

GUATEMALA'S NATIONAL RECONCILIATION LAW: COMBATING IMPUNITY OR CONTINUING IT?

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As the Guatemalan peace negotiations concluded in December 1996, debate about the amnesty provisions in the hastily approved "National Reconciliation Law" (NRL) dominated the national press and commentary in the U.S. media. Guatemalan human rights groups condemned the law and challenged its constitutionality, as its terms appeared to leave open the possibility that amnesty would be granted to those responsible for serious human rights violations. The law was seen as a serious stain on a promising peace process. A *New York Times* editorial warned that the "law will make it nearly impossible to prosecute most of the worst crimes committed against innocent people by security forces and guerrillas in the course of the conflict."²

Six months after the law's passage, the Guatemalan courts have yet to grant amnesty in any case involving serious human rights violations. Challenges to the law's constitutionality remain pending in Guatemala's Constitutional Court. Petitions for amnesty remain pending and new petitions continue to be filed.

Although the dire consequences many expected from the NRL have not been realized, it may still be nearly impossible to prosecute most of the worst crimes committed during the armed conflict. The application of the NRL to date has not compounded impunity in Guatemala, but actions by

1 Program Director, Robert F. Kennedy Memorial Center for Human Rights. These comments are an updated version of a memorandum circulated by the RFK Center in March 1997.

2 *New York Times*, Dec. 19, 1996.

the judiciary in key human rights cases are doing just that. The lack of progress in prosecuting military officials allegedly responsible for the 1990 murder of anthropologist Myrna Mack and the acquittal of former military commissioner Candido Noriega, accused of 35 murders and dozens of other violent crimes, are stark reminders that the problem of impunity in Guatemala will not be resolved simply by careful application of the NRL.

Nor should the current cautious application of the NRL by Guatemalan courts suggest that the law was drafted with full consideration of applicable international law limitations on the scope of amnesty laws. The Guatemalan law, while plainly an advance over other Latin American amnesty legislation in its drafting and application to date, still reflects an insufficient understanding of applicable international law by its drafters.

1. THE TERMS OF THE LAW

On December 18, 1996, the Guatemalan Congress overwhelmingly approved the "National Reconciliation Law" (NRL) by a vote of 65 in favor to 8 against—only the deputies from the New Guatemalan Democratic Front (FDNG) and the National Union of the Center (UCN) opposed the law. The NRL was based on the December 12, 1996, agreement negotiated between the Guatemalan government and the Guatemalan National Revolutionary Union (URNG) that established the legal basis for the reincorporation of members of the URNG into Guatemalan society. Both the peace negotiations and the subsequent legislation went beyond the immediate need to legalize the status of URNG members and established provisions for "extinguishing criminal responsibility" for crimes committed by, for example, members of the military, civil patrollers and politicians between the start of the armed conflict (36 years ago) and the date of the law's passage.

The NRL specifically excluded from amnesty those cases involving forced disappearances, torture or genocide, but did not mention extrajudicial executions. Also exempted from the amnesty provisions are crimes that have no statute of limitations or in which criminal responsibility cannot, according to Guatemalan law or international treaties ratified by Guatemala, be extinguished. However, the Guatemalan Penal Code does not include any crimes without a statute of limitations. The Guatemalan constitution establishes that there is no statute of limitations for the undue use of force or weapons against persons detained or held prisoner.³ Guatemala is not a party to the Convention on the Non-Applicability of Statutes of Limitation for War Crimes and Crimes against Humanity. It is a party to the Convention against Torture and the Inter-American Convention to

3 Constitución de 1985, art. 21.

Prevent and Punish Torture, both of which impose on the government a duty to prosecute perpetrators of torture. Guatemala is also a party to the American Convention on Human Rights, which imposes an obligation on states to prevent, investigate and prosecute those responsible for certain violations of human rights.⁴ In addition, Guatemala is a signatory to the Inter-American Convention on Forced Disappearance of Persons, in force since 1996.

