

Notes

Institutional Inoculation: The International Commission Against Impunity in Guatemala (CICIG), International Rule of Law Mechanisms, and Creating Institutional Legitimacy in Post-Conflict Societies

Post-conflict societies often face challenges in achieving justice for crimes committed during the conflict, establishing truth, securing reparations, and establishing guarantees of non-recurrence. Layered over these challenges are other common challenges in the justice system to restoring rule of law, both in absolute terms in applying and fulfilling the law and rebuilding societal trust in State institutions. The International Commission against Impunity in Guatemala (“CICIG”), which brings international prosecutors into Guatemala to co-prosecute cases of criminal networks in national courts alongside national prosecutors, presents a novel model for transnational justice cooperation, labeled in this Note as a “grafting” mechanism. In contrast with traditional approaches of truth commissions, international tribunals, and hybrid tribunals, grafting mechanisms do not create new or freestanding mechanisms but attach international elements to existing national institutions to promote cooperation and innovation, according to local needs. Through the lens of transitional justice and rule of law scholarship, this Note explores what factors define a grafting mechanism and allow it to restore public trust and strength to national justice institutions in the context of post-conflict societies. The Note first discusses the new analytical framework of grafting mechanisms and then explores the creation and experience of the CICIG before attempting to glean lessons for future grafts. The Note concludes that for a successful graft, flexibility, collaboration, and a dynamic relationship

between the national and international parts of the graft are necessary.

INTRODUCTION	537
I. GOALS OF TRANSITIONAL JUSTICE AND RULE OF LAW IN POST-CONFLICT SOCIETIES.....	542
A. The Shared Goals of Transitional Justice and Rule of Law in Post-Conflict Societies	543
B. Surrogates, Transplants, and Grafts: A Framework for Institutional Intervention in Post-Conflict Societies	545
1. Surrogates	546
2. Transplants	548
3. Grafts	550
II. FROM TRANSPLANT TO GRAFT: THE CREATION OF THE CICIG.....	551
A. The Guatemalan Armed Conflict: The Need for the CICIG.....	551
B. The CICIG’s Mandate and Structure	555
C. Relevant Legal Transitions in Guatemala and the Figure of <i>querellante adhesivo</i> in Guatemalan Law.....	559
III. PRACTICES AND PROCESSES OF THE CICIG	562
A. Investigations & Prosecutions: Tools for Gaining Legitimacy	564
1. Investigations.....	565
2. Co-Prosecutions.....	571
B. CICIG as a Catalyst for Legal and Institutional Reform	574
IV. EXAMINING THE “INSTITUTIONAL GRAFT”	580
A. Evaluating Indicators of CICIG’s Impact on Rule of Law	581
B. Prominent Concerns Related to the Institutional Graft..	588
C. Comparing CICIG to New Mechanisms: Honduras’s MACCIH	592
CONCLUSION	596

INTRODUCTION

Inosculation, commonly known as grafting, is a process by which parts of different plants connect and grow together. This practice has long been used to strengthen crops with the support of other plant variants.¹ This Note explores how a national legal institution can become stronger by combining it with a foreign element. In 2007, the Republic of Guatemala, the United Nations (“U.N.”), and a group of donor States from the Americas and Europe created the International Commission against Impunity in Guatemala (“CICIG,” in Spanish). This independent entity, based in Guatemala under the auspice of the U.N., has a special grant of power to co-prosecute criminal cases alongside the Guatemalan Public Prosecutor’s Office (“MP,” in Spanish) in national courts and a unique mandate to support Guatemala disarticulate clandestine structures that affect the State’s ability to properly function.² To date, the CICIG has brought charges against more than 700 individuals³ from organized criminal networks,⁴ private sector businesses,⁵ and public officials and employees, including: police officers,⁶ military officers,⁷ municipal au-

1. Eliezer E. Goldschmidt, *Plant Grafting: New Mechanisms, Evolutionary Implications*, FRONTIERS PLANT SCI. 5 (Dec. 17, 2014), <https://doi.org/10.3389/fpls.2014.00727> [<https://perma.cc/A3FP-SEFH>].

2. Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission Against Impunity in Guatemala (“CICIG”) arts. 1–3, U.N.-Guat., Dec. 12, 2006, 2472 U.N.T.S. 44373 [hereinafter CICIG Agreement].

3. Glenda Sánchez, *Llegan a 602 los Capturados por Corrupción*, PRENSA LIBRE (Nov. 30, 2015), <http://www.prensalibre.com/guatemala/justicia/llegan-a-602-loscapturados-por-corrupcion> [<https://perma.cc/5ACK-L8ZZ>] (reporting that over 600 public officials had been arrested in less than a year in connection with corruption cases in 2015); Elizabeth Malkin, *Guatemala’s Anti-Corruption Fight Inspired Latin America. It May be Shut Down*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/world/americas/guatemala-cicig-aldana-corruption.html?searchResultPosition=1> [<https://perma.cc/L3AQ-EEK5>].

4. See, e.g., Miguel Barrientos, Glenda Sánchez & Roni Pocón, *Capturan 178 Presuntos Extorsionistas Durante Operativo*, PRENSA LIBRE (Sept. 11, 2017), <http://www.prensalibre.com/guatemala/justicia/pandilleros-habrian-obtenido-mas-de-q5-millones-de-forma-ilicita> [<https://perma.cc/PUR2-YZVT>] (reporting on capture of 178 members of the MS-13 and Barrio 18 gangs).

5. See, e.g., Bill Barreto, *Ocho casos y siete empresas que se beneficiaron de “La Línea,”* PLAZA PÚBLICA (June 11, 2015), <https://www.plazapublica.com.gt/content/ocho-casos-y-siete-empresas-que-se-beneficiaron-de-la-linea> [<https://perma.cc/M2QE-U2BK>].

6. See, e.g., Boche, J. López & J. Santos, *MP y CICIG Allanan Sede de la Digici*, EL PERIÓDICO (Dec. 12, 2015), <https://elperiodico.com.gt/nacion/2015/12/12/mp-y-cicig-allanan-sede-de-la-digici/> [<https://perma.cc/A7V9-ZMCR>] (explaining a MP/CICIG raid on the police’s civil intelligence unit).

7. See, e.g., Bill Barreto, *De Moreno a La Línea: La Huella Militar en la Defraudación Aduanera*, PLAZA PÚBLICA (Aug. 22, 2015), <https://www.plazapublica.com.gt/>

thorities,⁸ members of congress,⁹ State ministers,¹⁰ judges,¹¹ a sitting vice-president and president, and four of Guatemala's past five Heads of State.¹² During the same period, outside the CICIG's role, the MP and judiciary successfully tried the first case of genocide against a

content/de-moreno-la-linea-la-huella-militar-en-la-defraudacion-aduanera [https://perma.cc/G7N3-YVT7] (tracing the involvement of military officials in cases of corruption from the armed conflict to present day).

8. Press Release, CICIG, Ligan A Proceso a 17 Sindicados en Caso Corrupción Municipalidades (Nov. 3, 2017), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=846&cntnt01returnid=1611> [https://perma.cc/RL5J-59RR].

9. For an example of a sitting congressman, see Press Release, CICIG, Ampliación: Ligan a Proceso y Envían a Prisión Preventiva al Diputado Roberto Kestler (Nov. 3, 2017), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=845&cntnt01returnid=1611> [https://perma.cc/MM7X-F4ET]. For an example of a former congressman, see Press Release, CICIG, Caso Plazas Fantasma: Ligados a Proceso Exdiputados del Congreso (May 31, 2016), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=722&cntnt01showall=&cntnt01returnid=1611> [https://perma.cc/WJ5K-77WN].

10. Press Release, CICIG, Caso La Cooperacha (June 11, 2016), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=727&cntnt01showall=&cntnt01returnid=1611> [https://perma.cc/6HDS-3M6L]; Press Release, CICIG, Condenan al Exministro de Gobernación y Otras 17 Personas en Caso Patrullas (Fase 2), <https://www.cicig.org/casos/condenan-al-exministro-de-gobernacion-en-caso-patrullas/> [https://perma.cc/2DWR-5FD7] (announcing the conviction and 165-month sentence against former Minister of the Interior Mauricio López Bonilla for fraud and embezzlement).

11. See Press Release, CICIG, Capturan a la Magistrada Blanca Stalling Dávila (Feb. 8, 2017), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=782&cntnt01returnid=67> [https://perma.cc/B9VZ-WGMB] (announcing the arrest of a Supreme Court magistrate for corruption); Rony Ríos, *MP y CICIG piden juicio en caso Bufete de la Impunidad*, EL PERIÓDICO (Aug. 8, 2017), <https://elperiodico.com.gt/nacion/2017/08/08/mp-y-cicig-piden-juicio-en-caso-bufete-de-la-impunidad/> [https://perma.cc/U8RW-3M8U] (reporting the arrest of a first instance criminal judge for corruption).

12. Press Release, CICIG, Caso La Línea: A Juicio Expresidente Otto Pérez y Exvicepresidenta Roxana Baldetti (Oct. 27, 2017), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=844&cntnt01returnid=1611> [https://perma.cc/C7HM-GLVJ]; *Cicig y MP solicitan retiro de inmunidad del alcalde Álvaro Arzú*, PRENSA LIBRE (Oct. 5, 2017), <http://www.prensalibre.com/guatemala/justicia/alvaro-arzu-alcaldemunicipalidad-de-guatemala-antejuicio-cicig-mp> [https://perma.cc/ZVS9-2BQR] (requesting the removal of immunity for former President Alvaro Arzú); Julio E. Santos, *MP y CICIG piden antejuicio contra el presidente Morales*, EL PERIÓDICO (Aug. 25, 2017), <https://elperiodico.com.gt/nacion/2017/08/25/mp-y-cicig-piden-antejuicio-contra-el-presidente-morales/> [https://perma.cc/KT8P-FBW2] (reporting on the MP/CICIG petition to remove the current president's immunity to investigate a case of electoral corruption); *Ex presidente Alfonso Portillo enfrenta a la justicia*, CICIG (Feb. 1, 2011), <http://www.cicig.org/index.php?page=ex-presidente-alfonso-portillo-enfrenta-a-la-justicia> [https://perma.cc/PH9E-75NM] (explaining the legal case against former President Alfonso Portillo).

former Head of State in a national court,¹³ as well as over a dozen other cases of international crimes.¹⁴ High-level convictions in these complex corruption and atrocity crimes cases mark a significant advance in Guatemala's post-conflict achievement of justice.

The CICIG pioneered what I call an "institutional grafting" mechanism. Borrowing the term from both agronomy¹⁵ and surgery,¹⁶ "grafting" refers to a system that is neither a surrogate for a national institution, such as an international tribunal or investigative commission, nor a transplant that creates a new institution, like a hybrid tribunal.¹⁷ Instead, in this case, a discrete international element is brought together, or "grafted," with an existing national institution with the intention that together they will strengthen and develop the national institution.

I argue that the grafting model is appropriate to serve the long-term goals of establishing a stable rule of law and facilitating greater access to justice by returning independence and legitimacy to national institutions. In the case of Guatemala, surveys and citizen action indicate strong support for both the U.N. mechanism and the

13. Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Sentencia, C-01076-2011-00015 Of. 2o (May 10, 2013) (Guat.) [hereinafter Genocide Sentence].

14. Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, Sentencia, C-01076-2012-0021 Of. 2o (Feb. 26, 2016) (Guat.) [hereinafter Sepur Zarco Sentence]; Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, Sentencia, C-01071-1980-00547 (Jan. 19, 2015) (Guat.) [hereinafter Spanish Embassy Sentence]; Corte Suprema de Justicia, Cámara Penal, Resolución, Expediente 1758-2012 & 1779-2012 (Apr. 10, 2013) (Guat.) [hereinafter Plan de Sánchez Decision]; Corte Suprema de Justicia, Cámara de Amparo y Antejuicio, Resolución, Expediente 1215-2011 (Aug. 3, 2012) (Guat.) [hereinafter Chegüen Decision]; Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, Sentencia, C-01076-2010-00003 Of. 1o (Aug. 2, 2011) (Guat.) [hereinafter Dos Erres Sentence I]; Corte Suprema de Justicia, Cámara Penal, Resolución, Expediente 509-2008 (Nov. 30, 2010) (Guat.) [hereinafter Cobán Decision]. *See also*, *Desaparición Forzada*, BUFETE JURIDICO DE DERECHOS HUMANOS (Feb. 28, 2014), <http://bdh.org.gt/index.php?id=desaparicion-forzada&lang=en> [https://perma.cc/KCY3-6CG9] (explaining the convictions achieved in five cases of enforced disappearance); *Guatemala: Fifth Former Soldier Convicted over Role in Dos Erres Massacre*, AMNESTY INT'L (Mar. 14, 2012), <https://www.amnesty.org/en/latest/news/2012/03/guatemala-fifth-former-soldier-convicted-over-role-dos-erres-massacre/> [https://perma.cc/5SGE-SRBU] (reporting on the second conviction in the Dos Erres case).

15. Britta M.C. Kumpers & Anthony Bishopp, *Plant Grafting: Making the Right Connections*, 25 CURRENT BIO. R411 (2015).

16. Michael D. Lieb et al., *Concurrent Carotid Endarterectomy and Coronary Artery Bypass Grafting/Valve Replacement in Asymptomatic Patients with Severe Carotid Stenosis: A Five Year Single Center Experience*, 58 J. VASCULAR SURGERY 1163 (2013).

17. TREVOR SUTTON, BUILDING ACCOUNTABILITY FROM THE INSIDE OUT 10–11 (2016).

national institution, seen as a common actor.¹⁸ The international slice of the graft permits the introduction of new or previously underdeveloped investigatory tools and techniques, and the national institution grounds the experience in a local context and provides sustainable capacity to deliver justice. This investigation is important today, as many countries around the world face uncertainty in their rule of law¹⁹ and past efforts by the international community to foster rule of

18. Martín Rodríguez Pellecer, *Encuesta: Pro MP-CICIG y Democracia, y No por Gobierno, Cacif y Ejército*, NÓMADA (Mar. 27, 2017), <https://nomada.gt/encuesta-pro-mp-cicig-y-democracia-y-no-por-gobierno-cacif-y-ejercito/> [<https://perma.cc/6VJC-26WX>] (discussing a 1,600-person study commissioned by the National Democratic Institute showing that the MP and CICIG were the most trusted institutions in Guatemalan society in 2017); Doménica Velásquez, *Encuesta Libre: Cicig se Gana Confianza y Aprobación de los Guatemaltecos*, PRENSA LIBRE (2017), <http://www.prensalibre.com/guatemala/decision-libre-2015/cicig-se-gana-confianza-y-aprobacion-de-los-guatemaltecos> [<https://perma.cc/5KFG-4SQ9>] (reporting on the results of a survey showing high approval rating for the CICIG, although lower for the justice system); Esvin López, *En Imágenes. Guatemaltecos Regresan a “La Plaza” en Apoyo a Thelma Aldana e Iván Velásquez*, PUBLINEWS GUAT. (Aug. 26, 2017), <https://www.publinews.gt/gt/noticias/2017/08/26/manifestacion-plaza-central-apoyo-ivan-velasquez-thelma-aldana-26-agosto-2017.html> [<https://perma.cc/Z5S4-4JU5>] (reporting on national protests in support of the MP and the CICIG in 2017); *Manifestaciones Pacíficas de Campesinos Apoyan a CICIG y MP y Demandan Renuncia de Pérez Molina*, CERIGUA (Aug. 5, 2015), <https://cerigua.org/article/manifestaciones-pacificas-de-campesinos-apoyan-a-c/> [<https://perma.cc/25VK-F2YY>] (reporting on country-wide protests in favor of the MP and CICIG in 2015); Press Release, CICIG, Encuesta ProDatos: 72% de la población guatemalteca apoya labor de la CICIG (Apr. 5, 2019), <https://www.prensalibre.com/tribuna/plus/mayoria-esta-a-favor-de-que-siga-la-cicig/> [<https://perma.cc/J27Z-SMPX>]; *CID Gallup: Mayoría de guatemaltecos encuestados ven positiva la continuidad de CICIG*, CON CRITERIO (Sep. 10, 2018), <http://concriterio.gt/cid-gallup-mayoria-de-guatemaltecos-encuestados-ven-positiva-la-continuidad-de-cicig/> [<https://perma.cc/LSG2-KP64>].

19. See, e.g., Press Release, European Comm’n, European Commission refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court (Sept. 24, 2018), http://europa.eu/rapid/press-release_IP-18-5830_en.htm [<https://perma.cc/QL7J-EUAC>] (reporting the continued invocation of article 267 procedures for referral to the Court of Justice of the European Union under the Treaty on the Functioning of the European Union (TFEU) on rule of law concerns that Poland violated articles 2 and 19(1) TFEU and article 47 of the Charter of Fundamental Rights of the European Union in imposing new restrictions on the judiciary); Press Release, European Parliament, Rule of Law in Hungary: Parliament Calls on the EU to Act (Sept. 12, 2018); <http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act> [<https://perma.cc/3RY6-VZ7L>] (reporting that the European Parliament voted 448 to 197 to refer Hungary to the European Council for suspension of rights under article 7(1) TFEU in connection with new measures adopted by Hungary which may restrain the judiciary and free elections); Press Release, Int’l. Comm’n of Jurists, Philippines: President Duterte’s Attack on the Chief Justice is an Attack on the Rule of Law (Apr. 10, 2018), <https://www.icj.org/philippines-president-dutertes-attack-on-the-chief-justice-is-an-attack-on-the-rule-of-law/> [<https://perma.cc/E7GV-55BT>] (arguing that the Philippines’ President’s recent threatening comments to the Supreme Court risk a chilling effect on judicial independence and rule of law); *Freedom in the World 2018: United States*,

law have produced mixed results.²⁰

This Note seeks to complement the current literature on the interaction between rule of law concerns and transitional justice goals in post-conflict societies by analyzing both the framework and the experience of the CICIG in the Guatemalan context. The central question is how can the grafting method of the CICIG serve as a model for other States seeking to restore independence and legitimacy to a national justice system? The importance of this inquiry is heightened by the recent installation in Honduras,²¹ and proposed creation of similar entities²² Mexico,²³ and Colombia,²⁴ which, alt-

FREEDOM HOUSE (2018), <https://freedomhouse.org/report/freedom-world/2018/united-states> [<https://perma.cc/7K3Q-QXPN>] (rating the United States down two index points for safeguards and potential of government corruption); Comisión Interamericana de Derechos Humanos, Situación de Derechos Humanos en Venezuela, ¶ 470, OEA/Ser.L/V/II/Doc.209 (2017), <http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf> [<https://perma.cc/QLM6-CKVA>] (concluding that since 2017, the rule of law has visibly deteriorated in Venezuela and major legal reforms have altered constitutional order and separation of powers); Venice Commission, Turkey Opinion on Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017, Advisory Opinion, CDL-AD(2017)005, ¶ 113 (Mar. 10, 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e) [<https://perma.cc/KE2Z-E33X>] (concluding that recent constitutional amendments in Turkey mark a step backward for rule of law).

20. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2278, 2280 (2003) (stating that the United States and international community promoted many rule of law projects in Latin America in the 20th century, but that well-funded efforts were largely unsuccessful).

21. Convenio entre el Gobierno de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos para el Establecimiento de la Misión de Apoyo contra la Corrupción y la Impunidad en Honduras, Hond.-O.A.S., Jan. 19, 2016, available at <http://www.oas.org/documents/spa/press/convenio-MACCIH-1.19.16.pdf> [<https://perma.cc/X7J7-HMGQ>] [hereinafter MACCIH Agreement].

22. MICHAEL SHIFTER, COUNTERING CRIMINAL VIOLENCE IN CENTRAL AMERICA 15 (2012).

23. See, e.g., Blanche Petrich, *Ayudaría a México una Comisión Contra la Impunidad, Considera Claudia Paz y Paz*, LA JORNADA (May 3, 2016), <http://www.jornada.unam.mx/2016/05/03/politica/004n1pol> [<https://perma.cc/G2NV-5SF4>] (citing former Guatemalan prosecutor as recommending an International Commission against Impunity in Mexico); Guillermo Trejo, *Por Qué México Necesita una Comisión Internacional Contra la Impunidad*, ANIMAL POLÍTICO (Sept. 29, 2015), <http://www.animalpolitico.com/blogeros-blog-invitado/2015/09/29/por-que-mexico-necesita-una-comision-internacional-contra-la-impunidad/> [<https://perma.cc/P8LP-5WXQ>] (reporting on civil society petitions to the government for the creation of an International Commission against Impunity in Mexico); Press Release, Plataforma Contra la Impunidad y Corrupción, Presentación de la Plataforma contra la Impunidad y Corrupción (Apr. 3, 2017), <http://www.plataformacontralaimpunidad.org/comunicado-01.php> [<https://perma.cc/5YQG-PEH6>] (expressing the support of an alliance of NGOs for the creation of a Council against Corruption in Mexico with the U.N.).

though created in the mold of the CICIG, appear to lack the central characteristics of a graft mechanism that allow for flexible cooperation and growth. The Note will focus on the necessary conditions for the model's success. A thorough analysis of the CICIG's experience is also relevant to the continued international discussions regarding the potential creation of an "International Anti-Corruption Court," as advanced by U.S. District Court Judge Mark Wolf.²⁵

In Part II, the Note presents relevant debates on the rule of law and transitional justice mechanisms, and explores the theoretical advantages of an institutional grafting mechanism, as opposed to traditional international or hybrid mechanisms. The legal and historical context of the CICIG's creation is introduced in Part III, which explains the CICIG's basic structure. Part IV examines some of the specific processes and practices that the CICIG has implemented to fulfill its mandate. In Part V, I draw lessons from the CICIG's experience to understand the conditions and factors relevant to a successful institutional graft, aided by a brief comparison to a similar mechanism in Honduras. From this, I conclude with comments on future endeavors to replicate the CICIG's success.

I. GOALS OF TRANSITIONAL JUSTICE AND RULE OF LAW IN POST-CONFLICT SOCIETIES

After a conflict, States confront the difficult task of balancing the often-competing interests of different parties affected by the conflict, including political and economic elites, belligerent parties, neighboring States, and diverse groups of civil society,²⁶ while conscious of the risk that conflict may again break out if the right bal-

24. See, e.g., Lina María Arango D., *Comisión Contra la Impunidad y la Corrupción*, EL DAIRIO (Jan. 17, 2017), <http://www.eldiario.com.co/seccion/OPINION/comisi-n-contrala-impunidad-y-la-corrupci-n-1701.html> [<https://perma.cc/BQ86-DJC4>] (citing recommendations for the creation of a commission against impunity and corruption in Colombia); Leandro Felipe Solarte Nates, *Colombia Necesita una Comisión Contra la Impunidad*, LAS 2 ORILLAS (Sept. 17, 2015), <https://www.las2orillas.co/colombia-necesita-una-comision-contrala-impunidad/> [<https://perma.cc/6G2A-5D6V>] (calling for a commission against impunity in Colombia).

