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Should Domestic Courts Prosecute Genocide? Examining the Trial of Efrain Rios Montt

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SHOULD DOMESTIC COURTS PROSECUTE GENOCIDE? EXAMINING THE TRIAL OF EFRAÍN RÍOS MONTT

*Jillian Blake**

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INTRODUCTION

Stating that “the future of international law is domestic,”¹ Anne-Marie Slaughter and William Burke-White argue that international law is moving beyond regulating relations between sovereign states and toward directly influencing domestic institutions by “strengthening [them], backstopping national governance, and compelling domestic action.”²

The crime of genocide is a case in point: grounded in an international treaty, it has compelled domestic courts to act. The 1948 International Convention on the Prevention and Punishment of Genocide (“Genocide Convention” or “Convention”) was the first law to explicitly ban genocide,³ defined as “any [number of] acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁴ While the Genocide Convention was international, it had a strong domestic component; it required states to both enact domestic legislation in conformity with its provisions⁵ and to prosecute geno-

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1. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 (2006).

2. *Id.* at 329.

3. Prior to the ratification of the Genocide Convention, German Nazi leaders were prosecuted for international crimes at the Nuremberg Trials between 1945 and 1946. *Nuremberg Trials*, HISTORY, <http://www.history.com/topics/nuremberg-trials> (last visited Nov. 18, 2013). At Nuremberg, the defendants were tried for crimes against peace (aggression), war crimes, and crimes against humanity; however, the defendants were not tried for genocidal acts committed during the Holocaust. *Id.*; see also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

4. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. For a comprehensive history of the Genocide Convention see SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002).

5. See *id.* art. 5 (“[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give

cide that took place within their territory.⁶ This was reasonable given that there was no permanent international criminal court at the time.⁷ The General Assembly also defeated a proposal to recognize universal jurisdiction as a means to prosecute genocide in the Convention,⁸ which would have allowed states to prosecute genocide that took place outside of their territory.⁹

Although states were originally charged with the responsibility to prosecute the crime, domestic courts did not act for decades;¹⁰ several states were slow to join the Convention,¹¹ and

effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide”). The Convention only requires domestic incorporation of the Convention in general terms and for states to determine punishment; it does not require that states incorporate the exact Convention definition of genocide. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 346–48 (2000).

6. Genocide Convention, *supra* note 4, art. 6 (“[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . .”).

7. The permanent International Criminal Court (“ICC”) was established by the Rome Statute, which was adopted in 1998 and entered into force in 2002. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. While there was no permanent court when the Genocide Convention was established, the Convention did contemplate such a body. See Genocide Convention, *supra* note 4, art. 6.

8. U.N. GAOR, 3rd Sess., 100th mtg. at 406, U.N. Doc. A/C.6/SR.100 (Nov. 11, 1948).

9. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 28 (2001) (“universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, . . . the nationality of the victim, or any other connection to the state exercising such jurisdiction”).

10. One notable exception was the prosecution of Nazi war criminal Adolf Eichmann for “crimes against the Jewish people,” which was the crime of genocide specifically against the Jewish people, under universal jurisdiction in Israel in 1961. See Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 401 (1961).

11. Many states did not join the Convention until years after it entered into force. Of the current 144 parties, sixty-three joined after 1980; the United States did not ratify the Convention until 1988. *Status of the Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-

many that joined did not enact municipal statutes criminalizing genocide, presumably working under the assumption that their treaty obligations or municipal laws criminalizing underlying offenses, such as murder, were sufficient.¹² With the exception of a few domestic trials involving the prosecution of crimes similar to the internationally defined crime of genocide,¹³ no one was convicted of the offense until 1998¹⁴ when the ad hoc international tribunal, the International Criminal Tribunal for Rwanda ("ICTR"), convicted Jean-Paul Akayesu, the mayor of a Rwandan town, for his role in the country's 1994 genocide of the Tutsi ethnic minority group.¹⁵ The ICTR has now ruled on seventy-five cases.¹⁶ In 2001, shortly after the ICTR's Akayesu conviction, the International Criminal Tribunal for the former Yugoslavia ("ICTY") made its first genocide conviction of the Serbian military officer Radislav Krstić, for the killing of Bosnian Muslims in the 1995 Srebrenica massacre.¹⁷ The ICTY has now decided 136 cases.¹⁸

1&chapter=4&lang=en (last visited Jan. 20, 2014) [hereinafter *Status of the Genocide Convention*].

12. Jan Wouters & Sten Verhoeven, *The Domestic Prosecution of Genocide*, in *ELEMENTS OF GENOCIDE* 177, 177 (Paul Behrens & Ralph Henham eds., 2013).

13. See WILLIAM SCHABAS, *National Courts Finally Begin to Prosecute Genocide, 'The Crime of Crimes,'* in *WAR CRIMES AND HUMAN RIGHTS: ESSAYS ON THE DEATH PENALTY, JUSTICE, AND ACCOUNTABILITY* 689, 689 n.3 (2008) [hereinafter SCHABAS, *National Courts Finally Begin to Prosecute Genocide*] (noting the trials of Pol Pot and Ieng Sary in Cambodia in 1979, while also noting that these prosecutions were for crimes closer to the modern definition of crimes against humanity than to the definition of genocide).

14. Johan D. Van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT'L L.J.* 286, 287 (1999).

15. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 734 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

16. *Status of Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Aug. 1, 2013) (most cases involve some genocide charge, but not all).

17. Prosecutor v. Krstić, Case No. IT-98-33, Judgment, ¶ 653 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>. In the massacre, Serb forces killed more than 8000 Muslim men and boys in the town of Srebrenica in July 1995. *Id.* ¶ 84.

18. *Key Figures of the Cases*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sections/TheCases/KeyFiguresoftheCases>

Domestic courts have also prosecuted genocide more aggressively in recent years.¹⁹ For example, domestic courts in Rwanda,²⁰ Croatia, and Bosnia and Herzegovina²¹ have been prosecuting individuals not prosecuted by the ICTR and ICTY. In addition, domestic Canadian²² and European courts have started to prosecute individuals for genocide offenses committed outside of their territory under universal jurisdiction.²³

In 2013, in a highly publicized case, Efraín Ríos Montt, the de facto leader of Guatemala from 1982–1983, was ordered to stand trial for genocide in Guatemala for the deaths of at least 1771 Ixil Mayan people during the most violent period of the

(last visited Aug. 1, 2013) (many cases involve genocide charges, but not as many as in the ICTR cases).

19. Kathryn Sikkink has referred to the general increase in prosecutions for international crimes as a “justice cascade.” KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 5 (2011). Sikkink finds “a dramatic new trend in world politics toward holding individual state officials, including heads of state, criminally accountable for human rights violations.” *Id.* According to Sikkink, “justice cascade means that there has been a shift in the legitimacy of the norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm.” *Id.*

20. In 1996, Rwanda enacted Organic Law No. 08/96, which allowed domestic criminal courts to prosecute genocide. Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 *DENV. J. INT’L L. & POL’Y*, 125, 131 (2008). In 2001, the Rwandan government created special courts, called Gacaca courts, to prosecute genocide cases. *Id.* at 125. Domestic military tribunals have also prosecuted individuals responsible for genocide in Rwanda. *Id.* at 133.

21. See *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, HUM. RTS. WATCH 3 (Oct. 14, 2004), <http://www.hrw.org/node/11965/section/3>.

22. See, e.g., *Rwanda Genocide Refugee Acquitted at Canadian War Crimes Trial*, TORONTO STAR (July 5, 2013), http://www.thestar.com/news/canada/2013/07/05/canadian_court_acquits_rwandan_refugee_of_genocide.html; *The World Prosecutes Rwanda’s Genocide*, GLOBAL POST (June 21, 2013), <http://www.globalpost.com/dispatch/news/afp/130621/the-world-prosecutes-rwandas-genocide> (“In 2009, a Rwandan militia leader, Desire Munyaneza, found guilty of war crimes, genocide and crimes against humanity in Canada’s first war crimes trial for his role in the genocide, was sentenced to life in prison.”).

23. See Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe: 1998–2008*, 30 *MICH. J. INT’L L.* 927, 931–58 (2009).

country's thirty-six-year-long civil war.²⁴ The trial was historic; Ríos Montt became the first former head of state to be tried for genocide in his home country.²⁵ James A. Goldston, executive director of the Open Society Justice Initiative, remarked, "[T]his first-ever domestic genocide trial of a former head of state is a high profile test of whether national courts and governments, not just international tribunals, can fulfill their responsibility to pursue justice for grave crimes."²⁶

This Article looks at that test and asks: should domestic courts prosecute genocide?²⁷ The Article argues that domestic prosecution of genocide is not inherently negative or positive, but could further certain goals of international criminal justice at the expense of others because the "goals do not constitute a

24. See Elisabeth Malkin, *In Effort to Try Dictator, Guatemala Shows New Judicial Might*, N.Y. TIMES, Mar. 17, 2013, at A1; Jo Tuckman, *Former Guatemalan Dictator José Efraín Ríos Montt Goes on Trial*, GUARDIAN (Mar. 19, 2013), <http://www.theguardian.com/world/2013/mar/19/guatemalan-dictator-jose-fran-rios-montt-trial>.

Prosecutors are hoping to prove that Ríos Montt must have been aware, and was consequently responsible for, a set of atrocities that resulted in the deaths of at least 1,771 Ixil Mayans in three towns in the country's western highlands while he was head of the government and counterinsurgency strategy.

Id.

25. *Trial Background, The Trial of Efraín Ríos Montt & Mauricio Rodríguez Sanchez*, OPEN SOCIETY JUSTICE INITIATIVE, <http://www.riosmontt-trial.org/trial-background/> (last visited Jul. 6, 2013) [hereinafter *Background: Ríos Montt & Rodríguez Sanchez Trial*].

26. James A. Goldston, *When Grave Crimes Elude Justice*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/05/30/opinion/global/when-grave-crimes-elude-justice.html> (arguing that the role of domestic courts in prosecuting mass atrocity crimes is particularly important given that the ICC only convicted one individual in its first ten years).

27. This question is similar, although not identical, to the question posed above: should domestic courts prosecute crimes against humanity and/or war crimes? While this Article focuses on the crime of genocide, many prosecutions for genocide include charges of crimes against humanity and/or war crimes. One significant difference between these crimes is that although the crime of genocide and laws of war are codified in international treaties (the Genocide and Geneva Conventions), a separate international treaty does not currently prohibit crimes against humanity. See M. Cherif Bassiouni, *Crimes Against Humanity*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/crimes-against-humanity/> (last visited Dec. 1, 2013) However, genocide, crimes against humanity, and war crimes are all prohibited under the Rome Statute to the ICC. Rome Statute, *supra* note 7, arts. 6–8.

harmonious whole; rather they pull in different directions.”²⁸ While the domestic prosecution of genocide (in the country where it occurred) better satisfies legal jurisdiction requirements and serves the goals of transitional justice, it may do so at the expense of traditional criminal justice goals (including victims’ rights) and defendants’ right to a fair trial and due process. The international community, including countries that have experienced genocide, should analyze the most important goals in prosecution in deciding whether to refer a case to the International Criminal Court (“ICC”), allow a foreign court to prosecute the crime, or prosecute the crime at home.

Part I of this Article provides background on the Guatemalan Civil War and Efraín Ríos Montt’s role in the genocide of indigenous peoples during the war. Part II describes the various venues available for prosecuting genocide, including domestic and international courts, and explains the role that each has played in the Ríos Montt genocide case. Part III outlines the major issues in the domestic prosecution of genocide, especially in countries with developing judicial systems. These issues are divided into four categories: jurisdiction, defendants’ right to a fair trial and due process, goals of criminal justice, and goals of transitional justice. Within the context of these considerations, the Article examines the case of Efraín Ríos Montt—a case that illustrates benefits and drawbacks of domestically prosecuting genocide. Part IV suggests ways to mitigate the tension between competing goals of justice in the prosecution of international crimes such as genocide.

I. THE GUATEMALAN CIVIL WAR, GENOCIDE, AND EFRAÍN RÍOS MONTT

The modern history of Central America, from roughly the end of World War II to the end of the Cold War, was strongly influenced by the United States and its anti-communist foreign policy. During this period, Central America “was afflicted by long civil wars based on ideology and several military interventions by . . . the United States.”²⁹

28. Mirjan R. Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008).

29. ARIE M. KACOWICZ, *ZONES OF PEACE IN THE THIRD WORLD: SOUTH AMERICA AND WEST AFRICA IN COMPARATIVE PERSPECTIVE* 183 (1998).

Guatemala in particular experienced the longest regional civil war, which lasted thirty-six years (1960–1996) and took the lives of more than 200,000 Guatemalans.³⁰ The war began six years after the United States Central Intelligence Agency (“CIA”)-sponsored overthrow of democratically elected leftist president Jacobo Árbenz in 1954,³¹ a “turning point in Guatemalan history.”³² The United States saw the Árbenz regime’s agrarian reform program, which expropriated some lands held by U.S. companies, as a threat to its commercial interests.³³ Furthermore, it viewed Árbenz as “soft’ on communism” and therefore perceived him as “a threat to U.S. security” interests as well.³⁴ Colonel Carlos Castillo, leader of a U.S.-friendly autocratic military junta, replaced Árbenz in a coup.³⁵ Castillo was assassinated in 1957, and different military leaders ruled Guatemala in the late 1950s and early 1960s.³⁶

In 1960, left-wing Guatemalan military officers launched a failed revolt after the Guatemalan government allowed the CIA to use Guatemalan territory to train Cuban exiles for the Bay of Pigs invasion.³⁷ The surviving rebels retreated to the hills and formed the Movimiento Revolucionario 13 de Noviembre (“MR-13”) insurgency, which later merged with the Guatemalan Labor Party (Partido Guatemalteco del Trabajo or “PGT”) to form the Rebel Armed Forces (Fuerzas Armadas Rebeldes or “FAR”).³⁸

In the late 1960s, the Guatemalan government, with U.S. military assistance, launched counterinsurgency attacks against rebels throughout the country.³⁹ Julio César Méndez

30. E. BRADFORD BURNS & JULIE A. CHARLIP, *LATIN AMERICA: A CONCISE INTERPRETIVE HISTORY* 300 (7th ed. 2002).

31. *See id.* at 243, 300.

32. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 352 (5th ed. 2001).

33. *Id.* at 349–50.

34. *Id.* at 351.

35. *Id.* at 352.

36. *Id.*

37. BURNS & CHARLIP, *supra* note 30, at 301.

38. *See* SUZANNE JONAS, *THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER* 66–67 (1991).

39. Douglas Farah, *Papers Show U.S. Role in Guatemalan Abuses*, WASH. POST (Mar. 11, 1999), <http://www.washingtonpost.com/wp-srv/inatl/daily/march99/guatemala11.htm> (“During the 1960s, the United States was intimately involved in equipping and training Guatemalan securi-

Montenegro, president of Guatemala from 1966–1974, led the government campaign with brutal tactics, and the Mano Blanca (“White Hand”), a paramilitary death squad, targeted government dissidents.⁴⁰ The leftist revolutionaries “initially obtained the support of some indigenous Maya, who viewed the guerillas as the last hope for redressing the economic and political marginalization of the indigenous communities.”⁴¹ This led the government forces to conclude that Mayan communities were “natural allies” of the insurgents and, therefore, “enemies of the state.”⁴² Government military strategists also “added racist fears, amplified by Guatemala’s apartheid-like social system, that Mayans were easily manipulated by outsiders . . . or that their participation in the insurgency was driven by a desire for racial vengeance.”⁴³

The conflict between guerilla insurgencies and the government continued throughout the 1970s,⁴⁴ and the guerilla groups united under the Revolutionary National Unity of Guatemala (Unidad Revolucionaria Nacional Guatemalteca or “UNRG”) in 1982.⁴⁵ Repression by government forces increased in the 1970s and 1980s, and the conflict radicalized.⁴⁶ Ríos Montt came to power in a 1982 military coup, launching the National Plan of Security and Development (Plan Nacional de Seguridad y Desarrollo or “PNSD”), which, by claiming a strong link between national security and development, called for the

ty forces that murdered thousands of civilians in the nation’s civil war, according to newly declassified U.S. intelligence documents.”).

40. BURNS & CHARLIP, *supra* note 30, at 301; see Declassified Intelligence Note of U.S. Dep’t of State, Guatemala: A Counter-Insurgency Running Wild? (Oct. 23, 1967), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB32/docs/doc05.pdf>.

41. *Guatemala: Silent Holocaust: The Mayan Genocide*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=294> (last visited July 3, 2013).

42. *Id.*

43. Greg Grandin, *Politics by Other Means: Guatemala’s Quiet Genocide*, in QUIET GENOCIDE, GUATEMALA 1981–1983, at 1, 9–10 (Etelle Higonnet ed., Marcie Mersky trans., 2009).

44. See *Background on Guatemala*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=294> (last visited Dec. 1, 2013).

45. *Quines Somos (“Who We Are”)*, UNIDAD REVOLUCIONARIA NACIONAL GUATEMALTECA [GUATEMALAN REVOLUTIONARY NATIONAL UNITY, UNRG], <http://www.urng-maiz.org.gt/quienesomos.html> (last visited Dec. 1, 2013).

46. See Grandin, *supra* note 43, at 7.

“extermination of subversive elements.”⁴⁷ From 1982 to 1983, “the bloodiest period in Guatemala’s history,” the military launched operations in 626 Mayan villages.⁴⁸ During these operations, government forces systematically raped, tortured, and murdered thousands of civilians and destroyed hundreds of villages as part of a “scorched earth” campaign.⁴⁹ The vast majority of the civilians killed in the campaigns were indigenous Mayans.⁵⁰

In 1983 Ríos Montt was pushed out of power in another military coup and replaced by General Mejía Victores.⁵¹ Under pressure from the international community, Mejía Victores allowed a gradual transition to democracy, holding elections for a Constituent Assembly and drafting a Constitution.⁵² He also issued Decree 8-86, which granted amnesty for political crimes committed between 1982 and 1986.⁵³ A civilian, Vinicio Cerezo, was elected president in 1985.⁵⁴ He was succeeded by a number of civilian leaders, including de León Carpio and Álvaro Arzú,⁵⁵ who engaged in U.N.-backed peace talks with the UNRG.⁵⁶

The year 1996 marked the official end to the Civil War with the signing of peace accords and the passage of the National Reconciliation Law.⁵⁷ This law granted amnesty for many crimes committed during the war,⁵⁸ but crimes of genocide were

47. *Timeline of Events: The Trial of Efraín Ríos Montt & Mauricio Rodríguez Sanchez*, OPEN SOC’Y JUSTICE INITIATIVE, <http://www.riosmontt-trial.org/trial-background/timeline-of-events/> (last visited Jul. 3, 2013) [hereinafter *Timeline: Ríos Montt & Rodríguez Sanchez Trial*].

48. *Guatemala: Silent Holocaust: The Mayan Genocide*, *supra* note 41.

49. *Id.*

50. *See id.*

51. *Timeline: Ríos Montt & Rodríguez Sanchez Trial*, *supra* note 47.

52. *See Constitutional Limits on Government: Country Studies—Guatemala*, DEMOCRACY WEB, <http://www.democracyweb.org/limits/guatemala.php> (last visited Dec. 1, 2013).

53. *Timeline: Ríos Montt & Rodríguez Sanchez Trial*, *supra* note 47.

54. *Guatemala: Civil War Years*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/701217/Guatemala/272510/Civil-war-years#ref468098> (last visited Nov. 29, 2013).

55. SKIDMORE & SMITH, *supra* note 32, at 353.

56. *Id.*

57. Decreto No. 145, 27 December 1996, Ley de Reconciliación Nacional [National Reconciliation Act], 54 DIARIO DE CENTRO AMERICA (Guat.).

58. *Id.* art. 2.

explicitly excluded.⁵⁹ In 1999, the U.N.-sponsored truth commission, the Commission for Historical Clarification, published its final report, which concluded that the Guatemalan state “committed acts of genocide against groups of Mayan people” during Ríos Montt’s rule.⁶⁰ It also found that state security forces committed 93% of the documented human rights violations.⁶¹

II. PROSECUTING GENOCIDE: DOMESTIC AND INTERNATIONAL COURTS

Following the signing of the peace accords and conclusion of the Civil War, indigenous and human rights groups campaigned to bring the Guatemalan leaders responsible for genocide to justice.⁶² The Guatemalan case demonstrates the various venues available for the prosecution of genocide and their complications in the modern international legal system. Courts that could potentially prosecute genocide include domestic courts exercising universal jurisdiction, the ICC, ad hoc courts (e.g., the ICTY and ICTR), hybrid courts, or domestic courts exercising territorial and/or personal jurisdiction. The Ríos Montt case started as a universal jurisdiction case in Spain and eventually was tried in a Guatemalan court with territorial and personal jurisdiction. Notably, charges against Ríos Montt for genocide have been pursued exclusively in domestic courts.

59. *Id.* art. 8 (“The termination of criminal responsibility in this law will not apply to crimes of genocide”) (translation by author).

60. COMISIÓN PARA EL EXCLARECIMIENTO HISTÓRICO [COMMISSION FOR HISTORICAL CLARIFICATION, CEH], GUATEMALA: MEMORY OF SILENCE, ¶ 122 (1994), *available at* http://shr.aaas.org/projects/human_rights/guatemala/ceh/mos_en.pdf (“[T]he CEH concludes that agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people.”).

61. *Id.* ¶ 15.

62. In addition to individual criminal charges (the focus of this Article), a complaint was filed against the state of Guatemala in the Inter-American Court of Human Rights in 1996. *See Blake v. Guatemala*, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 27 (July 2, 1996). In 2004, the court found that Guatemala was liable for a massacre in a Mayan village in 1982 and ordered the state to pay compensation to victims and their families. *See Plan de Sánchez Massacre v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 105 (Apr. 9, 2004).

A. Domestic Courts, Universal Jurisdiction

In 1999, a group led by indigenous Guatemalan Nobel Peace laureate Rigoberta Menchú brought the first charges for genocide against Ríos Montt and other former high-level Guatemalan officials (known as the “Guatemala Genocide Case”) in domestic Spanish courts under universal jurisdiction.⁶³ Spain adopted a universal jurisdiction law in 1985, which authorized domestic courts to try genocide crimes (and other serious crimes prohibited by international treaty) without a territorial or personal link to Spain.⁶⁴ In the Guatemala Genocide Case the trial judge ruled that the Spanish court had jurisdiction on the basis of the severity of the crimes alleged.⁶⁵ Furthermore, “the judge noted that several of the victims were Spanish or had died on Spanish territory.”⁶⁶ “[T]he judge [also] introduced a notion of ‘subsidiarity’ into the case—the idea that universal jurisdiction is required and justified when domestic courts have failed to address a particular matter themselves.”⁶⁷

On appeal, the Supreme Court found that universal jurisdiction could not be exercised without a “connecting nexus” to Spain.⁶⁸ The court therefore found that investigations could be pursued only into the charges of attacks against Spanish citizens, and not into terrorism and genocide charges against indigenous Mayans.⁶⁹ On the issue of subsidiarity, the court found that “national courts should not be making judgments [on another state’s ability to administer justice], which could

63. *Rigoberta Menchu et al. v. Ríos Montt et al.* (“Guatemala Genocide Case”), *Complaint*, ASSER INSTITUTE, CENTRE FOR INTERNATIONAL AND EUROPEAN LAW, http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Spain/Guatemala_Complaint_02-12-99.pdf (last visited Jul. 4, 2013).

64. Ley Orgánica del Poder Judicial [L.O.P.J.] [Organic Law of the Judicial Power] art. 23(4)(a) (B.O.E. 1985, 6) (Spain), as amended by Ley Orgánica del Poder Judicial [L.O.P.J.] [Organic Law of the Judicial Power] art. 1 (B.O.E. 2009, 1) (Spain).

65. Kaleck, *supra* note 23, at 956.

66. Naomi Roht-Arriaza, *International Decisions—Guatemala Genocide Case*, 100 AM. J. INT’L L. 207, 208 (2006) [hereinafter Roht-Arriaza, *International Decisions*] (noting that in 1980 the “Spanish ambassador was injured and several embassy employees were burned to death in a firebombing attack on [the Spanish Embassy in Guatemala City]”).

67. *Id.*

68. Kaleck, *supra* note 23, at 956.

69. Roht-Arriaza, *International Decisions*, *supra* note 66.

have an important effect on foreign relations and should [therefore] be left to the political branches.”⁷⁰

In September 2005, the Spanish Constitutional Court reversed the Supreme Court’s decision, finding that the exercise of universal jurisdiction was appropriate.⁷¹ The Spanish Constitutional Court then issued arrest warrants for several suspects, including Ríos Montt, in 2006.⁷² In 2007, the Guatemalan Constitutional Court dismissed the charges, finding that the Spanish court’s exercise of universal jurisdiction violated Guatemala’s sovereignty.⁷³ Although Spanish courts never tried Ríos Montt or other former Guatemalan officials,⁷⁴ the Spanish courts took testimony from victims and experts between 2008 and 2009.⁷⁵

B. The International Criminal Court, Ad Hoc and Hybrid Courts

International ad hoc and hybrid tribunals and the ICC did not play a role in the Guatemala case. Because the alleged genocide crimes were committed well before the Rome Statute entered into force in 2002,⁷⁶ referral to the ICC was not an option in the Ríos Montt case.⁷⁷ It is unclear whether Guatemala would have referred the case to the ICC even if it were possible.⁷⁸ However, the country did become a state party to the

70. *Id.* at 208-09.

71. Naomi Roht-Arriaza & Alumdena Bernabeu, *The Guatemalan Genocide Case in Spain*, BERKELEY REV. LATIN AM. STUD., Fall 2008, http://www.cja.org/downloads/Guatemala_U.C.Review_fall08.pdf.

72. Kaleck, *supra* note 23, at 956–57.

73. *Id.* at 957.

74. Spanish courts cannot try individuals in absentia. *The Spanish National Court*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?id=342> (last visited Feb. 21, 2014).

75. *Background: Ríos Montt & Rodriguez Sanchez Trial*, *supra* note 25.

76. *See* Rome Statute, *supra* note 7.

77. Under the legal principles *nulla poena sine lege* and *non-retroactivity ratione personae*, established in the Rome Statute, the court can “punish only in accordance with this Statute” and “[n]o person shall be criminally responsible . . . for conduct prior to the entry into force of the Statute.” Rome Statute, *supra* note 7, arts. 23–24.

78. At the time the charges were brought, the president of Guatemala, Otto Perez Molina, was a retired military officer and potentially implicated in genocide crimes committed during counterinsurgency operations in Mayan villages in the 1980s. *See* Mica Rosenberg & Mike McDonald, *Special Report: New Guatemala Leader Faces Questions about Past*, REUTERS, Nov. 11, 2011,

Rome Statute in 2012,⁷⁹ giving the ICC complimentary jurisdiction⁸⁰ over any genocide that is perpetrated in Guatemalan territory after 2012.⁸¹ The presence of the U.N.-sponsored truth commission in the 1990s “showed that the United Nations was familiar with conditions in Guatemala and that it had nevertheless not decided to create an ad hoc tribunal along the lines of those for Rwanda and the former Yugoslavia.”⁸² In the 2000s, the U.N. established hybrid tribunals for Sierra Leone (this court did not have subject matter jurisdiction over genocide),⁸³ East Timor, and Cambodia.⁸⁴ The U.N. notably did not establish a tribunal for Guatemala.

