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## Ahora Dicen Que los Guatemaltecos Somos Genocidas: Now They Will See Us as Genocidal - When Due Process, Justice, and International Consensus Collide in Guatemala

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¡AHORA DICEN QUE LOS  
GUATEMALTECOS SOMOS GENOCIDAS!  
NOW THEY WILL SEE US  
AS GENOCIDAL!—  
WHEN DUE PROCESS, JUSTICE, AND  
INTERNATIONAL CONSENSUS COLLIDE  
IN GUATEMALA

Tony Godfrey\*

ABSTRACT

*In the thirty-six years between 1960 and 1996 it is estimated that more than 200,000 Guatemalans were killed, raped, and/or “disappeared.” International commissions have determined that nearly half of these killings occurred between 1980 and 1983, during the de facto presidency of Efraín Ríos Montt. On May 10, 2013, Ríos Montt became the first former head of state to ever be tried and convicted of genocide by a domestic court, specifically on charges of massacring 1,771 members of the indigenous Ixil group. On May 20, 2013, that conviction was stayed by Guatemala’s Court of Constitutionality in a three against two decision on a number of contested procedural technicalities, stirring strong dissents both within and outside the Court. This article will trace a brief history of the internal armed conflict that gave rise to one of the grossest abuses of human rights in the Western hemisphere, the trial proceedings of a historic case of first impression, and the ultimate decision by the Court of Constitutionality that derailed it all. Finally, this article will comment on the juridical and human rights implications of the Court’s decision.*

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## I. INTRODUCTION

## A. THE ATROCITIES

IN 1999 the UN-led Guatemala *Comisión para el Esclarecimiento Histórico*, or Historical Truth Commission (CEH), published the final report it was originally commissioned to write in 1994.<sup>1</sup> This report, *Guatemala: Memory of Silence*, utilized testimony from as many as 9,000 witnesses<sup>2</sup> to present documented stories of over 42,000 specific deaths and atrocities during the thirty-six year internal armed conflict.<sup>3</sup> Throughout its report, the Commission was clear that the violence could only be explained as attempted genocide, “since babies could not make war against a well-equipped armed force.”<sup>4</sup> Extrapolating from its case studies, the Commission’s final report estimated at least 200,000 deaths and victims of forced disappearances, with 81 percent of these occurring from 1981 to 1983.<sup>5</sup> Eighty-three percent of those killed were of indigenous Maya descent, and 17 percent were Latino.<sup>6</sup> The CEH also found that of all the human rights violations it could investigate, 93 percent were committed by the state, and 3 percent by the guerrillas.<sup>7</sup> But, the CEH never made a formal declaration of blame, as its mandate only included documenting the extensive and inexplicable loss of life during the internal conflict.<sup>8</sup>

According to the CEH report, in March 1982 a military junta led by then-General Efraín Ríos Montt enacted a *coup d’état* that gave it de facto power over the country.<sup>9</sup> As leader of this junta, Ríos Montt was Guatemala’s head of state until August 1983 when a change of military command passed the power to General Oscar Meija Victores.<sup>10</sup> General Victores issued a formal decree that provided general amnesty to any and all responsible or accused of responsibility for political crimes between March 23, 1982, and January 14, 1986, Victores’s last day in power.<sup>11</sup>

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1. Press Release, Press Conference by Members of Guatemalan Historical Clarification Comm’n, U.N. Press Briefing 19990301 (Mar. 1, 1999), available at <http://www.un.org/News/briefings/docs/1999/19990301.guate.brf.html>.
  2. *Id.*
  3. COMM’N FOR HISTORICAL CLARIFICATION, *GUATEMALA: MEMORY OF SILENCE* 17 (1999).
  4. Press Conference by Members of Guatemalan Historical Clarification Comm’n, *supra* note 2, at 2.
  5. *Efraín Ríos Montt & Mauricio Rodríguez Sánchez before the National Courts of Guatemala Background*, INT’L JUSTICE MONITOR, <http://www.riosmontt-trial.org/trial-background/> (last visited Apr. 15, 2014) [hereinafter INT’L JUSTICE MONITOR].
  6. COMM’N FOR HISTORICAL CLARIFICATION, *supra* note 3, at 17.
  7. *Id.* at 86.
  8. *Id.* at 11.
  9. *Id.* at 80.
  10. *Id.*
  11. Amnesty Law, Decree 8-86 (1986) (Guat.); see also Byron Rolando Vásquez, *Ríos Montt se acerca a amnistía, según Corte de Constitucionalidad* [*Ríos Montt is Approaching Amnesty Depending on Constitutional Court*], PRENSA LIBRE [FREE PRESS] (Oct. 23, 2013), [http://www.prensalibre.com/noticias/justicia/rios\\_montt-](http://www.prensalibre.com/noticias/justicia/rios_montt-)

