

Reparations, Responsibility

 Victimhood in Transitional Societies

**REALISING VICTIMS'
RIGHTS TO REPARATION,
TRUTH AND JUSTICE IN
GUATEMALA IN THE MIDST
OF A ZERO-SUM GAME**

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I. Introduction

Multiple obligations exist under international law for States to protect human rights and restore or establish peace and stability in the aftermath of mass violence.¹ International standards, jurisprudence and doctrine formally obligate states to investigate, prosecute, sanction and remedy gross human rights violations, serious violations of humanitarian law or international crimes. However, at the same time, international law also recognises the capacity of states to implement amnesties in order to fulfil their duty of bringing an end to political violence with the aim of consolidating sustainable peace. Specifically, with this in mind, international humanitarian law consecrates the capacity of the state 'to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.² Consequently, the interpretation and implementation of this provision in practice is a complex task. At times, it may appear contradictory to victims' right to truth, justice and reparation, as states and international actors have to balance the demands of victims and the public interest in ending hostilities with armed actors, reconciliation and reintegration. How do states craft the conditions for sustainable peace that, at once, guarantee the rights of victims, whilst at the same time allowing amnesties for perpetrators of political violence? This is the puzzle that this report explores, with reference to the broader literature on transitional justice and, specifically, the case of post-conflict/post-genocide in Guatemala.

Despite the apparent absolutes in international law, States, victims and international actors have increasingly developed creative means through which to resolve the tension between the duty to investigate, prosecute and sanction perpetrators and to remedy victims' harm on the one hand, and their political will and public interest to achieve sustainable peace on the other. Domestic practice of transitional justice has allowed stakeholders to craft bespoke, contextually relevant and complementary mechanisms, 'rather than fulfilling one legal obligation while neglecting others'.³ This report will discuss the challenges faced in this particular regard with the context of Guatemala, analysing the mechanisms that were put in place in order to address the country's legacy of genocide and armed conflict, the extent to which they have been implemented, and the challenges that remain. The report explores the possibility of employing amnesty provisions and other benefits for perpetrators as a feasible contribution to guaranteeing and satisfying victims' rights, in particular to certain forms of reparation.

The report is laid out in the following sections. First, we analyse the transitional justice mechanisms derived from the Peace Agreement, presenting a detailed examination of the Commission for Historical Clarification (CEH), the legal process of return, resettlement and reintegration of victims of forced displacement, the National Reparation Programme (PNR) and the provision for amnesty in the transition towards peace. Second, we explore the lack of justice

1 C. Bell and J. Pospisil, Navigating inclusion in transitions from conflict: The formalised political unsettlement, *Journal of International Development* 29 (2017) 576-593.

2 Article 6(5), Additional Protocol II to the 1949 Geneva Conventions.

3 The Belfast Guidelines on Amnesty and Accountability. See https://www.ulster.ac.uk/_data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf

for victims of the armed conflict and genocide and explore the tension between victims' rights and amnesties. Third, we identify the elements that were not discussed during the Guatemalan Peace Negotiations in terms of the debate pertaining to justice versus peace. The last section will consider the feasibility of offenders' contributions to the criminal justice system in order to guarantee victims' rights. As mentioned, the article sets out an innovative proposal to overcome the stalemate in the search for guaranteeing and satisfying victims' rights, and persistent and embedded impunity in cases of grave human rights violations perpetrated during the armed conflict. In the absence of an open debate for the adoption of a transitional justice system, and far from a climate of trust within the parties, namely, victims, human rights lawyers, government representatives and perpetrators, Guatemalan judicial officials would contribute to providing justice in concrete cases by implementing measures of reduction of penal sanctions in exchange for effective contribution to victims' rights in the framework of the current domestic Guatemalan criminal law. Such a proposal is indeed innovative, and has not been attempted in the Guatemalan case, although has indeed been key to other contexts of transition elsewhere.⁴

A. Methodology

This article adopted a qualitative analysis for the methodological development of the research. This research has sought to provide a detailed analysis of the information collected, in order to produce a clear, insightful, and original proposal about the imperious necessity to rethink the implementation of transitional justice mechanisms in Guatemala, in particular amnesties, and how, if at all, this provision may be employed in order to develop an opportunity to contribute to ensuring victims' rights. The analysis and the final proposal of this report is based upon a series of in-depth interviews with 10 very well-recognised national and international lawyers acting for victims of human rights violations in Guatemala.⁵ The interviews were coded and their names were not mentioned at the request of the interviews. Interviews explored the level of satisfaction of victims' rights since the signing of the peace agreements in 1996, the response of the state to victims' and perpetrators' demands, the perspective of victims with respect to their claims, and the possibility for strategic mechanisms through which to guarantee victims' demands. In the end, a collective proposal that emerged out of the interviews and dialogue with those lawyers was the possibility of the development of measures of effective reduction of penal sanctions (for perpetrators) in exchange for their effective contribution to victims' rights within the framework of current domestic Guatemalan criminal law. In this regard, interviewees presented their juridical opinion on three specific aspects of the proposal: its legal viability; its relevance for groups of victims; and the possibility of the proposal (of reduction of sanction) being accepted by perpetrators and implemented by judges. Beyond the interviews, the report draws upon the in-depth research and knowledge of the authors on Guatemala and Latin America. Lina Malagón is a human rights lawyer and academic who has worked as a practitioner for two decades in the spheres of human rights and transitional justice, and Roddy Brett is an academic and practitioner who has worked in Latin America since 1992.

4 See Luke Moffett and Clara Sandoval, *Donde Estan Los Desaparecidos?* In Corte IDH blog, available at: <http://corteidhblog.blogspot.com/2018/11/donde-estan-los-desaparecidos.html>, accessed on 11 February 2020.

5 See Annex.

II. Guatemala: context

Guatemala experienced a brutal armed conflict between 1960 and 1996, shaped by a series of complex and mutually reinforcing factors, manifest through a combination of ideological, ethnic and socio-economic drivers reinforced by and framed within historical conditions of social and political exclusion, systemic institutional weakness and severe societal cleavage and division, in particular along racial lines.⁶ The conflict was waged as guerrilla insurgencies – united through the *Unidad Revolucionaria Nacional Guatemalteca* (National Guatemalan Revolutionary Unity, URNG) – mobilised against the lack of access to formal political channels, economic exclusion and horizontal inequalities, in particular, lack of access to and control of land.⁷

The country's brutal armed conflict was sustained by a bias in the control of economic and political resources by a racist, non-indigenous, Spanish-descended oligarchy. Within this context, the conflict culminated in a genocide carried out by the state against the indigenous Mayan peoples in the early 1980s. The genocide was perpetrated by the Guatemalan state within its counterinsurgency strategy against the country's indigenous communities, as the military focused their wrath against the URNG's perceived social base, principally in rural areas of Guatemala. According to the Historical Clarification Commission – Guatemala's UN-sponsored truth commission – acts of genocide were perpetrated in four regions of the country.⁸ The genocide involved egregious human rights violations, ultimately achieving its objective of decimating the guerrilla and its social base, which brought the guerrilla's strategic defeat by the mid-1980s. Significantly, decades later, in 2013, a Guatemalan court convicted former *de facto* President General Efraín Ríos Montt of genocide and crimes against humanity. Montt was sentenced to eighty years, although spent only ten days in prison before the Constitutional Court overturned the ruling.

Between 1990 and 1996, peace negotiations were carried out between successive Guatemalan governments and the URNG, finally bringing an end to Guatemala's protracted internal armed conflict. During the negotiations, the parties signed seventeen peace accords. The agreements were, on paper, both progressive and innovative, contemplating a series of mechanisms, including the demobilisation of the URNG, the dismantling of the paramilitary Civil Self-Defence Patrols and army units accused of gross human rights violations, the creation of a new civilian police force, and broad reforms to the armed forces. The final agreement crafted four important mechanisms with significant relevance for victims' rights and transitional justice mechanisms: i. the Commission for Historical Clarification (CEH) (or truth commission); ii. a legal process of return, resettlement and reintegration of victims of forced displacement; iii. the National Reparations Programme (PNR); and iv. provisions for amnesty in the transition towards peace. This report focuses upon these four measures with a view to understanding the transitional

6 See S. Jonas, *Of Centaurs and Doves: Guatemala's Peace Process*, (Westview, 2000).

7 See W. Dwight, *Guatemala: Democracy by Default*, in H. J. Wiarda and H. F. Kline (eds.) *Latin American Politics and Development*, 528-43, New York: Westview Press (2007), 7th ed.; and F. Stewart, *Policies Towards Horizontal Inequalities in Post-Conflict Reconstruction*, Centre for Research on Inequality, Human Security and Ethnicity (2005), 25-29.

8 CEH, *Guatemala: Memory of Silence*, Vol. X. Guatemala: UN CEH.

justice process implemented in Guatemala, in order to analyse the obstacles faced in the aftermath of Guatemala's armed conflict and genocide and to comprehend those challenges that the country continues to face. Specifically, the report presents an analysis of the synergies and tensions between reparations and amnesties, framed within the discussion pertaining to the interrelationship between truth, justice, reparations and guarantees of non-recurrence, and broader structural reform in the Guatemalan post-conflict era. The report explores this tension, investigating how those responsible for gross violations of human rights and serious violations of international humanitarian law or international crimes should or may be held accountable, whilst different transitional justice mechanisms are adopted to guarantee victims' rights and the promotion of peace and stability.

A. Mechanisms of Transitional Justice derived from the Peace Agreement

During the peace process, 17 peace agreements were signed with the aim of addressing the causes and consequences of the armed conflict, including substantive and operative themes.⁹ Nine of the agreements addressed crucial aspects on victims and vulnerable communities. In March 1994, the Global Agreement on Human Rights was signed as an immediate response to the critical situation faced by thousands of young people who had been recruited by the Guatemalan army, civilian self-defence patrols and the URNG and to the systematic violation of human rights during the internal armed conflict. Moreover, the Guatemalan state committed to dismantling its clandestine security apparatuses (CIACS). The United Nations Mission for Guatemala (MINUGUA) was established to verify the agreements, including institution-building throughout the country (1994-2004).¹⁰

The Final Accord for a Firm and Lasting Peace set up the basis for the adoption of transitional justice mechanisms in Guatemala and would be the starting point for the beginning of the implementation of the Peace Agreements and the functioning of the mechanisms for the transition to the post-conflict era.¹¹ However, the constitutional reforms necessary to give legal weight to the provisions of the agreements were rejected in a plebiscite in May 1999, precipitating a major setback to the process of post-conflict reconstruction.¹² Nevertheless elements of the transition went ahead.

