
UNIVERSITY OF CONNECTICUT
1881

GUATEMALA ON TRIAL
RIOS MONTT GENOCIDE TRIAL: AN OBSERVER'S PERSPECTIVE

Sasha Maldonado Jordison[*]

Abstract

Guatemala was under the microscope. The charges were genocide and crimes against humanity. The events took place between March 23, 1982 and August 8, 1983, the death toll was in the thousands and other victims in the hundreds of thousands. The country had made its way into history. This was the first time that a former head of state was put on trial for genocide before a national tribunal. This Note provides a historical account of the country as well as a brief overview of the conflict that gave rise to the charges of genocide and crimes against humanity. More importantly, it gives an observer's perspective of the trial and the circumstances, both social and political, surrounding the trial. It will finally lead us to lessons learned.

[*] J.D University of Connecticut School of Law, expected 2015; LLM in US Legal Studies University of Connecticut School of Law 2009; Abogado & Notario, Licenciado en Ciencias Juridicas y Sociales (JD Equivalent) Universidad Francisco Marroquin 2007. This Note would not have been possible without the experience of growing up in Guatemala and the opportunity provided by the Thomas J. Dodd Research Center at the University of Connecticut to conduct trial monitoring in one of the most historic national proceedings: The Rios Montt genocide trial. Moreover, this Note is the result of years of support from family and friends. To Will, Mayra, Andre, Francisco and Diana… thank you.

CONNECTICUT JOURNAL of INTERNATIONAL LAW

TABLE OF CONTENTS

INTRODUCTION 55

I. THE FRAMEWORK 55
A. GENOCIDE AND CRIMES AGAINST HUMANITY 55
1. GENOCIDE 55
2. CRIMES AGAINST HUMANITY 59
3. UNIVERSAL JURISDICTION 60
B. GUATEMALA: GENOCIDE & CRIMES AGAINST HUMANITY 61

II. MUDDYING THE WATERS: AMNESTY 66

III. GUATEMALA: COUNTRY PROFILE 68
A. HISTORICAL ANTECEDENTS 68
1. THE RIOS MONTT DICTATORSHIP 68
B. THE CRIME 69
C. SEEKING JUSTICE: ATTEMPTS AT TRIALS 76

IV. DOMESTIC TRIAL 77
A. THE SYSTEM'S DRAWBACKS 83
1. AMPAROS: ARE THERE ANY LIMITS? 83
2. DUE PROCESS VIOLATIONS 86
3. AN INEXPERIENCED JUDICIARY 87
B. THE SOCIETAL SCHEME AND THE TRIAL'S IMPACT 88

CONCLUSION 89

INTRODUCTION

"*Guatemala Nunca Mas*" ("Guatemala Never More") was the chant heard outside the *Palacio de Justicia* on Friday May 17, 2013, but it was minute compared to the excitement inside the courtroom.

Since the day the tribunal declared the trial against General Efrain Rios Montt open, Guatemala was under the microscope. The charges were genocide and crimes against humanity. The events took place between March 23, 1982 and August 8, 1983, the death toll was in the thousands and other victims in the hundreds of thousands. The country had made its way into history. This was the first time that a former head of state was put on trial for genocide before a national tribunal.[1]

The trial presented a renewed opportunity for a tainted and undeveloped judiciary to play its role in uncovering both truth and justice related to one of the bloodiest conflicts in modern history, while at the same time gaining the population's respect and achieving the ever elusive independence required. It was commendable that the trial even took place at all, but as will be discussed, there were hurdles and shortcomings in every phase of the process, from the actors involved to questions with the stability of the rule of law. Moreover, the verdict was short lived: only 3 days after the 718-page verdict was issued, the Guatemalan Constitutional Court stepped in and annulled part of the proceeding and, in a contentious and divided ruling, set the trial back to an earlier stage of the process.

Given this ruling, the future still remains uncertain. Nonetheless, the accounts of victimization are part of the historical record that will hopefully help in the slow efforts of justice in Guatemala and in the international community.

This Note will give a historical account of the country as well as a brief overview of the conflict that gave rise to the charges of genocide and crimes against humanity. It will also provide an observer's perspective of the trial and the circumstances, both social and political, surrounding the trial. Lastly, it will touch upon the lessons learned from a process that may have been too much to handle for the judiciary and for the country in general.

I. THE FRAMEWORK

A. Genocide and Crimes Against Humanity

1. Genocide

The concept of genocide was very much a part of the international community before the drafting of the Convention for the Prevention and Punishment of the Crime of Genocide in 1948. Raphael Lemkin first used the term "genocide" in his 1944 book '*Axis Rule in Occupied Europe.*'[2] Although the word appears in the

1. Statement made by United Nations Human Rights High Commissioner, Navi Pillay to BBC Mundo, *available at* http://www.bbc.co.uk/mundo/ultimas_noticias/2013/03/130319_guatemala_rios_am.

2. New conceptions require new terms. By "genocide" we mean the destruction of a nation or of an ethnic group . . . Generally speaking, genocide does not necessarily mean the immediate destruction

drafting history of the Charter of the International Military Tribunal, the final text of that instrument uses the cognate term *crimes against humanity* to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities.[3] The term 'genocide' was occasionally used by prosecutors in submissions to the Nuremberg Tribunal, but the word "genocide" does not appear in the final judgment.[4]

In response to the refusal to adopt and use the term "genocide" in conjunction with the clear limitation of the scope of the offense of 'crimes against humanity' – to occur only during times of war - the international community took decisive steps through the United Nations' General Assembly. There were two main objectives: (a) a declaration that genocide was a crime that could be committed in peacetime as well as in time of war, and (b) the recognition that genocide was subject to universal jurisdiction (that is, the crime could be prosecuted by any state, even in the absence of a territorial or personal link to it or its citizens; no direct damage to the prosecuting state or to its citizens need be imputed).[5] These initial efforts culminated with the General Assembly adopting Resolution 96 (I) in 1946,[6] which affirmed that "genocide is a crime under international law which the civilized world condemns."[7] The Resolution did not address the question of whether genocide (or crimes against humanity for that matter) could be committed during peacetime, but it did mandate the drafting of a convention against genocide.[8]

The Convention for the Prevention and Punishment of the Crime of Genocide was adopted on December 9, 1948, but did not enter into force until January 12, 1953. The Convention cemented the existence and understanding of what genocide means, but it was not until the Rome Statute[9] was enacted that the temporal scope of the crime was clarified. The Statute expanded the Genocide Convention's definition of genocide and applied it to times of both war and peace.

The crime of genocide is defined in Article II of the Convention. It states:

---

of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - ANALYSIS OF GOVERNMENT - PROPOSALS FOR REDRESS, WASHINGTON, D.C. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 79-99 (1944).

3. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter London Charter].

4. William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008), http://legal.un.org/avl/ha/cppcg/cppcg.html; *see generally* The Nuremberg Tribunal, U.S. v. Goering, 6 F.R.F. 69 (Oct. 1, 1946).

5. *See infra* section iii.

6. G.A. Resolution 96 (I), U.N. Doc. A/RES/96U (Dec. 11, 1946).

7. *Id*.

8. *Id.*

9. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc A/CONF.183/9 [hereinafter Rome Statute].

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[10]

The crime can be narrowed down to an intentional crime of destruction, which also includes incitement, attempt or complicity to commit the crime.[11] Despite the acceptance among the international community and the simplicity of the language, the term has slowly cemented itself throughout time.[12] The passage of time has not radically changed the nature of the crime itself. Nonetheless, the Convention has been criticized for its limited scope, as it was strictly limited by the perpetrator's "intent to destroy in whole or in part," the characterization of the victim group, and the acts committed. But this was the result of global frustration with the inadequate reach of international law in dealing with mass atrocities,[13] such as Cambodia and Rwanda. As history has shown, this difficulty would be addressed not by expanding the definition of genocide or by amending the Convention, but rather by an evolution in the closely related concept of crimes against humanity in international human rights law. [14] Accordingly, the crime of genocide has been left alone, where it occupies a special place as "the crime of crimes."[15]

It is important that we spend a brief moment on the ancillary obligations that the Genocide Convention, and the institutions that enforce it, place on states. The International Criminal Court (the "ICC") found a robust concept by holding that within the meaning of Article I of the Genocide Convention, there is a duty of "due diligence" that is imposed upon the states.[16] Due diligence requires such reasonable measures of prevention as could be expected from governments under similar

---

10. Convention for the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

11. Article 3 also includes the following as acts punishable as constituting genocide: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Genocide Convention, *supra* note 10, at art. 3.

12. *See generally* Rome Statute, *supra* note 9; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 4, S.C. Res. 808, para. 2, U.N. Doc. S/RES/25704 (May 3, 1993) as amended by G.A. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000) [hereinafter ICTY Statute]; S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

13. *See* Schabas, *supra* note 4, at 4.

14. *Id*.

15. *Id*.

16. International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007.

circumstances. It is an obligation of conduct, not of result. This means that if the state took all reasonable measures within its power to prevent the interference, it will not be held responsible should the violation nonetheless occur.[17]

This duty was later recognized by the United Nation's General Assembly and the Security Council.[18] Only one year later, the General Assembly recognized another ancillary obligation – the duty to protect. This obligation imposes on the states the responsibility of protecting their citizens from any form of government-sponsored attack.[19]

The last ancillary obligation of the Genocide Convention is the requirement that states enact legislation to give effect to the Convention's provisions, and to ensure that effective penalties are provided.[20]

Janez Jansa[21] has correctly expressed the feelings of the international community by stating that

> [d]espite the classification of genocide as an illegal act, no direct action has been taken by the international community against acts of Genocide. Groups of people, communities and nations continue to suffer and die in circumstances that contravene both the letter of the law and the common intent of the Convention. In instances where it has been established that the act of genocide has occurred or is in process the response of the international community has been, at best, slow and weak and at worst, totally and utterly ineffective. Whilst the international community has developed mechanisms for prosecuting the perpetrators of genocide under the UN Human Rights Declaration, there remains little or no evidence that it is willing and able to prevent such acts from happening again.[22]

Before any analysis or commentary can be made about the situation in Guatemala it is important that we keep in mind other abhorrent crimes under international law.

---

17. Sheri P. Rosenberg, *Responsibility to Protect: A Framework for Prevention,* GLOBAL RESPONSIBILITY TO PROTECT 1, 453-54 (2009).

18. *Id*. at 4-5 ("[O]ne that extended even to acts committed outside of their own borders by entities over which their influence may extend. This obligation to prevent genocide dovetails nicely with the responsibility to protect, recognised in 2005 by the United Nations General Assembly and endorsed the following year by the Security Council.").

19. *See* S.C. Res. 1674, para. 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (responsibility to protect); G.A. Res. 60/1, para. 138-39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (responsibility to protect).

20. Genocide Convention, *supra* note 10, at art. V.

21. Former Prime Minister of Slovenia and Chairman of the ICD Initiative on the "Convention on the Prevention and Punishment of the Crime of Genocide."

22. Janez Jansa, Inter-Parliamentary Alliance for Human Rights and Globe Peace, The UN Genocide Project: Initiative Overview, *available at* http://www.ipahp.org/index.php?en_initiatives_the-un-genocide-convention.

2. Crimes Against Humanity

The term originated in the 1907 Hague Convention preamble,[23] which codified the customary law of armed conflict. This codification was based on existing state practices that derived from the values and principles deemed to constitute the "laws of humanity," as reflected throughout history in different cultures.[24]

The London Charter was the first instrument to establish the crime in international law. The Charter defines *crimes against humanity* as:

> [N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[25]

This definition is missing an important descriptor, which has come to be one of the central characteristics of the crime. The Rome Statute contains Article 7(1) which introduces the requirement that these crimes are to be committed as part of a widespread or systematic attack directed against any civilian population.[26]

Regardless of the fact that the London Charter is the only one that has set forth a definition of the crime, the category has been adopted in at least four other instances with some minor modifications.[27]

Some within the international community believe that crimes against humanity can, in some cases, be just as serious as genocide.[28] There has been debate as to whether to characterize certain acts as genocide or crimes against humanity based on the legal definitions of both.[29] Indeed, crimes against humanity was the label

---

23. Laws of War: Laws and Customs of War on Land (Hague IV); Preamble, October 18, 1907, Yale Law School, The Avalon Project, *available at* http://avalon.law.yale.edu/20th_century/hague04.asp.

24. M. Cherif Bassiouni , *Crimes Against Humanity*, Crimes of War, *available at* http://www.crimesofwar.org/a-z-guide/crimes-against-humanity/#sthash.sqhuX7SQ.dpuf.

25. London Charter, *supra* note 3, at art. 6 (c).

26. Rome Statute, *supra* note 9, at art. 7(1).

27. *See* ICTY Statute, *supra* note 12, at art. 5; *id.* at art. 3; S.C. Res. 1315, art. 2 (Aug. 14, 2000) [hereinafter Special Court Statute]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, art. 5, NS/RKM/0801/12 (Jan. 2, 2001).

28. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General pursuant to S.C. Res. 1564, U.N. Doc. (Sept.18, 2004) (Jan. 25, 2005).

29. *See generally* Robert Coalson, *What's the Difference Between 'Crimes Against Humanity' and 'Genocide?*, ATLANTIC (Mar. 19, 2013), *available at*

attached to the Nazi atrocities at the Nuremberg trials, and it remains one of the "most serious crimes of concern to the international community as a whole."[30] Nevertheless, the more popular understanding tends to merge both 'genocide' and 'crimes against humanity' into one larger concept that entails indescribable atrocities.

Whether we are talking about genocide or crimes against humanity, we are describing a series of inhumane acts that are criminally punishable, both nationally and internationally. This idea is clearly reflected in the Genocide Convention.[31]

3. Universal Jurisdiction

Article VI of the Genocide Convention lays the framework for the contemporary understanding of 'universal jurisdiction:'

> Persons charged with genocide or any of the other acts enumerated . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[32]

The concept of universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state that has decided to exercise jurisdiction.[33] A competent and ordinary judicial body of any state can exercise universal jurisdiction.[34]

The prosecutions of these crimes are justified because they are considered crimes against all mankind, too serious to be limited by jurisdictional issues and state sovereignty, and so universally condemned that every state is authorized to vindicate the rights of the community.[35] Despite the critiques endured,[36] supporters

---

http://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/2/.

30. Rome Statute, *supra* note 9, at Preamble.

31. Genocide Convention, *supra* note 10, at art. I ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."); *id.* at art V ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.").

32. Genocide Convention, *supra* note 10, at art. VI.

33. PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON PROJECT ON UNIVERSAL JURISDICTION, Principle 1 (2001).

34. *Id.*

35. Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?* 862 INT'L REVIEW OF THE RED CROSS 377 (2006), *available at* https://www.icrc.org/eng/assets/files/other/irrc_862_philippe.pdf.

36. *See generally* Kenneth Roth, *The Case for Universal Jurisdiction*, GLOBAL POLICY FORUM, *available at* https://www.globalpolicy.org/component/content/article/163/28202.html (discussing how

of universal jurisdiction have found solace by invoking customary international law. [37] There are others, of course, that oppose the concept of universal jurisdiction.[38] Regardless of the doctrinal and legal discourse in favor or against, the text of the Convention clearly states that jurisdiction will belong to a competent tribunal of the state in which the act occurred – requiring a territorial link. So, the General Assembly quite explicitly rejected universal jurisdiction for the crime.[39]

Given the obligations acquired by ratifying the Genocide Convention, states have accordingly enacted the relevant texts of the Convention within their own penal codes,[40] whereas others have deemed that the underlying crimes of murder and assault were already adequately addressed so that perpetrators of genocide committed on their own territory would not escape accountability.[41]

Given the different positions a ratifying state can take, this paper will next explore which position Guatemala has embraced.

B. Guatemala: Genocide & Crimes Against Humanity

Guatemala signed the Genocide Convention on June 2, 1949, and ratified it only six months later, on January 13, 1950, without any declarations, understandings or reservations. [42] Ratification grants states the necessary time frame to seek the required approval for the treaty at the domestic level and to enact the necessary legislation to give domestic effect to that treaty.[43]

Having ratified the document, Guatemala was obligated to comply with all ancillary obligations including the obligation to enact legislation to give effect to the provisions of the Genocide Convention. Despite Guatemala's early support, the treaty provisions were not incorporated into domestic law until 1973, when the latest version of the Penal Code was enacted.[44] Guatemala decided not to make

---

former Secretary of State Henry Kissinger catalogued a list of grievances raised by acceptance of the principle of universal jurisdiction).

37. "Little more than a decade after article VI was adopted, the Israeli courts dismissed Adolf Eichmann's claim that the provision was an obstacle to the exercise of universal jurisdiction over genocide. It was held that despite the terms of the Convention, exercise of universal jurisdiction was authorized (sic.) by customary international law." Shabas, *supra* note 4.

38. Lord Browne-Wilkinson believed issues of sovereign immunity and consent would arise if universal jurisdiction was accepted without caveats and that more damage than good would be done. Stephen Macedo, *Introduction* in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 6 (2004) (citing Letter to William J. Butler, Commentary to the Princeton Principles); *see generally* Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFFAIRS (July/Aug. 2001).

39. The General Assembly, Report of the Sixth Committee of the General Assembly, *Genocide: Draft convention and Report of the Economic and Social Council*, G.A. Res. A/760/Corr.2 (Dec. 3, 1948).

40. *See e.g.* Codigo Penal, Ley 599 de 2000, arts. 101-02 (2000)(Col). For a complete list, *see* The Crime of Genocide in Domestic Laws and Penal Codes, PREVENT GENOCIDE INTERNATIONAL, *available at* http://preventgenocide.org/law/domestic/.

41. Schabas, *supra* note 4, at 3.

42. Genocide Convention, *supra* note 10, at 305.

43. Vienna Convention on the Law of Treaties, arts. 2(1)(b), 14(1), 16, May 23, 1969, 1155 U.N.T.S 331[hereinafter Vienna Convention].

44. CODIGO PENAL, art. 376 (Gua).

any reference to genocide among its Constitutional provisions[45] or to create a constitutional mandate; rather it became part of ordinary domestic law.

Article 376 of Guatemala's Penal Code codifies and defines the crime of genocide as a crime of international transcendence.[46] The terms of article 376 are almost identical to those in the Genocide Convention. The crime of genocide is defined as:

> A person shall be punishable with the crime of genocide, if any act is committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The acts are: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group or sterilization; and (e) Forcibly transferring children of the group to another group.[47]

The penalty can range from 30 to 50 years in prison.[48]

In addition to the crime of genocide, Guatemala included what is in essence, crimes against humanity in its domestic legislation. Article 378 defines this particular kind of crimes against humanity[49] as those crimes committed by:

> Any person who infringes upon humanitarian duties, laws or treaties regarding prisoners or hostages of war, wounded in armed conflict or commits any inhumane act against the civil population or against hospitals or any place destined for the care of the wounded shall be punished with a term of imprisonment ranging between twenty and thirty years.[50]

The definition under Guatemalan law is much more vague than the language contained in the Charter for the International Military Tribunal.[51] It appears that Guatemala embraced a variant of duties during times of war rather than the crime as defined by the ICC. The International Criminal Court has defined crimes against humanity to include any act committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[52] Among those 'acts' are murder, extermination, torture, rape, forced sterilization, and forced

45. The Guatemalan Constitution does not contain any reference to the crime.
46. CODIGO PENAL, *supra* note 44 (de trascendencia internacional).
47. *Id.* at art. 376.
48 *Id.*
49. *Id.* at art. 378 (which translates as crimes against humanity's duties).
50. *Id.*
51. London Charter, *supra* note 3, at art. 6(c).
52. Rome Statute, *supra* note 9, at art. 7.

disappearance.[53] Guatemala decided that the crimes of torture and enforced disappearance deserved to be separately identified in the Penal Code.[54]

When the Penal Code was amended to include genocide and crimes against humanity, Guatemala's Constitution, which was enacted in 1965, did not contain a provision that recognized the importance of international law. In 1985, a new Guatemalan Constitution was enacted. The key change and the one that interests our discussion, was the inclusion of Article 46, which establishes a general principle that when it comes to issues of human rights, accepted and ratified treaties and conventions shall have precedence over domestic law.[55]

Even though the recognition of such a principle is praiseworthy, it raises the academic and practical question of interpretation and implementation. Does this mean that all human rights treaties (and ancillary obligations) shall prevail over domestic law? Or are they to be considered as the 'Supreme Law of the Land?'[56]

The answer to these questions depends on the approach Guatemalan courts take in regards to accepting a monist or a dualist approach to international law. Is Guatemala a monist, a dualist or some sort of hybrid (like the United States)? Moreover, the modern drafters of constitutions face this issue when drafting new constitutions or amending current ones. They need to ask themselves two main questions: whether international law must be incorporated into domestic law and, if incorporated, how to rank it within the domestic legal order.[57] The answers will mostly become clear when one of the three models is embraced and followed.

In principle, most scholars agree that specific constitutional rules regulate the relationship between treaties and domestic law.[58] On the other hand, some argue that international legal precepts, and international law in general, should always

---

53. The acts the International Criminal Court considers to be a part of Crimes against humanity are: include murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury. *What are Crimes Against Humanity?* INT'L CRIM. CT., *available at* http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx.

54. *See generally* CODIGO PENAL, *supra* note 44, at art. 201 BIS.

55. CONSTITUCION POLITICA DE LA REPUBLICA DE GUATEMALA, art. 46 (1985) (GUA) [hereinafter GUATEMALAN CONSTITUTION].

56. U.S. CONST. art. VI, cl. 2. The United States has dealt with this issue in an interesting manner: "The Supremacy Clause gives treaties a domestic judicial sanction that they would otherwise lack. It makes treaties enforceable in the courts in the same circumstances as the other two categories of norms specified in the clause — federal statutes and the Constitution itself. The sole exception to this rule is for treaties that are non-self-executing in the sense contemplated by the Court in Foster v. Neilson. The concept of a non-self-executing treaty fits uneasily with the Supremacy Clause, as reflected in the common but untenable view that non-self-executing treaties lack the force of domestic law." Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties,* 122 HARV. L. REV. 599, 600 (2008-2009).

57. Fisnik Korenica & Dren Doli, *Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice*, 24 PACE INT'L L. REV. 92, 93 (2012).

58. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 68-70 (7th ed. 1997).

take precedence in regards to the regulation of the relationship between the two orders.[59] "In general, the question revolves around two issues: whether international law and domestic law should be part of a single system of law or whether international law and domestic law should be independent of one another."[60]

Under the precepts of the monistic doctrine, international law and national law always come together to form a single legal system.[61] In monist models, a ratified international treaty forms part of the domestic legal order and is directly incorporated, and often directly applied, at the national level.[62] In a monist system, as described by Hans Kelsen,[63] the different norms find their foundation in a superior norm. The validity of these norms (or laws) is echeloned in accordance with this superior norm. The superior norm is found at the top of the Kelsenian pyramid and it ensures the unity and coherence of the entire juridical system.[64] The superior norm is the state constitution.[65] If following the monist theory, then an additional problem arises: the need of identifying the 'superior norm' – will the superior norm be the domestic law (the constitution) or international law.[66]

By contrast a dualist doctrine views international and domestic law as two independent legal orders. "Dualist models of the relationship between international law and domestic law propose that a treaty takes effect internationally after being signed by the head of state, but in order for it to have sway over domestic legal affairs, the treaty's text must be adopted through a law of parliament."[67]

To determine which doctrine the Guatemalan Constitution reflects, we must first and foremost seek guidance in the text of the Constitution itself. Article 149 establishes that the State's international relations shall be in accordance with international principles, rules and practices in order to achieve a mutual benefit and to guarantee the respect of human rights.[68] Furthermore, different branches of government have different obligations; Article 186 places the duty on the President to call upon Congress for the approval of all international treaties before they are ratified.[69] However, Congress has the duty to approve certain types of treaties.[70]

---

59. A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist Versus Dualist Controversies*, 12 EUR. J. INT'L L. 309, 311 (2001) (arguing that the regulation of the relationship between international and domestic law must rest with the former).

60. Korenica & Doli, *supra* note 57, at 94.

61. *See generally* MALANCZUK, *supra* note 58.

62. *See generally* TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 33-40 (6th ed. 1998); *see* Francois Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT'L L. 325 (1998).

63. Jurist, philosopher and politician. His most important work regarding the nature and structure of the law was LA TEORÍA PURA DEL DERECHO (1982).

64. Rodolfo Rohrmoser Valdeavellano, *Aplicación del Derecho Internacional de Derechos Humanos en el Ambito Interno Guatemalteco, in* ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 261, 261 (ed. 2001).

65. Jose Emilio Rolando Ordonez, *Geometria y Derecho*, BIBLIOTECA JURÍDICA VIRTUAL DEL INSTITUTO DE INVESTIGACIONES JURÍDICAS DE LA UNAM, 609, 612 (2013).

66. Valdeavellano, *supra* note 64.

67. Korenica & Doli, *supra* note 57, at 94.

68. GUATEMALAN CONSTITUTION, *supra* note 55, at art. 149.

69. *Id.* at art. 186.

70. *Id.* at arts. 183, 171.

In conjunction with the authority above, Article 46[71] of the Guatemalan Constitution is subject to interpretation: where do treaties stand *vis a vis* the Constitution? The Constitutional Court has held[72] that, following the canon for constitutional interpretation by which the Constitution is to be read as a whole, an interpretation that harmonizes provisions is preferred. The fact that the Constitution recognized predominance of international law over domestic law is only recognition of the importance and development in the realm of human rights. The treaty must be incorporated into domestic law as a constitutional norm that is in harmony with the constitution; it may not change or void the Constitution.[73] If Guatemalan courts are in search of additional guidance for the interpretation of international human rights provisions and international law, then the decisions of other international tribunals can be cited but not as a source of law, only as an indication that certain principles have been recognized in international law.

