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

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INTRODUCTION

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

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

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2. Id. at 329.
3. Prior to the ratification of the Genocide Convention, German Nazi leaders were prosecuted for international crimes at the Nuremberg Trials between 1945 and 1946. Nuremberg Trials, HISTORY, http://www.history.com/topics/nuremberg-trials (last visited Nov. 18, 2013). At Nuremberg, the defendants were tried for crimes against peace (aggression), war crimes, and crimes against humanity; however, the defendants were not tried for genocidal acts committed during the Holocaust. Id.; see also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.
5. See id. art. 5 (“[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give
cide that took place within their territory.\(^6\) This was reasonable given that there was no permanent international criminal court at the time.\(^7\) The General Assembly also defeated a proposal to recognize universal jurisdiction as a means to prosecute genocide in the Convention,\(^8\) which would have allowed states to prosecute genocide that took place outside of their territory.\(^9\)

Although states were originally charged with the responsibility to prosecute the crime, domestic courts did not act for decades;\(^10\) several states were slow to join the Convention,\(^11\) and
many that joined did not enact municipal statutes criminalizing genocide, presumably working under the assumption that their treaty obligations or municipal laws criminalizing underlying offenses, such as murder, were sufficient.\textsuperscript{12} With the exception of a few domestic trials involving the prosecution of crimes similar to the internationally defined crime of genocide,\textsuperscript{13} no one was convicted of the offense until 1998\textsuperscript{14} when the ad hoc international tribunal, the International Criminal Tribunal for Rwanda (“ICTR”), convicted Jean-Paul Akayesu, the mayor of a Rwandan town, for his role in the country’s 1994 genocide of the Tutsi ethnic minority group.\textsuperscript{15} The ICTR has now ruled on seventy-five cases.\textsuperscript{16} In 2001, shortly after the ICTR’s Akayesu conviction, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) made its first genocide conviction of the Serbian military officer Radislav Krstić, for the killing of Bosnian Muslims in the 1995 Srebrenica massacre.\textsuperscript{17} The ICTY has now decided 136 cases.\textsuperscript{18}

\textsuperscript{1}http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf
\textsuperscript{12} Jan Wouters & Sten Verhoeven, The Domestic Prosecution of Genocide, \textit{in ELEMENTS OF GENOCIDE} 177, 177 (Paul Behrens & Ralph Henham eds., 2013).
\textsuperscript{13} See \textbf{WILLIAM SCHABAS}, \textit{National Courts Finally Begin to Prosecute Genocide, The Crime of Crimes, in WAR CRIMES AND HUMAN RIGHTS: ESSAYS ON THE DEATH PENALTY, JUSTICE, AND ACCOUNTABILITY} 689, 689 n.3 (2008) [hereinafter SCHABAS, National Courts Finally Begin to Prosecute Genocide] (noting the trials of Pol Pot and Ieng Sary in Cambodia in 1979, while also noting that these prosecutions were for crimes closer to the modern definition of crimes against humanity than to the definition of genocide).
\textsuperscript{18} \textbf{Key Figures of the Cases, INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA}, http://www.icty.org/sections/TheCases/KeyFiguresoftheCases
Domestic courts have also prosecuted genocide more aggressively in recent years. For example, domestic courts in Rwanda, Croatia, and Bosnia and Herzegovina have been prosecuting individuals not prosecuted by the ICTR and ICTY. In addition, domestic Canadian and European courts have started to prosecute individuals for genocide offenses committed outside of their territory under universal jurisdiction.

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

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

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

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


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

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


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

Id.


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

This question is similar, although not identical, to the question posed above: should domestic courts prosecute crimes against humanity and/or war crimes? While this Article focuses on the crime of genocide, many prosecutions for genocide include charges of crimes against humanity and/or war crimes. One significant difference between these crimes is that although the crime of genocide and laws of war are codified in international treaties (the Genocide and Geneva Conventions), a separate international treaty does not currently prohibit crimes against humanity. See M. Cherif Bassiouni, Crimes Against Humanity, CRIMES OF WAR, http://www.crimesofwar.org/a-z-guide/crimes-against-humanity/ (last visited Dec. 1, 2013) However, genocide, crimes against humanity, and war crimes are all prohibited under the Rome Statute to the ICC. Rome Statute, supra note 7, arts. 6–8.
While the domestic prosecution of genocide (in the country where it occurred) better satisfies legal jurisdiction requirements and serves the goals of transitional justice, it may do so at the expense of traditional criminal justice goals (including victims’ rights) and defendants’ right to a fair trial and due process. The international community, including countries that have experienced genocide, should analyze the most important goals in prosecution in deciding whether to refer a case to the International Criminal Court (“ICC”), allow a foreign court to prosecute the crime, or prosecute the crime at home.

