

THE INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA: WILL ACCOUNTABILITY PREVAIL?*

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I. INTRODUCTION

On February 13, 1982, the Guatemalan army stormed into the remote northern Guatemalan village of Santa María Tzejá. The inhabitants were gone. Given two hours notice that the army was on the path to the village, and knowing that the army had destroyed other villages, residents had fled in terror. During the next five days, seventeen people from the village, nearly all women and children, were massacred, the animals slaughtered, and all the buildings burned to the ground. The external world learned nothing of the carnage.

Two days later, a village resident, Manuel Canil, was with his mother, wife, and six children, along with other members of their extended family. Thinking the family was safely hidden in a small ravine, he went with his older son to scout the location of a more sheltered location. Suddenly they heard gunfire in the area where the family was hidden. A dog had barked and alerted an army patrol, which killed nine people in the group. Manuel's youngest son, five at the time, managed to hide behind a bush. The others were machine-gunned; those still alive were executed with a shot to the head. Manuel's youngest daughter survived the initial shooting but was thrown in the air and bayoneted – according to her five-year-old brother, who saw it all. Manuel lost his mother, his wife, and four of his children.¹

Horrific as it is, Manuel's story is merely one of thousands of similar tales of violence and terror experienced by the people of Guatemala over 36 years of

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1. CLARK TAYLOR, RETURN OF GUATEMALA'S REFUGEES: REWEAVING THE TORN 1 (1998).

internal warfare and repression.² Viewed by State forces as natural allies of the guerillas, the Maya were specifically targeted for repression, and the systematic massacre of whole villages such as Santa María Tzeja was an archetypical strategy of State-sponsored counterinsurgency efforts.³ Such massacres were particularly frequent during the early 1980s military dictatorship of General Efraín Ríos Montt. Today, more than a decade after the formal end of the armed conflict, perpetrators of gross human rights violations, such as General Montt, still have not been brought to justice. Given Guatemala's seeming reluctance to act, and in an effort to promote international accountability, General Montt was formally charged with genocide, torture, terrorism and illegal detention by a Spanish court in 2006.⁴ Yet demands for his prosecution in Guatemala or his extradition to Spain were recently stymied by Montt's election to the Guatemalan Congress in September 2007.⁵ As a result of his election, General Montt now enjoys congressional immunity from prosecution until the end of his four-year term.⁶

Accordingly, General Montt is able to participate in society and politics despite being a high-profile human rights abuser. This privilege is indicative of the culture of impunity that permeates Guatemalan institutions, and makes reconciling the past and building a peaceful future two sides of the same coin. Impunity is

2. For additional accounts of atrocities, see DANIEL WILKINSON, *SILENCE ON THE MOUNTAIN: STORIES OF TERROR, BETRAYAL, AND FORGETTING IN GUATEMALA* (2002). See generally PROYECTO INTERDIOCESANO DE RECUPERACIÓN DE LA MEMORIA HISTÓRICA, [RECOVERY OF HISTORICAL MEMORY PROJECT ("REMHI")], *GUATEMALA: NEVER AGAIN!* (Gretta Tovar Siebentritt trans., Orbis Books abridged ed. 1999) [hereinafter REMHI REPORT]; *GUATEMALA: MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSIONS AND RECOMMENDATIONS*, <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>. (last visited Sept. 1, 2008) [hereinafter CEH REPORT] (The full CEH Report is available in Spanish at: <http://shr.aaas.org/guatemala/ceh/mds/spanish/> (last visited Sept. 1, 2008)).

3. CEH REPORT, *supra* note 2, Conclusions, pt. II, para. 87. In some cases, Mayan groups were targeted as a result of effective, coordinated support within Mayan communities for guerilla insurgency efforts. However, in the majority of cases, the CEH concluded that the State exaggerated reports of Mayan involvement in insurgency campaigns in order to eliminate any hypothetical possibility of support for the guerilla forces. Based on historical racial prejudices against the Maya, the State sought to destroy the cultural unity undergirding Mayan communities so as to eradicate any possibility of collective action. *Id.* Conclusions, pt. I, paras. 31-32. The result of these efforts was "massive and indiscriminate aggression directed against communities independent of their actual involvement in the guerrilla movement and with a clear indifference to their status as a non-combatant civilian population." *Id.* Conclusions, pt. I, para. 32.

4. See Paco Fión, *Rights-Guatemala: A Glimmer of Hope for Genocide Victims' Families*, INTER PRESS SERVICE NEWS AGENCY, Dec. 14, 2006, <http://ipsnews.net/print.asp?idnews=35853>.

5. MIRANDA LOUISE JASPER & COLLEEN W. COOK, *GUATEMALA: 2007 ELECTIONS AND ISSUES FOR CONGRESS* C.R.S. NO. RS22727 (Congressional Research Service, Sept. 20, 2007).

6. *Id.*

“defined as the de facto or de jure absence of criminal, administrative, disciplinary or civil responsibility and the ability to avoid investigation and punishment.”⁷ Entrenched impunity weakens the rule of law and impedes “the ability of the State to fulfill its obligation to guarantee the protection of the life and physical integrity of its citizens and provide full access to justice.”⁸ As a result, public confidence in democratic institutions is lost,⁹ further weakening prospects for reform and democratic consolidation.

Although the concept of impunity received significant scholarly attention both during the civil war and in the decade since the formal Peace Accords of 1996,¹⁰ the case of General Montt indicates that practical reforms, whether through failure or absence, have not succeeded in fostering accountability or promoting justice. Moreover, the special character and increasing frequency of violence and human rights violations in recent years, marked by the rise of a “corporate mafia state,” warrants new attention.¹¹ In particular, the Guatemalan Congress’ recent decision to form a specialized commission to combat impunity signals a substantive, new, State-sponsored effort to address the modern landscape of crime and violence.¹² The Commission’s success depends upon a host of factors relating to state action and judicial reform.¹³ This paper identifies and analyzes the challenges the Commission must overcome in order to succeed, and assesses its likelihood of success under such circumstances.

Understanding the current implications for Guatemala’s culture of impunity requires a developmental analysis of the various factors implicated in creating and sustaining such a political system. To this end, Part II of this note identifies the origins of Guatemala’s modern day ‘culture of impunity’ by establishing the socio-political background leading up to the 1996 Peace Accords.

7. Agreement Between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala (“CICIG”), U.N.-Guat., Dec. 12, 2006, available at http://www.un.org/Depts/dpa/CICIG_English.pdf [hereinafter CICIG Agreement]. This agreement does not yet appear to have been recorded in an official source.

8. *Id.*

9. *Id.*

10. See, e.g., Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (1996); Joanna Crandall, *Truth Commissions in Guatemala and Peru: Perpetual Impunity and Transitional Justice Compared*, PEACE, CONFLICT & DEVELOPMENT, Apr. 2004, available at <http://www.peacestudiesjournal.org.uk/docs/perpetualimpunity.PDF>; Andrew N. Keller, *To Name or Not to Name? The Commission for Historical Clarification in Guatemala, its Mandate, and the Decision Not to Identify Individual Perpetrators*, 13 FLA. J. INT’L L. 289 (2001).

11. See *infra* Part V.B.

12. See CICIG Agreement, *supra* note 7.

13. See *infra* Parts V and VI.

Part III traces the consolidation of this culture of impunity within State structures and institutions by examining specific aspects of the negotiated peace, as well as post-conflict attempts at judicial reform. Contextualizing events in Guatemala within an international framework and drawing on international human rights law, Part IV explores Guatemala's continuing failure to prosecute the perpetrators of human rights violations. Part V examines the nature and scope of violence and corruption in modern day Guatemala and highlights existing obstacles to justice. Recent efforts to promote accountability in Guatemala, controversy surrounding the birth of the International Commission Against Impunity in Guatemala ("CICIG"),¹⁴ and a discussion of its inherent strengths and weaknesses are presented in Part VI. Part VII suggests that the CICIG is an innovative new model for the international community and concludes that it represents a positive first step in addressing the pervasive problem of impunity.

II. BACKGROUND

In 1954, a CIA-sponsored *coup d'état* forced democratically elected Guatemalan president Jacobo Arbenz Guzmán from office and set the stage for thirty-six years of civil war.¹⁵ CIA involvement came at the behest of big business interests, e.g. the U.S.-based United Fruit Company, which lost vast tracts of land as a result of extensive agrarian reforms initiated by Arbenz.¹⁶ Following his overthrow, these reforms were immediately reversed, and control of the Guatemalan state was consolidated within an informal alliance of conservative military and private sector interests.¹⁷ Political dissidents responded with armed resistance and, after a failed nationalist uprising by military officers in 1960, the Guatemalan civil war began.¹⁸ Estimates suggest that during the ensuing thirty-six year conflict, around 180,000 people died, 40,000 "disappeared," and over 400 villages were destroyed.¹⁹ In addition, more than 100,000 people fled Guatemala, and roughly a million were internally displaced.²⁰

14. CICIG is the acronym for the name of the Commission in Spanish: Comisión Internacional Contra la Impunidad en Guatemala. See Eric Green, *Stopping Violence in Guatemala Aim of New International Body: "Groundbreaking" commission supports Guatemalan human rights*, USINFO, Aug. 10, 2007, <http://www.america.gov/st/washfile-english/2007/August/200708101743161xenerg0.5841944.html>.

15. For a concise historical background, see Patrick Costello, *Historical Background*, ACCORD: AN INT'L REV. PEACE INITIATIVES (Conciliation Res., London), 1997, at 10, available at <http://www.c-r.org/our-work/accord/guatemala/historical-background.php>.

16. *Id.* at 10-11.

17. *Id.* at 11.

18. *Id.* at 10-11.

19. *Id.* at 10.

20. *Id.*

Two post-conflict inquiries have attributed the overwhelming majority of human rights abuses committed during the civil war to the Guatemalan military and its civilian adjuncts. The Recovery of Historical Memory (“REMHI”) project was spearheaded by the Catholic Church with the goal of promoting reconciliation and healing for the many victims of the civil war.²¹ REMHI found the Army and its associated groups responsible for over 47,000 of 52,427 documented abuses.²² Separately, the secular Commission for Historical Clarification (“CEH”)²³ was established as part of the 1994 Peace Accords to investigate the nature of crimes committed during the war.²⁴ In 1999, following an eighteen-month investigation, the CEH attributed ninety-three percent of the civil war era human rights violations and acts of violence to the State of Guatemala.²⁵ The Guatemalan Army was the primary offender of human rights; it was responsible, solely or in conjunction with other forces, for eighty-five percent of the total violations, including 626 registered massacres.²⁶ Civil Patrols, organized by the army, were also found responsible for eighteen percent of all violations.²⁷ In addition, the CEH linked army acts of extreme cruelty and savagery, including forced disappearances, arbitrary executions, and rape, to an aggressive racist counterinsurgency strategy that “resulted in the complete extermination of many Mayan communities, along with their homes, cattle, crops, and other elements essential to survival.”²⁸ Ultimately, the CEH found the actions of the Guatemalan State and its agents to be grave violations of international human rights law, prohibited by the Geneva Conventions,²⁹ and tantamount to genocide in four instances between 1981 and 1983.³⁰

21. See REMHI REPORT, *supra* note 2, at xxvii.

22. *Id.* at 289-90.

23. Comisión para el Esclarecimiento Histórico. See 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, 36 I.L.M. 283 [hereinafter CEH Agreement].

24. For further discussion of the CEH and its operation as a sort of Truth Commission, see *infra* Part III.A.

25. CEH REPORT, *supra* note 2, Conclusions, pt. II, para. 82.

26. *Id.* paras. 82, 86.

27. *Id.* para. 82. Some overlap in figures is due to the fact that civil patrols were organized by the army and in some cases jointly responsible for violations.

28. *Id.* paras. 85-88.

29. CEH REPORT, *supra* note 2, Conclusions pt. II, paras. 98-100. Guatemala has been a party to the Geneva Conventions since 1952.

30. *Id.* paras. 108-23. See *infra* Part IV for a detailed discussion of the legal implications of State action during the civil war.

With the Agreement on a Firm and Lasting Peace in 1996, Guatemala's internal conflict officially came to an end.³¹ Yet despite the changes brought about by the peace process, "failure to implement the Peace Accords and the recommendations of the [CEH] agreed under them has contributed to alarming new abuses, particularly directed against those trying to combat impunity."³² The extent to which entrenched interests are protected by a culture of impunity is particularly evident in the rise of illegal security groups and clandestine organizations which are commonly "believed to be responsible for [a] wave of threats, attacks, and other acts of political violence directed against human rights defenders, judges, prosecutors, witnesses, political leaders and others" in recent years.³³ Human rights defenders, defined broadly by the United Nations ("UN") as "people who, individually or with others, act to promote or protect human rights,"³⁴ have come under particular attack as extralegal groups have gained power.³⁵ Targeted for their efforts to call attention to violations or to bring past or present perpetrators to justice,³⁶ attacks against human rights defenders rose from around fifty per year to almost three hundred per year between 2000 and 2006.³⁷ The clandestine and illegal forces believed to be behind these attacks "are alleged to have established links with State officials, former and active members of the security apparatus, and organized criminal networks."³⁸ As a result, their actions frequently go uninvestigated and untried.³⁹ Strikingly, over 5,000 murders are reported in Guatemala every year, yet

31. Agreement on a Firm and Lasting Peace, Guat.-URNG, Dec. 29 1996, U.N. GAOR, 51st Sess., Annex II, U.N. Doc. A/51/796, S/1997/114 (1997) [hereinafter 1996 Accords].

32. Amnesty Int'l, *Guatemala: Guatemala's Lethal Legacy: Past Impunity and Renewed Human Rights Violations* at 4, AI Index AMR 34/001/2002, Feb. 28, 2002, available at [http://web.amnesty.org/library/pdf/AMR340012002ENGLISH/\\$File/AMR3400102.pdf](http://web.amnesty.org/library/pdf/AMR340012002ENGLISH/$File/AMR3400102.pdf).