C. Domestic Courts in Guatemala: The Recent Trial of Ríos Montt

While the universal jurisdiction case in Spain stalled, changing conditions in Guatemala made domestic prosecution possible there.⁸⁵ First, in 2006, Guatemala established the Interna-

available at <http://www.reuters.com/article/2011/11/10/us-guatemala-perez-idUSTRE7A93OP20111110>.

79. Guatemala became a state party to the ICC on April 2, 2012. *States Parties—Chronological List*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx (last visited June 9, 2013).

80. See Rome Statute, *supra* note 7, pmbl. (“[T]he International Criminal Court established under this Statute shall be complimentary to national criminal jurisdictions.”); Markus Benzing, *The Complimentary Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 592, 592 (2003) (“The [International Criminal] Court is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes enumerated under Article 5 of the Statute.”).

81. Under the principle of “*jurisdiction ratione temporis*,” established in the Rome Statute, the ICC may, generally, only exercise jurisdiction over crimes committed after the statute’s entry into force for the state in question. Rome Statute, *supra* note 7, art. 11(2).

82. Roht-Arriaza, *International Decisions*, *supra* note 66, at 209.

83. SCHABAS, *National Courts Finally Begin to Prosecute Genocide*, *supra* note 13, at 694.

84. See David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT'L L. 1, 2 (2007).

85. Naomi Roht-Arriaza, *Genocide and War Crimes in National Courts: The Conviction of Ríos Montt in Guatemala and Its Aftermath*, AM. SOC'Y INT'L L. INSIGHTS (May 23, 2013), <http://www.asil.org/insights/volume/17/issue/14/genocide-and-war-crimes->

tional Commission Against Impunity (Comisión Internacional contra al Impunidad en Guatemala or “CICIG”) to target high-level officials in international criminal trials.⁸⁶ Through the organization, the U.N.-trained Guatemalan lawyers and judges.⁸⁷ Second, during the presidency of Álvaro Colom from 2008 to 2012, the military’s control over domestic institutions declined.⁸⁸ Third, Guatemala’s Attorney General Claudia Paz y Paz, who had a strong background in international criminal law, showed a willingness to prosecute Ríos Montt.⁸⁹ Finally, Ríos Montt lost immunity from prosecution, which he had enjoyed from 2007 to 2012 as a member of Congress.⁹⁰

Because the Spanish court had already collected a body of testimony and evidence, the prosecution could begin its case with a solid foundation.⁹¹ In January 2012, Attorney General Paz y Paz indicted Ríos Montt for genocide and other charges, including torture, terrorism, and crimes against humanity.⁹² A Guatemalan judge ordered Ríos Montt and former army intelligence chief Mauricio Rodríguez Sánchez “to stand trial for genocide and crimes against humanity” in January 2013.⁹³ In

national-courts-conviction-rios-Montt-guatemala [hereinafter Roht-Arriaza, *National Courts*].

86. Nicholas Casey, *Guatemala Ex-Dictator’s Genocide Trial a Test for Justice*, WALL ST. J. (Apr. 23, 2013), <http://online.wsj.com/news/articles/SB10001424127887323551004578437013856080192>.

87. *Id.* For further background on the activities of the Comisión Internacional contra al Impunidad en Guatemala (“CICIG”), see *Learning to Walk Without a Crutch: An Assessment of the International Commission Against Impunity in Guatemala*, INT’L CRISIS GROUP (May 31, 2011), <http://www.crisisgroup.org/~media/Files/latin-america/36%20Learning%20to%20Walk%20without%20a%20Crutch%20—%20The%20International%20Commission%20Against%20Impunity%20in%20Guatemala.pdf>.

88. Lauren Carasik, *Justice Postponed in Guatemala*, BOS. REV. (May 28, 2013), <http://www.bostonreview.net/world/justice-postponed-guatemala>.

89. See *Background: Ríos Montt & Rodriguez Sanchez Trial*, *supra* note 25.

90. *Profile: Guatemala’s Efraín Ríos Montt*, BBC NEWS (May 10, 2013), <http://www.bbc.co.uk/news/world-latin-america-22486387>.

91. See *Background: Ríos Montt & Rodriguez Sanchez Trial*, *supra* note 25.

92. *Guatemala National Court Genocide Prosecution Against Ríos Montt*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://cja.org/article.php?id=1280> (last visited July 9, 2013).

93. *Id.*

March 2013, the trial for Ríos Montt and Rodríguez Sánchez began.⁹⁴

“The chief strategy of Ríos Montt’s defense team was not to engage in a substantive debate about the past, but rather to stall the proceedings and prevent them from reaching a conclusion.”⁹⁵ On the first day of trial (March 19th), Ríos Montt entered court without his longtime lawyers, Danilo Rodríguez and Francisco Palomo, but instead with a new lawyer, Francisco García Gudiel, who said he had only joined the defense that morning.⁹⁶ García Gudiel asked for a delay to familiarize himself with the case, but the three-judge panel headed by Judge Yasmin Barrios refused.⁹⁷ In response, García Gudiel declared the judge biased and repeatedly challenged the legitimacy of the courts.⁹⁸ Eventually, he was expelled from the courtroom by Barrios.⁹⁹ César Calderón, Rodríguez Sánchez’s lawyer, represented Ríos Montt for the remainder of the day.¹⁰⁰ The court stated that Ríos Montt could have any lawyer besides García Gudiel represent him the next day.¹⁰¹

Ríos Montt’s primary substantive defense was that the “massacres were excesses ordered by field commanders” and that he had no knowledge of the attacks.¹⁰² Rodríguez Sánchez’s law-

94. *Id.*

95. Jo-Marie Burt & Geoff Thale, *The Guatemala Genocide Case: Using the Legal System to Defeat Justice*, WASH. OFFICE OF LATIN AM. (June 5, 2013), http://www.wola.org/commentary/the_guatemala_genocide_case_using_the_legal_system_to_defeat_justice.

96. Emi MacLean, *Trial Opens with Statements, Prosecution Witnesses, After Defense Challenges Rejected*, OPEN SOC’Y JUSTICE INITIATIVE (Mar. 20, 2013), <http://www.riosMontt-trial.org/2013/03/trial-opens-with-prosecution-witnesses-after-defense-challenges-rejected/> [hereinafter MacLean, *Trial Opens*].

97. Peter Canby, *The Maya Genocide Trial*, NEW YORKER BLOG (May 3, 2013), <http://www.newyorker.com/online/blogs/comment/2013/05/the-maya-genocide-trial.html>; Emi MacLean, *Trial Opens*, *supra* note 96.

98. Emi MacLean, *Trial Opens*, *supra* note 96.

99. *Id.*

100. *See id.*

101. Burt & Thale, *supra* note 95.

102. Malkin, *supra* note 24. Under the Geneva Conventions, superiors could be absolved from liability for breaches by their subordinates if they did not have any knowledge of a breach. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86(2), June 8, 1977, 1125 U.N.T.S. 3.

yer, César Calderón, also argued that his client “did not have command responsibility for the alleged crimes.”¹⁰³ Over the next several weeks, Ríos Montt’s original lawyers returned and claimed that because of the events on the first day of trial (when García Gudiel was expelled), their client’s fair trial and due process rights had been violated.¹⁰⁴ The court heard testimony from defense experts about peace agreements, the military chain of command, and the internal insurgency.¹⁰⁵ According to one courtroom observer, “[a]s soon as the defence lawyers obtained their own translators, they made generous use of language issues to interrupt and confuse the witnesses, and to deliberately raise incendiary issues which had not been mentioned by the witness.”¹⁰⁶

On the fifth day of the trial (March 25th), one of Ríos Montt’s original lawyers, Danilo Rodriguez, reappeared and asked to again represent his client, a request that the court granted.¹⁰⁷ On the sixth day (March 26th), Ríos Montt’s defense team made three challenges to Judge Barrios’ oversight of the trial.¹⁰⁸ Attorney Marco Antonio Cornejo, one of Ríos Montt’s at-

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Id.

103. Emi MacLean, *Trial Opens*, *supra* note 96.

104. Burt & Thale, *supra* note 95.

105. Emi MacLean, *Day Two: Ríos Montt Representation, and Prosecution Testimony*, OPEN SOC’Y JUSTICE INITIATIVE (Mar. 21, 2013), <http://www.riosMontt-trial.org/2013/03/day-two-rios-Montt-representation-and-prosecution-testimony/>.

106. Elisabeth Patterson, *The Ríos Montt Trial—Have Efforts Been Made to Integrate the Mayan Perspective?*, OPEN SOC’Y JUSTICE INITIATIVE (Apr. 9, 2013), <http://www.riosMontt-trial.org/2013/04/elisabeth-patterson-the-rios-Montt-trial-have-efforts-been-made-to-integrate-the-mayan-perspective/>.

107. Emi MacLean, *They Came Only to Kill: More Testimony on Massacres as Outside Protest Claims No Genocide Occurred*, OPEN SOC’Y JUSTICE INITIATIVE (Mar. 26, 2013), <http://www.riosMontt-trial.org/2013/03/they-came-only-to-kill-witnesses-inside-describe-massacres-while-protesters-outside-deny-that-there-was-genocide-on-day-5-of-rios-Montt-trial/>.

108. Emi MacLean, *Judge again Rejects Defense Calls for Her Recusal and Suspension of Trial; 11 More Prosecution Witnesses Heard before Easter Re-*

torneys, argued that Judge Barrios should withdraw from the proceedings because of a civil complaint against her for expelling García Gudiel from the court on the first day of the trial.¹⁰⁹ The judge held that the motion was without merit and witnesses were able to continue their testimony.¹¹⁰

The prosecution then presented Ixil Mayans who witnessed the acts of the Guatemalan military in 1982 and 1983; a great number of the witnesses were children at the time of the military campaign and presented emotional testimony.¹¹¹ On the tenth day of the trial (April 4th), a witness testified that the current president of Guatemala, Otto Pérez Molina, had ordered soldiers to loot villages and execute people that fled.¹¹² Experts from the Guatemalan Forensic Anthropology Foundation testified with detailed information on exhumations of massacre sites.¹¹³ Experts also testified about the history of the conflict, peace accords, and the international law involved.¹¹⁴ Later in the trial, one expert testified that 18.3% of the indigenous population was killed from 1979 to 1986, which was comparable to the 20% of the targeted population killed in genocides in Rwanda and the former Yugoslavia.¹¹⁵

After the prosecution finished presenting their case, the defense claimed to have twelve witnesses; however, only two ar-

cess, OPEN SOC'Y JUSTICE INITIATIVE (Mar. 27, 2013), <http://www.riosMontt-trial.org/2013/03/judge-again-rejects-defense-calls-for-her-recusal-and-suspension-of-the-trial-11-more-prosecution-witnesses-heard-before-easter-recess/>.

109. *Id.*

110. *Id.*

111. *Id.*

112. Shawn Roberts, *Day 10: Witness Implicates President Perez Molina in Massacres*, OPEN SOC'Y JUSTICE INITIATIVE (Apr. 5, 2013), <http://www.riosMontt-trial.org/2013/04/day-10-witness-implicates-president-perez-molina-in-massacres/>.

113. Shawn Roberts, *Day 11 of Ríos Montt Trial: Forensic Experts Testify Regarding Exhumations*, OPEN SOC'Y JUSTICE INITIATIVE (Apr. 6, 2013), <http://www.riosMontt-trial.org/2013/04/day-11-of-rios-Montt-trial-forensic-experts-testify-regarding-exhumations/>.

114. See Matt Eisenbrant, *Prosecution Experts Testify on Psychological, Cultural, Statistical and Gender Issues*, OPEN SOC'Y JUSTICE INITIATIVE (Apr. 13, 2013), <http://www.riosMontt-trial.org/2013/04/prosecution-experts-testify-on-psychological-cultural-statistical-and-gender-issues/>.

115. *Id.*

rived at the court.¹¹⁶ One witness testified that the defendants could not have had detailed knowledge about the actions of the military during the conflict.¹¹⁷ The head of a humanitarian organization during the war testified that that the army did try to help indigenous populations, and that these indigenous groups were not the target of military operations but were merely caught in the middle of a civil war.¹¹⁸ The next day, the defense claimed to have ten witnesses, but once again only two arrived.¹¹⁹ Both of these witnesses reiterated the defense's argument that the aims of the army were more politically and militarily, rather than ethnically, motivated, and that the government established programs to help indigenous populations.¹²⁰

On the fourteenth day of the trial (April 18th), following defense testimony, defense attorney Rodríguez stated that the trial court had to abide by an April 3rd ruling by the Guatemalan Constitutional Court ("Constitutional Court") that ordered certain previously excluded defense documents admitted.¹²¹ Rodríguez argued that this ruling should have stopped the entire trial and that the trial was unjust before storming out of the courtroom.¹²² That day, Judge Carol Patricia Flores from the Court of First Instance ruled that the trial could not proceed based on this ruling and the trial was thus annulled.¹²³

116. Kate Doyle, *As Trial Nears Conclusion, Defense Witnesses Absent and Hearing Cut Short*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 17, 2013), <http://www.riosMontt-trial.org/2013/04/as-trial-nears-conclusion-defense-witnesses-absent-and-hearing-cut-short/>.

