

# Guatemala's Gender Equality Reforms: CIL in the Making

CHRISTIANA OCHOA\*

## INTRODUCTION

Attaining legitimacy and maintaining integral coherence are among the persistent goals of international law. My previous work on customary international law (CIL) has attended to these goals, specifically in relation to proscription. I have argued, together with others, that individuals should have a recognized role in the CIL formation process.<sup>1</sup> That work has been largely theoretical in its orientation and, as a result, I have, until now, not had the opportunity to study a particular location and situation in order to explore the practical question of how or whether the theory that individuals may or do engage in the proscription function actually takes shape. This Symposium on Latina/os and the law provides this opportunity by opening a space for a case study, rooted in Latin America, in which (1) international law has stood as a mediator between people and their state, and (2) which illustrates the point that CIL made up of state practice and *opinio juris* alone will regularly misrepresent the interests of the very people that human rights law aims to protect, resulting in diminished legitimacy for CIL and diminished democratic participation for individuals.

The case I will use to illustrate these points takes place essentially in Guatemala and focuses on the role Guatemalan women have played in making and shaping laws on gender equality within their own country, paying particular interest to how women have engaged in transnational networking and have strategically employed international law in this process. While, ultimately, this study is situated at a slightly different location of law formation than I have previously discussed—the state level, rather than the international level—it is my hope that by the end of this Article readers will appreciate not only the fundamental role of international law and cosmopolitanism in the efforts Guatemalan women have made toward attaining gender equality and equal protection under the law, but also the deliberative relationship between the

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\* Associate Professor of Law, Indiana University School of Law – Bloomington. J.D., Harvard Law School, B.A., University of Michigan. The author would like to thank Carla De La Barra for her rich and engaged contribution to this Article. Thank you also to Fausto Garcia Delgadillo, for providing assistance in locating documents from the Guatemalan Constitutional Court and to Susan Williams for her generous invitation to participate in a conference titled Constituting Equality, at Indiana University in April 2007. That conference will result in a book of collected works and substantial portions of this Article will appear as a chapter of that book. See SUSAN WILLIAMS, *CONSTITUTING EQUALITY* (forthcoming 2008).

1. See LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 79 (1989); Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 213 (1990); Till Müller, *Customary Transnational Law: Attacking the Last Resort of State Sovereignty*, 15 IND. J. GLOBAL LEGAL STUD. (forthcoming 2008); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 62 (1990).

national and international law-formation projects of people like the Guatemalan women that are the subject of this Article.

This Symposium is a particularly relevant place for this exploration because the story of women exiting their own borders, physically or ideologically, for inspiration and support from other women within the Americas—a regionally particular process of cosmopolitanization—has a unique history within Latin America that has not been fully told.<sup>2</sup> I will not tell that full history here, unfortunately, for it is not the aim of this Article. I hope, however, that the story provided herein might assist in some future telling of that history.

The relationship between international law and the women who have advocated for constitutional and legal reform on matters of gender equality also relates to a claim I have made previously—that vesting states with the sole status of “subjects” under international law, such that they are the only entity whose participation is legitimized in the CIL formation process is not sound, given the inherent skepticism regarding state adherence to human rights law within the international legal architecture.<sup>3</sup> The role women have played in circumventing the Guatemalan state in order to attain greater legal protections is an example of the exigency of including individuals in the process by which those norms that directly affect them are shaped into CIL.<sup>4</sup>

The constitutions of most, if not all, American countries contain provisions that define citizenship or nationality within the given country.<sup>5</sup> For many of us, it is on the national scale that we have defined ourselves and have been defined by others. Our national citizenship provides ready categorization with which to classify us into our various nominal identities—as Mexican, Puerto Rican, Ecuadorian, Cuban, Chilean, etc.

It is now commonplace to think of national constitutions as legitimating and concretizing a state, which will, in turn, relies on the constitution as a foundational document and primary source for the definition of citizenship and the promulgation of individuals rights.<sup>6</sup> Constitutions regularly contain provisions setting forth the rights of citizens.<sup>7</sup> In so doing, the assumption may often be that the national government holds

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2. Histories of early cosmopolitan feminism in particular locations within Latin America have been written, though no attempt at a comprehensive history of Latin American feminism or Pan-Americanism currently exists. *See, e.g.*, ASUNCIÓN LAVRIN, WOMEN, FEMINISM, AND SOCIAL CHANGE IN ARGENTINA, CHILE, AND URUGUAY, 1890–1940 (1995); Christina Ehrick, *Madrinas and Missionaries: Uruguay and the Pan-American Women’s Movement*, 10 GENDER & HIST. 406 (1998).

3. Ochoa, *supra* note 1, at 159–161.

4. In many respects, this argument is very similar to that made by Richard Delgado when he argued that the group most equipped to advocate for the rights of group A is group A, rather than group B. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566–567 (1984).

5. *See, e.g.*, U.S. CONST. amend. XIV; CONSTITUCIÓN ARGENTINA [CONST. ARG.] ch. IV, § 75; CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 22 (Braz.); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] ch. II, art. 30 (Mex.). Some constitutions define citizenship or nationality in the text while other constitutions delegate that responsibility to the legislature.

6. A lexis search of “‘constitutional rights’ together with ‘individual rights’” exceeded the 3000 hit maximum for a valid search.

7. Examples are too numerous to list but would include, for example: CONST. ch. I, art. 1–

the position of being the largest scale actor empowered with defining and delineating rights, with at least some rights being contingent on citizenship. Individual states or municipalities within a country may provide some rights and protections, but, ultimately, in this view the national government ostensibly stands in the position of right-grantor at the largest scale.<sup>8</sup> Granting citizenship, granting rights, and delineating which rights will apply to particular groups of individuals within the territory of a state are powers commonly believed to lie within the exclusive sovereign powers of the national government, often elaborated through national constitutions.<sup>9</sup>

This Article will illustrate my skepticism about the exclusive grasp of the state over the power to define or capture people's conceptions of themselves as citizens.<sup>10</sup> It will argue that if it was ever accurate to think of rights as quantities that are granted to individuals exclusively by states, that this is certainly no longer the case. Over the course of the last century, and particularly the last half-century, regional and international human rights bodies have taken on increasingly vital roles in stating and making known the internationally defined rights of individuals and also in protecting those rights. The emergence of a new font of rights, emerging from and located at the supra-state level, calls into question the exclusive claim of states to define citizenship, including the right to denominate who lies within and who falls outside of the state-defined "citizenship."<sup>11</sup>

In addition to questions of whether states currently have exclusive power to prescribe the rights of the people within their territories, which is an institutional issue, there exists the correlative phenomenon of individuals looking beyond their states for the creation, justification, and protection of their individual rights.<sup>12</sup> This phenomenon

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24, 27 (Mex.); CONSTITUCIÓN POLÍTICA REPÚBLICA DE COSTA RICA [CONST.] tits. IV-VIII; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR [CONST.] tits. II, IV; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] [CONST.] tits. III, IV.

8. In addition to the debate that occurs among the Justices in dicta within opinions such as *Sosa v. Alvarez-Machain* and *Roper v. Simons*, individual members of the Supreme Court have engaged in this debate in public forums. Justice Scalia's address to the American Society of International Law in 2004 is an example. See ASIL Proceedings of the 98th Annual Meeting (2004). Another includes a public debate between Justice Scalia and Justice Breyer held at American University on January 13, 2005. See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> [hereinafter Transcript of Discussion].