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

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

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

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

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

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

\(^{30}\) E. Bradford Burns & Julie A. Charlip, Latin America: A Concise Interpretive History 300 (7th ed. 2002).

\(^{31}\) See id. at 243, 300.


\(^{33}\) Id. at 349–50.

\(^{34}\) Id. at 351.

\(^{35}\) Id. at 352.

\(^{36}\) Id.

\(^{37}\) Burns & Charlip, supra note 30, at 301.


\(^{39}\) Douglas Farah, Papers Show U.S. Role in Guatemalan Abuses, Wash. Post (Mar. 11, 1999), http://www.washingtonpost.com/wp-srv/intl/daily/march99/guatemala11.htm ("During the 1960s, the United States was intimately involved in equipping and training Guatemalan securi-
Montenegro, president of Guatemala from 1966–1974, led the government campaign with brutal tactics, and the Mano Blanca (“White Hand”), a paramilitary death squad, targeted government dissidents. The leftist revolutionaries “initially obtained the support of some indigenous Maya, who viewed the guerillas as the last hope for redressing the economic and political marginalization of the indigenous communities.” This led the government forces to conclude that Mayan communities were “natural allies” of the insurgents and, therefore, “enemies of the state.” Government military strategists also “added racist fears, amplified by Guatemala’s apartheid-like social system, that Mayans were easily manipulated by outsiders . . . or that their participation in the insurgency was driven by a desire for racial vengeance.”

The conflict between guerilla insurgencies and the government continued throughout the 1970s, and the guerilla groups united under the Revolutionary National Unity of Guatemala (Unidad Revolucionaria Nacional Guatemalteca or “UNRG”) in 1982. Repression by government forces increased in the 1970s and 1980s, and the conflict radicalized. Ríos Montt came to power in a 1982 military coup, launching the National Plan of Security and Development (Plan Nacional de Seguridad y Desarrollo or “PNSD”), which, by claiming a strong link between national security and development, called for the
“extermination of subversive elements.” From 1982 to 1983, “the bloodiest period in Guatemala’s history,” the military launched operations in 626 Mayan villages. During these operations, government forces systematically raped, tortured, and murdered thousands of civilians and destroyed hundreds of villages as part of a “scorched earth” campaign. The vast majority of the civilians killed in the campaigns were indigenous Mayans.

In 1983 Ríos Montt was pushed out of power in another military coup and replaced by General Mejía Victores. Under pressure from the international community, Mejía Victores allowed a gradual transition to democracy, holding elections for a Constituent Assembly and drafting a Constitution. He also issued Decree 8-86, which granted amnesty for political crimes committed between 1982 and 1986. A civilian, Vinicio Cerezo, was elected president in 1985. He was succeeded by a number of civilian leaders, including de León Carpio and Álvaro Arzú, who engaged in U.N.-backed peace talks with the UNRG.

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

48. Guatemala: Silent Holocaust: The Mayan Genocide,
49. Id.
50. See id.
51. Timeline: Ríos Montt & Rodriguez Sanchez Trial, supra note 47.
53. Timeline: Ríos Montt & Rodriguez Sanchez Trial, supra note 47.
55. SKIDMORE & SMITH, supra note 32, at 353.
56. Id.
57. Decreto No. 145, 27 December 1996, Ley de Reconciliación Nacional [National Reconciliation Act], 54 DIARIO DE CENTRO AMERICA (Guat.).
58. Id. art. 2.
explicitly excluded.\textsuperscript{59} In 1999, the U.N.-sponsored truth commission, the Commission for Historical Clarification, published its final report, which concluded that the Guatemalan state “committed acts of genocide against groups of Mayan people” during Ríos Montt’s rule.\textsuperscript{60} It also found that state security forces committed 93\% of the documented human rights violations.\textsuperscript{61}

II. PROSECUTING GENOCIDE: DOMESTIC AND INTERNATIONAL COURTS

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

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


\textsuperscript{61} Id. ¶ 15.

