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Tentative Title: Using the ‘G’ Word: The Genocide Determination in Guatemala.

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ABSTRACT

This article focuses on the Guatemalan Commission for Historical Clarification’s¹ (the CEH’s) conclusions concerning genocide. We analyze the CEH’s determination that acts of violence in Guatemala between 1981-1983 fell within the scope of the Genocide Convention. While the extreme violence in Guatemala had previously provoked the use of the term ‘genocide’ from many social sectors, the legal arguments to make that claim were extremely complex. We discuss the social and legal implications of the CEH’s report, with a focus on the issues surrounding genocide. We highlight certain important geographical dimensions to the CEH’s determination of genocide, specifically the varied national, regional and international intersections with the genocide determination of the CEH’s report.

¹ Formally, the *Comision para el Esclarecimiento Historica*, or CEH. In this article we will use the initials CEH, and/or ‘the Commission’ to refer to the institution and its staff, and ‘the CEH’s report’ and/or *Memory of Silence* to refer to the 12-volume work that constituted the final product of the Commission’s work. Often, and especially internationally, the CEH is called the “Guatemalan truth commission” and *Memory of Silence* is cited as “The UN-sponsored truth commission’s report.”

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Introduction

Since ‘genocide’ emerged as a term in international law and politics in 1948, the word has been used to classify the most extreme forms of violence. The label ‘genocide’ conveys that such actions are both *very bad* and *very illegal*. Classifying acts of violence as genocide requires more than just objective data such as testimonies, the discovery of clandestine cemeteries, the exhumation of bones, and satellite images of displaced persons. It takes the power to create a legal argument that satisfies specific criteria and a high burden of proof. It also takes a legal infrastructure and political landscape capable of addressing such contentious, emotive and (possibly) consequential charges.

The power to classify a pattern of past violence as genocide often generates fresh conflict, with certain sectors determined to deny that the violence has those characteristics, and others organized around gaining the stature that the label genocide — the biggest of all crimes- invokes. Having ones’ pain and suffering called ‘genocide’ has certain ramifications; in turn, having ones’ experience ignored or deemed below this threshold also has consequences.² This phenomenon has been studied, most obviously in the Jewish experience under Nazism in Europe and subsequent establishment of the state of Israel, (Segev, 1993), but also concerning Rwanda, (Straus, 2006), the former Yugoslavia, (Morus, 2007) and others.

This article analyzes the significance of the Guatemalan Commission for Historical Clarification’s determination of genocide (through the documentation of ‘acts

² Other studies explore how the labeling of violence as genocide is significant .Site Straus, Power, Segev something from Bosnia. Morus demonstrates how the gravesites around Srebrenica remain an intense site of social struggle, with Bosnian and Serbian communities seeking to claim that the violence inflicted on their own communities was the most egregious.

of genocide’) in its eloquent and extensive 12-volume final report, *Memory of Silence* (CEH, 1999). Others have studied the impact of the violence, especially on Mayan communities (Gonzalez, 2002; Green, Manz, 2004; Zur etc.) Our purpose here is different. We focus on the *genocide determination* as expressed in the CEH report, rather than the impact of the violence, in itself, on culture and society, peoples and places. Instead of analyzing the genocidal policies and affects, *per se*, we address: 1) how and why the violence was called genocide by the Commission for Historical Clarification, and 2) the web of interlinked social and legal implications that flow from the CEH’s determination. Using the ‘G’ word-- genocide— influences how the nature of a conflict is understood. The call for ‘*Nunca Mas!*’ (Never Again!) invokes a refusal to ‘forget,’ without establishing a clear signal as to what, exactly, should be remembered. Among other issues, a determination of genocide influences new political identities, collective historical memory, and legal avenues for recourse at the local, regional and international levels.

During the 36 years of violence that the CEH investigated³ (referred to as the ‘armed confrontation’), an estimated 200,000 persons were killed and 45,000 persons ‘disappeared.’ More than 600 villages were destroyed in the ‘scorched earth campaign,’ and some 200,000 Guatemalans were forced into refuge in neighboring Mexico. More than a million persons were internally displaced. In addition to the brutality of political murders, massacres and other acts of overt violence, the hardships of discrimination were

³ The period of the violence could arguably date back to the conquest and the formation of the “racist, exclusionary state, that protected the interests of a privileged minority” (CEH, 1999:85), but in terms of scope of the CEH’s analysis, the focus was on the 1960-1996 period.

most commonly felt in everyday existence.⁴ Under such conditions, an armed-insurgency formed in the 1960s. While failing to rise to the level of actually taking power,⁵ the existence of the armed rebellion provided the rationale for a violent counter-insurgency campaign that took the form of an assault on the civilian population.

The CEH was the first official body established to address this violence. The CEH found evidence that in specific places, agents of the Guatemalan state committed acts of genocide against Mayan populations. In linking the acts of violence in specific geographical locations to the broader intent of the Guatemalan Army, the CEH created a compelling and convincing determination that the violence constituted genocide. Organizations from civil society have attempted to harness the CEH's report for social and legal purposes, while official sectors have ignored, rejected or attempted to mitigate the CEH's conclusions. In turn, the implications of the genocide determination in Guatemala have intersected with international developments concerning the tensions between universal human rights and state-sovereignty.