33. WASH. OFFICE ON LATIN AM. (WOLA), A BRIEF BACKGROUND ON THE UN COMMISSION AGAINST IMPUNITY IN GUATEMALA (Apr. 25, 2007), http://www.wola.org/index.php?option=com_content&task=viewp&id=350&Itemid=2.

34. Office of the United Nations High Commissioner for Human Rights, *Special Rapporteur on the Situation of Human Rights Defenders*, <http://www2.ohchr.org/english/issues/defenders/who.htm> (last visited Sept. 8, 2008).

35. Human Rights First, *Human Rights Defenders in Guatemala*, http://www.humanrightsfirst.org/defenders/hrd_guatemala/hrd_guatemala.asp (last viewed Aug. 16, 2007) (on file with author).

36. *Id.*; Amnesty Int'l, *supra* note 32, at 6.

37. Human Rights First, *supra* note 35. The recently-updated website reports "almost 200 attacks" in 2007. Human Rights First, *Human Rights Defenders in Guatemala*, http://www.humanrightsfirst.org/defenders/hrd_guatemala/hrd_guatemala.asp (last viewed Sept. 7, 2008).

38. WOLA, *supra* note 33. State-criminal linkages are discussed further in Part V.

39. *See* Human Rights First, *supra* note 35.

few are ever even investigated.⁴⁰ The impunity with which these groups operate undermines the justice system and promotes public insecurity, “which in turn creates a fertile ground for the further spread of violence, corruption, and criminal activities.”⁴¹ Facing a “human rights melt-down,”⁴² Guatemala’s ability to restore the rule of law and regain the confidence of its citizens and the international community depends fundamentally on its ability to tackle the historical culture of impunity that permeates political, economic, and social structures at every level.

III. CULTURE OF IMPUNITY

In order to understand the extent to which impunity pervades the Guatemalan state, it is necessary to evaluate the mechanisms and events through which the culture of impunity survived democratization and became entrenched in post-civil war Guatemala. As both “a cause and a consequence of violence,”⁴³ the cyclical and pervasive nature of impunity results in a dynamic that becomes harder to eradicate the longer it is allowed to continue. In Guatemala, several factors contributed to the continued operation of impunity during the transition years and throughout the peace process, sustaining it as “a central obstacle to justice and reconciliation.”⁴⁴ These factors include the approach and action of State actors during the transition period, the relative position of the State vis-à-vis opposition forces during peace negotiations, and the mechanisms and laws that emerged from the process, ostensibly in order to facilitate democratic consolidation.⁴⁵

Following democratic elections, Guatemala’s Political Constitution of the Republic (“PCR”)⁴⁶ was issued in 1985 and then reformed in 1993 as part of the peace process.⁴⁷ In form, Guatemala’s state structure and legal system resemble those of numerous other liberalized, representative democracies. Elected by “universal suffrage and an absolute majority of votes,” the President of the Republic serves a four-year term and works in conjunction with twelve ministers selected by

40. Editorial, *Only the Criminals are Safe*, N.Y. TIMES, July 31, 2007, available at http://www.nytimes.com/2007/07/31/opinion/31tue3.html?_r=1&_1&oref=slogin&oref=slogin (discussing the formation of the CICIG in light of the incapacity of Guatemala’s justice system to curb crime or violence). For additional discussion of the obstacles preventing effective justice in Guatemala, see *infra* Part V.C.

41. WOLA, *supra* note 33.

42. Amnesty Int’l, *supra* note 32, at 5-6.

43. REMHI REPORT, *supra* note 2, at xxxiii.

44. *Id.*

45. See *infra* notes 46-138 and accompanying text.

46. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [PCR] [Constitution], available at <http://www.acnur.org/biblioteca/pdf/0134.pdf>.

47. ANA CRISTINA RODRÍGUEZ, GUIDE TO LEGAL RESEARCH IN GUATEMALA, Part 2.2. (July 2006), <http://www.nyulawglobal.org/globalex/Guatemala.htm>.

presidential appointment.⁴⁸ Laws are made by a democratically elected Congress, and the Judiciary is independently mandated to apply the Constitution and laws of Guatemala.⁴⁹ The court system consists of small court judges, first instance courts, a court of appeals, and a supreme court.⁵⁰ All organs of the public administration are obligated to assist the judiciary in administering justice.⁵¹

Although elections were held in 1984 and 1985 and Guatemala returned to civilian rule in 1986, military structures remained intact and little attempt was made to hold security forces accountable for past abuses.⁵² This was due, in part, to a general amnesty issued by the military government prior to elections, which insulated security forces from prosecution for violations occurring after 1982.⁵³ Perhaps most significantly, however, the newly elected President, Vinicio Cerezo Arévalo, and his victorious political party, the Christian Democrats, maintained close ties with the army, and these ties were actually strengthened following Cerezo's election.⁵⁴ In addition, security forces used pressure and threats during the period surrounding elections "to limit the scope of any reforms that the new president might [have considered] introducing."⁵⁵ As a result, during a key transitional phase of Guatemala's history, President Cerezo implicitly reinforced the impunity enjoyed by the army by carefully avoiding any commitments aimed at investigation.⁵⁶ Notably, human rights violations actually increased during his five-year presidency.⁵⁷

In 1986, after the Supreme Court appointed an 'Executorial Judge' to investigate writs of habeas corpus, a popular organization called Mutual Support Group ("GAM") filed 1,367 writs on behalf of individuals whose disappearance was allegedly linked to state action.⁵⁸ In response, President Cerezo refused to continue meeting with the group and terminated plans that were underway to form a presidential commission to investigate disappearances.⁵⁹ However, as the human rights movement in Guatemala became aware of events taking place elsewhere in Latin America, groups such as GAM began actively lobbying for the creation of a

48. *Id.* at pt. 3.1.

49. *Id.* at pts. 3.2-3.3.

50. *Id.* at pt. 3.3.

51. *Id.*

52. Costello, *supra* note 15, at 15-16.

53. *Id.* at 16.

54. REMHI REPORT, *supra* note 2, at 245.

55. *Id.*

56. Costello, *supra* note 15, at 16.

57. *Id.*

58. Richard Wilson, *Violent Truths: the Politics of Memory in Guatemala*, ACCORD: AN INT'L REV. PEACE INITIATIVES (Conciliation Res., London), 1997, at 18, 19, available at <http://www.c-r.org/our-work/accord/guatemala/violent-truths.php>. The acronym "GAM" corresponds to the Spanish name of the group: Grupo de Apoyo Mutuo.

59. *Id.*

truth commission along the lines of the one underway in Argentina, and Guatemala's United Revolutionary Force, the National Revolutionary Union of Guatemala ("URNG"), enthusiastically adopted the cause.⁶⁰ At the same time, Guatemala, along with El Salvador and Nicaragua, attracted the attention of Mexico, Venezuela, Colombia, and Panama, who feared that internal strife would destabilize the region.⁶¹ These nations spearheaded a peace initiative that drew international attention to regional events and laid the foundations for negotiations that ultimately led to the 1994 and 1996 Peace Accords.⁶²

These agreements, brokered by the UN, were intended to bring 36 years of civil war to an end and reach a plan for democratic governance acceptable to the opposition URNG forces as well as the incumbent government.⁶³ By the time negotiations began in earnest, however, the guerrilla forces were largely destroyed, and the URNG's negotiating position vis-à-vis the Guatemalan Army was greatly diminished.⁶⁴ Moreover, the influence of civil actors was notably absent from the process.⁶⁵ Nevertheless, UN involvement led to a series of agreements that represented "a splitting of differences between radically opposed forces, with major concessions from both sides."⁶⁶ As "a mix of strong and weak agreements," the Accords therefore contain both "genuine achievements and serious limitations."⁶⁷ Two particularly limited areas of agreement, with negative implications for the attainment of justice and accountability, were the parameters of Guatemala's Truth Commission, and the extent of the legal amnesty granted for political crimes.

A. Truth Commission

In recent decades, truth commissions have become a standard facet of the transition process for countries attempting to consolidate democracy while struggling with a legacy of violence.⁶⁸ While pressure from civil society for justice and accountability is often high during the post-conflict period, fledgling

60. *Id.*

61. Costello, *supra* note 15, at 16.

62. *Id.* at 16-17. In conjunction with this initiative, Mexico, Venezuela, Panama, and Colombia called themselves the "Contradora Group." For more information on the Contradora Group, see Antonio Sandoval, *The Contradora Group and the Central America Crisis*, GLOBAL SECURITY.ORG, 1985, <http://globalsecurity.org/military/library/report/1985/SA.htm>.

63. See Susanne Jonas, *The Peace Accords: An End and a Beginning*, 30 NACLA REP. ON THE AMERICAS, May-June 1997, at 6.

64. See Keller, *supra* note 10, at 299.

65. Wilson, *supra* note 58, at 19-20.

66. Jonas, *supra* note 63, at 6.

67. *Id.* at 6-7.

68. Wilson, *supra* note 58, at 18. See generally Eric Brahm, *Truth Commissions*, June 2004, http://www.beyondintractability.org/essay/truth_commissions/.

governments face the challenge of bringing former enemies together to foster cooperation and stability.⁶⁹ In this context, the argument is often made that the only way to prevent further human rights abuses is to compromise on the issue of prosecution in order to secure peace agreements and foster reconciliation.⁷⁰ Accordingly, truth commissions are sometimes perceived of as part of a “truth phase” that facilitates the transition from a state characterized by impunity and a lack of respect for rights to a state in which rights are honored and enforced.⁷¹ By bringing the details of past atrocities to light without containing a prosecutorial component, truth commissions help validate and legitimize the experiences of wartime victims without alienating former actors or inciting new violence, and are thus understood to have a healing effect for society.⁷² As such, truth commissions represent a unique way of reconciling two post-conflict political agendas: establishing justice and consolidating democracy, without ushering in a new era of instability through vengeance.⁷³

Conceived of as an alternative to blanket amnesty, truth commissions have occasionally been established through legislation, but are more commonly established by presidential decree.⁷⁴ A truth commission’s mandate is established by its sponsoring parties and delineates not only the goals and procedures of the body, but also its powers.⁷⁵ Recognizing that “whoever defines the past might also control the future,”⁷⁶ the scope and content of a commission’s mandate have serious implications. One model that is often lauded as a good faith effort to promote peace and reconciliation is the South African Truth and Reconciliation Commission.⁷⁷ South Africa’s commission granted amnesty to human rights abusers, but only after they came forward and disclosed the details of their actions.⁷⁸ Victims were thus validated and, in some ways, vindicated by the public exposure of past atrocities; violators were made to accept a level of responsibility in the form of public scrutiny, and society as a whole benefited from greater understanding of the apartheid era and the events that transpired.⁷⁹ There, civil society was given a role

69. Brahm, *supra* note 68.

70. Anja Seibert-Fohr, *Human Rights as Guiding Principles in the Context of Post Conflict Justice*, 13 MICH. ST. J. INT’L L. 179, 180-84 (2005).

71. See e.g. Keller, *supra* note 10, at 318.

72. Brahm, *supra* note 68.

73. See Wilson, *supra* note 58, at 18.

74. Brahm, *supra* note 68.

75. See Keller, *supra* note 10, at 297.

76. Wilson, *supra* note 58, at 18.

77. Seibert-Fohr, *supra* note 70, at 180.

78. See ANTJIE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* (Times Books 1998), for an in-depth and moving account of South Africa’s Truth and Reconciliation Commission.

79. See generally *id.*

in shaping the Truth and Reconciliation Commission's structure and mandate.⁸⁰ Public participation in the process, however, remains the exception rather than the norm.⁸¹ In addition, those models which have expressly incorporated blanket amnesties, such as that of El Salvador, typically "do not serve as good examples for the return to peace and the rule of law."⁸²

Initially opposed vehemently by army negotiators, Guatemala's version of a truth commission was created as part of the 1994 Oslo Accords,⁸³ which were later incorporated into the final peace agreement of 1996.⁸⁴ With virtually no public participation, and given the relative weakness of the URNG's bargaining position,⁸⁵ the agreement establishing the CEH was the "shortest and weakest of all the Guatemalan accords."⁸⁶ With the stated aim of clarifying "with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict,"⁸⁷ the investigatory scope of the CEH was notably broad. Yet, having been assigned the task of investigating all human rights violations and acts of violence that occurred during thirty-six years of civil war, the CEH was granted only six months in which to do so, with the option of extending its work for an additional six months.⁸⁸

In addition to having an inordinately short amount of time with which to investigate an overly broad scope of acts, the CEH was further limited by its inability to subpoena witnesses or to grant amnesty to perpetrators who confessed.⁸⁹ As such, it had no power to compel participation or offer incentives for cooperation.⁹⁰ Moreover, unlike its equivalent in South Africa, the CEH was not granted any powers of search or seizure, and was therefore limited in its ability to obtain evidence in its investigations.⁹¹ This, in turn, was exacerbated by limited access to state archives.⁹² As a result of this weakness, State actors were able to deliberately obstruct investigations by refusing to cooperate.⁹³

Most significantly, the Oslo Agreement not only denied the CEH "any judicial aim or effect," but also prohibited it from assigning individual responsibility

80. See Keller, *supra* note 10, at 298.

81. *Id.*

82. Seibert-Fohr, *supra* note 70, at 180.

83. CEH Agreement, *supra* note 23; Wilson, *supra* note 58, at 19.

84. CEH Agreement, *supra* note 23; 1996 Accords, *supra* note 31.

85. See Keller, *supra* note 10 at 299.

86. Wilson, *supra* note 58, at 19.

87. CEH Agreement, *supra* note 23, at 283.

88. See Keller, *supra* note 10, at 301.

89. See *id.* at 302.

90. See *id.*

91. See *id.*

92. See *id.*

93. See *id.*

for abuses.⁹⁴ As such, the CEH was severely restricted in its ability to act as a vehicle for accountability.⁹⁵ Although this aspect of the truth commission was the most criticized, the CEH surprised the public in its report by tying institutional responsibility to the chiefs of staff for national defense and the country's presidents.⁹⁶ In so doing, the CEH indirectly informed the public of the identities of some individual perpetrators, without specifically naming names or violating its mandate.⁹⁷ In addition, it expressly condemned the Guatemalan government and military for human rights violations and repression, and found the State responsible for genocide in four cases.⁹⁸ Moreover, the CEH used "illustrative cases" to provide a broad analysis of "different types of violence" and therefore looked to the root causes of the civil war.⁹⁹ Despite favorable reactions to these condemnations, however, and notwithstanding arguments that the CEH acted prudently in deciding that the prohibition against assigning individual responsibility prevented it from naming names, the CEH was still limited in its ability to promote accountability in post-war Guatemala.¹⁰⁰

Ideally, the findings and recommendations of a truth commission should facilitate the beginning of a justice phase in which individual perpetrators are brought to justice for previous atrocities.¹⁰¹ In reality, however, truth commissions

94. CEH Agreement, *supra* note 23.

95. It is important to note, however, that although some truth commissions have assigned individual responsibility where a preponderance of the evidence supported such assignment, there is a general tendency not to "name names." See Brahm, *supra* note 68.

