Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA: A NON-TRADITIONAL TRANSITIONAL JUSTICE EFFORT

Tove Nyberg

Volume 28, Number 1, 2015

URI: https://id.erudit.org/iderudit/1067897ar
DOI: https://doi.org/10.7202/1067897ar

See table of contents

Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this article

Nyberg, T. (2015). INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA: A NON-TRADITIONAL TRANSITIONAL JUSTICE EFFORT. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *28*(1), 157–184. https://doi.org/10.7202/1067897ar

Article abstract

This paper examines the concept of transitional justice and makes the argument that transitional justice contexts would benefit from embracing a wider range of mechanisms. It uses the *International Commission Against Impunity in Guatemala* (CICIG) as an example of a non-traditional transitional justice measure and evaluates its mandate, set-up and achievements to show the advantages with a hybrid mechanism in the Guatemalan context.

INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA: A NON-TRADITIONAL TRANSITIONAL JUSTICE EFFORT

Tove Nyberg[*]

This paper examines the concept of transitional justice and makes the argument that transitional justice contexts would benefit from embracing a wider range of mechanisms. It uses the *International Commission Against Impunity in Guatemala* (CICIG) as an example of a non-traditional transitional justice measure and evaluates its mandate, set-up and achievements to show the advantages with a hybrid mechanism in the Guatemalan context.

Cet article analyse le concept de justice transitionnelle et propose l'argument que les contextes de justice transitionnelle pourraient bénéficier de l'adoption d'un éventail plus large de mécanismes. La Commission internationale contre l'impunité au Guatemala (CICIG) est utilisée en tant qu'exemple d'une mesure de justice transitionnelle non traditionnelle, et son mandat, sa mise en place et ses accomplissements sont évalués afin de démontrer les avantages d'un mécanisme hybride dans le contexte guatémaltèque.

Este artículo examina el concepto de justicia transicional y argumenta que los contextos de justicia transiocional se beneficiarían de abrazar una más amplia gama de mecanismos. Esto usa la Comisión Internacional Contra la Impunidad en Guatemala como un ejemplo de una medida de justicia transicional no tradicional y evalúa su mandato, estructuración y logros, para mostrar las ventajas con un mecanismo híbrido en el contexto guatemalteco.

[*] Ms. Tove Nyberg is a lawyer from Sweden (LLM degree, Stockholm University, 2010-2014) focusing on criminal justice and human rights. She has experience from NGO-work in Guatemala (Impunity Watch, 2012, 2013). She has also worked at a government agency in Sweden (Folke Bernadotte Academy, 2014) and at the United Nations Office on Drugs and Crime (2015). She is currently studying Socio-Legal and Criminological Research at University of Nottingham (MA-degree 2015-2016).

At the heart of the discussions of transitional justice are questions of what rebuilding objectives post-conflict societies should pursue and how they should pursue them. In 2004 the UN Secretary General issued a report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,[1] outlining a framework for strengthening UN support for transitional justice. A sophisticated definition is offered in the report: "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[2] Over the last two decades key aims dictating the debate are truth, justice, reconciliation and assurance of non-repetition. Numerous mechanisms have been implemented in transition countries, most notably truth commissions and war crimes tribunals.[3] Other traditional transitional justice measures are reparation programmes and institutional strengthening efforts, foremost including vetting of state officials particularly of security forces. The UN Secretary General's document further states that the mechanisms should be thought of as part of a whole rather than isolated pieces. Amongst scholars, today, there is a general consensus that transitional justice efforts must be understood holistically otherwise they appear feeble, hollow or as instances of expediency at best.[4]

The idea of this paper is to present arguments for why the concept of transitional justice not only need to be thought of as holistic but also broader than it commonly is, in the sense that it should include a wider range of different mechanisms. This point towards that transitional justice should not only be dealing with the past but also be thought of as a future-looking enterprise.

In recent years, transitional justice advocates have worked to define principles from best practices to guide the development of transitional justice approaches. The idea that transitional justice institutions must be responsive to local context, traditions and political dynamics to advance political reconciliation, have similarly received greater recognition. The 2004 report reaffirms this and adds that transitional justice policies are political questions, rather than merely technical.[5]

A broader understanding of the concept transitional justice entails different mechanisms, beyond the "traditional" ones, that are likely to benefit different post-conflict contexts. This paper uses the Guatemalan case and the *International Commission Against Impunity in Guatemala* (CICIG) to back up the argument.

The fact that increasing violence and high levels of impunity followed Guatemala's internal armed conflict (1960-1996), and weak hitherto transitional justice measures' lack of reform capacity, made Guatemala seek the UN's assistance.

---

1 Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UNSC, UN Doc S/2004/616, (2004) [Report Security Council].

2 *Ibid* at para 8.

3 Anne Bronwyn Leebaw, "The Irreconcilable Goals of Transitional Justice" (2008) 30:1 Hum Rts Q 95 at 95 [Leebaw].

4 Pablo De Greiff, "A Normative Conception of Transitional Justice" (2010) 50:3 Politorbis 1 at 17 [De Greiff "A Normative Conception"].

5 *Ibid* at para 19.

CICIG was therefore established as an effort to help state institutions combat impunity and strengthen the rule of law. A culture of impunity permeates Guatemalan institutions, and makes reconciling the past and building a peaceful future two sides of the same coin. Guatemala's deep-rooted problems with organised crime and corruption are not unique for post-conflict settings.

CICIG has demonstrated that deep-rooted problems, oftentimes linked to a previous conflict, can be combated. It should be considered a module worth studying and replicating for other post-conflict settings with similar problems.

It is unfortunately beyond the scope of this paper to investigate how CICIG would profit to collaborate with other transitional justice mechanisms in Guatemala, such as the former truth commission or the current MP prosecutions against former military human rights violations.

I. The concept of transitional justice

The concept of a transitional justice became international concern during the nineteens, a time of increasing international engagement in related fields concerning human rights such as international criminal law. The idea that the period after conflict faced special challenges and required special needs to become democratic received significant scholarly attention and whole institutions grew up in around it.

The author Teitel talks about the normalisation of law in a period of post-conflict in her paper on transitional justice in a new era.[6] The idea of "transition to democracy" revolves around the situation where a new regime needs to split with the past but not change so far or fast that state institutions themselves face risk of collapse.[7] Actors from the past may still hold a considerable amount of power, especially over the security sector that must somehow be dealt with.[8]

Scholars have suggested that post-conflict settings "provide windows of opportunity for institutional reforms."[9] However while the very premise of state-building literature is that international actors and domestic counterparts can recuperate or reform governance after conflict,[10] some argue that the expectations are too high and suggest that there is, in fact, generally very little change in governance after conflicts. Instead it is suggested that the main predictor of how a country preforms in the post-conflict period depends on the state behaviour prior to and during the conflict.[11]

---

6 Ruti G Teitel, "Transitional Justice in a New Era" (2002) 26:4 Fordham Int'l LJ 893 at 893 [Teitel].

7 Naomi Roht-Arriaza, *The Pinochet Effect. Transnational Justice in the Age of Human Rights* (Philadelphia: Pennsylvania Press, 2005) at 220 [Roht-Arriaza].

8 Report Security Council, s*upra* note 1 at para 22.

9 Charles Call, *Constructing Justice and Security after War* (Washington DC: U.S. Institute of Peace, 2007).

10 Stephan Haggard and Lydia Tiede, "The Rule of Law in Post-Conflict Settings: The Empirical Record" (2013) 58:2 International Studies Quarterly 405 at 405.

11 *Ibid*.

Transitional justice institutions seem to function in ways that are more complex than either human rights advocates or their critics typically acknowledge.[12] There is thus a need to think differently about the concept.

A. The normative conception

What, then, is normative conception of transitional justice; what are the goals that transitional justice efforts share? Palpable goals such as promotion of justice and dealing with the past to move forward are, perhaps, too abstract to be of help. Instead, reconciling a society to build a democracy may be a clearer goal to make sense of the practices associated with transitional justice to clarifying the relationship with other concepts and practices.[13] Without defining justice, this paper makes the claim that justice is part of a bigger picture of the puzzle together with democracy and security. It will also assume that they are both means to ends and ends themselves, and constitute basic prerequisites for each other; democracy is not possible without security, and security without the rule of law is a Hobbesian trap.[14]

Transitional justice can be thought of as a bridge between a violent past and a rule of law respecting democratic peaceful future. Teitel has written that when the aim of transitional justice is to "advance legitimacy in periods of political flux, pragmatic principles guide the policy of justice and adherence to the rule of law."[15] Moreover, it is necessary to address the large-scale abuses that have taken place to establish democracy and rule of law in a conflict-torn society. Democracy and respect for the principle of rule of law do not appear out of a certain point in history when combatants agree they will no longer commit violations and participate in a peace process. Instead they emerge from reconciliation and civic trust.[16] Democratic societies with a strong principle of rule of law normally have a history absent of massive and systematic violations, and where citizens have had a long time to engage and enjoy certain norms, gain civic trust and grow part of a culture based on rule of law.[17]

Concerning expectations of peace building and transitional justice measures one has to bear in mind that the massive and systematic violations that have occurred during conflicts are irreparable.[18] In a society where there is a need for transitional justice measures, criminality is the rule; in normal times it is the exception. In fact, it is fair to say that there has been no case of a completely successful transition process after a conflict. In light of the massive human rights violations that has taken place

---

12 Leebaw, *supra* note 3 at 117.

13 Pablo De Greiff, "Theorizing Transitionnal Justice" (2012) 51 Transitional Justice 31 [De Greiffe "Transitionnal Justice"].