117. *Id.*

118. *Id.*

119. Kate Doyle, *Day 19 of Ríos Montt Trial: Defense Continues to Avoid Presentation of Proposed Expert Witnesses as Trial Comes to a Close; Closing Arguments Planned*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 18, 2013), <http://www.riosMontt-trial.org/2013/04/day-19-of-rios-Montt-trial-defense-continues-to-avoid-presentation-of-proposed-expert-witnesses-as-trial-comes-to-a-close-closing-arguments-planned/>.

120. *See id.*

121. Kate Doyle, *Day 20: Defense Attorneys Walk Out of Trial in Protest; Preliminary Court Judge Annuls Trial as Attorney General Calls Action Illegal and Promises Legal Challenge*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 19, 2013), <http://www.riosMontt-trial.org/2013/04/day-20-defense-attorneys-walk-out-of-trial-in-protest-preliminary-court-judge-annuls-sentence-as-attorney-general-calls-action-illegal-and-promises-legal-challenge/>.

122. *Id.*

123. *Id.*

The trial stalled until the following week, when the Constitutional Court ruled in favor of the defense on several legal challenges and further instructed Judge Flores to order the trial to resume with the newly admitted evidence.¹²⁴ At this point, a web of legal challenges complicated the trial:

- (1) the adequacy of Ríos Montt's representation on the first day of the trial; (2) determinations by a pre-trial judge on the admissibility of evidence; (3) a decision by a different pre-trial judge that the entire trial should be annulled; and now, (4) whether a recusal motion must be fully considered, and appealed, before the trial can continue.¹²⁵

The trial resumed and both sides made closing statements.¹²⁶ Ríos Montt addressed the court and declared his innocence in a thirty-minute statement.¹²⁷ He reiterated many of the points made by his defense team and declared, "I never authorized, I never proposed, I never ordered acts against any ethnic or religious group."¹²⁸ On May 10th, the three-judge panel found Ríos Montt "guilty of genocide and crimes against humanity" and sentenced him to eighty years in prison.¹²⁹ Rodríguez Sanchez was found not guilty on the ground "that he did not have command responsibility."¹³⁰ The court found that Ríos Montt had command responsibility and that Ixil Mayan civilians were targeted for killing and rape.¹³¹

124. Lisa Laplante, *Lower Judge Complies with Constitutional Court Order; Trial May Re-start Next Week*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 27, 2013), <http://www.riosMontt-trial.org/2013/04/lower-court-judge-complies-with-constitutional-court-order-trial-may-re-start-next-week/>.

125. Jo-Marie Burt, *Trial Court Reopens but Adjourns Quickly as Defense Lawyer Is a No-Show; Constitutional Court Issues Three Judgments*, OPEN SOCIETY JUSTICE INITIATIVE (May 8, 2013), <http://www.riosMontt-trial.org/2013/05/trial-court-reopens-but-adjourns-quickly-as-defense-lawyer-is-a-no-show-constitutional-court-issues-three-judgments/>.

126. Jo-Marie Burt, *Historic Genocide Trial Nears End; Ríos Montt Addresses the Court, Declares Innocence*, OPEN SOCIETY JUSTICE INITIATIVE (May 10, 2013), <http://www.riosMontt-trial.org/2013/05/historic-genocide-trial-nears-end-rios-Montt-addresses-the-court-declares-innocence/>.

127. *Id.*

128. *Id.*

129. Jonathan Birchall, *Open Society Justice Initiative Welcomes Conclusion of Historic Ríos Montt Trial*, OPEN SOCIETY JUSTICE INITIATIVE (May 11, 2013), <http://www.riosMontt-trial.org/2013/05/476/>.

130. *Id.*

131. The Court released its full 718-page opinion a week after the verdict, for which an index of eleven PDF files is available. *Index of*

However, just days later, on May 20th, the Constitutional Court ruled 3-2 to overturn the verdict and sent the trial back to April 19th, meaning any testimony or evidence presented after that point would not be valid.¹³² The decision was made on the basis that Francisco García Gudiel had been expelled from the courtroom, which left Ríos Montt without an attorney on the first day.¹³³ Dissenting judges Mauro Chacon and Gloria Porras criticized the remedy as “disproportionate.”¹³⁴ The following week, the Constitutional Court said it would also consider whether a 1986 amnesty law barred prosecution of Ríos Montt.¹³⁵ In June 2013, the Constitutional Court was still considering several legal issues related to the case and assigned a new trial court to hear the case in April 2014.¹³⁶ In November 2013, the court announced that the trial would not begin until January 2015, further stalling any final verdict.¹³⁷ Following the announcement, lawyers for the Ixil Community filed a complaint with the Inter-American Commission on Human Rights “to condemn . . . Guatemala for the impunity for crimes

/especiales/efrain-rios-montt, JUSTICIA VIVA, <http://www.justiciaviva.org.pe/especiales/efrain-rios-montt/> (last visited Nov. 21, 2013).

132. Emi MacLean, *Uncertainty Hovers over Next Stages in Historic Guatemala Genocide Case after Constitutional Court Overturns Conviction*, OPEN SOC’Y JUSTICE INITIATIVE (May 28, 2013), <http://www.riosmontt-trial.org/2013/05/uncertainty-hovers-over-next-stages-in-historic-guatemala-genocide-case-after-constitutional-court-overturns-conviction/>.

133. *See id.*

134. *Id.*

135. Emi MacLean, *One Week after Overturning Former Dictator’s Genocide Conviction, Guatemalan Constitutional Court Considers Whether Ríos Montt Should Benefit from 1986 Amnesty*, OPEN SOC’Y JUSTICE INITIATIVE (May 30, 2013), <http://www.riosmontt-trial.org/2013/05/one-week-after-overturning-former-dictators-genocide-conviction-guatemalan-constitutional-court-hears-claim-that-rios-montt-should-benefit-from-1986-amnesty/>.

136. *See* Emi Maclean, *One Month After Guatemala’s Constitutional Court Intervenes to Challenge Ríos Montt Genocide Conviction: Amnesty Back on the Table, New Trial Court Booked Till Mid-2014, and Ríos Montt Back Home*, OPEN SOC’Y JUSTICE INITIATIVE (June 18, 2013), <http://www.riosmontt-trial.org/2013/06/one-month-after-guatemalas-constitutional-court-intervenes-to-challenge-rios-montt-genocide-conviction-amnesty-back-on-the-table-new-trial-court-booked-till-mid-2014-and-rios-montt-back-ho/>.

137. *Guatemala Rios Montt Genocide Trial to Resume in 2015*, BBC NEWS (Nov. 6, 2013), <http://www.bbc.co.uk/news/world-latin-america-24833642>.

of genocide.”¹³⁸ In February 2014, the Constitutional Court ruled that the Attorney General who brought the charges against Ríos Montt, Claudia Paz y Paz, must step down seven months before her term was to expire.¹³⁹

III. ISSUES IN DOMESTIC PROSECUTION OF GENOCIDE: JURISDICTION, DEFENDANTS' RIGHTS, AND THE GOALS OF CRIMINAL AND TRANSITIONAL JUSTICE

The domestic prosecution of genocide, such as the trial of Ríos Montt and other former high-level Guatemalan officials, raises several legal issues including jurisdiction, the defendant's right to a fair trial and due process, goals of criminal justice, and goals of transitional justice. The following section analyzes each of these issues to determine whether the domestic prosecution of genocide can meet international legal standards, and whether domestic prosecution of genocide is more likely to advance or hinder major goals of international criminal justice than prosecution by international tribunals. While the analysis focuses on the Guatemala case, it also draws on other examples.

A. Jurisdiction

In order to prosecute genocide, a court—domestic or international—must have jurisdiction over the crime. Jurisdiction is “[t]he power and authority constitutionally conferred upon . . . a court or judge to pronounce the sentence of the law, or to award the remedies provided by law.”¹⁴⁰ There are two primary conceptions of how international law can come under domestic court jurisdiction—“monist” and “dualist” theories. In “monist”

138. *Lawyers for Guatemala's Ixil Community Take Justice Demands to Inter-American Commission*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Dec. 2, 2013), http://ictj.org/news/lawyers-ixil-justice-demands?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=01836113bf-ICTJ_In_Focus_Issue_34_Dec_2013&utm_medium=email&utm_term=0_2d90950d4d-01836113bf-245994497.

139. Elisabeth Malkin, *Guatemala Court Rules to Curb Crusader*, N.Y. TIMES, Feb. 7, 2014, at A10, available at <http://www.nytimes.com/2014/02/07/world/americas/guatemala-court-rules-against-official.html>.

140. BLACK'S LAW DICTIONARY 673 (2d ed. 1910).

states, domestic courts automatically have jurisdiction over international law, while in “dualist” states international law must be transferred into domestic code before a domestic court can have jurisdiction.¹⁴¹ A major objection to prosecuting a crime before it has been established in international or domestic law is retroactivity, or *nulla crimen sine lege* (“no crime without law”), a cornerstone of democratic governance and human rights law¹⁴² that “rests on the political truth that if a law can be created after an offense, then power is to that extent absolute and arbitrary.”¹⁴³

Many states that ratified the Genocide Convention incorporated genocide directly into their domestic codes, giving them jurisdiction over genocide that occurs within their territory under either a monist or dualist conception and eliminating retroactivity concerns.¹⁴⁴ Guatemala is one such state. Guatemala

141. See generally Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction in National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168 (Stephen Macedo ed., 2004).

142. See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 15(1), U.N. Doc. A/RES/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 11(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; African Charter on Human and Peoples’ Rights, art. 7(2), OAU Doc. CAB/LEG/67/3 rev.5 (June 27, 1981), reprinted in 21 I.L.M. 58 (1982) [hereinafter African Charter]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 222, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force Sept. 21, 1970, Dec. 1971, Jan. 1, 1990, Nov. 1, 1998, respectively [hereinafter European Convention]; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. 25, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82, doc. 6, rev. 1, at 17 (1992) [hereinafter American Declaration]. However, some international human rights instruments also recognize that this prohibition may not apply when crimes violate “the general principles of law recognized by the community of nations,” which almost certainly include genocide. See ICCPR, *supra*, art. 15(2); European Convention, *supra*, art. 7(2).

143. Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC MONTHLY, <http://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> (last visited Nov. 21, 2013).

144. Wouters & Verhoeven, *supra* note 12, at 180.

ratified the Genocide Convention in 1950¹⁴⁵ and enacted Articles 376 (criminalizing genocide) and 377 (establishing the punishment for genocide) of the domestic penal code in 1973.¹⁴⁶ Guatemala is thus an example of a state that took the best possible action by ratifying the Genocide Convention early and criminalizing genocide within its penal code. In a domestic prosecution of genocide that occurred between 1982 and 1983, a Guatemalan court's jurisdiction is not open to reasonable challenge.

However, other states did not ratify the Genocide Convention, or ratified the Convention but did not incorporate the law into their domestic code, thus exposing themselves to jurisdiction and retroactive application problems.¹⁴⁷ Article V of the Convention, which requires states to enact necessary legislation to implement the Convention, could serve as evidence that the treaty was not intended to be self-executing.¹⁴⁸ Furthermore, the Genocide Convention does not set out a punishment for genocide, which would require a court to impose a retroactive punishment for the crime.¹⁴⁹ States might impose penalties already established in domestic criminal codes for the underlying offenses (such as murder). However, punishing underlying offenses could compromise recognition of the severity for the particular crime of genocide.¹⁵⁰ In particular, underlying offenses may not be punishable (for example, "public incitement of genocide" may not have a punishable underlying offense), and domestic statutes of limitations could bar prosecution of the underlying offenses (especially considering many genocide crimes are prosecuted years or even decades after they take place).

The problem of not incorporating genocide into the domestic code arose in Rwanda following the 1994 genocide. Although the killing of 800,000 people, primarily of the Tutsi ethnic mi-

145. *Status of the Genocide Convention*, *supra* note 11 (listing Guatemala as ratifying the Convention on January 13, 1950).

146. *See* Decreto No. 17-73, 5 July 1973, Código Penal de Guatemala [Guatemalan Penal Code] arts. 376, 377, *available at* http://www.oas.org/dil/esp/Codigo_Penal_Guatemala.pdf.

147. *See, e.g., id.* art. 377.

148. Wouters & Verhoeven, *supra* note 12.

149. *See* Genocide Convention, *supra* note 4.

150. SCHABAS, *National Courts Finally Begin to Prosecute Genocide*, *supra* note 13, at 716.

nority, in a matter of months clearly met the definition of genocide set out in the Convention,¹⁵¹ and Rwanda had acceded to the Convention in 1975,¹⁵² it did not ratify a domestic statute criminalizing genocide. Rwanda enacted legislation criminalizing genocide in 1996¹⁵³ and established local *gacaca* courts in 2001, in which both the absence of pre-established punishment and the fact that Rwanda had ratified several Conventions outlawing genocide were mentioned in the text of the law.¹⁵⁴ While Rwanda was still able to establish punishment for genocide because of the nature of the crimes committed in 1994,¹⁵⁵ it had to rely on a retroactive statute rather than established law, which would have given it a stronger legal basis for prosecution.¹⁵⁶

These examples demonstrate the need for countries to ratify the Genocide Convention *and* incorporate the crime into their domestic statute to avoid jurisdictional and retroactivity challenges. Although the prohibition on genocide is widely considered customary international law because it violates “general principles of law recognized by the community of nations,”¹⁵⁷ and even *jus cogens*,¹⁵⁸ legal complications remain when seek-

151. *See id.* at 696.

152. *Status of the Genocide Convention*, *supra* note 11.

153. *See* Sosnov, *supra* note 20.

