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Reconciling Indigenous peoples with the judicial process: An examination of the recent genocide and sexual slavery trials in Guatemala and their integration of Mayan culture and customs

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Article abstract

This article examines two recent landmark cases in Guatemala. The first one is the 2013 Rios Montt genocide case, which led to one of the first convictions of a former Head of State for genocide in a national court. The second one is the 2016 Sepur Zarco case, which marked the first time former military commanders were convicted in a national court of crimes against the duties of humanity for sexual and domestic slavery. In both cases, almost all the victims were Indigenous. The author was present for parts of both trials as an international observer and interviewed individuals directly involved in the prosecution. Considering that Guatemalan and international law require that legal decisions give due consideration to the customs of the Indigenous peoples concerned, the article assesses to what extent Indigenous culture was taken into account during the trial and how Indigenous concepts and customs were considered in the judgements. In both cases, the tribunal did not modify usual court procedures, except to provide interpreters for the testimony of the unilingual Q'eqchi and Ixil witnesses. Both judgements did, however, take into account several concepts and customs from the Mayan worldview and these were key to the Court's reasoning leading to the guilty verdicts.

RECONCILING INDIGENOUS PEOPLES WITH THE JUDICIAL PROCESS: AN EXAMINATION OF THE RECENT GENOCIDE AND SEXUAL SLAVERY TRIALS IN GUATEMALA AND THEIR INTEGRATION OF MAYAN CULTURE AND CUSTOMS

Elisabeth Madeleine Patterson[*]

This article examines two recent landmark cases in Guatemala. The first one is the 2013 Rios Montt genocide case, which led to one of the first convictions of a former Head of State for genocide in a national court. The second one is the 2016 Sepur Zarco case, which marked the first time former military commanders were convicted in a national court of crimes against the duties of humanity for sexual and domestic slavery. In both cases, almost all the victims were Indigenous. The author was present for parts of both trials as an international observer and interviewed individuals directly involved in the prosecution. Considering that Guatemalan and international law require that legal decisions give due consideration to the customs of the Indigenous peoples concerned, the article assesses to what extent Indigenous culture was taken into account during the trial and how Indigenous concepts and customs were considered in the judgements. In both cases, the tribunal did not modify usual court procedures, except to provide interpreters for the testimony of the unilingual Q'eqchi and Ixil witnesses. Both judgements did, however, take into account several concepts and customs from the Mayan worldview and these were key to the Court's reasoning leading to the guilty verdicts.

Cet article examine deux procès marquants émanant du Guatemala : d'abord, en 2013, l'affaire Rios Montt qui a mené à une des premières condamnations par une cour nationale d'un chef d'état pour génocide. En deuxième lieu, l'affaire Sepur Zarco en 2016 fut le premier procès au niveau national où d'anciens commandants militaires ont été jugés coupables de crimes contre les devoirs de l'humanité pour esclavage sexuel et domestique. Dans les deux cas, la majorité des victimes étaient issues de communautés autochtones. L'auteure, présente lors de certaines portions des procès à titre d'observatrice internationale, eut aussi la chance d'interviewer divers individus impliqués dans les poursuites. Considérant que le droit international et le droit guatémaltèque requiert que les jugements prennent dûment en considération les coutumes des peuples autochtones concernés, cet article évalue l'étendue de la prise en compte de la culture autochtone pendant le procès et l'intégration de leurs concepts et coutumes dans les jugements. Dans les deux cas, l'auteure considère que le tribunal n'a pas modifié la procédure judiciaire usuelle, sauf par l'octroi d'interprètes pour les témoins unilingues Q'eqchi et Ixil. Les deux jugements ont toutefois pris en considération divers concepts et coutumes Maya, facteurs qui se sont avérés essentiels à l'analyse de la Cour ayant conduit aux verdicts de culpabilité.

Este artículo examina dos procesos notables que emanan de Guatemala: primero, en el 2013, el caso Rios Montt que llevó a una de las primeras condenas por un tribunal nacional de un jefe de Estado por

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genocidio. En segundo lugar, el caso Sepur Zarco, en el 2016, fue el primer proceso a nivel nacional dónde antiguos comandantes militares han sido considerados culpables de crímenes contra los deberes de la humanidad por esclavitud sexual y doméstica. En ambos casos, la mayoría de las víctimas se derivaba de comunidades indígenas. La autora, presente por ciertas porciones de los procesos en calidad de observadora internacional, tuvo también la posibilidad de entrevistar a individuos diversos involucrados en los procedimientos. Considerando que el derecho internacional y el derecho guatemalteco requieren que los juicios tengan en cuenta debidamente las costumbres de los pueblos indígenas correspondientes, este artículo evalúa la extensión de la toma en consideración de la cultura indígena durante el proceso y la integración de sus conceptos y costumbres en los juicios. En ambos casos, la autora considera que el tribunal no modificó el procedimiento judicial usual, salvo por la concesión de intérpretes para los testigos unilingües Q' eqchi e Ixil. No obstante, ambos juicios tuvieron en cuenta conceptos diversos y costumbres Maya, factores que se revelaron esenciales al análisis de la Corte que había conducido a los veredictos de culpabilidad.

Guatemala is presently revisiting a very dark period of its history which occurred during the 1980s when hundreds of thousands of citizens, in large part Indigenous, were murdered. Following attempts to bring perpetrators to justice in other jurisdictions,[1] trials relating to extremely serious human rights violations have been carried out in Guatemala in the past few years. These prosecutions, led by Guatemalan State prosecutors, are one of the efforts undertaken by the Guatemalan State and civil society as part of the reconciliation process between the Indigenous peoples of Guatemala and the State.

Successful national prosecutions for crimes committed against Indigenous people include the 2009 conviction of ex-paramilitary officer Felipe Cusanero for forced disappearances between 1982 and 1984[2], the 2011 and 2012 convictions of five former counterinsurgency soldiers for their role in the Dos Erres massacre[3] and the 2012 conviction of five former paramilitary soldiers for their role in the 1982 Plan de Sanchez massacre.[4]

This article will focus on two of the most emblematic of the cases brought by Guatemalan prosecutors, in which all the victims and most of the lay witnesses were members of the Indigenous Mayan peoples of Guatemala: the Rios Montt and Sepur Zarco trials.[5]

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1 See Jillian Blake, "Should Domestic Courts Prosecute Genocide? Examining the Trial of Efrain Rios Montt" (2014) 39:2 Brook J of Intl L 563 at 575 (for the charges of genocide brought in Spain in 1999 by a group led by indigenous Guatemalan Nobel Peace laureate Rigoberta Menchu against Rios Montt which ultimately failed when Guatemala refused extradition) [Blake].

2 "Guatemala Sees Landmark Sentence", *BBC News* (1 September 2009), online: <news.bbc.co.uk/2/hi/8231142.stm>; José Elías, "Guatemala dicta la primera condena por la guerra civil", *El País* (2 September 2009), online: <elpais.com/diario/2009/09/02/internacional/1251842409_850215.html>.

3 Jo-Marie Burt & Paulo Estrada, "Ríos Montt to Face Second Genocide Trial for the Dos Erres Massacre", *International Justice Monitor* (3 April 2017), online: <www.ijmonitor.org/2017/04/rios-montt-to-face-second-genocide-trial-for-the-dos-erres-massacre> [Burt & Estrada]; Claudia Palacios, "A 34 años de la masacre de Dos Erres, los sobrevivientes siguen buscando verdad y justicia", *Diario La Hora* (9 December 2016), online: <lahora.gt/34-anos-la-masacre-dos-erres-los-sobrevivientes-siguen-buscando-verdad-justicia>.

4 Amnesty International Canada, News Release, "Guatemala Court Convicts Paramilitaries over 1982 Massacre" (21 March 2012), online: <www.amnesty.ca/news/guatemala-court-convicts-paramilitaries-over-1982-massacre>; "Ex-paramilitaries Jailed for Guatemala Massacre", *BBC News* (21 March 2012), online: <www.bbc.com/news/world-latin-america-17454434>.

5 Tribunal Primero de Sentencia Penal, Guatemala City, 10 May 2013, *Rios Montt Judgement*, No C-01076-2011-00015 Of. 2º (Guatemala) [*Rios Montt*]. See "Excerpts from the Judgment in the Trial of José Efraín Ríos Montt and José Mauricio Rodriguez Sanchez" in Open Society Justice Initiative, *Judging a dictator: The Trial of Guatemala's Ríos Montt* (New York: Open Society Foundations, 2013) 21 (for an English translation of parts of the judgment) [*Rios Montt English Translation*]; Tribunal Primero de Sentencia Penal, Guatemala City, 26 February 2016, *Sepur Zarco Judgement*, No C-01076-2012-00021 Of. 2º (annotated by author) (Guatemala) [*Sepur Zarco*]. Other important steps towards accountability include the 2009 conviction of former army colonel Marco Antonio Sánchez Samayoa, the 2010 conviction of national police members Héctor Ramírez Ríos and Abraham Lancerio Gómez, the 2011 indictment of General Mejia Victores, although he was declared unfit to stand trial, the 2011 arrest of General Hector Mario Lopez Fuentes, although he was declared unfit to stand trial, the 2013 conviction of former national police chief Hector Bol de la Cruz, the 2015 conviction of

Over 60% of Guatemala's 15 million inhabitants are Indigenous.[6] As we will examine, Guatemala's Constitution[7] provides that the State must respect and promote Indigenous customs and languages. Guatemala has also signed a post-civil war peace accord[8] and approved international instruments which oblige it to give due consideration to Indigenous customs and Indigenous languages in legal processes.

