

THE PARADOX OF PUNISHING FOR A DEMOCRATIC FUTURE

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ABSTRACT—Recently, the United States Supreme Court grappled with an issue of first impression in this country, but one familiar to other jurisdictions across the world—that is, whether a former head of state should be granted immunity from prosecution for his alleged criminal acts while in office. Both at home and abroad, those who argue in favor of criminal accountability often extol the democratic benefits of punishing state officials. Such justifications have been consecrated in law as well, finding their way into judicial decisions as a basis for overturning amnesty laws. But is there any evidence to support these claims? Can a country really punish its way to a more democratic future?

This study looks to empirical evidence from other countries that have prosecuted state officials for their alleged criminal acts over the last three decades to shed light on the possible effect of these prosecutions on democratic institutions and behaviors. First, it examines an in-depth case study of Guatemala, a country where this issue recently came to the fore during its last Presidential election, to develop a set of hypotheses about the possible democratic effects of punishing state officials for their crimes. To determine whether the findings there might be more generalizable, it then tests these hypotheses using the most extensive global data set of prosecutions of government officials in domestic courts, which specifically focuses on human rights prosecutions.

Interestingly, our findings reveal a paradox. While criminal prosecutions of state officials for human rights violations are associated with some pro-democracy outcomes, like increased civil society activism and pro-

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democratic mobilization, they are also associated with greater political polarization and anti-system backlash. By contrast, they appear to have little effect on democratic institutions, measured by whether a country has free and fair elections and an independent judiciary. Considering this data, a central takeaway is that the democratic effect of prosecuting political leaders tends to rest with the people. Whether punishing them helps to ensure a more democratic future depends more on how citizens respond—negatively or positively—than on the limited institutional effects resulting from punishment.

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INTRODUCTION

Donald J. Trump made history, as the first U.S. President, current or former, to be prosecuted for actions undertaken while he was in office.¹ Never before in the context of a former President being charged with multiple crimes, had the United States been forced to grapple with whether to grant immunity to a former head of state his alleged crimes while in office.² This unprecedented moment in American history spurred the U.S. Supreme Court to weigh in, with a majority of the Justices in *Trump v. United States* holding that U.S. Presidents have absolute immunity for acts that fall within the President’s “core constitutional powers” and presumptive immunity for other official acts.³

Weighing heavily on all the Justices’ minds in deciding the case was the potential impact of prosecuting heads of state on democracy. At oral argument, for instance, U.S. Supreme Court Justice Samuel Alito questioned whether allowing such prosecution would “lead us into a cycle that

¹ *Donald Trump Becomes the First President Charged With Criminal Activity*, NPR (Apr. 6, 2023),

<https://www.npr.org/2023/04/05/1168256845/donald-trump-becomes-the-first-president-charged-with-criminal-activity>; President-Elect Trump was convicted of crimes before he was in office but has not been convicted of any crimes committed while in office. Luc Cohen, Jack Queen & Andy Sullivan, *Donald Trump Becomes first US President Convicted of a Crime*, REUTERS, May 31, 2024, available at <https://www.reuters.com/legal/jurors-begin-second-day-deliberations-trump-hush-money-trial-2024-05-30/>.

² While the United States has had to consider whether to grant immunity to former governmental officials, it has never done so in the context of a former President being charged with a crime allegedly committed while in office. For instance, after the Civil War, Congress passed a law that would limit criminal punishment of acts committed by government officials during the U.S. Civil War to two years. James G. Randall, *Indemnity Act of 1863 a Study in the War-Time Immunity of Governmental Officers*, 20 MICH. L. REV. 589, 595-96 (1992). President Ford pardoned former President Nixon for any possible crimes he committed while in office, but no charges had been brought against him. *The Nixon pardon in constitutional retrospect*, NATIONAL CONSTITUTION CENTER, Sept. 8, 2024, at <https://constitutioncenter.org/blog/the-nixon-pardon-in-retrospect> (last visited Nov. 29, 2024)

³ *Trump v. United States*, 603 U. S. ____ at 8-9, 36. (2024) holding that U.S. Presidents have absolute immunity from criminal prosecution for official acts that falls “within his conclusive and preclusive constitutional authority” and presumptive immunity for all other official acts (internal quotation omitted).

destabilizes the functioning of our country as a democracy...”⁴ On the other hand, in stinging dissents, Justice Sotomayor warned of the ruling’s “disastrous consequences...for our democracy”⁵ and Justice Jackson characterized it as setting “a five-alarm fire that threatens to consume democratic self-governance.”⁶ The same underlying concern shaped how the case was discussed in the political arena as well. Trump celebrated the ruling as a “big win” for democracy.⁷ In sharp contrast, Senate Democrats justified the introduction of the No Kings Act, legislation that aimed to undo the legal effect of *Trump v. United States* by removing Presidential immunity, by saying that “[t]he very basis of our democracy is the idea that no man is above the law.”⁸

This debate over the democratic effects of punishing former U.S. Presidents in *Trump v. United States* mirrors analogous debates in the fields of human rights and transitional justice. Like the U.S. Supreme Court, courts and human rights enforcement bodies have referenced the democratic effect of prosecuting state officials when deciding whether to adopt a legal duty to prosecute and overturn amnesty laws. And their claims are just as contradictory. For instance, the United Nations Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR), concluded that Uruguay’s amnesty law “contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.”⁹ Likewise, in deciding that the same amnesty law, though passed by a popular referendum, had “no legal effect,” the Inter-American Court of Human Rights in *Gelman v. Uruguay* concluded its ruling did not undermine democracy because a “true” democracy is also characterized by the protection of human

⁴ ; Transcript of Oral Argument in *Trump v. United States* on April 25, 2024, at 112 available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf.

⁵ *Trump v. United States*, 603 U. S. ____ at 4 (2024) (Sotomayor, J., dissenting).

⁶ *Trump v. United States*, 603 U. S. ____ at 16 (2024) (Jackson, J., dissenting).

⁷ <https://truthsocial.com/@realDonaldTrump/posts/112711754312482501>.

⁸ Senate Democrats Statement on the No Kings Act, August 1, 2024, at <https://www.democrats.senate.gov/newsroom/press-releases/following-historic-and-dangerous-trump-immunity-ruling-leader-schumer-led-34-democratic-senators-in-launching-no-kings-act-to-crack-down-on-dangerous-precedent-to-eliminate-immunity-for-presidents--vps-crimes-and-tap-into-congress-constitutional-authority-to-restrict-judiciary-overreach>.

⁹ H.R.C., Case of Hugo Rodríguez V. Uruguay, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, Report of August 9, 1994, ¶12.4.

rights through criminal prosecutions.¹⁰ Conversely, the South African Constitutional Court upheld its amnesty law following the end of apartheid concluding that the “historical situation...required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order.”¹¹ Baked into all these legal determinations are assumptions about the potential impact of prosecuting heads of state on democracy. But is there any evidence to support these wide-ranging claims in either direction?

Prompted by these parallel debates, this article takes an evidence-based approach to examining what effects prosecuting state leaders has on democratic institutions and behaviors. Essentially, we are asking: Can a country really punish its way to a more democratic future? To answer this question, we look to the many jurisdictions that have prosecuted former government officials for their alleged crimes. Indeed, though the question of whether former heads of state should be subject to prosecution for their alleged crimes was a matter of first impression for the U.S. Supreme Court,¹² the practice has become increasingly common in other parts of the world struggling to overcome legacies of violence and corruption—a phenomenon Kathryn Sikkink calls the “justice cascade.”¹³ This increased resort to criminal punishment across the globe can in part be attributed to its rise as a dominant tool of accountability in two related, often interconnected, fields: human rights law and transitional justice. As detailed further in Part I, both fields have embraced criminal punishment, often touting its pro-democratic effects.¹⁴ Yet, to our knowledge, our study is the first to analyze this topic using empirical evidence drawn from countries that have pursued criminal accountability of their former political leaders in their own domestic courts.

¹⁰ Inter-American Court of Human Rights, *Gelman v. Uruguay*, Judgment (Merits and Reparations), February 24, 2011 at ¶ 232, 239 & 240.

¹¹ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

¹² Philip Bobbitt, *A Prudential Way Forward in Trump v. United States*, JUST SECURITY, July 29, 2024, at <https://www.justsecurity.org/98205/prudential-trump-v-united-states/>. (describing *Trump v. United States* as presenting a case of first impression)

¹³ Notably, as Kathryn Sikkink documented in her seminal book, over the last few decades, there has been an unprecedented shift toward greater criminal accountability for human rights violations across the globe. *See generally*, KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); *See also*, *PROSECUTING HEADS OF STATE*, (Ellen Lutz & Caitlin Reiger eds., 2009).

¹⁴ *See infra* Part I.

Our study employs two approaches to tackle our research question. First, we examine the case study of Guatemala, a country where the theoretical questions at the heart of this Article recently came to the fore. In some respects, Guatemala is a pioneer of prosecuting high-level officials for their crimes. In 2013, Guatemala became the first country in the world to prosecute a former head of state for genocide in its domestic courts (although the conviction was later overturned on shaky procedural grounds). In 2016, a Guatemalan court became the first national court in the world to prosecute sexual violence committed by former military officials as a crime against humanity. That same year, fourteen military officers were charged in the largest case involving enforced disappearance in Latin America, after exhumations unearthed 558 human remains at a former military base. In the wake of these cases, many of the human rights defenders interviewed by co-author Rachel López said that they pursued criminal accountability believing that it would discredit the corrupt and human rights-abusing military ruling class and usher in a new era of democratic governance. Arguably, the human rights defenders' strategy was realized during Guatemala's Presidential election in 2023. Much like in the 2024 Presidential election in the United States, the alleged criminal conduct of two of the frontrunners (as well as their close relatives) became a central issue in Guatemala's last Presidential election. Yet, in a surprising turn of events, an independent, anti-corruption candidate won the election.¹⁵ Some are calling this surprise election a "democratic spring."¹⁶ Still, his opposition has now weaponized the criminal apparatus against him, using it nearly to block his confirmation. What lessons can be gleaned from this case study? Did his opposing candidates' run-ins with the law help to usher in the first pro-democratic President in many years in Guatemala? Is Guatemala an example of a country successfully prosecuting its way to a more democratic future? Did the use of criminal punishment ultimately backfire, now threatening democracy?

With an eye towards these questions, we analyze what impact criminal prosecutions of state officials has had on Guatemalan democratic institutions and behaviors. Our analysis is informed by interviews with over two dozen judges, prosecutors, and human rights attorneys as well as the court records in the cases that resulted in successful convictions of state officials there (gathered for the first time by co-author Rachel López and compiled into

¹⁵ Jonathan Blitzer, *Is Guatemala about to See an Upset Win for Democracy?*, THE NEW YORKER, August 19, 2023, available at <https://www.newyorker.com/news/daily-comment/is-guatemala-about-to-see-an-upset-win-for-democracy>; Daniel Judt, *Bernardo Arévalo's Unexpected Victory Brings Guatemala Another Democratic Spring*, THE NATION, August 22, 2023, <https://www.thenation.com/article/world/bernardo-arevalo-guatemala-election/>.

¹⁶ *Id.*

a digital archive at the Princeton University Library). Drawing from the Guatemala case study, explained in greater detail in Part II, we identified the following set of testable hypotheses: 1) support for criminal prosecutions of state officials can also help to facilitate some pro-democratic institutional changes like buttressing the independence of the judiciary; 2) prosecutions of state officials can increase pro-democratic engagement indicated by the robustness of civil society activism and political engagement after prosecution; 3) criminal prosecutions can lead to greater political polarization and backlash; and 4) criminal prosecutions can decrease the likelihood that those who lose elections will accept the results.

Second, to determine whether the lessons gleaned from the Guatemala case study might be generalizable to other contexts, we then test these four hypotheses, using a comprehensive new global database on the prosecution of state agents collected by the Transitional Justice Evaluation Tools (TJET) project.¹⁷ The TJET project was developed between 2021 and 2024 by co-author Geoff Dancy at the University of Toronto, in coordination with Kathryn Sikkink, Phuong Pham, and Patrick Vinck at Harvard University. This database extensively covers prosecutions of state agents for human rights violations in all countries of the world from 1970-2020, including thirty-two cases documented by López, which resulted in convictions for atrocities committed during the Guatemalan internal armed conflict stretching as far back as 1993. Though exclusively capturing human rights prosecutions, this TJET dataset is the largest global dataset tracking prosecutions of state officials in domestic courts regardless of the type of prosecution, meaning that it is the best tool at our disposal for measuring the democratic effect of prosecuting state officials more broadly.

To test our hypotheses, we examine the effect of criminal prosecutions and convictions on eight different democratic outcomes, all are drawn from the Varieties of Democracy (V-DEM) database. Rather than adopting one definition of democracy—a deeply contested concept, the V-DEM project surveys the literature on democracy by political theorists to identify a set of common core principles.¹⁸ The V-DEM project then developed a set of variables to measure these principles. We identified those variables in the V-DEM dataset that most closely correspond to our

¹⁷ Geoff Dancy, Phuong Pham, Kathryn Sikkink, Oskar Timo Thoms, and Patrick Vinck, “TJET Database of Transitional Justice Mechanisms, 1970-2020” (Toronto: Transitional Justice Evaluation Tools, April 30, 2024), <https://transitionaljusticedata.org>.

¹⁸ For a more detailed explanation of V-DEM’s methodology, see “Why different varieties of democracy?” in the Frequently Asked Questions (FAQs) section on V-DEM project’s website at <https://v-dem.net/about/faq/>.

hypotheses drawing from the Guatemalan context. Our data analysis reveals that on average, human rights trials neither bolster nor endanger democratic institutions, like free and fair elections or judicial independence. However, they are associated with greater democratic political engagement, which includes participation in civic activism. Also, although prosecutions in general are not associated with greater democratic mobilization, convictions are. This means that in the wake of convictions, citizens organize more events with the express purpose of supporting democratic institutions. Perhaps our most interesting, but somewhat contradictory, finding is that there is evidence suggesting that human rights criminal prosecutions, as well as convictions, are associated with increased political polarization. Relatedly, while convictions were associated with greater pro-democracy mobilization, they are also associated with more anti-system mobilization, pointing again to their polarizing nature. Finally, in contrast to the Guatemala case study, on average, it does not appear that human rights trials lead defeated opponents to dig in their heels and refuse to acknowledge the legitimacy of elections. We hope that this cross-national analysis will illuminate the role that criminal accountability has played in context and help countries make more informed decisions about whether to prosecute former political leaders for their crimes.¹⁹

Some may justifiably argue against the comparative evidence marshalled in this piece on methodological grounds. First, can we really draw on events in a less developed democracy in Latin America with a recent experience of autocracy to learn about the United States, the oldest democracy in the world? It is true that Guatemala and the U.S. are very different, but it is a mistake to presume that the U.S. is exceptional, and that its democracy functions in a way that is immune from the types of pressures faced in other countries. Many analysts now consider the U.S. a weakened or illiberal democracy that violates human rights and faces endemic corruption that reaches into its core institutions.²⁰ Some legal scholars are even questioning whether transitional justice processes are now needed in the United States due to the continuing repercussions of its failure to explicitly address past racial

¹⁹ Geoff Dancy & Verónica Michel, *Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin America and Europe*, 60 INT. STUD. Q. 173 (2016); Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63 INT. STUD. Q. 99 (2019).

²⁰ The Polity V Project, for example, rated the US an "anocracy" in 2020, meaning that it no longer qualified as a full democracy. See <https://www.systemicpeace.org/polity/P5UnitedStates2020.pdf>

injustices, like slavery and Jim Crow.²¹ Furthermore, a large portion of the American electorate seems just as susceptible to populist or anti-system rhetoric as in other states experiencing democratic backsliding.²² Therefore, it may in fact be useful to learn from the example of other countries that have recently faced dilemmas that the US is only starting to confront.

Second, are trials for human rights crimes really comparable to the recent prosecutions of Donald Trump? The latter are centered more on corruption – hush money payments to Stormy Daniels, efforts to subvert vote counting in Georgia, and the retention of classified record in Florida – than they are on human rights violations.²³ On this, we offer a couple of considerations. One, the decision to grant Presidential immunity by the U.S. Supreme Court was not crime specific. Indeed, part of what concerned the liberal Justices on the bench in *Trump v. United States* was immunity for crimes that would easily be included in the TJET dataset, such as the assassination (essentially extrajudicial killing) of political opponents.²⁴

²¹ See generally, Colleen Murphy, *The Movement for Black Lives and Transitional Justice*, in *THE MOVEMENT FOR BLACK LIVES: PHILOSOPHICAL PERSPECTIVES* 116-137 (2021) (conceiving of the Movement for Black Lives in part as a response to the absence of transitional justice in United States); Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181 (2021) (arguing that “the United States is a nation in transition, struggling to surmount its racist past”).

²² Moreover, approximately 83% of American people believe that elected officials don’t care what people like them think and around 41% support some form of autocratic governance. Richard Wike, Janell Fetterolf, Maria Smerkovich, Sarah Austin, Sneha Gubbala and Jordan Lippert, *Representative Democracy Remains a Popular Ideal, but People Around the World Are Critical of How It’s Working*, PEW RESEARCH CENTER, Feb. 28, 2024, at 29 & 33 available at https://www.pewresearch.org/global/wp-content/uploads/sites/2/2024/02/gap_2024.02.28_democracy-closed-end_report.pdf (finding that 26% of Americans support a form of governance led by a “strong leader” and 15% support rule by the military).

²³ For an analysis of the Trump indictments using a transitional justice lens, see Jonathan Hafetz, *The Trump Hush-Money Prosecution and Militant Democracy*, BALKINIZATION, June 17, 2024, at <https://balkin.blogspot.com/2024/06/the-trump-hush-money-prosecution-and.html> (last visited August 7, 2024) (employing the concept for military democracy to argue that to evaluate the Trump prosecutions and efforts to disqualify him from the ballot).

²⁴ See p. 9 of transcript from the oral argument in *Trump v. United States* on April 25, 2024, at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf (During oral argument, Justice Sotomayor asked “[i]f the president decides that his rival is a corrupt person and he orders the military or orders someone to assassinate him, is that within his official acts that – for which he can

Furthermore, it is worth remembering that Donald Trump faces conspiracy charges based on his false statements to “angry” anti-system demonstrators on January 6, 2021 at the Capitol building in Washington, D.C, and then exploiting the violence that ensued.²⁵ The line between this conduct and ordering physical integrity violations is thin.²⁶ Two, maintaining a clean distinction between human rights violations and corruption in practice is often quite difficult. In Guatemala, the work of anti-corruption prosecutors and those seeking to prosecute mass violence often dovetailed. Similarly, leaders who have been charged for human rights crimes in other states, like Chile's Augusto Pinochet and Peru's Alberto Fujimori, were simultaneously charged with acts of corruption.²⁷ Indeed, some of the most notorious dictators, like the Philippines' Ferdinand Marcos, are known both for their crackdowns on opposition and for plundering government coffers. In recognition of this reality, over the past two decades, measures addressing corruption have increasingly been included as part of transitional justice tool kit in part because they are seen as necessary for democratic development.²⁸ We thus contend that it is a valuable exercise to draw on the best qualitative and quantitative evidence available on the prosecution of state leaders to learn about the impact of trials on democratic institutions and behaviors.

get immunity?” to which Trump’s counsel responded “we can see that could well be an official act”)

²⁵ For analysis and a full copy of this indictment, see Jaclyn Diaz, *The charges facing Trump in the Jan. 6 investigation, explained*, NPR, August 2, 2023, at <https://www.npr.org/2023/08/01/1191493880/trump-january-6-charges-indictment-counts>.

²⁶ At the International Criminal Tribunal for Rwanda, defendants have been convicted of incitement to genocide. See ICTR *Prosecutor v Akayesu* (Trial Chamber: Judgment) Case No ICTR-96-4-T, 2 September 1998.

²⁷ Naomi Roht-Arriaza, *The Multiple Prosecutions of Augusto Pinochet*, in PROSECUTING HEADS OF STATE (eds. Ellen Lutz and Caitlin Reiger) (2009); *Former Peru president convicted of corruption*, CBS NEWS, Jan. 8 2015, at <https://www.cbsnews.com/news/former-peru-president-convicted-of-corruption/> (last visited August 8, 2024).

²⁸ ALEXANDER SEGOVIA, GUIDANCE NOTE OF SECRETARY GENERAL ON THE RELATIONSHIP BETWEEN TRANSITIONAL JUSTICE AND CORRUPTION 6 (September 2023), <https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/SG-GuidanceNote-TJ-Corruption-digital.pdf>; See also James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT’L L. 125 (2009) (explaining the relationship between corruption and human rights using Kenya as a case study); Naomi Roht-Arriaza, *Reparations and Economic, Social and Cultural Rights*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 109 (Dustin N. Sharp ed., Springer 2013) (describing how addressing corruption and other economic crimes is needed to ensure the non-recurrence of violence).