25. See MARK WOLF, THE CASE FOR AN INTERNATIONAL ANTI-CORRUPTION COURT (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf> [<https://perma.cc/T7J4-LBQG>] (Judge Wolf's proposal has been discussed at various institutions including Harvard and Columbia Universities, the World Forum on Governance, and the Tom Lantos Human Rights Commission).

26. Pablo De Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 32, U.N. Doc. A/67/368 (Sept. 13, 2012).

ance is not struck.²⁷ Judicial institutions play a fundamental role in preventing States from returning to armed conflict by resolving disputes and balancing competing public and private interests.²⁸ Two important sets of goals that relate to this balance are transitional justice and rule of law institution-building, because they provide capacity and a framework for addressing underlying causes of conflict.

A. *The Shared Goals of Transitional Justice and Rule of Law in Post-Conflict Societies*

“Transitional justice” is a term described variously by experts, ranging from narrow conceptions limited to truth commissions, hybrid tribunals, and other exceptional mechanisms, to broader constructions. A well-accepted broad construction was advanced by Pablo De Greiff, the former U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (Special Rapporteur on Transitional Justice). In his academic work, he stated that transitional justice “refers to the *set of measures* implemented in various countries to deal with the legacies of massive human rights abuses.”²⁹ The advantage of adopting a broader idea of transitional justice is that it deemphasizes the specific mechanisms used and allows the term to focus on the various goals and the special contexts in which transitional justice occurs. This approach is seen in the U.N.’s approach with the Human Rights Committee’s formulation of four pillars of transitional justice: truth, justice, reparations, and guarantees of non-recurrence.³⁰

It is useful to note that although these issues are generally of interest to criminal justice, the history of a violent conflict creates special challenges to achieving these goals. Similarly, like all judicial systems, or governance generally, to be successful, transitional

27. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 40, U.N. Doc. S/2011/634 (Oct. 12, 2011).

28. Eric Brahm, *Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies*, 9 INT’L. J. NOT-FOR-PROFIT L. 62, 62 (2007); Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Rep. on Transitional Justice in Weakly Institutionalized Post-Conflict Settings*, ¶¶ 68, 100, U.N. Doc. A/HRC/36/50 (Aug. 21, 2017) [hereinafter Special Rapporteur on Transitional Justice].

29. Pablo De Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE: NOMOS LI 31–32, 34 (Melissa S. Williams et al. eds., 2012) (emphasis added).

30. Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *First Report to the General Assembly*, ¶ 82, U.N. DOC. A/676368 (Sept. 13, 2012).

justice is predicated on the civic trust bestowed on it by society.³¹ What distinguishes the challenge of post-conflict justice is that the context of conflict has eroded trust in public institutions and in the justice system in particular for a significant part of society. The four-pillar framework of transitional justice is intended to address the lack of trust in the system held by victims of a conflict; importantly, the guarantee of non-repetition promises a more secure future for members of society. This pillar is particularly significant to this Note because, in practice, providing a guarantee of non-repetition necessitates a change to the system to fix whatever made an individual or group's rights vulnerable previously. Non-repetition requires a *transformation* of the system.³²

The aim of repairing social trust and trust in public institutions connects the goals of transitional justice—in particular, non-repetition—with those of the rule of law and institution-building. For the purpose of this Note, I will adopt a broad definition of “rule of law” as the fulfillment of the laws in a country in a manner that is expected and accepted by the large majority of the population.³³ The absence of the rule of law correlates with undesirable consequences, such as high levels of violence, high levels of corruption, social unrest, and high levels of impunity.³⁴ In this context, actors are not assured of the security of their persons or belongings. As such, the ability to restore civic trust after it has been severely violated over decades, like in Guatemala and other post-conflict societies, is all the more difficult.³⁵

31. De Greiff, *supra* note 26, ¶¶ 61–64; see also JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 258–60 (F. Rieder ed., 2d ed. 1914) (1762) (describing the deterioration of the State and conflict that occurs when the sovereign unilaterally stops obeying and applying the rule of law).

32. Celebrated Guatemalan human rights lawyer Edgar Pérez has made a point in discussions to refer to *transformative* justice instead of transitional justice in the context of post-conflict systemic violations, in an effort to emphasize the need for an active societal change in these contexts, not just specialized mechanisms or emblematic cases.

33. This definition encompasses systems beyond liberal democracies, also including illiberal systems that have clearly established rules. The hypothesis is that a major source of conflict arises when a State's actions conflict with people's expectations of what and how rules are applied.

34. Agnès Hurwitz, *Civil War and the Rule of Law: Toward Security, Development, and Human Rights*, in CIVIL WAR AND THE RULE OF LAW: SECURITY, DEVELOPMENT, HUMAN RIGHTS 1, 5 (Agnès Hurwitz & Reyko Huang eds., 2014); Paulo Sérgio Pinheiro, *Democratic Governance, Violence, and the (Un)Rule of Law*, 129 DAEDALUS 119, 125, 127 (2000) (explaining how poor Brazilian neighborhoods experience violence from organized crime and abusive policies and practices in a context without rule of law).

35. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 7, 36, 40, U.N. Doc. S/2011/634 (Oct. 12, 2011).

Secondary effects of weak rule of law include transnational spillover of crime and violence, and reductions in international commerce and investment.³⁶ The international community routinely engages in efforts to promote the strengthening of institutions and rule of law around the world.³⁷ Similar to the narrow approach to transitional justice, rule of law scholars have also noted the emergence of a dogmatic approach to rule of law mechanisms from a list of limited and isolated tools, such as trainings and law reform.³⁸ This approach has been further critiqued for failing to appreciate the centrality of norm-creation in improving rule of law.³⁹

Given the similarities and interrelated character of transitional justice and rule of law concerns, we can group them together in a single inquiry. We can simply examine what types of factors allow for transnational cooperation in promoting civic trust and norm-creation in national institutions in a manner that addresses the needs of a post-conflict society.

B. Surrogates, Transplants, and Grafts: A Framework for Institutional Intervention in Post-Conflict Societies

As introduced above, international judicial intervention can employ different mechanisms when interacting with national actors. Depending on the context and specific objectives of the intervention, each mechanism presents different advantages and limitations. For the purposes of this Note, which is concerned with rule of law and transitional justice, I divide all mechanisms into three conceptual groups defined by the relationship between the mechanism and national institutions: surrogates, transplants, and grafts. Surrogate

36. Stewart Patrick, *Weak States and Global Threats: Assessing Evidence of "Spillovers"* 21–22 (Ctr. for Global Development, Working Paper No. 73, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984057 [<https://perma.cc/T5J7-YXUB>]; Agnès Bénassy-Quéré, Maylis Coupet & Thierry Mayer, *Institutional Determinants of Foreign Direct Investment*, 30 *WORLD ECON.* 764, 766, 778 (2007); ERNESTO STEIN & CHRISTIAN DAUDE, *INSTITUTIONS, INTEGRATION AND THE LOCATION OF FOREIGN DIRECT INVESTMENT* 13 (2001).

37. See, e.g., CHRIS VAN DER BORGH, *EU SUPPORT FOR JUSTICE AND SECURITY SECTOR REFORM IN HONDURAS AND GUATEMALA* (2016) (explaining E.U. efforts to support justice institutions in Central America); KLAUS DECKER, CHRISTIAN MÖHLER & DAVID F. VARELA, *IMPROVING THE PERFORMANCE OF JUSTICE INSTITUTIONS: RECENT EXPERIENCES FROM SELECTED OECD COUNTRIES RELEVANT FOR LATIN AMERICA* (2011) (describing past and potential efforts for OECD support of institution building in Latin America); Ehrenreich Brooks, *supra* note 20 (describing U.S. efforts around the world to promote rule of law through institution building).

38. Ehrenreich Brooks, *supra* note 20, at 2284; Patrick, *supra* note 36, at 30.

39. Ehrenreich Brooks, *supra* note 20, at 2285.

mechanisms generally operate under the assumption that national institutions are incapable of acting (or of acting correctly).⁴⁰ Therefore, it is more beneficial to use a completely foreign institution to act as a “surrogate” for national institutions and take on processes that typically would be the domain of those institutions. Transplant mechanisms similarly view national institutions as incapable of independently achieving acceptable outcomes but consider a systematic interaction with national institutions as desirable, either for legal, political, or social reasons.⁴¹ Therefore, transplant mechanisms create new, substantively foreign elements in the national context.

Academics and practitioners have discussed these two types of mechanism at length and a short discussion in relation to this Note’s concern follows below. In apposition, I introduce a new term for the CICIG’s unique experiment—“graft” mechanisms. A graft mechanism is distinct from surrogate and transplant mechanisms in two central ways. First, the graft mechanism is less concerned with *specific* outcomes, as with the systemic outcomes over the long run. Second, a graft mechanism does not sidestep national institutions by using foreign ones but works on the premise that there are sufficient minimum conditions in existing structures to reach desired results. In this sense, one assumption of the intervention is that the entirety of the mechanism will grow into the national institutions, strengthening the whole.

1. Surrogates

The realm of surrogates in transitional justice is relatively limited. The defining quality is that the surrogate replaces national

40. Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 10 (2009); Rome Statute of the International Criminal Court Preamble, art. 17(1)(a), July 1, 2002, 2187 U.N.T.S. 90 (stating “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”); American Convention on Human Rights (“San José Pact”) art. 46(1)(a), Nov. 21, 1969, 1144 U.N.T.S. 143 (stating that “remedies under domestic law have been pursued and exhausted”).

41. Baylis, *supra* note 40, at 4, 17 (“[M]ore opportunity for influence upon the domestic legal system”), 18 (discussing the shortcomings of hybrid tribunals vis-à-vis national courts); Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan*, 7 J. INT’L L & INT’L REL. 1, 8 (2011) (describing the initial creation of hybrid tribunals, one type of transplant mechanism, in contexts of “precarious processes of transitional governance . . . UN transitional authorities empowered to exercise all legislative and executive authority . . . it was not merely enough for these tribunals to try suspects—their practice and jurisprudence should catalyze a wider response”).

processes with an international one.⁴² In this sense, the international ad hoc tribunals⁴³ and transnational cases based on universal jurisdiction⁴⁴ are included in the definition, but the International Court of Justice is not. International criminal law scholar Naomi Roht-Arriaza describes the establishment of the international criminal tribunals as “built on the idea that only an international prosecution and trial would have the ability and legitimacy to try high-ranking perpetrators, including Heads of State.”⁴⁵ Implicit in this statement is the idea that a determination was made that national prosecution would be procedurally possible⁴⁶ but either practically impossible or not desirable. In this way, surrogates reveal their primary concern: achieving positive results in a specific set of cases.⁴⁷ While this objective can be very important for attaining some degree of legal justice for victims, achieving widely accepted outcomes, and creating new legal norms with greater chances of international recognition,⁴⁸ it does not provide much support for addressing concerns of rule of law and local legitimacy.⁴⁹

Furthermore, although surrogate mechanisms are often created with the consent of national governments, many have questioned whether replacing the role of national institutions in important cases carries paternalist elements of neo-colonialism.⁵⁰

42. Baylis, *supra* note 40, at 10, 12.

43. Ad hoc tribunals include the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Special Tribunal for Lebanon (“STL”).

44. The Hissène Habré and Agosto Pinochet prosecutions in Chad and Spain, respectively, are examples of transnational surrogacy cases. Reed Brody, *The Prosecution of Hissène Habré—An “African Pinochet,”* 35 NEW ENG. L. REV. 321 (2001).

45. Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT’L L. 79, 81 (2008).

46. Meaning that a system, the specific crime, and jurisdiction exist that would allow for prosecution.

47. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 312 (2002).

48. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 41, U.N. Doc. S/2004/616 (Aug. 23, 2004); *see also* Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 539–40, 543 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (recognizing sexual slavery as a crime against humanity for the first time).

49. Recent scholarship also casts doubt on whether the international character of these tribunals results in more favorable views towards the results. *See* Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AM. J. INT’L L. 233, 240 (2016).

50. *See, e.g.,* Abdul Tejan-Cole, *Is the ICC’s Exclusively African Case Docket a*

2. Transplants

As mentioned above, transplants are foreign entities created at the national level with limited interactions with the rest of the system. Perhaps the most common example of transplant mechanisms is hybrid tribunals, also known as third generation tribunals,⁵¹ which include the tribunals and courts in East Timor, Sierra Leone, Kosovo, Cambodia, and Bosnia & Herzegovina. Whether created as a wholly separate structure in the national justice system or as a new component of the system, the new institution created by these tribunals is distinguished from the ordinary system by access to special rules. These tribunals receive attributes tailored to their goals, such as unique rules of procedure and limited superior jurisdiction in cases from a specific period, conflict, or type of crime.⁵²

As international criminal law practitioner Etelle Higonnet argues, “hybrids can harness the credibility of international law and the legitimacy of international institutions, which can lend hybrid courts a degree of authority as a fair mechanism for holding perpetrators accountable.”⁵³ Similarly, as Roht-Arriaza writes, this blending of national and international was “theorized to be better at creating legitimacy and relevance for local audiences.”⁵⁴ Both authors highlight the theoretical benefits of hybrid tribunals by providing training and generating local jurisprudence, signaling a concern with the long-term impacts of transplant mechanisms.⁵⁵ However, Roht-Arriaza recognizes that critics point to the paucity of real impacts observed over the decade or more after the creation of the various transplants.⁵⁶

Legitimate and Appropriate Intervention or an Unfair Targeting of Africans?, ICC FORUM: INVITED EXPERTS ON AFRICA QUESTION (Mar. 2013–Jan. 2014), <https://iccforum.com/africa#Tejan-Cole> [<https://perma.cc/Z5KY-DXLK>]; W. Douglas Smith, *The International Criminal Court: The Long Arm of Neocolonialism?*, INT’L AFFAIRS REV. (Nov. 1, 2009), <http://www.iar-gwu.org/node/87> [<https://perma.cc/RL5F-Y7US>]; Amanda Hsiao, “*The ICC in Africa: Impartial Judge or Neo-Colonial Project*,” ENOUGH PROJECT BLOG (Oct. 2, 2009), <https://enoughproject.org/blog/icc-africa-impartial-judge-or-neo-colonial-project> [<https://perma.cc/CL2F-C28V>].

51. First generation tribunals refer to the Nuremberg and Tokyo military tribunals, while second generation tribunals comprise the ICTY, ICTR, and STL (and perhaps the International Criminal Court as a sort of second generation plus).

52. See, e.g., Internal Rules (Extraordinary Chambers in the Courts of Cambodia); Rules of Procedure & Evidence (Residual Special Court for Sierra Leone).

53. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 349 (2006).

54. Roht-Arriaza, *supra* note 45, at 81.

55. Higonnet, *supra* note 53, at 359; Roht-Arriaza, *supra* note 45, at 89–90. See also Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 309 (2003).

56. Roht-Arriaza, *supra* note 45, at 88–89.

Likewise, Máximo Langer, discussing Alan Watson's idea of "transplants," identifies the prime limitation of transplants, stating that, "[e]ven if a human body has to adjust itself to a new organ, it will still remain essentially unchanged."⁵⁷ Langer and Roht-Arriaza observe that it is difficult to change an entrenched local system by introducing foreign concepts or actors in one specific area within the system; the weight of inertia and local ideas tends to bend the foreign element to local customs, not the other way around, thus leaving the broader system unchanged.

Although transplant mechanisms may provide advantages on the issue of legitimacy and allow greater participation of local actors in the legal process, at the institutional level, the creation of a separate entity erects barriers between the "special system" and the ordinary justice system as a whole. As one author observes, it is difficult for national institutions to benefit from hybrid tribunals because "accounts [for the results of the tribunal] rest primarily on the shoulders of the involved international judges . . . who will introduce international norms."⁵⁸ This critique is well-documented;⁵⁹ however, the challenge for transplants to influence the full justice system is deeper. As a former U.S. State Department official has argued, transitional justice and the rule of law mechanism often fail to take into account local customs, traditions, and goals.⁶⁰ Therefore, the aim of fostering civic trust is limited, because the agency of national actors in the hy-

57. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 32 (2004).

58. Baylis, *supra* note 40, at 18.

59. Ezequiel Jimenez, *Hybrid Tribunals as Capacity Building: Narrowing the Impunity Gap?* 43–44, 47 (Spring 2015) (unpublished M.A. thesis, University of Tromsø, University of Roehampton & University of Gothenburg), <https://munin.uit.no/bitstream/handle/10037/8242/thesis.pdf?sequence=2> [<https://perma.cc/L8DJ-R29L>] (finding that the prosecution priorities, inadequate preparation for giving trainings, and insular design of hybrid tribunals make them ill-suited for national capacity building); Alejandro Chehtman, *Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'*, 9 J. INT'L CRIM. JUST. 547, 550, 552 (2011) (explaining that national actors commonly report that trainings are not tailored to local needs and that trainers are poorly prepared); Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *Justice Delayed?: Internationalised Criminal Tribunals and Peace-Building in Lebanon, Bosnia and Cambodia*, 11 CONFLICT, SEC. & DEV. 335, 347–48, 350 (describing the limitations of formal trainings on international law given to national actors in the context of a planned hand-over of the War Crimes Chamber in Bosnia and Herzegovina and the challenge of complicated and weak national systems).

60. Ehrenreich Brooks, *supra* note 20, at 2284–85 (identifying the use of "an identical template to societies all over the world, taking little account of their differences" as one reason for failed rule of law assistance efforts), 2301 (arguing that UNMIK's limited impact is in part due to its disregard of local preferences).

brid tribunal is viewed as less critical to the tribunal's success.

3. Grafts

The term "graft" is not entirely new; Higonnet uses it to describe hybrid tribunals,⁶¹ although the definition as presented in this Note is distinct. Graft mechanisms, as exemplified by the CICIG, are more concerned with long-term structural changes than the outcome of a specific set of cases. The foreign element is grafted onto an existing institution to support national processes, and in doing so accepts the national legal system *wholesale*. Thereby, the foreign element, in this case the CICIG staff, works within the national legal context to promote independence and institutional accountability, without special access to different rules. It is important to underline the distinction between hybrid mechanisms and grafts.

Three characteristics define a graft. First, the graft is subordinate to the national legal system. This means that there are neither international personnel superior to national personnel nor new or international laws brought into the national system to override national laws. Any new rules or processes introduced by the graft mechanism are equally applicable to the entire system. Second, the graft can effect change throughout the full justice system through its cooperative and collegial work with national institutions. A graft mechanism allows for changes and development in the justice system through the cooperative development of new criminal investigatory and procedural techniques and methods that address real needs of the system. As the relationship between the graft and national institutions develop, so do their roles. Finally, a successful graft requires strong protections against undue State interference. This element is important to safeguard the integrity of the graft as its investigations advance and corrupt interest groups attempt to disrupt the graft's work. However, these protections must only be procedural, relating to the graft's tenure, financing, leadership, and legal protection, and not serve to overpower a national partner institution, per the first factor. I will explore these ideas concretely below with examples from the CICIG.

Relatedly, although concerned with legal concepts and not international mechanisms, Langer's analysis of Watson's idea of "transplants" in relation to Langer's own concept of "legal translations" is helpful in understanding the fundamental conceptual difference between grafts and transplants. In discussing the "transfer of

61. Higonnet, *supra* note 53, at 356 (describing hybrid tribunals as "operating in parallel" or "grafted on to the local judicial system," though Higonnet does not define the term or distinguish whether hybrid tribunals act differently in these contexts).

legal ideas and institutions between legal systems,”⁶² Langer is similarly interested in the interaction between the foreign and the national milieu and how this interaction produces different iterations or creole versions of foreign practices.⁶³ The center of Langer’s discussion is that “transplanting” a foreign legal concept into a system will not produce the same manifestation of that concept as in the original system.⁶⁴ Instead, he argues that foreign concepts are “translated” in the new system, according to the local context.⁶⁵

I seek to push Langer’s analysis a step further by applying it to mechanisms. Graft mechanisms certainly engage in legal translation, and the CICIG has done so by introducing new investigatory and prosecution techniques and encouraging its partner, the MP, to apply these practices as appropriate for the Guatemalan context. The graft, however, goes beyond translation to innovation. It creates new techniques that are organic to the local context and that receive greater legitimacy, given the trust placed in the foreign element’s process and status. In this manner, over time, as the national and foreign elements work together, national institutions not only benefit from international support but also are imbued with greater legitimacy both internationally and in the national context.

II. FROM TRANSPLANT TO GRAFT: THE CREATION OF THE CICIG

To understand the CICIG, it is important to examine the process that led to its creation. In particular, a brief synopsis of the Guatemalan conflict and post-conflict national contexts, as they relate to criminal justice, is helpful to illuminate the objectives and motivating purpose of the CICIG. Similarly, I will present a general overview of the CICIG’s mandate, legal structure, and the way in which it fits with Guatemalan national law.

A. *The Guatemalan Armed Conflict: The Need for the CICIG*

The impetus for the CICIG came from concerns of post-conflict security, peace, and rule of law during the negotiation of the Peace Accords signed between the Guatemalan government and the Guatemalan National Revolutionary Unity (“URNG”). These Accords ended a thirty-six-year armed conflict, which left 250,000 civil-

62. Langer, *supra* note 57, at 5.

63. *Id.* at 8.

64. *Id.* at 63.

65. *Id.*

ians dead or disappeared and 1.5 million displaced.⁶⁶ The transition to peace was accompanied by several institutions, including two truth commissions⁶⁷ and the United Nations Verification Mission in Guatemala (“MINUGUA”), which was mandated with verifying the fulfillment of the Peace Accords, especially the Human Rights Agreement.⁶⁸ These institutions allowed society to take an active role in the construction of a democratic society, from providing opportunities to give testimony of the conflict, to opening new spaces for meeting and debate on how to reform and reconstruct the social compact between the State and civil society.⁶⁹

Although accountability for war crimes and human rights violations during the conflict was a priority for many civil society organizations in Guatemala,⁷⁰ national authorities were reluctant to pursue criminal cases from the conflict domestically⁷¹ or cooperate with for-

66. COMISIÓN DE ESCLARECIMIENTO HISTÓRICO, GUATEMALA MEMORIA DEL SILENCIO: TOMO I ¶ 212 (1999) http://biblio3.url.edu.gt/Libros/memoria_del_silencio/indice.pdf [<https://perma.cc/MA9U-QFBK>] [hereinafter CEH] (final report of the U.N.-sponsored truth commission).

67. The U.N.-sponsored *Comisión de Esclarecimiento Histórico* (CEH) and the Catholic Church-sponsored *Proyecto para la Recuperación de Memoria Histórica* (REMHI).

68. G.A. Res. 48/267, ¶ 2, U.N. Doc. A/RES/48/267 (Sep. 28, 1994) (creating the U.N. Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala). See also S.C. Res. 1094, ¶ 1, U.N. Doc. S/RES/1094 (Jan. 20, 1997) (extending the time of MINUGUA’s mandate and expanding the mandate to include verification of the cessation of hostilities agreement).