Forty-eight percent of the total human rights violations in Guatemala occurred during 1982 alone.<sup>12</sup>

## B. HUMAN RIGHTS ACCOUNTABILITY INTERNATIONALLY AND DOMESTICALLY

Guatemala is by no means the only country to have experienced gross human rights atrocities<sup>13</sup> and Ríos Montt would not be the first former head of state to be tried for human rights atrocities. The highly publicized case of former Chilean dictator, General Augusto Pinochet, readily springs to mind.<sup>14</sup> Such prosecutions have been slowly mounting in to what some scholars have called a “justice cascade” since Pinochet’s arrest in 1998.<sup>15</sup>

When prosecuting members of state for human rights abuses, three fundamental legal avenues are utilized.<sup>16</sup> The first is international-multi-lateral tribunals organized by multinational organizations like the United Nations.<sup>17</sup> A well-known example of purely international accountability is the International Criminal Court (ICC).<sup>18</sup> This is also seen in “hybrid courts,” formed by special tribunals organized by multinational organizations, as used in the prosecution of Charles Taylor by the Special Court for Sierra Leone.<sup>19</sup> The second is a purely foreign prosecution, such as the case of Augusto Pinochet, tried in the United Kingdom under its laws.<sup>20</sup> Finally, there are the more traditional routes of domestic prosecution.<sup>21</sup>

The domestic route to accountability was the only viable road to the prosecution of Ríos Montt due to domestic and international Guatemalan obligations.<sup>22</sup> The final ceasefire in the decades-long civil war came in 1996 with the culmination of a number of accords and agreements signed over several years, known as the Agreement for a Firm and Lasting

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amnistia-corte\_de\_constitucionalidad-juicio\_genocidio-cc-masacre\_0\_1016298381.html# (quoting the Content Act of 1986).

12. INT’L JUSTICE MONITOR, *supra* note 5.

13. See HOTEL RWANDA (United Artists 2004).

14. David Connett, John Hooper & Peter Beaumont, *Pinochet Arrested in London*, THE GUARDIAN (Oct. 17, 1998), <http://www.theguardian.com/world/1998/oct/18/pinochet.chile>.

15. KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 3, 5 (2011).

16. *Id.* at 4.

17. *Id.*

18. *Id.*

19. *Id.* at 4–5; see Owen Bowcott, *Charles Taylor’s 50-Year Sentence Upheld at War Crimes Tribunal*, THE GUARDIAN (Sept. 26, 2013), <http://www.theguardian.com/world/2013/sep/26/charles-taylor-liberian-president-sentence-upheld>.

20. *Id.* at 4–5

21. SIKKINK, *supra* note 15, at 5.

22. See Christina M. Fetterhoff, *Ríos Montt Genocide Trial Tests Durability of Domestic & International Legal Protections*, HUMAN RIGHTS BRIEF (Apr. 16, 2013), <http://hrbrief.org/2013/04/rios-montt-genocide-trial-tests-durability-of-domestic-international-legal-protections/>.

Peace.<sup>23</sup> A key component of these accords, the Comprehensive Agreement on Human Rights, was signed on March 29, 1994,<sup>24</sup> and provided a commitment by the government to respect “human rights and international treaties, conventions and other instruments.”<sup>25</sup> In keeping with these accords, Article 16 of the Guatemalan Code of Criminal Procedure requires domestic courts and tribunals to fulfill Guatemala’s commitments to protect human rights and enforce its obligations under international treaties and laws.<sup>26</sup> These pledges to protect human rights and a legal obligation for domestic courts to fulfill the obligations of those pledges presented a clear, but restricted, route of domestic accountability for human rights abuses.

This domestic requirement of accountability has posed a particular problem for Guatemala: impunity. General Victores’s Amnesty Decree-Law 8-86, granting amnesty to all who acted during the rule of General Ríos Montt, was neither the first nor the last act of impunity for state officials.<sup>27</sup> In 1996, as a part of the final peace accords formally ending the internal conflict in Guatemala, the Law of National Reconciliation was passed.<sup>28</sup> This law granted impunity to all perpetrators during the civil war.<sup>29</sup> However, the Law of National Reconciliation expressly excludes its impunity for acts of genocide.<sup>30</sup> In fact, such political amnesty continues today as a constitutional right of all active state officials.<sup>31</sup>

Fortunately for Ríos Montt, his participation in the government of Guatemala did not end in 1982. After his removal as head of state in 1983, Ríos Montt maintained a strong position in government, founding a political party known as the Guatemala Republican Front and mounted several presidential campaigns via the party.<sup>32</sup> Despite these failed presidential campaigns he was granted immunity as a member of Congress