The article proceeds in two parts. First, we detail the determination of genocide and how it occurred within the CEH. To do so, we briefly summarize the creation and key characteristics of the Guatemalan Commission for Historical Clarification. We examine how the Commission staff deliberated the issue and constructed the argument concerning genocide. It is an important story to be told, in that the debates inside the Commission illuminate struggles in Guatemala (of course), but also in that these debates

⁴ According to the most widely accepted socio-economic data, 54% of the Guatemalan population lives in extreme poverty, with incomes that fail to meet basic needs.

⁵ As, for example, in neighboring Nicaragua in 1979 when the FSLN seized power.. The Guatemalan rebels failed to achieve even the threat of doing so, as by the FMLN in El Salvador in the early 1980s.

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are reverberating in other locales. Throughout the (so-called) international community, the ability to determine when violence is ‘good’ and ‘just’ (i.e. a *just war*) or when it is ‘bad’ or criminal, signals particular powers. The second part of the article discusses the implications of the CEH’s finding of genocide. We discuss the legal efforts to prosecute those responsible for the violence, and the impact of the CEH’s report on these activities. Finally, we discuss the social implications of the CEH’s report on historical memory and political identities in Guatemala, and possible tensions between the legal and social aspects of the genocide determination.

An additional goal of this article is to explore the relationship between geography and genocide in Guatemala. We focus on the ways in which the Guatemalan Commission for Historical Clarification was able to come to the conclusion that the violence in Guatemala amounted to acts of genocide, and, in turn, how the configuration of the nature and extent of these acts of genocide met the legal criteria for a genocide finding under the Genocide Convention generally, as well as specifically within the developing body of jurisprudence that occurred in the 1990s.⁶ We suggest that, for Guatemala, geography was an essential part of the methodology and the reasoning employed by the staff of the CEH in reaching the determination of genocide. In turn, the genocide determination for Guatemala has profoundly influenced the geographical dimensions of legal and social landscapes.

Part One: The Commission for Historical Clarification

⁶ Especially the jurisprudence generated through the cases before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

a) Establishing the CEH

The URNG and the Guatemalan government began negotiating in earnest in 1994.⁷ How to address human rights violations⁸ (especially the violence suffered by the civilian population) was a very contentious topic for all parties. Issues of justice and accountability threatened to derail the entire negotiation process. Although the popular sector wanted ‘the truth’, when the parties sat down at the negotiating table, the salient carrot to encourage the evolving peace process was amnesty.⁹ After intense negotiations,¹⁰ on June 23, 1994 the parties agreed to an “Accord for the Establishment of a Commission for the Historical Clarification of Human Rights Abuses and Other Acts of Violence that Have Caused the Suffering of the Guatemalan People.” Critics pointed out that, as mandated, the Commission lacked the authority to either identify (‘name names’) or punish offenders. The accord failed to guarantee any material (i.e. financial) reparations for the victims/survivors. The six-12 months allowed seemed hopelessly inadequate for the task of investigating atrocities that had occurred during 36 years of

⁷ The guerrillas had been insisting on negotiations for years, but the Guatemala government had consistently refused to negotiate with the “communists” and “terrorists.” The Guatemalan military seemed to believe that it had little need to negotiate with the URNG, which was widely considered to have been effectively beaten militarily during the counterinsurgency of the 1980s.

⁸ The accord mandating the Commission uses the term ‘armed confrontation.’

⁹ This is the classic equation that in Latin America in the 1980s-1990s produced ‘commissions of inquiry’ that became known as “truth commissions.” See, especially (Hayner 1994, Popkin and Roht-Arriaza, Ortlincher all the zillion others). Big footnote here with reference to some of the key scholarship on truth commissions as a genre.

¹⁰ Participants from both parties and the UN moderating team reported that this was one of the most difficult elements of the entire peace-process. The military was seen as the winner in this round of negotiations.

conflict, particularly as the Commission's funding was left undetermined.¹¹ The Commission was to be comprised of three persons; two Guatemalans and one international.¹²

Following the finalization of the peace process in December 1996, the parties were consulted as to the selection of the three Commissioners. The February 1997 selection of Christian Tomuschat, (a German law professor and human rights expert with experience in Guatemala) as head of the Commission, was followed by the appointments of Edgar Alfredo Balsells Tojo, a newspaper columnist and former Constitutional Court Judge with a history in academia, and Otilia Lux de Coti, an indigenous leader considered a political moderate, but active within Mayan politics. The Commission employed a large staff (almost 300 persons, also comprised of nationals and internationals), and established field offices throughout the country. The field offices collected over 8,000 testimonies in the countryside between September 1997- February 1998. The Commission also received submissions from organizations from civil society, key witnesses, and declassified US documents. Although the Guatemalan government and army tolerated the Commission, the military refused to share significant information, and very few military officers gave testimony to the Commission. The three Commissioners and their staff debated and deliberated over the methodology and ideological framework for the report. In some sense, the Commission was attempting to overcome some of the weaknesses of the mandate. For example, the Commission was barred from 'naming

¹¹ The Commissioners had to spend their first few months raising funds from sympathetic embassies.