9. Transcript of Discussion, *supra* note 8.

10. See Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 U. CIN. L. REV. 105, 127-136 (2005).

11. Although immigration law holds as a central tenet the rights of states to say who will be allowed within its territory, states are prohibited under international law from discriminating on the basis of citizenship with respect to a number of rights.

12. This Article will at times be relying explicitly or implicitly on the seven functions of effective decision process articulated by Harold Lasswell. HAROLD D. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* (1956). These seven categories (intelligence, promotion or recommendation, prescription, invocation, application, termination, and appraisal) are defined in Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 261 (1967) as follows:

is increasingly talked about in various literatures on civil society,<sup>13</sup> cosmopolitan citizenship,<sup>14</sup> global feminism,<sup>15</sup> and bottom-up law making,<sup>16</sup> as well as the discourse over the subaltern.<sup>17</sup> And this phenomenon is where my second set of questions arises, asking what role individuals have, through an engagement with international law, in altering the interpretive understanding of their rights. This Article will inquire specifically about this role of individuals in respect to gender equality, at the domestic as well as at the international level.

In making this inquiry, I will focus in this Article on Guatemala and on the political-equality claims of Guatemalan women in order to provide a data point—a story—of women taking on multiple senses of identity, belonging and citizenship in the process of making arguments and claims for greater equality. I will argue that, to a notable extent, women engaged in women's rights and gender equality politics in Guatemala have at various times taken on multiple layers of affiliation and loyalty,

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1. Intelligence is the obtaining, processing, and dissemination of information (including planning).
  2. Promotion (or recommendation) is the advocacy of general policy.
  3. Prescription is the crystallization of general policy in continuing community expectations.
  4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.
  5. Application is the final characterization of concrete circumstances according to prescriptions.
  6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.
  7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and the responsibility therefor [sic].

*Id.*

This framework was central to a body of work by a number of international legal scholars, especially Lasswell, McDougal, Reisman, and Lung-chu Chen. *See, e.g., id.*; MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER ch. 4 (1980).

13. *See, e.g.*, GLOBAL CIVIL SOCIETY 2001 (Helmut Anheier, Marlies Glasius & Mary Kaldor eds., 2001); GLOBAL CIVIL SOCIETY 2002 (Marlies Glasius, Mary Kaldor & Helmut Anheier eds., 2002); 9 EURO L. J. (2003) (devoting the entire volume to the issue of law and transnational civil society).

14. *See* Martin Köhler, From the National to the Cosmopolitan Public Sphere, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 231 (Daniele Archibugi, David Held & Martin Köhler eds., 1998). Many authors have articulated this phenomenon. *See, e.g.*, KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY (2005); COSMOPOLITAN CITIZENSHIP (Kimberly Hutchings & Roland Dannreuther eds., 1999).

15. GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS (Myra Marx Ferree & Aili Mari Tripp eds., 2006).

16. *See, e.g.*, BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César Rodríguez-Garavito eds., 2005).

17. *See, e.g.*, Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988). Spivak's essay warns that the subaltern are not a heterogeneous group.

such that they become not only Guatemalan but also members of various transnational women's networks and/or deeply local or indigenous movements.

The emergence of cosmopolitan citizenship, rooted as it may be,<sup>18</sup> raises important questions regarding the role of constitutions in defining individual rights for a given country's citizens. Through the case of Guatemala, this Article will demonstrate that the emergence of a cosmopolitan sense of identity and of citizenship draws the once-exclusive claims of states over definitions of citizenship and over rights-granting into question. The result of this shift is that constitutions cannot work alone in securing rights, regardless of how well conceived or drafted they may be. Rather, constitutions are increasingly influenced, pressured, and interpreted by i) international human rights law and institutions on one side and ii) by individuals acting domestically and transnationally on the other.

In Part I of this Article, I will briefly establish that both legal and cultural discrimination against women continues in Guatemala despite very clear constitutional provisions guaranteeing gender equality. Part II will then discuss the inter-related roles of international law, international civil society, and local activism in relation to issues of gender equality to argue that, especially as the exclusivity of state sovereignty is diminished, constitutions are only one of the many mechanisms that must play roles in providing for and protecting formal as well as functional equality. Part III then highlights how Guatemalan women may continue to take on rooted cosmopolitan identities in their efforts to obtain gender equality. The Conclusion emphasizes the importance of the transnational engagement of Latin American women, including Guatemalan women, to domestic and international law-formation projects.

## I. GUATEMALA: FERTILE GROUND FOR ROOTED COSMOPOLITANISM

### A. Unenviable Conditions

Approximately thirty-seven percent of Guatemalan women are illiterate.<sup>19</sup> For indigenous women, illiteracy rates are an estimated seventy-five to ninety percent.<sup>20</sup> Compared to women in other states in the Western Hemisphere, Guatemalan women's health is poor. The average Guatemalan woman lives 66.4 years, representing the lowest life expectancy in Central America.<sup>21</sup> Approximately 250 of every 100,000 Guatemalan women will die from pregnancy and birth-related complications as compared to twenty-six out of every 100,000 in Costa Rica.<sup>22</sup>

Guatemalan women face continued gender discrimination and gender-based violence. The femicide epidemic in Guatemala is just one type of violence facing women in that country. The public nature of the violence resulting in femicide, and the

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18. KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005) (discussing the idea of the "rooted cosmopolitan").

19. UNICEF, *At a Glance: Guatemala*, [http://www.unicef.org/infobycountry/Guatemala\\_statistics.html](http://www.unicef.org/infobycountry/Guatemala_statistics.html).

20. Valerie MacNabb & Cent. Am. Analysis Group, *Women's Role in Guatemala's Political Opening*, in 1 *IN FOCUS* (11th ed. 1998), available at [http://www.asylumlaw.org/docs/guatemala/GUA\\_4/Section%20III/Political%20opening.pdf](http://www.asylumlaw.org/docs/guatemala/GUA_4/Section%20III/Political%20opening.pdf).

21. *Id.*

22. *Id.*

rapid rise of that phenomenon, has resulted in widespread attention to this problem.<sup>23</sup> It is important to note, however, that a vast majority of all violence against women in Guatemala occurs at home.<sup>24</sup>

Women are discriminated against in the political sphere as well. Women's participation in Guatemala's formal government is low. About one-sixth of the Congress is female and only seventeen percent of the judges and magistrates in Guatemala are women. This holds true even at the most local level. Statistics on the gender of mayors in Guatemala estimate that approximately ninety-eight percent of mayors are men.<sup>25</sup> These figures stand in sharp contrast to what an observer might imagine the situation in Guatemala to be if that person were to look only to the equality guarantees that have been present in the Guatemalan Constitution in varying degrees since 1945.

*B. Constitutional History as an Instigation for Cosmopolitanism: Three Phases*

1. 1945

As far back as the 1945 Constitution, there were provisions making gender discrimination illegal,<sup>26</sup> including the right of all citizens to hold public jobs and public office without discrimination on the basis of sex.<sup>27</sup> But there were significant exceptions relevant to women. Namely, only literate women over eighteen were recognized as citizens.<sup>28</sup> This exception was significant given the consistently low literacy rates among Guatemalan women.