This Article proceeds in four Parts. Part I documents the rise of criminal accountability in the fields of human rights and transitional justice. It also provides an overview of the ongoing debate within these fields about the appropriate aim and reach of criminal accountability of state officials. While some scholars have celebrated the prosecutions of former state officials for their human rights abuses around the world, others have decried the “anti-impunity turn of the human rights movement,” essentially arguing that the human rights movement has uncritically adopted criminal accountability as its exclusive measure of justice without examining the vast implications of such a choice²⁹—a choice Samuel Moyn suggests might be “indefensible.”³⁰ Framed within the literature in these two fields, we explore the structural and political critiques of criminal accountability of state officials. Part II of the Article then grounds our analysis, by exploring the effects of criminal prosecution of political leaders on Guatemalan democracy drawing from field research in Guatemala. It starts by contextualizing the 2023 Guatemalan Presidential election within the longer history of the internal armed conflict as well as the roles played in that conflict by the fathers of two Presidential hopefuls. It further describes how these hopefuls were implicated in criminal prosecutions in Guatemala, including the genocide case and other landmark prosecutions. Finally, it analyzes the impact of criminal prosecutions on the 2023 Presidential election in Guatemala. Drawing from this research, Part III revisits the structural and political critiques of criminal accountability in light of the Guatemalan experience, arguing that criminal accountability can accomplish more than those critiques envision. At the same time, criminal prosecution is multi-directional, so can be employed against human rights defenders and pro-democracy candidates as well. Gleaning the lessons learned from the Guatemala case study, we develop a set of testable hypotheses aimed at discerning the effect of criminal convictions on democratic institutions and behaviors in transitional States.

Then, to shed some light on how generalizable the Guatemalan experience is to other contexts, in Part IV, we test these hypotheses employing an extensive cross-national empirical data set to better understand the interplay between criminal accountability and democratic outcomes. Namely, we examine the effect of criminal accountability of state officials on the following: 1) democratic institutional features like free and fair elections and the independence of the judiciary; 2) political engagement indicated by

²⁹ See generally, KAREN ENGLE ET AL., *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* (2016); See also, Sarah Nouwen and Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity* 13 J. INT’L CRIM. JUSTICE 157 (2015).

³⁰ Samuel Moyn, *Anti-Impunity as Deflection of Argument in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 71 (2016).

the robustness of civil society activism and pro-democratic mobilization; 3) political polarization and backlash; and 4) the likelihood that those who lose elections will accept the results. Our analysis reveals somewhat contradictory results. While criminal prosecutions of state officials for human rights violations are associated with some pro-democracy outcomes, like increased civil society activism and pro-democratic mobilization, they are also associated with greater political polarization and anti-system backlash. By contrast, they appear to have little effect on democratic institutions, measured by whether a country has free and fair elections and an independent judiciary. Considering these findings, Part IV provides a more nuanced picture of criminal accountability as a tool for transitional justice, substantiating and elaborating on what Tom Ginsburg and Aziz Huq call the “paradox of punishment,” a nod to criminal punishment’s contradictory outcomes for democracy.³¹ We further argue that a complex grappling with the power dynamics within transitioning societies—a feature often missing from debates about punishment of state officials—is needed in order to navigate this paradox. To that end, further research is also needed to understand the causal relationship between criminal accountability and polarization.

I. The Rise of Criminal Punishment of State Officials

As Kathryn Sikkink documented in her seminal book, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, over the last few decades, there has been an unprecedented shift toward greater criminal accountability of state officials across the globe.³² This increased resort to criminal punishment can in part be attributed to its rise as a dominant tool of accountability in two related, often interconnected, fields: human rights law and transitional justice.

In the field of human rights, there has been a notable turn toward criminal accountability over the last several decades.³³ The decision to

³¹ Tom Ginsburg & Aziz Z. Huq, *The Pragmatics of Democratic “Front-Sliding.”* 36 ETHICS INT’L AFFAIRS 437, 439 (2022) (“Democracy requires a stable set of rules within which leaders are chosen and policies are adopted, challenged, and potentially rejected. If a party comes to believe it cannot win pending elections (say, because of demographic change), or comes to view an opponent as an existential threat (often because of a polarized understanding of racial, ethnic, or religious identity), leaders and rank-and-file members of the party may decide those rules are not worth respecting.”)

³² See generally, KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

³³ See generally, KAREN ENGLE ET AL., *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* (2016); See generally, KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

prosecute a prior leader for their human rights violations is not merely a political choice, but increasingly seen as a legal requirement.³⁴ Treaties, like the Genocide Convention and the Convention Against Torture, obligate state parties either to prosecute state officials for their criminal violations of those conventions or to extradite them to another state willing to do so.³⁵ Beginning in the 1990s, human rights scholars and advocates have also asserted that there is a customary international law duty to prosecute a wide array of criminal violations of international human rights, like genocide, torture, and crimes against humanity.³⁶ Moreover, human rights bodies, the Inter-American Court on Human Rights and the Human Rights Committee, which

³⁴ See also 2023 GUIDANCE NOTE, *supra* note **Error! Bookmark not defined.**, at n. 43 (listing the international treaties and instruments that obligate “States to investigate, prosecute and punish gross violations and abuses of international human rights law and serious violations of international humanitarian law.”)

³⁵ Article IV (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”) In the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), the International Court of Justice concluded that “[e]xtradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984]. . . .” Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at p. 443, para. 50). The Court adds that the States parties to the Convention against Torture have “a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (*ibid.*, p. 449, para. 68). The Court reiterates that the object and purpose of the Convention are “to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts” (*ibid.*, p. 451, para. 74 and *cf.* also para. 75).

³⁶ See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2542-44 (1991) (making the case that there is a general legal obligation under international law to prosecute the human rights violators of prior regimes) ; Michael P Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 L. AND CONTEMPORARY PROBLEMS 41,61 (1996)(arguing for an international law prohibition against amnesties for gross human rights violations); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449–513, 87 (1990)(making the case for the recognition of an affirmative international law obligation on States to investigate disappearances, death squad killings, and other grave human rights violations of predecessor governments); GARY JOHNSON BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 28-36 (2002) (portraying the pursuit of international criminal justice as a sign of the idealism of liberal states).

have overturned amnesties, have done so believing that they threatened democracy.³⁷

Likewise, criminal punishment has also become a defining feature of “transitional justice,” a field that developed as countries, particularly in Latin American, started to democratize after the Cold War and were confronted with how to address the wrong-doing of prior repressive regimes.³⁸ In the early days of the field, many warned that prosecuting former state officials might threaten fledgling democracies, incentivizing spoilers to hold on to power through any means including violence. Today, however, criminal punishment is considered an essential component of democratic transition and prioritized by human rights defenders as a method of discrediting past authoritarian leader.³⁹ Criminal accountability has been concretized as one of the four pillars of transitional justice.⁴⁰ Indeed, the U.N. Secretary General

³⁷ H.R.C., Case of Hugo Rodríguez V. Uruguay, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, Report of August 9, 1994, ¶12.4. (concluding that Uruguay’s amnesty law “contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations”);

³⁸ Ruti Teitel, who coined the phrase “transitional justice,” defines it as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003). Naomi Roht-Arriaza critiques Ruti Teitel’s definition of transitional justice as unnecessarily abstract and legalistic and defines transitional justice as a “set of practices, mechanisms, and concerns that arise following a period of conflict, civil strife, or repression, that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.” NAOMI ROHT-ARRIAZA, *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 1–2 (Cambridge Univ. Press ed., 2006).

³⁹ *Id.*; See also Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, First Report to the General Assembly, ¶ 82, U.N. Doc. A/67/368 (Sept. 13, 2012).

⁴⁰ See, e.g., REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION OF TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE, FIRST REPORT TO THE GENERAL ASSEMBLY, ¶ 8, U.N. Doc. A/67/368 (Sept. 13, 2012) (naming the four pillars as “truth, justice, reparations and guarantees of non-recurrence”); THE SECURITY COUNCIL REPORT, *TRANSITIONAL JUSTICE: WHAT ROLE FOR THE UN SECURITY COUNCIL?* 3 (October 2022), available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/transitionaljustice_2021.pdf (listing “four generally accepted pillars or approaches to transitional justice, which should be seen as complementary: criminal prosecutions; truth-seeking or fact-finding, including by non-judicial bodies such as truth commissions; reparations, which can be material, symbolic, individual

embraced criminal accountability as a core pillar of transitional justice, claiming that it “helps strengthen societal trust and the rule of law.”⁴¹

Yet, the appropriate aim and reach of criminal accountability in transitioning societies remains the subject of persistent debate within both fields.⁴² Some scholars have celebrated the emerging obligation under international law to punish former political officials for their human rights abuses as a positive sign for the rule of law and democracy globally.⁴³ Others have decried the “anti-impunity turn of the human rights movement,” essentially arguing that the movement has uncritically adopted criminal accountability as its exclusive measure of justice.⁴⁴ For instance, Karen Engle has argued that the human rights movement has developed a certain attachment to criminal law that blinds it to alternative approaches to transitional justice.⁴⁵ In a collected volume, she and her co-authors call us to question whether criminal law ought to be “the necessary and preferred response to a particular set of human rights violations and international

and/or collective; and institutional and legal reforms, including of the police, judiciary and/or military.”); *See also* Clara Sandoval, *Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition*, in *JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES*, 186 (2017) (“There is broad consensus that transitional justice is meant to deal with the legacy of mass atrocities through four pillars: truth seeking, criminal justice, reparation, and institutional reform.”).

⁴¹ GUIDANCE NOTE OF THE SECRETARY-GENERAL, *TRANSITIONAL JUSTICE: A STRATEGIC TOOL FOR PEOPLE, PREVENTION AND PEACE* 16 (June 2023), https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023_07_guidance_note_transitional_justice_en.pdf; GUIDANCE NOTE OF THE SECRETARY-GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE 3-4 (March 2010) (naming the following rights and duties as fundamental to transitional justice: “the right to justice, the right to truth, the right to reparations, and the guarantees of non-recurrence of violations”);

⁴² Leigh A. Payne, *The Justice Paradox?: Transnational Legal Orders and Accountability for Past Human Rights Violations*, in *TRANSNATIONAL LEGAL ORDERS* 439–472, 439 (Terence C. Halliday & Gregory Shaffer eds., 2015).

⁴³ *See supra* note **Error! Bookmark not defined.** *See also* Matiangai Sirleaf, *Beyond Truth & Punishment in Transitional Justice*, 54 *VA. J. INT’L L.* 195, 276 (2014) (“[S]cholars and practitioners believe trials contribute to the rehabilitation of countries by changing a society’s moral values and ‘foster[ing] respect for democratic institutions and thereby deepen[ing] a society’s democratic culture.’”)

⁴⁴ Samuel Moyn, *Anti-Impunity as Deflection of Argument in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 71 (2016).

⁴⁵ Karen Engle et al., *Introduction*, in *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 4 (2016).

crimes.”⁴⁶ Much like in the field of human rights, some transitional justice scholars have also criticized the focus of the field on criminal accountability instead of addressing the root causes of violence.⁴⁷ Interestingly, both proponents of criminal accountability and of amnesty justify their position with reference to criminal punishment’s effect on democracy.⁴⁸

The central critiques of criminal accountability have both structural and political dimensions. First, those offering structural critiques warn that individual criminal punishments “reinforce an individualized and decontextualized understanding of harms they aim to address.”⁴⁹ These critics caution that individualizing culpability diminishes the likelihood of the profound transformation and broader redistribution needed to ensure that the crimes do not reoccur.⁵⁰ Another variant of this critique holds that pushing for criminal accountability zaps the resources of human rights advocates within civil society.⁵¹ Namely, mobilizing to support trials could trade off with mobilizing for other public goods like a clean environment, education, labor rights, or other distributive issues on the social justice agenda.⁵² In this

⁴⁶ *Id.* at 3.

⁴⁷ Zinaida Miller, *Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice*, in 2 Int’l J. Transitional Just. 266, 288 (2008) (“By ignoring the deeper roots of conflict, the relationship of inequality to reconciliation and the injustice of maldistribution, transitional justice mechanisms may actively contribute to new outbreaks of violence”).

⁴⁸ *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) at ¶22, available at <https://www.saflii.org/za/cases/ZACC/1996/16.pdf> (“South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order.”)

⁴⁹ Karen Engle, *A Genealogy of the Criminal Turn in Human Rights*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 16 (2016). See also Richard Wilson, *Justice After Atrocity*, in *The Oxford Handbook of L. and Anthro.* 515 (2020)

⁵⁰ Mattia Pinto, *Historical Trends of Human Rights Gone Criminal* 42 HUM. RTS. Q. 729 (2020) (citing ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* 1 (2011) & Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321–367 (2009); Barrie Sander, *The Anti-Impunity Mindset*, in *POWER IN INTERNATIONAL CRIMINAL JUSTICE* 332. (“[T]he equation of anti-impunity with a narrow individualised form of justice has risked masking the collective dimensions of mass atrocities behind the depoliticised veil of the individuals under examination.”)

⁵¹ *Id.* at 249 (describing how the anti-immunity mindset might divert attention away from root causes of violence, like extreme poverty, systemic discrimination, and widespread economic injustice).

⁵² See, e.g., ELKE ZUERN, *THE POLITICS OF NECESSITY: COMMUNITY ORGANIZING AND DEMOCRACY IN SOUTH AFRICA* (2011).

way, fixation on prosecutions of the most visible forms of violence may only reinforce the current order rather than sparking deeper structural reforms.⁵³ Relatedly, other scholars, like Kamari Clarke and Sarah Nouwen, have described how the criminal accountability norm in international criminal law imposes Western conceptions and modalities of justice, disproportionately on the leaders of weak countries in the Global South, without accounting for alternative modes of justice.⁵⁴

Second, those employing political critiques fear that governments will manipulate the rhetoric of victims' rights to disguise policies really aimed at expanding their power and control.⁵⁵ This phenomenon has been labeled "populist punitiveness"⁵⁶ or "penal populism."⁵⁷ Others have argued that mobilizing to repair harms of the past risks getting mired in a politics of *ressentiment* that only inflames divisions rather than reinforcing the norm of

⁵³ Vasuki Nesiah, *Doing History with Impunity*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 96 (2016)(stating that "the particular ways in which international justice and anti-impunity have been framed have reproduced and reinforced a structure of global governance premised on exploitation and inequality"); Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, in 12 FINNISH YEARBOOK OF INTERNATIONAL LAW 204 (2001)(claiming that international criminal law risks trivializing "the world's billion poor, 800 million hungry, 2.4 billion without sanitation, or 90 million children without basic education"); RANDLE DEFALCO, *INVISIBLE ATROCITIES* (2023)(arguing that international criminal law prioritizes the most visible forms of violence over slow violence that has equally harmful effects).

⁵⁴ KAMARI CLARKE, *AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK* (2019); Sarah Nouwen and Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity* 13 J. INT'L CRIM. JUSTICE 157 (2015).

⁵⁵ Samuel Moyn, *Anti-Impunity as Deflection of Argument* in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 86 (2016); MARKUS DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* 6 (2002); Leslie Vinjamuri & Jack Snyder, *Law and Politics in Transitional Justice*, 18 ANNUAL REVIEW OF POLITICAL SCIENCE 303–327 (2015); Zinaida Miller, *Anti-Impunity Politics in Post-Genocide Rwanda*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 150–152 (2016).

⁵⁶ Anthony Bottoms, *The Philosophy and politics of punishment and sentencing*, in *THE POLITICS OF SENTENCING REFORM* (Christopher M. V. Clarkson & Rod Morgan eds., 1995).

⁵⁷ JOHN PRATT, *PENAL POPULISM* (2007); NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008).

forbearance.⁵⁸ Fundamental to democracy is the willingness for incumbents to step down when they lose, and for oppositions out of power to remain loyal to the regime.⁵⁹ On this basis, it may be that learning to forget is healthier than holding political grudges and seeking to punish former leaders, even if they committed human rights violations.⁶⁰

The most extreme version of this concern is that prosecutions may promote a resumption of violence and ultimately lead to regime collapse.⁶¹ The thinking here is that right-wing groups, supporters of the military, and authoritarian sympathizers would rather attack democratic institutions than allow their allies to be held accountable in court for past human rights violations. For this reason, it may be most prudent to avoid the call for trials and instead pursue a middle ground solution to past harms, like amnesties or truth commissions.⁶² Social science research has not revealed much evidence to bear out these concerns. Some research contends that interventions by the International Criminal Court (ICC) might inspire leaders to cling to power, or continue fighting civil wars, in order to avoid capture and prosecution.⁶³ But these findings are specific to international courts. Other empirical studies have concluded that *domestic* prosecutions are associated with less government violence over time,⁶⁴ which may be explained by the way that criminal accountability, or the fear thereof, changes the cost-benefit analysis

⁵⁸ See e.g., Steven A. Koh, *Prosecution and Polarization*, 50 FORDHAM URBAN L. J. 1117 (2023) (arguing that criminal prosecutions often foster polarization and alienation rather than healing in transitioning societies).

⁵⁹ Juan J Linz, *Crisis, Breakdown and Reequilibration*, in THE BREAKDOWN OF DEMOCRATIC REGIMES (Juan J Linz & Alfred Stepan eds., 1978).

⁶⁰ DAVID RIEFF, IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES (Reprint edition ed. 2017).

⁶¹ Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, 123 DAEDELUS 47 (2003).

⁶² Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT. SECUR. 5 (2003).

⁶³ Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. UNIV. L. REV. 777 (2006); Monika Nalepa & Emilia Justyna Powell, *The Role of Domestic Opposition and International Justice Regimes in Peaceful Transitions of Power*, 60 J. CONFL. RESOLUT. 1191 (2016); Alyssa K. Prorok, *The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 INT. ORGAN. 213 (2017); Daniel Krmaric, *Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice*, 62 AM. J. POLIT. SCI. 486 (2018).

⁶⁴ Hun Joon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions*, 54 INT. STUD. Q. 939 (2010); Dancy et al., *supra* note 19.

of front-line police and security forces.⁶⁵ Knowing that punishment is possible, state agents may decline to follow orders calling for repressive tactics, and they may be even less likely to engage in extra-legal measures on their own volition. Researchers have also found that that transitional trials are associated with less organized crime, especially that which is perpetuated by corrupt police.⁶⁶

However, at an empirical level, it remains unclear how criminal punishment of state agents and leaders in domestic courts affect democratic institutions and behaviors.⁶⁷ A handful of studies have investigated the link between other transitional justice mechanisms and democracy, finding some evidence that highly publicized truth commissions inspire modest reforms⁶⁸ and that vetting and lustration policies are a factor that favor robust liberal democracy.⁶⁹ Most recently, Dancy and Thoms find that truth commissions are associated with more pro-democratic behaviors but not democratic institutional reform.⁷⁰ But the same level of scrutiny has not turned to the question of trials and democracy. The few empirical studies that do exist use rather coarse measures of prosecutions, and democracy indicators that combine many different features of democracy into one composite index and

⁶⁵ Tiberiu Dragu & Mattias Polborn, *The Administrative Foundation of the Rule of Law*, 75 J. POLIT. 1038 (2013); Tiberiu Dragu & Yonatan Lupu, *Collective Action and Constraints on Repression at the Endgame*, 51 COMP. POLIT. STUD. 1042 (2018); David Pion-Berlin & Harold Trinkunas, *Civilian Praetorianism and Military Shirking During Constitutional Crises in Latin America*, 42 COMP. POLIT. 395 (2010).

⁶⁶ Guillermo Trejo, Juan Albarracín & Lucía Tiscornia, *Breaking State Impunity in Post-Authoritarian Regimes: Why Transitional Justice Processes Deter Criminal Violence in New Democracies*, 55 J. PEACE RES. 787 (2018).

⁶⁷ For a theory of how prosecutions may boost trust and institutional legitimacy in democracies, see Anja Mihr, *Transitional Justice and the Quality of Democracy: From Democratic Institution Building to Reconciliation* (2012).

⁶⁸ Onur Bakiner, *Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society*, 8 INT. J. TRANSITIONAL JUSTICE 6 (2014); Laura K. Taylor & Alexander Dukalskis, *Old Truths and New Politics: Does Truth Commission 'publicness' Impact Democratization*, 49 J. PEACE RES. 671 (2012).

⁶⁹ Cynthia M. Horne, *The Impact of Lustration on Democratization in Postcommunist Countries*, 8 INT. J. TRANSITIONAL JUSTICE 496 (2014); CYNTHIA M. HORNE, BUILDING TRUST AND DEMOCRACY: TRANSITIONAL JUSTICE IN POST-COMMUNIST COUNTRIES (2017); Geoff Dancy et al., *Russia's Willing Collaborators*, FOREIGN AFFAIRS, Jun. 2023, <https://www.foreignaffairs.com/ukraine/russias-willing-collaborators> (last visited Aug 14, 2023).

⁷⁰ Geoff Dancy and Oskar Timo Thoms, *Do Truth Commissions Really Improve Democracy?* 55 Comparative Political Studies 555 (2022).

are based on data that is over two decades old.⁷¹ Though these studies find some positive statistical relationships, it remains unclear how specifically prosecuting state agents and leaders for their abuses of power reshape democratic practices. How, if at all, does punishing the state officials change elections, alter the judiciary, or transform citizen behavior?