154. Organic Law No. 40/2000 Setting Up “Gacaca Jurisdictions” and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 (Jan. 26, 2001) (Rwanda).

Considering that the genocide and the crimes against humanity are notably provided for by the convention of December 9, 1948 preventing and punishing the crime of genocide, by the Geneva convention of August 12, 1949 relating to protecting civil persons in wartime and the additional Protocols, as well as the convention of November 26, 1968 on imprescriptibility of war crimes and crimes against humanity. Considering that Rwanda has ratified those three conventions and published them in the Official Gazette of the Republic of Rwanda, without however providing for sanctions for such crimes.

Id.

155. *See id.*

156. *See* Wouters & Verhoeven, *supra* note 12.

157. ICCPR, *supra* note 142, art. 15(2); *see also* European Convention, *supra* note 142, art. 7(2).

158. *Jus cogens* is

a peremptory norm of general international law [which] is a norm accepted and recognized by the international community of States as

ing prosecution without ratification of relevant treaties and incorporation into domestic codes with defined punishment.¹⁵⁹

In both the Guatemalan and Rwandan examples, domestic courts had a territorial link to the crime, giving them a strong claim for jurisdiction. Without a territorial or personal link, a domestic court might still assert "universal jurisdiction"¹⁶⁰ over the international crime of genocide. Many countries have accepted universal jurisdiction.¹⁶¹ Furthermore, "[u]niversal jurisdiction over genocide . . . has come to be widely treated as an accepted feature of customary international law."¹⁶² Arguments in favor of universal jurisdiction are that the crimes committed "are so grave they harm the entire international community" and that such prosecution ensures that there are no safe havens for international criminals.¹⁶³

Still, universal jurisdiction is less widely accepted than territorial or personal jurisdiction.¹⁶⁴ Major criticisms of universal jurisdiction include that it is "potentially quite expansionist and subject to abuse . . . [by allowing] a small group of nations . . . to prosecute officials from other nations based on their particular conception of customary international law."¹⁶⁵ Furthermore, the legitimacy of a court taking action against a person who "cannot be said to have in any way authorized the exercise of [the full power of the state] through nationality or conduct

a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

159. See Wouters & Verhoeven, *supra* note 12, at 177–78.

160. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *supra* note 9.

161. See *Universal Jurisdiction: A Principle of International Justice*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/international-justice/universal-jurisdiction> (last visited July 7, 2013) ("Since the end of [World War] II, there have been investigations or prosecutions based on universal jurisdiction in the courts of at least 17 countries.")

162. Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 347 (2001).

163. Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do These Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375, 378 (2006).

164. See Slaughter, *supra* note 141, at 168–71.

165. *Id.* at 169–70.

within the state's territory" could also interfere in the internal affairs of another sovereign state.¹⁶⁶

In recent years, domestic Canadian and European courts have been active in exercising universal jurisdiction to prosecute genocide crimes. The following individuals have been convicted of genocide and genocide-related offenses: Bosnian Serb Nikola Jorgić (Germany, 1997),¹⁶⁷ Rwandan Fulgence Niyonteze (Switzerland, 1999),¹⁶⁸ Rwandan businessman Étienne Nzabonimana and his half-brother Samuel Ndashyikirwa (Belgium, 2005),¹⁶⁹ former Rwandan army general Bernard Ntuyahaga (Belgium, 2007),¹⁷⁰ Rwandan Désiré Munyaneza (Canada, 2009),¹⁷¹ Rwandan pastor François Bazaramba (Finland, 2010),¹⁷² Dutch-Rwandan Yvonne Besabya (Netherlands, 2013),¹⁷³ Swedish-Rwandan Stanislas Mbanenande (Sweden, 2013),¹⁷⁴ and Rwandan Sadi Bugingo (Norway, 2013).¹⁷⁵ France began its first genocide trial for former Rwandan army captain

166. *Id.* at 172.

167. *Bosnian Serb Gets Life Sentence*, CHI. TRIB. (Sept. 26, 1997), http://articles.chicagotribune.com/1997-09-26/news/9709270023_1_nikola-jorgic-international-war-crimes-tribunal-bosnian-serb.

168. *Ex-Rwandan Mayor Gets Life Sentence*, ASSOCIATED PRESS, Apr. 30, 1999, available at <http://www.apnewsarchive.com/1999/Ex-Rwandan-Mayor-Gets-Life-Sentence/id-3b18bd8eefd7b2a993507c4039df017f>.

169. *2 Rwandans Sentenced for Role in '94 Massacre*, L.A. TIMES (Jun. 30, 2005), <http://articles.latimes.com/2005/jun/30/world/fg-briefs30.4>.

170. Angélique Chrisafis, *Former Rwandan Major Gets 20 Years in Genocide Trial*, GUARDIAN (July 5, 2007), <http://www.theguardian.com/world/2007/jul/05/rwanda.angeliquechrisafis>.

171. Ian Austen, *Canadian Judge Convicts Rwandan in Genocide*, N.Y. TIMES, May 23, 2009, at A8.

172. *Finland Sentences Rwanda Preacher to Life for Genocide*, BBC NEWS (June 11, 2010), <http://www.bbc.co.uk/news/10294529>.

173. Thomas Escritt, *Dutch Court Jails Rwandan Woman for Incitement to Genocide*, REUTERS, Mar. 1, 2013, available at <http://www.reuters.com/article/2013/03/01/us-rwanda-genocide-dutch-idUSBRE9200MR20130301>.

174. Per Nyberg, *Swedish Hutu Gets Life for Rwandan Genocide*, CNN (June 20, 2013), <http://www.cnn.com/2013/06/20/world/europe/sweden-rwanda-genocide/>.

175. *Norway Jails Rwandan for 21 Years Over Role in 1994 Genocide*, GUARDIAN (Feb. 14, 2013), <http://www.theguardian.com/world/2013/feb/14/norway-jails-rwandan-genocide>.

Pascal Simbikangwa in 2013.¹⁷⁶ Notably, Austrian courts tried (but did not convict) Bosnian Serb Duško Cvjetković in 1995.¹⁷⁷ A general survey of universal jurisdiction genocide cases shows a recent increase in domestic universal jurisdiction prosecutions, with several countries, including Sweden, Norway, and France, holding their first-ever genocide trials in the past year.¹⁷⁸

In what is likely the most high-profile universal jurisdiction case in modern history, Spanish courts indicted former Chilean dictator Augusto Pinochet for crimes including genocide, terrorism, and torture in 1998.¹⁷⁹ The Pinochet case inspired action by human rights groups bringing charges against Ríos Montt in 1999.¹⁸⁰ These cases and the recent wave of domestic genocide prosecutions in Canada and Europe demonstrate the reach and limits of universal jurisdiction as a means to prosecute genocide.

First, concerning the limits, there was significant disagreement among Spanish courts over what was required to invoke universal jurisdiction, which held up the Guatemalan Genocide Case for several years.¹⁸¹ The highest court, the Constitutional Tribunal, held that the case could be prosecuted under universal jurisdiction.¹⁸² However, Spain's Supreme Court held that domestic courts only have jurisdiction over international crimes committed against their citizens.¹⁸³ In 2009, Spain revised its universal jurisdiction statute to require that the de-

176. Jerry Votava, *French Court Orders Trial for Rwandan Genocide Suspect*, JURIST (Apr. 3, 2013), <http://jurist.org/paperchase/2013/04/france-court-orders-trial-for-rwanda-genocide-suspect.php>.

177. *Bosnian Serb Acquitted in War Crimes Trial*, ASSOCIATED PRESS, May 31, 1995, available at <http://www.apnewsarchive.com/1995/Bosnian-Serb-Acquitted-in-War-Crimes-Trial/id-6f4a7804453455576880d444c2410946>.

178. See Karen Corrie, *Beyond Arusha: The Global Effort to Prosecute Rwanda's Genocide*, OPEN SOC'Y JUSTICE INITIATIVE (Apr. 17, 2013), <http://www.opensocietyfoundations.org/voices/beyond-arusha-global-effort-prosecute-rwandas-genocide>.

179. Richard J. Wilson, *Prosecuting Pinochet in Spain*, 6 HUM. RTS. BRIEF 3–4, 23–24 (1999), available at <http://www.wcl.american.edu/hrbrief/v6i3/pinochet.htm> (last visited Jul. 10, 2013).

180. See *supra* Part II.A for an overview of the Ríos Montt proceedings in Spain.

181. See *id.*

182. Roht-Arriaza, *International Decisions*, *supra* note 66, at 207–08.

183. See Kaleck, *supra* note 23, at 956.

defendant be present in Spain, the victims be Spanish,¹⁸⁴ or there be some other connection to Spain.¹⁸⁵ Currently, the Spanish Parliament is considering legislation to even further limit universal jurisdiction.¹⁸⁶ Similar universal jurisdiction-limiting legislation was passed in Australia, Canada, and the United Kingdom.¹⁸⁷ As a result, many domestic courts exercising universal jurisdiction are now requiring a “plus” factor (e.g., a passive personality factor)¹⁸⁸ that the defendant be present in the forum country or that the defendant previously lived in that country.¹⁸⁹

Another limit of universal jurisdiction is that a defendant may not be extradited for trial when he or she is not present in the forum state. This limitation was illustrated in the Guatemalan Genocide Case when even after an investigation was opened against the defendants and warrants were issued for their arrest, the Guatemalan court did not accept the authority of the ruling and refused to grant Spain’s extradition request.¹⁹⁰ Many of the domestic prosecution cases involve individuals present in the forum country.¹⁹¹ Universal jurisdiction can still be useful in eliminating safe havens for individuals who flee their home countries to escape prosecution; the defendant’s presence in another country can give that country a jurisdictional link to prosecute his or her crimes.

184. Jaclyn Belczyk, *Spain Parliament Passes Law Limiting Reach of Universal Jurisdiction Statute*, JURIST (Oct. 16, 2009), <http://jurist.org/paperchase/2009/10/spain-parliament-passes-law-limiting.php>.

185. *Spanish Congress Enacts Bill Restricting Spain’s Universal Jurisdiction Law*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?id=740> (last visited Feb. 21, 2014).

186. Jim Yardley, *Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally*, N.Y. TIMES, Feb. 10, 2014, at A7, available at <http://www.nytimes.com/2014/02/11/world/europe/spanish-legislators-seek-new-limits-on-universal-jurisdiction-law.html>.

187. See Slaughter, *supra* note 141, at 172.

188. I.e., that the defendant’s crime affected nationals of the forum state outside of the state’s territory.

189. See, e.g., Slaughter, *supra* note 141, at 172. In the German Nikola Jorgic genocide case, “the Federal Supreme Court required a special link or nexus between Germany and the offense, even though no such nexus is required by the German law . . . [and] found the necessary link on the basis that the defendant had lived in Germany from 1969 to 1982.” *Id.*

190. See *supra* Part II.A.

191. See *supra* nn.167–177.

While the Guatemalan Genocide Case shows the boundaries of universal jurisdiction, it also demonstrates its power. Even if a court exercising universal jurisdiction is unable to secure a conviction or extradite suspects, its power may lie in its ability to gather evidence and testimony and bring attention to a crime, which may eventually induce domestic courts to take action.¹⁹² While defendants (including Ríos Montt) were never brought to Spain to stand trial, the court “yielded witness and expert testimonies and military documents, some of which were then introduced into evidence in the Guatemalan trial.”¹⁹³ The indictment and arrest warrants for Guatemalan suspects also brought considerable attention to the issue and influenced the eventual domestic prosecution.¹⁹⁴

Finally, the ICC has jurisdiction over genocide that occurs in any state,¹⁹⁵ given the state is party to the Rome Statute¹⁹⁶ and domestic courts are not actively prosecuting the crime themselves.¹⁹⁷ The Guatemalan Genocide Case shows that it may take time for the ICC to become effective. Because many of the world’s genocide crimes were committed before the court was created, the ICC cannot have a role in the prosecution of those crimes.¹⁹⁸ The result is that the true need for such a court to prosecute genocide may not be known for many years.

The above analysis leads to the conclusion that domestic courts with a territorial or personal link to the crime (e.g., the Guatemalan court that prosecuted Ríos Montt) have the strongest case for jurisdiction over genocide. Universal jurisdiction is still controversial and evolving; however, universal jurisdiction “plus” seems to be another promising means by which to prosecute individuals who try to evade justice by fleeing to foreign countries. Courts exercising universal jurisdiction can also play the important role of catalyst for, and aid to, an eventual domestic prosecution. Further, the ICC’s jurisdic-

192. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 223 (2005) (arguing that one of the benefits of universal jurisdiction is spurring a future domestic investigation or prosecution).

193. Roht-Arriaza, *National Courts*, *supra* note 85.

194. See *supra* Part II.C.

195. Rome Statute, *supra* note 7, art. 5.

196. *Id.* art. 12(1).

197. *Id.* art. 17(1)(a).

198. See *supra* Part II.B.

tion over genocide is dependent on ratification of the Rome Statute, a relatively new institution, and is also intended to be complementary to domestic jurisdiction. In terms of jurisdiction, then, domestic courts *should* prosecute genocide, but external domestic and international courts should also be prepared to step in when necessary to fulfill the international community's legal obligations.