Considering that almost all the victims of the Rios Montt and Sepur Zarco trials were Indigenous, it is crucial to take into account the Indigenous perspective in these transitional justice[9] trials in order to work towards reconciliation between the Indigenous peoples of Guatemala and the Guatemalan State.

This article will examine the extent to which Indigenous peoples' language, culture and customs were given due consideration in these trials, from a procedural as well as a substantive point of view.

The first case attended by the author is the prosecution of Guatemala's former president, General Rios Montt, by the High Risk "A" Tribunal in Guatemala for the massacre of 1,771 Maya Ixil people in the early 1980s. General Montt was found guilty of genocide on May 10, 2013. Even though the court decision was later annulled because of procedural irregularities,[10] it made history as one of the first convictions of a former Head of State for genocide in a national court.[11]

The second case attended concerns the prosecution of two military officers, Esteelmer Reyes Girón and Heriberto Valdez Asig, for sexual violence and domestic

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former Guatemalan police chief Pedro Garcia Arredondo, and the 2016 ruling allowing criminal cases to go forward against 8 military officers in what is known as the "CREOMPAZ" case.

6 Silvel Elías, "Indigenous Peoples in Guatemala" in *The Indigenous World*, by Diana Vinding & Cæcilie Mikkelsen (Copenhagen: International Work Group for Indigenous Affairs, 2016), online: <www.iwgia.org/regions/latin-america/guatemala>.

7 Guatemala City, 17 November 1993, *Constitución Política de 1985 reformada por Acuerdo Legislativo* (1993) No 18-93 (Guatemala), online: <pdba.georgetown.edu/Constitutions/Guate/guate85.html> [*Constitution*].

8 Mexico City, 31 March 1995, *Agreement on Identity and Rights of Indigenous Peoples between the Government of Guatemala and the URNG* (20 November 1998), United States Institute of Peace Library, online: <www.usip.org/sites/default/files/file/resources/collections/peace_agreements/guat_950331.pdf> [*Peace Accords*].

9 See "What is Transitional Justice?", *International Center for Transitional Justice* (2009), online: <www.ictj.org/about/transitional-justice> ("Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms").

10 Principally due to the fact that on the first day of the trial, Rios Montt's lawyer was ordered out of the courthouse for obstruction of justice and no lawyer for Rios Montt was present in court for a few hours.

11 See Steve Bloomfield, "Mengistu Found Guilty of Ethiopian Genocide", *The Independent* (13 December 2006), online: <www.independent.co.uk/news/world/africa/mengistu-found-guilty-of-ethiopian-genocide-428233.html>; Tsegaye Tadesse, "Ethiopian Court Hands Death Sentence to Mengistu", *Reuters* (26 May 2008), online: <www.reuters.com/article/us-ethiopia-mengistu-idUSL2648747420080526>. Ethiopia had convicted former dictator Mengistu Haile Mariam of genocide in 2006 (upheld on appeal in 2008), although the conviction was in absentia and he was never extradited back to Ethiopia to serve his sentence.

and sexual slavery committed during the same period against 15 Maya Q'eqchi women from the small community of Sepur Zarco. On February 26, 2016, the same tribunal convicted them. To our knowledge, this is the first time that a national tribunal had condemned its own soldiers for domestic and sexual slavery as crimes against humanity[12] committed during an internal armed conflict.[13]

The article will first provide background on the two cases, then examine from a first-hand perspective[14] how Indigenous culture was taken into account during the trial and to what extent Indigenous concepts and customs were integrated into the judgements.

I. Background

A. Historical context

Guatemala suffered a very violent civil war between the mid-1960s and 1996. It was triggered by a successful CIA-led military coup in 1954[15] to replace President Arbenz, who had begun a process of redistribution of land. The war opposed the Guatemalan military (and right-wing paramilitary groups) to left-wing guerilla factions, initially composed of supporters of Arbenz.[16]

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[12] See Guatemala City, 27 July 1973, *Código Penal de Guatemala* (1973), art 378 (Guatemala) [*Penal Code*]; *Sepur Zarco*, *supra* note 5 at 493; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 art 3 (entered into force 21 October 1950) [*First Geneva Convention*]. Article 378 of the Guatemala *Penal Code* refers to "Crimes against the Duties of Humanity", rather than "crimes against humanity". In the judgement, the tribunal indicates that it is taking into account Guatemala's obligation to respect common article 3 of the Geneva Conventions, which prohibits degrading treatment of civilian populations, to interpret the content of article 378. The tribunal also refers throughout the judgement to how widespread and systematic sexual violence was used by the State as a military strategy.

[13] Nina Lakhani, "Justice at Last for Guatemalan Women as Military Officers Jailed for Sexual Slavery", *The Guardian (*1 March 2016), online: <www.theguardian.com/world/2016/mar/01/guatemala-sexual-slavery-sepur-zarco-military-officers-jailed>; Amnesty International, Press Release, "Guatemala: Conviction of Military in Sexual Abuse Case, A Historic Victory for Justice" (26 February 2016), online: <www.amnesty.org/en/press-releases/2016/02/guatemala-conviction-of-military-in-sexual-abuse-case-a-historic-victory-for-justice>. See also "Congo army colonel guilty of ordering mass rape on New Year's Day", *The Guardian* (21 February 2011), online: <www.theguardian.com/society/2011/feb/21/congo-rape-trial>; "Democratic Republic of Congo: Ending Impunity for Sexual Violence", *Human Rights Watch* (10 June 2014), online: <www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence> (a military tribunal had tried soldiers for mass rape as crimes against humanity in the Democratic Republic of the Congo).

[14] See Elisabeth Patterson, *Lawyers without Borders* (blog), online: <www.asfcanada.ca/fr/blogue/auteur/elisabethpatterson>; Elisabeth Patterson, "The Rios Montt Trial–Have Efforts Been Made to Integrate the Mayan Perspective?" (9 April 2013), *International Justice Monitor* (blog), online: <www.ijmonitor.org/2013/04/elisabeth-patterson-the-rios-montt-trial-have-efforts-been-made-to-integrate-the-mayan-perspective> (for blog posts about the trial).

[15] See Gerald K Haines, *CIA and Guatemala Assassination Proposals, 1952-1954*, June 1995, online: CIA <nsarchive.gwu.edu/NSAEBB/NSAEBB4>.

[16] Jan A Hessbruegge & Carlos F Ochoa García, "Mayan Law in Post-Conflict Guatemala" in Deborah Isser, ed, *Customary Justice and the Rule of Law in War-Torn Societies* (Washington: USIP Press books, 2011) 26 at 30 [Hessbruegge and Ochoa García].

Pursuant to the *Peace Accords* signed by the State and the guerillas in 1995, the United Nations sponsored a national commission to investigate the history of the civil war. Guatemala Commission for Historical Clarification estimated that the 30-year civil war had led to 200,000 deaths, 45,000 enforced disappearances[17], and the internal and international displacement of 1.5 million people.[18]

The Commission found that a majority of the victims were civilians, a quarter of the victims were women, 83% were Mayan Indigenous and at least 93% of the casualties were caused by State forces or paramilitary groups linked to the State.[19] It concluded that the Guatemalan State had "committed acts of genocide against groups of Mayan people"[20] and that the attacks against the Indigenous villages were most numerous in 1981-83.

The Commission demonstrated that the military had in some cases eradicated entire villages of Indigenous people, killing or displacing their inhabitants and destroying their homes and their crops. The military claimed that these actions had been necessary because the villagers were supporting the guerilla. The Commission ascertained that this was truly the case in only a few of the communities targeted. The link between Mayan communities and the insurgents was intentionally exaggerated by the State. State actors used this excuse to eliminate these communities so that they could not potentially join the insurgents.[21]

B. Legal Framework

The Guatemalan State is legally bound to ensure that Indigenous peoples' customs and languages are given due consideration in the legal process. Article 66 of the 1985 *Constitution* requires that the Guatemalan State must "recognise, respect and promote the forms of life, customs, traditions, forms of social organization, the use of indigenous attire by men and women, languages and dialects [of its Mayan peoples]."[22]

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17 An "enforced disappearance" is when a person is secretly abducted or imprisoned by a state or political organization and their body is never found. See also *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 art 7(2)(i) (entered into force 1 July 2002) ("'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time"). See also *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, 2716 UNTS 3 art 2 (entered into force 23 December 2010) (for a very similar definition).

18 Comisión para el Esclarecimiento Histórico, vol 1-12, *Guatemala: Memoria Del Silencio*, (Guatemala City: CEH, 1999) [CEH].