14 Gabriel Marcella, *Democratic Governance and the Rule of Law: Lessons from Colombia* (PKSOI Papers: Strategic Studies Institute, 2009) at 2.

15 Teitel, *supra* note 6 at 97.

16 De Greiff "A Normative Conception", *supra* note 4 at 18.

17 *Ibid* at 19.

18 Leebaw, *supra* note 3 at 95.

during conflicts, no country in transition has prosecuted or appropriately punished each end every perpetrator, nor awarded reparations providing every victim with benefits proportionate to the harm they suffered.[19] De Greiff has described transitional justice's natural place as being "a very imperfect world". He explains it as one characterised by massive and systematic violations of basic norms and by the fact that there are "huge and predictable costs" implied with the efforts to make the system change itself and enforce compliance with those norms.[20] However, instead of viewing transitional justice as "extraordinary" in the sense of a distinct type of justice on the one hand and that it is merely a compromise on the other, De Greiff argues that transitional justice represents the requirements of a general understanding of justice when applied appropriately to "the peculiar circumstances of a very imperfect world, that is, a world characterised by massive rule breakdown and great risks to the institutions that attempt to overcome such breakdowns."[21]

De Greiff furthermore writes that, in times where basic norms have been massively and systematically violated, transitional justice measures exist to show currency of these basic norms. A comprehensive and holistic transitional justice effort is needed to show that the norms hold enough legitimacy. Only coordinated interventions are likely to turn the attitudes that the norms are indeed affecting people's behaviour, particularly that of power-holders, and gradually restore trust in the state.[22]

B. A holistic approach

"Hybridity" as an institutional response to post-conflict problems has become more common in recent years. In hybrid structures "two or more legal systems coexist in the same social field."[23] Most commonly, hybridity involves a type of international criminal tribunal and a truth commission. The aim of hybridity is to address problems more holistically.[24]

A holistic approach provides that numerous political, social, legal and security institutions, functioning simultaneously in a system can maximise the capabilities of each other and can contribute to reconstructing a society rather than just a single institution. Holistic approaches serve the different needs of individuals and groups during the conflict, as well as in the post-conflict period.[25]

Thus, if the normative concept of transitional justice is what is described above, a holistic approach is indeed necessary and the mechanisms should be implemented together rather than on their own. Most of these mechanisms do nothing

---

19 De Greiff "A Normative Conception", *supra* note 4 at 19.
20 *Ibid*.
21 De Greiffe "Transitionnal Justice", *supra* note 13 at 34.
22 De Greiff "A Normative Conception", *supra* note 4 at 18.
23 Phil Clark, "Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda" (2007) 39:4 Geo Wash Int'l L Rev 765 at 765 [Clark].
24 *Ibid*.
25 *Ibid*.

directly for the people and those that do, such as reparations, usually fall far short of proportionality.[26] A difficult challenge lies in avoiding that the measures seem arbitrary or, as De Greiff puts it, merely forms of "scapegoating", "mere word" or "blood money". He means that the relationship between the various measures form a thick web.[27] For example, reparations seem to call for truth-telling since otherwise it is easy to interpret the reparations as "pay off" in return for silence. Truth-telling needs reparations since it may otherwise seem as a cheap inconsequential measure. They are more likely to be interpreted as commitment to justice if they are implemented together.[28] Events of the last two decades suggest that criminal prosecutions often have been seen as the centrepiece of social repair by many human rights advocates. While national and international trials are very important, assessing accountability for mass atrocities to individuals has several limitations.[29] Trials, even though the majority of victims are not likely to see their abuser prosecuted and convicted, are more likely to be interpreted as part of the accountability efforts that the new government is implementing if collective, with for example measures of vetting of state officials.

In line with this argument, "traditional" transitional justice should also be coordinated with other peace-building measures such as Security Sector Reform (SSR) programmes and Disarmament, Demobilisation and Reintegration (DDR) programmes. Security related aims are likely to facilitate from establishing links between these programmes and justice measures. And although justice oriented measures sometimes seem to compete with peace and security oriented measures, their conceptual goals are the same. De Greiff has argued that proper conceptualisation of these shared goals helps to explain why it makes sense to think about establishing links between, for instance, reparation programs and DDR programmes. It might help DDR to fend off the objection that it rewards "belligerents" for example.[30] It is beyond the scope of this paper to further develop how they should cooperate and benefit each other.

Moreover, law has been described as being between the past and the future.[31] Transitions imply paradigm shifts in the concept of justice; thus, law's function is inherently paradoxical. Many post-conflict legal institutions are trapped uncomfortably between backward- and forward- looking pursuits.[32] Transitional justice cannot focus on only the past. To function as a bridge between a violent past and a democratic peaceful future, transitional justice needs to do both; become also a future looking enterprise, as the example of CICIG will show.

---

26 De Greiffe "Transitionnal Justice", *supra* note 13 at 36.

27 *Ibid* at 37.

28 *Ibid.*

29 Laurel Fletcher & Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24:3 Hum Rts Q 573 at 578-579.

30 Ana Cutter Patel et al, *Disarming the Past: Transitional Justice and Ex-Combatants* (New York: Social Science Research Council, 2009) at 142.

31 Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2009) at 4.

32 Clark, *supra* note 23 at 772.

C. The transition period

The prevailing idea amongst transitional justice scholars has been that new governments should implement efforts to deal with the past as fast as possible. Although transition periods normally are counted as the immediate years after the end of a conflict or fall of a regime[33] some efforts, however, may be required to delay several years before being implemented. Attempts to completely or partially sweep the past under a rug of silence are, however, not just contrary to international law but are not going to work.[34]

During the 1980s and 1990s, many countries in Latin America found themselves in a transitional setting. Truth commissions and similar efforts served their part. In most cases, however, the judiciary proved too weak and not independent enough to, for example, prosecutes perpetrators. Trials in Latin America happened but well after the end of the repressions or conflicts. It took a combination of judicial reform, constitutional and judicial review and examples from other jurisdictions to push the courts to act.[35]

The judiciary's will and capacity to try perpetrators shows currency for fundamental norms and demonstrates that the new government recognises and respects the principle of rule of law. This rationale together with the insistence of the international community and victim's group's demand for justice provides a strong incentive to prosecute even after the immediate transition period. Thus, even if a long time can be expected before those responsible for human rights abuses are tried, the trials nonetheless serve an essential role. First, it seems that complete lack of prosecutions encumbers efforts at reconciliation and social reconstruction. Roht-Arriaza has described this kind of impunity as a "festering wound in the body politic".[36] Furthermore, human rights law and international criminal law has been developed as a result of multiple events, agendas and interests.[37] Human rights enforcement efforts have, similarly, established themselves through overlapping forums and there has been many ways to obtain redress.[38]

Thus the transition period can arguably be counted as several years after the end of a conflict. It is not necessary to limit it to a certain number of years.

D. The local context

The transitional justice discussion has centred on different mechanisms to bring justice to a country. The UN General Assembly report "Strengthening and coordinating United Nations rule of law activities" describes the breadth and

---

33 Roht-Arriaza, *supra* note 7 at 220.
34 *Ibid.*
35 *Ibid* at 222.
36 *Ibid* at 223.
37 *Ibid* at 198.
38 *Ibid* at 207.

complexity of UN rule of law engagement.[39] There has been a wide range of efforts, from purely international tribunals and peacekeeping missions, to local assistance programs and truth commissions. Nevertheless, integration of rule of law activities into country level operations is relatively recent. Since the 1990s, there has been a prominent shift towards more engagement at a country level. UN actors increasingly provide rule of law assistance in countries at the request of governments. A vast array of activities and missions now exists to promote the rule of law at country level.[40]

The 2004 UN Secretary General report recognises that "the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity. Both national and international experts have a vital role to play, to be sure."[41] It emphasises the importance to analyse the national context, such as needs and capacities, and to make sure local expertise is mobilised. Increasingly, the UN is looking to activate, consult and involve national stakeholders, including justice sector officials, civil society, professional associations, traditional leaders and key groups, such as women, minorities, displaced persons and refugees. In this way, "national bodies are taking the lead in carrying out diagnostics of the justice sector by mobilizing national legal professionals and leading national consultations and assessments relating to transitional justice."[42]

However, post-conflict countries often seem to share the characteristic that there is no strong and organised domestic constituency pressing for criminal justice and rule of law. Corrupt politicians, leaders of lingering military groups or organised crime groups etcetera compete for control over the justice systems, or seek to prevent justice from being administrated altogether.[43] Characteristics as these suggest that successful efforts, in so far as they are adapted to, take full account of and incorporated with the local context, will be worth replicating.