II. Guatemala In Focus

The question at the heart of this article—that is, whether it is possible for a country to punish its way to a more democratic future—was recently put to the test in Guatemala. During the summer of 2023, criminal trials for atrocities and corruption came to the fore in the country's Presidential elections. At the start of the Presidential campaign season, the two frontrunners, Zury Ríos and Sandra Torres, were implicated in prosecutions for serious crimes involving an abuse of office either by them or a close relative whom they backed.⁷²

But, in a surprising turn of events, an independent, anti-corruption progressive candidate, Bernardo Arévalo, the son of Guatemala's first democratically elected president, pulled ahead, ultimately winning the election. Did his opposing candidates' run-ins with the law help to usher in this new era of democratic governance in Guatemala? Is Guatemala a case wherein successful prosecution ultimately strengthened democracy?

This Part will address those questions by contextualizing this election within the longer history of Guatemalan internal armed conflict and the atrocity trials that followed it. In doing so, it will also describe the role of anti-corruption efforts that developed in parallel to the atrocity trials. These efforts

⁷¹ Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RIGHTS Q. 980 (2010)(relying on a dataset of countries that transitioned to democracy from 1970 to 2004 and the Polity IV which combines several indicators of democracy into one index); Andrew Reiter, who created the dataset used in the aforementioned study, has referred to the TJET as a "new global dataset, with more refined data on trials" than his own. See <https://andyreiter.com/datasets/>; Brian K. Frederking, *Putting Transitional Justice on Trial: Democracy and Human Rights in Post-Civil War Societies*, 91 INT. SOC. SCI. REV. 1 (2015).

⁷² Sofia Menchu and Diego Oré, *Meet Guatemala's leading presidential candidates*, REUTERS, June 25, 2023, available at <https://www.reuters.com/world/americas/meet-guatemalas-leading-presidential-candidates-2023-06-25/>; Leila Miller, *A dictator's daughter runs for president, unleashing memories of Guatemala's dark past*, L.A. TIMES <https://www.latimes.com/world-nation/story/2023-06-12/guatemala-civil-war-genocide-dictators-daughter>.

were led by an UN-backed commission that for over a decade helped institute reforms to the legal infrastructure in Guatemala, which ultimately helped to facilitate the atrocity trials. Additionally, though the mandate of the commission expressly excluded crimes arising out of the armed conflict, anti-corruption attorneys often found that those at the center for their investigations were also involved in atrocity crimes during the armed conflict—unfortunately, a common phenomenon around the world.⁷³ This Part will analyze the effect of both the atrocity and the anti-corruption proceedings on the recent Presidential election in Guatemala. We conclude that while the anti-corruption prosecutions likely had a greater effect on electoral politics than the atrocity trials, there is some evidence to suggest that it was the convergence of both that ultimately helped to tip the scales toward Arévalo.

Still, as is later substantiated by cross-nationals analysis in Part IV as a finding that applies more broadly, these trials were also very polarizing for Guatemalan society and followed by some democratic backsliding. In recent times, the far right has been able to weaponize the criminal apparatus against the human rights and anti-corruption advocates that were critical to pushing them ahead. This Part also touches this paradox of punishment, which is covered in more detail in Part III.

A. The Guatemalan Armed Conflict and the Fathers of Presidential Hopefuls

The significance of criminal trials to the last Guatemalan Presidential election can only be fully appreciated when they are framed within Guatemala's historical context, in particular its 36-year armed conflict and the Cold War.⁷⁴ The legacy of that conflict plays out in stark terms given that two of the Guatemalan Presidential hopefuls, Bernardo Arévalo and Zury Ríos, are the children of former heads of state who occupied central leadership roles on both sides of the conflict during that era.

To set the stage for later analysis of the electoral effect of the atrocity and corruption proceedings, this subsection provides this necessary context drawing largely from Stephen Schlesinger's and Stephen Kinzer's comprehensive history of the U.S. government's role in the Guatemalan armed conflict documented in *Bitter Fruit: The Story of the American Coup*

⁷³ See *supra* note 27 & 28.

⁷⁴ See COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, GUATEMALA: MEMORIA DEL SILENCIO, CAPÍTULO PRIMERO: CAUSAS Y ORÍGENES DEL ENFRENTAMIENTO ARMADO INTERNO 98 (1999) [hereinafter CEH Report] (discussing the historical context that set the stage for the Guatemalan internal armed conflict).

*In Guatemala.*⁷⁵ Of particular significance is the relationship of each Presidential hopeful's father with the United States government, which later supported the atrocity and anti-corruptions proceedings in Guatemala, as well as the legacy of Bernardo Arévalo's father as the first democratically elected President who pursued a redistributive agenda.

i. Bernardo's Dad

The seeds of the armed conflict were planted when Juan José Arévalo Bermejo, the father of current Guatemalan President Bernardo Arévalo, became the first democratically elected President of Guatemala in 1945.⁷⁶ Backed by a growing middle class comprised of schoolteachers, small business owners, skilled laborers, and students,⁷⁷ Arévalo supported a number of pro-labor and redistributive initiatives that threatened the United Fruit Company, a U.S. banana company, and in turn evoked the ire of the U.S. government.⁷⁸ Although Arévalo disavowed Communism,⁷⁹ his political opponents cast him as a Communist in order to undermine U.S. support for his administration.⁸⁰ The U.S. government readily accepted this view, which was ironic given that Arévalo credited the Four Freedoms articulated by Franklin Roosevelt as an inspiration for his model of governance.⁸¹ The U.S. ambassador to Guatemala, in particular, believed Arévalo to be a Communist and began plotting his ouster, which ultimately was successful when he was recalled in 1950.⁸² Arévalo left office disillusioned by what he saw as the hallow promise of American democracy and freedom, commenting at the inauguration of his successor, Jacobo Arbenz Guzmán:

⁷⁵ Stephen Schlesinger & Stephen Kinzer, *BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA* 49 (1999).

⁷⁶ *Id.*

⁷⁷ *Id.* at 43, 51, & 77-78; See also Greg Grandin, *The Blood of Guatemala: A History of Race and Nation* 203-04 (2000) (describing the supporters of Arevalo as including “[m]iddle-class reformers and student activists,” as well as “women’s organizations”)

⁷⁸ Namely, Arévalo supported labor reforms that made it easier to organize the United Fruit Company’s approximately 40,000 Guatemalan workers to unionize and strike. Schlesinger & Stephen Kinzer, *supra* note 76, at 51, 70. Under him, the Guatemalan Congress also passed a law that allowed for the redistribution of fallow lands, and the United Fruit Company held more unused land than any other country of individual in the country. *Id.* at 52, 70.

⁷⁹ *Id.* at 47, 52.

⁸⁰ *Id.* at 51-52 (describing how the FBI developed a dossier on Arevalo, fearing that he was a Communist)

⁸¹ *Id.* at 43, 46, 49, & 79 (describing Arévalo’s claims that “Guatemala was trying to establish a government modeled upon the principles enunciated by Franklin Roosevelt”)

⁸² *Id.* at 71.

The banana magnates, co-nationals of Roosevelt, rebelled against the audacity of a Central American president who gave to his fellow citizens a legal equality with the honorable families of exporters.... It was then that the schoolteacher, ingenuous and romantic, from the presidency of his country, discovered how perishable, frail and slippery the brilliant international doctrines of democracy and freedom were.⁸³

It was ultimately Arbenz who put Arévalo's ideals into action, evoking even more extreme backlash from the United Fruit company and the U.S. government.⁸⁴ First, when Arbenz sought to expropriate uncultivated land owned by the United Fruit Company, the U.S. State Department officials intervened, asking that the U.S. company be compensated at what it believed was market value, rather than the devalued rate of the property that the company had previously reported for tax purposes to the Guatemalan government.⁸⁵ Later on, after Dwight Eisenhower assumed the Presidency in the United States, United Fruit saw an opportunity to realize the covert CIA operation to overthrow Arbenz that it had been plotting for years, but had been rebuffed under Harry Truman.⁸⁶ United Fruit thus doubled down on a public relations and lobbying campaign and was able to convince key U.S. officials that Arbenz was a Communist, and thereby a threat to democracy and freedom, and needed to be deposed.⁸⁷ Despite scant evidence of Guatemalan ties to Russia and very few Guatemalans identifying as Communists, Guatemala's expropriation of United Fruit land ultimately was catalyst enough for Eisenhower himself to approve the plan to overthrow Arbenz.⁸⁸

⁸³ *Id.* at 56.

⁸⁴ *Id.* at 71. ("As Arévalo left the presidency and was succeeded by Jacobo Arbenz, the Fruit Company, like the rest of Guatemala, foresaw that idealistic generalities might soon give way to forceful actions.")

⁸⁵ *Id.* at 73.

⁸⁶ *Id.* at 88-91.

⁸⁷ *Id.* at 73-74, & 81-84 (describing how the United Fruit company orchestrated a wildly successful media and political campaign to convince the American people and its government that Guatemala was moving toward Marxism); Their efforts were tremendously successful in persuading officials in the Eisenhower administration that Guatemala presented a Communist threat, in no small part due to the positioning of key officials who had formerly been executives of United Fruit in the administration. *Id.* at 93 (detailing all the connections between the Eisenhower administration officials and the United Fruit Company).

⁸⁸ *Id.* at 92-93 ("But the takeover of United Fruit land was probably the decisive factor pushing the Americans into action. Without United Fruit's troubles, it seems probable that the Dulles brothers might not have paid such intense attention to the few

The CIA ultimately selected and agreed to finance Carlos Castillo Armas, a former commander in the Guatemala military who was living in exile, to lead the invasion of Guatemala.⁸⁹ At the end of 1953, he publicized what he called his “Tegucigalpa Plan,” in which he outlined his opposition to the “the Sovietization of Guatemala” naming Arévalo along with Arbenz as the leaders of the movement to bring Communism to Guatemala.⁹⁰ In 1954, Armas led seventy men in an invasion of a military base in the capital of Guatemala.⁹¹ The attack objectively was not a military success, but it did succeed in putting enough pressure on Arbenz that he ultimately resigned that year, resulting in a military government takeover and reversal of land reforms efforts of the prior government.⁹²

During this time, the Guatemalan government instituted the National Security Doctrine, a repressive anti-communist agenda developed primarily in the United States that targeted the “internal enemy.”⁹³ According to Guatemalan military documents, an internal enemy was defined as “all those individuals, groups, or organizations, who try to disrupt the established order,” whether they be communists or not.⁹⁴ It was in this context that groups of leftist Guatemalans mobilized, culminating in a failed uprising of leftist military officers on November 13, 1960.⁹⁵ This date is seen as the start of Guatemala’s internal armed conflict. Thereafter, Guatemala was ruled by a string of military rulers until the conflict concluded in 1996, when the

Communists in Guatemala, since larger numbers had taken part in political activity on a greater scale during the postwar years in Brazil, Chile and Costa Rica without causing excessive concern in the U.S. government.”) *Id.* at 94 (“Eisenhower gave his approval for the plot against Arbenz after Allen Dulles told him that the odds of success were better than 40 percent but less than even.”)

⁸⁹ *Id.* at 116-19.

⁹⁰ *Id.* at 119. (“The organized opposition against the Sovietization of Guatemala, aware that the government of Col. Jacobo Arbenz and Dr. Juan Arévalo is acting along lines dictated by international communism, hereby raises the banner of struggle for national liberation.”)

⁹¹ *Id.* at 119.

⁹² *Id.* at 175-76; MUNA ABBAS ET AL., AM. BAR. ASS’N, INVISIBLE THREATS: ONLINE HATE SPEECH AGAINST HUMAN RIGHTS DEFENDERS IN GUATEMALA 11 (2019), https://www.americanbar.org/groups/human_rights/reports/invisiblethreats-online-hate-speech.

⁹³ CEH Report, *supra* note 74, at 117–123.

⁹⁴ *Id.* at 339 (citing to Ejército de Guatemala, Manual de Guerra Contrasubversiva, Guatemala, Noviembre de 1983, pgs. 2-3)(defining the enemy as “todos aquellos individuos, grupos u organizaciones que por medio de acciones ilegales tratan de romper el orden establecido...” E incluyó también “a aquellos individuos, grupos u organizaciones que sin ser comunistas tratan de romper el orden establecido.”).

⁹⁵ *Id.* at 123.

Guatemalan Government and the Guatemalan National Revolutionary Unity (URNG) signed the Agreement on a Firm and Lasting Peace (Acuerdo de Paz Firme and Duradera).⁹⁶

ii. Zury's Dad

One of those military leaders was a General by the name José Efraín Ríos Montt—the father to Zury Ríos—came to power via a military coup in 1982.⁹⁷ As a junior officer, Montt had taken part in the CIA-backed coup that resulted in Arbenz's resignation.⁹⁸ Ríos Montt was only the de facto head of state in Guatemala for seventeen months in 1982 and 1983, but he presided over the bloodiest period of the conflict.⁹⁹

While Ríos Montt's tactics were not new, he redoubled earlier military strategies and increasingly turned them on the civilian population in Guatemala. Namely, Ríos Montt intensified the so-called scorched earth campaign, which started by his predecessor General Romeo Lucas García.¹⁰⁰ According to military documents, the goal of the campaign was “quitarle el agua del pez,” or to displace or exterminate all the populations that might provide aid to the guerilla movement.¹⁰¹ As part of this effort, during this time, the classification of “internal enemy” was expanded to include anyone who might potentially support the guerilla groups.¹⁰² Under this broader definition,

⁹⁶ Agreement on a Firm and Lasting Peace, Guat.-URNG, Dec. 29, 1996, 36 I.L.M. 274.

⁹⁷ Miller, *supra* note 72.

⁹⁸ Stephen Kinzer, *Efraín Ríos Montt, Guatemalan Dictator Convicted of Genocide, Dies at 91*, NY TIMES, April 1, 2018, available at <https://www.nytimes.com/2018/04/01/obituaries/efrain-rios-montt-guatemala-dead.html>.

⁹⁹ OPEN SOCIETY JUSTICE INITIATIVE, JUDGING A DICTATOR: THE TRIAL OF GUATEMALA'S RÍOS MONTT, 1 (2013), available at <http://www.opensocietyfoundations.org/publications/judging-dictator-trial-guatemala-s-rios-montt>.

¹⁰⁰ *Id.*

¹⁰¹ CEH Report, *supra* note 74, at 344 (citing to Ejército de Guatemala, plan de campaña Victoria 82, anexo H, literales B y G.) (“Sin embargo, la intención iba más allá del objetivo metafóricamente expresado en el lema “quitarle el agua al pez” porque una vez logrado el propósito de vaciar áreas, la población continuó siendo perseguida hasta sus lugares de refugio donde, nuevamente, se ejecutaron matanzas y destrucción de siembras. En otras palabras, las acciones de arrasamiento y persecución denotaron y connotaron una intención de exterminio.”)

¹⁰² *Id.* at 381 (“El amplio concepto de enemigo interno esgrimido por el Estado fue relanzado con especial violencia e intensidad en los años ochenta, e incluyó no solo a los que activamente trataban de cambiar el orden establecido, sino a todos los que potencialmente podían llegar a respaldar esa lucha.”)

most of the indigenous Mayan population was identified as the “internal enemy” and thus targeted by the military.¹⁰³ As documented in the records of the atrocity trials gathered by López, the military razed entire indigenous villages to the ground, and even murdered an anthropologist studying the displacement of indigenous communities, after classifying them as an “internal enemy.”¹⁰⁴

Despite mounting evidence of crimes against humanity and genocide reported by the Central Intelligence Agency and U.S. Department of State, the United States government continued to provide military aid, equipment, and training to the Ríos Montt’s government.¹⁰⁵ Publicly, U.S. officials

¹⁰³ Jo-Marie Burt and Paulo Estrada, *Legacy of Guatemala Dictator Ríos Montt Shows Justice is Possible*, WOLA, April 13, 2018, available at <https://www.wola.org/analysis/legacy-guatemala-dictator-rios-montt-shows-justice-possible/>; Kate Doyle, *Guatemala’s Genocide Trial*, THE NATION, May 22, 2013, available at <https://www.thenation.com/article/archive/guatemalas-genocide-trial/>. However, part of the reason that the indigenous Mayans were targeted was that they were seen as an impediment to the modernization project of Guatemala. Indeed, documentation collected by the CEH, dating as far back as the 1970s, contained “assertions that the ‘indian’ is an element that does not permit development and that should either mix to become mestizo or be eliminated.” Interview with Otilia Lux de Cotí, CEH Commissioner (Dec. 13, 2017) (“Existían comunicados de los años 70 que contenían afirmaciones como ‘el indio’ es un elemento que no permite el desarrollo de Guatemala, el cual debe mezclarse y convertirse en mestizo, o debe eliminarse.”)

¹⁰⁴ Myrna Mack Chang II, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente de Guatemala, C-5-99 Of. 3ro., Sentence, Oct. 3, 2002, n.24; Río Negro II, N° 28-2003, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá, Baja Verapaz, Sentence, May 28, 2008, 316; Plan de Sanchez, C-01076-2011-00001 Of. 1, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente (Mayor Riesgo A), Sentence, March 14, 2012, 45, 77. (sentences on file with authors). *See also*, López *infra* note 151, at 768, 797, 799-80, & 813 (summarizing court documents and other primary sources, which demonstrate how the designation of someone as an “internal enemy” became fatal). *See generally*, RICARDO FALLA, *MASACRES DE LA SELVA : IXCAN, GUATEMALA (1975-1982)* (1992).

¹⁰⁵ Through Freedom of Information Act requests, the National Security Archive obtained numerous government documents that demonstrate the United States’ knowledge of numerous massacres and extrajudicial killings perpetrated by the Guatemalan government. To view the Central Intelligence Agency and U.S. Department of State cables, *see* Kate Doyle & Carlos Osorio, *U.S. Policy in Guatemala, 1966–1996*, The Nat’l Security Archive, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB11/docs> [<https://perma.unl.edu/WZH7-V7HS>]; *see also* Santiago Wills, *Did Reagan Finance Genocide in Guatemala?*, ABC News, (May 14, 2013),

claimed that reports of atrocities were “unconfirmed.”¹⁰⁶ President Reagan said that he thought Ríos Montt got a “bum rap on human rights” and was “a man of great personal integrity and commitment.”¹⁰⁷ Reagan’s statements were made in 1982—the same year that the U.N. General Assembly passed a resolution urging governments “to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported.”¹⁰⁸

As part of the peace agreement that resulted in the end of the internal armed conflict, the Guatemalan government agreed to the creation of a UN-backed truth commission coupled with an amnesty law. Although the amnesty law excluded international crimes such as genocide, torture, and forced disappearances, many people still believed that it was designed to ensure everlasting impunity.¹⁰⁹ Likewise, since the truth commission was not allowed to name names, many viewed it as an inadequate substitute for justice,¹¹⁰ or as Guatemalan writer Francisco Goldman put it, a “piñata of

http://abcnews.go.com/ABC_Univision/News/ronald-reagan-finance-genocide-guatemala/story?id=19179627 [<https://perma.unl.edu/V5A9-WM4B>] (explaining the United States’ involvement in the genocide in Guatemala between 1982 and 1983). U.S. President Bill Clinton apologized for the United States’ role in these gross human rights violations in Guatemala. Helmut Philipp Aust, *Complicity and the Law of State Responsibility* 104 (2011). *See also*, Schlesinger & Stephen Kinzer, *supra* note 76. (“As the atrocities escalated, the U.S. government gave repeated and dramatic evidence of its support of the Ríos Montt regime. Economic aid resumed in October. President Reagan praised Ríos Montt and his government on a state visit in December. In January 1983, the U.S. government lifted its embargo on the sale of arms to Guatemala and sent \$6.3 million in spare parts for helicopters, the same helicopters that had already begun to appear in accounts of army massacres of entire villages.”)

¹⁰⁶ *Id.* at (“Reports based on eye-witness accounts were dismissed by U.S. officials as ‘unconfirmed.’”).

¹⁰⁷ Kinzer, *supra* note 98; Steven R. Weisman, *Reagan Denounces Threats to Peace in Latin American*, NY TIMES, Dec. 5, 1982, available at <https://www.nytimes.com/1982/12/05/world/reagan-denounces-threats-to-peace-in-latin-america.html>.

¹⁰⁸ GA Res. A/37/745 XVII, at 17 (Dec. 14, 1982).

¹⁰⁹ National Reconciliation Law, Article 8, Decreto numero 145-1996, Dec. 27, 1996; Interview with Naomi Roht-Arriaza (Nov. 14, 2017).

