disappearances, genocide, torture, and other crimes that do not have a statute of limitation could all still be prosecuted under the law. Decreto No. 145 (1996), Ley de Reconciliación Nacional [National Reconciliation Law], 54 *Diario De Centro America (Guat.)* (“La extinción de la responsabilidad penal a que se refiere esta ley, no será aplicable a los delitos de genocidio, tortura y desaparición forzada, así como aquellos delitos que sean imprescriptibles o que no admitan la extinción de responsabilidad penal, de conformidad con el derecho interno o los tratados internacionales ratificados por Guatemala.”); see also Margaret Popkin, *Guatemala’s National Reconciliation Law: Combating Impunity or Continuing It?*, 24 *REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS* 173, 173 (1997), <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/24/dtr/dtr7.pdf> [<https://perma.cc/6MT5-E6PR>] (“[I]t may still be nearly impossible to prosecute most of the worst crimes committed during the armed conflict.”).

¹⁴ For a broader analysis of how the reports of non-judicial entities influence judicial decision-making, see Pammela Quinn, *Advancing the Conversation: Non-Judicial Voices and the Transnational Judicial Dialogue*, in *EXPERTS, NETWORKS, AND INTERNATIONAL LAW* 47 (Holly Cullen, Joanna Harrington, & Catherine Renshaw eds., 2017).

presented in these reports established historical narratives around which judges defined crimes and attributed responsibility, particularly to high-level officials. The truth commissions also helped to diffuse international human rights norms at the local level.

The implications of these findings usher in a dramatically different way of conceptualizing transnational justice as pluralist. Drawing inspiration from the frame of legal pluralism and building off emerging research in the political science arena on sequencing, I encourage lawyers and legal scholars to develop legal rules and judicial norms to facilitate the operation of various legal and quasi-legal institutions in the same space.¹⁵ I argue that post-conflict pluralism can be a vehicle for liberalization because it creates additional opportunities for norm diffusion and contestation. In addition, I caution policy-makers not to underestimate the value of “historical clarification” in advancing justice and creating roadmaps for prosecutions that are strategic rather than scattershot. For this reason, I suggest that we should design transitional justice systems and adopt judicial norms that encourage post-conflict pluralism.

In Section 2, I posit a theory that justice in post-conflict societies should be a fundamentally pluralist endeavor and advocate that we embrace multifaceted transitional justice, rather than try to recast it within the truth-versus-justice paradigm. To set the stage for an analysis of post-conflict pluralism in Guatemala, Section 3 provides a more in-depth description of my methodology and essential background information, including the history of the internal armed conflict in Guatemala and a description of the various mechanisms and methods that emerged to address grave crimes committed during this period. Section 4 describes how the truth telling documented by TRCs contributed to prosecutions in Guatemala and Spain. In particular, I highlight how these truth commissions provided judges with the necessary historical context to understand the nature of the crimes, explained *modus operandi*, established the chain of command by exposing the organizational structure of the military, and described the collective and enduring harm suffered because of the crimes. In Section 5, using the example of Guatemala as a launching point, I identify the specific ways in which truth commissions can

¹⁵ Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155 (2007) (“[N]ormative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations.”).

move the needle forward on justice, by diffusing international law, recounting norm-shifting narratives, and acting in the place of fragile or compromised state institutions in the wake of mass atrocity.

2. THE MOVE TOWARD A PLURALIST CONCEPTION OF TRANSITIONAL JUSTICE

Transitional justice scholars have long been on a quest for the ideal mechanism or combination of mechanisms that will ensure the long-term success of all post-conflict countries. Initially, discourse on transitional justice emphasized that there was a choice to be made between peace and justice in the periods of transition to democracy. For instance, Samuel Huntington discussed the decision to “prosecute and punish or to forgive and forget.”¹⁶ Generally, advocates who favored “peace,” in the form of amnesties and truth commissions, insisted that greater accountability could upset fragile negotiated peace agreements and lead to backlash.¹⁷ The general understanding was that TRCs were “a second-best alternative when trials were seen as too destabilizing or politically infeasible.”¹⁸ Alternatively, those who favored “justice” argued that the rule of law could not be established until wrongdoers were punished for their crimes.¹⁹

Despite the focus on this dichotomy, in post-conflict countries, transitional justice mechanisms rarely occurred in isolation.²⁰ In practice, they tend to be sequenced, or in a few cases, occur simultaneously.²¹ In a sense, transitional justice in post-conflict countries

¹⁶ SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 211 (1991).

¹⁷ See, e.g., Snyder & Vinjamuri, *supra* note 2, at 43–44 (“Trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy.”); see also Boot, *supra* note 2, at A34.

¹⁸ Schabas, *Introduction*, *supra* note 6, at 1. See also ROHT-ARRIAZA, *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY*, *supra* note 1, at 3 (stating that “the model of a ‘truth commission’ gained force as a ‘second-best option’ where trials were deemed too destabilizing”).

¹⁹ See, e.g., Orentlicher, *supra* note 3, at 2540 (1991) (arguing that “the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes”).

²⁰ Skaar et al., *TRANSITIONAL JUSTICE IN LATIN AMERICA*, *supra* note 12, at 29 (noting that there is “an ever-expanding toolbox of transitional justice mechanisms”).

²¹ Dancy & Wiebelhaus-Brahm, *supra* note 5.

evolved faster than the scholarship did.²² As a consequence, at least rhetorically, there is increasing recognition that justice and peace are mutually re-enforcing. The UN has now adopted a multi-faceted approach that combines measures to achieve justice, truth, reparation, and guarantees of non-repetition.²³ In his report on the rule of law in post-conflict societies, then-UN Secretary-General Kofi Annan stated, “[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”²⁴ In September 2009, then-UN Secretary-General Ban Ki-moon asserted that “the debate is no longer between peace and justice, but between peace and what kind of justice.”²⁵ The European Union has stated that it is “convinced that peace and justice are not contradictory aims . . . [and] that lasting peace cannot be achieved without a suitable response to calls for individuals to be held accountable for the most serious international crimes.”²⁶

The literature, particularly in the political science arena, has thus shifted to examine whether there is an optimal sequencing of mechanisms that generate the best outcomes for democracy and human rights.²⁷ To some extent, however, the exploration of sequencing has replayed the familiar truth versus justice debate. On one hand, some believe that a slow approach to justice is best, with peace, generally achieved via amnesties and truth commissions, being prioritized, before any attempts at accountability are undertaken.²⁸ Rather than

²² Alexander Dukalskis, *Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other*, 13 INT'L STUD. REV. 432, 432 (2011).

²³ See generally U.N. Secretary-General, *Guidance Note of the Secretary General: United Nations Approach to Transitional Justice* (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf [<https://perma.cc/57FH-W64B>].

²⁴ U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 1, S/2004/616 (Aug. 23, 2004), <https://undocs.org/S/2004/616> [<https://perma.cc/K5H2-QL3Z>].

²⁵ Press Release, Secretary-General, *Honoring Geneva Conventions, Secretary-General Says Debate 'No Longer between Peace and Justice but between Peace and What Kind of Justice'*, U.N. Press Release SG/SM/12494, (Sept. 26, 2009), <http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm> [<https://perma.cc/5PBC-BYVM>].

²⁶ European Union Press Release 11900/08, *Declaration by the Presidency on Behalf of the EU to Mark the 10th Anniversary of the Rome Statute of the International Criminal Court* (July 16, 2008), http://www.europa-eu-un.org/articles/en/article_8025_en.htm [<https://perma.cc/SU4W-ZQ38>].

²⁷ Skaar et al., *supra* note 12, at 28.

²⁸ See Fletcher & Weinstein, *supra* note 4, at 212 (arguing that the “tortoises” who have taken their time before pursuing criminal prosecutions have fared better than the “hare” that rushed to judgment); Joanna R. Quinn, *Chicken and Egg?*

rejecting justice wholesale, they argue that prosecutions should not be attempted until the political transition has been stabilized. Others, like Human Rights Watch, warn that peace first, justice later, in practice means no justice at all, which in their view will ultimately undermine long-term stability.²⁹

The tight hold of the truth-versus-justice debate, as evinced by its current reverberations in the literature on sequencing, in part is a result of the legal profession's understanding of the law as linear and insular. I contend that this need to choose emerges from our narrow "jurispathic" conception of justice, in which law must be hierarchical and courts supreme.³⁰ Those who believe most fervently in the need for traditional notions of criminal responsibility in post-conflict societies to take precedence reflect a kind of legal centralism. Legal centralism is the idea that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."³¹ One of the precepts of legal centralism is that "the state is the best or only hope for the realization of liberal democratic values, such as democracy, equality, human rights, and the rule of law."³² To legal centralists, all other normative institutions are secondary and subordinate to the law and institutions of the state.³³

It is this conceptual hegemony of the state as the preeminent

Sequencing in Transitional Justice: The Case of Uganda, 14 INT'L J. OF PEACE STUD. 35, 37 (2009) ("It may well be that the cessation of hostilities needs to be a certainty before embarking on a process of transitional justice."); Lucy Hovil & Joanna R. Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda* at 17-19 (Refugee Law Project Working Paper No. 17, July 2005), <http://reliefweb.int/report/uganda/refugee-law-project-working-paper-no-17-peace-first-justice-later> [<https://perma.cc/ML8X-JJQ4>] (emphasizing the importance of ending the conflict in Uganda first before determining what system of justice to impose). Similar arguments were made during the Review Conference for the Rome Statute in Kampala on June 2, 2010.

²⁹ Human Rights Watch, *Seductions of "Sequencing": The Risks of Putting Justice Aside for Peace* (2010), <https://www.hrw.org/news/2011/03/18/seductions-sequencing> [<https://perma.cc/GAE8-TQYZ>] (recognizing that countries in transition or negotiating peace deals face difficult choices but also believing that neglecting accountability for egregious crimes in the aftermath of concluding a peace agreement can be and often is detrimental to long-term stability).

³⁰ Robert M. Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 41 (1983).

³¹ William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473, 498 (2010) (quoting John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM AND UNOFFICIAL L. 1, 3 (1986)).

³² Twining, *supra* note 31, at 499.

³³ Griffiths, *supra* note 31, at 3.

lawmaker and enforcer that, to some extent, limits further development of transitional justice. Those in favor of justice view truth commissions as nothing other than second-rate substitutes for criminal prosecutions, thereby overlooking their important contributions to the rule of law, which this Article documents. However, the legal centralists' reliance on the state warrants especially strong skepticism in post-conflict societies, where the state has perpetrated or acquiesced to violence.

Instead of being trapped in the dichotomies that have dominated the field for decades, I urge transitional scholars and practitioners to adopt a legal pluralism frame when conceptualizing and examining transitional justice. Legal pluralists believe that legal centralism is "a myth, an ideal, a claim, an illusion."³⁴ Instead, Griffiths claims, "Legal pluralism is fact."³⁵ Legal pluralism is "a theory or system that recognizes more than one ultimate substance or principle."³⁶ Legal pluralism accepts, and even champions, the benefits of multiple, overlapping legal or quasi-legal systems.³⁷ Instead of seeking harmonization and hierarchy, legal pluralism favors diversity in legal systems as a means to generate "alternative ideas and as a site for discourse among multiple community affiliations."³⁸ Legal pluralism was first noted by anthropologists who documented how indigenous norm-setting institutions remained influential and sometimes dominant in post-colonial contexts even when the colonial state authority actively tried to displace them.³⁹ Sally Merry Engle refers to this class of legal pluralism as "classic legal pluralism."⁴⁰

Political theorists have since observed that legal pluralism is not limited to colonial contexts, where local norms conflicted or merged with Western ones. In western societies, a host of norm-setting institutions ranging from churches to business associations may set rules outside of the official state rulemaking process.⁴¹ Sally Engle Merry explains that "nonstate forms of normative ordering are more difficult to see" in societies without colonial pasts, but nevertheless

³⁴ Griffiths, *supra* note 31, at 4.

³⁵ *Id.*

³⁶ Twining, *supra* note 31, at 477.

³⁷ Berman, *supra* note 15, at 1155.

³⁸ *Id.*

³⁹ *Id.* at 1170.

⁴⁰ Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y. REV. 869, 872-74 (1988).

⁴¹ Berman, *supra* note 15, at 1172.

present.⁴² In these contexts, legal pluralism “center[s] on a rejection of the law-centered-ness of traditional studies of legal phenomena, arguing that not all law takes place in the courts.”⁴³ These more recent understandings of legal pluralism envision lawmaking and enforcing as much more porous, multi-directional, and non-hierarchical.⁴⁴ So, by way of illustration, “the family and its legal order are shaped by the state, but the state in turn is shaped by the family and its legal order because each is a part of the other.”⁴⁵

While legal pluralists have historically focused on the relationship between state and internal non-state law, more recently, in response to concerns about legal fragmentation in the global legal order, legal scholars have utilized legal pluralism as a helpful frame for grappling with the growing number of international legal and quasi-legal institutions.⁴⁶ For example, Mark Drumbl applied legal pluralism to international criminal justice when analyzing the interplay between international courts, ad hoc tribunals, hybrid courts, and national courts.⁴⁷ Applying legal pluralism to the international arena more broadly, Paul Schiff Berman argued that the pluralist “framework is essential if we are to more comprehensively conceptualize a world of hybrid legal spaces.”⁴⁸ According to Berman, international law scholars have generally ignored hybridity in the law and tried to situate disputes as either domestic or international. Rather, he contends that “the global legal system is an interlocking web of jurisdictional assertions by state, international, and non-state normative communities.”⁴⁹ Global legal pluralists thus examine how local actors might either deploy, change, or resist international, transnational, or non-state norms and how these norms may also be transformed in the process.⁵⁰ The emphasis is on the persuasive power of these norm-setting institutions rather than how their

⁴² Merry, *supra* note 40, at 873.

⁴³ *Id.* at 872-74.

⁴⁴ *Id.* at 878.

⁴⁵ *Id.* at 883.

⁴⁶ William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2003); Paul Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225, 237 (2009).

⁴⁷ Mark Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295 (2005)

⁴⁸ Berman, *Global Legal Pluralism*, *supra* note 15, at 1159.

⁴⁹ *Id.*

⁵⁰ Berman, *The New Legal Pluralism*, *supra* note 46, at 232, 236.

ranking in a legal hierarchy influences their coercive authority.⁵¹ So, for example, global legal pluralism is at work when the findings of a commission of inquiry spur legal activity in the domestic courts of the abuser's home country or when a nonbinding decision by the International Court of Justice influences how state courts in the United States rule on a case.⁵²

The legal pluralism frame is also very instructive with regard to transitional justice. Jaya Ramji-Nogales has used this frame when discussing the need to incorporate local preference and indigenous institutions into a pluralist transitional justice design.⁵³ She believes, as I do, that "competing visions of substantive justice will exist within the affected society and the international community" and that transitional justice design should aim to "incorporate, or at least respond to, a variety of perspectives."⁵⁴ Similarly, using the transitional justice experiences of Argentina and Chile as examples, Carrie Menkel-Meadow asserts that transitioning societies are not homogeneous and so employing pluralist processes, which provide for different and simultaneous models of transitional justice, would best account for diverse conditions on the ground.⁵⁵ Building on this point, I contend that in order to encapsulate all of these competing instincts and impetuses as democratically as possible, transitional justice should be inherently multifaceted and a blend of global and local. The transitional justice process typically involves a variety of local, national, and international actors all seeking to redress the violence and human rights abuses that occurred during periods of armed conflict, civil strife, and repression. Adopting a pluralist approach to transitional justice takes the emphasis off prioritizing one actor over another, which has been the primary focus of the literature on the truth versus justice debate and sequencing. Instead of trying to determine an optimal order for transitional justice mechanisms, it places the focus on developing a set of principles and legal

⁵¹ *Id.* at 235 ("[I]n a world of plural normative assertions, one crucial question will be whether the community's articulation of norms is sufficiently persuasive to convince those wielding coercive power to enforce such norms.").

⁵² *Id.* at 234.

⁵³ Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 7 (2010).

⁵⁴ *Id.* at 4-5.

⁵⁵ Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals Beyond Rule of Law and Democracy Development in Argentina and Chile*, 3 INT'L J. CONFLICT ENGAGEMENT AND RESOL. 1, 24 (2015).

rules that facilitate their operation in practice.

Not only is this an important theoretical shift, but practically, it has a leveling, perhaps even democratizing, effect. After mass atrocity, victims have different methods of healing and reintegrating back into society. It is unlikely that any one mechanism would be enough to satisfy all victims' desires for justice and thereby promote reconciliation. This is because what reconciliation and justice mean is highly dependent on who is answering the question. Reconciliation is a difficult concept to nail down because it can occur on so many different levels.⁵⁶ At the micro level, reconciliation can occur between a perpetrator and a victim, or even within a perpetrator's own conscience.⁵⁷ At the macro level, it could mean reconciliation between the victim community and the state that targeted it, or, alternatively, the civilian bystanders who were complicit in crimes.⁵⁸

Similarly, justice in the transitional context evades definition.⁵⁹ It can mean "many things to many survivors: for some it may be criminal trials of political leaders, for others punishment of their neighbor who killed a family member is most important, and some may find justice in being able to return to one's home and live in peace."⁶⁰ In Guatemala, there are survivors who support criminal

⁵⁶ John D. Ciorciari & Jaya Ramji-Nogales, *Lessons from the Cambodian Experience with Truth and Reconciliation*, 19 BUFFALO HUMAN RIGHTS L. REV. 193, 196 (2013) ("Reconciliation also lends itself to numerous definitions that vary and even compete along several axes, including goals, subject, and scope."); ROHT-ARRIAZA, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 1, at 12 ("Definitions of reconciliation are still contested and murky, and the individual, community, and polity aspects of such processes are still not well understood."); Susan Kemp, *The Inter-Relationship between the Guatemalan Commission for Historical Clarification and the Search for Justice in National Courts* 73, in TRUTH COMMISSIONS AND COURTS, *supra* note 6, at 73.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Roman David, *What We Know about Transitional Justice: Survey and Experimental Evidence*, 38 ADVANCES IN POL. PSYCHOL. 151, 171 (2017) ("Research consistently shows that the meaning of justice in postconflict societies is a broad social category that goes beyond the notion of legal justice. In particular, the meaning of justice for victims includes individual, social, and political aspects of justice."); See, e.g., Michael Bratton, *Violence, Partisanship and Transitional Justice in Zimbabwe*, 49 J. OF MOD. AFR. STUD. 353, 365 (2011) (asking the meaning of justice, respondents to a survey conducted in Zimbabwe indicated that it meant fair treatment (38%), truth telling, openness and transparency (17%), equality of socio-economic living standards (14%), and the rule of law (6%), while 19% of those surveyed said that they did not know).

⁶⁰ Laurel E. Fletcher, *Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation*, 72 L. & CONTEMP. PROBS. 51, 54 (2009).

sanctions for those responsible and others who do not.⁶¹ This difference may affect the healing process. According to empirical evidence, testifying in a public forum is healing for some survivors, but not others.⁶² Thus, I argue that, in order to incorporate all of these differing perspectives, transitional justice should be inherently multi-faceted. We should embrace pluralization of transitional justice and, as Jaya Ramji-Nogales has argued, design systems that plan for it, not only because it is inevitable, but also because it is desirable.