B. Defendants' Rights to a Fair Trial and Due Process

Robert Jackson, the chief prosecutor at the Nuremberg trials, said: "You must put no man on trial if you are not willing to . . . see him freed if not proven guilty. . . . [T]he world yields no respect to courts that are merely organized to convict."¹⁹⁹ Today, the right to a fair trial is recognized as a universal human right for criminal defendants in numerous international human rights treaties. Major elements of a fair trial under international standards include the presumption of innocence,²⁰⁰ right to a public trial,²⁰¹ right to legal counsel,²⁰² right to examination of evidence and witnesses,²⁰³ and right to appeal.²⁰⁴ In addition to these rights, the international and political nature of genocide prosecution raises general due process concerns.²⁰⁵

One concern is the prosecution of an individual by the group against which genocide is alleged, which is likely to violate a defendant's fair trial and due process rights. The domestic genocide prosecution of Adolf Eichmann in Israel in 1961 arguably could have violated Eichmann's fair trial and due process rights because he was tried in a country founded by members of the religious and ethnic group (Jewish) against whom he was

199. Justice Robert H. Jackson, Associate Justice, Supreme Court of the United States, Address to the American Society of International Law (Apr. 13, 1945).

200. See ICCPR, *supra* note 142, art. 14(2); UDHR, *supra* note 142, art. 11(1); African Charter, *supra* note 142, art. 7(1)(b); European Convention, *supra* note 142, art. 6(2); American Declaration, *supra* note 142, art. 26.

201. See ICCPR, *supra* note 142, art. 14(1); UDHR, *supra* note 142, art. 10; European Convention, *supra* note 142, art. 6(1); American Declaration, *supra* note 142, art. 26.

202. See ICCPR, *supra* note 142, art. 14(3)(d); African Charter, *supra* note 142, art. 7(1)(c); European Convention, *supra* note 142, art. 6(3)(c).

203. See ICCPR, *supra* note 142, art. 14(3)(e); European Convention, *supra* note 142, art. 6(3)(d).

204. See ICCPR, *supra* note 142, art. 14(5).

205. See Morris, *supra* note 162, at 337–38.

charged with genocide.²⁰⁶ However, this may have been the only available option for the prosecution at the time. In this way, the development of international and domestic courts with universal jurisdiction allows adjudication by a third party, providing a significant advancement for genocide prosecution by ending impunity while mitigating real or perceived violations of a defendant's due process rights. This criticism is not as relevant to the Ríos Montt case because he was not tried in a court substantially controlled by the group against whom he was charged with genocide (indigenous Mayan groups),²⁰⁷ but it could be important in future domestic genocide prosecutions.

In addition to ethnic, religious, or racial bias in domestic courts, "[t]he lack of judicial independence in many countries . . . [threatens] the prospect of impartiality and due process, particularly in politically charged cases."²⁰⁸ This criticism is particularly relevant to the Ríos Montt trial and in other countries with developing or transitional legal systems. Ríos Montt showed a lack of respect for, and deference to, the judicial process.²⁰⁹ The political nature of genocide prosecution, especially with former high-level officials, makes an impartial domestic trial much less feasible than a trial by an international tribunal. Ríos Montt had powerful allies within Guatemala—he was a member of Congress merely one year earlier—²¹⁰ that intimidated prosecutors, witnesses, and judges.²¹¹ During the trial, paid advertisements ran in Guatemala linking judges, lawyers,

206. This was not a major defense in the Eichmann trial; in fact, because a central issue was the jurisdiction of the Israeli court to try Eichmann, the court found that Israel's link to the Jewish people gave it jurisdiction over Holocaust crimes. See Nicholas N. Kittrie, *A Post Mortem of the Eichmann Case—The Lessons for International Law*, 55 J. CRIM. L. & CRIMINOLOGY 16, 23 (1964).

207. In fact, some have commented that the trial did not do enough to incorporate indigenous Mayan culture. See Patterson, *supra* note 106.

208. Morris, *supra* note 162, at 353.

209. See *supra* Section II.C.

210. *Profile: Guatemala's Efraín Ríos Montt*, BBC NEWS (May 10, 2013), <http://www.bbc.co.uk/news/world-latin-america-22486387>.

211. See, e.g., Pillay Welcomes Historic Genocide Judgment in Guatemala, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (May 13, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13319&LangID=E> (U.N. High Commissioner for Human Rights, Navi Pillay, "salute[d] the victims, relatives and survivors . . . as well as the lawyers, prosecutors and judges who carried out their duties under exceptionally difficult circumstances in the face of serious threats and intimidation.").

and activists involved in the trial with guerillas, and stating that the peace process would be undone if Ríos Montt were convicted.²¹² While the right to a fair trial and due process are a defendant's right, it shows the general impact a domestic trial could have on judicial impartiality. While political influence undermines the overall fairness and credibility of the trial, domestic political bias is also relevant to victims' rights and the goals of criminal justice.

Domestic prosecutions may also violate due process rights if they substantially alter accepted requirements for international criminal liability for genocide, because they "would fail to fulfill the . . . requirements that the criminal law be non-vague, specific, and prospective in its application."²¹³ The Genocide Convention protects four groups: national, ethnic, racial, and religious groups.²¹⁴ However, many countries have enacted genocide laws that either add groups not included in the Genocide Convention or omit groups protected by the Genocide Convention.²¹⁵ Groups that various states have added to their domestic genocide statutes include political, social, and class groups.²¹⁶

Guatemala enacted its domestic genocide code in line with three of the four groups enumerated in the Genocide Convention (excluding race),²¹⁷ and indigenous Mayan groups clearly fit under the "ethnic" category. However, the original Guatemalan Genocide Case in Spain included a claim that the government intended to eliminate a specific "national" group with a particular political ideology.²¹⁸ The same charges were alleged against Pinochet and Argentine defendants in earlier universal jurisdiction cases.²¹⁹ The domestic Spanish genocide law pertained to "national ethnic, religious, or social group[s]," which

212. Burt & Thale, *supra* note 95.

213. Morris, *supra* note 162, at 352.

214. Genocide Convention, *supra* note 4; LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 58–61 (1991).

215. Wouters & Verhoeven, *supra* note 12, at 180–81.

216. *Id.* at 181, n.14 (listing countries that have excluded and added genocide groups, and which groups they have added and/or excluded).

217. Compare Genocide Convention, *supra* note 4, art. 1, with *Codigo Penal de Guatemala*, *supra* note 146, art. 376.

218. See Roht-Arriaza, *International Decisions*, *supra* note 66.

219. See Margarita K. O'Donnell, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 N.Y.U. L. REV. 333, 353–59 (2009).

was “different from the Genocide Convention in two crucial respects: first, there was no comma between the words ‘national’ and ‘ethnic’, and second, the term ‘social’ replaced the term ‘racial’ group.”²²⁰ This approach has been criticized as not meeting international standards.²²¹ Courts in Argentina accepted an interpretation of genocide that applied to crimes committed by the government against political opponents during the country’s “Dirty War,”²²² which has been also criticized as inconsistent with international law.²²³ On the positive side, domestic judges applying international law can “participate in [a] global judicial dialogue [that can] enhance their own legitimacy and create a sphere in which they are seen to operate within a legal rather than a political context.”²²⁴ However, if domestic interpretations stray too far from accepted international principles, due process rights could be violated and may impermissibly expand international criminal liability, “creating inconsistent and incoherent doctrine.”²²⁵

Another concern about the domestic prosecution of severe international crimes is the degree to which domestic courts adhere to international standards for a fair trial. According to Steven Ratner and Jason Abrams, components of a competent judiciary include “well-crafted statutes; . . . a trained cadre of judges, prosecutors, defenders, and investigators; . . . courtroom facilities; . . . [and] a culture of respect for the fairness and impartiality of the process and the rights of the accused.”²²⁶ In Rwanda, domestic *gacaca* courts were set up in 2001 to try a large number of individuals.²²⁷ These courts were criticized by international human rights groups for not meeting basic fair trial standards, as “[j]udges . . . [were] chosen by community election; they [were] given minimal training in

220. Richard J. Wilson, *The Spanish Proceedings*, in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 23, 27 (Reed Brody & Michael Ratner eds., 2000).

221. See, e.g., Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150 (2006).

222. See O'Donnell, *supra* note 219.

223. See *id.* at 335.

224. Slaughter, *supra* note 141, at 189.

225. O'Donnell, *supra* note 219, at 335.

226. STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 159 (1997).

227. See Sosnov, *supra* note 20, at 134–35.

criminal law, serve[d] without pay, and [could] impose sentences ranging up to 30 years' imprisonment."²²⁸ There were also allegations of widespread bribery and corruption in the system and "a number of witnesses and gacaca court officials [were] killed across the country, often in a brutal manner."²²⁹ Concerns over fair trials in these local courts were so great that European states including France and the U.K. refused to extradite individuals to Rwanda where they would be subject to trial.²³⁰ Although similar concerns exist regarding courts in Guatemala,²³¹ they may not be as severe as those surrounding Rwanda. Ironically, Ríos Montt's defense team in Guatemala compromised the integrity of the process by using due process as a justification for filing numerous frivolous legal challenges.²³²

The ICC, ICTY, ICTR, and other international tribunals have incorporated international fair trial standards into their founding statutes. However, other bias issues still exist in these forums. International tribunal staff, many of whom have a strong ideological dedication to ending international crime ("international legal idealists"), "may be inclined to presume guilt, to view convictions as more important than process, and to base charging decisions more on potential impact than on evidence."²³³ Furthermore, because international courts hear many cases related to the same event (such as a massacre), they "may thus be biased or perceived as biased when it has already adjudicated facts central to the later defendant's criminal responsibility."²³⁴ Additionally, there may be political pressure on international courts that depend on state funding to

228. Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16, 16 (2007).

229. *Id.* at 17.

230. Haroon Siddique, *Judge Orders Release of Four Men Accused over Rwandan Genocide*, GUARDIAN (Apr. 8, 2009), <http://www.theguardian.com/world/2009/apr/08/rwanda-accused-set-free>; *France Refuses to Extradite Genocide Suspect*, BBC NEWS (Sept. 15, 2010), <http://www.bbc.co.uk/news/world-europe-11310352>.

231. *See supra* Section II.C.

232. *See id.*

233. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 662 (2010).

234. *Id.* at 663.

produce convictions.²³⁵ Finally, the prosecutor in international criminal courts may find it much easier than the defendant to gain access to witnesses and evidence from state governments.²³⁶ Thus, while international courts' "provisions and . . . practice . . . require these courts to aspire to the highest standards set by international human rights treaties, customary international law, and general principles of law,"²³⁷ they contain inherent biases that could compromise the right to a fair trial.

With regard to a defendant's right to a fair trial and due process concerns, domestic courts *should maybe* prosecute genocide, depending on what due process guarantees and domestic political influence are present in the trial. In terms of a fair trial and due process, a foreign domestic court exercising universal jurisdiction *should* prosecute genocide. This is because these courts (such as European courts) are likely to have developed legal systems that follow international fair trial and due process standards, while at the same time being more physically and politically disconnected from the crimes. Domestic courts exercising universal jurisdiction are also less likely to be composed of "international legal idealists" and may be less politically influenced than international criminal courts; "[d]omestic judges and law clerks are used to remaining neutral and even-handed in less public and sensational cases."²³⁸

C. Goals of Criminal Justice

Justifications for criminal punishment in the domestic sphere include deterrence, retribution, incapacitation, rehabilitation, and condemnation.²³⁹ These goals can be seen as the flip side of a defendant's rights; they capture both victims' rights to justice and the right of society to condemn crime. The goals of incapacitation and rehabilitation are less likely to apply at the international criminal level.²⁴⁰ However, other central goals of crim-

235. Jacob Katz Kogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 132-33 (2002).

236. *Id.* at 131 ("the cooperation regime that undergirds international criminal courts significantly and systematically affects the ability of defendants to provide for their own defense").

237. *Id.* at 117.

238. Bibas & Burke-White, *supra* note 233, at 662.

239. *Id.* at 651.

240. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J.

inal justice, such as deterrence, retribution, and condemnation, are particularly relevant to international criminal law and the Guatemala case.

Scholars have asked whether international criminal justice can deter future mass atrocities, with varying degrees of confidence that it can.²⁴¹ Assuming at least a marginal deterrent effect, would deterrence be greater if genocide were prosecuted in domestic or international courts? The answer depends on which courts have the greatest powers to convict and incarcerate perpetrators, since there will be no deterrence without feared penalty. The Ríos Montt example suggests that international courts, or domestic courts exercising universal jurisdiction, may do a better job at deterrence, especially in politically charged cases, because “national courts are frequently subject to political manipulation, particularly in transitional societies.”²⁴² Due to Ríos Montt’s national political influence, he has been able to delay prosecution for several years, with trial set to begin again in January 2015 at the earliest.²⁴³ If perpetrators of genocide believe they will be prosecuted within their country, they may also believe that enough political influence can keep them out of jail, thus minimizing any possible deterrent effect.

Alternatively, Stephanos Bibas and William Burke-White argue that “[l]arger, speedier domestic systems are much better

39, 44 n.24, 48 (2002) (author notes “incapacitation” often does not apply in transitional justice cases).

241. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 9 (2001) (“[The] spread of accountability reflects the early glimmerings of an international criminal justice system and the gradual emergence of inhibitions against massive crimes hitherto tolerated or condoned by the international community.”); Aukerman, *supra* note 240, at 68 (“But it is not clear how much of a deterrent effect increased prosecutions would have on *genocidaires*. Potential war criminals may underestimate the actual risks.”); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 783 (2006) (“We contend that even when there is support for [international criminal tribunals], . . . it is still very likely that [they] will play a marginal, if not counterproductive, role in deterring humanitarian atrocities in the weak or failing states where such atrocities are most likely to be committed”).