¹² Guatemalans were aware of the experiences of several other 'truth commissions' in the region, particularly Chile and El Salvador. In Chile, the eight commissioners were all nationals; in El Salvador three foreigners were selected. Guatemala's was a 'hybrid' approach, reflecting the compromises made by both parties.

names' and therefore chose to focus on the institutional structures that perpetrated the violence. Of particular importance was the question as to whether the CEH would refer to the violence as genocide.

Given the weakness of the mandate, the secrecy of the CEH's work, and a political atmosphere rooted in silence and denial rather than transparency and accountability, expectations for the CEH were quite low. The public was shocked, then, when on February 25, 1999 the CEH released its astonishingly strong report, *'Memory of Silence.'* In more than 3,500 pages, the CEH determined that 93% of the acts of violence documented were committed by the military or their agents,¹³ and that between 1981-1983 the state had committed acts of genocide. In the next section we examine in details how this determination was made.

b) The argument concerning 'Acts of Genocide'

The genocide argument was one of the most complex parts of the CEH process. Genocide could not simply be deduced from the ferocious levels of violence that Mayan communities in Guatemala suffered during the early 1980s, as compelling as the testimonial evidence was. The high burden of proof for making a genocide argument—that people are killed because they belong to a particular national, ethnic, racial or religious group *as such*—meant that the CEH's genocide determination was far from inevitable. It had to be constructed from a nuanced reading of recent international jurisprudence vis-à-vis the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter referred to as 'The Genocide

¹³ 3% were attributed to the rebel forces, and 4% unknown.

Convention'), as well as a highly contextualized analysis of the particular geographies of violence in Guatemala.

Initially, support for a genocide determination was not strong within the CEH. The Commissioners and their legal staff recognized the need to draw attention to the massacre of hundreds of Mayan communities from 1981 to 1983. Yet, the lawyers were not confident about scaling the legal barrier to a genocide determination. In particular, head Commissioner Christian Tomuschat was skeptical about the genocide argument. During a rare public forum in May 1998, for instance, Tomuschat faced down vociferous criticism from several Mayan organizations when he refused to commit the CEH to a genocide determination (Ross, 2004: 76). Certainly, the intense emotion conveyed to the CEH by social organizations and individuals within Guatemala helped push the three Commissioners to articulate the report's conclusions with increasing moral force and clarity. But the arguments for or against genocide could not be simple moral judgments. The arguments had to be constructed within the framework of existing international law, with the main obstacle being how to demonstrate that the Guatemalan state *intended* to kill Mayans *as* Mayans.

The difficulties in establishing intent had socio-historical implications as well as legal ones. The CEH's mandate called for the Commission to analyze the root causes of the armed conflict in Guatemala, and this melding of juridical and historical methods set the Guatemalan CEH apart from other similar experiences (broadly referred to as 'truth commissions) in Latin America (Grandin, 2005). Tomuschat had set up a committee of Guatemalan scholars to analyze the causes of the conflict, and this group raised concerns about how a genocide argument might distort the historical analysis. Did the state kill

Mayans *as* Mayans or because indigenous communities were organizing against the state? Would a genocide determination reify the racial characteristics of the conflict, portraying Mayans as passive victims of a racist state when many were protagonists of a broad political struggle? Moreover, even though a large number of people were killed in Mayan communities in the early 1980s, the CEH was documenting a 34-year war, in which there were other sorts of victims, such as *ladino* (non-indigenous) politicians, labor leaders, and urban intellectuals. Would a genocide ruling overshadow the longevity of the conflict and the existence of non-indigenous victims?

The CEH developed a hard-hitting analysis on the causes of the conflict that emphasized multiple forms of social, political and economic exclusions. In addition to Guatemala's structural inequities, the CEH focused particularly on political processes such as the closing of political "space" for opposition following the overthrow of the reformist government of Jacobo Arbenz in 1954, and in the early 1960s. As new movements arose to counter the various structural and political exclusions, the CEH concluded that the state responded with a "disproportionately repressive response:"

The inclusion of all opponents under one banner, democrat or otherwise, pacifist or guerrilla, legal or illegal, communist, or non-communist, served to justify numerous and serious crimes. Faced with widespread political, social, economic, and cultural opposition, the State resorted to military operations directed toward the physical annihilation or absolute intimidation of this opposition.¹⁴

¹⁴ (CEH 1999: 22, paragraph 25). THIS IS FROM THE CEH SUMMARY, INCLUDE THE SUMMARY IN THE BIBLIOGRAPHY

Racial exclusion and persecution against Mayan populations was an important factor in the intensification of the violence in Guatemala, but it wasn't the only factor, or even the primary one. The essence of the conflict wasn't a war by the state against Mayans per se, but a repression against popular movements that challenged Guatemala's exclusionary political, economic and social structures. Many Mayans joined these movements, especially in the 1960s and 1970s. Because of this, a genocide argument built solely around the categories of race or ethnicity would be counter-historical.