The legal pluralist frame also helps take the focus off another dichotomy that frequently appears in the literature: the relative merits of international versus national interventions. This recurring debate in the field centers on what role international actors should play in transitional justice, which inevitably raises questions of what deference should be given to a sovereign's decision to devise its own transitional justice design. In other words, how universal is the notion that grave crimes warrant prosecution, regardless of its effect on the political compromises made by the governing authorities to achieve peace? When is it appropriate for the international community to step in with its own legal responses following mass atrocity? The Universalist would say that we must strive to keep our systems as uniform as possible and that this is best accomplished at the international level.⁶³ The Sovereignist would object, claiming that this undermines the autonomy of nation-states, which is the foundation of our global legal order.⁶⁴

Neither of these solutions is entirely satisfactory in transitioning societies. Requiring that all transitional justice be done at the international level so that it is uniform is neither practicable nor desirable, especially at this moment, when international criminal justice is facing its own crisis of confidence. In the last few years, the International Criminal Court has been accused of biased case selection, particularly by African nations. These critiques crescendoed in 2016 when the African Union began to develop a strategy for "collective

⁶¹ Interview with Alejandro Rodriguez, Human Rights Attorney, Impunity Watch (Aug. 2, 2016) ("Hay víctimas que no están de acuerdo con una sanción, otras sí.").

⁶² See ROHT-ARRIAZA, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 1, at 5.

⁶³ Berman, *supra* note 15, at 1165 ("Universalists, for their part, will chafe at the idea that international norms should ever be subordinated to local practices that may be less liberal or less rights-protecting.").

⁶⁴ *Id.* ("Sovereignists will object to the idea that nation-states should ever take into account international, transnational, or non-state norms.").

withdrawal from the ICC.”⁶⁵ Moreover, even if it were desirable for international criminal tribunals to be the main arena for prosecutions for crimes associated with mass atrocity, they currently lack the capacity to do so.⁶⁶ Indeed, in its sixteen years of operation, the International Criminal Court has only convicted four defendants.⁶⁷ Such a requirement would also conflict with the principle of complementarity, which provides that when justice can be done at the local level, it should be.⁶⁸

Alternatively, relying exclusively on local jurisdictions to prosecute crimes in which state actors or institutions may be implicated at the highest levels may result in unequal punishment and even impunity, as it did for many years in Guatemala. Indeed, one empirical study that examined seven post-conflict countries found that domestic criminal prosecutions only progressed when there was intense UN involvement, regardless of whether they had strong or weak internal legal systems.⁶⁹

As Naomi Roht-Arriaza aptly put it, “two dimensions—national/international, or truth commission/trial—are no longer enough to map the universe of transitional justice efforts.”⁷⁰ As my research suggests, in post-conflict societies, norms are shared and diffused across a multiplicity of actors, be they truth commissions, the national judiciary, the international community, or various

⁶⁵ African Union Assembly Dec. 590(XXVI), A.U. Doc. EX.CL/952(XXVIII), Decision on the International Criminal Court, at ¶ 10(iv) (Jan. 30, 2016), https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf [<https://perma.cc/F8TJ-SMV9>].

⁶⁶ See Ramji-Nogales, *supra* note 53, at 7 (describing international criminal courts incapability of trying “every individual who committed a crime in a situation of mass violence”).

⁶⁷ The International Criminal Court has only convicted three defendants and acquitted two. For more information about these cases, see *Defendants*, INT’L. CRIM. CT., <https://www.icc-cpi.int/Pages/cases.aspx>.

⁶⁸ See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 497 (2003) (explaining that “under the principle of complementarity, the court must defer to national courts unless they are unable or unwilling to prosecute.”); See also Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L. F. 67, 72–81 (2010) (explaining that the text of Article 17 requires a two-step test and that the first step—the so-called “proceedings requirement” —is an examination into whether a State is currently investigating or prosecuting the case or has already done so).

⁶⁹ Fletcher, et al., *supra* note 4, at 195 (“Only in countries with weak legal systems and intense UN involvement are criminal justice proceedings being instituted against a limited set of perpetrators.”).

⁷⁰ ROHT-ARRIAZA, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 1, at 11.

actors in civil society. Empirical research suggests that we should embrace this reality. A recent study that examined the sequencing of transitional justice mechanisms in Latin America found little evidence that there is one "optimal sequence" to promote democracy.⁷¹ Moreover, research in the political science arena has found that "none of the transitional justice mechanisms on their own reduce human rights violations or improve democracy."⁷² Rather, only combinations of transitional justice mechanisms have been found to affect human rights and democracy positively.⁷³ The only conclusive finding across studies is that criminal trials, when combined with other mechanisms like amnesties and truth commissions, are democracy-promoting, meaning that "successful democratic consolidation is almost never observed where trials have not been conducted."⁷⁴

While quantitative analysis of the effects of various combinations of transitional justice mechanisms on democracy and human rights is now commonplace, at least among political scientists, how such blending of mechanisms contributes to these long-term outcomes in practice has been undertheorized. Emerging scholarship that addresses this trend has tended to focus on *whether* the various sequencing of these mechanisms affect long-term outcomes, such as democratic consolidation and sustained peace, but not on *how* their interaction in practice might contribute to these goals.⁷⁵ The scholarship that has focused on the relationship between truth commissions and trials have primarily focused on the few countries where they occurred simultaneously.⁷⁶ Much less has been written about how truth commissions and trials that are sequenced have been complementary in practice.⁷⁷ Scholars have missed opportunities to

⁷¹ Dancy & Wiebelhaus-Brahm, *supra* note 5, at 332 ("In a crude sense, this suggests that there is not an optimal timing or sequencing of [transitional justice] needed to promote democratic development.").

⁷² Olsen, Payne & Reiter, *supra* note 11, at 996.

⁷³ *Id.*

⁷⁴ Dancy & Wiebelhaus-Brahm, *supra* note 5, at 340.

⁷⁵ Skaar et. al., *supra* note 12, at 28.

⁷⁶ William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L. F. 3, 3-6 (2004) (focusing on the example of Sierra Leone).

⁷⁷ Skaar, et. al., *supra* note 12, at 28. *But see* Eduardo González Cueva, *The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions*, in TRUTH COMMISSIONS AND COURTS, *supra* note 6, at 55, 59-66 (2004) (highlighting the cooperation between Peruvian truth commissions and the court system). *See also* Susan Kemp, *The Inter-Relationship between the Guatemalan Commission for Historical*

innovate systems that account for the pluralization of transitional justice, and thus more effectively address the unique challenges that transitioning societies face when trying to overcome their troubled pasts.

This article attempts to fill this gap by drawing lessons from the Guatemalan experience with transitional justice. Guatemala provides a compelling illustration of the promise that more integrated and pluralist transitional justice systems might hold. Although scholars mistakenly portray Guatemala as a country where truth commissions preceded trials,⁷⁸ as my research reveals, trials occurred prior to, concurrently with, and after the work of the truth commissions. This makes it an interesting case study to explore the various ways that trials and truth commissions might complement each other in practice. My research suggests that the operation of multiple legal or quasi-legal institutions can be particularly advantageous as a tool for liberalization, in that it can open up “spaces of resistance” to counter the official state narrative or to disrupt a corrupt legal system.⁷⁹ Furthermore, in lieu of imposing international law on transitional countries through a positivist legal order at the international level, allowing for norm diffusion through and across various institutions is more likely to yield liberalizing results locally.

3. TRANSITIONAL JUSTICE IN GUATEMALA

In order to contextualize my later findings, a baseline understanding of the Guatemalan internal armed conflict and the transitional justice mechanisms set up to address atrocities committed during that period is essential. Although there were many causes of the internal armed conflict in Guatemala, any analysis of it would be incomplete without placing it within the broader context of the Cold War.⁸⁰ In 1953, then President Jacobo Arbenz Guzmán ushered

Clarification and the Search for Justice in National Courts, in TRUTH COMMISSIONS & COURTS, *supra* note 6, at 67, 74 (2004) (considering the relationship between truth commissions and criminal prosecutions).

⁷⁸ See, e.g., Dukalskis, *supra* note 22, at 440 (stating that Guatemala conducted a sequence of truth commissions followed by prosecutions); see also Fletcher et al., *supra* note 4, at 215 (stating that Guatemala “opted for truth commissions rather than trials”).

⁷⁹ Berman, *supra* note 15, at 1176.

⁸⁰ See Comisión para el Esclarecimiento Histórico, *Guatemala: Memoria Del Silencio, Capítulo primero: Causas y Orígenes del Enfrentamiento Armado Interno* 98 (1999)

in a wave of agrarian reforms in an effort to redistribute land.⁸¹ One of his most controversial measures was to expropriate land that remained uncultivated. When Arbenz sought to repatriate land owned by the United Fruit Company, a US-owned banana company, the United States, who with the backdrop of the Cold War was predisposed to view Arbenz as a communist, began a covert CIA operation to overthrow his government.⁸² In 1954, Carlos Castillo Armas and a small army, who were trained by the CIA, led an invasion into the capital of Guatemala. While the attack objectively was not a military success, it did succeed in putting enough pressure on Arbenz that he ultimately resigned that year and a military government took over.⁸³

Thereafter, the Guatemalan government instituted the National Security Doctrine, a repressive anti-communist agenda developed primarily in the United States that targeted the "internal enemy."⁸⁴ It was in this context that groups of leftist Guatemalans mobilized, culminating in a failed uprising of leftist military officers on November 13, 1960.⁸⁵ This date is seen as the start of Guatemala's internal armed conflict.

Although the political and military might of the guerilla groups was limited, the State viewed this armed insurgency as a fundamental threat to their moderation project and so responded with brutal force. At the time of the civil war, Guatemala was one of only a handful of countries in Latin America to have an indigenous majority population and the government believed that this population was stalling the country's economic development.⁸⁶ The Guatemalan government saw only two possibilities for the indigenous Mayan population: assimilation or elimination. This was confirmed by the documents collected by the CEH. Otilia Lux de Cotí, one of the three Commissioners of the CEH, explained to me that the CEH discovered correspondence dating as far back as the 1970s, containing "assertions that the 'indian' is an element that does not permit development and that should either mix to become mestizo or be

[hereinafter CEH Report] (discussing the historical background that set the context for the Guatemalan internal armed conflict).

⁸¹ *Id.* at 101-02.

⁸² Stephen Schlesinger & Stephen Kinzer, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA (1999).

⁸³ *Id.*

⁸⁴ CEH Report, *supra* note 80, at 117-123.

⁸⁵ *Id.* at 123.

⁸⁶ *Id.* at 79.

eliminated.”⁸⁷ During the 1980s, considered the bloodiest period of the conflict, the Guatemalan government, led by military strongmen, developed the so-called scorched earth campaign, in which they razed entire villages and killed tens of thousands of people.⁸⁸ The conflict continued until 1996 when the Guatemalan Government and the Guatemalan National Revolutionary Unity (URNG) signed the Agreement on a Firm and Lasting Peace (*Acuerdo de Paz Firme and Duradera*).⁸⁹

3.1. *The Commission for Historical Clarification*

After considering the various options for how to address the mass human rights violations that occurred during the armed conflict, Guatemala opted for amnesty and a truth commission.⁹⁰ Although, under the national reconciliation law, amnesty did not exist for international grave crimes such as genocide, torture, and forced disappearances, many people still saw it as fostering impunity.⁹¹ In addition, many human rights advocates viewed the truth commission as an inadequate substitute for justice.⁹² Describing the truth commission as a “piñata of forgiving,” Francisco Goldman, a Guatemalan writer, put into words the feelings of many at the time: that the peace agreement and accompanying amnesties were a surrender made by ladinos rather than the true victims of the armed conflict,

⁸⁷ Interview with Otilia Lux de Cotí, CEH Commissioner (Dec. 13, 2017) (“Existían comunicados de los años 70 que contenían afirmaciones como ‘el indio’ es un elemento que no permite el desarrollo de Guatemala, el cual debe mezclarse y convertirse en mestizo, o debe eliminarse.”)

⁸⁸ PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 32 (Routledge ed., 2nd ed. 2011).

⁸⁹ Agreement on a Firm and Lasting Peace, Guat.-URNG, Dec. 29, 1996, 36 I.L.M. 274.

⁹⁰ HAYNER, *supra* note 88, at 32.

⁹¹ National Reconciliation Law, Article 8, Decreto numero 145-1996, Dec. 27, 1996; Interview with Naomi Roht-Arriaza (Nov. 14, 2017).

⁹² Jemima García-Godos & Luis Raúl Salvado, *Guatemala: Truth and Memory on Trial*, in *TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY*, *supra* note 12, at 205 (“[T]he insurgency gradually lost popular support in the course of the negotiations, in part because the accords it signed were widely perceived as weak in their response to popular demands for justice... The accord [which created the CEH] generated disillusionment within social movements and the human rights sector for its provision that ‘the Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect . . .”).

the indigenous Mayan population.⁹³ As he put it, “[t]he Guatemalan Armed Forces and the guerrillas have negotiated a law forgiving themselves for 36 years of crimes that sear the heart and stupefy the mind, and are asking their fellow citizens to believe that this is the gateway to the rule of law in a new democratic society.”⁹⁴

The resulting UN-backed truth commission, the Commission for the Historical Clarification (or CEH, for its Spanish acronym), was established by a peace agreement between the Guatemalan military government and the guerilla that was reached in Oslo on June 23, 1994.⁹⁵ In the preamble of the agreement, the parties recognized that “the people of Guatemala have a right to know the whole truth concerning these events, clarification of which will help avoid a repetition of these sad and painful events and strengthen the process of democratization in Guatemala.”⁹⁶ The agreement specified that its goal was to clarify objectively, equally, and impartially the human rights violations and the acts of violence that caused the suffering of the Guatemalan population during the armed conflict.⁹⁷ It would also formulate “recommendations that will facilitate peace and national harmony in Guatemala,” in particular by suggesting measures to preserve the memory of the victims, fostering a culture of mutual respect, and strengthening the democratic process.⁹⁸ It “was not instituted to judge, which is the role of the tribunals, but instead to clarify the history of what occurred during more than three decades of fratricidal war.”⁹⁹ The agreement also specified that the work of the CEH would begin with the signing of the Agreement on a Firm and Lasting Peace and would continue for six months with a possibility to extend for six months more if the CEH wished.¹⁰⁰ Due to the extensive investigative period and the

⁹³ Francisco Goldman, *In Guatemala, All is Forgotten*, NY TIMES (Dec. 23, 1996) <http://www.nytimes.com/1996/12/23/opinion/in-guatemala-all-is-forgotten.html> [<https://perma.cc/XRB6-MXBK>].

⁹⁴ *Id.*

⁹⁵ CEH Report, *supra* note 80, at 15.

⁹⁶ Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, June 23, 1994, UN Doc. A/48/954/S/1994/751, Annex II, Preamble, ¶ 2, https://peacemaker.un.org/sites/peacemaker.un.org/files/GT_940623_EstablishmentCommissionClarifyPastHumanRightsViolations.pdf [<https://perma.cc/M8R3-S9F7>] [hereinafter Oslo Accord].

⁹⁷ CEH Report, *supra* note 80, at 15.

⁹⁸ *Id.* at 24.

⁹⁹ *Id.* at 15.

¹⁰⁰ Oslo Accord, *supra* note 96, at 2.

territorial and social complexities in which the CEH had to work, the CEH decided to extend its work for the additional six months allowed by the Oslo Agreement.¹⁰¹

The agreement further specified that the CEH “could not individualize responsibility or have judicial goals or effects.”¹⁰² The CEH interpreted this provision to mean that the CEH was only meant to clarify history and not to serve as or to take the place of a criminal proceeding.¹⁰³ Furthermore, after examining the “literal, historical, teleological, and systematic interpretation of the term ‘to not individualize responsibility,’” the CEH concluded that it did not have the authority to identify the names of those responsible for human rights violations.¹⁰⁴ For that reason, the CEH did not name names of individuals in the text of the report; however it did attribute institutional responsibility for grave crimes.¹⁰⁵ At the same time, the CEH concluded that, even though it was not a judicial body and its conclusions did not have legal effect, nothing prevented the Guatemalan government, particularly its judicial system, from relying on the information contained in the report.¹⁰⁶ The report further stipulated that citizens, including victims and their family members, had the right to bring legal actions in relation to the case studies described in the report.¹⁰⁷

3.1.1. *The Composition of the CEH*

The Oslo Agreement provided that the CEH would have three members: 1) the moderator of the peace negotiations, 2) a Guatemalan citizen of “irreproachable conduct,” and 3) an academic proposed by the university rectors.¹⁰⁸ In the end, the moderator of the peace negotiations persuaded Christian Tomuschat, who was the rapporteur of the UN Human Rights Commission on the human rights situation in Guatemala from 1990 to 1993, to take his place as

¹⁰¹ CEH Report, *supra* note 80, at 41.

¹⁰² *Id.* at 24 (“[L]os trabajos, recomendaciones e informe de la Comisión no individualizaran responsabilidades, ni tendrán efectos o propósitos judiciales.”).

¹⁰³ *Id.* at 42.

¹⁰⁴ *Id.* at 44.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Oslo Accord, *supra* note 96, at 2.

the only foreign Commissioner on the CEH.¹⁰⁹ In addition to these three Commissioners, the CEH had a staff of 273 professional, including 142 Guatemalans and 131 from other countries.¹¹⁰

The CEH adopted a strategy of "territorial deployment," by establishing offices in the interior of the country and prioritizing those areas most affected by the armed conflict, in order to make it easier for Guatemalans to access their office and to give testimony.¹¹¹ In total, the CEH established four sub-headquarters and ten regional offices.¹¹² From the regional offices, the CEH investigators would travel to the municipalities and communities of every department of the country in order to inform them directly or indirectly (through NGOs, formal officials, and traditional leaders) about the mandate of the CEH.¹¹³

In total, CEH investigators visited 2,000 communities, collected 500 collective testimonies, and registered 7,338 individual testimonies.¹¹⁴ The CEH promised everyone who spoke with them that they would not reveal their identities.¹¹⁵ According to Denis Martinez, who was an employee of the CEH, there was a standard script for each interview that detailed what the CEH was, its purpose, the guarantee of confidentiality, and that participation was voluntary and not compensated.¹¹⁶ He also relayed that the questions they asked resembled what the Attorney General's office uses today to document an alleged criminal incident.¹¹⁷ It included sections for consent, general demographic information about the declarant, such as where they were born and their age, and the complete information about the criminal incident, including the date of the incident, the victims, what violation occurred (e.g. rape, extrajudicial killing, torture, etc.), and who they believed was responsible.¹¹⁸ This information was then inputted into a database, which the American

¹⁰⁹ Interview with Christian Tomuschat, UN Human Rights Commission Rapporteur (Oct. 11, 2016).

¹¹⁰ CEH Report, *supra* note 80, at 31.

¹¹¹ *Id.* at 32.

¹¹² *Id.*

¹¹³ *Id.* at 32-33.

¹¹⁴ CEH Report, *supra* note 80, at 33.

¹¹⁵ Interview with Christian Tomuschat, *supra* note 109.

¹¹⁶ Interview with Denis Martinez, CEH employee (Aug. 12, 2016).

¹¹⁷ *Id.* ("[E]ra un formulario similar a los que utiliza el Ministerio Público para documentar un incidente.")

¹¹⁸ Interview with Denis Martinez, *supra* note 116; *see also* CEH Report, *supra* note 80, at ¶ 188.