Usually international courts, such as the International Court of Justice, will invoke previous case law and will not refer to domestic case law to support their decisions.[74] But this doesn't seem to solve the conflict.

The Guatemalan Supreme Court has also weighed in and reached a similar conclusion to that of the Constitutional Court. In *Organizaciones Politicas v. Tribunal Supremo Electoral*, it held that human rights treaties were incorporated and were superior to domestic norms, including the Constitution itself.[75]

There should be little doubt as to the treatment and relevance of human rights laws within the Guatemalan domestic system, except for the fact that the Constitution itself, in Article 204, sets forth a caveat: it instructs all national courts and tribunals to follow the principle that the Constitution is superior to any law or treaty when deciding or resolving an issue.[76] The Constitutional Court has not addressed the issue directly, but some members of the Court see the two precepts are compatible; Article 46 is an exception to the general rule set forth in Article 204.[77]

There is still an element of uncertainty as to which is the 'correct' approach to the incorporation of international law in Guatemala. The existence of two supranational courts that have narrowly dealt with the issue leave open the ability to make arguments for either. Moreover, it is important to keep in mind that Guatemala, like many other civil law tradition countries, does follow the rule of *stare decisis*. There is no mandatory precedent. Consequently, every time the issue

---

71. Remember that Article 46 establishes a general principle that when it comes to issues of human rights, accepted and ratified treaties and conventions shall have precedence over domestic law. GUATEMALAN CONSTITUTION, *supra* note 55.

72. Corte de Constitutcionalidad, Expediente 280-90, Apelacion Sentencia de Amparo, 18 Gaceta Jurisprudencial (Oct. 19, 1990) reiterado Corte de Constitucionalidad, Expediente 199-95, Opinion Consultiva, 37 Gaceta Jurisprudencial (May 18, 1995) (Gua.).

73. *Id*.

74. Rome Statute, *supra* note 9, at art. 38.

75. Corte Suprema de Justicia, Expediente 71-90 Sentencia de Amparo (Oct. 12, 1990) (Gua.).

76. GUATEMALAN CONSTITUTION, *supra* note 55, at art. 204.

77. Valdeavellano, *supra* note 64, at 265. An exception may also be found in Law of Amparo, Habeas Corpus, and Constitutionality, arts. 3, 114, Decreto-Ley 1-86 (1986)(Gua.) [hereinafter Law of Amparo].

is presented to either court, conflicting decisions can be rendered and will be binding for the case at hand.

II. MUDDYING THE WATERS: AMNESTY

The Rios Montt trial already faced a complicated and rather unexplored and unresolved landscape. But an issue that was greatly debated was the definition of amnesty and its applicability to prosecutions for genocide.

First, we must not confuse amnesty with the notion of sovereign immunity. Briefly, sovereign immunity is a legal doctrine by which the state cannot commit a legal wrong and is therefore immune from civil suit or criminal prosecution from another foreign state.[78] This immunity extends to heads of state in the present day.[79]

Unlike sovereign immunity, amnesty can take many different forms. "[I]n its simplest terms, amnesty is a legal act, which provides [the beneficiary] immunity from future legal suit for some past action."[80] Although there are some common characteristics to amnesties, they can also be as varied as the human condition.[81]

The use of amnesties has been quite common, especially in the context of civil wars. The purpose was not only to provide immunity from legal liability, but also to try to promote a forgetting, an oblivion, so that thoughts of revenge or reprisal would not reopen the conflict.[82] That is why phrases such as "both sides shall grant a general amnesty and totally wipe from their memory . . . [the acts of conflict]" have been commonly used when negotiating an end to these conflicts.[83]

There have been discussions among academics and international tribunals about whether international courts or other bodies are in any circumstances bound by any or all amnesties negotiated.[84] When deciding on the applicability of amnesties, their effects need to be taken into consideration. It appears to be settled that "amnesty laws which have the effect of erasing crimes of the utmost gravity are incompatible with international humanitarian law, and that the legal consequences of any such amnesty fall under the general doctrine of violation of human rights."[85] Moreover, providing such amnesties to perpetrators of these atrocious crimes is contrary to the legal obligations of states under international law.[86]

---

78. RALPH G. STEINHARDT, PAUL L. HOFFMAN & CHRISTOPHER N. CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYERING 219 (2009) (citing Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte, 1 A.C. 147 (2000)).

79. *Id.* at 219 ("[T]he head of state is entitled to the same immunity as the state itself . . . such immunity is said to be granted *ratione personae*.").

80. Roderick O'Brien, *Amnesty and International Law*, 74 NORDIC J. INT'L L. 261, 262 (2005).

81. *See generally id.* (detailing the common and variable characteristics of amnesty).

82. O'Brien, *supra* note 80, at 264.

83. *Id.* at 264-65.

84. Yasmin Naqvi, *Amnesty for War Crimes: Defining the Limits of International Recognition*, 851 INT'L REV. RED CROSS 583 (2003).

85. William Bourdon, *Amnesty,* CRIMES WAR EDUC. PROJECT (Francis Hodgson trans., 2011) *available at* http://www.crimesofwar.org/a-z-guide/amnesty/.

86. *See* Genocide Convention, *supra* note 10, at arts. IV-VI.

The discussion about whether amnesty should be followed or declared inapplicable arises most commonly in the context of transitional justice; especially when addressing the state's obligations to investigate and criminally prosecute the perpetrator(s) and the victim's right to reparation. International tribunals and international human rights monitoring bodies would support this incompatibility of amnesty and the international obligations states have.[87]

Agreements in which amnesties are provided are frowned upon if the purpose is to provide for immunity rather than to achieve reintegration of the perpetrators into society.[88] The right to justice of the victims is absolutely dependent, from an international legal point of view, on criminal prosecutions and punishment. If amnesty provisions are allowed and enforced then the victim's rights would cease to exist.[89]

Despite the 'academic' controversy, amnesty laws do not seem to be prohibited under general international law.[90] Article 6(5) of the 1977 Additional Protocol II to the 1949 Geneva Conventions, relating to internal armed conflicts, provides:

> At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[91]

However, the practice has been to exercise jurisdiction without necessarily deciding upon the validity of the amnesty agreement.[92] This suggests that justice

---

87. Comm. on Human Rights, 44th Sess., U.N. DOC. HRI/GEN/1/REV.9 (Mar. 10, 1992) (stating that Amnesties are generally incompatible with the duty of States to investigate); *see also* Comm. on Human Rights, U.N. DOC. E/CN.4/2005/102, 61st Sess., (Feb. 18, 2005) (prepared by Diane Orentlicher) [hereinafter *Promotion and Protection of Human Rights*].

88. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General,* ¶¶ 10, 32, U.N. Doc. S/2004/616 (Aug. 23, 2004) (declaring that the United Nations-endorsed peace agreements can "never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights," and that . . . "carefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although …these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.") [hereinafter *The Rule of Law and Transitional Justice*].

89. *Id.* at ¶¶ 5-7 (linking accountability, rights of the victims, rule of law and transitional justice to judicial mechanisms). On the concept of transitional justice *see generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (Oxford University Press 2000).

90. Although such a prohibition may be a developing norm of international law, its existence remains yet uncertain; *see* ANTONIO CASESSE ET AL., INTERNATIONAL CRIMINAL LAW 315 (Oxford University Press, 3d ed. 2003*)*; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507, 521-22 (1999).

91. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(5), June 8, 1977, 1125 U.N.T.S. 17513; O'Brien, *supra* note 80, at 265.

92. Prosecutor v. Anton Furundzija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) *citing* Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) ("National measures authorising or condoning torture or absolving its perpetrators through an amnesty law . . . would not be accorded international legal recognition. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible . . . whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of

may be reached through alternative means and that lack of prosecution is not equivalent to impunity.[93]

III. GUATEMALA: COUNTRY PROFILE

In late January 2012,[94] Guatemala joined a growing list of countries that have conducted genocide trials in domestic courts under the governance of domestic law.[95] Even though the international community applauds these efforts, there are harsh realities that these countries must face during and after these criminal trials, including social and ethnic divides, "young" and developing notions of the rule of law, transitional justice, and cultures of corruption. These realities have additional complexities that come from the fact that society's and individual's scars are not entirely healed and that the international community's intervention, although good intentioned, may come in too strong.

A. Historical Antecedents

1. The Rios Montt Dictatorship

Guatemala's political history is filled with *golpes de estado* (coups) and *de facto* military regimes, intermingled with 'democratic' elections. This is not a historical paper, but an overview of the politics of the time seems necessary and will prove beneficial to the reader.

In the late 1940's and mid-1950's, Guatemala held several democratic elections without much conflict. Both elected Presidents, Juan José Arévalo[96] and

---

possible national authorization (sic) by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle."); *see also* Case Concerning Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002, I.C.J. ¶ 61 (Feb. 14).

93. As pointed out by Michael P. Scharf, "It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress […] these [non-judicial accountability] mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment, and rehabilitation" and "in many situations they may be better suited to achieving the aims of justice". Scharf, *supra* note 90, at 512; *see also The Rule of Law and Transitional Justice*, *supra* note 88, ¶ 8 (confirming that transitional justice "may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.").

94. On Thursday, January 26, Judge Flores determined that there was enough evidence and information to place General Efrain Rios Montt on trial for genocide and crimes against humanity. Alberto Nájar*, Rios Montt va a juicio por genocidion 30 años despues*, BBC MUNDO (Jan. 27, 2012), http://www.bbc.co.uk/mundo/noticias/2012/01/120127_rios_montt_juicio_guatemala_an.shtml.

95. "Rwanda's national courts [have] prosecute[d] those accused of planning the genocide or of committing serious atrocities, including rape. By mid-2006, the national courts had tried approximately 10,000 genocide suspects." Twenty-two of those tried were convicted and executed before the death penalty was abolished. Outreach Programme on the Rwanda Genocide and the United Nations, *The Justice and Reconciliation Process in Rwanda*, U.N. DEPT. OF PUBLIC INFORMATION (Apr. 2013), http://www.un.org/en/preventgenocide/rwanda/pdf/Backgrounder%20Justice%202013.pdf.

96. Arévalo was the Guatemalan President from 1945 to 1951. He was considered the "founding father of modem Guatemala" and set up a social security system and more progressive labor laws, and believed that Guatemala was capable of modernizing. Tim Golden, *Juan Jose Arevalo is Dead at 86, Guatemalan President in Late 40s,* N.Y. TIMES, Oct. 8, 1990, at D10; *see also* STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 131 (2006).

Jacobo Árbenz Guzmán were heavily supported by the majority of the population, including teachers, agricultural laborers and state employees. Árbenz's term is remembered by the passing of the *Ley de Reforma Agraria* (Agrarian Reform Law).[97] He was accused of supporting communists because his policies promoted the notion that Guatemalan jobs and production should be given to Guatemalans first. In this instance, his nationalism was "confused" with communism.[98] "[H]is mistake had been to promote land reforms by expropriating (with compensation) significant acreage of the American-owned United Fruit Company."[99] Árbenz's plan and policies ultimately backfired. Instead of achieving Guatemalan self-reliance, Árbenz's plan helped instigate internal conflict. The sentiments of unrest lingered. The pervasive anti-communist sentiments in the United States[100] and their "well-founded fears of an invasion from Cuba"[101] played an important role in the inception of the conflict.

It took many years, and many other events, for the conflict to enter into full confrontation.[102] November 13, 1960, is the date in which the conflict is said to have begun, but it was not until 1963, with the uprising and creation of the Revolutionary Movement (MR13), that the genesis of the internal conflict arose.[103]

B. The Crime

The Guatemalan civil war lasted thirty-six years,[104] during which General Efraín Ríos Montt was in power for two years.[105] It is critical to note that Montt's

---

97. Ley de Reforma Agraria, Decreto 900 (1952)(Gua).

98. Sasha Maldonado Jordison, *The Central American Court of Justice: Yesterday, Today and Tomorrow?*, 25 CONN. J. INT'L L. 183, 210 (2009).

99. In addition, "the CIA intervened, this time in Guatemala in an effort to help rebels overthrow Colonel Jacobo Arbenz Guzman." JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1972, at 285 (1996).

100. *See, e.g.,* WENDY WALL, ANTI-COMMUNISM IN THE 1950'S, GILDER LEHRMAN INST. OF AM. HISTORY (2009), *available at* http://www.gilderlehrman.org/history-byera/fifties/essays/anti-communism-1950s (In the "early 1950s, American fears of internal communist subversion reached a nearly hysterical pitch. Government loyalty boards investigated millions of federal employees, asking what books and magazines they read, what unions and civic organizations they belonged to, and whether they went to church …. Between the late 1940s and the early 1960s, school systems, universities, movie studios, social welfare agencies, ports, companies with defense contracts, and many other employers used background checks, loyalty oaths, and other means to weed out employees deemed politically undesirable.").

