

UDC 39

DOI: 10.33876/2311-0546/2022-2/113-127

Original Article

© James S. Phillips

## LEGAL STRUGGLES OF THE INDIGENOUS PEOPLES OF GUATEMALA

*Guatemala has a population of 17 million residents of which 41% are Maya; 1.77% are Xina people; 18% are of European descent; and 41% are of mixed indigenous and European ancestry. For several centuries the legacy of indigenous peoples in Guatemala has been under siege. There is overwhelming evidence that the indigenous peoples of Guatemala, in their history, have suffered from colonialism, economic imperialism, genocide, crimes against humanity, dispossession of their lands and resources, criminal gangs, and problems related to climate change. The above issues are examined within the framework of international law. International law and organizations could help to rescue their culture which will benefit all of humanity.*

**Keywords:** Guatemala, Indigenous Peoples, Demographics, Historical Background, Lands and Resources, Genocide

**For citation:** Phillips, James S. 2022. Legal Struggles of the Indigenous Peoples of Guatemala. *Herald of Anthropology (Vestnik Antropologii)*. 2: 113–127.

### Introduction

There is overwhelming evidence that the indigenous peoples of Guatemala, in their history, have suffered from colonialism, economic imperialism, genocide, crimes against humanity, dispossession of their lands and resources, criminal gangs, and problems related to climate change. Anthropologist Jennifer Schirmer has described Guatemala as “A Violence Called Democracy” (Schirmer 1999). The above issues will be examined within the framework of international law.

### Demographics

Guatemala has a population of 17 million residents of which 41% are Maya; 1.77% are Xina people; 18% are of European descent; and 41% are of mixed indigenous and European ancestry (National Institute of Statistics of Guatemala 2020: 1). Professor Richard Fagen notes that the indigenous peoples “have kept their language, culture, and identity” and that “Most of them survive by a combination of subsistence farming and ill-paid seasonal work on central plantations” (Fagen 1981: 89).

### Historical Background from the Pre-Columbian Era Through the United States-Backed Military Coup of 1954

The Mayan Empire emerged in approximately 2600 BCE (*Torres* 2018: 9). It included what is today known as Central America, excluding Panama. The Mayans built large temples, pyramids, schools and outdoor sports arenas (*Ibid.*). Some cities had more than 50 thousand residents. The people grew squash and corn, and made tools with clay and stone (*Ibid.*).

Internal conflict, drought, famine, and disease destroyed the Empire even before the Spanish invasion (*Torres* 2018: 21–22). The Spanish conquerors brought new diseases such as smallpox, influenza, and yellow fever to Mayan lands in the 16<sup>th</sup> century. Guatemala was the leading component of the Spanish Central American colony which was called the Kingdom of Guatemala; the latter included not only Guatemala but also Chiapas (which is now part of southern Mexico), El Salvador, Belize, Honduras, Nicaragua and Costa Rica (*Foster* 1987: 70).

In 1821 most of Central America including Guatemala, obtained independence from Spain. In 1823, Guatemala, Belize (which was part of Guatemala then), El Salvador, Honduras, Costa Rica and Chiapas formed The Federation of Central America as an independent republic (*Torres* 2018: 32). Later a Guatemalan secessionist movement resulted in Guatemala becoming an independent republic, by itself, in 1847. Guatemala has long been known for production of coffee, sugar, and bananas. Many of the indigenous people worked on plantations run by persons of Ladino descent.

In the next approximately 50 years there were numerous political fights and armed confrontations involving large landowners, urban businessmen, the military, peasants and workers, indigenous and nonindigenous (*Foster* 1987: 152–185). By 1898, Guatemala's dominant wealthy elite were more firmly entrenched than ever. Manuel Cabrera became President after the assassination of President Reino. Cabrera is most remembered for allowing the United Fruit Company from the United States to enter the political and economic life of Guatemala (*Chapman* 2007: 83). Many years of brutal oppression of the Mayans and the working class in general followed. Finally, in 1944, there was an armed revolt against the authoritarian oligarchy. The 1944 Revolution was led by Army Major Francisco Javier Arana and Army Captain Jacobo Arbenz Guzman. Under the new regime Jose Arvelo, self-described "Christian socialist", was elected President on a platform of land reform and expansion of labor rights (*Chomsky* 2001: 154).

In 1950 Jacobo Arbenz, a moderate socialist, was elected. He implemented an agrarian reform program which transferred uncultivated land to peasants and landless peasants and gave greater rights to workers. Unfortunately, the land reform program only included a minority of lands held by wealthy landowners.

The United Fruit Company (UFC) and its corporate allies and the big landowners feared that Arbenz was moved toward some kind of socialism which threatened their interests. John Foster Dulles, U. S. Secretary of States in the Eisenhower Administration (1953–58), was the former lawyer for the United Fruit Company. In 1954 the United States, acting through its Central Intelligence Agency, engineered a military coup led by Colonel Carlos Castillo Armas of the Guatemalan Army. He was flown into Guatemala on a CIA plane. Juan Torres states that: "The reason for supporting Armas was that the United Fruit Company expected Arbenz to uphold land ownership laws unfavorable to the UFC" (*Torres* 2018: 33). Arbenz left the country fearing for his life. Thus the Eisenhower Administration

was complicit in overthrowing the government which had had two previously elected presidents by the voters of Guatemala. It should be noted that during the Arbenz government from 1950 to 1954, the U.S had issued economic sanctions against Guatemala in opposition to the land reform program.