The difficulties the CEH had in articulating a position on genocide reflected a lacuna within the Convention itself. Scholars have pointed to a 'blind spot' within the Convention's definition of genocide that neglects political genocide as a category. Certainly, Guatemala evidences systematic political persecution against members of the Communist Party and eventually anyone who could remotely be labeled a communist or 'subversive,' even if this just meant anyone organizing for political, social or economic rights. Yet 'political group' is not included in the language of the 1948 Genocide Convention in part because of opposition from Soviet delegates during the deliberations leading up to the elaboration of the Convention. Legal scholars at the time agreed that the inclusion of political genocide could water down the impact of the genocide convention, enabling any group to claim victimization by genocide. In the past two decades, however, international legal scholars have attempted to address this lacuna.¹⁵

¹⁵ [elaborate a bit on this a couple of sentences within this paragraph]

Despite these concerns, the CEH kept thinking about the genocide issue. Thousands of testimonies told a story of intense brutality against Mayan communities,¹⁶ and the Commissioners wanted to condemn those human rights violations in the strongest possible terms. The debate had political resonance, too, since immunity for genocide was not included in the 1996 Law of National Reconciliation, an amnesty law that preceded the peace accords (certain other crimes were not covered either; this is a topic we take up below). The genocide question kept weighing upon the Commissioners and their legal staff, until they could see their way clear to addressing both the objective and subjective elements of a genocide argument.

Article II of the Genocide Convention defines the crime of genocide in terms of both *objective actions* and a *subjective* element of intent. The objective actions against particular groups must include one or more of the following: 1) killing members of the group; 2) inflicting serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life intended to bring about its destruction in whole or in part; 4) imposing measures intended to prevent births within the group; and 5) forcibly transferring children of the group to another group. The subjective element means the “intent to destroy the group, in whole or in part.” The objective actions were easy to document in the case of Guatemala, through the thousands of testimonies, individual and collective, that the CEH obtained in the rural areas, and the hundreds of massacres in Mayan villages that it documented. The subjective element of intent is more complicated, of course, and to make this part of its argument, the CEH

¹⁶ [footnote on the number of massacres documented in the final report—660?].

reviewed recent advances in international jurisprudence related to the definition of genocide.

In 1996, the International Criminal Tribunal for the Former Yugoslavia (ICTY) had interpreted the subjective element of genocide in a way that helped the CEH move forward on its own analysis. Specifically, the ICTY asserted that the intent to commit genocide did not have to be expressed clearly. It could be inferred from a “general political doctrine” combined with the repetition of destructive and discriminatory actions.

¹⁷ In other words, if the motive for destroying an ethnic group is not racist per se, but strictly military, this is still a basis to determine the crime of genocide, so long as the victims are targeted because of their membership in the group.¹⁸

Two distinctions are important to this line of reasoning. The first is the distinction between motive and intent.¹⁹ The second is the distinction between genocidal policy and ‘acts of genocide.’²⁰ The CEH report notes that “it is enough to intend to destroy the

¹⁷ [cite relevant paragraph of report]

¹⁸ [cite paragraph in CEH report].

¹⁹ *I think we need to be clearer about why differentiating between motive and intent was such a big deal, that is, why that allows for a genocide determination to be made. The problem in Bosnia (or for the prosecutors at the ICTY) was similar and yet different. On the one hand the prosecutor had extensive evidence of mass slaughter and the victims being targeted for being Muslim men and/or boys. The prosecutor had difficulty coming up with ‘intent’ because 1) there were no government documents saying that killing Muslims, in whole or in part, is our intent and 2) no whistler-blower willing to testify that the planning included that intent, for example, and 3) the defendants argue that they had intended to kill soldiers, who just happened to be Muslim. It seems like the problem the CEH faced concerning intent was different, in that the issue was how to avoid reifying Mayan victims? One way to do this might be to move the paragraph ‘two distinctions are important’ closer to the end, so that the reader has more of the details...and the two distinctions are presented as a conclusion?*

²⁰ *The ‘Acts of Genocide,’ versus ‘Genocide’ distinction has a history, outside of Guatemala. What most genocide scholars will hear when they hear ‘acts of genocide’ is the US State Department’s bullshit attempt at evading the question, ‘what are you going*

group, whatever the motive may be.” Distinguishing between motive and intent allows the CEH to differentiate between a genocidal policy and acts of genocide: “A genocidal policy exists when the final objective is the extermination of a group, in whole or in part. Genocidal acts exist when the final objective is not the extermination of the group, but other political, economic or military ends, in which the means used to achieve this goal contemplate extermination of the group in whole or in part.”²¹ So, in the case of Guatemala, the state’s ultimate motivation was to defeat the armed insurgency, but in order to do this, it intentionally destroyed Mayan communities seen as a potential support base for the guerrillas. This is enough to assert the crime of genocide, according to the CEH.