101. Pablo Monsanto, *Surgimiento del Conflicto Armado*, ALBEDRIO, (Nov. 2009), *available at* http://www.cedema.org/uploads/PabloMonsanto-001.pdf.

102. *See generally* Javier De Leon, *El 13 de Noviembre sigue vigente en Guatemala*, INCIDENCIA DEMOCRATICA (Nov. 13 2009), *available at* http://www.i-dem.org/?p=24965.

103. Monsanto, *supra* note 101, at 6 (the Revolutionary Movement has executed the leader of the Judicial Police and takes a military post, also killing the post Commander. At this point the government recognizes that rebels came in contact with state military forces and that there have been casualties). For a detailed description of event that took place and shaped Guatemala's internal conflict *see* FRANCISCO VILLAGRÁN KRAMER, BIOGRAFÍA POLÍTICA DE GUATEMALA, Vol. 1, (2d ed.1993).

104. *Acuerdo de paz firme y duradera,* CONGRESO DE LA PEPUBLICA DE GUAT. (Dec. 29, 1996); *see* G.A. Res. 50/132, para.10, U.N. Doc. A/RES/50/132 (Feb. 12, 1996); *see also* GUSTAVO PORRAS CASTEJON, GUATEMALA: DIEZ AÑOS DESPUES DE LOS ACUERDOS DE PAZ FIRME Y DURADERA (2008).

105. His Presidency was obtained through a military coup against then President Romeo Lucas García. He was named as a defendant by Rigoberta Menchú, Recipient of Nobel Peace Prize in 1992, for

regime was described as one being defined by death squads, disappearances, torture and blood.[106]

The Montt dictatorship (1982-1983) can only be characterized by a series of human rights violations.[107] It was a regime that was focused on the elimination of the 'internal enemy.' [108] That internal enemy was any individual that the government determined was undesirable.[109] Among the most notable and nefarious strategies and policies implemented are the Courts of Special Jurisdiction, the use of Civil Defense Patrols and civic action programs focused on battling the insurgency.

The Law of Courts of Special Jurisdiction[110] (*Tribunales de Fuero Especial*) imposed the death penalty by shooting, in outrageously summarized processes for the crimes of: kidnapping or abduction; aggravated arson; deactivation of defense; fabrication or possession of explosives; rail disaster; attempting against means of transportation; attempting against the security of public services; piracy; air piracy; poisoning of water or food or medicine; betrayal; attempting against the State's independence of integrity; forced betrayal; genocide; terrorism; deposits of weapons or ammunition; and explosives traffic.[111] Unknown officials, civil or military, whom judged and sentenced more than 500 individuals, directed these courts. The process was drastic and swift and these tribunals were parallel to those in the Judicial branch. The offense was affecting the juridical, political, economic and social institutions.[112]

"That is how the creation of a repressive and counterinsurgent State was accentuated, militarizing without any kind of weights and counterweights balance; but with an omniscient power from the head of State."[113]

Another unique characteristic of the Rios Montt regime were the Civil Defense Patrols – '*Patrullas de Autodefensa Civil*' (PAC). Although not originally established by Rios Montt, but by his predecessor Lucas Garcia,[114] they were a

---

the violent attack against the Spanish Embassy in 1980. *See* Paola Hurtado, *Lo que Solo Lucas García pudo Olvidar*, EL PERIÓDICO (Jan. 10, 2013), http://www.elperiodico.com.gt/es//pais/28239

106. *See* Olga Lopez, *MP Insta a Ordenar a Ministerio de Defensa Entrega de Planes Militares*, PRENSA LIBRE (Mar. 4 2009), http://www.prensalibre.com/pl/2009/marzo/04/299193.html.

107. *See generally* 8 ANN. HUM. RTS. REP, 577 (1983) [hereinafter Human Rights Report]. The categories of violations can be appropriately grouped as: violations against life, against physical and psychological integrity, against personal safety and against personal liberty; *see also* REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE ¶ 108-22 (United States Institute of Peace) (Feb. 25, 1999) [hereinafter GUATEMALA: MEMORY OF SILENCE].

108. Lucrecia Molina Theissen, *Si tú estás con nosotros, te alimentaremos; si estás en contra nuestra, te mataremos,* CARTAS A MARCO ANTONIO (Jan. 28, 2012), http://cartasamarcoantonio.blogspot.com/2012/01/si-tu-estas-con-nosotros-te.html.

109. *Id*.

110. Ley de Tribunales de Fuero Especial, Decreto Ley 46-82 (1982)(Gua).

111. *Id*. at arts. 3, 4.

112. Oswaldo J. Hernandez, *La Justicia fue de los Generales*, PLAZA PUBLICA (Mar. 7, 2013) *available at* http://www.plazapublica.com.gt/content/la-justicia-que-fue-de-los-generales

113. Edwin Jahir Dabroy, *The Foundational Moment of Guatemala's Contemporary State: The Transitional Road to Democracy and its Influence in Time* 20 (1977), *available at* http://biblioteca.clacso.edu.ar/gsdl/collect/clacso/index/assoc/D10037.dir/DabroyJ_i.pdf

114. Acuerdo Gubernativo 222-83 (1983)(Gua). The Preamble reads: "Para proteger a la población honrada y trabajadora del país, de la acción promovida por la subversión, el Ejército de

central piece in this game of chess. The PAC's purpose, as announced to the citizens, was to protect the population from the insurgents and involve the entire population in the conflict.[115] It "assumed much of the burden for making local communities secure against attack, while at the same time patrolling to search for and engage guerrillas. The patrols themselves became targets of the guerrillas. Although service in Civil Defense Patrols [was] voluntary, members were frequently pressured into joining."[116] The PAC's were a mechanism of getting the population, especially those in rural areas, to be actively participating and implicated in war.[117]

The policies implemented by the Montt regime were all connected to each other, and this was especially true between the PAC's and the civic action programs. The Civil Defense Patrols were part of the "*Frijoles por Fusiles*" (Bullets for Beans) campaign.[118] The message was simple: "if you are with us, we will feed you, and if you are not, we will kill you." Through this campaign, the government attempted to win over the insurgent groups, to have them trade in their weapons in exchange for work and food.[119] During the time these campaigns were taking place, they were most likely used to mask the most terrifying campaign against the indigenous population - the infamous military strike "*Tierra Arrazada*" ("Scorched Earth"). This was supposed to be the Guatemalan army's response to a guerrilla offensive with "*Operación Ceniza*" ("Operation Ashes").[120] Adopting a strategy called "draining the sea the fish swim in," Ríos Montt ordered armed forces to raze entire villages and slaughter indigenous peasants suspected of guerilla sympathies.[121]

The most relevant Scorched Earth campaign was *Dos Erres*. It began in October 1982, when guerrillas ambushed an army convoy near the tiny village of Dos Erres, killing 21 soldiers. The Army retaliated on December 6, 1982, flying in 58 Kaibil soldiers to wipe out the inhabitants of Dos Erres, considered to be guerrilla sympathizers.[122] The *Dos Erres* massacre has long been investigated and

---

Guatemala ha organizado las Patrullas de Autodefensa Civil, especialmente en las poblaciones del interior de la República. Que para regular la organización, el funcionamiento y el control de las Patrullas de Autodefensa Civil, es necesario crear la respectiva jefatura con jurisdicción en todo el territorio nacional, para cuyo propósito esprocedente dictar la correspondiente disposición legal".

115. FEDERACION INTERNACIONAL DE DERECHOS HUMANOS (FIDH), GENOCIDIO EN GUATEMALA: RIOS MONTT CULPABLE (July 2013), *available at* http://www.fidh.org/IMG/pdf/informe_guatemala613esp2013.pdf [hereinafter GENOCIDIO EN GUATEMALA].

116. Human Rights Report, *supra* note 107, at 577-78.

117. PROYECTO INTERDIOCESANO, RECUPERACION DE LA MEMORIA HISTORICA, GUATEMALA: NUNCA MAS, vol. II, Ch. 2, 113(1998) [hereinafter GUATEMALA: NEVER AGAIN].

118. There were other programs that took place, such as "Techo, Trabajo y Tortillas."

119. Edgar Arandia, Frijoles por Fusiles, LA RAZON (Apr. 21, 2013) http://www.la-razon.com/index.php?_url=/opinion/columnistas/Frijoles-fusiles_0_1818418241.html.

120. GUATEMALA: MEMORY OF SILENCE, *supra* note 107, at Annex I.

121. Justice for the Dos Erres Massacre: Overcoming Impunity in Guatemala, CTR. FOR JUSTICE & ACCOUNTABILITY (2014), http://cja.org/article.php?list=type&type=459.

122. *Id*. The Center for Justice and Accountability narrates the events: Disguised as guerrillas, the Kaibils descended on the village and herded the men into the school building and the women into two churches. After searching, in vain, for communist propaganda and contraband, the soldiers began the

prosecuted in Guatemala, but it has only been able to prosecute lower level military participants.[123]

Tierra Arrazada was not the only campaign conducted by the General in the year he was in power. In 1982, the military launched several operations code-named: Operation Victoria 82, Operation Sofia, Operation Ixil and Operation Firmeza 83.[124]

That same year, Amnesty International conservatively reported that in a matter of 4 months an estimated 2,186 people were killed.[125] The *Proyecto Interdiocesano Recuperacion de la Memoria Historica* (REHMI) reports that at the height of the bloodshed under Ríos Montt, reports put the number of killings and disappearances at more than 23,700,[126] and the estimated total number of victims at more than 55,000.[127] It has been reported that, by the end of the Rios Montt regime, as many as one and a half million peasants were uprooted from their homes.[128] The final estimate of lives lost during the 36 years of internal conflict is 200,000.[129]

Finally the United Nations determined that genocide occurred in Guatemala.[130] Through the Accord of Oslo on June 23, 1994,[131] the United Nations, with the cooperation of the Government of the Republic of Guatemala, formed the Commission for Historical Clarification (CEH) in order to "clarify with objectivity,

---

slaughter. They threw a three-month old baby, alive, into an empty water well, then proceeded to smash the heads of infants against walls and trees. The skulls of older children were crushed with a sledgehammer. The villagers were then interrogated, then shot and dumped into the well. Women and girls were raped, then mutilated with machetes. The Kaibils shoveled dirt into the well; the survivors' cries still audible through the earthen seal. An estimated 350 civilians were massacred at Dos Erres. *Id.*

123. In 1994, a local NGO, Families of the Detained and Disappeared of Guatemala (FAMDEGUA) filed a criminal complaint against military personnel believed responsible for the massacre. But after receiving death threats, the Public Prosecutor refused to pursue the case. The families then filed a petition with the Inter-American Commission on Human Rights (Case No. 11,420). After some deliberating, the Commission issued a decision that obligated Guatemala, and which the Guatemalan Supreme Court, to execute the pending arrest, enforced warrants. *Id*.

124. For a detailed timeline of events during General Rios Montt's regime and other important events that took place during the internal conflict, *see Efrain Rios Montt & Mauricio Rodriguez Sanchez Before the National Courts of Guatemala*, INT'L JUSTICE MONITOR, http://www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-timeline (last visited Jan. 28, 2015).

125. AMNESTY INTERNATIONAL, GUATEMALA: MASSIVE EXTRA-JUDICIAL EXECUTIONS IN RURAL AREAS UNDER THE GOVERNMENT OF GENERAL EFRAIN RIOS MONTT, SPECIAL BRIEFING AMR34/34/82 (July 1982)

126. GUATEMALA: NEVER AGAIN, *supra* note 117, at Chapter 8.

127. *Id*.

128. *See generally* GUATEMALA: NEVER AGAIN, *supra* note 117; BEATRIZ MANZ, REFUGEES OF A HIDDEN WAR: THE AFTERMATH OF COUNTERINSURGENCY IN GUATEMALA (1988).

129. *Efrain Rios Montt: Biography*, BARCELONA CTR. FOR INT'L AFFAIRS (June 24, 2013) *available at* http://www.cidob.org/es/documentation/biografias_lideres_politicos/america_central_y_caribe/guatemala/efrain_rios_montt

130. COHA, *Confused About Genocide in Guatemala? Apparently You're Not Alone*, COUNCIL ON HEMISPHERIC AFFAIRS (May 24, 2013), *available at* http://www.coha.org/confused-about-genocide-in-guatemala-apparently-youre-not-alone/.