### **Guatemalan Genocide and Other Related Crimes**

To understand the military coup of 1954 it must be understood that throughout history Guatemala's plantation owners had taken over vast tracts of land, originally mainly occupied by Mayan people and they needed a cheap source of labor (*Grandin* 2009: 2). An emerging urban business sector also needed low labor costs. The state passed laws of forced labor, debt and vagrancy laws which helped to ensure a sufficient labor supply. This was exacerbated by a history of racism against the Mayans (*Ibid.*). After the fall of the Arbenz government, the Guatemalan military and allied paramilitary units employed violence "fundamentally aimed against the excluded, the poor, and the Maya as well as those who struggle in favor of a more equitable society" (*Ibid.*).

By the end of 1956 "only 0.4% of those supposed to benefit from the land reform program had retained their land" (*Schirmer* 1999: 14). On November 13, 1960 young military officers, with a socialist orientation, attempted a coup with the purpose of "social justice, a just distribution of national wealth and against the los gringos imperialisticos (*Ibid.*: 15). Four guerilla groups were formed to support indigenous peoples, peasants, workers, and students and eventually united under the title of Guatemalan National Revolutionary Unity.

The Guatemalan government as well as the United States accused the guerillas of seeking a Communist revolution and a socialist reorganization of society. It was somewhat unclear whether members of the Guatemalan Right were motivated more by racist attitudes toward the Maya than worrying about a "Communist revolution." In any event, the Maya were perceived as the largest block in support of the radical insurgents. Thus they were targeted by the Guatemalan state. The civil war, which lasted from 1960 to 1996, was largely a battle between the Maya and the Guatemalan state.

The Guatemalan military with the assistance of the United States launched a counterinsurgency strategy, mainly against the Maya (*Grandin* 2009: 2). A 1968 declassified U. S. State Department report made clear how the U.S. viewed the counterinsurgency method:

"Murder, torture and mutilation is alright if our side is doing it and the victims are Communists (*Foster* 1987: 244)".

Although the world has probably not noticed, the U.S. government played an important role in the repression and genocidal policies directed against the Maya. In an interview with anthropologist Jennifer Schirmer, Guatemalan Naval Captain Alberto Yon Rivera in 1996 stated as follows: "It is quite simple and I won't deny it; between the 1960s and the 1990's we had a structure from the C.I.A. The money, resources, the training, and the relations were all through the C.I.A. Later, this was supplemented by the DEA (Drug Enforcement Administration). This was the case because our intelligence, in the end, had to serve the interests of the U.S." (*Schirmer* 1999: 171). Dr. Schirmer had accumulated various information about US and CIA covert aid to the Guatemalan military. General Hector Morales Gramajo, a former Guatemalan Defense Minister, and a prominent leader for many years in the army, told Dr. Schirmer in an interview in 1990 that: "The C. I.A.

has been working all along with us, so this kind of information is not that unusual” (Ibid.: 169). General Gramajo mentioned that the US CIA station chief in Guatemala had brought in people for intelligence training and “for more modernized intelligence methods and analysis” (Ibid.: 170). The US government also provided millions of dollars in aid from Congress to the Guatemalan military. This aid was for military salaries, equipment such as computers, walkie-talkies, special fire arms, communications gear, metal jeep parts, and other assistance (Ibid.: 171). In addition, even at the height of the genocide being led by Rios Montt (General in 1981–2 and also President after a coup in 1982) the Guatemalan government had the full public support of the US government. On a trip to Guatemala City in 1982, President Ronald Reagan described Montt as a “man of great personal integrity and commitment” who is “totally dedicated to democracy” (Ibid.: 33). It should be noted in passing, as we shall discuss later, former General and President Montt was found guilty of the crime of genocide in 2015 by a Guatemalan court.

Although the political repression and extrajudicial killings have occurred, in varying degrees, up to the present, the worst years were from 1981 to 1983 — especially for the Mayans. During the period of 1981–1983 the Guatemalan military and allied paramilitary groups engaged in selective and indiscriminate massacres, destruction of indigenous personal and real property, houses, sacred sites, cattle and other animals, sexual violence, forced disappearances, forced displacement, and forced recruitment into civil patrols which forced indigenous people to fight their own people and sometimes kill them. There were also numerous acts of kidnapping, deprivation of liberty and separation of children. Most of the victims were Mayans.

Despite the horrors committed by the Guatemalan state there was no referral by any country to the UN Security Council as in the case of Bosnia, for example; nor was there any action taken in the International Criminal Court or in a hybrid type court as in Sierra Leone, for example. However, as a consequence of the United Nations’ brokered Peace Accords of 1996 between the Guatemalan Government and the Guatemalan guerillas the parties agreed to the establishment of a truth commission which was called “The Commission on Historical Clarification in Guatemala”. It was a three-person commission. The Chairperson, a German international law professor, was appointed by the UN Secretary-General. The other two members were Guatemalans who were selected by consent of the parties to the Peace Accords. One was a distinguished Mayan scholar and the other a distinguished Guatemalan law professor of European descent.

From 1997 to 1999 the Commission gathered statements, and testimony from a large number of witnesses; documents from the Guatemalan Government and declassified papers of the United States Central Intelligence Agency.

