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Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala

Naomi Roht-Arriazza*

In November 2006, a local trial court in Guatemala’s capital ordered the arrest of the country’s ex-President, Oscar Mejía Victores, along with ex-Defense Minister Aníbal Guevara, ex-Police Chief Germán Chupina, and ex-head of the Secret Police Pedro Arredondo on charges of genocide, torture, enforced disappearances, arbitrary detention, and terrorism. The defendants, along with two others whose arrest warrants were not executed, were deeply implicated in the conceptualization and execution of a repressive state strategy that resulted in the deaths of two hundred thousand Guatemalans and the destruction of over four hundred villages. Although the arrest order was carried out through a Guatemalan court, it was issued by a Spanish judge, Santiago Pedraz. Judge Pedraz of Spain’s Audiencia Nacional issued the warrants in July 2006, followed by formal extradition requests. He based Spanish jurisdiction over crimes committed by Guatemalans in Guatemala on a Spanish law that allows universal jurisdiction over certain international crimes.

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3 The Audiencia Nacional hears cases involving drug smuggling, terrorism, state corruption, and international crimes that cannot adequately be dealt with at the level of provinces and autonomous communities. Although divided into chambers, it is roughly equivalent to a US district court.
Mejía holed up in his house and the secret police chief fled, while the ex-Defense minister and the ex-Police Chief were held in a military hospital under guard. This case represents the first time members of the military high command were affected by any legal action against them, and one of a handful of cases where any Guatemalan military officer has been subject to judicial proceedings.\(^4\) After over a year in detention, the defendants were freed when Guatemala’s Constitutional Court (“GCC”) decided on December 12, 2007 that it would not honor Spanish arrest warrants or extradition requests.\(^5\) The court held that Spanish courts did not constitute a “competent authority” because Spain did not have jurisdiction over events that took place in Guatemala; the effort to exercise universal jurisdiction was unacceptable and an affront to Guatemala’s sovereignty. The court added that the charges were related to political crimes and thus not extraditable, and that Spain’s participation in the 1980s Central American peace process meant that it was bound by the commitments made by the government and the insurgents that an official truth commission would have no judicial effects. Given that commitment, the GCC concluded, it would be inconsistent for Spain to now seek to prosecute crimes arising out of the region’s civil conflicts.

The problem of near-complete impunity for crimes committed during periods of repression and internal armed conflict is not unique to Guatemala. The powerful military and civilian figures who order such crimes usually retain a large amount of power—`de jure` or `de facto`—even after the conflict ends or the government changes and are singularly uninterested in criminal investigations into the past. In contrast, the post-armed conflict state tends to be weak, with limited resources and a culture of corruption and self-dealing among state actors.

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\(^4\) There have been two high-profile trials of military officers in the killings of Bishop Juan Gerardi and anthropologist Myrna Mack. The Mack case, after over a dozen years, resulted in the convictions of three officers, one of whom promptly went into hiding. The sentence is at Recurso de Casación Conexados 109-2003 and 110-2003 (Corte Suprema de Justicia, Jan 14, 2004), available online at <http://www.derechos.org/nizkor/guatemala/myrna/myrnacs.html> (visited Apr 5, 2008). In the Gerardi case, the Supreme Court upheld the convictions of two officers in January 2006. See Conie Reynoso, *Confirmar sentencia: Continúa pena de 20 años de cárcel para sindicados*, Prensa Libre (Jan 14, 2006), available online at <http://www.prensalibre.com.gt/pl/2006/enero/14/132159.html> (visited Apr 5, 2008). For an excellent description of the Gerardi case, see Francisco Goldman, *The Art of Political Murder: Who Killed the Bishop?* (Grove 2007). A handful of civil patrollers, members of paramilitary groups created and controlled by the army, have also been convicted of murder in Guatemalan courts. But as detailed in this Article, by and large the prosecutors’ office has not pursued cases arising out of the armed conflict, and judges have been intimidated, threatened, or bought off.

\(^5\) Sentencia del 12 de Diciembre de 2007, Corte de Constitucionalidad (Guatemala), Expediente 3380-2007, Audiencia Nacional de España, available online at <http://www.cc.gob.gt/index-2.html> (visited Apr 5, 2008) (“GCC decision”) (click “Últimas Resoluciones” at the top of the page for access to the decision).
authorities. Moreover, in Guatemala as elsewhere, post-armed conflict military and paramilitary networks have mutated into criminal networks, engaged in drug running, human trafficking, and similar violent enterprises, with a degree of impunity similar to that enjoyed by former military officials in human rights-related cases.6

Much of the international institution-building over the last two decades in the field of human rights and international humanitarian law has been aimed at overcoming the impunity of powerful, untouchable actors. An emerging international norm7 holds that when large-scale humanitarian law violations have been committed, action must be taken to deal with the past, including measures to allow victims to find out what happened to their loved ones, to sanction those responsible, and to provide redress. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") were built on the idea that only an international prosecution and trial would have the ability and legitimacy to try high-ranking perpetrators, including heads of state. Similarly, the International Criminal Court ("ICC") was founded out of concern that states would be unwilling or unable to prosecute powerful actors domestically, and that therefore a complementary forum was needed. However, the experience of the ICTY and ICTR, while positive in many ways, soon gave rise to criticism that the Tribunals were enormously expensive, remote from the societies where the crimes took place, and did not help to restore or create viable national justice systems.8

Hybrid tribunals, combining national and international law, procedure, and personnel, seemed the appropriate response, and variants on such hybrid courts were created in Sierra Leone, Cambodia, East Timor, and Kosovo. In particular, hybrid courts are theorized to be better at creating legitimacy and relevance for local audiences, embedding international legal norms in national legal systems, and training local lawyers and judges to use these norms and to carry out complex criminal investigations, all at a lower cost than international tribunals.9

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Initial evaluations of these courts showed varied results. While the Sierra Leone Special Court was relatively successful in its outreach to the local society, on a per case basis it was still quite expensive and the results vis-à-vis local legacy are still unclear.\(^\text{10}\) The other hybrids were seen, by and large, as less successful, although in the Cambodia and Bosnia cases it is still too early for definitive assessments.\(^\text{11}\) Still, even assuming unequivocal success, setting up hybrids is an expensive and time-consuming proposition, and one unlikely to be used in many situations where the government is unwilling to support it or the international community does not provide adequate resources.

The Guatemalan case suggests another way to “hybridize” prosecutions in the face of dysfunctional national justice systems and rampant impunity. With respect to the security forces’ high command, cases for genocide, torture, massacres (extrajudicial killing), and enforced disappearance have been brought simultaneously in national courts in Guatemala, Spain, and Belgium.\(^\text{12}\) Victims’ groups have pursued a combined inside and outside legal strategy, pushing for domestic prosecutions for genocide while also focusing on transnational prosecution based on universal jurisdiction in other states’ national courts. The effort to obtain witness testimony and extradition of the defendants in the transnational cases has led to considerable litigation in Guatemalan courts on international law issues. At the same time, an agreement between the Guatemalan government and the United Nations in 2006 created the International Commission Against Impunity in Guatemala or Comisión Internacional Contra la Impunidad en Guatemala (“CICIG”), which will look into the workings of current clandestine groups and push for their investigation and prosecution by local prosecutors in the local courts. Between them, these efforts aim to impel the local prosecutors and courts into action against impunity, with international support and oversight.\(^\text{13}\)


\(^{11}\) Id.

