

# The International Commission against Impunity in Guatemala

A New Model for International Criminal Justice Mechanisms

Andrew Hudson\* and Alexandra W. Taylor\*\*

## Abstract

*This article analyses the groundbreaking but little understood International Commission against Impunity in Guatemala (CICIG) to develop an improved rule of law model for the UN in reforming weak legal systems. It engages in an in-depth study of CICIG's activities and a comparative analysis of CICIG against similar international criminal justice mechanisms. The authors argue that CICIG's level of integration into the local judicial system and its dual focus on powers to promote prosecutions and institutional reform tools make it a unique model worth replicating. This article also makes recommendations to further improve CICIG's model for future application to new contexts and countries.*

## 1. Introduction

In the 15 years since the creation of the International Criminal Tribunals for the former Yugoslavia (ICTY)<sup>1</sup> and Rwanda (ICTR),<sup>2</sup> the international community has shifted towards establishing 'hybrid' tribunals more closely

\* Andrew Hudson is Manager of the Human Rights Defenders Program at Human Rights First. [hudsona@humanrightsfirst.org]

\*\* Alexandra Taylor was a 2009 summer intern at Human Rights First and is a J.D. candidate at the University of Virginia School of Law. Thanks to Aaron Zisser and Olga Almqvist who provided invaluable research assistance. [alexawtaylor@gmail.com]

1 SC Res. 808, 22 February 1993.

2 SC Res. 955, 8 November 1994.

embedded in the institutions of the country where the crimes are committed.<sup>3</sup> These hybrid mechanisms, including the Special Panel for Serious Crimes in Timor-Leste,<sup>4</sup> the Special Court for Sierra Leone,<sup>5</sup> the Extraordinary Chambers in the Court of Cambodia,<sup>6</sup> and the Special Tribunal for Lebanon (STL),<sup>7</sup> as a rule are empowered to try individuals in locally headquartered courts staffed by a mixture of international and domestic judges and prosecutors. The trend towards embedding international initiatives within the local context can also be seen in the proliferation of bilateral technical assistance programmes supplying training and equipment to ineffective legal systems. Among these embedded mechanisms, the little-known International Commission against Impunity in Guatemala (*Comisión Internacional contra la Impunidad en Guatemala*, CICIG) is a particularly innovative model worth replicating in other states seeking international assistance to strengthen the rule of law.

CICIG is tasked to support, strengthen and assist Guatemalan institutions in identifying, investigating, prosecuting, and ultimately dismantling domestic illegal security apparatuses and clandestine security organizations.<sup>8</sup> CICIG has five main powers to carry out its mandate, namely the authority: (1) to investigate any person, official, or private entity;<sup>9</sup> (2) to present criminal charges to Guatemala's Public Prosecutor and to join criminal proceedings as a private prosecutor;<sup>10</sup> (3) to name civil servants who commit administrative offences and to participate as a third party in resulting disciplinary proceedings;<sup>11</sup> (4) to recommend public policies and legal and institutional reforms;<sup>12</sup> and (5) to request statements, documents, and cooperation from any government official or entity.<sup>13</sup> However, CICIG lacks clear enforcement mechanisms or penalties for non-compliance, which renders the last power especially weak. These five powers can be broadly grouped into two categories: powers related to promoting individual prosecutions and powers related to institutional reform.

3 See D. Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 *Stanford Journal of International Law* (2007) 1–38; S. Nouwen, "Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts", 2 *Utrecht Law Review* (2006) 190–214.

4 UNTAET Reg. 2000/15, 6 June 2000.

5 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

6 Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

7 SC Res. 1757, 30 May 2007.

8 Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission against Impunity in Guatemala ("CICIG"), 12 December 2006, [CICIG Agreement], Art. 1.

9 *Ibid.*, at Art. 3, § 1(a).

10 *Ibid.*, at Art. 3, § 1(b).

11 *Ibid.*, at Art. 3, §§ 1(d) and 1(e).

12 *Ibid.*, at Art. 3, § 1(c).

13 *Ibid.*, at Art. 3, § 1(h).

