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## The unacknowledged genocide: The Guatamalan Maya's quest for justice

### Introduction

The era from the start of World War II through to the 1960s... was an era of unprecedented aggression in the occupation of indigenous lands, and backed by the equally unprecedented wealth and power of the industrial world and the systematic dislocation of thousands of indigenous peoples around the world. [Coates, 2004. p. 226/7]

The indigenous peoples of the Americas stood little chance of survival when faced with the strategic western military force they were met with and as a population, they share a sad collective history of exploitation and social condemnation. This paper aims to open up further discussion on the lack of justice achieved to date while assessing the true extent of damage caused to the indigenous society, how their customs and traditions were upset, disjointed and in essence, erased. Drawing on the unquestionable relationship between indigenous peoples and land, this work will offer further insight into how the military-backed scorched earth policies not only destroyed important indigenous lands, but the forced removal of the indigenous population from these lands to the government designed 'model villages' completely upset indigenous custom, tradition and lineage, and hindered the transfer of said traditional practices and customs from one generation to the next. This paper will further hypothesise if the case would have been better suited to an international criminal tribunal like those instances of the International Criminal Tribunal for the Former Yugoslavia [ICTY], International Criminal Tribunal for Rwanda [ICTR], The Special Court of Sierra Leone [SCSL] and The Extraordinary Chambers in the Courts of Cambodia [ECCC]. It has been over 20 years since the end of the civil war in Guatemala yet those responsible for some of the gravest crimes committed during the war have not been brought to justice. The crimes of Ríos Montt and his government remain unpunished and there is no closure for the indigenous peoples who were most affected by violence of the regime. The indigenous peoples of Guatemala still face uncertain hardships while enduring this perpetual quest for acknowledgment of the atrocities, recognition of victimhood and justice.

## Background

In his writings on genocide, Adam Jones alludes to the fact that the crime of genocide against indigenous peoples of the Americas is sadly not a new concept and in fact they have been victim to continuous acts of genocide over the past century, pointing out that “[t]he European holocaust against indigenous peoples of the Americas was arguably the most extensive and destructive holocaust of all time” [Jones, 2006. p. 70]. This is echoed in the writings of Ward Churchill, who has said of the genocide inflicted upon the indigenous in the Americas “over the past five centuries is unparalleled in human history, both in sheer magnitude and in its duration” [Churchill, 1997. p. 97]. The indigenous peoples of Guatemala resisted assimilation and strived to maintain strong levels of Mayan practice and customs, a battle that was made incredibly difficult when said population became branded as the internal enemy of the state during the civil war period. The most violent period of the internal armed conflict, and the main focus of this paper, was a two year window in the early 1980s: 1981-1983. With the government and military under the control of Efraín Ríos Montt, “[a] holocaust descended upon the Mayan highlands” [Jones, 2006. p. 77]. The catastrophic fate of the indigenous peoples of Guatemala during his reign has left an enormous scar on the face of Guatemalan civil society at large. The extent of the brutality and human rights violations against the indigenous peoples was extraordinary: “[i]n just six years, some 440 Indian villages were obliterated and some 200,000 Indians massacred, often after torture” [Jones, 2006. p. 77]. There was no escaping the brutal forces of the state and military; there was no distinction between the indigenous victims – men, women and children all became targets. A macabre level of cruelty was experienced by the female population in particular, who “were routinely raped while being tortured. Women – now widows – who lived could scarcely survive the trauma: the presence of sexual violence in the social memory of the communities has become a source of collective shame” [ppu.org]. Horrifically not even pregnant women were immune from the brutality of the military forces as the wombs of pregnant women were cut open [La Violencia Frohlich & Janning. 2015] in order to curb the next generation of Maya. The tranquil existence of the Guatemalan Maya soon became one of sheer terror.

In 1996 the civil war came to an end with the aid of United Nations [UN] supported mediation efforts and the signing of the Oslo Peace Accords. As part of the peace process the UN created The Commission for Historical Clarification (*La Comisión para el Esclarecimiento Histórico*) [CEH], whose mission was to uncover truths and find answers as to “why did these acts of outrageous brutality, which showed no respect for the most basic rules of humanitarian law, Christian ethics and the values of Mayan spirituality, take place?” [CEH Report, 1999 p. 11]. For the first time, in February 1999 the world got to witness what had happened so silently

in Guatemala. The CEH published their report, aptly titled 'Memory of Silence' which portrayed the sad and incredibly cruel existence of the Mayan population of Guatemala during the civil war. The state-sponsored military attacks on the indigenous populations, as stated in the CEH report were of an "aggressive, racist and extremely cruel nature of violations that resulted in the massive extermination of defenceless Mayan communities" [Navarro 1999]. The report included findings such as:

the killing of defenceless children, often by beating them against walls or throwing them alive into pits where the corpses of adults were later thrown; the amputation of limbs; the impaling of victims; the killing of persons by covering them in petrol and burning them alive [ppu.org].

The barbarous aggression was inflicted across the entire indigenous population regardless of age or gender: "[v]ictims of all ages often had their limbs amputated" [ppu.org] thus creating an eternal environment of terror. The CEH Report attributed 93% of the human rights violations it investigated to some of the highest authorities in the state. The report went beyond attributing responsibility to only domestic parties and boldly put the United States under close scrutiny for the part it played in the commencement of the Guatemalan civil war. "[T]he commission obtained extensive documentation of the US role in overthrowing a democratic government in Guatemala (1954) then installing and sustaining the military dictators who eventually turned to full-scale genocide against Mayan Indians and domestic dissenters" [Jones, 2006. p. 379].