\(^{12}\) The Belgian cases involve the deaths of two Belgian priests—Serge Berten and Walter Voordekkers—during the early 1980s, presumably at the hands of security forces. Family members of the victims brought a case in Belgian courts in January 2001 under Belgium’s then-expansive universal jurisdiction law. The case remained open after the law was amended in 2003. See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* ch 7 (Penn 2005).

\(^{13}\) A third strategy, also important in the Guatemalan context, involves the roles of the Inter-American Commission on, and Court of, Human Rights in pushing for an end to impunity and awarding redress to some victims. However, a full discussion of the role of the Inter-American system is beyond the scope of this Article. For more information, see Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin
This Article will first briefly describe the background of the Guatemalan conflict and the evolution of the transnational cases against the military high command. It will then focus on some of the legal strategy issues involved and on the gains and losses of this transnational networking approach to combating impunity. In particular, it will look at how the multinational legal team, working simultaneously in the Spanish and Guatemalan courts on different aspects of the case, has allowed for learning and training opportunities for the lawyers involved, has forced local courts to engage with international law, and has tried to use the power of foreign courts to leverage domestic processes. It will consider the content and impact of the Guatemalan and Spanish jurisprudence generated by the case and its current prospects. It will then describe the mandate and goals of CICIG and conclude with some initial thoughts on how these initiatives might complement each other and serve as an example elsewhere.

I. THE CONTEXT AND THE PROCEEDINGS

Guatemala’s internal armed conflict began in 1960 and ended officially in 1996. Over that period, according to the UN-sponsored Commission on Historical Clarification (“CEH”), some 200,000 people were killed, over 90 percent of them by the military. Some 40,000 were the victims of enforced disappearance. The bulk of the atrocities were committed in the late 1970s and early 1980s; the vast majority of the victims were Mayan indigenous people who were considered to be the support base for a guerrilla movement. The CEH found that in at least four specific areas of the country, the army had committed “acts of genocide.” The CEH’s rationale, adopted by complainants in the genocide cases, was that

It is very important to distinguish between “the intent to destroy a group in whole or in part”, that is, the positive determination to do so, and the motives of such an intent. In order to determine genocide, it is only necessary to demonstrate that there exists an intent to destroy the group, regardless of motive. For example, if the motive of the intent to destroy an ethnic group is not a racist orientation but only a military objective, the crime may nevertheless be understood to be genocide.


15 CEH, 3 Guatemala, § 855 (defining genocide as a series of acts, including killing and creating conditions of life aimed at the physical destruction of victims, when committed with the “intent to destroy, in whole or in part, a racial, religious, national or ethnical group as such”) (quoting the
However, despite the fact that a 1996 amnesty law specifically excludes genocide, forced disappearance, torture, and other international crimes from its ambit,\(^{16}\) no charges were ever filed against the organizers and planners of the campaigns. To this day, less than a handful of cases arising out of the internal armed conflict have ever been prosecuted, and most of those involve leaders of the paramilitary militias (civil patrols) instituted by the army.

Given this panorama, in December 1999, Nobel Peace Prize winner Rigoberta Menchú and others brought a complaint in the Spanish Audiencia Nacional\(^{17}\) alleging genocide, torture, terrorism, summary execution, and unlawful detention perpetrated against Guatemala's Mayan indigenous people and their supporters during the 1970s and 1980s. The complainants’ rationale for the genocide charges included the targeting of Mayans as an ethnic group. It was also based, following a gloss on the definition of genocide that the Audiencia had accepted in earlier cases involving Chilean and Argentine defendants, on the intended elimination of a part of the Guatemalan “national” group due to its perceived ideology.\(^{18}\) Among the events underlying the complaint was the massacre of Menchú’s father and thirty-five other people in the 1980 firebombing of the Spanish embassy, the killing or disappearance of four Spanish priests, and a large number of rural massacres, rapes, cases of torture, and enforced disappearance. The complainants grounded Spanish jurisdiction on Article 23.4 of the Organic Law of the Judicial Branch ("LOPJ").\(^{19}\) That provision allows for prosecution of certain crimes committed

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\(^{16}\) Convenio sobre la Prevención y el Castigo del Delito de Genocidio (1948), art II, 78 UN Treaty Ser 277 (1951).


\(^{18}\) See explanation in note 3.

\(^{19}\) See Auto de la sala de lo penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometido durante la dictadura Chilena (Decision (Auto) of the Full Penal Chamber Confirming Spanish Jurisdiction Over the Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship), Appeal No 173-98, 1st Section, File 1/98 from Judicial Chamber 6 (Audiencia Nacional, Nov 5, 1998) (Spain), available online at <http://www.derechos.org/nizkor/chil/audi.html> (visited Apr 5, 2008) (author translation). See also the English translation of the decision regarding Chile in Reed Brody and Michael Ratner, eds, The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain (Kluwer 2000).

by non-Spaniards outside Spain, including genocide, terrorism, and other crimes recognized in international treaties ratified by Spain. On March 27, 2000, Investigating Judge Guillermo Ruiz Polanco of the Audiencia Nacional accepted the Guatemalan complaint and agreed to open an investigation.\(^{20}\) In reaching that decision, the judge noted that several of the victims were Spanish and that the Guatemalan courts had failed to investigate the crimes.\(^{21}\)

The Spanish Public Prosecutors' Office, at the time in the hands of the conservative Popular Party, appealed the judge's jurisdiction.\(^{22}\) An appeals panel of the Audiencia Nacional, and then the Spanish Supreme Court, found that the Spanish courts had no jurisdiction. The Supreme Court held, by a vote of 8-7, that customary international law required a link to the forum state when universal jurisdiction was not grounded in specific treaty provisions or authorized by the United Nations.\(^{23}\) Thus, only those cases that involved Spanish citizens could proceed. In September 2005, Spain's highest tribunal, the Constitutional Tribunal, reversed.\(^{24}\) The Tribunal began with the plain language and legislative intent of Article 23.4 of the LOPJ. As the Constitutional Tribunal pointed out, the law itself establishes only a single limitation: the suspect cannot have been convicted, found innocent, or pardoned abroad. It contains no implicit or explicit hierarchy of potential jurisdictions and focuses only on the nature of the crime, not on any ties to the forum; it establishes concurrent jurisdiction. Given the absence of textual support for a restrictive interpretation of the law, such a construction would be overly strict and unwarranted given the grave nature of the crimes. The Tribunal re-opened the case for all complainants, including large numbers of Guatemalans who were survivors or family members of massacre victims.\(^{25}\) The full case, focusing on genocide, could then go forward.

\(^{20}\) Juzgado Central de Instrucción No 1, Audiencia Nacional, Madrid, Dil Previás 331/99, Auto de 27 de Marzo de 2000 (on file with author).

\(^{21}\) Id.


\(^{25}\) Id at 211.
The next step in the re-opened case, which was assigned to Judge Santiago Pedraz, was to take the statements of the suspects, a procedure designed to allow defendants to tell their side of the story before any arrest warrants issued. Judge Pedraz, following long-established rules for taking statements in another state through a rogatory commission, worked through a Guatemalan judge to set up the dates, and the judge, along with the Spanish prosecutor, traveled to Guatemala. The defendants apparently did not see much advantage to telling their side of the story; they filed extraordinary writs of *amparo* before the local courts claiming their appearance would violate their constitutional rights. In most Latin American countries, the ability to challenge government action in violation of constitutional rights, known as *amparo*, is a cornerstone of individual rights, and the defendants made constant use of the procedure from this point on.26 At this time as well, the Center for Justice and Accountability (“CJA”), a US–based NGO that had experience litigating transnational cases through its work using the US Alien Tort Statute,27 came into the case representing several families of victims. CJA and its international attorney Almudena Bernabeu would soon put together and lead an international legal team for this new phase of the case.