The term “acts of genocide” is analytically important to the CEH report in that it allows the CEH to assert that a genocidal crime was committed, even if the state’s actions against Mayan communities were motivated by political and military criteria rather than purely racial objectives. The point is to understand how these various factors came to be intertwined in particular times and places, and how the army’s “general political doctrine” allowed for an assault against entire Mayan regions.

to do about the unfolding genocide in Rwanda’ when confronted with questions about film-reels of butchered bodies in Kigali in April 1994. The US State Department famously (or infamously) said that ‘acts of genocide’ were occurring and refused to say what that had to do with ‘genocide’ or the US’s obligations to prevent. So we have to somehow footnote or add enough so it is clear that the CEH was working with ‘acts of genocide’ in order to determine genocide rather than deny it. CJA lawyer suggests that the commission was very afraid, reluctant etc to use the powerful word ‘genocide’ when it knew that its ability to research and collect evidence was limited by time, money and politics. But it had confidence in the overwhelming evidence that it did find in specific cases. So it used ‘acts’ of genocide to both establish genocide but also as a caveat, referring to what it actually could prove.

²¹ [cite paragraph from report, authors’ translation]

The National Security Doctrine was the guiding military principal of the Guatemala army during the Cold War, as it was for many other Latin American militaries.²² The National Security Doctrine held that it was the responsibility of the military to protect the country against internal “subversion,” specifically the threat of “Communism.” The NSD promoted the idea of the “internal enemy” as a prime threat to the nation’s stability, and this notion of internal enemy was intrinsic to the repression in Guatemala during the years of the armed conflict. The concept of internal enemy became operationalized in different ways throughout the period of the conflict: sometimes it meant actual members of the Communist Party, or opposition politicians; other times it was urban labor leaders, intellectuals, or rural activists.²³ Key to concluding that acts of genocide were committed in Guatemala was showing how the concept of internal enemy came to be applied to entire Mayan regions, and how the Guatemalan state opted for the counterinsurgency option with the highest toll on human life among the civilian population in Mayan areas.

The CEH’s genocide analysis centered on four regions where evidence indicated that the brunt of human rights violations took place from 1981 to 1983. These four regions were: 1) Maya-q’anjob’al and Maya-chuj, in Barillas, Nentón and San Mateo Ixtatán, northern Huehuetenango; 2) Maya-ixil, in Nebaj, Cotzal and Chajul, department of Quiché; 3) Maya-k’iche’ in Zacualpa, department of Quiché; and 4) Maya-achi, in Rabinal, Baja Verapaz.²⁴ In these regions, where nearly all the victims of human rights violations were Mayan, the CEH’s analysis was made after a careful and integrated study

²² [cites? Maybe cite the National Security Archive briefing books on Guatemala, or simply cite the pages of the CEH report that refer to the NSD].

²³ [cite interview with Marcie]

²⁴ Add map here of these regions?

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of testimonies, cases, key witness interviews, secondary sources and detailed maps of insurgent activity, military command structures and massacred villages. The CEH was also very clear that it focused on only four regions because of the practical limitations in its investigative capacity, without meaning to conclude that these were the only places in Guatemala where acts of genocide may have taken place.

In these four regions, Mayan populations were the targets of systematic human rights violations. This included the individual execution of Mayan community leaders (catechists, Mayan priests, cooperative members and members of local development committees and social organizations), as well as collective massacres. Soldiers and paramilitary forces made no distinction by age, sex, or condition of the victims. Members of the army or army-directed civil patrols systematically carried out acts of extreme cruelty, including torture and other inhuman and degrading treatment, whose intention was to terrorize the community and destroy the foundations for social cohesion. This included the collective rape of women, and the murder and mutilation of children and elderly people, as well as women and men. Indiscriminate massacres were accompanied by the razing of villages; in the Maya-ixil region, for example, between 70% and 90% of the villages were destroyed. Crops were burned, leaving these populations without food, and survivors were persecuted and bombed as they fled into the hills. The CEH demonstrated that these crimes were not excesses committed by rogue troops, but actions strategically planned by the army high command to destroy the actual or potential social support base of the guerrillas.

The Guatemalan state intended to kill Mayans, the CEH asserted, because it conflated these populations into its target of “internal enemies” even though its

overarching goal was the defeat of the guerrillas. The army redefined indigenous populations into “good” Mayans (deemed to be on the side of the army) and “bad” Mayans (believed to be supporting the insurgency). “Good” Mayans could be redeemed, but “bad” ones had to be eliminated. How entire communities, regions and ethnic groups come to be defined as “bad” Mayans (i.e. targets for elimination) had to do with the legacy of racism in Guatemala but also with the army’s evaluation of the political histories of particular regions.