Association for the Advancement of Science (AAAS), at the CEH's request, later analyzed to come up with specific statistics for each violation.¹¹⁹ Their methodology is detailed in the annex of the CEH. Sociologists and other non-lawyers complained that the interview process was so rigid that it did not permit them to document the voices of the people.¹²⁰ Another challenge reported to me was that the Mayan translators did not have any formal training in translation, which complicated the interview process.¹²¹

In order to ensure the confidentiality of those who gave testimony, the CEH coded all of its interviews so that each interview was assigned a unique number and all identifying information was removed from the interview notes.¹²² For this reason, the CEH also decided to send its archives to the UN headquarters in New York City.¹²³ The CEH estimated that it collaborated with more than 20,000 individuals who provided information to the CEH, including more than 1,000 "key witnesses," who were members of the military, members of the civil defense patrols (or PACs, as they are known by their Spanish acronym), military commissioners, politicians, combatants in the guerrilla, intellectuals, labor leaders, and members of civil society.¹²⁴ However, according to Christian Tomuschat, none of the alleged perpetrators came forward to testify.¹²⁵ At the same time, he and Otilia Lux both said that they had a lengthy interview, lasting three or four hours, with Benedicto Lucas García, the former chief of staff of the military during the worst periods of the conflict who is currently on trial for enforced disappearance in the CREOMPAZ case and was recently convicted of crimes against humanity, aggravated sexual assault, and enforced disappearance in the Molina Theissen case.¹²⁶ However, he evaded all of their questions.¹²⁷

¹¹⁹ Interview with Denis Martínez, *supra* note 116 (explaining that instead of inputting names of those responsible, the statisticians inputted what group they belonged to, such as the military, para-military, special forces, etc.).

¹²⁰ Interview with Denis Martínez, *supra* note 116 ("La queja de los sociólogos o los que no eran abogados, era que no permitía documentar las palabras de la gente...")

¹²¹ *Id.*

¹²² *Id.*

¹²³ CEH Report, *supra* note 80, at 33.

¹²⁴ *Id.* at 33–34.

¹²⁵ Interview with Christian Tomuschat, *supra* note 109.

¹²⁶ *Id.*; Interview with Otilia Lux de Cotí, *supra* note 87.

¹²⁷ *Id.*

The CEH also consulted thousands of pages of documents submitted by diverse organizations from civil society, including military documents that the United States government had declassified.¹²⁸ Christian Tomuschat explained that the Commission had also asked the Guatemalan Government to access its military archives, but the military forces “lied blatantly, saying that there were no archives at all. It came out later that there were so many documents.”¹²⁹ In his view, the Guatemalan Government did not actively obstruct the work, but did not cooperate with the CEH.¹³⁰

According to its report, the CEH’s principal purpose was “to create a record of the recent bloody past of Guatemala.”¹³¹ The CEH hoped that “the truth would lead to reconciliation, and that, in fact, confronting the truth is an essential step to arriving at reconciliation.”¹³² Moreover, it said, “knowing the truth about what happened would make it easier to achieve national reconciliation, so that Guatemalans could in the future live in an authentic democracy, without forgetting that the rule of law has been and continues to be the primary demand to create a new state.”¹³³ The report also underscored that “[r]econciliation is not possible without justice.”¹³⁴

The Oslo Agreement did not itself make reference to reparations or assistance to the victims.¹³⁵ However, the “*Acuerdo sobre Bases para la Incorporación de la URNG a la Legalidad*” in paragraph 19 established that the entity in charge of reparations and assistance to victims should “take into account the recommendations formulated by the CEH.”¹³⁶

3.1.2. *The Judicial Foundation used by the CEH*

The CEH took the reference to human rights in the Oslo Agreement to mean international human rights norms, commenting that

¹²⁸ CEH Report, *supra* note 80, at 16.

¹²⁹ Interview with Christian Tomuschat, *supra* note 109.

¹³⁰ *Id.*

¹³¹ CEH Report, *supra* note 80, at 16. (“El propósito principal del Informe es dejar constancia del reciente pasado sangriento de Guatemala.”)

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 17.

¹³⁵ *Id.* at 43.

¹³⁶ *Id.*

“it is only through international rules and principles that we are able to measure objectively the distortions and perversions suffered by the national legal order, at least partially, under different military governments.”¹³⁷ It therefore based its findings on the Universal Declaration of Human Rights, which it considered customary international law, as well as international treaties, including the Convention on the Prevention and Punishment of the Crime of Genocide, which was in force during the armed conflict.¹³⁸ In addition, although the Oslo Agreement did not mention international humanitarian law, the CEH believed that it applied because its aim is to protect human rights in wartime.¹³⁹ Specifically, the CEH concluded that Common Article 3 of the four Geneva Conventions of 1949 applied to both the military and the guerilla groups.¹⁴⁰ More controversially, the CEH found that the Additional Protocol II, which Guatemala had only ratified in 1987 and insisted did not apply, was enforceable because its rules formed a part of customary international law.¹⁴¹ The CEH also took into account national law, particular the various Constitutions in effect during the internal armed conflict, finding that the Guatemalan government violated its duty to respect and protect the right to life either through its direct action or with its knowledge and acquiescence.¹⁴²

The CEH registered 42,275 victims, of whom over 23,000 were victims of arbitrary executions and over 6,000 were victims of disappearances.¹⁴³ Of those registered victims, 83% were Mayan and 17% were Ladino.¹⁴⁴ Overall, the CEH estimated that over 200,000 people were killed during the armed conflict, around 90 percent of them by the military.¹⁴⁵ It also estimated that there were around 40,000

¹³⁷ *Id.* at 45.

¹³⁸ *Id.* Guatemala ratified the Genocide Convention in 1950, before the armed conflict began. Convention On The Prevention And Punishment Of The Crime Of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [<https://perma.cc/C9J4-D3W3>].

¹³⁹ CEH Report, *supra* note 80, at ¶¶ 71–72.

¹⁴⁰ *Id.* at 46, ¶¶ 73 & 75

¹⁴¹ *Id.* at ¶ 74.

¹⁴² *Id.* at 46–47, ¶¶ 77 & 78.

¹⁴³ *Id.* at 21 (Conclusiones y Recomendaciones, Capítulo cuarto: Conclusiones).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 16 (Capítulo segundo: Las violaciones de los derechos humanos y los hechos de violencia).

victims of enforced disappearance.¹⁴⁶ The CEH also concluded that the military committed “genocidal acts” in four specific areas, including the Ixil region.¹⁴⁷ It further concluded that the majority of atrocities were perpetrated in the late 1970s and early 1980s.

In February 1999, the CEH publicly presented its report to approximately 10,000 people who attended a grand ceremony in Guatemala City. When the head of the CEH, Christian Tomuchat, announced its finding that the majority of human rights violations were committed by national security forces, the audience began to chant: “Justice! Justice!”¹⁴⁸ Upon hearing the CEH’s conclusion, Álvaro Arzú, the President of Guatemala at that time who was supposed to receive the report, excused himself from his table and left the ceremony without formally accepting the report.¹⁴⁹ About a week later, the government took out advertisements in various news outlets disputing that the CEH report represented the true story of the armed conflict.¹⁵⁰

3.2. *The Catholic Church’s Recovery of Historical Memory Project*

The CEH built off the work of the Recovery of Historical Memory Project of the Catholic Church’s Human Rights Office (REMHI), an effort begun by the Human Rights Office of the Guatemalan Archbishop (or ODHAG for its acronym in Spanish), which was created in October of 1994, the same year that CEH received its mandate from the United Nations.¹⁵¹ ODHAG created REMHI in part due to the skepticism about CEH from human rights activists and the founder of ODHAG, Bishop Juan Gerardi, who believed that the CEH would not go far enough since its mandate explicitly prohibited it from assigning guilt to perpetrators and from having “any

¹⁴⁶ *Id.* at 73 (Mandato y Procedimiento de Trabajo).

¹⁴⁷ *Id.*

¹⁴⁸ *Se presenta informe Guatemala, memoria del silencio en 1999*, PRENSA LIBRE (Feb. 26, 1999), <http://www.prensalibre.com/hemeroteca/se-presenta-informe-guatemala-memoria-del-silencio-en-1999>.

¹⁴⁹ *Id.*

¹⁵⁰ García-Godos & Raúl Salvado, *Guatemala: Truth and Memory on Trial*, *supra* note 92, at 208.

¹⁵¹ HAYNER, *supra* note 88, at 33–34 (noting that REMHI collected thousands of statements through trained local interviewers); RECUPERACIÓN DE LA MEMORIA HISTÓRICA, OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, GUATEMALA: NUNCA MÁS 19 (1998) [hereinafter REMHI Report].

judicial aim or effect.”¹⁵² The directors hoped that REMHI, which did not have the same time constraints as CEH and was able to name names, could lay the groundwork for CEH to be more effective in its work.¹⁵³ According to the leadership of REMHI, who I interviewed, REMHI was also meant to be a resource for victims who wanted to bring cases (though some of the human rights attorneys I interviewed were unaware of this objective).¹⁵⁴ However, at the time, Edgar Gutierrez, the General Coordinator of REMHI, did not believe that justice would ever be possible.¹⁵⁵

Despite this internal objective, externally, REMHI was portrayed as a historical preservation project. Indeed, in the introduction to REMHI, the Archbishop of Guatemala at the time, Monsignor Prospero Penados del Barrios, stated that its official purpose was “to preserve the historical memory of political violence and document the gravest violations of human rights of people and indigenous communities during the thirty-six year fratricidal conflict, which produced extreme social polarization.”¹⁵⁶ The project was designed to create a space, even if limited, where those who gave their testimony could feel recognized and supported.¹⁵⁷ Everything from how the interviews were conducted to the training of the interviewers and the instruments used to gather information were devised to facilitate that goal.¹⁵⁸

¹⁵² See FRANCISCO GOLDMAN, *THE ART OF POLITICAL MURDER* 5 (2007) (describing Bishop Gerardi’s skepticism towards the UN Historical Clarification Commission). See also Oslo Accord, *supra* note 96, at 2. (“Los trabajos, recomendaciones e informe de la Comisión no individualizarán responsabilidades, ni tendrán propósitos o efectos judiciales.”); Interview with Edgar Gutiérrez, General Coordinator of REMHI (July 25, 2016).

¹⁵³ Interview with Edgar Gutiérrez, *supra* note 152; Interview with a Diocese Coordinator of REMHI who wishes to remain anonymous (July 27, 2016) (Recording of interview on file with author).

¹⁵⁴ Interview with Edgar Gutiérrez, *supra* note 152; Interview with a Diocese Coordinator of REMHI, *supra* note 153; Interview with Mynor Alvarado, Legal Director of Grupo Apoyo Mutuo (Aug. 17, 2016) (Recording of interview on file with author).

¹⁵⁵ Interview with Edgar Gutiérrez, *supra* note 152.

¹⁵⁶ REMHI Report, *supra* note 151, at 19 (“. . . preservar la memoria histórica sobre la violencia política, las gravísimas violaciones a los derechos humanos de las personas y comunidades indígenas durante estos treinta y seis años de lucha fratricida que produjo una polarización social sin límites.”)

¹⁵⁷ *Id.* at 23 (“La conducción de las entrevistas, la preparación de los animadores y el uso de los instrumentos de recogida de información se orientaron a tratar de generar un espacio que, aunque limitado, supusiera un reconocimiento y apoyo para los declarantes.”)

¹⁵⁸ *Id.*

REMHI was staffed by pastoral teams from eleven dioceses (with one declining to participate) that focused mainly on the rural areas of the country, which were isolated due to the limited access to modes of communication and the diverse Mayan languages spoken there.¹⁵⁹ Its link to the Catholic Church was essential to its success.¹⁶⁰ Mayan Guatemalans, deeply fearful of outsiders, especially after the extreme repression and violence of the armed conflict, trusted the church because it was already established in their communities and had been a safe haven for many during the worst years of the war.¹⁶¹ This was crucial because REMHI collected its testimony at a time when political tension was still high and both military and paramilitary forces were still active.¹⁶² Indeed, some of the people interviewed did not know that the armed conflict had ended.¹⁶³

In the central office, REMHI had five research teams, each with a different theme or focus, including socio-psychological, cultural, gender, legal and social historical.¹⁶⁴ Over two years, REMHI trained six to eight hundred people in how to interview and collect testimony.¹⁶⁵ The interviewers were people from the local communities where they worked and were selected by representatives from the communities and religious sectors.¹⁶⁶ The selection criteria for the position included the ability to listen and communicate, having the trust and recognition of the community, and dedication to confidentiality and continuity of the work.¹⁶⁷

The interviewers worked out of thirteen regional centers and conducted over half of their interviews in fifteen different Maya

¹⁵⁹ *Id.* at 19; GOLDMAN, *supra* note 152, at 7.

¹⁶⁰ REMHI Report, *supra* note 151, at 21.

¹⁶¹ *Id.*

¹⁶² REMHI, Metodología de Investigación (Apr. 6, 2013), <http://www.remhi.org.gt/portal/metodologia-de-investigacion/> [<https://perma.cc/4PA2-KBL5>] [hereinafter REMHI Methodology]

¹⁶³ Interview with Edgar Gutiérrez, *supra* note 152.

¹⁶⁴ REMHI Methodology, *supra* note 162.

¹⁶⁵ HAYNER, *supra* note 88, at 33–34 (noting that REMHI “collected thousands of statements by training over six hundred local interviewers and working through church networks”). *But see* GOLDMAN, *supra* note 152, at 6 (describing how according to Bishop Geradi, REMHI had trained over 800 people over two years).

¹⁶⁶ REMHI Methodology, *supra* note 162.

¹⁶⁷ *Id.* (“Entre los criterios de selección estaban: capacidad de escucha y comunicación; confianza y reconocimiento de la gente de la comunidad; compromiso de confidencialidad y continuidad en el trabajo.”).

languages and the rest in Spanish.¹⁶⁸ In order to compare the testimony given across the country, the interviewers all asked the same seven questions:

- 1) What happened?
- 2) When and where?
- 3) Who was responsible?
- 4) What effects did the act have in your life?
- 5) What did you do to deal with the act?
- 6) Why do you think that it happened?; and
- 7) What needs to happen in order for the acts not to reoccur?¹⁶⁹

REHMI collected testimony for six months. As Edgar Gutiérrez, the coordinator of REMHI, explained to me, in smaller villages where everyone knows each other, some people did not want their community to know that they went to the church to give testimony.¹⁷⁰ Therefore, REMHI paid for radio announcements, in which they invited witnesses to go to other communities to give their testimony.¹⁷¹ These interviews were recorded and/or transcribed and are now available at ODHAG upon request.¹⁷² According to all of the former staff of REMHI with whom I spoke, there were never any reprisals against people who gave their testimony.¹⁷³

Similar to CEH, REMHI also interviewed key witnesses through another procedure.¹⁷⁴ These people were not necessarily victims;

¹⁶⁸ GOLDMAN, *supra* note 152, at 6.

¹⁶⁹ REMHI Methodology, *supra* note 162 (“Para facilitar la comparabilidad de los testimonios y la conducción de las entrevistas se estructuró una metodología basada en siete preguntas para la recogida de testimonios: ¿qué sucedió?, ¿cuando y dónde?, ¿quienes fueron los responsables?, ¿qué efectos tuvo ese hecho en su vida?, ¿qué hizo para enfrentarlo?, ¿por qué cree que pasó? y ¿qué habría que hacer para que no volviera a suceder?”).

¹⁷⁰ Interview with Edgar Gutiérrez, *supra* note 152.

¹⁷¹ *Id.*

¹⁷² HAYNER, *supra* note 88, at 34.

¹⁷³ Interview with Edgar Gutiérrez, *supra* note 152; Interview with a Diocese Coordinator of REMHI, *supra* note 153.

¹⁷⁴ Interview with Edgar Gutiérrez, *supra* note 152.

instead REMHI sought them out for their knowledge of a community, the period when the acts occurred, or the structure of the military.¹⁷⁵ In some instances, the person interviewed had personal knowledge of atrocities committed because they were part of the military.¹⁷⁶

Because of the strong desire of the victims to find the remains of their relatives who were missing, REMHI created the first forensic team to exhume clandestine mass graves in Guatemala. Since the Guatemala government did not have its own forensic team, the Attorney General's office signed contracts with organizations like ODHAG to gather forensic evidence for its cases.¹⁷⁷

In April 1998, REMHI's work culminated in the release of *Guatemala, Nunca Mas!*, a four-volume, 1,400 page report that, unlike CEH, identified the individuals responsible for mass atrocities.¹⁷⁸ The report named over 50,000 individuals who were killed during the armed conflict (representing about a quarter of the total fatalities) and documented 410 massacres.¹⁷⁹ It also concluded that the majority of the massacres occurred from 1981 to 1983 (though some occurred as late as 1995) and that the Guatemalan Army and the PACs were responsible for 80% of the killings of civilians whereas the guerillas were responsible for less than 5%.¹⁸⁰ The REMHI report also analyzed the pattern and practice of the crimes committed during the war as well as both their immediate and lasting impact on individuals and communities.¹⁸¹ Additionally, direct testimony from victims and perpetrators from both sides of the conflict regarding human rights violations and their lasting effects of the events was described throughout the report.¹⁸²

When the report was released, no high level Guatemalan officer had been convicted or imprisoned for human rights violations perpetrated during the war.¹⁸³ Bishop Gerardi made it clear, however, that the evidence REMHI gathered would be available to those

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ GOLDMAN, *supra* note 152, at 4-5.

¹⁷⁹ *Id.* at 22.

¹⁸⁰ *Id.*

¹⁸¹ REMHI Report, Volume I: Impactos de la Violencia, *supra* note 151.

¹⁸² GOLDMAN, *supra* note 152, at 22.

¹⁸³ *Id.* at 25.

seeking justice against military officials or the guerillas.¹⁸⁴ REMHI also shared its database with CEH, which it used in its calculations to estimate the total numbers of people killed or disappeared and confirm overall patterns.¹⁸⁵

Although the heads of REMHI saw the fight for justice as the next phase of REMHI and hoped that the dissemination of the report would encourage victims to press for trials, the brutal murder of Bishop Gerardi the day after the release of the report put a grinding halt to those plans for about three years.¹⁸⁶ According to Edgar Gutiérrez, everyone was scared.¹⁸⁷ The victims wondered, if the perpetrators did that to a bishop, what they would do to them.¹⁸⁸

3.3. Prosecutions of International Crimes in Guatemala and Spain

Although a few low level paramilitary officials were successfully convicted, the power that the perpetrators still held in Guatemala, formally and informally, caused prosecutions of the high command of the army, those who principally planned and organized the mass atrocities and other human rights violations, to stall.¹⁸⁹ Realizing that prosecutions in Guatemala were infeasible, on December 2, 1999, Nobel Prize winner Rigoberta Menchú filed a complaint with the Spanish *Audiencia Nacional*, using the precedent of a similar case against former Chilean President Augusto Pinochet and a Spanish statute that provided universal jurisdiction for international grave crimes regardless of where they occurred.¹⁹⁰ The complaint alleged

¹⁸⁴ *Id.*

¹⁸⁵ HAYNER, *supra* note 88, at 34. For more information about the database, see GUATEMALA: NUNCA MAS, <http://www.remhi.org.gt/bd/>.

¹⁸⁶ Interview with Edgar Gutiérrez, *supra* note 152.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Keller, *supra* note 13, at 297-301; Decreto No. 145, Ley de Reconciliation Nacional [National Reconciliation Law], *supra* note 13; Popkin, *supra* note 13.

¹⁹⁰ Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 79 n.3 (2008) ("The Audiencia Nacional hears cases involving drug smuggling, terrorism, state corruption, and international crimes that cannot adequately be dealt with at the level of provinces and autonomous communities. Although divided into chambers, it is roughly equivalent to a US district court."). Naomi Roht-Arriaza & Almudena Bernabeu, *Many Roads to Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-conflict Guatemala*, in THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA

that eight former military or government officials, including Efraín Ríos Montt and Benedicto Lucas García, were responsible for torture, genocide, terrorism, assassination, and illegal detention between 1978 and 1986.¹⁹¹ The criminal acts described in the complaint included the bombing of the Spanish Embassy in Guatemala City in 1980, which killed thirty-seven people, as well as the extrajudicial killing of Spanish and other foreign priests and relatives of the complainant, Rigoberta Menchu.