Fortunately, despite the inability to take formal statements, Judge Pedraz did not leave Guatemala entirely empty-handed. He met informally with several representatives of victims organizations who told their stories and detailed the lack of justice in the local courts. In particular, they told the judge that an association of survivors, the Association for Justice and Reconciliation (“AJR”), had been trying to get the local prosecutors’ office to investigate the same set of defendants since 2000, but that aside from a few early depositions of other retired military officers, nothing had been done.28 Guatemala, like most countries in Latin America, changed its criminal procedure during the 1990s to make it more prosecutor-driven; only the prosecutors’ office (Ministerio Público) rather than victims or judges could press forward with an investigation. And despite

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27 28 USC § 1350 (2006). The statute allows for civil suits in US federal court by aliens for torts in violation of the law of nations or a treaty of the US.

28 The AJR case was brought by a Guatemalan human rights group, the Center for Legal Action for Human Rights, in two phases: in 2000 against officials of the Lucas Garcia regime and in 2001 against those of the subsequent Ríos Montt regime. Case No. 3920-2000, Ministerio Público, Guatemala (on file with author). Although the complaints are unpublished, information (in Spanish) on them is available online at <http://www.caldh.org> (visited Apr 5, 2008).
millions in international aid, training, and support, the prosecutors’ office remained ineffective, disrespectful to victims, and vulnerable to threats and corruption, and was reportedly infiltrated by military intelligence and criminal networks of various sorts.

In any event, Judge Pedraz returned to Spain, and a month later, on July 7, 2006 issued charges and international arrest warrants for the defendants on charges of genocide, state terrorism, torture, and related crimes. In early November, Guatemala’s Fifth Tribunal for Crime, Drug Trafficking and Environmental Offenses (the local trial court) executed four of the six arrest warrants. Two others were rejected for technical reasons. Although the technical problems were cleared up soon after, those warrants have never been executed. One of them was for General Ríos Montt, the former head of state from 1982–83, who by that time was running for Congress, and the other for General Benedicto Lucas, former army chief of staff from 1978–80. The four defendants reacted differently: one fled, one holed up in his house, one was in a military hospital and was put under guard, and the other turned himself in and


While the constitution and the law provide for an independent judiciary, the judicial system often failed to provide fair or timely trials due to inefficiency, corruption, insufficient personnel and funds, and intimidation of judges, prosecutors, and witnesses. The majority of serious crimes were not investigated or punished. Many high-profile criminal cases remained pending in the courts for long periods as defense attorneys employed successive appeals and motions.


31 See note 2.

32 Guatemala does not typically publish lower court pretrial decisions, hence no published record of these rejections is available. (Reference documents on file with author.)

33 The warrants were initially rejected because of a clerical error; the ones that reached Guatemala included only the allegations surrounding the 1980 Spanish Embassy massacre, not the genocide charges stemming from the entire 1979–85 period. New, corrected arrest orders were sent immediately, but by that time the case was suspended due to the first of many amparos. The lower court judges then left them pending until the legal issues around the executed warrants could be settled, which is why they were never executed. See Calderon, Capturan a ex militares (cited in note 6).
also ended up in a military hospital. They all, however, hired lawyers in Guatemala to contest the extraditions.

On November 22, Judge Pedraz followed up with formal extradition requests.\textsuperscript{34} He cited an 1895 Extradition Treaty between Guatemala and Spain and explained in detail why each article of the Treaty applied in this case. He also discussed the crime of genocide and attached a copy of the 2005 Spanish Constitutional Court decision to show that he had jurisdiction under Spanish law.\textsuperscript{35}

II. THE PARALLEL ADVANTAGES OF HYBRID TRIBUNALS AND TRANSNATIONAL PROSECUTIONS

The effort to use Spanish courts to bring high-ranking Guatemalan security force officers to justice, especially from 2006 on, exemplifies how, in many ways, transnational litigation shares some of the advantages of litigation in hybrid tribunals. In particular, both emphasize creating new movement within domestic legal systems and lowering costs. In other aspects, however, especially the ability to execute arrest warrants, the litigation has shared the disadvantages of other forms of international criminal prosecution.

A. TRAINING LOCAL LAWYERS IN INTERNATIONAL LAW AND COMPLEX CRIMINAL INVESTIGATION

One of the often-mentioned benefits of hybrid tribunals is their ability to impact local jurisprudence and train local staff, both lawyers and judges. By creating mixed national-international judicial panels and mixed professional staffs, hybrid courts combine the expertise and legitimacy of international judges and staff with the knowledge of local law and legal culture and the long-term commitment to the country of national personnel. International investigations and prosecutions provide on-the-job training for national lawyers in international law and complex criminal cases.\textsuperscript{36} They also, at least in theory, help imbue newly reformed or (re)created justice systems with the ethics and spirit of the rule of law. In practice, that theoretical promise has not always materialized. Critics have pointed out that most of the substantive legal jobs may well, under time constraints, go to outsiders, that the judges are not necessarily qualified in

\textsuperscript{34} Juzgado Central de Instrucción No. 1, Dl Previas 331/99, Auto de 22 Noviembre 2006 (on file with author).

\textsuperscript{35} Id.

\textsuperscript{36} See, for example, Dickinson, Hybrid Courts at 307 (cited in note 9).
international law nor willing or able to impart whatever expertise they have to local counterparts, and that links to the local bar may be tenuous at best.\textsuperscript{37}

Compared to the creation of hybrid institutions, transnational prosecutions can also provide advantages, including some of the same training and norm diffusion benefits. Early transnational prosecutions involving international crimes like genocide, torture, and other crimes against humanity often incorporated exiled lawyers from the state where the atrocities took place. National human rights and legal groups served more as information sources, witness-seekers, and media channels, while the litigation team was based largely abroad. This distinction was true, for instance, of the earlier cases in the Spanish courts against the high command of the Argentine and Chilean militaries for their crimes during the 1970s.\textsuperscript{38} Subsequent cases, including the ongoing effort to prosecute former Chadian dictator Hissene Habré in Senegal and Belgium\textsuperscript{39} and the attempt to prosecute high-ranking US officials in German courts,\textsuperscript{40} involved the creation of complex multinational legal teams. The Guatemala case followed and elaborated on this approach.

In the Guatemalan case, Rigoberta Menchú had been initially represented in Spain by labor and criminal lawyers who focused on the validity of Spain’s jurisdiction. Once the genocide case was re-opened, and after the judge’s visit to Guatemala in June 2006, a new legal team led by the CJA began working with lawyers in Menchú’s local foundation offices in Guatemala to develop the evidence for the Spanish case. At the same time, the team began dealing with the extradition and rogatory commission cases in the Guatemalan courts. Eventually the legal team grew to include local counsel in Spain with experience litigating universal jurisdiction cases, lawyers in the Hague and San Francisco with knowledge of both international and national criminal law, law students at the University of California-Hastings and Harvard human rights legal clinics, and the Menchú Foundation lawyers in Guatemala (who were coordinating with other legal human rights groups there).