Article 2 of the NRL authorizes amnesty for political crimes against the state committed by the insurgency during the internal armed conflict. "Political crimes" refer to specific crimes against the state, such as sedition and illicit association, not to the motivation for committing crimes. Article 2 list those crimes from the Penal Code and the Law of Weapons and Munitions that may be considered political crimes. The NRL also provides for granting amnesty for certain "related common crimes" committed by insurgents. Article 3 establishes that related common crimes are those acts committed in the armed conflict that directly, objectively, intentionally and causally are related to the commission of political crimes. Article 4 enumerates the specific crimes in the Penal Code that can be considered related common crimes for purposes of granting amnesty to the insurgents. The Guatemalan Constitution (article 171) authorizes Congress to decree amnesty for political and related common crimes.

Article 5 of the law authorizes the courts to grant amnesty to state actors (or members of any other force established by law –e.g., civil patrols) for common crimes perpetrated in the armed conflict with the objective of preventing, impeding, pursuing or repressing the political and related common crimes committed by the insurgents. The relationship between the crimes committed and the preventive goal must be "rational and objective", and the crimes must not have been committed for personal motives. The law appears to place the burden of proof on those opposing the granting of amnesty. Amnesty is also available for those who covered up or in other ways served as accomplices to these crimes.

Article 6 establishes that the amnesty provisions apply to state actors for actions that were ordered, carried out or not carried out in order to avoid a greater harm, as well as to acts related to the peace negotiations, all of which are to be considered to be of a political nature. This would seem to include actions related to President Serrano's 1993 attempted "self-coup".

Article 11 establishes special expedited procedures for determining whether someone is eligible for amnesty. The prosecutor's office and the

4 Inter-American Court on Human Rights, Velásquez Rodríguez case, Sentence of July 19, 1988, Series C, No. 4.

courts, at the request of the interested party or on their own, are to transfer cases that are potentially eligible for amnesty to the designated appeals chamber, which is to ask the parties to submit their arguments within a ten-day period. If the court decides it needs additional information, it can subsequently hold a hearing, providing at least three days advance notice to the parties. Within three days after being notified of the appeals chamber's decision, the "legitimately interested" parties may appeal the chamber's decision to the designated chamber of the Supreme Court", which has five days to confirm, revoke or modify the prior resolution.

The NRL is quite complex and subject to different interpretations. Although the law is not a blanket amnesty, there are legitimate concerns that it may compound the already serious problem of impunity in Guatemala. The law's specific exceptions and its commitment to provide compensation to victims represent an advance over other Latin American amnesty laws passed in recent years.

2. PROVISIONS FOR COMPENSATION AND THE "CLARIFICATION COMMISSION"

In addition to its amenity provisions, the NRL also recognizes the state's responsibility to provide compensation to victims of human rights violations and refers to the role of the "Clarification Commission." Article 9 provides that the State has a humanitarian obligation to assist the victims of human rights violations that took place in the context of the internal armed conflict. Assistance is to be provided under the coordination of the Secretariat of Peace through governmental measures and programs, with priority to be given to those who, from a social and economic standpoint, are in greatest need. In providing compensation to the victims of human rights violations, the Secretariat of Peace is to take into account the recommendations to be formulated by the Clarification Commission (agreed to in the Peace Accords).⁵

The Clarification Commission has yet to begin its work⁶. Its mandate, which does not include naming individual perpetrators of human rights

5 The Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that have Caused Suffering to the Guatemalan Population was signed by the Guatemalan government and the URNG on June 23, 1994.

6 The U.N. has named Christian Tomuschat, a German human rights expert who served as the U.N. Human Rights Commission's Independent Expert on Guatemala from 1990-93, to head the Clarification Commission.

The two Guatemalan Commission members are Edgar Alfredo Balsells Tojo, selected from the university rectors nominations, and Otilia Ines Lux García, the Educations

violations, was established in the peace negotiations. Article 10 of the NRL refers to the Clarification Commission and recognizes its responsibility to design the means to achieve the understanding and recognition (*conocimiento y reconocimiento*) of the historical truth about the period of the internal armed conflict, with the goal of ensuring that the acts that took place during that conflict will not recur. State organisms and entities are to provide the Commission with whatever support it needs.