¹¹⁰ Jemima García-Godos & Luis Raúl Salvado, *Guatemala: Truth and Memory on Trial*, in TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY, *supra* note **Error! Bookmark not defined.**, at 205 (“[T]he insurgency gradually lost popular support in the course of the negotiations, in part because the accords it signed were widely perceived as weak in their response to popular demands for justice... The accord [which created the

forgiving.”¹¹¹ However, the truth commission’s report was surprisingly extensive and hard-hitting. Most strikingly, it concluded that the Guatemalan government was responsible for 200,000 deaths and that acts of genocide occurred in four designated regions of Guatemala during a period that overlapped with Ríos Montt’s rule of Guatemala.¹¹² The report also concluded that, during that same time, in the Ixil region, between 70 and 90 percent of the villages were wiped out.¹¹³

Although a few low level paramilitary officials had been convicted, the prosecutions of the high command of the army—those who planned and organized the most egregious human rights violations—stalled.¹¹⁴ Believing that criminal accountability in Guatemala was impossible due to the entrenched power of the military even after the war ended, Nobel Prize winner Rigoberta Menchú filed a criminal complaint in Spain, using a Spanish provision, which at the time allowed for universal jurisdiction for international crimes even if there was no nexus to Spain.¹¹⁵ The complaint

CEH] generated disillusionment within social movements and the human rights sector for its provision that ‘the Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect . . .’).

¹¹¹ Francisco Goldman, *In Guatemala, All is Forgotten*, NY TIMES (Dec. 23, 1996) <http://www.nytimes.com/1996/12/23/opinion/in-guatemala-all-is-forgotten.html> [<https://perma.cc/XRB6-MXBK>].

¹¹² CEH Report, *supra* note 74, at 358 (“A juicio de la CEH, el conjunto de acciones violentas perpetradas por el Estado contra la población maya-ixil durante los años 1980-1983, permite concluir que se cometieron actos de genocidio, inspirados por una determinación estratégica que también revistió carácter genocida, por cuanto un objetivo de la campaña militar contrainsurgente fue la destrucción parcial del grupo víctima, al considerarse que de esta manera se lograría vencer al enemigo.”)

¹¹³ *Id.* at 345, 420 (“El caso más notable es el de la región ixil, donde entre el 70% y el 90% de las aldeas fueron arrasadas.”).

¹¹⁴ Keller, *supra* note **Error! Bookmark not defined.**, at 297–301; Decreto No. 145, Ley de Reconciliación Nacional [National Reconciliation Law], *supra* note **Error! Bookmark not defined.**; Popkin, *supra* note **Error! Bookmark not defined.**

¹¹⁵ Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT’L L. 79, 79 n.3 (2008). (“The Audiencia Nacional hears cases involving drug smuggling, terrorism, state corruption, and international crimes that cannot adequately be dealt with at the level of provinces and autonomous communities.”). Naomi Roht-Arriaza & Almudena Bernabeu, *Many Roads to Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-conflict Guatemala*, in THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICAN AND SPAIN 184, 188 (Jessica Almqvist & Carlos Esposito, eds., 2012).

alleged that eight former military or government officials, including Ríos Montt, were responsible for torture, genocide, terrorism, assassination, and illegal detention.¹¹⁶ Acting upon the arrest warrant issued by the Spanish Judge overseeing the case, a Guatemalan court ordered the arrest of four of those subject to the Spanish arrest warrant.¹¹⁷ Ríos Montt escaped arrest due to a technicality that held up the execution of the warrant for his arrest as well as a series of appeals filed by his lawyers.¹¹⁸ Then, on December 12, 2007, Guatemala's Constitutional Court ("GCC") decided not to honor Spanish arrest warrants or extradition request, reasoning that the Spanish case was an affront to Guatemala's sovereignty.¹¹⁹

Thus, even though Ríos Montt was seen as responsible for overseeing the genocide of tens of thousands of indigenous Mayans, he continued to wield considerable power in Guatemala and due to his position in Congress, remained immune to prosecution under Guatemalan law.¹²⁰ In early 1990, he founded the Guatemalan Republican Front (FRG) political party.¹²¹ Soon after, he became a candidate for President, and, according to the polls, likely would have won if the Guatemalan Constitutional Court had not disqualified him from running, based on a Constitutional provision that barred anyone who had participated in a military coup.¹²² Employing populist messages portraying himself as an outsider candidate who supported law and order and opposed corruption, he was able to galvanize widespread support in the indigenous areas that were the hardest hit during his reign, such as the Ixil region.¹²³ As late as 2003, when co-author Rachel López first began her research in Guatemala, Ríos Montt was a prominent congressman who had

¹¹⁶ Guatemalan Generals Case, Complaint filed by Rigoberta Menchú with the Juzgado Central de Instrucción de Guardia de la Audiencia Nacional in Spain, Dec. 2, 1999 (on file with authors). *See also*, OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 2.

¹¹⁷ Roht-Arriaza, *supra* note 115, at 80.

¹¹⁸ *Id.* at 87 & n. 33.

¹¹⁹ *Id.* at 80 (citing to Sentencia del 12 de Diciembre de 2007, Corte de Constitucionalidad (Guatemala), Expediente 3380-2007, Audiencia Nacional de España).

¹²⁰ Kinzer, *supra* note 98 ("General Ríos Montt served several terms in Congress, which gave him immunity from prosecution.").

¹²¹ Regina Bateson, *Voting for a Killer: Efraín Ríos Montt's Return to Politics in Democratic Guatemala*, 54 *COMPARATIVE POLITICS*, 203, 203 (2022).

¹²² David Stoll, *Why They Like Ríos Montt*, 24 *NACLA REPORT ON THE AMERICAS* 4, 4-7 (1990), available at <https://bpb-us-e2.wpmucdn.com/sites.middlebury.edu/dist/e/2896/files/2018/01/Why-They-Like-Rios-Montt-1990.pdf>.

¹²³ *Id.* at 4-5.

just launched a second campaign for President.¹²⁴ This time he was allowed to run, but lost in part due to the corruption of the former FRG president, who was previously sold to the Guatemalan people as the stand-in for Ríos Montt in the prior Presidential election and mostly acted at his direction.¹²⁵

Still, over the next decade a number of hardly noticed but seismic shifts (described fully in the next section) would move the needle toward greater criminal accountability and, ten years later, Ríos Montt would be charged and then convicted of genocide in a Guatemalan court for his role in the 1982 massacres of several Ixil villages.¹²⁶ This was a landmark moment, not just for Guatemala, but for the world: it was the first time that a former head of state was indicted and convicted of genocide in his own country.¹²⁷

As soon as the verdict was rendered, however, the backlash began: Military veterans protested; a powerful organization of business elites held a press conference and claimed the judgment “exacerbate[d] polarization” and revealed that “justice ha[d] become a prisoner of ideological conflict.”¹²⁸ Only ten days later, the conviction was overturned on shaky procedural grounds, which many attribute to the intentional obstruction by Ríos Montt’s defense attorneys as well as the swift backlash to the judgment.¹²⁹ While the case was supposed to be retried, Ríos Montt was later determined to have dementia and died before the trial concluded.¹³⁰ Meanwhile, those attorneys and judges who litigated and adjudicated the genocide case became the targets of reprisals, including have criminal charges brought against them.¹³¹ Despite

¹²⁴ Bateson, *supra* note 121, at 211.

¹²⁵ *Id.* at 210 (“Portillo said he would ‘defer to General Ríos Montt if elected,’ and he ran on the slogan, ‘Portillo to the presidency, Ríos Montt to power.’”) *Id.* at 222 (“At least in part, Ríos Montt lost the 2003 election because populism is inherently ‘episodic,’ due to ‘its attitude towards institutions.’ Once in power, populists either adopt new political strategies to “transcend populism,’ or they fail. Ríos Montt fell into the latter category. Ríos Montt had built his democratic political career railing against corrupt, ineffective politicians. But during the FRG administration of 1999–2003, corruption worsened, rather than improving, and crime rates went up, not down.”)

¹²⁶ Elisabeth Malkin, *Former Leader of Guatemala Is Guilty of Genocide Against Mayan Group*, NY TIMES, May 10, 2013, https://www.nytimes.com/2013/05/11/world/americas/gen-efrain-rios-montt-of-guatemala-guilty-of-genocide.html?_r=1&.

¹²⁷ See generally OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99.

¹²⁸ Jo Marie Burt, *From heaven to hell in ten days: the genocide trial in Guatemala*, 18 J. GENOCIDE RESEARCH 143, 155 (2016).

¹²⁹ *Id.* at 156-7.

¹³⁰ *Id.* at 157.

¹³¹ *Id.* at 158.

these setbacks, many still regard the genocide trial as significant achievement since it demonstrated that “in a post-conflict society such as Guatemala, domestic legal systems can adjudicate, in a fair and impartial way, complex cases of grave human rights abuses.”¹³² For this reason, political scientist Jo Marie Burt has argued that this case represents a paradox common to Latin American countries that pursue criminal accountability as a method of transitional justice.¹³³

B. Transitional Trials in Guatemala

Still, the Ríos Montt case was just one of case among a series of remarkable historic firsts in the realm of transitional justice in Guatemala. In 2016, due in no small part to the courage of a group of Mayan women who were held as sexual slaves at a military base during the armed conflict, one of Guatemala’s High Risk Tribunals (a court set up to try especially sensitive cases) became the first national court in the world to prosecute sexual violence as a crime against humanity.¹³⁴ That same year, fourteen other military officers were charged in the largest case involving enforced disappearance in Latin America, after exhumations unearthed 558 human remains from mass graves at a former military base called CREOMPAZ.¹³⁵

While these high-level cases have been celebrated by human rights scholars and advocates alike, what is less know is that they built on a long lineage of transitional justice trials in Guatemala. Indeed, during her field research in Guatemala in 2016, co-author Rachel López documented thirty-

¹³² *Id.* at 165.

¹³³ *Id.* (“As I have tried to argue, the genocide case represents a paradox. It laid bare some of the profound problems of Guatemala’s post-war justice system. It also laid bare that influential actors interested in the status quo ante of impunity retain substantive quotas of power. But the genocide trial also revealed the qualitative steps forward that Guatemala has made to grapple with the legacies of a violent past and overcome the impunity benefiting the perpetrators of grave violations of human rights.”)

¹³⁴ Maya Thomas-Davis, *Guatemala: Justice for Sepur Zarco sex slavery victims*, ALJAZEERA, Mar. 3, 2016, <https://www.aljazeera.com/indepth/features/2016/03/guatemala-justice-sepur-zarco-sex-slavery-victims-160303072107762.html>; Jo Marie Burt, *Gender Justice in Post-Conflict Guatemala: The Sepur Zarco Sexual Violence and Sexual Slavery Trial*, 4 CRITICAL STUDIES 63 (2019)(“The 2016 Sepur Zarco trial was one such landmark case: it was the first time that Guatemala prosecuted wartime sexual violence, and the first time that a domestic court prosecuted sexual slavery as a crime against humanity.”).

¹³⁵ CREOMPAZ: *The Largest Case of Forced Disappearance in Latin America*, NISGUA, <https://nisgua.org/portfolio-items/creompaz-report/>.

two cases resulting in convictions for atrocities committed during the Guatemalan internal armed conflict stretching as far back as 1993.¹³⁶ Although all of Guatemalan sentences are technically public, obtaining the court documents for these cases was remarkably challenging.¹³⁷ To obtain copies of the sentences, López traveled long distances courts or human rights organizations in remote, rural areas of Guatemala. These primary documents, collected for the first time by López, are now being compiled into a digital archive at the Princeton University Library, and have been included in the cross-national database compiled by the Transitional Justice Evaluation Tools (TJET) project centered at the University of Toronto and Harvard University. In addition, she obtained the record of the case brought in Spain against the Guatemalan generals who were the alleged engineers of numerous atrocities against the Mayan population.

Together, these cases tell the story of the evolution of transitional justice in Guatemala. Prior to the release of the truth commission's report in 1999, Guatemalan courts exclusively depicted even the gravest international crimes involving massacres of villages as common crimes like homicide, assassination, or kidnapping committed by rogue actors like farmers or low level paramilitary acting alone without any officials orders.¹³⁸ Over the last two decades, however, Guatemalan prosecutors and judges trained their focus on the governmental actors who orchestrated the commission of grave crimes

¹³⁶ Myrna Mack Chang I, Pieza 20: 3630–50, Sentencia de la Sala Cuarta de la Corte de Apelaciones, April 28, 1993 (on file with authors); Jo-Marie Burt and Paulo Estrada have also noted that “since the signing of the peace accords in 1996, Guatemalan courts have handed down 26 sentences in 21 cases of human rights violations from the conflict era, including genocide, massacres, forced disappearances, extrajudicial executions, sexual violence, and other crimes against humanity.”) Jo-Marie Burt and Paulo Estrada, *Esperanza en medio de la oscuridad: las víctimas continúan en su búsqueda de justicia por crímenes del conflicto armado interno de Guatemala*, WOLA, Jan. 21, 2022, <https://www.wola.org/es/analisis/justicia-conflicto-armado-interno-guatemala/>(last visited August 8, 2024)

¹³⁷ Even the former head of the war crimes unit in Guatemala City said that she didn't have access to these court records, in part because local jurisdictions will not share them with her. Interview with Hilda Pineda, Head of the War Crimes Unit in the Guatemalan Attorney General's Office (Nov. 22, 2016).

¹³⁸ Before 2000, only low-level officials were convicted of ordinary crimes, such as assassination, homicide, and grave injury. *See, e.g., Myrna Mack Chang I*, Pieza 20: 3630–50, Sentencia de la Sala Cuarta de la Corte de Apelaciones, April 28, 1993; *Rio Negro I, Part A*, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá, 01-98, Of. 2º, Sentence (1998); *Rio Negro I, Part B*, 01-98, Of. 1º, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá (1999); *Noriega Estrada*, Expediente No. 22-96, Tribunal de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente del departamento de El Quiché (1999).

at the highest level of authority, but relied on their subordinates to carry them out, charging former heads of state and high-level military officials with international crimes such as genocide, crimes against humanity, and enforced disappearances.¹³⁹

How and why did criminal accountability become part of the transitional justice agenda in Guatemala? As a starting point, many human rights and indigenous activists interviewed by López prioritized the prosecution of high-level officials as part of a broader advocacy strategy, hoping that it would change the “political structures” and help draw links between the war criminals of the past and the kleptocrats of today.¹⁴⁰ These advocates argued that the failure to fully reckon with the genocide and the history of racism against the indigenous Mayans resulted in racial and economic injustice and the government abuses of the past persisting today.¹⁴¹

¹³⁹ See e.g., *Edgar Fernando García II*, C-01069-1997-00001 Of. 3°, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala (Tribunal de Mayor Riesgo “A”), Sentence, Sept. 20, 2013, 151; *Ríos Montt*, C-01076-2011-00015 Of. 2°, Tribunal Primero de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Guatemala, Sentence (2013); *Myrna Mack Chang II*, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente de Guatemala, C-5-99 Of. 3ro., Sentence, Oct. 3, 2002; *Río Negro II*, N° 28-2003, Tribunal de Sentencia Penal Narcoactividad y Delitos contra el Ambiente de Salamá, Baja Verapaz, Sentence, May 28, 2008. A Chart of atrocity trails and court documents is also on file with authors.

¹⁴⁰ Interview with Alejandro Rodríguez, a human rights attorney and researcher at Impunity Watch in Guatemala, who was the *quellrante adhesivo* (a private prosecutor who represented the victims) in the *Molina Theissen* case. (“Llevar eso a juicio ha significado cambiar modelos de justicia, no solo el hecho de que las víctimas puedan reorganizarse como tejido social, sino también cambiar las estructuras políticas.”); Interview with a staff member of Oficina de Derechos Humanos del Arzobispado de Guatemala (ODHAG) who wished to remain anonymous (“Tenemos entonces una red criminal en la que participan, y es conocido públicamente, militares que participaron en la guerra, incurriendo en narcotráfico, trata de personas, empresas de seguridad privada para corporaciones multinacionales que someten a tácticas de represión a las comunidades que en este momento defienden su territorio de explotación minera, hidroeléctrica, etc. Ellos defienden pacíficamente sus intereses pero estas organizaciones militares recurren tácticas represivas de nuevo porque no han sido castigados después de la guerra...”)

¹⁴¹ Interview with Otilia Lux de Cotí, an indigenous advocate and one of the three Commissioners of CEH, (Dec. 13, 2017) (“Existían comunicados de los años 70 que contenían afirmaciones como el indio es un elemento que no permite el desarrollo de Guatemala, el cual debe mezclarse y convertirse en mestizo, o debe eliminarse. Eran comunicados que mostraban como se miraba a los indígenas de ser causantes del subdesarrollo, lo que refleja el pensamiento conservador y oligarca. Lo que era

To support this claim, they pointed to examples of current day political leaders who committed grave crimes during the war and today are implicated in corruption and exploitation of natural resources, often using the same violent tactics as they did during the war.¹⁴² They further contend that the failure to hold these officials to account has left criminal networks from the armed conflict intact and resulted in the state not having enough funds for healthcare and education, due to them raiding the government coffers.¹⁴³ Some believed that the broadcasting of the trials would raise the public's consciousness about these connections and create political space for other more redistributive reforms in the process.¹⁴⁴ In this way, they connected the

completamente erróneo porque el subdesarrollo tiene una casusa económica, política y jurídica; la impunidad principalmente no ha permitido el desarrollo y buen vivir de la ciudadanía. En cambio ver a los indígenas como el elemento de obstáculo es absurdo...")

¹⁴² *Id.*; Interview with staff member of ODHAG ("Por otro lado, pudiera parecer que viéramos la historia con ojos actuales. Por ejemplo el caso de Otto Perez Molina, quien está señalado de graves violaciones cometidos durante la guerra ...Él no ha sido investigado, juzgado ni sentenciado por la comisión de estas violaciones por lo tanto esa inacción del sistema de justicia le permitió llegar a la presidencia del país y hacer el saqueo de todos los fondos y arcas públicas del estado, y lo que trajo como consecuencia: las muertes por el sistema de salud, las aulas vacías, los colegios sin maestros. En eso consiste la garantía de non repetición, no es que no haya genocidio, es que efectivamente esas causas que originan la guerra, el enfrentamiento armado y todo lo demás efectivamente se empiecen a combatir. Esa es la falencia, tal vez no del informe CEH, sino de los mecanismos en conjunto, de los acuerdos de paz, de los mecanismos para garantizar el derecho a la justicia, la verdad, el derecho a la información, el derecho a la reparación. Es decir, el compromiso real de combatir las estructuras de impunidad que van a seguir sirviendo a los intereses que originaron la guerra en este país o en Colombia o en cualquier otro país. Es algo que tal vez no le compete a una comisión de la verdad pero si es una competencia de los mecanismos que se establecen en el postconflicto, y que son necesarios para superar los problemas de la guerra.")

¹⁴³ *Id.*

¹⁴⁴ Interview with Francisco Soto, the Director of Center for Legal Action on Human Rights. Interview with Director of Grupo de Apoyo Mutuo (GAM) ("También tiene que ver con que paralelo al taque que hacia el ejército, hubo ataques contra defensores de derechos humanos, contra la avanzada del sistema interamericano y las convenciones de derechos internacionales. Aun hoy si usted habla de derechos humanos en redes sociales, los ataques son iguales, son los que defienden a los delincuentes, son los que defienden a los criminales, cualquier cosa que pase se le emputan a los defensores de los derechos humanos. Porque no entienden que los derechos humanos es una filosofía de vida, es la salud, es trabajo, es desarrollo. Al final los derechos humanos debería ser sinónimo de bienestar en todos los ámbitos, pero aquí fue criminalizado ese tema. Entonces yo me imagino que los jueces preferían llamarlo asesinato y secuestro. De hecho el Cute estaba sindicados de plagio

criminal trials to other human rights, like the right to health, education, sustainable development, and a healthy environment.¹⁴⁵

Still, even with the weight of the human rights movement behind the criminal trials, it is perplexing that a country with a 95% impunity rate for homicides succeeded in becoming the first to convict a former head of state for genocide – among other unprecedented convictions of war criminals – in its domestic courts. In addition to those factors that have been described before, like the presence of an anti-genocide law in criminal statute¹⁴⁶ and provisions that allow for private parties to initiate criminal cases,¹⁴⁷ there were other justice catalysts in Guatemala that made the groundbreaking prosecutions possible. These include 1) the truth-telling efforts of truth and reconciliation commissions (TRCs), one official and one unofficial, 2) the work of a UN-backed commission which supported judicial and prosecutorial independence and integrity, 3) the creation of “High Risk Tribunals,” which provided additional protection for judges and prosecutors working on these cases, 4) judgments against Guatemala by the Inter-American Court of Human Rights, 5) the institutional pressure on Guatemalan actors resulting from the genocide charges brought in Spanish courts against Guatemalan generals, and 6) support from the U.S. and other foreign governments.