96. CEH REPORT, *supra* note 2, Conclusions, pt. II, paras. 105-26.

97. See Keller, *supra* note 10, at 293.

98. CEH REPORT, *supra* note 2, Conclusions, pt. II, paras. 105-26.

99. Crandall, *supra* note 10, at 7-8.

100. See Keller, *supra* note 10, at 304, 318. Because the CEH had no "judicial aim or effect," the theory has been advanced that it could have chosen to name names without violating the prohibition against assigning individual responsibility. Keller effectively argues that the CEH's decision not to name names prevented it from acting outside the scope of its mandate or violating the due process rights of identified perpetrators, thus maintaining the legitimacy of both the Commission and its final report. Although he argues that this decision was correct, Keller nonetheless acknowledges that it still represented a significant restraint on the CEH's ability to promote accountability.

101. Keller argues that although the truth phase is necessary during transition, it is not by itself enough to bring closure to victims and to effectively guard against ongoing impunity. *Id.* at 318. According to Stromseth:

The long-term impact of accountability proceedings on the rule of law depends critically on three factors: first, the effective disempowerment of key perpetrators who threaten stability and undermine public confidence in the rule of law; second, the character of the accountability proceedings pursued, particularly whether they demonstrate credibly that previous patterns of abuse and impunity are rejected and that justice can be fair; and

are often fully substituted for prosecution and a justice phase never initiates.¹⁰² Both the REMHI and CEH reports contained recommendations aimed at identifying those involved, as well as dismantling the State structures and institutions that were instrumental in facilitating and perpetuating a culture of impunity in Guatemala.¹⁰³ Yet, although these recommendations have not been implemented, the CEH's report served to diminish international pressure on Guatemala, thereby removing the impetus for prosecution that continuing scrutiny might have brought about.¹⁰⁴ As a result, "[a]lthough the CEH achieved a historical truth, it has fallen far short of redignifying the Guatemalan people, and may have inadvertently become an accessory to the continuing repression and impunity against them."¹⁰⁵

B. Amnesty: International Law and the Law of National Reconciliation

As part of the 1994 Comprehensive Agreement on Human Rights, Guatemala agreed not to sponsor legislation or other measures designed to prevent prosecution and punishment of human rights violators.¹⁰⁶ Notably, the agreement also stipulated that no special law or exclusive jurisdiction could be used to uphold impunity in cases of human rights abuses.¹⁰⁷ As such, the agreement "held implicit promise that an amnesty for serious violations of human rights would not be permitted."¹⁰⁸ Yet, in December of 1996, Guatemala passed the National Reconciliation Law, which allows courts to grant amnesty for "political crimes against the state, the institutional order, and public administration; common crimes 'directly, objectively, intentionally, and causally' linked to political crimes; and common crimes perpetrated with the aim of preventing, impeding, or pursuing political and related common crimes."¹⁰⁹ Because the law specifically excludes from amnesty cases involving forced disappearances, torture, or genocide, it has been lauded by some as a step forward with regard to previous blanket amnesties

third, the extent to which systematic and meaningful efforts at domestic capacity-building are included as part of the accountability process.

Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 257 (2007).

102. Keller, *supra* note 10, at 318-19.

103. Amnesty Int'l, *supra* note 32, at 5.

104. Crandall, *supra* note 10, at 11.

105. *Id.* at 18.

106. Comprehensive Agreement on Human Rights, Guat.-URNG, § III(1), March 29, 1994, U.N. Doc. A/48/928-S/1994/448, Annex I (1994). Guatemala's 'duty to prosecute' will be discussed below.

107. *Id.* § III(3).

108. See Cassel, *supra* note 10, at 222.

109. See *id.* at 223.

issued in other Latin American countries.¹¹⁰ In practice, however, impunity has extended even to those excluded from protection by the amnesty law.¹¹¹ In passing the National Law of Reconciliation, Guatemala seemingly moved away from its stated goal of combating impunity and towards a post-conflict period without convincing prospects for justice and accountability.

C. Failure of Judicial Systems/Criminal Justice Reform

In 1994, the Guatemalan Congress enacted a new criminal procedure code, the *Código Procesal Penal* (“Penal Code”), which transformed the penal system from an inquisitorial system to an adversarial one.¹¹² Key features of the new scheme are “shortened pre-trial detentions, plea bargaining, introduction of evidence through oral proceedings, the presumption of innocence and a right to defense, a right to use one’s native language, and changes in appeal processes.”¹¹³ Designed in part to address concerns over corruption and citizen security, the overhaul also sought to promote “community understanding of and participation in the criminal justice system.”¹¹⁴ At the same time, reorganization of the Public Prosecutor’s Office substantially increased the number of prosecutors, and granted the ministry significant independence from the executive branch.¹¹⁵ Further efforts to improve the justice system included extensive police reform, with the institution of the National Civilian Police to replace the notoriously corrupt former police forces.¹¹⁶ Moreover, the 1996 Accord on Strengthening of Civil Society and the Role of the Army in a Democratic Society (“ASCS”) made reform of the justice system a priority, and created the Commission on Strengthening the Justice System to achieve its goals.¹¹⁷ The recommendations of the Commission were not unlike those of the CEH and REMHI, and included the need for modernization, professional standards, access to justice, speedier trials, security and justice, and constitutional reforms.¹¹⁸

110. Naomi Roht-Arriaza, *Combatting Impunity: Some Thoughts on the Way Forward*, 59 *LAW & CONTEMP. PROBS.* 93, 94 (1996).

111. See introductory examples of impunity, *supra* Part I.

112. Nathanael Heasley, Rodger Hurley, Kara E. Irwin, Andrew H. Kaufman, Nadine Moustafa, & Alain Personna, *Impunity in Guatemala: The State’s Failure to Provide Justice in the Massacre Cases*, 16 *AM. U. INT’L L. REV.* 1115, 1133-34 (2001).

113. Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala’s Conversion to the Adversarial System*, 5 *SW. J. L. & TRADE AM.* 365, 365 (1998).

114. *Id.*

115. Heasley et al., *supra* note 112, at 1134.

116. *Id.*

117. Amnesty Int’l, *supra* note 32, at 11-12.

118. *Id.* at 12.

Within weeks of the creation of the new police force in 1997, fresh complaints of corruption had already emerged.¹¹⁹ Moreover, a package of Congressional proposals to reform the Constitution, as well as additional legislation to implement the Peace Accords, was defeated by public referendum in 1999. Significantly, only eighteen percent of the eligible public voted.¹²⁰ A variety of reasons have been advanced as to why the reforms failed, including the fact that they were not well publicized or explained to the general public due to opposition from powerful sectors.¹²¹ As a result, implementation of the Peace Accords now depends upon one-by-one approval of individual measures.¹²² With regard to the process of criminal justice reform, Steven Hendrix identified several key challenges facing the new system in 1998.¹²³ These included an overwhelmed public defender service, ongoing corruption, inadequate salaries for enforcement officials and judges, and a rapidly increasing crime wave that threatened public security.¹²⁴ Doubts also existed as to whether Guatemala had the institutional capacity to carry out the mandated changes.¹²⁵ As such, the biggest obstacle to the peace process and successful reforms appeared to be “the inability of the government to curb violence and insecurity.”¹²⁶

A 2001 study by Heasley et al. focused on Guatemala’s failure to provide timely justice in four specific massacre cases that were representative of the larger number of massacres committed during the civil war.¹²⁷ Their study suggested that the judicial reforms initiated by Guatemala theoretically prepared it to provide timely justice in the cases they studied,¹²⁸ but that success was precluded by six major obstacles: “intimidation; corruption; incompetence; resource management/lack of resources; the lack of a definition for the term ‘military secrets;’ and the misuse and failure to utilize procedural mechanisms.”¹²⁹ The authors also noticed the presence of these obstacles in several additional cases in which State actors allegedly violated the right to life.¹³⁰ Suggesting that “[s]trong executive branch support for the criminal proceedings could provide added impetus

119. Hendrix, *supra* note 113, at 370.

120. See Amnesty Int’l, *supra* note 32, at 12.

121. See *id.*

122. See *id.*

123. Hendrix, *supra* note 113, at 370. See *id.*, for a detailed account of the criminal justice system pre-reform in Guatemala, and for a description of the reforms enacted.

124. *Id.* at 406-10.

125. *Id.* at 396.

126. *Id.* at 419.

127. Heasley et al., *supra* note 112. The study focuses on the massacres cases of Plan de Sanchez, Rio Negros, Dos Erres, and Cuarto Pueblo. It also examines several additional cases in which the State is alleged to have violated the right to life.

128. *Id.* at 1135.

129. *Id.* at 1185. See *id.* at 1185-88, for a detailed discussion of these obstacles.

130. *Id.* at 1121.

to resolve the massacre cases,¹³¹ the authors pointed to promises made by President Portillo around the time of his election in 2000 as potential evidence of an increasing commitment to human rights and justice on the part of the administration.¹³² These promises included commitment to the resolution of the massacre cases, creation of a justice system that promoted accountability, and implementation of the recommendations made by the CEH.¹³³ He also invited the international community to hold him accountable for his promises.¹³⁴ Since then, the Inter-American Court of Human Rights has handed down judgments calling on Guatemala to identify, prosecute, and punish the perpetrators of several cases of grave human rights violations, including the Plan de Sánchez massacre.¹³⁵ As of early 2008 and the inauguration of President Colom, however, effective investigations have not been carried out.¹³⁶ The murder rate in Guatemala is rising, “killings of vulnerable populations such as women, adolescents, and children have

131. *Id.* at 1191.

132. *Id.* at 1189-94.

133. Heasley et al., *supra* note 112, at 1189.

134. *Id.* at 1190.

135. Case of Carpio-Nicolle *et al.* v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 117, para. 129 (Nov. 22, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_117_ing.pdf (ordering investigation, prosecution, and sanction); Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 90 (Nov. 19, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf (ordering, *inter alia*, investigation of events, prosecution and sanction of perpetrators, and a public apology); Case of Molina-Theissen v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 106, para. 82 (May 4, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_106_ing1.pdf (ordering investigation, prosecution, and sanction); Case of Myrna Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 275 (Nov. 25, 2003), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf (ordering effective investigation, prosecution, and sanction of perpetrators); Case of Bámaca-Velásquez v. Guatemala, Inter-Am. Ct. H.R., (ser. C) No. 91, para. 73 (Feb. 22, 2002), available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_91_ing.pdf (reaffirming duty to investigate, prosecute, and sanction); Case of the “Street Children” (Villagrán-Morales *et al.*) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 77, paras. 99-101 (May 26, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf (reaffirming duty to investigate, prosecute, and sanction perpetrators); Case of Bámaca-Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, para. 230.8 (Nov. 25, 2000), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf (ordering investigation of events, and prosecution and sanction of perpetrators); Case of the “Street Children” (Villagrán-Morales *et al.*) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 253.8 (Nov. 19, 1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf (ordering investigation of events, and prosecution and sanction of perpetrators).

136. Inés Benítez, *Rights: Guatemala Turns Deaf Ear to Inter-American Justice*, INTER PRESS SERVICE NEWS AGENCY, Apr. 11, 2008, <http://ipsnews.net/news.asp?idnews=41957>.

become epidemic,” and police and military forces have been implicated in human rights crimes against citizens.¹³⁷ In the case of Guatemala, corruption and impunity appear to be so deeply entrenched as to stymie even State-backed efforts at reform.¹³⁸

IV. INTERNATIONAL OBLIGATIONS AND RESPONSIBILITY

Guatemala is party to two treaties that ostensibly impose a duty to prosecute State perpetrators of gross human rights violations.¹³⁹ As such, Guatemala is accountable internationally for failure to prosecute civil war era atrocities. Inter-American jurisprudence also suggests that Guatemala’s amnesty law violates human rights norms that impose a duty to prosecute in a broader range of cases than those exempted from the amnesty.¹⁴⁰ To the extent that these norms prevail, some redress may be possible at the international level.¹⁴¹ Despite a handful of recent successes in the Inter-American Court of Human Rights, however, organized crime and violence continue to plague Guatemalan society and politics with seeming impunity.¹⁴²

A. International Human Rights Law and Legal Regimes

By virtue of its position in the international system of states, Guatemala is subject to international law in the form of binding obligations as well as non-binding norms or standards.¹⁴³ Binding obligations arise from three sources: treaties, customary international law, and general principles of law.¹⁴⁴ The most

137. GUATEMALA HUMAN RIGHTS COMMISSION/USA, GUATEMALA HUMAN RIGHTS REVIEW 1 (Jan.-Dec. 2006), available at <http://www.ghrc-usa.org/Publications/HumanRightsReview2006.pdf>.