While positive, these provisions do not ensure full compliance with the requirements set forth in Inter-American jurisprudence on the scope of amnesty laws.⁷ A commitment to provide compensation will need to be transformed into a meaningful reality. The "historical truth" may not include both society's right to know the truth and survivors right to know what happened to their relatives. Even if a state—like Chile—carries out a serious effort to uncover the truth, recognizes state responsibility and awards compensation to survivors, it will still violate the American Convention's requirement that states prosecute and punish perpetrators of serious violations. The Commission recently clarified that "investigations must seek to identify perpetrators; otherwise victims will find it 'virtually impossible' to establish civil liability of the wrongdoers for damages."⁸ Thus, according to the Inter-American Commission on Human Rights, the American Convention requires that Guatemala go beyond establishment of the "historical truth" and some measure of compensation. It must satisfy the right to justice by leaving victims and their families judicial recourse for identification of those responsible for serious violations of human rights and imposition of appropriate punishment.

The wording of the N.R.L. if not interpreted in a manner consistent with constitutional and international law limitations, leaves open the possibility that amnesty will be granted to those responsible for extra-judicial execu-

Ministry's coordinator of bilingual education, who was proposed by the Mayan sectors. The Commission's start-up date has been postponed until August 1997 because of delays in obtaining funding and hiring staff.

7 Following the Velásquez Rodríguez case, *supra* note 4, the Inter-American Commission on Human Rights has issued four decisions on cases involving amnesties in Uruguay, Argentina, El Salvador and, most recently, Chile. In its 1994 country report on El Salvador, the Commission further addressed the sweeping Salvadoran amnesty passed in 1993 in the wake of the U.N. Truth Commission's report.

8 D. Cassel, "Lessons from the Americas: The International Community's Response to Amnesties for Serious Violations of Human Rights," report prepared for U.S. Meeting of Experts on Reining in Impunity for International Crimes and Serious Violations of Human Rights, April 13, 1997 (International Human Rights Law Institute, DePaul University College of Law) at 18: citing (and translating) Report no. 36/96, Case 10.843 (Chile) at 18, para. 66. OAS Doc. OEA/Ser/L/V/II,93. Oct. 15, 1996.

tions, including the massacres of thousands of indigenous peasants in the Guatemalan highlands in the early 1980s. Under the NRL's terms, a key issue in determining the scope of the amnesty is the interpretation of the phrase "in the armed conflict." Under applicable international law, the fact that a serious human rights violation or crime against humanity was committed in an armed conflict does not create an exception to the requirement that those responsible be held accountable. Responsibility for determining who will be eligible for amnesty has been placed in the hands of the Guatemalan judiciary—an institution that has not distinguished itself in the struggle to overcome impunity.

3. MINUGUA'S POSITION

The United Nations Human Rights Observer Mission in Guatemala (MINUGUA) has not denounced the NRL as violate of the March 1994 Comprehensive Agreement on Human Rights, which provides the basis for MINUGUA's mandate, or of international human rights instruments. Instead, MINUGUA has urged a narrow interpretation of the amnesty law. In a "Public Declaration" issued shortly after the law was passed, MINUGUA outlined the restrictions on the application of amnesty contained in the NRL. Thus, for example, its statement clarified that amnesty could not be applied to state actors or forces established by law if any of the following apply: a) the crimes were not committed "in the armed conflict"; b) the crimes were not perpetrated with the objective of preventing, impeding, pursuing or repressing political or related common crimes set forth in the Penal Code and the Law of Weapons and Munitions and enumerated in articles 2 and 4 of the NRL; c) there is not a rational and objective relation among the goals indicated and the acts committed; d) the crimes were committed for a personal motive; e) even though elements appear to suggest that such a relationship existed or that there was no personal motive, this is shown not to be the case; f) the crimes include genocide, torture or forced disappearance; g) the crimes are the consequence of the use of inappropriate means or weapons against a person detained or held prisoner (article 21 of the Constitution). MINUGUA noted that the expression "in the armed conflict" is sufficiently clear to exclude from amnesty those human rights violations that occurred "outside the strict framework of the internal armed conflict". MINUGUA further stated that it would "rigorously verify due process in all cases in which the benefit established by the Law of National Reconciliation is invoked."