Still, the 1945 Constitution laid important historical groundwork for gender equality. First, it introduced the idea that sex-based discrimination is illegal. Second, it included provisions for the amparo action which is employed to challenge violations of constitutional guarantees.<sup>29</sup> The amparo, continues to play a vital role in protecting constitutional rights and human rights<sup>30</sup> and has become essential in enforcing modern day gender equality provisions.

23. *See id.*

24. *Id.* (stating that UNICEF estimates that seventy-six percent of all violence occurs in the home).

25. *Id.*

26. "All persons enjoy the guarantees established by this Constitution without any restrictions other than those that it expresses. With the same reservation any discrimination for reasons of relationship, sex, race, color, class, religious beliefs or political ideas is declared illegal and punishable." CONSTITUCION DE LA REPUBLICA DE GUATEMALA [CONST.] art. 21 (1945).

27. In particular, Article 38 states "All Guatemalans, without distinction of sex, are eligible for public employments and offices, according to their merit and capacity, excepting the incompatibilities which the laws indicate and the limitations established by the Constitution." CONST. art. 38 (1945) (Guat.).

28. CONST. art. 9 (1945) (Guat.).

29. CONST. art. 51 (1945) (Guat.).

30. The right to amparo (or sufficiently similar) actions was included as a fundamental human right in the American Convention on Human Rights. O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123. *See also* Manuel de Jesús Mejicanos Jiménez, *El Amparo Como Garantía para el Acceso a la Justicia y Protección de los Derechos Humanos en la Jurisdicción Constitucional*

## 2. 1965

The 1965 Constitution provides significantly more detail regarding amparo actions<sup>31</sup> and civil and political rights provisions, such as the freedom of assembly<sup>32</sup> and freedom of expression.<sup>33</sup> These provisions were by no means drafted in connection to women's rights provisions. They were likely a reaction to the 1956 Constitution, which had expressly prohibited any individual or collective communist action.<sup>34</sup> Nonetheless, these protections have quite clearly been very important in women's efforts to mold the meaning of the Constitution.

The 1965 Constitution is also essentially important because it makes progress in its treatment of women, as it eliminates the female literacy requirement contained in the 1945 version and instead confers citizenship on all men and women over the age of eighteen;<sup>35</sup> sets out provisions declaring that all human beings are free and equal in dignity and rights;<sup>36</sup> and continues to prohibit sex-based discrimination. A rough translation reads: "In Guatemala all human beings are free and equal in dignity and rights. Any discrimination because of race, color, sex, religion, birth, economic or social position or political opinions is prohibited."<sup>37</sup>

## 3. 1985

These substantive freedom, equality and discrimination provisions were carried over into the most recent Guatemalan Constitution, promulgated in 1985, with no significant changes. But the 1985 Constitution also included a number of new provisions enabling the pursuit of substantive equality and freedom from discrimination.

In large part, these provisions were the result of a long civil war within the country. For example, the 1985 Constitution explicitly incorporates international human rights treaties and declares that they will be privileged over domestic law.<sup>38</sup> Article 46, of the 1985 Constitution (on the "Preeminence of International Law"), states that: "The general principle is established that in the field of human rights treaties...agreements approved and ratified by Guatemala have precedence over municipal law."<sup>39</sup> With this

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*Guatemala*, 32–33 REVISTA IIDH 175, 181 (2000–2001), available at <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/32/pr/pr8.pdf> (making the claim that the amparo action has been treated as a non-derogable right, even in times of emergency).

31. The amparo action has not always been acclaimed as wholly good. See ARCHANA SRIDHAR & JOSÉ RICARDO BARRIENTOS QUEZADA, *ANÁLISIS DE LOS PROCESOS ADMINISTRATIVO Y PENAL EN CASOS DE EVASIÓN TRIBUTARIA EN GUATEMALA* 16 (2007) (arguing that amparo actions serve as excessive stalling tactics for individuals being prosecuted for tax evasion).

32. CONSTITUCION DE LA REPUBLICA DE GUATEMALA [CONST.] art. 63 (1965).

33. *Id.*

34. PAUL KOBRAK, *ORGANIZING AND REPRESSION IN THE UNIVERSITY OF SAN CARLOS, GUATEMALA, 1944 TO 1996*, ch. 4 (1999), available at [http://shr.aaas.org/guatemala/ciidh/org\\_rep/index.html](http://shr.aaas.org/guatemala/ciidh/org_rep/index.html).

35. CONST. art. 13 (1965) (Guat.).

36. CONST. art. 43 (1965) (Guat.).

37. *Id.*

38. CONSTITUCION POLITICA DE LA REPUBLICA DE GUATEMALA [CONST.] ch. I art. 46 (1985).

39. *Id.*

very short provision, the Guatemalan Constitution legally recognizes that rights can and do derive from sources other than the Constitution, that individuals may avail themselves of those rights, and that the Guatemalan government and Constitution can be challenged before international bodies for violations of international human rights. The 1985 Constitution also devotes an entire chapter to the creation and operation of a Human Rights Commission and Office of the Ombudsman for Human Rights, charged with the promotion of human rights as well as the prosecution of cases of governmental abuses of human rights.<sup>40</sup> The inclusion of human rights treaties in national law and the creation of enforcement bodies are of monumental importance and are only starting to be fully appreciated. This is especially the case in the context of Guatemala, which is riddled with a history of military coups, abuses of power, and well-documented, severe cases of repression and human rights violations.<sup>41</sup>

These are the core of the formal provisions of the Guatemalan Constitution providing for substantive, institutional, or infrastructural protections that bear on gender equality and political organizing and advocacy on gender-based rights. But, as I stated at the outset, the questions I want to explore require discussion beyond a description of Guatemala's Constitutional provisions.

## II. LEAVING GUATEMALA

### *A. International Law*

The Guatemalan Constitution incorporates human rights treaties. It is, in part, through these documents that women have taken on a "multi-layered" sense of self that extends beyond the Guatemalan state borders. These documents afford women the possibility of relying on human rights treaties to hold Guatemala accountable for the formal equality guaranteed by the Constitution. Because, again, with the creation of supra-national fonts for the creation of individual rights and international and foreign institutions engaged in their enforcement, one's own definition of citizenship (a traditional conduit for the vesting and enjoyment of rights) may now rest at the international or transnational level in addition to the national or local. But, in order to understand the functional importance of these constitutional provisions, one must first know what international human rights treaties Guatemala has signed.

Guatemala is a signatory member to every relevant human rights treaty, including the International Covenant on Economic, Social and Cultural Rights,<sup>42</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>43</sup> and the Convention on

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40. CONST. tit. VI, ch. V (1985) (Guat.) (discussing the Commission and the Procurator of Human Rights).

41. See Angelica Cházaro & Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 HASTINGS WOMEN'S L.J. 141, app. 3, at 176 (2006) (discussing Guatemala's thirty-year cycle of repression).