The remnants of the civil war can still be seen vividly on the tapestry of modern day Guatemala, a country where there is huge inequality between the rich and the poor, or perhaps more appropriately, between the indigenous population and the general population.

### **3.1 Cultural Genocide**

In a hearing before the sub-commission of the Western Hemisphere an indigenous man from Brazil made one simple statement that embodies the special connection between indigenous peoples and the land they occupy: "[l]and is culture and culture is life for us" [Indigenous Sub-Commission (1994). p. 69]. This allows for an understanding that an attack on culture is an attack on life in many indigenous communities. This section will examine the crime of cultural genocide as it relates to the history and continued plight of the indigenous peoples of Guatemala in the pursuit of their collective cultural survival. There is a lack of prosecution for such crimes at present because there is a lack of international legal and political will to tie down a definition of the term. To apply a definition

to the crime, the words used to describe genocide by the General Assembly in 1946 in resolution 96 must to be taken into consideration: “[g]enocide is the denial of the right of existence of entire human groups” [UN General Assembly Resolution A/RES/96/1946]. If a group’s culture and society is attacked and they are forcibly removed from their lands, homes and families it would be consistent with the understanding of genocide as the general assembly understood it, a group who have their entire way of life upended and destroyed. It has been credibly documented that during the reign of Ríos Montt, “[t]he army destroyed ceremonial centres, sacred places and cultural symbols. Language and dress, as well as other elements of cultural identification were targets of repression” [CEH Report 1999. p.35]. That is, in essence, a denial of existence of the group whether in whole or in part. There is a limitation of the definition of genocide within international law, however, “indigenous nations continue to face systemic, widespread threats to their fundamental human rights to culture. These identity groups are increasingly conceptualizing such rights violations as cultural genocide” [Kingston, 2015. p. 63-83].

Cultural genocide was part of the crimes committed by the state and military upon the indigenous communities of Guatemala. their society. The goal, as envisioned by the government and military, was complete destruction of the Mayan way of life, their culture, their history and their society. As stated in the report, “The massacres, scorched earth operations, forced disappearances and execution of Mayan authorities, leaders and spiritual guides, were not only an attempt to destroy the social base of the guerrillas, but above all, to destroy the cultural values that ensured cohesion and collective action in Mayan communities” [CEH Report, 1999 p.23]. Even if some or all members of a group remained alive, attacks on their cultural lives and existence were just as brutal. This is a sentiment which is echoed by Kress, who reiterates the significance of cultural identity to any group and how it is a defining feature, further arguing that “the primary goal of the international rule against genocide (is) to protect the existence of certain groups in light of their contributions to world civilization, a campaign leading to the *dissolution of the group as a social entity* is directly relevant to that goal” [Kress, 2006. p. 461-502].

### 3.2 Cultural Genocide - The Tactics

This is precisely what happened in the instance of Dos Erres, an entire village massacred with no lineage remaining except for the haunting memory which is depicted in many indigenous folk tales and songs. Kristin Hon has claimed that cultural genocide is just as destructive as physical or biological genocide, perhaps with less bloodshed but alluded to the obliteration of a group identity through the process describing it as “nothing more or less than the total destruction of a culture so as to

obliterate the identity of a people” [Hon, 2013 p. 359-409]. Again the goal of the Ríos Montt regime can be clearly seen through a similar lens, as much as senior officials deny any direct attacks against the indigenous Mayans, the history and mortality figures speak for themselves. Additionally, the CEH documented high numbers of clandestine graves that meant many of the victims of the genocide did not receive a proper Mayan burial. This is of huge importance for all communities of Guatemala but it is especially important for the Mayan population, who again were the most affected group, as they hold a “core belief in the active bond between the living and the dead. The lack of a sacred place where this bond can be attained is a serious concern that appears in testimonies from many Mayan communities” [CEH Report 1999 p. 28]. The tactics employed by the military and the civil patrols were physically and psychologically cruel, while physical “[a]ggression was directed against elements of profound symbolic significance for the Mayan culture, as in the case of the destruction of corn and the killing of their elders” [CEH, Report 1999 p. 30]. There were further elements of psychological disruption to the Mayan lifestyle and culture with the patrol’s overt defamation of the indigenous culture “through the use of Mayan names and symbols for task forces and other military structures” [CEH, Report 1999 p. 30].

Within the previously discussed model villages, inhabitants were forced into accommodation rather than be allowed choose their own. Having witnessed first-hand these model villages, Rebecca Clouser attested that “the location of their houses were chosen at random by the military, villagers were separated from their relatives” [Clouser, 2009 p. 13]. This unquestionably disrupted patterns of kinship which is often instrumental in indigenous populations. This inevitably created a massive disturbance of the transmission of indigenous cultural identity and heritage from generation to generation as a result of the hostilities and violence directed towards them and the evolving need to conceal their ethnicity.

The forced militarised resettlement of people played a significant role in the destruction of the Mayan culture. Forms of amnesty were given to those civilians who opted to move into these military controlled communities, where the inhabitants would be subject to “psychological operations to re-educate the people” [CEH, Report, 1999 p. 31]. The scorched earth policies of the Ríos Montt regime and the forced transfer of indigenous populations from the traditional villages to the newly conceptualised model villages were causing irreparable damage to the cultural property of Guatemala.