138. Corruption and clandestine security forces are discussed in Part V, *infra*.

139. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 102 Stat. 382, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. See discussion of the international duty to prosecute, *infra* Part IV.C.

140. *Infra* Part IV.C, pp. 23-27.

141. See overview of cases brought against Guatemala in the Inter-American Court of Human Rights (IACHR), *infra* notes 234-50 and accompanying text.

142. *Infra* notes 234-50 and accompanying text. A more detailed account of the current state of crime and violence in modern day Guatemala is provided in Part V.A-B, *infra*.

143. See generally RICHARD B. LILLICH, HURST HANNUM, S. JAMES ANAYA, & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE (2006).

144. See *id.* at 62-66, 152-53.

straightforward of these sources are treaties. When a state ratifies a treaty, it commits itself to the obligations delineated therein.¹⁴⁵ In modern times, treaties are increasingly multilateral, and in the context of human rights law, they are generally promulgated and undertaken within the framework of the United Nations or similar regional regimes.¹⁴⁶ The relevant organizational bodies for Guatemala are the United Nations (“UN”) and the Organization of American States (“OAS”).¹⁴⁷ Article 46 of the Guatemalan Constitution (“PCR”) establishes “as a general principle that in the matter of human rights, treaties and conventions accepted and ratified by Guatemala have preeminence over the juridical internal order or domestic law.”¹⁴⁸ Thus, treaty law trumps domestic law. *Vis-à-vis* the PCR itself, the Constitutional Court has concluded that where a conflict arises between human rights treaty law and constitutional law, the law that recognizes the most rights is to be considered paramount.¹⁴⁹

Customary international law, on the other hand, consists of norms that have developed not only a common meaning among most states or actors with international personality,¹⁵⁰ but are also linked to shared expectations of future

145. See “treaty,” BLACK’S LAW DICTIONARY (online 8th ed. 2004).

146. See generally LILLICH ET AL., *supra* note 143.

147. Both systems have their own enforcement processes. While a detailed analysis of these mechanisms falls outside the scope of this paper, it is important to note that international enforcement of human rights norms is not extensive or necessarily efficient. Moreover, the system is State-centric; the rights delineated in human rights law protect people from state action, not from the acts of individual perpetrators (unless acting on the part of the state). Much of the value of the body of law related to human rights comes from the fact that as norms become increasingly recognized, international scrutiny can play an important role in preventing or rectifying violations perpetrated by other states. See generally *id.* The obligations that Guatemala has undertaken through the UN and OAS systems are discussed below.

148. Rodríguez, *supra* note 47, at pt. 4.2. Article 46 of the PCR reads: “Preeminencia del Derecho Internacional. Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen [p]reeminencia sobre el derecho interno.” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [PCR] [Constitution] art. 46, available at <http://www.acnur.org/biblioteca/pdf/0134.pdf>.

149. Rodríguez, *supra* note 47, at pt. 4.2.

150. Under one theory of international personality, non-state actors are said to have international personality when they have acquired institutional standing within the international community that allows them to operate in the same way as a state vis-a-vis other states. See, e.g., JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 54-56 (2002). But see *id.* at 52-54 (discussing the more popular though logically flawed “will theory,” under which “the will of the founders . . . [determines] the organization’s legal personality”). For a thorough history of the theory and development of the concept of international legal personality, see JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (2004). The United Nations is an example of an international

behavior in conformity with their meaning.¹⁵¹ As such, the two key factors influencing the development of customary international law are past state practice and subjective generality of practice.¹⁵² Past state practice has increasingly come to refer to state action beyond actual physical behavior, including action in the form of diplomatic correspondence, press releases, military orders, legislation, and other such official practice.¹⁵³ Subjectively, a state need not expressly manifest its assent to an international norm in order for the norm to develop an obligatory character.¹⁵⁴ However, in keeping with the fundamental principle that “a state may not be bound without its consent,” clear and persistent objections to a developing customary norm will generally prevent such a norm from becoming binding on the objecting state.¹⁵⁵

A final category of law that imposes binding international obligations is constituted by general principles of law. In its modern day articulation, this category comprises general shared principles of law, evidenced by state practice, that stem from either the international or domestic arenas. In its evolution to include international principles along with those arising in a domestic legal context, the distinction between this category and customary international law has waned.¹⁵⁶ The human rights framework, however, continues to recognize general principles of law as a third and separate category from which binding international norms emerge.¹⁵⁷

International norms can also take the form of “soft law.”¹⁵⁸ Soft law consists of the standards articulated in non-treaty documents, which are not binding by nature, but which nonetheless command some informal level of authority when invoked, such as UN Declarations.¹⁵⁹ Although not independently binding, instruments of soft law affect the development of legal obligations in two significant ways. First, soft law may be referred to as a source of interpretation through which rights and obligations are given meaning.¹⁶⁰ Secondly, instruments of soft law often provide expression to norms that are in development; when determining that a norm represents customary international law or a general principle of law, subjective or

organization with international legal personality. As a result, it can enter into agreements with other states and bring claims to protect its rights. NIGEL D. WHITE, *THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE* 28-32 (2002).

151. LILICH ET AL., *supra* note 143, at 152.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 153.

156. *Id.*

157. *See id.*

158. *Id.* at 136. For a full discussion of soft law and the use of non-binding instruments in international human rights law, see *id.* at 136-43.

159. *Id.* at 136.

160. *Id.* at 141-42.

objective evidence is often found in the form of declarations or other non-binding expressions, thereby creating the consensus which leads to a finding of obligation.¹⁶¹

International human rights law is applicable in times of peace as well as times of conflict.¹⁶² However, the necessity of allowing states to derogate from certain human rights norms during times of public emergency is a recognized principle of human rights law, and is embodied in the three major human rights treaties.¹⁶³ Yet although the International Covenant on Civil and Political Rights (“ICCPR”), the American Convention, and the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶⁴ all recognize certain permissible derogations, these treaties and customary international law maintain that there is a certain core body of rights that are fundamentally non-derogable.¹⁶⁵ Although the three treaties are not completely consistent in their identification of the rights that fall into this category, those rights that clearly cannot be abrogated regardless of situation include, *inter alia*, the right to life (and thus to be free from genocide) and the right to be free from torture.¹⁶⁶ Essentially, then, there is no way to avoid incurring responsibility for violation of these rights.

Another body of international law, humanitarian law, operates to protect particular classes of people during times of conflict.¹⁶⁷ Its reach is limited, however, when it comes to internal armed conflicts such as the civil warfare experienced in Guatemala. In deference to the reluctance of many states to apply laws that would grant belligerent status to rebel forces, thereby lending them legitimacy and possibly even legal recognition, the main body of humanitarian law, the Geneva Conventions, deals primarily with warfare between states.¹⁶⁸ Common Article 3 of

161. *Id.*

162. *Id.* at 216.

163. For a discussion of hierarchy within international human rights law utilizing the concept of non-derogable rights, see Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*, 12 EUR. J. INT’L L. 917 (2001).

164. Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, Nov. 4, 1950, Europ.T.S. 5; 213 U.N.T.S. 221 [hereinafter European Convention].

165. See LILLICH ET AL., *supra* note 143, at 222-28.

166. *Id.*

167. *Id.* at 216.

168. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

the Geneva Conventions, however, “provides some minimum protections for victims of internal armed conflicts, while avoiding any recognition of the rebel forces or any rebel entitlement to prisoner of war status.”¹⁶⁹ By prohibiting the parties of internal armed conflicts to infringe upon the rights to life, dignity, liberty, due process, and treatment of non-combatants, Common Article 3 thus creates an additional source of international obligation for states with regard to the treatment of their own nationals during internal armed conflict.¹⁷⁰ Due to its inherent generality and the reluctance of states to admit to internal armed conflicts, Common Article 3 has not been overly effective in practice since its creation.¹⁷¹ In the case of Guatemala, however, the existence of an internal armed conflict between 1960 and 1996 cannot be denied. As a result, Guatemala ostensibly incurred international responsibility under Common Article 3 to the extent that state actors violated the general prohibitions of the Article.¹⁷²

B. International Law and Guatemala’s Past

After taking the testimony of 5,465 individuals, REMHI documented 52,427 victims “of human rights and humanitarian law violations, in a total of 14,291 incidents.”¹⁷³ As these numbers indicate, these violations “were often collective, targeting communities and other groups.”¹⁷⁴ Finding the government to be cumulatively responsible for 47,004 victims (89.65 percent of all violations documented by REMHI), the report also attributed responsibility for 2,523 victims to guerilla forces (4.81 percent).¹⁷⁵ Of the violations for which the government was found responsible, 32,978 were attributed directly to the army (62.9 percent), 10,602 to the army in conjunction with paramilitary organizations (20.22 percent), and 3,424 to paramilitaries acting alone (6.53 percent).¹⁷⁶ The CEH found that ninety-three percent of the violations it documented were attributable to the State, with eighty-five percent of those cases attributable to the army.¹⁷⁷ It is beyond the scope of this paper to analyze the legal origins of every human rights violation for which the Guatemalan State might have incurred international responsibility during the years of civil war, yet certain violations which incur international responsibility

169. LILICH ET AL., *supra* note 143, at 248. Article 3 applies to all the Geneva Conventions and is known as Common Article 3. *See* Geneva Conventions, *supra* note 168.

170. LILICH ET AL., *supra* note 143, at 249.

171. *Id.*

172. This comment reflects the author’s own conclusion based on foregoing discussion.

173. REMHI REPORT, *supra* note 2, at 289.

174. *Id.*

175. *Id.* at 290.

176. *Id.*

177. CEH REPORT, *supra* note 2, Conclusions, pt. II, para. 82.

are generally understood to have occurred.¹⁷⁸ According to REMHI, the most frequently reported abuses were individual or collective murders, attacks, irregular detentions, threats, torture, cruel, inhuman, or degrading treatment, forced disappearances, abductions, and rape.¹⁷⁹ Because gross violations have gone unpunished and many of the perpetrators remain influential in Guatemalan society and politics today, it is relevant to a discussion of impunity to outline the sources of international obligation breached by these State-sponsored actions.¹⁸⁰

As mentioned above, Guatemala is a member of the United Nations and the Organization of American States. Several clearly binding norms arise from these two treaty regimes, which Guatemala violated. Perhaps the most notable of these is the prohibition of genocide. Guatemala, along with most countries of the world, is a party to the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide.¹⁸¹ Even if Guatemala was not a signatory, the International Court of Justice has recognized the substantive provisions of the Genocide Convention as constituting customary international law binding on all states.¹⁸² Article 2 of the Convention states:

Genocide is understood as any of the following acts, committed with the intent to destroy, in whole or in part, a national, ethnic, 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.¹⁸³

This definition makes the type of victim group and intent to destroy the group essential to the crime of genocide. Whereas REMHI found the systematic targeting of communities for religious or ethnic reasons to generally include “aspects of genocide,”¹⁸⁴ the CEH conducted a methodical analysis of state action using the

178. REMHI REPORT, *supra* note 2, at 289-311; CEH REPORT, *supra* note 2, Conclusions, pt. II.

179. REMHI REPORT, *supra* note 2, at 289-90.

180. Notably, REMHI reported that the “highest number of victims relative to the incidents that occurred were recorded during the short de facto regime of General Ríos Montt” mentioned in the introduction to this Note. *Id.* at 291.

181. Genocide Convention, *supra* note 139.

182. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

183. Genocide Convention, *supra* note 139, art. 2.

184. REMHI REPORT, *supra* note 2, at 292.

framework of the Genocide Convention and concluded that “within the framework of counterinsurgency operations carried out between 1981 and 1983, [the State] committed acts of genocide against groups of Mayan people” in four instances.¹⁸⁵ In particular, the CEH found that documented acts indicated violations of Article 2(a), 2(b), and 2(c), committed with the “intent to destroy” Mayan groups “in whole or in part.”¹⁸⁶

Even where whole groups were not targeted, the abuses documented by both the CEH and REMHI demonstrate that the Guatemalan State violated the right to life through widespread, repeated, and systematic executions. Article 4(1) of the American Convention on Human Rights, the main treaty of the Inter-American system of which Guatemala is a party, prohibits arbitrary deprivation of life.¹⁸⁷ Article 6(1) of the legally binding International Covenant on Civil and Political Rights¹⁸⁸ contains the same prohibition, which is further bolstered by influential soft law instruments such as the Universal Declaration of Human Rights¹⁸⁹ and the American Declaration on the Rights and Duties of Man.¹⁹⁰ In addition to the massacres already noted, both the CEH and REMHI documented widespread arbitrary extrajudicial killings, forced disappearances,¹⁹¹ persecution leading to death,¹⁹² and indiscriminate attacks on civilian individuals that clearly violated this tenet of international human rights law.¹⁹³ Through the indiscriminate killing of civilians, international humanitarian law stemming from Article 3 of the Geneva Conventions was also breached.¹⁹⁴

185. See generally CEH REPORT, *supra* note 2; *id.*, Conclusions, pt. II, para. 122.

186. *Id.*, Conclusions, pt. II, para. 122.

187. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter American Convention].

188. International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

189. Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

190. American Declaration on the Rights and Duties of Man, art.1, Apr. 1948, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) [hereinafter American Declaration].

191. REMHI relied upon the Truth Commission for El Salvador to define forced disappearance as “the detention of a person whose fate is unknown because the detainee either becomes entrapped in a clandestine detention network or is executed and the body concealed.” A forced disappearance is “an ongoing violation that only ends when the victim reappears alive – either free or in detention – or when his or her body is positively identified by relatives or acquaintances.” REMHI REPORT, *supra* note 2, at 294.