42. Guatemala acceded the International Covenant on Economic, Social and Cultural Rights on May 19, 1988. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

43. Guatemala acceded the International Covenant on Civil and Political Rights on May 5, 1992. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.



the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>44</sup> It has also signed the optional protocols to the ICCPR<sup>45</sup> and CEDAW,<sup>46</sup> both of which recognize the competence of their international treaty bodies to receive and consider communications from individuals from states subject to their jurisdiction who claim to be victims of a violation.<sup>47</sup> These protocols grant to Guatemalan citizens the right to reach outside of Guatemala—beyond their own state—when they seek recognition of human rights violations and some degree of protection from those violations.<sup>48</sup>

Guatemala is also a member of the Organization of American States (OAS)<sup>49</sup> and a signatory to the American Convention on Human Rights,<sup>50</sup> and Guatemala allows its citizens to petition the Inter-American Commission with complaints of violations of that Convention.<sup>51</sup> As a result, Guatemala has had a nearly constant presence before the Inter-American Commission, defending and explaining all manner of human rights violations.<sup>52</sup> Finally, Guatemala is also a signatory to the Inter-American Convention

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44. Guatemala signed CEDAW on June 8, 1991 and ratified CEDAW on August 12, 1982. Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 13.

45. Guatemala acceded the Optional Protocol to the ICCPR on November 28, 2000. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

46. Guatemala signed the Optional Protocol to CEDAW on September 7, 2000 and ratified it on May 9, 2002. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 4, U.N. GAOR, 54th Sess., 28th plen. mtg., U.N. Doc. A/RES/54/4 (Oct. 6, 1999).

47. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), <http://www.unhcr.ch/pdf/report.pdf>.

48. The Optional Protocols provide for communications to be submitted by “individuals or groups of individuals . . . claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party” in order to seek redress from the relevant Committee. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 46, art. 2; *see also* Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 45, art. 2 (explaining that individuals can submit claims when States violate individual’s enumerated rights under the Covenant as long as individuals have exhausted domestic remedies).

49. The OAS is an organization which “brings together the nations of the Western Hemisphere to strengthen cooperation on democratic values, defend common interests and debate the major issues facing the region and the world.” OAS, Key OAS Issues: The OAS at a Glance, [http://www.oas.org/key\\_issues/eng/KeyIssue\\_Detail.asp?kis\\_sec=20](http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=20). Guatemala has ratified the OAS charter and belongs to the Organization. OAS, OAS Member States: Guatemala, <http://www.oas.org/documents/eng/memberstates.asp?sCode=GUA#Inicio>.

50. Guatemala signed the American Convention on Human Rights on November 22, 1969 and ratified it on April 27, 1978. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No.36, 1144 U.N.T.S. 123; *see also* Inter-Am. Comm’n on Human Rights, American Convention on Human Rights: Signatures and Current Status of Ratification, <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.

51. Guatemala recognized the jurisdiction of the court on March 9, 1987. *See id.*

52. *See* University of Minnesota, Human Rights Library, <http://www1.umn.edu/humanrts/cases/commissn.htm> (compiling Guatemalan cases in front of the Inter-American Commission on Human Rights).

on the Prevention, Punishment and Eradication of Violence Against Women, often referred to as the "Convention of Belém do Pará," which is the only international treaty specifically treating violence against women.<sup>53</sup>

These human rights treaties rarely operate formally against any state, except through the actions of individuals when they are cited as the basis of their legal claims before their domestic judicial bodies or as the grounding for their petitions before international bodies to ensure adequate protection of their human rights. These fundamentally internationalist exercises have been a key part of Guatemalan women's search for functional equality.

*B. International Encounters—The notable role of trans-border feminism*

Historically, Guatemalan women have had a close relationship with the larger regional struggle for gender equality. In 1945, Guatemala hosted the Inter-American Congress of Women.<sup>54</sup> The Guatemalan event was initiated by the Women's International League for Peace and Freedom,<sup>55</sup> which included women from nineteen nations. This was a significant step in raising awareness regarding women's issues in Guatemala. However, it was only against the current constitutional backdrop, which has intermingled international human rights treaties, that Guatemaltecas have seen themselves becoming more and more involved in generating a politics of equality through coordinated participation and action at both the domestic and international levels.

In Guatemala, as in much of the Americas, feminist and women's movements gained strength during the 1980s. According to Valerie McNabb of the Central American Analysis Group:

For their part, women have been the frontrunners in strengthening Guatemala's incipient civil society through protest, mobilization, negotiation, and the formation of governmental and non-governmental organizations. They have introduced, proposed, and pushed through laws and public policy guidelines to promote women's political participation, organizing the women's movement around the issues of violence against women, human rights, education, health and political participation. . . . Like elsewhere in Central America—and as opposed to elite transitions in the Southern cone countries—women's efforts at mass mobilization have proven instrumental in Guatemala's democratization.<sup>56</sup>

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53. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women was signed by Guatemala on June 24, 1994 and ratified on April 4, 1995. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, March 5, 1995, 33 I.L.M. 1534 (1994); *see also* Inter-Am. Comm'n of Women, Status of Signing and Ratification of the Convention of Belém do Pará, <http://www.oas.org/cim/English/Laws.Rat.Belem.htm>.

54. *Chronology of Guatemala*, in *RADICAL WOMEN IN LATIN AMERICA: LEFT AND RIGHT* 37 (Victoria González & Karen Kampwirth eds., 2001).

55. Women's Int'l League for Peace and Freedom, Highlights from WILPF's History, <http://www.wilpf.int.ch/history/highlights.htm>.

56. MacNabb & Cent. Am. Analysis Group, *supra* note 20, at 2.

During this very period—often referred to as the Decade of Women in the Americas<sup>57</sup>—women's groups increasingly reached across national boundaries to share their national experiences on gender issues and to consider routes to gender equality. For women in Guatemala, this coincided with the political opening that came when its internal war and violence quieted.<sup>58</sup> Guatemalan women exiled in Mexico were able to return, some of them politicized from the experience of exile.<sup>59</sup> In fact, two of the first self-identified feminist organizations in Guatemala arose from informal discussions among “politically active Guatemalan women exiled in Mexico and those living in Guatemala City.”<sup>60</sup>

In addition, Latin American and Caribbean Feminist Encounters and Central American Women's Encounters served as forums in which women from various countries convened and shared their domestic experiences of civil war and the peace processes that were developing during the late 1980s and 1990s.<sup>61</sup> The forums served as avenue to coordinate efforts throughout Central America to “strengthen women's participation in public decision-making at all levels.”<sup>62</sup> Although the first Latin American and Caribbean Feminist Encounter occurred in 1981, in Bogotá, Colombia, the 1987 Encounter in Mexico drew in more Guatemalan participants than the earlier Encounter.<sup>63</sup>

From this event, Central American women began to feel “the growing force of Latin American feminism;”<sup>64</sup> leading them to generate a “gender perspective on the political problems and issues they faced”<sup>65</sup> as Central Americans specifically. As a result, Central American women, Guatemalans included, organized the first Central American Women's Encounter in 1989, to “develop a feminist position specific to their regional realities [and to] undertake joint action initiatives to address issues and problems of common concern.”<sup>66</sup> The Permanent Assembly of Central American Women for Peace was formed by women in the Encounter. This, in turn, prompted the formation in 1989 of COAMUGUA, the Coordination of Women's Groups in Guatemala.<sup>67</sup>

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57. See generally Inter-Am. Comm'n of Women, History of CIM: Decade of Women in the Americas 1976–1985, <http://www.oas.org/CIM/english/History7.htm>.