19 *Ibid*, vol 3 at 37, 42, 102. Only 3 % of the casualties were attributed to the guerilla.

20 *Ibid* at 48–50.

21 *Ibid* at 29.

22 *Constitution*, *supra* note 7, art 66.

Furthermore, Guatemala has ratified the *Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries*[23] which provides that States must have due regard to Indigenous peoples' customs and customary law, when applying national laws and regulations to the peoples concerned.[24] It also provides, at article 12, that measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, through interpretation or otherwise.[25]

The *United Nations Declaration on the Rights of Indigenous Peoples*[26], which Guatemala voted in favour of, states that legal decisions "shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned."[27]

Furthermore, the *Peace Accords* signed at the end of the civil war in 1995 between the Government of Guatemala and the Guatemalan guerilla organizations (URNG) included a specific accord on the rights of Indigenous peoples and that judicial authorities must fully take into account the traditional norms governing Indigenous communities.[28] The Indigenous Accord was negotiated because respect for the country's Indigenous majority was one of the principal demands of the URNG. It recognizes that unless the historic discrimination and exploitation of Indigenous peoples is resolved, Guatemala will never be able to develop fully and take its place in the community of nations.

The Indigenous Accord also provides that judicial authorities must fully take into account the traditional norms governing Indigenous communities. Also, the Government must promote measures to ensure access for Indigenous peoples to the national legal system, including by providing free court interpreters and training to judges on the culture and customary norms of Indigenous peoples and by permitting the presentation of cultural expertise in Court.[29]

Guatemala has made significant efforts to implement the *Peace Accords*, *ILO Convention 169* and *UNDRIP* by making the judicial system more sensitive to Indigenous peoples' cultures and facilitating their access to justice. Today, for example, defendants have a right to interpreters, over 10% of judges are bilingual (Spanish and an Indigenous language), and there are mobile courts and mediation centres attending to Indigenous peoples as well as a department of the Attorney General's office specialized in defending Indigenous peoples' rights.[30]

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23 *Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991, accession by Guatemala 5 June 1996) [*ILO Convention 169*].

24 *Ibid*, art 8.

25 *Ibid*, art 12.

26 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*].

27 *Ibid*, art 40.

28 *Peace Accords*, *supra* note 8, preamble.

29 *Ibid* at ss IV(E)(4)–(5).

30 Hessbruegge and Ochoa García, *supra* note 16 at 52.

Unfortunately, however, insufficient funding reduces the efficacy of the measures adopted.[31] Access to justice for Indigenous peoples continues to be deficient, possibly as low as 10%, according to the UN Rapporteur on the Rights of Indigenous Peoples.[32] In a 2015 report, the Inter-American Commission on Human Rights noted that there are often insufficient interpreters on hand to offer services to Indigenous participants in the judicial system and that court workers often lack basic knowledge of Indigenous rights.[33] With respect to local Indigenous justices of the peace, which could facilitate a quick and inexpensive access to justice for Indigenous peoples, the Commission notes that their structures are very weak and that they cannot count on the cooperation of the police or of the State generally to prevent, contain and resolve conflicts.

A constitutional reform proposal to recognize legal pluralism and grant authority to Indigenous traditional authorities has been in discussion at the Congress for several years now, but it was halted in the spring of 2017.[34] It is important to note, however, that the Constitutional Court of Guatemala has recognized that indigenous authorities are entitled to administer justice. Indeed, in the *Garcia-Cardona* rape case involving minors, the Court decided that although article 203 of the *Constitution* states that "the jurisdictional function is exercised, with absolute exclusivity, by the Supreme Court of Justice and the other tribunals established by the law",[35] it should be read in light of article 66 of the *Constitution* which creates an obligation to respect Indigenous customs. Hence article 203 does not exclude the possibility that recognized Indigenous authorities can decide social conflicts within their communities.[36]

C. Rios Montt Trial

General Rios Montt became the *de facto* Head of State in Guatemala in March 1982 following a military coup. He remained in power until August 1983, at which time he was ousted by another military coup. A very significant proportion of

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31 *Ibid* at 29–30.

32 Victoria Tauli Corpuz, "Derechos humanos, jurisdicción indígena y acceso a la justicia: Hacia el diálogo y respeto intercultural" (Discourse delivered at the Encuentro internacional sobre técnicas de investigación en asuntos indígenas de Colombia, Bogotá, 24 February 2016) [unpublished], cited in OAS, Inter-American Commission on Human Rights, *Informe anual 2016, Capítulo V: Seguimiento de recomendaciones formuladas por la CIDH en sus informes de país o temáticos*, at para 115, online: <www.oas.org/es/cidh/docs/anual/2016/docs/InformeAnual2016cap.5-Guatemala-es.pdf>.

33 OAS, Inter-American Commission on Human Rights, *Situación de los derechos humanos en Guatemala: Diversidad, desigualdad y exclusión*, OR OEA/Ser.L/V/II. Doc. 43/15 (2015) at paras 407–09.

34 Henry Pocasangre & Manuel Hernández, "Congreso evade discusión de derecho ancestral", *Prensa Libre* (8 March 2017), online: <www.prensalibre.com/guatemala/politica/autoridades-ancestrales-desisten-de-la-aprobacion-del-articulo-203>.

35 *Constitution*, *supra* note 7.

36 Corte de Constitucionalidad, Guatemala City, 10 March 2016, *Apelación de sentencia de Amparo*, Iuristec, No 1467-2014 at 24 (Guatemala), online: <iuristec.com.gt/index.php?title=Sentencia:20160310-0000-1467-2014> [*García-Cardona*].

the massacres of Mayan peoples described by the Truth Commission were committed during Montt's rule.[37]

Civil society groups had tried several times though unsuccessfully since 1999 to prosecute Rios Montt, either in Europe or in Guatemala.[38] The Centre for Human Rights Legal Action (CALDH), a human rights organization formed in 1994 and based in Guatemala City was key to these prosecutions, jointly with the Association for Justice and Reconciliation (AJR), a civil society organization established in 2000 composed of indigenous genocide survivors representing twenty-two communities. Over several years they investigated, formulated and presented the evidence that would eventually form the basis of the Rios Montt indictment and then participated very actively in the trial as "*querellantes adhesivos*" (civil parties).[39]

Rios Montt was finally prosecuted in March 2013 by the Guatemalan State for genocide and crimes against humanity, along with his director of military intelligence, Jose Mauricio Rodriguez Sanchez. The case focused solely on their alleged role in planning and carrying out the massacre of 1,771 members of the Ixil people, a Mayan ethnic group of about 100,000 persons[40] living in the northwestern highlands of Guatemala. The massacres were alleged to have been carried out by soldiers and military-backed militias.

The crime of genocide under Guatemalan law requires proving the murder of members of an ethnic group, or another form of serious physical violence against them, with the intent to destroy partially or completely the ethnic group in question.[41] The prosecution's objective was to prove that Rios Montt was the intellectual author of the mass killings of Ixils, with the objective of destroying the Ixil people.

More specifically, the indictment[42] of the prosecution alleged that, under the leadership of General Rios Montt, the military carried out the following acts:

- selective executions of individuals belonging to the Ixil ethnic group;
- collective massacres of Ixils;
- destruction of houses, crops, domestic animals and whole Ixil villages;
- shelling communities and sacred Ixil places;

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37 *Ibid* at 48–50.

38 Blake, *supra* note 1 (for description of cases).

39 Roddy Brett, "Peace without Social Reconciliation? Understanding the Trial of Generals Rios Montt and Rodriguez Sanchez" (2016) 18:2-3 *J of Genocide Research* 285 at 291 [Brett]. The status of civil party under the Guatemalan system provides several rights, include that of presenting evidence and calling witnesses.

40 Instituto Nacional de Estadística, Guatemala City, 2002, *Censos Nacionales XI de Población y VI de Habitación* (June 2003) at 32 (Guatemala), online: <www.ine.gob.gt/sistema/uploads/2014/02/20/jZqeGe1H9WdUDngYXkWt3GIhUUQCukcg.pdf> [*Censos Nacionales 2002*].

41 See *Penal Code*, *supra* note 12, art 376.

42 Fiscalía de Derechos Humanos, *Acusacion Final Efrain Rios Montt*, (City: Publisher 2013) [annotated and translated by author] [*Acusacion Final Rios Montt*].

• sexual violence against Ixil women;

• slavery and forced labour of Ixil children, women and men;

• persecution and torture of Ixil refugees.