The Commission had to decide whether the Guatemalan state had committed acts of genocide in violation of international law. It should be noted that the Commission generated findings that can be considered acts of genocide but also can be considered crimes against humanity and war crimes under provisions of international human rights law.

Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) states as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

(a) Killing members of the group

(b) Causing serious bodily harm or mental harm to members of the group

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

(d) Imposing measures intended to prevent birth within that group

(e) Forcibly transferring children of that group to another group.”

Crimes against humanity, under the Rome Statute of the International Criminal Court, and under customary international law, include extermination, enslavement, forced labor, deprivation of liberty, imprisonment, torture, forcible transfer of populations, sexual violence, enforced disappearance, and other inhumane acts intentionally causing great suffering or serious injury to the body or physical health.

These crimes must be shown to be widespread or systematic.

War crimes under the Rome Statute and the Geneva Convention include willful killing, torture, willfully causing great suffering or serious injury, extensive destruction and appropriation of property not justified by military necessity, compelling a war prisoner to fight against his or her own people, intentionally directing attacks against a civilian population not taking part in hostilities (UN Convention...; Rome Statute 1998a; Rome Statute 1998b).

The Commission received evidence concerning four different Mayan regions of Guatemala. What follows are representative sections of the Commission's comprehensive findings.

The Commission found in the 1980's that "The Army came to identify the indigenous peoples as the "internal enemy" (CEH 1999: Section 3230, p. 24 in *Higonnet*). The commission found that the Guatemalan Government believed that a majority of indigenous peoples were supporting the guerrillas because of the indigenous peoples' "lack of available land and immense poverty (Ibid.)."

The Commission found in Section 3234 of its findings that "Racism polarized Guatemalan society, dividing it into two big groups indigenous people and Ladinos. Racism occupied an influential place in dominant Guatemalan classes' ideas about and treatment of "the Indians" (CEH 1999: Section 3230, p. 24). The Commission found that the Guatemalan military made no distinction between combatants and non-combatants. A witness, from a Mayan village, testified as follows: "...they accused us of being guerillas and we didn't even know who these groups were, but they blamed the community for this and then they burned all our houses, they killed our parents, our families, our grandfathers and even kids, even pregnant women and they even killed our animals and ate them" (CEH 1999: Section 3252, p. 31). The Commission admitted into evidence a CIA document of 1981 which states as follows:

"During the battle it was impossible to differentiate between a member of the guerilla and an innocent civilian, and according to the soldiers, they were forced to fire at anything that moved. Comment: The Guatemalan authorities admitted that many civilians were assassinated in Cocob; many of them were undoubtedly non-combatants. The repercussions of this incident will reflect negatively upon the army throughout the area" (CEH 1999: Section 3258, p. 32).

Indiscriminate massacres of Mayan civilians were documented for all of the Mayan region surveyed by the Commission (CEH 1999: Section 3258, pp. 40-46, 89-91, 111-115, 117).

Witnesses told the Commission that "children of nursing age were killed by throwing them against the floor or walls" (CEH 1999: Section 3334, p. 51). There were also many selective massacres. One Army officer told members of the village: "You have to tell me who the witch doctors are that perform their magic, because they have to be finished off;

we don't want the witch doctors to perform rituals against the military" (CEH 1999: Section 3271, p. 35).

Another witness gave the following statement to a Commission investigator: "The Army arrived dressed in civilian clothes and then lined up the people in the central plaza — women, men and children — and started asking for identification cards. Before that, they had accused the people of being guerillas and a man who had his face covered appeared and began to signal the commander. The commander gave the order to shoot anyone who tried to get away. Thirty-five people died in the massacre and soldiers took away another 35" (CEH 1999: Section 3281, p. 38).

The Commission found that during the years 1980–1983 the military murdered a variety of community leaders such as Mayan priests, members of peoples' lands committees, members of committees on development, mayors, leaders of cooperatives, Mayan teachers and professors (CEH 1999: Section 3281, pp. 34–35, 87–88, 108–11).

The Army used "scorched earth policies" against Mayan villages. The Commission found that there were only three massacres in which the town or village was not burned to the ground. The Commission found that "The rest of the villages where there were massacres were physically destroyed either during or after the massacre. Likewise, many villages where there were no massacres because the population fled, were burned to the ground or destroyed. In general, the period of indiscriminate massacres coincides with the physical destruction of communities" (CEH 1999: Sections 3305, p. 44). One witness from a Mayan village testified that "They destroyed our houses, they robbed our possessions, they burned our clothes, they took away the animals, they cut down the milpas (cornfields), they persecuted us day and night" (CEH 1999: Section 3390, p. 71). In another region the witness testified that the Army exploded a bomb on a house that caught fire. The witness stated that women and children were burned alive (CEH 1999: Section 3520, p. 111). It should be noted that sometime the Army Airforce would drop bombs "A vast majority of the communities in the region suffered forced displacement. The displacement ranged from four to six weeks in some places, too much longer periods of two years in other places" (CEH 1999: Section 3541, p. 115). When people were forcibly removed from the village they were taken to other places where they were subjected to Army surveillance. They were not allowed to leave the compound. Some people who fled hid in the mountains for long periods and endured great physical and medical hardships.

The Commission found that: "The persecution during the displacement shows the desire to exterminate. There was nowhere safe to hide. The Army tirelessly chased after noncombatants, who were eliminated without any means of defending themselves" (CEH 1999: Section 3471, p. 93).