131. 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) Commission for Historical Clarification Charter, U. S. INST. PEACE, http://www.usip.org/sites/default/files/file/resources/collections/commissions/Guatemala-Charter.pdf [hereinafter Oslo Accord].

equity and impartiality" the acts of violence and potential human rights violations connected to the armed conflict in Guatemala; "the Commission was not established to judge . . . but rather to clarify the history of the events of more than three decades of fratricidal war."[132]

The CEH had two years to complete its investigation, compile results and make recommendations. Accordingly, the CEH issued its report entitled "*Guatemala: Memoria del Silencio"* (Guatemala: Memory of Silence) and delivered it to representatives of the Guatemalan government, Guatemalan National Revolutionary Unity (URNG), and the U.N. Secretary General on February 25, 1999. It concluded:

> [T]hat during the armed confrontation, the incapacity of the Guatemalan State to provide answers to legitimate social demands and claims led to the creation of an intricate repressive apparatus, which replaced the judicial action of the courts, usurping their functions and prerogatives. An illegal and underground punitive system was established, managed and directed by military intelligence. The system was used as the State's main form of social control throughout the internal armed confrontation and operated with the direct or indirect collaboration of dominant economic and political sectors.[133]

The release of the report was surrounded by controversy, and tragically, by murder and cover-ups. [134]

The report concludes that true reconciliation will be a long and complex process.[135] The immediate key tasks that will facilitate Guatemala's full transition to reconciliation and the observance of the rule of law in a democratic state are: furthering the demilitarization process of both the state and society; strengthening the judicial system; opening up of greater opportunities for effective participation; and ensuring reparations for the victims of human rights violations.[136] The Report makes recommendations for reparation, which include the establishment of a *National Reparation Programme* that seeks economic, psychosocial, cultural remedies under the principle of facilitating reconciliations between perpetrators and victims.[137]

---

132. Laura Powell, *Confused About Genocide in Guatemala? Apparently You're Not Alone*, TRUTH-OUT (May 29, 2013), http://www.truth-out.org/news/item/16653-confused-about-genocide-in-guatemala-apparently-youre-not-alone.

133. GUATEMALA: MEMORY OF SILENCE, *supra* note 107, at ¶ 9.

134. *See generally* FRANCISCO GOLDMAN, THE ART OF POLITICAL MURDER (2007). The murder of Monsignor Gerardi late at night only a few days after the report was published, again placed Guatemala under the spotlight for both the murder of a high profile member of the church and for the results reported by the CEH.

135. GUATEMALA: MEMORY OF SILENCE, *supra* note 107, at ¶¶ 147, 148.

136. *Id.* at ¶ 150.

137. *Id.* at ¶¶ 50-52.

The CEH Report also notes that Guatemala is a country that faces particular difficulties regarding impunity that arise as a consequence of the blanket amnesties as well as the difficulties that arise when there is complicity of the judicial system.[138]

The armed conflict ended in 1996, at which time members of the insurgency and the government came together to sign the Peace Accords. The conflict was *legally* over.[139] Negotiations had been ongoing for years before reaching this point. Through the "*Acuerdo de Esquipulas II*" (Esquipulas Accord II), national reconciliation was being promoted. Among other things, it set forth the foundation for the Oslo Accord. These talks had been taking place since the 1980s. It is important to keep in mind that during decades of negotiation, the option for amnesty, of one or both sides, was always present.[140]

As mentioned in section I, amnesty is a concept which is accepted by international law, albeit quite controversially.[141] Acting in accordance with international law, Guatemala approved the 'Amnesty law' in 1996, as part of the numerous instruments included in the Peace Accords.[142] The amnesty encompassed members of both 'sides.' It proved effective in ceasing hostilities, demobilizing the guerrilla and moving the peace conversations forward.

One year later, after the Peace Accords were signed, Congress enacted '*Ley de Reconciliación Nacional'* (National Reconciliation Law) on December 27, 1997, which among other provisions contains the last and applicable "Amnesty Law." Although its terms are quite broad, it is clear that genocide, torture and forced disappearance crimes were beyond the scope of the amnesty being provided.[143]

---

138. *Id,* at 19, 56-60, 94-96.

139. It is important to note that the Peace Accords was a mere formality as the violence continued and the social and ethnical division was even more latent, ready to emerge from the shadows.

140. Bolivar Torres Cevallos, *Los Acuerdos de Paz en Guatemala*, Asuntos Internacionales, 45 AFESE 11, 11, 18.

141. *See infra* section I.

142. The Guatemala Peace Accords are a series of individual agreements that deal with particular challenges and issues, such as: constitutional and electoral reform; incorporation of insurgent groups into civil society and definite cease fire. For a comprehensive list of the different documents *see* MISION PERMANENTE DE GUATEMALA ANTE LAS NACIONES UNIDAS, *available at* http://www.guatemalaun.org/paz.cfm

143. The text of the National Reconciliation Law provides useful guidance: "*La extinción de la responsabilidad penal a que se refiere esta ley, no será aplicable a los delitos de genocidio, tortura y desaparición forzada, así como aquellos delitos que sean imprescriptibles o que no admitan la extinción de 12 responsabilidad penal, de conformidad con el derecho interno o los tratados internacionales ratificados por Guatemala."* Ley No. 145, 27 Dec. 1998, Ley de Reconciliación Nacional [National Reconciliation Law], art. 8 (Guat.). International law through the United Nations' General Assembly prohibited amnesty in those cases where its effect would be to exonerate from prosecution or legal penalty the presumed perpetrators of forced disappearances. During the time I spent as an international observer, the amnesty issue was greatly debated. It was also greatly polarizing. The population was divided into two clearly defined "sides" although they could all be categorized as supporters. On the one hand you had those that wanted the genocide trial to reach a conviction and those who perhaps were interested more in maintaining peace than in obtaining a guilty verdict. It seems important to mention that at no point during our time as observers or any time later, did the Supreme Court or the Constitutional Court rule on the issue. No analysis of Decree 145-1996 was ever conducted.

The question is whether the law actually excluded those actions that according to international law are beyond the scope of the amnesty, which would include: genocide, torture[144] and forced disappearances.

The passing of an amnesty law does not guarantee that its terms will be dispositive of the issue, especially if abduction or forced disappearance is one of the charges the individual faces.[145] The international community has taken an anti-impunity position. According to this position, individual criminal accountability is the cornerstone of a strong system of international law and human rights; domestic amnesties go against the basic values of the international community and the state's commitments in international law. Courts around the world have taken this position.[146] For example, the Argentine Supreme Court has held that the development of international law made the provisions of amnesty inapplicable to the most serious crimes committed during the period of the dictatorship.[147] Following this reasoning, Argentinean judges (such as Judge Gabriel Cavallo)[148] declared null and void two amnesty laws[149] on the grounds that they were in violation of international law and those obligations Argentina had acquired, especially in regards to the victim's right to restitution damages.

Despite rulings like the Argentine court above, there is still some leeway given to domestic courts when it comes to the analysis of amnesty laws. Effective and complete transitional justice must recognize the role these laws play. The ICC

144. *Velando por la Justicia en Guatemala: Marcie Mersky analiza los recientes acontecimientos judiciales,* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (trans. Jesús Cuéllar Menezo, Jan. 29, 1993) http://ictj.org/es/news/velando-por-la-justicia-en-guatemala-marcie-mersky-analiza-los-recientes-acontecimientos.

145. "This Law did not, however, explicitly exclude crimes against humanity (Guatemala is not a party to the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity), war crimes, or gross violations of human rights other than torture and enforced disappearance". Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Amnesties, at 39 (2009) *available at* http://www.ohchr.org/documents/publications/amnesties_en.pdf.

146. Under the notorious 'self-amnesties' of political and military leaders and their henchmen in countries such as Chile and Argentina, amnesty operated blatantly as a means to shield perpetrators from the legal consequences of their own crimes. In still others, blanket amnesties that is – amnesties covering entire groups of persons unconditionally were efforts to circumvent domestic criminal law, whether as parts of broader peace negotiations or international treaties, or as executive decisions simply to cut short any legal consequences of an ended or ongoing conflict. With the advent of the anti-impunity norm, the overall attitude toward amnesties in the international legal community underwent a remarkable 180 degree shift. Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOBAL POL.S 1, 6 (2008).

147. Bourdon, *supra* note 85.

148. *Id*.

149. On June 14, 2005 the Argentine Supreme Court declared two laws unconstitutional: the "*Ley de Punto Final*" (Full Stop Law) and the "*Ley de Obediencia Debida*" (Law of Due Obedience). These laws were commonly known as "*Leyes de Perdón*" (the "Forgiveness Laws"). These laws were enacted by the Alfonsín government and their purpose was to halt trials that were taking place and give amnesty to members of the armed forces. Prior to the Supreme Court's decision, the Legislature had passed a law that declared these two pieces of legislation null. Argentina en Noticias, *Anulación de las Leyes Punto Final y Obediencia Debida*, ARGENTINA.AR (Aug. 21, 2013), http://www.argentina.ar/temas/historia-y-efemerides/21316-anulacion-de-la-leyes-de-punto-final-y-obediencia-debida.

has acknowledged that in order to preserve peace and have the country effectively move forward, the terms of the amnesty must be respected.[150]

C. Seeking Justice: Attempts at Trials

The first attempts to bring Rios Montt to trial happened in the late 1990's.[151] These were the result of Spanish prosecutors using principles of universal jurisdiction. Initially, Spain attempted to prosecute human rights violations by finding some nexus to the crimes. For example, when initiating prosecution against former Argentine dictator Augusto Pinochet, the State claimed they had jurisdiction due to the disappearances and killings of Spanish citizens during the Pinochet regime in Argentina.[152] At the center of the proceedings, was Judge Baltasar Garzon.[153] He issued an international arrest warrant against Pinochet, who at the time was receiving medical attention in the United Kingdom. Judge Garzon expected extradition until the House of Lords, and ultimately Home Minister Straw, decided not to proceed with the extradition.[154]

Even though the Pinochet warrant was ineffective, a few years later, in 1999, the Spanish Constitutional Court held that Spanish courts may hear cases alleging crimes against humanity and genocide on the basis of universal jurisdiction.[155] This decision reversed Spain's Supreme Court decision that had declined to hear the Guatemalan case because it was not tied to Spain's national interests. The Constitutional Court rejected this reasoning, making clear that "the principle of universal jurisdiction takes precedent over whether or not national interests are at stake."[156]

That same year, Nobel Peace Prize recipient from Guatemala, Rigoberta Menchú, filed a lawsuit in Spanish courts charging former Head of State General

150. Bourdon, *supra* note 85 (it is now possible increasingly to consider that judges faced with an allegations relating to a crime of universal jurisdiction, and finding an amnesty law in their way, will in the first instance have to analyze the conditions under which the amnesty law was passed).

151. A case introduced in the Spanish National Court in December 1999 by a group of Guatemalans, led by Mayan activist Rigoberta Menchu, charges eight high-ranking officials, including Rios Montt, with international crimes—torture, genocide, illegal detention and state-sponsored terrorism. Arrest warrants were issued in 2006. *See infra* note 157.

152. Richard A. Falk, *Assessing the Pinochet Litigation, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, 104 (Stephen Macedo ed., 2004); STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 78, at 215.

153. Spanish jurist who formerly served as magistrate to the J*uzgado Central de Instrucción No. 5*, which investigates the most important criminal cases in Spain. For a brief overview of the case see Profile: Judge Baltasar Garzon, BBC NEWS (Apr. 7, 2010), *available at* http://news.bbc.co.uk/2/hi/europe/3085482.stm.

154. NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (Univ. of Pa. 2005); *see generally* Maria del Carmen Marquez Carrasco & Joaquin Alcaide Fernandez, *Case Note, In Re Pinochet: Spanish National Court, Criminal Division (Plenary Session) case 19/97, (Nov. 4, 1998 and case 1\98 (Nov. 5 1998)*, 93 AM. J. INT'L L. 690 (1999).

155. *Guatemala Genocide Case*, STC 237/2005, Sep. 26, 2005.

156. *Id.*

Efraín Ríos Montt and other senior Guatemalan officials with terrorism, genocide, and systematic torture – The "Guatemalan Genocide Case."[157]

After a series of appeals, in 2006, the National Court (Spain) issued arrest warrants for the eight defendants named in the lawsuit. At first, the Guatemalan Constitutional Court accepted the warrants and authorized extradition proceedings. However, the Court then reversed itself in 2007[158] and declared that the arrest warrants and extradition requests were invalid.[159] Nonetheless, witnesses were taken to Spain to elicit testimony.[160]

One way in which General Ríos Montt would be able to avoid the issuance of any additional arrest warrants was to run for office. In 2007 he announced that he would run for a seat in Congress.[161] As a member of Congress, he would have parliamentary immunity from any criminal or civil proceeding against him.[162] He decided to run for Congress because his Presidential ambitions were cut short by a Constitutional provision[163] that was affirmed by the Constitutional Court.[164] Only a few days after his time as Congressman ended in 2012, Rios Montt appeared before a domestic tribunal and was formally charged with genocide and crimes against humanity.[165]

IV. DOMESTIC TRIAL

General Efraín Ríos Montt was convicted of genocide and committing crimes against humanity on May 17, 2013.[166] Following decade-long efforts by legal

157. *The Guatemala Genocide Case Before the Spanish National Court*, CTR. FOR JUSTICE & ACCOUNTABILITY (2014), http://cja.org/section.php?id=83 [hereinafter *The Guatemala Genocide Case*]; *see also Efrain Rios Montt & Mauricio Rodriguez Sanchez Before the National Courts of Guatemala*: *Background*, International Justice Monitor, http://www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-background/ (last visited Jan. 29, 2015).