1. Commission for Historical Clarification (CEH)

The truth commission in Guatemala sought to clarify with objectivity, fairness and impartiality, the human rights violations and acts of violence that took place during the internal armed conflict.

9 Some of the relevant accords included those to protect and promote the identity and rights of indigenous people, the resolution of agrarian problems and rural development, institutional reform of the state and electoral regimen, the Historical Clarification Commission and the definitive ceasefire.

10 S. Jonas, Democratization Through Peace: The Difficult Case of Guatemala, *Journal of Interamerican Studies and World Affairs*, 42(4) (2000), 9-38.

11 Signed 29 December 1996.

12 Jonas, 2000.

The CEH would formulate specific recommendations for furthering Guatemala's transition to peace and it would publish a final report based on commission investigations regarding the events of the armed conflict.¹³ The final report integrated a comprehensive assessment of the deeply rooted historical injustices, weaknesses in national institutions and specific recommendations for preserving the memory of victims and strengthening rights and democratic protections.¹⁴

The mandate of the CEH limited the investigations, publication and recommendation of the commission; in particular, its final report was prohibited from individualising responsibility and would not have juridical effect.¹⁵ This characteristic of the truth commission was a fundamental factor in facilitating the CEH's approval by the state and military, due to the latter's involvement in acts of violence and their accompanying fear of criminal penalties.¹⁶ The CEH made a decisive contribution to historical clarification and serving victims' rights to truth and memory, whilst it facilitated the work of the commissioners in their truth-telling endeavour. At the same time, the CEH evidenced the dimension of state responsibility for the political violence during the armed conflict, in particular for perpetrating acts of genocide against the Mayan people. In practice, the limitations to the truth recovery process in specific human rights cases precipitated the promotion of legal cases against particular perpetrators, such as the former dictator Jose Efraim Rios Montt.¹⁷

Human rights activists and civil society organisations were not convinced of the length and mandate of the CEH, given that it was only initially for six months, did not individualise responsibility, could not be used as evidence in legal cases and that its most sensitive information would be embargoed until 2049 (fifty years after the launch of the CEH's final report). However, the mandate of the CEH was extended for a further 12 months, and the CEH in general, and the Commissioners, in particular, gradually generated a sense of ownership with respect to the perception of civil society organisations over the truth-seeking process.¹⁸

Beyond the CEH, an informal truth recovery commission was established by the Human Rights Office of the Archdiocese of the Catholic Church, entitled the Recuperation of Historical Memory Project (or REMHI). This project was implemented for a two-year period, and eventually published its four-volume final report, *Guatemala: Never Again*, in 1998. The report's findings were similar to those of the CEH that would come the following year. In both cases, the military was found responsible for the majority of the killings (93%) and held responsible for egregious violence. In the days following the launch of the REMHI report, its president, Bishop Juan José

13 Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence. Objectives I.

14 Commission for Historical Clarification (1999), Guatemala memory of silence. Conclusions and Recommendations. Guatemala: UNOPS.

15 Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence CEH. Purposes III.

16 See V. Sanford, *Buried secrets: truth and human rights in Guatemala*, Palgrave Macmillan (2003).

17 S. Kemp, Guatemala Prosecutes former President Rios Montt: New Perspectives on Genocide and Domestic Criminal Justice, *Journal of International Criminal Justice*, 12(1) (2014), 133-156.

18 Berghof Foundation and Swisspeace. Peace process in Guatemala: a case study on negotiation and the process of national dialogue in Guatemala. Guatemala, June 24, 2016, para. 2.5.6.

Gerardi, was brutally murdered. Three former military officials were subsequently found guilty of his murder.¹⁹ The killing of Bishop Gerardi sent an unequivocal message: the military would take not responsibility for its actions during the armed conflict. Such a message was reinforced the following year, when then president, Alvaro Arzú, refused to accept publicly the final CEH report in its official launch. The struggle against state denial of human rights violations has been a key challenge faced by victims in Guatemala, which is clearly demonstrated with the rejection of the findings of both independent truth commissions and ongoing impunity for human rights violations perpetrated during the conflict.

2. Legal process of return, resettlement and reintegration of victims of forced displacement

During the armed conflict, it is estimated that 1.5 million people were internally displaced, and more than 150,000 Guatemalans fled to Mexico, where some 45,000 were accorded status as refugees by the UNHCR.²⁰ The Agreement on the Resettlement of the Population Groups Uprooted by the Armed Conflict ("Resettlement Agreement") recognised "the national, traumatic dimensions of the uprooting that occurred during the armed conflict (...) which caused violations of human rights and great suffering in the communities which were forced to abandon their homes and ways of life, and in the populations that remained in those areas."²¹ The Accord provided commitments that applied to the return and resettlement for refugees, returnees, internally displaced persons and popular resistance groups.²² The Agreement pursued the reincorporation of those groups which had been socially, economically and politically marginalised, particularly taking measures to fight against poverty and extreme poverty amongst these people and communities. The Resettlement Agreement contemplated special provisions for the protection of female-headed families and widows and orphans, and the protection of indigenous culture, customs and forms of social organisation.²³

No law has since been passed to comply with the mandates of the Resettlement Agreement; rather it has been implemented through operative procedures. Thus, the parties created a Technical Committee made up of two government representatives, two from the displaced population, and two representatives with consultative status from donors and cooperating entities.²⁴ The State committed itself to promoting the return of land to the original holders or to seek adequate compensatory solutions, identify land for resettlement and offer options for its purchase. Moreover, the committee would prioritise food security, access to basic services such as health, education, housing, sanitation and drinking water. It also sought to enhance

19 Raúl Molina Mejía & Patrice Mcsherry Justice in the Gerardi Case But Terror Continues, *NACLA Report on the Americas*, 35(1) (2001), 8-11.

20 In Guatemala there is no official register of victims, the CEH report estimates these figures. Commission for Historical Clarification. Guatemala, *Memory of Silence*. (1999). Volume V. Conclusions and Recommendation, para. 66.

21 The Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict. Introduction.

22 Ibid. Chapter I. Par. 1

23 Ibid. Chapter II. Pars. 1 to 7.

24 Ibid. Chapter V. Pars. 1 to 5.

productivity and promote local markets, generate jobs and income and craft the sustainable management of resources. These provisions were framed within a gender-based approach across all aspects of development policy.²⁵ In 2001 the Inter-American Commission of Human Rights remarked how the aforementioned commitments had been only partially complied with, and that much remained to be done to respond to the fundamental rights and needs of this population, in particular, regarding additional investment of capital and technical support, the execution of additional projects to provide access to basic services, and the political will and action to 'overcome longstanding deficiencies such as the absence of systems to accurately register and confirm land title, to effectively resolve land disputes, and to design and implement comprehensive policies to overcome extreme poverty through sustainable, integral, participatory development.'²⁶

Subsequently, in 2016, three important networks of victims,²⁷ with the support of the Human Rights Ombudsman and the Office of the United Nations High Commissioner for Human Rights, elaborated a report on the Impact of Peace Agreements for the Victims of the Internal Armed Conflict. In this report, the organisations detailed the limited support that the State had offered for resettlement and return of internally displaced populations, the low budget allocation during the decades when implementation of the Agreement was supposed to take place, and how the State had handed over very little land, in particular in impoverished places, and had not provided the appropriate technical, legal and credit support.²⁸

3. National Reparation Programme (PNR)

The right of reparation was included in the Global Agreement on Human Rights²⁹ and the CEH report recommended that the State create a policy of redress for victims and their families with the aim of dignifying them, ensuring non-repetition, and respecting national and international human rights standards.³⁰ As in the case of the procedure to assist and resettle displaced peoples and communities, no law was created to ensure the fulfilment of the commitments of integral reparation for victims. For years, human rights and victim organisations demanded the adoption of a comprehensive reparation policy. In 2000 these groups created the Multi-Institutional Instance for Peace and Concord to demand a formal response from the State. After the constant pressure exerted by this network, in 2003 a National Reparation Programme (PNR)

25 Ibid. Chapters II and III.

26 OEA/Ser.L/V/II.111, doc. 21 rev., 6 April 2001, para. 41.

27 Red Nacional de Víctimas, Consejo Nacional de Víctimas and Movimiento Nacional de Víctimas Q'anil Tinamit.

28 The Network and the National Victims' Movement. Impact of Peace Agreements on the Victims of the Internal Armed Conflict 1996-2016. Demands of truth, justice and dignified reparation. 16 November 2016. The report is available: <http://memoriavirtualguatemala.org:8080/xmli/bitstream/handle/123456789/261/Impactos%20de%20los%20Acuerdos%20de%20Paz%20para%20las%20v%C3%ADctimas%20documento%20pol%C3%ADtico.docx%20%281%29.pdf?sequence=1&isAllowed=y>. Accessed on 23 November 2019

29 Global Agreement on Human Rights. VIII. Reparation and/or assistance to victims of human rights violations.

30 Commission for Historical Clarification. Guatemala, *Memory of Silence*. (1999). Chapter V. Recommendations. Title III. Reparation Measures.

was created in Guatemala by the 258-2003 Governmental Agreement of the President of the Republic, and in 2013, its validity was extended for a further 10 years.³¹

The PNR aimed at repairing individual and collective civilian victims of human rights violations and crimes against humanity committed during the internal armed conflict. The programme includes five concrete measures: material restitution; economic compensation; psychosocial support and rehabilitation; dignification of victims; and cultural restitution measures.³² Taking into account some of the unfulfilled provisions of the Peace Accords and the most sensitive and recurrent demands of the victims, the Governmental Agreement in 2013 added that dignification of victims would be satisfied through actions to support exhumations and burials and measures pertaining to truth and memory; material restitution would integrate the restitution of land, housing, legal certainty of land property and productive investment projects.³³