Manuel Ollé Sese, the lead attorney on the case, told me that he was afraid to bring the case in Spain because, at the time, there were many judges and prosecutors who wanted to see universal jurisdiction undone.¹⁹² At first, he hesitated to be part of the case, because he feared that they would use it to do away with universal jurisdiction altogether.¹⁹³ In the end, it was not Spain who undermined the case, but Guatemala. In a groundbreaking decision in 2005, the Spanish Constitutional Court held that its universal jurisdiction statute granted the Spanish judiciary jurisdiction over international crimes even when there was no nexus to Spain.¹⁹⁴ Thus, the case forged ahead until December 12, 2007, when the Guatemalan Constitutional Court decided that it would not honor the Spanish arrest warrants or extradition requests. The court held that Spanish courts did not constitute a “competent authority” because Spain’s effort to exercise universal jurisdiction over crimes that occurred in Guatemala was unacceptable and an affront to Guatemala’s sovereignty.¹⁹⁵

Nonetheless, Guatemalan human rights attorneys continued to push ahead with numerous cases against the high command of the Guatemalan military in their national courts. These efforts culminated in 2012, when Ríos Montt was brought before a Guatemalan court on charges of genocide and crimes against humanity for his role in the massacre of Ixil villages in 1982.¹⁹⁶ This was the first time

AND SPAIN 184, 188 (Jessica Almqvist & Carlos Esposito, eds., 2012).

¹⁹¹ Guatemalan Generals Case, Complaint filed by Rigoberta Menchú with the Juzgado Central de Instrucción de Guardia de la Audiencia Nacional in Spain, Dec. 2, 1999 (on file with author) [hereinafter Spanish Complaint].

¹⁹² Interview with Manuel Ollé Sese, Lead Attorney of the Guatemalan Generals Case (Oct. 26, 2016) (Interview notes on file with author).

¹⁹³ *Id.*

¹⁹⁴ Guatemalan Generals Case, Tribunal Constitucional, STC 237/2005, Sept. 26, 2005 [hereinafter Spanish Constitutional Court Decision].

¹⁹⁵ *Id.*

¹⁹⁶ See generally JUDGING A DICTATOR: THE TRIAL OF GUATEMALA’S RÍOS MONTT, OPEN SOCIETY JUSTICE INITIATIVE, <http://www.opensocietyfoundations.org/publications/judging-dictator-trial-guatemala-s-rios-montt> [https://perma.cc/F2N5-

that a former head of state had been tried for genocide in his own country.¹⁹⁷ This widely publicized case is only part of the dramatic judicial awakening occurring in Guatemala, which has much to teach us about the value of international law at the local level. Over the past decade, there has been a litany of convictions of the high military command responsible for grave international crimes in Guatemala. Such prosecutions would have been unthinkable some thirty years back when the crimes occurred.

4. THE BLENDING OF TRUTH AND JUSTICE

4.1. Methodology

In order to determine how truth and justice might be complementary, I engaged in original field research for this article beginning in June 2016. The first phase of my research focused primarily on library research and document analysis. With the guidance of my host institutions, the University of San Carlos in Guatemala and the Autonomous University of Madrid in Spain, I engaged in intensive research to familiarize myself with the legal systems of Guatemala and Spain, focusing in particular on their rules of criminal procedure and evidence at the trial level. I also obtained authorization from Judge Víctor Hugo Herrera Ríos to attend hearings in a case involving the enforced disappearance of a fourteen year-old teenager named Marco Antonio Molina Theissen and from Judge Claudette Domínguez to review the court proceedings in a pending case involving crimes uncovered as the result of the exhumation of a mass grave at a former military base called CREOMPAZ. Following these two ongoing cases deepened my understanding of the Guatemalan judicial system.

Additionally, with assistance from Guatemalan and Spanish judges, prosecutors, and human rights attorneys, I also obtained

LM62] (describing the trial of Ríos Montt).

¹⁹⁷ Ted Piccone and Ashley Miller, *Rios Montt Trial an Example of National, International Courts Working Together*, BROOKINGS INSTITUTE (June 4, 2013), <https://www.brookings.edu/opinions/rios-montt-trial-an-example-of-national-international-courts-working-together/> [<https://perma.cc/52AU-9JXK>] (“The trial of Ríos Montt, de facto president from 1982-1983, represents the first time a national judiciary has tried a former head of state for the crime of genocide in his home country.”).

copies of the trial sentences in the cases related to the armed conflict in which there have been convictions, as well as the complete record of the *Guatemalan Generals* case brought in Spain. Because of the extraordinary difficulty of obtaining access to these cases, I am the first person to have compiled and analyzed all of these primary documents.¹⁹⁸

In tandem with completing an in-depth review of these legal documents, I conducted semi-structured interviews with the Guatemalan and Spanish prosecutors as well as the attorneys from human rights organizations that assisted them. These interviews helped me understand why REMHI and CEH were critical to them as they built their cases. Significantly, I was also able to interview many of the Guatemalan and Spanish judges who oversaw the cases involving human rights abuses committed during the armed conflict. In addition, I interviewed the professional staff and leadership of CEH and REMHI in order to learn firsthand about the practices they employed when collecting evidence as well as the procedures they put in place to preserve evidence and protect those who offered testimony.

Overall, I interviewed three Guatemalan judges (including Judge Miguel Ángel Gálvez Aguilar), both of the Spanish investigating judges (Judge Guillermo Ruiz Polanco and Judge Santiago Pedraz), four employees of CEH (including Christian Tomuschat and Otilia Inés Lux de Cotí, two of the three Commissioners), two directors of REMHI, the former Attorney General of Guatemala (Claudia Paz y Paz), the current and former head of the war crimes unit in the Guatemalan Attorney General's office (Hilda Pineda and Orlando Lopez), the former head of the International Commission against Impunity in Guatemala (Carlos Castresana), five attorneys who acted as private prosecutors in the Spanish case, the Legal Director of the International Foundation of Baltasar Garzón (FIBGAR), the current public prosecutor in Spain's Attorney General's Office in

¹⁹⁸ Although all of Guatemalan sentences are technically public, the taboo nature of the cases and the decentralization of the courts that processed them made accessing them remarkably challenging. To obtain copies of the sentences, I traveled long distances on dirt roads to courts or human rights organizations in remote, rural areas of Guatemala. Because some courts did not have ready access to copiers, I took pictures of the decisions, some hundreds of pages long, with my phone or iPad. I also often had to approach multiple sources to obtain them. Accessing them is so challenging that even the current head of the war crimes unit in Guatemala City said that she does not have access to them all, in part because local jurisdictions will not share them with her. Interview with Hilda Pineda, Head of the War Crimes Unit in the Guatemalan Attorney General's Office (Nov. 22, 2016).

charge of prosecuting universal jurisdiction cases, an investigator at ODHAG, the Director and co-founder of the Guatemalan Forensic Anthropology Foundation (Fredy Peccerelli), the Director of the Myrna Mack Foundation (Helen Mack), the Director of Center for Legal Action on Human Rights (Juan Francisco Soto), and human rights attorneys from five Guatemalan human rights organizations who actively participated in the prosecutions in Guatemala under the designation of *quellrantes adhesivos*.

4.2. Justice in the TRC Reports

While the common perception of Guatemalan transitional justice is that prosecutions for grave human rights violations are a relatively recent advent, there were a few early cases, which had a notable impact in Guatemala. Indeed, through my fieldwork, I was able to document eleven cases in which there were convictions that pre-date the CEH and REMHI.

While REHMI contained scant references to the various cases that pre-date it, the CEH referenced these cases throughout its report. For example, the CEH noted that in 1991 human rights and impunity became part of the national discussion because of the cases involving the assassinations of Myrna Mack and Michael Devine.¹⁹⁹ In particular, it noted that the Myrna Mack case, which was brought against both the low level officials who committed the crime and the high level officials who planned it, opened a new front in the fight for human rights that was quickly supported by different sectors of the social movement for human rights.²⁰⁰ The report noted that in both cases, the government argued it could not guarantee human rights while it was also fighting an armed conflict.²⁰¹

The CEH relied on these cases to come to various conclusions about the efficacy of the Guatemalan judiciary during the armed conflict. Using the Mack case as an illustration, the CEH concluded that judicial proceedings were marred with irregularities and negligence. Specifically, it described how the Ministry of Defense blocked access to information needed to adjudicate the Mack case, and the court did not apply any of the corresponding sanctions for

¹⁹⁹ CEH Report, *supra* note 80, at ¶ 715.

²⁰⁰ *Id.* at ¶ 718.

²⁰¹ *Id.* at ¶ 715.

obstruction of justice.²⁰² Citing a case involving a massacre at Santiago Atitlan, the CEH concluded that during the armed conflict, the military tribunals were used as forums where selective justice could be employed.²⁰³ Although numerous military officials were involved in the massacre, only one Sergeant and one Lieutenant were convicted.²⁰⁴ The CEH also cited the Xaman case, which found that military courts lacked the independence and impartiality to carry out criminal proceedings.²⁰⁵ The appellate court that rendered that decision pointed out that military judges were subject to the military hierarchy and that the Ministry of Defense paid their salaries.²⁰⁶

In addition, the CEH pointed to the cases during the armed conflict, which were dismissed or overturned under questionable circumstances, as evidence that the judiciary was complicit in human rights violations during the armed conflict.²⁰⁷ For example, the CEH highlighted a case that became known as the case of 28. Confronted with the numerous disappearances that occurred during the armed conflict, one human rights organization filed 2,000 habeas corpus petitions, and only 28 were accepted.²⁰⁸ Later, the court concluded the vast majority of those 28 cases were unfounded.²⁰⁹ The CEH also described numerous cases in which Guatemala courts dismissed habeas corpus petitions filed by family members in search of their loved ones as being unfounded and later information (or sometimes even the individual) surfaced, proving that their loved ones had been in the custody of the Guatemalan state all along.²¹⁰ After reviewing these cases, the CEH concluded that the Guatemalan judiciary was “an instrument of defense and protection of the powerful” and failed to uphold the fundamental rights of those subjected to grave human rights violations.²¹¹

²⁰² *Id.* at ¶ 2784.

²⁰³ *Id.* at ¶ 2785–86.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at ¶ 2787.

²⁰⁶ *Id.* at ¶ 2784.

²⁰⁷ *Id.* at ¶ 2686.

²⁰⁸ *Id.* at ¶ 2662.

²⁰⁹ *Id.*

²¹⁰ *Id.* at ¶ 2688–701.

²¹¹ *Id.* at ¶ 2635 (“Todo ello colocó a la población en una situación de absoluta indefensión frente a los abusos del poder y le ha hecho percibir al Organismo Judicial como un instrumento de defensa y protección de los poderosos, que ha reprimido o negado la protección de los derechos fundamentales, especialmente de

However, even more informative than the irregularities of these cases, was the absolute absence of judicial action in others. The CEH concluded that the failure of the Guatemalan judiciary to protect human rights during the armed conflict is undeniable “in light of the thousands of human rights violations registered by the CEH that were not investigated, judged, or sanctioned by the Guatemalan State.”²¹² By exposing the failures of the judiciary, the CEH drew attention to the need for judicial reform as a centerpiece of transitional justice. As one human rights advocate describe it, “in this way, the truth pulled justice along with it, it towed it, because it was clear from the report that what existed was a system of injustice.”²¹³

4.3. “Truth-Full” Justice in Spanish Courts

The CEH report played a critical role throughout the *Guatemalan Generals* case in Spain. First, it was the factual foundation of the complaint that Rigoberta Menchú filed with the Spanish *Audiencia Nacional*, being cited and quoted continually throughout the complaint as the primary source of both historical and contemporary facts regarding the case.²¹⁴ Even the complaint itself acknowledged the special significance of the CEH report, characterizing it as “the most important source for this deliberation” and explaining that “the most important facts that motivated the presentation of the complaint originated from the CEH report.”²¹⁵

quienes han sido víctimas de graves violaciones de derechos humanos.”)

²¹² *Id.* at ¶ 2634 (page 127 of El Capítulo Segundo, Las Violaciones de Los Derechos Humanos y Los Hechos de Violencia, Continúa en El Tomo III). (“El fracaso de la administración de justicia guatemalteca en la protección de los derechos humanos durante el enfrentamiento armado interno ha quedado clara y plenamente establecido, a la vista de miles de violaciones de derechos humanos registradas por la CEH que no fueron objeto de investigación, juicio ni sanción por el Estado de Guatemala.”).

²¹³ Interview with Alejandro Rodríguez, *supra* note 61 (“En ese sentido tal vez la verdad ha jalado a la justicia... ha remolcado, porque lo que si se percibe claramente es un sistema de injusticia.”).

²¹⁴ Spanish Complaint, *supra* note 191.

²¹⁵ *Id.* at 1 (“En el marco general del final del proceso caracterizado por la firma de los Acuerdos de Paz, sobre los que más adelante haremos las precisiones necesarias, se determinó la creación de la Comisión Para El Esclarecimiento Histórico (CEH), que será la fuente más importante de nuestras ponderaciones.”). *Id.* at 13–14 (“Como la parte más importante de los hechos que motivan esta presentación tienen origen en lo informado por la COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO (CEH) . . .”).

4.3.1. TRCs' Influence on Judicial Decision-making in Spain

The CEH report also had a significant influence on judicial decision-making in the case. Since the complaint was filed under a procedure called a 'popular action' (*acción popular*), which allows for private citizens to file complaints when a crime affects society as a whole, it did not require the support of the public prosecutor from the Spanish Attorney General's office. In fact, the office actively opposed it.²¹⁶ When the Spanish Attorney General petitioned to have the case dismissed in January 2000, one of his reasons was that the CEH had already investigated the crimes in question.²¹⁷ On March 27, 2000, the investigating judge, Judge Guillermo Ruiz Polanco, denied his petition, explaining that the facts alleged in the complaint – again, largely reliant on the CEH report – were sufficient enough indicators (*diligencias*) of genocidal acts to warrant further investigation at that stage.²¹⁸

In the series of appeals that followed that decision, the conclusions of the CEH report were determinative in the courts' consideration of whether Spain could exercise universal jurisdiction in this case. On appeal, the *en banc* panel of the Criminal Section of the Spanish *Audiencia Nacional* concluded that pursuant to the subsidiary principle, in order for Spanish courts to exercise universal jurisdiction over a case, the complainant must establish the inaction or ineffectiveness of the judiciary where the crime occurred – in this case, Guatemala.²¹⁹ In justifying its decision to overrule Judge Polanco, the panel reasoned that, even though the findings of the CEH had no judicial effect (pursuant to its mandate), the CEH had specifically recommended that the State bring cases based on the evidence

²¹⁶ JUAN DAMIÁN MORENO, LECCIONES INTRODUCTORIAS SOBRE PROCESO PENAL 34 (2013); Guatemalan Generals Case, Juzgado Central de Instrucción N° 1, Audiencia Nacional, Diligencias previas 331/99, Mar. 27, 2000, at 7 (on file with the author).

²¹⁷ *Id.* at 4 (“[S]implemente transmite una preocupación personal por los hechos ocurridos en la República de Guatemala que, por otra parte, están siendo investigados por la Comisión para el Esclarecimiento Histórico.”) (quoting the public prosecutor's petition, establishing that the Commission on Historical Clarification is investigating the developments in the Republic of Guatemala) (on file with the author).

²¹⁸ *Id.* at 11.

²¹⁹ Guatemalan Generals Case, Sala de lo Penal de la Audiencia Nacional, Diligencias previas 331/99, Rollo Apelacion N° 115/2000 (2000).

documented in its report.²²⁰ Furthermore, noting that the CEH report had only been published on February 25, 1999 and the complaint was filed on December 2, 1999, the court concluded that ten months was not long enough to decide definitively that the Guatemalan judiciary was inactive.²²¹

Later, the Spanish Supreme Court rejected this reasoning, stating that the court should have considered the date that the acts occurred, not when the CEH published its report.²²² It also found that the *en banc* panel of the Criminal Section of the Spanish *Audiencia Nacional* committed an error in evaluating the facts because the CEH explicitly concluded that the Guatemalan judiciary was ineffective.²²³ The Spanish Supreme Court thus partially overturned the Criminal Section's decision, allowing the prosecutions to move forward for the acts against Spanish citizens only because they implicated the Spanish national interest.²²⁴ Later, the Constitutional Court, the highest court in Spain with the authority to decide constitutional matters, overturned the Supreme Court, concluding that it improperly added the requirement of having "a connection with national interests," which was not present in the universal jurisdiction statute.²²⁵ The Constitutional Court thus upheld Judge Polanco's decision that the complainant presented enough evidence to move forward with the investigation.²²⁶

In 2006, the case was reassigned to Investigating Judge Santiago Pedraz after Judge Polanco was transferred to another jurisdiction.²²⁷ In Judge Pedraz's own words, the work of CEH, as well as of REMHI, was "fundamental to this case."²²⁸ He told me that the CEH was especially useful because it was the most detailed account of what happened in Guatemala and had the credibility of the UN behind it.²²⁹ Tomuschat also testified before Judge Pedraz and explained why the CEH found that acts of genocide occurred in

²²⁰ *Id.* at 6.

²²¹ *Id.* at 7.

²²² Guatemalan Generals Case, Sala de lo Penal del Tribunal Supremo, Recurso de Casacion N° 803/2001, Sentencia N° 327/2003 (2003) at 19.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Guatemalan Generals Case, Tribunal Constitucional (Sala Segunda) Sentencia N°237/2005 (2005).

²²⁶ *Id.*

²²⁷ Interview with Judge Polanco (Oct. 27, 2016).

²²⁸ Interview with Judge Santiago Pedraz (Oct. 27, 2016).

²²⁹ *Id.*

Guatemala and what their methodology was.²³⁰

The importance of the TRC reports to Judge Pedraz is also clear from the record. For example, when he issued the international order for the arrest of Ríos Montt, Ángel Aníbal Guevara, Germán Chupina, Humberto Mejía Victores, Pedro García Arredondo, Donaldo Álvarez, and Benedicto Lucas García in July 2006, he based his factual findings almost entirely on the CEH and REMHI reports.²³¹ Specifically, in that order, he referred to the CEH report as proof that the defendants in question were in charge of and had effective control over the military and paramilitary forces who perpetrated the massacres, enforced disappearances, rapes, displacements and bombings that were the subject of the complaint.²³² He also referred to the CEH's description of military commissioners and PACs and to the statistical findings of the CEH regarding the numbers of grave violations of human rights.²³³

Acting upon Judge Pedraz's order, a Guatemalan court issued arrest warrants for four of the six defendants in the case.²³⁴ However, after a year of detention (of those who did not flee the country), on December 12, 2007, the Guatemalan Constitutional Court blocked the extradition of those defendants. According to Judge Pedraz, because the Guatemalan Constitutional Court blocked him from conducting his own investigation in Guatemala, the CEH report was essential to the continuation of the case.²³⁵

In addition to interviewing both investigating judges assigned to the *Guatemalan Generals* case and consulting the record, I also interviewed a number of attorneys who worked as private prosecutors (as opposed to the public prosecutor from the Spanish Attorney General's office) in this case.²³⁶ Since all of the attorneys I interviewed had worked on other universal jurisdiction cases as well,

²³⁰ Interview with Christian Tomuschat, *supra* note 109; Interview with Naomi Roht-Arriaza, *supra* note 91.