These international and national lawyers have strategized and worked together on pleadings before both the Spanish and Guatemalan courts and, most

\textsuperscript{37} See, for example, Higonnet, Restructuring Hybrid Courts at 368-69 (cited in note 9).
\textsuperscript{38} For a narrative of those cases, see generally Roht-Arriaza, The Pinochet Effect (cited in note 12).
\textsuperscript{40} See Center for Constitutional Rights, German War Crimes Complaint against Donald Rumsfeld, et al, available online at <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al.> (visited Apr 5, 2008) (describing the case brought against Donald Rumsfeld and others for torture in Abu Ghraib).
recently, before international human rights bodies. There have been advantages to this approach: rather than a (potentially paternalistic) one-way transmission of knowledge from the international lawyers to the local ones, there has been a partnership wherein both sides learn. The international lawyers have had to grapple with how to present international law arguments in the (rather Byzantine, at least by US standards) Guatemalan legal system, while the national lawyers get the experience and access to non-Spanish language research materials of the internationals. Interestingly, prior experience with civil Alien Tort cases in the US has proven particularly useful in thinking about how to protect witnesses from retraumatization, give complainants an active protagonistic role in the proceedings and in witness preparation, selection, and presentation. When it came time to present witnesses before the Spanish judge, for example, the judge accepted that witnesses be asked specific questions by their lawyers, a style of deposition more familiar to US trial lawyers than to the traditionally less oral, less structured style of Spanish pretrial procedure.

Working with witnesses has also opened the way for incorporating new, young Guatemalan lawyers into complex criminal cases. Once the case began moving forward in Spain, the legal team laid out a strategy for proving genocide. Building on the findings of the CEH, they put together witness lists involving people from the hardest-hit areas and people who could testify about different aspects of genocide: massacres, bombings, forced displacement, destruction of community structures, and targeting of local religious and secular authorities. The team also added new complainants who were survivors and eyewitnesses to massacres. Most of the attorneys working with these witnesses to accompany them to give testimony before the Spanish court have been young Mayan women who can communicate with the witnesses in the witnesses’ own language (which is generally not Spanish). These young lawyers will return to Guatemala with exposure to methods of investigation, witness preparation, and criminal procedure that will inform their work at home. Through this joint work, these cases begin to build up a cohort of international human rights lawyers equally at home in their national systems and with international law and with enough knowledge of foreign legal systems to be able to conceive of multilayered strategies that move from the national to the international and back.

B. MAKING LOCAL COURTS ENGAGE WITH INTERNATIONAL LAW

A related advantage of hybrid courts is their ability to foster local ownership of justice processes. By combining national and international law and personnel, such courts may foster the (re)construction of a viable domestic legal system which may act as a source of justice rather than of oppression or corruption. Hybrid courts may be able to reflect local culture, language, and law
Making the State Do Justice while remaining anchored to the core values of international human rights and humanitarian law.\textsuperscript{41} Because proceedings take place locally, the affected population and the press can observe them. On the other hand, hybrids, like national courts generally, are for these same reasons no doubt more vulnerable to threats, political influence, and corruption than their purely international counterparts.\textsuperscript{42}

Transnational investigation and prosecution can in theory penetrate national legal systems in ways similar to those posited for hybrid courts, but they are also subject to limitations. A case in point is the intense judicial activity surrounding Judge Pedraz’s 2006 arrest orders and extradition requests. These orders and requests set off a furious battle in the Guatemalan courts. The local courts had to decide whether to execute the arrest warrants, whether to grant extradition,\textsuperscript{43} and how to deal with requests for judicial cooperation involving witnesses, defendants, documents, and assets. Along the way, the local courts had to grapple with complex arguments about the propriety of universal jurisdiction, the nature of international crimes, and the role of international law in Guatemala’s constitutional order. Each of these involved a combination of local and international law.

In general, the rules on extradition are designed to deal with common crimes, not international crimes like genocide. Most extradition treaties, including the Spain-Guatemala Treaty,\textsuperscript{44} have a similar set of rules. The alleged acts must be criminalized in both legal systems, and the requested state must only satisfy itself that the requesting state has jurisdiction under its own laws and has made out the rough equivalent of probable cause; a full evidentiary showing is not required. Political crimes, and common crimes connected to them, are not subject to extradition; however, the treaty does not define what constitutes a political crime. Also like many extradition treaties, the Spain-Guatemala Treaty

\textsuperscript{41} See, for example, Higonnet, Restructuring Hybrid Courts at 411 (cited in note 9).

\textsuperscript{42} See, for example, Justice Initiative, Security Council Must Address Costs of Moving Taylor Trial to the Hague (Apr 4, 2006), available online at <http://www.justiceinitiative.org/db/resource2?res_id=103165> (visited Apr 5, 2008) (reviewing the debates around removing the Charles Taylor trial in the Sierra Leone Special Court to the Hague due to security concerns in West Africa); Justice Initiative, Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly (Feb 14, 2007), available online at <http://www.justiceinitiative.org/db/resource2?res_id=103627> (visited Apr 5, 2008) (providing an example of concerns about the lack of independence of the Cambodian Extraordinary Chambers).

\textsuperscript{43} Even if the courts allowed the extraditions to proceed, the Executive Branch would still have a chance to stop them at a later point. Ministerio de Relaciones Exteriores de Guatemala, El procedimiento de extradicion en Guatemala 6–7, available online at <http://www.oas.org/juridico/MLA/sp/gm/sp_gm-ext-gen-procedure.pdf> (visited Apr 5, 2008).

\textsuperscript{44} Tratado de Extradicion entre Espana y Guatemala, (Nov 7, 1895) and Protocolo Adicional aclarando su articulo VII (Feb 23, 1897).
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does not require (but does allow) the extradition of nationals.\textsuperscript{45} Guatemala's Constitution also contains a prohibition on the extradition of nationals, but its Article 27 has an exception that seems tailor-made for this case: it excludes alleged crimes contained in "treaties and conventions with respect to crimes against humanity or against international law."\textsuperscript{46}

Even though the arrest orders came from a Spanish court, they would have to be enforced through Guatemalan courts ordering the police to execute the warrants. Extradition proceedings had the immense advantage of bypassing the public prosecutors' office, which had long held up domestic proceedings and was not considered particularly eager to move any of the armed conflict or genocide cases along given their political sensitivity and complexity. If the courts moved towards extradition, at the very least, that might embarrass the prosecutors' office into action. Indeed, in July 2007 the prosecutors' office began threatening to call witnesses in the Spanish Embassy massacre case of 1980, in what seemed to be a feeble attempt to preempt the Spanish proceedings by showing they were prosecuting the case at home. This response vindicated the complainants' legal strategy: by pushing for prosecution abroad, they could prod the courts into acting at home, even if the prosecutor's actual motivation was to undermine the foreign proceedings.\textsuperscript{47}

The defendants immediately filed writs of \textit{amparo} complaining that their constitutional rights had been violated by the local court's execution of the arrest warrants.\textsuperscript{48} The defendants argued, among other things, that the Spanish courts were not a "competent authority" to issue an arrest warrant and could not exercise extraterritorial jurisdiction because Guatemalan sovereignty forbade it. They further argued that the language of the extradition treaty referred to those who had "taken refuge" in Guatemala, and that as Guatemalan citizens therefore they were not covered by the treaty, that the alleged crimes were not covered by the treaty, and that the treaty was too old and outdated to be effective. The trial court rejected these arguments and found that Spanish jurisdiction was proper.\textsuperscript{49} That decision was appealed, but the appeals court sent the case back to the lower court.\textsuperscript{50} The trial court again found jurisdiction, and the appeals court, in

\textsuperscript{45} Id, art IV.


\textsuperscript{47} For a fuller explanation of how this insider/outside theory has worked in the case of Spanish investigations into military dictatorships in the Southern Cone, see Roht-Arriaza, \textit{The Pinochet Effect} at chs 7-8 (cited in note 12).