The Center for Human Rights Legal Action (CALDH) has called on MINUGUA to verify that the provisions of the NRL violate the Guatemalan government's commitment in the Comprehensive Human Rights Agreement not to support "the adoption of legislative measures, or measures of

any other type, aimed at preventing the prosecution and punishment of those responsible for human rights violations"⁹ MINUGUA has not done so.¹⁰

4. CONSTITUTIONAL CHALLENGES TO THE NATIONAL RECONCILIATION LAW

The Guatemalan Constitutional Court is currently considering two challenges to the constitutionality of specific articles of Guatemala's National Reconciliation Law. The principal petition was filed by the Alliance against Impunity (Helen Mack is the lead petitioner); a second petition was filed by Danilo Rodríguez Galves. The initial petitions were based on Guatemalan constitutional law arguments. The Alliance filed a supplemental brief based on international law arguments. Guatemala's Constitution (article 46) establishes that international human rights treaties and conventions ratified by Guatemala take precedence over national law. The petitions challenge the constitutionality of articles 5, 6 and 11 of the National Reconciliation Law. Among the major arguments advanced are:

- (1) The NRL violates individual constitutional guarantees, such as the rights to access to justice, to be heard before previously established tribunals, to due process, and to public action against those who violate human rights;
- (2) Congress exceeded its constitutional authority by classifying purely common crimes as political and thereby permitting amnesty to be granted for common crimes;
- (3) Members of the government, its institutions and the armed forces may be granted amnesty for actions for which they are constitutionally required to be held responsible; and
- (4) The NRL conflicts with Guatemala's international law obligations to prevent, investigate and punish those responsible for certain violations of human rights.

The Constitutional Court denied the petitioners request for a temporary stay of the amnesty law, because "there is no flagrant unconstitutionality, nor is any permanent injury likely to be caused." This leaves open the

9 Comprehensive Human Rights Agreement, signed March 29, 1994, article 3.

10 A recent article by MINUGUA, lawyer Luis Pásara defended the amnesty provisions of the law. "Guatemala: amnistía para la paz" *ideele*, no 97 (May. 1997). p. 74.

possibility that some individuals might be granted amnesty before the Constitutional Court rules.

Guatemala's Human Rights Ombudsman presented a subsequent petition arguing that the law is unconstitutional, but was not allowed to present an oral argument to the Court. At a hearing on February 14, the Prosecutor General defended the constitutionality of the law while petitioners in the Alliance case argued that the contested articles were unconstitutional. Because a number of cases are backed up in the Constitutional Court, it is not clear when a ruling will be made.

While not impossible, it seems unlikely that the Guatemalan Constitutional Court will opt to undo a law that is seen as part of the peace process and passed overwhelmingly by Congress. The scope of the amnesty is instead likely to be defined on a case-by-case basis. The dangers of arbitrary judicial decisions could be considerably reduced if the Constitutional Court were to establish that the NRL's constitutionality rests on adequate interpretations and application, in conformity with applicable international law.

5. PETITIONS FOR AMNESTY ON INDIVIDUAL CASES

On January 8, 1997, after defendants had begun to apply for amnesty in specific cases, MINUGUA issued a public statement. It called "upon the judiciary to recognize their grave responsibility and not to apply the benefits of the law to crimes that occurred outside the strict context of the internal armed conflict or that did not have a rational and objective relationship with the prevention, pursuit or repression of the crimes enumerated in articles 2 and 4 of the Law."

The wording of the NRL leaves considerable room for interpretation in determining whether a particular crime is eligible for amnesty. Even the procedures for making that determination have been understood differently by different judges.

a. The Mack and Carpio cases*

Statements by government officials have indicated that they do not view the amnesty as covering cases such as the killings of Myrna Mack and Jorge Carpio Nicolle or the Xamán massacre. While the Public Ministry has

* *NOTA DEL EDITOR:* con fecha 12 de agosto de 1997 la Corte de Constitucionalidad decidió que el caso Mack debía ser tramitado de conformidad con el nuevo Código de Procedimientos Penales que establece el juicio oral.

argued that the NRL is constitutional, it has opposed application of its amnesty provisions in specific cases, including those of the Mack, Carpio and Xamán defendants. In explaining why these cases should not be eligible for amnesty, public prosecutor Mynor Melgar was quoted as saying that, in the Xamán case, "the military patrol's attack did not occur in the context of an army counterinsurgency strategy." According to the same article, Melgar further explained that the Mack and Carpio cases were not products of the war because the victims were not guerrillas.¹¹

The prosecutor's reasoning raises troubling issues for other cases. What, for example, might a prosecutor argue if a massacre were carried out as part of the army's counterinsurgency strategy (rather than as an apparently unanticipated over-reaction)? Or if the victims did have links to the URNG or had provided food to guerrilla combatants?