69. MINUGUA, INFORME FINAL: ASESORÍA EN DERECHOS HUMANOS 6, 7, 19, 21, 23 (2004), <http://www.derechoshumanos.net/lesahumanidad/informes/guatemala/Informe-Final-Minugua.pdf> [<https://perma.cc/E5VJ-GVQJ>] (reporting on civil society participation in the REMHI, the creation of the National Reparations Program, national conferences, and promoting the creation of the CICIACS); Brahm, *supra* note 28, at 64 (highlighting the importance of the Civil Society Assembly in the negotiation of the Peace Accords. Although this space has been criticized in retrospect because of its limited capacity, it represented an early attempt to involve diverse civil society groups in a national justice initiative).

70. See, e.g., IMPUNITY WATCH, RECONOCIENDO EL PASADO: DESAFÍOS PARA COMBATIR LA IMPUNIDAD EN GUATEMALA (2008), https://static.wixstatic.com/ugd/f3f989_f41fe5baa1b34c99b9aba2c3dd2a4295.pdf [<https://perma.cc/PJ5G-FNBE>].

71. Due to the lack of action by national justice authorities, many cases were able to reach judgments against the State for inaction. See “Las Dos Erres” Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009); Molina Theissen v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 106 (May 4, 2004); Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004); Maritza Urrutia v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003); Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003); Bámaca Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000); “White

eign proceedings.⁷² At the same time, by 2000, levels of violence in the country began to rise again, exceeding 30 homicides per 100,000 inhabitants in 2002 and reaching 45.3 homicides per 100,000 inhabitants by 2006.⁷³ Subsequent investigations revealed that former military officers from the conflict became heads of organized crime organizations,⁷⁴ raising fears of a resurgence of violence.

In 2006, the year before CICIG was set up, Guatemala faced a 95% impunity rate for homicide,⁷⁵ meaning that of one hundred reported cases of homicide, only five were resolved in some fashion.⁷⁶ The relatively low number of judges in the country exacerbated the apparent breakdown in the rule of law.⁷⁷ Confronted with a situation

Van” (Paniagua Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37 (Mar. 8, 1998).

72. *The Guatemala Genocide Case: Foreign National Court—Spain*, CTR. JUSTICE & ACCOUNTABILITY, <http://cja.org/what-we-do/litigation/the-guatemala-genocide-case/foreign-national-court-spain/> [<https://perma.cc/F6Y8-HJEK>] (explaining the obstacles to prosecuting atrocity crimes outside of Guatemala).

73. UNODC, GLOBAL STUDY ON HOMICIDE 2013, at 126 (2014), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf [<https://perma.cc/6C6K-GH83>]. It is estimated that in 2007 there were two million firearms in the possession of civilians, the most of any Central American country. This is four times higher than the second highest country, El Salvador, and twice the rate per capita of El Salvador. Steven Dudley, *Homicidios en Guatemala: Análisis de los datos*, INSIGHT CRIME (Apr. 10, 2017), <https://es.insightcrime.org/investigaciones/homicidios-guatemala-analisis-datos/> [<https://perma.cc/D4Y8-RVE>].

74. MINUGUA, *supra* note 69, at 19.

75. MP, MEMORIA DE LABORES AÑO 2006, at 78 (2006).

76. Compare to claimed 90% conviction rate and 77% clearance rate for homicide in populations of comparable size in Ecuador and New York City, respectively. Similarly, New York State and France achieve 50%–60% conviction rates. Katherine Morejón, *El 90% de los Casos de Homicidios en el Ecuador Tienen Sentencia*, EL CIUDADANO: SISTEMA DE INFORMACIÓN OFICIAL (Mar. 15, 2016); *El 90% de los Casos de Homicidios en el Ecuador Tienen Sentencia*, NUESTRO MUNDO (Mar. 15, 2016), <https://notimundo.com.ec/90-los-casos-homicidios-ecuador-tienen-sentencia/> [<https://perma.cc/6U7N-MV95>]; *Clearance Report: Fourth Quarter 2017*, N.Y.C. POLICE DEP’T, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/clearance.page> [<https://perma.cc/GP49-2K66>]; N.Y. State Division of Criminal Justice Services, NEW YORK STATE ADULT ARRESTS DISPOSED, CRIMINAL JUSTICE STATISTICS (May 2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> [<https://perma.cc/6GX8-J7FF>] (showing a range in conviction rates for violent felonies in New York State from 56%–60%); Ministère de la Justice, CONDAMNATIONS SELON LA NATURE DE L’INFRACTION DE 2009 À 2016 (Dec. 21, 2017), <http://www.justice.gouv.fr/statistiques-10054/donnees-statistiques-10302/les-condamnations-27130.html> [<https://perma.cc/79V4-PVBG>] (reporting 469 convictions for homicide in 2010); Ministère de l’Intérieur, [CHIFFRES-CLÉS] HOMICIDES, <https://www.interieur.gouv.fr/Interstats/Themes/Homicides/Chiffres-cles-Homicides> [<https://perma.cc/48RX-4J7V>] (reporting 796 homicides in 2010).

77. The Netherlands, a country with a comparable population to Guatemala, has almost 100 judges per 100,000 inhabitants, while Guatemala only has only three per 100,000,

of impunity for past and current crimes, civil society considered national justice institutions as lacking independence in law and in practice. In response to growing evidence of pervasive corruption and increasing insecurity faced by human rights defenders, Guatemalan civil society organizations called for a new mechanism to strengthen the capabilities of the justice system.⁷⁸ The Comprehensive Agreement on Human Rights (“Human Rights Agreement”), signed by the belligerent parties to the conflict in 1994, provided the foundation for these discussions. Article IV of the Human Rights Agreement recognizes the threat of impunity of organized crime and entrenched interests carried over from the armed conflict to democracy and the rule of law. In this respect, the Agreement requires the State to “combat any manifestation of illegal bodies or clandestine security apparatuses” that present a threat to the fulfillment of human rights.⁷⁹ This broad, long-term goal became the mandate of the CICIG.

Initially, Guatemalan civil society and the international community favored a highly international mechanism that would have been vested with *independent* prosecutorial powers in the national system, the Investigative Commission against Illegal Networks and Clandestine Security Apparatus (“CICIACS”).⁸⁰ This first idea would have resembled a surrogate or transplant mechanism by giving special power to a foreign element and sidestepping a national institution. However, the Constitutional Court of Guatemala blocked this first attempt, in 2005,⁸¹ holding that the Guatemalan Constitution

despite being twice the geographic size of the Netherlands and about 50% rural. DECKER, MÖHLER & VARELA, *supra* note 37, at 29, 53; *Guatemala*, CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> [<https://perma.cc/2YLW-AK6Z>]; *Netherlands*, CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> [<https://perma.cc/BLE8-JVB6>].

78. IMPUNITY WATCH, CAMBIAR LA CULTURA DE LA VIOLENCIA POR LA CULTURA DE LA VIDA: LOS PRIMEROS DOS AÑOS DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA 12–13 (2010); MINUGUA, *supra* note 69, at 19.

79. Acuerdo Global sobre Derechos Humanos, art. 2 Guat.-U.R.N.G.-U.N., Mar. 29, 1994, http://www.cicig.org/uploads/documents/mandato/acuerdo_global_sobre_derechos_humanos.pdf [<https://perma.cc/288X-DWM4>].

80. Agreement between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala (“CICIACS”), art. 2(2), U.N.-Guat., Jan. 7, 2004 [hereinafter CICIACS Agreement] (defunct, available at <http://www.un.org/News/dh/guatemala/ciciacs-eng.pdf> [<https://perma.cc/F2D2-268D>]).

81. Corte de Constitucionalidad, Opinión Consultiva, No. Gaceta 73, Expediente 1250-2004, 5 (Aug. 5, 2004) (Guat.), <https://biblioteca.iidh-jurisprudencia.ac.cr/index.php/documentos-en-espanol/prevencion-de-la-tortura/1912-opinion-consultiva-sobre-el-texto-del-acuerdo/file> [<https://perma.cc/H3EA-KD76>].

grants the power to initiate prosecutions exclusively to the MP.⁸² In 2007, after removing the power to unilaterally initiate prosecutions,⁸³ the Guatemalan Congress ratified the agreement to create the CICIG as a *dependent* entity.⁸⁴

B. The CICIG's Mandate and Structure

The CICIG's success is due in large part to the inclusion of the three graft elements discussed in Part I(B)(iii) (dependence on a national institution, protections against State interference, and a broad latitude of activity) in its instrument of creation. The preamble of the CICIG Agreement, based on the legal obligations acquired by Guatemala in the Human Rights Agreement of March 22, 1994, sets out the concern that the CICIG is meant to address: that "illegal security groups and clandestine security organizations seriously threaten human rights as a result of their criminal activities and [their] capacity to act with impunity . . . [and] weaken the rule of law . . . resulting [in] loss of confidence of citizens in the democratic institutions of the country."⁸⁵ In this way, the overarching purpose of CICIG is to restore a state of law and trust in the justice system, not the resolution of specific crimes, *per se*.

Based on this purpose, the CICIG Agreement sets out two specific objectives in article 1(1):

- (a) To support, strengthen and assist institutions . . . responsible for investigating and prosecuting crimes allegedly committed in connection with the activities of illegal security forces and clandestine security organization . . . as well as identifying their structures, activities, modes of operation and sources of financing and promoting the dismantling of these organizations

82. See Constitución Política de la República de Guatemala art. 251 (May 31, 1985) (Guat.) [hereinafter CPRG].

83. CICIG Agreement, *supra* note 2; Corte de Constitucionalidad, Opinión Consultiva No. Gaceta 84, Expediente 791-2007, 35–37 (May 8, 2007) (Guat.), https://issuu.com/ciciggt/docs/cc_opinion_consultiva [<https://perma.cc/QP5M-FZZU>].

84. Decreto No. 35-2007, Aprueba el Acuerdo con la Organización de Naciones Unidas, relativo al Establecimiento de una Comisión Internacional contra la Impunidad en Guatemala (CICIG) [Approval of the Agreement with the United Nations regarding the Establishment of an International Commission against Impunity in Guatemala (CICIG)] (Aug. 1, 2007) (Guat.), <http://ww2.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnálisisDocumentaciónJudicial/cds/CDs%20leyes/2007/pdfs/decretos/D035-2007.pdf> [<https://perma.cc/3PWU-X834>].

85. CICIG Agreement, *supra* note 2, art. 2.

(b) To establish such mechanisms and procedures as may be necessary for the protection of the right to life and to personal integrity pursuant to the international commitments of the State of Guatemala . . .

In pursuit of these objectives, article 2(1) sets out three functions that the CICIG should carry out:

(a) Determine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing and possible relation to State entities or agents and other sectors that threaten civil and political rights in Guatemala

(b) Collaborate with the State in the dismantling of illegal security groups and clandestine security organizations and promote the investigation, criminal prosecution and punishment of those crimes committed by their members;

(c) Recommend to the State the adoption of public policies for eradicating clandestine security organization and illegal security groups and preventing their re-emergence, including legal and institutional reforms⁸⁶

These objectives define the different roles played by CICIG and mark its different lines of work: investigation, prosecution, and institutional reform. Article 1(d) defines “illegal security groups and clandestine security organizations” as “groups that (i) commit illegal acts in order to affect the full enjoyment and exercise of civil and political rights and (ii) are linked directly or indirectly to agents of the State or have the capacity to generate impunity for their illegal actions.”⁸⁷ Again, the CICIG’s mandate evinces its system-level approach by focusing its attention on actors that directly impact institutions through direct action against them and transformation of the system rules to better prevent future deterioration.

Articles 1 and 2 confer a wide mandate on CICIG. It has the authority to investigate anyone actively involved or connected to acts that fall under its mandate, which is also broadly defined not by the crimes it can investigate, but by the *impact* of the activities on the positive rights of others.⁸⁸ Further, this mandate is supported by the defining power of the CICIG—the ability to “promote criminal pros-

86. *Id.*

87. *Id.*

88. *Id.* art. 1(d).

ecutions” and to “join as a private prosecutor (*querellante adhesivo*)”⁸⁹—as well as significant powers to initiate and participate in administrative proceedings against civil servants,⁹⁰ among other incidental investigative powers and privileges that are to be expected. In this sense, the CICIG has a type of qualified independence. It is able to work autonomously on its investigations, if necessary, but is subject to national prosecutors’ (and ultimately national judges’) agreement on the underlying merits of a case. This set of powers makes CICIG not simply a mechanism to support the prosecution of organized crime but an instrument to strengthen and support the justice system by cleansing the system of bad actors and structures that prevent the system from functioning.

This point cannot be overstated—there are few examples of a State consenting to the creation of an international entity with the explicit function to investigate the State and hold the State responsible for its own failings. It is counterintuitive to the self-interests of a State to make its sovereignty vulnerable or for corrupt State officials to expose themselves to potential scrutiny.⁹¹ However, the safeguards provided to the CICIG further evidence this intention. The mechanism is empowered to guarantee confidentiality and holds diplomatic privileges of inviolability and immunity.⁹² Though this type of privilege may be typical for international organisms, the CICIG acts like a national institution, thus marking one important difference between the CICIG and its MP counterpart, which does not benefit from such robust protections.

The Commission is shielded further from State intervention in the course of its work by a provision that gives the U.N. the exclusive right to withdraw CICIG during its two-year term.⁹³ That is, once the Agreement is signed, or an extension of the mandate has been granted, the State of Guatemala has no power to remove the CICIG. Instead, if the country wishes to end the CICIG’s work, it must wait until the end of the existing mandate. This element is critical, because as investigations advance, it is possible that people in power will attempt to stymie the process or retaliate against the graft. In Guatemala, this condition protected the CICIG in August 2017,⁹⁴ Septem-

89. *Id.* art. 3(1)(b).

90. *Id.* art. 3(1)(c–e). Article 3(1)(e) provides that the CICIG may “[a]ct as an interested third party in the administrative disciplinary proceedings referred to above.”

91. Aila M. Matanock, *Governance Delegation Agreements: Shared Sovereignty as a Substitute for Limited Statehood*, 27 GOVERNANCE: INT’L J. POL’Y, ADMIN. & INSTITUTIONS 589 (2014).

92. CICIG Agreement, *supra* note 2, art. 3, 6, 9, 10.

93. CICIG Agreement, *supra* note 2, art. 11.

94. EFE-EPA, *Guatemala’s President Declares CICIG Head Persona Non Grata*, EFE

ber 2018,⁹⁵ and January 2019,⁹⁶ when the President of Guatemala tried to remove the CICIG Commissioner, Iván Velásquez, by declaring him *persona non grata*, and withdraw Guatemala from the Agreement. The Guatemalan Constitutional Court concluded that this action represented an unlawful unilateral modification of the Agreement and that the action was, therefore, void.⁹⁷ U.N. Secretary General Antonio Guterres also categorically rejected Guatemala's ability to terminate the Agreement, calling on Guatemala to respect the terms of the Agreement and declaring that he would allow the CICIG to continue functioning.⁹⁸ The mechanism has continued its

(Aug. 27, 2017), <https://www.efe.com/efe/english/world/guatemala-s-president-declares-cicig-head-persona-non-grata/50000262-3362730> [<https://perma.cc/D5Q7-VXDR>].

95. Cecilia Zamora, *Presidente Morales Prohíbe Ingreso de Comisionado de la CICIG a Guatemala*, PRESIDENCIA DE GUATEMALA (Sept. 4, 2018), <https://www.presidencia.gob.gt/presidente-morales-prohibe-ingreso-de-comisionado-de-la-cicig-a-guatemala/> [<https://perma.cc/YZA3-UKW8>] (announcing Morales's order to block Commissioner Velásquez's entry into Guatemala); Press Release, Gobierno de la República de Guatemala, Ministerio de Relaciones Exteriores de Guatemala [Governor of the Republic of Guatemala, Ministry of Foreign Affairs of Guatemala] (Sept. 4, 2018), <http://www.minex.gob.gt/Noticias/Noticia.aspx?ID=27942> [<https://perma.cc/3FWW-FFLM>] (stating that President Morales and the National Security Council consider Commissioner Iván Velásquez a threat to public order and security, governability, institutinality, justice, and peace in the country).

96. *Jimmy Morales Acusa a la CICIG de "Violación Grave a las Leyes Nacionales e Internacionales,"* CNN ESPAÑOL (Jan. 7, 2019), <https://cnnespanol.cnn.com/video/terminado-acuerdo-cicig-onu-guatemala-sot-jimmy-morales-brk/> [<https://perma.cc/W93P-UXZE>].

97. Corte de Constitucionalidad, Tribunal Extraordinario de Amparo, Expedientes Acumulados 96-2019, 97-2019, 99-2019, 106-2019, 107-2019, Oficial 3o de Secretaría General (Jan. 9, 2019) (Guat.); Corte de Constitucionalidad, Expediente 4207-2018, Of. 3 Secretaría General, 6, 8–9 (Sept. 16, 2018) (Guat.) (granting an injunction against President Morales's order to immigration authorities to block Commissioner Velásquez from entering the country, ordering the President to continue dialogue with the U.N. with respect to the CICIG's work, ordering the Executive to allow the "CICIG Commissioner" into the country, and restating that the Constitutional Court is the designate organ to make final determinations of Constitutional interpretation), <http://www.cc.gob.gt/2018/09/17/caso-cicig-resolucion-4207-2018/> [<https://perma.cc/7EB3-W8VQ>]; Corte de Constitucionalidad, Expediente 4207-2018 (Sept. 19, 2018) (Guat.) (granting an injunction against the Executive's demand to the U.N. that it name a new CICIG Commissioner, clarifying that its decision of September 16, 2018, applies to Commissioner Iván Velásquez, that according to art. 5 of the CICIG Agreement, the Secretary-General of the U.N. names the CICIG Commissioner, and that it is a prosecutable offense for a government official to disobey an order of a court), <http://www.cc.gob.gt/2018/09/22/caso-cicig-auto-de-ampliacion-y-votos-razonados-disidentes-dentro-del-expediente-4907-2018/> [<https://perma.cc/8XUW-6GWZ>] (see also dissenting votes of Judge Neftaly Aldana Herrera and Judge Josefina Ochoa Escribá); Corte de Constitucionalidad, Resolución, Expedientes Acumulados 4151, 4179, 4180 y 4182-2017, at 4–5 (Oct. 10, 2017) (Guat.), <http://cc.gob.gt/?p=23025> [<https://perma.cc/RWM2-N4S9>].

98. ONU y Secretario General [UN & Secretary General], *Guterres "Rechaza*

work in Guatemala and will do so until the end of its mandate in September 2019.⁹⁹

C. Relevant Legal Transitions in Guatemala and the Figure of querellante adhesivo in Guatemalan Law

The creation of the CICIG followed a multi-year process of reforming the Guatemalan justice system in the transition to democracy. The reforms in Guatemala were part of a vanguard movement in Latin America, along with Argentina, that led to the adoption of an adversarial criminal system in fourteen previously inquisitorial countries in the region.¹⁰⁰ Guatemala is a civil law country with legal traditions tracing back through Spanish law to French and Roman law.¹⁰¹ Until the 1992 reforms to the Criminal Procedural Code,¹⁰² Guatemala had an inquisitive criminal law system, influenced by

Enérgicamente” la Decisión de Guatemala de Finalizar el Acuerdo de la CICIG, UN NEWS (Jan. 7, 2019), <https://news.un.org/es/story/2019/01/1449022> [<https://perma.cc/W3TK-Q7ZT>].

99. As discussed in Part IV(b), *infra*, one of the main challenges faced by graft mechanisms is risk that a government threatened by the mechanism’s work will end its mandate. At the time of this publication, it appears that the CICIG’s time in Guatemala has come to close. The incumbent government has declared that it will not renew the CICIG’s mandate after September and neither of the two presidential run-off candidates after the June 16, 2019 general election, Sandra Torres (UNE political party) and Alejandro Giammattei (VAMOS political party) have or are likely to support a CICIG extension. Elisabeth Malkin, *Guatemala’s Presidential Election May Be a Blow to Anti-Corruption Effort*, N.Y. TIMES (June 17, 2019) <https://www.nytimes.com/2019/06/17/world/americas/guatemala-election.html> [<https://perma.cc/V6Y6-3CS4>]. The CICIG and MP prosecuted Giammattei in connection with the extra-judicial killings of prisoners in the Pavón prison in September 2016 when he was the Director of Prisons. CICIG, CASO PAVÓN: ELEMENTOS PROBATORIOS “SECUENCIA FOTOGRÁFICA DE OPERATIVO PAVO REAL” (2011), https://www.plazapublica.com.gt/sites/default/files/pavon_cicig_informe_fotografico.pdf [<https://perma.cc/F8WB-9MXQ>]. In April 2019, the MP and CICIG requested the removal of Torres’ immunity to criminal investigation through the *antejuicio* procedure, in connection with an illicit campaign financing case. Ministerio Público, *Antejuicio 59-2019*.

100. Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 618, 631 tbl.1 (2007).

101. ALBERTO BOVINO, TEMAS DE DERECHO PROCESAL PENAL GUATEMALTECO 29 (1996).

102. GERMÁN GARAVANO, MARCO FANDIÑO & LEONEL GONZÁLEZ, EVALUACIÓN DEL IMPACTO DEL NUEVO MODELO DE GESTIÓN FISCAL DEL MINISTERIO PÚBLICO DE GUATEMALA 24 (2014); Mónica Leonardo Segura, *Guatemala, in LAS VÍCTIMAS Y LA JUSTICIA TRANSICIONAL: ¿ESTÁN CUMPLIENDO LOS ESTADOS LATINOAMERICANOS CON LOS ESTÁNDARES INTERNACIONALES?* 157, 162–63 (Fundación para el Debido Proceso Legal ed., 2010), <http://www.dplf.org/sites/default/files/1285258696.pdf> [<https://perma.cc/YS28-MABF>]. See also CÓDIGO PROCESAL PENAL [Criminal Procedural Code] (Guat.).

subsequent authoritarian regimes.¹⁰³ Like most countries in the region, which share not only Spanish colonial history but also the trauma of harsh post-colonial authoritarian regimes, the reforms were both celebrated and difficult to put into practice as new rights were often “interpreted in the light of old principles.”¹⁰⁴ The change to an adversarial criminal system marked not only a change in criminal procedure and thought but also a change in how society viewed the role of the justice system.¹⁰⁵

The reform process generated a historic moment of debate among national jurists to define what this change would entail and how best to guarantee the fundamental rights of citizens and achieve justice.¹⁰⁶ Since the State had been the central violator of rights during the armed conflict, people were unconvinced that the MP could both promote the interests of the State and be an advocate for victims.¹⁰⁷ As a result, the drafters of the new code included the figure of *querellante adhesivo* or “private prosecutor” in article 116 of the new Code of Criminal Procedure.¹⁰⁸ The central purpose of the provision is to strengthen the participation of victims, survivors, and citizens in the criminal justice process to motivate better prosecutions and protection of victim’s rights.¹⁰⁹ However, as Guatemalan rule of

103. BOVINO, *supra* note 101, at 27. For example, at one time military tribunals were given jurisdiction over all criminal acts including over civilians, basic procedural protections like habeas corpus were suspended many times during the conflict, and right before the transition to democracy, the president of the military junta unilaterally named judges. CEH, *supra* note 66, ¶¶ 2647, 2650, 2673, 2731, 2737.