58. See generally Ilja A. Luciak, *Gender Equality, Democratization, and the Revolutionary Left in Central America: Guatemala in Comparative Context*, in *RADICAL WOMEN IN LATIN AMERICA*, *supra* note 54, at 189, 205.

59. See MacNabb & The Central American Analysis Group, *supra* note 20, at 2.

60. SUSAN A. BERGER, *GUATEMALTECAS: THE WOMEN'S MOVEMENT 1986–2003*, at 30 (2006).

61. See MacNabb & Cent. Am. Analysis Group, *supra* note 20, at 2.

62. Michael Clulow, *Building Women's Citizenship and Governance, Central America: Women as Citizens*, at 2 (April 2005), available at [http://owa.netxttra.net/\\_uploads/documents/Final.english.short.womenascitizens.pdf](http://owa.netxttra.net/_uploads/documents/Final.english.short.womenascitizens.pdf).

63. Cathy Blacklock, *Democratization and Popular Women's Political Organizations*, in *JOURNEYS OF FEAR: REFUGEE RETURN AND NATIONAL TRANSFORMATION IN GUATEMALA 203* (Liisa North & Alan Simmons eds., 1999), available at <http://www.yorku.ca/erlac/documents/Blacklock.pdf>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

The Guatemalan participants of these Encounters were often students and leaders at the University of San Carlos—often taking the skills and knowledge they acquired at the Encounters and putting them into practice in local NGOs in order to fulfill university practicum requirements.<sup>68</sup> As such, the feminist ideas that had been so important in the regional feminist Encounters were disseminated through NGOs into a large number of communities of women at a very local level.

This wide dissemination of information, however, initially caused the women's movement in Guatemala to be fragmented—formed of many small separate organizations, each representative of different needs, goals, and individual projects.<sup>69</sup> The groups lacked a “long-term sustainable relationship between the various sectors of the women's movement.”<sup>70</sup> This persisted until many of these groups united in 1994 with the creation of the “Sector de Mujeres” (Women's Sector).<sup>71</sup> The Women's Sector began to demand a role in the negotiations for peace that came in the wake of Guatemala's internal war. This in turn strengthened the women's movement while also providing “the organizational structure to help the movement develop a multi-cultural, multi-classed gender analysis based on rights.”<sup>72</sup>

### C. Peace Agreements

Guatemalan women, through the Women's Sector, participated forcefully in the process leading to the signing of Guatemala's Peace Accords, which ended that country's thirty-six year civil war. Since “gender issues were on the forefront internationally, [it was] easier to incorporate provisions favoring women's rights into [the Peace] accord.”<sup>73</sup> In addition, it appeared that Guatemalan women learned from the prior experiences of their El Salvadorian counterparts (who had recently experienced a similar process) and resolved to ensure women and gender equality concerns figured in the Guatemalan peace process.<sup>74</sup> The Women's Sector was ultimately successful in ensuring women's demands were included in the Peace Accords.<sup>75</sup>

The 1996 Peace Accords were made up of a series of agreements drafted from 1994-1996.<sup>76</sup> These agreements establish the goals of accountability for human rights violations committed during the war;<sup>77</sup> protection of indigenous<sup>78</sup> and women's

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68. *Id.* at 203–04.

69. *See* BERGER, *supra* note 60, at 33.

70. *Id.* at 34.

71. *See id.*

72. *Id.* at 35.

73. Luciak, *supra* note 58, at 200.

74. *See id.* at 199 (discussing Luz Mendez—a prominent member of the Peace Agreements—and her awareness of the downfalls of El Salvador's Peace Agreement, which gave little attention to women's issues).

75. MacNabb & Cent. Am. Analysis Group, *supra* note 20, at 2–3.

76. *See* United States Institute of Peace, Peace Agreements Digital Collection, [http://www.usip.org/library/pa/guatemala/pa\\_guatemala.html](http://www.usip.org/library/pa/guatemala/pa_guatemala.html).

77. Comprehensive Agreement on Human Rights, March 29, 1994, *available at* [http://www.usip.org/library/pa/guatemala/guat\\_hr\\_940329.html](http://www.usip.org/library/pa/guatemala/guat_hr_940329.html); Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, June 23, 1994, *available at*

rights;<sup>79</sup> and reform of the health, education, and social services.<sup>80</sup> Under the Agreement on Social and Economic Aspects and Agrarian Situation, for example, the government recognizes its duty to eliminate discrimination against women in political, economic, social, and cultural spheres. This Agreement represented a significant step in committing the Guatemalan government to work to ensure “women have equal opportunities in education . . . equal access to housing . . . implementing nationwide comprehensive health program[s] . . . [and] revising national legislation and regulations to eliminate all forms of discrimination against women in terms of economic, social, cultural and political participation.”<sup>81</sup>

The Peace Accords have been cited as a catalytic moment in the level of governmental attention devoted to traditionally marginalized groups, including women.<sup>82</sup> They are also important to the current discussion because they are the culmination of the first wave of transnational women’s networking and thus represent a notable change in the tenor of women’s rights discourse and gender equality initiatives in Guatemala. The Peace Accords and the ten international Women’s Encounters between 1981 and 2005 have had additional longer-term effects.<sup>83</sup> For example, the Peace Accords, for their part, created a rare opportunity for cooperation between indigenous and Latina women.<sup>84</sup> In addition, the international Women’s Encounters

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[http://www.usip.org/library/pa/guatemala/guat\\_940623.html](http://www.usip.org/library/pa/guatemala/guat_940623.html).

78. Agreement on Identity and Rights of Indigenous Peoples, Mar. 31, 1995, *available at* [http://www.usip.org/library/pa/guatemala/guat\\_950331.html](http://www.usip.org/library/pa/guatemala/guat_950331.html).

79. *Id.*; Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society, Sept. 19, 1996, *available at* [http://www.usip.org/library/pa/guatemala/guat\\_960919.html](http://www.usip.org/library/pa/guatemala/guat_960919.html) [hereinafter *Strengthening of Civilian Power*]; Agreement on Social and Economic Aspects and Agrarian Situation, May 6, 1996, *available at* [http://www.usip.org/library/pa/guatemala/guat\\_960506.html](http://www.usip.org/library/pa/guatemala/guat_960506.html) [hereinafter *Social and Economic Aspects*].

80. *Strengthening of Civilian Power*, *supra* note 79; *Social and Economic Aspects*, *supra* note 79.

81. *Social and Economic Aspects*, *supra* note 79.

82. Despite the lack of clarity over the exact legal significance of the Peace Agreements, the World Bank has recognized their significance, stating:

The Peace Accords represented a turning point for Guatemala’s development path . . . . Key areas of emphasis related to economic development and poverty reduction include: a focus on human development, a program for the modernization of the democratic state, and strengthening and promoting participation. The rights of the indigenous and women were also highlighted as cross-cutting themes throughout the accords, in an attempt to reverse the historical exclusion of these groups.

WORLD BANK, *GUATEMALA: POVERTY IN GUATEMALA* iv (2003), [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/05/000094946\\_03032104003172/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/05/000094946_03032104003172/Rendered/PDF/multi0page.pdf).