158. GENOCIDIO EN GUATEMALA, *supra* note 115, at 6-7.

159. *Id*.

160. *The Guatemala Genocide Case*, *supra* note 157.

161. Barcelona Centre for International Affairs, Efrain Rios Montt 14, *available at* http://www.cidob.org/en/content/pdf/1824 (last visited Feb. 7, 2015).

162. GUATEMALAN CONSTITUTION, *supra* note 55, at art. 161 (so they may perform all their duties, all congressional representatives shall have personal immunity).

163. GUATEMALAN CONSTITUTION, *supra* note 55, at art. 186.

164. General Efrain Rios Montt ran for President in 2003 but lost the elections. The Electoral Tribunal accepted his candidacy despite the clear constitutional prohibition. As soon as his candidacy was accepted, challenges were filed in court. Finally, in 2006 the Constitutional Court held that the Electoral Tribunal had erred in accepting his request and candidacy. During the initial phases of the challenges, the General's supporters took to the street. They intended to pressure the Constitutional Court into deciding in the General's favor. But the protests turned violent and created chaos in the capital city. That Thursday is remembered as "*Jueves Negro*" ("Black Thursday") and "*Viernes de Luto*" ("Mourning Friday"). For a general overview *see Veto Definitivo para Rios Montt para Presidente*, PRENSA LIBRE (Oct. 11, 2006), http://www.prensalibre.com/noticias/Veto-definitivo-Rios-Montt-presidente_0_131988685.html; *see also Genocidio en Guatemala: Rios Montt Culpable,* FEDERACION INTERNACIONAL DE DERECHOS HUMANOS (July 2013), http://www.fidh.org/IMG/pdf/informe_guatemala613esp2013.pdf.

165. GENOCIDIO EN GUATEMALA, *supra* note 115, at 7-8.

166. EMI MACLEAN, JUDGING A DICTATOR: THE TRIAL OF GUATEMALA'S RIOS MONTT 3 (Open Society Justice Initiative 2013).

groups representing the victims of atrocities, it was the first time a former head of state had been prosecuted in a national court for genocide. Three days later, the conviction was overturned and annulled by the country's constitutional court on procedural grounds.[167] The decision brought the country to a state of disarray and the state of uncertainty remains.

The trial was, in a way, the culmination of many institutional and cultural changes that had been occurring in Guatemala, albeit slowly. The quest for rule of law and judicial independence began to make notable progress due to important legislative and judicial reforms, changes in leadership and innovative collaborations.[168] Among the key factors were: new leadership in the *Ministerio Publico* (Public Ministry),[169] the judiciary agreeing to create a number of specialized "High Risk" courts,[170] and the designation of judges and prosecutorial units that would focus only on complex cases, like the one at hand. These reforms benefited from the 2007 establishment of the *Comision Internacional contra la Impunidad en Guatemala – CICIG*[171] (International Commission Against Impunity in Guatemala), an independent international body established by the United Nations and the government of Guatemala with the mandate to conduct investigations and present complaints for prosecution, as well as support reforms.[172]

In more ways than one, General Montt's trial was an illuminating spectacle. Highlighted by attorney expulsions, outbursts from judges, counsel for the defense, and members of the public, and various other scenes fit for a movie, the trial proceedings provided a glimpse of the outrage surrounding the Guatemalan genocide. Moreover, it is interesting to note that the courtroom was consistently filled beyond maximum capacity during the public portion of the trial, which lasted nearly two months. Defendant family members, human rights activists, NGOs, national and international press, and of course the victims and their families all attended the proceedings. The scores of indigenous victims who sat in the

---

167. The three-to-two ruling by a panel of constitutional judges annuls everything that has happened in the trial since 19 April, when Gen Rios Montt was briefly left without a defense lawyer. *Guatemala Annuls Rios Montt's Genocide Conviction*, BBC NEWS (May 21, 2013), http://www.bbc.com/news/world-latin-america-22605022

168. There was not one single moment that can be identified as a defining moment in Guatemalan judicial and political history. This note will not discuss the institutional changes that have occurred since the late 1990's. The sources used should give the reader enough background.

169. The Public Ministry was created under Art. 251 of the Constitution which establishes that the Public Ministry is an auxiliary institution for the public administration, as well as, the courts; its functions are autonomous, but with a constitutional rank. Its objective is to ensure strict compliance with domestic laws. *Base Legal,* MINISTERIO PUBLICO, *available at* http://www.mp.gob.gt/acerca-del-mp/base-legal/ (last visited Oct. 3, 2014).

170. Corte Suprema de Justicia, Acuerdo Numero 12-2011 (Gua.).

171. *Acuerdo Entre La Organización De Las Naciones Unidas Y El Gobierno De Guatemala Relativo Al Establecimiento De Una Comision Internacional Contra La Impunidad En Guatemala* [Agreement between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala], art. 1, COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA (Dec. 12, 2006), *available at* http://www.cicig.org/uploads/documents/mandato/acuerdo_creacion_cicig.pdf.

172. *Id*. at art. 2(1)(c).

courtroom were handed headphones through which Ixil translations were provided.[173]

Victim testimony lasted for nine days.[174] The stories were quite brutal. Witness after witness described military incursions on their villages, indiscriminate massacres, rape, torture, and forced dislocation into the mountains where victims faced starvation and military bombing campaigns. Multiple witnesses described being treated "like animals."[175] For example, witness Elena Caba limped to the witness stand to tell the court of the April 3, 1982 massacre in which soldiers killed 96 people.[176] Caba, then eight or nine years old, nearly died: soldiers stripped her naked and threw her from a bridge into a river. When she landed in a pool in the river, and injured herself but did not die, the soldiers above threw rocks and shot at her, hitting her foot with a bullet.[177] She saw many dead bodies in the river, but was able to swim to the riverbank, hide, and eventually flee. Her family was not so lucky; soldiers fatally shot her younger siblings, aged four, three, and one, hacked her father to death with a machete after shooting him, and killed her mother.[178]

The prosecution used expert witnesses who offered forensic evidence concerning: the discovery of mass graves, including of women and children; statistical evidence that demonstrated a wildly disproportionate rate of military killings of Ixiles as compared to non-Ixiles; the chain of command which would ensure that the military head of state had both knowledge of the crimes that were being committed and the legal authority to order or, alternatively, to prevent, stop, or remedy the crimes; international law concerning genocide and crimes against humanity; anthropology, history, psychology, and sociology experts who testified about the impact of the military's actions on civilians and on the Maya Ixil culture; and the role of racism in the military's policies and practices.[179]

The defense was made up of several lawyers who are well known amongst other Guatemalan lawyers. Due to their reputation, the tribunal warned them about the use of "delay tactics."[180] From the defense team's attitude it appeared that they lacked interest in setting up a proper defense but decided to rely on Guatemala's tangled constitutional provisions[181] and the judiciary's inexperience to stall and

---

173. MACLEAN, *supra* note 166, at 4.
174. *Id*.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*. Another victim account: Cipriano Antonio Bernal, at the age of 13, barely escaped a massacre by the Guatemalan elite military unit, the kaibiles, who killed his whole family and many others on April 12, 1983. The kaibiles, an elite military unit, killed his grandmother, mother, five- and eight-year-old brothers, six-year-old niece, sister-in-law, and the three-day-old baby of his sister-in-law. He survived by running to hide, dodging bullets, and returning later to find his family dead and the village burned to the ground. *Id*.
179. *Id*. at 5.
180. *Id*. at 7.
181. Guatemala has two parallel but complimentary final courts: the Supreme Court and the Constitutional Court. Both courts have independent jurisdictions but sometime they may overlap, especially when the proceeding is a first of its kind. For the court's competence and jurisdiction *see* GUATEMALAN CONSTITUTION, *supra* note 55, at art. 214-216, 268-272.

obtain a mistrial or have the defendant be absolved based on some sort of technicality. Despite the defense team's shortcomings, there were serious due process violations stemming from decisions made by the presiding judge, decisions that will be discussed below.[182]

In addition to their procedural maneuvers, the defense presented some witnesses. Their two most prominent witnesses recounted how the government established humanitarian initiatives that directly benefited the Ixil community.[183] Another witness discussed the military chain of command. He stated that it was not the General but the General Staff (Estado Mayor) who issued the key orders.[184] The General's knowledge was a key factor in the defense's strategy. Other witnesses proved unhelpful due to lack of precise knowledge.

After a series of suspensions, which presented an array of problems, the trial arrived at the phase where closing arguments were to be made. These statements were made on May 8 and 9, 2013.[185] The prosecution was focused on the fact that the evidence had shown that the acts committed were planned, repetitive and indiscriminate. Key to the prosecution's case were the military counterinsurgency plans as well as the National Plan for Security and Development (*Plan Nacional de Seguridad y Desarrollo*), a political-military strategy document stressing the promotion of "indoctrination and education of the rural population" as a way to counter subversive activity in the country.[186] The Public Ministry displayed a video of Ríos Montt urging nationalism—"*Guatemaldad*"— to respond to the asserted failure of Guatemala in order to overcome its "amalgam[ation] of nations with their own languages and customs."[187]

The defense, in its usual tone, was quite dramatic. All in all, they rejected the idea that the General had total and absolute control. The team asserted that it was the regional commanders who made the decisions and took action; therefore, the correct decision was complete absolution of the charges.[188]

The event that took many by surprise was the statement made by General Ríos Montt on his own behalf. In an extended, spirited and unexpected declaration, he asserted to the court and a hushed audience his innocence of all charges.[189] He spoke of the dire economic, political and military situation the country faced when he took power in 1982. "The country was dying,"[190] he stated. He denied any direct involvement in the crimes at issue: "I never authorized, I never proposed, I

182. *See infra* section a.

183. The expert talked about programs like "food for work" and other aid provided by institutions such as FUNDAPI to the people in the highlands. MACLEAN, *supra* note 173, at 7.

184. *Id.* at 5.

185. *Id.* at 7.

186. *Id.* at 7-9.

187. *Id.* at 11.

188. *Id.* at 11-12

189. *Id*.

190. For extracts of the General's declaration, *see Extractos de la declaracion del general Efrain Rios Montt,* PRENSA LIBRE (May 10, 2013) *available at* http://www.prensalibre.com/noticias/justicia/Extractos-testimonio-Efrain-Rios-Montt_0_916108663.html.

never ordered acts against any ethnic or religious group."[191] Ríos Montt exhorted the court to recognize that there is "no evidence of my participation," and that "there was never an intention or purpose of destroying any ethnic group."[192] He fiercely contested the chain of command illustrated by the Public Ministry, insisting that, as head of state, he was "occupied by national and international matters,"[193] and the military dealt with military matters. Further, zone commanders operated with autonomy, and as president, he could not be connected with the crimes and abuses that happened within a particular region. He concluded:

> I will never accept responsibility for the charges. I was the head of state. What is the job of head of state and commander in chief? Command and control and administration of the Army. I was in charge of the national territory, not the local military zone. The local commanders had autonomy.[194]

General Montt's statement lasted 51 minutes.[195]

On the afternoon of Friday May 10, 2013, the tribunal issued its 718-page decision and announced its verdict: guilty of genocide and crimes against humanity, and sentenced Rios Montt to 80 years in prison:[196] fifty years for genocide and thirty years for crimes against humanity.[197] The court ruled that the prosecution and civil parties had proved the concrete crimes of genocide and crimes against humanity.[198] They found that the nature of the violence deployed against the Maya Ixil included massacres, forced disappearances, torture, cruel, inhumane and degrading treatment, rape and sexual violence against women and girls, infanticide and the abduction of children, destruction of crops to induce starvation, razing of civilian non-combatant villages, burning of houses, forcible displacement in subhuman conditions or forcible relocation of surviving populations into militarized "model villages", aerial bombardments, and control of populations, territory and natural resources.[199]

One of the elements of genocide is "intent to destroy, in whole or in part, a national, ethnic, racial or religious group."[200] The court found that the crimes were not spontaneous acts, but that Ríos Montt and the Guatemalan military intended to