II. The case of CICIG

The concept of transitional justice comprises a range of processes and mechanisms associated with attempts to come to terms with past abuses, to ensure and achieve accountability, justice and reconciliation. These can include both judicial and non-judicial mechanisms, with different levels of international involvement (including none at all). The mechanisms can consist of individual prosecutions, reparations, truth-seeking, institutional reform, investigations or dismissals, or a combination.[44]

---

39 Report of the Secretary-General, *Strengthening and coordinating United Nation's rule of law activities*, UNGA, 36th Sess, UN Doc A/63/226, (2008).

40 *Ibid* at para 15.

41 Report Security Council, *supra* note 1 at para 15.

42 *Ibid.*

43 Per Bergling, *Rule of Law on the International Agenda, International Support to Legal and judicial Reform in International Administration, Transition and Development Co-operation* (Mortsel: Intersentia, 2006) at 14 [Bergling].

44 Report Security Council, *supra* note 1 at para 4.

CICIG is not a transitional justice mechanism per se since it focuses on present day crime. However, CICIG was created in an effort to improve the justice system in Guatemala; to finally resolve the problems with security and impunity it has faced since the years of internal armed conflict. It may thus be viewed as the most recent step in the transitional justice process. This paper therefore argues that CICIG is an example of a non-traditional transitional justice mechanism that should be included in the discussion and perhaps serve as best practice. Explaining CICIG in line with De Greiff's normative conception of transitional justice, will show that a transition process should aim not only to implement the traditional transitional justice mechanism such as reparation and truth commissions but also other future-looking justice-promoting efforts. The measures are more likely to restore or establish the force of certain fundamental norms and promote justice and democracy if they are implemented together as a multi-pronged effort.

A. Transitional Justice process in Guatemala

The UN has been present in Guatemala since the start of the peace process. The first measure was in the form of the UN Verification Mission in Guatemala (La Misión de Verificación de las Naciones Unidas Guatemala, MINUGUA). MINUGUA was a peacekeeping mission and accompanied the peace process from 1994 for a decade. The last two of the eleven 1994 and 1996 peace agreements brought the internal armed conflict to an official end.[45] The *Commission for Historical Clarification* (*La Comisión para el Esclarecimiento Histórico*, CEH) was established as part of the peace agreements to investigate the nature of crimes committed during the internal armed conflict. CEH was severely restricted by its mandate to act as transportation for accountability. Nevertheless, it released a report where it tied institutional responsibility to the chiefs of staff for national defence and the country's presidents. In addition, it condemned the Guatemalan Government and military for human rights violations and repressions, and linked the activities of the army during the internal armed conflict period to forced disappearances, arbitrary executions, rape, and the complete extermination of many Mayan communities, along with the destruction of their homes, cattle, crops and other elements essential to survival. Ultimately, it found the actions of the government to be grave violations of international human rights law.[46]

The peace agreements and CEH only conveyed truth and reconciliation to the extent that revelation and reflection on the motivations and responsibilities of the conflict paved way for public recognition of the structures of violence and impunity.[47] However, the government and guerrilla actors signing the peace agreements did not

---

45 *Agreement on a Firm and Lasting Peace*, UNGA, 51st Sess, UN Doc A/51/796, S/1997/114, (1997).

46 Report of the Commission for Historical clarifications: Conclusions and Recommendations, Press Release, "Guatemala: Memory of Silence" (1 March 1999), online: Press Conference <http://www.un.org/press/en/1999/19990301.guate.brf.html>.

47 Victoria Sanford, *Buried Secrets, truth and human rights in Guatemala* (New York: Palgrave MacMillan, 2003) at 271.

have the political will or capacity to make sure it was properly implemented. Powerful elites, military and conservative and populist political parties obstructed progress towards important judicial reforms. The peace agreements did not grant the UN an operational role in the peace process; neither did it include formal compliance mechanisms. International aid provided financing for judicial reform, but reluctance to follow through important reforms diluted international influence.[48] Thus, despite the UN verification mission MINUGUA's presence in Guatemala, proper implementation of the commitments in the peace agreements and the recommendations by CEH never happened.[49]

Ever since the end of the conflict victim's groups in Guatemala have demanded reparations. However, the National Reparations Program did not start until ten years after the peace agreements. In design, the Program includes many different measures, both to improve people's material conditions and to provide symbolic recognition to the victims. But in practice, the focus is on small, individual payments, leaving many deeply dissatisfied.[50]

Regarding prosecutions, after many years of efforts by victims, only a handful of cases have been prosecuted; dozens of other cases are trapped in a "maze of institutional neglect, lost evidence, and judicial stall tactics".[51] Several cases have been tried in the Inter-American Court of Human Rights related to negligence and corruption of the national justice system. However, its demand that the government provides information on the 40,000 disappeared people has been disregarded. In 2004, the Guatemalan state formally admitted for the first time there had been a genocidal policy in the operation against the Mayan people in the case of Plan de Sanchez before the Inter-American Court.[52] Reparations were paid but justice has remained vague.

On May 10th 2013, 86-year-old former military head of state Jose Efrain Rios Montt was convicted of genocide and crimes against humanity and was sentenced to a total of 80 years in prison. This was the first time that a former head of state has been tried for genocide in genuine national proceedings. However, ten days later the history was unmade; the Constitutional Court short-circuited the appeal process and threw out the verdict in a poorly explained decision. The general belief is that the judges responded to certain interests and political pressure.[53]

---

48 Patrick Gavigan, "Organized Crime, Illicit Power Structures and Guatemala's Threatened Peace Process" (2009) 16:1 International Peacekeeping 62 at 63 [Gavigan].

49 Impunity Watch and Convergencia por los Derechos Humanos, "La persistencia de la verdad: a diez anos del informe de la CEH", (2009), online: Impunity Watch <http://www.impunitywatch.org/docs/La_persistencia_de_la_verdad-CEH.pdf> at 7.

50 International Centre on Transitional Justice, "Guatemala", online: ICTJ <https://www.ictj.org/our-work/regions-and-countries/guatemala>.

51 *Ibid*.

52 *Case of Plan de Sanchez Massacre (Guatemala)* (2004), Inter-Am Ct HR (Ser C) No 105, at para 36.

53 International Crisis Group, "Justice on Trial in Guatemala: The Rios Montt Case", Latin America Report No 50 (23 September 2013), online: International Crisis Group <http://www.crisisgroup.org/~/media/Files/latin-america/Guatemala/050-justice-on-trial-in-guatemala-the-rios-montt-case.pdf> at 2.

B. Organised crime' threat to justice

CICIG was created to defeat the same structures that made it impossible to implement the peace agreements in Guatemala. Several factors contribute to high levels of continuous impunity after the internal armed conflict. One of the major reasons were illegal security forces and clandestine security organisations (henceforth CIACS from the Spanish abbreviation),[54] originally formed by former members of the military, conducting criminal activities and impeding the state from providing full access to justice. The culture of impunity is a central obstacle to criminal and social justice and reconciliation in Guatemala.[55] It should be considered both a cause and a consequence of the weak justice system becoming harder to eradicate the longer it is allowed to continue.

Today, CIASCS are commonly referred to as groups which commit illegal acts that affect the Guatemalan people's enjoyment and exercise of their fundamental human rights, and have direct or indirect links to state agents or the ability to block judicial actions related to their illegal activities.[56] Hence, CIACS generate impunity for their illegal actions.

Since the end of the internal armed conflict, the state's security apparatus ─ death squads, intelligence units, police officers, and military counter-insurgency forces ─ have escaped accountability. They mutated into criminal networks, engaging in all sorts of criminal activities: drug trade, arms trafficking, money laundering, extortion, human trafficking, black-market adoptions, kidnapping for ransom and car theft rings etc.[57] The weak and corrupt law enforcement institutions did not stop them since they already possessed influence and control over the government. This, in turn, enabled more drug cartels in the beginning of the 21st century to operate throughout the country. Through bribery and offers about lucrative affairs, Mexican cartels infiltrated not only the national police (Policía National Civil, PNC) but also the legislative body and the municipal administrations and political bodies.[58] Consequently, many observers believed that the entire democratic system was threatened.[59] And in the beginning of the 21st century Guatemala sank lower on international democracy ranking lists such as Transparency International and Freedom House.