83. Ivonne Solórzano, *Aliadas en Resistencia o Resistencia a las Alianzas? Un acercamiento al movimiento de mujeres en Guatemala*, at 13 (2006) (on file with author).

84. MacNabb & Cent. Am. Analysis Group, *supra* note 20, at 3 (noting there is an enduring split between ladina feminist and indigenous women working on gender equality issues and that indigenous women do not typically see themselves as feminists and tend more toward a humanist perspective).

were mirrored by Central American female parliamentarians who began to gather to exchange ideas and experiences.<sup>85</sup>

*D. Cosmopolitan Guatemaltecas*

1. Acting Within

The President of the Congress in Guatemala, Catalina Soberanis, was among the active participants in the gatherings of female Central American parliamentarians. She advocated for these meetings in order to study the advancement and the placement of women throughout Central America.<sup>86</sup> Soberanis requested that María Eugenia Morales Aceña de Sierra scrutinize the Guatemalan Civil Code for both explicit and implicit discrimination against women.<sup>87</sup> From this position, María Eugenia de Sierra stepped into the Office of the Ombudsman for Human Rights and initiated a constitutional case against the government of Guatemala, arguing that a number of the family provisions of the Civil Code were unconstitutional.<sup>88</sup> The Civil Code provisions she identified as violating the goal of gender equality ranged from the merely offensive to the tragically disempowering. Some of the most controversial are summarized below:

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85. See Ingrid Roldán Martínez, *María Eugenia de Sierra: Guardé Mis Pinceles, Pero Quiero Retomarlos*, SEMANARIO DE PRENSA LIBRE, Jan. 14, 2007, <http://www.prensalibre.com/pl/domingo/archivo/revistad/2007/enero07/140107/frente.shtml>.

86. See *id.*

87. See *id.* María Eugenia de Sierra became the first official Guatemalan Women's Rights Defender in 1990.

88. *María Eugenia Morales Aceña de Sierra contra Guatemala* (1993), Corte de Constitucionalidad—Guatemala—Gaceta Jurisprudencial No. 28, Expediente No. 84-92. Constitutional Case made available by Licenciado Fausto Garcia Delgadillo.

Article	Prior to Case
109	Government conferred on men the power to represent the marital unit
131	Government empowered the husband to administer marital property
110	Government conferred to the wife the "special obligation" of caring for minor children and the home
113	Government permitted married women the possibility of working outside the home if it didn't prejudice her role of mother and home-maker
114	Government conferred on men the right to oppose wife's activities if he provided for her and had justified reasons
255	Government conferred on the husband primary responsibility of representing children of the union
317	Government conferred on women, by virtue of sex, the special ability to be excused from exercising certain forms of guardianship <sup>89</sup>

In reviewing this case, the Guatemalan Constitutional Court cited judicial efficiency and Guatemalan cultural traditions and integrity as its reason for upholding these provisions.<sup>90</sup> Further, the Court focused on the strong protection that marriage as a social institution required in order to grant all Guatemalans equal opportunity.<sup>91</sup> The Court went on to emphasize the importance of matrimony, focusing on the legislator's role in forming the norms to protect the superior values of the family.<sup>92</sup> The Court clarified that it did not view the laws as discriminatory but, rather, protectionist, focusing on the interest and protection of children.<sup>93</sup> The Court explained that the provisions, viewed in context, exemplified the regulations of marriage and had no discriminatory intent. The Court additionally dismissed constitutional claims against some Civil Code provisions on the ground that those provisions merely granted favor to women.<sup>94</sup>

The very body charged with upholding the very well-drafted and seemingly clear provisions of the Constitution that declared that discrimination on the basis of sex is illegal, interpreted the Constitution to mean that women's equality was not to disrupt cultural tradition or judicial efficiency. Had there been no legal recourse to international bodies, the constitutional case would have ended with this ruling, subjecting women to a comprehensively submissive position within the family. In fact,

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89. CÓDIGO CIVIL arts. 109, 110, 113, 114, 115, 131, 133, 255, 317 (Guat.).

90. *María Eugenia Morales Aceña de Sierra contra Guatemala*, at 13–14.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

their situation might have been worse than it had been before the case by entrenching an extremely problematic interpretation of the equality provisions of the Constitution that envisioned as legitimate men's roles in prohibiting their wives from working and viewing this gender dynamic as consistent with prohibitions on gender discrimination.

Also significant, at the international level, is that without additional recourse, an adjudicatory body engaged in the process of determining CIL on questions of gender equality would have no option but to count this type of discrimination as evidence of a fairly weak interpretation of women's rights within Guatemala under a system in which only states count in custom formation. Without international recourse available to individuals, an international body such as the International Court of Justice or the Inter-American Commission, attempting to ascertain the content of CIL in respect to women's rights and gender equality would look exclusively at state sources regarding Guatemala's practices and *opinio juris*<sup>95</sup> in respect to gender equality and would conclude that Guatemala's contribution to any emerging CIL in respect to women's rights and gender equality would align in a virtual "ledger" with equally regressive states. However, as I will explain below, state practice (an essential component of state-centered CIL formation doctrine) does not always reflect the changing normative positions (or desires) of the population. Instead, states may maintain positions of power by way of violating recognized human rights provisions and/or in contravention of the desires of their people. My argument, here and elsewhere, is that in such cases the content of what individuals have come to believe are their legal rights should carry weight in front of adjudicatory bodies engaged in determining the content of CIL.

## 2. Acting Out

In this particular case, for example, María Eugenia de Sierra was able to challenge the Guatemalan Court's interpretation of the Constitution by mounting a petition before the Inter-American Commission on Human Rights, arguing that the Civil Code was in violation and in contravention of the American Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women and that the Guatemalan Court's disposition of the case demonstrated that domestic remedies for this violation had been exhausted.<sup>96</sup> Making use of this multi-tiered protection afforded by the existence of the Inter-American Commission and of the previous experience within Guatemala with transnational political activity, María Eugenia de Sierra attempted to force an interpretation of the Code that more closely reflected the beliefs and desires of Guatemalan women.

On October 1, 1998, the Inter-American Commission decided the case in María Eugenia de Sierra's favor. In making its recommendation, the Commission focused on María Eugenia's right to equal protection, as set out in Article 24 of the American Convention. The Commission then recognized that "differences in treatment in

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95. The traditional doctrine on CIL states that CIL is made up of state practice and *opinio juris* as determined through consultation with, among other things, judgments and opinions of national judicial tribunals. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) 1987.

96. Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01\*, OEA/Ser.L/V/II.111, doc. 20 (2001), available at <http://www.cidh.org/women/Guatemala11.625eng.htm>.



otherwise similar circumstances are not necessarily discriminatory” and that “[a] distinction which is based on ‘reasonable and objective criteria’ may serve a legitimate state interest in conformity with the terms of Article 24.”<sup>97</sup> However, the Commission did not find in favor of the State. Instead, while it recognized that the Constitutional Court of Guatemala had upheld the Civil Code provision as a matter of domestic law “essentially on the basis of the need for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacities as wives and mothers,” the Commission also noted that Guatemala had “made no effort to probe the validity of these assertions or to weight alternative positions.” As such, the Commission urged Guatemala to amend the relevant provisions of the Civil Code.