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23. Marcie Mersky, *Human Rights in Negotiation peace Agreements 1* (Int’l Council on Human Rights Policy, Working Paper, Mar. 2005), available at [http://www.ichrp.org/files/papers/58/128\\_-\\_Guatemala\\_-\\_Human\\_Rights\\_in\\_Negotiating\\_Peace\\_Agreements\\_Mersky\\_Marcie\\_\\_26\\_May\\_2005.pdf](http://www.ichrp.org/files/papers/58/128_-_Guatemala_-_Human_Rights_in_Negotiating_Peace_Agreements_Mersky_Marcie__26_May_2005.pdf).

24. *Id.*

25. Comprehensive Agreement on Human Rights, pmbl., Mar. 29, 1994, (Guat.) available at [http://www.usip.org/sites/default/files/resources/collections/peace\\_agreements/guat\\_hr\\_940329.pdf](http://www.usip.org/sites/default/files/resources/collections/peace_agreements/guat_hr_940329.pdf).

26. Decreto No. 51-92, Código Procesal Penal [Criminal Procedure Code] art. 16 (Guat.).

27. ANNE MANUEL & ERIC STOVER, HUMAN RIGHTS WATCH, GUATEMALA GETTING AWAY WITH MURDER 5 (1991), available at [https://s3.amazonaws.com/PHR\\_Reports/guatemala-getting-away-with-murder-1991.pdf](https://s3.amazonaws.com/PHR_Reports/guatemala-getting-away-with-murder-1991.pdf).

28. See Decreto No. 145-1996, 27 Dec. 1996, Ley de Reconciliación Nacional [National Reconciliation Act] art. 1 (Guat.)

29. *Id.* art. 2.

30. *Id.* art. 8.

31. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [POLITICAL CONSTITUTION OF THE REPUBLIC OF GUATEMALA] art. 161(a)-(b), amended by Acuerdo Legislativo No. 18-93, Nov. 17, 1993; Decreto No. 63-94, Ley Organica del Organismo Legislativo [Organic Law of the Legislative Branch] art. 54 (Guat.).

32. *Efrain Rios Montt & Mauricio Rodriguez Sanchez before the National Courts of Guatemala Who’s Who*, INT’L JUSTICE MONITOR, <http://www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-whos-who/> (last visited Apr. 15, 2014).

from 1990 to 2004, and from 2007 to 2012.<sup>33</sup> These impunity laws led the Inter-American Commission for Human Rights to rate Guatemala's impunity index at 98 percent; meaning that 98 percent of past human rights abuses remained unprosecuted in any way.<sup>34</sup>

### C. A PROSECUTION OF FIRST IMPRESSION

On March 19, 2013, after decades of legal wrangling, impunity of Guatemalan officials began to take a different course with the prosecution of Ríos Montt for acts of genocide during his time as *de facto* head of state.<sup>35</sup> The formal criminal indictment charged Ríos Montt with the intended killing of 1,771 Ixils (a Maya sub-group) in 72 separate operations,<sup>36</sup> and displacing 29,000 more.<sup>37</sup> Genocide is defined by the Guatemalan Criminal Code as the deliberate destruction, total or in part, of a national, ethnic, or religious group by killing members of the group, or compulsive displacement of children or adults of the group.<sup>38</sup>

## II. LEGAL BACKGROUND

### A. THE FRAMEWORK

To understand the complicated legal and procedural questions of the pending case staying Ríos Montt's historic conviction, one must appreciate the make-up of the Guatemalan judiciary and the unique, specific procedural motions argued.

The Constitution of Guatemala establishes a Court of Constitutionality "whose essential function is the defense of the constitutional order; it acts as a collegiate tribunal with independence from other organisms of the State and exercises specific functions assigned to it by the Constitution and the law in the matter."<sup>39</sup> One of these functions is to address on appeal any *amparos* brought before any of the tribunals of justice.<sup>40</sup> An *amparo* is a unique type of legal action created by the Constitution that deals specifically with the "threat, restraint, or violation of the rights which the Constitution and the laws guarantee."<sup>41</sup> In some ways an

33. *Id.*

34. Press Release, Inter-Am. Comm'n Human Rights, IAHCR Conducted Visit to Guat., No. 37/09 (June 12, 2009), available at <http://www.cidh.oas.org/Comunicados/English/2009/37-09eng.htm>.