²³¹ Guatemalan Generals Case, Juzgado Central de Instrucción N° 1, Audiencia Nacional, Diligencias previas 331/99 (2006).

²³² *Id.* at 10-16.

²³³ *Id.* at 13-15, 22, 25-26.

²³⁴ Guatemalan Generals Case, Corte de Constitucionalidad de Guatemala, Expediente 3380-2007, Sentencia (2007). See also Roht-Arriaza, *Making the State Do Justice*, *supra* note 190, at 79-80 (providing an account of the outcomes of Judge Pedraz' arrest warrants).

²³⁵ Interview with Judge Pedraz, *supra* note 228.

²³⁶ The private prosecutor identifies the accused, presents evidence, and recommends both civil and criminal sanctions. Interview with Joan Garcés (Dec. 4, 2015) (Interview notes on file with author).

they often spoke in general terms about how the work of truth commissions had been an asset to them. For instance, Enrique Santiago Romero, who has worked on numerous universal jurisdiction cases in which the reports of truth commissions were used to support the claims of his clients, said that the authenticity of the facts in the truth commission reports is usually assumed.²³⁷ He did not know of a single case in which the judge or the accused challenged the facts alleged in the reports of truth commission.²³⁸ Joan Garcés, the only surviving personal advisor of Chilean President Salvador Allende and lead counsel in the Pinochet universal jurisdiction case, explained to me that this is because TRCs usually are sanctioned by the state.²³⁹

Carlos Slepoy, an Argentinian attorney who was the victim of kidnapping and torture under Argentinian President Isabel Martínez de Perón and has served as a private prosecutor in numerous universal jurisdiction cases, said that UN-backed truth commissions in particular are given more weight because they are considered to be neutral.²⁴⁰ He also found that courts gave more weight to TRCs when they are composed of panels of experts rather than politicians.²⁴¹ Carlos Slepoy pointed out that Guatemala was a great example of this, since the legal team used the factual findings from the CEH report as the foundation of their case.²⁴² In particular, he believes that the CEH's finding that there were acts that could be classified as genocide was particularly significant for the Spanish courts.²⁴³ According to Slepoy, the report had automatic credibility

²³⁷ Interview with Enrique Santiago Romero (Dec. 4, 2015). Specifically, Romero worked on universal jurisdiction cases involving Argentina, Colombia, Palestine, and the Western Sahara.

²³⁸ *Id.*

²³⁹ Interview with Joan Garcés, *supra* note 236. He was the lead private prosecutor in the Pinochet case, heading a multinational team of ten lawyers representing nearly 4,000 survivors and families of survivors in approximately 3,000 cases of assassination, forced disappearance, and torture committed under General Augusto Pinochet's leadership. He is also one of the only survivors of the bombing of the Presidential Palace by Pinochet. Before he escaped, he made a promise to President Salvador Allende, who perished in the bombing, that he would tell the world what had happened there. For more information, see *40 Years After Chilean Coup, Allende Aide Juan Garcés on How He Brought Pinochet to Justice*, DEMOCRACY NOW! (Sept. 10, 2013), https://www.democracynow.org/2013/9/10/40_years_after_chilean_coup_allende [<https://perma.cc/9E7N-AGAD>].

²⁴⁰ Interview with Carlos Slepoy (Dec. 4, 2015).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

with the court, which never questioned its authority due to the implied legitimacy of its source.²⁴⁴ However, in other cases he has worked on, the Spanish court did not give the same weight to reports by national truth commissions.²⁴⁵

4.3.2. TRCs as the Principal Investigators in UJ Cases

Similar to its use by Guatemalan attorneys described later in this article, Enrique Santiago Romero described to me how truth commissions were helpful when they were trying to identify witnesses and perpetrators, particularly when civil society from the country where the crimes occurred is less organized.²⁴⁶ Carlos Slepoy further elaborated, stating that in the *Guatemalan Generals* case the legal team and the investigating judge used the lists of victims in both TRC reports to determine who they might contact to identify potential witnesses and perpetrators.²⁴⁷

Manuel Miguel Vergara Céspedes, the Legal Director for the International Foundation of Baltasar Garzón (FIBGAR), who did not work on the *Guatemalan Generals* case, but is an expert on universal jurisdiction in general, explained that the evidence gathered by truth commissions is especially important in the context of universal jurisdiction.²⁴⁸ This is because the majority of universal jurisdiction cases have occurred in civil law countries, where an independent investigating judge leads the investigation.²⁴⁹ Since in universal jurisdiction cases, investigating judges rarely are able to investigate in the countries where the alleged crimes occurred—as was the case with Judge Pedraz in the *Guatemalan Generals* case—judges are heavily reliant on the fact-finding of others, especially TRCs.²⁵⁰ At the

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Interview with Enrique Santiago Romero, *supra* note 237.

²⁴⁷ Interview with Carlos Slepoy, *supra* note 240. See also Roht-Arriaza, *Making the State Do Justice*, *supra* note 190, at 90 (describing how the legal team used the findings of the CEH report to put together witness lists involving people from the hardest-hit areas and people who could testify about different aspects of genocide: massacres, bombings, forced displacement, destruction of community structures, and targeting of local religious and secular authorities).

²⁴⁸ Interview with Miguel Vergara Céspedes, Legal Director, International Foundation of Baltasar Garzón (FIBGAR) (Dec. 3, 2015).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

same time, Pedro Martínez Torrijos, the current prosecutor in charge of prosecuting universal jurisdiction cases on behalf of the Spanish Attorney General, cautioned that TRC reports usually can only be used as indirect evidence (as distinguished from direct evidence, or “*prueba plena*,” which directly proves the commission of crime), since there is no opportunity to confront the witnesses.²⁵¹

While the CEH report was critical to the Spanish case, that case also helped to raise the profile of the CEH report. The Spanish case represented the first time that the report was submitted as evidence in a criminal case.²⁵² This helped to diffuse the report to a broader audience, both internationally and nationally.²⁵³ While there were a number of cases with convictions after the release of the CEH report, only after the Spanish case did Guatemalan attorneys start regularly admitting the CEH report as evidence in their cases.²⁵⁴ This interplay between the CEH, the Spanish courts, and Guatemalan courts provides a compelling example of the multidirectional and porous nature of post-conflict pluralism.

4.4. “Truth-Full” Justice in Guatemalan Courts

After the Spanish case, the admission of the CEH and REMHI reports at the criminal trials in Guatemala became increasingly common, especially as attorneys set their sights on prosecuting the so-called “intellectual authors of the crimes.” These intellectual authors were the ones who planned and ordered criminal acts but relied on their subordinates to carry them out. In total, I documented thirty cases involving crimes committed during the armed conflict that resulted in convictions (including two before military tribunals).²⁵⁵ In fourteen of the nineteen cases that concluded after the

²⁵¹ Interview with Pedro Martínez Torrijos (Dec. 3, 2015).

²⁵² Interview with Alejandro Rodríguez, *supra* note 61 (“[D]igamos a nivel político es la primera vez que se utiliza el informe, que se cita, con un impacto internacional, eso también sirvió para la difusión del informe.”).

²⁵³ *Id.*

²⁵⁴ I confirmed this by consulting the sentences in cases that were decided after the CEH report was released but before the Spanish case was filed.

²⁵⁵ For the purposes of this analysis, I have included *Río Negro I*, Part A, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá, 01-98, Of. 2°, Sentence (1998) [hereinafter *Río Negro I*, Part A] and *Ríos Montt*, C-01076-2011-00015 Of. 2°, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala, Sentence (2013) [hereinafter *Ríos Montt*]. Even though appellate courts overturned both of these cases,

CEH report was publicly released in 1999, the court either admitted the CEH report as evidence or referenced its findings. The admission of the REMHI report was less common but still significant. In seven of the twenty-one cases that concluded after REMHI issued its report in 1998, the court admitted either the REMHI report itself or evidence that REMHI collected. Echoing the sentiment expressed by Spanish human rights attorneys, Guatemalan human rights attorneys explained that they believed that the courts gave the CEH report more weight because it was an official report, ostensibly sanctioned by the Guatemalan government.²⁵⁶

Despite the admonition that the CEH report should not have any judicial effect, judges have regularly admitted it (and the REMHI report) into evidence as “documentary evidence” (*prueba documental*). Under Guatemalan law, the judge can admit and consider documentary evidence, but it cannot be the only source of evidence in a case.²⁵⁷ However, it can be taken into account as part of the cumulative evidence in a case.²⁵⁸ As a matter of course, Guatemalan trial courts explain the probative weight (*valor probatorio*) given to each piece of admitted evidence in a case. This provides an exact understanding of how much weight the courts gave to the TRC reports that were admitted as evidence and insight into how these reports informed the courts’ decisions. Consequently, a review of these sentences reveals that the reports were helpful in identifying those responsible at the structural or systemic level, analyzing the causes and consequences of the armed conflict and providing the social and historical context in which the grave crimes occurred. The reports also had an important role in the prosecution of gender-based violence during the armed conflict as they demonstrated that rape was systematically employed to demoralize and splinter the Mayan communities, who were viewed as actual or future supporters of the guerilla forces.

they are instructive when demonstrating how trial courts weight the CEH and REMHI reports.

²⁵⁶ Interview with Mynor Alvarado, *supra* note 154.

²⁵⁷ Interview with Alejandro Rodriguez, *supra* note 61 (“Básicamente es una prueba documental que el juez la puede valorar, no puede por sí misma probar nada, pero en conjunto con los demás elementos de prueba ya tiene un valor.”).

²⁵⁸ *Id.*

4.4.1. Truth Commissions as Historians

One of the courts' most striking uses of the TRC reports in Guatemala was as a source for the historical context of the crimes in question. These historical facts fall within the broader category of legislative facts, which inform the underlying narrative through which a court understands a case. Legislative facts are distinct from record facts. They are not specific to a case, but rather "include more generic facts about the world that inform judges' legal decisions."²⁵⁹

Through a close examination of these decisions, we see how courts looked to historical and social context, not solely as the backdrop of a crime, but also to determine motive. Indeed, it was only with a deep understanding of the historical context that the courts were able to attribute criminal responsibility to the intellectual authors, who orchestrated the crimes from behind the scenes but did not directly carry them out. Prior to the release of the CEH report, there were only convictions of low-level officials for ordinary crimes.²⁶⁰

A comparison between the sentences that courts rendered before the release of the TRC reports and those rendered after their release illuminates how influential they were to judicial decision-making. In particular, an analysis of the two trials involving the murder of Myrna Mack Chang, one taking place before the release of the CEH report and the other after, demonstrates the profound impact the report had on the court's understanding of the motive for the crime.

Myrna Mack was an anthropologist who worked for the Association for the Advancement of Social Sciences in Guatemala (AVANCSO) and was investigating the displacement and repatriation of communities during the armed conflict.²⁶¹ After several days of surveillance, members of the Security Section of the Presidential

²⁵⁹ Pammela Quinn, *Advancing the Conversation: Non-Judicial Voices and the Transnational Judicial Dialogue*, *supra* note 14, at 56.

²⁶⁰ The convictions that occurred before 2000 were all against lower level officials for ordinary crimes, such as assassination, homicide, and grave injury. *See, e.g., Myrna Mack Chang I*, Pieza 20: 3630-50, Sentencia de la Sala Cuarta de la Corte de Apelaciones, April 28, 1993 [hereinafter *Myrna Mack Chang I*]; *Rio Negro I*, Part A, *supra* note 255; *Rio Negro I*, Part B, 01-98, Of. 1°, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá (1999) [hereinafter *Rio Negro I*, Part B]; *Noriega Estrada*, Expediente No. 22-96, Tribunal de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente del departamento de El Quiché (1999) [hereinafter *Noriega Estrada*].

²⁶¹ *Myrna Mack Chang I*, *supra* note 260, at 7.

General Staff (EMP), the Guatemalan equivalent of the U.S. Secret Service, stabbed her twenty-seven times outside of her office in Guatemala City, resulting in her death.²⁶²

In 1993, in large part due to the unrelenting advocacy of her sister Helen Mack, *Myrna Mack I* became the first case in Guatemala in which there was a conviction for crimes related to the armed conflict.²⁶³ In that case, the court convicted Noel de Jesús Beteta Alvarez, who was directly involved in her murder, basing its decision primarily on eyewitness testimony, forensic reports, and photographs. However, the court characterized the crime as if it was an ordinary crime unrelated to the armed conflict. In its decision, the court made no mention of the armed conflict and only noted that the defendant was a Sergeant Major Specialist of the EMP as part of its more general description of the defendant.²⁶⁴ In addition, even though the Human Rights Ombudsman who brought the case characterized her murder as extrajudicial killing in the complaint, the court found Beteta Alvarez guilty of assassination, seemingly viewing her murder as unassociated with the Guatemalan government.²⁶⁵ The court only mentioned the nature of her work once, when admitting testimony about her research, but specified that this testimony “only establishe[d] the work that she did” and failed to link her work to the motive for the crime.²⁶⁶

The trial court also closed the investigations into the EMP chiefs who allegedly ordered her murder because, according to the court, there was no proof that they gave the order to kill Myrna Mack Chang.²⁶⁷ Later, the Guatemalan Supreme Court reversed the trial court’s decision on this question only, concluding that the trial court had been derelict in its duty to establish the facts of the case by examining the intersection between “historical truth” and “legal

²⁶² David Baluarte & Erin Chlopak, *The Case of Myrna Mack Chang: Overcoming Institutional Impunity in Guatemala*, 10 HUM. RTS. BRIEF 11 (2003), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1417&context=hrbrief>.

²⁶³ *Id.* See also LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSNATIONAL AND TRANSRACIAL ADOPTION* 231 (2012).

²⁶⁴ *Myrna Mack Chang I*, *supra* note 260, at 31.

²⁶⁵ *Id.* at 33.

²⁶⁶ *Id.* at 31 (“Lo declarado por Clara Josefina María Arenas Bianchi, Carmen Rosa de León Escribano, Marco Tulio Gutiérrez Arenales, refieren las investigaciones realizadas por Myrna Elizabeth Mack Chang, sobre refugiados, ex patriados y desplazados, su preocupación por los indígenas que habitaban áreas de conflicto, principalmente Quiché y Cobán, y la proyección que tenían sus investigaciones, solo prueba el trabajo por ella realizado.”).

²⁶⁷ *Id.* at 33.

truth," which courts should deduce, in accordance with the law, from what appears in the record.²⁶⁸ The Supreme Court reasoned that the trial court should have taken the claims by the Ombudsman seriously because the EMP had undeniably participated in numerous extrajudicial killing of Guatemalan citizens, particularly those who were involved in certain activities such as researching the displacement of indigenous communities, as Myrna Mack did.²⁶⁹

Thus, on remand, in *Myrna Mack Chang II*, the trial court drew much of its understanding about the motive for her death from the historical and social context described in the REMHI and CEH reports, which by then had both been released. Specifically, the court admitted the second volume of the CEH report, because it provided a contemporary history of Guatemala and the occurrences of the armed conflict.²⁷⁰ Upon learning about the National Security Doctrine described in the CEH report, the court concluded that the government erroneously classified Myrna Mack Chang as an "internal enemy," linking her to the displaced people she researched in the interior of the country.²⁷¹

²⁶⁸ *Myrna Mack Chang I*, Pieza 20: 3658–88, Corte Suprema de Justicia (1994) ("Comprobará y establecerá los hechos buscando la coincidencia entre la verdad histórica y la formal o jurídica y resolverá, conforme las constancias procesales. En todo caso, prevalecerá la verdad formal deducida, conforme a la ley, de lo que aparezca en autos. Existe violación de esta norma procesal cuando la Sala no asume la obligación de promover la investigación sobre la participación de Edgar Augusto Godoy Gaitan, Juan Valencia Osorio, Juan Guillermo Oliva Carrera, Juan Jose Lario, Juan Jose Del Cid Morales y un Individuo de Apellido Charchal.").

²⁶⁹ *Id.* at 22 ("Que la valoración de estos medios de prueba es esencial cuando el Procurador de los Derechos Humanos declaró formalmente que se trataba de un asesinato de naturaleza política que involucraba a las fuerzas de seguridad del Estado de Guatemala. Expuso, que en nuestro medio, es innegable que las fuerzas de seguridad han participado abiertamente en la ejecución extrajudicial de ciudadanos guatemaltecos, en los que ha estado incluido el Estado Mayor Presidencial. También forma parte de la experiencia social que cierto tipo de actividades comportan el riesgo de convertir a los ciudadanos en víctimas de la represión del Estado; que asuntos relacionados con refugiados, desplazados y repatriados forman parte de estas actividades.").

²⁷⁰ *Myrna Mack Chang II*, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente de Guatemala, C-5-99 Of. 3ro., Sentence, Oct. 3, 2002, 24. [hereinafter *Myrna Mack Chang II*] ("Informe de la Comisión para el Esclarecimiento Histórico (CEH) Guatemala, Memorias del Silencio, Tomo II: Las Violaciones de los Derechos Humanos y Hechos de Violencia, Primera Edición, en las páginas y números de textos asentadas en el acta correspondiente nos sirven para conocer la historia contemporánea y su contenido nos permite conocer que fue lo que ocurrió durante el conflicto armando . . .").

²⁷¹ *Id.* ("[A] leer el contenido de la doctrina de la Seguridad Nacional concluimos que la Antropóloga Myrna Mack se le considero erróneamente enemigo interno, al vincular su trabajo científico con la situación que vivían los desplazados

Similarly, the court admitted the third volume of REMHI, entitled "Historical Context," because it educated the court about the social, political, and economic evolution of the country from 1986 to 1990 and the relationship between the army and broader society.²⁷² In doing so, it noted the CEH's and REMHI's mutual finding that Myrna Mack Chang's murder occurred days after the *Comunidades de Población en Resistencia* had made a complaint about the activities of the military.²⁷³ Citing the REMHI report, which described her as the only independent expert on internal displacement in Guatemala, the court concluded that her death was meant to send a message to the civilian population.²⁷⁴ Thus, on the basis of both reports and other evidence presented, the court found that the motive of her murder was political and convicted the three chiefs of the EMP.²⁷⁵ This was the first time that a Guatemalan court had convicted the high-level officials, who planned crimes associated with the armed conflict, but did not directly carry them out.

Similarly, a comparison of the decisions in *Rio Negro I* and *Rio Negro II* demonstrates how the CEH report, which was admitted into evidence in *Rio Negro II*, but not *Rio Negro I*, was critical to the courts' consideration of the criminal acts under examination by the courts. The case involved a massacre, during which paramilitary and military forces brutally murdered numerous Mayan women and children from a village called Rio Negro.²⁷⁶ As described in the CEH report, the Guatemalan military targeted the inhabitants of Rio

en el interior del país, así mismo confirma el móvil político de su asesinato.").

²⁷² *Id.* ("Informe de la Comisión para el Esclarecimiento Histórico (CEH) Guatemala, Memorias del Silencio, Tomo II: Las Violaciones de los Derechos Humanos y Hechos de Violencia, Primera Edición, en las páginas y números de textos asentadas en el acta correspondiente, nos sirven para conocer la historia contemporánea y su contenido nos permite conocer que fue lo que ocurrió durante el conflicto armado . . ."). *See also id.* ("Los párrafos citados narran el desenvolvimiento social, político y económico de Guatemala de mil novecientos ochenta y seis a mil novecientos noventa, describiendo el actuar del ejército en relación a la sociedad.").