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

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

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

66. Naomi Roht-Arriaza, International Decisions—Guatemala Genocide Case, 100 A M. J. INT’L L. 207, 208 (2006) [hereinafter Roht-Arriaza, International Decisions] (noting that in 1980 the “Spanish ambassador was injured and several embassy employees were burned to death in a firebombing attack on [the Spanish Embassy in Guatemala City]”).
67. Id.
68. Kaleck, supra note 23, at 956.
have an important effect on foreign relations and should [therefore] be left to the political branches.”

In September 2005, the Spanish Constitutional Court reversed the Supreme Court’s decision, finding that the exercise of universal jurisdiction was appropriate. The Spanish Constitutional Court then issued arrest warrants for several suspects, including Ríos Montt, in 2006. In 2007, the Guatemalan Constitutional Court dismissed the charges, finding that the Spanish court’s exercise of universal jurisdiction violated Guatemala’s sovereignty. Although Spanish courts never tried Ríos Montt or other former Guatemalan officials, the Spanish courts took testimony from victims and experts between 2008 and 2009.

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

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

70. Id. at 208-09.
73. Id. at 957.
75. Background: Ríos Montt & Rodríguez Sanchez Trial, supra note 25.
76. See Rome Statute, supra note 7.
77. Under the legal principles nulla peona sine lege and non-retroactivity ratione personae, established in the Rome Statute, the court can “punish only in accordance with this Statute” and “[n]o person shall be criminally responsible . . . for conduct prior to the entry into force of the Statute.” Rome Statute, supra note 7, arts. 23–24.
78. At the time the charges were brought, the president of Guatemala, Otto Perez Molina, was a retired military officer and potentially implicated in genocide crimes committed during counterinsurgency operations in Mayan villages in the 1980s. See Mica Rosenberg & Mike McDonald, Special Report: New Guatemala Leader Faces Questions about Past, REUTERS, Nov. 11, 2011,
Rome Statute in 2012,\textsuperscript{79} giving the ICC complimentary jurisdiction\textsuperscript{80} over any genocide that is perpetrated in Guatemalan territory after 2012.\textsuperscript{81} The presence of the U.N.-sponsored truth commission in the 1990s "showed that the United Nations was familiar with conditions in Guatemala and that it had nevertheless not decided to create an ad hoc tribunal along the lines of those for Rwanda and the former Yugoslavia."\textsuperscript{82} In the 2000s, the U.N. established hybrid tribunals for Sierra Leone (this court did not have subject matter jurisdiction over genocide),\textsuperscript{83} East Timor, and Cambodia.\textsuperscript{84} The U.N. notably did not establish a tribunal for Guatemala.

\textbf{C. Domestic Courts in Guatemala: The Recent Trial of Ríos Montt}

While the universal jurisdiction case in Spain stalled, changing conditions in Guatemala made domestic prosecution possible there.\textsuperscript{85} First, in 2006, Guatemala established the Interna-
national Commission Against Impunity (Comisión Internacional contra al Impunidad en Guatemala or “CICIG”) to target high-level officials in international criminal trials. Through the organization, the U.N.-trained Guatemalan lawyers and judges. Second, during the presidency of Álvaro Colom from 2008 to 2012, the military’s control over domestic institutions declined. Third, Guatemala’s Attorney General Claudia Paz y Paz, who had a strong background in international criminal law, showed a willingness to prosecute Ríos Montt. Finally, Ríos Montt lost immunity from prosecution, which he had enjoyed from 2007 to 2012 as a member of Congress.

Because the Spanish court had already collected a body of testimony and evidence, the prosecution could begin its case with a solid foundation. In January 2012, Attorney General Paz y Paz indicted Ríos Montt for genocide and other charges, including torture, terrorism, and crimes against humanity. A Guatemalan judge ordered Ríos Montt and former army intelligence chief Mauricio Rodríguez Sánchez “to stand trial for genocide and crimes against humanity” in January 2013.