For example, the CEH’s summary of genocide in the Maya-Ixil region of northern El Quiché notes that army officials studied the history of the region in depth. A series of revolts in the Ixil area in the nineteenth and twentieth century marked the Ixils as an “historically rebellious” ethnic group and a “natural support base” for the guerrillas.²⁵ The army designated the area around the three main Ixil towns as the “Ixil Triangle,” after which the entire region came to be known by this military term taken from the name of the Mayan ethnic group that resided there (the military’s counterinsurgency campaign there in 1982 was called “Operation Ixil”). The crux of the CEH genocide argument in this region is that historical and socio-political criteria led the army to consider the Ixil population *as such* to be “internal enemies,” or “bad Mayans.” This is what brought about acts of genocide directed at the Ixil population as a whole, including mass killings and forcible displacement.

The CEH genocide argument, then, was not simply deduced from the large number of human rights violations experienced by Mayan populations during the height of the counterinsurgency war. The distinctions between motive and intent, and between genocidal policy and acts of genocide, allowed the CEH to maneuver around the lacunae

²⁵ [paragraphs 897-910)

in the 1948 Genocide Convention, and to construct an argument that incorporated the political histories of Mayan populations as well as their status as victimized ethnic groups.

Particular acts of violence, which exhibit the characteristics of one of the five categories listed as ‘acts of genocide,’ establish a pattern of such ‘acts’ such that taken together (geographically) these acts constitute genocide. ‘Geography’ provides the methodology to link evidence in particular places to genocidal intent, precisely because the Commission lacked time and resources to operate in all regions of the country.

Part Two: Legal and Social Implications

Memory of Silence constitutes a key link between Guatemala and genocide. While other sections of the CEH’s report are potentially more important for understanding the conflict (for example the CEH’s analysis of military intelligence) the CEH’s report, and the Commission itself, are best known for having determined that certain acts of violence in Guatemala met the criteria for genocide. The fact that the CEH called the violence ‘genocide’ is what is remembered and broadcast in national and international media.

The reactions to the CEH’s report, and its determination of genocide, ranged from euphoric, to complete rejection. For the human rights community in Guatemala, the strength of the CEH’s final report, including its determination of genocide, was a rare,

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and welcomed, victory. Many groups feel vindicated by the report's conclusions precisely due to the genocide determination, in ways that these communities would have rejected the report without such a finding. Without the determination of genocide, the CEH report could well have failed to resonate with the communities providing testimonies to the CEH. In contrast, members of the Guatemalan state and military refused to accept the report.²⁶

What difference does the genocide determination in the CEH's report make, and for whom? What would 21st century Guatemala look like if the report had been published without such a determination? Here we highlight certain interlinked legal and social implications.

a) Legal

The military had permitted the establishment of a Commission on the basis that its findings would lack judicial consequences.²⁷ As agreed upon in the course of the lengthy and precarious process, amnesty for the belligerents was an accepted fact of the negotiations. As the peace process was moving into its final stages in December 1996, the Guatemalan government promoted and passed a 'National Reconciliation Law,' which was widely perceived to be the main legal instrument by which perpetrators of human rights violations would be assured amnesty. However, the National Reconciliation Law contained a clause (Article 8) which specifically prohibits the

²⁶ (add paragraph here from Liz's carnegie work, and/or Amy's notes from 1999)

²⁷ Cite specific language in the Accord mandating the Commission, that refer to the fact that the work, report and recommendations of the CEH should have no judicial consequences.

granting of amnesty for the crimes of “genocide, torture or forced disappearance.” The CEH’s genocide determination seemed to have established a legal loophole around this amnesty legislation.

Granted, the problem with prosecuting mass atrocity in Guatemala had less to do with deficiencies in the legal code²⁸ than with the social context in which both the amnesty (the National Reconciliation Law) and the CEH’s report collide. Although Article 8 of the National Reconciliation Law prohibited the granting of amnesty for genocide, the law ran the risk of being interpreted in a manner contrary to international law and the Guatemalan state. The linchpin was the ability to define an act of violence as a ‘crime’ (and therefore outside the parameters of the amnesty) rather than an act of war (and therefore protected by the National Reconciliation Law). It is left to judges to make such rulings, and Guatemalan judges have been notoriously reluctant to prosecute on issues concerning the state and human rights.²⁹ The problem is less the actual wording of the amnesty legislation, but rather the world (and the courts) in which it would likely be interpreted. Cases against the state or individuals have rarely been taken up in Guatemalan courts (Mersky and Roht-Arriaza, 2005). One key exception was the prosecution of a general and two colonels for the assassination of Guatemalan anthropologist Myrna Mack. That paradigmatic case illustrates the difficulties and dangers of the pursuit of justice within Guatemala (Hale, et. al. 2002).

²⁸ Guatemala is a signatory to the *Genocide Convention* and the *Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. (add more info like when Guatemala signed?)