\textsuperscript{48} For a description of \textit{amparo}, see text accompanying note 26.

\textsuperscript{49} Resolución, Tribunal Quinto, No 2-2006 (Mar 28, 2007) (on file with author).

\textsuperscript{50} Resolución, Sala Primera de Apelaciones, No 2-2006 (June 1, 2007) (on file with author).
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October 2007, agreed. The court recognized that the extradition treaty was binding, that Spanish jurisdiction was proper, and that the crimes at issue were of "grave importance" under international law and thus subject to extradition even though they were not—and could not have been in 1897—listed as extraditable crimes in the treaty. The trial court also fined the defendants' lawyers for filing frivolous appeals.52

The defendants, throughout the process, filed challenge after challenge, some of them almost exact repetitions of earlier ones. The defendants' repeated challenges suspended the proceedings over and over again, to the immense frustration of the complainants. No one begrudged the defendants a legitimate right to defense, but as their lawyers refiled arguments that had already been rejected over and over, it became clear that here, as in other criminal cases involving powerful defendants,53 the writ of amparo had become a mechanism for delay and abuse.

As soon as the arrest warrants were announced, three complainants in the Spanish case—Rigoberta Menchú, Jesús Tecú, and Juan Manuel Gerónimo—asked for and were admitted to the case as intervenors (terceros interesados). Yet despite their intervenor status, they were continually denied access to the file, notification of hearings, and copies of relevant documents. By August 2007, they were frustrated and decided to file their own amparo alleging violations of their rights as victims of human rights violations. Advised by the international legal team, they cited the jurisprudence of the Inter-American Commission and Court on the right to the truth, the right to information, the right to prompt and effective justice without excessive delay, and the right to an independent tribunal.54 Shortly thereafter, the trial court agreed with them and ordered the


Id.

The use of abusive amparos was documented, for example, in the Myrna Mack case, one of the few cases in which the Guatemalan courts convicted military officers of killing. See Fundación Myrna Mack, Caso Myrna Mack, resumen de las audiencias ante el Tribunal Tercero de Sentencia del 3 de Septiembre al 3 de Octubre de 2002, available online at <http://www.myrnamack.org.gt/main.php?id_area=33> (visited Apr 5, 2008). Guatemala does not typically publish lower court pretrial decisions, hence there is no public record of these amparos. A bill has been pending in the Guatemalan Congress to reform the amparo procedure, but it has apparently not progressed very far.

See, for example, Consultative Opinion OC 9-87 of Oct. 6, 1987 on Judicial Guarantees in States of Emergency, art 27(2), 25 and 8, ¶ 24, available online at <http://www1.umn.edu/humanrts/iachr/b_11_4i.htm> (visited Apr 5, 2008); see also Blake case, Reparations Judgment (Jan. 22, 1999) Ser C; Resolutions and Sentences, ¶¶ 61, 63, available online at <http://www1.umn.edu/humanrts/iachr/C/48-ing.html> (visited Apr 5, 2008). The complainants also cited, as persuasive authority, cases of the Colombian Supreme Court that balanced defendants' due process rights against victims' rights to truth and access to justice.
case file released. The release was suspended when the defendants filed—yet another—writ of amparo. Nonetheless, the offensive (rather than defensive) use of the amparo proceeding to claim rights as victims under international law to limit the abusive use of dilatory motions is an innovation in Guatemala. While the use of dilatory writs will, in the end, be curbed only by either legislation or a change in attitude of the higher courts, at least it established a precedent that victims do indeed have internationally recognized rights that must be given effect in local courts.

Through this complicated set of domestic proceedings, triggered by an international warrant, trial-level Guatemalan courts had to grapple with international law and to compare their procedures and ways of thinking with the jurisprudence generated by international courts as well as other Latin American courts facing similar issues. Through the offensive use of the amparo writ, international law—in this instance concerning the rights of victims—was brought into an area of domestic law where international law had not previously been applied. In this way, transnational prosecutions allow local courts to become familiar with international law and to modernize and innovate, while remaining grounded in local legal culture and practice.

III. LIMITS TO EFFECTIVENESS: THE CONSTITUTIONAL COURT DECISION OF DECEMBER 2007 AND THE SPANISH JUDGE’S RESPONSE

On December 12, 2007, the GCC ruled that the Spanish arrest warrants were invalid and that defendants could not be extradited. The sixty-plus page ruling responded to yet another amparo, lodged by Guevara and Arredondo, against the constitutionality of the arrest warrants issued in November 2006. The amparo questions only the validity of the arrest warrants, yet the GCC looked beyond that question to consider the validity of the entire extradition proceeding. The ruling began by accepting that the 1895 extradition treaty between Spain and Guatemala is still valid, but found that it must be interpreted in light of the drafters’ intentions. Nothing in the treaty explicitly refers to extraterritorial jurisdiction, they noted, and the fact that the treaty speaks of those seeking asylum or refuge in another state indicates that the drafters were thinking about nationals of another state hiding in the requested state.

56 See GCC decision (cited in note 5).
57 See id at 15–17 (cited in note 5). This method of interpreting the treaty is at odds with the method of treaty interpretation set out in the Vienna Convention on the Law of Treaties (1980), 1155 UN
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treaty, they argued, must be read in light of the territorial principle of the criminal law. Therefore, they concluded, the treaty does not apply to crimes committed within Guatemala.

The GCC added that it could look into Spanish law because it needed to convince itself that the courts of the requesting country are a “competent authority” under the Extradition Treaty. Although from 2005 on Spain clearly had jurisdiction under Spanish law, the GCC asks whether the 2005 Spanish Constitutional Court decision that allowed re-opening of the full investigation, comports with international law.

It concludes that universal jurisdiction cannot be maintained because it affronts Guatemalan sovereignty. While Guatemala might recognize an international tribunal, the GCC stated, it will not recognize the extraterritorial jurisdiction of another national court. Otherwise, it argued, one state would be judging another state's ability or willingness to prosecute without either Security Council or General Assembly approval. This line of reasoning is highly problematic, as it is in practice an action of judicial review of the decisions of foreign courts. In effect, the Guatemalan court disagrees with the Spanish court's interpretation of Spanish law. In addition, the GCC finds that extradition is improper for other reasons: both Spain and Guatemala prohibit the extradition of nationals. However, this is not strictly speaking true: Article 27 of Guatemala's constitution allows the extradition of nationals where the crimes are based on treaties and conventions with respect to crimes against humanity or against international law. The GCC reads this reference, though, as limited to surrender to international courts like the ICC, the ad hoc international criminal tribunals, or even the Inter-American Court of Human Rights (which has no criminal jurisdiction).

In dicta, the GCC finds that the crimes alleged are common crimes connected to political crimes because they are connected to the armed conflict, and that the Constitution holds that citizens cannot be extradited for political crimes. This is legally incorrect: the Genocide Convention’s Article VII specifically states that “genocide and the other acts enumerated in Article III


See Tratado de Extradición and Protocolo Adicional aclarando su articulo VII (cited in note 44).

Guatemala Const, art 27 (cited in note 46). The Court adds that extradition of nationals is also improper because there is no reciprocity, but this is also not strictly speaking true; where a treaty requires it, Spain will extradite its nationals. Art 1, Ley 4/1985, de 21 de Marzo, de Extradición Pasiva, available online at <http://noticias.juridicas.com/basedatos/Penal/14-1985.html> (visited Apr 5, 2008).