The PNR policy made an explicit criterion of prioritisation in its implementation. Individual beneficiaries would be considered, according to the severity of the violations, their socioeconomic status and their social vulnerability, with special attention to widows, orphans, the disabled or elderly people, and minors. In the case of collective beneficiaries, the factors through which prioritisation was framed were the severity of violations, socioeconomic status and vulnerability of communities, organised groups of victims and indigenous peoples.³⁴ However, many victims, in particular prioritised ones, have found it difficult to comply with the three formal requirements established in the policy: i. to present identity documents; ii. to present birth or death certificates of all victims involved in the case; and iii. to present testimony of the violations suffered during the armed conflict.³⁵ Diverse practical challenges shaped individual and collective obstacles to permit access to the programme, such as the historical state deficit with regard to the registration of citizens and lands, forced displacement that provoked the loss of victims' identification and legal certificates of properties, the destruction of public records during the war. Moreover, those that lived in remote zones, and were illiterate also found it difficult to comply with the necessary requirements to access the programme.³⁶

As a result of this policy, the PNR has only compensated approx. 32,802 victims³⁷ out of a total of 200,000 dead and disappeared, and 1.5 million displaced people.³⁸ Moreover, at no point in its

31 Governmental Agreements 258-2003, 619-2005, and 539-2013.

32 PNR 2005. National Reparation Policy.

33 Governmental Agreement 539-2013. Art. 3.1.

34 Governmental Agreement 258-2003. Art.2.

35 Recognizing the past: challenges to combat impunity in Guatemala." Guatemala: Impunity Watch (2008); and M. Leonardo Segura, *Guatemala. Luces y sombras en el camino hacia la verdad, la justicia y la reparación*. In *Contribución de las políticas de verdad, justicia y reparación a las democracias en América Latina*. Instituto Interamericano de Derechos Humanos (IIDH), San José: IIDH (2011), 191-213.

36 D. Martínez, D. and L. Gómez, *Promise to be Fulfilled: Reparations For Victims of the Armed Conflict in Guatemala, Reparations, Responsibility and Victimhood in Transitional Societies*, July 2019. Available at: <https://reparations.qub.ac.uk/assets/uploads/Guatemalan-Report-ENG-LR.pdf>. Accessed 23 November 2019.

37 National Reparation Program. Number of beneficiaries by type of violation from 2005-2014. Guatemala: National Reparation Program.

38 Commission for Historical Clarification. *Guatemala, Memory of Silence*. (1999). Volume V. Conclusions and Recommendations.

operation, have any convicted individuals from the military had any assets removed from them to be transferred to the PNR. The future of this programme is far from secure. According to a comprehensive study on the reparations policy for victims in Guatemala, 'during the pro-military governments of President Otto Pérez Molina (2012-2015) and Jimmy Morales (2016-2019), the PNR has faced progressive weakening due to low budget allocations and constant changes in the authorities and technical personnel in charge of implementing the programme'.³⁹ As a result, the majority of the victims of the armed conflict and genocide remain without redress decades after suffering their violations, which speaks to broader obstinacy in ending impunity and remedying their harm.

4. Provision of amnesties in the transition towards peace

During the peace process, alternative mechanisms of justice were adopted and subsequently implemented after the signing of the agreement in 1996 with the support of MINUGUA.⁴⁰ The Agreement on Strengthening Civilian Power and the Role of the Armed Forces in a Democratic Society and the Agreement on the Basis for Legal integration of the URNG implied the demobilisation of the URNG, the dismantling of Civil Self-Defence patrols, the creation of a new civilian police force, and reforms of the armed forces.

The Agreement on the Basis for Legal Integration of the URNG established Congress would approve a National Reconciliation Law, with a view to promoting national reconciliation and without neglecting the obligation to combat impunity.⁴¹ This norm would contain a clause allowing URNG members to be integrated into legal life through declaring the extinction of criminal liability for political crimes; related crimes common to the commission of said political crimes and which could not be shown to have been driven by personal motives; and common crimes perpetrated with the aim of preventing, thwarting, suppressing or punishing the commission of political crimes during the internal armed conflict up to the date on which the Law entered into force.⁴² The Agreement was emphatic in terms of the fact that amnesty would not extend to crimes which, under internal or international laws ratified or signed by the Guatemalan state, were imprescriptible or were not subject to an extinction of criminal liability. Despite the fact that the Agreement referred to the integration of the former illegal combatants, its provisions of amnesty were not limited to those members, rather the accord established terms for extinguishing criminal responsibility regardless of the armed group.

On 18 December 1996, the Guatemalan Congress approved the National Reconciliation Law (LRN) based upon the Peace Accord;⁴³ Articles 2 and 3 authorised amnesty for political crimes against the state committed during the internal armed conflict, and related common crimes

39 Martínez, and Gómez (2019), p12.

40 Reports of MINUGUA are available at: http://memoriavirtualguatemala.org:8080/xmlui/discover?filtertype=author&filter_relational_operator=equals&filter=MINUGUA

41 The Agreement on the Basis for Legal Integration of the URNG. Par. 17. The Agreement is available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/GT_961212_AgreementOnBasisOfTheLegalIntegrationOfURNG.pdf. Accessed November 23, 2019.

42 Ibid., para. 23.

43 Decree 145 of 1996. December 18, 1996.

committed by insurgents. Article 5 of the law authorised the courts to grant amnesty to state actors for common crimes perpetrated during the armed conflict with the objective of preventing, impeding, pursuing or repressing the political and related common crimes committed by the insurgents.⁴⁴ Equally, the guarantee applied to state actors for those actions that were ordered, carried out or not carried out in order to avoid a greater harm, as well as to those acts related to the peace negotiations, all of which were to be considered to be of a political nature.⁴⁵ The LRN specifically excluded from amnesty those cases involving forced disappearances, torture or genocide.⁴⁶ In terms of authors, the amnesty was open to those who covered up or served as accomplices to the crimes.⁴⁷ With respect to the right to implementation of this amnesty provision, the CEH report emphasised that the authors of those crimes for whose commission liability was not extinguished by said law should be prosecuted, tried and punished.⁴⁸

The challenge of providing justice in cases committed by state agents has been one of the most intractable impediments to the implementation of the Peace Agreements and the consolidation of peace in the country. According to the CEH, the human rights violations caused by state repression were repeated, prolonged and continuous, and represented 93% of those registered by the CEH.⁴⁹ Immediately after signing the Agreements, the Alliance against Impunity (headed up by Helen Mack, relative of Myrna Mack)⁵⁰ and other individual victims appealed against the constitutionality of the LRN, in particular Articles 5 and 6. The claimants accused the LRN, among other charges, of violating the right of access to justice.⁵¹ The Constitutional Court denied the claimants' demands, arguing that the amnesty had been granted with the aim of achieving a firm and lasting peace and did not apply to the crimes of genocide, torture, forced disappearance, imprescriptible crimes or crimes that had to be excluded from the scope of amnesty according to 'international obligations' assumed by the State.⁵² Since this Constitutional Court ruling debates regarding the implementation of the amnesty law in relation to serious human rights violations have consistently taken place in the context of specific cases. This has concentrated around the provision of an amnesty by an accused, who seeks in his application across distinct types of cases, and victims, who have consistently rejected the condition of amnesty.⁵³ This interpretation implies that the LRN adheres to and encapsulates the international conventions

44 National Reconciliation Law, Decree 145-96 of the Congress of the Republic.

45 Article 6.

46 Article 8.

47 Article 2.

48 Chapter V, para.47.

49 CEH. CAP IV. 82.

50 Myrna Mack was an anthropologist murdered by a military death squad in Guatemala because of her criticism of the government's treatment of the indigenous Maya.

51 The Myrna Mack Foundation summarised its arguments against the LRN in a public document about the implementation of amnesties in Guatemala, which can be accessed at http://www.myrnamak.org.gt/images/stories/fmm/archivos/analisis/2012/Analisis_Amnestia.pdf. Accessed 23 November 2019.

52 Ruling No. 9-97 and 20-97, 7 October 1997.

53 For instance, the cases of *Chitay Nech*, *Bámaca Velásquez*, *Tiu Tojín*, *Maritza Urrutia*, and *Molina Theissen*, among many others.

ratified by the Guatemala state and implies grave human rights violations and crimes against humanity are excluded from the application of an amnesty.⁵⁴

Inappropriate appeal to and use of the amnesty provision has been recurrent. In 2017, in its report on Situation of Human Rights in Guatemala, the Inter-American Commission on Human Rights indicated that 'in relation to the cases arising from the internal armed conflict, (...) there is abusive use of *amparo* proceedings as a delaying strategy in some criminal proceedings, requests for amnesty and prescription, as delaying tactics to protect the accused.'⁵⁵ The Inter-American Court of Human Rights and the Inter-American Commission have issued recurrent decisions regarding the prohibition of total/blanket amnesties for grave human rights violations and the use of amnesties and statutes of limitations as a mechanism of impunity.⁵⁶ However, Guatemalan prosecutors and judges have often interpreted the amnesty provisions in the Peace Accords as signifying that Guatemala may abstain from complying with its international obligations, specifically to investigate, prosecute and sanction those accused of grave human rights violations, favouring the accused.⁵⁷ For example, in the following-up to the implementation by Guatemala of the order to investigate, prosecute and punish given by the Court in 12 cases against Guatemala,⁵⁸ the Court emphasised to the Guatemalan state its consolidated jurisprudence with respect to the 'incompatibility with the Convention of applying amnesty laws, arguing prescription, criminal non-retroactivity, *res judicata*, nor the principle of *non bis in idem* or any similar exclusion of liability ... in order to excuse its obligation to investigate serious human rights violations.'⁵⁹

The continued demand of amnesty provision by perpetrators and its approval by some judicial operators has continuously undermined confidence in the joint construction of mechanisms that allow for the satisfaction of victims' rights. For example, in 1999, in the report published during his visit to Guatemala, the Special Rapporteur on the Independence of Judges and Lawyers stated, 'It has been alleged that in cases concerning human rights violations there is a strong suspicion, based on circumstantial evidence, of military involvement. In these cases, it was alleged that the influence of the military had further hindered the speedy, impartial administration of justice, and in some thwarted due administration of justice.'⁶⁰ Ten years later, the same UN Special Procedure

54 It has been argued in the case of *Myrna Mack*. See the public document: http://www.myrnamak.org.gt/images/stories/fmm/archivos/analisis/2012/Analisis_Amnestia.pdf. Accessed 23 November 2019.