### 3.3 Cultural Genocide - The Aftermath

What is important to note is that Guatemala has a long history of protecting the cultural property of the country. In fact, “(t)he first steps to preserve

Guatemala's culture were taken in 1946, when the Ministry of Culture's Instituto de Antropología e Historia was founded" [ICRC Report, 2000 p. 93]. Guatemala's cultural heritage is divided into two groupings and they are tangible and intangible cultural heritage and under the heading of intangible cultural heritage it has a breakdown of the time periods from which cultural property is protected and it explicitly states "the pre-Hispanic period which includes Mayan heritage" [ICRC Report, 2000 p. 94].

Furthermore, the report also states that the urban layout of towns and villages are forms of cultural property, which was not taken into consideration nor was it any way protected or preserved at the time of the internal displacement of the indigenous population displaying how the government and military ignored national law in place at the time.

In writing about the Mayan movement after the war Burrell has claimed "much of this destruction was performed in an ongoing spectacle of terror, one that was particularly successful because the military assiduously cultivated parties already engaged in local conflicts, and forcibly inducted indigenous men and boys into military service, harvesting their insider knowledge while producing some of the fiercest killers in Latin America" [Burrell, 2013 p. 24]. After being initiated into the patrol units these men and boys would be forced to make their own people their enemy and join the military in their ongoing genocidal attacks on the indigenous populations of Guatemala. As Sieder states, "The combination of random violence, mass displacement and militarized resettlement severely affected indigenous cultural and religious practices" [Sieder, 2003. p. 213]. The military, not only attacked livestock, crops and water supply of the indigenous population; they also "destroyed sacred sites, ceremonial spaces and cultural artefacts. Indigenous language and dress were repressed" [Burrell, 2013 p. 24]. There was very little international or domestic legal instruments that could be relied on for the protection and preservation of the Mayan cultural property. The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954 only applies to destruction of cultural property during armed conflict. As will be discussed in the following section, Guatemala only acceded to the Convention in 1985. Further to this, there are intergovernmental organisations that work towards the protection of cultural property, like UNESCO, who drafted the World Heritage Convention 1972 [unesco.org]. However this is non-binding and the organisation has to abide by domestic laws: "[i]t (UNESCO) has no mandate to provide criminal protection or custody of materials, not to mention to impose sanctions directly against delinquent national authority" [Nafziger, 2014 p. 295] and though not binding it promotes compliance. The lack of protection of cultural property during an internal armed conflict is an area that warrants further expansion and will be addressed further on in this paper.

Jennifer Otterson Mollick, writing for the Carnegie Council, has said

the following about the importance of cultural property and why it is so often targeted: “[i]t is often collateral damage during battles and bombings, the object of theft for those seeking to sell valuable objects, or the target of destruction in an attempt to destroy a people’s culture or evidence of a culture’s existence” [carnegiecouncil.org], an attack with the intent to destroy a group through eliminating their culture, history and existence is an act of genocide. Destroying cultural property is a tactic employed by many groups as a means to gain control over a group, by way of eliminating the group’s heritage, history and cultural practice and effectively destroying the societal ties that bind a people together. While attacks on cultural property are harming objects rather than people it can be a quick escalation when in the hands of a war lord who is working toward their own agenda and vision. Cryer suggests that attacks on cultural property as an act of cultural genocide is important as it can be viewed as a lead up act to the intended destruction of a group “attacks of ethnic cleansing – and attacks on cultural and religious property - may be significant evidence towards the intent to destroy” [Cryer, 2010. p. 225].

This arguably explains why the crime of destruction against cultural property is so grave yet underrated, as crimes that can be considered acts of cultural genocide can be a pre-cursor to acts of physical genocide, as was the case of the Maya in Guatemala. As mentioned previously, Guatemala had not ratified many of the international legal instruments which were in place at the time and the reason for this is perhaps due to the level of protection said instruments would have afforded the indigenous peoples during the internal armed conflict, in terms of the three generations of human rights. The following section will address the applicable legal framework as it pertained to the Guatemalan genocide case.

#### **4.1 Reparation**

Reparation within the context of indigenous peoples can be quite complicated. This is often owing to the poor economic position of indigenous communities and “made more complicated by high rates of illiteracy and very poor basic services of health and education and with respect to the number of victims and their relatives who are expected to benefit from measures of reparation” [Gómez, 2014. p. 147]. Taking this into consideration, the CEH recommended that a system be created to offer both psychological and economic assistance for those who were most affected by the massive human rights violations that had occurred during the civil war period. The list of recommendations included “the investigation of the whereabouts of the disappeared, the location and exhumation of clandestine graves; the establishment of a National Commission for the Search for Disappeared Children... the building of monuments in memory of those killed and the official acknowledgement of state responsibility” [Sieder,

2003, p. 219]. Two significantly important aspects of the recommendations made by the CEH in the conclusion of their report in relation to the achievement of justice for the indigenous peoples who were most affected by the crimes, was the preservation of historical memory and measures of victim healing.