The indictment put much emphasis on the intention of the accused to partially or totally destroy the Ixil population through mass killings.[43] Rios Montt was accused of having put in place a policy of control over the Ixil population, particularly through "model villages" for the survivors of the massacres. In these villages, Ixil survivors were forced to adopt the lifestyle of the non-Indigenous majority of Guatemala. The residents of these villages were allegedly prevented from practising their language and traditional cultural and spiritual activities.[44]

D. Sepur Zarco Trial

Sepur Zarco is a small Mayan Q'eqchi Indigenous community located in eastern Guatemala. The Q'eqchi are one of the four larger Indigenous peoples in Guatemala, composed of approximately 900,000 members.[45]

In the early 1980s, peasants of the Sepur Zarco community had taken steps to obtain titles for the lands they worked.[46] The large local landowners, who claimed ownership of these lands, called upon the army to suppress these demands.[47]

More than a dozen men from the Sepur Zarco community were allegedly abducted by the military, kept in custody, and are suspected of having been killed. Forensic exhumations of mass graves took place in recent years near the community, and many of the bodies found showed traces of torture. Some of the remains were identified as being those of some of the abducted men, while the remains of other disappeared community members have yet to be found.[48]

After the disappearance of the men, their wives were forced to work under threat of death at the Sepur Zarco military base, which had since been built in the community. They had to cook and wash the soldiers' clothing with their own supplies of food and soap, without financial compensation.[49]

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43 *Ibid* at 7.

44 *Ibid* at 57, 96, 104.

45 *Censos Nacionales 2002*, *supra* note 40 at 32. See also CIA, "|*The World Factbook: Guatemala*|", online: <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html>. The more populous Indigenous peoples are the K'iche who represent 9.1 % of the population (Kaqchikel 8.4 %, Mam 7.9 %, Q'eqchi 6.3 %).

46 See *Sepur Zarco*, *supra* note 5 at 21 (for description of the Expert witness Rita Laura Segato's testimony).

47 *Ibid* at 474.

48 See *ibid* at 482 (for Carmen Xol Ical's testimony). Several witnesses indicated that the remains of their husband had not been found.

49 See *ibid* at 482–83 (for Carmen Xol Ical and Maria Ba Caal's testimonies). All the women described these facts.

The women were also allegedly repeatedly raped by soldiers, sometimes by many soldiers at once, and in front of their children. These rapes took place in the women's own homes, at the military base, or outdoors alongside the river where they washed the clothes. The soldiers told the women that because they no longer had a husband, they were now free and at their disposal. The mistreatment the women received had various consequences, including hemorrhages, spontaneous abortions, and severe psychological trauma.[50]

For several years, the women suffered in silence and humiliation, often crossing paths with their tormentors. In 2003, an alliance of human rights' defenders and feminists decided to explore the possibility of conducting strategic litigation with the aim of bringing to justice the use of massive scale of sexual violence against women and girls during the armed conflict.[51] The Alliance conducted interviews in several areas of the country and it became clear that the women of the community of Sepur Zarco wished to bring their tormentors to justice.[52] The Alliance offered constant psychological and legal support, and in 2011, despite their fear and shame, twelve of the women decided to file criminal complaints.[53] In 2012, the women were called upon to render their testimony in advance before judge Miguel Angel Galvez. In June 2014, following a lengthy analysis of the evidence,[54] two of the people identified during these testimonies were arrested. Lieutenant Reyes Girón and military assistant Valdez Asig were placed in custody for their alleged role in the crimes purportedly committed at the Sepur Zarco military base.

On February 1, 2016, the trial for sexual violence and domestic slavery as crimes against the duties of humanity under the Guatemalan *Penal Code* began before the High Risk "A" Tribunal in Guatemala City.

II. Cultural accommodation during the trials

A. Procedural Aspects

The prosecution and the victims' legal teams in both the Rios Montt and Sepur Zarco trials relied heavily on the testimony of many Indigenous and generally non-Spanish-speaking victims. It is important to note that in Guatemala, the victims are not mere witnesses, but rather play an active role in presenting evidence and legal

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50 See *ibid* at 239 (for Cecilia Caal's testimony). Several women described this in their testimony.

51 This alliance is composed of the Equipo de Estudios Comunitarios y Acción Psicosocial (ECAP) and the Unión Nacional de Mujeres Guatemaltecas (UNAMG). See Lawyers Without Borders Canada, *Le procès Sepur Zarco: Un cas emblématique pour la justice des femmes autochtones victimes de violences durant le conflit armé interne*, 2016, at 15, online: LWBC <www.asfcanada.ca/uploads/publications/uploaded_rapport-sepur-zarco-asf-lowres-1-pdf-113.pdf> [LWBC Report].

52 Interview of Susana Navarro, Director of ECAP (1 March 2016) Guatemala City [Interview of Navarro].

53 LWBC Report, *supra* note 51 at 18.

54 *Ibid*.

arguments due to their role as civil parties.[55]

Modifications to judicial procedure can take the form of what is strictly necessary to be able to obtain the testimonial evidence, such as providing the services of court interpreters to translate between the Indigenous languages and Spanish. It can also be more substantial, such as accommodating Mayan customs and integrating Mayan customary law,[56] as the *UNDRIP*, the Guatemalan *Constitution* and the *Peace Accords* can be interpreted as dictating.

Other countries have integrated procedural accommodations in trials involving Indigenous persons. The Federal Court of Canada, for instance, is an interesting model as it has specific guidelines[57] which may apply in the case of disputes involving Aboriginal Peoples providing for trials to be held in an Indigenous community, mandatory pre-trial cultural awareness training for all non-Indigenous persons involved in the trial (including lawyers, judges and juries), traditional Indigenous ceremonies before and after the trial and the ability to swear on an Indigenous symbol rather than on the *Constitution* or the Bible, or affirming solemnly.[58]

Although we found that such procedural adjustments did not take place in either the *Rios Montt* or the *Sepur Zarco* cases, there were some accommodations made. We highlight below some of the elements observed during the trials.

1. RIOS MONTT TRIAL

During the Rios Montt trial, the Indigenous presence outside the courthouse and in the courtroom was strong. This seemed to give much strength to the victims, who had travelled a very long way to the capital, often for the first time in their lives.[59] During the duration of the trial, supporters laid out in front of the courthouse a ceremonial Maya grass and flower floor tapestry, with candles and photos of people killed during the dictatorship of General Montt. This indigenous ceremony took place outside the courthouse, but it could, in an effort to integrate Indigenous custom, have been integrated to a greater extent into the trial process, for example, in the

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55 Due to the important role the victims play in the judicial procedure, their legal teams were well supported financially by several international organizations such as LWBC, UN Women and the UN Maya Programme. Interview of Dominic Voisard, LWBC (13 May 2017) [Interview of Voisard 2017].

56 See Hessbruegge and Ochoa García, *supra* note 16 (for an essay on Mayan customary law).

57 See Canada, Federal Court, *Practice Guidelines for Aboriginal Law Proceedings*, 3rd ed (April 2016) at ss III(B)(4)–(6), online: <cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf> [*Federal Guidelines*].

58 See *ibid* at s III(D); Antonella Artuso, "Eagle feather affirmation for courts", *Toronto Sun* (27 July 2012), online: <www.torontosun.com/2012/07/27/eagle-feather-affirmation-for-courts>. It is possible to swear on Eagle feathers or by a smudge ceremony in Federal Court and in many Ontario Courts.

59 Interview of Rios Montt victims' travel coordinator (21 March 2013) Guatemala City.

Courthouse prior to the beginning of the trial or before the testimony of an Elder.[60]

In the High Risk "A" Tribunal courtroom, a significant portion of the public was Indigenous, as evidenced by the embroidered huipil blouses and headscarves worn by the women. Some of the men also wore red and black embroidered Ixil jackets. Ixil community members who were not able to attend the court sessions were able to follow the proceedings translated into the Ixil language on the local Ixil radio station.[61]

The setting in which the proceedings took place was visibly intimidating for the Indigenous witnesses[62]: a 500-capacity room with high ceilings, three judges placed high up in a towering position, and an army of photographers and cameras from the national and international media. To make witnesses more at ease, it would have been possible for the hearing to take place at another location, in the community[63] or in a smaller and less formal building. For example, the *Federal Guidelines* require that holding all or part of the trial in an Aboriginal community be evaluated and "the effect that the venue may have on the ability/ease of witnesses to testify in open court" must be taken into account.[64] At the very least, the elderly Indigenous witnesses could have testified via video from a location closer to their community.

The Tribunal was made up of three judges: President Yassmin Barrios, Patricia Bustamante and Pablo Xitumul, an Indigenous person.[65] To provide their testimony, lay witnesses needed to swear solemnly before the judges in front of a very large Guatemalan coat of arms. They were informed immediately prior to their declaration that if they were to lie, they would be fined up to approximately US$1,500 and could be sent to prison. Considering how the notion of "truth" in an Indigenous context[66] may be different from the Western one, it could have been useful to explain the distinction between not knowing the answer, making an honest mistake and deliberately committing perjury (making a false statement under oath with intent to mislead).

Having suffered so much at the hands of the Guatemalan State, it is understandable that this could generate a great deal of fear.[67] Their lack of familiarity with the Court process was evidenced, for example, by the fact that some witnesses

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60 See *Federal Guidelines*, *supra* note 57 at 37.

61 *Ibid*.

62 *Ibid*.

63 See Jo-Marie Burt, "Genocide Trial Suspended; Plaintiffs Claim Proceedings Illegal", *International Justice Monitor* (6 May 2016), online: <www.ijmonitor.org/2016/05/genocide-trial-suspended-plaintiffs-claim-proceedings-illegal> [Burt, "Genocide Trial Suspended"]. We understand that in the subsequent procedures of the Rios Montt trial in 2016, the Court traveled to Nebaj, Quiché, Ixil territory, to hear the testimony of victims who were too old or infirm to travel to Guatemala City.