55 OEA/Ser.L/V/II. Doc. 208/17, 31 December 2017, para. 6.

56 IACHR urges Guatemala to continue making progress in fulfilling its international obligations and in the fight against impunity. Press release N° 58/14, 16 May 2014; Inter-American Court of Human Rights, Case of *Barrios Altos v. Perú*, Merits, 14 March 2001, para. 41; and *Gomes Lund and Others (Guerrilha Do Araguaia) v. Brasil*, Admissibility, Merits, Reparations and Legal Costs, 24 November 2010, paras. 147-182.

57 Inter-American Court of Human Rights, Case *Massacre of Dos Erres v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. November 24, 2009. Serie C N° 211, pars. 127 and 131. Inter-American Court of Human Rights, Case of *Chitay Nech et al Vs. Guatemala*. Resolution of Compliance Supervision, August 22, 2013, par. 7 in fine.

58 The 12 cases are: *Blake*; "White Panel" (*Paniagua Morales et al.*); "Niños de la Calle"; *Bámaca Velásquez*; *Myrna Mack Chang*; *Maritza Urrutia*; *Molina Theissen*; *Massacre Plan de Sánchez*; *Carpio Nicolle et al.*; *Tiu Tojín*; *Massacre of Dos Erres*; and *Chitay Nech et al.*

59 Inter-American Court of Human Rights, Resolution of 24 November 2015. Supervisión Cumplimiento de Sentencia in 12 Guatemalan cases vs. Guatemala, para. 26, p.11.

60 E/CN.4/2000/61/Add.1, 6 January 2000, para.34

stated that the Court of Appeals of June 2006 in the “El Jute” case⁶¹ ‘declared the applicability of the National Reconciliation Law to a conduct that, according to national and international norms, is not amnestiable - especially enforced disappearance - because it considers it to be related to political crimes.’⁶²

5. A Fleeting Moment of Hope?

In 2009 a brief period of hope commenced on the promise of meeting victims’ rights, principally due to international pressure and pressure from victim movements. The Attorney General’s Office, under the direction of human rights lawyer, activist and academic, Dr. Claudia Paz y Paz, began to support serious investigations into the gross human rights violations that had occurred during the armed conflict. Paz y Paz had been elected to office as a result of the pressure from the UN-sponsored International Commission Against Impunity in Guatemala (CICIG).⁶³ CICIG not only played a direct role in the election of the new Attorney General, but also, within a short period of time, contributed to strengthening the autonomy and investigative capacity of prosecutors and judges. CICIG significantly supported the High Impact Tribunals, created under the peace accord framework, and provided judges with special training and additional protection to investigate complex criminal cases. In general, the impact of CICIG was to embolden judges and prosecutors to take on Guatemala’s embedded culture of impunity, including for cases of human rights violations.⁶⁴

Within this context, human rights organisations increasingly promoted the investigation of multiple cases that initially focused on the violations perpetrated by foot soldiers and low-ranking military officers during the conflict.⁶⁵ The progress precipitated during Paz y Paz’s term as Attorney General began to have a significant impact during the presidency of former General Otto Pérez Molina (2012-2015), who had served as Director of Military Intelligence in the Ixil region during the Ríos Montt de facto government and was subsequently chief representative of the military during the negotiation of the Peace Accords. During the Pérez Molina administration, General Efraín Ríos Montt was found guilty of genocide and crimes against humanity in 2013, although the sentence was subsequently overturned.⁶⁶ However, the Montt case set a precedent within Guatemala, leading to the ‘Montt effect’; in short the case broke the wall of impunity and

61 On October 19, 1981, eight people were disappeared from the village, El Jute under the orders of Mario Enrique Sánchez Samayoa, colonel of the Zacapa military zone, with the participation of other military commissioners.

62 A/HRC/11/41/Add.3, 1 October 2009, para.86.

63 E. Grégoire and K. Hamilton, International accompaniment, reflexivity and the intelligibility of power in post-conflict Guatemala, *Journal of Genocide Research*, 18(2-3) (2016), 189-205.

64 A. Hudson and A. Taylor, The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms, *Journal of International Criminal Justice* 8(1) (2010), 53-74; and R. Brett, *The Origins and Dynamics of Genocide: Political Violence in Guatemala*. London: Palgrave Macmillan (2016), 33-45.

65 Kemp, 2014.

66 Sentence for genocide and crimes against the duties of humanity against the Mayan Ixil People. Sentence dictated by the First Court of Criminal Sentence, Narcoactivity and Crimes against the Environment A. Guatemala. 10 May 2013. Available at <http://www.justiciaviva.org.pe/especiales/efrain-rios-montt.php>

evidenced that state perpetrators could no longer expect impunity for their actions.⁶⁷ In the aftermath of the genocide case then, a series of key cases have been prosecuted. For example, in recent years, the Courts of Greater Risk have received relevant cases such as the Spanish Embassy, Sepur Zarco and Molina Theissen, and judges have found perpetrators guilty of various crimes and have also ordered reparation measures.⁶⁸

Pérez Molina was impeached due to corruption scandals and, in 2016, President Jimmy Morales (2016-2019) assumed office.⁶⁹ Under Morales, judicial processes against military officials accused of or involved in human rights violations during the armed conflict have been undermined. This has included the dismantling of the judicial structures that had been producing condemnatory sentences. In August 2018, President Morales banned the entry into the country of the President of the CICIG, which subsequently led to the dismantling of the office by September 2019.⁷⁰

In January 2019, the Guatemalan Congress approved Initiative 5377 aimed at modifying the National Reconciliation Law (LRN) and creating a blanket amnesty. The bill sought the release of those found guilty of human rights violations, and to suspend ongoing investigations of crimes against humanity committed during the armed conflict within 24 hours of its approval. During the process of submission and approval of the draft, international human rights bodies and non-governmental organizations urged the State to suspend the reform.⁷¹ In February 2019, victims and the Office of the Human Rights Procurator filed an appeal of unconstitutionality against the bill, alleging that the reforms sought to grant amnesty to war criminals.⁷² On 12 March 2019, the Inter-American Court of Human Rights ordered the State of Guatemala to halt discussion of bill 5377 and immediately file it.⁷³ A few months later, in July 2019, the Constitutional Court granted a provisional *amparo* to protect the rights of the plaintiffs, pending a final decision on the adoption of a law to modify the LRN.⁷⁴ By February 2020, the bill is active in the Congress with no progress.⁷⁵ Despite some hope over a decade ago to address victims’ rights, such confidence in

67 J.M. Burt, From heaven to hell in ten days: the genocide trial in Guatemala, *Journal of Genocide Research*, 18(2-3) (2016), 143-169.

68 Case of the Embassy of the Spain, Judgment C-01071-1980-00547 Of. 1. Guatemala, 19 January 2015. Case of Sepur Zarco, Judgment C-01076-2012-00021 Of. 2°. Guatemala, February 26, 2016. Case of Molina Theissen, Judgment C-01077-1998-00002 OF. Guatemala, May 23, 2018.

69 A. Beltrán, A New Era of Accountability in Guatemala? *Current History*, 115 (778) (2016), 63-67.

70 See more: <https://www.bbc.com/mundo/noticias-america-latina-49517442>, accessed November 23, 2019

71 CIDH calls the State of Guatemala to refrain from amending the National Reconciliation Law. Press release. January 25, 2019; Guatemala: Legislative initiatives seriously threaten human rights. Amnesty International. Press release. February 12, 2019. UN Special Representative, Ms. Pramila Patten, urges the Congress of Guatemala not to pass bill granting amnesty to perpetrators of sexual violence. Press release. March 13, 2019.

72 See: <https://www.prensalibre.com/guatemala/politica/organizaciones-sociales-rechazan-reformas-a-la-ley-de-reconciliacion-nacional-y-anuncian-impugnaciones/>. Accessed September 2019.

73 Inter-American Court of Human Rights, *Case of Members of the Chichupac Village and neighbouring communities of the Municipality of Rabinal, Case of Molina Theissen and 12 other Guatemalan v. Guatemala*, Provisional Measures and Compliance Supervision, Resolution of March 12, 2019.

74 See more: <https://cmiguate.org/corte-de-constitucionalidad-ordena-al-congreso-suspender-debate-sobre-propuesta-de-ley-de-amparostia/>. Accessed November 23, 2019.

75 Human Rights Watch mentions it in its Report 2020. Available at: <https://www.hrw.org/world-report/2020/country-chapters/guatemala>

the Guatemalan government has been eroded by those in power, which has in turn maintained a culture of impunity.

In the normative sphere, the universal and regional human rights systems have extensively debated amnesties and have insisted on the absolute prohibition of blanket amnesties,⁷⁸ as a reaction to the self-amnesties and the general and unconditional amnesties in forgiveness and forgetfulness laws that proliferated in Latin America in the 1970s and 1980s.⁷⁹ In the last decades, states have adopted transitional justice mechanisms when facing the necessity to balance justice and peace in post-conflict transition scenarios and to support the re-establishment of fragile democracy.⁸⁰ As a result, the United Nations has adopted a comprehensive definition of transitional justice and its key components have been defined as '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.'⁸¹

III. Debate on the lack of justice for the victims of the armed conflict: the tension between victims' rights and amnesties

The implementation of the Peace Accords has provoked an intense debate in Guatemala regarding the application of amnesty. The controversy focuses on questions relating to the scope of the State's duty to investigate, prosecute and punish, raising a series of key interrelated questions. First, what is the essential content of the duty to investigate and punish? In this regard, what is of utmost relevance for the research presented in this report is whether or not said duty signifies that all crimes committed during the armed conflict should be punished through a criminal process? Second, was the provision of amnesty the correct benefit to guarantee the termination of the armed conflict and satisfy the rights of victims? Amnesty for armed actors arguably permitted the completion of the peace negotiations and the achievement of a final Accord. Finally, given the limited impact of the provision of amnesty, would the reduction of penal sanctions for the atrocities committed, in exchange for confessions by perpetrators (of the truth) and their specific contribution to the comprehensive reparation of victims represent a more effective model for guaranteeing victims' rights?