There was to be a designated day of remembrance. This was mirrored in the wording of the Oslo Peace Accord which also stated the importance of the memory of the victims of the fratricide in Guatemala. In doing this, the CEH recommended that “local authorities should promote and authorize the raising of monuments and the creation of communal ceremonies in accordance with the forms of Mayan collective memory” [CEH Report, 1999 p. 49]. This was to include assistance in restoring and preserving the cultural property which was damaged during the conflict with the commission highlighting “[t]he scared Mayan sites violated during the armed confrontation are reclaimed and their importance highlighted” [CEH Report, 1999 p. 49]. This was of vital significance as the cultural importance of the Mayan lands was finally being recognised. Secondly, the state should take measures for the compensation for the victims. This was to include a detailed system of reparation for victims, survivors and relatives of the victims of the armed confrontation. These reparations were recommended by the CEH on the basis that they recognise “that truth, justice, reparation and forgiveness are the bases of consolidation of peace and national reconciliation” [CEH Report, 1999 p. 50] which further displayed that the CEH recognised the need for the indigenous peoples of Guatemala to feel part of their state once more and feel safe and secure in maintaining their existence and survival. This recommendation was also derived from the Oslo agreement, under which came the National Reparation Plan, which appeared a great accomplishment on paper whereas in practice, it has done and achieved relatively little.

There have been numerous condemnations of the lack of progress made in terms of reparation by the Guatemalan state. The organisation ‘Transitional Justice International’ has said of the program “[i]n design, the program includes many different measures, both to improve people’s material conditions and to provide symbolic recognition to the victims. But in practice it consisted of only small individual payments, leaving many deeply dissatisfied” [ictj.org]. The international monitoring agency, Impunity International, have commented on the lack of progress that has been made in relation to justice being achieved for the victims and survivors. They maintain that “[l]ittle progress has been made to bring to justice those individuals responsible for the most serious violations committed during the internal armed conflict, or to implement the institutional reforms needed to remove those suspected of involvement from public office” [impunitywatch.org]. The reparation process resulting from the CEH report has been a slow process. It was only in 2005 that Guatemala



saw the creation of the Guatemalan NRP, as per the conditions of the UN CEH report. The body, although created with the best of intentions, has also been slow with achieving the goals it set out to achieve under the recommendations from the CEH report. Nevertheless, a great deal of effort has been placed into the process of identifying the deceased in clandestine graves. The issue of mass graves was a massive concern for many of the Mayan survivors and relatives of the victims of the genocide.

This is due in most part to cultural and spiritual connections the indigenous peoples of Guatemala have with their deceased kin, Nieves Gómez has written extensively about this intrinsic aspect of the spiritual practices of the Mayan people in Guatemala stating “[c]ultural practices relating to death and the deceased are particularly important due to the special relationship of reciprocity existing between the living and the dead” [Gómez, 2014 p. 144]. If this relationship is broken it can have an enormous impact of the living members of the group [Gómez, 2014 p. 144]. This became a major concern and the need to have it rectified formed an integral part of the National Reparation Program as “[m]any Mayans have expressed the need to reconcile themselves with the dead before they can reconcile themselves with the living” [Sieder, 2003 p. 219]. Freddy Peccerelli, a Guatemalan forensic anthropologist, founder and director of the The Guatemalan Forensic Anthropology Foundation (*Fundación de Antropología Forense de Guatemala*) [FAFG] has maintained that the mass exhumation of clandestine graves from during the times of the internal armed conflict have had a dual benefit to the victims and survivors of the genocide. Firstly, the deaths cannot be denied or unacknowledged and secondly “[w]ith the truth and remains returned, the family have the decision to honour their dead according to their families’ religious customs” [fafg.org]. Even if the identification of the dead and the return of their remains don’t help the prosecution of Ríos Montt, they hold a symbolic significance as “[a]lthough exhumations and burials do not represent punishment for those responsible for violations, arguably they represent a form of restorative justice for victim’s families” [Sieder, 2003 p. 220]. Since its creation, the FAFG “has now exhumed 1,450 graves, discovered the remains of 6,500 victims” [amnesty.org] and strives to supply support and scientific evidence to the Guatemalan courts to help justice be served and achieved “FAFG has provided forensic evidence to the Guatemalan Justice System and the Public Prosecutor’s Office in 1,400 anthropological reports in legal cases relating to the internal armed conflict” [fafg.org].

## 4.2 The Right to Reparation

The right for victims of human rights violations to seek reparation is enshrined in national and international legal instruments. Article 124 of the Guatemala penal code allows for victims to seek reparation once a

guilty verdict has been handed down. Once Ríos Montt's original guilty verdict was handed down, civil parties for the centre for human rights and legal action [CALDH] and the Association for Justice and Reconciliation made cases before trial judges for reparations to be made specific to a trial. The reparations hearing was held two days after the guilty verdict was heard, the hearing was not attended by Ríos Montt who had been hospitalised. Although arguments were made that requests for reparation from the State were not well founded as the trial was that of Ríos Montt and not of the state therefore the state should not be liable. This was quickly thrown out and after forty minutes of deliberation the court returned its decision, "[t]he court ordered largely symbolic reparations—intended to preserve the dignity of the victims, promote remembrance, and force the country to confront the horrors of the past" [ijmonitor.org]. Reparations ordered by the court included formal apologies by the government for committing genocide and crimes against humanity and a separate apology for the sexual violence suffered by indigenous women. The court further stated "all of the apologies must be public ceremonies, at the National Palace of Justice and the Municipal Centers" [ijmonitor.org]. As mentioned, the court ordered reparation included a separate apology to be issued to Mayan women who were victims of sexual violence.