As a result, the Commission asked the State to take “legislative and other measures necessary to give effect to any right or freedom not already ensured as a matter of domestic law and practice”<sup>98</sup> by amending or repealing the offending provisions of the Civil Code “so as to bring national law into conformity with the norms of the American Convention and give full effect to the rights and freedoms guaranteed to María Eugenia Morales de Sierra therein.”<sup>99</sup> As a result, seven of the nine offending provisions of the Civil Code were removed or amended.<sup>100</sup> After the María Eugenia case, the Civil Code is more closely aligned with women’s rights and gender equality desires. And, since the Inter-American Commission’s decision stands in direct contradiction to the Guatemalan Court’s own interpretation of its Constitution, the effect of this case is that the Constitution has thus essentially been interpreted by the Inter-American Commission, in consultation with the Guatemalan Women’s Rights Defender, as prohibiting the kinds of formal and substantive discriminations previously found in the Civil Code.

The María Eugenia de Sierra case is an example of women’s ability to exit their national borders in order to demand that what their rights as citizens of the world – as cosmopolitan citizens – should be reflected within their national borders as well. The effects of this case are significant, not just for Guatemalan women, of course. The *María Eugenia* case will serve a quasi-precedential function for other States-party to the Inter-American Convention and, less directly, to any State and international body attempting to define the content and meaning of women’s rights and gender equality. The case and the Civil Code revisions that resulted from it also provide significantly different information than was previously available to any body attempting to discern Guatemala’s contribution to international custom on women’s rights and gender equality. This substantive difference now reflects individual women’s participation and engagement with the international legal system, rather than being merely a reflection of the predilections of the Guatemalan state, had it been left to revel in its own sovereignty.

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97. *Id.*

98. *Id.*

99. *Id.*

100. See CÓDIGO CIVIL (Guat.), available at <http://www.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnálisisDocumentacionJudicial/cds/2004/PDFs/Codigos/CODIGO%20CIVIL.pdf>.

## III. CONTINUED CAUSE FOR COSMOPOLITANISM

Irrespective of the improved interpretation of the Constitution and significant amendments in the Civil Code, it is important to keep in mind that what the Constitutional Court stated as its reasons for upholding the retrograde provisions of the Civil Code – that those provisions were in keeping with tradition – continues to have resonance in Guatemala. Guatemala is a traditionally family-oriented society and the organization of the traditional family ordinarily preferences men in significant ways. Where tradition and law were once in agreement on the fact that men held a dominant role in society and within the family before the *María Eugenia de Sierra* case, that tradition is no longer reflected in Guatemala's Civil Code and Constitution, due to relatively recent domestic and transnational activism reflecting evolving norms on this issue.

There are other, more recent, examples in which Guatemalan women's rooted cosmopolitanism has led to changes that are fundamentally altering the landscape of gender-based negotiated power. In 2005, very much as a result of massive mobilizations of women's organization with links to international organizations and transnational networks, women were successful in presenting and pressuring their Congress to pass legislation to strengthen contraceptive security in Guatemala. This initiative, the Universal and Equitable Access to Family Planning Services Law, requires the government to pay special attention to the monitoring and financing of contraceptive services.<sup>101</sup> Immediately after the introduction of the law in Congress, demonstrations broke out both to support and repress the passage of the law.

Representing tradition, the opposition to the law was headed by Marco Antonio Ramos (from the Evangelical Church), John de Salto (the president of the Association of Evangelical Ministers), the Family Christian Movement, the Catholic Church, headed by Cardinal Quezada Toruno, and others.<sup>102</sup> Their primary concern was that the law did not respect the Constitution, in particular Article 3, which references respect to the right to life, and Article 73 regarding family as the source for education.<sup>103</sup>

The traditional perspective, however, was not representative of the actual desires of the population. Women's groups, for example, took a different view. On Dec. 5, 2005, during the Rural Women's Encounter, more than seventy representatives demanded from President Oscar Berger that he approve the Family Planning Services Law. A survey conducted by "Prensa Libre," a leading Guatemalan newspaper, showed that out of the 600 people interviewed, ninety-six percent agreed that the Ministry of Health

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101. U.S. AGENCY FOR INT'L DEV., DELIVER PROJECT, STATE OF THE PRACTICE BRIEF: ENSURING A VOICE AND A CHOICE FOR THE WOMEN OF GUATEMALA 3 (2006), available at [http://www.usaid.gov/gt/docs/contraceptive\\_security.pdf](http://www.usaid.gov/gt/docs/contraceptive_security.pdf).

102. Ivonne Solórzano, *Movimiento de Mujeres Ante la Violencia, La Salud Sexual y Reproductiva, y los Efectos de la Tormenta Stan*, Facultad Latinoamericana de Ciencias Sociales, REVISTA ELECTRÓNICA SOCIAL SOCIEDAD CIVIL Y MOVIMIENTOS SOCIALES, available at <http://64.233.167.104/search?q=cache:kfQHIX8NWOMJ:www.flacso.edu.gt/revista/scivil/doc/s/Articulos/InformeMujeresFeb06.pdf+%22Movimiento+de+Mujeres+Ante+la+Violencia,+La+Salud+Sexual+y+Reproductiva,+y+los+Efectos+de+la+Tormenta%22&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a> (on file with the author).

103. *Id.*

should help or teach people about birth control.<sup>104</sup> In addition, 89.7% agreed that the Ministry should distribute condoms, pills, and other methods of contraception.<sup>105</sup>

Nonetheless the President vetoed the Family Planning Services Law on Dec. 6, 2005, but then failed to return it to the Legislature in time for his veto to take effect. As a result, the Constitutional Court held that the President's veto had lost its operative effect as a result of this failure.<sup>106</sup> This law, much like the reforms to the Civil Code, would clearly not have been passed without the wide-spread mobilization of women, inspired by contacts with transnational women's organizations. The Family Planning Services Law and the politics surrounding it serves as another instance in which the demands of a globalized and mobilized women's movement and the legal reforms they have successfully wrestled come into conflict with traditional Guatemalan gender relations.

Most currently, women in Guatemala have taken up the issue of violence against women, mirroring the attention given to this issue by the 1994 Bélem do Pará Convention, and the relatively recent attention given to the issue by the Inter-American Commission on Human Rights<sup>107</sup> and by the United Nations General Assembly, which recently released an in-depth study on all forms of violence against women.<sup>108</sup>

In the years following the adoption of the Bélem do Pará Convention, the rate of femicide in Guatemala has skyrocketed. Whether there is a causal relationship between Guatemala's adoption of Bélem do Pará and the increased cases of femicide or a relationship between the trifecta of Bélem do Pará, the María Eugenia de Sierra case, and the family planning law and the increase in femicide is uncertain. What is clear though is that the Bélem do Pará Convention, which is part of Guatemalan law, as a result of Article 46 of the Constitution, integrating human rights treaties,<sup>109</sup> has not brought any resolution to the problem. In the year 2000, six years after Bélem do Pará, only sixty women were classified as victims of femicide; by 2005 the number had reached 556.<sup>110</sup>

Once again, Guatemalan women called on international institutions to provide a stronger interpretation of constitutional protections than they were able to extract from

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104. Amafredo Castellanos, *Población apoya planificación*, PRENSA LIBRE, Dec. 5, 2005, <http://www.prensalibre.com/pl/2005/diciembre/05/129394.html>.