In Colombia legal experimentation of transitional justice to balancing competing interests has been through the Justice and Peace Law of 2005, which created a legal framework and a special jurisdiction to try those who demobilized, primarily members of paramilitary groups, has demonstrated the difficulty of prosecuting all of them. By December 2005, out of a total of 35,000 demobilised paramilitaries, 4,981 were due to undergo the special judicial process, the remainder received the benefit of amnesty.⁸² Of the 4,981 people under investigation, 52% of them were transferred to the ordinary criminal system for different judicial reasons, for example, if the person did not meet the legal requirements.⁸³ As of June 2017, only 50 final sentences have been issued, covering 205 ex-paramilitaries, 6,004 criminal facts and 28,055 victims.⁸⁴ The Justice and Peace jurisdiction has not been able to provide a full justice response despite the enormous financial expenses, the technical and human efforts of the judicial operators and the victims' demands. Further efforts remain underway in light of the 2016 peace agreement

Guatemala's international obligations to ensure an effective remedy to victims are rooted before the start of the conflict.⁷⁶ However, while the obligation to comply with the duty to investigate, prosecute and punish is clear, the State also has an obligation to guarantee the cessation of the violations and to take measures to prevent recurrence.⁷⁷ Nevertheless, the fulfilment of these obligations and punishment of all those responsible for all crimes committed faces serious practical and normative obstacles.

78 See Inter-American Court of Human Rights, Judgment of March 14, 2001, Case of Barrios Altos v. Perú. Serie C No. 75.

79 Chile (Decree-Law 2191, 18 April of 1978), Argentina (Ley de Punto Final 23.492, 24 December 1986 and Ley de Obediencia Debida 23.521, 4th June of 1987), Brasil (Law 6683, 28 August of 1979) and Uruguay (Ley de Caducidad de la Pretensión Punitiva del Estado 15.848, 22 December 1986).

80 Olsen, T., L. Payne, A. Reiter (2010) *Transitional Justice in Balance. Comparing processes, weighing efficacy*. Washington D.C.: United State Institute of Peace Press; N. Roht-Arriaza, The New Landscape of Transitional Justice, in N. Roht-Arriaza and J. Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century*. New York: Cambridge University Press (2006); and R. Uprimny, C. Sanchez León, and L.M. Sanchez Duque, *Justicia para la paz. Crímenes atroces, derecho a la justicia y paz negociada*, Dejusticia (2014), 90-151.

81 Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice. https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf Consulted September 2019.

82 Amnesty proceeded for demobilised persons who were not being prosecuted or had been convicted for crimes that are not amnestiable or pardonable, in accordance with the Political Constitution of Colombia, the law or international treaties. See A. M. Díaz and G. Gallón, *Colombia: La metáfora del desmantelamiento de los grupos paramilitares*. Bogota: Colombian Commission of Jurists (2010).

83 Comptroller General of the Nation (2016) *Análisis sobre los Resultados y Costos de la Ley de Justicia y Paz*. <https://www.contraloria.gov.co/documentos/20181/466201/An%C3%A1lisis+sobre+los+resultados+y+costos+de+la+Ley+de+Justicia+y+Paz/dcce2907-f669-42b8-8857-7e14750cc467?version=1.0>, accessed 16 January 2020.

84 Figures of the Transitional Justice Department, Prosecutor Office, published in the report "Justicia. Balance de la contribución del CNMH al esclarecimiento histórico. National Center for Historical Memory". June 2018. Available at: <http://www.centrodememoriahistorica.gov.co/micrositios/balances-jep/descargas/balance-justicia.pdf>, accessed 23 November 2019.

76 CCPR/C/21/Rev.1/Add. 13. General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. 29 March 2004, adopted by the Human Rights Committee; the duty to investigate, prosecute and punish is also recognised in treaties as the Geneva Conventions of 1949, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006. See also cases already referred to in this report such as *Barrios Altos v. Perú*. See also *Ogur v Turkey*, App. no. 21594/93 (ECtHR 20 May 1999), paras 92–93; *Kaya v Turkey*, App. no. 22535/93 (ECtHR 28 March 2000), para. 124; *The Massacres of El Mozote and Nearby Places v. El Salvador* ((merits, reparations and costs), judgment of 25 October 2012, Series C No. 252), para.286; and *Margus v Croatia*, (Application no. 4455/10), Judgment Grand Chamber, 27 May 2014, para.138-140.

77 In this sense, the General Assembly of the United Nations adopted and proclaimed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution 60/147 of 16 December 2005.

between the FARC and the Colombian government through the Special Jurisdiction for Peace, which aims to learn and overcome the shortcomings of the Justice and Peace process.⁸⁵

Amnesty has been widely used as a tool for reaching peace agreements in conflict contexts to achieve a range of political goals.⁸⁶ Simply taking them off the table in dealing with the past would miss an opportunity to provide incentives for perpetrators and other responsible actors to engage and take ownership of making good on the past. However there are limits to the extent of which amnesties can be used, in particular the increasing recognition of the prohibition of blanket self-amnesties and those that cover serious human rights violations, crimes against humanity and genocide under international law. Nevertheless conditional amnesties were not considered as a means to achieve some accountability in exchange for truth, acknowledgement and reparations for Guatemalan victims.

A. Relevant issues not discussed during the Guatemalan Peace Negotiations

Transitional justice cannot be considered as offering a single model of implementation, and its success often depends on the context and political will to effectively implement measures to deal with the past. Comparative experiences have shown how mechanisms can be developed to promote peace, with legal incentives for combatants, and at the same time to ensure that victims have satisfaction of their rights in a broad framework that involves their active and efficient, albeit imperfect, participation.⁸⁷ Instead of total amnesties and self-amnesties established to erase the responsibility of combatants and disregard the rights of victims, other mechanisms may allow for a more appropriate weighting.⁸⁸ In this way sentencing and early release incentives can be permissible where they facilitate benefits for victims, such as a reduction in prison sentences or the imposition of alternative sentences in exchange for confessions of the whole truth and contributing to reparation of the victims. These measures are acknowledged as legitimate mitigation factors in sentencing and release under the rules of the International Criminal Court.⁸⁹ This approach reflects the state prosecutorial and punitive discretion, while at the same time enabling criminal responsibility to be established for serious crimes committed, but encourages a path for perpetrators to contribute to wider public goods of the transition in meeting some of their victims' rights. The Office of the United Nations High Commissioner for Human Rights, in its document entitled *Instruments of the Rule of Law for Societies Emerging from Conflict* (2009), recognised the admissibility of benefits of reduced sentences in exchange for full disclosure of

85 See H. Olasolo and J.M.F. Ramirez Mendoza, The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition, *Journal of International Criminal Justice* 16(3) (2018) 1011-1047; and L. Moffett, C. Lawther, K. McEvoy, C. Sandoval and P. Dixon, *Alternative Sanctions before the Special Jurisdiction for Peace: Reflections on International Law and Transitional Justice*, RRV (2019).

86 See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart (2008).

87 See P. Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, London: Routledge (2010).

88 L. Mallinder and K. McEvoy, Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies, *Contemporary Social Science* 6(1) (2011) 107-128.

89 Rules 145(2)(a)(ii) and 223(c), ICC Rules of Procedure and Evidence.

the truth about the facts, provided that the sentence remains proportionate to the gravity of the crime.

Unlike blanket amnesties, the admissibility of certain forms of reduction of punishment even for the most egregious crimes, including partial amnesties, in exchange for effective contribution to victims' rights, is a matter that merits debate beyond the parties of a peace negotiation. In this regard, any discussion about criminal benefits for perpetrators must involve victims and their organisations and include their active and effective participation in the decision-making processes set up to this end. Thus, important achievements for victims - such as the recovery of the bodies of disappeared persons, the establishment of the truth about atrocities, perpetrators, accomplices and beneficiaries, the delivery of illegally acquired goods - could be achieved. Practice has shown that the participation of victims produces better results in the agreements reached.⁹⁰ In this regard, any discussion on the balance between lower levels of administration of justice and maximum satisfaction of victims' rights to truth and reparation implies a good faith commitment by all parties to overcome the atrocities of the past and avoid their repetition at all costs. This may be strained with the passage of time and change in political priorities and governments.

By way of example in Northern Ireland, the Independent Commission for the Location of Victims' Remains (ICLVR) was established by the British and Irish governments in 1999 to facilitate the recovery of those individual disappeared by Republicans during the conflict.⁹¹ The 'Disappeared Commission' worked in cooperation with those organisations responsible for the disappearances, with the legal protection of a 'use immunity' provision, in that any information provided to the Commission could not be used in a criminal or civil court against the person providing it. In other words, the purpose of the Commission concentrated on the single goal of determining the location of remains of those victims who were disappeared – broader goals of truth and acknowledgement were not built into the Commission. Indeed, these broader transitional justice objectives may have run contrary to the 'quiet' nature of its operation.⁹² While the work of the Commission and cooperation of those responsible for the disappearances resulted in the remains of the 13 of the 16 missing being recovered, it has been put under strain by prosecutions against senior republicans for high profile disappearances, such as Jean McConville, due to information from other sources.⁹³ A broader truth recovery process through the Independent Commission for Information Retrieval has been proposed in Northern Ireland, with similar immunities for those coming before it and perhaps reduced sentences for those who are convicted under the complementary investigatory Historical Investigations Unit that is supposed to be enacted in 2020. Ultimately like the Colombian experience, these juridical experimentations can be fraught with political contestation over time and need to include effective victim participation.