This coincides with a "gradual shift over the past decade in Guatemala from occlusion to increased visibility of the use of sexual harm as a weapon of war and genocide" [Crosby A, 2016 p. 265-283] during the internal armed conflict. An emphasis was to be placed on historical memory and there were to be official memorials created to acknowledge and honour the memory of the victims of the genocide. This was to include a national day against genocide which was to be the 23rd of March every year. Non-repetition was a concern for the victims and survivors of the genocide and at their behest, the court-ordered reparation also included extensive training for military personnel in the field of human right and international humanitarian law "with the aim of preventing future war crimes and crimes against humanity. Fourth, the order requires the establishment of schools (elementary, secondary, high school and universities) in the communities affected by the genocide" [ijmonitor.org]. The CALDH also requested that liaising with the indigenous peoples affected in relation to reparations and timelines; however the court rejected this, perhaps showing that an air of insignificance still remains around the indigenous peoples of Guatemala [ijmonitor.org]. The denial of the genocide still exists within Guatemala, so much so that the CALDH, as part of the reparation hearing requested that a law be passed through the parliament "criminalizing genocide denial and hate speech against racial minorities" [ijmonitor.org].

The court, perhaps unsurprisingly, rejected this request also. The court had refused to issue a time frame during which the reparations were to be

made and CALDH requested a six month period which was also rejected by the court, perhaps a foresight of the guilty verdict being overturned. Due to constant delays of the trial and the overturning of the genocide verdict, reparations to the indigenous victims of the genocide remain unmade and historical memory continues to be distorted. The quest for justice for the indigenous peoples of Guatemala remains on the metaphoric back burner. The situation is made more complex due, in large part, to the fact that the state is responsible for the crimes and they have the obligation now to ensure that reparation is made. Meredith Gibbs asserts that “the relationship between restorative justice and remedies and the relative roles of victims, offenders, community and the State in (traditional) formulation[s] becomes far more complex when it is the State which is responsible for criminal harm” [Gibbs, 2009 p. 45-57]. This hinders the hunt for justice in Guatemala, justice that remains out of reach for those directly and indirectly affected and haunted by the genocide.

### **5.1 The Prosecution of Cultural Genocide**

The crime of cultural genocide, although a relatively young concept, is not entirely new in the realm of international law. The previously mentioned UN sponsored Whitaker Report published in 1985 concluded that more work within the international legal world needed to be completed on the crime of cultural genocide and ethnocide. In the conclusion of the report, Whitaker suggested that these crimes be pursued in greater depth and given a greater consideration within the international understanding of the crime of genocide [Schabas, 2000. p. 467]. Robert Cryer has offered further clarification on the issue of reading General Assembly Resolution 96 to include cultural genocide and points out that even though the preamble to the resolution “stated that genocide results in great losses to humanity, in the form of cultural and other contributions represented by these human groups, this did not suggest that cultural loss, in the absence of physical destruction can amount to genocide” [Cryer, 2010 p. 225]. Berster questions the idea of the intent to destroy clause under article two of the Genocide Convention and if it could be understood to mean cultural genocide. Questioning whether the requirement would be satisfied when the “perpetrator aspires after the groups social destruction that is, the dissolution of the group as a social entity by destroying the cultural ties between its members” [Berster, p. 677-692].

The issue of cultural genocide is contentious. It could be an incredibly valuable concept when applied to the precarious position of indigenous peoples within the international legal framework. While it has been proven that a physical genocide took place in Guatemala, the eradication of the Mayan culture was very much a part of lengthy internal armed conflict there and the loss in transmission of said culture to following generations

is one of grave concern. Is the loss of a cultural identity a crime worthy of prosecuting, and if so, what are the means for creating a framework to do so? Cultural genocide “limits freedom to practice cultural traditions and to live out their lives in culturally appropriate patterns, and it effectively destroys a people by eroding both their self-esteem and the relationships that bind them together as a community” [Kingston, 2015 p. 63-83], thus destroying a group by attacking the main pillars of their society, lifestyle and cultural integrity. This section will identify the reasons why said crime is so grave and recognition of the crime is intrinsically tied to the achievement of justice especially in the instances concerning indigenous peoples.

Considering the list of human rights violations documented in Guatemala during the thirty six year civil war, it should seem apt that charges of cultural genocide should be brought against those responsible for the crimes. The issue as it stands, is the lack of agreement between international lawyers and scholars alike on what the exact definition of cultural genocide is, and if it exists at all. Raphael Lemkin included cultural genocide in his understanding of genocide, and many academics, scholars and international legal experts have been in agreement on this point [Nersessian, 2005]. There are equally as many who disagree with the inclusion of the term in the Genocide Convention. Schabas specifically identifies the deliberate omission of cultural genocide from the Convention [Schabas, 2010. p. 130]. That is not to say that the crime, in the case of Guatemala, could not be punished, for instance, it could be possibly to include the crime under article 2 of the Genocide Convention. That would be to link the crime of cultural genocide to mental harm to a group due to the destruction of their culture. Berster argues that this could have been the reasoning for the inclusion of the specific wording of the article and that there could have been a moment of foresight that the crime of genocide could be commit outside the sphere of physical harm. Of this alternative interpretation Berster maintains that “by extending article II(B) to the causing of *mental* harm, the sixth committee seems even to have consciously chosen to widen the protective scope of Article II beyond scenarios of physical or biological destruction” [Berster, 2015 p. 677-692]. A similar observation was reported by the Carnegie Council in the relation to the drafting of the Genocide Convention noting that the inclusion of cultural genocide was omitted from the wording in the convention and that the act was confined to that of only physical and biological genocide: “[t]he 1948 convention on prevention and punishment of the crime of genocide prevents physical and biological genocide but makes no mention of cultural genocide” [carnegiecouncil.org]. The same report proceeds to further highlight the significance of the often disregarded crime and states that “[c]ultural genocide extends beyond attacks upon on the physical and/or biological elements of a group and seeks to eliminate the wider institutions” [carnegiecouncil.org], as was the case with the cultural genocide of

the indigenous peoples of Guatemala. It was not simply the group being wiped out, the attacks went further than that: they were a means to erase the entire culture of the Mayans; an attempt to curb the transmission of their cultural heritage, values and lifestyles from one generation to the next, made evident by the re-education programs that were part of the military controlled model villages.