105. *Id.*

106. Constitutional Case made available by Licenciado Fausto Garcia Delgadillo. Corte de Constitucionalidad – Guatemala—Amparo en Única Instancia, Expediente No. 264-2006, Presidente de la República, ciudadano Oscar José Rafael Berger Perdomo v. Guatemala (May 18, 2006).

107. *See e.g.*, INTER-AM. COMM'N ON HUMAN RIGHTS, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS (2007), available at <http://www.cidh.org/women/Access07/tocaccess.htm>; INTER-AM. COMM'N ON HUMAN RIGHTS, VIOLENCE AND DISCRIMINATION AGAINST WOMEN IN THE ARMED CONFLICT IN COLOMBIA (2006), available at <http://www.cidh.org/countryrep/ColombiaMujeres06eng/Informe%20Colombia%20Mujeres%20Ing.pdf>.

108. The Secretary-General, *In-depth Study on All Forms of Violence Against Women*, U.N. Doc. A/61/122/Add.1 (July 6, 2006), available at <http://www.un.org/womenwatch/daw/documents/ga61.htm>.

109. *See supra* note 38.

110. Leida Jara, *Aumentan Asesinatos de Mujeres en Guatemala*, RED FEMINISTA, Jan. 18, 2006, <http://www.redfeminista.org/pnoticia.asp?id=3542>.

within Guatemala. The alarming increase in the femicide rate and the lack of satisfactory state action to address the problem led to a petition being presented to the Inter-American Commission of Human Rights through the case of *María Isabel Véliz Franco v. Guatemala*.<sup>111</sup> The allegations of the case include the government's inability to process the evidence encountered in the crime scene, judicial delays, and the inability to follow police evidentiary leads.<sup>112</sup> In particular, the Commission took into consideration the number of femicides that Guatemala has encountered from 2001–2004, totaling 1188 cases, of which only nine percent had been investigated before the Commission admitted the petition.<sup>113</sup>

The effects this case will have on Guatemalan law and on the physical security or insecurity of women will take a number of years to play out.<sup>114</sup> However, it serves as another example in which the prohibitions on sex-based discrimination and the guarantees to life and human dignity contained in the Guatemalan Constitution are being engaged and re-interpreted from above and from below.

By Nov. 14, 2006, it was established that the number of femicides had reached 2,796, with only a total of twenty cases resulting in sentencing.<sup>115</sup> In response to this statistic, which emerged from the proceedings before the Commission, women from twelve different organizations met in the Supreme Court of Justice to discuss the problems with investigations (or lack thereof) into women's assassinations.<sup>116</sup> As a result, women's organizations have asked the government to allocate more funding to the prevention and prosecution of the violence.<sup>117</sup> On Nov. 28, 2006, in response to mounting internal and international pressure, the President organized a plan against femicide.<sup>118</sup> The plan, the *Abordaje del Femicidio*, focuses on several particular areas – Investigation, Formation and Capacity-Building, Incidents, Lobbying and Communication – to sensitize the public about femicide and to prevent violence against women.<sup>119</sup> These governmental actions have resulted from the active role women have taken, within Guatemala and internationally, to redefine their Constitution and their state's orientation toward gender equality.

#### CONCLUSION

In the early parts of the twentieth century, women in the Americas, damaged by the often conflicting delineations of constitutions with respect to women and citizenship,

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111. *Véliz Franco v. Guatemala*, Petition 95-04, Inter-Am. C.H.R., Report No. 92/06 (Oct. 21, 2006) available at <http://www.cidh.org/annualrep/2006sp/Guatemala95.04sp.htm>.

112. *Id.*

113. *Id.*

114. The case has been declared "admissible" but has not yet run its full course. *Id.*

115. Lorena Seijo, *Prevalece Impunidad, Solo 20 Sentencias en Dos mil 796 Asesinatos de Mujeres*, PRENSA LIBRE, Nov. 14, 2006, <http://www.prensalibre.com/pl/2006/noviembre/14/156292.html>.

116. *Id.*

117. *Id.*

118. Presidente Guatemala Seguridad Nov. 28, 2006, *Presidentes Suscriben Compromiso de Implementar Una Estrategia Contra el Femicidio* (Nov. 28, 2006), available at <http://www.guatemala.gob.gt/noticia.php?codigo=204&tipo=1>.

119. *Id.*

advocated strongly for inalienable citizenship guarantees such that marriage or other changes in legal status could not result in finding oneself to be a citizen of no land.<sup>120</sup> The transnational connections formed between women in the Americas during this era, through their political advocacy for guarantees of national citizenship,<sup>121</sup> gave rise to a sensibility occasionally referred to at times as Pan-Americanism.<sup>122</sup>

The multi-tiered engagement of Guatemalan women with international law and organizations as well as with their domestic constitutional and statutory law, together with the local organizing and activism conveyed in largely descriptive fashion herein is indicative of the role individuals play in shaping law and challenging their state's position on particular human rights issues. Guatemalan women's engagement has resulted in fundamental challenges to long-held cultural traditions within Guatemala, just as it has resulted in legal change, both statutory and constitutional.

The role of international law and transnational networking in this domestic reform cannot be underestimated. But it would be a mistake to view the role of international law too simply – to see international law and transnational networking as *themselves* the source of change. This would lose sight of the individuals within Guatemala who have acted as active agents to wring new meaning in respect to gender equality from the Guatemalan legal system. To the extent that international law has operated to exert pressure from outside of Guatemala, it has been largely the result of the actions of women within Guatemala.

As I stated at the outset of this Article, CIL, composed as it is of state action and *opinio juris*, must (of course) take account of changes like those that Guatemala has undergone in respect to gender equality since the end of its civil war. While an argument may be made that the process of legal reform described herein demonstrates that states are a good proxy for the popular will, thus obviating the need for individuals to participate in the CIL formation process, I believe this view misses important insights.

Guatemala's legal reforms in respect to gender equality have developed in the short time since its civil war came to a close. This rapid pace of change indicates that the government of Guatemala before and during the civil war was reflective of some position other than that of actual democratic political will.<sup>123</sup> Examples like the one provided herein – in which state action and *opinio juris* fail to reflect the political will of the people in respect to the realization of human rights—abound, especially in failing democracies or in non-democratic states. Each serves as an example of the veiled but actual desires of individuals within non-democratic countries and within failing democracies that are not accounted for under the current doctrine on CIL

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120. See generally Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 545 (2001) (recounting various legal feminists' international work regarding women's rights and anticipating how this work will be continued in the future).

121. Inter-Am. Comm'n of Women, History of CIM: Women's Emancipation through Education, <http://www.oas.org/cim/English/History1.htm>.

122. Pan-Americanism arises, obviously, within the Americas. The phenomenon, however, is similar to that to the phenomenon of cosmopolitanism.

123. This, of course, is true of many of the past government's political positions, as should be obvious to anyone who considers that the government's failures resulted in an internal revolution.

formation and gives rise to significant concerns about the democratic legitimacy of CIL that fails to recognize the vital role of individuals in its formation.