---

54 See definition "Cuerpos Ilegales y Aparatos Clandestinos de Seguridad", Agreement to Establish the International Commission against Impunity in Guatemala (CICIG), United Nations and the Government of Guatemala, (12 December 2006), online: CICIG <http://www.cicig.org/uploads/documents/mandato/cicig_acuerdo_en.pdf> [CICIG 2006].

55 Proyecto Interdiocesano Recuperación de la Memoria Histórica (Guatemala), *Guatemala: Never Again!* (New York: Orbis Books, 1999) at xxxiii.

56 CICIG 2006, *supra* note 54.

57 Naomi Roht-Arriaza & Almudena Bernabeu, "Many Roads to Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Conflict Guatemala" in Jessica Almqvist and Carlos Esposito, *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (England: Routledge, 2012) at 204 [Roht-Arriaza & Bernabeu].

58 Ivan Briscoe & Marlies Stappers, *Breaking the wave: critical steps in the fight against crime in Guatemala* (Impunity Watch and Clingendael Institute, 2012) at 7.

59 Mary Fan Malone, *The Rule of Law in Central America: Citizens' Reaction to Crime and Punishment* (London: Bloomsbury, 2012) at 12.

Although the peace agreements did not directly address the structural relationships between the Guatemalan military, economic elites and CIACS, it did warn about the threats posed and called for the dismantling of CIACS.[60]

Thus, a significant part of the former military and security force officials responsible for past human rights violations are also behind the large culture of impunity in Guatemala today. The consequences of this are disastrous.[61] These actors ensure that impunity continues through creating grounds for further violence, corruption, and criminal activities. This is particularly obvious in the way entrenched interests are protected in the public sphere. CIACS are believed to be responsible for the threats, attacks, and other acts of political violence against prosecutors, judges, witnesses, politicians and human rights defenders in recent years.[62] It is also believed they establish new strong links with state officials and active members of the security apparatus. The results are that their actions normally go uninvestigated or untried.[63] Many powerful people have a vested interest in maintaining the system in the current ineffective form.

Apart from perpetual insecurity this creates for individuals, the judicial system is also highly dysfunctional in Guatemala. Consequently, citizens' low level of confidence in the judicial system leads to the will of taking justice into their own hands. They often form lynch mobs or hire assassins to resolve disputes. Similar outcomes can be observed in other dysfunctional states in transitional justice process. When state institutions are unwilling or incapable of delivering security or other basic services and where traditional societal structures have been substantially undermined, people are likely to turn for support to other social entities: military, religious movements, transnational networks of extended family relations or organised crime.[64]

It has been extremely difficult to change vicious circle of impunity in Guatemala. Restoring the rule of law and regaining the citizens' and the international community's confidence depends fundamentally on Guatemala's ability to tackle the historical impunity that permeates political, economic, and social structures at every level.[65]

C. The vicious circle of impunity

In democratic systems, the laws shall apply to everyone equally by impartial judges. Guatemala is an electoral democracy but lacks the characteristics of a just society with strong rule of law, according to the definitions of the UN. CIACS are

---

60 Gavigan, *supra* note 48 at 65.

61 Roht & Bernabeu, *supra* note 57 at 204.

62 Megan Donovan, "The International Commission Against Impunity in Guatemala, Will Accountability Prevail" (2008) 25:3 Ariz J Int'l and Comp L 779 at 784 [Donovan].

63 *Ibid* at 784.

64 Volker Boege et al, "On hybrid political orders and emerging states: What is failing – states in the global south or research and politics in the West?" (2009) 8 Berghof Handbook for Conflict Transformation Dialogue Series at 22 [Boege et al].

65 Donovan, *supra* note 62 at 785.

believed to still infiltrate virtually every government and law enforcement agency.[66] Entrenched impunity weakens the rule of law and impedes "the ability of the State to fulfil its obligation to guarantee the protection of the life and physical integrity of its citizens and provide full access to justice."[67] As a result, public confidence in democratic institutions is low, further weakening prospects for reform and democratic consolidation.[68]

Impunity has been defined by the UN as the:

> [i]mpossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings, [since] [t]hey are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to the appropriate penalties, including making reparations to their victims.[69]

The country was referred to as a fragile state at risk of becoming a so-called failed state, where the public administration and political institutions can completely cease to function.[70] One UN Special Rapporteur concluded that, "while Guatemala is a rich country, it is a poor and even weak State."[71] There can be confusion regarding the typical characteristics of "weak", "fragile", "failed" and "collapsed" states. However, the focus is on state institutions' lack of capacity or willingness to perform core state functions in the fields of security, administration and welfare.[72]

A string of international and regional human rights and political bodies expressed deep concern. The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, in its 2001 review of Guatemala, held that "absence of a State policy intended to combat impunity has prevented the identification, trial and punishment of those responsible for violations."[73] The Committee against Torture, the monitoring body to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, expressed concerns in its consideration of Guatemala 2006 about the lack of investigations of

---

66 International Crisis Group, "Learning to walk without a crutch: an assessment of the International Commission against impunity in Guatemala", Latin America Report No 36 (31 May 2011), online: International Crisis Group <http://www.crisisgroup.org/~/media/Files/latinamerica/36%20Learning%20to%20Walk%20without%20a%20Crutch%20--%20The%20International%20Commission%20Against%20Impunity%20in%20Guatemala.pdf> [International Crisis Group].

67 CICIG 2006, *supra* note 54 at preamble, para 3.

68 Donovan, *supra* note 62 at 781.

69 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UNCHR, 61st Sess, UN Doc E/CN.4/2005/102/Add.1 (2005).

70 The Economist, "Guatemala and organised crime: Reaching the untouchables", (11 March 2010), online: The Economist <http://www.economist.com/node/15663302>.

71 See concluding comments General Assembly, Human Rights Council and Olivier De Schutter, *Report of the Special Rapporteur on the right to food*, UNHRC, 13th Sess, UN Doc A/HRC/13/33/Add.4 (2009).

72 Boege et al, *supra* note 64 at 16.

73 CCPR, *Concluding observations and recommendations of the Human Rights Committee*, UNHRC, 72nd Sess, UN Doc CCPR/CO/72/GTM (2001).

massacres as well as the continuous military involvement in police matters.[74] The Universal Periodical Review (UPR) of 2008 by the Human Rights Council stated "endemic impunity" as a major problem to meet Guatemala's obligation to international human rights and customary law.[75] The UPR Working Committee noted that homicides increased 82% according to the PNC, from 3230 homicides in 2001 to 5571 in 2011. That is 38.5 per 100 000 inhabitants per year (the usual metric which among others are used by the UN Office on Drugs and Crime) making it "one of the highest in the world".[76] Several cases of forced disappearances, extra-judicial executions and massacres went to the Inter-American Court of Human Rights. Guatemala is today the country in the America's with the highest number of such cases sentenced by the Inter-American Court.[77]

D. The hybrid model

At the beginning of the 21st Century, after the UN Mission MINUGUA had left, the government of the time nonetheless concluded that the development and modernisation of the justice system in Guatemala had languished. Most of the international assistance had not proved sustainable enough. At this point, Guatemala did not need help to reform of the judiciary but instead required international help dismantling CIACS that were controlling large portions of the state. Consequently, in 2007, the government called for international assistance to combat the high impunity and increasing influence of CIACS. In response, the UN Secretary General signed an agreement with the Guatemalan Government to establish CICIG.[78] CICIG has an unprecedented mandate among similar UN efforts or other international efforts to promote accountability and strengthen the rule of law.

From the trend by the international community to create stronger local legitimacy stemmed the so-called hybridity concept. Hybrid mechanisms can be tribunals or other justice mechanisms, such as a commission like CICIG. They have been created in different ways, although the most common has been through a bilateral agreement between the UN Secretary General and a host country. Normally the host country voluntarily seeks UN assistance. In hybrid tribunals, domestic judges sit alongside international counterparts to try cases prosecuted by a mix of domestic and international lawyers. The judges apply domestic law that has been reformed to comply with international standards and norms. In the mechanism without judges, investigators and prosecutors have been embedded in the justice system in a similar way, enabling "on-the-job training" for local personnel.[79] Hybrids combine the skill and local legitimacy of international legal personnel with domestic personnel that

---

74 *Concluding observations and recommendations by the Committee Against Torture: United States of America*, CAT, 36th Sess, UN Doc CAT/C/USA/CO/2 (2006) at para 11 and 16.

75 Human Rights Council, Press Release, "Working Group on the Universal Periodic Review" (5-16 May 2008). Second Session at para 23 [Human Rights Council].