## 5.2 The Prosecution of Cultural Genocide Vs Protection of Culture

The previously mentioned report carried out by the Carnegie Council criticised the current understanding of the term genocide and the faults they see with the definition. The Council maintain that “[b]y limiting genocide to its physical and biological manifestations, a group can be kept physically and biologically intact even as its collective identity suffers in a fundamental and irremediable manner” [carnegiecouncil.org]. By applying this understanding to the situation of the indigenous peoples in Guatemala, it becomes apparent that this is one of the many inflictions they have suffered as a group. Lawrence Davidson has argued that cultural genocide is not in direct violation of international law and proposes that it is possibly because it is less ‘bloody’ than physical genocide [Davidson, 2012. p. 3]. If this is to be believed then it must also be questioned why the provision for mental harm to the group and the forced removal of children was included in the Convention if not to allude to some form of protection from non-physical harm coming to civilians. In the case of the Mayans of Guatemala, they had their cultural values and heritage ripped apart. The CEH documented numerous instances of forms of cultural destruction, for example, in the model villages where the indigenous populations were to be re-educated in the ideology of the state. When a group is bound by a shared heritage which includes all facets of life like religious practice, language and dress, the collective identity of the group becomes shattered when these norms are repressed to such an extent. This is an argument shared with Kristin Hon, who has given claim that cultural genocide is just as destructive as physical or biological genocide, perhaps with less bloodshed but alluded to the obliteration of a group identity through the process describing it as “nothing more or less than the total destruction of a culture so as to obliterate the identity of a people. As such, a culture or identity can be destroyed even if all members of the group [are] still alive” [Hon, 2013. p. 359-409]. Again this is describing the situation of the Guatemalan Mayans under the rule of the military government in the 1980s. Their ethnicity was a target and a means of persecution at the hands of the state.

Cultural genocide is an ambiguous crime which can take many forms and unlike physical or biological genocide which has an international treaty, there is no international legal protection against the crime. As

Kingston, asserts, “Cultural genocide is a ‘unique wrong’ that warrants independent recognition by the international community and should not be limited to a subsidiary role in cases of physical genocide. Existing human rights jurisprudence lacks sufficient flexibility to address cultural genocide, and narrow legal definitions of genocide fail to address the intentional and systematic eradication of a group’s cultural existence” [Kingston, 2015 p. 63-83]. Prevention and prosecution of the crime would be best handled in the international arena by international tribunals, or the ICC should have their jurisdiction spread to such grounds. If an indigenous population is victim to such a crime at the hands of the state, as was the case in Guatemala, there is very little indigenous people can rely on in terms of prosecution and punishment of those found guilty of the crime. Davidson further describes the reality of the crime of cultural genocide as an “under-recognized and under-studied phenomenon” [Davidson, 2012, p. 1]. Perhaps this is where the lack of clarity on the issue is most evident, the lack of awareness and knowledge. It is an area that requires further study and expansion so that the international legal community can work towards the eradication of this crime. The first step to achieving this would be to codify an agreed definition of term and have the crime included under the Genocide Convention. There is an urgency needed for a universal definition of cultural genocide to be acknowledged and agreed upon. It is only then that the crime can be prosecuted with greater force, both domestically and internationally. This is one of the major concerns with the crime of cultural genocide is the fact that victims of the crime cannot rely on prosecution of those who commit the crimes against them. Hon has written about the lack of prosecution of cultural genocide “the living may suffer cultural genocide without death, and without being vindicated by the prosecution for physical genocide” [Hon, 2013 p. 359-409]. With the protection of an internationally binding instrument these forms of crimes will inevitably become less frequent.

## **6. Toward International Protection of Culture**

What is clear is that there is a lack of political will to include cultural genocide under international law, which is interesting because more recently the world has seen the significance of decimation of cultural identity by way of destruction to cultural property. The gravity of these blatant attacks on culture are becoming more evident within the international community and in March 2016 the ICC make its first conviction for destruction of cultural property in the case of Ahmad al-Faqi al-Mhadi [ICC-01/12-01/15]. At the confirmation of charges hearing, al-Mhadi was alleged to be criminally responsible for “intentionally directing attacks against buildings dedicated to religion and/or historical monuments, including nine mausoleums and a mosque” [ICC]. It may be early hope

and heavy optimism being placed on the shoulders of the new chief prosecutor for the ICC Fatou Bensouda, who, thus far seems to recognise the severity of crimes of cultural genocide and destruction of cultural property. Bensouda has described the destruction to the cultural heritage in Timbuktu directed by al-Mhadi stating “[t]he magnitude of the loss of such irreplaceable physical embodiment of history and culture was felt by the whole of humanity, and at the expense of future generations” [reuters.com]. If the same interpretation of law and appreciation for cultural diversity and heritage was felt in the case of the Mayans in Guatemala, the severity of the destruction of their cultural integrity may have been more widely known and appreciated. This is the form of innovative thinking that is needed to propel cultural genocide into the collective conscience and with internationally known lawyers, Bensouda for example, championing the importance of cultural identity and property the international community will have to acknowledge and accept the importance of the connections between life and cultural integrity. The repercussions of committing such crimes is coming closer to the forefront of international criminal law and “[b]y repeatedly sanctioning the restitution of cultural property following various wars, the international community has implicitly recognized that seizure and destruction of cultural heritage are an integral part of international wrongful acts” [Vrdoljak, 2011 p. 17-47].