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


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


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

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

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

94. Id.
97. Peter Canby, The Maya Genocide Trial, NEW YORKER BLOG (May 3, 2013), http://www.newyorker.com/online/blogs/comment/2013/05/the-maya-genocide-trial.html; Emi MacLean, Trial Opens, supra note 96.
98. Emi MacLean, Trial Opens, supra note 96.
99. Id.
100. See id.
101. Burt & Thale, supra note 95.
102. Malkin, supra note 24. Under the Geneva Conventions, superiors could be absolved from liability for breaches by their subordinates if they did not have any knowledge of a breach. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86(2), June 8, 1977, 1125 U.N.T.S. 3.
yer, César Calderón, also argued that his client “did not have command responsibility for the alleged crimes.” Over the next several weeks, Ríos Montt’s original lawyers returned and claimed that because of the events on the first day of trial (when García Gudiel was expelled), their client’s fair trial and due process rights had been violated. The court heard testimony from defense experts about peace agreements, the military chain of command, and the internal insurgency. According to one courtroom observer, “[a]s soon as the defence lawyers obtained their own translators, they made generous use of language issues to interrupt and confuse the witnesses, and to deliberately raise incendiary issues which had not been mentioned by the witness.”

On the fifth day of the trial (March 25th), one of Ríos Montt’s original lawyers, Danilo Rodriguez, reappeared and asked to again represent his client, a request that the court granted. On the sixth day (March 26th), Ríos Montt’s defense team made three challenges to Judge Barrios’ oversight of the trial. Attorney Marco Antonio Cornejo, one of Ríos Montt’s at-
torneys, argued that Judge Barrios should withdraw from the proceedings because of a civil complaint against her for expelling García Gudiel from the court on the first day of the trial. The judge held that the motion was without merit and witnesses were able to continue their testimony.

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

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

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

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

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

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

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

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127. Id.

128. Id.


130. Id.

131. The Court released its full 718-page opinion a week after the verdict, for which an index of eleven PDF files is available. Index of
However, just days later, on May 20th, the Constitutional Court ruled 3-2 to overturn the verdict and sent the trial back to April 19th, meaning any testimony or evidence presented after that point would not be valid.\textsuperscript{132} The decision was made on the basis that Francisco García Gudiel had been expelled from the courtroom, which left Ríos Montt without an attorney on the first day.\textsuperscript{133} Dissenting judges Mauro Chacon and Gloria Porras criticized the remedy as “disproportionate.”\textsuperscript{134} The following week, the Constitutional Court said it would also consider whether a 1986 amnesty law barred prosecution of Ríos Montt.\textsuperscript{135} In June 2013, the Constitutional Court was still considering several legal issues related to the case and assigned a new trial court to hear the case in April 2014.\textsuperscript{136} In November 2013, the court announced that the trial would not begin until January 2015, further stalling any final verdict.\textsuperscript{137} Following the announcement, lawyers for the Ixil Community filed a complaint with the Inter-American Commission on Human Rights “to condemn . . . Guatemala for the impunity for crimes


\textsuperscript{133} See id.

\textsuperscript{134} Id.


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

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

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

A. Jurisdiction

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

140. BLACK’S LAW DICTIONARY 673 (2d ed. 1910).
states, domestic courts automatically have jurisdiction over international law, while in “dualist” states international law must be transferred into domestic code before a domestic court can have jurisdiction. 141 A major objection to prosecuting a crime before it has been established in international or domestic law is retroactivity, or nulla crimen sine lege (“no crime without law”), a cornerstone of democratic governance and human rights law142 that “rests on the political truth that if a law can be created after an offense, then power is to that extent absolute and arbitrary.”143

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

144. Wouters & Verhoeven, supra note 12, at 180.
ratified the Genocide Convention in 1950 and enacted Articles 376 (criminalizing genocide) and 377 (establishing the punishment for genocide) of the domestic penal code in 1973. Guatemala is thus an example of a state that took the best possible action by ratifying the Genocide Convention early and criminalizing genocide within its penal code. In a domestic prosecution of genocide that occurred between 1982 and 1983, a Guatemalan court’s jurisdiction is not open to reasonable challenge.