104. BOVINO, *supra* note 101, at 33 (trans. by author); *see also* DECKER, MÖHLER & VARELA, *supra* note 37, at 23–24.

105. Criminal procedure experts have commented on the lack of substantive change in the Guatemalan criminal procedure from colonial times until the 1994 reforms, describing a highly formalistic and formulaic system immune to legislative change that was presented with new possibilities in the checks and balances of an adversarial system. Luis Rodolfo Ramírez García & Miguel Ángel Urbina, *Guatemala*, in *LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA* 443, 458–59 (Julio B.J. Maier et al. eds., 2000).

106. *Id.* at 467 (describing the reform process of seeking to implement recommendations from the Inter-American Court of Human Rights and U.N. experts, esteemed national jurists, and civil society).

107. ERICK JUÁREZ ELÍAS, *MINISTERIO PÚBLICO VERSUS IMPUNIDAD* 9 (2013).

108. The prior 1973 Code of Criminal Procedure recognized certain rights of the “accuser” but limited the participation of the accuser in the process and specifically prohibited “notifying or including [the accuser] in the process [of carrying out any motions].” CÓDIGO PROCESAL PENAL [CRIM. PROC. CODE] art. 165 (July 27, 1973) (Guat.) (trans. by author; originally, “*en ningún caso, serán notificados ni notificados [los acusadores] en el tramite [de peticiones y gestiones].*”). Compare CÓDIGO PROCESAL PENAL [CRIM. PROC. CODE] art. 116 (Guat.).

109. Alex Antolín Morales Álvarez, *Importancia de Tener Como Agraviados a los Hermanos de la Víctima y Puedan Ejercer los Derechos del Querellante Adhesivo* 1–3 (Sept.

law scholar Mónica Leonardo notes, the *querellante adhesivo* was, until recently, a little-used provision by victims, because of the high financial and technical barriers to understanding all of the MP's actions and in order to assemble a sufficiently capable legal team to represent the victim throughout the process.¹¹⁰

The *querellante adhesivo*, like the figures of civil party, private accuser, joint prosecutor, and popular accuser in various jurisdictions in Latin America and of Franco-Roman provenance,¹¹¹ allows a person or association to participate actively in the criminal process. In the case of Guatemala, the *querellante adhesivo* is afforded the full range of procedural actions provided by the Code to any other party in the process, including the power to collaborate with the MP's prosecution or to challenge motions of the MP.¹¹² This means that the *querellante* may, inter alia, call and examine and cross witnesses, present evidence, advance legal arguments, and ask for specific sentences.¹¹³ In Guatemala, the *querellante* may be an individual or legal entity affected by the proceeding in question.¹¹⁴ Moreover, the statute gives any citizen the ability to file a complaint "against officials or public employees, who are alleged to have directly violated human rights in the exercise of their functions, or on the occasion thereof, or in the case of crimes committed by public officials who abuse their position."¹¹⁵ This provision highlights the drafters' intention for the *querellante adhesivo* to act as a check on the MP, in the interests of justice. It is especially important in Guatemala, given the history of the complicity of the judiciary in human

2006) (unpublished L.L.B. thesis, Universidad de San Carlos de Guatemala), http://biblioteca.usac.edu.gt/tesis/04/04_6321.pdf [<https://perma.cc/2WBY-PR2S>].

110. Leonardo Segura, *supra* note 102; JUÁREZ ELÍAS, *supra* note 107, at 107.

111. See, e.g., CÓDIGO PROCESAL PENAL arts. 111–21 (Chile) (establishing the different rights of the *querellante*); CÓDIGO PROCESAL PENAL DE LA NACIÓN [CRIM. PROC. CODE] art. 85 (2014) (Arg.) (defining the role of the *querellante autónomo*); CODE DE PROCÉDURE PÉNALE [CRIM. PROC. CODE] arts. 85-91-1 (Fr.) (defining the rights of the *partie civile*); L.E. CRIM. arts. 19, 101, 108 (Spain) (describing some of the powers of the *acusador particular*); C.P.P. art. 137 (Colom.) (describing the rights of victims to participate in criminal investigations and trials).

112. Ricardo Prado Ayau, La Violación al Derecho Humano de Protección Judicial del *Querellante adhesivo* en el Proceso Penal Guatemalteco 33–37 (Aug. 2006) (unpublished L.L.M. thesis, Universidad Rafael Landívar), <http://biblio3.url.edu.gt/Tesis/2006/07/07/Prado-Ricardo.pdf> [<https://perma.cc/6WUU-TVAV>].

113. Ramírez García & Urbina, *supra* note 105, at 490–91.

114. CÓDIGO PROCESAL PENAL [CRIM. PROC. CODE] art. 116 (Guat.).

115. *Id.* (trans. by author from original, "contra funcionarios o empleados públicos que hubieren violado directamente derechos humanos en ejercicio de su función, o con ocasión de ella, o cuando se trate de delitos cometidos por funcionarios públicos que abusen de su cargo.").

rights violations.¹¹⁶ Recent studies of the use of the *querrelante adhesivo* across several different categories of crime demonstrate that, although its use is still low, when victims do participate in proceedings, the rate of conviction is significantly higher.¹¹⁷

Procedurally, therefore, the main power that the CICIG uses in its investigations is a power shared by any person in Guatemala. However, the CICIG is uniquely able to wield this power to have a system-wide impact because of its financial and human resources, expertise, and special investigative powers (i.e., access to official information). Further, when existing legal tools are insufficient to make effective use of the system, the CICIG is able to promote regulatory and statutory reform to construct new ones. This tightrope act of having powers and resources approaching that of a “private” public prosecutor, while neither impinging on the prerogatives of the MP nor reducing the MP’s responsibilities, is the crux of the CICIG’s success.

III. PRACTICES AND PROCESSES OF THE CICIG

The CICIG’s work has evolved over time, demonstrating a degree of flexibility to respond to changing needs of the national context of its partners.¹¹⁸ The need to renew the CICIG’s mandate every two years highlights the importance (and perhaps partial source) of this flexibility. Each renewal has been accompanied by a moment of doubt as to whether the Guatemalan government would extend the

116. The CEH stated in its conclusions that “[t]he country’s judicial system, due either to induced or deliberate ineffectiveness, failed to guarantee the application of the law, tolerating, and even facilitating, violence. Whether through acts of commission or omission, the judicial branch contributed to worsening social conflicts at various times in Guatemala’s history. Impunity permeated the country to such an extent that it took control of the very structure of the State, and became both a means and an end. As a means, it sheltered and protected the repressive acts of the State, as well as those acts committed by individuals who shared similar objectives; whilst as an end, it was a consequence of the methods used to repress and eliminate political and social opponents.” COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE TZ’INIL NA’TAB’AL, CONCLUSIONS AND RECOMMENDATIONS ¶ 10 (1999).

117. OBSERVATORIO JUDICIAL DEL SISTEMA DE JUSTICIA PENAL EN GUATEMALA, EL SISTEMA DE JUSTICIA PENAL EN GUATEMALA: UN PROYECTO AÚN EN PROGRESO 18–19 (2018), <https://www.cicig.org/wp-content/uploads/2018/11/Hallazgos-Observatorio.pdf> [<https://perma.cc/HPL6-TVA2>].

118. CICIG, INFORME DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA CON OCASIÓN DE SU OCTAVO AÑO DE LABORES 11–12 (2015) (discussing the changes in the 2013–2015 Work Plan and after, in light of the significant political and judicial changes of the 2014 judicial selections and 2015 protests) [hereinafter CICIG EIGHTH REP.].

mandate.¹¹⁹ Accordingly, the CICIG has had to be ready to adjust for the possible change in its plans. This can be seen in how the CICIG's primary two activities—investigations and prosecutions, and legal reform¹²⁰—have developed over its mandate. These two prongs of the CICIG's work will be explored in this following section to understand how they are inter-related and contribute to an exchange of capacities between the CICIG and national institutions.

119. OPEN SOCIETY JUSTICE INITIATIVE, AGAINST THE ODDS: CICIG IN GUATEMALA 113 (2016), <https://www.opensocietyfoundations.org/sites/default/files/against-odds-cicig-guatemala-20160321.pdf> [<https://perma.cc/PBC7-YN2C>] (describing the general difficulties faced with renewing the CICIG's mandate every two years) [hereinafter OSJI]; *Comunicado Oficial*, MINISTERIO DE RELACIONES EXTERIORES DE GUATEMALA (Aug. 31, 2018), <http://www.minex.gob.gt/Noticias/Noticia.aspx?ID=27939> [<https://perma.cc/N63L-HQ8C>] (stating that Guatemala has informed the Secretary-General of the U.N. that it will not ask for an extension of the CICIG's mandate); EFE, *Piden a Jimmy Morales renovar el mandato de la CICIG*, DEBATE (May 7, 2018), <https://www.debate.com.mx/mundo/jimmy-morales-presidente-guatemala-corrupcion-cicig-20180507-0227.html> [<https://perma.cc/5WYD-5VKG>] (reporting the calls for a renewal of the CICIG's mandate in 2019 and the skepticism of former Attorney General Thelma Aldana that President Jimmy Morales will comply); Roni Pocón & Henry Estuardo Pocasangre, *CICIG Empieza Nuevo Mandato en Medio de Amparo en Contra de Renovación*, PRENSA LIBRE (Sept. 4, 2017), <https://www.prensalibre.com/guatemala/politica/cicig-inicia-extension-de-su-mandato-solicitado-por-el-presidente-jimmy-morales> [<https://perma.cc/AH9L-VL8N>] (reporting that President Jimmy Morales extended the CICIG's mandate by two years, but not the four years promised during the electoral campaign); Juan Manuel Vega, *Después de la Incertidumbre de Meses, CICIG Se Queda en Guatemala*, SOY502 (Apr. 23, 2015), <http://www.soy502.com/articulo/despues-incertidumbre-meses-cicig-queda-guatemala> [<https://perma.cc/X75T-D23D>] (reporting that the President Pérez Molina finally renewed in the CICIG's mandate in 2015 after months of uncertainty); Carlos Dada, *Corruption Charges Turn Guatemala Upside Down*, NEW YORKER (Sept. 4, 2015), <https://www.newyorker.com/news/news-desk/corruption-charges-turn-guatemala-upside-down> [<https://perma.cc/J2GB-89BL>] (reporting that in 2014 President Pérez Molina announced that he would not renew the CICIG's mandate); *Vigencia del Mandato de la CICIG*, CICIG (Jan. 17, 2012), <https://www.cicig.org/cicig/prorroga/vigencia-del-mandato-de-la-cicig/> [<https://perma.cc/4L7G-ZT73>] (explaining the CICIG's position that renewals of the original mandate are allowed under the CICIG Agreement, in light of legal challenges to President Alvaro Colom's renewal of the mandate in 2009 and 2011, and in anticipation of President Pérez Molina's renewal of the mandate in 2013); INTERNATIONAL CRISIS GROUP, GUATEMALA: SQUEEZED BETWEEN CRIME AND IMPUNITY 22 (2010), <http://www.stevendudley.com/pdf/33%20Guatemala%20%20Squeezed%20Between%20Crime%20and%20Impunity.ashx.pdf> [<https://perma.cc/VDS8-NZH5>] (explaining the debate around the appropriate length of the CICIG's mandate that existed during the President Colom's administration).

120. Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. INT'L CRIM. JUST. 53, 55 (2010).

A. Investigations & Prosecutions: Tools for Gaining Legitimacy

Investigations, co-prosecutions, and administrative proceedings are the cornerstone of the CICIG's power. Investigations allow the CICIG to support the MP in many cases at once through information-sharing platforms¹²¹ and providing specialized investigatory support.¹²² Prosecution is the most direct and visible way to dismantle organized crime networks, by removing principal and supporting criminal members through incarceration and dissuading others from engaging in similar activities.¹²³ As a visible exercise of power, transparent results accrued from progressive prosecutions are also essential to repairing fractures in institutional trust.¹²⁴ Finally, by supporting administrative proceedings, the CICIG helps national institutions remove public officials who consistently engage in and set up corruption schemes.¹²⁵

These three avenues constitute the toolbox that the CICIG can use to support the MP in their shared mandate. Investigations allow the CICIG to introduce the MP to new techniques and procedures under a "learning by doing" model.¹²⁶ The legal power to participate

121. CICIG, INFORME DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEAMALA CON OCASIÓN DE SU QUINTO AÑO DE LABORES 7 (2012), <http://www.cicig.co/uploads/documents/2012/COM-067-20120911-DOC02-ES.pdf> [https://perma.cc/XY74-UWAR] (describing the *Plataforma Integrada de Información Policial*) [hereinafter CICIG FIFTH REP.]; CICIG, INFORME DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEAMALA CON OCASIÓN DE SU CUARTO AÑO DE LABORES 20, 22 (2011), <http://www.cicig.co/uploads/documents/2011/COM-052-20111005-DOC01-ES.pdf> [https://perma.cc/CAX8-WXKQ] (describing new information sharing platforms with the MP and the Ministry of the Interior [hereinafter MinGob]) [hereinafter CICIG FOURTH REP.].

122. CICIG EIGHTH REP., *supra* note 118, at 6, 17 (describing how the Financial Analysis Section in the CICIG has helped support the MP's prosecutions with specialized analysis).

123. Tove Nyberg, *International Commission Against Impunity in Guatemala: A Non-Traditional Transitional Justice Effort*, 28 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL, 157, 182 (2015).

124. Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 244, 245 (2015) (comparing the basic characteristics that independent agencies must have to produce reliable investigations of police abuse and arguing that transparency in the investigation of government officials is important to building legitimacy and trust in the eyes of the public).

125. Dada, *supra* note 119 (describing how Attorney General Claudia Paz y Paz was able to remove corrupt public attorneys from the MP with the help of CICIG investigative information).

126. Unlike other international rule of law mechanisms, CICIG's general strategy is not to provide workshops and trainings to national actors but to partner its international staff and trained national staff with national institutions. This practical approach encourages innovation as international and national teams confront real world challenges and adjust

in judicial proceedings gives the CICIG the teeth to achieve tangible results. Finally, the power to initiate administrative proceedings against civil servants allows for the promotion of accountability of actors within national institutions. While all of these powers are important to the CICIG's work, information regarding the introduction of new investigatory methods and co-prosecutions is more prevalent than the internal administrative proceedings of Guatemalan institutions.¹²⁷ Therefore, this following section will focus on how these actions have shaped the CICIG's work and allowed for a successful graft.

1. Investigations

In 2007, when the CICIG began operations in Guatemala, it was a new type of mechanism, and no one knew exactly what to expect from it. There was no blueprint to follow. As such, the CICIG made choices about its first priorities, how to frame the scope of its work, and its relationship with national institutions: aggressive, conciliatory, limited, innovative, or some other approach. In the context of the CICIG's downgraded powers from autonomous initiator of criminal prosecutions to dependent co-prosecutor,¹²⁸ commentators

together. To some extent, this model also avoids the hierarchal dynamic of "international expert/teacher" and "national novice/learner," but affords a more equal relationship. Cf. S.C. Res. 2350 ¶ 6, U.N. Doc. S/RES/2350 (Apr. 13, 2017) (mandating the U.N. Mission for Justice Support in Haiti to "strengthen rule of law in Haiti [and] further support and develop the [Haiti National Police]"). CICIG's diverse international staff from, inter alia, Chile, Colombia, France, Italy, Spain, and Uruguay work alongside national lawyers, criminal investigators, financial analysts, and security personnel.

127. Administrative proceedings are typically not public and rely upon variable institutional mechanisms to achieve results. This makes it more difficult for the CICIG to participate in the administrative removal of bad actors. For example, during most of Attorney General Dr. Claudia Paz y Paz's tenure, the Congress refused to elect representatives to the MP Council, the body responsible for the removal of sanctioned public attorneys. In 2014, when members were elected to the Council, eighty attorneys were working in the MP with pending sanctions for removal. *Diputados eligen a miembros al Consejo del MP*, PRENSA LIBRE (June 10, 2014), <https://www.prensalibre.com/noticias/politica/diputados-juramentan-miembros-Consejo-MP-0-1154284819> [https://perma.cc/9X3E-CUE5]. In part for this reason, in 2016, the CICIG supported new legislation that abolished the MP Council and vested the Attorney General with the administrative powers of the Council. Decreto 18-2016, Reformas a la Ley Orgánica del Ministerio Público [Reforms to the Organic Law of the MP] arts. 9–15, 32–36 (Feb. 23, 2016) (Guat.), <http://www.acnur.org/fileadmin/Documentos/BDL/2016/10460.pdf> [https://perma.cc/6N5V-YT7T]; Carlos Álvarez, *Cicig apoya las reformas a la Ley Orgánica del MP*, PRENSA LIBRE (Feb. 17, 2016), <https://www.prensalibre.com/guatemala/justicia/cicig-apoya-las-reformas-a-la-ley-organica-del-mp> [https://perma.cc/6C3U-9LGR].

128. See *supra* Part II.A (discussing the establishment of the CICIG).

believed that CICIG's main strength had been muzzled and had minimal expectations for the CICIG's work.¹²⁹ Nonetheless, through a cooperative posture of engagement, the CICIG has been able to develop a comprehensive strategy to investigate and prosecute various types of clandestine networks.¹³⁰

Over the past decade of the CICIG's work, it has developed roughly three categories of targets for investigation. The initial category is networks of former security forces, which was contemplated at the creation of the CICIG and is squarely in the text of its mandate.¹³¹ This category quickly expanded to include the activities of complex criminal organizations, like transnational gangs and trafficking organizations.¹³² The latter set of cases was important to establishing early acceptance of the CICIG's work, because unlike cases of former security forces, which caused tensions with some military interest groups, organized crime was widely seen as a political and social priority.¹³³ The second category of cases also grew very quickly from the CICIG's mandate: politically sensitive cases. Among the first cases that the CICIG took on were the already-

129. See IMPUNITY WATCH, *supra* note 70, at 22, 42 (discussing the initial skepticism of the CICIG by the CICIACS supporters, which later was overcome by the CICIG's effectiveness).

130. See *supra* Introduction (citing the different types of individuals and crimes the CICIG has co-prosecuted).

131. CICIG Agreement, *supra* note 2, art. 1(1). See, e.g., JUAN JOSÉ MARTÍNEZ D'AUBUISSON & STEVEN DUDLEY, REIN OF THE KABIL: GUATEMALA'S PRISONS UNDER BYRON LIMA (2017), <https://www.insightcrime.org/investigations/reign-of-kaibil-guatemala-prisons-under-byron-lima/> [<https://perma.cc/S9MZ-D7NP>] (reporting on the creation of the networks of corrupt current and former military officials in Guatemala, like *La Cofradía* and *La Montaña*, and their penetration of the prison system for illicit purposes).

132. CICIG, DOS AÑOS DE LABORES: UN COMPROMISO CON LA JUSTICIA 7 (2009) [hereinafter CICIG SECOND REP.] (noting the investigation of gangs and narco-trafficking groups as a joint priority with the MP and national police (PNC)); OSJI, *supra* note 119, at 41.

133. See, e.g., *Tribunal Condena a 14 Integrantes de Banda Criminal los Zetas*, CICIG (Sept. 10, 2010), <https://www.cicig.org/comunicados-2010-c/tribunal-condena-a-14-integrantes-de-banda-criminal-los-zetas/> [<https://perma.cc/8BTJ-9AXB>] (reporting the convictions of Zeta members for eleven murders in 2008, with sentences from eight to 313 years in prison); *Capturan a Abogada Vinculada a Adopciones Irregulares*, CICIG (Apr. 8, 2011), <https://www.cicig.org/casos/capturan-a-abogada-vinculada-con-adopciones-irregulares-2/> [<https://perma.cc/Q7X8-SQLR>] (reporting the arrest of a lawyer allegedly involved in an illegal adoption and trafficking network); *Capturan a Cuarenta Integrantes de Mara Salvatrucha Dedicados a Extorción*, CICIG (July 8, 2012), <https://www.cicig.org/casos/capturan-cuarenta-integrantes-de-mara-salvatrucha-dedicados-a-la-extorsion/> [<https://perma.cc/AL3B-GNLR>] (reporting the arrest of forty MS-13 gang members allegedly involved in an extortion network).

existing corruption cases against former President Alfonso Portillo¹³⁴ and the 2009 *Rosenberg* case of a high-profile murder of a lawyer who accused the sitting president, Álvaro Colom, of ordering his murder.¹³⁵ These two cases pushed the CICIG into the public spotlight and marked the first public test of its capacity,¹³⁶ allowing the CICIG to gain a first stamp of public approval.¹³⁷ Finally, since the *La Línea*¹³⁸ and *Cooptación del Estado*¹³⁹ cases in 2015, the CICIG and MP introduced a new category of networks that they would jointly prosecute labeled “illicit political-economic networks” (“RPEI” in Spanish),¹⁴⁰ invoking the finance clause of article 1(1) of the CICIG Agreement.¹⁴¹ The progressive ability to innovate from a broad mandate in response to immediate criminal justice needs and influ-

134. Steven Dudley, *Guatemala Elites and Organized Crime: The CICIG*, INSIGHT CRIME (Sept. 1, 2016), <https://www.insightcrime.org/investigations/guatemala-elites-and-organized-crime-the-cicig/> [<https://perma.cc/333J-AJGJ>]. The case against former President Alfonso Portillo was an important early CICIG case that tested the CICIG’s strength to co-prosecute a former head of State, helped to define the CICIG’s jurisdictional mandate, and required a high level of coordination between national actors, the CICIG, and international actors. The case was ultimately unsuccessful in Guatemala, but Portillo was subsequently extradited to the United States and successfully convicted in the Southern District of New York on charges of embezzlement and money laundering, using much of the evidence that the CICIG and MP were able to collect. See *United States v. Portillo*, No. 09-CR-1142 (RPP), 2014 WL 97322 (S.D.N.Y. Jan. 8, 2014) (this is the last court document available before Portillo submitted a guilty plea and was sentenced). See also Press Release, Comisión Internacional Contra la Impunidad en Guatemala (CICIG) (May 30, 2011) <https://www.cicig.org/casos/cicig-apela-sentencia-absolutoria-del-ex-presidente-portillo-y-dos-ex-ministros/> [<https://perma.cc/9HAR-ETKL>].

135. David Grann, *A Murder Foretold: Unravelling the Ultimate Political Conspiracy*, NEW YORKER (Apr. 4, 2011), <https://www.newyorker.com/magazine/2011/04/04/a-murder-foretold> [<https://perma.cc/6GLB-XME6>].