The Army had no problem killing vulnerable people. Witnesses testified that: "In one of the beds, there was a baby that was scarcely 8 years old. ...A soldier took it in his arms and the other soldier put the barrel of the gun in its mouth and with one shot, blew off the top of the baby's skull" (CEH 1999: Section 3472, p. 93). There was evidence that indigenous people were forced by the military to fight against and/or inform on other indigenous people either in their own villages or in other villages. Mayans were forced to murder other Mayans.

One example was where Mayan people were forcibly conscripted into the so-called Civil Patrol. The Commission found that the Army used these Patrols to carry out killings in some cases. According to Commission data, the Civil Patrolmen participated in four massacres "with the greatest marks of cruelty" (CEH 1999: Section 3441, p. 75). In one

village some of the Mayans were forced to hang other Mayans suspected of being guerillas (CEH 1999: Sections 3340, 3341, p. 52). These were ordinary people not connected to the Civil Patrol. The Government sought to fragment and undermine the social cohesion to weaken what the Government believed was the main base of the revolution. A document of the CIA, admitted into evidence by the Commission, stated that the “indigenous population is totally in favor of the EGPC (Army of the Poor, which was one of the Guerilla groups” (CEH 1999: Section 3253, p. 31). The CIA concluded that it was necessary for the Guatemalan military to kill non-combatants (Ibid.).

There was also much torture and sexual violence in all of the indigenous areas. In one village soldiers “cut off the ears, their nose and they poured salt in the wound” (CEH 1999: Section 3407, pp. 74–75). Sexual violence including rape in public was common in the area (CEH 1999: Section 3407, pp. 53–4, 76, 96 and pp. 120–121). Women were raped in front of their husbands and even in front of their children. Frequently after the sexual attacks they were then killed. Some young women were so badly damaged that they were unable to have children. The military was always eager to send a message to the indigenous population: supporting the guerillas has deadly consequences.

There was evidence of destruction of places that were deemed sacred sites. One example was that of a village which had a ceremonial place according to custom for community events. It was destroyed by the military. Corn fields were destroyed not only to eliminate sources of food but also because of the cultural significance to the people. In the case of another village the Commission made the following findings: “In the village of Cotzil, the soldiers dug trenches in the place where the Mayan ceremonies were held; the soldiers had orders to assassinate whoever they found... The village was razed, they burned everything: homes, clothes, dead people and animals” (CEH 1999: Section 3353, p. 54).

After considering all of the evidence the Commission (CEH), in 1999, concluded that there was evidence “that human rights violations were directed at a purposely discriminatory manner against the Maya population in these regions” (CEH 1999: Section 3582, p. 127). It was further concluded that “In almost all of these cases, the perpetrators’ objective was to kill the maximum possible number of members of the (aforementioned Maya) group” (CEH 1999: Section 3588, p.129). In addition, the CEH found that: “In studying happened in the four regions, the CEH established that alongside the mass killings — which were enough to guarantee the elimination of the groups identified as enemies — Army units or Civil Patrolmen systematically committed acts of cruelty and other cruel, inhuman and degrading acts. The effect of these acts was to terrorize the population and destroy the basic elements of social cohesion between members, particularly when they were forced to witness or commit these acts themselves” (CEH 1999: Section 3590, p. 1290).

The Commission held that the physical destruction of Mayan communities, the massacres, the forced displacement, sexual violence, torture and forcing people to fight against their own people were done intentionally and constituted acts of genocide” (CEH 1999: Section 3693–3695, p. 1320). The Commission found that the Guatemalan state had failed to honor its duty to investigate and punish acts of genocide in its territory all in violation of the United Nations Convention for the Prevention and Punishment of the Crime of Genocide (CEH 1999: Section 3604–3606, p. 132). The Commission further held that persons who committed genocide, whether they be “governmental leaders, functionaries or private citizens should be prosecuted” in Guatemalan courts or in an international court (CEH 1999: Section 360, p. 132–133).

The CEH also found that attacking civilians not engaged in hostilities constituted a violation of the laws of armed conflict as set forth in Common Article 3 of the Geneva Convention 1949, ratified in 1952 (Ibid.). The Commission construed the phrase “intent to destroy,” in whole or in part, of Article II of the Genocide Convention” as only requiring a general intent to destroy a particular population in whole or in part, regardless of the subjective motive (CEH 1999: Section 3607, p. 133). Thus, it was not necessary to show that intent was based on race or ethnic hatred. It does not matter whether the Government’s objective was military or a desire to eradicate socialism. Furthermore, the CEH made clear that the state actors need not have intent to destroy the whole ethnic group; intent to destroy part of the targeted population is enough.

During the years of 1981–1983 there were 200,000 or more indigenous people killed and 400 indigenous villages destroyed (*Herman and Peterson* 2010: 93; *Roht* 2009: 135). This is not to mention the many people who disappeared.

Since the Commission has no enforcement mechanism it had to rely on recommendations made to the Guatemalan Government to secure some restorative justice to the victims. One may ask what was the value of the Guatemalan Historical Clarification Commission? One thing which was helpful was that it made known to the Guatemalan people and to the world the acts of genocide and other related crimes which were committed. Such findings of 1999 would hopefully stimulate greater respect for international human rights. However, neither the Guatemalan state nor the United States has ever fully acknowledged the culpability of these two governments. Also, neither Taiwan nor Israel, who assisted the Guatemalan military at various times, have been held accountable.