## 7. Conclusion

*Thousands are dead. Thousands mourn. Reconciliation, for those who remain, is impossible without justice* [CEH Report, 1999 p. 12].

The CEH report stated that the military’s actions demonstrated “an aggressive racist component of extreme cruelty that led to the extermination en masse, of defenceless Mayan communities” [CEH Report, 1999 p. 34]. In line with its mandate, the CEH “attributed responsibility for violations to institutions and not to individuals, stating that 93 per cent of all cases investigated were the responsibility of the military and its agents” [Sieder, 2003 p. 216] and documenting a total of six hundred and fifty eight massacres against the Mayan population of Guatemala. Under Ríos Montt, the lives of the Guatemalan Maya were destroyed from the core through violent and aggressive means which left Mayan society decimated:

the legitimate authority structure of the communities was broken; the use of their own norms and procedures to regulate social life and resolve conflicts was prevented; the exercise of Mayan spirituality and the Catholic religion was obstructed, prevented or repressed; the maintenance and development of the

indigenous peoples' way of life and their system of social organisation was upset. Displacement and refuge exacerbated the difficulties of practising their own culture [CEH Report, 1999 p. 35].

The report for historical clarification “provided an exhaustive historical analysis of the causes and consequences of the conflict, concluding that political violence in Guatemala was the direct result of acute socio-economic inequalities and a history of racism against the indigenous majority” [Sieder, 2003 p. 218]. The sad truth for many indigenous Guatemalans is that impunity is still rife in the country in all aspects of society. This is what is stood in the way of cementing the prosecution of Ríos Montt for the crimes he had committed and as a result, making reparations. The reaffirming moment when victims and survivors of the genocide received the verdict that it was formally and officially recognised that a genocide occurred was momentous. It meant the surviving indigenous population could officially and finally begin their journey for closure. But once again, the joyous delivery was short-lived with the overturned verdict. In a sense “[t]he Guatemalan case demonstrates the various venues available for the prosecution of genocide and their complications in the international legal system” [Blake, 2014 p. 563-613], while allowing first hand vision of the equally complex procedure of securing a domestic prosecution for the ‘crime of crimes’. The residue from the corrupt political system during the civil war period, consisting of an “illegal and underground punitive system, managed and directed by military intelligence. The system was used as the State’s main form of social control throughout the entire internal armed confrontation” [CEH Report, 1999 p. 18] and has permanently damaged the reputation of the nation where today “[t]he continuity of the causes of past and present impunity leads to a culture of impunity where citizens expect and accept impunity as the norm” [impunitywatch.org]. The spirit of the indigenous peoples in their quest for justice in Guatemala is unprecedented. They, as a collective unit, continue to strive for recognition and justice as a means to reconcile with the state that betrayed them in the past.

Jones has said of the Mayan peoples in Guatemala: that they “emerged from the genocide of the late 1970s and early 1980s with renewed vigour and conviction” [Jones, 2006 p. 87] and as a people, they had, and still have, very little choice as “the pursuit of justice in Guatemala still depends on the initiative of victims and NGOs and faces the obstacle of a highly unreliable justice system” [Popkin & Bhuta 1999. p. 99-122]. This has a resounding effect on the ability to achieve justice for the indigenous peoples of Guatemala, who, today still strive for official recognition of the crimes that they and their entire community were victims of. Societal recognition is of paramount importance in the quest for justice, Greek



biographer and essayist Plutarch famously remarked that “in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoer” [Noussia Fantuzzi, 2010] affirming that until the entire Guatemalan state are as equally outraged as the indigenous communities at the inadequate achievement of justice to date. Kelsen has written “[j]ustice is social happiness. It is happiness guaranteed by social order” [Kelsen, 1957 p. 2] and that justice cannot be achieved by man alone that it must be achieved through society. It is a juxtaposition that remains unsolved and hinders the possibilities of national reconciliation. The search for justice in Guatemala can only be ended when there is recognition of the crimes by the entire population and with the help of the international community this can be achieved. Justice is certainly subjective, meaning that for some, justice will be the successful prosecution of Ríos Montt; while for others, and particularly the indigenous peoples of Guatemala, justice could come in the form of official acknowledgement of state responsibility, official apologies and the delivery of essential forms of reparation in a timely and fair fashion. The lack of justice further denounces the atrocities that befell the victims of the crimes, as Sanford states “[o]ne of the effects of the massive violence... is the indiscriminate taking of victims, and the namelessness this creates for victims and survivors as well as for the violence itself” [Sanford, 2009 p. 45], the victims of the genocide remain nameless bodies in the collective perception and will remain so until official state acknowledgement has been made. What is clear is that the entire process has been shamefully long and there is a real concern that Ríos Montt will never be prosecuted for the atrocities committed during his time in control of the government and military. Even outside the Ríos Montt case, “[v]ery few prosecutions have taken place at the domestic level in relation to the crimes of the civil war, and most of these were in relation to low level perpetrators” [Hayner, 2011 p. 35]. This is a re-occurring issue with crimes relating to a period of armed conflict and often the heads of state are left untouched. This is perhaps even more visible now with the release of the Chilcot Report. Recently the ICC have announced that they will not try Tony Blair for his part in the Iraq war. The situation is similar to that of Ríos Montt, a former head of state escaping charges of violations of law committed during a time of armed conflict. However the possible impeachment of Blair has now been called for by MPs in the United Kingdom. It has been acknowledged that “the attempt will be symbolic and is unlikely to result in imprisonment” [The Guardian] with the call being “seen in Westminster as an alternative form of punishment that could ensure Blair never holds office again” [The Guardian].