136. OSJI, *supra* note 119, at 44.

137. *Id.* at 47–48.

138. See *Comunicado de Prensa 011: Desmantelan Red de Defraudación Aduanera*, CICIG (Apr. 16, 2015), <http://www.cicig.co/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=587&cntnt01showall=&cntnt01returnid=1377> [<https://perma.cc/35MU-H674>].

139. See *Comunicado de Prensa 047: Caso Cooptación del Estado de Guatemala*, CICIG (June 2, 2016), <http://www.cicig.co/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=723&cntnt01showall=&cntnt01returnid=1611> [<https://perma.cc/6JL9-J7F2>].

140. CICIG, NOVENO INFORME DE LABORES DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA (CICIG) 3, 10 (2016) [hereinafter CICIG NINTH REP.]; CICIG EIGHTH REP., *supra* note 118, at 58.

141. CICIG Agreement, *supra* note 2, art. 1 (stating that “[t]he fundamental objectives of this agreement are: (a) To . . . identify[] sources of financing [of illegal security forces and clandestine security organizations]”).

ence the practice of national institutions is a hallmark of the graft model.¹⁴²

Through these various investigations, the CICIG has been able to introduce new investigatory tools such as “wiretapping, GPS car tracking, phone call triangulation, surveillance cameras, [and] plea bargaining.”¹⁴³ The CICIG uses a “learning by doing” approach¹⁴⁴ whereby it shares tasks and capacity with its national counterparts on cases to create learning opportunities through collaboration, not through training. Working on the *Rosenberg* case, the CICIG and MP concluded that there was a need for a legal and institutional framework to authorize wiretapping as an investigative tool¹⁴⁵ and created the Wiretapping Unit in the MP to provide support to investigations generally.¹⁴⁶ Similarly, the CICIG pushed for reforms to the existing plea-bargaining laws in 2009,¹⁴⁷ which, together with wiretapping, allowed for the breakthrough in the now emblematic case *La Línea* in 2015.

The use of plea bargaining and collaboration agreements has been central to building corruption cases, because often it is only possible with insider information to make use of other investigatory tools like forensic accounting and wiretapping to build a complex

142. MP, INFORME ANUAL MEMORIA ADMINISTRACIÓN MAY 2016–2017, at 71 (2016) [hereinafter MP 2016 Report] (adopting the RPEI definition in on-going investigations).

143. OJSI, *supra* note 119, at 51.

144. Léa Réus & Miguel Zamora, *Alcances y Limitaciones de la Comisión Internacional contra la Impunidad en Guatemala*, in ALCANCE Y LIMITACIONES DE LA JUSTICIA INTERNACIONAL 627, 633 (Héctor Olasolo et al. eds., 2018).

145. Decreto No. 21-2006, Ley Contra la Delincuencia Organizada [Law Against Organized Crime] arts. 49–51 (July 19, 2006) (Guat.) (although the procedure for using wiretapping pre-dates the CICIG, it was not used until the CICIG began to collaborate with the MP to construct the technical and institutional capacity needed to carry out operations).

146. Réus & Zamora, *supra* note 144, at 642. See MP, MINISTERIO DE GOBERNACIÓN (GUAT.) & CICIG, ACUERDO INTERINSTITUCIONAL PARA ESTABLECER E IMPLEMENTAR EL SISTEMA DE INTERCEPTACIONES TELEFÓNICAS (2008), http://www.cicig.co/uploads/documents/reforma_institucional/ASIST-TECN_DOC01_20111125_ES.pdf [https://perma.cc/FW8B-4MUX].

147. CICIG, TERCER AÑO DE LABORES 21 (2010) [hereinafter CICIG THIRD REP.]; CICIG SECOND REP., *supra* note 132, at 21–22. See Decreto No. 17-2009, Ley del Fortalecimiento de la Persecución Penal [Law for the Strengthening of Criminal Prosecution], arts. 5–7 (Apr. 14 2009) (Guat.); cf. Decreto No. 21-2006, *supra* note 145, arts. 90–102; CICIG, PRIMER CONJUNTO DE REFORMAS PROPUESTAS POR LA CICIG, MODIFICACIONES EN MATERIA PROCESAL PENAL: INCIDENTES-COLABORACIÓN EFICAZ-PROTECCIÓN DE TESTIGOS-VIDEOCONFERENCIAS 7, 14–15 (2009), http://www.cicig.co/uploads/documents/reforma_institucional/REFOR-INST_DOC08_20111125_ES.pdf [https://perma.cc/H43G-WA2H].

case.¹⁴⁸ In contrast to the previous inquisitorial system in Guatemala, in which the judge was completely in charge of the criminal procedure, the use of plea-bargaining and collaboration agreements with protected witnesses has exponentially increased the power afforded to public prosecutors.¹⁴⁹ Using these two tools, prosecutors can quickly move through cases of low-level members of criminal networks, giving priority resources to large-scale investigations and providing incentives for such actors to collaborate in the prosecution of principals.

The introduction and development of plea-bargaining as a prosecutorial strategy is also linked to the shifting approaches to criminal justice in Guatemala, as discussed above.¹⁵⁰ In order to qualify for a plea bargain, the charges against the defendant must carry no more than a potential five-year sentence, so that the defendant is not coerced into an overly punitive punishment without the advantage of a full legal process.¹⁵¹ By focusing plea deals on relatively more common and less difficult cases, courts are more available for complex cases.

Unlike other Latin American statutory equivalents, articles 90–102 of the Law against Organized Crime set out specific mandatory conditions for a cooperation agreement.¹⁵² First, a defendant must “provide details on the functioning of the [criminal] structure,

148. See generally Thiago Bottino, *Colaboração Premiada e Incentivos à Cooperação No Processo Penal: Uma Análise Crítica dos Acordos Firmados na “Operação Lava Jato,”* 122 REVISTA BRASILEIRA DE CIÊNCIAS CRIMINAIS 359 (2016) (discussing the progressive needs for plea-bargaining and protected witnesses in Brazil in the construction of large scale corruption and organized crime cases).

149. César Barrientos Pellecer, *Evaluación de la Reforma Procesal Penal en Guatemala*, REVISTA DE CIENCIAS PENALES DE COSTA RICA 45, 49, 60 (2003), <http://biblioteca.cejamerica.org/bitstream/handle/2015/2013/evaluaciondelareformaprocesalpenalenguatemala.pdf?sequence=1&isAllowed=y> [<https://perma.cc/MSE2-H7N9>]. See also Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40 (Máximo Langer & David Alan Sklansky eds., 2017) (discussing in-depth the same phenomenon of increased prosecutorial discretion and power through the use of plea-bargaining).

150. INT’L CRISIS GRP., CRUTCH TO CATALYST? THE INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA 3 (2016).

151. OBSERVATORIO JUDICIAL DEL SISTEMA DE JUSTICIA PENAL EN GUATEMALA, EL SISTEMA DE JUSTICIA PENAL EN GUATEMALA: UN PROYECTO AÚN EN PROGRESO 19–20 (2018), <https://www.cicig.org/wp-content/uploads/2018/11/Hallazgos-Observatorio.pdf> [<https://perma.cc/HPL6-TVA2>].

152. Compare Decreto No. 21-2006, *supra* note 145, arts. 90–102, with Lei No. 12.850, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] SEÇÃO 1 - EDIÇÃO EXTRA de 5.08.2013, arts. 4–6 (Aug. 2, 2013) (Braz.).

the roles of its members, or the modus operandi of the crimes.”¹⁵³ The conditions also institute a probationary period not less than double the period of the maximum sentence for the crime that is not prosecuted under the deal.¹⁵⁴ This serves as an important incentive for collaborators not to return to engaging in illicit activities, because should they engage in illegal activity, they would be subject to serving both the sentence that they made a deal to get out of and the new crime committed.¹⁵⁵ Collaborators who were not accomplices in serious crimes of murder, rape, torture, and kidnapping may receive a categorical reduction of two-thirds of their sentence or possible cessation of criminal prosecution.¹⁵⁶

The change from an inquisitorial system to an accusatorial system meant a change in legal culture for prosecutors—shifting their formal responsibility from an obligation to always prosecute every case to increased prosecutorial discretion.¹⁵⁷ This shift allowed pros-

153. Réus & Zamora, *supra* note 144, at 643 (“*proveer detalles sobre el funcionamiento de la estructura, los cargos de sus integrantes o los modus operandi en la comisión de delitos*”).

154. Decreto No. 21-2006, *supra* note 145, art. 95.

155. The Law Against Organized Crime also contains conditions not only aimed at non-repetition but also reparations. See Decreto No. 21-2006, *supra* note 145, art. 102 (requiring collaborating witnesses to repair harms within their economic capability and to return fruits of their illicit activities). Professor Richman addresses concerns over prosecutorial abuse regarding lack of transparency and risks for defendants in cooperation deals. Although his concerns are not fully met by the Law against Organized Crime, the statutory rules on conditions and scope of deals provide defendants with a much clearer picture of the benefits and risks they face. Richman, *supra* note 148.

156. Decreto No. 21-2006, *supra* note 145, art. 92. The categorical reduction approach is less sensitive than some common law approaches to cooperation agreements; however, in the context of a system plagued by corruption, again, it serves to provide transparency and foreseeability for defendants and prosecutors alike. It should be noted that collaborators in cases of the above-mentioned crimes (listed in art. 25 of the Law Against Organized Crime) are eligible for the same benefits, but the judge must weigh the efficacy and degree of collaboration against the severity of the crime and the individual’s responsibility in its commission.

157. Another interesting example of an ancillary effect of the CICIG’s law reform efforts on prosecutorial workload and discretion is its support for a constitutional law reform process that would recognize the competence of indigenous legal systems. Currently, under ad hoc agreements, prosecutors and judges may agree to work with indigenous authorities to resolve certain crimes through indigenous processes, such as simple assaults, burglary, or other crimes. This mechanism allows prosecutors to efficiently resolve cases and lower caseloads. See Guillermo Padilla, *Pluralismo Jurídico y Paz en Guatemala*, 41 REVISTA IIDH 209, 210–13 (2005). A constitutional reform would generalize and expand this possibility. See Congreso de la República [Congress], Law Initiative No. 5179, at 60 (Oct. 6, 2016) (presented by Mario Taracena Diaz-Sol et al.) (Guat.), <https://www.congreso.gob.gt/wp-content/plugins/iniciativas-de-ley/includes/uploads/docs/Registro5179.pdf> [<https://perma.cc/CFY7-F4CP>].

ecutors to free-up resources for the development of new investigatory techniques to find linkages between complex cases and for the use of strategic litigation to reduce crime.¹⁵⁸ In 2009, the Guatemalan Attorney General initiated a pilot program in the Department of Quetzaltenango, the second largest jurisdiction by population in Guatemala, to reorganize the prosecutorial district from a geographic-prosecutor-based system to a unit-functions-based system.¹⁵⁹ The reorganized office has five functions-based units: the first unit determines whether a given complaint warrants an investigation; the second unit explores whether alternative resolution methods are available; the third unit conducts the investigation; the critical fourth unit is responsible for identifying patterns and linkages across cases; and the fifth unit is tasked with conducting litigation.¹⁶⁰ Under this new model, which was subsequently applied to the entire MP system,¹⁶¹ the CICIG's promotion of plea-bargaining was directly complementary to the changes occurring in the national system.¹⁶² The creation of a unit in the MP dedicated solely to the analysis of investigative findings across divisions and offices allowed the MP to integrate the CICIG's investigations into all of its related casework.¹⁶³

2. Co-Prosecutions

In its second year of operations, the CICIG joined its first

158. JUÁREZ ELÍAS, *supra* note 107, at 57.

159. ELVYN DÍAZ, PROPUESTAS PARA EL FORTALECIMIENTO DE LA PERSECUCIÓN PENAL Y LA INVESTIGACIÓN CRIMINAL 58 (2017); ABA, ÍNDICE DE REFORMAS DE LA FISCALÍA PARA GUATEMALA 19 (2011), https://www.americanbar.org/content/dam/aba/directories/roli/guatemala/guatemala_prosecutorial_reform_index_2011_spanish.authcheckdam.pdf [<https://perma.cc/5PM2-GLDJ>]; MINISTERIO PÚBLICO, MEMORIA DE LABORES MINISTERIO PÚBLICO AÑO 2009, at 33 (2009) [hereinafter MP 2009 REP.].

160. DÍAZ, *supra* note 159, at 61.

161. MINISTERIO PÚBLICO, MEMORIA DE LABORES 2013, at 120 (2013) [hereinafter MP 2013 REP.].

162. *La Colaboración Eficaz*, CICIG (Oct. 4, 2010), <http://www.cicig.org/index.php?page=la-colaboracion-eficaz> [<https://perma.cc/F93V-LSRR>].

163. This includes the MP's offices dedicated to Anti-Corruption, Anti-Organized Crime, Administrative Crimes, Narcotrafficking, Human Trafficking, Homicide, Financial Crimes, and Electoral Crimes. *See also* MP, INFORME ANUAL MEMORIA ADMINISTRACIÓN MAYO 2015–2016, at 201 (2015) (explaining how the CICIG and *Fiscalía Especial Contra la Impunidad* investigated over 119 cases together) [hereinafter MP 2015 REP.]; MP, MEMORIA DE LABORES 2012, at 36 (2012) [hereinafter MP 2012 REP.] (explaining cooperation between the CICIG and MP Analysis Unit); MP, MEMORIA DE LABORES MINISTERIO PÚBLICO AÑO 2011, at 36 (2011) (explaining how the CICIG's investigations have been used by the Analysis Unit) [hereinafter MP 2011 REPORT].

case as *querellante*—the *Zacapa Massacre Case*.¹⁶⁴ The case involved a violent confrontation between two armed organized crime groups, and the CICIG’s involvement was not questioned. However, in the second case that the CICIG attempted to join as *querellante adhesivo*, the *Portillo* corruption case, a national court of first instance denied *querellante adhesivo* status to the CICIG. The court reasoned that the CICIG could only intervene in cases where there is a “proved existence of illegal armed networks” involved in the case. Subsequently, the Third Hall of the Court of Appeals overruled the lower court and accepted the CICIG’s petition to join the case.¹⁶⁵ This marked the first issue of interpretation of the CICIG’s prosecution mandate, which, as discussed above, has been allowed an expansive reading, signaling the Guatemalan Judiciary’s and MP’s recognition of the CICIG’s new role.

Interestingly, despite the dispute over the extent of CICIG’s prosecution power as a *querellante adhesivo*, this power has been used judiciously by the CICIG, as shown below in Table 1.

2008	‘09	‘10	‘11	‘12	‘13	‘14	‘15	‘16	‘17	‘18	‘20
2	12	6	3	14	4	4	16	9	14	16	18

What we observe is that the CICIG reserves its ability to act as *querellante adhesivo* for high-impact cases in which the risk of external pressure to the MP is higher than usual, and in cases in which the CICIG seeks to introduce new strategies. This is seen, for instance, 2015 corruption cases related to the Perez Molina administration and the 2017 and 2018 cases related to the Morales’ administrations alleged election violations and justice tampering. During both periods, the CICIG and MP were able to build upon investigations to put forth new cases. One example is the in the *La Línea* case,¹⁶⁷ where the

164. The Zacapa Massacre case involved a dispute on March 25, 2008, between at least two rival organized crime groups involved in narcotics trafficking, in which eleven people were killed. A total of fourteen Mexicans and Guatemalans were convicted of murder, firearms charges, and trafficking charges, and were sentenced to between eight and 313 years in prison (however, per Guatemalan law, only fifty years of a sentence can be enforced). See Decreto No. 17-73, Código Penal [Penal Code], art. 44 [Guat.]; *Caso Zacapa (Causa No. 19004-2008-00638)*, CICIG <http://www.cicig.co/index.php?page=19004-2008-00638> [<https://perma.cc/2J64-J6GG>]; *Los Leones*, INSIGHT CRIME (Mar. 9, 2017), <https://es.insightcrime.org/guatemala-crimen-organizado/los-leones/> [<https://perma.cc/WTQ2-5MJX>].

165. CICIG SECOND REP., *supra* note 132, at 19.

166. Table elaborated by the author based on information from the CICIG annual reports 2009–2016, and information provided by the CICIG.

167. The case was initiated in 2015 and led to the arrests of many public officials,

CICIG and MP were able to use witness protection and plea-bargaining¹⁶⁸ to develop upwards of four new high-impact cases against criminal networks and public corruption.¹⁶⁹

Another innovation that the CIGC was able to introduce into the general Guatemalan criminal justice system, through use in cases of co-prosecution, was the use of protected witness testimony via videoconference.¹⁷⁰ This tool was used in the *Portillo* case¹⁷¹ and allowed a protected witness to give testimony during a trial from a foreign location. It has since been used by the MP independently in other high-impact cases, such as the *Dos Erres Massacre* case from the armed conflict.¹⁷² This demonstrates that the MP has been able to effectively integrate new techniques used in its joint work with the CICIG into other cases and that the MP is able to develop useful transnational cooperation strategies to make even better use of these tools.¹⁷³ Moreover, the legal tools introduced are also beyond the organized crime cases of concern to the CICIG but are useful in the prosecution of cases involving human rights and violations of fundamental freedoms.

The data in Table 1 reinforces two important concepts of the

including President Otto Pérez Molina and Vice-President Roxana Baldetti, who were both arrested a day after each resigned from office following months of public protests.

168. Roni Pocón & Miguel Barrientos, *Salvador González, alias Eco, Es Puesto en Libertad*, PRENSA LIBRE (Oct. 19, 2017), <http://www.prensalibre.com/guatemala/justicia/salvador-gonzalez-eco-queda-libre-caso-la-linea> [https://perma.cc/ZJ8Y-CH7P]; Claudia Palma, *Eco y Monzón, las piezas claves de La Línea*, PRENSA LIBRE (Apr. 13, 2016), <http://www.prensalibre.com/guatemala/justicia/eco-y-monzon-piezas-clave-de-la-linea> [https://perma.cc/B5DU-LUMQ].

169. Michael Lohmuller, *Guatemala's Government Corruption Scandals Explained*, INSIGHT CRIME (June 21, 2016), <https://www.insightcrime.org/news/analysis/guatemala-s-government-corruption-scandals-explained/> [https://perma.cc/F7R2-C5Q3] (explaining the relations between the *La Línea* [customs and tax fraud ring], *Puerto Quetzal* [bribery and money laundering case], *Cooptación del Estado* [illicit electoral campaign financing ring], and *La Cooperacha* [embezzlement ring] cases).

170. Decreto No. 17-2009, De Las Reformas Al Decreto Número 51-92 Del Congreso De La República, Código Procesal Penal [Law for the Strengthening of Criminal Prosecution], art. 17 (Apr. 14, 2009) (Guat.).

171. *Caso Alfonso Portillo (Causa No. 7102-2001)*, CICIG (2013), <http://www.cicig.co/index.php?page=7102-2001> [https://perma.cc/J9MF-B7WH].

172. Réus & Zamora, *supra* note 144, at 636 (in the *Dos Erres* case a former military official involved in the massacre was able to give testimony via videoconference from Mexico where a Mexican judge and prosecutor were able to verify the witness's identity, safety, and voluntary testimony).

173. This point has also been observed by other researchers. See OSJI, *supra* note 119, at 44 (describing criminal judicial cooperation between the MP and U.S. institutions, including the DEA, DOJ, and FBI).

graft model. First, the CICIG's success is not the result of "transplanting" or replacing the MP by litigating all cases of corruption, or even all high-impact cases. Second, the numbers seem to suggest that early on in its tenure, there was a greater need for CICIG's direct participation in proceedings as *querellante adhesivo*. However, over time, as the MP was strengthened, the CICIG has either been able to step back or the CICIG-MP investigation/preparatory phase of cases has been so intimately intertwined that participation in litigation is not needed. This again indicates that the graft model creates a dynamic relationship that adapts to the needs and the changing capacities of the two institutions.

B. CICIG as a Catalyst for Legal and Institutional Reform

Article 2.1(c) of the CICIG Agreement gives the CICIG a responsibility to "[r]ecommend to the State . . . legal and institutional reforms necessary to achieve [its mandate]."¹⁷⁴ Based on this duty, the CICIG has pushed for over thirty legal reforms over its time in Guatemala.¹⁷⁵ The most ambitious of these was the constitutional reform process that the CICIG helped organize in 2016.¹⁷⁶ This process sought to reform an entire section of the constitution that deals with the organization of the justice system.¹⁷⁷ The process is particularly interesting because it incorporated participation from all sectors of the State and civil society, in stark contrast to past Guatemalan law reform processes,¹⁷⁸ and the CICIG's own past approach.

174. CICIG Agreement, *supra* note 2, art. 2.1(c).

175. WOLA, LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA: UN ESTUDIO DE INVESTIGACIÓN DE WOLA SOBRE LA EXPERIENCIA DE LA CICIG 12 (2015); CICIG, NEWSLETTER: JUNE 2018, at 8–9 (2018) (citing thirty-four proposed law reforms that CICIG has recommended to Congress, including, for example, proposals on political immunity, arms control, plea bargaining, organization of the judiciary, trafficking, organization of the police force, and extradition).

176. *See generally* DIÁLOGO NACIONAL: HACIA LA REFORMA DE LA JUSTICIA EN GUATEMALA (2017) (copy on file with the *Columbia Journal of Transnational Law*).

177. SECRETARÍA TÉCNICA, EXPOSICIÓN DE MOTIVOS: REFORMA CONSTITUCIONAL EN MATERIA DE JUSTICIA 8 (2016) (copy on file with the *Columbia Journal of Transnational Law*).

178. Through its 200 years of existence, the State of Guatemala has undergone over a dozen constitutional reform processes, all through a constituent assembly process. *See* CORTE DE CONSTITUCIONALIDAD, DIGESTO CONSTITUCIONAL (2001) [hereinafter DIGESTO CONSTITUCIONAL] (compiling all constitutions and reforms in Guatemala between 1808 and 2001). These constituent assemblies were convened in accordance with the formal requirements stated in the preceding constitution. These varied across constitutions, ranging from simple requirements, such as citizenship or age, to more exclusionary requirements, such as education, landholding, or business venture. *See, e.g.*, CONSTITUCIÓN DE LA

In 2011, the CICIG attempted a sort of expert constitutional reform, proposing a series of changes related to the administration of justice, after consultation with actors at the national university (Universidad San Carlos de Guatemala), a private university (Universidad Rafael Landívar), and a local think tank (ASIES).¹⁷⁹ However, this process was unsuccessful because there was an insufficient level of political pressure and buy-in to get the reforms passed.¹⁸⁰ This attempt was also one of a series of unsuccessful attempts to reform the constitution by individual political actors.¹⁸¹

The new 2016 model was based on collective buy-in and attempts to seek some broad consensus for a significant but focused reform proposal. The process was formally inaugurated by the presidents of each branch of government, calling for a “National Dialogue Towards the Reform of Justice in Guatemala,” signaling broad support from the State. The process itself is organized by the Technical Secretariat, which is comprised of the MP, the CICIG, and the Human Rights Ombudsperson (“PDH”).¹⁸² The process began with a consultation process in the capital and in five regions of Guatemala over a six-week period during which the reform process and goals were explained and comments and proposals were solicited from any

REPÚBLICA DE GUATEMALA art. 163 (Sept. 15, 1965) (Guat.) (requiring representatives to be over the age of thirty); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 9 (Mar. 11, 1945) (Guat.) (differentiating male citizens over eighteen and female citizen over eighteen who are literate); CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA art. 8 (July 19, 1935) (Guat.) (requiring literacy for citizenship); LEY CONSTITUTIVA DE LA REPUBLICA DE GUATEMALA DECRETADA POR LA ASAMBLEA NACIONAL CONSTITUYENTE art. 8 (Dec. 11, 1879) (Guat.) (requiring substantial income for citizenship). However, representatives tended to be national or regional elites.