76 Human Rights Council, *supra* 75 at para 9.

77 The Inter-American Court of Human Rights, Judicial Search Body.

78 CICIG 2006, *supra* note 54..

79 Laura Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295 [Dickinson].

have knowledge of the context and law. In theory, they should help to reform justice systems and strengthen the rule of law. Because proceedings take place locally, the affected public and media can observe.[80]

An example of international tribunals is The War Crimes Chamber (WCC). It was set up in 2005 within the courts of Bosnia and Herzegovina and a Special Department within the prosecutor's office. WCC was created to take over cases from the International Criminal Tribunal for the former Yugoslavia (ICTY). WCC is now permanent and tries local cases in Bosnia and Herzegovina, as well as old ICTY cases. From the start the prosecutors were both international and local but it was meant to gradually evolve so that finally only local prosecutors would be left.[81] Similar set ups have been created in Sierra Leone and Cambodia. Another UN strategy has been to embed international judges and prosecutors directly into the existing domestic institutions. This was the case in Kosovo in 2000 where the UN created the Regulation 64 Panels[82] allowing international judges and prosecutors to serve in certain cases in the domestic judiciary when requested by parties to that case.[83] This was also the case with the Serious Crimes Investigation Team (SCIT) in Timor-Leste created in 2008. However, the SCIT did not have judges like a hybrid tribunal but only international prosecutors to assist the Public Prosecutor's Office in Timor-Leste. The SCIT's main function was to address cases of serious human rights violations committed in the country in 1999. Another hybrid model was created in 2009 in Pakistan. The Pakistani Government approached the UN to create a commission to investigate the assassination of former Prime Minister Benazir Bhutto. The Bhutto commission was tasked with presenting a report to the Secretary General on its findings, but ultimate responsibility for identifying and prosecuting the perpetrators remained with the Pakistani judicial system. Another example, however with a different set up, was the *UN International Independent Investigation Commission* (UNIIIC) in Lebanon. It has been the only hybrid mechanism with the autorisation of the Chapter VII. It was created in 2005 to investigate the murder of a former Prime Minister at the request of the Lebanese Government.[84] The Chapter VII authority served to require cooperation from neighbouring states. UNIIIC investigated, independently, under domestic law, using a mixed team of international and Lebanese investigators. They passed over the results of its investigation to domestic institutions for prosecution.[85]

---

80 Andrew Hudson & Alexandra Taylor, "The international commission against Impunity in Guatemala, A New Model for International Criminal Justice Mechanisms" (2010) 8:1 Journal of International Criminal Justice 53 at 55 [Hudson & Taylor].

81 Bodgan Ivanisevic, "The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court" (2008) International Center for Transitional Justice at 6.

82 *Regulation No 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK, UN Doc UNMIK/REG/2000/64 (2000).

83 Robert F Carolan, "An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment" (2008) 17 Transnat'l L & Contemp Probs 9 at 198.

84 *Resolution 1595*, UNSC, UN Doc S/RES/1595, (2005).

85 Security Council & Detlev Mehlis, *Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595*, UNSC, UN Doc S/2005/662, (2005) at para 5.

CICIG fits in the hybrid collection but is a unique set up among other UN hybrids since it has independent prosecutorial powers, unlike the Bhutto commission or UNIIIC. However, unlike the tribunals, it must rely on the Guatemalan courts for verdicts. It has many of the attributes of an international prosecutor, but operates under Guatemalan law, in the Guatemalan courts, and follows Guatemalan criminal procedure. It also does not deal with past crimes but present crimes, unlike many of the previous international efforts. This: its close connection to the national institutions coupled with completely independent prosecutorial powers, and present focus, made it possible to achieve longer-term results than other international hybrids have managed to do.

E. The birth of CICIG

In Guatemala, the idea by more progressive political forces to receive international judicial assistance matured during the first decade of the 21st Century. It had become clear that the implementation of the peace agreements was a herculean task. Conservative factions of the political, military and business sector blocked new reformative legislation. At the same time new elements of organised crime, mainly related to competing Mexican drug cartels, continued to increase their presence in Guatemala and neighbouring countries. Impunity and the lack of citizens' security became a dominant political issue, particularly in election campaigns. The idea of CICIG was born out of one of the peace agreements, the *Global Human Rights Accord* of 1994, which proposed a commission to dismantle the CIACS. International observers also suggested this as an option for Guatemala, including Human Rights Watch and the UN Special Rapporteur on the Independence of Judges who visited Guatemala in 1999. The latter recommended an independent agency be set up to investigate judicial corruption.[86] The establishment of CICIG constitutes the second attempt by the UN and Guatemala to create a commission of this nature. In 2003, a *Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala* (CICIACS) was proposed. However, the Congress never ratified this proposal. The Guatemalan Government issued judicial resolutions establishing that capacity of international support had to have certain limits. In response to an advisory opinion requested by the President, the Constitutional Court declared some elements of the CICIACS proposal unconstitutional.[87]

Eventually a new agreement between the UN Secretary General and the government was reached to establish CICIG in December 2006. It was declared constitutional in May 2007 and was ratified by Congress in August the same year. There was a strong opposition from the Frente Republicano Guatemalteco (a political right-wing party with majority in Congress at the time led by Rios Montt, the former head of state during the internal armed conflict and later tried for genocide 2013),

---

86 *Civil and Political Rights, Inclusing the Questions of: Torture and Detention*, UNCHR, 56th Sess, UN Doc E/CN.4/2000/61/Add.1, (2000).

87 Guatemalan Congress resolution, CCLXXXII, 28 Agosto 2007.

along with a number of other political parties.[88] A tipping point for the ratification of the proposal seems to have been the killing of three parliamentarians of the Central American Parliament and their driver in February 2007 by senior members of the Guatemalan Police. The police officers were arrested but killed inside a maximum-security prison within a week. The incident is believed to have influenced Congress to ratify the CICIG Agreement in August 2007.[89] Opposition remained strong and pushed for an annulment of the ratification until November 2007 when Álvaro Colom, a supporter of CICIG, was elected as president. CICIG was officially inaugurated in Guatemala City in January 2008.

F. The CICIG Agreement

The CICIG Agreement between the UN and the government of Guatemala is based on Guatemala's international legal obligations, such as the *Charter of the UN* and the *International Covenant on Civil and Political Rights*.[90] The article 46 of the Guatemalan Constitution states that, as a general principle and in the matter of human rights, treaties and conventions accepted and ratified by Guatemala have pre-eminence over internal judicial order or domestic law.[91]

The Agreement lists reasons why CICIG was needed: the widespread organised crime and their threat to the rule of law and human rights in Guatemala, and the consequent inability of the State to fulfil its obligations to guarantee the protection of its citizens.[92] Furthermore the Agreement considers the obligation in the peace agreements which Guatemala undertook to combat and dismantle CIACS. It also states that the fundamental purpose of CICIG is to support, strengthen and assist relevant institutions in Guatemala with their investigations and prosecution of crimes related to CIACS. This involves identifying their structures, activities, methods, and possible relationship to state entities or agents and sources of financing and promoting the dismantling of such organisations.[93] Other purposes of CICIG are to promote and establish mechanisms and procedures that are necessary for the protection of the right to life and personal integrity in accordance with the international human rights standards to which Guatemala is bound.[94]

---

88 International Crisis Group, *supra* note 66 at 5.

89 Guatemalan Congress report, CCLXX, 21 Enero 2003.

90 CICIG 2006, *supra* note 54; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976) [*ICCPR*].

91 Asamblea Nacional Constituyente, "Constitutión Política de la República de Guatemala, 1985 con reformas de 1993", No 18-93 (17 de Noviembre de 1993), online: ACNUR <http://www.acnur.org/biblioteca/pdf/0134.pdf> at art 46.

92 CICIG 2006, *supra* note 54.

93 *Ibid*, art 1, 1(a).

94 *Ibid*, art 1, 1(b).