GCC decision at 22–23, 54 (cited in note 5).
shall not be considered as political crimes for the purpose of extradition.\textsuperscript{60} The GCC may have been signaling that it would consider these crimes in any domestic prosecution as subject to the Guatemalan Law of National Reconciliation, which grants limited amnesty to persons who have committed political crimes and common crimes connected to them.\textsuperscript{61} But Articles 4 and 8 of that law specifically exclude the type of crime alleged in the Spanish request.\textsuperscript{62} Along the same lines, the Court characterizes the context of the case as a region-wide civil conflict over political and economic models, with external support on both sides and which pitted ethnic and indigenous people against each other. By so labeling the conflict, the Court implicitly rejects the charge of genocide.\textsuperscript{63}

Finally, the Court recognizes the obligation of the Guatemalan courts to investigate and prosecute under the principle of aut dedere aut judicare (extradite or prosecute) if extradition is denied and invites the complainants to submit their evidence to the Public Prosecutor. This is a bit disingenuous, since the judges know perfectly well that charges on these crimes have long been filed with the prosecutor and have gone nowhere. However, the GCC's recognition that the domestic system needs to prosecute is important. Now they need to follow through.

As a result, the Court finds that the suspects' constitutional rights have been violated and orders the arrest warrants quashed. While technically the judgment should only apply to the two defendants who appealed, they make it extensive to all the other suspects as third-party intervenors. There can be no appeal from the decision.

The GCC's decision is clearly a setback for the complainants and for international law. It exemplifies some of the limits of a transnational litigation strategy. In a climate of intimidation where judges are routinely bribed or threatened into submission, where the legal system has been repeatedly criticized for its ineffectiveness and for allowing rampant impunity, and where some (but


\textsuperscript{61} Ley de Reconciliación Nacional (cited in note 16).

\textsuperscript{62} Id, arts 4, 8.

\textsuperscript{63} GCC at 50 (cited in note 5).
not all) of the defendants still hold power, the defensive tone and negative outcome of the case may have been inevitable. The willingness of the lower courts to go forward, the obvious errors and omissions of the GCC’s judgment, and even the length of time it took for the GCC to rule on the arrest warrants despite several earlier opportunities to do so, are reasons for hope that there are some cracks in the façade of impunity. After all, early cases in the Chilean and Argentine courts also featured more open lower courts, followed by conservative decisions rejecting international human rights law obligations at the highest levels. Both the Chilean Supreme Court and the Argentine Supreme Court have now invalidated or limited amnesty laws and approved prosecutions for past crimes based in part on international law obligations.

The Achilles heel of all international justice efforts, whether at the ICC, through hybrid courts, or through transnational prosecutions, is the inability to execute arrest warrants against powerful defendants. The ICC, for example, has been hamstrung by the inability to apprehend indicted Sudanese officials accused of crimes against humanity in Darfur, despite the existence of a Security Council referral and numerous resolutions condemning those crimes. The International Criminal Tribunal for the Former Yugoslavia became effective only when NATO troops began to seek out and arrest suspects. Hybrid tribunals, although theoretically less exposed to this problem because they have the cooperation of the territorial government, have still experienced difficulties: Charles Taylor for many years could not be extradited from Nigeria to the Sierra

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64 Efrain Ríos Montt, for example, was elected to Congress in 2007, in part as a stated attempt to gain immunity from prosecution. As a Congressman, he has immunity for criminal acts committed while in office, but that immunity does not preclude investigation by the Spanish courts. See Ex-Dictador Ríos Montt vuelve al Congreso, La Prensa (Sept 11, 2007), available online at <http://laprensa.aplyca.com/ediciones/2007/09/11/ex_dictador_rios_montt_vuelve_al_congreso> (visited Apr 5 2008); Inés Benítez, Ex-Dictator on Rocky Road to Congress—and Immunity, IPS (May 23, 2007), available online at <http://ipsnews.net/news.asp?idnews=37871> (visited Apr 5, 2008). As to the other defendants, one strategic consideration here is that they may have less current ability to influence outcomes or to threaten participants than other, lower-ranked former officers who may be more active in current criminal and intelligence networks.


67 The two most wanted suspects at the ICTY are still at large, and NATO has been criticized for its inaction. See, for example, Human Rights Watch, Balkans: Srebrenica's Most Wanted Remain Free (June 29, 2005), available online at <http://hrw.org/english/docs/2005/06/29/bosher11228_txt.htm> (visited Apr 5, 2008).
Leone Special Court. The Special Panels on Serious Crimes in East Timor were similarly unable to prosecute members of Indonesia’s high command for atrocities in East Timor because Indonesia refused to extradite them. Transnational prosecutions will suffer from the same weakness when the defendant’s presence is sought through extradition: unless he leaves his country and travels to a third state willing to execute the arrest warrants, the defendant will be beyond the reach of the foreign court.

IV. Aftermath and Current Prospects

Reaction to the GCC decision was not long in coming. International human rights groups uniformly criticized the holding and the reasoning. European civil society groups began pressuring their governments and EU institutions to question the Guatemalan government’s commitment to human rights, a particularly sensitive point given the installation of a new government in January 2008 as well as ongoing negotiations for an EU-Central American Association Agreement. Above all, human rights and humanitarian lawyers pointed out that if Guatemala was not going to extradite the suspects, it had an international legal obligation to try them at home. That obligation was explicit under the UN and Inter-American Conventions Against Torture and Enforced Disappearances as well as the Genocide Convention. It was also, quite obviously, not being fulfilled.


70 See, for example, CIFCA (Copenhagen Initiative for Central America and Mexico), Urgente: Guatemala anula el proceso de España contra los militares acusados de genocidio (Jan 15, 2008), available online at <http://www.cifca.org/Decision%20CC,%20a%20COLAT,%20%20Die%202007.pdf> (visited Apr 5, 2008).

71 The EU and the Central American countries are engaged in negotiation of a comprehensive Association Agreement, which is to include both political and economic components including a free trade agreement. As part of those negotiations, on December 15, 2003, the parties concluded an EU-Central America Political Dialogue and Cooperation Agreement, which states in article 1(1): “Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, as well as for the principle of the rule of law, underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement.” CE/AM-CENTR/en/1, available online at <http://ec.europa.eu/external_relations/ca/pol/pdca_12_03_en.pdf> (visited Apr 5, 2008). For information on the negotiation process and goals, see The EU’s Relations with Central America: Overview, available online at <http://ec.europa.eu/external_relations/ca/index.htm> (visited Apr 5, 2008).

72 Ley de Reconciliación Nacional, arts 4, 8 (cited in note 16).
Most spectacularly, Spanish Judge Pedraz also responded to the GCC decision. On January 9, 2008, he issued his own ruling condemning Guatemala’s lack of cooperation and abandonment of its responsibilities under international law. In strong language, the judge complained about the complete lack of collaboration on his requests for rogatory commissions and lambasted the GCC decision as ignoring Guatemala’s conventional and customary law obligations to extradite or to prosecute, which the judge traced back as far as Grotius, as well as the extradition treaty.

Judge Pedraz also recalled that genocide is a crime in international law that cannot be labeled a political offense and found that Guatemala was also violating an international treaty and customary law obligation to prevent and to punish the crime of genocide against the Mayan people. He concluded:

This resolution of the Constitutional Court, issued by the maximal judicial authority, in light of the above-referenced facts and of the advanced age of the accused, together with the well-known fact that the level of impunity for lesser crimes in Guatemala is among the world’s highest, confirms the State’s intention not to investigate these crimes and bring those responsible before the courts. This gives clear backing to impunity, ignoring the above-referenced international law and, therefore, placing Guatemala in the sphere of countries that violate their international obligations and disdain the defense of human rights.