192. Death as a result of persecution “includes people who died of hunger or illness, or from feelings of pain and anguish, while being pursued and persecuted by the army or civil patrollers.” *Id.* at 295.

193. CEH REPORT, *supra* note 2, Conclusions, pt. II; REMHI REPORT, *supra* note 2, at 293-96.

194. Article 3(a) of the Geneva Conventions applies to “non-international armed conflict” and prohibits attacks on the life of individuals not actively engaged in armed

Along with genocide, torture is also a non-derogable right.¹⁹⁵ Expressly prohibited by Article 7 of the ICCPR¹⁹⁶ and Article 5 of the American Convention,¹⁹⁷ torture is the subject of a specialized UN treaty. Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment¹⁹⁸ defines torture with reference to severity and purpose, prohibiting “severe pain or suffering, whether physical or mental” that is inflicted intentionally in order to achieve an end such as extracting a confession or other information, punishment, intimidation, coercion, or discrimination.¹⁹⁹ In addition to the prohibitions outlined above, Common Article 3 of the Geneva Conventions requires the parties of internal armed conflict to treat non-combatants humanely and expressly prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment,”²⁰⁰ thereby making treatment of that nature during internal conflict a violation of international humanitarian law. While the distinction between torture and cruel, inhuman, or degrading treatment is not always clear, the REMHI report catalogued 2,752 incidents (comprising 9,908 victims) that it considered to fit within the definition of torture provided by the Torture Convention.²⁰¹ Also, the report points out that many more incidents of torture must have gone unreported due to death or disappearance.²⁰² Although ninety percent of torture victims were men, the report also notes that women, particularly young women and girls, were frequently raped by the army, military commissioners, and civil patrollers during the conflict, and these numbers were not included in the calculated torture figures.²⁰³

combat, including members of the armed forces of any party to the conflict who have laid down their arms or are sidelined for any reason. Geneva Conventions, *supra* note 168.

195. For an overview of international prohibitions against torture (as well as applicable domestic U.S. law), see Human Rights Watch, *The Legal Prohibition against Torture*, <http://humanrightswatch.org/press/2001/11/TortureQandA.htm> (last visited Sept. 7, 2008).

196. “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” ICCPR, *supra* note 188, art. 7.

197. Article 5(1) establishes that “every person has the right to have his physical, mental, and moral integrity respected” and Article 5(2) prohibits torture and cruel, inhuman, or degrading punishment or treatment. American Convention, *supra* note 187.

198. Torture Convention, *supra* note 139.

199. *Id.* art 1(1). Torture is also expressly prohibited in Article 5 of the UDHR. *Supra* note 189.

200. Geneva Conventions, *supra* note 168, art. 3(1)(c).

201. REMHI REPORT, *supra* note 2, at 298.

202. *Id.*

203. Testimony indicated that “for every ten women, one girl was raped, and one out of every three women raped was a young woman.” Moreover, incidents of rape were undoubtedly under-reported. *Id.*

These documented abuses indicate that Guatemala as a State has incurred international responsibility for gross violations of human rights.²⁰⁴ Although it was not permitted to name individual violators, the CEH implied that certain key actors and heads of state could and should be held directly responsible when it concluded that “[t]he responsibility for a large part of these violations, with respect to the chain of military command as well as the political and administrative responsibility, reaches the highest levels of the Army and successive governments.”²⁰⁵ Moreover, noting that the bloodiest period of the conflict occurred when Romeo Lucas García, Efraín Ríos Montt, and Oscar Mejía Víctores were commanders-in-chief of the army, REMHI asserted that “none of these three can escape responsibility for so many victims.”²⁰⁶ Although all three of these men have been formally charged with genocide by a Spanish court, Spain’s efforts to bring them to justice have failed, largely due to Guatemala’s lack of cooperation in enforcing arrest warrants and extradition orders.²⁰⁷

204. It is worth noting that both the CEH and REMHI also attribute numerous, and in many cases, similar violations to the guerilla forces, albeit not numerically to nearly the same extent as state actors. REMHI REPORT, *supra* note 2, at 290-91; CEH REPORT, *supra* note 2, Conclusions, pt. II, paras. 127-28. The CEH concluded that guerilla forces did not always distinguish between combatants and non-combatants and thus committed various abuses in violation of Common Article III of the Geneva Conventions. CEH REPORT, *supra* note 2, Conclusions, pt. II, paras. 138-39. By virtue of their reintegration into the politics and society of post-conflict Guatemala, many of these non-state perpetrators have also benefited from the culture of impunity in Guatemala and have remained untried and at large.

205. CEH REPORT, *supra* note 2, Conclusions, pt. II, para. 106.

206. REMHI REPORT, *supra* note 2, at 290-91. Seventy-one percent of all violations during the period in which they controlled the army were attributed to the State. *Id.* at 291.

207. Recently, Spain has become the “world’s foremost practitioner of universal jurisdiction.” Geoff Pingree & Lisa Abend, *Spanish Justice: Guatemala and Efraín Ríos Montt*, THE NATION MAG., Oct. 9, 2006, at 6. The principle of universal jurisdiction is articulated in the Genocide Convention and is arguably a principle of international law. Under this theory, any court anywhere in the world has jurisdiction over certain international crimes, regardless of where they occur or who is involved. For a discussion of this theory and resistance to its use, see Menno Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 940-65 (2001). More readily accepted by individual states are the general principles of international jurisdiction articulated in Article 5 of the Torture Convention. The first of these is territorial jurisdiction in which courts are empowered to adjudicate allegations of torture within a nation-state’s boundaries. The second principle is active nationality, in which jurisdiction lies over nationals active in the act of torture in another country. Finally, jurisdiction can lie based upon the principle of passive nationality, in which a victim who was tortured in another state is a national of the state asserting jurisdiction. Torture Convention, *supra* note 139, art. 5(1)(a)-(c). Judge Baltasar Garzón’s ruling in 1998 that General Augusto Pinochet could be tried in Spain for crimes against humanity put Spain in the forefront of international efforts to prosecute serious crimes. Pingree & Abend, *supra*, at 6.

Because Guatemala directly incorporates human rights treaty law into its legal regime, the aforementioned prohibitions are on equal footing with domestic law and thus create domestic liability as well. In addition, the Guatemalan Constitution contains several express provisions that are clearly violated by actions of the type outlined above. Some of these parallel international norms have already been discussed, such as the right to life.²⁰⁸ Others, like the state's responsibility to guarantee the integrity of its people,²⁰⁹ may create obligations which, while clearly similar to internationally recognized norms, are also broad enough to provide viable causes of action where international law fails to do so.²¹⁰ It is undeniable that the State of Guatemala has violated numerous binding tenets of international human rights and humanitarian law. It also appears possible that several key individual actors could be held directly accountable for state violations under the auspices of international law or, perhaps, domestic Guatemalan law. The high-profile example of General Ríos Montt, whom the State not only failed to prosecute domestically but also shielded from international prosecution, and who now enjoys Congressional immunity, provides unambiguous proof of the extent to which impunity has thwarted justice in Guatemala.²¹¹ That actors like Ríos Montt continue to hold positions of power further indicates that impunity is not limited in time and space to the perpetrators of former atrocities, but rather that it continues to characterize the workings of the state today.

C. International Duty to Prosecute

In the case of Ríos Montt, Spain originally restricted its efforts to prosecute to actions taken by Ríos Montt in which Spanish nationals were killed. In a landmark decision, however, Spain's Constitutional Court applied the concept of universal jurisdiction and ruled that claims could be prosecuted without regard for the nationality of victims or perpetrators. Pingree & Abend, *supra*, at 6. Nevertheless, in June 2005, the Venezuelan Supreme Court lifted an order of house arrest and decided that Spain had not cited sufficient evidence to support extradition of García, who subsequently died in a Venezuelan hospital in May 2006. *Guatemala's Romeo Lucas García*, WASH. POST, May 30, 2006, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/29/AR2006052900984.html>. Montt, as previously discussed, now enjoys congressional immunity from prosecution in Guatemala. Even prior to his election, however, the Guatemalan State failed to issue the local arrest warrants for Montt and Mejía Víctores called for by the Spanish courts.

208. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [PCR] [Constitution] art. 3, available at <http://www.acnur.org/biblioteca/pdf/0134.pdf>.

209. *Id.*

210. This suggestion reflects the opinion of the author. Seemingly untested, a guarantee to protect its population's "integrity" might plausibly create obligations to prevent any acts that are grossly demeaning or offensive to a person's dignity or well-being.

211. *See supra* notes 3-9 and accompanying text.

In its final conclusions, the CEH report asserts that “[t]he State must also respond for breaches in the legal obligation to investigate, try and punish human right violations, even when these were not committed directly by state agents or when the State may not have had initial knowledge of them.”²¹² With the creation of the International Criminal Court and ad hoc criminal tribunals for the former Yugoslavia and Rwanda, international criminal prosecution has reemerged over the past decade as a normative goal of the international system.²¹³ While there is growing consensus that “the most serious human rights violations should not go unpunished and ... the international community should step in where domestic prosecution fails,” the extent to which states are obligated to pursue criminal justice in the form of prosecution in post-conflict situations remains unresolved.²¹⁴ However, an overview of the applicable international treaties to which Guatemala is a party, combined with the jurisprudence of the Inter-American system, suggests that Guatemala has a duty to prosecute in certain cases that is separate from the State’s general responsibilities to promote and protect human rights.²¹⁵ In essence, this means that Guatemala is accountable internationally for failure to bring past or present perpetrators of certain human rights abuses to justice.

Several treaties “clearly provide for a duty to prosecute the humanitarian or human rights crimes defined therein, including in particular the grave breaches provisions of the 1949 Geneva Conventions, the Genocide Convention, and the Torture Convention.”²¹⁶ However, the duty imposed by the Geneva Conventions is limited to international armed conflict and therefore not directly applicable as a treaty obligation in the present context.²¹⁷ The Genocide Convention, on the other hand, is applicable and stipulates that those responsible for genocide as defined by the treaty “shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²¹⁸ In addition to requiring states to “provide effective penalties”²¹⁹ for perpetrators, the Convention also specifies that individuals charged with genocide are to be tried in the State in which the act occurred, or in a competent international tribunal.²²⁰ The Genocide Convention was ratified by Guatemala in 1950 and entered into force in 1951.²²¹ It therefore creates an unequivocal duty to prosecute perpetrators of genocide that is applicable to events

212. CEH REPORT, *supra* note 2, Conclusions, pt. II, para. 81.

213. Seibert-Fohr, *supra* note 70, at 180.

214. *Id.* at 181.

215. *See infra* notes 216-50 and accompanying text.

216. Michael P. Scharf, *From the Exile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 350-51 (2006).

217. For further discussion of the duty to prosecute grave breaches imposed by all of these conventions, including the Geneva Conventions, *see id.* at 351-53.

218. Genocide Convention, *supra* note 139, art. 4.

219. *Id.* art. 5.

220. *Id.* art. 6.

221. Genocide Convention, *supra* note 139.

in Guatemala since before the start of the civil war. Likewise, the Torture Convention requires state parties to make violations punishable under domestic criminal law.²²² Sentences that take into account the gravity of the crime are mandated for those convicted of torture,²²³ and the Convention requires states to either extradite alleged offenders or submit their cases to competent authorities for prosecution.²²⁴ Because Guatemala did not accede to the Torture Convention until January 5, 1990, however, the Convention applies retroactively for events occurring in Guatemala prior to that date.²²⁵

In addition, when Guatemalan amnesty was arranged in 1996, there already existed Inter-American jurisprudence on the issues of impunity and amnesty for human rights violations.²²⁶ Notably, in 1988, the Inter-American Court of Human Rights issued a judgment interpreting the American Convention on Human Rights as imposing a duty on state parties to investigate and punish violations of rights recognized by the Convention.²²⁷ Among these is the right to life,²²⁸ the right to humane treatment,²²⁹ the right to personal liberty,²³⁰ and the right to a fair trial.²³¹ Moreover, while the Guatemalan Peace Accords were being negotiated, the Inter-American Commission's 1994 country report on El Salvador found the Salvadoran amnesty in violation of the American Convention on Human Rights "in part 'because it applied to crimes against humanity.'"²³² Because Guatemala ratified the American Convention prior to its entry into force on July 18, 1978, it has been legally bound by it since its inception.²³³ In 1999, the Inter-American Court of Human Rights found Guatemala guilty of violating the American Convention in the case of several street children who were abducted, tortured, and murdered by police in 1990.²³⁴ Prior to this decision, the policemen involved had been acquitted of

222. Torture Convention, *supra* note 139, art. 4.

223. *Id.*

224. *Id.* art 7.

225. Article 28 of the Vienna Convention on the Law of Treaties states that treaty provisions "do not bind a party in relation to any act or fact which took place ... before the date of the entry into force of the treaty with respect to that party." May 23, 1969, 112 Stat. 2681-822, 1155 U.N.T.S. 331.

226. *See* Cassel, *supra* note 10, at 209.

227. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 (July 29, 1988) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf. For later discussion, *see* Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 2. rev. paras. 63-123 (1999). *See also* Seibert-Fohr, *supra* note 70, at 185.

228. American Convention, *supra* note 187, art. 4.

229. *Id.*, art. 5.

230. *Id.*, art. 7.

231. *Id.*, art. 8.

232. *See* Cassel, *supra* note 10, at 214.