35. Jerson Ramos, *Comienza debate por genocidio contra Efraín Ríos Montt [Debate begins for Genocide Against Efraín Ríos Montt]*, PRENSA LIBRE [FREE PRESS] (Mar. 20, 2013), [http://www.prensalibre.com/justicia/Rios-Montt-acusado-genocidio-mandato\\_0\\_885511628.html](http://www.prensalibre.com/justicia/Rios-Montt-acusado-genocidio-mandato_0_885511628.html).

36. Elisabeth Malkin, *Accused of Atrocities, Guatemala's Ex-Dictator Chooses Silence*, N.Y. TIMES, Jan. 27, 2012, at A11, available at <http://www.nytimes.com/2012/01/27/world/americas/efrain-rios-montt-accused-of-atrocities-in-guatemala.html>.

37. *Guatemalan Ex-Ruler Ríos Montt to Face Genocide Trial*, BBC NEWS (Jan. 28, 2013), <http://www.bbc.com/news/world-latin-america-21238765>.

38. Decreto No. 17-73, Código Penal de Guat. [Criminal Code of Guat.] art. 376.

39. Constitución Política de La República de Guatemala art. 268.

40. *Id.* art. 272(c).

41. *Id.* art. 265.

*amparo* may be thought of as a distinct action, in the same way that tortious and criminal actions are distinct.

With these two structures in mind, it is also relevant that the court before which Ríos Montt was tried was not a normal court, but the first meeting of High-Risk Tribunal A (Tribunal Primero A de Mayor Riesgo), comprised of Chief Judge Yazmin Barrios, Judge Patricia Bustamante, and Judge Pablo Xitumul.<sup>42</sup> Because the High-Risk Tribunal A is a criminal, not constitutional court, any legitimate *amparo* filed against the special tribunal would fall within the jurisdiction of the Court of Constitutionality after passing through the intermediary Courts of Appeals.<sup>43</sup>

## B. THE CASE PROPER

On May 10, 2013, the special High-Risk Tribunal A handed down a formal verdict of guilty against Ríos Montt on counts of genocide and sentenced him to eighty years in prison.<sup>44</sup> The verdict came in a weighty 718-page decision from the tribunal.<sup>45</sup> Ten days later, on May 20, 2013, that 718-page decision was stayed by the Court of Constitutionality in a three to two decision addressing four of the hundreds of *amparos* filed over the course of the month-long trial by Ríos Montt's ever-changing defense counsel.<sup>46</sup>

## C. THE BUILD-UP

On the first day of trial, March 19, 2013, Ríos Montt suddenly replaced his extensive defense team with a single attorney, Francisco Garcia Gudiel.<sup>47</sup> Gudiel testified that he was asked to take over Ríos Montt's defense by the defendant himself at 6:00 a.m., a mere two hours before the trial was set to begin.<sup>48</sup> While the tribunal initially recognized this bizarre and sudden change in representation, Gudiel repeatedly moved for the recusal of Chief Judge Barrios based on personal enmity between Gudiel and Barrios stemming from a previous case.<sup>49</sup> The tribunal consistently rejected Gudiel's call for recusal and ultimately expelled Gudiel from the courtroom for his outbursts—temporarily leaving the defendant

42. *Efrain Rios Montt & Mauricio Rodriguez Sanchez before the National Courts of Guatemala Who's Who*, *supra* note 31.

43. Constitución Política de La República de Guatemala art. 272(c).

44. PAULA WORBY, UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUATEMALA: BACKGROUND PAPER, Oct. 2013, at 18, available at <http://www.acnur.org/t3/uploads/media/9355.pdf?view=1>.

45. *Id.*

46. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 1 (Guat.), available at [http://www.prensalibre.com/noticias/justicia/Resolucion-CC-Exp1904\\_PREFIL20130522\\_0004.pdf](http://www.prensalibre.com/noticias/justicia/Resolucion-CC-Exp1904_PREFIL20130522_0004.pdf).

47. Emi MacLean, *Trial Opens with Statements, Prosecution Witnesses, After Defense Challenges Rejected*, INT'L JUSTICE MONITOR (Mar. 20, 2013), <http://www.riosmontt-trial.org/2013/03/trial-opens-with-prosecution-witnesses-after-defense-challenges-rejected/>.