²⁷³ *Id.* ("Al igual que en el informe rendido por la Comisión de Esclarecimiento Histórico, se da a conocer la difícil situación que vivían los desplazados y la denuncia efectuada por las Comunidades de Población en Resistencia, el siete de septiembre de mil novecientos noventa, días antes del asesinato de Myrna Mack . . .").

²⁷⁴ *Id.* ("[E]n el informe se cita a la antropóloga como la única experta independiente en el tema de los desplazados y como su muerte constituyó un mensaje a la población civil, calificando su asesinato de orden político.").

²⁷⁵ *Id.*

²⁷⁶ Kathleen Dill, *International Human Rights and Local Justice in Guatemala: The Rio Negro (Pak'oxom) and Agua Fria Trials*, 17 *CULTURAL DYNAMICS* 323, 325 (2005).

Negro, in part, because they rejected a plan to relocate them from their ancestral lands near the Chixoy River where the Guatemalan government planned to build a hydroelectric dam, a project funded by the World Bank.²⁷⁷

Neither of the two sentences in *Rio Negro I* made any mention of this background, which is essential to understanding the motive for the crime and its connection to the military's broader campaign. In the first sentence in *Rio Negro I*, the trial court convicted three paramilitary officers who played a significant role in the Rio Negro massacre, but concluded that the officers took the law, as they interpreted it, into their own hands and acted without authorization from the military.²⁷⁸ After the Court of Appeals in Coban overturned this decision on other grounds, the trial court, on remand, denied any connection at all between the military and the three officers, describing the defendants as farmers who arrived with a group of other men to Rio Negro.²⁷⁹ The court also refused to admit the executive order that specified the purpose and authority of the PACs into evidence, saying that it was not enough to prove that the accused were members.²⁸⁰

In direct contrast to *Rio Negro I*, the trial court in *Rio Negro II* concluded that "in order to analyze the existence of a crime, its judicial classification, and the criminal responsibility of the accused, it [was] essential to situate the facts in question within the historical and social-political context in which they occurred."²⁸¹ The court thus heavily relied on the CEH in its decision. Specifically, the CEH report informed the court's understanding of the causes and consequences of the Rio Negro massacre, situating it within the Guatemalan government's broader fight against communism.²⁸² As the court explained, quoting the CEH report, the government had invented a new adversary called the "internal enemy," which was broadly

²⁷⁷ CEH, *Illustrative Case No. 10: Massacre and Elimination of the Community of Río Negro, Guatemala, Memoria del Silencio*, vol. VI, annex I, 45-47.

²⁷⁸ *Rio Negro I*, Part A, *supra* note 255, at 28.

²⁷⁹ *Rio Negro I*, Part B, *supra* note 260, at 1-2, 67.

²⁸⁰ *Id.* at 64.

²⁸¹ *Rio Negro II*, N° 28-2003, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá, Baja Verapaz, Sentence, May 28, 2008, 315, 325 ("Al analizar la existencia del delito, su calificación jurídica, y la responsabilidad penal de los procesados, es de obligatoria referencia ubicar el contexto histórico y político-social en el cual se desarrollaron los hechos sometidos a juicio.") [hereinafter *Rio Negro II*].

²⁸² *Id.* at 316.

defined as “any person, social group, demand, or idea susceptible of being a launching point, ally, or eventual support to international communism, either currently or at some point in the future.”²⁸³ This casting of a wide net of adversaries explained why the army targeted communities and individuals that had little to no contact with guerrilla forces. Again, drawing from the CEH report, the court noted that the army considered the location of the massacre to be an area that was strategically important because of its geographic position and socio-economic importance in the region, even though it never really was a combat zone.²⁸⁴ Fearing that “subversive propaganda” might appeal to the population, the army started by selectively disappearing or killing local leaders, but with time, implemented strategies that indiscriminately targeted anyone who might have some relation with the guerilla movement.²⁸⁵

Numerous other Guatemalan courts also admitted both the REMHI and CEH reports for the historical and social context they provided. For example, in *Sepur Zarco*, the court also admitted REMHI and CEH because it provided information about the lived experience of the climate of violence during the armed conflict and “contained the recent history of Guatemala, which all Guatemalans need to know in order to prevent the reoccurrence [of violence].”²⁸⁶ In both the *Dos Erres* and *Ríos Montt* cases, the courts, using identical language, described the CEH report as “a historical document that provides understanding of the wartime ideology that existed during the armed conflict, which is the central reference point for the criminal acts that we are judging.”²⁸⁷ In *Ríos Montt*, in addition to admitting the CEH report, the trial court also admitted the REMHI report because it served as a compilation of the recent history of

²⁸³ *Id.*

²⁸⁴ *Id.* at 317.

²⁸⁵ *Id.* at 317.

²⁸⁶ *Sepur Zarco*, C-01076-2012-00021 Of. 2°, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala (Tribunal de Mayor Riesgo “A”), Sentence, Feb. 26, 2016. [hereinafter *Sepur Zarco*] (“Dicho informe contiene la Historia reciente de Guatemala, la cual debe ser conocida por todos los guatemaltecos para evitar su repetición.”).

²⁸⁷ *Dos Erres*, C-01076-2010-00003, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala, Sentence, Aug. 2, 2011, 236 [hereinafter *Dos Erres*] (“Es un documento histórico que permite conocer la guerra ideológica existente durante el conflicto armado, siendo el marco de referencia en donde se produjo el hecho que se juzga.”). *Ríos Montt*, *supra* note 255, at 663.

Guatemala.²⁸⁸

In sharp contrast to the above cases, in *Edgar Fernando Garcia I*, the court refused to admit the REMHI report into evidence. This is the only case I have found in which court failed to admit a TRC report, wholesale, into evidence. Although the court stated that it thought it was important to know the history of the Guatemalan armed conflict so that the events do not repeat themselves, that history did not contribute to verifying whether the accused participated in the acts in question.²⁸⁹ However, in that same case, the court admitted the portion of the CEH report specifically related to Edgar Fernando Garcia's disappearance, ironically as a "written, historical reference" of the extreme events that occurred.²⁹⁰

In direct contradiction to the reasoning in *Edgar Fernando Garcia I*, in *Edgar Fernando Garcia II*, a case involving the intellectual authors of the disappearance, the court admitted Volume III of REMHI, entitled "Historical Context."²⁹¹ Specifically, the court stated that it admitted the REMHI report because it was a historical study of the situation in the 1980s in Guatemala, identified the victims of repression during those years, and described the violence against social leaders at the time.²⁹² However, the court rejected Volume VI of REMHI entitled "Victims of the Conflict," because it "only contained a list of places."²⁹³ The court admitted the same part of the CEH report as the trial court did in *Edgar Fernando Garcia I* because it established that the crime was committed in the context of the armed conflict, when enforced disappearances of student leaders, particularly from the University of San Carlos, were common.²⁹⁴ This case is significant because it was the first time that senior police officials were convicted "for their role in ordering, overseeing, and then concealing the crime."²⁹⁵

²⁸⁸ *Id.* at 664.

²⁸⁹ *Edgar Fernando García I*, C-01069-1997-00001, Tribunal Octavo de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente del Departamento de Guatemala, Sentence, Oct. 28, 2010, 71-72. [hereinafter *Edgar Fernando Garcia I*].

²⁹⁰ *Id.* at 68.

²⁹¹ *Edgar Fernando García II*, C-01069-1997-00001 Of. 3º, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala (Tribunal de Mayor Riesgo "A"), Sentence, Sept. 20, 2013, 151. [hereinafter *Edgar Fernando Garcia II*].

²⁹² *Id.* at 148. See also REMHI Report, *supra* note 151, at 90-106, 127-54. (Volume III, Historical Context).

²⁹³ *Edgar Fernando Garcia II*, *supra* note 291, at 151-52.

²⁹⁴ *Id.* at 95-96.

²⁹⁵ *Guatemalan Court Convicts National Police Chief*, THE NATIONAL SECURITY

4.4.2. *Truth Commissions as Experts in Organizational Responsibility*

The TRC reports also aided courts to understand the operations of military units and therefore attribute responsibility up the chain of command. Hilda Pineda explained that the TRCs illustrated how various members of the military apparatus, such as the military commissioners, the intelligence agents, and the police, might have participated in the armed conflict.²⁹⁶ For example, in *Rio Negro II*, the CEH report informed the court's understanding of the PACs.²⁹⁷ As the CEH report explains, and the court recites, the army mandated the creation of this paramilitary group around 1981.²⁹⁸ CEH attributed numerous human rights violations during the war to various PACs across the country, which were sometimes committed of their own accord and sometimes in collusion with government forces.²⁹⁹ The admission of this evidence is noteworthy because, as stated above, the second trial court in *Rio Negro I* rejected the admission of the law that created the PACs, asserting that at no time was it proven that the accused had been enlisted as PACs.³⁰⁰

Similarly, in *Jute*, the court admitted the portion of the CEH report that described "the mechanisms of terror" used by the Guatemalan government to disappear people considered to be enemies of the state.³⁰¹ In particular, the court found the CEH's elucidation of the inter-workings of the PACs as well as the military commissioners, another group created by the military to involve local populations in its counterinsurgency strategies, particularly useful.³⁰² With

ARCHIVE (Sept. 24, 2013), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB440/> [<https://perma.cc/ZEK9-RM6G>].

²⁹⁶ Interview with Hilda Pineda, *supra* note 198. ("Hay algunos estudios específicos dentro las comisiones de la verdad o los informes de la comisión que se relación a las estructuras que pudieron haber participado, por ejemplo, cómo funcionaba la defensa civil, los comisionados militares, la inteligencia del ejército, de la policía, los operativos combinados.")

²⁹⁷ *Rio Negro II*, *supra* note 281, at 318.

²⁹⁸ *Id.* at 318.

²⁹⁹ *Id.*

³⁰⁰ *Rio Negro I*, Part B, *supra* note 260, at 64.

³⁰¹ *Jute*, 195-2008. Of. 2, El Tribunal Primero de Sentencia Penal, Narcoactividad y el Tribunal de Delitos Contra el Ambiente del Departamento de Chiquimula, Sentence, Dec. 3, 2009, at 124-27.

³⁰² *Id.* at 124.

regard to military commissioners, the court admitted the portion of the CEH report that detailed their organization, structure, chain of command, and duties.³⁰³ As the CEH explained, military commissioners actively participated in denouncing members of their communities to the military, which ultimately resulted in detention, disappearances, and extrajudicial killings.³⁰⁴ Sometimes, they would denounce people who had nothing to do with the guerilla, out of a desire to keep peace or fear of reprisal from the military.³⁰⁵ The military commissioners were also involved in the capture and transfer of people believed to be part of or helping the guerillas.³⁰⁶ For example, sometimes they would use their homes as detention centers, torture people, or assist in enforced disappearances.³⁰⁷ When admitting the report, the court praised the methodology of the CEH report, saying that its credibility was unquestionable.³⁰⁸

In the case regarding the disappearance of Edgar Leonel Paredes Cheguén, the court also admitted the sections of the CEH report explaining the involvement of military commissioners in enforced disappearances.³⁰⁹ The court highlighted the following specific information from the CEH report that it found helpful: 1) in the western part of Guatemala, where the disappearance in this case occurred, the military commissioners were linked to death squads; 2) one in every three human rights violations was committed by a paramilitary force; 3) military commissioners and the military were responsible for systematic human rights violations and crimes against the humanity perpetrated during the armed conflict against the civil population; and 4) the majority of the violations they committed were extrajudicial killings, torture, deprivation of liberty, enforced disappearances, and rape.³¹⁰ In *Edgar Fernando Garcia II*, the court admitted Volume II, because it explained how the National Police

³⁰³ *Id.* at 127.

³⁰⁴ *Id.* at 126.

³⁰⁵ *Id.* at 126.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 126–27.

³⁰⁸ *Id.*

³⁰⁹ *Edgar Leonel Paredes Cheguén*, C-20003-2009-000223, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala (Mayor Reiso “B”), Sentence, March 26, 2013, 46. [hereinafter *Edgar Leonel Paredes Cheguén*]. See CEH Report, *supra* note 80, at 158–81 (Chapter 2, Violation of Human Rights and Acts of Violence, Title V, Military Commissioners). See also *id.* at 404–58 (Chapter 2, Violation of Human Rights and Acts of Violence, Title XI, Enforced Disappearance).

³¹⁰ *Edgar Leonel Paredes Cheguén*, *supra* note 309, at 46.

functioned in the 1980s.³¹¹ This evidence was significant in that case, because the people accused of the disappearance were two heads of the National Police.³¹²

Alejandro Rodriguez, a human rights attorney for Impunity Watch, who was the *quellrante adhesivo* in the Molina Theissen case, explained that in that case he used the conclusions of the CEH to demonstrate the pattern and practice of the military. Specifically, he used it to show that there was a secret military unit that would take people to military zones and kill them there. He explained that this was important in his case, because it showed that the enforced disappearance of Marco Antonio Molina Theissen was not an isolated example.³¹³ This, coupled with the CEH's finding that there were around 45,000 disappearances during the armed conflict, helped to establish the chain of command.³¹⁴ Since his case was against officials who held high-level positions in the military during the armed conflict, including Benedicto Lucas García, the former chief of staff of the military, this evidence was critical.

4.4.3. Truth Commissions as *Modus Operandi* Experts

Importantly, the TRC reports also offered Guatemalan courts insights on the *modus operandi* employed by the military and police during the armed conflict. In some instances, the courts were able to make links between the specific facts of the case in question and the general *modus operandi* of the Guatemalan government documented in the TRC reports. For example, in *Edgar Fernando Garcia I*, the court concluded that the enforced disappearances of the leaders of the student labor organization AEU, including Fernando Garcia, were part of a general practice of enforced disappearances and

³¹¹ *Edgar Fernando Garcia II*, *supra* note 291, at 151.

³¹² *Id.*

³¹³ Interview with Alejandro Rodriguez, *supra* note 61 (“Nosotros usamos el informe de la CEH en el caso Molina Theissen de diferentes maneras. Primero a través de sus conclusiones para demostrar la política, los patrones sistemáticos del ejército, por ejemplo que había un circuito clandestino de atención, que metían a las personas en zonas militares, que mataban personas dentro de las bases militares. Todo ello es importante como contexto y no solo para demostrar que era un caso aislado sino que se trataba de una cadena de mando.”).

³¹⁴ *Id.* (“Además de que la CEH documentó más o menos 6,000 desapariciones forzadas, y hay 45,000 casos de desapariciones forzadas. También ahí se muestra la cadena de mando.”).

extrajudicial killing by the Guatemalan government during the armed conflict, which the CEH and REHMI reports extensively documented.³¹⁵

In *Dos Erres*, the court admitted the section of the CEH report entitled “Human rights violations and acts of violence,” because it established that the strategy applied by the army in *Dos Erres* was the same as that described in the military’s Victoria 82 Plan. This Plan directed military units to “conduct security, development, counter-subversive operations, and ideological warfare in their respective areas on a certain day at a certain time until the new orders were received, with the goal of locating, capturing, or destroying subversive elements or groups.”³¹⁶ Citing the CEH report, the court explained that the military used violence and propagated terror in service of these operations to ensure that these communities would not support the insurgency.³¹⁷ Whenever the army detected the presence of the guerilla in an area, it would go to that location or a nearby community and commit acts of violence against the local population.³¹⁸

In *Ríos Montt*, the court admitted the REMHI report because it described the various attacks by the military against the Ixil people, a civilian non-combatant population, and the militarization of daily life of the people in the Ixil region.³¹⁹ In *Río Negro II*, the court narrated how, according to the CEH report, the military and paramilitary forces tied up the women of the community and treated them like animals in order to make the brutal repression of the Mayan population easier.³²⁰ In *Edgar Leonel Paredes Cheguén*, the court noted that the CEH report proved the modus operandi of military intelligence operations during the armed conflict.³²¹

³¹⁵ *Edgar Fernando Garcia I*, *supra* note 289, at 62.

³¹⁶ *Dos Erres*, *supra* note 287, at 235 (“Los comandos involucrados conducirán operaciones de seguridad, desarrollo, contrasubversivos y de guerra ideológica en sus respectivas áreas de responsabilidad a partir del día ‘D’ hora ‘H’ hasta nueva orden, con el objeto de localizar, capturar o destruir grupos o elementos subversivos, para garantizar la paz y seguridad de la Nación . . .”).

³¹⁷ *Id.* at 236.

³¹⁸ *Id.* at 235.

³¹⁹ *Ríos Montt*, *supra* note 255, at 664.

³²⁰ *Río Negro II*, *supra* note 281, at 336.

³²¹ *Edgar Leonel Paredes Cheguén*, *supra* note 309, at 46.

4.4.4. Truth Commissions as Corroborators

Often times, the reports were admitted because they corroborated other evidence. For instance, in *Edgar Fernando Garcia II*, the court admitted Volume III, because it confirmed the reports of four expert witnesses.³²² In *Myrna Mack Chang II*, the court admitted the third volume of REMHI because it corroborated “essential aspects” of information contained in the CEH report.³²³ In the *Spanish Embassy* case, the court admitted Case Study 79 from the CEH report, because of its congruence with other admitted evidence regarding the bombing of the embassy and the subsequent assassination of the Rector of the University of San Carlos and several students.³²⁴

In *Jute*, the court noted that the explanation of the operations of the military commissioners in the CEH report, described in a previous section, corroborated other testimony presented at trial.³²⁵ Specifically, the court noted that the CEH corroborated the declaration of an expert witness who outlined the structure, chain of command, and operations of military commissioners, particularly during the period when the acts in question occurred.³²⁶ It also corroborated the testimony of two witnesses who described how the military patrols in the town of Jute operated as well as the process that the accused, who witnesses identified as military commissioners, used to locate, conduct surveillance of, and capture victims.³²⁷ The court noted that the modus operandi described by these two witnesses

³²² *Edgar Fernando Garcia II*, *supra* note 291, at 151 (“Es de utilidad para confirmar los peritajes rendidos por los peritos Katharine Temple Lapsley Doyle, Rember Aroldo Larios Tobar, Valia Elisa Muralles Bautista, Marina Consuelo García Bravatti de Villagran.”).

³²³ *Myrna Mack Chang II*, *supra* note 270, at 24 (El Informe Proyecto Interdiocesano de Recuperación de la Memoria Histórica “Guatemala, Nunca Más”. Tomo III, “El Entorno Histórico”, en las páginas y número de texto asentadas en el acta correspondiente, nos sirven para establecer los siguientes aspectos: A) Este informe corrobora en aspectos esenciales, el contenido del Informe formulado por la comisión de Esclarecimiento Histórico, al hacer referencia a las violaciones de Derechos Humanos registrados durante el conflicto armado.”).

³²⁴ Interestingly, the investigation and determination of responsibility for the bombing of the Spanish Embassy was included as part of the mandate of the CEH. *Spanish Embassy*, C-01071-1980-00547, Tribunal Primero de Sentencia Penal, Narcoactividad, y Delitos contra el Ambiente de Guatemala, Sentence, January 19, 2015, 286–88, 312.

³²⁵ *Jute*, *supra* note 301, at 128.