242. William Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 741 (2003).

243. *Guatemala Ríos Montt Genocide Trial to Resume in 2015*, *supra* note 137.

at deterring and incapacitating. International criminal justice . . . should instead emphasize punishing as well as healing the wounds of atrocities.”²⁴⁴ This analysis, however, compares international criminal justice, generally, with the domestic prosecution of traditional domestic crimes. The study of the domestic prosecution of international crimes, such as genocide, suggests that complications in international justice do not stem just from the forums of international justice (e.g., international courts), but also from the nature of international crimes themselves. While domestic prosecution of traditional crime is generally better at deterrence than international criminal justice, the case of Ríos Montt suggests that international courts might provide greater deterrence than domestic courts. However, having both forums available would be best; the greater number of forums available for prosecution, the greater the deterrent effect on potential perpetrators because of the higher likelihood that some court will prosecute them.

Prosecuting a crime in a domestic court could offer greater retribution for victims in the home country to be in control of the process. As José Alvarez argues, “local justice is more accessible, more compatible with community expectations, and . . . may present greater opportunities for control over . . . proceedings.”²⁴⁵ At the same time, the conviction necessary for retribution and condemnation could be more likely in a court with a more developed judicial system. For example, in the Guatemala case, Ríos Montt’s defense team was able to sabotage the prosecution with “*litigio malicioso*, roughly translated as unethical legal tactics. . . . Such behavior is not unprecedented in Guatemala; the frivolous and improper use of legal motions . . . is well-documented.”²⁴⁶ “Endless appeals, shopping for friendly justices, and seeking to delay verdicts and sentencing are classic techniques of those seeking to avoid justice in Guatemala,” according to Geoff Thale, program director at the Washington Office for Latin America.²⁴⁷ An unequivocal “guilty” verdict,

244. Bibas & Burke-White, *supra* note 233, at 654.

245. Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 462 (1999).

246. Burt & Thale, *supra* note 95.

247. Mike McDonald, *Guatemala Trial of Ríos Montt Has Likely Collapsed*, REUTERS, May 21, 2013, available at <http://www.reuters.com/article/2013/05/22/us-guatemala-riosmontt-idUSBRE94L01N20130522>.

even if by an international court, could have sent a clear message and provided greater retribution (through seeing Ríos Montt incarcerated).

Prosecuting genocide in a foreign court with universal jurisdiction, especially in instances where the crime occurred in a country with a developing judicial system, could better address the goals of traditional criminal justice. This is because a foreign court with universal jurisdiction is less likely to be directly politically influenced by the defendant and will have stronger institutional capacity to convict an individual. While international courts have certainly acquitted individuals, the defense tactics used by the defense in the Ríos Montt case would not have been possible in an international court. Because the goals of punishment depend on a conviction in a court of law, international courts could better meet traditional goals of criminal justice.

Thus, with regard to traditional goals of traditional justice, domestic courts *should not* prosecute genocide, and international courts (or those exercising universal jurisdiction) *should* prosecute genocide. Still, domestic prosecution should remain an option to increase deterrence, a major goal of traditional criminal justice, by eliminating jurisdictions of impunity.

D. Goals of Transitional Justice

This Article has focused on traditional criminal law issues: jurisdiction, defendants' rights, and goals of punishment. However, this analysis alone overlooks the fact that genocide is not just an international crime, but also a historical event with deep political and social implications. The emerging field of transitional justice addresses these issues in the context of international law. As Ruti Teitel explains, "[t]he role of criminal justice in transitional times . . . transcends that of conventional punishment . . . [and] advances other purposes that are particular to political change."²⁴⁸

The tools and goals of transitional justice are distinct from, and overlap with, the traditional criminal justice goals described in the previous section. "The tools of transitional justice include trials, truth commissions, reparations, apologies, and

248. RUTI G. TEITEL, TRANSITIONAL JUSTICE 66 (2000).

purges.”²⁴⁹ The major goals of transitional justice include establishing truth, providing a forum for victims, holding perpetrators accountable, strengthening rule of law and institutional structures, and promoting societal restoration and reconciliation.²⁵⁰ “Transitional justice requires a balance of liberal commitments and political precautions.”²⁵¹

Establishing the truth is an essential component of transitional justice and has been a major goal of victims and human rights advocates in Guatemala.²⁵² The U.N. had already established a truth commission in Guatemala in the 1990s, which issued an extensive report on documented human rights abuses and international crimes committed during the civil war.²⁵³ For this reason, truth seeking may have not have been a primary goal of the genocide trial. Still, a trial could provide greater truth-seeking power, especially as some “castigated [the U.N. truth commission in Guatemala] as too weak, with a scope too confined to incidents surrounding armed conflict and powers too frail to authorize subpoenas or to name in its final report those individuals responsible for the wrongdoing.”²⁵⁴ Furthermore, additional information may come to light after a truth commission has concluded and can be presented in a subsequent prosecution. In a country that has not utilized other tools of international transitional justice similar to the truth commission, domestic prosecution of genocide could provide a valuable forum for establishing the truth.

In terms of establishing truth, then, domestic prosecution in the country where the genocide occurred is the best forum. The court has easier access to witnesses. During the Ríos Montt trial more than 100 witnesses and experts testified to events that occurred during the Civil War,²⁵⁵ creating a significant historical record. The greater the opportunity for full community par-

249. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 766 (2004).

250. See *What Is Transitional Justice?* INT'L CTR. FOR TRANSITIONAL JUSTICE, <http://ictj.org/about/transitional-justice> (last visited Feb. 7, 2014).

251. Posner & Vermeule, *supra* note 249.

252. See TEITEL, *supra* note 248, at 79–81.

253. See generally COMM'N FOR HISTORICAL CLARIFICATION, *supra* note 60.

254. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 129 (1998).

255. Elisabeth Malkin, *Former Leader of Guatemala Is Guilty of Genocide Against Mayan Group*, N.Y. TIMES, May 11, 2013, at A6.

ticipation, the greater the possibility for hearing a wide range of testimony and establishing the truth. Furthermore, the court is closer to relevant evidence and documents. For example, in 2005, investigators discovered an archive of the Guatemalan National Police that contained detailed information on murders and disappearances not available when the Truth Commission made its findings.²⁵⁶ The proximity of the Guatemalan court to evidence and witnesses increased the truth-finding power of the court.

Domestic courts are also better suited to meet the needs of restorative justice because of their ability to have a more direct impact on the society where the crimes took place. The Guatemalan case demonstrates the restorative benefits of holding the trial in a domestic court as opposed to an international or foreign court. For example, in the first ever “rape as a crime against humanity” case at the ICTY (an international court), “thirty-eight women detained in rape-camps told their stories to the ICTY, the people of Foča [the town in southern Bosnia where the crimes occurred] were isolated from the events of the trial and largely unable to personally benefit from the proceedings.”²⁵⁷ By contrast, in the 2013 domestic Guatemalan case, victims of sexual violence testified in their home country.²⁵⁸ According to local human rights groups, the “trial . . . marked a turning point for rape survivors, breaking the taboo of [discussing] sexual violence used as a weapon of war.”²⁵⁹ Alejandra Castillo, assistant director of the Guatemalan Human Rights Legal Action Centre, explained:

[In Guatemala,] [a]fter women suffered sexual violence, they were often rejected by their communities and not accepted back. There’s still stigma attached to sexual violence. But talking about it during the trial has paved the way for more dialogue and initiatives to combat high levels of sexual violence that still exist in Guatemala today. It’s a step forward.²⁶⁰

256. Simon Watts, *Guatemala Secret Files Uncovered*, BBC NEWS (Dec. 5, 2005), <http://news.bbc.co.uk/2/hi/americas/4499354.stm>.

257. Burke-White, *supra* note 242, at 735.

258. See Anastasia Moloney, *Guatemalan War Rape Victims Break Silence in Genocide Trial*, TRUST.ORG (May 20, 2013), <http://www.trust.org/item/20130510144558-362tb/>.

259. *Id.*

260. *Id.*

The trial also “allowed members of the Ixil community to tell their stories before a national audience for the first time,” which indigenous groups said was restorative and could help others understand their struggles.²⁶¹

Holding the trial in Guatemala engaged Guatemalan society in public dialogue and activism. The trial was covered heavily in the Guatemalan media,²⁶² and civil society groups, both those in support of and in opposition to Ríos Montt, held protests throughout the trial at the courthouse and at the prison where Ríos Montt was incarcerated.²⁶³ Public deliberation is necessary in a transitional society, and the domestic trial in Guatemala provided a forum for citizens to engage and express their opinions about the past regime and about the judicial and political future of their country.

Furthermore, the issuing of a guilty verdict in the trial sent a clear transitional message about military actions during the Civil War. While the Constitutional Court overturned the May 10th verdict, the decision was based on a legal technicality rather than on the substance of the evidence against the defendant.²⁶⁴ The verdict was, therefore, still significant in showing leadership culpability and judicial condemnation of acts of genocide during the Civil War. Even in the absence of a final conviction and incarceration of Ríos Montt (two goals of traditional criminal justice), the transitional message of even an over-

261. INT'L CRISIS GROUP, JUSTICE ON TRIAL IN GUATEMALA: THE RÍOS MONTT CASE 3 (Sept. 23, 2013) [hereinafter JUSTICE ON TRIAL], <http://www.refworld.org/pdfid/524032604.pdf>.

262. See generally *Search Results: Efrain Rios Montt*, SIGLO XXI [21ST CENTURY], <http://www.s21.com.gt/etiquetas/efrain-rios-montt> (last visited Mar. 1, 2014); *Tags/Rios Montt*, PRENSA LIBRE, [FREE PRESS], http://www.prensalibre.com/tema/rios_montt.html (last visited Mar. 1, 2014).

263. Daniel Hernandez, *Protests Follow Judges' Rulings in Guatemalan War Crimes Trial*, L.A. TIMES (Apr. 19, 2013), <http://articles.latimes.com/2013/apr/19/world/la-fg-wn-guatemala-war-crimes-rios-montt-20130419>; Robert Mercatante, “Yes, There Was Genocide!”: *Guatemala's Ixil Vow to Keep Fighting for Justice*, CTR. FOR INT'L POLY, AMERICAS (June 28, 2013), <http://www.cipamericas.org/archives/9895>; *Supporters of Ex-Guatemala Dictator Rios Montt Protest Outside Prison over Genocide Verdict*, GLOBAL NEWS (May 12, 2013), <http://globalnews.ca/news/555644/supporters-of-ex-guatemala-dictator-rios-montt-protest-outside-prison-over-genocide-verdict/>.

264. See *Interview with Juan Francisco Soto, Director of CALDH*, OPEN SOC'Y JUSTICE INITIATIVE (Aug. 1, 2013), <http://www.riosMontt-trial.org/2013/08/interview-with-juan-francisco-soto-director-of-caldh/>.

turned guilty verdict is important. The trial of Pinochet shows the impact of transitional justice, even in the absence of a guilty verdict: “[a]t the time he was arrested in London in October 1998, the country was divided, . . . [b]ut the international condemnation that ensued in 1999 altered public opinion in Chile.”²⁶⁵ In the wake of the campaign for international justice against Pinochet, “the vast majority of Chileans view Pinochet as a dictator, and he has precious little support among the younger generation.”²⁶⁶

Finally, the construction of judicial institutions is clearly more likely to occur when defendants are prosecuted in the country where the crimes occurred. Guatemala is severely in need of stronger judicial institutions. According to a Human Rights Watch report, “98 percent of crimes in Guatemala do not result in prosecutions. Deficient and corrupt prosecutorial and judicial systems, as well as the absence of an effective witness protection system, all contribute to this alarmingly low prosecution rate.”²⁶⁷ Furthermore, a report by the American Bar Association Center for Human Rights found that the judicial system is regularly used in Guatemala to threaten and intimidate human rights defenders.²⁶⁸ As political science professor Anita Isaacs stated, “[t]here are islands of democracy here, but it remains a sea of impunity.”²⁶⁹

In Guatemala, the U.N. Truth Commission and judicial training programs seem to be contributing to progress. For example, information discovered in the police archive in 2005 has led to numerous charges against former police officials. In 2011, Héctor Bol de la Cruz, a former chief of police, was arrested and charged with the 1984 disappearance of a twenty-seven-year-

265. Roger Alford, *Forty Years Ago Today: Pinochet's Coup in Chile*, OPINIO JURIS (Sept. 11, 2013), <http://opiniojuris.org/2013/09/11/forty-years-ago-today-pinochets-coup-chile/>.

266. *Id.*

267. *World Report 2013: Guatemala*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report/2013/country-chapters/guatemala> (last visited Aug. 1, 2013).

268. AM. BAR ASSOC. CTR. FOR HUMAN RIGHTS, *TILTED SCALES: SOCIAL CONFLICT AND CRIMINAL JUSTICE IN GUATEMALA* 3 (2013), http://www.americanbar.org/content/dam/aba/administrative/human_rights/jd_tilted_scales_eng.authcheckdam.pdf.

269. Casey, *supra* note 86.

old student activist.²⁷⁰ One year earlier, two of his former agents were sentenced to forty years in prison based on archive evidence that linked them to the same disappearance.²⁷¹ In 2012, another former police chief, Pedro García Arredondo, was sentenced to seventy years in prison for “orchestrating the kidnapping of engineering student Edgar Saenz” in 1981;²⁷² and, also in 2012, former director of National Police Marlene Raquel Blanco Lapola was charged with the extrajudicial killing.²⁷³ Recent arrests and convictions demonstrate a strengthening of the rule of law in Guatemala. While a great deal of impunity still exists, war crimes trials and transitional justice mechanisms are contributing to the development of judicial institutions in Guatemala.