First, as López has documented in her prior article *Post-Conflict Pluralism*, the prosecutors and human rights advocates were aided by previous fact-finding by the two truth and reconciliation commissions (TRCs), which completed extensive documentation of the atrocities.¹⁴⁸ The

y secuestro, pero no era desaparición forzada. Fue el tribunal que en sentencia cambia el delito. La ley establece que si en el proceso el tribunal determina que hay otros delitos, el tribunal de oficio puede cambiar esos delitos imputados. Había mucho miedo porque se lo pedimos dentro del debate, y el tribunal dijo que no porque no había lugar. Pero cambiaron y cuando leyeron la sentencia dijeron: ‘el pueblo de Guatemala los sentencia por desaparición forzada.’ Hay varias explicaciones, pero para mí una es que los derechos humanos estaban proscritos y aun hoy aún son sinónimo de algo malo, por todo el trabajo que hizo probablemente el ejército durante todos los años de guerra diciendo que los derechos humanos no servían para nada, y al pueblo le cuesta entender que la salud por ejemplo es el derecho humano.”)

¹⁴⁵ *Id.*

¹⁴⁶ Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 LAW SOC. REV. 533 (2017). *But see also*, Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 818 (2018). (arguing that further research is needed to account for the justice delay between the adoption of human rights treaties and the charging of international crimes experienced in many countries like Guatemala).

¹⁴⁷ Dancy and Michel, *supra* note 18.

¹⁴⁸ Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 750 (2018).

first was the Recovery of Historical Memory Project of the Catholic Church's Human Rights Office (REMHI), an effort begun by the Human Rights Office of the Guatemalan Archbishop (or ODHAG for its acronym in Spanish).¹⁴⁹ The second was the UN-backed Commission for the Historical Clarification (or CEH, for its Spanish acronym), which was established as part of a peace agreement between the Guatemalan military government and the guerilla in 1994.¹⁵⁰ Although these TRCs were once thought to be inadequate substitutes for justice and antithetical to criminal accountability, TRCs played a surprisingly important role in the aforementioned prosecutions.¹⁵¹ First, the reports of the TRCs provided prosecutors with a blueprint for their cases, often aiding them to identify both witnesses and perpetrators.¹⁵² Second, they were frequently the source of critical evidence at trial, in particular helping courts to understand command responsibility and contesting the official state-sanctioned version of events.¹⁵³ However, the report of the UN-backed TRC was viewed as more credible since it was officially established by the Guatemalan government.¹⁵⁴ Furthermore, the TRCs helped to diffuse international human rights norms at the local level, which shifted how

¹⁴⁹ RECUPERACIÓN DE LA MEMORIA HISTÓRICA, OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, GUATEMALA: NUNCA MÁS (1998).

¹⁵⁰ COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, GUATEMALA: MEMORIA DEL SILENCIO 98 (1999).

¹⁵¹ Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 750 (2018).

¹⁵² Interviews with attorneys from numerous human rights organizations, including GAM, ODHAG, CALDH, and MTM, as well as Guatemalan prosecutors Hilda Pineda and Orlando Lopez.

¹⁵³ See, e.g. Interview with Alejandro Rodríguez, a human rights attorney and researcher at Impunity Watch in Guatemala, who was the *quellrante adhesivo* (a private prosecutor who represented the victims) in the *Molina Theissen* case (“Nosotros usamos el informe de la CEH en el caso Molina Theissen de diferentes maneras. Primero a través de sus conclusiones para demostrar la política, los patrones sistemáticos del ejército, por ejemplo que había un circuito clandestino de atención, que metían a las personas en zonas militares, que mataban personas dentro de las bases militares. Todo ello es importante como contexto y no solo para demostrar que era un caso aislado sino que se trataba de una cadena de mando.”)

¹⁵⁴ Interview with Hilda Pineda, who was the head of the Special Prosecutor's Office on Human Rights in Guatemala at the time of the interview (“En cambio REMHI es un informe de la ODHAG, la oficina de Derechos Humanos del Arzobispado de Guatemala, y de alguna manera puede ser atacado y desestimado por la defensa. Sin embargo el informe de la Comisión de Esclarecimiento Histórico es el informe del propio Estado de Guatemala y “aceptado” (Por lo menos la intervención de las comisiones...)

prosecutors charged crimes associated with the 36-year armed conflict in Guatemala.¹⁵⁵

The International Commission against Impunity in Guatemala (CICIG), an UN-backed commission that for over a decade worked to dismantle corruption at the highest levels, also helped to catalyze the atrocity trials in Guatemala.¹⁵⁶ Established in 2007 via an agreement between the United Nations and the Guatemalan government, CICIG had the power to initiate investigations on its own, but could not prosecute any individuals or propose legislation without the approval of the Guatemalan Attorney General's office.¹⁵⁷

Although CICIG was expressly prohibited from working on cases related to the armed conflict, it supported numerous law reform efforts that bolstered judicial and prosecutorial independence, which in turn made prosecutions of war criminals feasible.¹⁵⁸ For example, working with the then-President of the Criminal Chamber of the Supreme Court of Justice, CICIG created a system of High-Risk Tribunals, which in addition to corruption and narco-trafficking cases had jurisdiction over all cases related to the armed conflict, including those of high level officials described in the last section.¹⁵⁹ These courts were equipped with the security and expertise necessary to adjudicate complex and politically sensitive cases like those involving grave crimes.¹⁶⁰ CICIG also supported the appointment of

¹⁵⁵ Interview with investigator for the Comisión para el Esclarecimiento Histórico (CEH); *See also* the chart of atrocity trails and court documents is also on file with authors (showing Guatemalan prosecutors began charging the crimes associated with the armed conflict as international crimes after the release of the CEH report)

¹⁵⁶ Jeff Abbott, *Guatemala's CICIG: UN-backed anti-corruption body shuts its doors*, AL JAZEERA, Sept. 3, 2019, <https://www.aljazeera.com/news/2019/09/guatemala-cicig-backed-anti-corruption-body-shuts-doors-190903132411201.html>.

¹⁵⁷ Mark L. Schneider, *Democracy in Peril: Facts on CICIG in Guatemala*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, April 11, 2019, <https://www.csis.org/analysis/democracy-peril-facts-cicig-guatemala>

¹⁵⁸ *Id.* (“These reform proposals include witness protection, wiretapping (only available to the Unit for Special Methods (wiretapping) within the Public Prosecutor’s office), confidential informants, and courts for high-risk crimes.”); OPEN SOCIETY JUSTICE INITIATIVE, *AGAINST ALL ODDS*, (2016), available at <https://www.justiceinitiative.org/publications/against-odds-cicig-guatemala>;

¹⁵⁹ *Id.* Interview with Carlos Castresana Fernández, the first head of CICIG.

¹⁶⁰ Interview with Guatemalan Judges Jazmin Barrios and Miguel Angel Galvez.

independent judges and reform-minded Attorney Generals who refused to yield to executive pressures to halt the human rights cases was also critical.¹⁶¹

Moreover, officials at CICIG said that even though they were prohibited from working on cases related to the armed conflict, many of the perpetrators of human rights violations then became the corrupt politicians of today, with former President Perez Molina being one notable example. Strikingly, Carlos Castresana Fernández, the first head of CICIG, estimated approximately 100 of the individuals, which CICIG investigated and Guatemalan courts found guilty of corruption-related crimes, were also involved in crimes during the armed conflict.¹⁶² According to Castresana, through CICIG's investigations and resulting convictions, some of the clandestine power structures that remained intact after the peace agreement were dismantled, creating space for democratic reform.¹⁶³

In addition to CICIG, a number of other international forces pushed toward criminal accountability in Guatemala. Guatemalan human prosecutors and judges interviewed by López explained how the judgments against Guatemala by the Inter-American Court of Human Rights, and to a lesser extent the genocide case brought in Spanish courts using the principle of universal jurisdiction, provided an impetus for Guatemalan prosecutors and courts to proceed with pending cases.¹⁶⁴ Those interviewed also identified

¹⁶¹ Interview with Carlos Castresana Fernández, the first head of CICIG. (explaining how he pressed for corrupt judges that were linked to organized crime to be replaced and for the appointment of Attorney General Claudia Paz y Paz.) *See also*, OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 2.

¹⁶² *Id.*

¹⁶³ *Id.* (explaining that nearly every unit of the Attorney General's office had someone who was put there to protect)

¹⁶⁴ Interview with Jazmin Barrios, the Guatemalan judge who proceeded over the Rios Montt case. ("Los casos que nosotros hemos juzgado son porque, en su momento histórico no se les dio atención dentro del territorio nacional y tuvieron que acudir a la Corte Interamericana de Derecho Humanos. La Corte Interamericana dicta resolución en la que obliga al Estado de Guatemala a investigar y juzgar los hechos. Eso produce que el Estado cumpla con su obligación de investigar y juzgar, y eso hace que el Ministerio público investigue y acuse, y luego los órganos jurisdiccionales lógicamente hacen lo correspondiente al impartir justicia.") Interview with Executive Director of GAM (noting that some government have been better than others in complying the judgement from the Inter-American system) Jo-Marie Burt and Paulo Estrada, *Esperanza en medio de la oscuridad: las víctimas continúan en su búsqueda de justicia por crímenes del conflicto armado interno de Guatemala*, WOLA, Jan. 21, 2022, <https://www.wola.org/es/analisis/justicia-conflicto-armado-interno-guatemala/> (last visited August 8, 2024) (stating that the Inter-American Court of Human Rights (IACHR) has issued 14 judgments against Guatemala for wartime human rights violations).

political and financial support from international organization as well as the U.S. government and other foreign governments as being essential. Numerous judges and prosecutors created the United States Embassy with helping to support their work when they faced political backlash that threatened to undermine the atrocity trials.¹⁶⁵ In addition, the United Nations Development Programme (UNDP) and a number of European countries funded the preservation of the national police archive, which has provided vital evidence in the many of the cases involving grave crimes.¹⁶⁶

C. The 2023 Presidential Election in Guatemala

Last year, the aspirations of the human rights advocates who pressed for criminal accountability hoping it would catalyze political change in Guatemala were sharply put to the question, when criminal trials for atrocities and corruption came to the fore in their last Presidential election. During the primary, the two frontrunners were Zury Ríos and former first lady Sandra Torres, both of whom were implicated in prosecutions for serious crimes, involving an abuse of office either by Torres herself, who was charged with corruption, and by Zury's father, whom she openly backed when he was on trial for genocide.¹⁶⁷ The election served in part as a referendum on the legacy of human rights violations and criminal accountability in the country.

i. Zury Ríos's Campaign

¹⁶⁵ Interview with Miguel Angel Galvez, a Guatemalan judge who has overseen many of the atrocity and corruption cases (Nov. 14, 2016)(explaining how the United States government would help to protect them when his work was threatened by corrupt forces within Guatemala as well as provided his chambers with the technical and financial resources needed to adjudicate his cases).

¹⁶⁶ SWISS PEACE, THE HISTORICAL ARCHIVE OF THE NATIONAL POLICE OF GUATEMALA 2005 – 2017 (2018), at https://www.swisspeace.ch/assets/publications/downloads/20211101_AHPN-Publication_English-Version_Doppelseiten.pdf. (last visited August 8, 2024).

¹⁶⁷ Maite Garmendia and Gema Palencia, *Mi papá quiere ser presidente: Hijos de pesidenciables hablan sobre candidatura de sus progenitores*, PRENSA LIBRE, Nov. 5 2003, archived version available at <https://web.archive.org/web/20070315211823/http://www.prensalibre.com/especial/ME/elecciones/tribuna/archivo/10/central.html>; Sofia Menchu and Diego Oré, *Meet Guatemala's leading presidential candidates*, REUTERS, June 25, 2023, available at <https://www.reuters.com/world/americas/meet-guatemalas-leading-presidential-candidates-2023-06-25/>; Leila Miller, *A dictator's daughter runs for president, unleashing memories of Guatemala's dark past*, L.A. TIMES <https://www.latimes.com/world-nation/story/2023-06-12/guatemala-civil-war-genocide-dictators-daughter>.

Zury Ríos was a staunch supporter of her father Ríos Montt, calling him her “inspiration,” taking every chance to defend his legacy, and attending nearly every day of his trial.¹⁶⁸ She denies that genocide occurred in Guatemala.¹⁶⁹ She also claims that the criminal prosecutions of her father were pushed by outside interests—a common refrain regarding all the atrocity trials—and that his trial was unfair.¹⁷⁰

When she elected to Congress in her late 20s and served four terms as part of FRG, the party founded by her father.¹⁷¹ In the last presidential election, she was barred from running, because the Guatemalan Constitution prohibits the children of people involved in a coup from assuming office.¹⁷² This time, however, the Guatemalan Constitutional Court, now mostly made up of her allies, including her former Vice Presidential running mate and her lawyer, permitted her candidacy.¹⁷³ However, instead of running under the banner of her father’s party, the FRG, she ran as part of a new coalition party formed between Valor, the party she founded in 2016, and Unionista, another conservative party, though still backed by military families who share her views about the Guatemalan armed conflict.¹⁷⁴ Her Vice President running mate, Héctor Cifuentes, was also under investigation for allegedly diverting public funds to finance political campaigns supported by Byron Lima Oliva, the man who killed Bishop Juan Gerardi.¹⁷⁵ Bishop Gerardi was responsible for REMHI, the truth commission that preceded the UN-backed truth

¹⁶⁸ *Id.*; Evelyn Boche Ventura & Lorena Arroyo, *Sandra Torres, Edmond Mulet y Zury Ríos: los candidatos favoritos que se disputan la presidencia de Guatemala*, EL PAÍS, June 25, 2023, available at <https://elpais.com/internacional/2023-06-25/sandra-torres-edmond-mulet-y-zury-rios-los-candidatos-que-se-disputan-la-presidencia-de-guatemala.html>;

¹⁶⁹ José Luis Sanz, *The Guatemalan army had every right to execute the necessary actions*, El Faro, April 23, 2013, available at <https://elfaro.net/en/202301/centroamerica/26671/%E2%80%9CThe-Guatemalan-army-had-every-right-to-execute-the-necessary-actions%E2%80%9D.htm/> (Quoting Zury Ríos as saying “One cannot deny that in war, there are excesses. There were excesses committed by the insurgency and on the side of the counterinsurgency. But the notion that this was a state policy is false. That this was a genocide is false.”)

¹⁷⁰ *Id.*; Miller, *supra* note 167.

¹⁷¹ Miller, *supra* note 167.

¹⁷² Boche Ventura & Arroyo, *supra* note 168.

¹⁷³ *Id.*

¹⁷⁴ *Id.*; Miller, *supra* note 167; Elsa Coronado, *Zury Ríos y el Espejismo del Triunfo Para la Derecha Conservadora*, PLAZA PÚBLICA, June 28, 2023, <https://www.plazapublica.com.gt/content/zury-rios-y-el-espejismo-del-triunfo-para-la-derecha-conservadora>.

¹⁷⁵ Boche Ventura & Arroyo, *supra* note 168.

commission and whose report was admitted as evidence in many of the atrocity trials in Guatemala.¹⁷⁶

Zury Ríos's messaging as a Presidential candidate resembled her father's, appealing to populist sentiments and often portraying herself as the law-and-order candidate.¹⁷⁷ She promised to replicate the anti-gang policies of the neighboring President of El Salvador, Nayib Bukele, often criticized by human rights groups for violating due process rights, engaging in pretextual and arbitrary detentions, and committing torture.¹⁷⁸

Despite being seen as one of the three main frontrunners, with one poll predicting that she would win the primary election, Ríos ended up only winning 6.56% of the votes and finishing sixth.¹⁷⁹ Was this case of criminal prosecutions succeeding in changing the political winds? In other words, had Guatemala successfully punished its way to democratic transition?

Although her opponents tried to discredit her by highlighting that she was the daughter of accused genocidaire Ríos Montt, it is unclear whether this strategy swayed the electorate against Zury.¹⁸⁰ According to voter analysis, her loss may have had more to do with past poor performance of her party in Congress and her alliance with Unionista, which saw diminished popularity at the polls.¹⁸¹ However, two pieces of additional evidence are also telling. First, in the week leading up to the primary election on June 25, 2023, Google searches in Guatemala for the term “genocidio” reached a peak for the year 2023. This provides some indication that the public saw the election as involving the question of genocide in Guatemala's recent history, perhaps because of the involvement of the Ríos Montt family. Second, the public also seemed concerned about Zury's association with the so-called “pacto de

¹⁷⁶ López *supra* note 151, at 776-77 & 793-94 (“In seven of the twenty-one cases that concluded after REMHI issued its report in 1998, the court admitted either the REMHI report itself or evidence that REMHI collected.”)

¹⁷⁷ Miller, *supra* note 167; Boche Ventura & Arroyo, *supra* note 168.

¹⁷⁸ *Id.* (“En la actual campaña, Ríos ofreció replicar las políticas antipandillas de Nayib Bukele y la ‘muerte civil’, es decir, la inhabilitación para ejercer cargos públicos, de las personas responsables por corrupción.”); See e.g., Amnesty International, *El Salvador: President Bukele engulfs the country in a human rights crisis after three years in government*, June 2, 2022, at <https://www.amnesty.org/en/latest/news/2022/06/el-salvador-president-bukele-human-rights-crisis/> (last visited April 30, 2024).

¹⁷⁹ Coronado, *supra* note 174; Menchu and Oré, *supra* note 167; Boche Ventura & Arroyo, *supra* note 168.

¹⁸⁰ Coronado, *supra* note 174.

¹⁸¹ *Id.*

corruptos,” a clandestine “network of corrupt political, economic, and military elites seeking to advance their own interests and to ensure that their acts of corruption and grave human rights violations from the armed conflict remain in impunity, as one of the factors contributing to her loss.”¹⁸² In particular, her association with politicians who sought to undermine the independence of judges and expel International Commission against Impunity in Guatemala (CICIG), the UN-backed commission that for over a decade worked to dismantle corruption at the highest levels, and enjoyed widespread support from the population, likely sunk her candidacy.¹⁸³

After losing the election, Zury thanked her opponents, but never admitted defeat.¹⁸⁴

ii. Sandra Torres’s Campaign

In the end, one of the candidates who ended up pulling ahead and clinching a position in the run-off election was former first lady Sandra Torres. Both Torres and her ex-husband, former President Álvaro Colom, had runs-in with the law prior to the election. In 2018, after years of investigations by CICIG, Colom was charged with fraud and money laundering for actions taken while he was President and still married to Torres.¹⁸⁵ Although some of

¹⁸² *Id.*; Daniella Burgi-Palomino, Lisa Haugaard, Ana María Méndez Dardón, Ursula Indacochea, Corie Welch, *When the Dominoes Fall: Co-optation of the Justice System in Guatemala*, LATIN AMERICA WORKING GROUP EDUCATION FUND; WASHINGTON OFFICE ON LATIN AMERICA; DUE PROCESS OF LAW FOUNDATION; AND GUATEMALA HUMAN RIGHTS COMMISSION/USA, October 2022, available at <https://www.wola.org/wp-content/uploads/2022/10/When-Dominoes-Fall-F.pdf>.

¹⁸³ Coronado, *supra* note 174; Sandra Cuffe, *Guatemala’s anti-corruption CICIG body to shut down: What to know*, AL JAZEERA, Sept. 9, 2019, available at <https://www.aljazeera.com/news/2019/9/1/guatemalas-anti-corruption-cicig-body-to-shut-down-what-to-know> (“Polls have consistently shown more than 70 percent of Guatemalans support CICIG.”)

¹⁸⁴ Coronado, *supra* note 174 (“El lunes emitió un escueto comunicado en el que agradeció el apoyo, pero no reconoció la derrota.”)

¹⁸⁵ Elizabeth Malkin, *Guatemala Arrests Ex-President and His Finance Minister in Corruption Case*, NY Times, Feb. 13, 2018, available at <https://www.nytimes.com/2018/02/13/world/americas/guatemala-corruption-colom-oxfam.html>. Torres and Colom divorced in part because of a law that prohibited family members of former Presidents from running for that same office. Although a court blocked Torres from running anyways, the couple never reconciled. Elizabeth Malkin, *Álvaro Colom, Guatemalan President Who Fought for the Indigenous, Dies at 71*, NY Times, Jan. 27, 2023, available at <https://www.nytimes.com/2023/01/27/world/americas/alvaro-colom-dead.html>.

the charges were dropped, he remained under house arrest in Guatemala City until his death on January 23, 2023.¹⁸⁶

Torres herself was charged and arrested for campaign fraud in 2019 after an investigation by CICIG revealed that she failed to report approximately \$3.6 million in campaign financing in 2015.¹⁸⁷ Although a damning recording of her surfaced which implicated her directly in fraud, after four months of detention, Torres was released under the new Attorney General, known for hindering anti-corruption cases.¹⁸⁸ Then, just weeks before campaigning for the last Presidential election was permitted to begin, the charges were officially dismissed, and Torres allowed to assume her place on the ballot.¹⁸⁹ Some commentators alleged that the dismissal was a result of corruption in the judiciary.¹⁹⁰

Despite initially being seen as the frontrunner, Torres lost in every department—Guatemala’s equivalent to states in the United States—except five—Alta Verapaz, Quiché, Izabal, Petén, and Zacapa—out of twenty-two total.¹⁹¹ This is quite notable because these departments are mostly poor and indigenous and where many atrocities occurred during the armed conflict.¹⁹²

¹⁸⁶ César Pérez Marroquín, *Fallece Álvaro Colom, expresidente de Guatemala, confirman fuentes allegadas a la familia*, PRENSA LIBRE, Jan. 23, 2023, available at <https://www.prensalibre.com/guatemala/politica/fallece-alvaro-colom-expresidente-de-guatemala-confirman-fuentes-allegadas-a-la-familia-breaking/>.