48. *Id.*

49. *Id.*

without an attorney.<sup>50</sup> Ríos Montt was advised of his right to be represented by an attorney.<sup>51</sup> After Chief Judge Barrios insisted that a state-appointed public defender would step in to represent him, Ríos Montt stepped out of the courtroom to make a phone call and, within minutes, one of his prior attorneys entered the courtroom to continue his representation.<sup>52</sup>

#### D. THE ISSUE

The *amparo* before the Court of Constitutionality that stayed the verdict of Ríos Montt primarily dealt with the events of the first day of trial,<sup>53</sup> although it is stymied in a bog of procedural technicalities. The original question before the Court of Constitutionality was the validity of a ruling by the Third Chamber of the Court of Criminal Appeals on May 9, 2013, finding that the High-Risk Tribunal A's suspension of proceedings from April 19 until the reinstatement of Gudiel as Ríos Montt's defense counsel on April 30 complied with the Third Chamber's April 18 order granting interim relief by suspending the trial and reinstating Gudiel as Ríos Montt's counsel.<sup>54</sup> A long issue statement, but you read it correctly: Ríos Montt challenged the Third Chamber's conclusion that the High-Risk Tribunal A's suspension of trial and reinstatement of his chosen defense counsel complied with its order to the tribunal to suspend trial and reinstate Ríos Montt's chosen defense counsel.<sup>55</sup>

Ríos Montt's defense had argued repeatedly that Gudiel's expulsion from the courtroom on the first day of trial had temporarily denied Ríos Montt an attorney and it was not until April 30 that the tribunal reinstated Gudiel on Ríos Montt's trial team.<sup>56</sup> This, the defense argued, not only deprived Ríos Montt of representation for a few hours, but also of his own chosen representation for a majority of the trial.<sup>57</sup> While this question had been presented to various appeals courts and the Court of Constitutionality several times throughout the trial process, the issue appeared resolved when, on April 19, the trial was suspended in accordance with a decree from the Third Chamber of the Court of Criminal Appeals

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50. *Id.*

51. *Id.*

52. *Id.*

53. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 2.

54. *Id.* at 4.

55. *See id.*

56. Amy Ross, *More Battles in Ríos Montt Genocide Trial Even While Trial Remains on Leave Until Tuesday*, INT'L JUSTICE MONITOR (May 5, 2013), <http://www.riosmontt-trial.org/2013/05/more-legal-battles-in-rios-montt-genocide-trial-even-while-trial-remains-on-leave-until-tuesday/>.

57. *Id.*



on April 18,<sup>58</sup> and Gudiel was reinstated on April 30.<sup>59</sup>

In its decision on May 20 the Court of Constitutionality ordered the trial reset to April 19 due to the tribunal's failure to comply with the Third Chamber's orders related to Gudiel.<sup>60</sup>

### III. THE MAJORITY'S CRAZY-STRAW OF LOGIC

#### A. ACCEPTED FACTS BY THE COURT

The Court begins by making explicit findings of fact, pulled from Ríos Montt's complaint alone.<sup>61</sup> As stated previously, the beginnings of this issue come from Gudiel's expulsion on the first day of trial, as well as a refusal by the High-Risk Tribunal A to fully process Gudiel's motion for recusal of the judges on the tribunal.<sup>62</sup> Ríos Montt initially appealed this action by the High-Risk Tribunal A to the Third Chamber of the Court of Criminal Appeals, and was granted interim relief on April 18.<sup>63</sup> In accordance with the ruling of April 18, the High-Risk Tribunal A's ruling on March 19 expelling Gudiel was to be vacated, and trial suspended until such time as the ruling was vacated and Gudiel's motions for recusal were heard by the Tribunal.<sup>64</sup> The Court of Constitutionality pointed out that in order for the Tribunal to be found in compliance with the Third Chamber's ruling the trial would have to have been suspended by April 19th, the day the Tribunal was notified of the Third Chamber's grant of interim protection.<sup>65</sup> Immediately following this conclusion, the majority writes "it should be noted that, in effect, the underlying criminal proceeding was suspended from the above date [April 19]."<sup>66</sup>

#### B. THE RATIONALE

To this point the majority had found that initial rulings of the Tribunal should be vacated and trial suspended, that trial was suspended at the appropriate time, and the initial rulings were then vacated. But this was not enough for the majority to find compliance.

It should be noted that, in effect, the underlying criminal proceeding was suspended from the above date, but that suspension was not due to compliance of interim relief decreed on the 18th [by the Third Chamber] but decided *motu proprio* to wait for decisions by the Constitutional Court regarding the decision of the Tribunal to cancel

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58. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 2.

59. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 2069 (Dissent) (Guat.), available at [http://www.cc.gob.gt/index.php?option=com\\_content&view=article&id=941&Itemid=131](http://www.cc.gob.gt/index.php?option=com_content&view=article&id=941&Itemid=131).

60. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 13.

61. *Id.* at 8.

62. *Id.*

63. *Id.* at 9.

64. *Id.*

65. *Id.* at 10.