179. CICIG, ESTADO DE REFORMAS PROMOVIDAS POR LA CICIG EN MATERIA LEGISLATIVA 3 (2015), http://www.cicig.org/uploads/documents/2017/02_Estado_actual_reformas_promo.pdf [<https://perma.cc/MBA2-9WEX>]; CICIG, RECOMENDACIONES EN MATERIA DE REFORMA CONSTITUCIONAL (2011), http://www.cicig.org/uploads/documents/reforma_constitucional/REFOR-CONS_DOC01_20111128_ES.pdf [<https://perma.cc/6SGW-9JUM>].

180. Carlos Arturo Villagrán Sandoval, *Soberanía y Legitimidad de los Actores Internacionales en la Reforma Constitucional de Guatemala: El Rol de CICIG*, POLÍTICA INTERNACIONAL (June 2016), at 36–37.

181. Luis Fernando Mack, *La Reforma Constitucional, en Perspectiva Histórica*, FLACSO (Feb. 3, 2017), <http://www.flacso.edu.gt/dialogo/?p=1641> [<https://perma.cc/FT5N-QESL>]. See also *Propuesta de Reforma Constitucional en Materia de Justicia*, DIÁLOGO NACIONAL, at 49–51 (Oct. 5, 2016), http://www.reformajusticiagt.org/wp-content/uploads/2016/10/Present_P_RefConstit.pdf [<https://perma.cc/56YZ-WS2V>] [hereinafter “Propuesta de Reforma”] (describing eleven failed constitutional reform attempts since 1996).

182. *Actores*, DIÁLOGO NACIONAL: HACIA LA REFORMA DE LA JUSTICIA EN GUATEMALA (2017) (copy on file with the *Columbia Journal of Transnational Law*).

interested participant.¹⁸³ During this process, the Technical Secretariat organized seven regional conferences around Guatemala in which 1,500 people participated in 148 discussion tables.¹⁸⁴ These sessions included information on the current reform process, international standards for independence of judges, an overview of recent reform attempts, and an overview of the current constitutional provisions.¹⁸⁵ Additionally, over 3,000 individuals participated in an online survey regarding the focus of the process.¹⁸⁶ At the end of the first phase, the Technical Secretariat received 246 proposals for the constitutional reform from indigenous organizations, NGOs, think tanks, religious organizations, the private sector, professional organizations, and individuals.¹⁸⁷

Over the following twelve weeks, during the second phase, everyone who had sent a proposal was invited to participate in a weekly series of discussions broken into mixed tables where the participants debated and came to agreements for the specific text of reforms and new constitutional provisions. Each discussion table's results were then shared to the plenary body and debated until agreements could be reached. The result was a set of agreed-upon proposals for the constitutional reform that formed the content of Law Initiative No. 5179 and was presented to Congress for debate and vote.¹⁸⁸ Three of the articles were quickly passed by Congress, two articles limiting political immunity during criminal investigation were rejected,¹⁸⁹ and the remainder were approved by the leaders of

183. *Cronograma*, DIÁLOGO NACIONAL: HACIA LA REFORMA DE LA JUSTICIA EN GUATEMALA (2017), http://www.reformajusticiagt.org/?page_id=581 [https://perma.cc/TR8N-2CJ4].

184. EXPOSICIÓN DE MOTIVOS, *supra* note 177, at 8.

185. Reformas a la Constitución Política de la República en Materia del Sector Justicia, Iniciativa 5179, at 8–9 (Oct. 5, 2016) (Guat.) <https://www.congreso.gob.gt/wp-content/plugins/iniciativas-de-ley/includes/uploads/docs/Registro5179.pdf> [https://perma.cc/Y6Z8-GHPJ].

186. *Resumen de Encuesta de Primera Fase, Dialogo Nacional*, DIÁLOGO NACIONAL: HACIA LA REFORMA DE LA JUSTICIA EN GUATEMALA (June 6, 2016), http://www.reformajusticiagt.org/wp-content/uploads/2016/06/Resumen_encuesta_06062016.pdf [https://perma.cc/2C7P-J6JS].

187. *Listado de Propuestas Recibidas*, DIÁLOGO NACIONAL: HACIA LA REFORMA DE LA JUSTICIA EN GUATEMALA (June 9, 2016), <http://www.reformajusticiagt.org/?p=846> [https://perma.cc/9WUU-5LMC].

188. Reformas a la Constitución Política de la República en Materia del Sector Justicia, Iniciativa 5179, arts. 8, 9 (Oct. 5, 2016) (Guat.) <https://www.congreso.gob.gt/wp-content/plugins/iniciativas-de-ley/includes/uploads/docs/Registro5179.pdf> [https://perma.cc/Y6Z8-GHPJ].

189. Both articles received a majority vote but not the two-thirds supermajority required to pass.

all the political parties in committee,¹⁹⁰ most with some modification. This final proposal is awaiting a full floor vote.¹⁹¹

Particularly illustrative of the CICIG's important role in law reform are articles 7, 10, and 15 of Law Initiative No. 5179, which proposed a full constitutional reform for the selection and management of high justice authorities.¹⁹² Since its installation in Guatemala, the CICIG has witnessed three rounds of processes for the selection of Attorney General and appellate and supreme court judges in 2010,¹⁹³ 2014,¹⁹⁴ and 2018.¹⁹⁵ Corruption and other anomalies have been constant in the selection process by the ad hoc Nomination Commissions.¹⁹⁶ In 2010 the first CICIG Commissioner, Carlos

190. This meeting took place on February 9, 2017. Reformas a la Constitución Política de la República en Materia del Sector Justicia (Discusión por artículos y redacción final), Iniciativa 5179 (2017), http://www.reformajusticiagt.org/wp-content/uploads/2017/05/5179_APROBAC_ART1.pdf [<https://perma.cc/DYF6-PW6V>].

191. As of this writing, the remaining articles are stalled. The last motion in Congress on the reforms was May 2, 2017. *Resumen—No. Iniciativa: 5179*, CONGRESO DE LA REPUBLICA, <https://www.congreso.gob.gt/iniciativa-de-ley-detalle/?id=1312> [<https://perma.cc/5LV6-G726>].

192. Iniciativa que dispone aprobar reformas a la Constitución Política de la República de Guatemala en Materia del Sector Justicia, Iniciativa de Ley No. 5179, arts. 4, 6, 7, 10, 15, 16 (Oct. 6, 2016), <https://www.congreso.gob.gt/iniciativa-de-ley-detalle/?id=1312> [<https://perma.cc/V9LU-Q7E6>].

193. LISSETH E. MONTENEGRO, MOVIMIENTO PRO JUSTICIA, APLICACIÓN LEY DE COMISIONES DE POSTULACIÓN: ELECCIÓN DE FISCAL GENERAL DE LA REPÚBLICA Y JEFE DEL MINISTERIO PÚBLICO 11 (2010), http://www.movimientoprojusticia.org.gt/sitio_antiguo_06_06_2017/mpj/pdf/informes/Informe%20Final%20de%20Monitoreo-Proceso%20I%20Fiscal%20General-2010.pdf [<https://perma.cc/85ES-KRVW>]; CICIG, INFORME: PROCESO DE ELECCIÓN DE MAGISTRADOS A LA CORTE SUPREMA DE JUSTICIA Y CORTES DE APELACIONES Y OTROS TRIBUNALES COLEGIADOS DE IGUAL CATEGORÍA AÑO 2009, 32 (2009), http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC02_20091101_ES.pdf [<https://perma.cc/UDZ2-7F57>].

194. CICIG, INFORME DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA CON OCASIÓN DE SU SÉPTIMO AÑO DE LABORES 22 (2014), https://www.cicig.org/uploads/documents/2014/COM_039_20141023_DOC01.pdf [<https://perma.cc/XK9E-L79V>] (explaining the CICIG's activities to support reforms to the selection process of high justice authorities).

195. XI INFORME ANUAL DE LABORES, CICIG (Nov. 9, 2018), <https://www.cicig.org/cicig/informes/informe-de-labores/xi-informe-anual-de-labores-de-la-cicig/> [<https://perma.cc/7YK8-5JC9>].

196. Nomination Commissions or *Comisiones de Postulación* were a product of the 1985 constitution and transition to democracy from military rule. The CPRG establishes that ad hoc commissions must be convened two to four months before the expiration of the mandate of the posts to be filled and are composed of different configurations of representatives from all the relevant universities in the country, the lawyers' association, and representatives from other branches of government. CPRG, *supra* note 82, arts. 215, 217, 251 (establishing the selection process for supreme court judges, appellate court judges, and

Castresana, a former Spanish prosecutor, helped draw public attention to issues in judicial selection when he resigned in protest of the selection of an Attorney General implicated in CICIG corruption cases.¹⁹⁷ Then, in 2014, the CICIG pushed for increased transparency and reforms to the selection process.¹⁹⁸ However, after Judge Claudia Escobar, who was appointed to an appellate court in that process, publicly denounced quid pro quo pressure from the Executive Branch for that appointment and revealed mafia-like negotiations of judicial appointments, the CICIG supported the MP's formal investigation into the Nomination Commissions.¹⁹⁹ Judge Escobar recorded a conversation with a proxy for the Executive Branch asking her to resolve a case in her court of first instance in favor of the political party of the president in exchange for a judicial appointment.²⁰⁰ In view of the MP and CICIG revelations, many civil society organizations and international bodies called on Guatemala to repeat the selection process, citing widespread corruption in the selection process of the 126 judges.²⁰¹ After a thorough investigation, the MP and CICIG uncov-

the attorney general). This was a significant, intentional change from single-branch-dominated processes in the prior constitutions to what was considered a more democratic and representative process. *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DE GUATEMALA arts. 221, 242 (Sept. 15, 1965) (Guat.) (establishing the process for the selection of attorney general and judiciary); CLAUDIA ESCOBAR, WILSON CTR., ELECCIÓN DEL FISCAL GENERAL EN GUATEMALA 2 (2018), https://www.wilsoncenter.org/sites/default/files/eleccion_del_fiscal_general_final_0.pdf [<https://perma.cc/AX8T-A4W4>] (describing the history and purpose behind the Nomination Commissions).

197. MONTENEGRO, *supra* note 193, at 13. Castresana's resignation drew sufficient attention and scrutiny that the selected Attorney General was removed shortly after entering office and an entirely new selection process was convened.

198. CICIG, *supra* note 194, at 44–62 (explaining the CICIG's activities to support reforms to the selection process of high justice authorities).

199. Jessica Gramajo, *Elección de Cortes Está Viciada, Dice Jueza*, PRENSA LIBRE (Oct. 6, 2014), https://www.prensalibre.com/postuladora_sala_de_apelaciones/Salas_de_apelaciones-Congreso-elecciones-irregularidades-Guatemala-Corte_de_Constitucionalidad-renuncia-jueza-Claudia_Escobar_0_1225077482.html [<https://perma.cc/22JJ-7LUK>]. Many of Guatemala's top officials, including appellate-level judges and the Attorney General, are appointed through a process under the Nomination Commissions Law, an ad hoc committee composed of different representatives, depending on the office to be selected. In the case of judicial authorities, the commissions are made of representatives from the law schools, bar association, Congress, Judiciary, and Executive Branch. *Ley de Comisiones de Postulación*, Decreto 19-2009 (May 21, 2009) (Guat.), <http://ww2.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnálisisDocumentaciónJudicial/cds/CDs%20leyes/2009/pdfs/decretos/D019-2009.pdf> [<https://perma.cc/U479-WUUV>].

200. *See Acusan a Gudy Rivera de Presionar a Magistrados a Favor de Baldetti*, Soy502 (Oct. 9, 2014) <https://www.soy502.com/articulo/gudy-rivera-presiono-magistrados-favorecer-roxana-baldetti> [<https://perma.cc/Z6WL-GF54>].

201. *See, e.g.*, Expedientes Acumulados 4639-2014, 4645-2014, 4646-2014, 4647-2014, Corte de Constitucionalidad, en calidad de Tribunal Extraordinario de Amparo (Nov.

ered²⁰² a vast corruption network aimed at controlling the judiciary through the strategic support of congressional campaigns, promotion of lawyers from private universities, and the use of law school deans at private universities, who participate in the Nomination Commissions.²⁰³ That investigation eventually implicated the President's secretary and the Vice-President.²⁰⁴ In 2018, the MP and CICIG continued their investigation of the Nominations Commissions in a complex case called *Parallel Commissions*, which alleges that a large political and organized crime network buys and sells seats on Guatemalan courts in exchange for promises in order to extra-officially control the court system.²⁰⁵

19, 2014) (Guat.) (decision by the Constitutional Court of Guatemala denying a petition by seven civil society organizations to order Congress to repeat the selection process for the Courts of Appeal); *Experta de la ONU Exhorta a Guatemala a Repetir Selección de Magistrados de Forma Transparente*, OHCHR (Oct. 8, 2014), <https://www.ohchr.org/sp/newsevents/pages/displaynews.aspx?newsid=15145&langid=s> [<https://perma.cc/3NHJ-XV7U>] (reporting the U.N. Special Rapporteur on the Independence of Judges and Lawyers expressing concern over reports of corruption and failures by the government to take actions to address the same concerns expressed in 2009).

202. *Comisiones Paralelas: Ligan a Proceso a Abogado Roberto López y Otros dos Sindicados*, CICIG (Apr. 17, 2018), <https://www.cicig.org/casos/com-041-comisiones-paralelas-ligan-a-proceso-a-roberto-lopez/> [<https://perma.cc/27D8-LDXL>] (reporting the decision of a judge to uphold the arrest and detention of three suspects in a mass corruption scheme to sell off and pack the Guatemalan supreme and appellate courts).

203. See, e.g., Mirte Postema, *Righting Guatemala's Broken Judicial Selection Process*, AMS. Q. (Oct. 6, 2014), <https://www.americasquarterly.org/content/righting-guatemalas-broken-judicial-selection-process> [<https://perma.cc/N3NG-D4N5>] (describing the special interests of private law school deans in the selection process for attorney general). See also Javier Estrada Tobar, *U. Da Vinici: Abogados Exprés y Su 'Fantasma' en la Elección de Fiscal*, NÓMADA (Mar. 5, 2018), <https://nomada.gt/pais/entender-la-politica/da-vinci-abogados-expres-y-su-fantasma-en-la-eleccion-de-fiscal/> [<https://perma.cc/2ELJ-KVRV>] (reporting on creation of new universities with law schools following the introduction of the Nomination Commissions, leading to school with no students, built in order to have a say in the Nomination Commissions). The power of private universities comes from the largely unregulated and self-regulated structure of higher education in Guatemala. See CPRG, *supra* note 82, art. 86; Decreto No. 82–87, Ley de Universidades Privadas [Private Universities Law], arts. 11, 14 (Nov. 21 1987) (Guat.); Reglamento de la Ley de Universidades Privadas, arts. 1, 3, 53 DIARIO DE CENTRO AMÉRICA (June 20, 1989) (Guat.).

204. See, e.g., Francisco Goldman, *From President to Prison: Otto Pérez Molina and a Day for Hope in Guatemala*, NEW YORKER (Sept. 4, 2015) <https://www.newyorker.com/news/news-desk/from-president-to-prison-otto-perez-molina-and-a-day-for-hope-in-guatemala> [<https://perma.cc/Z2WU-MZZN>]; Nina Lakhani, *Guatemala's Former Vice-President Jailed for 15 Years on Corruption Charges*, GUARDIAN (Oct. 9, 2018), <https://www.theguardian.com/world/2018/oct/09/guatemala-former-vice-president-jailed-15-years-corruption-case> [<https://perma.cc/QU5Z-W4FV>].

205. *Caso Comisiones Paralelas*, CICIG (Feb. 27, 2018), https://www.cicig.org/comunicados-2018-c/com_023_20180227/ [<https://perma.cc/NXJ6-7ZRB>].

Law Initiative No. 5179 seeks to address many opportunities for corruption by creating a permanent institution to oversee the judiciary and propose candidates for ascension, and to provide greater regulation and protections for judicial careers.

This constitutional reform process illustrates the dynamics of a graft mechanism. As an international actor, the CICIG can be seen as more impartial than some national actors, and it has built up sufficient trust and legitimacy in the eyes of Guatemalans to help coordinate this intimately national project—the only international organization included in the Technical Secretariat.²⁰⁶ At the same time, the CICIG played a secondary role to civil society in formulating the actual proposal and collaborated with the MP to synthesize and identify agreements between the different participants. As an external actor with significant insider knowledge and legitimacy, the CICIG was able to act as a bridge between historically adversarial groups. This allowed the private sector and indigenous peoples' organizations to sit down at the same table to discuss constitutional reforms and was crucial to brokering agreements on fundamental questions, such as whether Guatemala should recognize a pluralist judicial system comprising local indigenous justice systems.²⁰⁷ This role, contrasted with the more-removed support function of the U.N. System Resident Coordinator and Office of the High Commissioner on Human Rights in Guatemala,²⁰⁸ underscores the special place among national institutions that the CICIG has carved out for itself.

IV. EXAMINING THE “INSTITUTIONAL GRAFT”

Compared to other international mechanisms, the graft model that the CICIG has pioneered presents advantages of flexibility and building local legitimacy. Unlike the international and hybrid tribunals or investigation commissions, which need narrowly defined mandates vis-à-vis national institutions to avoid conflict and confusion, the CICIG's broad partnership with national institutions avoids these issues and allows it to adopt different models of support as needed. This section examines the impacts of the CICIG on national institutions and society, and addresses common critiques of the CICIG model. I also compare the CICIG's mandate to a new Honduran anti-corruption mechanism to draw out important distinctions in potential future institutional graft designs.

206. Villagán Sandoval, *supra* note 180, at 44.

207. *Id.* at 50. See EXPOSICIÓN DE MOTIVOS, *supra* note 177, at 23.

208. DIÁLOGO NACIONAL, *supra* note 182.

A. Evaluating Indicators of CICIG's Impact on Rule of Law

Recalling the aims of the CICIG's mandate, as well as transitional justice and rule of law goals, indicators show progress. CICIG seeks to support human rights, democracy, and rule of law by dismantling criminal networks. Transitional justice is concerned above all with restoring social trust and the rule of law. This section looks at indicators that allow for assessment of progress towards these goals, such as institutional independence, crime rates, public trust, judicial statistics, and effective use of resources.

Independent institutions and separation of powers are fundamental to the rule of law.²⁰⁹ In Guatemala, two expressions of independence are of concern: formal and actual. Though some progress can be seen, this area of reform is still in contention with interest groups. Formal independence is addressed through reforms to the rules regulating the internal management of institutions and the relationship among institutions. CICIG has attempted to address the structural issues affecting independence through law reform efforts, which are ongoing and have not yet gone into effect as of this writing.²¹⁰ As such, Guatemala's judges and prosecutors are still subject to an intensely political selection process with few institutional protections.²¹¹ Actual independence refers to the attitudes and actions of officials when face-to-face with institutional interference. On this front, the CICIG seems to have made clear strides. Judge Escobar's 2015 denunciations of pressure from the Executive Branch,²¹² the Constitutional Court's repeated rejection of unlawful actions by President Morales,²¹³ and the Attorney General's threat of prosecution

209. See EUROPEAN COMM'N FOR DEMOCRACY THROUGH LAW, COUNCIL OF EUR., RULE OF LAW CHECKLIST, ¶¶ 82–84 (2016) (discussion the importance of separation of powers and non-politicization of the judiciary for the rule of law); COMISIÓN INTERNACIONAL DE JURISTAS, LA INDEPENDENCIA JUDICIAL EN GUATEMALA 58 (2016) (describing the efforts of Guatemala and the international community to restore rule of law and judicial independence); OHCHR, *Basic Principles on the Independence of the Judiciary* ¶ 4, <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx> [<https://perma.cc/HN49-ZSXZ>] (stating the importance of non-intervention by other actors in the decisions of courts).

210. See *supra* Part III(B) regarding the Constitutional reform and discussion on Nomination Commissions.

211. See *A juicio Roberto López Villatoro y Otros Dos Sindicados del Caso Comisiones Paralelas*, CICIG (Dec. 4, 2018), <https://www.cicig.org/casos/a-juicio-roberto-lopez-villatoro-y-otros-dos-sindicados/> [<https://perma.cc/7ZHW-QB8G>]; see also STEVEN DUDLEY, INSIGHT CRIME, THE WAR FOR GUATEMALA'S COURTS 3 (2014).

212. ESCOBAR, *supra* note 196, at 2 (describing the history and purpose behind the Nomination Commissions).

213. Tribunal Extraordinario de Amparo, Expedientes Acumulados 96-2019, 97-2019,

against Congressional Representatives who disobey court orders²¹⁴ evidence how various judicial institutions are able to continue to act with independence in the face of undue political pressure. Although the full extent of the CICIG's impact can only be assessed years after its departure, these appear to be some signs of change.

According to a 2012 study by the CICIG and national civil society organization, five years after the installation of the CICIG, impunity for homicide dropped from 95% to 72%.²¹⁵ As Table 2 shows, after ten years of CICIG operations, the MP's overall clearance rate²¹⁶ is at a historic high.

99-2019, 106-2019, 107-2019, Oficial 3o de Secretaria General, Corte de Constitucionalidad, en Calidad de Tribunal Extraordinario de Amparo (Jan. 9, 2019) (Guat.) (granting a temporary injunction to prevent Guatemala from unilaterally withdrawing from the CICIG Agreement); Expediente 4207-2018, Of. 3 Secretaría General, Corte de Constitucionalidad, en Calidad de Tribunal Extraordinario de Amparo 6, 8-9 (Sept. 16, 2018) (Guat.); Expediente 4785-2017, Corte de Constitucionalidad (Sept. 3, 2018) (Guat.) (granting an injunction to indigenous communities who were not consulted prior to the issuance of a mining license, despite extensive pressure by the private sector to deny the injunction); Expedientes Acumulados 4151-2017, 4179-2017, 4180-2017 y 4182-2017, Corte de Constitucionalidad, en Calidad de Tribunal Extraordinario de Amparo (Oct. 10, 2017) (Guat.) (granting an injunction against the Government's attempt to expel Commissioner Velásquez); Amparo 01050-2018-01380, Of. y Not. 1a Memorial 7361, Juzgado Tercero de Primera Instancia Civil del Departamento de Guatemala (Dec. 21, 2018) (civil court of first instance entered a temporary injunction against the State's action to expel eleven CICIG investigators, citing the CICIG Agreement and previous Constitutional Court decisions).