64 *Federal Guidelines*, *supra* note 57 at 16.

65 José Luis Sanz, "El Fin de la Primavera de Claudia Paz", *Plaza Publica* (18 August 2014), online: <www.plazapublica.com.gt/content/el-fin-de-la-primavera-de-claudia-paz>.

66 Further information on the differences between the notions of truth will be found at II.B.1, *below*.

67 *Ibid*.

would lift up both hands very high in the air when making their declaration.[68]

Aside from allowing victims to testify in Ixil, it does not appear that procedural changes were made during the Rios Montt trial to either the court setting or procedures to take into account the culture of the Ixil.[69] This in spite of the apparent requirements of the *UNDRIP*, *ILO Convention 169*, the *Constitution* of Guatemala and the *Peace Accords*. Knowing the amount of trauma the victims had purportedly gone through, accommodations even of a symbolic nature could have been welcome. However, such cultural accommodations would possibly have been used by critics of the trial and supporters of the accused to fuel their argument that the trial was biased and disrespectful of the due penal process.

2. SEPUR ZARCO TRIAL

During the Sepur Zarco trial, the Indigenous presence in the courtroom was also very strong, as well as the presence of non-Indigenous women's groups. This presence was apparently of great psychological support for the victims, who did not know the capital city and did not understand Spanish.[70]

The Sepur Zarco trial strengthened solidarity within the women's movement, already active in fighting against the extreme rates of violence against women in Guatemala at present.[71] It is estimated that in Guatemala, since 2003, over 5,000 women have been killed and 14,000 disappeared, many of whom are Indigenous.[72] Guatemala passed the Law against femicide in 2008 legally creating an aggravated type of homicide (femicide), as well as creating specialized courts attending only to violence against women crimes and a national data collection system on violence against women.[73]

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68 Personal observation during the first week of the trial (March 19th–22 2016).

69 For example, there was no simultaneous translation towards Ixil to allow the witnesses to understand what was being said in Spanish.

70 Interview of Arturo Chub Ical and Carolina Yaxcal, Victims' coordinators and interpreters (26 February 2016) Guatemala City [Interview of Ical and Yaxcal].

71 "Mujeres de Sepur Zarco se suman a la marcha contra la violencia hacia las mujeres", *Acoguate* (25 November 2015), online: <acoguate.org/2015/11/25/mujeres-de-sepur-zarco-se-suman-a-la-marcha-contra-la-violencia-hacia-las-mujeres/#sdendnote1sym>.

72 "Nos faltan Cristina y 14 mil mujeres más", *Nomada* (6 July 2016), online: <nomada.gt/nos-faltan-cristina-y-14-mil-mujeres-mas>. See also Mercedes Hernandez, "Feminicidio en Guatemala: cronología de la impunidad", *Feminicidio* (10 March 2011), online: <www.feminicidio.net/articulo/feminicidio-en-guatemala-cronolog%C3%ADa-de-la-impunidad>; Louisa Reynolds, "Tribunales de femicidio buscan desterrar la impunidad en Guatemala", *Inter Press Service* (2 August 2013), online : <www.ipsnoticias.net/2013/08/tribunales-de-femicidio-buscan-desterrar-la-impunidad-en-guatemala>; Claire Laurent, "The Killing of Women and Girls Around the World", *Academic Council on the United Nations System*, online: <acuns.org/wp-content/uploads/2013/05/Claire-Laurent.pdf> [Laurent].

73 Congreso de la República de Guatemala, Guatemala City, 2 May 2008, *Ley contra el femicidio y otras formas de violencia contra la mujer*, No 22-2008 (Guatemala).

One striking aspect of the Sepur Zarco trial was that all the victims (seated behind the prosecution, in the witness box) kept their heads and faces covered during the whole trial with their Q'eqchi shawls.[74] It is possible that the fact that they belonged to one of the Indigenous peoples facilitated their being allowed to keep their faces covered.

Also, the twelve women victims, who had already testified (in veils) in 2012 before Judge Galvez, were not required to re-testify during the 2016 trial. Their 2012 recorded testimony was presented before the Tribunal in 2016 and they were not cross-examined in 2016, despite very different circumstances.[75] However this change in the usual procedure was made to avoid traumatising the victims once more, and was probably not related to their Indigenous origin.[76]

The attitude of the State prosecutors towards the victims was apparently supportive, understanding and respectful of the women's Q'eqchi culture.[77] Unfortunately the women were not necessarily respectfully treated by the Court staff and did suffer episodes of blatant racism during the trial. For example, the employees of the Court apparently forbade the victims from using the toilets located beside the courtroom, close to the area where they were seated. Demanding explanations, their aides were told that the women would "clearly dirty them." As a result, they had to wait until the lunch break to go to the bathroom outside the courthouse, and then again all afternoon until their return home.

Various complaints did nothing to change this, until the President of the Tribunal, Judge Barrios, was informed of the situation and publicly demanded that the judicial body respect the victims and allow them to use the toilets.[78]

It would no doubt have been useful for the Court staff and the defence lawyers and possibly the prosecutors to have access prior to the trial to cultural training.[79]

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74 See Alexandra Billet, "Cas Sepur Zarco: 11e, 12e et 13e journées d'audience", *Lawyers Without Borders* (blog), online: <www.asfcanada.ca/fr/blogue/billet/cas-sepur-zarco-11e-12e-et-13e-journees-d-audience/301> (for photos and personal observations during the trial).

75 See Interview of Voisard 2017, *supra* note 55. In 2012 the two accused had not yet been named as accused, and hence no lawyer representing them cross-examined the witnesses. A public defender lawyer was appointed to cross-examine the witnesses, but considering there were no identified accused, the questions could only be of a general nature.

76 Interview of Navarro, *supra* note 52. ECAP provided psychological accompaniment for the victims since 2009.

77 Interview of Ical and Yaxcal, *supra* note 70.

78 *Ibid*.

79 See *Federal Guidelines*, *supra* note 57 at 27.

B. Use of Indigenous Languages

1. RIOS MONTT TRIAL

In the Rios Montt trial, the witnesses' first, and in many cases only, language was Ixil, and in some cases, K'iche. The Court was not initially planning on having translation available, but it realized it had no choice but to provide interpreters if it wished to hear the oral testimonies.

Three official interpreters for the three different dialects of the Ixil language were hired by the High Risk "A" Tribunal to allow witnesses to give their testimony in their own language. However, to speed up the process, the judge, Yassmin Barrios, strongly encouraged witnesses to give their testimony in Spanish, if they could speak even "just a little bit of Spanish."[80] Several witnesses started off without an interpreter at the insistence of Judge Barrios, but completed their testimony with the help of one once it became obvious that they did not understand the questions.

The victims also counted on the presence of an unofficial translator that they had chosen themselves seated in the witness box. She listened to and commented on the translation made by the official interpreter to ensure conformity with what the witnesses were actually saying.[81] Furthermore, at the end of the second day of the trial, the defence team also made a request to bring their own Ixil interpreters, to verify the official interpreter's translation.

An interpreter always needs to make choices on how to translate sentences, based on the context. There is always a risk that the interpreter has misunderstood what the witness wished to say. If the interpreter is neutral, errors can arise simply because of a misunderstanding. If the translator has a certain bias, he may consciously wish to modify the translation.

During the first week of the trial, several heated discussions concerning translation took place between the Court interpreter, the victims' interpreter and the defence team's interpreters.

For instance, in the Ixil language, gender is not always evident when using pronouns as it is in Spanish. For example, when talking there often is no distinction between "he" and "she."[82] Also, the plural and singular sometimes cannot be determined from the word alone and have to be understood in context. This caused some confusion and harsh cross-examination of one witness when he had mentioned the word "soldier." It had first been translated as singular, whereas the survivor had meant "soldiers."[83]

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80 Personal observation during the first week of the trial (March 19th–22 2016).

81 Interview of the victims' Ixil translator (21 March 2013) near Guatemala City [Interview of the Ixil translator].

82 Interestingly, this is also the case in Inuktitut and Cree.

83 Interview of the Ixil translator, *supra* note 81.

Some Western legal concepts may not exist or bear the same meaning in Indigenous cultures. In this case, "truth" appears to be one such concept. It was striking to hear the answer of an Ixil witness when the Court asked him before his testimony: "Will you state the truth?" Through his translator, the witness answered: "I will say what I have seen."[84] This answer was very similar to the one a Cree Elder gave to the Québec Superior Court in Canada in 1973. When asked by the judge to tell the truth, he answered through a translator: "I can only tell what I know."[85] In this regard, prior training in relevant Indigenous concepts and customs for all actors of the judicial process is essential.

Finally, the Guatemalan judicial process clearly is not adapted to the Ixil custom of not interrupting Elders. One of the Elder witnesses specifically asked whether he could speak longer after having testified, and Judge Barrios explained to him that unfortunately he could not, as the lawyers had asked all their questions.[86]

2. SEPUR ZARCO TRIAL

During the *Sepur Zarco* case, the witnesses testified in Q'eqchi in advance before Judge Galvez in 2012. Other witnesses also testified in Q'eqchi during the trial in 2016.