90 J. Méndez, Victims as Protagonists in Transitional Justice, *International Journal of Transitional Justice* 10(1) (2016), 1-5.

91 The Northern Ireland (Location of Victims' Remains) Act 1999 was passed by the British government, and the Criminal Justice (Location of Victims' Remains) Act 1999 was passed by the Irish government.

92 See Lauren Dempster, 'Quiet' Transitional Justice: 'Publicness', Trust and Legitimacy in the Search for the 'Disappeared', *Social & Legal Studies* (2019) 1-27.

93 See Anna Bryson, Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with the Past, 39 *Hastings International & Comparative Law Review* (2016) 299-354.

Nonetheless, it demonstrates that providing a mitigated or alternative legal structure for those responsible can engender ownership in repairing the harm they have caused.

B. Reflections on the Guatemala case: Is the offenders' contribution to the justice feasible in satisfying victims' rights?

The Guatemala case suggests a series of important lessons from the perspective of the nexus between transitional justice and peacebuilding.⁹⁴ Guatemala's peace negotiations between successive governments and the URNG took place between 1987 and 1996, during which time the United Nations, through the UN Verification Mission in Guatemala (MINUGUA), formally supported the peace process (1994-1996) and monitored the implementation of the agreements (1997-2004) for a significant period of time. The Guatemala case represented one of the first times that transitional justice mechanisms addressing truth, amnesty and reparations were incorporated, explicitly, as a package within an internationally sponsored peace process. However, the process was negotiated between two parties that enjoyed considerably different levels of leverage and were negotiating from very different perspectives. The URNG had been strategically defeated in the mid-1980s after the state-sponsored genocide against indigenous communities – its alleged social base. The guerrillas thus came to the negotiations from a weak military position, unlike the insurgents in El Salvador, and, in fact, had very little to lose. Consequently, the URNG was fortunate to put its name to what was, in the end, a set of highly favourable and ultimately progressive agreements, in particular with regard to the human rights, indigenous rights and identity and the transitional justice provisions that were incorporated within the final agreements.⁹⁵ The inclusion of significantly important provisions relating to transitional justice came as a result not of the URNG's progressive protagonism in this respect, nor of its capacity to impose said issues upon its intransigent and deeply conservative counterpart, which stood against anything beyond blanket amnesty for the military. Rather, these provisions came as a consequence of the pressure exerted by two key sectors - civil society and the international community.⁹⁶

In the case of civil society, the Civil Society Assembly (ASC) was mandated by the negotiating parties to send non-binding proposals for the substantive accords to the negotiating table and the UN. Whilst civil society demands were weighted more keenly towards penal justice, the scope of the CEH accord would arguably have been far weaker had it not been for the activism of civil society in this regard. Amnesty was the option favoured by the military and the political and economic elites that it represented, as well as by the guerrilla. However, victim organisations pushed for wider provisions, including truth-telling and reparations. Similarly, the UN, OAS,

94 P. Lundy and M. McGovern, Whose Justice? Rethinking Transitional Justice from the Bottom up, *Journal of Law and Society*, 35(2) (2008) 265-92.

95 J. Balint, J. Evans, and N. McMillan, Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach, *International Journal of Transitional Justice*, 8(2) (2014), 194–216.

96 J. Pearce, From Civil War to 'Civil Society': Has the End of the Cold War Brought Peace to Central America? *International Affairs*, 74(3) (1998), 587–615; and R. Brett, *Social Movements, Indigenous Politics and Democratisation in Guatemala, 1985-1996*. New York/Amsterdam: Brill/CEDLA (2008).

donor countries and international non-governmental organisations pushed for the inclusion of said provisions as fundamental, particularly given the nature of the crimes perpetrated by the state during the armed conflict.⁹⁷

The military and the political and economic elites went along with the peace negotiations under the strict and, ultimately, correct assumption that, once the agreements were signed, international leverage would debilitate and Guatemala would be open for business. In this respect, the elites learned to walk the walk and talk the talk with the aim of guaranteeing a smooth transition to the rewards of investment that post-conflict would bring and the state's reincorporation into the international community of states. At the same time, the military assumed that no meaningful investigations would take place into the genocide or other egregious crimes.⁹⁸ In short, the military as an institution presumed it would retain its role as national arbiter and be able to secure impunity for the crimes that had been committed, a presumption that, in the end, proved to be only partially correct.⁹⁹

Without the pressure from both civil society and the international community, it is likely then that the peace agreements would have looked significantly different to those that were consecrated in the final accords, the last of which – the Accord for a Firm and Lasting Peace – was signed on 31 December 1996. Implementation of the agreements, overseen by MINUGUA, began under the government of President Alvaro Arzú.¹⁰⁰ Significantly, once signed, government will wane considerably and the country gradually moved back, in part, to business as usual. Implementation of the agreements was extremely slow and partial, languishing amid increasing homicide, violence and spiralling exclusion at the end of the 1990s and beginning of the 2000s.¹⁰¹ The government failed consistently to implement the provisions of the accords, disregarding agreed timetables, and frustrating international observers and donors. Fiscal reform, in particular – the commitment to increase taxable income to 12 per cent – and the transformation of the military's constitutional mandate to safeguard national security were slow, complex processes that met with foot-dragging from successive governments and direct opposition from the military, thus never fully achieving the commitments made by the negotiating parties.¹⁰²

As the implementation stage staggered onwards, both civil society and the international community – the two parties most interested in securing the provisions of the agreements – lost leverage. From the late 1980s until the end of the 1990s, international actors – such as the Contadora Group, the Group of Friends, the UN, the Consultative Group, the OAS and the European Commission – played a significantly important role, wielding unprecedented pressure

97 N. Short, *The International Politics of Post-Conflict Reconstruction in Guatemala*, Palgrave Macmillan (2007).

98 M. Popkin and N. Bhuta, Latin American Amnesties in Comparative Perspective: Can the Past Be Buried? *Ethics & International Affairs*, 13(1) (1999), 99-122.

99 R. Brett, Guatemala, in B. Conley-Zilkic (ed.), *How Mass Atrocities End: Studies from Guatemala, Burundi, Indonesia, the Sudans, Bosnia-Herzegovina, and Iraq*, Cambridge: Cambridge University Press (2016), 29-55.

100 C. Caumartin, *Racism, Violence, and Inequality: an Overview of the Guatemalan Case*. Oxford: Centre for Research on Inequality, Human Security and Ethnicity (2005).

101 R. Brett, The Janus Face of International Activism and Guatemala's Indigenous Peoples, in A. De Waal (ed.), *Advocacy in Conflict: Critical Perspectives on Transnational Activism*, London: Zed Books (2015).

102 Brett, 2016.

against the Guatemalan state and government with respect to the consolidation of the peace agenda and the closure of the peace process.¹⁰³ Their impact on the peace process, in terms of its sustainability and its content, cannot be overestimated. Moreover, the international community provided considerable political and financial support to civil society, strengthening its capacity to pressure the state.

Civil society platforms demanding truth, justice and reparations for past human rights violations, pressure for state reform with respect to the formulation of inclusive public policies and institutions, and advocacy for the development of progressive legislation were the consequence of the confluence of international and national civil society demands.¹⁰⁴ The content of the peace agreements, including transitional justice mechanisms and rights provisions, and the subsequent passing of both related public policies and legislation, were specifically shaped by the coalition between civil society and international actors, supported as they were by those few politicians that were behind the process.¹⁰⁵ However, and significantly, as international leverage began to diminish in the aftermath of the peace process, so progressive civil society actors became an isolated voice, pressuring, to little effect, domestic elites to push forward an agenda that they had no intention of implementing.

The international community played then a decisive role during the peace process and in the initial years of the post-agreement reconstruction phase, supporting domestic civil society actors to force debate around truth, justice and reparations, whilst also pressuring governments and financing state initiatives to address said issues. With the support of international actors and national civil society advocates, in the decade after the peace process, key truth and reparations provisions were attained. However, the results of the implementation of the reparation programme were extremely limited, as previously stated and, moreover, the measures have been progressively weakened under successive governments.¹⁰⁶

At the same time, a series of laws were adopted that related to a diverse range of social, political and legal questions that had represented a core aspect of the peace process, thus evidencing a degree of state level reform, in particular with respect to the justice sector. Laws on Discrimination (gender, ethnic, racial, and religious) and a Decentralisation Law were passed in 2002.¹⁰⁷ In the same year, the 2002 penal code made discrimination a crime,¹⁰⁸ and high profile

103 S. Petersen, I. Samset and V. Wang, *Foreign Aid to Transitional Justice: The Cases of Rwanda and Guatemala, 1995–2005*, in K. Ambos, J. Large, and M. Wierda (eds.), *Building a Future on Peace and Justice*, Springer, Berlin, Heidelberg (2009).

104 K. Andrieu, *Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm*, *Security Dialogue*, 41(5) (2011), 537–558.

105 See M. Ballengee, *The Critical Role of Non-Governmental Organizations in Transitional Justice: A Case Study of Guatemala*, *UCLA Journal of International Law and Foreign Affairs* 4 (1999-2000) 477.

106 D. Martínez and L. Gómez, *Promise to be Fulfilled: Reparations For Victims of the Armed Conflict in Guatemala*, *Reparations, Responsibility and Victimhood in Transitional Societies*, August 2019, p.12.

107 Law for the Promotion of Education against Discrimination for Gender and Ethnic Descent (2002); Law of Decentralization (2002); this law transferred powers and responsibilities to municipalities and other executive branches.

108 Decree 57/2002.

racial discrimination cases were subsequently prosecuted.¹⁰⁹ At the same time, other legislation has been debated, including the Development Councils Law, the Domestic Workers Law, Sexual Harassment Law, the Law Governing Indigenous Peoples and Communities, the Linguistic Regionalisation Law, and the Law Concerning Racial Discrimination. However, when it has come to securing justice for human rights violations committed during the conflict, and, in particular, the genocide itself, extreme reticence has been evident, and violent opposition has often been exerted by the military and the political and economic elites.