G. Mandate: Purpose, functions and powers

Agreements to set up international commissions normally include specification of a mandate, powers and functions. In the case of CICIG, the mandate derives from the UN and the Guatemalan Government. It can broadly be grouped into two categories: prosecutorial powers related to the dismantling of CIACS, and institutional reform. It is defined as following:

> [First] [d]etermine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing and possible relation to State entities or agents and other sectors that threaten civil and political rights in Guatemala, in conformity with the objectives of this Agreement;[95]
>
> [Second] [c]ollaborate with the State in the dismantling of illegal security groups and clandestine security organizations and promote the investigation, criminal prosecution and punishment of those crimes committed by their members;[96]
>
> [Third] [r]ecommend to the State the adoption public policies for eradicating clandestine security organizations and illegale security groups and preventing their re-emergence, including the legal and institutional reforms necessary to achieve this goal."[97]

The mandate is relatively broad since it includes a wide range of functions. The agreement further states that CICIG shall have complete functional independence in discharging its mandate.[98] It has legal personality and can enter into contracts and institute legal proceedings.[99]

Within CICIG's powers are: to collect, evaluate and classify any information and request statements, documents and cooperation from any government official or entity;[100] investigate any person, official or private entity;[101] report civil servants who commit administrative offences and participate as a third party in resulting disciplinary proceedings;[102] to file criminal complaints; and join criminal proceedings as a complementary prosecutor with respect to all cases within its jurisdiction.[103] CICIG can furthermore provide technical advice to the relevant institutions and advise State bodies in the implementation of such administrative proceedings and, finally, recommend public policies, legal and institutional reforms.[104]

---

95 *Ibid*, art 2, 1(a).
96 *Ibid*, art 2, 1(b)
97 *Ibid*, art 2, 1(c).
98 *Ibid*, art 2, 2.
99 *Ibid*, art 4, 1(a), 1(c).
100 *Ibid*, art 3, 1(h).
101 *Ibid*, art 3, 1(a).
102 *Ibid*, art 3, 1(d) and 1(e).
103 *Ibid*, art 3, 1(b).
104 *Ibid*, art 3, 1(c).

H. CICIG's set up

CICIG is neither entirely national nor international; it has both national and international personnel. The funding comes entirely from voluntary contributions from UN member states, currently twenty-two.[105] The government is obliged to provide offices for CICIG and ensure that domestic institutions have enough resources to comply with their obligations under the CICIG Agreement.[106] Accordingly, CICIG has characteristics of an international commission. It does not use international law, unlike the hybrid tribunals, but instead is set up to assist Guatemalan institutions adopt more robust criminal law practices to investigate and prosecute domestic actors currently committing crimes under Guatemalan law. It does so combining its independent investigatory powers and its prosecutorial powers, but must ultimately defer cases to the domestic judicial system. The purpose is to dismantle organised crime and not focus on human rights violations from the past, like some other hybrid mechanisms. Although, as mentioned before, the mandate is indirectly linked to the internal armed conflict since some of the CIACS members are mobilised former military members.

CICIG's multiple focuses in promoting prosecutions, reforming institutions and building local capacity, are believed to increase the influence over local institutions and therefore to also increase the likelihood of strengthening the rule of law in the longer term.[107] The mandate is oriented towards forming and strengthening capacities of domestic institutions by "on the job training". CICIG's prosecutorial powers constitute of acting as a "private" prosecutor, and can thus join cases as a complementary prosecutor. This setup allows CICIG to work alongside MP during every stage of the prosecutorial process. This is believed to have a demonstrable effect whereby CICIG's work is a catalyst for broader legal reforms.[108]

The absence of enforcement or penalty powers can create difficulties. However, the fact that CICIG can demand disciplining and removal of uncooperative personnel is a promising tool to overcome some of its otherwise weak enforcement powers.[109]

CICIG is a unique hybrid, as mentioned before, in its ability to act as a complementary prosecutor. As CICIG's website makes clear, the organisation is: "unprecedented among UN or other international efforts to promote accountability and strengthen the rule of law"[110] and "its novelty lies in the fact that, for the first time, an international body has been given the authority to conduct criminal proceedings in national courts."[111] However, since the culture of impunity is partly

---

105 CICIG, *Annual report, Sexto informe de labores de la Comisión Internacional contra la Impunidad en Guatemala (CICIG)*, Período septiembre 2012 – agosto 2013, 2013 at 4 [CICIG 2013].

106 CICIG 2006, *supra* note 54 at art 6(1).

107 Hudson & Taylor, *supra* note 80 at 55.

108 *Ibid*.

109 *Ibid* at 67.

110 See CICIG's webpage: "About", online: CIGIG <http://cicig.org/index.php?page=about>.

111 CICIG, "CICIG brochure", offline: CICIG <http://cicig.org/uploads/documents/Brochure_English.pdf>.

due to a corrupt judicial system that is unwilling to change, dependency on the Guatemalan judicial system has created difficulties for CICIG in fulfilling its mandate.

I. Main achievements

1. INSTITUTIONAL STRENGTHENING

Institutional strengthening derives from all three parts of the mandate. During the first period CICIG signed a number of agreements with MP, state departments and the government among others.[112] CICIG began to collaborate daily with three key institutions: the Ministry of the Interior, PNC and MP.[113] During the first period CICIG primarily focused on building a fluid working relationship of mutual trust with these institutions. A group of special prosecutors with support from CICIG was set up to select criminal investigation cases in accordance with CICIG's mandate. The special prosecutor group had eighteen ongoing cases by the end of the first period and was all together proceeding in twenty investigations. CICIG acted as a complementary prosecutor in three of them.[114] Key achievements during the first period that improved the case investigations were the implementation of a wiretapping system and the implementation of the collaboration of defendant-informants-system. Today every unit within MP uses these investigation methods.[115]

The on-going support provided by CICIG to MP to tackle criminal structures have achieved tangible results in relation to arrests, proceedings and extraditions, mainly linked to crimes such as corruption, extra-judicial killings, drug trafficking, fuel contraband, illegal adoptions, money laundering and extortion. The efforts are testimony to the fact that impunity rates in the country can be reduced within the framework of the rule of law. The impunity rate has fallen from 95% in 2009 to 72% in 2012 for crimes against life (murder and manslaughter) according to CICIG's own figures.[116] According to data from the PNC the homicide rate has gone down from 46.36 per 100 000 people in 2009 to 38.61 in 2011 to even lower in 2013, as 34.03 per 100 000 people.[117]

The High Commissioner for Human Rights in its report on Guatemala in 2012, welcomed the important results obtained in investigations in high-profile cases by CICIG and MP. The cases "demonstrated a strengthened institutional commitment to combat impunity and the political will of the authorities within the Public Prosecutor's Office and the Ministry of the Interior to cooperate and coordinate actions. It is expected that this will evolve into a permanent and sustainable

---

112 CICIG, *Annual Report, Dos años de labores: un compromiso con la Justicia resumen ejecutivo*, 2009 at 5 [CICIG 2009].

113 *Ibid* at 7.

114 *Ibid* at 3.

115 Interview, CICIG official, 26 November 2013.

116 CICIG 2013, *supra* note 105 at 5.

117 Realización propia con base de la Dirección General de Operaciones de la Policia Nacional Civil (PNC) y el Instituto Nacional de Estadísticas (INE).

institutional mechanism. The technical support provided by CICIG certainly contributed to achieving these results."[118]

2. LEGAL REFORM

In 2009, the Law against Organized Crime in relation to the Effective Collaboration of Defendant-Informants[119] and a number of other laws or amendments to laws were passed by the Congress proposed by CICIG, in order to improve criminal investigations and prosecutions of organised crime members. During the first period CICIG recommended a reform of the criminal jurisdiction in high-risk cases. Through this reform, CICIG sought to enable such cases to be sent to special courts where extraordinary measures would exist to safeguard the security of judges, prosecutors, court officials, witnesses and other individuals participating in proceedings. The proposal was approved, with some amendments, by the Congress in 2009 (Criminal Jurisdiction in High-Risk Proceedings Act).[120] These courts have jurisdiction over cases of crimes against persons and property protection by international humanitarian law, genocide, forced disappearance, torture, human trafficking, abduction or kidnapping, among others. For a case to be heard by a high-risk court, MP is responsible for making a request before the Supreme Court.[121] Evidently these courts have helped prosecution in reaching better results.

3. INVESTIGATIONS OF EMBLEMATIC CASES

Arguably, CICIG's most direct visible impact is shown in the investigations and prosecutions.[122] Several high impact cases are believed to have brought a psychological change to the public's perception of the justice system.[123] Powerful CIACS members and prominent state officials have been prosecuted. To promote prosecution, CICIG has worked with MP to implement new investigation methods, which in turn has led to more effective investigations and prosecutions and constituted a more methodological and technical consistency.[124]

Over the years CICIG has adopted a more coherent and well-defined way of presenting their work in their annual reports. In the seventh annual report CICIG clarifies the mandate in terms of what type of organised crime they are addressing under five headlines, where they also identify more specifically what the problems are

---

118 *Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala*, UNHRC, 19th Sess, UN Doc A/HRC/19/21/Add.1, (2012) at para 26.

119 El Congreso de la República de Guatemala, Reforma la Ley contra la Delincuencia Organizado, CENADOJ, *Decreto Número 23-2009*, online: CENADOJ <http://www.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnalisisDocumentacionJudicial/cds/CDs%20leyes/2009/pdfs/decretos/D023-2009.pdf>.

120 The adoption of the Act on Criminal Jurisdiction in High-risk Trials (Legislative Decree No 21-2009), as amended by Legislative Decree No 35-2009.

121 CICIG, Boletín informative de la CICIG, (2013), online: CICIG <http://www.cicig.org/index.php?page=boletin_informativo_2013>.