¹⁸⁷ Sandra Cuffe, *Guatemala arrests former presidential candidate Sandra Torres*, AL JAZEERA, Sept. 2, 2019, <https://www.aljazeera.com/news/2019/9/2/guatemala-arrests-former-presidential-candidate-sandra-torres>.

¹⁸⁸ Boche Ventura & Arroyo, *supra* note 168.

¹⁸⁹ Simon Romero, Natalie Kitroeff, and Jody García, *In this Election, Some Candidates Lost Before a Single Vote Was Cast*, NY TIMES, June 22, 2023, available at <https://www.nytimes.com/2023/06/22/us/guatemala-presidential-election.html>.

¹⁹⁰ Irma Alicia Velásquez Nimatuj, *Sandra Torres: Libre Gracias a la Impunidad*, NARRATIVA Y ENSAYO, <https://www.narrativayensayoguatemaltecos.com/sandra-torres-libre-gracias-a-la-impunidad/> (last visited Nov. 4, 2023).

¹⁹¹ To consult the 2023 Presidential election results in Guatemala, see Juan Manuel Vega, *Conteo de votos en vivo: Estos son los resultados electorales preliminares de la segunda vuelta en Guatemala*, PRENSA LIBRE, August 20, 2023, available at <https://www.prensalibre.com/guatemala/elecciones-generales-guatemala-2023/conteo-de-votos-segunda-vuelta-2023-guatemala/>. Sandra Torres also finished first in the primary. Redacción EFE, *Bernardo Arévalo, el académico que quiere emular la presidencia de su padre en Guatemala*, QUÉ PASA, August 17, 2024, available at <https://quepasamedia.com/author/efe/>.

¹⁹² Ferdy Montepeque, *El deterioro electoral de la Une confirma la última derrota de Sandra Torres*, PLAZA PÚBLICA, Sept. 18, 2023, available at

The polling results suggest that Torres' promise of social assistance programs like "Bolsa Solidaria," a program that Torres started as first lady and often evoked in speeches directed those these rural populations, helped her to win those departments.¹⁹³ Yet, the broader decline in support for Torres and her party across the country coincides with her indictment for campaign fraud in 2019.¹⁹⁴ For that reason, some attribute her loss to the charges filed against her, even though they were ultimately dismissed.¹⁹⁵ She has even be dubbed the "candidate who makes Presidents," because although she has consistent support from about 1.5 million Guatemalan voters, as demonstrated in the previous elections, she also consistently faces strong opposition (around 41.4%)—the highest among the presidential candidates—giving anyone who faces her an upper hand.¹⁹⁶ Arguably, this data lends credence to those who believe that criminal prosecutions increase polarization.

Just as with prior three Presidential elections in which she ran, Torres never admitted defeat.¹⁹⁷ However, in contrast to prior elections, this time, she attributed her loss to election fraud, despite the overwhelming evidence that no fraud occurred, and she filed a lawsuit seeking to prevent Bernardo Arévalo from ascending to office.¹⁹⁸

iii. Bernardo Arévalo

Much like Zury Ríos, Bernardo Arévalo frequently evoked the legacy of his father, characterizing his campaign as the rebirth of the democratic spring started by his father in 1944.¹⁹⁹ Indeed, he closed his campaign saying that even though he is not his father, he walks on the same path and shares the same dreams as his father and the other revolutionaries of 1944.²⁰⁰ To some

<https://www.plazapublica.com.gt/content/el-deterioro-electoral-de-la-une-confirmacion-ultima-derrota-de-sandra-torres>.

¹⁹³ *Id.*; Boche Ventura & Arroyo, *supra* note 168.

¹⁹⁴ Montepeque, *supra* note 192. ("Al observar los resultados de las primeras vueltas, este efecto se aprecia mejor: en 2015 ganó los comicios con el 18%, cuatro años más tarde subió a 22.2% y en 2023 cayó al 16% de votos emitidos, de acuerdo con los datos preliminares del Tribunal Supremo Electoral (TSE).")

¹⁹⁵ *Id.*

¹⁹⁶ Boche Ventura & Arroyo, *supra* note 168.

¹⁹⁷ Montepeque, *supra* note 192.

¹⁹⁸ *Id.*

¹⁹⁹ *Arévalo evoca a su padre y la "primavera" de 1944 al cerrar campaña en Guatemala*, FRANCE 24, August 8, 2023, available at <https://www.france24.com/es/minuto-a-minuto/20230817-ar%C3%A9valo-evoca-a-su-padre-y-la-primavera-de-1944-al-cerrar-campa%C3%B1a-en-guatemala>.

²⁰⁰ *Id.*

extent, this sentiment was reflected in his campaign promises as well. If elected, Arévalo promised to prioritize reducing poverty and improving the health and education of Guatemala's people.²⁰¹ As if history were repeating itself, Sandra Torres seized on his platform promises and the legacy of his father to label Arévalo a Communist.²⁰²

Torres also portrayed Arévalo as beholden to foreign interests, emphasizing that he grew up in Uruguay and claiming that he was the puppet of the former head of CICIG and former Attorney General Thelma Aldana, who pushed the atrocity and anti-corruption cases forward in Guatemala.²⁰³ Such accusations are not new; they have often been levied against those who support the atrocity trials in Guatemala as a method to discredit them.²⁰⁴ However, arguably, Arévalo's family history with the U.S. government made allegations that he was a plant of the U.S. harder to stick.

For his part, Arévalo used the criminal charges of corruption against Torres to his advantage, urging voters to go to the polls to ensure that the "corruptos" didn't take power and emphasizing that anti-corruption measures

²⁰¹ *Guatemala's elite may try to scupper the presidential election*, THE ECONOMIST, August 17, 2023, available at <https://www.economist.com/the-americas/2023/08/17/guatemalas-elite-may-try-to-scupper-the-presidential-election>

²⁰² Anaité Álvarez, *Rodeada de militantes, Torres se lanza contra Arévalo y Semilla*, LA HORA, June 27, 2023, available at https://lahora.gt/nacionales/anaita_alvarez/2023/06/27/rodeada-de-militantes-torres-se-lanza-contra-arevalo-y-semilla/.

²⁰³ *Id.*; See also Sonia Pérez D. and Christopher Sherman, *Bernardo Arévalo, Guatemala's electoral surprise, makes corruption fight top priority*, ASSOCIATED PRESS, June 27, 2023, available at <https://apnews.com/article/guatemala-election-bernardo-arevalo-sandra-torres-7712a36b6607c7ae46961818f2703c98> ("Arévalo is already seeing how the opposition will paint him: a communist, a foreigner – he was born in Uruguay but is Guatemalan.")

²⁰⁴ Ana Cristina Alvarado Valenzuela, *Análisis de los discursos negacionistas del genocidio en Guatemala*, REVISTA CONTENCIOSA 2 (2022), available at <http://portal.amelica.org/ameli/journal/607/6073558007/html/> (quoting LA FUNDACIÓN CONTRA EL TERRORISMO, *LA FARSA DEL GENOCIDIO* (2013)) ("Pocas veces en la Historia de la Humanidad, se ha orquestado con tanta envidia y bajeza, una campaña de desinformación y mentiras, que han sido repetidas con tanta frecuencia, y en forma sistemática, que ante la complacencia, confabulación, complicidad y financiamiento, de parte de países europeos y algunos sectores político-sociales estadounidenses..."); OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 11.

were a cornerstone of his campaign.²⁰⁵ His promises were more credible, because his party was also born out of the anti-corruption demonstrations in 2015 against former President Otto Perez Molina who was implicated in the atrocities of the 1980s during Montt trial and charged with corruption after an investigation by CICIG.²⁰⁶ In this sense, he was the embodiment of the hopes of the human rights defenders who pushed for criminal accountability to usher in political change and economic justice in Guatemala.

At the same time, the criminal apparatus of the state was also employed against Arévalo and his supporters. After Arévalo unexpectedly made it into the run-off, the head of the Office of the Special Prosecutor Against Impunity, Rafael Curruchiche, who had recently been named as a corrupt official by the U.S. government, suspended Arévalo's party, claiming that his party falsified some of the signatures needed to get Arévalo on the ballot.²⁰⁷ Shortly thereafter, Curruchiche announced plans to arrest members of Arévalo's party within a few weeks of the Presidential election.²⁰⁸ This tactic of using criminal prosecution to target human rights defenders and anti-

²⁰⁵ Pérez D. & Sherman, *supra* note 203. (At this last campaign speech, Arévalo exclaimed, “[p]orque votar es dejar claro que el que manda en este país es el pueblo de Guatemala y no los corruptos.”); FRANCE 24, *supra* note 199.

²⁰⁶ Jeff Abbott, ‘A new spring’: Guatemala’s Arevalo becomes president after Congress delays, AL JAZEERA, Jan. 15, 2024, <https://www.aljazeera.com/news/2024/1/15/guatemalas-arevalo-becomes-president-on-anticorruption-plank-amid-chaos>; OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 5.

²⁰⁷ Karla Arévalo, *Bernardo Arévalo alerta sobre posibles "arrestos masivos" de miembros del Movimiento Semilla*, VOZ DE AMERICA, July 26, 2023, available at <https://www.vozdeamerica.com/a/bernardo-arevalo-alerta-sobre-capturas-masivas-contra-miembros-de-su-partido-semilla/7199038.html>; Yeny Garcia, *¿Qué pasa en las elecciones de Guatemala y por qué el llamado urgente a proteger la democracia?*, VOZ DE AMERICA, July 14, 2023, available at <https://www.vozdeamerica.com/a/que-pasa-en-guatemala-por-que-necesario-protoger-democracia-segunda-vuelta-elecciones/7179620.html>; U.S. DEPARTMENT OF STATE’S REPORT TO CONGRESS ON FOREIGN PERSONS WHO HAVE KNOWINGLY ENGAGED IN ACTIONS THAT UNDERMINE DEMOCRATIC PROCESSES OR INSTITUTIONS, SIGNIFICANT CORRUPTION, OR OBSTRUCTION OF INVESTIGATIONS INTO SUCH ACTS OF CORRUPTION IN EL SALVADOR, GUATEMALA, HONDURAS, AND NICARAGUA, PURSUANT TO SECTION 353(B) OF THE DEPARTMENT OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS APPROPRIATIONS ACT 3 (2021), <https://www.state.gov/wp-content/uploads/2022/08/Tab-2-353-Names-June-2022-Report-Correction.pdf> (last visited May 8, 2024).

²⁰⁸ *Fiscal anuncia posibles arrestos en el partido de Arévalo en Guatemala*, BARRON’S, August 18, 2023, available at <https://www.barrons.com/video/fiscal-anuncia-posibles-arrestos-en-el-partido-de-arevalo-en-guatemala/4AC872DD-F626-4DB0-94B6-AD4508C0C505.html>

corruption advocates is a familiar one.²⁰⁹ In fact, Curruchiche arrived on the U.S. State Department's list for "raising apparently spurious claims against FECI prosecutors, private attorneys, and former International Commission Against Impunity in Guatemala (CICIG) prosecutors."²¹⁰ Thus, while resort to criminal accountability in Guatemala proved a successful strategy in Arévalo's case, an uncomfortable reality is that it can be employed in both directions, even criminalizing those who promote human rights, democracy, and the rule of law.

III. Developing A Theory of Trials and Democratic Behavior

Grounded in the Guatemalan case, we can revisit the structural and political critiques outlined in Part I, identifying where these critiques converged and diverged with the transitional justice experience in this context. Then, drawing from this analysis, we identify a set of testable hypotheses to determine whether the lessons gleaned from the Guatemala case study are generalizable to other contexts.

A. Revisiting the Structural and Political Critiques

First and foremost, the Guatemalan transitional experience tells a much different story than the structural critiques of criminal punishment in times of transition depict.²¹¹ Scholars who offer structural critiques often fear that the individualized nature of criminal prosecutions fails to address the root causes of atrocities and are unlikely to yield the deeper transformation needed to ensure their non-repetition.²¹² Some further contend that when human rights advocates put all their eggs in the criminal punishment basket, they are unable to pursue larger structural reforms, like redistribution of resources, needed to facilitate an enduring democratic and just society.²¹³ And some

²⁰⁹ Adeline Neau and Josefina Salomon, *It's hunting season against justice officials in Guatemala*, AMNESTY INTERNATIONAL, Nov. 22, 2023, available at <https://www.amnesty.org/en/latest/news/2023/11/hunting-season-against-justice-officials-guatemala/>; HUMAN RIGHTS WATCH, HUMAN RIGHTS PROTECTIONS IN GUATEMALA: EVALUATING STATE CAPACITY TO PROTECT AND PROMOTE HUMAN RIGHTS 11-13 (2019), <https://www.wola.org/wp-content/uploads/2020/08/Derechos-Humanos-GT-ENG-4.9.pdf>. (last visited on May 8, 2023).

²¹⁰ U.S. DEPARTMENT OF STATE'S REPORT TO CONGRESS ON FOREIGN PERSONS WHO HAVE KNOWINGLY ENGAGED IN ACTIONS THAT UNDERMINE DEMOCRATIC PROCESSES OR INSTITUTIONS, *supra* note 210 at 3.

²¹¹ Karen Engle, *A Genealogy of the Criminal Turn in Human Rights*, in *Anti-Impunity and the Human Rights Agenda* 16 (2016).

²¹² See *supra* Part I.

²¹³ *Id.*

claim that the decision to turn to criminal punishment is often made unreflectively, without weighing the full effects of such a decision, or in response to international pressures, mostly from the West.²¹⁴

What is compelling about the Guatemala case is that human rights defenders and indigenous groups pursued criminal accountability as part of a broader political strategy aimed at clearing a path for the structural reforms they also desired. Echoing Jamie Rowen's conception of transitional justice as a movement,²¹⁵ the pursuit of criminal punishment figured into the broader strategy and goals of the movement for racial and social justice in Guatemala. Some human rights advocates put energy into criminal prosecution, believing that the public nature of criminal trials would discredit the so-called "pacto de corruptos," who sought to quash reforms aimed at greater economic and social equity, dating as far back as Juan José Arévalo's presidency in the mid-to late 1940s. Activists hoped that the evidence that would be divulged in the criminal trials would debunk the official state narrative that the armed conflict was necessary to save the country from communism, a narrative often used to delegitimize the redistributive demands of indigenous Mayans.²¹⁶ Moreover, they wagered that the trials would help draw links between the war criminals of the past and the kleptocrats of today. In short, human rights advocates strategically embraced criminal accountability to generate political will for more ambitious structural reforms and produce enduring democratic outcomes in the country. By contextualizing these prosecutions within this broader movement, a much richer understanding of the possibilities and limitations of criminal accountability emerge. In particular, the Guatemalan case study exposes the conceivable interplay between the pursuit of criminal punishment and other justice demands, like racial and distributive justice, in post-conflict settings.

Relatedly, at least in Guatemala, it cannot be said that the human rights movement uncritically adopted the anti-impunity agenda, as alleged by those embracing the structural critiques. As documented in Part II, the human rights advocates there had a sophisticated theory of change that extended well beyond individual convictions. At the same time, there is a question over whether they would have pursued the same strategy without the international support they received both in terms of material resources and political

²¹⁴ *Id.*

²¹⁵ JAMIE ROWEN, *SEARCHING FOR TRUTH IN THE TRANSITIONAL JUSTICE MOVEMENT* (2017).

²¹⁶ López *supra* note 151, at 819. Interview with GAM Director ("aun hoy aún son sinónimo de algo malo, por todo el trabajo que hizo probablemente el ejército durante todos los años de guerra diciendo que los derechos humanos no servían para nada, y al pueblo le cuesta entender que la salud por ejemplo es el derecho humano.")

cover.²¹⁷ Indeed, when interviewed in 2016, numerous judges and human rights lawyers commented that they would not be able to carry out their work without the backing of the U.S. government and other foreign and international actors. Still, while the anti-impunity agenda was advanced by international forces, it was certainly not set by them. Instead of being co-opted by Western powers, the human rights movement capitalized on the convergence of interests with international actors as a vehicle to advance their broader agenda, which extended far beyond criminal punishment.²¹⁸ Rather than the docile recipients of Western conceptions and modalities of justice, this case study underscores the agency of indigenous and human rights groups in strategically pushing for criminal accountability to achieve their own domestic goals when their national government was unresponsive to their broader justice demands.

Now, in the wake of their successful pursuit of prosecutions for atrocities committed during the internal armed conflict in Guatemala, a central question is whether the prosecute-to-reform strategy was successful. As a starting point, it seems criminal accountability can accomplish more than structure-oriented critics imagine. Crucially, the criminal cases involving international grave crimes in Guatemala did much more than individualize the crimes. As outlined in past work by López, the lengthy judgments by Guatemalan courts often scrutinized the historical context and exposed the structural and racialized nature of the violence.²¹⁹ In addition, the atrocity

²¹⁷ The United States government funds 40% of CICIG's budget. René Uruña, *Transplant Pains: What's at Stake in Guatemala's Constitutional Showdown?*, VERFBLOG, Sept. 27, 2018, available at <https://verfassungsblog.de/transplant-pains-whats-at-stake-in-guatemalas-constitutional-showdown/>.

²¹⁸ See, e.g., Jesse Franzblau, *The Rise and Fall of Guatemala's Most Feared General*, THE NATION, Sept. 24, 2015, available at <https://www.thenation.com/article/archive/the-rise-and-fall-of-guatemalas-most-feared-general/> (“Civil society organizations warn that the initiative will boost foreign-investor-led “development” policies synonymous with dispossession and forced displacement, further militarize security policies, and exacerbate conditions of poverty and violence in the region. But for Washington, supporting CICIG and high-profile anti-corruption cases falls into a broader policy objective to secure domestic and international buy-in for the plan.”) See also Jeff Abbott & Kate Linthicum, *He's one of Guatemala's last independent judges. Will he be forced to flee too?*, L.A. TIMES, June 17, 2022, available at <https://www.latimes.com/world-nation/story/2022-06-17/after-sending-soldiers-to-trial-for-civil-war-atrocities-a-guatemalan-judge-faces-threats> (“Even as he faced criticism and occasional threats at home, Gálvez's reputation for independence drew praise from the United States, which sees anticorruption efforts in Central America as crucial to reducing migration.”)

²¹⁹ Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 795-806 (2018).

trials in Guatemala identified those responsible at the structural or systemic level, analyzed the causes and consequences of the armed conflict, and provided the social and historical context in which the grave crimes occurred.²²⁰ In fact, at the Rios Montt trial, Montt's co-defendant unsuccessfully tried to urge the court to reject the theory of command responsibility, arguing that "criminal responsibility is personal and individual—each person must answer for that which they have done themselves."²²¹ Relatedly, as part of the effort to prove command responsibility, the trials also exposed the *modus operandi* employed by the military and police during the armed conflict.²²²

At the same time, while the court records laid bare the root causes of the violence, such as poverty and racism, criminal punishment alone did not remedy them. At best, criminal punishment acted as lustration, purging perpetrators of crimes committed under the earlier regime from political power. In this sense, the strategy was remarkably successful. For instance, former Guatemala President Otto Pérez Molina was implicated both in the genocide trial of General Rios Montt and then in a mass corruption scheme through which he received millions of dollars in bribes, which was investigated by CICIG and then prosecuted by Guatemalan authorities.²²³ These revelations resulted in unprecedented mass protests for weeks, which eventually forced Pérez Molina to resign in 2015.²²⁴ Although Pérez Molina's involvement in the genocide was well known even before he was elected to the presidency, these criminal proceedings galvanized a coalition made up of indigenous groups and the Guatemalan middle class—essentially a merger of the human rights and anti-corruption campaigns in Guatemala—to oust him.²²⁵ Part of what made this movement possible was that the corruption charges exposed his connections to the clandestine criminal network, made

²²⁰ *Id.*

²²¹ OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 11.

²²² Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 795-806 (2018).

²²³ *Guatemalan president accused of involvement in civil war atrocities*, THE GUARDIAN, April 5, 2013, <https://www.theguardian.com/world/2013/apr/05/guatemalan-president-accused-civil-war>; *Former Guatemala leader Otto Pérez Molina to face trial*, BBC, Oct. 28, 2017, <https://www.bbc.co.uk/news/world-latin-america-41786239>.