Generally, as Edward Herman and David Peterson have observed, in the United States the word “genocide” is usually reserved for countries which the U.S. opposes while the U.S. either denies the use of the word genocide or plays it down with respect to countries it is allied with (*Herman and Peterson* 2010: 29–112). This pattern also applies to the International Criminal Court.

The Commission did make a series of recommendations in 1999 in its “Memory of Silence” document. The CEH recommended various provisions for preservation of the memory of the victims; reparations; economic compensation for personal and other injuries and damages resulting from the genocide; cooperation from the Guatemalan state to help find the disappeared and to allow exhumation; showing mutual respect and observance of human rights; steps to ensure respect for Mayan culture and symbols; reform of the judicial system to prevent impunity for violations of law; and measures to ensure the primacy of civilian power over the armed forces (CEH 1999: “Memory of Silence” recommendations, pp. 201–222 in *Higonnet*). These recommendations were made to the Guatemalan Government.

The Commission also recommended that the Guatemalan Government ratify several international human rights conventions and treaties. In response the Guatemalan Government, between the years 2000 and 2003, did ratify the following international agreements:

- 1) The Inter-American Convention on Forced Disappearances.
- 2) The additional Protocol to the American Convention on Human Rights regarding social, economic, and cultural activities.
- 3) The Optional Protocol of the UN Covenant on Civil and Political Rights.
- 4) The Optional Protocol of the Convention of the Rights of the Child and the Children in Conflict.



5) The International Convention Against Torture (*Mersky* 2005: 3).

What is most interesting is that because Guatemala signed these agreements it gave individual aggrieved persons the right to pursue claims of human rights violations in certain international judicial or quasi-judicial bodies such as the UN Human Rights Committee and the Inter-American Court of Human Rights. It does not appear that these remedies have been used very much. However, in 2008 the resident of an indigenous village filed a complaint with the Inter-American Commission on Human Rights against the Guatemalan government alleging multiple violations of the American Convention on Human Rights committed by the Guatemalan military. This case arose out of an indiscriminate massacre in 1982. Two hundred and two people were killed including women, children, and the elderly. The Commission found that the state should be held liable and should prosecute those who committed the orders. After the Commission's ruling, the Guatemalan government failed to properly investigate and prosecute the offenders. Thereupon, the Commission referred to the Inter-American Court of Human Rights which conducts trial-type proceedings which include live witnesses, depositions, and production of documents. The Court made a decision on November 24, 2009 which held that the Guatemalan government had unjustly delayed the proceeding and had not held the offenders responsible. The Court issued a judgement on behalf of the members and relatives of the village in the sum of fourteen million five hundred quetzals as damages (Decision of Inter-American Court of Human Rights, pp. 1–80).

In the Guatemalan Courts there have been convictions of military officers and others involved in the genocide (*Roht* 2009, ft 4: 136). Former President and former Congressman Rios Montt was convicted of genocide after he left Congress in 2016. His conviction was overturned by an appellate court in Guatemalan and he was retried but died before completion of the trial in 2018.

Rigoberto Menchu, a prominent Mayan leader and Nobel Peace Prize winner, filed a complaint in a Spanish Court which has universal jurisdiction over human rights claims. Ms. Menchu's complaint named various officers and individuals who participated in the genocide. These included criminal and civil claims. After eight years of legal battles, including extradition proceedings, the Constitutional Court of Guatemala refused extradition of the defendants from Guatemala to Spain (*Ibid.*: 138–147). Ms. Menchu brought her claim in 1999.

Despite some convictions obtained by Guatemalan prosecutors in Guatemalan courts, most of the culprits, including former Defense Minister, Hector Gramajo, avoided prosecution. In many cases in the Guatemalan courts there have been lengthy delays and appellate court rulings dismissing or overturning convictions.

In 2006 Guatemala entered into an agreement with the United Nations to joint an International Commission Against Impunity the purpose of which was to reform the judicial system and obtain convictions for corruption. Guatemalan had faced international criticism for too much impunity. Although these efforts were not very successful former President Perez Molina was convicted for corruption in 2015 and is now serving a prison sentence (*Dissent*: 103).

In 2019 conservative Jimmy Morales, who has close ties to the Guatemalan military, terminated Guatemala's participation in the international commission against impunity. However, recently the Guatemalan Constitutional Court has suspended termination of the Commission. Morales is now under investigation for campaign finance fraud.

The United States State Department, in its Human Rights Report of 2018, noted that Jose Mauricio Rodriguez Sanchez was charged with genocide involving a Mayan genocide during the civil war which lasted from 1960 to 1996. He was found guilty by a 3-judge panel (US SD Report 2018: 2). The Report also notes that from January to March of 2019 at least three indigenous rights advocates were killed because of their political activity. Two of them were involved in indigenous rights activism (US SD Report 2019: 20).

### **Dispossession of Indigenous Lands and Resources**

The indigenous peoples of Guatemala, who were engulfed by settler colonialism and economic imperialism throughout their long history, lost much of their traditional lands and resources. What is left is currently threatened by corporate developers, allied with the Guatemalan state and by international business and finance.