122 CICIG 2009, *supra* note 112.

123 Interview, Marroquin, 11 November 2013 [Marroquin].

124 Interview, Núnez, 24 October, 2013 [Núnez].

in relation to these classifications, and how they have operated. The five are: smuggling; administrative corruption; illegal campaign financing; judicial corruption and; drug trafficking and money laundry.[125]

In 2012, CICIG published a report where it mapped corrupt judges and demanded an investigation into the judges' links to criminal structures. In the latest annual report, CICIG describes the new lines of investigation methods introduced.[126] Iván Velásquez Gómez, former prosecutor and judge in Colombia, arrived as the third Commissioner of CICIG in September 2014. He executed an organisational reform allowing for the development of new investigatory frameworks related specifically to illegal smuggling of products and illegal campaign financing. A measurement system for impunity and a minimum agenda with recommendations for combating impunity were also developed during this period. CICIG has initiated projects with UNICEF and UN Women to improve strategies for combating impunity for crimes of trafficking for sexual exploitation and violence against women.[127] In 2014, in relation to the selection of new judges and magistrates, CICIG publicly challenged, with some success, the appointment of several judges who were unfit as judges at the Supreme Court since the selection process was marked by political manipulation.[128]

CICIG's success can be exemplified in the famous Rosenberg case where the attorney Rodrigo Rosenberg was murdered in Guatemala City. Just before his death, Rosenberg had recorded a video where he declared he was under death threat and, if he was to be murdered, it was an order given by the government. The investigation discovered that Rosenberg's death was arranged by himself in order to bring the President down. Rosenberg had hired assassins to have himself killed. The investigation also discovered criminal networks were involved. The Rosenberg case is a good example of the intended demonstration function; the investigation by CICIG showed MP how to systematically use surveillance cameras, telephone tapping and interrogation with witnesses.[129] Another emblematic case that received much attention is the Pavón case which involves the killing of seven prisoners in the Pávon Prison and the Infierno prison in 2006. The investigation discovered a parallel structure within the government that performed extra-judicial killings of persons deemed "dregs" or "enemies of society". The group used government power and government machinery to conduct its criminal activity and escape accountability. The alleged intellectual perpetrators, the persons ordering the crime, included: Erwin Sperisen, former director of PNC; Victor Hugo Soto Diéguez, former director of criminal

---

125 CICIG, *Seventh annual report: Informe de la Comisión internacional Contra la Impunidad en Guatemala con ocasión de su séptimo año de labores*, (2014), online: CICIG <http://www.cicig.org/uploads/documents/2014/COM_039_20141023_DOC01.pdf> at 11-15.

126 *Ibid*.

127 *Ibid* at 5; See also the thematic report: *Informe temático sobre trata de personas con fines de explotación sexua,* published on CICIG's website.

128 Open Society Justice Initiative, *Una labor inacabada: la Comisión Internacional contra la Impunidad en Guatemala (CICIG)*, Documento Informativo (2015), online: Open Society Foundation <https://www.opensocietyfoundations.org/sites/default/files/cicig-report-spanish-20150319-final_0.pdf> at 7 [Open Society Justice Initiative]; See also CICIG thematic report, *Judges of impunity*, 2013.

129 CICIG 2013, *supra* note 105.

investigation unit within PNC; Javier Figueroa, former sub-director of criminal investigation unit within PNC; Carlos Vielman, former Interior Minister; and Victor Rivera, advisor to the former Interior Minister.[130] A third example of an emblematic case is the Portillo case which involves investigation for embezzlement of the former President Alfonso Portillo, together with former Minister of Defence Eduardo Arévalo Lacs and former Minister of Public Finance, Manuel Maza Castellanos.[131]

The beginning of 2015 was an eventful period for CICIG. Several investigations conducted during 2014 and 2015 revealed and dismantled a range of organised criminal networks.[132] The most sensational revelation of a comprehensive multimillion dollar tax-fraud scheme leading to President Perez Molina's resignation and arrest. A joint investigation by CICIG, MP and PNC resulted in the arrest of a large number of members of the scheme network including, beside the President Perez Molina, current and former employees of the Superintendence Tax Administration (SAT) on April 17th. An international arrest warrant is issued for the Private Minister of the current Vice President, Baldetti. In a press conference, Iván Velásquez explained that the scheme profited from contraband and tax fraud at customs posts.[133] The revelation led to thousands of Guatemalans protesting outside the presidential palace against the government corruption.

J. CICIG's legacy

Teitel has written that "[c]omparative review reveals highly divergent approaches to the rule of law, reflecting varying legal and other cultural differences. These practices reflect hybridized approaches concerning legal and societal approaches to violence."[134]

Early on, aims of transitional justice traditionally were ambitious, involved establishing the rule of law and democracy. Over the last centuries, its aims have become more modest, primarily focusing on maintaining peace and stability. Peace-

---

130 CICIG, *Case report. Sentencias condenatorias en procesos que apoya la CICIG.* (2013), online: <http://www.cicig.org/uploads/documents/2013/SENT-20131018-01-ES.pdf>.

131 CICIG, Caso Alfonso Portillo, Causa No 7102-2001, (2001), online: CICIG <http://www.cicig.org/index.php?page=7102-2001>.

132 For example: on April 30 2015, CICIG and MP filed charges against judge Flores Polaco for money laundering, illicit enrichment and breach of the duty to submit financial disclosure statement; on February 19 2015, based on CICIG investigation of a Court of Appeal judge Erick Gustavo Santiago de Leon for illicit favours to companies, the Supreme Court removed his immunity for him to be charged accordingly; on September 3 2014, based on a CICIG investigation, the former army captain Byron Lima, was arrested for running bribery ring from prison. Lima is convicted for the murder of human rights activist Bishop Juan Gerardi. The Director of the prison system, Edgar Camargo Lierealso, was also arrested for involvement in the bribery ring. See CICIGs webpage online: CICIG <cicig.org>.

133 CCICIG, Comunicado de prensa, "Caso La Línea : Jueza liga a proceso a todos los capturados" (Abril 21 de 2015), online: CICIG <http://www.cicig.org//index.php?mact=News,cntnt01,detail,0andcntnt01articleid=588andcntnt01returnid=67>.

134 Teitel, *supra* note 6 at 898.

making alone, in the form of short-term approaches to conflict management, has proven not likely to strengthen a rule of law culture.[135]

Thus, with justice as a premise for a peaceful democratic future as this paper claims, there is a need for transitional justice mechanisms, scholars and practitioners to broaden their perspective and take account of deep-rooted problems also prior to and after the conflict. The expansion of transitional justice also needs to adopt a more forward-looking approach. Efforts cannot focus primarily on the past, as they have tended to do so far.

CICIG must be understood in its proper perspective. It does not deal with past crimes from the internal armed conflict, but it may nevertheless be viewed as a step in the transitional justice process.

The first conclusion that can be drawn is that CICIG was indeed necessary to the extent that the Guatemalan Government demonstrated it did not have independent capacity to free itself from the control of CIACS and therefore requested UN assistance in 2006. Since then, the mandate has been prolonged four times, by two different governments and the UN. The most recent time President Perez Molina was hesitant but due to international pressure, particularly by the United States through among other means a visit to Guatemala by the vice president Joe Biden in March 2015, CICIG was requested to stay for another two years. The CICIG-initiative demonstrates that even sectors of the conservative political elite perceived that the culture of impunity is unsustainable. Arguably, its hybrid nature and close connection to the national institutions made it possible to achieve longer-term results than a purely international commission would have, as this chapter will try to demonstrate.

Keeping in mind that, like many post-conflict countries, Guatemala has a long history coloured with violence and a much polarised, conservative society with extreme social and economic gaps makes a transition to a rule of law respecting democracy a hardy process. Experiences show that deep-rooted power structures are not easily dissolved. It is likely that only various ambitious efforts over a long period of time will be able to offer enough support and contribute to a more democratic society with respect for the rule of law.

Also keeping in mind while evaluating CICIG's achievements is that its abilities are ultimately dependent on domestic institutions. Its success is closely tied to the progressiveness and political will of the judicial institutions. However, while presenting CICIG's achievements this paper has aimed to show that there is good reason for more and deeper research and evaluations of efforts like CICIG. It would be especially interesting to investigate how a mechanism like CICIG could provide assistance, receive information and collaborate with other transitional justice mechanisms.

A conclusion can be drawn that in the Guatemalan case, a hybridised model like CICIG, has proven to be a viable way to combat deep-rooted structural problem

---

135 *Ibid*.

with impunity. Other countries with similar problems should consider a similar hybridised solution.