Under article 11 of the NRL, when the public prosecutor or a judicial authority has a case before it that concerns crimes covered by articles 4 and 5, they are to transfer the matter to the *Sala de Apelaciones* (Appeals Chamber). In the Mack and Carpio cases, Judge Delgado of the *Juzgado Primero de Sentencia* (First Sentencing Court) determined that the crimes were not covered by the amnesty provisions of the NRL and that the cases therefore would not be transferred to the *Sala*. The petition for amnesty in the Carpio case was decided on January 14; an appeal was subsequently filed in the Third Appeals Chamber.

A petition for amnesty on behalf of those accused of being intellectual authors of Myrna Mack's murder was filed January 6, 1997. The defendants argued that the murder was a political crime committed during the armed conflict and therefore fell within the NRL's provisions for amnesty. On February 6, Judge Delgado issued a decision declining to transfer the case to the appellate chamber, because *asesinato* (murder) is not one of the crimes listed as a related common crime in the NRL.¹² This ruling followed Judge Delgado's earlier ruling in the Carpio case. In the Mack case, the Tenth Appeals Chamber accepted the public prosecutor's argument that, under the NRL, it lacked jurisdiction to hear an appeal. In June 1997, with no substantive, appellate ruling on their earlier petition, the officers alleged to have planned and ordered the killing of Myrna Mack filed a new amnesty petition in the Third Appeals Chamber.

11 *La Prensa Libre*, Noticias de Guatemala, Jan. 6, 1997 (internet version).

12 Article 4, which relates to the insurgent's crimes, lists the crimes that can be considered "related common crimes", it does not include murder. Article 5, which refers to crimes by state actors. Includes no list.

b. Other cases in which amnesty has been requested¹³

As of May 1997, at least three Appeals Chambers had granted amnesty for former guerrillas who were in criminal proceedings for related common crimes, including illegal possession of weapons, ammunition and explosives.

Initially, few petitions for amnesty were filed. Thus far, all the cases being considered for amnesty have resulted from petitions of defendants who are either currently incarcerated or facing criminal proceedings. At least eight amnesty petitions have been filed on behalf of prisoners serving sentences for common crimes (e.g. murder and rape) in Guatemala's Pavón Prison. In general, lawyers for military defendants appear to be waiting for the Constitutional Court's ruling regarding the NRL's constitutionality before making amnesty applications. Thus, in the Xamán massacre case, lawyers for the defendants have indicated their intention to apply for amnesty for the accused soldiers, but are reportedly awaiting the ruling of the Constitutional Court.

Unlike the judge in the Mack and Carpio cases, trial judges in most cases have transferred amnesty petitions to the appellate chambers without making a preliminary ruling. Amnesty petitions have been filed on behalf of army specialists accused of murder. Two of the defendants in the Carpio case are also accused of murdering two people in 1993 in Amatitlán. Their amnesty petition was rejected by the trial court and is currently before the Tenth Appeals Chamber. Four soldiers convicted of killing Michael Devine were denied amnesty by the Fourth Appeals Chamber.

On February 26, 1997, the Ninth Appeals Chamber in Antigua denied a petition for amnesty on behalf of Cándido Noriega Estrada, a former civil patrol leader accused of being responsible for a series of murders, kidnappings, rapes and threats (a total of 156 crimes) during the 1980s. The Appeals Chamber found that the crimes were not related to the armed conflict, because the army stated that the defendant had not been a civil patroller, making him ineligible for amnesty under article 5 of the NRL. Three months later, however, in a much-criticized ruling, the trial court in Quiché acquitted Noriega of all charges. Appeals Chambers have denied petitions for amnesty of a former military commissioner convicted of drug trafficking and an army captain convicted of kidnapping.

13 Information about individual cases is meant to be illustrative rather than comprehensive. New petitions for amnesty continue to be filed; not all are reported in the press, and, under expedited procedures, cases may move quickly through the judicial system.