---

191. *Id*.
192. *Id*.
193. MACLEAN, note 173, at 11-12
194. *Id.*; *Extractos de la declaracion del general Efrain Rios Montt, supra* note 190.
195 . *Extractos de la declaracion del general Efrain Rios Montt, supra* note 190.
196. *See generally* José Elías, *Condenado a 80 años de prisión el exdictador de Guatemala Ríos Montt*, EL PAIS (May 11, 2013), http://internacional.elpais.com/internacional/2013/05/10/actualidad/1368201415_670677.html.
197. MACLEAN, *supra* note 173, at 24, 26, 37 (citing a Partial Judgment file C-01076-2011-00015 pages 108, 111, 113-14, 130, 137, 138, 140, 141-43, 683-84, 688-89, 699).
198. *Id.* (citing a Partial Judgment file C-01076-2011-00015 pages 682-703)
199. MACLEAN, *supra* note 173, at 24, 26, 37 (citing a Partial Judgment file C-01076-2011-00015 pages 108, 111, 113-14, 130, 137, 138, 140, 141-43, 683-84, 688-89, 699).
200. Genocide Convention, *supra* note 10, at art. II.

eliminate the Maya Ixil as an ethnic group,[201] in large part due to racism. The military operational plans evidenced efforts to systematically attack the Maya Ixil who were perceived to be rebellious, difficult to control, and the social base of the guerrilla.[202]

As mentioned earlier, the process was plagued with appeals. There were several hundred *amparos*,[203] although arguably the defense's outnumbered the prosecution's. When the verdict and sentencing took place, there were several *amparos* still pending in the Constitutional Court. On May 20, 2013, in a polarizing and divided 3-2 ruling, the Constitutional Court overturned the ten-day old verdict and annulled the final days of the trial—sending the trial back to where it was on April 19.[204] At this point, the trial was finalized. Yet, the Court did not instruct or even acknowledge this fact. The Court stated that the lower tribunal should have suspended hearings to allow for an interim legal challenge to proceed to completion.[205] The court also determined that the expulsion of Ríos Montt's defense attorney, which in fact left him defenseless, was a due process violation. It ruled that the lower court, again, should have suspended the proceedings until the Court decided on the issue.[206]

A few days had passed and the political atmosphere on the streets remained tense. Everyone awaited the Supreme Court and the Constitutional Court's next decision – amnesty. The issue of whether the 1996 amnesty applied to the former dictator remained unsolved.[207] It was not until October 22 that the Constitutional

---

201. MACLEAN, *supra* note 173, at 43 (citing a Partial Judgment file C-01076-2011-00015 page 697).

202. *Id.* at 14 (citing a Partial Judgment file C-01076-2011-00015 pages 107-09, 691.

203. An amparo is an action challenging a purported infringement of constitutional or legal rights, it is aimed at restoring protection of those rights after a violation has occurred. See generally GUATEMALAN CONSTITUTION, *supra* note 55, at art. 265; Ley de Amparo, Decree 1-86 (1986)(Gua). For additional information see section a, *infra*.

204. On April 19, the tribunal had heard all prosecution witnesses, but still awaited the presentation of some of the defense witnesses, closing arguments and, the final verdict and sentence.

205. Judgment of Constitutional Court of Guatemala in State v. Ríos Montt and Rodriguez Sanchez, Case File 1904-2013, Decision of 20 May 2013, at Part IV (The Court considers relevant to clarify that the amparo that suspended the proceedings on April 18, was to have immediate effects.. . . No other proceedings should have taken place. This would have allowed the process to purge itself of any possible violations).

206. Judgment of Constitutional Court of Guatemala in State v. Ríos Montt and Rodriguez Sanchez, Case File 1904-2013, Decision of 20 May 2013 Part V ("This improper continuation, of which this Court is aware by its own cognizance, entailed the continuation of the suspended public bench trial as well as the taking of subsequent procedural steps that also gave rise to new challenges, all of which is detrimental to the legal certainty of the criminal proceedings concerned, and does nothing to assist in complying with the provisions of article 203 of the Constitution: to deliver prompt and proper justice. Hence, the importance of effectively complying with provisional amparo decisions, not according to the whimsical criteria of whoever is legally bound to comply therewith, but rather in strict compliance therewith, by following the guidelines of the court that rendered it [sic].").

207. Emi MacLean, *Un Mes Despues de la Decision de la Corte de Constitucionalidad que anulo el fallo que condeno a Rios Montt por genocidio: La Amnistia esta de Nuevo sobre la mesal la nueva Corte encargada del juicio esta ocupadada hasta mediados del 2014 y Rios Montt esta de Nuevo en casa*, OPEN SOCIETY JUSTICE INITIATIVE (June 25, 2013), http://es.riosmontt-trial.org/2013/06/un-mes-despues-de-la-decision-de-la-corte-constitucional-que-anulo-el-fallo-que-condeno-a-rios-montt-por-genocidio-la-amnistia-esta-de-nuevo-sobre-la-mesa-la-nueva-corte-a-cargo-del-juicio-esta-ocup/.

Court announced its decision. It determined that the lower courts were incorrect in stating that amnesty applied and was therefore reversing and remanding.[208]

Given there were so many *amparos* and other appeals still pending in the higher courts, when the lower tribunal issued its decision, new rulings continued to be published. One of these was the ruling by the Appellate Court (*Sala de Apelaciones*) that leaves the entire proceeding without effect and it rolls back the trial to November 2011 – when the General had not been linked to the process, and no charges had been made. In the meantime, the trial continues to be suspended and it is said that it will be sometime in 2015 when the trial can resume. The actual logistics and the procedural effects all these decision will have is still uncertain.

A. The System's Drawbacks

The human rights activist community views the trial as a great step for Guatemala and for their particular cause – bringing genocide to light, punishing the perpetrators and obtaining redress for the victims of these atrocities.[209] What they do not take into consideration is the damage caused to a frail society by fiercely pushing their agenda.

There are those who see the Ríos Montt trial as a renewed opportunity for an independent judiciary to play its role in uncovering both truth and justice related to one of the bloodiest conflicts in modern history. The fact that the trial took place at all is a testament to the conviction and sustained pressure of victims and human rights defenders, as well as the significance of recent social and political reforms. The witness testimonies and court judgment are part of the historical record. However, the fact that the trial's end is still uncertain, even after a verdict, is a sign that there are still significant challenges to an independent judiciary, and certainty to the rule of law, in Guatemala.[210]

Given the limited nature of this Note, I will highlight problematic areas arising mainly from my experience being part of a trial monitoring team during Rios Montt's trial, and also from my knowledge of the Guatemalan legal system. The main issues are the tangled and unlimited power of *amparos*, due process violations, and an inexperienced judiciary.

1. Amparos: Are There Any Limits?

Amparos have a rich and long history, and we can find their source in international law. The American Convention on Human Rights recognizes the right to judicial protection.

Article 25 of the Convention provides:

---

208. Sebastian Escalon, *La CC ampara a Ríos Montt, pero no lo amnistía*, PLAZA PUBLICA (Oct. 23, 2013), http://www.plazapublica.com.gt/content/la-cc-ampara-rios-montt-pero-no-lo-amnistia.

209. *E.g.* FIDH, *supra* note 114, at 35-36.

210. MACLEAN, *supra* note 173, at 3.

> Everyone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duty.[211]

Thus, we see that states, by signing the convention, have an obligation to establish a recourse and an efficient system to enforce that recourse.

The *amparo* proceeding, a Latin-American legal institution, appears as a complex juridical instrument protecting fundamental rights and freedoms against violations or attempted violations of these rights.[212] *Amparos* are recognized by (practically) all Latin American countries but with different denominations.[213] Although the core is the same, it acquires different characteristics that stem from the jurisdiction in which it is used. Generally, the *amparo* procedure is a means of exercising and controlling the constitutionality of laws and other legal acts.[214] In principle, it is used to protect only those rights that are constitutionally guaranteed to the citizens, but its application has been expanded to 'lower' categories of violations.[215]

The *amparo* can have two facets, or legal origins. On the one hand it appears like a constitutional right,[216] the right to the protection of constitutional rights and guarantees; and on the other hand, like a specific constitutional guarantee[217] which is materialized in legal actions or specific *amparo* appeals. Under the first facet, the *amparo* appears as a separate law that has constitutional rank in the system. It gives the citizens the right to obtain *immediate* protection of any constitutional rights or freedoms through the judiciary.[218] Under the second facet, as a specific constitutional guarantee, the *amparo* appears as an action or an appeal that is to be exercised only before a constitutional or supreme court.

In Guatemala, the *amparo* encompasses both facets – it is a constitutional right and a constitutional guarantee regulated by the Constitution and also the Law on Amparo, Habeas Corpus and Constitutionality ("*Ley de Amparo, Exhibicion Personal y de Constitucionalidad*").[219]

---

211. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S., art. 25.

212. *See generally* George Girlesteanu, *The Amparo Proceedings - Instrument for the Protection of Fundamental Rights and Freedoms - (I)*, 2 ROM. J. COMP. L. 54 (2011).

213. Some countries with amparos are: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras. ALLAN R. BREWER-CARÍAS, LEYES DE AMPARO EN AMERICA LATINA (2009) *available at* http://iapjalisco.org/libros/allan_brewer_final_PARTE1.pdf

214. CESAR LANDA, EL PROCESO DE AMPARO EN AMERICA LATINA, at 3 (Sep. 2010) *available at* http://www.juridicas.unam.mx/wccl/ponencias/13/354.pdf

215. *Id*. at 56

216. ALLAN R. BREWER-CARIAS, ETUDES DE DROIT PUBLIC COMPARE 1060 (2001).

217. *Id*.

218. HECTOR FIX-ZAMUDIO, ENSAYOS SOBRE EL DERECHO DE AMPARO 47-49 (2003).

219. Law of Amparo, *supra* note 76.

As set forth in Article 265 of the Constitution,[220] the objective of the *amparo* is to protect citizens against threats of violations of their rights or to restore those rights when the violation has already occurred. This seems to be in line with the general concept of *amparo*, but there is something quite unique about the Guatemalan regime: the Constitution provides that there is no area of the law that cannot be subject to an *amparo.*[221] Moreover, the Law on Amparo, Habeas Corpus and Constitutionality reiterates this principle, extending to any "situation" that entails a risk of violation of constitutional and other legal rights.[222]

Another factor worth noting is that Article 2 of the Law on Amparo, Habeas Corpus and Constitutionality instructs the judiciary to interpret the law broadly in order to properly protect human rights and other constitutional guarantees.[223]

The broad protection of these provisions enabled the filing of more than 100 *amparos* during the one-year trial of General Efrain Rios Montt.[224] The defense team's strategy seemed to center, if not wholly depend, on the filing of *amparos* against any and every adverse decision.

The *amparos* began the first day that hearings were held. Among other things, they were filed against the appointment of the defense attorney, the decision of the tribunal not to recuse itself after recusal was sought and the exclusion of evidence.[225] One of the few *amparos* that was vital from a due process standpoint was the one filed when Ríos Montt was without representation. This *amparo* was crucial in the final determination by the Constitutional Court that the trial should be remanded to a previous phase.[226]

The infinite web of *amparos* and the numerous judgments that followed by the Constitutional Court, appellate courts, and even a judge of first-instance tasked to deal with preliminary matters, seemed only to spur more legal challenges, rather than resolve and clarify issues. The manner in which the courts, the press and the parties approached each decision fueled the chaos that developed during the last two months of the trial. Each challenge was different in nature and had different effects on the process itself. Some were substantive and technically would have suspended the process, while others were only procedural and did not necessarily suspend the proceedings.

Due to the fast pace the tribunal was set on keeping, many of the Constitutional Court's decisions were too late to be implemented (and hence created another opportunity to file an *amparo* because there was a violation of the

---

220. GUATEMALAN CONSTITUTION, *supra* note 54, at art. 265.

221. *Id.* "No hay ámbito que no sea susceptible de amparo"

222. Law of Amparo, *supra* note 76, at arts. 8,10.

223. *Id.*, at art. 2.

224. MACLEAN, *supra* note 141, at 9; *see also* Mike McDonald, *Guatemala Trial of Rios Montt Has Likely Collapsed: Lawyers*, REUTERS (May 21, 2013), http://www.reuters.com/article/2013/05/22/us-guatemala-riosmontt-idUSBRE94L01N20130522.

225. MACLEAN, *supra* note 141, at 17-18.

226. *Guatemala: anulan sentencia contra Ríos Montt por genocidio,* BBC MUNDO (May 21, 2013), http://www.bbc.co.uk/mundo/ultimas_noticias/2013/05/130520_ultnot_guatemala_corte_anula_fallo_ rios_ montt_jrg.shtml.

constitutional right to due process) or were cryptic, unclear or incomplete.[227]

The possibility, and reality, of abusing the use of *amparos* has been recognized domestically and internationally. The Commissioner of the CICIG has stated that reforming the law on *amparos* is a priority:

> Not only are there too many amparo cases pending resolution, but the law encourages frivolous *amparos*. If you file an *amparo* to gain time, no court should protect you; even though the *amparo* itself is a very valuable tool. Therefore, we should save this instrument as a legal tool, but at the same time prevent the abuse that many times – unfortunately – is produced.[228]

The Inter-American Court of Human Rights has also previously criticized the use of *amparos* as an "abusive" delay tactic, "thus frustrating due judicial protection of human rights."[229]

The abuse of *amparos* exposed a weakness in the system and the tradition of corruptive, dilatory and unprofessional tactics by the parties that weakened the admiration the international community proclaimed at the beginning of the trial. It made the judicial system seem "byzantine."[230]

2. Due Process Violations

The Guatemalan Constitution protects the right to counsel or representation, and due process.[231] Article 8 of the Constitution, under the heading "Human Rights," establishes that the defendant has a right to counsel, who will be present in every and all judicial proceedings.[232] Article 12 sets forth the right to legal defense.[233]

It is clear that when a defendant does not have his attorney present at a hearing his constitutional rights are violated. Regardless of the defense team's antics and dramatic exits from the courtroom, the fact of the matter is that Ríos Montt was

---

227. Every time the observers and the press was alerted that a decision was to be released, like bees we would swarm the Court's premises. The decisions were cryptic and the Secretary was never able to answer the question of 'impact' on the process. The court seemed to be approaching the issue fragmentally.