For thousands of years the physical environment has been under the control of the good stewardship of the Maya whose knowledge of the interconnection between human beings and nature allowed them to survive as a people.

Indigenous peoples of Guatemala have been aided somewhat by the UN Declaration of the Rights of Indigenous peoples (2007), the International Labor Organization Convention 169 (1989) and the American Declaration of the Rights of Indigenous Peoples (2016). These documents require the Guatemalan Government and its corporate allies to engage in consultation with the affected indigenous peoples for the purpose of obtaining their consent before economic development projects can proceed where the people's culture and livelihood are materially affected.

There is a growing consensus in the international community and at the United Nations that not only informed consultation is necessary but also informed consent. I have discussed the issues of consultation and consent in greater detail elsewhere (*Phillips* 2015: 121–126).

The impact of international law has apparently caused the Guatemalan Congress to amend the Guatemalan Constitution to require consultation with indigenous peoples before economic projects can commence. The Guatemalan Constitutional Court in 2018 ordered the Energy of Mines to comply with the ILO Convention 169 consultation guidelines in negotiating with the Xina population with respect to the San Rafael gold mine before the mine could continue operating (US SD 2019: 21). A similar result occurred in a 2019 case before the same court. The Court ordered the Fenix Nickel Plant to suspend the mine's operation until the required consultation with the affected peoples had been achieved by the state and the company (*Ibid.*).

Indigenous peoples successfully obtained compensation for damages caused by a state approved construction of the Chixoy hydroelectric dam from the years 1975 to 1985 (*Ibid.*).

The construction of the dam caused 400 deaths and thousands of people displaced. As of October 2019, these people have received 98% of the settlement or 26 million dollars (US SD 2019: 3).

In 2013 the Guatemala Constitutional Court had ruled that the Government must respect the results of municipal referendums on whether mining projects can be constructed (*Phillips* 2015: 125).

In spite of the hopeful developments the Office of the United Nations Commissioner for Human Rights reported in 2019 that there were mine operations near the Barrio Nuevo area despite lack of consultation. The Government seems to have allowed mining companies to build mines and conduct mining operations in a number of indigenous areas without any consultation whatsoever and in spite of objections registered by the voters in local elections. Furthermore, there is evidence that the Guatemalan Government has not cooperated with indigenous people to establish effective demarcation of lands rendering it difficult for indigenous people to establish title to their traditional lands and resources (US SD 2019: 21).

The Guatemalan Government, like the U.S. and Colombia, does not appear to require consent of indigenous peoples before mining and other projects and other projects can be approved. The Guatemalan Constitution only requires consultation. Moreover, as the U S State Department Human Rights Report of 2019 indicates there are still irregularities in the Guatemalan judicial system.

Indigenous peoples of Guatemala remain subject to the power of big landowners, multinational companies, international business and finance and therefore the threat to cultural and environmental sustainability continues.

### **Criminal Gangs**

Indigenous and other peoples in Guatemala have had to face the problem of gangs. Since the Peace Accords of 1996 many young men who served in the military are with the Guatemalan National Revolutionary Unity (UNRG or guerillas) became unemployed and had easy access to weapons (*Valdovinos* 2020: 1). Too many of these persons have turned to criminality as a way of making a living.

I interviewed many Guatemalans during the years 1996–2004, when, as a lawyer, I represented many Guatemalans in U. S. Immigration and Federal Courts. I can now recite something I learned.

A frequent situation was that gang members, who were armed, demanded money from ordinary citizens in exchange for their safety. Sometimes furniture and appliances were removed by the gangs from people's homes. At times the real property and houses were expropriated by gang members for their use. Citizens frequently had to pay a set sum of money every week or every month to these criminal elements. People who failed to comply were threatened with execution. There were times when person who refused to cooperate were killed or their families were harmed. Gang members, like the genocidal military of the past, had no problem sexually abusing women and killing or abusing children. When individuals did call the police most often no one came. Also, many individuals were afraid to call the police because they feared they would be killed or injured or have members of their families killed or injured by gang members if they found out that the police had been called. Sometimes honest policemen were harassed and even killed by the gangs. Frequently people would find death threat notes on the doors of their homes. There were instances where gang members killed people or injured members of their families if it was discovered that they were cooperating with the police. Some police may have been corrupt. Another factor is that police departments often lacked sufficient personnel and equipment because of cuts in public spending. Spending cuts had been required and/or en-

couraged by international banks and the International Monetary Fund. Lack of police protection is one consequence of the dominance of neoliberal economic doctrine throughout the western hemisphere. Neoliberalism, led by the United States, supports and emphasizes privatization of public services, tax cuts for the wealthy, and limited social spending. The gangs have existed in all parts of Guatemalan, rural and urban since about 1980. Many of the current Guatemalan arrivals at the border of the United States have reported in the press that their decision to come to the U.S. was because of the fear of gang members. Most of the people I interviewed viewed the revolutionary movement as supporting the interests of the poor against the big landowners, the military and rich businessmen. They had little knowledge of or interest in ideology.

John Washington, in his recent study of asylum seekers coming to the U.S. from Central America and Mexico, and the problem of criminal gangs states as follows: “The police in the northern triangle of Central America and Mexico — perhaps in no small part because of the United States’ longstanding favoring and financial support of strong-arm, iron-fist rule — are not only corrupt but ineffective: another argument showcasing the governments’ lack of control” “ (*Washington 2020: 62–63*). Washington observes that criminal conviction of gang members are rare in Central America and Mexico. His study was completed in 2020.