214. MP de Guatemala (@MPguatemala), TWITTER (Jan. 28, 2019), <https://twitter.com/MPguatemala/status/1089939494927822848> [<https://perma.cc/9P76-BFL4>] (stating that the MP will prosecute anyone who does not comply with the Constitutional Court's order to halt the congressional impeachment committee against three Constitutional Court magistrates for their votes against President Morales' action).

215. CICIG, SEXTO INFORME DE LABORES DE LA COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA (CICIG) 6 (2013) [hereinafter CICIG SIXTH REP.]. The CICIG refers to impunity rates, which should be interpreted as equivalent to U.S. conceptions of clearance rates.

216. I use "clearance rate" here to mean all cases that are in some manner resolved, including via dropped charges, mediation, plea bargains, and convictions. Readers may note that in 2016 the MP clearance rate appears to surpass 100%; this is because the MP reporting data of resolved cases takes into account backlogs from previous years.

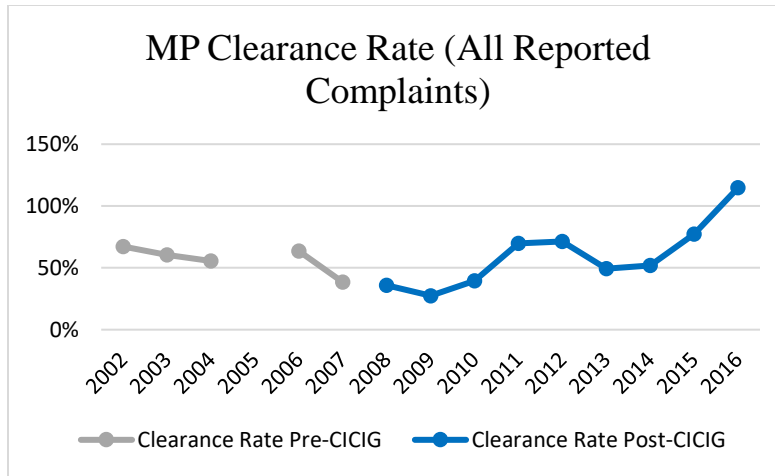


Table 2: Elaboration by author with data from MP annual reports.

In regards to violence, based on data from the U.N. Drug and Organized Crime office and the Guatemalan National Police, homicides have dropped by 40% from an all-time high in 2008 (see Table 3).

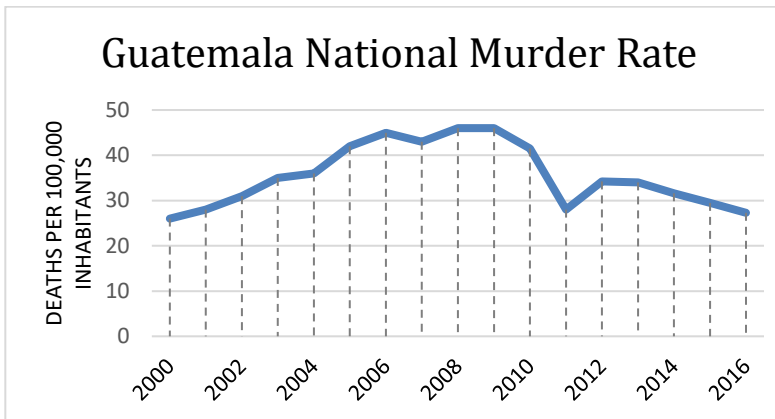


Table 3: Elaborated by the author with data from UNODC and PNC²¹⁷

Popular countrywide mobilizations of citizens expressing their support for the work of the CICIG and the MP in the face of attempts by two presidents to delegitimize the CICIG demonstrated sustained support for the CICIG in 2015, 2017, and 2018.²¹⁸ This suggests that

217. SECRETARÍA TÉCNICA DEL CONSEJO NACIONAL DE SEGURIDAD, REPORTE ESTADÍSTICO ENERO 2017, at 6 (2017); UNODC, GLOBAL STUDY ON HOMICIDE 126, 146 (2013); *Intentional Homicide Victims*, <https://dataunodc.un.org/crime/intentional-homicide-victims> [<https://perma.cc/5A6D-WS5G>] [select the “Country” drop-down menu; then select “Guatemala”].

218. Isaias Morales, *Ciudadanos Manifiestan Apoyo a Thelma Aldana Frente a CSJ*,

the CICIG is succeeding in its mandate to help restore the “confidence of citizens in the democratic institutions of the country.”²¹⁹ This is further supported by a recent survey conducted by a national firm that found that in August 2017, 58.2% of citizens supported the CICIG Commissioner, Iván Velásquez.²²⁰

Further, both the CICIG and the MP have gained recognition from international and regional bodies, often crediting both of their efforts to improve access to justice in Guatemala. For example, the Inter-American Commission on Human Rights noted in its recent report on Guatemala that “the Office of the Attorney General and CICIG dismantled thirteen corruption rings in the three branches of government.”²²¹ During the September 2018 standoff²²² between

CRÓNICA (Mar. 21, 2016) <http://cronica.gt/ciudadanos-manifiestan-apoyo-a-thelma-aldana-frente-a-csj/> [<https://perma.cc/4H2K-KMZ6>]; *Instituciones Manifiestan Su Apoyo a La Labor del Comisionado de CICIG, Iván Velásquez*, MINISTERIO PÚBLICO (Aug. 24, 2017), <https://www.mp.gob.gt/noticias/2017/08/24/instituciones-manifiestan-su-apoyo-a-la-labor-del-comisionado-de-cicig-ivan-velasquez/> [<https://perma.cc/T48X-8J6F>]; *Ciudadanos Manifiestan Apoyo a Iván Velásquez y Cicig*, PRENSA LIBRE (Aug. 24, 2017), <http://www.prensalibre.com/guatemala/politica/ciudadanos-manifiestan-apoyo-a-ivan-velasquez-y-a-cicig> [<https://perma.cc/U5XG-VZWB>]; Sucely Contreras, *Fiscales Manifiestan Su Respaldo a la Fiscal General y al Comisionado CICIG*, GUATEVISIÓN (Aug. 25, 2017) <https://www.guatevision.com/anifiestan-respaldo-la-fiscal-general-comisionado-cicig/> [<https://perma.cc/PY6Y-TG57>].

219. CICIG Agreement, *supra* note 2, at 2.

220. Enrique Naveda & Carlos Arrazola, *Jimmy Morales, el Comisionado Velásquez y la Crisis Política en Guatemala*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/es/2017/09/05/jimmy-morales-ivan-velasquez-cicig-onu-guatemala-crisis-corrupcion/> [<https://perma.cc/LDV2-GC5C>] (citing a poll conducted by Phillip Chicola).

221. Inter-Am. Comm’n H.R., *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion*, ¶ 61, OEA/Ser.L/V/II, Doc. 43/15 (Dec. 31, 2015).

222. After a year of tension between the CICIG and President Morales over investigations directly concerning Morales, his family, and members of his government, Morales announced that he would not renew CICIG’s mandate and announced a renewed attempt to expel Commissioner Velásquez, despite the Constitutional Court’s 2017 ruling. *See supra* note 213. In response, the U.N., after receiving a favorable second Constitutional Court decision, *id.*, announced that it would not change its position of support for Commissioner Velásquez. Press Release, Spokesperson for the Secretary-General, Statement Attributable to the Spokesperson for the Secretary-General on Guatemala (Sept. 5, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-09-05/statement-attributable-spokesperson-secretary-general-guatemala> [<https://perma.cc/3KT9-PRWV>] (stating that Guatemala’s decision to prevent Commissioner Velásquez from entering the country “does not appear to be consistent with the [CICIG] Agreement” and that “the Secretary-General has asked Mr. Velásquez to continue at the helm of CICIG from outside Guatemala until there is more clarity on the situation”); Press Release, Secretary-General U.N., Note to Correspondents in Response to Questions on Guatemala (Sept. 19, 2018) <https://www.un.org/sg/en/content/sg/note-correspondents/2018-09-19/note-correspondents-response-questions-guatemala-scroll> [<https://perma.cc/BN75-JCG6>] (stating that under the CICIG

Morales's government and the U.N. over the direction of the CICIG, international, regional, and national organizations and institutions maintained firm support for the CICIG.²²³

Agreement, "the Secretary-General appoints the Commissioner of the CICIG" and that he "sees no reason to change his existing position of support for Commissioner Iván Velásquez").

223. Inter-Am. Comm'n H.R., *IACHR Expresses its Concern over Guatemala's Decision to Not Renew the Mandate of the International Commission Against Impunity in Guatemala (CICIG)*, OAS (Sept. 4, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/196.asp [<https://perma.cc/7924-2LBZ>]; Minister Chrystia Freeland, *Canada Disappointed by Decision Not to Renew the International Commission Against Impunity in Guatemala*, GOV'T OF CAN. (Sept. 1, 2019), <https://www.canada.ca/en/global-affairs/news/2018/09/canada-disappointed-by-decision-not-to-renew-the-international-commission-against-impunity-in-guatemala.html> [<https://perma.cc/NU65-P8XK>]; Maja Kocijancic, *Statement by the Spokesperson on the Decision of the Guatemalan Government Not to Renew the CIGIC Mandate*, EEAS (Sept. 2, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage/49985/statement-spokesperson-decision-guatemalan-government-not-renew-cigic-mandate_en [<https://perma.cc/ZP8S-6G5V>]; Alan Duncan, *Sir Alan Duncan Statement on the United Nations International Commission Against Impunity in Guatemala*, U.K. FOREIGN & COMMONWEALTH OFFICE (Sept. 3, 2018), <https://www.gov.uk/government/news/sir-alan-duncan-statement-on-the-united-nations-international-commission-against-impunity-in-guatemala> [<https://perma.cc/76LD-WXTT>]; Press Release, Grupo de Donantes G13 (Sept. 5, 2018), <http://www.g13.org.gt/content/comunicado-de-prensa-4> [<https://perma.cc/FE77-7VY8>] (expressing worry of the organization of the biggest donors to Guatemala by the governments actions, signed by Canada, the European Union, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom; the United States did not sign on, nor did the World Bank, IMF, Inter-American Development Bank, or the OAS); Diego García-Sayán, *Statement of the Special Rapporteur on the Independence of Judges and Lawyers: Guatemala Must Guarantee Judicial Independence as Attacks on Judges Continue*, OHCHR (Sept. 20, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23599&LangID=E> [<https://perma.cc/5BRG-UA8A>]; Engel & Sires *Statement on Failure to Renew CICIG*, U.S. HOUSE REP. COMM. FOREIGN AFF. (Aug. 31, 2018), <https://foreignaffairs.house.gov/press-releases?ID=F0D4A280-B40C-4C0E-9BBE-449A710CD582> [<https://perma.cc/H3E8-LTAA>]; Patrick Leahy, *Leahy Statement on Defending the Rule of Law in Guatemala*, U.S. SENATOR PATRICK LEAHY (Sept. 6, 2018), <https://www.leahy.senate.gov/press/090618defendingruleoflawguatemala> [<https://perma.cc/4LVU-8MVH>]; Norma Torres, *Torres Condena la Decisión de Presidente Morales de No Renovar el Mandato de CICIG*, CONGRESSWOMAN NORMA TORRES (Aug. 31, 2018), <https://torres.house.gov/media-center/press-releases/torres-condena-la-decisi-n-de-presidente-morales-de-no-renovar-el> [<https://perma.cc/Q9RQ-FY96>]; Press Release, Bob Carlson, ABA President, *Statement of Bob Carlson Re: Public Corruption Investigations in Guatemala* (Sept. 4, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/statement_of_bobcar.html [<https://perma.cc/PDD5-7K4J>]; Joint Statement on the Decision Not to Renew the Mandate of the International Commission Against Impunity in Guatemala and Barring its Chief Commissioner from Entry into the Country, FÉDÉRATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME [INT'L FED'N FOR HUMAN RIGHTS] (Sept. 7, 2018), <https://www.fidh.org/en/region/americas/guatemala/joint-statement-on-the-decision-of-the-guatemalan-president-not-to> [<https://perma.cc/WE39-QXR5>] (joint statement by fourteen international rule of law and human rights NGOs); *The ICJ Condemns*

Related to this development is the increased public trust in the justice system. Latinobarómetro poll data shows that between 2011 and 2017 public trust in the justice system rose ten percent.²²⁴

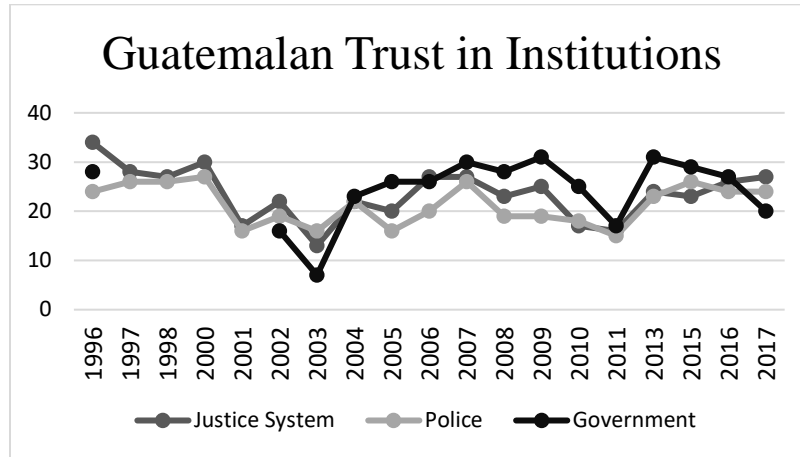


Table 4: Elaboration by author with data from Latinobarómetro²²⁵

Table 4 also shows a decrease of public trust in the government generally. Is this contrary to the conclusion that the CICIG is fulfilling its purpose? I argue that it is not. Public trust in the government, according to this data, rises and falls. In the past three years, the CICIG and MP have revealed massive and pervasive corruption in the government; it is therefore understandable that this contributes both to decreases and increases in public trust. The steady increase of public trust in the justice system is a positive sign because if citizens trust

Guatemalan President's Decision Not To Renew Mandate of the International Commission Against Impunity, INT'L COMM'N OF JURISTS (Sept. 5, 2018), <https://www.icj.org/the-icj-condemns-guatemalan-presidents-decision-not-to-renew-mandate-of-the-international-commission-against-impunity-2/> [https://perma.cc/4B33-PT85]; *Organizations Reject Attacks Against CICIG and Demand Respect for the Rule of Law and Judicial Independence in Guatemala*, CTR. FOR JUSTICE & INT'L LAW (Sept. 6, 2018), <https://www.cejil.org/en/organizations-reject-attacks-against-cicig-and-demand-respect-rule-law-and-judicial-independence> [https://perma.cc/2Q4K-FWMT] (joint statement by seven U.S. human rights NGOs); *Condenamos Revocación del Mandato de la CICIG y Exigimos se Garanticen la Seguridad y los Derechos de las Personas que la Integran, las Defensoras y Organizaciones*, INICIATIVA MESOAMERICANA DE MUJERES DEFENSORAS DE DERECHOS HUMANOS (Sept. 5, 2018), <http://im-defensoras.org/2018/09/pronunciamiento-condenamos-revocacion-del-mandato-de-la-cicig-y-exigimos-se-garanticen-la-seguridad-y-los-derechos-de-las-personas-que-la-integran-las-defensoras-y-organizaciones/> [https://perma.cc/9M94-NKNS] (statement by two Latin American human rights networks of NGOs).

224. *Análisis de Datos*, LATINOBARÓMETRO (2017), <http://www.latinobarometro.org/latOnline.jsp> [https://perma.cc/F7DK-BG63].

225. *Id.*

the justice system, then they are more likely to trust that it will address corruption and other trust-eroding issues in the government, generally. In surveys, it can be difficult to separate trust in the CICIG from trust in the justice system generally, but the significant rise in complaints reported to the MP (see Table 5), even while homicides are down, suggests that generally citizens are more willing to report crimes.

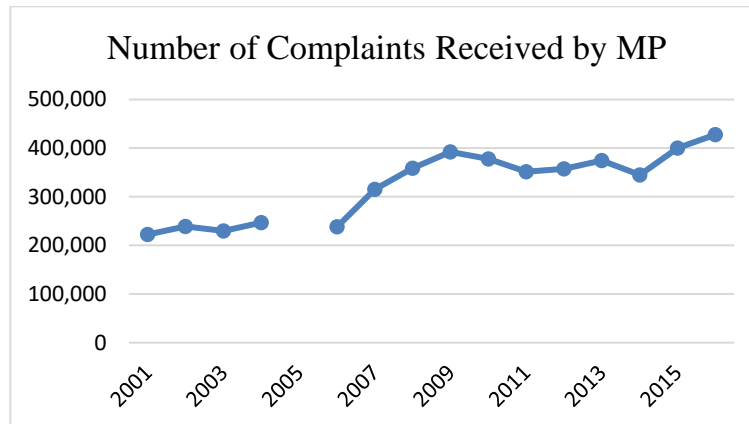


Table 5: Elaboration by author with data from MP annual reports.²²⁶

An increased willingness to report crimes indicates that people are increasingly more expectant that the MP will seriously attend to their complaints and that there is a decreasing perceived risk that the reporters of crimes will face retaliation for reporting. It is important to remember that although the CICIG's presence certainly supports the MP, complaints are filed directly with the MP and are outside the control of CICIG. This suggests that the trends are not simply an indication of trust in the CICIG but a sign of independent trust in the MP as an increasingly trustworthy public institution.

Finally, as a graft mechanism, the CICIG avoids many of the costs associated with the creation of a new court and jurisdiction. Table 6 below gives a snapshot of the difference in costs associated with international justice mechanisms. Unsurprisingly, the largest difference is with the ICTY, the first modern ad hoc tribunal. This difference, however, is understated, if compared to the ICTY budget in 2006 when it was at the prime of its mandate; ten years after its creation, the ICTY's budget was \$152,568,650.²²⁷

226. *Informacion Publico*, MP, https://www.mp.gob.gt/transparencia/?page_id=54 [<https://perma.cc/UK2T-JSE4>] [navigate to individual reports by selecting the appropriate drop-down menus].

227. Fausto Pocar (President of the ICTY), Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, ¶ 107, U.N. Doc.

	Total Budget (Year)	Total Posts (Budget/Post)	Life of Mandate
CICIG	\$14,591,229 (2016)	173 (\$84,342/post)	2007–Today
ICTY	\$49,032,000 (2016)	272 (\$180,264/post)	1993–2017
MICT (Arusha Branch)	\$38,441,950 (2016)	119 (\$323,041/post)	2010–Today
ECCC	\$32,341,269 (2016)	185 (\$174,817/post)	2003–Today

Source: Elaboration by author based on real budget according to annual report of each institution.²²⁸

Likewise, both the International Residual Mechanism for Criminal Tribunals (“MICT”) and the Extraordinary Criminal Chambers in Cambodia (“ECCC”), which were designed to be more cost-effective, are significantly more expensive than the CICIG in absolute terms and relative to size. Cost should not be the determinative factor in any international justice mechanism; other goals are important to consider, as discussed in Part I; however, the CICIG’s success, coupled with its relatively cost-efficient model, warrants further study.

B. Prominent Concerns Related to the Institutional Graft

While the institutional graft accomplishes many goals that other international justice mechanisms are less equipped to address, it is less adept at achieving other goals and creates new concerns. One of the central structural concerns regarding the CICIG model is its durability and sustainability after the mechanism leaves. This con-

A/61/271-S/2006/666 (Aug. 21, 2006).

228. *Comision Internacional Contra Impunidad Cicig*, UNDP (2017), <http://open.undp.org/#project/00048435> [<https://perma.cc/V9BN-4EK3>]; G.A. Res. 71/268, Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annex U.N. Doc. A/RES/71/268 (Dec. 23, 2016); Carmel Agius (President of ICTY), *Letter Dated 17 May 2016 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Addressed to the President of the Security Council*, ¶ 34, U.N. Doc. S/2016/454 (May 17, 2016); U.N. Secretary-General, Budget for the International Residual Mechanism for Criminal Tribunals for the Biennium 2016–2017, ¶ 16, at 6–7, U.N. Doc. A/70/378 (Sept. 18, 2015); ECCC, ECCC REVISED BUDGET—2016/2017 3, Annex B.2 at 4 (2016), https://www.eccc.gov.kh/sites/default/files/ECCC%20Revised%20Budget-2016-2017_0.pdf [<https://perma.cc/DFP5-PTR3>].

cern may be over-emphasized. The CICIG's departure could have two different impacts: first, the concrete work of the MP could change and, second, the social trust in the justice system could alter.

In the first case, two pieces of information indicate that today, the concrete work of the CICIG would likely continue without it through the MP. As discussed in Part III, the CICIG has progressively ceded responsibilities to the MP.²²⁹ Furthermore, it appears that the MP considers itself sufficiently strong that, in an interesting role reversal in 2017, the Attorney General and chief prosecutors used their own influence to impede the removal of CICIG Commissioner Velásquez.²³⁰ Similarly, in September 2018 and January 2019, the Constitutional Court firmly upheld the CICIG's mandate²³¹ in the

229. See, e.g., GERMÁN GARAVANO, MARCO FANDIÑO & LEONEL GONZÁLEZ, *EVALUACIÓN DEL IMPACTO DEL NUEVO MODELO DE GESTIÓN FISCAL DEL MINISTERIO PÚBLICO DE GUATEMALA* 59–61 (2014) (describing the impact of new investigatory techniques in the MP's prosecution of gangs and drug traffickers, improving over a two-year period from 5% to 47% solved cases). Additionally, after the CICIG THIRD REP., *supra* note 147, there is little mention of joint prosecution of gang cases while the MP 2012 REPORT introduces "*Plan Pandilla*," the MP's anti-gang strategy in which they succeeded in arresting full criminal structures, up to forty-six members of a single gang at once. MP 2012 REP., *supra* note 163, at 78.

230. Isaias Morales, *Ciudadanos Manifiestan Apoyo a Thelma Aldana Frente a CSJ*, CRÓNICA (Mar. 21, 2016) <http://cronica.gt/ciudadanos-manifiestan-apoyo-a-thelma-aldana-frente-a-csj/> [<https://perma.cc/3DL6-X3ZZ>]; Press Release, Ministerio Público, Instituciones Manifiestan Su Apoyo a la Labor del Comisionado de CICIG (Aug. 24, 2017), <https://www.mp.gob.gt/noticias/2017/08/24/instituciones-manifiestan-su-apoyo-a-la-labor-del-comisionado-de-cicig-ivan-velasquez/> [<https://perma.cc/USM2-R88T>]; *Ciudadanos Manifiestan Apoyo a Iván Velásquez y Cicig*, PRENSA LIBRE (Aug. 24, 2017), <http://www.prensalibre.com/guatemala/politica/ciudadanos-manifiestan-apoyo-a-ivan-velasquez-y-a-cicig> [<https://perma.cc/KW7H-BGHG>]; Sucely Contreras, *Fiscales Manifiestan su Respaldo a la Fiscal General y al Comisionado CICIG*, GUATEVISIÓN (Aug. 25, 2017), <https://www.guatevision.com/anifiestan-respaldo-la-fiscal-general-comisionado-cicig/> [<https://perma.cc/ET76-UHGH>].