228. *Cooperation with the Supreme Court of Justice,* INT'L COMM'N AGAINST IMPUNITY IN GUATEMALA (CICIG), http://www.cicig.org/index.php?page=cooperation-with-the-supreme-court-of-justice.

229. Case of Myrna Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, "Pleadings of the Commission" ¶ 210 (Nov. 25, 2003); Case of Bulacio v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 100, "Considerations" ¶ 115 (Sept. 18, 2003); Case of the "Las Dos Erres" Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 211, "Application" ¶ 120, 122 (Nov. 24, 2009); *see also* Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala, Inter-Am Comm'n H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), *available at* http://www.cidh.oas.org/pdf%20files/GUATEMALA.2003.pdf.

230. McDonald, *supra* note 209.

231. GUATEMALAN CONSTITUTION, *supra* note 54, at arts 9, 29, 44, 140, 153.

232. GUATEMALAN CONSTITUTION, *supra* note 54, at art. 8.

233. *Id.* at art. 12.

unrepresented, and for that matter, 'defenseless' for at least 5 hours during the hearings.[234] There was no one there to enforce his rights.

The Constitutional Court recognized this violation and it was one of the main reasons the Court decided to 'void' the proceedings and send the trial back to April 19.[235]

Many observers do not accept that there was an actual violation of due process. Their conversation focuses around the way in which such a violation was challenged.[236] It is not easy to recognize that even the most heinous individuals have rights under domestic and international law. Recognizing and enforcing their rights does not undermine the process and is not an obstacle to justice. For instance, think of Nuremberg and the convictions obtained. In the long run, it diminishes the observers' credibility. [237]

3. An Inexperienced Judiciary

Although the courts in Guatemala had begun to prosecute some of the perpetrators of crimes committed during the internal conflict, the judiciary was still not prepared to deal with a high level, and a highly scrutinized prosecution.

The prosecutions focused on low-level soldiers, police, paramilitaries, or members of the civilian patrols established by the military. Between 2009 and 2013, nearly 30 people were convicted of forced disappearances, murder, and crimes against humanity.[238] Genocide had not been part of the conversation.

The High Risk tribunals did not issue many of these decisions nor did they conduct the trials and determine the defendant's sentence; they were conducted in regional courts without as much interference and attention.[239]

The Guatemalan judiciary has been plagued with corruption and disrespect for the law.[240] Resources, both administratively and work force, are scarce. Although there is a Judiciary School, the training is not all encompassing. In a case of this magnitude and relevance, the judges need not only be well trained in domestic law

234. Corte Resuleve Recursos a Favor de Rios Montt en Guatemala, LA NACION (Apr. 24, 2013) *available at* http://www.nacion.com/mundo/Corte-recursos-Rios-Montt-Guatemala_0_1337466263.html

235. The Court stated that due to the fact that Rios Montt was left without a trusted attorney, the amparo was resolved in his favor. *Id*.

236. MACLEAN, *supra* note 141, at 18-19.

237. Many human rights organizations and activists we spoke to did not believe there had been a violation of due process. Many even stated that it was the defense team's fault because they had abandoned the defendant. Although true, it doesn't shift the focus. The tribunal is impartial and is there to enforce the law and the rights of the parties, regardless of who they are and the crimes committed.

238. *See Guatemala: Fifth Former Soldier Convicted Over Role in Dos Erres Massacre*, AMNESTY INT'L (Mar. 14, 2012), http://www.amnesty.org/en/news/guatemala-fifth-former-soldier-convicted-over-role-dos-erres-massacre-2012-03-14; Mike McDonald, *Guatemala Convicts Ex-police Chief for Student Leader's Disappearance*, REUTERS, (Sep. 20 2013 5:11 PM), http://www.reuters.com/article/2013/09/20/us-guatemala-court-idUSBRE98J0YQ20130920.

239. *Condena contra ex militar, Felipe Cusanero, abre esperanzas de Justicia por crímenes de guerra*, NOTICIAS (Aug. 31, 2009), http://noticias.com.gt/nacionales/20090831-condena-contra-ex-militar-felipe-cusanero-abre-esperanzas-de-justicia-crimenes-de-guerra.html.

240. U.N. DEP'T OF POLITICAL AFFAIRS, CICIG: *Leaving its Imprint in Guatemala*, *available at* http://www.un.org/wcm/content/site/undpa/main/enewsletter/news0212_cicig.

(substantive and procedural), but also have sufficient knowledge of international law. The fact that there was no real precedent for genocide under domestic law made it so that the tribunals had to rely on principles of international law to effectively establish a precedent in a genocide trial. Tribunals as important and relevant as the High Risk Tribunals need to have all the information available because precedent is still being created.

Another facet of the judiciary's inexperience was the clear bias exhibited by the members of the tribunal. The presiding judge, Jazmín Barrios, has been involved in prosecuting human rights violations committed during the internal conflict since her appointment to the Court.[241] Even though she was able to write a judgment over 700 pages long in a matter of hours, there was no real analysis; throughout the judgment she relied on this reasoning: "it is logical."[242] There was a clear inclination to assure that justice was attained for the victims.

B. The Societal Scheme and the Trial's Impact

The judiciary was not the only institution that was inexperienced. Civil society was also inexperienced at handling such a high profile case. Moreover, the 20 years that had passed since the signing of the Peace Accords had not helped in healing the emotional wounds of individuals and society as a whole. Luis Linares' statement, "[t]o prosecute a former commander for crimes as grave as genocide has only helped to reignite the ever lit embers of a civil war," adequately depicts the situation in Guatemalan society.[243] People's passions, memories, experiences and prejudices were all exalted and worn on their sleeves. It is a naturally sensitive subject, but when you have a society that is trying to cope with its differences and with a bloody past, tension is high.

On a daily basis, there were press releases by powerful groups on both sides. The climate was so sensitive and tense that the mention of the "wrong" university sparked snarky comments.[244]

There is something to be said in defense of those who opposed the trial. Human rights organizations and activists pushed their agenda; they wanted to obtain redress for the victims of the atrocities – which is a noble pursuit. But they also ignored the wounds of others in society; many people in the city fell victim to the guerrilla tactics and suffered great loss of business in the conflict areas. This

241. *Jazmín Barrios, la jueza que condenó a Ríos Montt*, PRENSA LIBRE (May 11, 2013), http://www.prensalibre.com/noticias/justicia/Jazmin-Barrios-condeno-Rios-Montt_0_917308431.html.

242. *Id.*; *see also* MACLEAN, *supra* note 141, at 46 (citing a Partial Judgment file C-01076-2011-00015).

243. Jose Elias, *Condenado a 80 anos de prision el exdictador de Guatemala Rios Montt*, EL PAIS (May 11, 2013), *available at* http://internacional.elpais.com/internacional/2013/05/10/actualidad/1368201415_670677.html , (Luis Linares phone interview).

244. While interviewing a high ranked official in the *Procuraduria de Derechos Humanos*, I was asked which law school I had attended while living in Guatemala. When I replied and mentioned the top ranking private school (which has fostered a very strong opposition to the trial) her remark was: "Oh! You're on the wrong side. You're friends with all those crazy people". This is how tense the situation was during my time as observer and long time after.

went on for 36 years. Part of the negotiations to achieve peace were amnesty agreements for both sides of the conflict. Guatemala decided to take the approach to "forget and move on." But it was hard to move on when there was such a big push by the international community to 'obtain justice.' It seems that Guatemala regressed due to the trial, despite the international community's admiration. Guatemala has never been keen of international involvement in domestic affairs and to many, this seemed to be the quintessential invasion of sovereignty.

CONCLUSION

The case and the efficacy of the judicial system, at this point, remain in limbo. There was much praise when the courts decided to indict General Efraín Ríos Montt, especially among the international community. A fully domestic prosecution of genocide was unprecedented. But the stark realities of the Guatemalan justice system, as well as the societal and ethnic divide began to surface when old wounds were uncovered.

The array of decisions by different courts, and the annulment of the verdict raises justified concerns about Guatemala's willingness and capacity to prosecute grave crimes. It casts doubt on the judicial certainty in the country and, specifically, the protection of the rights of the defendants and victims, but also about the protection of human rights generally. Other concerns are the advanced age of the defendant, historical impunity and corruption, and the political and social complications of restarting the trial. There is also a question of judicial independence given the strong feelings certain sectors of society have and the influence they carry.

From an institutional perspective, the challenges are no less serious. There are only two High Risk Tribunals in Guatemala that have the mandate (both in jurisdiction and competence) to hear serious cases such as those involving genocide.[245] And because of procedural issues, they have both been involved in different phases of the process. This means that if the trial is "remanded" and taken back to the April 19 date that was cryptically referred to by the Constitutional Court, there would be no competent tribunal to take over the matter. The Supreme Court would have to intervene and create a new tribunal. Guatemalan law does give the Supreme Court the power to create other tribunals so they might decide to create a specific tribunal for cases involving genocide and crimes against humanity, and perhaps other crimes of international nature, or simply create a third High Risk Tribunal of "general" jurisdiction. Either decision the Supreme Court makes may prove advantageous to the judiciary. If it decides to stay with the format of "general" jurisdiction, the creation of a new tribunal would alleviate some of the work load from the other tribunals and it would have new, independent judges. Although, one may argue that those judges would still be tainted by the strong media coverage. If the Supreme Court decided to create a special tribunal, then it might prove to the international community that the country and the judiciary are

245. Acuerdo Numero 12-2011, s*upra* note 167

committed to the prosecution of these crimes and finding redress and justice for the victims.

From a procedural perspective, a new court may find it impossible to begin at a stage where all the evidence has already been heard because the judges would only be able to see the transcripts of the reception of evidence and not the evidence itself. A new court may lack the authority to invalidate the earlier trial court's proceedings and also lack clear guidance by the Constitutional Court, provided that by the time the trial resumes (if ever), the Court has not resolved the other *amparos* that are still pending.

The Constitutional Court needs to resolve all the *amparos* if the trial has any chance of success – I use the word broadly, as success in this case does not necessarily entail a conviction. Not only does it need to resolve the *amparos*, but it needs to do so clearly. The court cannot forget that it is creating case law that, although not binding among the lower courts, is considered to be strong guidance for future decisions. There are legal issues and questions about Guatemalan law that need clarification and perhaps this is the moment for the Constitutional Court, as well as the Supreme Court, to take command and ownership of the issue and begin to interpret those items that are vague and obscure.

Given the current impasse and the possibility that the situation remains the same, other avenues will have to be pursued. One of the main purposes of the trial, at the domestic level, is to provide the victims with justice. Perhaps it is time to think about reparation. The Commission for Historical Clarification, in its 1999 Report, recommended the State should have a National Reparation Programme in place for the victims and their families.[246] This should be done by the State in conjunction with the national Congress. The Programme should include a series of measures inspired by the principles of equality, social participation and respect for cultural identity, among which at least the following should figure:[247]

> a) Measures for the restoration of material possessions so that, as far as is possible, the situation existing before the violation be re-established, particularly in the case of land ownership.
> b) Measures for the indemnification or economic compensation of the most serious injuries and losses resulting as a direct consequence of the violations of human rights and of humanitarian law.
> c) Measures for psychosocial rehabilitation and reparation, which should include, among others, medical attention and community mental health care, and likewise the provision of legal and social services.
> d) Measures for the satisfaction and restoration of the dignity of the individual, which should include acts of moral and symbolic reparation.

Although this Programme would feel insufficient for the victims who were able to obtain a guilty verdict in the national courts, it is still a step forward – a step

246. GUATEMALA: MEMORY OF SILENCE, *supra* note 106, at 49-50.
247. GUATEMALA: MEMORY OF SILENCE, *supra* note 106, para. 9.

towards the respect of human rights and towards the recognition and integration into a progressive international community.

As a Guatemalan, my hopes are that the judiciary and other high institutions come through and decide the issue, independently and impartially, while in strict compliance with legal notions and principles. There are many cultural and societal hurdles that also need to be overcome that will influence the outcome of this trial, but, nonetheless, the effort is commendable, whatever the end result may be.