Nonetheless, the judge wrote, the GCC decision showed the continued need for Spanish judicial authorities to investigate the alleged crimes. However, he would no longer rely on the Guatemalan courts but would bring witnesses to Spain to testify. In addition, he called on anyone—victims, witnesses, or others—having information about the case to bring it directly to him through the proper channels. He thus opened up new possibilities for evidence gathering by victims’ groups, complainants’ lawyers and others around the world.

74 Id.
75 Id at § 6 (translation by author).
76 In another innovation, the Spanish Public Prosecutor designated some of the eyewitnesses as witnesses for the Spanish Crown, which allows Spain to pay their travel expenses. Given the modest economic status of almost all the witnesses, this made it possible for them to testify. Unpublished decision of Public Prosecutor, Audiencia Nacional.
77 Auto dejando sin efecto las comisiones rogatorias a la Republica de Guatemala (Jan 16, 2008) (cited in note 73). The proper channels for submitting additional information or evidence presumably would include Spanish consulates throughout the world.
In February 2008, witnesses began arriving at the Spanish court. They included experts, journalists, and eyewitnesses from some of the areas of the country where, according to the CEH Report, acts of genocide were committed. The eyewitnesses detailed massacres, rape, torture, bombings and persecution of massacre survivors, destruction of crops and livestock, and targeting of Mayan religious practices and community authorities. They also named specific military officials, including the defendants, and specified their role in these crimes.\(^8\) The witnesses spent a full week telling the judge their story. This in itself can have reparatory effects.\(^7\)

The continuing political pressure and what is expected to be an ongoing parade of witnesses will no doubt keep the issue in the public eye in Guatemala. Whether this translates into effective change in the attitude of Guatemala’s prosecutors and judges is, at this point, unknown. It is of course more difficult for such change to happen without at least a modicum of physical security for all those involved.\(^8\) However, the pressure has already apparently had some result: on February 25, Guatemalan President Álvaro Colom announced that he would order the military to open up its archives from the armed conflict period and turn them over to the Human Rights Ombudsman.\(^8\)

In April 2008 the proceedings took yet another turn. Guatemalan trial court judge José Eduardo Cojulin, whose chambers had received Judge Pedraz’s repeated requests for a rogatory commission to interview witnesses, decided that he would honor those requests. He reasoned that the GCC’s decision had no bearing on his international judicial cooperation obligations, and that, while he could not allow Judge Pedraz to come to Guatemala, he could conduct the interviews himself and forward the results to the Spanish court. He thus set out a demanding schedule of witness interviews, beginning April 17.\(^8\) When


\(^{79}\) There is extensive literature on truth-telling and its potential salutary effects for some victims. See, for example, Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge 2001). On the other hand, there is a risk that victims will end up frustrated by the continued inability to acquire custody over the defendants and thus to proceed to full trial and sentencing. The witnesses were well aware of that possibility and chose to testify nonetheless.


witnesses told him they could not appear because they had no funds to travel to the capital, he agreed to travel to them to take their statements. He rejected the predictable *amparos* from the defendants. At this point, there are witnesses testifying in both countries. It is possible that Judge Cojulún’s actions will eventually make their way up to the GCC, which can choose to reaffirm or modify its earlier reasoning. It is also possible that the judge, hearing repeated witness testimony of grievous crimes, will decide to take some action beyond forwarding the testimony to Madrid.

In any case, along with internal pressure, the Spanish case has already changed the national equation, bringing the issue again to the forefront of national consciousness. Unless the GCC changes its mind or one of the named defendants (or other defendants named in the future) leaves the country, the case may never come to trial; Spain does not allow trial *in absentia*. Nonetheless, the judge will continue taking testimony and eventually, if the evidence is sufficient, is expected to issue individualized indictments (*autos de procesamiento*) against these and, perhaps, other defendants. These indictments would set out the evidence that the charged crimes were committed and that the defendants were responsible, and at a minimum, they would serve as a valuable historical record and a validation of the witness testimony. The indictments would also serve as a powerful tool for lawyers, victims groups and even, if it so chose, the Executive Branch in Guatemala to pursue new avenues of investigation and prosecution.

V. ENTER CICIG: THE INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA

The Spanish litigation is not the only attempt to overcome the legacy of impunity in Guatemala. As noted at the beginning, this impunity extends beyond the former military and security force officials responsible for past human rights violations to encompass present common crime, including (and especially) that committed by powerful networks of drug traffickers, smugglers of all sorts, extortion gangs, and car theft rings. In part, these are the same people: many of the military intelligence and security force networks involved in human rights violations transformed themselves, under weak civilian governments, into criminal networks.\(^8\) So impunity for past crimes and impunity in the present are inextricably bound together.

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\(^8\) For example, the Bush administration revoked the visas of two former chiefs of military intelligence because of their links to drug trafficking. Frank Smyth, *Guatemala, Home of Powerful Drug Runners*, Nieman Watchdog (Nov 20, 2005), available online at...
The result is a pervasive sense of insecurity, an almost completely dysfunctional prosecution service, intimidation and corruption of judges and prosecutors, and many powerful people with a vested interest in maintaining the system in its current ineffective form. Most crimes are never even investigated; only 2 percent are ever resolved.\(^4\) Even in the few cases where convictions are won, the defendants are often freed by mobs, mysteriously disappear before serving time, or are allowed to run rackets in prison.\(^8\)

On January 16, 2003, NGOs together with the Guatemalan Human Rights Ombudsman (Procurador) Sergio Fernando Morales Alvarado proposed the creation of a Commission to Investigate Illegal Groups and Clandestine Security Organizations ("CICIACS"). The proposal responded to "the clamor which has been caused by the assassinations, threats and kidnappings of human rights defenders, judges, magistrates, politicians, lawyers, Congressional advisers, political leaders, journalists, priests, indigenous representatives and other people."\(^6\) The President presented a bill to Congress creating CICIACS, but an agreement between the government and the UN to establish CICIACS was torpedoed when the GCC found it unconstitutional because the Guatemalan Constitution reserves a prosecutorial role for the Public Prosecutor alone.\(^8\) It took another two years to modify the plan to meet those objections, but on December 11, 2006 the revised agreement between the UN and the Guatemalan government creating a new version of CICIACS, known as CICIG, was signed. The agreement was ratified by the Guatemalan Congress in August 2007 and entered into force on September 4, 2007.\(^8\)

From the UN’s perspective, the commitment to help end impunity at the national level in this manner is an innovation. CICIG is “not a truth
commission, nor a special international tribunal, nor a classical technical assistance program, but rather is fashioned to respond to critical needs not always met by those kinds of measures.\textsuperscript{89} The idea draws, however, on two ongoing anti-impunity efforts: the ICC and the UN’s investigation into the killing of former Lebanese Prime Minister Rafiq Hariri in 2005.

The ICC was constructed to be complementary to national courts, which have the primary responsibility to investigate and to prosecute genocide, crimes against humanity, and war crimes. In Article 17, the Rome Statute sets out the tests for whether a state is “unwilling or unable” to engage in its own prosecutions; if it is neither unwilling nor unable, the Court has no jurisdiction.\textsuperscript{90} But ICC prosecution, even if feasible,\textsuperscript{91} leaves open the question of what to do with a state that is unable to prosecute, to build up that capacity. One idea is a hybrid—but a hybrid investigatory mechanism, not a hybrid court.