66. *Id.* (emphasis added).

criminal proceedings during the processing of appeal.<sup>67</sup>

The majority ruling of the court sets out a necessarily grandiose foundation for its ultimate ruling: if the constitution is not respected, the entire constitutional order will be ruptured.<sup>68</sup> It is with this importance of the rule of law in mind that the Law of *Amparo*, *Habeas Corpus*, and Constitutionality mandates the clean execution of decisions by the Court of Constitutionality, “whether original or confirming those of other courts”.<sup>69</sup> The Court then relies on its general authority of Article 72 of the Law of *Amparo*, *Habeas Corpus*, and Constitutionality to review not only judicial actions, but also the rationale behind those actions, even if they are actions ordered by other superior courts.<sup>70</sup> This is a gross misapplication of Article 72, as it not only stretches the implications of the Article for the court, but also misapplies the purpose of Article 72. In fact, Article 72 sets out the rights of a party aggrieved by a legal procedure or ruling to present their case to the Court of Constitutionality.<sup>71</sup> Nonetheless, the majority uses this provision to review and ultimately nullify decisions not only for their effects, but the rationale for the actions by a lower court.<sup>72</sup>

There is, finally, the issue of the rehearing of defense counsel’s motion for recusal of the judges sitting on the Tribunal.<sup>73</sup> It is important to note that the majority opinion expressly uses as its stipulations of facts those facts presented by Ríos Montt’s complaint.<sup>74</sup> According to this fact, even though trial was suspended on April 19 as required, and Gudiel reinstated on April 30 before trial began, and the record of the court indicated that at the hearing of April 30 Gudiel re-urged his motion for recusal,<sup>75</sup> the majority found that the Tribunal did not rehear the motion as ordered. On this issue the majority appeals to Article 67 of the Code of Criminal Procedure.<sup>76</sup> Again, the majority appears to misapply the Article. Article 67 sets out the proper procedure for presenting and hearing a motion for recusal, and if such a motion is presented at a hearing, “and that motion is rejected as manifestly unfounded, the hearing shall con-

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67. *Id.* (emphasis added).

68. *Id.* at 5.

69. *Id.* at 5–6.

70. *Id.* at 13.

71. See Ley de Amparo, Exhibición Personal y de Constitucionalidad [Law of Amparo, Habeas Corpus, and the Constitution], available at <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDs%20leyes/2006/pdfs/normativa/D001-86.pdf>.

72. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 13.

73. *Id.* at 16.

74. *Id.* at 1.

75. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013 (Dissent), 2067 (“in the audio recording of the respective hearing is found that this motion was only against the decision of the trial court ordering the expulsion of counsel, but not against the decision regarding disqualification”).

76. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 16–17.

tinue.”<sup>77</sup> There is nothing, based on the majority decision, to indicate that the motion was not heard and rejected as manifestly unfounded. On the contrary, as the dissents point out, the record indicates that this is exactly what happened.<sup>78</sup>

### C. THE ANNULMENT

Based upon its rationale, the majority ultimately affirms the complaint made by Ríos Montt against the Third Chamber.<sup>79</sup> In order to remedy the constitutional violations brought to light by Ríos Montt’s complaint, the court annuls all proceedings from April 18 and onward.<sup>80</sup> While trial was suspended from April 19 to April 30, proceedings did begin again after April 30, with a final verdict rendered on May 10.<sup>81</sup> With the majority’s ruling, those final proceedings and verdict no longer legally exist. It is this portion of the majority’s opinion, more than any other that has caused controversy and spurred such strong dissents from two of the five judges of the Court of Constitutionality.

#### 1. *The Stirring Dissents*

Each of the two dissenting judges filed separate opinions that highlight two major criticisms of the majority opinion and ruling. First, the purpose of an *amparo* is to protect the constitutional rights of the complainant and, if these rights are found to be violated, they are to be restored and protected.<sup>82</sup> Second, the *amparo* action in question is not truly one of constitutional rights, but one of procedure, and is thus outside the scope of the jurisdiction of the Court of Constitutionality.<sup>83</sup> The two dissents deal with these major concerns in turn.

### D. JUDGE ESCOBAR

The purpose of an *amparo* is to “protect people against threats of violations of their rights or to restore the same if any violation occurred.”<sup>84</sup> In the instant case, the rights in question are tangentially related to due process because the defendant’s chosen defense counsel, Gudiel, was expelled from the trial proceedings.<sup>85</sup> But, Gudiel had already been reinstated and his motions for recusal of the judges of the Tribunal revisited. Judge Escobar says clearly:

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77. Decreto No. 51-92, Código Procesal Penal [Criminal Procedure Code] art. 67.

78. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013 (Dissent), 2067.

79. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013, 20.