Established pursuant to an agreement between the Guatemalan government and the United Nations Secretary-General, CICIG operates completely within the domestic legal system of its host country. CICIG incorporates both international and local staff but is funded entirely by voluntary contributions from UN member states. CICIG is a hybrid both because it is neither entirely national nor international and because it combines the independent investigatory and limited prosecutorial powers of a tribunal with ultimate deference to the domestic judicial system characteristic of a commission. CICIG must refer all of its cases to Guatemalan prosecutors and can only participate in such cases as a private prosecutor (*querellante adhesivo*).<sup>14</sup> This unique setup allows CICIG to train local personnel and build capacity by working side-by-side with local institutions at every stage of the prosecution process. It therefore has a 'demonstration effect' whereby the actions of CICIG are a catalyst for broader endogenous legal reform.

CICIG's mandate is 'unprecedented among UN or other international efforts to promote accountability and strengthen the rule of law'<sup>15</sup> as it is the first hybrid mechanism whose subject matter jurisdiction is not related to serious human rights violations but rather to dismantling organized crime. CICIG is more rooted within the local legal system than UN hybrid tribunals, but gives the international community a more systematic influence over local institutions than technical assistance programmes. CICIG is also unusual as it maintains the investigatory powers associated with a prosecutor, but it lacks independent prosecutorial powers and must act within the Guatemalan judicial system. Given the recent interest of several states in UN assistance to reform weak domestic legal systems, a thorough analysis of CICIG will help improve the model for future application.

This article analyses the ability of CICIG to investigate and dismantle illegal organized groups while strengthening Guatemalan judicial institutions at the half-way mark of its four-year term.<sup>16</sup> The first section summarizes the origins, mandate and powers of CICIG, and the second section places CICIG within the spectrum of other recent international criminal justice initiatives. The third section describes CICIG's successes and challenges as compared to the experience of similar international mechanisms. The final section concludes by drawing lessons for creating future international criminal justice devices to combat impunity in host countries.

We argue that CICIG's experience within Guatemala shows that its unique hybrid structure is worth replicating. In particular, CICIG's multiple focuses on promoting individual prosecutions, reforming institutions and building local capacity have increased the likelihood that CICIG's work will effect lasting

14 A *querellante adhesivo* is the Guatemalan version of the *action civile* in other civil law systems, whereby a third party, often a victim of a criminal offence, may participate as a civil party in a criminal proceeding to claim damages from such offender.

15 Comisión Internacional Contra la Impunidad en Guatemala, 'About the Commission', available online at <http://www.cicig.org> (visited 27 July 2009).

16 The CICIG Agreement was ratified by the Guatemalan Congress on 1 August 2007 for an initial two-year mandate and was renewed in 2009 for a further two years to September 2011.

change in Guatemala. From CICIG's experience, we distil several key lessons for the international community in establishing similar future international criminal justice mechanisms, namely: (1) bilateral agreements with the Secretary-General are likely to create legal personality uncertainties within the UN and only be successful if they are combating criminals still located within the host country; (2) clear case selection guidelines are vital; (3) developing a transparent outreach strategy and engaging with civil society is crucial; (4) the protection of staff and witnesses should be prioritized; and (5) tools to build local capacity and reform institutions are equally as important as investigatory and prosecutorial powers.

## 2. Why was CICIG Formed?

### A. Guatemala's Violent Context

Though the creation of CICIG is undeniably linked to the legacy of Guatemala's brutal 36-year internal armed conflict, CICIG was not intended to investigate the perpetrators of human rights violations committed during the conflict.<sup>17</sup> Instead, its mandate was tailored to address the current infiltration of government institutions by criminal clandestine organizations and the operation of violent illegal security forces outside of the control of the Guatemalan state. Such organizations have their roots in military intelligence and counter-insurgency structures established during the conflict but which were never dismantled.<sup>18</sup> These groups operate with almost total impunity given links to the very state actors tasked with prosecuting them.