²²⁴ *Guatemala's President Otto Perez Molina resigns*, BBC, Sept. 3, 2015, available at <https://www.bbc.com/news/world-latin-america-34137225>. Azam Ahmed and Elisabeth Malkin, *Otto Pérez Molina of Guatemala Is Jailed Hours After Resigning Presidency*, NY TIMES, Sept. 3, 2015, available at <https://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html>;

²²⁵ Jesse Franzblau, *supra* note 218.

up of former military leaders and narcotraffickers who often are described as running the country from behind the scenes, placing them in plain sight.²²⁶

Moreover, Bernardo Arévalo seems to be the embodiment of the strategy pursued by human rights defenders in Guatemala. Pushing a redistributive platform that prioritized healthcare and education as well as poverty alleviation, he was able to ascend to office in part because of his primary opponents' association with criminality.²²⁷ In the case of Zury Ríos, although her support for her father during his genocide trial and her denial that genocide occurred in Guatemala was not dispositive in the election, initial data suggests that her own association with officials considered by the public to be members of the “pacto of corruptos” contributed to her loss in the primary.²²⁸ Likewise, in the case of Sandra Torres, Arévalo was able to seize on the allegations of corruption against her to paint her as part of the corrupt political class.²²⁹ This strategy was likely effective, because it dovetailed with a broader decline in her popular support since an indictment against her was filed in 2015.²³⁰ Moreover, Torres' effort to paint Arévalo as a puppet of the U.S. government, a refrain frequently employed to discredit those who pushed for the atrocity and corruption prosecutions in Guatemala, was less effective given that he was the son of a President who the U.S. government vehemently opposed.²³¹ While it is too early to tell if Arévalo will be able to enact the redistributive reforms that he promised on the campaign trail, his election provides some credence to the human rights movement's belief that criminal prosecutions could clear a path for political candidates who supported more socially and economically progressive policies. As of now, however, criminal prosecutions alone have not been enough to produce much needed redistributive reforms in a country where economic inequality is deeply entrenched along racial lines.

Second, political critiques also deserve greater scrutiny in light of the Guatemalan experience. Those evoking political critiques are wary of employing criminal punishment, especially during the unsteady times of transition, because they worry that such tools might backfire and lead to negative consequences.²³² Some fear that corrupt political actors will use criminal punishment as a way to consolidate power, by weaponizing victims'

²²⁶ *Id.*

²²⁷ See *supra* Part II.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See *supra* Part I.

rhetoric to amass control and punish political opponents.²³³ Others argue that punishing past political leaders might stoke resentment among their supporters, increasing polarization and diminishing the likelihood of reconciliation.²³⁴ In extreme cases, the threat of criminal punishment might result in politicians who are implicated in human rights abuses or corruption refusing to relinquish their political posts or even to resume the conflict as a means to avoid prosecutions.²³⁵

While the available remedy of criminal accountability, namely incarceration, is narrow and alone will not achieve the broad-based transformation needed after mass atrocity, Guatemala provides some evidence that the political and expressive potential of condemning prior bad acts can shift power dynamics, creating space for the broader mobilization of civil society and social change. Paradoxically, instead of preserving the power of political and economic elites, as some proponents of the political critiques might predict, the trials helped buttress indigenous resistance to the corrupt powers that govern Guatemala, often behind the scenes.²³⁶

Still, the context of Guatemala also reveals how criminal punishment can be a double-edged sword. The atrocity and corruption trials in Guatemala cannot be fully understood in a vacuum. They are a part of an ongoing battle over rights to the history of Guatemala as well as political control of the country.²³⁷ While criminal prosecutions are a tool that at times empowered the most marginalized in Guatemalan society, they can also be used to repress the disempowered. Indeed, as the example of Guatemalan transitional justice puts in full display, criminal punishment is not unidirectional; it can be used to advance pro-democratic ends, but it can also be used to persecute pro-democratic actors. Just as human rights movements have employed criminal prosecutions as a tool to push for a more democratic future, the anti-democratic opposition have likewise used it at times as a tool to undermine democracy and the rule of law in Guatemala.²³⁸ Accordingly, in Guatemala, corrupt officials and human rights abusers have been criminally prosecuted,

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Kajkoj Máximo Ba Tiul, *100 Days of Indigenous Mobilization in Guatemala Demonstrate Half a Century of Indigenous Resistance*, CULTURAL SURVIVAL, Jan. 9, 2024, available at <https://www.culturalsurvival.org/news/100-days-indigenous-mobilization-guatemala-demonstrate-half-century-indigenous-resistance> (describing the mobilizations of indigenous communities in support of the atrocity and corruption trials and against the anti-democratic forces in Guatemala).

²³⁷ *Id.*

²³⁸ *Id.*

but so have dozens of judges and lawyers in an effort by pro-military forces to paralyze the judiciary.²³⁹

Leading the charge for the anti-democratic movement in Guatemala is an organization called *la Fundación Contra el Terrorismo* (FCT) that was founded by the son of a former military official who supported Zury Ríos in the last Presidential election.²⁴⁰ Since 2012, FCT has used a rule that allows non-governmental organizations to file criminal complaints and if accepted, to become a party to criminal proceedings, to target those prosecuting and presiding over the atrocity trials.²⁴¹ At first, nearly all of the FCT complaints were dismissed.²⁴² Yet, with the ousting of CICIG by President Jimmy Morales in 2019 and Morales' installment of prosecutors with allegiances to the "pacto de corruptos," FCT's strategy began to pay off, now with the expanded goal of targeting those formerly at the helm of anti-corruption prosecutions.²⁴³ The FCT has now successfully weaponized the criminal apparatus against dozens of pro-democratic officials, either forcing them into exile or jailing them.²⁴⁴

Now the FCT has set its sights on Arévalo, with Guatemala's democratic future teetering in the balance.²⁴⁵ Shortly after Arévalo was declared one of the winners of the primary election, FCT sprang into action. This time, the FCT took to social media to declare the election fraudulent, and instead of filing its own criminal complaints, relied on its allies in the Public Prosecutor's Office working in concert with other political actors to challenge his ascension to office, but using the FCT playbook.²⁴⁶ Immediately after the primary election results were made public, nine political parties in Guatemala, including the parties of Zury Ríos and Sandra Torres, challenged the results, claiming that they were fraudulent.²⁴⁷ Subsequently, the Guatemalan

²³⁹ Steven Dudley, Alex Papadovassilakis, & Jody García, *Ricardo Méndez Ruiz y el arte del terror judicial en Guatemala*, INSIGHT CRIME (Feb. 7, 2024), <https://insightcrime.org/es/investigaciones/ricardo-mendez-ruiz-arte-terror-judicial-guatemala/> (last visited May 15, 2024).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Peter Appleby, *Élites de Guatemala interfieren de nuevo en elecciones presidenciales y suspenden resultados*, INSIGHT CRIME, July 4, 2023, available at <https://insightcrime.org/es/noticias/elites-guatemala-interfieren-elecciones-presidenciales-suspenden-resultados/>.

Constitutional Court stalled the confirmation of the election results, ordering a recount of the vote by the Supreme Electoral Tribunal (TSE).²⁴⁸ Though the TSE ratified the results, the Public Prosecutor's Office brought new charges, alleging that some of the signatures required to establish Arévalo's party, Semilla, had been forged, and raided the party's and TSE offices.²⁴⁹ In response, thousands of protesters took to the streets in opposition to what they saw as election meddling, and in a surprising ruling, the Guatemalan Constitutional Court shielded Semilla from further investigations until after the run-off election.²⁵⁰

The Public Prosecutor's office abided by the ruling, but after Arévalo's win at the ballot box in August, redoubled its efforts, trying to strip immunity from Arévalo and other members of his political party in an effort to prevent him from taking office.²⁵¹ In December, the office announced that it would seek the annulment of the election results, despite not having the authority to do so.²⁵² The Organization of American States characterized this as an "attempted coup," and the United States as well as the Europe Union condemned these actions as undemocratic.²⁵³ Ultimately, the Constitutional Court ruled that all elected officials, including Arévalo should be able to assume their offices.²⁵⁴ Thus, on January 14, 2024, with thousands of people gathered in the capital to celebrate, Arévalo was sworn in as the new President of Guatemala, but only after a ten-hour delay by conservative lawmakers.²⁵⁵ These efforts have not waned now that Arévalo has been sworn in, with the FCT again ramping up its familiar strategy of filing complaints against Arévalo and other members of his party.²⁵⁶

²⁴⁸ *Id.*

²⁴⁹ Peter Appleby, *Confusión en elecciones de Guatemala: las élites corruptas se aferran al poder*, INSIGHT CRIME, July 14, 2023, available at <https://insightcrime.org/es/noticias/confusion-elecciones-guatemala-elites-aferran-poder/>.

²⁵⁰ Dudley, Papadovassilakis, & García, *supra* note 239; Alex Papadovassilakis & Gavin Voss, *GameChangers 2023: Revés en elecciones descalabra establecimiento corrupto en Guatemala*, INSIGHT CRIME, Dec. 27, 2023, available at <https://insightcrime.org/es/noticias/gamechangers-2023-reves-electoral-guatemala-furia-establecimiento/>

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Dudley, Papadovassilakis, & García, *supra* note 239;.

²⁵⁶ *Id.*

To some extent, the events in Guatemala legitimize the fears of those who levy political critiques that criminal prosecutions can be used to punish political opponents and encourage political spoilers to try to retain office, thereby undermining democracy.²⁵⁷ The Guatemala case study also provides some evidence for the claim that criminal prosecutions can stoke division and exacerbate polarization.²⁵⁸ At the same time, the trials were effective in activating political engagement, both in the form of protest and civil society activism, as evinced by the formation of Semilla, which was established in the wake of the corruption charges against Perez Molina.

B. Case Driven Hypotheses

The purpose of this crucial case study is not only to examine the relationship between trials and democracy in a country that has extensive experience prosecuting state agents—but also to draw inferences that might be applied in other circumstances. What lesson can countries struggling with their own dilemmas about whether to pursue criminal accountability for the abuses of their former heads of state take from the Guatemalan experience? And relatedly, how generalizable is the Guatemalan experience to other contexts? Drawing on our case research, as well as key debates in the field, we develop four main hypotheses.

The first hypothesis is that human rights trials strengthen rather than endanger democratic institutions. While those who advance structural critiques argue that criminal prosecutions cannot achieve the broader structural changes needed for a country to maintain an enduring democracy, the Guatemalan transitional justice experience illustrates how they can be effective in clearing a political path for progressive leaders with more transformative agendas that involve creating more robust democratic institutions. In Guatemala, it is also true that support for criminal prosecutions helped to facilitate some pro-democratic institutional changes, such as the creation of the High Risk Tribunals, needed to adjudicate the most politically sensitive cases, as well as anti-corruption investigative units supported by CIGIG.²⁵⁹ While some of the judiciary has been captured by anti-accountability elites and used at times to target human rights advocates and Arévalo, the rightful president-elect, other democratic institutions remain intact. For example, the adjudication of human rights cases in the High Risk Tribunals have continued despite the backlash, and Guatemala continues to

²⁵⁷ See *supra* Part I.

²⁵⁸ *Id.*

²⁵⁹ OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 99, at 2.

have free and fair elections despite efforts to disrupt them.²⁶⁰ Thus, the question arises whether criminal prosecutions in fact undermine or destabilize institutions required to ensure that democracy endures.

A second hypothesis is that human rights prosecutions empower pro-democratic engagement and mobilization. In Guatemala, that was certainly the case. As described above, the criminal prosecutions for corruption helped mobilize coalitions and ignite mass protests, which ultimately supported more democratic outcomes in that country. Pro-democratic demonstrations also made a difference at the polls, bolstering the electoral possibilities for anti-corruption candidates and delegitimizing anti-democracy spoilers.

A third hypothesis is that criminal prosecutions lead to greater political polarization and anti-system backlash. While trials seem to catalyze pro-democratic action in Guatemala, they also provoked resistance from elites and their allies who feared that the “the democratic spring” in Guatemala would undermine their economic interests. Moreover, the successful employment of criminal prosecutions against those engaged in corruption and human rights abuses also galvanized an anti-democratic movement that used the criminal apparatus to undermine these efforts. For example, the verdict against Ríos Montt spurred a well-funded genocide denial campaign in Guatemala. Likewise, pockets of strong supporters and equally strong opponents to Sandra Torres in the wake of the corruption charges against her lend credence to the idea that criminal prosecution can lead to increased polarization. Likewise, the efforts by the “pacto de corruptos” to derail Arevalo’s election and his ability to take office suggest that some groups will dig in their heels when they are targeted for accountability.

A fourth and final hypothesis is that human rights trials will be associated with greater reluctance to accept election outcomes. The unwillingness of both Sandra Torres and Zury Ríos to admit defeat, coupled with the forceful efforts to prevent Arévalo from taking office, raises the question of whether prosecutions are associated with eroding norms of

²⁶⁰ Sandra Cuffe, *Indigenous survivors pursue justice at genocide trial in Guatemala*, AL JAZEERA, April 5, 2024, available at <https://www.aljazeera.com/news/2024/4/5/indigenous-survivors-pursue-justice-at-genocide-trial-in-guatemala> (describing how Manuel Benedicto Lucas Garcia, the former head of Guatemala’s army, stood [trial for genocide](#) in April of 2024); WOLA, Guatemala: Respect Election Results, July 7, 2023, <https://www.wola.org/2023/07/guatemala-respect-election-results/> (stating that the electoral missions of the Organization of American States and the European Union, which observed the last Presidential elections “found no evidence of fraud or major irregularities that would call the results into question”)

democratic forbearance. It is possible that corruption and human rights trials in Guatemala raised the stakes for defeated opposition because they could only ensure they are protected from prosecution if they are in power.

IV. Testing Hypotheses Using Global Data

Does the movement for criminal accountability in transition set democracy back, or does it advance democratic governance? On one hand, skeptics may look at the Guatemalan case and point to some real concerns. Prosecutions took years to develop, and even today, they face stiff resistance from right-wing holdover elements. Moreover, they have at times taxed an institutionally weak judiciary, and have done little to curb corruption. Judges received death threats, and some had to move out of the country. On the other hand, supporters might point to prosecutions as the offshoot of a lively pro-accountability movement that refuses to be stifled. It could be that the activism surrounding the prosecutions is overall positive for Guatemalan democracy because it serves as a check on rapacious leaders seeking to hijack the system for their own benefit. And keeping anti-impunity and anti-corruption on the agenda helped to boost the chances for a reformer to win an unlikely victory in 2023 presidential elections.

The issue is that neither of these readings of events can handle the counterfactual problem. It is simply impossible to know what Guatemala would have looked like without the prosecution of Efraín Ríos Montt, or without the anti-impunity movement that supported that trial and others. Would a Guatemala without prosecutions been more democratic, or would it have been less democratic? One can only guess. However, using global data from all other transitional democracies, one can study the general relationship between human rights trials and democratic outcomes.

In this section, we use the most complete global database on human rights prosecutions, from Transitional Justice Evaluation Tools (TJET), to test four different hypotheses derived from our case study. The first hypothesis is that human rights trials endanger democratic institutions. If this were the case, one might expect to observe a relationship between criminal prosecutions and declining values on measures that capture critical facets of democratic governance.

The other three expectations have to do with democratic behaviors, not institutions. The second hypothesis is that human rights prosecutions empowers pro-democratic mobilization. If this is accurate, it would mean that

trials are accompanied by upticks in measures of the robustness of civil society activism and political engagement. A third hypothesis is that trials are associated with greater political polarization and backlash, which may include the rise of movements that are opposed to the democratic regime itself. A fourth and final hypothesis is that prosecutions are associated with a decreased willingness to accept democratic outcomes on the part of election losers.

A. Case Selection and Data

The study is not concerned with all countries, and it is not concerned with all types of criminal prosecutions. The analysis is oriented around cases that are comparable to Guatemala in that they have experienced regime transition, and might have held members of the former regime accountable for human rights violations. The sample used for the empirical analyses in this section includes all states that started a democratic transition between 1970 and 2020. If a state undergoes such a transition, or if it enters the international system as a democracy (Czech Republic), it is included in our dataset. To determine transitions, we use a combination of three prominent scholarly democracy datasets: Polity5, the Boix, Miller and Rosato dataset (BMR), and Varieties of Democracy's Episodes of Regime Transformation (VDem-ERT).²⁶¹ A transition begins when at least two out of the three democracy datasets indicate a significant change from autocracy to democracy. We register transition start years and consider transitions to be open-ended until a new democratic transition begins.

Data on human rights prosecutions come from Transitional Justice Evaluation Tools (TJET).²⁶² Among other things, this database keeps records on all transitional trials, which are prosecutions of states agents for human rights violations or intrastate conflict-related crimes, particularly those that occur after democratic transition for acts committed prior to the transition. This set of trials closely resembles the Rios Montt prosecution, as well as other notable examples like Argentina's 1985 Trial of the Juntas and Guinea's

²⁶¹ POLITY PROJECT, *Polity 5: Political Regime Characteristics and Transitions, 1800-2018*, (2020), www.systemicpeace.org; Carles Boix, Miller, Michael & Sebastian Rosato, *A Complete Data Set of Political Regimes, 1800–2007*, 46 COMP. POLIT. STUD. 1523 (2013); AMANDA B. EDGELL ET AL., *Episodes of Regime Transformation Dataset (V2.0) Codebook*, (2020), <http://www.v-dem.net/>.

²⁶² Geoff Dancy et al., *TJET Database of Transitional Justice Mechanisms, 1970-2020*, (2024), <https://transitionaljusticedata.org>.

ongoing trial for the Bloody Monday Massacre of September 28, 2009.²⁶³ Drawing on these data, we model the impact of three different variables: the number of transitional trials that start in any year (TRIALS), the number of transitional trials of high-ranking officials that start in any year (HI-RANKING TRIALS),²⁶⁴ and the number of convictions that are produced in these trials in any given year (CONVICTIONS). Crucially, convictions are counted in whichever year they occur.

To test the four hypotheses, we analyze the effects of prosecution counts on eight different democratic outcomes, all of which are drawn from the Varieties of Democracy (V-DEM) database.²⁶⁵ The first two outcomes are JUDICIAL INDEPENDENCE and FREE AND FAIR ELECTIONS. If it is the case that prosecutions are destabilizing -- either because they invite attacks from entrenched interests, or because they encourage incumbents to hold onto power at all costs -- then these critical institutional features of the democratic polity will suffer following the conduct of trials. The Judicial Independence measure comes from V-Dem's indicator of high court independence, which is rooted around the following question: "when the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its sincere view of the legal record?"²⁶⁶ Higher scores reflect judiciaries that are more willing to challenge the executive. The Free and Fair elections measure is based around the question: "Taking all aspects of the pre-election period, election day, and the post-election process into account, would you consider this national election to be free and fair?"²⁶⁷

The second set of outcomes is meant to test Hypothesis 2, that prosecutions are associated with pro-democratic mobilization. The first is POLITICAL ENGAGEMENT, which is based on the following question measured by V-DEM: "What share of the population is regularly active in independent political interest associations?"²⁶⁸ The second is DEMOCRATIC MOBILIZATION, which is centered on the question: "In this year, how frequent

²⁶³ Tamara Aburamadan, *Guinea Massacre Trial Enters Final Stage*, (Apr. 26, 2024), <https://www.hrw.org/news/2024/04/26/guinea-massacre-trial-enters-final-stage> (last visited Apr 29, 2024).

²⁶⁴ High-ranking officials includes current or former heads of state; cabinet ministers, senators and parliamentarians; military generals and admirals; and commanders of security forces.

²⁶⁵ Michael Coppedge et al., *V-Dem: A New Way to Measure Democracy*, 25 J. DEMOCR. 159 (2014).

²⁶⁶ V-DEM VARIETIES OF DEMOCRACY CODEBOOK, v.14, 176 (2024).

²⁶⁷ *Id.* at 73.

²⁶⁸ *Id.* at 237.

and large have events of mass mobilization for pro-democratic aims been?”²⁶⁹ These indicators reflect two different facets of democratic participation, the first through voluntary political associations, and the other through protests and demonstrations. If human rights prosecutions catalyze democratic behavior on the part of the citizens, then one should expect a positive relationship between trials and these dependent variables.

The third set of variables are used to test Hypothesis 3, that criminal accountability for human rights violations divides political society. The models employ two measures to examine this possibility. The first, POLITICAL POLARIZATION is based on the V-Dem question “Is society polarized into antagonistic, political camps?”²⁷⁰ Higher scores on the Political Polarization variable indicate greater disunion in the polity. The second dependent variable in this set, ANTI-SYSTEM MOVEMENTS, is a measure built on the following question: “Among civil society organizations, are there anti-system opposition movements?”²⁷¹ Anti-system movements as those “organized in opposition to the current political system,” or which aim to “change the polity in fundamental ways.” Both of these outcomes reflect behavioral elements of democratic society that may indicate growing dysfunction. Higher scores on these measures indicate that there is greater polarization and anti-system activity.

The fourth and final set of variables are used to test Hypothesis 4, that human rights prosecutions affect the willingness of opponents to abide by democratic norms. The first, OPPOSITION LOYALTY, measures answers to the question, “To what extent do the parties in the opposition show commitment to democratic norms prior to elections?”²⁷² The second, ACCEPTANCE OF ELECTIONS, concerns the readiness of opposition groups to admit defeat after an electoral loss. This measure is based on the question, “Did losing parties and candidates accept the result of this national election within three months?”²⁷³ Higher values on these measures indicate greater acceptance of elections.