80. *Id.*

81. C-01076-2011-00015 of Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente. May 10, 2013 (Guat.).

82. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013 (Dissent), 2073.

83. *Id.* at 2068.

84. *Id.*

85. *Id.*

I believe that this Court's ruling exceeds the issues raised in complaint, given that the guarantee of constitutional justice is the restoration of violated rights, which effectively already happened as a result of the interim protection granted by this Court, in the records indicated. The resolution of the majority opinion departs from any procedural logic. The protection promoted sought a) the restoration of the defense attorney, and b) the hearing of the disqualification process. The Tribunal's suspension of the trial addressed these issues and restored the rights of the complainant.<sup>86</sup>

Judge Escobar acknowledges outright the maxim of *iura novit curia*, that the Court knows the law and is not limited to the legal arguments in the initial complaint to justify its analysis.<sup>87</sup> But, this maxim does not empower the Court to grant relief not requested by the petitioner.<sup>88</sup>

Judge Escobar does grant to the majority that the Tribunal suspended hearings not simply to comply with the granting of interim relief of the order of April 18 by the Third Chamber, but also to receive clarification from the Court of Constitutionality as to the validity and rationale for suspending trial proceedings.<sup>89</sup> Such a request for clarification is in line with Article 55 of the Law of *Amparo*, *Habeas Corpus* and Constitutionality.<sup>90</sup> The Court of Constitutionality, however, remained silent upon this request for clarification and the Tribunal chose to proceed through that silence.<sup>91</sup> Now, after failing to receive guidance from the Court of Constitutionality, and after the completion of trial with a verdict rendered, the Tribunal's actions have been annulled.<sup>92</sup>

With an *amparo* action meant to protect and restore rights of the complainant, it is difficult to understand a ruling that reinstates rights already reinstated. As the dissent later points out, such a double-reinstatement comes at the detriment of the rights of another party to these proceedings that to now have been largely ignored: the victims.<sup>93</sup>

While the majority opinion is couched in a grand vision of the importance of due process, Escobar's dissent points out that the Court's interpretation of Article 2 of the Constitution, wherein the protection of due process is found, also necessitates a full consideration of the facts to preserve "the confidence of the citizen towards the justice system within a rule of law."<sup>94</sup> It is difficult at best to believe that privileging a procedural issue on the level of a constitutional question at the expense of a decades-long trial process wherein thousands of victims seek justice

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86. *Id.* at 2069.

87. *Id.* at 2067.

88. *Id.* at 2068.

89. *Id.*

90. *Id.* at 2067; *see also* Ley de Amparo, Exhibición Personal y de Constitucionalidad [Law of Amparo, Habeas Corpus, and the Constitution], art. 55.

91. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013 (Dissent), 2068.

92. *Id.*

93. *Id.* at 2070.

94. *Id.* at 2071.

preserves such a confidence in the rule of law.<sup>95</sup> With the rights to due process of the victims in mind, one must not neglect the laws of Guatemala itself and the articles of the Code of Criminal Procedure set out to protect both defendants and victims.<sup>96</sup>

#### E. JUDGE CORADO

The second dissent does not address the same constitutional issues of due process that the majority relies on so heartily, or the protection of the unrepresented victims in the majority opinion. Instead, Judge Corado's criticism stems from two prongs.

The first is that the relief granted in an *amparo* action "should not create consequences that make worse the status of those named as parties in the underlying criminal prosecution."<sup>97</sup> While this may seem an echo of Judge Escobar's cries for justice and respect of the victims at the trial, he instead focuses on the overreaction of the majority opinion to the question at hand.<sup>98</sup> Judge Corado looks to the Court of Constitutionality's own prior decisions, highlighting the importance of a proportional approach to judgment, writing "the principle of proportionality involves analyzing the suitability of the employee's need and the weighty implication of a strict sentence."<sup>99</sup> Without a clear showing of continued damages to the complainant after April 19th, one cannot justify a total annulment of a completed criminal process in which a verdict has been rendered.<sup>100</sup> Even if the majority is right in its finding of a continued violation of rights, there are other, more traditional remedies for the specific injustices: namely, sanctions against the judges who allegedly refused to comply completely with the orders of their superior courts.<sup>101</sup>

The second prong of Judge Corado's dissent hits at the heart of the jurisdiction of the Court of Constitutionality, namely, issues of constitutional protection.<sup>102</sup> In line with his prior reasoning, Judge Corado points out that the complaint at issue before the Court of Constitutionality did not arise from the execution of the Tribunal's suspension of trial and reinstatement of Gudiel, but from its explanation of its rationale behind its execution.<sup>103</sup> With this in mind, not only is the purpose of the *amparo* to protect complainants from constitutional violations, as argued so emphatically by Judge Escobar, but also when complaints have remedies available to other normal legal procedures those processes ought to take

95. *Id.*

96. *Id.* at 2072; see Decreto No. 51-92, Código Procesal Penal [Criminal Code of Procedure], art. 3, 4, 13, 16, 19, 21.