³²⁶ *Id.*

³²⁷ *Id.* at 128–29.

was the same as that described in the CEH report.³²⁸

The court in *Dos Erres* also admitted the case study on the Dos Erres massacre from the CEH report because it corroborated the expert report rendered by Social Historian Manolo Estuardo Vela Castañeda.³²⁹ Both reports found that the army mistakenly believed that the Dos Erres community was linked to the guerilla group called *Fuerzas Armadas Rebeldes* (FAR) and that the massacre was in retribution for an ambush carried out by the FAR.³³⁰ The reports by CEH and the expert witness also both found that the kaibiles, a military unit that specialized in these types of operations, were responsible for the massacre, and that the high command of the military planned it.³³¹ Chillingly, both reports also found that the Dos Erres massacre was the only one in the history of the Peten, a northern region of Guatemala, where a community was wiped entirely off the map.³³²

Additionally, in *Ríos Montt*, the court admitted Volumes I, II, II, X, and XI of the CEH report, in part because it established that the strategy utilized by the military during the armed conflict in the 1980s was the same as that delineated in the military's plan called Victoria 82, which was also admitted into evidence.³³³ It also admitted Volumes I, II, II, and IV of the REMHI report because it corroborated the following evidence: 1) the testimony and report rendered by expert witness Nieves Gómez Dupuis; 2) the testimony of the survivors who described the massacres in the Ixil region and how the military's goal was to destroy the seed of their population; 3) the testimony of both expert and lay witnesses who established that the armed conflict caused the destruction of their social fabric; 4) the testimony of survivors about enforcement disappearances, torture, and their escape to the mountains; 5) the testimony of Ixil women about being raped by soldiers; and 6) the existence of the mechanisms of terror described in various military plans, including Victoria 82, Firmeza 83, and Operation Sofia.³³⁴

³²⁸ *Id.* at 129.

³²⁹ *Dos Erres*, *supra* note 287, at 238.

³³⁰ *Id.* at 238-39.

³³¹ *Id.* at 239.

³³² *Id.*

³³³ *Ríos Montt*, *supra* note 255, at 662-63.

³³⁴ *Id.* at 664.

4.4.5. Truth Commissions on Collective Harm

Truth commissions sometimes adopted the all-important role of conveying cultural information that helped courts understand why human rights abusers employ certain strategies and what harm they cause to both communities and individuals. For instance, in *Rio Negro II*, drawing from the CEH report, the court explained that in addition to the physical harm caused by the repeated brutal rapes of the women and girls from Rio Negro, they also inflicted a symbolic injury on the community, because Mayan women bear the responsibility for social and cultural reproduction in those communities.³³⁵ Specifically, “the women personify the values that should be reproduced in the community and they were dishonored.”³³⁶ This explanation helped the court understand that these acts were not isolated crimes, but rather part of an orchestrated military strategy. In the same case, citing Case Study 14 from the CEH report, the court concluded that the children of Rio Negro, who were taken and forced to be indentured servants for the very people that killed their relatives, experienced immeasurable psycho-social consequences as a result of their degrading treatment and complete upheaval from their societal norms and culture.³³⁷

Similarly, in *Choatalum*, a case in which a military commissioner was convicted of enforced disappearance during the armed conflict, the court admitted the CEH report because it explained the numerous reasons, such as needing to flee to the mountains and the general climate of terror, that prevented thousands of Guatemalans from observing the rituals that they normally would perform when they lost a loved one.³³⁸ This caused profound pain in the affected communities, which was particularly acute in the instance of enforced disappearance, because of the uncertainty of not knowing the whereabouts or fate of the disappeared person.³³⁹ This was especially harmful to Mayan communities, who maintain a strong connection

³³⁵ *Rio Negro II*, *supra* note 281, at 336.

³³⁶ *Id.* (“Las mujeres personifican los valores que deben ser reproducidos en la comunidad y fueron mancilladas . . .”).

³³⁷ *Id.* at 354.

³³⁸ *Choatalum*, C-26-2,006 Of. III, Tribunal de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente del Departamento de Chimaltenango, Sentence, Sept. 7, 2009, 69-70 [hereinafter *Choatalum*].

³³⁹ *Id.*

with the dead.³⁴⁰ The trial court also, significantly, noted that the CEH found that the clandestine cemeteries and the anxiety of not knowing what happened to their relatives, even today, continues to be an open wound in the country and a permanent reminder of the violent acts that degraded the dignity of their loved ones.³⁴¹ This finding became particularly important later in this case, when on appeal, the Guatemalan Constitutional Court found that enforced disappearance does not have a statute of limitations because of the continuing nature of harm it causes.³⁴²

Similarly, the court in *Edgar Fernando Garcia II* admitted Volume I of REMHI entitled “The Impact of Violence” because it discussed the context that produced enforced disappearances and explained the unresolved grief that they caused for the family and friends of the disappeared.³⁴³

4.4.6. Truth Commissions as Investigatory Bodies

Truth commissions also acted as investigatory bodies, which was critical given that many of Guatemala’s state institutions were either corrupt or completely ineffectual.³⁴⁴ For example, as the CEH noted in its report, the Guatemalan judiciary was unable to guarantee compliance with the law and tolerated and, in some instances, fomented violence.³⁴⁵ In fact, during the armed conflict, the Guatemalan government used the judiciary as a tool to shield its repressive actions from judgment and repress its enemies.³⁴⁶ Additionally, many of the institutions that would have been responsible for

³⁴⁰ *Id.*

³⁴¹ *Id.* at 70.

³⁴² Choatalum, Corte de Constitucionalidad.

³⁴³ *Edgar Fernando Garcia II*, *supra* note 291, at 151.

³⁴⁴ CEH Report, *supra* note 80, at 23 (“El Sistema judicial del país, por su ineficacia provocada o deliberada, no garantizó el cumplimiento de la ley, tolerando y hasta propiciando la violencia. Por omisión o acción, el Poder Judicial contribuyó al agravamiento de los conflictos sociales en distintos momentos de la historia de Guatemala. La impunidad caló hasta el punto de apoderarse de la estructura misma del Estado, y se convirtió tanto en un medio como en un fin. Como medio, cobijó y protegió las actuaciones represivas del Estado, así como las de particulares afines a sus propósitos, mientras que, como fin, fue consecuencia de los métodos aplicados para reprimir y eliminar a los adversarios políticos y sociales.”)

³⁴⁵ *Id.*

³⁴⁶ *Id.*

investigating and collecting evidence did not exist at the time of the crimes. For example, *Ley Orgánica del Ministerio Público*, which created the Attorney General's office, only went into effect in 1994.³⁴⁷ Similarly, the Congress enacted the first Code of Criminal Procedure in 1992.³⁴⁸

For that reason, TRCs sometimes had to guard evidence that likely would have been destroyed if a state institution had gotten ahold of it. For example, in *Edgar Fernando García I*, the court admitted recorded testimony that REMHI had obtained from an anonymous source. The case involved the disappearance of Edgar Fernando García, who the National Police had detained along with another student, Danilo Chinchilla.³⁴⁹ García and Chinchilla were two of seven student leaders of a labor organization at the University of San Carlos who the police had detained during a three-month period.³⁵⁰ During the arrest, the police shot Chinchilla as he tried to escape and he was taken to Hospital Roosevelt.³⁵¹ Once there, a group of leaders from the Guatemalan Labor Party helped him escape.³⁵² At that time, Chinchilla made a tape recording in which he explained what happened to García and him when they were detained.³⁵³ Many years later, when REMHI began its investigation, the recording was given to the director of ODHAG so that it could be analyzed as part of REMHI.³⁵⁴ Chinchilla later became one of the numerous disappeared in Guatemala and thus was unable to testify at trial, so the prosecutor sought to admit his recorded testimony.³⁵⁵ After hearing testimony from Chinchilla's partner who verified without hesitation that the voice on the recording was Chinchilla's,

³⁴⁷ *Ley Orgánica del Ministerio Público*, Decreto Numero 40-94, http://www.oas.org/JURIDICO/mla/sp/gtm/sp_gtm-mla-leg-publico.pdf [<https://perma.cc/BB5F-G96M>]. Public Hearing by Judge Miguel Angel Galvez in Ríos Montt (Feb. 4, 2013).

³⁴⁸ Decreto Numero 51-92.

³⁴⁹ CEH Report, *supra* note 80, at 145 (Tomo VI, Anexo I, Casos Ilustrativos, CI 48, Desapariciones forzadas de Edgar Fernando García, Sergio Saúl Linares Morales y Rubén Amílcar Farfán. Fundación del Grupo de Apoyo Mutuo (GAM)).

³⁵⁰ *Id.*

³⁵¹ *Edgar Fernando García I*, *supra* note 289, at 63. CEH Report, *supra* note 80, at 146 (Tomo VI, Anexo I, Casos Ilustrativos, CI 48, Desapariciones forzadas de Edgar Fernando García, Sergio Saúl Linares Morales y Rubén Amílcar Farfán. Fundación del Grupo de Apoyo Mutuo (GAM)).

³⁵² *Id.*

³⁵³ *Edgar Fernando García I*, *supra* note 289, at 63.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 64–65.

the court admitted it into evidence.³⁵⁶ The court said that the recording made them certain about the detention and subsequent disappearance of Fernando García.³⁵⁷

The court in *Edgar Fernando García I* also admitted a certificate that contained testimony collected by REMHI regarding efforts made to locate Edgar Fernando García after his disappearance, including filing legal complaints and publishing announcements in Guatemalan newspapers.³⁵⁸ Similarly, in *Edgar Fernando García II*, the court admitted a questionnaire from an interview conducted by REMHI because it contained information about Edgar Fernando García as well as documents related to his disappearance.³⁵⁹

Later down the line, TRC reports also provided a blueprint for prosecutors' investigations of cases. Numerous prosecutors and attorneys from human rights organizations explained that in nearly all of their cases, they used both the REMHI and CEH reports as a launching point for their investigations.³⁶⁰ Hilda Pineda said that "one of the first things prosecutors in her office do when they start an investigation is check if the case is documented in the REMHI or CEH reports."³⁶¹ She said that "it opens the door for us to enter."³⁶² Sometimes, prosecutors used the report to identify witnesses and even perpetrators.³⁶³ Given that witnesses were not named in either report and perpetrators were not named in the CEH report, this is a surprising revelation. In the case of REMHI, the directors of the project explained that sometimes they would act as liaisons between witnesses and prosecutors from the Attorney General's Office.³⁶⁴ For example, if the Attorney General's office hoped to bring a case regarding a particular event, they would consult REMHI's database

³⁵⁶ *Id.* at 65.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 74.

³⁵⁹ *Edgar Fernando García II*, *supra* note 291, at 149–50.

³⁶⁰ Interviews with attorneys from GAM, ODHAG, CALDH, and MTM, and prosecutors Hilda Pineda and Orlando Lopez.

³⁶¹ Interview with Hilda Pineda, *supra* note 198 ("Primero porque nos dan las primeras herramientas para iniciar nuestra investigación. Una de las acciones preliminares que realiza el fiscal es verificar si en el REMHI o en la Comisión de Esclarecimiento Histórico está el caso documentado. Porque esto nos ayuda a buscar información que ahí mismo se relaciona.").

³⁶² *Id.* ("Nos abre la puerta para entrar.")

³⁶³ *Id.*

³⁶⁴ Interview with Edgar Gutiérrez, *supra* note 152; Interview with a Diocese Coordinator of REMHI, *supra* note 153.

to identify potential witnesses.³⁶⁵ ODHAG would then contact the witness to see if they would consent to having their contact information shared with the Attorney General's Office and possibly testify before a tribunal.³⁶⁶ This happened in the case of *Fernando García I.* According to Alejandro Rodriguez, who worked in the office of the *Procurador de los Derechos Humanos* when it brought the case, his legal team consulted the REMHI database and identified a person who ended up being a key witness in their case.³⁶⁷

Both the REMHI and CEH reports also helped investigators locate clandestine graves. Hilda Pineda explained that the reports helped investigators locate where potential witnesses might be or specific information about the location of the graves. With this information, her investigators are able to go to that location and ask people where the remains might be. In some cases, the family buried the victims themselves and could tell them exactly where they were buried.³⁶⁸ Alejandro Rodriguez also described how the reports provided a legal basis for people to petition for exhumations because they described the approximate location where their family member might be buried.³⁶⁹ In the *Choatalum* case, the trial court explained that it considered REMHI and CEH "relevant and pertinent in the clarification of the case, especially because they helped identify the whereabouts of a clandestine grave in a location where a military base operated at the time of the armed conflict."³⁷⁰ The reports also provided a basis for victims to ask for reparations from the Guatemalan government.³⁷¹

The reports were also informative for judges. Pulling a copy of

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ Interview with Alejandro Rodriguez, *supra* note 61.

³⁶⁸ Interview with Hilda Pineda, *supra* note 198 ("Algunas informaciones nos han ayudado, por lo menos, a ubicar testigos dentro del caso o alguna relación en específico del lugar, porque ya con el lugar nosotros ya nos desplazamos y esto hace que las personas luego nos digan y nos señalen el lugar donde posiblemente esté una persona enterrada de manera clandestina, o por necesidad de la familia en los operativos militares algunos familiares los enterraron ellos mismos.").

³⁶⁹ Interview with Alejandro Rodriguez, *supra* note 61 ("Para la gente también es importante, porque también permite solicitar exhumaciones porque se señalan los lugares o lugares aproximados a donde pertenecía la víctima.").

³⁷⁰ *Choatalum*, *supra* note 338, at 70 ("[C]onclusiones de estos informes que este tribunal considera relevantes y pertinentes para el esclarecimiento del presente caso, toda vez que en el caso concreto se probó la existencia de un cementerio clandestino en el lugar donde funcionó un destacamento militar.").

³⁷¹ Interview with Alejandro Rodriguez, *supra* note 61.

REMHI from his shelf, Judge Miguel Angel Galvez told me that REMHI was very valuable to him because it helped him to identify what military reports and other documents to consult.³⁷² This is particularly significant as Judge Galvez declassified a number of military documents in the *Diario Militar* case.³⁷³ They also are helpful tools for human rights organizations when training new staff. The legal director of Grupo Apoyo Mutual (GAM) explained that REMHI and CEH are mandatory reading for all new hires.³⁷⁴

4.4.7. Truth Commissions as Reporters to the Experts

The TRC Reports also provided helpful background information for expert witnesses. In *Plan de Sanchez*, an expert witness on military strategy recounted how the CEH explained the concept of “internal enemy” found in the military’s manual on the war against subversives.³⁷⁵ Drawing from what he had read in the CEH report, he interpreted the reference to the internal enemy to mean, practically speaking, that the military must eliminate communists, collaborators, and anyone that, even without being a communist, supports the ideology and favors using subversive activities to take power.³⁷⁶ When discussing the G2, a Guatemalan military unit, he quoted the CEH report as the basis for his finding that military intelligence was based on gossip, which explains why there was so much abuse of innocent people.³⁷⁷

In *Sepur Zarco*, Prudencio Garcia Martinez de Murguia, an expert witness on military operations, used both REMHI and CEH as the basis of his opinion. He specifically referenced REMHI, stating that the military’s objective was to paralyze the indigenous population who might give support to the guerilla by indicating, explicitly or implicitly, that if you collaborate with the guerilla, what happened

³⁷² Interview with Miguel Angel Galvez (Nov. 14, 2016).

³⁷³ Evelyn De León, *Juez Gálvez desclasifica 8 planes militares del conflicto armado*, SOY 502 (Mar. 31, 2016), <https://www.soy502.com/articulo/juez-galvez-desclasifica-8-planes-militares-conflicto-armado> [<https://perma.cc/P6JX-WCQP>].

³⁷⁴ Interview with Mynor Alvarado, *supra* note 154 (“Es como una lectura obligatoria para quienes se integran, para que se enteren de la situación.”)

³⁷⁵ *Plan de Sanchez*, C-01076-2011-00001 Of. 1, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente (Mayor Riesgo A), Sentence, March 14, 2012, 45. [hereinafter *Plan de Sanchez*]

³⁷⁶ *Id.* at 45, 77.

³⁷⁷ *Id.* at 60.

to your brother, father, or neighbor will happen to you.³⁷⁸ He also referred to the great number of cases of rape documented by the CEH report as evidence that it was a regular practice of the Guatemalan army during the armed conflict.³⁷⁹ He also noted that the CEH described how the military would always separate the women from everyone else when they descended on a village.³⁸⁰ The expert witness concluded that this demonstrated premeditation and noted that the report made it clear that these incidents were not isolated outbursts of hate or savagery aimed at those in close proximity.³⁸¹ The court gave evidentiary weight to both of these findings.³⁸² The expert also noted that REMHI demonstrated a clear harm to the psychology of the Maya population that resulted from these assaults.³⁸³

Similarly, in *Plan de Sanchez*, an expert witness on social psychology drew from the CEH report when finding that rape was a common practice during the armed conflict and designed to destroy the dignity of a person in the most intimate way.³⁸⁴ Noting the report, the expert also described the collective harm to the Mayan communities that experienced communal shame from the memory of the rape of Mayan women in their communities.³⁸⁵

In *Edgar Fernando Garcia I*, an expert witness named Fernando Arturo Lopez Antillon, who was a former director of ODHAG and provided his expertise on the use of *recurso de exhibicion personal* (which is similar to our habeas corpus) during the period when Edgar disappeared, explained that he used both REMHI and CEH as background information for his testimony.³⁸⁶

5. LESSONS FROM GUATEMALA ABOUT POST-CONFLICT PLURALISM

The example of Guatemalan transitional justice offers broader lessons for how post-conflict pluralism can have liberalizing effects and fortify the rule of law. Specifically, at the macro level, the TRCs

³⁷⁸ *Sepur Zarco*, *supra* note 286, at 57.

³⁷⁹ *Id.* at 60.

³⁸⁰ *Id.* at 63.

³⁸¹ *Id.*

³⁸² *Id.* at 69.

³⁸³ *Id.* at 60.

³⁸⁴ *Plan de Sanchez*, *supra* note 375, at 87-88.

³⁸⁵ *Id.* at 88.

³⁸⁶ *Edgar Fernando Garcia I*, *supra* note 289, at 38.

in Guatemala: 1) diffused legal norms derived from international human rights and humanitarian law locally; 2) created space for the expression of alternative narratives about the armed conflict that countered the dominant official narrative and ultimately influenced judicial decision-making; and 3) filled a void when impartial and independent state institutions did not exist.

5.1. TRCs Diffuse Human Rights Norms

First, the case of Guatemala demonstrates how TRCs can act as “norm diffusers,” spreading the legal norms and precedent of international human rights law to local jurisdictions.³⁸⁷ Even though, as specified in its mandate, the CEH was not supposed to have any legal effect, it succeeded in bringing the language and norms of international human rights to Guatemala very visibly and with a veil of authority. As I explained in Part II, the CEH interpreted the Oslo Agreement’s reference to human rights as an instruction to use international human rights and humanitarian law when evaluating what occurred during the armed conflict.³⁸⁸ It, thus, characterized the crimes it documented using the language of international criminal justice and human rights law instead of ordinary crimes. For instance, using the Convention on the Prevention and Punishment of the Crime of Genocide, which Guatemala ratified in 1950, as its legal basis, the CEH concluded that the military perpetrated acts of genocide against the Mayan-Ixil population from 1980 to 1983.³⁸⁹ The CEH found that, in that region, between 70% to 90% of the towns were razed to the ground.³⁹⁰

³⁸⁷ Berman, *supra* note 15, at 1173 (defining norm entrepreneurs as “individuals or groups who try to influence popular opinion in order to inculcate a social norm.”)

³⁸⁸ CEH Report, *supra* note 80, at 45.