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

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

147. See, e.g., id. art. 377.
148. Wouters & Verhoeven, supra note 12.
149. See Genocide Convention, supra note 4.
150. Schabas, National Courts Finally Begin to Prosecute Genocide, supra note 13, at 716.
nority, in a matter of months clearly met the definition of geno-
cide set out in the Convention, and Rwanda had acceded to
the Convention in 1975, it did not ratify a domestic statute
criminalizing genocide. Rwanda enacted legislation criminaliz-
ing genocide in 1996 and established local gacaca courts in
2001, in which both the absence of pre-established punishment
and the fact that Rwanda had ratified several Conventions out-
lawing genocide were mentioned in the text of the law. While
Rwanda was still able to establish punishment for genocide be-
cause of the nature of the crimes committed in 1994, it had to
rely on a retroactive statute rather than established law, which
would have given it a stronger legal basis for prosecution.

These examples demonstrate the need for countries to ratify
the Genocide Convention and incorporate the crime into their
domestic statute to avoid jurisdictional and retroactivity chal-

151. See id. at 696.
152. Status of the Genocide Convention, supra note 11.
154. Organic Law No. 40/2000 Setting Up “Gacaca Jurisdictions” and Or-
    ganizing Prosecutions for Offences Constituting the Crime of Genocide or
    Crimes Against Humanity Committed Between October 1, 1990 and Decem-

Considering that the genocide and the crimes against humanity are
notably provided for by the convention of December 9, 1948 prevent-

155. See id.
156. See Wouters & Verhoeven, supra note 12.
157. ICCPR, supra note 142, art. 15(2); see also European Convention, su-
    pra note 142, art. 7(2).
158. Jus cogens is

a peremptory norm of general international law [which] is a norm
accepted and recognized by the international community of States as
ing prosecution without ratification of relevant treaties and incorporation into domestic codes with defined punishment.159

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

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

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159. See Wouters & Verhoeven, supra note 12, at 177–78.
160. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, supra note 9.
164. See Slaughter, supra note 141, at 168–71.
165. Id. at 169–70.
within the state’s territory” could also interfere in the internal affairs of another sovereign state.\textsuperscript{166}

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

\begin{footnotes}
\item 166. \textit{Id.} at 172.
\item 172. \textit{Finland Sentences Rwanda Preacher to Life for Genocide}, BBC NEWS (June 11, 2010), http://www.bbc.co.uk/news/10294529.
\end{footnotes}
Pascal Simbikangwa in 2013.\textsuperscript{176} Notably, Austrian courts tried (but did not convict) Bosnian Serb Duško Cvjetković in 1995.\textsuperscript{177} A general survey of universal jurisdiction genocide cases shows a recent increase in domestic universal jurisdiction prosecutions, with several countries, including Sweden, Norway, and France, holding their first-ever genocide trials in the past year.\textsuperscript{178} In what is likely the most high-profile universal jurisdiction case in modern history, Spanish courts indicted former Chilean dictator Augusto Pinochet for crimes including genocide, terrorism, and torture in 1998.\textsuperscript{179} The Pinochet case inspired action by human rights groups bringing charges against Ríos Montt in 1999.\textsuperscript{180} These cases and the recent wave of domestic genocide prosecutions in Canada and Europe demonstrate the reach and limits of universal jurisdiction as a means to prosecute genocide.

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


\textsuperscript{180} See supra Part II.A for an overview of the Ríos Montt proceedings in Spain.

\textsuperscript{181} See id.

\textsuperscript{182} Roht-Arriaza, International Decisions, supra note 66, at 207–08.

\textsuperscript{183} See Kaleck, supra note 23, at 956.
defendant be present in Spain, the victims be Spanish,\textsuperscript{184} or there be some other connection to Spain.\textsuperscript{185} Currently, the Spanish Parliament is considering legislation to even further limit universal jurisdiction.\textsuperscript{186} Similar universal jurisdiction-limiting legislation was passed in Australia, Canada, and the United Kingdom.\textsuperscript{187} As a result, many domestic courts exercising universal jurisdiction are now requiring a “plus” factor (e.g., a passive personality factor)\textsuperscript{188} that the defendant be present in the forum country or that the defendant previously lived in that country.\textsuperscript{189}

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


\textsuperscript{187} See Slaughter, supra note 141, at 172.