There does not seem to have been a similar level of controversy concerning translation during the Sepur Zarco trial as had happened during the Rios Montt trial.[87] Some Q'eqchi words and concepts were nevertheless amply discussed by expert witnesses.

For example, the concept of "*moxok*" was explained by linguistic and cultural expert witnesses. A woman who has been raped is "*moxok*", which means soiled, and thereby loses the respect of her community. From the same idea originates the expression "*e'xmux limyu'am*": they have soiled my life.

Also, it was often difficult for the interpreters to translate directly into Spanish some of the Q'eqchi words used by the victims. It therefore became necessary to interrupt the testimony of the victim to explain to the Court the precise meaning of the Q'eqchi words in Spanish.[88]

For example, the witnesses would use the term "*barz'unleek*", which, taken literally, translates to "they played with me", but in fact means "they raped me".

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84 Personal observation, second day of the trial (20 March 2013).

85 Boyce Richardson, *Strangers devour the Land* (New York: Alfred A. Knopf, 1976) at 91.

86 Personal observation, second day of the trial (20 March 2013). The pressure the Tribunal was under due to the numerous attempts by the defence team to halt the trial certainly impeded lengthy testimonies of the almost 100 lay witnesses.

87 Interview with Alexandra Billet, Lawyers without Borders Canada staff lawyer, having been present throughout the case (25 February 2016) Guatemala City.

88 Interview of Ical and Yaxcal, *supra* note 70.

Another example is the expression "*xnumsink*", which literally translates to "they mocked me", but is once again a way of referring to rape. A literal translation would not have been enough to prove the acts had been committed.[89]

III. Integration of the indigenous worldview in the judgments

A. The Judgements

1. *RIOS MONTT*

On May 10th, 2013, Rios Montt was found guilty of genocide and crimes against humanity in an oral judgement and sentenced to eighty years in prison. On May 17th, 2013, the trial court issued its 718-page judgement describing in detail the facts proven and the basis for the court's verdict.

The judgement established that the Guatemalan military had committed genocide against the Ixil people in 1982-83,[90] and that Rios Montt contributed by participating in the planning of this genocide and by having knowledge of the acts being committed on the ground.[91]

This was one of the first times in history that a former Head of State was convicted for genocide in a domestic, rather than international, court.

The verdict was however short-lived. On May 20, only three days after the written judgement was issued, the Guatemalan Constitutional Court annulled a portion of the proceedings due to irregularities during the first day of the trial in a 3-2 ruling, indirectly annulling the entire judgement.[92]

A large media campaign to annul the judgement had been led by the CACIF,[93] the country's main chamber of commerce, as well as by the then president of Guatemala, Pérez Molina. An expert witness had claimed during the trial that President Molina was responsible for the massacres on the Ixil as he had been giving out orders from a regional army base.[94] A retrial of Rios Montt began on March 19,

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89 *Ibid*.

90 *Rios Montt*, *supra* note 5 at 683–99.

91 *Rios Montt*, *supra* note 5 at 699–703. See Hanna Bosdriesz & Sander Wirken, "An Imperfect Success– The Guatemalan Genocide Trial and the Struggle against Impunity for International Crimes" (2014) 14 *Intl Crim L Rev* 1067 at 1077–86 (for an analysis of the judges' treatment of the different elements of the crime of genocide) [Bosdriesz & Wirken].

92 The numerous court decisions relating to the *Rios Montt* case are not the subject of this article. See *International Justice Monitor: a project of the Open Justice Society Initiative*, online: <www.ijmonitor.org/?s=rios+montt+&category_name=guatemala-trials> (for coverage in English); *Lawyers without Borders Canada* (blog), online: <www.asfcanada.ca/fr/blogue/tag/rios-montt> (for coverage in French); *Genocidio Nunca Mas* (blog), online: <paraqueseconozca.blogspot.ca> (for live coverage of the trials in Spanish); Blake, *supra* note 1 (for an article weighing the advantages and disadvantages of prosecuting in national courts rather than international).

93 Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras.

94 See Brett, *supra* note 39 at 297.

2016. Those proceedings were, however, suspended on May 5, 2016, due to a complaint by human rights organizations that the new proceedings were unconstitutional, in part due to the fact that the hearings for the other defendant, Rodriguez Sanchez, were not open to the public with no legitimate reason.[95]

Despite the fact that the 2013 verdict was annulled, it has had a significant impact on Guatemalans to show that Indigenous peoples can be respected and have access to justice. As a member of the Guatemalan human rights community commented: "Indigenous victims sat in a court of law, on an equal footing to the former dictator. This court, part of a racist exclusionary State, heard their testimonies, and gave them probative value on the strength of which Montt was found guilty." Another stated further: "The annulment does not take away the verdict from us, from the victims. Montt was indicted; genocide was proved in a court of law. That is historical fact."[96]

2. *SEPUR ZARCO*

On February 26, 2016, the Guatemalan High Risk "A" Tribunal condemned its country's own soldiers for acts of domestic and sexual slavery committed during an internal armed conflict. Military officers Valdez Asig and Reyes Girón were found guilty of crimes against the duties of humanity under articles of Guatemala's *Penal Code*.[97]

The accused were both sentenced to 30 years of prison for this specific crime. Valdez Asig was also sentenced to 210 additional years of prison for the forced disappearances of seven men and Esteelmer Reyes Girón was sentenced to an additional 90 years for the murder of three women.

a) Reparations

The Guatemalan criminal process allows for reparations to be granted to victims. The hearing to decide on the question of reparations took place on March 2, a few days after the judgement. It was before the same tribunal, including Judge Yassmin Barrios.

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95 Interview of Dominic Voisard, LWBC (4 September 2016). See Burt, "Genocide Trial Suspended", *supra* note 63.

96 Brett, *supra* note 39 at 296, 300 (interview of a CALDH employee).

97 See *Sepur Zarco*, *supra* note 5 at 493. The tribunal interprets article 378 on "Crimes against the Duties of Humanity" as taking into account Guatemala's obligations under the common article 3 of the Geneva Conventions which prohibit degrading treatment of civilian populations.

Reyes Girón was condemned to pay approximately $85,000 CAD to each of the victims of sexual violence. As for Valdez Asig, he was condemned to pay approximately $42,500 CAD to the family of each of the seven men that had disappeared.

Furthermore, the State of Guatemala was condemned to make reparations in connection with the violations and to prevent their recurrence. The State was ordered to: deploy further efforts to find the missing husbands of the women; build a health clinic and a bilingual school in Sepur Zarco; recognize February 26 as a national day for victims of sexual violence, sexual slavery and domestic slavery; erect a monument representing the women of Sepur Zarco's quest for justice; and include mandatory courses, as part of the training of military forces, on the human rights of women and the prevention of violence against women. The State was also ordered to translate the judgment into the 24 Mayan languages spoken in Guatemala.[98]

Thirty years after the events that triggered the aggressions against them, the inhabitants of Sepur Zarco still do not possess formal titles to their lands. The decision on reparations did not go so far as to attribute such titles to the victims. The tribunal only ordered that the administrative procedures the missing persons had begun in 1981 to obtain recognition of property rights continue their course before today's competent authority.[99]

B. Mayan Concepts and Customs Key to Prove Guilt

1. *RIOS MONTT*

Rios Montt was charged under article 376 of the Guatemalan *Penal Code* of having committed genocide, amongst other crimes. The prosecution needed to prove that Rios Montt committed, with intent to destroy the Ixil people, in whole or in part, at least one of the following acts:

> (1) killing members of the group; (2) causing serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (4) forcibly displacing children or adults to another group; (5) imposing measures intended to prevent births within the group.[100]

Examining a considerable body of evidence,[101] the tribunal found that Rios

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98 *Ibid* at 509–10 [translated by author].

99 *Ibid* at 510 [translated by author].

100 *Penal Code*, *supra* note 12, art 376 [translated by author].

101 *Rios Montt*, *supra* note 5 at 145–682. The bulk of the 706-pages judgement, from page 145 to 682, is spent describing the evidence. The tribunal reviewed: a) expert evidence; b) the testimonies of over 100 lay witnesses, most of which were Ixil, as well as military personnel witnesses, witnesses for the accused, and the declarations of Rios Montt and Rodriguez Sanchez; c) documentary evidence, including the military plans of 1982; and d) material evidence, such as bone fragments extracted from the region by forensic anthropologists.

Montt had indeed committed all these acts, with the specific intent to destroy the Ixil people, and that part of the Ixil people had in fact been physically destroyed.[102] Showing that destroying the culture of the Ixil people had been an objective of the army was an important element of the prosecution's argument.

In this section, we will focus on the elements of the judgement that relate specifically to the intent to destroy the Ixil's Indigenous culture and determine to what extent the tribunal made an effort to take the Ixil concepts and customs into account.

a) Intent to Destroy the Culture, Language, Dress and Spiritual Practices

The tribunal found that the prosecution had successfully proven that Rios Montt institutionalized the Army's racist worldview against the Mayan population, and especially the Ixil group, which meant that "cultural expressions such as the traditional costume and the language became a real threat to life, integrity, and survival" [103] of the Ixil ethnic group.