³⁸⁹ *Id.* at 358 (“A juicio de la CEH, el conjunto de acciones violentas perpetradas por el Estado contra la población maya-ixil durante los años 1980–1983, permite concluir que se cometieron actos de genocidio, inspirados por una determinación estratégica que también revistió carácter genocida, por cuanto un objetivo de la campaña militar contrainsurgente fue la destrucción parcial del grupo víctima, al considerarse que de esta manera se lograría vencer al enemigo.”). Guatemala ratified the Genocide Convention in 1950, before the armed conflict began. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

³⁹⁰ See CEH Report, *supra* note 80, at 358 (“El caso más notable es el de la región Ixil, donde entre el 70% y el 90% de las aldeas fueron arrasadas.”).

A comparison between the cases before and after the release of the TRC reports reveal their persuasive effect, particularly with regard to how courts classified crimes associated with the armed conflict. Prior to their release, Guatemalan courts exclusively characterized even the gravest international crimes as common crimes such as homicide, assassination, or kidnapping. As one human rights attorney explained, the Guatemalan judicial system was not accustomed to using terms like crimes against humanity, disappearance, or torture.³⁹¹ As a result of a deliberate campaign by the military to discredit human rights defenders, human rights was associated with communism; it was synonymous with something bad.³⁹² So even though Guatemala incorporated crimes such as genocide and war crimes into its criminal code in 1973, Guatemalan courts did not classify the grave crimes committed during the armed conflict as such until the late 90s.³⁹³ This change is particularly telling for convictions rendered after the enactment of Guatemala's amnesty law in 1996, which extinguished criminal liability for any common or political crimes related to the armed conflict, but not for core international crimes, like genocide, torture, and enforced disappearance.³⁹⁴ For example, in the decision *Rio Negro I*, rendered in 1998, the Guatemalan court classified the crimes associated with the Rio Negro massacre as assassination, instead of as genocide or crimes against humanity. However, after the release of the CEH report, prosecutors start charging crimes as genocide, crimes against humanity, and enforced disappearances.

Most strikingly, the CEH's conclusion that the military perpetrated acts of genocide against the Mayan-Ixil population was the impetus for two cases that included charges of genocide.³⁹⁵ Not only was this finding the basis of the *Guatemalan Generals* case in Spain, in which genocide was charged, but also in the *Ríos Montt* case in

³⁹¹ Interview with Mynor Alvarado, *supra* note 154 ("La explicación es que, nuestro sistema judicial no estaba acostumbrado a estos casos de lesa humanidad, desaparición, tortura. Eran términos que no se utilizaban.").

³⁹² *Id.* ("Los derechos humanos en Guatemala estaban asimilados a la guerrilla. Es decir, el término viene de los comunistas, desde los guerrilleros.").

³⁹³ See Mark Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 L. & SOC'Y. REV. 533 (2017) (noting that Guatemalan courts rejected challenges to the prosecution of government officials in the 1990s because the country's amnesty law specifically excluded crimes against humanity and genocide from amnesty).

³⁹⁴ Guatemalan National Reconciliation Law, Decree 145-96, Dec. 27, 1996.

³⁹⁵ *Id.* at 358. Guatemala ratified the Genocide Convention in 1950, before the armed conflict began. Genocide Convention, *supra* note 389.

Guatemala, which was the first time that a former head of state was tried for genocide in their home country. Prior to the release of the CEH report, what occurred in Guatemala had not been officially characterized as genocide.³⁹⁶

Given the gap between the enactment of atrocity laws in the early 70s and their use in criminal cases involving grave crimes committed during the armed conflict, the TRCs, by using human rights language to characterize the crimes committed during the armed conflict, facilitated the internalization of human norms, particularly amongst state actors. The TRCs bolstered human rights advocates' claims that these crimes rose to the level of grave international crimes and created political openings for the prosecution of high level military officials. In the view of one human rights advocate I interviewed, the most important aspect of the CEH report was its classification of the facts as crimes, because it provided judges with cover in their decisions.³⁹⁷

Many scholars have examined how legal norms diffuse across judicial networks.³⁹⁸ However, less attention has been paid to how TRCs that characterize abuses using the human rights frame can also spread human rights norms. This finding also builds on the work of other scholars in the political science arena, which examine what factors encourage compliance with human rights law in domestic contexts, particularly those scholars who have explored why prosecutions of human rights violations occur in some post-conflict societies but not others. For instance, Beth Simmons has theorized that ratification of human rights treaties promotes local diffusion of human rights norms in transitioning countries by creating a favorable environment for civil society to demand rights, thereby facilitating social mobilization.³⁹⁹ She theorizes that treaties catalyze a reorientation of citizens' values and beliefs by reframing their grievances

³⁹⁶ CEH Report, *supra* note 80, at 358 ("El caso más notable es el de la región Ixil, donde entre el 70% y el 90% de las aldeas fueron arrasadas.").

³⁹⁷ Interview of a Member of the Legal Team at ODHAG Who Wishes to Remain Anonymous (July 27, 2016) ("Esto ha permitido que los jueces se sientan más amparados en cuanto a sus conclusiones. Lo vimos en el único caso de juicio por genocidio en contra de Efraín Ríos Montt.").

³⁹⁸ See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 148 (2004) (describing principles underlying the formation of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2638 (1997); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *Geo. L.J.* 487 (2005).

³⁹⁹ See SIMMONS, *supra* note 8, at 148.

with the state in terms of guaranteed rights.⁴⁰⁰

In a more recent study, Mark Berlin and Geoff Dancy concluded that the codification of human rights treaties into domestic criminal codes increases the likelihood that human rights prosecutions will occur.⁴⁰¹ Yet, these studies do not account for the justice delay between the adoption of human rights treaties and their use in prosecutions experienced in a number of countries, including Guatemala. The findings of this study point to the need for an external catalyzing factor, such as the intervention of a credible TRC that recasts past violations using the human rights framework, in order to effectuate the internalization of human rights norms. This study thus invites further empirical research into whether this finding—i.e. that TRCs encourage internalization of human rights norms, as manifested by its use in litigation—is generalizable or specific to the context of Guatemala.

The study also adds to the literature on socialization of states by suggesting that acculturation not only occurs among states, but also between transitional justice mechanisms and states. This may also explain Simmons's finding that ratification of human rights treaties only had a measurable effect on human rights compliance in transitioning countries, but not stable democratic countries or authoritarian regimes.⁴⁰²

5.2. TRCs Create Space for Narrative Contestation

In addition to diffusing legal norms, TRCs can offer a locale for narrative contestation, which can also greatly affect judicial decision-making. As prominent legal scholar Robert Cover explained in his landmark work, *Nomos and Narrative*, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”⁴⁰³ In countries transitioning after mass atrocities have occurred, the national narrative, or what sociologist Émile Durkheim called the collective conscience, which is a nation's or society's collective understanding of its own history, must be reconstructed.⁴⁰⁴ Since individuals likely experience mass atrocity

⁴⁰⁰ *Id.* at 152.

⁴⁰¹ See generally Berlin & Dancy, *supra* note 393.

⁴⁰² SIMMONS, *supra* note 8, at 82–86.

⁴⁰³ Cover, *supra* note 30, at 4.

⁴⁰⁴ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 79 (George Simpson trans.,

differently depending on their socioeconomic and cultural identity, creating a common understanding of the past to forge a national identity is extremely challenging.

This was certainly the case in Guatemala, where citizens had very different experiences of the violence depending on whether they were urban or rural, poor or wealthy, and Mayan or ladino. For example, if you were a wealthy ladino living in Guatemala City, you might have been only vaguely aware of the scorched earth campaign in the countryside.⁴⁰⁵ This divide made the work of the TRCs all the more important. Because the TRCs interviewed thousands of individuals all across Guatemala in an attempt to clarify the past, a task that courts are not equipped to take on, they were able to construct a collective narrative that was a composite of all of those individual voices. The narrative that emerged from this process was quite different from the official state narrative that the military had propagated during the years of the conflict. In Christian Tomuschat's own words, before the CEH released its report, "the country felt that the armed conflict was a big success; that the country had been saved from Communism and that it had in fact been a terrible tragedy did not enter their minds."⁴⁰⁶ Hilda Pineda, the current head of the war crimes unit in the Guatemalan Attorney General's office, explained that part of the strategy of the Guatemalan government was to ensure that no one knew what was happening. That allowed them to guard their prestige.⁴⁰⁷ She said that she has even called journalists to testify in her cases about how they were censored and prevented from informing the public about what occurred.⁴⁰⁸ Once the CEH's finding that the military was responsible for over 90% of the crimes

1933) (describing the collective conscience as the "totality of beliefs and sentiments common to average citizens of the same society").

⁴⁰⁵ Interview with Hilda Pineda, *supra* note 198 ("El ejército, parte de su política de arrasamiento de tierras y de estrategia militar fue no permitir ninguna publicidad, no se sabía lo que ocurría, las comunidades estaban sufriendo de una manera tan cruel y despiadada y sin embargo muchas personas de la ciudad nunca se enteraron de lo que ocurría.")

⁴⁰⁶ Interview with Christian Tomuschat, *supra* note 109.

⁴⁰⁷ Interview with Hilda Pineda, *supra* note 198.

⁴⁰⁸ *Id.* ("Por mucho tiempo se ocultaron los hechos, incluso los mismo de comunicación que han declarados en algunos de los juicios, el caso de Ríos Montt, el caso de la embajada de España, el caso de Fernando García, han llegado periodistas a ser testigos de los juicios y ellos mismo dicen 'teníamos censura, estábamos censurados, no podíamos decir lo que ocurría, no podíamos informar.'")

went public, it took away from the military's prestige and glory.⁴⁰⁹ According to Christian Tomuschat, discrediting the military, which still had a tremendous amount of political power in Guatemala, was one of the most important outcomes of the CEH's work.⁴¹⁰

The narrative shifting work of the TRCs had a very tangible impact in Guatemala. This recasting of the narrative of the armed conflict and resultant delegitimization of the military created an opening for prosecutions of high-level officials that did not exist prior to the release of the CEH.⁴¹¹ As the former Attorney General of Guatemala Claudia Paz y Paz explained, the CEH report was critical not only because it defined the crimes of the military, but also because it created the political will necessary to bring the cases charging those crimes.⁴¹² Similarly, Alejandro Rodríguez believes that the most important thing that REMHI and CEH did was to engender a movement for justice.⁴¹³ In his own words, "Here, without a doubt, the CEH report shook Guatemala and opened the way to start the fight for justice."⁴¹⁴

In addition, Alejandro Rodríguez believes that without the CEH report, civil society would not have been able to advocate as successfully for the need to construct new legal systems.⁴¹⁵ In his view, the CEH report motivated the population. It generated a space to discuss what had never been discussed before.⁴¹⁶ He explained that before the release of the CEH report, everyone was afraid. It is hard to describe or understand the fear that existed in 1993 and 1994, much less the early 80s. The population was completely

⁴⁰⁹ Interview with Christian Tomuschat, *supra* note 109.

⁴¹⁰ *Id.*

⁴¹¹ García-Godos & Raúl Salvado, *Guatemala: Truth and Memory on Trial*, *supra* note 92, at 208 ("The first major impulse leading to judicial processes for past human rights abuses was the delivery of the CEH report in 1999. The report offered a window of opportunity for victims' groups and human rights organizations to put forward claims to establish responsibility for past crimes.")

⁴¹² Interview with Claudia Paz y Paz, Former Attorney General of Guatemala (Feb. 14, 2017).

⁴¹³ Interview with Alejandro Rodríguez, *supra* note 61 ("Creo que eso es lo más importante, el proceso REHMI y comisión genera un movimiento en busca de la justicia.").

⁴¹⁴ *Id.* ("... aquí sin duda el impacto de la CEH sacudió a Guatemala y abrió el camino para iniciar la lucha por la justicia.").

⁴¹⁵ *Id.* ("Sin el informe de la CEH no se hubiese podido avanzar en la necesidad de construcción de nuevos sistemas jurídicos.").

⁴¹⁶ *Id.* ("Pero probablemente el informe de la CEH conmovió a la población. Primero generó el espacio para discutir algo que nunca se había discutido, que todo el mundo tenía miedo de poderlo hacer.").

immobilized.⁴¹⁷ The CEH was critical in creating safe spaces where victims could express themselves, discuss what really happened, and develop their own history.⁴¹⁸

The significance of historical narrative is all the more important when courts grapple with extraordinary crimes, like genocide and crimes against humanity. As Neha Jain explains in *Radical Dissents*, “unlike the standard case of trials for ordinary crimes, extraordinary criminality such as mass atrocity requires the construction of a broader context that provides meaning and content to the conduct of the individual accused in the courtroom.”⁴¹⁹ This is because, by their very definition, crimes against humanity and genocide require prosecutors to prove that individual attacks are part of a broader operation.⁴²⁰

Due to the time and procedural constraints that courts face, courtrooms are not suitable venues for developing the historical context needed to understand these crimes. For that reason, the narratives documented by the TRCs in Guatemala supplied more than just the historical backdrop of the crimes; they significantly influenced how courts determined what crimes had been committed, why they occurred, and who was culpable for them. As I described in Part III, prior to the release of the CEH, Guatemalan courts often portrayed the crimes associated with the armed conflict as the acts of rogue military or paramilitary officials, or as the court did in *Rio Negro I*, as the acts of civilians with no connection to the military.⁴²¹ The REMHI and CEH reports revealed that these were not the

⁴¹⁷ *Id.* (“La verdad es que no logró como describir o aprehender el fenómeno del miedo que había en 1993–1994, la que población esta inmovilizada completamente. Y ya ni regresemos al 84, que son ya 30–35 años que llevan estos juicios . . .”).

⁴¹⁸ *Id.* (“El sistema de justicia ha cambiado muchísimo y el CEH fue central en generar espacios de confianza, discusión de la verdad, que las víctimas pudieran tener un espacio para expresarse, y una reivindicación histórica.”).

⁴¹⁹ Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT’L L. 1163 (2017).

⁴²⁰ For example, the Rome Statute—the treaty that created the International Criminal Court (ICC)—provides that in order for a crime to be classified as a crime against humanity it must be part of a “widespread or systematic” attack. Rome Statute of the International Criminal Court art. 7, 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90. An attack is considered “widespread” either because of the large number of victims in a single incident, or the cumulative effects of a number of incidents. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013 (2005). To be “systematic,” it must have occurred as part of an organized plan to commit violence against a collective. *Id.*

⁴²¹ *Rio Negro I*, Part B, *supra* note 260, at 1–2, 67.

random acts of a few bad apples, but rather part of a broader orchestrated military plan, thus legitimizing the narrative of Mayan communities whose voices have traditionally be marginalized in Guatemala. In this way, the TRCs had a similar effect to what Beth Simmons theorizes regarding human rights treaties, namely they empowered groups with different rights preferences than the country's political elites.⁴²²

5.3. TRCs Fulfill the Duties of Corrupt or Ineffective State Institutions

Finally, because TRCs are typically state-sanctioned entities, but operate independently from the government, they can fill a void when state institutions are corrupt or inoperable. As was the case in Guatemala, after mass atrocities occur, state entities may be defunct or act in the service of human rights abusers. Under these circumstances, affected communities are justified in being mistrustful, even suspicious, of the exercise of state power and the impartiality of government institutions, like the judiciary. In this context, decentralized sources of authority, particularly when it comes to addressing the violent acts of the past, may be advantageous. As I have noted in prior work, "[b]ecause '[t]he repeated experience of domination and defeat leads to psychic withdrawal from the public sphere,' another related goal of transitional justice is the reintegration of victims into society."⁴²³ Building institutions that act in an official capacity, but are not state actors per se, like truth commissions, can create arenas where victims or marginalized groups can engage with an authority figure in ways that rebuild their trust and confidence in the rule of law. Even entities like REMHI that were not state-sanctioned, but had the backing of the Catholic Church, an authority figure in Guatemala, can serve important state-like functions in situations when state institutions are compromised.⁴²⁴

Moreover, in countries like Guatemala, where the entire state apparatus was involved in mass atrocity and state officials including police may have an incentive to destroy or tamper with evidence,

⁴²² SIMMONS, *supra* note 8, at 125.

⁴²³ Rachel López, *The (Re)collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y.U. J. INT'L L. & POL. 799, 838 (2015) (quoting Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 752).

⁴²⁴ Interview with Judge Miguel Galvez, *supra* note 372.

TRCs can play a special role as custodians of evidence. In a number of cases, REMHI filled this role. As mentioned above, REMHI created the first forensic team in Guatemala and the Attorney General's office used the forensic evidence gathered by this team in its cases.⁴²⁵ Similarly, in *Edgar Fernando García I*, the court admitted the recorded testimony of another student who was detained at the same time as Fernando Garcia and explained what occurred. This recording was given to REMHI for safekeeping during the armed conflict and since that student later went missing, the court would not have had access to this information if REMHI had not safeguarded it.⁴²⁶ In that case, the recording was determinative to the court's final decision.⁴²⁷

This finding builds on the work of other scholars who have discussed the integrated nature of fact-finding, particularly in the human rights field. In particular, Pammela Quinn has discussed the importance of other outside entities, who gather facts, later used by courts in their decision-making.⁴²⁸ As Quinn points out, courts are often ill-equipped to engage in the intensive fact-finding needed to make fully informed judicial decisions.⁴²⁹ In contrast to courts, these non-judicial institutions, such as TRCs, special rapporteurs, and other ad hoc appointees are able to draw from a more extensive record and examine a large number of human rights violations as opposed to a single case that is the subject of a prosecution or other legal dispute.⁴³⁰

6. CONCLUSION

As I have outlined in this article, the relics of the peace versus justice debate have created unhelpful binary thinking about transitional justice that persists today. Even though scholars have begun to acknowledge that the debate does not accurately reflect the lived experience of post-conflict societies, the tendency to evaluate

⁴²⁵ Interview with a Diocese Coordinator of REMHI, *supra* note 153.

⁴²⁶ CEH Report, *supra* note 80, at 145 (Tomo VI, Anexo I, Casos Ilustrativos, CI 48, Desapariciones forzadas de Edgar Fernando García, Sergio Saúl Linares Morales y Rubén Amílcar Farfán. Fundación del Grupo de Apoyo Mutuo (GAM)).

⁴²⁷ *Edgar Fernando García I*, *supra* note 289, at 65.

⁴²⁸ See generally Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT'L L. & POL. 97 (2012).

⁴²⁹ Pammela Quinn, *supra* note 14 ("As critical as facts and fact-finding are to judicial decision-making, courts are often poorly equipped to unearth them.").

⁴³⁰ *Id.*

transitional justice mechanisms as separate unrelated entities persists today and stymies further development of the field.

This study, because it is grounded in information from primary sources obtained through field research in Guatemala and Spain, provides a much richer picture of how the work of transitional justice mechanisms can be complementary. On one hand, the investigation, or lack thereof, can inform how TRCs evaluate the judiciary in post-conflict countries and even aid in fact-finding. On the other hand, as the case of Guatemala reveals, TRCs are not simply lesser versions of traditional justice proceedings, but rather can play a critical role in advancing traditional justice and the rule of law in post-conflict societies, by acting as norm diffusers, investigative units, locales for narrative contestation, and cultural conveyers to courts. Post-conflict pluralism thus can be a vehicle for liberalization and democratization.

In light of its benefits, we should embrace post-conflict pluralism, not only because it is inevitable, but also because it is desirable. I thus urge us to design future transitional justice systems with the coordination of these individual mechanisms in mind. This opens the door for additional research in this area. For example, future researchers might examine how to balance the utility of TRC reports as evidence in criminal trials with the due process rights of the accused.

In countries like El Salvador, whose high court recently invalidated the amnesty law enacted after that country's civil war, and Colombia, a country navigating its own transition, lessons about post-conflict pluralism learned from the Guatemalan experience will help them to anticipate ways that the work of TRCs (past or future) and trials can be more fully integrated.