233. American Convention, *supra* note 187.

234. Street Children, Inter-Am. Ct. H.R. (ser. C) No. 63, paras. 1-3, 253.

criminal charges in Guatemala.²³⁵ In 2001, the Inter-American Court issued a subsequent ruling, ordering Guatemala to investigate the case fully, sanction those responsible, and pay reparations to the victims' families.²³⁶ Similar rulings ordering Guatemala to investigate, prosecute and sanction perpetrators, and pay reparations to victims or their families, have been issued in *Bámaca-Velásquez*,²³⁷ *Plan de Sánchez*,²³⁸ *Mack Chang*,²³⁹ *Theissen*,²⁴⁰ and *Carpio-Nicolle*.²⁴¹

Thus, Guatemala is a party to two treaties that expressly impose a duty to prosecute: the Genocide Convention and the Torture Convention. The first applies to state acts of genocide occurring before the start of the Guatemalan civil war.²⁴² The latter is not applicable to acts of torture occurring before 1990, but clearly applies to state action thereafter.²⁴³ In addition, the Inter-American system, of which Guatemala is a part, imposes a duty to prosecute upon states for a wide range of violations extending beyond genocide and torture.²⁴⁴ Applying the interpretation of the American Declaration enunciated by the Inter-American Court, Guatemala's amnesty law appears to be in direct conflict with it. As noted above, it is a stricture of Guatemalan constitutional law that the most protective law prevails when there is a conflict between domestic law and international human rights treaty obligations.²⁴⁵ Thus, Guatemala's Law of National Reconciliation cannot operate to shield perpetrators of the rights enunciated in the American Declaration.

Among the additional guidelines that emerged from cases decided by the Inter-American Court and Commission between 1988 and 1992, were the principles that amnesties may not bar investigations aimed at discovering the truth behind violations, nor may they foreclose victims' or survivors' rights to compensation.²⁴⁶ The Inter-American Commission's Rules of Procedure allow petitioners to argue that domestic remedies are unobtainable, or that justice is being actively obstructed by the State.²⁴⁷ In effect, the Inter-American system has come to recognize a victim's individual right to justice.²⁴⁸ In its 1994 country report on El Salvador, the Commission also established the principle that, under the American Convention on Human Rights, amnesties may not apply to perjury or other obstructions of justice by officers of the court or litigants, and further suggested that amnesties are

235. Benítez, *supra* note 136.

236. *Street Children*, Inter-Am. Ct. H.R. (ser. C) No. 77, paras. 99-101.

237. *Bámaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 70, para. 230.8.

238. *Plan de Sánchez*, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 90.

239. *Mack Chang*, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 275.

240. *Molina-Theissen*, Inter-Am. Ct. H.R. (ser. C) No. 106, para. 82.

241. *Carpio-Nicolle*, Inter-Am. Ct. H.R. (ser. C) No. 117, para. 129.

242. *See* Genocide Convention, *supra* note 139.

243. *See* Torture Convention, *supra* note 139.

244. *See* Inter-American Court jurisprudence, *supra* note 135.

245. *See supra* notes 148-49 and accompanying text.

246. *See Cassel*, *supra* note 10, at 219.

247. R. PROC. INTER-AM. C.H.R., tit. II, ch. II, arts. 30-32, 34.

248. *Seibert-Fohr*, *supra* note 70, at 186.

conditioned upon acknowledgement of responsibility by the state.²⁴⁹ These principles were in place when the Law of National Reconciliation was adopted in 1996. As noted above, they have subsequently been applied by the Inter-American Court in several cases against Guatemala, resulting in orders calling for the State to investigate incidents and pay compensation to the families of victims.²⁵⁰

The above-outlined principles call the legitimacy of Guatemala's amnesty law into question. Although the law expressly excluded cases in which amnesty is prohibited by domestic law or Guatemala's obligations under international treaties, neither the agreement nor the law made note of customary international law as a limiting framework for amnesties.²⁵¹ Absent extensive application and practice at the international level, the conclusion that customary international law proscribes a duty to prosecute that would deny legitimacy to amnesties like Guatemala's is tentative. Professor Douglass Cassel argues, however, that had the UN incorporated Inter-American jurisprudence into explicit guidelines regarding amnesties, it would have been difficult for the UN mediator or the UN Mission in Guatemala to condone the amnesty that emerged from the peace process.²⁵² Moreover, subsequent Inter-American jurisprudence has reaffirmed a duty to prosecute violations of the American Convention in specific rulings against Guatemala.²⁵³ Thus, the Law of National Reconciliation is clearly inapplicable to cases of genocide, torture, and the extensive rights protected by the American Convention. In addition, as long as Guatemala continues to remain part of the Inter-American system, the amnesty law may also be illegitimate in broader terms as a result of jurisprudence suggesting that obstacles to effective justice for individuals cannot be supported by law.²⁵⁴

V. GUATEMALA TODAY: THE "CORPORATE MAFIA" STATE

As discussed, the Peace Accords, the CEH, the National Law of Reconciliation, and ineffective judicial reforms have all played a role in preventing the consolidation of the rule of law in post-conflict Guatemala, and thus fostering a culture of impunity that permeates all levels of society. The extent to which this is

249. See Cassel, *supra* note 10, at 214, 219.

250. See foregoing discussion of duty to prosecute, *supra* notes 236-41 and accompanying text. In a recent case, the Court went so far as to order Guatemala to adopt concrete measures aimed at preventing the repetition of events in the case. Carpio-Nicolle, Inter-Am. Ct. H.R. (ser. C) No. 117, para. 135.

251. See Cassel, *supra* note 10, at 223.

252. *Id.* at 223-24.

253. See Inter-American Court jurisprudence, *supra* note 135.

254. See Cassel, *supra* note 10, at 223-24. See also Inter-American Court jurisprudence, *supra* note 135.

true is best illustrated by exploring the degree of human rights violations and injustices occurring in recent years, and the reasons behind their continuation.

A. Human Rights Violations on the Rise

In March of 2007, the United States Department of State issued its annual Country Report on Human Rights Practices for Guatemala. Among the prevalent human rights and societal problems present during 2006, the report noted:

. . . the government's failure to investigate and punish unlawful killings committed by members of the security forces; widespread societal violence, including numerous killings; corruption and substantial inadequacies in the police and judicial sectors; police involvement in kidnappings; impunity for criminal activity; harsh and dangerous prison conditions; arbitrary arrest and detention; failure of the judicial system to ensure full and timely investigation, or fair trials; failure to protect judicial sector officials, witnesses, and civil society organizations from intimidation; discrimination and violence against women; discrimination and violence against gay, transvestite, and transgender persons, trafficking in persons; ethnic discrimination; and ineffective enforcement of labor laws, including child labor provisions.²⁵⁵

This excerpt reveals the extent to which Guatemala's legacy of violence and impunity pervades the workings of the entire country today. In an address to the United Nations in September 2006, Guatemalan President Oscar Berger assured the General Assembly that Guatemala had made significant progress in building the "pluralistic and participatory society envisioned by the 1996 Peace Accords."²⁵⁶ This assurance is called into question, however, by the drastic deterioration in the human rights situation in recent years.²⁵⁷ In particular, the role of clandestine security forces and the extent to which the police and judiciary continue to play a role in the practice and covering up of violations necessitates further elaboration.

B. The Corporate Mafia State

255. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA 2006 (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78893.htm>.

256. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 1.

257. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 255.

Illegal and clandestine security groups are a particularized aspect of the current landscape of crime and violence in Guatemala. In this Note, the term “security groups” refers to organized crime groups with ties to public institutions, state officials, and the police.²⁵⁸ One of the goals of the Peace Accords was to dismantle such groups,²⁵⁹ yet their continued and extensive operation has led to the conclusion that a parallel state has developed in Guatemala.²⁶⁰ This “Corporate Mafia State” consists of an elaborately networked alliance between “traditional sectors of the oligarchy, some ‘new entrepreneurs,’ elements of the police and military, and common criminals.”²⁶¹ Collusion between these members is aimed at protecting monopolies, as well as controlling lucrative underground and illegal industries, such as “drugs and arms trafficking, money laundering, car theft rings, the adoption racket, kidnapping for ransom, illegal logging, and other proscribed use of state protected lands.”²⁶² In essence, clandestine forces and illegal networks are the new medium through which the former landed oligarchy and powerful segments of society in Guatemala continue to dominate society and exercise the control and domination exerted during years of civil war.²⁶³ Liberalized markets and the big business of modern multinational arrangements create enormous profit potential, and human rights inquiries have revealed “insidious linkages . . . between multinational corporations and powerful Guatemalan economic interests, traditional politicians, and the security services.”²⁶⁴ Hence the concept of the ‘corporate mafia state.’

In a 2003 report published by the Washington Office on Latin America, authors Susan C. Peacock and Adriana Beltrán distinguish between the “hidden powers” that embed themselves in Guatemalan government and social structures, and the “clandestine groups” that do their bidding.²⁶⁵ The term “hidden powers” is used to describe “an informal amorphous network of powerful individuals in Guatemala who use their positions and contacts in the public and private sectors both to enrich themselves from illegal activities and to protect themselves from

258. See Human Rights First, *supra* note 35; Srabani Roy, *Rights-Guatemala: U.N. to Probe Violent Underworld*, INTER PRESS SERVICE NEWS AGENCY, <http://www.ipsnews.net/print.asp?idnews=35865> (last visited Sept. 9, 2008).

259. See Human Rights First, *supra* note 35.

260. Roy, *supra* note 258.

261. Amnesty Int’l, *supra* note 32, at 51.

262. *Id.*

263. *Id.*

264. *Id.*

265. SUSAN C. PEACOCK & ADRIANA BELTRÁN, WASH. OFF. ON LATIN AMERICA, HIDDEN POWERS IN POST-CONFLICT GUATEMALA: ILLEGAL ARMED GROUPS AND THE FORCES BEHIND THEM 5-7 (2003), available at <http://www.wola.org/media/Guatemala/HiddenPowersFull.pdf>.

prosecution for the crimes they commit.”²⁶⁶ This network is fluid and can encompass competition among individual participants, but it is “their overlapping webs of influence in government and society” that convey power and influence within the state structure.²⁶⁷ “Clandestine groups,” on the other hand, are identified as “illegal armed groups that operate clandestinely and do the bidding of the hidden powers.”²⁶⁸ Leaders and participants in these groups are believed to include former military officials who were active during the civil war.²⁶⁹ The WOLA report promotes accountability for the crimes committed by the hidden powers and clandestine groups by providing numerous examples of corruption and violence linked to government officials and former military officers, including the names of those involved where possible.

In just one of many examples, in 2001 the Guatemalan government deposited approximately \$157 million into two banks owned by Francisco Alvarado MacDonald, a close friend and financial supporter of President Portillo.²⁷⁰ After the banks went bankrupt, a judge blocked government intervention and MacDonald actually filed suit seeking compensation for losses resulting from government efforts to intervene in the banks’ matters.²⁷¹ In 2002, a member of the Monetary Board who had supported government intervention was kidnapped near his home.²⁷² Several days later, army officers dressed as civilians and the National Police were involved in a shoot-out in Guatemala City, allegedly resulting from an operation in which the army officers were transporting ransom money for the kidnapped Board member.²⁷³ After newspaper reports linked MacDonald to additional financial irregularities, the primary journalist responsible was kidnapped.²⁷⁴ At the time of the report, MacDonald had managed to avoid prosecution of the 43 charges brought against him by prevailing on numerous appeals and motions.²⁷⁵ Examples of these sorts of suspicious connections and evasions of justice involving public and private individuals pervade the WOLA report.

Significantly, the report notes that abuses committed by these groups are “clearly targeted” at public officials and other individuals involved in “anti-impunity initiatives.”²⁷⁶ This includes “those who seek justice for the past . . . and those who denounce present-day corruption by state agents,” as well as individuals

266. *Id.* at 5.

267. *Id.*

268. *Id.* at 7.

269. *Id.*

270. *Id.* at 64.

271. *Id.* at 64.

272. *Id.*

273. *Id.* at 65.

274. *Id.*

275. *Id.*

276. *Id.* at 3.

who fight for economic, social, and indigenous rights.²⁷⁷ Thus, both past and present events link the perpetrators and victims of crime in Guatemala through systemic networks of corruption and impunity; for many, Guatemala has come to be known as a ‘corporate mafia state’ run by “hidden powers.”

C. Obstacles to Justice

Guatemala is listed among the eleven most corrupt countries in Latin America, and there is a “generalized perception of uncontrollable corruption” among its citizenry.²⁷⁸ The extent to which corruption impedes justice is best exemplified by the events surrounding the February 2007 killing of three Salvadoran congressmen.²⁷⁹ En route to a meeting of the Central American Parliament, the congressmen were ambushed and executed by four Guatemalan police officers.²⁸⁰ The officers, who confessed soon thereafter, claimed they thought the men were drug dealers, and the chief of the Salvadoran police force has stated that the officers may have been hired to do the killing and tricked into believing as much.²⁸¹ The officers were sent to a maximum security prison in Guatemala where, four days later, they were killed around the same time a riot broke out.²⁸² Exactly what happened inside the prison is unclear. The police and interior minister claim that the policemen were killed by rioting gang members.²⁸³ According to the inmates, however, “a group of heavily armed men in military garb charged through seven locked doors without interference from the guards before executing the four police officers.”²⁸⁴ The inmates further claimed that they rioted *after* the killings in order to get their side of the story out to reporters and human rights organizations because they were afraid of being used as scapegoats for the incident.²⁸⁵ Investigation of these events has exposed rampant corruption within the police force, and raised questions about ties between drug trafficking and high-level officials.²⁸⁶ Furthermore, human rights advocates are skeptical of promises to get to

277. *Id.*

278. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 1.

279. Natalie Huls, Art Steele, Mihir Mankad, Huwaida Arraf, Courtney Nicolaisen & Miya Saika Chen, *International Legal Updates: Police Corruption in Guatemala*, 14 HUM. RTS. BRIEF, Spring 2007, at 38, 38.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*; James C. McKinley Jr., *In Guatemala, Officers’ Killings Echo Dirty War*, INT’L HERALD TRIB., March 5, 2007, available at <http://www.iht.com/articles/2007/03/05/america/web-0305guatemala.php>.