Furthermore, under Rios Montt's command, the military gathered members of the Ixil ethnic group into camps in order to subject them to a process of assimilation into the dominant national culture.[104] This was perpetrated because the Ixil were regarded as internal enemies in light of their cultural and historical ancestry.

The tribunal explained how the physical and mental injuries inflicted on members of the Ixil ethnic group by the military operations severely impacted the social fabric of the Ixil group.[105]

The destruction of the culture continued in the re-education camps. Some of the survivors of the massacres were forcibly brought to these camps, and some survivors went of their own accord when they could no longer survive in the mountains, where they had fled.

The tribunal explained how people in the camps were made to listen to re-education speeches and had new forms of government imposed on them. The adoption of new cultural and religious practices foreign to their worldview was also imposed.[106]

Soldiers also took children out of their cultural environment, capturing them in the villages and transferring them to the model villages.[107]

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[102] 5.5 % of the Indigenous population in the Ixil region was killed in 1982-83. *Ibid* at 691.
[103] *Ibid*, s III(21).
[104] *Ibid*, s III(22.7).
[105] *Ibid*, s III(38.1).
[106] *Ibid*, s III(64).
[107] *Ibid*, s III(66).

The tribunal concluded that the Ixil ethnic group was "culturally destroyed in part," as members became separated between those who took refuge in the mountains and those who were concentrated in the "model villages."[108]

b) Corn

In coming to the conclusion that the army's intent was to destroy the Ixil culture, the court took into account certain aspects of the Ixil worldview and examined several Ixil concepts and customs. For example, the importance of corn for the Ixil was referred to throughout the judgement. It is their sacred food, symbolizing life, and it links the living to their ancestors, as grains of corn are passed down from generation to generation.[109]

Lay and expert witnesses explained how the military systematically destroyed the corn fields and corn reserves of the Ixil villagers when raiding a village. Obviously corn was their food staple, and hence it was a strategy to starve them. However witnesses explained that the destruction of corn was also an attack on Ixil culture.[110]

c) Importance of Burial Rites

The court recognized the importance in Ixil culture of the harmony between nature and human beings and between living beings and the dead. In particular, providing a proper burial to their deceased family members is vital. The court referred to lay and expert testimony explaining how the deceased can only rest if their family members cherish and care for them. In turn, the deceased watch over the welfare of the living, will send advice and warning messages to improve the quality of life of the living. For there to be harmony, the dead need to rest in a sacred place in which the living can pray for them, bring them flowers, candles and music and say goodbye.[111]

When a massacre occurred and the survivors had to flee or were captured, the community was unable to bury their dead in a sacred place, perform the traditional rites, accompany them in the passage between life and death and bury them as was the custom in the community.[112] The court recognized this trauma described by both expert and lay witnesses,[113] which was compounded by having to leave the land where their ancestors are buried.[114] The testifying survivors still felt guilt towards their ancestors [115]and considered the link with their ancestors severed.[116]

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[108] *Ibid*, s III(65).
[109] *Ibid* at 214, 216, s IV(5) (Expert Nieves Gomez Dupuis).
[110] *Ibid* at 170, 690, ss IV, V (Expert Jaime Romeo Valdez Estrada).
[111] *Ibid* at 209, s IV (Expert Nieves Gomez Dupuis).
[112] *Ibid*, s V.
[113] *Ibid*, s V.
[114] *Ibid*, s IV (Expert Angel Romeo Valdez Estrada).
[115] *Ibid* at 163, s IV.

d) Specific Intent to Attack Women as Transmitters of Culture

The three judges examined the importance in Ixil culture of women, who play a predominant role both in the maintenance of cultural values and in the social organization.[117] Witnesses explained how women ensure the ethnic group's future, providing their children with an education based on the Indigenous Ixil language and worldview, which is the basis of the culture's survival.

The tribunal relied on the testimony of Ixil women,[118] as well as an expert witness,[119] to determine that the Guatemalan military raped many Ixil women and that the attacks were part of a strategy to destroy the Ixils. The physical appropriation of women through acts of violence, whether or not they were killed, contributed to undermining the foundations of their identity and of the physical reproduction of the members of the Maya Ixil ethnic group.[120]

The tribunal found that the sexual violence against Ixil women and girls caused damages not only at the individual level but also at the collective level. As symbols of cultural transmission, tarnishing their dignity meant seriously damaging the integrity of the Ixil ethnic group.[121]

e) Killing of Foetuses, the "Ixil seed"

The court recognized the testimony of lay and expert witnesses describing that the Guatemalan military had also killed pregnant women, slit their abdomen open and extracted the foetus.[122] This was meant to eliminate the Ixil seed and the group itself.[123]

2. *SEPUR ZARCO*

In the *Sepur Zarco* judgement, several similar links are made between violence against women and the intent to destroy the Q'eqchi culture. Also, reference to concepts specific to the Q'eqchi worldview were made to characterize the specific damage caused to the women by the domestic and sexual enslavement they suffered.

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116 *Ibid*, s V (Jaime Romeo Valdez Estrada).
117 *Ibid*, s IV (Expert Nieves Gomez Dupuis).
118 *Ibid*, s V (Magdalena Bernal De Paz, Elena De Paz Santiago, Ana Lopez, Ana Pacheco Ramirez, Magdalena Maton Raymundo, Juana Sanchez Toma, Carmen Teresa Perez Lopez, Margarita Rivera Ceto, Maria Cavinal Rodriguez, Cecilia Baca Gallego, Ana Maton and Juana Hernandez).
119 *Ibid*, Reference in *Rios Montt* to the testimony of Paloma Soria Montañez).
120 *Ibid*, s III(72).
121 *Ibid*, s III(43).
122 *Ibid* at 691.
123 *Ibid*.

a) Violence Against Women as an Attack on the Q'eqchi Community

The tribunal finds that the acts committed against the women had the effect of creating a cultural fracture within the community. Having been raped and enslaved by the military hurt the victims, but also the community in general.[124] Similarly to the *Rios Montt* judgement, the practice of systematic rape of women was a strategy to reach human and cultural destruction of the community.[125]

b) Use of Mayan Sacred Texts in Military Strategy

One of the practices of the Guatemalan military during the civil war was to kill pregnant women by cutting their abdomen, and killing the foetus.[126] One of the lay witnesses in the Sepur Zarco trial, Catarina Caal, explained to the court how her pregnant daughter was killed before her eyes and the soldier pulled the baby violently out from her belly.[127]

According to one expert witness, after having cut a pregnant woman's abdomen, the military would also sometimes place the woman's severed head inside her own abdomen. The expert argued, and the Court validated her testimony, that this practice appears to draw from the story of Ixquic in the Mayan sacred book "*Popol Vuh*".[128] In this story, the princess Ixquic is impregnated by a skull (calavera).

The judgement also refers to the fact that the Guatemalan Army used concepts from the *Popol Vuh* as names for its military campaigns. For example, one of its operations was named "Operation *Xibalba*", which is what the underworld is called in the *Popol Vuh*.[129]

c) Moxok

In coming to the conclusion that the rapes and enslavement not only caused physical and psychological harm, but also cultural harm, the tribunal drew abundantly on Q'eqchi concepts.

For example, the testimonies of the victims often referred to being "*moxok*." The Q'eqchi linguistic expert witness explained that the act of having been "*moxok*" refers to sexual violation, but has a more profound meaning in the Q'eqchi culture.

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124 *Sepur Zarco*, *supra* note 5 at 98–109, 476, s IV, V (Expert testimony of Irma Alicia Velasquez Nimatuj and section on the criminal liability of the accused).

125 *Ibid* at 476.

126 CEH, *supra* note 18 at 43.

127 *Sepur Zarco*, *supra* note 5, s IV(B). Her testimony was also presented in the Expert Testimony of Monica Pinzon, slides presented to the Court during her testimony, personal copy of the author.

128 *Sepur Zarco*, *supra* note 5 at 476; Testimony of Expert Witness Rita Laura Segato at 32.

129 *Sepur Zarco*, *supra* note 5 at 24.

The woman has been dirtied, profaned and her social and spiritual world destroyed.[130] It entailed her social and spiritual destruction within the Mayan community, a "social death".[131]

The victims explained how, because they had been "*moxok*", they have been unable to remarry or recover their plot of land, and have often had to live with family members, to beg to survive, or to work for other members of the community as servants.

d) Susto

Several witnesses indicated that after the massacres of their husbands and their enslavement by the Army, they suffered from "*susto*". An expert witness explained to the tribunal what this sickness was for the Q'eqchi. It is when the spirit of the person leaves the body of the person, which remains limp or very weak.[132] It can happen in situations of extreme violence and the Mayan have treatments to rebalance the spirit and the body to cure the person from *susto*.