Historical memory has an enormous role to play in the healing of the scars left on the broken body of the Guatemalan indigenous population.

However the strength and will in the community is continuously growing and with it has come a new wave of energy in what is now being called ‘the indigenous movement’ which is fuelled by “indigenous peoples proclaiming the validity and worth of their cultures, languages, laws, religious beliefs, and political institutions; they demand respect and political space” [Jones, 2006 p. 68]. That said, a sense of erasure remains in Guatemala concerning the historical memory of the events. Victoria Sanford—an anthropologist who has spent years studying the impact of the civil war on the collective identity of the country and indeed the indigenous population—has commented on the blatant attempts to erase the events from national consciousness. She claims that the erasure of the genocide from the collective conscience was “compounded by the official silencing of victims and survivors through government disinformation and the negation of the violence – silencing that has been enforced by army acts and threats of continued violence” [Sanford, 2009 p. 45]. The impact on relationships as a result of the genocide in Guatemala has been momentous. As has been previously discussed “although the army organised the genocide, and backed its operation where necessary, the work was done by armed civilians and police” [ppu.org]. The actions of the government, military and the PAC resulted in community members turning on kin. The fact that the police were heavily involved in the massacres, would have unquestionably created a massive distortion of the force. Police who are supposed to protect civilians and yet they became an object that inspired fear and terror among the indigenous peoples of Guatemala. This has most likely affected the work the police force in Guatemala carry out today and most likely accounts for the abnormally high homicide rates, very few of which are ever investigated [Hayner, 2011 p. 35]. “[T]he scale of the violence and brutality, with thousands of human rights violations committed, has left deep wounds on the victims and survivors, as well as on the Guatemalan society as a whole” [impunitywatch.org]. The events live on in the memory of the victims and survivors of the genocide and of forced disappearances, and even today “[c]ollective memories of torture, death, massacres and disappearances have created a constant sense of threat among many Guatemalans, making fear a way of life” [Clouser, 2009 p. 13].

Further to achieving justice for the indigenous peoples of Guatemala, the international legal community as a whole must recognise the gravity of crimes against the cultural identity of a people. Barelli, writing on the evolving position of indigenous peoples within international law, has argued “indigenous rights, rather than claims, have come to represent the core of the indigenous debate, where indigenous peoples and state’s representatives sit on an equal footing at the UN permanent forum on indigenous issues” [Barelli, 2009 p. 957-983]. The UN has put full force behind bringing indigenous issues to the metaphoric table and have

continuously been trying to improve their international legal standing. There have been two decades of the world's indigenous peoples at the UN; with the poor performance of the first, a second decade was announced and progress in the realm of indigenous issues was beginning to be made. At the beginning of the second decade of World Indigenous Peoples, the General Assembly under resolution 60/1 2005 asserted a "commitment to continue making progress in the advancement of human rights of the world's indigenous peoples at local, regional, national and international levels" [General Assembly Resolution 60/1 2005 GA/RES/60/1 Paragraph 127]. The plan of action for the second decade was to also have an aim of "developing a strong monitoring mechanisms and enhancing accountability at the international, regional and particularly national level, regarding the implementation of legal, policy and operational frameworks for the protections of indigenous peoples and the improvements of their lives" [Report of the UN Secretary General. Paragraph 9(v)]. Finally, after nearly a quarter of a century in the making, the United Nations Declaration on the Rights of Indigenous Peoples was entered into force in 2007. The introduction of numerous legal instruments has resulted in the survival of the Mayan population, and indeed, culture a lot more promising. As mentioned in section 2, the post-Ríos Montt government in Guatemala have improved greatly with ratifying international legislation; thus affording much more protections to its indigenous history, heritage, culture, and indeed the physical environment. The 1972 Stockholm Declaration on environment was a result of a meeting of the UN General Assembly Conference held in Stockholm in relation to basic principles and protections relating to the human environment which Guatemala signed in 2002 and ratified in 2008, which affords specific protection to the physical lands. The pursuit of justice for the indigenous peoples of Guatemala has been a long and tumultuous road—a journey that has not come to an end, however. "Increasingly, they (Indigenous peoples) have mobilized to denounce the genocides visited upon them in the past and demand their rights in the present" [Jones, 2006. p. 68]. While there remains some gaps in the relevant legal framework regarding the rights and protections for national minorities and indigenous peoples, the struggle for their peace and survival continues to rise to the surface of the international legal world where:

[r]espect for minorities and indigenous peoples' rights is also linked to issues of conflict and peace. For the sake of peaceful societies and peaceful relations among states, the vision of public policies should be away from sustaining, encouraging or creating myths of a cultural or "blood" purity of a society, but rather focus on the reshaping of national identities to include today's multicultural realities [Stamatopoulou, 2007 p. 249].

In the situation of the advancement of justice for the Maya of Guatemala, the hope remains that the spotlight will once again be aimed at the trial of Ríos Montt; that the currently frayed population can be reconciled and unified by collective remorse. On April 1st 2018, Ríos Montt passed away having never been prosecuted for his crimes against the indigenous peoples of Guatemala.

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