231. Corte de Constitucionalidad, Expediente 4207-2018, Of. 3 Secretaría General, at 6, 8–9 (Sept. 16, 2018) (Guat.), <http://www.cc.gob.gt/2018/09/17/caso-cicig-resolucion-4207-2018/> [<https://perma.cc/VX3F-38AE>] (granting an injunction against President Morales's order to immigration authorities to block Commissioner Velásquez from entering the country, ordering the President to continue dialogue with the U.N. with respect to the CICIG's work, ordering the Executive to allow the "CICIG Commissioner" into the country, and restating that the Constitutional Court is the designated organ to make final determinations of constitutional interpretation); Corte de Constitucionalidad, Expediente 4207-2018 (Sept. 19, 2018) (Guat.), <http://www.cc.gob.gt/2018/09/22/caso-cicig-auto-de-ampliacion-y-votos-razonados-disidentes-dentro-del-expediente-4907-2018/> [<https://perma.cc/37YM-AHN5>] (granting, over the dissenting votes of Judge Neftaly Aldana Herrera and Judge Josefina Ochoa Escribá, an injunction against the Executive's demand to the U.N. that it name a new CICIG Commissioner and clarifying that its decision of September 16, 2018, applies to Commissioner Iván Velásquez, that according to art. 5 of the CICIG Agreement, the Secretary-General of the U.N. names the CICIG Commissioner, and that it is a

face of Executive Branch pressure to defy the Court and acts of intimidation against independent national institutions.²³² Similarly, despite the increased presence of hard-line military officials in the government,²³³ the special *Tribunals de Mayor Riesgo* (High-Risk Tribunals), ruled on September 26, 2018, in the midst of the political crisis, that the Guatemalan government and army committed genocide against the Maya-Ixil ethnic group in 1982–1983.²³⁴ This suggests that the MP and the courts have reestablished themselves as strong, independent institutions.

Certainly, regulatory reforms could be revoked by presidential order, and the legislative reforms are in danger in cases when the majority of Congress feels at risk of criminal prosecution.²³⁵ For example, in September 2017 a group of legislators tried to modify crimes related to electoral financing, although the action was temporarily enjoined by the Constitutional Court.²³⁶ Then again, constitu-

prosecutable offence for a government official to disobey an order of a court).

232. Steven Dudley, Héctor Silva Ávalos & Parker Asmann, *Guatemala President Announces End of CICIG's Mandate*, INSIGHT CRIME (Aug. 31, 2018), <https://www.insightcrime.org/news/analysis/guatemala-president-announces-end-cicig-mandate/> [https://perma.cc/22LZ-SJ8J] (reporting the use of military jeeps with mounted artillery surrounding the CICIG as the President announces that he will not renew the CICIG's mandate); Mariela Castañón, *Presencia de PNC causa alarma en PDH*, LA HORA (Sept. 5, 2018), <http://lahora.gt/presencia-de-pnc-causa-alarma-en-pdh/> [https://perma.cc/4CCU-SYBR] (reporting that police surrounded the PDH without any request by the PDH for their presence, causing alarm in the PDH); *CC Otorga Amparo Provisional a PDH y Ordena Garantizar el Derecho de Manifestación Pacífica*, PDH (Sept. 11, 2018), <https://www.pdh.org.gt/cc-otorga-amparo-provisional-a-pdh-y-ordena-garantizar-el-derecho-de-manifestacion-pacifica/> [https://perma.cc/EG83-9P6C] (reporting that the Constitutional Court granted a temporary injunction to the PDH against the Executive to ensure respect for the right of all citizen of assembly and right to protest, in the context of use of military and police against protesters); Elder Juárez, *PDH: Presencia de Elementos Castrenses Es una Intimidación*, LA HORA (Sept. 12, 2018), <http://lahora.gt/pdh-presencia-de-elementos-castrenses-es-una-intimidacion/> [https://perma.cc/HN3H-834G] (reporting on the use of army special forces—Kaibiles—in front of the Congress is an improper use of military force in public security and clear attempt to intimidate protesters).

233. See generally FOSS, *SITUACIÓN DE LA POLICÍA NACIONAL CIVIL EN GUATEMALA* (2018), <http://www.ceg.org.gt/images/documentos/publicaciones/Situaci%C3%B3n%20de%20la%20PNC%20agosto%202018.pdf> [https://perma.cc/V23Z-VGKL].

234. Javier Estrada Tobar & Martín Rodríguez Pellecer, *El Genocidio Se Comprobó ante un Tribunal (de Nuevo): Aquí, Toda la Historia*, NÓMADA (Sept. 27, 2018), <https://nomada.gt/identidades/de-donde-venimos/el-genocidio-se-comprobo-ante-un-tribunal-de-nuevo-aqui-toda-la-historia/> [https://perma.cc/7AZN-ZSGN].

235. Naveda & Arrazola, *supra* note 220.

236. The motion of *amparo*, a type of protectionary motion, is established in the *Law of Amparo, Personal Exhibition and Constitutionality* (Decree No. 1-86), which establishes in Article 8 that any act, resolution, provision, or law of authority that “carries an implicit threat, restriction or violation of the rights that the Constitution and the laws guarantee” can

tional reforms establishing a judicial and prosecutorial institutional career, as well as other procedural protections, would be much more challenging politically and legally for a future government to undo.²³⁷ Additionally, unlike top-down reforms that can be weakened by incompatibilities with local custom,²³⁸ the work of the CICIG and MP to develop new prosecutorial methodologies over ten years that are consistent with the new reforms means that any future change would confront resistance in both law and practice.

However, as the recent decision by President Morales to not renew the CICIG's mandate after September 2019 demonstrates,²³⁹ perhaps the principal challenge to institutional grafts is the tension created when sitting governments are accused of corruption. Pérez Molina's resignation in 2015 and subsequent arrest is likely to be a rare occurrence when government is faced with prosecution by national and graft institutions.²⁴⁰ It is more likely that government will react as the Morales regime did, by seeking to halt and remove the institutional graft, in an effort of self-preservation. Like in the case of Guatemala, the strength of the graft is seen in the national reaction to this challenge. To the extent that new institutional graft mechanisms are created, a less common event as support for multilateralism retreats,²⁴¹ it is conceivable that governments will seek increased

be blocked by means of an *amparo*. In this case, the rights in relation to the Commissioner's immigration status were threatened, and Guatemala's obligations under the CICIG Agreement were protected by the *amparo*. See Decreto No. 1-86, Ley de Amparo, Exhibición Personal y de Constitucionalidad [Protections, Habeas Corpus and Constitutionality Law] (Jan. 8, 1986) (Guat.); Resolución Expedientes Acumulados 4151-2017, 4179-2017, 4181-2017 y 4182-2017, at 1–3, Corte de Constitucionalidad [Constitutional Court] (Oct. 18, 2017) (Guat.).

237. CPRG, *supra* note 82, arts. 175, 277, 278, 280 (stipulating that for a law with constitutional rank, a vote of two-thirds of Congress and a favorable decision by the Constitutional Court is needed, for other reforms, a national assembly must be called by a two-thirds vote by Congress with a specific mandate, and reforms must be ratified by a popular referendum).

238. John D. King, *The Public Defender as International Transplant*, 38 U. PENN. J. INT'L L. 833, 860–61 (2017) (discussing the challenges of Chilean criminal law reform because of difference in local legal culture between inquisitorial and adversarial systems).

239. Dudley et al., *supra* note 232 (reporting Morales's announcement not to renew the CICIG's mandate).

240. I hypothesize that the circumstances of the first major prosecution involving a graft mechanism, the unprecedented protests, and strong international support created a unique situation that explains the outcome.

241. Matt Apuzzo & Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html> [<https://perma.cc/2E8J-SH74>] (reporting on John Bolton's address to the Federalist Society in September 2018 counseling against multilateral approaches to international justice).

control over the graft mechanism to protect themselves against future inquiries. The alternative is the election of a government that believes itself to be fully free of involvement in corruption and that seeks the help of the international community through a graft mechanism to strengthen a weak system.

C. Comparing CICIG to New Mechanisms: Honduras's MACCIH

The success of the CICIG and MP, particularly after the successful arrest of President Pérez Molina in 2015 and continued success afterwards, inspired other countries to adopt similar mechanisms, though with reservations. In the case of Honduras, at the same time that the political crisis was ongoing in Guatemala, the Honduran MP uncovered a \$200 million sprawling corruption network in the Honduran Social Security Institute,²⁴² which prompted, like in Guatemala, a sustained period of protests across the country.²⁴³ The Organization of American States (“OAS”), which had been closely observing Honduras since the 2009 coup d’état,²⁴⁴ de-

242. *Casos del Seguro Social-IHSS*, OBSERVATORIO HOND., <http://www.observatoriahonduras.org/sitio/corruptcion/caso-del-seguro-social-ihss/#1503335937234-84673f98-e4c3> [<https://perma.cc/C5Y8-FFD3>] [click on each drop-down menu to expand information about each case] (describing the fifteen criminal cases stemming from the IHSS investigation, including, inter alia, allegations of price inflation, the use of fake businesses, bribery, money laundering, illegal arms trafficking, and tax evasion).

243. Sibylla Brodzinsky, ‘*Our Central American Spring*’: *Protesters Demand an End to Decades of Corruption*, GUARDIAN (Aug. 14, 2015), <https://www.theguardian.com/world/2015/aug/14/honduras-guatemala-protests-government-corruption> [<https://perma.cc/PZ8T-WAH7>] (reporting continuous protests in Honduras as a result of the IHSS \$200 million corruption scandal).

244. OAS A.G./Res. 1 (XXXVII-E/09), ¶¶ 1–3 (Jul. 2, 2009) (declaring that the removal of President Zelaya constituted an “unconstitutional alteration of the democratic order,” that President Zelaya should be returned to office, and that any government produced by the coup d’état would not be recognized); OAS A.G./Res. 2 (XXXVII-E/-09), ¶ 1 (July 16, 2009) (declaring that Honduras is suspended from participating in the OAS for violation of article 21 of the Inter-American Democratic Charter). See OAS A.G./Res. 1 (XXVIII-E/01) Inter-Am. Democratic Charter art. 21 (Sept. 11, 2001):

When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately. The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations. Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.

Acuerdo de Cooperación entre la Secretaría General de la Organización de los Estados Americanos y la Comisión de la Verdad y la Reconciliación de Honduras, SG/OAS-

veloped a proposal, at the request of Honduras, for a Support Mission against Corruption and Impunity in Honduras (“MACCIH”).²⁴⁵

The MACCIH bears many resemblances to the CICIG: its name, a mandate that recognizes the impact of corruption on “governability, trust in institutions and the rights of people”²⁴⁶ and charges the MACCIH with investigating corruption affecting the Honduran justice system,²⁴⁷ and a mixed structure of international and national investigators working with national institutions within the national system.²⁴⁸ However, although articles 3.1.1.1 and 3.1.1.2 state that the MACCIH should select cases on which to “actively collaborate” with the MP and judges on corruption cases,²⁴⁹ the mandate does not provide a procedure for the MACCIH to co-prosecute cases in the way the CICIG does as a *querellante adhesivo*, even though the Honduran Criminal Code of Procedure provides for it.²⁵⁰ Without the

Comisión de la Verdad y la Reconciliación de Honduras, Apr. 11, 2011, O.A.S.T.S. No. 40, <http://www.oas.org/dil/AgreementsPDF/40-2011.PDF> [<https://perma.cc/Y36T-TPAM>] (establishing a cooperation protocol between the OAS and the Truth and Reconciliation Commission charged with investigating the human rights abuses that occurred following the events of the coup d’état); Acuerdo entre el Tribunal Supremo Electoral de la República de Honduras y la Secretaría General de la Organización de Estados Americanos para la Prestación de Cooperación Técnica en Materia Electoral, SG/OAS-Hon., Apr. 30, 2009, O.A.S.T.S. No. 33, http://www.oas.org/dil/AgreementsPDF/33-2009_Acuerdo_prestacion_cooperacion_tecnica_SG-OEA_Honduras.PDF [<https://perma.cc/NK99-SD2Q>] (establishing an Electoral Technical Assistance Cooperation Agreement between the Supreme Electoral Tribunal of Honduras and the Secretary General of the OAS for the upcoming 2009 Honduran elections).

245. MACCIH Agreement, *supra* note 21.

246. *Id.* at 1 (rendered as “*afectan la gobernabilidad, la confianza en las instituciones y los derechos de las personas*” in original) (trans. by author).

247. *Id.*, art. 1.2.

248. MACCIH Agreement, *supra* note 21, arts. 1–6, 10.1; Mecanismo Interinstitucional de Cooperación Bilateral entre el Ministerio Público de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos a Través de la Misión de Apoyo Contra la Corrupción y la Impunidad en Honduras (MACCIH-OEA), Hon.-SG/OAS (Jan. 18, 2017), <http://www.oas.org/es/sap/dsdme/maccih/new/docs/Acuerdo-Ministerio-Publico-MACCIH-creacion-Unidad-Fiscal-Especial-contra-Impunidad-y-Corrupcion.pdf> [<https://perma.cc/MXD5-BTN6>] (establishing a cooperation agreement between the MP and MACCIH for carrying out the MACCIH’s mandate).

249. MACCIH Agreement, *supra* note 21, arts. 3.1.1.1, 3.1.1.2 (reading in relevant part “*los cuales la MACCIH seleccione y decida colaborar activamente*” and “. . . *colaborar activamente con un grupo de jueces que conocen de causas de corrupción, fiscales, investigadores y especialistas forenses del Ministerio Público, . . . seleccionados y certificados por la MACCIH, para recabar información, investigar y perseguir casos de corrupción y redes de corrupción.*”).

250. CÓDIGO PROCESAL PENAL [Crim. Proc. Code] arts. 16, 96 (Hon.) (explaining the rights and procedures for *querellantes* and *acusador privado* (private accuser)).

power to independently co-prosecute cases, the MACCIH loses much of the power that the CICIG wields, which was certainly an intentional choice influenced by the CICIG's success.

As a general matter, the MACCIH Agreement affords more power to the national government. The clear power that the MACCIH does have is to “accompany, advise, supervise and evaluate” State institutions.²⁵¹ These vague terms are given meaning in an annex to the MACCIH Agreement, revealing that MACCIH's power is largely advisory.²⁵² Another difference between the CICIG and MACCIH mandates is the degree of specificity. While CICIG's mandate is very open and broad in scope,²⁵³ MACCIH's mandate contains several specific activities that it must carry out.²⁵⁴ Finally, unlike the CICIG Agreement's article 5(1)(a), which gives the Secretary-General of the U.N. the sole authority to name the CICIG Commissioner, article 10.4 of the MACCIH Agreement requires that the Government of Honduras accept the nomination of the head of MACCIH before their appointment by the General Secretariat of the OAS.²⁵⁵ These conditions limit the power and autonomy of the MACCIH.

Similar to the FECI in Guatemala, the Honduran MP quickly established the *Unidad Fiscal Especial contra la Impunidad y la Corrupción* (Special Prosecution Unit against Impunity and Corruption—hereinafter, “UFECIC”)²⁵⁶ to work directly with the MACCIH

251. MACCIH Agreement, *supra* note 21, arts. 3.1.1.1–3.1.1.6 (recognizing the MACCIH's power to “asesorar, supervisar y/o evaluar”).

252. MACCIH Agreement, *supra* note 21, Anexo II, ¶ 1 (defining “certify” to mean that the MACCIH asserts that the proper “procedures, acts and/or resolutions or decision of the Honduran authorities was taken with strict adherence to the law”); *id.* ¶ 2 (defining “evaluate” to mean MACCIH's “actions, procedures or protocols” by which it grades “the actions of Honduran authorities and make observations or recommendations”); *id.* ¶ 3 (defining “supervise” to mean “an action and/or procedure by which the MACCIH . . . verifies the correct application of national law [and] application or observance of the MACCIH's recommendations” by Honduran authorities) (trans. by author).

253. See *supra* Part II.A, Part III.A.i (discussing the broad text of the CICIG Agreement and ways this has permitted innovation in its implementation).

254. See, e.g., MACCIH Agreement, *supra* note 21, arts. 3.1.2.1 (supporting the elaboration of a National Plan of Action: “apoyar la elaboración de un Plan de Acción Nacional”); *id.* art. 3.1.2.2 (organizing a national workshop: “realizar un taller nacional”), art. 3.1.3.3 (advising the drafting of an anticorruption law: “asesorar en la elaboración de un proyecto de ley anticorrupción”); *id.* arts. 3.1.3.8, 3.1.3.9 (stating that the MACCIH should strengthen extradition and civil forfeiture mechanisms).

255. MACCIH Agreement, *supra* note 21, art. 10.4 (“El/la Vocero/a de la MACCIH deberá contar con la previa aceptación del GOBIERNO y será debidamente acreditado ante las autoridades del GOBIERNO por el Secretario General.”).

256. Acuerdo No. FGR-001-2017, art. 12, LA GACETA, 6, 10 (Feb. 10, 2017) (Hon.),

on its mandate. However, despite advances in their work, MACCIH's work must be fundamentally different from the CICIG's because the limits on its actions prevent it from working on equal footing with the MP to hold it accountable and engage in graft mechanism growth. While the MACCIH accepts the Honduran justice system wholesale, as required for a graft mechanism, its power is so limited that it cannot be thought of as an actor in the justice system, but merely ancillary.²⁵⁷ What we can hope for is a thoughtful and impartial advisory role that national institutions can independently decide to heed.

An important innovation in the MACCIH model, however, is the direct incorporation of civil society in its mandate.²⁵⁸ In adherence to article 4.2 of the MACCIH Agreement, MACCIH created the Honduras Observatory (*Observatorio Honduras*), composed of a diverse array of NGOs and academic organizations, which act as a type of advisory group to the MACCIH by analyzing the progress of the MACCIH and MP and making recommendations for continued progress.²⁵⁹ This group, though advisory to an advisory mechanism, creates a formal space for civil society to interact with the MACCIH and track its progress. This is more transparent and allows for broader action than the CICIG's informal and ad hoc spaces with civil society in Guatemala. The incorporation of civil society into the work of MACCIH hopefully will help generate trust more quickly and give civil society a stake in the mechanism's success. After a year of work with the MP and two years of existence, surveys indicate that society in Honduras views the MACCIH positively.²⁶⁰

<http://www.oas.org/es/sap/dsdme/maccih/new/docs/Publicacion-Diario-Oficial-La-Gaceta-detalles-para-creacion-de-UFECIC.pdf> [<https://perma.cc/S7DZ-VJ CJ>].

257. See *supra* Part I.B.iii (explaining the key characterizations of graft mechanisms).

258. See MACCIH Agreement, *supra* note 21, art. 6.2 (stating that civil society was crucial to the creation of the MACCIH and mandating that the MACCIH support human rights defenders and journalists).

259. *Estructura del Observatorio*, OBSERVATORIO HOND., <http://www.observatoriahonduras.org/sitio/about/estructura-del-observatorio/> [<https://perma.cc/XX8Z-YFR8>] (describing participation of organizations from several different sectors, including unions, think tanks, protesters, and NGOs focused on human rights, LGBTI issues, children, and the environment).

260. EQUIPO DE REFLEXIÓN, INVESTIGACIÓN, Y COMUNICACIÓN, PERCEPCIONES SITUACIÓN HONDUREÑA, PERCEPCIONES: SITUACIÓN HONDUREÑA 2–3 (2017), <http://www.observatoriahonduras.org/sitio/wp-content/uploads/2017/06/estudio-opinion-publica3-1.pdf> [<https://perma.cc/5PNG-6JLX>] (reporting that 42% of Hondurans think that the MACCIH is doing a good job, compared to 31% who believe it is doing a poor job; and reporting that more than 30% of Hondurans believe that the MP and MACCIH should investigate corruption).

CONCLUSION

Other countries are already looking to the CICIG as an example for the creation of new international justice mechanisms; however, not all of these CICIG-inspired projects are graft mechanisms and, therefore, are limited in their ability to reproduce the CICIG's experience.²⁶¹ Evaluating the CICIG as a graft mechanism is useful because it allows an inspection of its core features and goals in a new framework, separate from prior international justice experiences. This allows us to glean more lessons about what conditions, activities, and characteristics of international cooperation and national institutions facilitate a transformation of social trust in institutions and help meet rule of law and transitional justice goals.

This Note is merely a cursory investigation into the CICIG's experience, and each of the issues raised here can be studied in greater depth. As national governments and the international community continue to seek solutions to weak rule of law in post-conflict contexts, graft mechanisms provide an important alternative to traditional surrogate and transplant models. This is particularly true when focus is on long-term goals of stability and peace rather than other goals, such as specific individual responsibility or the promotion of international legal precedent. By designing mechanisms that foster institutional collaboration and allow for flexibility, graft mechanisms support new, organic developments in national institutions.

*Miguel Zamora**

261. See, e.g., The Support Mission against Corruption & Impunity in Honduras ("MACCIH" in Spanish), created under an agreement with the O.A.S. MACCIH Agreement, *supra* note 21. The MACCIH, like the CICIG, works with the public prosecutor's office, with a specially created unit. Acuerdo No. FGR-001-2017, Acuerdo Creación de la Unidad Fiscal Especial Contra la Impunidad de la Corrupción [Agreement for the Creation of the Special Prosecutorial Unit against Corruption and Impunity], No. 34,262, Section A, 6, LA GACETA (Feb. 10, 2017) (Hon.). However, unlike the CICIG, this relationship is not a cooperation but is instead defined by a duty to "supervise and evaluate." MACCIH Agreement, art. 3.1.1. Furthermore, MACCIH's mandate is described in thorough detail, leaving little room for flexibility. See MACCIH Agreement, *supra* note 21, arts. 3.1–4.1, 6.1. The MACCIH's mandate is also more limited in its goals, referencing specific actions and a general effort against corruption. These characteristics make the MACCIH less of a graft mechanism and more like an advisor or classic international organization trainer. There is no indication of mixing international and national elements in practice. However, one advantage of the MACCIH is that its mandate is for four-year periods. MACCIH Agreement, art. 16.2.

* Miguel Zamora holds a J.D. from Columbia Law School and a B.A. in International Relations from Tufts University. He previously worked on a variety of human rights issues in Central America. He wishes to thank Professor Daniel Richman and Léa Réus for their invaluable advice.