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

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

\textsuperscript{190} See supra Part II.A.

\textsuperscript{191} See supra nn.167–177.
While the Guatemalan Genocide Case shows the boundaries of universal jurisdiction, it also demonstrates its power. Even if a court exercising universal jurisdiction is unable to secure a conviction or extradite suspects, its power may lie in its ability to gather evidence and testimony and bring attention to a crime, which may eventually induce domestic courts to take action.\footnote{192}{See Naomi Roht-Arriaza, The Pinochet Effect: Transnational Justice in the Age of Human Rights 223 (2005) (arguing that one of the benefits of universal jurisdiction is spurring a future domestic investigation or prosecution).} While defendants (including Ríos Montt) were never brought to Spain to stand trial, the court “yielded witness and expert testimonies and military documents, some of which were then introduced into evidence in the Guatemalan trial.”\footnote{193}{Roht-Arriaza, National Courts, supra note 85.} The indictment and arrest warrants for Guatemalan suspects also brought considerable attention to the issue and influenced the eventual domestic prosecution.\footnote{194}{See supra Part II.C.}

Finally, the ICC has jurisdiction over genocide that occurs in any state,\footnote{195}{Rome Statute, supra note 7, art. 5.} given the state is party to the Rome Statute\footnote{196}{Id. art. 12(1).} and domestic courts are not actively prosecuting the crime themselves.\footnote{197}{Id. art. 17(1)(a).} The Guatemalan Genocide Case shows that it may take time for the ICC to become effective. Because many of the world’s genocide crimes were committed before the court was created, the ICC cannot have a role in the prosecution of those crimes.\footnote{198}{See supra Part II.B.} The result is that the true need for such a court to prosecute genocide may not be known for many years.

The above analysis leads to the conclusion that domestic courts with a territorial or personal link to the crime (e.g., the Guatemalan court that prosecuted Ríos Montt) have the strongest case for jurisdiction over genocide. Universal jurisdiction is still controversial and evolving; however, universal jurisdiction “plus” seems to be another promising means by which to prosecute individuals who try to evade justice by fleeing to foreign countries. Courts exercising universal jurisdiction can also play the important role of catalyst for, and aid to, an eventual domestic prosecution. Further, the ICC’s jurisdic-
tion over genocide is dependent on ratification of the Rome Statute, a relatively new institution, and is also intended to be complementary to domestic jurisdiction. In terms of jurisdiction, then, domestic courts should prosecute genocide, but external domestic and international courts should also be prepared to step in when necessary to fulfill the international community’s legal obligations.

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

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

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


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

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

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

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

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

205. See Morris, supra note 162, at 337–38.
charged with genocide. However, this may have been the only available option for the prosecution at the time. In this way, the development of international and domestic courts with universal jurisdiction allows adjudication by a third party, providing a significant advancement for genocide prosecution by ending impunity while mitigating real or perceived violations of a defendant’s due process rights. This criticism is not as relevant to the Ríos Montt case because he was not tried in a court substantially controlled by the group against whom he was charged with genocide (indigenous Mayan groups), but it could be important in future domestic genocide prosecutions.

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

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206. This was not a major defense in the Eichmann trial; in fact, because a central issue was the jurisdiction of the Israeli court to try Eichmann, the court found that Israel’s link to the Jewish people gave it jurisdiction over Holocaust crimes. See Nicholas N. Kittrie, A Post Mortem of the Eichmann Case—The Lessons for International Law, 55 J. CRIM. L. & CRIMINOLOGY 16, 23 (1964).
207. In fact, some have commented that the trial did not do enough to incorporate indigenous Mayan culture. See Patterson, supra note 106.
208. Morris, supra note 162, at 353.
209. See supra Section II.C.
and activists involved in the trial with guerillas, and stating that the peace process would be undone if Ríos Montt were convicted. While the right to a fair trial and due process are a defendant’s right, it shows the general impact a domestic trial could have on judicial impartiality. While political influence undermines the overall fairness and credibility of the trial, domestic political bias is also relevant to victims’ rights and the goals of criminal justice.