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The *ILO Convention 169* and the *United Nations Declaration on the Rights of Indigenous Peoples* provide that legal decisions must give due consideration to the customs and legal systems of the Indigenous peoples concerned. Guatemala's *Constitution* and the *Peace Accords* provide that the customs of its Indigenous peoples must be respected.

In both the landmark 2016 sexual slavery *Sepur Zarco* case and the 2013 *Rios Montt* genocide case, most lay witnesses were Indigenous and often unilingual Q'eqchi or Ixil speakers. The court proceedings adapted to this reality by allowing the witnesses to testify in their language. The court did not however make any other modifications to usual court procedure to take into account the witnesses' Mayan culture. Examples of potential modifications could have included holding the trials in the Indigenous communities or in a less formal setting or integrating certain Indigenous ceremonies during Elder testimonies, or showing more deference to the testimonies of the Elders. This could have helped put witnesses more at ease and demonstrated consideration for Mayan customs.

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130 *Ibid*, s IV (Expert testimony of Mayra Nineth Barrios Torres).
131 *Ibid* at 476; Testimony of Expert Witness Rita Laura Segato at 31.
132 *Ibid* at 89 (Expert testimony of Monica Pinzon Gonzalez).

Furthermore, the proceedings did not integrate elements of Mayan customary law, such as admitting to one's crime and asking for forgiveness from the victims.[133] Monetary compensation for the harm done was provided for in the judgement, but this aspect of the Guatemala penal system does not emanate from Mayan restorative justice, but rather from Hispanic law. It is not clear to us whether sufficient efforts were made by the Court, but also by the victims' lawyers and the prosecutors, to integrate the victims' perspective in the damages' award. It is not however surprising that Mayan customary law was not used, considering that the accused in both trials were not Maya[134] and that this would have been perceived as a violation of their due process rights.

On the other hand, the judgements did take into account several Mayan concepts and customs. The *Rios Montt* judgement drew upon values and practices from the Ixil worldview, and these were important in proving that the accused intended to destroy the Ixil people and hence had committed genocide. In the case of the *Sepur Zarco* judgement, several Q'eqchi concepts and norms were analysed and used to show the extent of the damage done to the women by domestic and sexual enslavement.

In both judgments, ample reference to the testimonies and reports of anthropological experts was made, some of whom were of Maya descent[135], although trained as academics. No traditional Q'eqchi or Ixil cultural experts testified.[136]

It is important to note that certain sectors of Guatemalan society, in particular the military and landholding and commercial elite, opposed the very existence of these trials, claiming that the trials were betraying the *Peace Accords* signed between the State and the URNG guerillas, reopening old wounds, dividing the country and hindering the reconciliation process.[137] They expressed fear that if Guatemala was

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133 Hessbruegge and Ochoa García, *supra* note 16, at 45–46 (on Mayan Law in criminal proceedings); Lieselotte Viaene, "La relevancia local de procesos de justicia transicional. Voces de sobrevivientes indígenas sobre justicia y reconciliación en Guatemala posconflicto" (2013) 16 Antípoda–Revista de Antropología y Arqueología 85 at 108 (the lack of restorative justice has, according to one author, led some Q'eqchi communities to oppose participation in transitional justice trials); *Hacia la reforma de la justicia en Guatemala*, online: <www.reformajusticiagt.org> (it is important to note also that a constitutional reform is presently undergoing consultations in Guatemala to reform the judicial system, including a delegation of certain judicial responsibilities to Indigenous authorities); Patricia Ramirez Parra, ed, *Camino por la justicia: victimización y resistencia de mujeres indígenas y campesinas en Guatemala y Colombia* (Medellín: Universidad de Antioquia, 2014) at 88–90 (however, many Indigenous women have raised concerns that violence against women is not addressed appropriately by customary authorities).

134 Interview of Ical and Yaxcal, *supra* note 70. One of the accused, Heriberto Valdez Asig, was apparently fluent in Q'eqchi, his mother being Q'eqchi.

135 *Ibid*.

136 See *Federal Guidelines*, *supra* note 57, s III(D). Some countries accept Indigenous cultural experts with no formal academic training. Elder testimony and oral history are received in the Federal Court of Canada.

137 Martín Rodríguez Pellecer, "Los militares y la élite, la alianza que ganó la guerra", *Plaza Publica* (21 August 2013), online: <www.plazapublica.com.gt/content/los-militares-y-la-elite-la-alianza-que-gano-la-guerra>.

branded as a "genocidal state," foreign investment would flee the country. Others have argued that the landholding and commercial elite felt gravely threatened by the genocide trial. Due to their collaboration with the Rios Montt government in the early eighties, there was a risk that their members could in turn be prosecuted[138]. Empowered by a condemnation of genocide for the former dictator, Indigenous victims' associations might also push for agrarian reform.

In light of the immense pressure the tribunal was receiving from certain sectors of Guatemalan society, we consider that reasonable efforts were made to integrate the Indigenous perspective, especially in regards to how the crimes affected the victims. This is an important step towards greater reconciliation between the victims and the Guatemalan judicial process.[139]

The trials to bring Rios Montt to justice are continuing. In March 2017, the High Risk "A" Tribunal declared that there was sufficient evidence to proceed to trial in another criminal case against Rios Montt, this time for his responsibility in the 1982 Dos Erres massacre.[140] On October 13, 2017, the Ixil genocide trial against Ríos Montt and Rodríguez Sánchez, which had led to the annulled judgement, resumed, despite Rios Montt's dementia.[141]

On July 19, 2017, the eleven women of Sepur Zarco could breathe a sigh of relief, as the *Sepur Zarco* decision was unanimously ratified by the High Risk Appellate Court.[142] The reparations ordered by the court, both for women and for the community in general, have not yet been complied with, although certain steps have been made and discussions are well advanced between the co-plaintiffs and the government.[143] From the perspective of restorative justice, and in order to continue

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138 *Ibid*.

139 See Catherine Lu, "Reconciliation and Reparations" in Helen Frow & Seth Lazar, eds, The Oxford Handbook of Ethics of War, (Oxford, Oxford University Press, 2015), Chapter 29. In the case of these two instances of transitional justice, steps towards reconciliation do not appear to be between the victims and the perpetrators, but between the victims and the Courts/Guatemalan State. This can be identified as "structural reconciliation" rather than "relational reconciliation".

140 Burt & Estrada, *supra* note 3; Henry Estuardo Pocasangre & Jerson Ramos, "Ríos Montt enfrentará juicio especial por masacre de Dos Erres", *Prensa Libre* (31 March 2017), online: <www.prensalibre.com/guatemala/efrain-rios-montt-enfrentara-juicio-por-masacre-en-las-dos-erres>.

141 Jo-Marie Burt & Paulo Estrada, "The Guatemala Genocide Trial Resumes", International Justice Monitor (20 October 2017), online: <https://www.ijmonitor.org/2017/10/the-guatemala-genocide-trial-resumes>.

142 Jo-Marie Burt & Paulo Estrada, "Court Ratifies Historic Sepur Zarco Sexual Violence Judgment", International Justice Monitor (21 July 2017), online: <https://www.ijmonitor.org/2017/07/court-ratifies-historic-sepur-zarco-sexual-violence-judgment>. The decision can however still be appealed and the amparo recourse is still being processed.

143 Mujeres Transformando el Mundo, Press Release, "Por el cumplimiento de las Medidas de reparación Sepur Zarco", (12 May 2017), online: <www.mujerestransformandoelmundo.org/es/articulo/por-el-cumplimiento-de-las-medidas-de-reparacion-caso-sepur-zarco>. Elsa Coronado, "Sepur Zarco: la vida despues de una sentencia que se incumple", Plaza Publica (31 October 2017), online : <https://www.plazapublica.com.gt/content/sepur-zarco-la-vida-despues-de-una-sentencia-que-se-incumple>. A mobile health clinic has been inaugurated.

the process of reconciliation, it is crucial that reparations be complied with.[144]

Several observers have noted that despite the annulment of the 2013 *Rios Montt* judgement, the genocide trial has contributed to reconciliation and empowerment of Indigenous peoples in Guatemala. No longer are Indigenous peoples mere objects of Guatemalan State policy. They now vindicate their rights and demand a more responsive and inclusive State.[145] The trial has opened a window towards truth and justice and has put an end to the certainty of immunity and impunity for the economic, political and military elite of Guatemala.[146]

Although racism, violence against women, severe inequality of access to justice, mistrust of the State judicial system and lack of reparations is still very present, we would argue that the *Rios Montt* and *Sepur Zarco* judgements have had a positive impact on the reconciliation of Indigenous peoples and especially Indigenous women with the Guatemalan judicial process.

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144 See Karine Vanthuyne & Ricardo Falla, "Surviving in the margins of a genocide case in the making: recognizing the economy of testimony at stake in research on political violence" (2016) 18:2-3 *J of Genocide Research* 207 (on the economic expectations of victims in this regard).

145 *Bosdriesz* & *Wirken*, *supra* note 91 at 1093.

146 Luz Mendez Gutierrez & Amanda Carrera Guerra (ECAP), *Mujeres indígenas: clamor por la justicia* (Guatemala City: F&G Editores, 2014) at 29.