In the "Colotenango" case, civil patrollers have been prosecuted for killing 64-year-old Juan Chanay Pablo and wounding two other people during an August 1993 demonstration against civil-patrol abuses. Witnesses to these events have been harassed and intimidated, and the case has been fraught with irregularities. The defendants filed a petition for amnesty and then withdrew it. In an apparently unrelated development, the Guatemalan government and petitioners on behalf of the victims recently reached a "friendly settlement" before the Inter-American Commission on Human Rights. The settlement provides for both individual and community compensation and states that the criminal case will proceed. The community of Colotenango will be compensated with assistance for infrastructure, schools and health centers, worth approximately \$500,000. This assistance will be channeled through FONAPAZ (the National Fund for Peace). The friendly settlement agreement does not directly address the amnesty issue or any other aspect of the Peace Accords.

At the moment, it appears that the Guatemalan courts will continue to rule on amnesty petitions on a case-by-case basis. This is far better than a general amnesty, but, given the wording of the NRL, leaves considerable room for judicial interpretation. Thus far, the government seems eager to ensure that the high-profile cases not be amnestied, although this does not ensure that amnesties will not be granted. Will the government's concern extend to lower-profile cases that have not received international attention? And what will happen with the massacre cases from the early 1980s? Even if they are not amnestied under the NRL, will they be eligible for amnesty under earlier amnesty laws passed during the 1980s? The NRL does not mention or specifically derogate earlier amnesty laws, leaving open the questions of whether they remain in effect.

CONCLUSION

Although initial court rulings have refused to apply the amnesty to defendants in the Mack and Carpio murder cases, final appellate decisions have yet to be issued. Nor has the Constitutional Court ruled on challenges to the provisions of the law that permit amnesty for state agents. Human rights advocates in Guatemala have raised the concern that the burden of proof may be interpreted to fall on those opposing a grant of amnesty and that the minimal period allowed for submitting arguments opposing an amnesty petition is inadequate. Barring a finding of unconstitutionality, the possible fate of cases involving army massacres in the early 1980s is particularly troubling. Whether or not these massacres constituted genocide, they involved the wholesale slaughter of indigenous peasants who were thought to be guerrilla supporters. Guatemalan authorities, particu-

larly the Prosecutor General, need to make clear that the brutal massacre of unarmed peasants cannot fall within the terms of the NRL.

The NRL's amnesty provisions and their judicial interpretation to date suggest that Guatemala is trying to avoid following in the footsteps of its neighbor, El Salvador, which legislated total impunity after the United Nations Truth Commission for El Salvador's 1993 report. In the 32 cases included in its report, the Salvadoran Truth Commission named those perpetrators it was able to identify. Since issuance of the Truth Commission's report and the ensuing amnesty, the Salvadoran government has made no effort—judicial or otherwise—to determine what happened to victims and who was responsible, nor provided any compensation to victims of human rights violations.

In order to comply with its obligations under international law and break with a tradition of impunity, Guatemala faces many challenges. Not only must it establish the "historical truth" of what happened during the years of armed conflict, but it must make it possible for survivors to seek a judicial determination of what happened to their relatives—and who was responsible. Guatemala also faces the enormous challenge of providing appropriate compensation to the victims of human rights violations.

Although the terms of the NRL were far from satisfactory to Guatemalan human rights groups, the prolonged educational and advocacy efforts of these groups undoubtedly contributed to the decision not to pass a blanket amnesty. The Clarification Commission must not become a substitute for justice; the Guatemalan justice system is still obliged to carry out investigations and, when responsibility can be established, impose appropriate punishments. While the Guatemalan government's approach thus far reflects an effort to refrain from compounding the situation of impunity prevailing in Guatemala, it in no way guarantees that justice will be achieved. The Guatemalan courts have not established a strong record in dealing with human rights violators. In many cases, evidentiary problems resulting from the failure to carry out a timely and independent investigation will preclude successful prosecution. Disappearance cases pose a special challenge. The Guatemalan judiciary has a great responsibility to determine whether the NRL will signal an advance in Latin American efforts to overcome a strong tradition of impunity or—as many fear—will help to ensure that most of those responsible for serious violations of human rights during the past 36 years will never have to face prosecution.