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

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

212. Burt & Thale, supra note 95.
213. Morris, supra note 162, at 352.
216. Id. at 181, n.14 (listing countries that have excluded and added genocide groups, and which groups they have added and/or excluded).
217. Compare Genocide Convention, supra note 4, art. 1, with Código Penal de Guatemala, supra note 146, art. 376.
was “different from the Genocide Convention in two crucial respects: first, there was no comma between the words ‘national’ and ‘ethnic’, and second, the term ‘social’ replaced the term ‘racial’ group.”220 This approach has been criticized as not meeting international standards.221 Courts in Argentina accepted an interpretation of genocide that applied to crimes committed by the government against political opponents during the country’s “Dirty War,”222 which has been also criticized as inconsistent with international law.223 On the positive side, domestic judges applying international law can “participate in [a] global judicial dialogue [that can] enhance their own legitimacy and create a sphere in which they are seen to operate within a legal rather than a political context.”224 However, if domestic interpretations stray too far from accepted international principles, due process rights could be violated and may impermissibly expand international criminal liability, “creating inconsistent and incoherent doctrine.”225

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

222. See O’Donnell, supra note 219.
223. See id. at 335.
224. Slaughter, supra note 141, at 189.
227. See Sosnov, supra note 20, at 134–35.
criminal law, serve[d] without pay, and [could] impose sentences ranging up to 30 years’ imprisonment.” 228 There were also allegations of widespread bribery and corruption in the system and “a number of witnesses and gacaca court officials [were] killed across the country, often in a brutal manner.” 229 Concerns over fair trials in these local courts were so great that European states including France and the U.K. refused to extradite individuals to Rwanda where they would be subject to trial. 230 Although similar concerns exist regarding courts in Guatemala, 231 they may not be as severe as those surrounding Rwanda. Ironically, Ríos Montt’s defense team in Guatemala compromised the integrity of the process by using due process as a justification for filing numerous frivolous legal challenges. 232

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

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229. Id. at 17.
231. See supra Section II.C.
232. See id.
234. Id. at 663.
produce convictions.\textsuperscript{235} Finally, the prosecutor in international criminal courts may find it much easier than the defendant to gain access to witnesses and evidence from state governments.\textsuperscript{236} Thus, while international courts’ “provisions and . . . practice . . . require these courts to aspire to the highest standards set by international human rights treaties, customary international law, and general principles of law,”\textsuperscript{237} they contain inherent biases that could compromise the right to a fair trial.

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

\textbf{C. Goals of Criminal Justice}

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

\textsuperscript{236} Id. at 131 (“the cooperation regime that undergirds international criminal courts significantly and systematically affects the ability of defendants to provide for their own defense").
\textsuperscript{237} Id. at 117.
\textsuperscript{238} Bibas & Burke-White, supra note 233, at 662.
\textsuperscript{239} Id. at 651.
inal justice, such as deterrence, retribution, and condemnation, are particularly relevant to international criminal law and the Guatemala case.

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

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

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

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


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

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

244. Bibas & Burke-White, supra note 233, at 654.
246. Burt & Thale, supra note 95.
even if by an international court, could have sent a clear message and provided greater retribution (through seeing Ríos Montt incarcerated).

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

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

**D. Goals of Transitional Justice**

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

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

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

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

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251. Posner & Vermeule, supra note 249.
252. See Teitel, supra note 248, at 79–81.
253. See generally Comm’n for Historical Clarification, supra note 60.
participation, the greater the possibility for hearing a wide range of testimony and establishing the truth. Furthermore, the court is closer to relevant evidence and documents. For example, in 2005, investigators discovered an archive of the Guatemalan National Police that contained detailed information on murders and disappearances not available when the Truth Commission made its findings. The proximity of the Guatemalan court to evidence and witnesses increased the truth-finding power of the court.