²⁹ (get cites from the recent UN report Liz sent)

In contrast to other sites of mass violence, (such as for the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia),³⁰ the United Nations has, to date, failed to establish an international court to investigate and prosecute the Guatemalan atrocities. Guatemalans have taken numerous complaints to a regional body, the Inter-American Court of Human Rights, located in San Jose, Costa Rica. The results are varied, with Guatemalan plaintiffs experiencing limited success in recent (post 2000) admissions of responsibility by the Guatemalan state,³¹ possibly influenced by the CEH's 1999 report and its strong supportive evidence and argument determining genocide.³² Even the Guatemalan's governments decision to accept responsibility in certain cases falls far short of achieving 'accountability,' in that 1) the Inter-American Court lacks the ability to determine individual criminal accountability, 2) in many instances, it is unclear just what the Guatemalan government is accepting responsibility for, and 3) the collective reparation measures taken have been at best modest and at worst divisive for the communities affected by the violence.³³ Given the complex and shifting nature of who,

³⁰ The genocide of 1981-1983 also falls outside the temporal jurisdiction of the International Criminal Court, which can only prosecute crimes committed after July 1, 2002.

³¹ Roht-Arriaza and Merskely, get entire citation from Liz

³² Can we infer an influence from the timing, i.e. that the CEH's report has given the plaintiff's more support and/or weakened the state's ability to protect the perpetrators within past and current governments? Why the state began to accept the verdict of the Inter-American cases, maybe the genocide argument helped spur this, because it impacted Guatemala in the international arena, and Rios Montt, the focus of the genocide accusations is in Congress, so to deflect criticism away from the FRG the state admits to the past wrongdoing, although M and N note that this is very tenuous admission, particular factions within the state not necessarily a consensus position. Very complex and shifting nature of who makes what kinds of decisions, moreover as M/N point out it is really difficult to determine what sort of responsibility and/or acknowledgement of genocide, if any, has come about in these particular settlements before the regional court.

³³ Roht-Arriaza and Merkey ibid

within the Guatemalan government at any particular time, promotes the admission of responsibility, it is difficult to believe that accepting certain verdicts by the Inter-American Court constitutes a shift from the culture of denial and impunity. Moreover, government officials have cooperated in San Jose, only to fail to follow through on obligations at home.

Guatemalans have also pursued cases abroad under the principle of universal jurisdiction.³⁴ Stymied by impunity and inadequate judicial remedies at home, and in collaboration with increasingly sophisticated transnational activists (Keck and Sikkink, 1998), Guatemalans (like others across the globe) have found certain national courts receptive to the idea that some crimes are so heinous as to make them ‘crimes of international concern’ and hence, appropriate for investigations and/or trials despite the fact that the alleged crimes occurred ‘far’ from the seat of the court (see Ross, 2001, Sriram, 2003). Madrid and Brussels have been particularly sympathetic hosts to such suits. In 1999, Rigoberta Menchu Tum (the Guatemalan Mayan activist who won the 1992 Nobel Peace Prize) filed a complaint in Madrid.

In these instances, the fate of the Guatemalan cases in Madrid are tied to the fate of the principle of universal jurisdiction, itself. In numerous instances, it is apparent that every ‘advance’ of universal jurisdiction has been met with political resistance. For an international order that relies upon guarantees of diplomatic immunity between nations,

³⁴ The doctrine of universal jurisdiction holds that certain crimes are so heinous as to be of international concern. In its broadest interpretation, universal jurisdiction means that any court, anywhere, can prosecute the perpetrators of crimes such as torture, even if the accused is from a nation other than where the suit is brought (see Sriram, 2003, and Ross, 2006b). Universal jurisdiction received little attention until it ensnared Chile’s General Augusto Pinochet Ugarte in October 1998, since that time scholars have noted an acceleration in activities (the so-called ‘justice cascade’—Sikkink).

universal jurisdiction represents a troublesome trend--a disruption of the established order between nations-- and has therefore been resisted. In dynamics classic to this tension, the Guatemalan cases have proceeded in fits and starts in the Spanish courts (Roht-Arriaza, 2006). The central tension is between the universal imperative to prosecute (and therefore resist and deter) heinous crimes, and the desire to preserve state sovereignty and the international order.

The genocide determination by the CEH must be understood within these specific geographies of violence, power and justice. The RMT Foundation, CALDH and the CJA, (the organizations most directly associated with legal activism surrounding prosecuting genocide in Guatemala), reference the ‘Un- sponsored truth commission’ and highlight its finding of genocide. The lead lawyer in the case before the courts in Madrid insists that the CEH’s report was absolutely crucial for the advancement of these cases in Madrid. In the Inter-American cases in San Jose, Costa Rica, and those moving forward in Madrid, Spain, one of the central arguments put forward by the plaintiffs is that the Guatemalan state has failed to prosecute these cases within its own judiciary, such that the failure to investigate/prosecute constitutes a further crime, as well as the rationale for bringing such cases before alternative (regional and international) jurisdictions. Indeed, in many instances, Guatemalan plaintiffs must support the claims before regional and international bodies based on the failure of the Guatemalan state to effectively handle such complaints.

³⁵ Having both the CEH’s documentation and determination of the crime of genocide, as well as the absence of judicial remedies at home, bolsters the rationale of universal jurisdiction in Madrid and the pursuit of cases before the Inter-American Court. In turn,

³⁵ Although in the latest round of appeals, the Guatemalan won in that the Spanish courts accepted that they had jurisdiction and that the Guatemalan plaintiffs didn’t have to show lack of progress at home.