Gang violence coupled with widespread poverty and climate change accounts for a large number of Guatemalans leaving their country and seeking asylum abroad. Guatemalans have been seeking asylum in Nicaragua, Costa Rica, Panama, and the United States. Eighty percent of the asylum seekers come to the U.S. or seek entry thereto (*Valdovinos 2020: 1*).

International law mandates that nation states provide an opportunity for persecuted persons to file for asylum. Those Guatemalans who seek entry to the United States at or close to a port of entry or who are able to reach the U.S. interior, face serious obstacles in seeking asylum. These asylum seekers, who enter at or near a port of entry, by the U. S. border and are discovered are immediately arrested by the U. S. Border Patrol. They usually must wait for a hearing for an unreasonable amount of time in detention facilities that are commonly oppressive and unsanitary. Sometimes women have been sexually abused and forced to undergo unnecessary operation. Children have been separated from their parents by policies implemented by the Trump Administration. When an applicant for asylum does get a hearing on his or her asylum claim it is before an integration officer who is not a judge or legally trained. At this stage the applicant must show “a credible fear” based on a “significant possibility” that if returned to his or her own country he or she will be persecuted because of either their race, religion, nationality, membership in a social group and political opinion (8 U.S. code 1101a). If the applicant cannot establish that the threatened persecution occurs because of one of those five factors, then the officer will deny the application. The individual is then returned to the detention facility, which may be in Mexico, and eventually is removed or allowed to leave for his or her home country. A major problem is that many of the people at the border are seeking protection from gang members who have threatened their lives or have made life almost impossible. If an applicant wants to appeal from the decision of the officer he or she can do so. The appeal is to a U. S. Immigration Judge located near the border. However, there is a long delay sometimes for the applicant to get a hearing. In some circumstances the applicant can be released from the detention facility but the applicant must pay a cash bond to obtain his or her temporary freedom. Bonds are often set by the immigration judge for

\$1,500 to \$20,000 (*Washington* 2020: 149). From my own experience and knowledge, I can assert that most Guatemalans coming to the U.S. are indigenous peoples and poor Ladinos. They often come with nothing more than their clothes on their backs. If a person cannot pay the bond, they must stay in horrific detention facilities that are still being maintained by the U. S. Not surprisingly, many prefer to return home although also many prefer to endure the terrible conditions of detention rather than risk death in Guatemala from the criminal gangs. Individuals can obtain free legal service from sympathetic lawyers and organizations.

Individuals who enter illegally, without being detected by the U. S. Patrol agents and who reach areas beyond the border regions can file for asylum and can remain free until their asylum application is determined by the U. S. Immigration Court and the U. S. Federal Courts of Appeal.

A major problem for all asylum seekers is that they have to show or present evidence that the past persecution or feared future persecution is related to race, religion, nationality, membership in a social group or political opinion. Therefore, if they enter because of poverty or climate change they are ineligible. The question arises whether persecution from criminal gangs, who are non-state actors is a ground for asylum or withholding of removal. The United Nations High Commissioner for Refugees has recognized this problem and has adopted a legal position, under international law, that criminal gangs should be treated as de facto nation states. The Commissioner's ruling was issued in 2016. While the Commissioner's ruling was in connection in El Salvador it is certainly applicable to Guatemala.

John Washington explains the Commissioner's reasoning as follows with respect to the Commissioner's "Eligibility Guidelines for Assessing the International Protection Needs for Asylum Seekers from El Salvador" (*Washington* 2020: 29).

Mr. Washington states that:

"...the UNHCR explains that contradicting a gang is a political action. The gangs after all, have de facto political control over certain Salvadoran villages and towns, such as El Limon, the small village outside San Salvador where a mass grave was discovered in 2019... The gangs in these places charge taxes, they offer protection, they enact criminal punishment, they even evict, and dispossess people living in their territory" (Ibid.).

It is familiar U.S. asylum law that were a state is unwilling or unable to control non-state actors who persecute people because of one of the five factors mentioned above they can obtain asylum. Because of the Commissioner's opinion, recited above, an asylum applicant could argue that refusal to comply with gang members' demands or informing police about gang activities is a form of political opinion rendering asylum applicable. However, U. S. Attorney General Jeff Sessions ruled in 2018 that: "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify one for asylum" (Ibid.). It must be noted that Immigration Judges are administrative judges appointed by the U. S. Attorney General. Thus, Mr. Sessions' opinion, which was rendered in a case, is binding on the Immigration judges. Therefore, under the Trump administration, applicants have often been left without a viable legal argument even though their lives are threatened by out of control armed criminal gangs." However, asylum seekers can seek relief in the U.S, Courts of Appeal to override the U. S. Attorney General's opinion if there are available lawyers willing to work pro bono or at low cost on behalf of these people.

## Problems Related to Climate Change

In the last several years large storms, rising sea levels and extreme drought are additional reasons why indigenous peoples in Guatemala are seeking refuge in the United States (*Macham* 2019: 1).

On January 7, 2020, the quasi-judicial United Nations Human Rights Committee in the case of *Ioane Teitiota vs. New Zealand* issued an important decision which could provide indigenous Guatemalans with an argument for asylum or refugee status, where there is a serious threat to life based on climate related disasters or conditions (*Teitiota vs. New Zealand*, January 7, 2020).