In spite of a limited, yet significant progress, the most problematic question with regard to the achievement of the core transitional justice themes enshrined in the peace agreements pertains to justice for past crimes. In general, justice for past violence in Guatemala has been extremely scarce, with of course some key notable exceptions, such as the recent cases of Sepur Zarco, and the Molina Theissen case, as well as the landmark case of the massacres of Rio Negro.¹¹⁰ What is significantly important in the context of Guatemala, is that the possibility for 'full justice' was on the cards since the signing of the peace deal in 1996. Guatemala has set, at least on paper, important precedents with regards to the transitional justice framework and standards. In other words, the amnesty provisions in Guatemala pertained uniquely to political crimes, for either guerrilla or state actors. Moreover, and significantly, no aspect of the agreement permitted armed actors to negotiate a reduced sentence for their crimes through the conferral of reparations and truth about violations, as has been the case recently in Colombia through the Victims' Agreement of the Peace Agreement, signed between President Santos' government and the Revolutionary Armed Forces of Colombia in 2016. In the case of Guatemala, it is important to ask whether, had such provisions in fact been included within the peace agreements, more concrete progress could have been achieved with respect to accountability for grave human rights violations. The Guatemalan state has denied carrying out any wrongdoing during the armed conflict and has vehemently and, when necessary, violently opposed accountability mechanisms. Racism against indigenous Guatemalans has embedded this perspective still further; the victims were only 'Indians' and hardly human, from the military's perspective.¹¹¹ The murder of Bishop Gerardi and the overturning of the Rios Montt genocide conviction demonstrated the ongoing belief that accountability would be unlikely to happen against members of the military.

The Guatemalan state has carried out a systematic repudiation of the reformist agenda incorporated into the peace agreements. When necessary, the accused have consistently filed for amnesty for crimes such as genocide and crimes against humanity – crimes explicitly excluded from the country's amnesty provisions. There has been no formal apology to the victims of the armed conflict or the genocide, who are often treated with contempt. The zero-sum game played by the military and the political and economic elites has been replicated by human rights movements. In other words, and for good reason, victims continue to demand justice and there

109 S. Kaplan, *Inclusive Social Contracts in Fragile States in Transition: Strengthening the Building Blocks of Success*. Washington: USIP (2017), 112-119.

110 *Case of Sepur Zarco*, Judgment C-01076-2012-00021 of 2, Guatemala, 26 February 26, 2016. *Case of Molina Theissen*, Judgment C-01077-1998-00002, Guatemala, 23 May 2018; and *Río Negro Massacre Case v. Guatemala*, Inter-American Court of Human Rights, Judgment of September 4, 2012, Preliminary Objection, Merits, Reparations and Costs, para.324.

111 Brett, 2016.

may be little likelihood that they would be amenable to the suggestion that perpetrators should enjoy a reduction in sentence if they were willing to provide some degree of information (truth) relating to crimes of the past, such as forced disappearance, homicide, extra-judicial execution, and so on. Victims have received almost no redress for their demands to the state; the military and police institutions have remained impervious to both victims' demands for justice and, on the whole, to pressure from the international community in this regard. Total intransigence on the part of the state has meant that victims have had little, if no reason to modify their perspectives relating to demands and rights. Moreover, the military itself has acted uniformly, signifying that there have been very few cases of individuals' breaking ranks to inform on the military, with the well-known exception perhaps of the two special forces (Kaibiles) officials who testified in the Plan de Sanchez case.¹¹² Threats of violence and the strong sense of hierarchy and cohesion within the Guatemalan military have signified that public dissent by former or acting officials has been rare. In this context, it is important to consider the impact on victims in suggesting to make concessions with respect to a reduction in sentences, when there has been no political will on the part of the state to satisfy their rights. Consequently, it is likely that victims and human rights movements would resist calls for such concessions: trust between themselves and the state remains extremely low, whilst at the same time they continue to receive threats and intimidation for their activism.

C. Reduction of sanctions for perpetrators in the ordinary criminal law framework

Despite significant progress in the peace agreements with respect to the normative dimensions of transitional justice and implementation of a range of mechanisms, the Guatemalan state continues to flout its obligations to provide victims with the satisfaction of their rights to justice, truth and reparations. Perpetrators are getting older and many of them are now dying in impunity, without contributing to the guarantee of justice, truth and reparations for the atrocities of the past, in particular with respect to crimes such as forced disappearance. Thousands of people have sought their relatives without a response.¹¹³ The lack of good faith on behalf of the state and political will of the government and military to deal with the past may mean that the victim movements may resist negotiations around penal sanctions.

In a scenario of good faith and legitimate interest with respect to repairing the damage to victims' rights, it is still not late to generate a broad debate with social organisations and the government. Conditional amnesties or other incentives for perpetrators, could be used to procure information and other remedies for victims, such as the location of the disappeared, dignification of victims' suffering or acknowledgements of wrongdoing by those responsible. A public debate and

112 The massacre at Plan de Sánchez occurred on 18 July 1982, when the Guatemalan military and Civil Defence Patrols murdered more than 250 people. The case was referred to the Inter-American Human Rights Commission, which subsequently referred the case to the Inter-American Human Rights Court. In 2004, the Court issued two judgements, establishing the Guatemalan state's liability and ordering an extensive package of compensation to the victims and survivors and relatives of those murdered. See Inter-American Court of Human Rights Case of the *Plan de Sánchez Massacre v. Guatemala* Judgment on reparations, 19 November 2004.

113 See Luke Moffett and Clara Sandoval, *Donde Estan Los Desaparecidos?* In Corte IDH blog, available at: <http://corteidhblog.blogspot.com/2018/11/donde-estan-los-desaparecidos.html>, accessed on 11 February 2020.

engagement on an alternative approach to dealing with the past could provide the basis of such a framework.¹¹⁴ The *Belfast Guidelines on Amnesty and Accountability* have studied the relevance of balancing states' multiple obligations and objectives in protecting human rights in light of the use of conditional amnesties to contribute to accountability. In this regard, Guidelines 2 and 5 indicate that although amnesties are designed to restrict prosecutions, limited amnesties can complement selective prosecution strategies. Moreover, conditional amnesties do not necessarily block the operation of non-prosecutorial accountability mechanisms, and the granting of individual amnesty can be conditioned on participation in accountability processes. However, currently in Guatemala these conditions do not exist. The Guatemalan government continues to pursue the policy of a blanket amnesty for all crimes committed in the past, and victims and their organisations do not trust that this discussion would be any different to what it was more than twenty years ago, and thus continue to seek maximalist justice and prison sanctions. Perspectives remain zero sum, and mistrust remains. This speaks to the failure of Guatemala to achieve broader goals of transitional justice in building social trust in state institution and a culture of human rights for all.

For a feasible and immediate response, the judicial system would have to take the initiative and implement specific measures aimed at changing the course of the rulings. In cases of serious human rights violations and crimes against humanity there exists no specific criteria under international law with respect to the degree to which sentences can be reduced by judges at the sentencing stage. Human rights treaties themselves employ terms such as proportional, adequate, and appropriate, leaving states some margin of appreciation to achieving in sentencing for such violations and crimes. The conventions that enshrine the obligation to punish do not strictly specify the imposition of a specific sanction.¹¹⁵ In this sense, Seils finds that 'neither international human rights treaties nor international human rights jurisprudence establish specific penalties for serious human rights violations. International treaties and other instruments establishing tribunals, like the Rome Statute, provide sentencing provisions, but do not bind states in respect of national proceedings.'¹¹⁶ Umprimny et al. have stated that international and regional courts have 'unambiguously understood that punishment should not be illusory and that criminal conduct requires a criminal penalty.'¹¹⁷

The Belfast Guidelines on Amnesty and Accountability have indicated that conditional amnesty processes can

'distinguish between different categories of offenders or crimes, the legal effects of the amnesty may differ between categories of beneficiaries. Offences that are more serious

114 According to the Belfast Guidelines on Amnesty and Accountability, public consultation or people's forum/citizen assembly in the design of a conditional amnesty may increase its legitimacy.

115 For instance, Articles 4 and 5, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Article 4(2), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 7(1), 2006 International Convention for the Protection of All Persons from Enforced Disappearance. See also Article 6, the Inter-American Convention to Prevent and Punish Torture; and Article 3, the Inter-American Convention on Forced Disappearance of Persons.

116 P. Seils, *Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace*, ICTJ (2015), p6.

117 Umprimny et al. (2014), p62-69. Case of the *Rochela Massacre v. Colombia*, Merits, Reparations and Legal Costs, Inter-American Court of Human Rights, 11 May 2007, para.196.

may receive only sentence reductions under the law, while less serious offences may obtain full amnesty. Such a tiered approach can provide an element of proportionality in the legal consequences for different categories of offenders and may thus increase an amnesty's legitimacy or legality.¹¹⁸

An innovative and exploratory proposal to implement measures of effective reduction of sanctions in exchange for effective contribution to victims' rights in the framework of the domestic Guatemalan criminal law could be timely and effective. In the absence of an open debate for the adoption of a transitional justice system, and specific measures of a conditional amnesty as an accountability contribution, Guatemalan judicial actors would be able to act under Article 2 of the Guatemalan Constitution: 'it is the duty of the State to guarantee the inhabitants of the Republic life, freedom, justice, security, peace and integral development of the person', and apply the internal criminal law of legal benefits for effective contribution to justice. Reducing prison sentences is not unknown in Guatemala. Indeed, the criminal code includes that possibility, and in particular in 2006 the Guatemalan Congress approved the Law against Organised Criminal Groups.¹¹⁹ This Law established an integral procedure of investigation and particular rules for negotiation between the judicial apparatus and the accused for effective collaboration in criminal investigation. As a consequence of the agreement, the accused may receive reduced sanctions in the case where three or more organised people commit crimes as drug trafficking, money laundering, terrorism, and homicide and kidnapping among others.¹²⁰