97. Corte de Constitucionalidad [Court of Constitutionality], Expediente [Record] 1904-2013 (Dissent), 2073.

98. *Id.*

99. *Id.* at 2074 (quoting Judgment 3-2011).

100. *Id.*

101. *Id.* at 2073.

102. *Id.* at 2074.

103. *Id.*

precedence.<sup>104</sup> The Court of Constitutionality itself pointed out this same idea, and the potential abuse of the *amparo* should it be utilized as a procedural play, rather than a constitutional protection.

[It is] not the responsibility of *amparo* to replace the legal protection offered by the ordinary justice system, so that when claimed in this way it guarantees a violation occurring in a judicial process that must be avoided in order to divert constitutional justice to the improper purpose of reviewing the merits of the resolutions of ordinary courts, as the Court of Amparo does not act to decide the material and/or procedural claims of the parties, but are to examine whether or not the rights that the Constitution and applicable laws warrant and provide maximum protection of those rights.<sup>105</sup>

This purpose of *amparo* in mind, Judge Corado considers the issue—the validity of the Third Chamber’s determination that the Tribunal adequately executed its order to suspend trial and reinstate defense counsel Gudiel after it suspended trial and reinstated defense counsel Gudiel—to be a procedural question left to normal legal processes, and not an issue of constitutional rights relevant to the jurisdiction of the Court of Constitutionality.<sup>106</sup>

#### F. WHAT’S NEXT?

Unfortunately, the next steps in light of the majority’s opinion are hazy at best, and pose a number of problems should the trial move forward.

One of the clearest problems with the Court of Constitutionality’s trial reset ruling is that a verdict had already been read, and the defendant found guilty. This does not present an ongoing trial in the middle of a process, but a now guilty defendant. The termination of the trial removes the *amparo* as the proper method of remedy, and makes a special appeal of the verdict itself, perhaps in conjunction with an *amparo*, the proper means of challenging the tribunal’s verdict.<sup>107</sup> The Court of Constitutionality’s purposeful avilment of the knowledge of the verdict having been read calls a great deal of its decision into question, not the least of which the procedural basis upon which it ruled.

Perhaps most important are the problems faced by the prosecution and the unrepresented victims of the Ixil groups throughout these procedural mazes. During the initial trial, 98 victims testified to the atrocities experienced by themselves, their families, and their friends.<sup>108</sup> The ability to reconvene such a large number of witnesses—spread throughout rural ar-

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104. *Id.* at 2075.

105. *Id.* at 2076.

106. *Id.*

107. Decreto No. 51-92, Código Procesal Penal [Criminal Code of Procedure], arts. 415–22.

108. David Laconangelo, *Ríos Montt Trial to Resume in April 2014 While Witness Fear Deepens*, LATIN TIMES (June 10, 2013, 5:12 PM), <http://www.latintimes.com/articles/5025/20130610/rios-montt-trial-genocide-2014-witnesses-fear.htm#.Ung5OhYZeBk>.

eas across Guatemala—was a herculean feat to begin with and may not be repeatable. Throughout the trial many of Ríos Montt’s sympathizers criticized the proceedings as being anti-Guatemalan, with one prominent corporation running ads warning that because of the trial the world would see Guatemala as a state of genocide, saying loudly, “Now they will see us as genocidal!”<sup>109</sup> In light of the CEH reports, however, the international community had concluded long ago that Guatemala had experienced genocide. What this trial provided was the possibility of the first successful domestic prosecution of a former head of state by a country formerly rife with problems of impunity. Now, with the trial in flux and the Court’s ultimate failure to execute its guilty verdict, perhaps the cry should not be worries of the international community seeing Guatemala as genocidal, but as ineffective. Or worse, that domestic courts generally may not be capable of protecting the citizenry against large-scale human rights abuses despite the “justice cascade.”

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109. COMITÉ COORDINAR DE ASOCIACIONES AGRÍCOLAS, COMERCIALES, INDUSTRIALES, Y FINANCIERAS [COMMITTEE TO COORDINATE AGRICULTURAL, COMMERCIAL, INDUSTRIAL, AND FINANCIAL ASSOCIATIONS], [http://www.cacif.org.gt/index.php?option=com\\_content&id=1059&Itemid=468](http://www.cacif.org.gt/index.php?option=com_content&id=1059&Itemid=468) (last visited Apr. 15, 2014).

# Updates