K. CICIG's strengths

CICIG's mandate is directed towards institutional strengthening, which will enable the domestic institutions to deal with impunity of the past, present and the future. For example, the prosecution ─ and verdict, although annulled by the Constitutional Court ─ against Rios Montt is a positive historic event because a former head of state had never before been prosecuted for genocide by a domestic court. CICIG's presence in the country probably contributed to the realisation of the criminal process as part of the capacity-building of MP and its political and moral support of former Attorney-General Claudia Paz y Paz and her team. The more direct contribution to the case by CICIG was the establishment of the high-risk court that heard the Rios Montt case.

CICIG contrasts with prior international institutional capacity-building initiatives implemented in the country since the peace agreements. It is suggested that many such initiatives "have been perceived as imposed from outside and above, lacking adequate discussion with or acceptance by broad sectors of society and thus local ownership."[136] The peace process accompanied and supported by the UN and the international community was indeed directed towards a structural reform, including efforts to remove some of the dark powers of the past in order to reach democracy and respect for human rights. However, the objectives of and activities by CICIG are different from other international human rights efforts in Guatemala; not directly addressing past human rights violations, for example. This focus has permitted the possibility of garnering more support from sectors other than human rights' defenders, such as parts of the powerful business association CACIF, given that they also became victims of CIACS activities and increased violence after the end of the internal armed conflict.

CICIG also has a unique mandate among other UN efforts promoting the rule of law. In general, hybrids combining national and international law, procedure and personnel, seem to be better at creating legitimacy and relevance for a domestic audience. They also seem to be better at embedding international legal norms within the legal system, training local professionals to use these norms and carry out complex criminal investigations. A common weakness among many purely international justice efforts is their inability to execute arrest warrants against powerful criminals.[137]

One explanation of this is that international tribunals have been rather remote from the societies in which the crimes took place.[138] Theoretically this is easier for hybrids since they have the support of the national government. Furthermore, even

[136] International Crisis Group, *supra* note 66 at 7.
[137] Roht-Arriaza & Bernabeu, *supra* note 57 at 192.
[138] Dickinson, *supra* note 79 at 305.

with the assumption that hybrids are closer than tribunals to the national societies in which they operate, they require adequate resources from the international community and are unlikely to reach any results if the national government is not willing to support them completely.

Generally, accountability through prosecution is believed to have long-term impact on the rule of law. It is said to depend on the disempowerment of perpetrators who threaten and weaken public confidence in the rule of law. Accountability is also said to depend on how proceedings are pursued, the extent to which systematic efforts of institutional capacity building are part of the proceedings, and if they address patterns of abuse and impunity and demonstrate that justice can be achieved.[139] CICIG's efforts in assisting MP, or acting as complementary prosecutor, reflect this. Thus, CICIG's work should have a long-term impact on the rule of law in Guatemala.

It is important to bear in mind that, in many cases, goals are set artificially and are unrealistically high. When the UN itself assumes a central role, there is a temptation to demand concrete results and large-scale reforms. In fact, it is unlikely that any rule of law reform or transitional justice initiative imposed from the outside will be completely successful.[140] The roles of the UN and the international community are acts of solidarity and support. Scholars have argued that mainstream western concepts of state building today tend to overburden the actual state institutions on the ground.[141]

Lastly, recent analysis, reports and articles of CICIG are positive towards the impacts it has and can still have in Guatemala. For example, the current Attorney-General Thelma Aldana recently said in interview for newspaper that CICIG should, for now, continue to work in Guatemala together with the institutions to ascertain that a real institutional reform process is set in motion.[142] In a recent report from Open Society Justice Initiative, CICIG is referred to as an important hybrid model that can reinforce rule of law in countries that are struggling to control violent crime and organised crime groups, usually generated from internal armed conflict.[143] In an interview with the sub-director of Human Rights Watch Daniel Wilkinson, author of the book "Silence on the Mountain: Stories of Terror, Betrayal, and Forgetting in Guatemala", he calls CICIG a "brilliant, innovative and bold idea (…) [and claims that] if something could save this country it is an original effort like this one."[144] Guatemala's problems are not unique for post conflict settings. Since the armed

---

139 Jane E Stromseth, "Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?" (2007) 38 Georgetown University Law Center 251 at 257.

140 Bergling, *supra* note 43 at 117.

141 Martin Doornbos et al, "Failing States or Failed States? The Role of Development Models: Collected Works" (2005) Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) at 21.

142 Siglo21, "Fiscal Thelma Aldana: CICIG debería seguir" (9 de enero de 2015), online: Siglo21 <http://www.s21.com.gt/nacionales/2015/01/09/fiscal-thelma-aldana-ucicig-deberia-seguir>.

143 Open Society Justice Initiative, *supra* note 128 at 2.

144 See the interview l Periodic on Jueves 23 de abril de 2015 of Daniel Wilkinson, *Silencio en la montaña: historias de terror, traición y olvido en Guatemala*, (Boston: Houghton Mifflin Compagny, 2002), online: CICIG <http://www.cicig.org/uploads/img/2015/others/NOT_039_20150423_EP_892549.jpg>.

conflict organised crime is widespread and high-level state officials have been involved in corruption schemes. Some leaders in government, civil society and private sector, however, understand that something innovative was necessary. This shows a unique political will to combat deep-rooted problems. The international community, in turn, has spent millions of dollars on initiatives to strengthen rule of law in Guatemala since the end of the armed conflict but nothing proved sustainable enough. The problems with organised crime and corruptions were too overwhelming. CICIG has, by working alongside state institutions and revealed criminal activity and arrested those responsible, demonstrated that progress is possible. "Before CICIG people thought it impossible to advance in cases like these ones."[145] Wilkinson also argues that Guatemala have created a successful model, one of its kind on the global level, worth replicating by other countries with similar problems.

L. Challenges

Even if the quality of investigation and prosecution has increased in Guatemala during CICIG's presence, the qualities of the verdicts have not quite corresponded with this progress.[146] The reason is likely to be incapable, uncooperative or corrupt judges, or in some cases a lack of prosecutorial strategy or sloppy investigations.

The relationship with the Guatemalan courts has been somewhat problematic; the fact that CICIG can act as a private prosecutor is bound to create tension with the courts. On the one hand, CICIG is participating alongside MP and is therefore part of cases only as prosecutors. On the other hand, CICIG may also investigate and report civil servants, such as judges.

While the report "Judges of Impunity" created a damaging relationship with the judiciary, CICIG declared in its sixth annual report that it sought to:

> Strike up debate on the legitimacy, or lack thereof, of some rulings passed down by Guatemalan judges. The report attempts to achieve this goal by presenting a series of cases, some of which were supported by CICIG, where illegal judicial decisions were made by judges who have been co-opted by criminal structures involved in drug trafficking trafficking in humans for adoption."[147]

A criticism ─ and possible explanation for the lack of success in the strengthening of some parts of the justice system ─ has been that international personnel have lacked a proper understanding of Guatemala's legal, political, social and economic system. It was also suggested that CICIG has focused only on legal problems and not enough on the political obstacles, and had thus failed to see "the whole picture".[148]

---

145 *Ibid*.
146 Interview, Delgado, 29 November 2013.
147 CICIG 2013, *supra* note 105 at 32.
148 Interview, see Nunéz, *supra* note 124 and 24 October 2013; Marroquin, *supra* note 123 at 18 November 2013; Mack, 26 November 2013.

***

The aim of this paper was to try to show that a transitional justice debate will gain in broadening the concept and include a wider range of mechanisms. It tried to do so by explaining the normative conception of transitional justice, the reasons for adopting a holistic, context-specific approach and then presenting CICIG as an example of a non-traditional transitional justice mechanism that have achieved important results relating to the judicial system in Guatemala.

As the article has explained, the culture of impunity should be considered both a cause and a consequence of the weak justice system in Guatemala, hindering and threatening the process of democratisation and the rule of law. And since the conflict, Guatemala has failed to prosecute a large number of perpetrators of human rights violations and has permitted some of those responsible for historic crimes to continue to operate in the form of CIACS, influence, and even exercise some control over state institutions. This, in turn, has paved the way for new types of organised crime to establish itself in the country.

In conclusion, CICIG was created to defeat the same structures that made it impossible to implement the peace agreements. There are lessons to be learned from the CICIG example: reforming a country's institutions is not an easy task but nevertheless crucial if the conceptual goals of transitional justice are to be fulfilled.

Governments and others tend to think that transitional justice efforts can be traded off against one another when in fact a holistic approach to state building requires the efforts to "balance each other" and policy makers to consider other mechanisms when implementing transitional justice mechanisms. The Guatemalan example shows that this is probably the way forward. CICIG is an example of a mechanism that is not traditional in the sense that it is not dealing with the past. It is a hybrid responding to crimes within the broader realm of transitional justice.

A broader way of thinking about transitional justice measure has been a step forward for Guatemala; the situation in the country needed CICIG to follow through the reform processes after the conflict and head towards a rule of law culture instead of one of impunity.