286. McKinley, *supra* note 285.

the bottom of events such as this because “[t]he attorney general’s office does not have the resources, the independence, or the strength to investigate the National Police.”²⁸⁷

For the year 2006, the Office of Professional Responsibility within the Civilian National Police (“PNC”) reported 1,571 complaints against police officers, including 37 murders, 36 forced disappearances, 10 kidnappings, 260 thefts, 16 rapes, 398 corruption or bribery cases, 80 threats, and 51 cases of illegal detention.²⁸⁸ Authorities have acknowledged an increase in incidences of torture, including its use by police officers as an information-gathering technique.²⁸⁹ Moreover, Guatemala is situated on a major drug trafficking route, and accusations of drug trafficking have been directed at several former military officers.²⁹⁰ Although the United States has assisted in two special anti-narcotics efforts since 1993, both have languished as the commanders themselves have been linked to the drug trade.²⁹¹

Such incidents have led “human rights advocates and opposition politicians” in Guatemala to conclude that “criminal gangs have corrupted Guatemala’s national police force and that groups of officers are operating like drug syndicates, robbing and killing competing dealers.”²⁹² On the one hand, the existence of rogue officers and police squads is partially attributable to the legacy of Guatemala’s long, internal war. After all, many of today’s police and security forces were schooled in torture and assassination during the decades of internal conflict.²⁹³ On the other hand, evidence suggests that state involvement continues to play a direct role in perpetuating this legacy. In an anonymous statement to the International Herald Tribune in March 2007, a high-ranking UN official revealed his contention that the Interior Ministry and the National Police have “created death squads over the last three years, trying to combat the wave of violent crime” related to gang warfare.²⁹⁴ Thus, the violence that is plaguing Guatemala stems not only from gang-related crime, clandestine groups, and police corruption, but also from State-backed responses to it.

287. *Id.* at 5.

288. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 1.

289. *Id.*

290. McKinley, *supra* note 285.

291. *Id.*

292. *Id.*

293. *Id.* According to the national police chief, “strong labor laws” and weak “vetting procedures” have prevented him from “purg[ing]” such officers from the 19,000 member police force. *Id.*

294. *Id.* According to the official quoted, the officers in the squads generally “belong to evangelical churches” and view “the extrajudicial killing of gang members . . . as [holy] ‘social cleansing.’” Moreover, it often “gets out of [] hand[],” and the officers “beg[i]n to commit crimes for their own profit.” In his words, “[t]hey create a Frankenstein.” *Id.*

In addition to the obstacles presented by police involvement in criminal activity and corruption, the situation in Guatemala is further exacerbated by the justice system's inability to hold perpetrators accountable for their crimes. In many cases, prosecution is hindered at the early stages because police corruption or disinterest on the part of officers results in inadequate investigations during which valuable evidence is not handled properly, or collected at all, scenes are not preserved, witnesses are not interviewed, and warrants are not carried out.²⁹⁵ At subsequent stages, "[t]he pursuit of justice is further hindered by the lack of coordination among prosecutors, investigators, forensic doctors, and psychologists."²⁹⁶ Cooperation and coordination of responsibility between the public prosecutor and the police is particularly lacking, leading to frequent omissions or duplications of investigative work.²⁹⁷ Corruption, insufficient personnel, and insufficient funding also hamper the ability of the judiciary to carry out fair or timely trials.²⁹⁸ Finally, frequent manipulation of the judiciary and the judicial system through the intimidation of judges, prosecutors, and witnesses represents a particularly egregious obstacle to fair trials in Guatemala.²⁹⁹ As a cumulative result of these circumstances, the conviction rate in Guatemala is appalling, with approximately ninety-eight percent of crimes never reaching a verdict.³⁰⁰

Crime, intimidation, and judicial interference are not new to Guatemala, but organized criminal activity of the sort outlined above, and the corruption associated with it, have become more prevalent in post-conflict Guatemala. Amnesty International reports that:

Those involved use their connections – political and with the military and police – to reap profits and intimidate or even eliminate those who get in their way, know too much, offer competition, or try to investigate their activities. The victims are not targeted for “classic” human rights reasons, such as reasons of conscience or opposition to the government. They are victimized because they threaten the financial interests of Guatemala's powerful economic elite and those in the security forces who protect them or share the spoils.³⁰¹

295. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 2-3.

296. *Id.* at 3.

297. *Id.*

298. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 255.

299. *Id.* See *supra* notes 33-41 and accompanying text, for specific examples of threats, disappearances, and killings which have impacted criminal trials.

300. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 3.

301. Amnesty Int'l, *supra* note 32, at 51.

An unfortunate consequence of the failure on the part of the police and judiciary to hold perpetrators accountable for their actions is an increase in vigilante justice.³⁰² In addition to police officers and clandestine security groups, private citizens have also begun taking law enforcement into their own hands.³⁰³ The targets of this vigilantism are often “social undesirables” such as gang members, petty thieves, and prostitutes.³⁰⁴ Yet “just as often, [they] appear to be victims of mistaken identity, false accusations[,] or petty personal feuds.”³⁰⁵ In 2006 alone, vigilante justice resulted in fourteen public lynchings.³⁰⁶ Thus, the legacy of civil war in Guatemala appears to have left intact systems of corruption and impunity that both sustain old and give rise to new forms of corruption, violence, and extrajudicial activity, with devastating consequences for society at large.

VI. CICIG

On August 1, 2007, the Guatemala Congress voted to approve the creation of the International Commission Against Impunity in Guatemala (“CICIG”).³⁰⁷ As an independent body, mandated to investigate and prosecute clandestine security groups, the CICIG represents a promising and innovative mechanism for Guatemala as it attempts to combat organized crime, corruption, and impunity.³⁰⁸ The road to ratification of the agreement forming the CICIG was not smooth, however, and the controversy surrounding its creation, along with the resulting limitations built into its mandate, indicate that it may still face an uphill battle in its efforts to effect real change in the workings of the Guatemalan state.³⁰⁹

A. Background

The CICIG is the second attempt in recent years to form an independent commission with the power to investigate and dismantle illegal security groups. In 2003, Guatemala entered into an agreement with the United Nations to form the Commission for the Investigation of Illegal Armed Groups and Clandestine

302. GUATEMALA HUMAN RIGHTS COMMISSION/USA, *supra* note 137, at 3.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. CONGRESO DE LA REPUBLICA DE GUATEMALA, QUINTA LEGISLATURA, 2004-2008, BOLETÍN INFORMATIVO (Aug. 15, 2007), http://www.congreso.gob.gt/gt/ver_noticia.asp?id=4115. The acronym corresponds to the Spanish name: Comisión Internacional Contra la Impunidad en Guatemala.

308. *See generally* WOLA, *supra* note 33.

309. *See infra* Parts V.A, V.B., and V.C; *supra*, Conclusion.

Organizations (“CICIACS”).³¹⁰ Subject to broad external control, the CICIACS was so expansive that in August 2004 Guatemala’s Constitutional Court found several aspects of the agreement unconstitutional, thereby foreclosing the initiative for nearly two years.³¹¹ Eventually, in December 2006, a new agreement was reached, the CICIG, which was declared constitutional on May 8, 2007.³¹²

Opposition to the CICIG remained virulent, however, and consideration of the agreement by the Foreign Relations Commission of the Guatemalan Congress was delayed considerably by numerous stall tactics on behalf of representatives of the Guatemalan Republican Front (“FRG”).³¹³ In July 2007, the FRG, along with the National Union of Hope (“UNE”), the National Party for Advancement (“PAN”), and several smaller political parties, convinced the Foreign Relations Commission to block ratification of the agreement.³¹⁴ Defending its action on the grounds that the CICIG is unconstitutional (despite the ruling of the Constitutional Court), the FRG proposed that a national commission comprised of the Public Defender’s Office, the Supreme Court, and the Public Prosecutor’s Office be created instead.³¹⁵ Ultimately, however, a member of the UNE switched his vote a week later,³¹⁶ and the agreement to form the CICIG was ratified by 110 legislators on August 1, 2007.³¹⁷

Although ratification insulated the CICIG from formal political opposition, the fact that such resistance came from within the ranks of multiple influential political parties presents an ongoing challenge to the success of the commission in two important ways. First, because it was publicized widely that the CICIG is not retroactive,³¹⁸ the behavior of its opponents in the Constitutional Congress strongly suggests a high level of fear surrounding investigation of current and future illegal activity.³¹⁹ Beyond providing a sad commentary on the extent to which organized

310. Agreement Between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala, U.N.-Guat., Jan. 7, 2004, <http://www.un.org/News/dh/guatemala/ciciacs-eng.pdf>. CICIACS stands for Comisión de Investigación de Cuerpos Ilegales y Aparatos Clandestinos y de Seguridad.

311. Interview with Marty Jordon, Co-Director, Guatemala Human Rights Commission/USA, in Wash., D.C. (Oct. 5, 2007); WOLA, *supra* note 33.

312. CICIG Agreement, *supra* note 7; *Human Rights First, What’s at Stake?: Call for End to Impunity in Guatemala*, <http://action.humanrightsfirst.org/campaign/CICIG2/explanation> (last visited Sept. 8, 2008).

313. Interview with Marty Jordon, *supra* note 311.

314. *Controversy Surrounds CICIG*, GUAT. HUM. RTS. UPDATE (Guat. Hum. Rts. Comm’n/USA, Washington, D.C.) July 15-31, 2007, at 6.

315. *Id.*

316. *Id.* at 7.

317. *CICIG Approved*, GUAT. HUM. RTS. UPDATE (Guat. Hum. Rts. Comm’n/USA, Washington, D.C.) Aug. 1-15, 2007, at 5, 5-6.

318. This aspect will be discussed further below.

319. Interview with Marty Jordon, *supra* note 311.

crime has pervaded the Guatemalan Congress, current opposition also indicates that the CICIG will continue to face challenges from influential officials with a stake in thwarting its success.³²⁰ In a second and related way, last summer's congressional resistance hurt the CICIG's prospects by contributing to overall pessimism with regard to the commission's potential for success.³²¹ In particular, uncertainty surrounding presidential elections at the time led many to fear that if the CICIG was not formally constituted prior to the January 2008 change of administration, it would risk being annulled by further challenges to the ratification decision.³²² Given that its initial mandate of two years began running when the agreement was signed by President Berger after its August ratification, skepticism and concerns about its timely organization were not unfounded.³²³

Worries that the CICIG would never get off the ground have proved unwarranted, however. Moving quickly, UN Secretary-General Ban Ki-Moon appointed Spanish Judge Carlos Castresana Fernández to head the commission on September 17, 2007, just thirteen days after the ratified agreement between the UN and Guatemala took effect.³²⁴ Then, after a run-off election in November, Álvaro Colom, a vocal supporter of the CICIG during the congressional controversy surrounding its ratification,³²⁵ was elected to the presidency.³²⁶ Finally, on January 11, 2008, the CICIG was officially inaugurated in Guatemala City.³²⁷

B. Structure and Mandate

The agreement establishing the CICIG identifies its fundamental objectives as:

320. *See id.*

321. *Id.*

322. *Id.*

323. The CICIG's mandate may be renewed after two years upon request from the State of Guatemala. CICIG: International Commission Against Impunity in Guatemala: Fact Sheet, U.N. Dep't Pub. Info. & U.N. Dep't of Pol. Aff. 2 (Jan. 24, 2008), *available at* <http://www.nychiefs.org/cicig-factsheet.pdf>.

324. Press Release, Secretary-General, Secretary General Appoints Carlos Castresana Fernández of Spain to head International Commission Against Impunity in Guatemala, U.N. Doc. SG/A/1096 (Sept. 17, 2007).

325. *Controversy Surrounds CICIG*, *supra* note 314, at 6.

326. Manuel Roig-Franzia, *Colom Wins Presidency in Guatemalan Runoff*, WASH. POST FOREIGN SERVICE, Nov. 5, 2007, at A11, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/04/AR2007110401727.html>.

327. *Guatemala: Inicia trabajos Comisión contra la Impunidad*, SERVICIO DE NOTICIAS DE LAS NACIONES UNIDAS, Jan. 11, 2008, <http://www.un.org/spanish/News/printnews.asp?newsID=11345>.

- (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.³²⁸

To these ends, the functions of the commission delineated in the agreement are to investigate, dismantle, and prosecute illegal security groups and clandestine organizations, and to make public policy recommendations aimed at eliminating such groups and preventing their re-emergence through legal and institutional reforms.³²⁹

Addressing the legitimate concern that any such body will be subject to the corruption, influence, and intimidation that has jeopardized the rule of law in Guatemala thus far, Article 2.2 of the CICIG Agreement states that it “shall enjoy complete functional independence in discharging its mandate.”³³⁰ As such, the commission has the power to enter into contracts, acquire and dispose of property, initiate legal proceedings, enter into agreement with other States, international organizations, and “take such other action as may be authorized under Guatemalan law to carry out its activities and fulfil its mandate.”³³¹ Commissioner Castresana is required to submit periodic reports to the UN Secretary-General, and is empowered to recruit international and national personnel with human rights expertise to form a specialized staff.³³² The commission’s secretariat, moreover, must be headed by an international official.³³³ These safeguards are clearly intended to provide the CICIG with sufficient institutional independence and international accountability to guard against corruption or insidious attempts to frustrate its operation.

In order to discharge its mandate, the powers accorded to the CICIG are substantial. While some of these powers raise questions about their scope and

328. CICIG Agreement, *supra* note 7, art. 1.1(a)-(b).

329. *Id.* art. 2.1(a)-(c).

330. *Id.* art. 2.2.

331. *Id.* art. 4.

332. *Id.* art. 5.1(a)-(b).