Ruti Teitel argues that “[t]he transitional normative message is most clearly expressed through the international legal order, as its strengths are a normative machinery with the capacity to comprehend extraordinary political violence deployed outside the ordinary legal order.”²⁷⁴ This argument might suggest that trials held in international courts would more clearly send the message that the conduct of the defendant was something particularly heinous beyond that found in any “normal” domestic trial. While this is a valid point, charging defendants with international crimes prohibited by international treaty sends the message that such crimes are outside of the domestic criminal sphere, even if that crime is prosecuted in a domestic court. This is another reason why states must make sure to ratify relevant international treaties and incorporate them into their domestic codes; even though defendants could be tried with

270. Mike McDonald, *Long-Hidden Archives Help Guatemala War Crimes Trials*, REUTERS, Feb. 8, 2012, available at <http://www.reuters.com/article/2012/02/08/us-guatemala-archives-idUSTRE8172D220120208>; *Guatemala arrests ex-police chief in war crime probe*, REUTERS, Jun. 9, 2011, available at <http://www.reuters.com/article/2011/06/09/us-guatemala-arrest-idUSTRE7585XF20110609>.

271. McDonald, *supra* note 270.

272. *Guatemala Jails Former Police Chief over Student Kidnapping*, TELEGRAPH (Aug. 22, 2012), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/guatemala/9491383/Guatemala-jails-former-police-chief-over-student-kidnapping.html>.

273. *World Report 2013: Guatemala*, *supra* note 267.

274. TEITEL, *supra* note 248, at 30.

underlying domestic offense crimes (e.g., murder), the normative message of a conviction for an international crime (e.g., crimes against humanity or genocide) is much stronger.²⁷⁵

Another drawback of international courts is that they can also be viewed as illegitimate “instrument[s] of hegemony.”²⁷⁶ This reality, or perception, can seriously limit their ability to positively impact society. An aversion to hegemony is justifiably strong in Guatemala; U.S. hegemony during the Cold War supported state violence that terrorized the population during the Civil War.²⁷⁷ International human rights organizations and the U.N. have played a large role in the prosecution, leading “defendants and their allies [to] continue to condemn the ‘international meddling’ in Guatemalan affairs.”²⁷⁸ Political groups in the country, especially those tied to the military, also see the trial as a threat to the current President, Pérez Molina, who was in the military in the 1980s and has been implicated in numerous crimes.²⁷⁹ Even in the domestic trial of Ríos

275. See *supra* Section III.A, for a discussion on incorporating international law into domestic codes.

276. See Akhavan, *supra* note 241, at 14.

277. See, e.g., John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES (Mar. 11, 1999), <http://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html?src=pm> (“[U.S.] President [Bill] Clinton apologized . . . for United States support of right-wing governments in Guatemala that killed tens of thousands of rebels and Mayan Indians in a 36-year civil war.”). See also *supra* Section I, for a description of the United States’ role in the Guatemalan civil war.

278. Carasik, *supra* note 88.

279. See *id.*

In 2011, several human rights organizations presented an Allegation Letter to the UN Special Rapporteur on Torture outlining evidence against Perez Molina. Their motion included a widely circulated videotape of Perez Molina in 1982 standing over battered bodies who had reportedly been subjected to abusive interrogation before being extrajudicially executed. Numerous other witnesses as well as Guatemalan military documents and U.S. cables have directly implicated Perez Molina for crimes against humanity in the Ixil triangle. There is also evidence, including declassified intelligence documents, that Perez Molina continued to perpetrate human rights abuses when he ascended to the position of Director of Military Intelligence in the early 1990s, including complicity in the torture and extrajudicial assassination . . .”

Montt, the role of the international community was criticized on nationalist grounds, and this opposition would have likely been even stronger if an international court prosecuted the case.

While Ríos Montt's crimes occurred more than thirty years ago, the transitional message is important because many of the problems of that era that were implicated in the case continue to this day. While far more Latin American countries are now democracies,²⁸⁰ issues of indigenous rights,²⁸¹ political rights,²⁸²

Id. See also *supra* Section II.C (describing witness testimony against Perez Molina at the Ríos Montt trial in Guatemala).

280. See Arch Puddington, *Latin America's Wavering Democracies*, FREEDOM HOUSE BLOG (Sept. 6, 2012), <http://www.freedomhouse.org/blog/latin-america's-wavering-democracies> (“[D]emocracy, while under pressure, remains the norm in Latin America. The region today is far freer than it was in 1980.”).

281. According to Inter-American Development Bank (“IADB”) data, about 10% of the region's population is indigenous; Bolivia's and Guatemala's populations are approximately half indigenous. *The IDB and Indigenous Peoples*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/topics/gender-indigenous-peoples-and-african-descendants/indigenous-peoples,2605.html> (last visited Feb. 21, 2014) (“The indigenous population in Latin America is estimated at around 40 to 50 million people, or 8 percent to 10 percent of the region's overall population.”); *Percentage of Indigenous Populations in LAC*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/topics/gender-indigenous-peoples-and-african-descendants/percentage-of-indigenous-population-in-lac,7043.html#UkCkYFG51UQ> (last visited Nov. 22, 2013). According to the World Bank, “indigenous peoples in Latin America . . . continue to suffer from higher poverty, lower education, and greater incidence of disease and discrimination than other groups.” *Indigenous Peoples, Poverty and Human Development in Latin America: 1994–2004*, WORLD BANK (May 18, 2005), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,content-MDK:20505834~pagePK:146736~piPK:146830~theSitePK:258554,00.html>; see also JUSTICE ON TRIAL, *supra* note 261, at 1–2 (“The genocide charges raised the raw issue of race and ethnicity in a country where the indigenous peoples, who census figures say make up about forty percent of the population, remain overwhelmingly poor and largely excluded from the highest levels of national government and business.”).

282. For example, freedom of the press is a serious concern in Venezuela, Ecuador, Nicaragua, and Bolivia. See Robert Valencia, *How the Latin American Press Is Losing Its Voice*, WORLD POLICY BLOG (Mar. 19, 2013), <http://www.worldpolicy.org/blog/2013/03/19/how-latin-american-press-losing-its-voice> (“In 2007, the [Inter-American Commission on Human Rights] concluded that the Chávez [former President of Venezuela] administration failed to protect and punish acts of intimidation against journalists who belonged to

generalized violence,²⁸³ and the role of the United States in domestic affairs²⁸⁴ remain as some of the most significant issues facing the region. For this reason, the trial and judgment are not just about the past, but also about the present and future.

In terms of transitional justice, domestic courts where the genocide occurred *should definitely* prosecute crimes. The goals of seeking the truth, establishing the rule of law, and promoting societal reconciliation can only be achieved by actively engaging the society where the crimes occurred. While international tribunals and domestic courts exercising universal jurisdiction can achieve these goals to some extent, the society where the crimes occurred must engage in the process for it to have any lasting impact.

IV. TENSIONS AND SOLUTIONS

Jurisdiction and the goals of transitional justice clearly favor domestic prosecution. However, international courts and domestic courts exercising universal jurisdiction could better meet international standards and be more effective with regard to fair trial and due process rights.

At the same time, this divide is not absolute. For example, it is difficult to promote rule of law institutions without respect for defendants' and victims' rights. While there may be a tension, which leads to trade-offs, none of these factors can be ignored. Teitel argues this point:

Globovisión and Radio Caracas Televisión, another defunct TV channel critical of Chávez.”).

283. In discussing numerous reasons Latin American nations have “retreated from records of relatively impressive democratic performance,” Puddington points to

[c]ountries where criminal violence, often driven by drug-trafficking rivalries, has spiraled so completely out of control as to have weakened press freedom, rule of law, and other democratic indicators. Mexico . . . is the principal example. Drug-related violence has also retarded the growth of democratic institutions in El Salvador, Guatemala, Honduras, and the Dominican Republic.

Puddington, *supra* note 280.

284. See Christopher Sabatini, *Rethinking Latin America*, FOREIGN AFF., Mar./Apr. 2012, available at <http://www.foreignaffairs.com/articles/137101/christopher-sabatini/rethinking-latin-america>.

For trials to realize their constructive potential, they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times, and when they are not conducted in a visibly fair way, the very same trials can backfire, risking the wrong message of political justice and threatening a fledgling liberal state.²⁸⁵

Adopting an intermediary approach, such as regional criminal law enforcement, could mitigate these tensions.²⁸⁶ According to Burke-White, “[s]upranational tribunals are often unwieldy, expensive, and both physically and psychologically distant from the particular crimes in question. National courts, while less expensive to administer and closer to the events in question, often lack judicial resources and run the risk of bias.”²⁸⁷

Latin America should thus consider a regional criminal court.²⁸⁸ Latin American and Caribbean countries have already largely embraced international criminal justice;²⁸⁹ as of September 2013, twenty-six countries in the regions have ratified the Rome Statute of the International Criminal Court.²⁹⁰ Both the Inter-American Court of Human Rights, an organ of the Organization of American States (“OAS”) based in San José, Costa Rica,²⁹¹ and the Inter-American Commission on Human

285. TEITEL, *supra* note 248, at 30.

286. *See generally* Burke-White, *supra* note 242.

287. *Id.* at 734.

288. While Burke-White claims that there are certain benefits to the regionalization of international criminal law, he does not “necessarily [call] for the creation of regional criminal courts.” *See id.* at 761.

289. *See* Salvador Herencia Carrasco, *Implementation of War Crimes in Latin America: An Assessment of the Impact of the Rome Statute of the International Criminal Court*, 10 INT'L CRIM. L. REV. 461, 461–62 (2010).

290. The Latin American and Caribbean countries that have ratified the Rome Statute are Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *See States Parties-Chronological List*, *supra* note 79. Cuba, El Salvador, and Nicaragua have not ratified the Rome Statute. *See id.* In North America, Canada has ratified the Statute, but the United States has not. *See id.*

291. *See Corte Interamericana de Derechos Humanos* [Inter-American Court of Human Rights], INTER-AM CT. HUM. RTS., <http://www.corteidh.or.cr/> (last visited Aug. 1, 2013).

Rights, another OAS institution based in Washington, D.C.,²⁹² already investigate and adjudicate regional human rights complaints. Alexandra Huneeus recently argued that the Inter-American human rights system is also already “developing quasi-criminal review”²⁹³ by “order[ing] and supervis[ing] national prosecutions.”²⁹⁴ The fact that the stalled genocide trial in Guatemala has just been referred to the Inter-American Commission confirms this view.

A regional criminal court would be a durable institution that promotes the rule of law through accountability for international crimes in the region. Such a court would also provide a means by which criminals could be tried in a forum that is close to home, but would be less biased by a domestic political system. Possible candidates for prosecution include Inocente Orlando Montano from El Salvador,²⁹⁵ Juan Carlos Bonilla Valladares from Honduras,²⁹⁶ and Alesio Gutiérrez from Nicaragua.²⁹⁷ However, such a court may not be established for some time given current tensions in the inter-American system,²⁹⁸

292. See *Inter-American Commission on Human Rights*, ORG. AM. STS., <http://www.oas.org/en/iachr/> (last visited Aug. 1, 2013).

293. Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 4 (2013).

294. *Id.* at 1.

295. See Milton J. Valencia, *Salvadorian Convicted of Immigration Fraud*, BOS. GLOBE (Sept. 11, 2012), <http://www.bostonglobe.com/metro/2012/09/11/former-salvadoran-official-convicted-immigration-fraud-boston-sought-spain-war-crimes-charges/q0rTPruik4sLU8x9ESfByJ/story.html> (“A former Salvadoran military commander pleaded guilty Tuesday in federal court to lying to immigration authorities so that he could stay in the United States, a move that could aid Spanish authorities who are seeking to have him extradited to that country to face war crimes charges.”).

296. See Katherine Corcoran & Martha Mendoza, *Juan Carlos Bonilla Valladares, Honduras Police Chief, Investigated in Killings*, HUFFINGTON POST (June 1, 2012), http://www.huffingtonpost.com/2012/06/01/juan-carlos-bonilla-valla_n_1562328.html.

297. Victoria Sanford, *Victory in Guatemala? Not Yet*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/opinion/its-too-soon-to-declare-victory-in-guatemalan-genocide.html?pagewanted=2>.

298. See Ignacio Boulin, *Challenges to the Inter-American Human Rights System*, HARV. INT'L. L.J. DIG., Dec. 16, 2013, <http://www.harvardilj.org/2013/12/challenges-to-the-inter-american-human-rights-system/>; *In Depth: OAS General Assembly*, AM. Q.,

recent reforms to inter-American institutions,²⁹⁹ and a still-developing ICC. In the near future, domestic prosecution of international crimes under territorial and universal jurisdiction will likely continue in cases where ICC referral is neither legally nor politically feasible.

CONCLUSION

The question of whether domestic courts should prosecute genocide is not answered with a simple "yes" or "no." Instead, a number of complex factors need to be considered in evaluating the forum for genocide prosecution, including jurisdiction, victims' and defendants' rights, and transitional justice. In terms of promoting the goals of transitional justice, the strongest forum is domestic. However, risks associated with a domestic court prosecution must also be taken into account.

The recent trial of Ríos Montt in Guatemala illustrates this tension. While the forum in a domestic court clearly provided the greatest transitional benefits to Guatemalan society, the court was not able to convict Ríos Montt despite an overwhelming body of evidence.³⁰⁰ The case remains pending, however, and a final guilty verdict might still be possible. Regional criminal law enforcement mechanisms offer an attractive possible solution to the domestic-international forum problem; however, the factors addressed in this Article should be evaluated on a case-by-case basis. In the future, international law must protect human rights using a number of tools, including domestic mechanisms, guided by international principles, and with the attention and contribution of the international community.

<http://www.americasquarterly.org/content/iachr-reform-depth> (last visited Aug. 4, 2013).

299. See generally David Padilla, *The Future of the Inter-American System of Human Rights*, AM. U. WASH. C. L. HUM. RTS. BRIEF (1995).

300. See *supra* Section II.C.