The idea of an UN–backed international investigatory commission to supplement as well as to collaborate with national authorities was implemented in response to the assassination of Lebanon’s former Prime Minister Rafiq Hariri. The Security Council created the Independent Investigation Commission (“Commission”), based in Lebanon, with a three-month initial mandate (later extended to two years) to assist the Lebanese authorities with criminal investigation into the matter, including identifying the perpetrators.\textsuperscript{92} The Commission had the power to subpoena documents, interview officials, and report back to the Security Council on the results of its investigation.\textsuperscript{93} The Council’s Resolution noted “with concern the fact-finding mission’s conclusion that the Lebanese investigation process suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion.”\textsuperscript{94} Although it was clear from the start that part of the Security


\textsuperscript{90} Rome Statute of the International Criminal Court (1998), arts 17–19, 37 ILM 1002.

\textsuperscript{91} The ICC only has jurisdiction under certain conditions: the crimes must have taken place before July 2002 or the date the treaty comes into force for the relevant state. Unless the Security Council refers the case, the consent of either the territorial state or the state of nationality of the offender is required. Id, arts 12, 13.


\textsuperscript{93} It did so in October 2005, and its mandate was extended under a new commissioner. The investigation found heavy Syrian involvement in the Hariri killing. As a result of the investigation, an international tribunal to seek justice in the Hariri and related cases is underway. See Jefferson Morley, Background on Syria and the Rafiq Hariri Investigation, Wash Post (Oct 21, 2005) available online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/ AR2005101 201741.html> (visited Apr 5, 2008); Security Council Res No 1664, UN S/RES/1664 (2006).

\textsuperscript{94} Id.
Council's concern was the likely involvement of Syria in the assassination, the Resolution itself is based solely on the needs and limitations of the Lebanese government, not on any international aspects of the crime.

Unlike the Lebanese case, in Guatemala the agreement for an independent investigatory commission did not emerge from the Security Council but rather from talks between the government and UN officials, specifically the Department of Political Affairs. Article 1 of the Agreement between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala lists as its objectives:

(1)(a) To support, strengthen and assist institutions of the State of Guatemala responsible for investigating and prosecuting crimes allegedly committed in connection with the activities of illegal security forces and clandestine security organizations and any other criminal conduct related to these entities operating in the country, as well as identifying their structures, activities, modes of operation and sources of financing and promoting the dismantling of these organizations and the prosecution of individuals involved in their activities;

(b) To establish such mechanisms and procedures as may be necessary for the protection of the right to life and to personal integrity pursuant to the international commitments of the State of Guatemala with respect to the protection of fundamental rights and to international instruments to which Guatemala is a party;

(c) To that end, an International Commission Against Impunity in Guatemala shall be established pursuant to the provisions of this Agreement and the commitments of the State under national and international human rights instruments, in particular the Comprehensive Agreement on Human Rights [of the 1996 peace accords];

(d) For the purposes of this Agreement, illegal security groups and clandestine security organizations shall mean those groups that:

(i) commit illegal acts in order to affect the full enjoyment and exercise of civil and political rights and

(ii) are linked directly or indirectly to agents of the State or have the capacity to generate impunity for their illegal actions.

CICIG is to “determine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing and possible relation to State entities or agents and other sectors that threaten civil and political rights in Guatemala, in conformity with the objectives of this

95 See Morley, Background on Syria (cited in note 93).
96 See CICIG, Background (cited in note 89).
Agreement," collaborate with the State in the dismantling of these groups, promote the investigation, criminal prosecution, and punishment of those crimes committed by their members, and recommend the adoption of public policies for eradicating such groups and preventing their re-emergence.

To accomplish its goals, CICIG cannot directly prosecute crimes, but can initiate criminal complaints, provide information to the Prosecutors' Office, and act as a complementary prosecutor (querellante adhesivo) in criminal cases. It can subpoena documents, hire its own staff of investigators, file disciplinary complaints against public servants, guarantee confidentiality to witnesses, and publish its results. Once it is fully staffed there will be over 100 investigators; so far the project has raised $21 million in voluntary contributions. The UN Secretary-General appoints the Commissioner, who is an Assistant Secretary General, and he in turn is free to hire his own staff. The Guatemalan government guarantees the safety of its personnel and of those who collaborate with it.

On the other hand, the Commission is weakened by its inability to compel testimony directly and by its dependence on the Public Prosecutor, who is the only person who can actually take the cases to court. It will also depend on the Guatemalan courts to act once the cases are being prosecuted. It will require a delicate combination of cajoling, training, threatening, and shaming the Prosecutors' Office (especially its higher level officials) and courts, as well as sufficient international funding and backing, to make the project work. In addition, to complement its prosecutorial work, CICIG can also recommend the adoption of public policies and reforms.

On September 17, 2007, Carlos Castresana was appointed the CICIG Commissioner. Castresana is a Spanish former anticorruption and antidrug trafficking prosecutor who worked for the UN Office on Drugs and Crime. He was also the person who filed the first complaint in Spanish courts using that country's universal jurisdiction law to investigate Latin American military dictators; in 1996, he accused Argentina's military high command of genocide, terrorism, and torture, in what would eventually become known as the "Pinochet case." Presumably, he is well aware of the Guatemalan genocide case before the Spanish courts. Although given his background he is presumably

98 Id, art II ¶ (1)(a).
99 Id.
100 Peace and Security Section UN Department of Public Information and Department of Political Affairs, CICIG Fact Sheet (Jan 28, 2008) (on file with author).
101 Id.
not opposed to prosecutions based on universal jurisdiction, the priorities of his office will be elsewhere.

In its current form, CICIG will not focus on past crimes arising from the 1970s and 80s, although there is no explicit limitation in the mandate. However, the organizers and leaders of illegal security groups and clandestine security organizations are connected to, or one and the same as, former military officers implicated in human rights violations or genocide. To this extent, the Spanish investigation and CICIG's work may end up overlapping. Prosecutions of the former military for more recent crimes would still be a victory for victims of genocide, massacres, and disappearances, while advances in the genocide prosecutions could disrupt at least some current crime networks. By pushing from both ends, the present and the past, outside pressure may force action in the Public Prosecutors' office to at least go through the motions of investigating and prosecuting. It will take on-the-ground pressure from the CICIG Commissioner and international insistence on concrete milestones and achievements in both present and past prosecutions for those efforts (which will no doubt be perfunctory at first) to take on a life of their own and actually bring long-term improvement that is real.

VI. CONCLUSION

Impunity remains a core problem of post-armed conflict state building. Guatemala exemplifies the process by which impunity for the crimes of the past begets more impunity in the present; the two are linked. Early efforts to combat impunity worldwide focused largely on the creation of new global institutions like the ad hoc international criminal tribunals and the ICC. As the limitations as well as the strengths of those institutions have become clearer, a more diversified and complex set of responses, grounded in the particular realities of each state, have begun to proliferate. In particular, hybrid courts, with explicit goals that include strengthening domestic legal systems and training local lawyers in international criminal law, have emerged. Transnational prosecutions can serve many of the same functions as these hybrid tribunals, although they suffer from the same weaknesses as other international criminal justice mechanisms in being able to apprehend suspects.

Moreover, international investigatory commissions and transnational prosecutions, like those discussed here with respect to Guatemala, can play complementary roles in catalyzing changes in domestic ability and will to investigate and prosecute the powerful. The success of these mechanisms, like that of international prosecutions more generally, should be measured not only (or even principally) by how many convictions they secure, but at how well they succeed in changing the possibilities for justice at home.