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

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

257. Burke-White, supra note 242, at 735.
259. Id.
260. Id.
The trial also “allowed members of the Ixil community to tell their stories before a national audience for the first time,” which indigenous groups said was restorative and could help others understand their struggles.261

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

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


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

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

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

266. Id.
269. Casey, supra note 86.
old student activist.\textsuperscript{270} One year earlier, two of his former agents were sentenced to forty years in prison based on archive evidence that linked them to the same disappearance.\textsuperscript{271} In 2012, another former police chief, Pedro García Arredondo, was sentenced to seventy years in prison for “orchestrating the kidnapping of engineering student Edgar Saenz” in 1981;\textsuperscript{272} and, also in 2012, former director of National Police Marlene Raquel Blanco Lapola was charged with the extrajudicial killing.\textsuperscript{273} Recent arrests and convictions demonstrate a strengthening of the rule of law in Guatemala. While a great deal of impunity still exists, war crimes trials and transitional justice mechanisms are contributing to the development of judicial institutions in Guatemala.

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

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\textsuperscript{271} McDonald, supra note 270.


\textsuperscript{273} World Report 2013: Guatemala, supra note 267.

\textsuperscript{274} Teitel, supra note 248, at 30.
\end{footnotesize}
underlying domestic offense crimes (e.g., murder), the normative message of a conviction for an international crime (e.g., crimes against humanity or genocide) is much stronger.275

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

275. See supra Section III.A, for a discussion on incorporating international law into domestic codes.
276. See Akhavan, supra note 241, at 14.
278. Carasik, supra note 88.
279. See id.

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

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

\[\text{Id. See also supra Section II.C (describing witness testimony against Perez Molina at the Ríos Montt trial in Guatemala).}\]

\[\text{280. See Arch Puddington, Latin America’s Wavering Democracies, Freedom House Blog (Sept. 6, 2012), http://www.freedomhouse.org/blog/latin-americas-wavering-democracies (“[D]emocracy, while under pressure, remains the norm in Latin America. The region today is far freer than it was in 1980.”).}\]


generalized violence,\textsuperscript{283} and the role of the United States in domestic affairs\textsuperscript{284} remain as some of the most significant issues facing the region. For this reason, the trial and judgment are not just about the past, but also about the present and future.

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

IV. TENSIONS AND SOLUTIONS

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

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

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

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

Puddington, supra note 280.

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

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

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

\textsuperscript{285} Teitel, supra note 248, at 30.
\textsuperscript{286} See generally Burke-White, supra note 242.
\textsuperscript{287} Id. at 734.
\textsuperscript{288} While Burke-White claims that there are certain benefits to the regionalization of international criminal law, he does not “necessarily [call] for the creation of regional courts.” See id. at 761.
\textsuperscript{290} The Latin American and Caribbean countries that have ratified the Rome Statute are Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. See States Parties-Chronological List, supra note 79. Cuba, El Salvador, and Nicaragua have not ratified the Rome Statute. See id. In North America, Canada has ratified the Statute, but the United States has not. See id.
Rights, another OAS institution based in Washington, D.C.,292 already investigate and adjudicate regional human rights complaints. Alexandra Huneeus recently argued that the Inter-American human rights system is also already “developing quasi-criminal review”293 by “order[ing] and supervis[ing] national prosecutions.”294 The fact that the stalled genocide trial in Guatemala has just been referred to the Inter-American Commission confirms this view.

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

294. Id. at 1.
295. See Milton J. Valencia, Salvadorian Convicted of Immigration Fraud, BOS. GLOBE (Sept. 11, 2012), http://www.bostonglobe.com/metro/2012/09/11/former-salvadoran-official-convicted-immigration-fraud-boston-sought-spain-war-crimes-charges/q0TPrui4sLU8x9EsByj/story.html (“A former Salvadoran military commander pleaded guilty Tuesday in federal court to lying to immigration authorities so that he could stay in the United States, a move that could aid Spanish authorities who are seeking to have him extradited to that country to face war crimes charges.”).
296. See Katherine Corcoran & Martha Mendoza, Juan Carlos Bonilla Valladares, Honduras Police Chief, Investigated in Killings, HUFFINGTON POST (June 1, 2012), http://www.huffingtonpost.com/2012/06/01/juan-carlos-bonilla-valladares_n_1562328.html.
recent reforms to inter-American institutions, \(^{299}\) and a still-developing ICC. In the near future, domestic prosecution of international crimes under territorial and universal jurisdiction will likely continue in cases where ICC referral is neither legally nor politically feasible.

CONCLUSION

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

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


300. See supra Section II.C.