As long as there is no juridical obstacle, and such a reduction is not prohibited for other violations, such as crimes against humanity and genocide, then having this analysis in practical cases, either ex-officio or as a result of victims' demands, judges could mitigate the sentences of cooperative perpetrators. Judges could order a contribution to the right to the truth and reparation, and impose sanctions according to the dimension and effectiveness of their contribution to victims' rights. For example, in those cases in which the recovery of the remains of those killed or disappeared during the armed conflict is part of reparation measures due to victims, the judge could impose a reduced sanction if perpetrators made an effective contribution in terms of information that led to the recovery of remains. Alternatively similar mitigation could be made for sincere and effective apologies, contribution of a proportion of a state pension, statement of dignification of the victims' suffering and/or an accurate full account of the violations by convicted individuals.¹²¹

Guatemalan Criminal Law does not prohibit the reduction of sanctions in the cases of forced disappearances or extrajudicial executions, therefore no legal barrier exists for judges in these cases.¹²² In the consultations made to Guatemalan lawyers for this proposal, they coincided that some judges interpret the transactional law for effective collaboration with justice only for criminal

118 Transitional Justice Institute, University of Ulster (2013), p21.
 119 Decree 21.
 120 Article 2(a), (b), and (e).
 121 See 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147.
 122 Articles 201 ter and 132 bis, Criminal Code.

organisations related to corruption cases.¹²³ However, they also emphasised that any requirement for the application of the benefits of that mentioned Decree is a legal obstacle in applying to those cases relating to the violations of the armed conflict. On the contrary, interviewees argued that it would be an opportunity to understand the impact of transactional law in promoting and guaranteeing victims' rights. Therefore, within the framework of transactional law for effective contribution to justice, judges, as directors of the trial stage of the criminal process, would have the capacity to define legal benefits and a proportional reduction in the final sanctions against the accused.

Guatemala's domestic judicial apparatus is not limited by international law when deciding on the possible reduction of sentences for perpetrators as far as they contribute to the reparation of victims and the fulfilment of their rights. Moreover, there are internal legal tools in Guatemalan criminal law that are aimed at seeking progress in the guarantee of victims' rights. This approach would require at least three important conditions: i. the independence of the judicial system should be guaranteed; ii. the accused must understand the relevance of their testimony and receive a tangible incentive for participating in truth recovery or reparation measures; and iii. the contribution might be of such magnitude that the reduction of the sanction would represent the appropriate response from the justice system. Those Guatemalan lawyers that were consulted with respect to this proposal were emphatic in the continued lack of acceptance of criminal responsibility in cases of grave human rights violations, in terms of ongoing governmental, military and state support to the accused, as representing recurrent obstacles to obtaining collaboration in criminal procedures.¹²⁴ However, this proposal needs to identify and track down the concrete beneficiaries facing decades of criminal prosecutions who would potentially like to achieve a final decision in their cases.¹²⁵ The permanent interest from their supporters in promoting blanket amnesties may suggest that some of the offenders would be interested in considering an alternative and effective mechanism to put an end to these prosecutions. Moreover, perhaps it would be important to identify a conciliatory narrative through which to approach said perpetrators. In short, it may be expedient to emphasise to indicted persons that they would be making a significant step towards closing Guatemala's darkest historical period, by providing truth and reparation for victims, whilst also benefitting from a meaningful reduction in their sentence. The practical implementation of this proposal requires further research and dialogue with local actors, particularly given the current context favouring impunity in Guatemala.

IV. Conclusions

This report has sought to understand the path of transitional justice in the aftermath of Guatemala's internal armed conflict and genocide. The country's conflict came to an end through

123 Decree 21, 2006.
 124 Interviews GL1, GL2, GL3, 18/09/2019; GL4, GL5, 19/09/2019; GL6, GL7, GL8, 20/09/2019; GL9, 23/09/2019; GL10, 24/09/2019.
 125 Jo-Marie Burt and Paulo Estrada analyse who are the beneficiaries of the amnesty law. See <https://www.plazapublica.com.gt/content/quienes-se-benefician-con-la-amnistia>, accessed 16 January 2020.

a protracted, internationally monitored peace process which, in itself, established a series of key transitional justice mechanisms aimed at guaranteeing the rights of victims, including with respect to justice, truth and reparation. Given the intransigence of the country’s military toward making any concrete concessions with respect to victims’ rights, the provisions consecrating transitional justice mechanisms were, in the words of a Guatemalan human rights lawyer, “apparently full justice shored up by a robust clean amnesty”¹²⁶ On paper, Guatemala faced and sought accountability for its dark past by offering a full amnesty for political crimes, but not international crimes, whilst also approving a solid truth commission and reparations programme, amongst other transitional justice mechanisms. However, there was no deal agreed in terms of criminal benefits for perpetrators because the military refused to accept any responsibility for the crimes committed and thus any possibility of accountability for them.

The path towards the guarantee of victims’ rights did not go smoothly; the so-called *full justice provisions* ultimately derided the victims. The Guatemala case explicitly evidences how apparent full justice provisions may bring with them severe challenges for the satisfaction of victims’ rights. Firstly, the lack of progress with respect to a broad range of the provisions of the peace agreements meant that no significant transformation took place in political and economic terms. On the contrary, the political and economic elites, as well as the military, have maintained a stranglehold on the country. The judiciary and legal system more broadly speaking remains held hostage to clientelist networks and political interests, and are steeped in corruption.

Despite key changes brought about by the CICIG, impunity has remained excessively high; CICIG’s exit from the country does not bode well. In this context, the military has refused to accept responsibility for violations, whilst also rejecting any possible concessions that would lead towards meaningful conciliation and justice and truth for its victims. With the exit of CICIG from the country, human rights advocates have lost a key ally in the struggle against impunity. Moreover, with the assumption of Alejandro Giammattei to the presidency, in January 2020, concerns have been once more expressed by the national human rights community with respect to the possibility of an escalation in attacks against human rights defenders and the overturning of hard-won gains against corruption and impunity. President Giammattei is alleged to have ties with the Illegal Clandestine Security Apparatuses that precipitated the establishment of CICIG, and the so-called *Cofradía*, a group of elite military intelligence officials allegedly involved in organised crime, as well as being a close ally of former military officers accused of human rights violations.¹²⁷ Within this context, of course, even mechanisms that would have the effect of reducing potential sentences of convicted military perpetrators may be unlikely to gain much traction, given that the government once again represents a staunch ally for the military.

In this context lawyers and judges favouring the military accused of gross violations of human rights have strategically employed appeals to the amnesty provisions to prevent accountability for egregious violations, even when it has been abundantly clear that the crimes for which they were appealing amnesty were not *amnestiable*. Even in spite of said malicious litigation practices,

126 GL4, Interview, 19/09/2019.

127 See J. Burt and P. Estrada, *The Future of Accountability Efforts in Guatemala in the Balance as New Hard-Line Government Takes Office*, *International Justice Monitor*, January 2020.

there have been key advances with respect to specific legal cases, such as the *Molina Theissen* case, amongst others, principally due to the courage of victims – and in some cases judges – and the capacity of human rights lawyers.

No movement from the state or successive governments towards accepting accountability/responsibility for crimes, and justifiable maximalist demands from victims and the human rights movements for justice. In such a context of zero-sum perspectives the cogs of the wheels of transitional justice have come to a halt. As a consequence, and following on from contexts elsewhere, this report has suggested a distinct strategy – novel and innovative for the context of Guatemala – through which to address the severe restriction on the guarantee of victims’ rights to truth, justice and reparation in the context of Guatemala’s post-genocide, post-conflict scenario. Drawing upon conversations with legal scholars and lawyers and human rights activists in Guatemala and elsewhere, the report has proposed an approach that would seek to employ domestic criminal law to offer reductions of sentences for perpetrators in exchange for them providing an effective contribution to the satisfaction of victims’ rights, for example with respect to the recovery of remains of disappeared persons, which are key forms of reparation for victims of these crimes. We believe this approach to be potentially significant in terms of its innovative nature, although remain cautious as to its possible impact given both the ongoing intransigence of the Guatemalan military, government and elites, and the perspectives of victims and their organisations in a context in which the military and state have systematically rejected accountability and met victims’ demands with a wall of denial. Significantly, we would propose that any such approach be levied carefully with victims and their organisations; victims’ rights must not be sacrificed yet again in Guatemala.

Annex

Interviews

Interviewed	Date	Via
GL1 (Guatemalan Lawyer 1)	18-09-2019	Skype
GL2 (Guatemalan Lawyer 2)	18-09-2019	Call
GL3 (Guatemalan Lawyer 3)	18-09-2019	Skype
GL4 (Guatemalan Lawyer 4)	19-09-2019	WhatsApp
GL5 (Guatemalan Lawyer 5)	19-09-2019	Skype
GL6 (Guatemalan Lawyer 6)	20-09-2019	Skype
GL7 (Guatemalan Lawyer 7)	20-09-2019	Call
GL8 (Guatemalan Lawyer 8)	20-09-2019	Skype

Conclusions

GL9 (Guatemalan Lawyer 9)	23-09-2019	Skype
GL10 (Guatemalan Lawyer 10)	24-09-2019	Skype

Questionnaire

1. According to your experience, what is the level of satisfaction of victims' rights since the signing of the peace agreements in 1996?
2. What has been the response of the State to victims' reparation in legal cases?
3. What has been the response of the State to perpetrators' demands in terms of amnesty requests in legal cases?
4. What has been the perspective of victims with respect to their claims in the current legal process?
5. Do you think victims and survivors could consider the possibility for new strategic mechanisms through which to guarantee their demands in the framework of their individual criminal processes?
6. We are analysing the possibility of the development of measures of effective reduction of penal sanctions for perpetrators in exchange for their effective contribution to victims' rights within the framework of current domestic Guatemalan criminal law. Do you think it could be supported and implemented by prosecutors and lawyers? Accepted by victims and perpetrators?

Reparations, Responsibility

 Victimhood in Transitional Societies

**REALISING VICTIMS'
RIGHTS TO REPARATION,
TRUTH AND JUSTICE IN
GUATEMALA IN THE MIDST
OF A ZERO-SUM GAME**

March 2020

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