The Committee held that a state has an obligation to grant asylum or refugee status, under Article 6 of the UN Covenant on Civil and Political Rights (1966), where continued exposure to environmental degradation is likely to produce death or serious illness (*Ibid.*). This decision has some precedential value even though Mr. Teitiota lost his case because of insufficient evidence. However, this ruling can become part of general international law.

## Conclusion

For several centuries the legacy of indigenous peoples in Guatemala has been under siege. International law and organizations could help to rescue their culture which will benefit all of humanity. International law can form the basis of what attorney Michael Tigar has called a “jurisprudence of insurgency” (*Tigar* 2000: 273).

## Sources

### *Government Reports and Statutes*

Institute of Statistics 2019 — Institute of Statistics, Guatemalan Government Documents, 2019

8 United States Code 2020–8 United States Code, Section 1101 (a) 42(A)

Human Rights in Guatemala Report 2018 — Human Rights in Guatemala Report, U. S. State Department.

Human Rights in Guatemala Report 2019 — Human Rights in Guatemala Report, U. S. State Department

IACHR 2001 – The Case of Las Dos Erres Massacre, Inter-American Court on Human Rights (IACHR) Court Document. Nov. 24, 2001.

HRC 2020 — The Case of *Teitoita vs. New Zealand*, UN Human Rights Committee January 7, 2020 Available at <https://www.refworld.org/cases,HRC,5e26f7134.html> January 7, 2020; ccpr/C/27(D)2728(2016) Human Rights Committee/HRC, January 7, 2020.

### *International Law Documents*

UN Convention 1948 — The Convention on the Prevention and Punishment of the Crime of Genocide. 1948.

International Covenant 1966 — Article 6 of the International Covenant on Civil and Political Rights. 1996.

Rome Statute 1998a — The Rome Statute of the International Criminal Court on crimes against humanity. 1998.

Rome Statute 1998b — The Rome Statute of the International Criminal Court on War Crimes. 1998.

*Commission on Historical Clarification in Guatemala,  
Comision para el Esclarecimiento Historico (CEH), 1999*

- CEH 1999 — “General Considerations and Legal Definitions” in Higonnet E. *Quiet Genocide: Guatemala 1981–1983*. Transaction Publishers: New Publishers, 2009. Pp. 17–28.  
 CEH 1999 — “CEH’s “Analysis of Selected Regions ...” in Higonnet, pp. 29–133.  
 CEH 1999 — “Final Conclusions to the Genocide Section” in Higonnet, pp. 127–133.  
 CEH 1999 — “Guatemala: Memory of Silence Recommendations. In Higonnet, pp. 201–225.

## References

- Chapman, Peter 2007. *Bananas: How the United Fruit Company Shaped the World*. New York: Canongate.
- Chomsky, Noam 2001. *Turning the Tide*. Boston: South Bend Press.
- Dada, Carlos 2020. Central America Dismantles Democracy. In *Dissent*, Fall. Pp. 95–106.
- Fagen, Richard 1987. *The Challenge of Central America*. New York: A Pocca Book, Basil Blackwell.
- Foster, Lynn V. 2007. *A Brief History of Central America*. New York: Checkmark Books.
- Grandin, Greg 2009. Politics by Other Means: Guatemala’s Quiet Genocide. In Higonnet (ed.). *Quiet Genocide: Guatemala 1981–1983*. Transaction Publishers: New Publishers, 2009. Pp. 1–13.
- Herman, Edward S. and David Peterson 2010, 2011. *The Politics of Genocide*. New York: Monthly Review Press.
- Higonnet, Etelle, ed. 2009. *Quiet Genocide: Guatemala 1981–1983*. Transaction Publishers: New Publishers.
- Macham, Lauren 2019. *How Climate Change is Pushing Central Americans to the U.S.* <https://www.the-guardian.comentarisfe/2019/April/06/61/65/access/February/8/2022>,
- Mersky, Marcie 2005. *Human Rights in Negotiating Peace Agreements. In International Council on Human Rights*. Belfast: Ireland. Pp. 1–3.
- Phillips, James S. 2015. The Rights of Indigenous Peoples under International Law. In *Global Bioethics* V. 26, Issue 1–4, March-December 2015.
- Roht-Arriaza, Naomi 2009. Criminal Prosecutions for Genocide in Guatemala: Advances and Obstacles in Transnational and Domestic Cases. In Higonnet (ed.). *Quiet Genocide: Guatemala 1981–1983*. Transaction Publishers: New Publishers, 2009. Pp. 135–155.
- Schirmer, Jennifer 1998. *The Guatemalan Military Project: A violence Called Democracy*. Philadelphia: University of Pennsylvania Press.
- Tigar, Michael 2000. *Law and the Rise of Capitalism*. New York: Monthly Review Press.
- Torres, John A. 2018. *The Guatemalan Genocide of the Maya People*. New York: Rosen Publishing Co.
- Valdovinos, Andrew 2019. *Ten Facts About Gangs in Guatemala*. June 30, Borgen Project. <https://borgenproject.org/10-facts-about-gangs-in-guatemala/>
- Washington, John 2020. *The Dispossessed: A Story of Asylum at the U.S. — Mexican Border and Beyond*. London and New York: Verso.