333. *Id.* art.5.1(c). At the time of writing, the identity of this individual was not yet announced.

practical operation,³³⁴ those questions will be addressed further below. First, it is significant in and of itself to make note of the range of authority given the commission to carry out its ambitious objectives. Laid out in Article 3, these powers include information gathering; the ability to request reports and cooperation from State officials, administrative authorities, and entities; the authority to provide technical advice to State institutions concerning administrative proceedings against state officials involved in clandestine operations; and the power to guarantee confidentiality to those who assist the commission.³³⁵ It is also specifically mandated to “report to the relevant administrative authorities the names of civil servants who in the exercise of their duties have allegedly committed administrative offences,” especially those alleged to have interfered with the functioning of the commission, and to act as an interested third party in any resulting administrative proceedings.³³⁶ Perhaps most significantly, article 3.1(b) empowers the commission to file criminal complaints with the relevant authorities and to join relevant criminal proceedings as a private prosecutor.³³⁷ In conjunction with all of these powers, the CICIG is also authorized to enter directly into agreements with “the Office of the Public Prosecutor, the Supreme Court, the Office of the Human Rights Ombudsman, the National Civilian Police and any other State institutions.”³³⁸ Article 6 contains provisions requiring state institutions such as these to cooperate with the CICIG, and to establish specialized units to carry out investigations and pursue criminal prosecutions.³³⁹ Thus, although the CICIG Agreement envisions a commission that operates in conjunction with state entities and already existing police and legal institutions, it also clearly provides for unique and innovative powers designed to ensure that accountability and justice prevail over corruption and impunity.

C. Scope, Open Questions, and Challenges to Success

In its focus on illegal security groups and clandestine organizations,³⁴⁰ the scope of the CICIG’s mandate does not appear to include past atrocities such as civil war era human rights violations. Moreover, in the lead up to its ratification, it

334. *See infra* notes 307-32 and accompanying text.

335. CICIG Agreement, *supra* note 7, art. 3.1(a), (c), (g), (h).

336. *Id.* art. 3.1(d)-(e).

337. *Id.* art. 3.1(b).

338. *Id.* art. 3.1(f).

339. *Id.* art. 6.

340. Article 1.1(d) defines illegal security groups and clandestine security organizations as 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.” *Id.* art. 1.1(d).

was widely publicized that the CICIG is not meant to be directed at past crimes.³⁴¹ Given the horrific extent of past atrocities, it would be easy to become disillusioned or disappointed by the CICIG's inability to reach back and address some of these wrongs. Yet, upon closer analysis, the scope of the commission's mandate is both practical and wise.

Although imperfect, Guatemala's version of a truth commission brought a measure of closure to the abuses of previous decades. To reopen investigation of civil war era atrocities would tax resources, involve considerable problems of proof, and fundamentally orient the commission toward the past rather than the future. In focusing on the contemporary state of crime in Guatemala, the CICIG can best address the legacy of violence and impunity that the CEH and other reforms failed to eradicate. While this will not resolve questions of international responsibility stemming from civil war era abuses, it has the potential to forestall ongoing responsibility for failure to address current and continuing human rights violations. In so doing, Guatemala can garner renewed international goodwill, support, and respect. Moreover, the nature of organized crime in Guatemala is such that many of the key perpetrators of past abuses will not escape current efforts to promote justice due to their ongoing involvement in criminal activity. If the CICIG diligently investigates key cases brought to its attention and demonstrates a commitment to effective prosecution, regardless of the actors involved, it will promote positive change by initiating crucial processes of accountability and identifying necessary reforms for future success. As a result, given the totality of circumstances, the CICIG's focus on present and future conditions may in fact represent the ideal way of dealing with Guatemala's past.

With its focus on prosecution and substantive reform, the CICIG is clearly different in nature and purpose from other international mechanisms such as truth commissions. Given its focus, the commission's powers of investigation substantively differ from those granted to the CEH in numerous ways. Broadly defined and taken together, however, several of these powers raise significant questions about the way in which they will be exercised, and their concomitant effect on the CICIG's reputation and success. First, the CICIG is expressly mandated to collect information from any source, as well as to root out and report individual names in cases of corrupt and criminal civil servants, and to guarantee confidentiality to all "witnesses, victims, experts, or collaborators" who assist the commission in its work.³⁴² In addition, the commission's power to request reports, documents, and cooperation from state entities, which are in turn obligated to comply, does not expressly resolve questions regarding the scope of its power to compel cooperation.³⁴³ While the provisions as a whole appear to suggest a power of subpoena, they do not conclusively resolve whether or not a judicial order will in

341. Interview with Marty Jordon, *supra* note 311.

342. CICIG Agreement, *supra* note 7, art. 3.1(d), (g).

343. *See* discussion, *infra*.

fact be necessary in order to require individual or state action. This ambiguity could create tension between the CICIG and uncooperative state entities. As such, it is imperative that the CICIG act firmly and consistently in its insistence on cooperation from the State, and bring instances of uncooperative behavior or obstruction to the attention of the international community. While cooperation is essential, the CICIG cannot risk depriving its operation of effectiveness by being conciliatory and creating a precedent in which its requests for action go unanswered without consequence.

As a result of ambiguity surrounding the precise scope of powers such as these, debate in Congress prior to the agreement's ratification reflected concern that the breadth of the commission's mandate gives it the virtually unlimited ability to indiscriminately enter and search private property, and to solicit accusations without revealing its sources to the accused.³⁴⁴ The implication of these criticisms is that the CICIG would create a climate of fear within society. Conceivably, were the CICIG to wield its power in a careless and irresponsible way, an environment might be created in which individuals felt compelled to indiscriminately report others in an attempt to avoid personal scrutiny or allegations of obstruction. Yet, even if this possibility were advanced out of genuine concern, fears of this sort clearly stem from a social consciousness that includes memories of authoritarian purges, state terror, and the apprehension that these powers will be utilized by corrupt state officials. Wielded responsibly under international guidance and with the aim of reforming the Guatemalan state and judicial system, the powers given the CICIG do not pose this threat. Moreover, concerns of this nature may have been advanced as a political ploy on the part of politicians with a personal interest in thwarting the formation of the CICIG, and are not necessarily representative of a genuine fear that the CICIG will run rampant with its power and terrorize the people of Guatemala. The powers granted to the commission are clearly a step forward in promoting not only accountability but also comprehensive, systemic change, and it falls to the commission to resolve any ambiguities concerning the precise nature of its powers in a responsible and consistent manner. Clearly, the precedent established by the first set of interactions between the CICIG and state entities will be crucial to the Commission's ongoing ability to carry out its mandate.

Of course, only time will tell if the CICIG will responsibly and consistently resolve questions regarding the scope of its power. Likewise, several factors key to the commission's success will have to be evaluated over time given that the commission has only just barely gotten underway. Although international oversight and institutional independence are key components of the commission, a clear limitation placed upon it in its evolution from the CICIACS is that the CICIG is dependent upon the cooperation of state institutions, in particular the Public

344. See Congreso de la Republica de Guatemala, Quinta Legislatura, 2004-2008, Boletín Informativo (Aug. 15, 2007), http://www.congreso.gob.gt/gt/ver_noticia.asp?id=4115.

Prosecutor, for the actual prosecution and resolution of cases.³⁴⁵ At present, the CICIG has signed cooperation agreements with the Public Prosecutor and the Civilian National Police, but it is too early to tell if any conflicts have arisen or will arise between these entities.³⁴⁶ Article 6 of the CICIG Agreement requires the Government of Guatemala to provide the CICIG with all the assistance needed to carry out its mandate, including freedom of movement, access to information and state entities, and freedom to interview anyone it deems necessary.³⁴⁷ It also requires the Public Prosecutor to “appoint such special prosecutors and take all other relevant actions” as necessary, and commands the National Civilian Police to create special units to support the Public Prosecutor’s work.³⁴⁸

Thus, on the surface, the CICIG Agreement provides for extensive state cooperation, while the independent mandate of the commission seeks to ensure that its operation will not be foreclosed by corruption within state entities. Yet, given the precise nature of the problem that the CICIG is trying to confront – a widespread legacy of violence and impunity – skepticism about its ability to surmount the obstacles posed by endemic corruption and institutionalized crime is not without merit. Significantly, the CICIG Agreement itself provides for the United Nations withdrawal if the Guatemalan State “fails to provide full cooperation with CICIG in a manner that will interfere with its activities” or “fails to adopt legislative measures to disband clandestine security organizations and illegal security groups during the mandate of CICIG.”³⁴⁹ These provisions not only legitimize fears that the CICIG may be rendered ineffective by the State’s failure to fulfill its obligations, but also present the additional challenge that the commission will have its support network disbanded if a failure to make timely progress is perceived as being the result of indolence on the part of the State.

Not unrelated are the challenges posed by the CICIG’s reliance on international funding. A positive aspect of the overall structure of the CICIG is that it “is unlikely to require the hundreds of millions of dollars typically needed for similar mechanisms, such as international tribunals.”³⁵⁰ Instead, probably because it is designed to work in conjunction with already existing institutional structures, it operates on a budget of U.S. \$20 million.³⁵¹ Moreover, the CICIG has received

345. Interview with Marty Jordon, *supra* note 311.

346. E-mail from Marty Jordon, Co-Director, Guatemala Human Rights Commission/USA, to Megan Donovan, author (Feb. 12, 2008, 01:42:30 MST) (on file with author).

347. CICIG Agreement, *supra* note 7, art. 6.

348. *Id.*

349. *Id.* art. 11(a)-(b).

350. Roy, *supra* note 258.

351. See *CICIG Officially Inaugurated*, GUAT. HUM. RTS. UPDATE (Guat. Hum. Rts. Comm’n/USA, Washington, D.C.), Jan. 1-15, 2008, at 5, 5-6. As discussed above, this reliance on existing institutions may have a crippling effect on the Commission’s ability to proceed. On the other hand, the cooperation and inter-dependence fostered by the CICIG’s

financial commitments from various international donors, and at the moment it appears that international funding has begun to trickle in.³⁵² However, Article 11 of the CICIG Agreement also provides for the UN's withdrawal in the event that the commission is not funded adequately from the international community.³⁵³ While this dependence on international funding may help act as an additional mechanism for international accountability and scrutiny, it also presents the risk that funding will cease in the event that progress and reform are not readily apparent. Although criminal prosecutions and legislative reforms are clearly observable markers that the international community has a right to expect, the nature of the CICIG's goal – to eradicate impunity – may require more time than the attention span of the international community allows. As such, the commission could be crippled before or just as it begins to make true, sustainable progress.

It is important to note that some of the potentially problematic aspects of the CICIG mentioned above are the very characteristics that make the Commission innovative. Although the CICIG must depend in part upon the institutional goodwill of the police and Public Prosecutor, its investigatory power is independent of these bodies. Thus, the ability of corrupt influences to hamper investigations is stymied. Moreover, in working with the local court system and the police and Public Prosecutor to achieve convictions, the CICIG aims to strengthen and reform the criminal justice system in addition to its prosecutorial objectives.³⁵⁴ Given the tension between these goals and the ability of the body's structure to impede progress, the CICIG's impact will be maximized if it is able to focus on a select number of particularly emblematic cases, and see those cases through to successful prosecution. As the CICIG got underway in January 2008, Castresana indicated that the Commission would open two headquarters.³⁵⁵ The first is a public office which will receive and process corruption cases and information from Guatemalans.³⁵⁶ The second is a center of operations from which the CICIG will conduct its investigations.³⁵⁷ Notably, at the formal request of President Colom, on February 12, 2008, Castresana committed the CICIG to investigating the case of fourteen public bus drivers slain the prior week.³⁵⁸ Allegedly linked to organized crime, this is the first case that the administration has formally asked the Commission to

structure has the potential to effect truly systemic institutional reform, which is the second major goal of the Commission.

352. E-mail from Marty Jordon, *supra* note 346.

353. CICIG Agreement, *supra* note 7, art. 11.

354. U.N. Department of Political Affairs, *United Nations and Guatemala to Launch International Probe Against Impunity and Organized Crime*, Jan. 10, 2008, http://www.nisgua.org/themes_campaigns/index.asp?id=3047.

355. *CICIG Officially Inaugurated*, *supra* note 351, at 5.

356. *Id.*

357. *Id.*

358. Hugo Alvarado, *Cicig investigará muertes de pilotos*, PRENSA LIBRE, Feb. 12, 2008, available at <http://www.prensalibre.com/pl/2008/febrero/12/219761.html>.

investigate.³⁵⁹ How the CICIG and state entities proceed from here, and the ultimate trajectory of the case, will undoubtedly set the stage for future operations and, ultimately, the success of the Commission in achieving its goals. From the outset, it is imperative that the Commission set clear parameters within the scope of its mandate, and foster strong working relationships with state entities without sacrificing the goals of its mission.

VII. CONCLUSION

The newly operational International Commission against Impunity in Guatemala offers a unique and innovative model for the international community in dealing with issues of organized crime, entrenched corruption, and endemic impunity. As an independent international body with the power to investigate crime and corruption and spearhead both criminal prosecution and systemic judicial and legislative reform, the CICIG has enormous potential to address the dire state of crime and violence in Guatemala. At the same time, its success is fundamentally predicated upon the commitment and cooperation of elements of the National Police, the Public Prosecutor's Office, and state officials in general. Given Guatemala's recent history, skepticism over the level of State commitment and fears surrounding the power of corrupt elements to thwart the Commission's progress are not unfounded. Moreover, dependence upon international support and a short initial mandate present additional challenges to the operational capacity of the CICIG, and its ability to promote long-term, systemic change. In scaling back the composition and mandate of the CICIACS, however, the international community found a model that proved amenable to the majority of Guatemalan legislators and was able to command official State support. That the CICIG overcame early challenges to its formation and was able to begin operating in January 2008 indicates that there is momentum behind it. Hopefully, this momentum will see it through to a successful end.



359. *Id.*