Guatemala is contributing to this particular global movement. In short, the CEH's determination of genocide has implications within and beyond Guatemala, for the way in which it might bolster the growing practice of universal jurisdiction.

Finally, it is important to note that the Guatemalan cases being brought forward in Madrid seek to utilize the international arena, but with the express purpose of furthering judicial developments within Guatemala, itself. Sources within Guatemala, such as at CALDH, have described their efforts in the international arena as being a component of a broader strategy to promote the development of the justice system and therefore accountability in Guatemala. Prosecuting the genocide at home is seen as a way to develop the judicial system and defeat future impunity. The stated goal, (consistent with the Pinochet Precedent)³⁶ is that the persistence of legal cases in the international arena will further cases at home.

The CEH and its report have a dialectic relationship to these events. On the one hand, the creative use of foreign jurisdictions can stimulate (rather than replace) local efforts, such as in Mr. Pinochet's case. The CEH was able to envision, debate and publish an analysis that called certain acts of violence genocide, in part due to developments in international legal jurisprudence. In turn, the CEH's analysis of genocide in Guatemala has contributed to these developments in regional and international arenas. International bodies are being created, and national courts such as those in Brussels and Madrid, are being transformed through the activities associated with hosting crimes of international concern, precisely due to the failure of judicial remedy in the places where the crime occurred.

³⁶ After returning home to Chile from London, Pinochet faced hundreds of suits in Chilean Courts (Roht-Arriazza, 2005).

b) Social

Clearly, these legal activities are directly related to the social, in that some of the legal advances, even in San Jose or Madrid, embolden efforts by social movements organized around justice and accountability in Guatemala. The legal advances rely upon the efforts of social movements, and in turn, the activities by social movement actors influence the possibilities in legal arenas.

In a sense, the genocide determination by the CEH ‘cuts two ways’ in legal and social aspects. Although the genocide determination has been welcomed in its vindication of the suffering as well as its potential to open up avenues for the legal process, it also has the potential to limit the historical understanding(s) of the nature of the conflict in problematic ways. Focusing on the violence against Mayans AS Mayans allows for a form of ‘flattening out’ the historical analysis, reducing Mayan political subjectivities to ethnic victims. Recall that this concern had been grappled with during CEH staff’s deliberations; members of the staff were wary of casting an a-historical ‘ethnic’ flavor to the violence, which evidence suggested had been rooted in the Guatemalan state’s effort to eliminate political opposition. So while in some respects the genocide determination is an accomplishment with ‘progressive’ implications, in other ways the determination of genocide could, actually, reduce historical understandings of the causes and nature of the violence.

Much of this problematic—the ‘pros’ versus ‘cons’ of labeling violence as a genocide—resonates with the inadequacies of the Genocide Convention, itself, which

relies on the reification of racial, ethnic, religious and national identities in order to prove that such violence is the most heinous. How violence is understood, and how historical memory is formed, is a tension apparent in many places. How the past is remembered is certainly key for society and culture. All historical memory contains multiple narratives of “what happened:” selecting some means excluding others. In this particular case, explaining the violence in terms of its Mayan victims presents the difficulty of missing the accurate socio-political analysis, as a trade-off for earning the ‘genocide’ distinction.

While it is difficult to make definitive claims in the absence of further research the genocide determination appears to have helped keep the CEH report alive. The fact of *Memory of Silence* means that the ‘genocide’ persists as an issue that refuses to be buried. Genocide ‘hangs in the air’ in Guatemala. It helps keep space open to talk about the past and the ongoing effects of the war.

Genocide against Mayans creates a space for pressing certain revindicaciones, ie reparations, this is very conflictive ([should they go only to Mayans?]) so there are many initiatives related to this: exhumations, ‘memory’ houses and museums, focused on the victims of the war. But it’s also a ‘clean’ space untainted politically by associate with the failed revolutionary movement ie the construction of Mayan populations as victims.³⁷

Conclusion:

The genocide determination moved some things forward, such as regional and international trials, and keeping the CEH report a living document in Guatemala, but also

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set other things back like a frank assessment of Mayan involvement as historical protagonists in the revolutionary movement.

Still don't know where to put this in:

Quote Marcie:

I think it's very important now to decriminalize those people whose lives were lost. One of the ways that this society has dealt with the post-war coming to light is to see victims as a private problem of each family. In a sense, then, you have a privatization of the loss. As if the loss of some 200,000 lives was not also a loss for the society as a whole, but rather each mother, father, sister, brother or child's loss on an individual scale. As if those 200,000 lives didn't mean anything in terms of the country's potential toward the future, as leaders, as thinkers, as producers or as creators. I think until there's a deprivatization of the pain and of that human loss and the society really understands as a whole what it lost, it's very difficult to think about reconciliation in any meaningful or deeper way.

What I fear sometimes is that the consequences of the war, what's left of it in people's ways of dealing with each other, thinking about each other, in their own personal pain, may take more time to get over than the length of the war itself.