We employ a total of 24 models to test the effects of each prosecutions measure – trials, hi-ranking trials, and convictions -- on each of the eight outcomes of interest. Each model is a fixed-effects OLS regression, which controls for variation within countries as well as between countries. For each model, we include a unique control variable that identifies the

²⁶⁹ *Id.* at 235.

²⁷⁰ *Id.* at 232.

²⁷¹ *Id.* at 204.

²⁷² *Id.* at 234.

²⁷³ *Id.* at 75.

country, creating a unique y-intercept for each panel. Fixed effects thus account for the fact that all countries start their transitional justice campaigns in a different context, and that they contain “unobserved heterogeneity,” or differences that we cannot necessarily measure. This kind of model allows the analyst to determine not only whether correlations hold across cases, but also whether changes to independent variables covary with values on a dependent variable in each case.

All of the models include the same controls. The first is LEGACY OF VIOLENCE. This measure, devised by TJET, captures how widespread human rights violations have been in a given country since 1949, compared to the level of human rights violations of all other countries since 1949. This index uses and builds on the well-established latent physical integrity measure first introduced by Keith Schnakenberg and Christopher Fariss.²⁷⁴ The reason for including Legacy of Violence is that states with a history of egregious human rights violations are more likely to struggle with the development of a functioning democratic society. Once rule by exception and antagonistic violence become the norm, it is difficult to transform back into a normative environment where non-violent contestation prevails. Because democratic outcomes have routinely proven to be associated with level of wealth and population, we also include control variables for GDP per capita, based on a latent estimate, as well as a logged measure of population size from the World Development Indicators.²⁷⁵

To assess the impact of prosecutions, each model contains a lagged value of the trial or conviction count from the previous year. But a lagged count is not sufficient to test the hypotheses because this operationalization would only allow one to observe the short-term effect of trial activity. We are primarily interested in the intermediate- and long-term effects of prosecutions on democratic practices. In Guatemala, for example, one would expect the Rios Montt prosecution not to matter just in the year 2013 or 2014, but to cast a long shadow on democratic governance that lasts years into the future. For this reason, we mainly observe the effects of trial and conviction variables that are summed over time in a democracy. This means that the more trials and the more convictions a country has had, the higher the values of the

²⁷⁴ Keith E. Schnakenberg & Christopher J. Fariss, *Dynamic Patterns of Human Rights Practices*, 2 *POLIT. SCI. RES. METHODS* 1 (2014); Christopher J. Fariss, *Respect for Human Rights Has Improved Over Time: Modeling the Changing Standard of Accountability*, 108 *AM. POLIT. SCI. REV.* 297 (2014).

²⁷⁵ Christopher Fariss et al., *Latent Estimates of Historic Gross Domestic Product, GDP per Capita, Surplus Domestic Product, and Population Data Version 1*, (2022), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/FALCGS> (last visited Oct 26, 2023).

variables will be. The main variables of interest for the analysis are called SUM TRIALS, SUM HI-RANK TRIALS, and SUM CONVICTIONS. The sum variables range widely. The minimum value of Sum Trials is 0, and the highest value is 480 (Argentina in 2020). For this reason, we standardize the sum measures so that a one-unit increase indicates a change in one standard deviation.

B. Model Results

The results of the 24 models are presented in Figures 1-4, which are coefficients plots demonstrating the direction and statistical significance of each trials variable. For each row, the dot represents the value of the Beta coefficient, and the lines on each side of the dots are confidence intervals. If the confidence interval crosses the dashed line, it means that the effect is statistically insignificant, or that it cannot be distinguished from zero. If the dot is on the right of the zero line, it means that there is a positive relationship between the independent and dependent variable. If it is to the left of the zero line, it signifies a negative relationship. The vector of coefficients for all of the control variables is omitted for ease of presentation, but these are available with the authors.

The first set of six models yield very interesting results, shown in Figure 1. Represented here is an examination of the potential effects of prosecutions on democratic institutional change. If trials or convictions were associated with improvement to -- or with the erosion of -- judicial independence and free and fair elections, this would be apparent in the coefficient plot. Figure 1 shows that all of the variables are on the positive side, but none is statistically significant. On this basis, one can draw the inference that transitional criminal accountability is not much associated with institutional change. Even further, one could more definitively claim there that is little to no evidence holding prosecutions for human rights violations damages or endangers democratic institutions. Transitional trials simply do not seem to significantly alter judicial independence or electoral operations.

The rest of the models test hypotheses concerning the effects of transitional prosecutions on democratic behaviors, meaning how people act in the democratic polity. The second set of models, represented by Figure 2, examines the relationship between human rights prosecutions and pro-democratic activity. Political Engagement in the left column captures participation in voluntary organizations, where Democratic Mobilization in the right column signifies the presence of pro-democracy demonstrations. One can see that Trials and Hi-ranking trials are both associated with greater

political engagement, a finding that dovetails with newer micro-level research on Colombia and Chile.²⁷⁶ This could owe to an expressive effect of prosecutions, wherein citizens find inspiration to again get involved in politics seeing that harms of the past are being addressed by the new regime. Moving to Column 2 of the figure, trial proceedings themselves do not appear to catalyze pro-democracy demonstrations. However, convictions do. As convictions increase, it is more likely that pro-democracy demonstrations will occur.

The discovery that convictions are associated with democratic mobilization is especially fascinating when taken in combination with findings from the third set of models illustrated in Figure 3. Human rights criminal prosecutions, as well as convictions, are very much associated with greater political polarization (Column 1), and convictions are correlated with more anti-system movement activity (Column 2). What this indicates is that, following the initiation of trials and the conviction of human rights violators, political society becomes more ideologically divided, and less willing to compromise. Some pockets may even choose to call for the end of the current democratic regime, or to change the rules of the game in their own favor. Intriguingly, then, the inference is that after convictions, there is both more pro-democratic demonstration *and* more anti-democratic protest. This makes sense given what we know about transitional justice. It often advances in rancorous political environments, where a gain for one side is seen as a loss for another, in zero-sum fashion. The politics of transitional justice in such circumstances is not harmonious; it is agonistic, or rooted in struggle.²⁷⁷

Political conflict is inevitable. The true test for democracy and its survival is not necessarily whether all citizens can learn to agree, but whether they can learn to disagree without destroying the foundations of the regime.²⁷⁸ The fourth and final set of models tests whether transitional prosecutions are associated with the willingness of oppositional political parties to accept defeat in elections. Opposition Loyalty concerns their commitment to democracy prior to elections, and Acceptance of Elections concerns their commitment following a loss. If skeptics of transitional justice are right, then prosecutions should be associated with waning democratic commitments on

²⁷⁶ Elsa Voytas, *More than Money: The Political Consequences of Reparations*, OSF (2024), <https://osf.io/preprints/osf/akz26> (last visited Apr 30, 2024).

²⁷⁷ CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* (1 edition ed. 2013); Chantal Mouffe, *Democracy, Human Rights and Cosmopolitanism: An Agonistic Approach*, in *THE MEANINGS OF RIGHTS: THE PHILOSOPHY AND SOCIAL THEORY OF HUMAN RIGHTS* 181 (Costas Douzinas & Conor Gearty eds., 2014).

²⁷⁸ Ginsburg & Huq, *supra* note 31, at 439 (2022).

the part of opposition. Figure 4 shows that prosecutions are in fact not much related to democratic commitments on the part of democratic competitors. It does not appear that human rights trials lead defeated opponents to dig in their heels and refuse to acknowledge the legitimacy of elections. While that is certainly a phenomenon that has, as of late, come into fashion, the data suggest that this is not attributable to trials of state leaders or their agents.

C. The “Paradox of Punishment”

Drawing from these quantitative findings and the Guatemalan case study, this Article provides a much more nuanced picture of criminal accountability as a transitional justice tool for facilitating democracy. Interestingly, both the Guatemalan experience and our data analysis reveal a contradiction: criminal prosecutions both bolster democracy in some ways and threaten it in others.

On one hand, criminal punishment seems to have a positive effect on some democracy-enhancing characteristics. Specifically, our data reveals that criminal prosecutions are associated with greater levels of civil society activism. Similarly, criminal convictions, though not prosecutions, are associated with an increase in pro-democracy demonstrations and civil society activism. To some extent, polls in the United States support the finding that criminal convictions can contribute to changes in democratic behavior. Early in the election cycle, polls found that Trump would likely lose the next Presidential election to Biden if he was convicted of any of the pending charges against him.²⁷⁹ Even the conviction in the hush money case—arguably the least serious of the charges he faced and based on conduct before he was in office—shifted some voters to Biden.²⁸⁰

By contrast, in Guatemala, simply bringing charges was enough to mobilize mass protest of the former Guatemala President Perez Molina, which ultimately catalyzed his resignation.²⁸¹ In the most recent Presidential election in Guatemala, criminal prosecutions also appeared to have a substantial impact on the results of the run-off election. Indeed, some

²⁷⁹ See, e.g., Jonathan Swan, Ruth Igielnik, and Maggie Haberman, *Trump Indictments Haven't Sunk His Campaign, but a Conviction Might*, NY TIMES (Nov. 6, 2023), <https://www.nytimes.com/2023/11/06/us/politics/trump-biden-times-siena-poll.html?smid=nytcore-ios-share&referringSource=articleShare>.

²⁸⁰ Nate Cohn & Ruth Igielnik, *Small Shift Toward Biden After Trump Verdict*, NY TIMES (June 5, 2024) <https://www.nytimes.com/2024/06/05/upshot/polling-trump-conviction-voters.html?smid=nytcore-ios-share&referringSource=articleShare&sgpr=c-cb>.

²⁸¹ See *supra* note 224.

evidence suggests that the electorate sidelined one candidate after she was charged with crimes associated with corruption.²⁸² Ultimately, these charges cleared the path for a pro-democratic President, whose platform prioritizes the economic and social policies that the human rights movement also supports. Thus, in contravention of those who fear that criminal punishment merely individualize culpability, leaving the root causes of violence unsettled, the Guatemalan case study exposes the conceivable interplay between the pursuit of criminal punishment and other justice demands, like distributive justice, in post-conflict settings.

On the other hand, criminal punishment seems to produce some effects that endanger democracy. Both the Guatemala case study and our quantitative data suggest that over time criminal punishment is associated with heightened polarization and backlash. First, according to our data, human rights criminal prosecutions, as well as convictions, are highly correlated with greater political polarization, while convictions are associated with increased anti-system movement activity that could undermine democracy. The Guatemalan experience corroborates this finding. There, as the election and then later the inauguration of Arevalo drew closer, and with it the prospect of criminal punishment of the “pacto de corruptos,” anti-democratic forces weaponize the criminal apparatus against him and his supporters, nearly derailing democracy in Guatemala.

Here too there are obvious parallels to the U.S. case as well where there is some evidence of increased polarization and backlash in response to the Trump indictments. Namely, Trump made the criminal prosecutions of him a centerpiece of his campaign, portraying himself as a martyr and claiming that Biden had orchestrated them to discredit him.²⁸³ The strategy seemed to be effective with his case, given that donations to his campaign soared after Trump’s indictment and then ultimate conviction in the hush money case.²⁸⁴ Furthermore, while it remains to be seen whether prosecutions

²⁸² Montepeque, *supra* note 192 (documenting the decline in support for Presidential hopeful Sandra Torres after she was charged with corruption).

²⁸³ Michelle Price & Jill Colvin, *Trump tries to move past his guilty verdict by attacking the criminal justice system*, AP, May 31, 2024, at <https://apnews.com/article/trump-2024-campaign-trial-4629840240cb308c5eae335532ad17ed> (last visited Nov. 29, 2024).

²⁸⁴ Anisha Kohli, *Trump Campaign Says It Saw a Spike In Donations After Indictment*, TIME, April 15, 2023, <https://time.com/6272256/trump-2024-indictment-donation-surge/> (last visited Nov. 29, 2024); Shane Goldmacher, *Trump Announces Nearly \$53 Million Fund-Raising Haul After Guilty Verdict*, NY TIMES, May 31, 2024, <https://www.nytimes.com/2024/05/31/us/politics/trump-fundraising-verdict.html?smid=nytcore-ios-share&referringSource=articleShare>. (last visited Nov. 29, 2024)

will materialize, President-elect Trump and his nominee for Attorney General have threatened to investigate and punish the prosecutors who brought charges against Trump for his role in the violence and attempt to thwart certification on January 6, 2021 and numerous others who he believes have wronged him.²⁸⁵

These findings reflect a dilemma that Tom Ginsburg and Aziz Huq have dubbed “the paradox of punishment.”²⁸⁶ According to Ginsburg and Huq, this paradox occurs because while the prosecutions of those who engage in illicit acts that undermine democracy would seem necessary to uphold democracy, it often risks mobilizing anti-democratic forces.²⁸⁷ And if the anti-democratic defendant enjoys significant political support, then they can portray the prosecution as persecution and thus galvanize anti-system movements to destabilize the democratic order.²⁸⁸ Our research also reveals a new dimension to the paradox of punishment described by Ginsburg and Huq: Criminal prosecutions correlate to both pro-democratic and anti-democratic mobilization, perhaps explaining why polarization tends to increase in the wake of criminal prosecutions.

At the same time, our research suggests that the negative effects that often garner the most attention are red herrings. For example, although those who levy structural critiques argue that a focus on criminal punishment might distract from efforts to reform institutions, our evidence suggest that they have neither negative nor positive effects on institutional markers of democracy, such as whether a country has free and fair elections or an independent judiciary. Moreover, although some like Justice Alito worry that resort to criminal prosecutions of former leaders will lead to them being unwilling to cede elections, as occurred in Guatemala, this phenomenon is not widespread. In fact, we found little evidence that criminal prosecutions cause losing parties to be less willing to accept defeat in elections.

²⁸⁵ Rebecca Beitsch, Jared Gans, Zach Schonfeld, *What to know about Pam Bondi, Trump’s attorney general pick*, THE HILL, Nov. 11, 2024, at <https://thehill.com/regulation/court-battles/5005023-trump-appoints-bondi-doj/> (last visited Nov. 29, 2024); Sam Woodward, *Trump has threatened to prosecute hundreds: Here’s what you need to know*, USA TODAY, Nov. 7, 2024, <https://www.usatoday.com/story/news/politics/elections/2024/11/07/trump-threatened-to-prosecute-adversaries-citizens-what-to-know/76109262007/>. (last visited Nov. 29, 2024).

²⁸⁶ Ginsburg & Huq, *supra* note 31, at 446.

²⁸⁷ *Id.* at 446-47.

²⁸⁸ *Id.* at 447.

Reflecting on these findings, we conclude that a fundamental element that has enabled atrocities across the globe has often been missing from scholarly debates about whether to employ criminal punishment in transitional societies: power.²⁸⁹ That is, we argue that a complex grappling with power dynamics is needed in order to understand the full effects of criminal punishment on democracy in context. While critiques of criminal punishment tend to set their aim on the failure of criminal punishment to achieve structural change because of its focus on the individual, such critiques do not examine and question whether individualization of responsibility can play a role in disrupting power structures and changing narratives. Indeed, the atrocities that occurred in Guatemala were only possible because of the planning and resources of those cloaked with power and authority. As the case of Guatemala demonstrates, unless those power structures are dismantled, those same actors will continue to engage in illicit acts that continue to undermine democracy and exacerbate racial and economic inequality. Our research suggests that criminal accountability may be one method for shifting political power in transitional contexts by mobilizing pro-democracy forces and altering narratives that galvanize political participation. Still, because the employment of criminal punishment risks backlash and might increase polarization, which can ultimately destabilize democracy, societies must make their own tradeoffs and compromises when deciding whether to pursue criminal punishment in transition. Thus, in line with what other scholars have argued as well, transitioning societies might need greater latitude in navigating the paradox of punishment.²⁹⁰

CONCLUSION

In transitioning societies, legal systems must be recalibrated—in some cases rebuilt—and different countries might make different nuanced compromises based on what “justice” means to them. As part of this process transitioning societies must decide whether to pursue criminal punishment against the wrongdoers of the prior regime. Grounded by empirical evidence,

²⁸⁹ When scholars address power in international criminal justice, their focus is often on the power of international institutions like the International Criminal Court vis-à-vis states, not the power dynamics within countries recovering from mass atrocity. See, e.g., MORTEN BERGSMO, MARK KLAMBERG, KJERSTI LOHNE AND CHRISTOPHER B. MAHON (EDS.), *POWER IN INTERNATIONAL CRIMINAL JUSTICE* (2020).

²⁹⁰ See, e.g., Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT’L L. 1, 7 (2010) (arguing that local preference and indigenous institutions should be incorporated into a pluralist transitional justice design). See also, John D. Ciorciari & Jaya Ramji-Nogales, *Lessons from the Cambodian Experience with Truth and Reconciliation*, 19 BUFFALO HUM. RTS. L. REV. 193 (2013)

our research provides important insights into the effects of criminal accountability on democracy in periods of transition that can be instructive to other countries hoping to strengthen democracy.

Turning back to the question that animated this study—that is, can a country really punish its way to a more democratic future?—our research suggests a paradox. In some instances, punishment is associated with democratic outcomes. It does seem to encourage political engagement measured by pro-democratic demonstrations and greater participation in civil society. The case of Guatemala also demonstrates that at times prosecutions can be a valuable tool in disrupting entrenched power structures and creating space for broader social and political change. At the same time, criminal punishment can galvanize anti-democratic behavior as well, increasing polarization and engagement in anti-system mobilization. As the case study of Guatemala also demonstrates, anti-democratic spoilers can employ the criminal apparatus to destabilize democracy.

Ultimately, our research underscores the complex interplay between criminal accountability, power dynamics, and broader struggles for social and racial justice in post-conflict societies. While criminal trials may not be a panacea, they can serve as a catalyst for change when situated within a larger movement for accountability and reform. Still, they can also spur the anti-democratic opposition into action. As transitioning societies grapple with legacies of the past, a nuanced understanding of the possibilities and limitations of criminal punishment in context is essential to charting a path towards a more just and democratic future. When it comes to criminal punishment, there is no one size fits all.

Figure 1. Human rights trials and democratic institutions

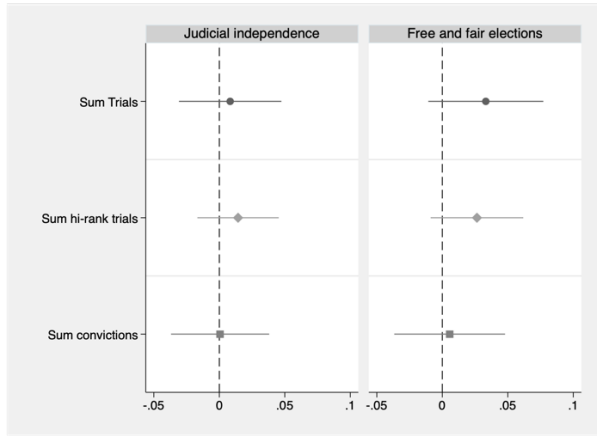


Figure 3. Human rights trials and political polarization

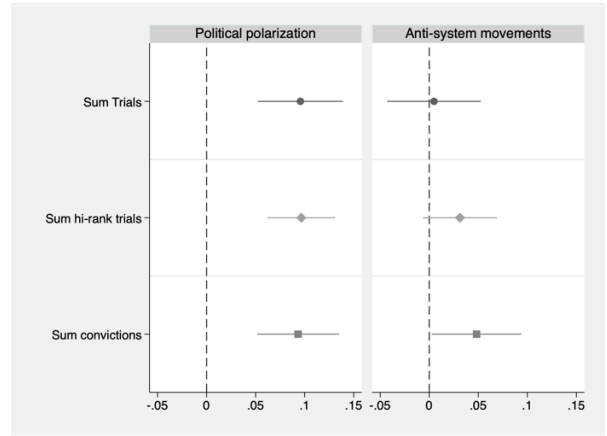


Figure 2. Human rights trials and democratic mobilization

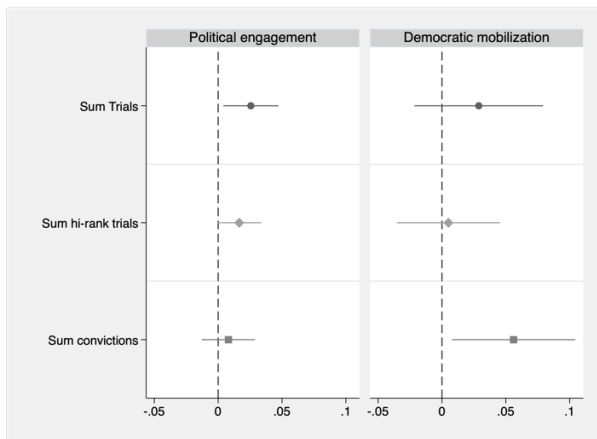


Figure 4. Human rights trials and acceptance of elections