Guatemala is one of the most violent countries in Latin America. In 2008, 6,338 Guatemalans were violently killed, representing an average of 16 murders per day.<sup>19</sup> Of those murdered, 131 homicide cases made it to trial, resulting in 83 convictions and 48 acquittals, representing a staggering conviction rate of just 2.06%.<sup>20</sup> Guatemalan institutions are unable to address this rampant violence due to lack of resources, intimidation, corruption and infiltration by illegal and clandestine security organizations. The UN Special Rapporteur on Extrajudicial Executions famously stated, 'Guatemala is a good place to commit a murder, because you will almost certainly get away with it.'<sup>21</sup> The National Civilian Police does not have a sufficient number of police officers to

17 For information on the internal armed conflict, see the Guatemalan Truth Commission, *Guatemala — Memory of Silence* (Guatemala City: Commission for Historical Clarification, 1999).

18 P. Gavigan, 'Organized Crime, Illicit Power Structures and Guatemala's Threatened Peace Process', 16 *International Peacekeeping* (2009) 62–76, at 62.

19 Radio Nederland, 'Guatemala: Infiltraciones en la Policía Nacional', 26 November 2008.

20 Comisión de Derechos Humanos de Guatemala, 'Informe Seminal Sobre Derechos Humanos', No. 04/09 (30 January 2009) at 5.

21 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, 'Civil and Political Rights, Including the Question of Disappearances and Summary Executions', UN Doc. A/HRC/4/20/Add.2, 19 February 2007, at 17.

guarantee law and order; in some parts of the country police coverage is just one officer per 3,000 citizens.<sup>22</sup> Illegal security forces not only operate death squads and engage in violent activities with impunity, but they even draw members from among police ranks.<sup>23</sup>

Ultimately, the high level of violence is a manifestation of the penetration of clandestine organizations into the state and the reach of illegal security forces across Guatemalan society. The 17 February 2007 murder of three Salvadoran members of the Central American Parliament and their driver became an international symbol of lawlessness in Guatemala. The four were apparently killed by senior members of Guatemala's police, including the head of the organized crime unit. Shortly after their arrest, the police officers were themselves killed inside a maximum security prison.<sup>24</sup> Aware that it could not combat such organized crime on its own, the Guatemalan state sought assistance from the UN. The incident galvanized Guatemala and the international community to create CICIG.

Therefore, unlike other international criminal justice mechanisms, CICIG does not use international law and judges to punish perpetrators of mass atrocities, but instead helps Guatemalan institutions adopt more robust criminal law practices to investigate and prosecute domestic actors currently committing crimes under Guatemalan law.

## B. CICIG's Origins

CICIG is not the first international commission, or perhaps even hybrid commission, that Guatemala has experienced.<sup>25</sup> After the signing of peace agreements in 1994, the UN and Guatemala established a Historical Clarification Commission which differed very significantly from CICIG as it was a transitional justice-focused truth commission tasked with investigating human rights violations that occurred during Guatemala's internal conflict. Nevertheless, the Historical Clarification Commission no doubt helped pave the way for CICIG's protracted birth. CICIG is the result of a 2003 proposal to create the Commission for the Investigation of Illegal Bodies and Clandestine Security Groups (CICIACS) which had a similar mandate to CICIG but was vested with independent prosecutorial powers.<sup>26</sup> On 5 August 2004, the Guatemalan Constitutional Court issued an advisory opinion finding the

22 Comisión de Derechos Humanos de Guatemala, 'Informe Seminal Sobre Derechos Humanos', No. 05/09 (11 February 2009), at 7.

23 Radio Nederland, *supra* note 19.

24 Washington Office on Latin America Special Report, *The Captive State: Organized Crime and Human Rights in Latin America* (Washington, DC: WOLA, October 2007), 1.

25 See e.g. C. Tomuschat, 'Between National and International Law: Guatemala's Historical Clarification Commission', in V. Götz, P. Selmer, R. Wolfrum (eds), *Liber amicorum Günther Jaenicke — Zum 85. Geburtstag* (Berlin/Heidelberg/New York: Springer Verlag, 1998) 991–1011.

26 Agreement between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala ("CICIACS"), 7 January 2004.

CICIACS agreement unconstitutional as prosecutorial powers could only be exercised by Guatemala's Public Prosecutor (*Ministerio Público*).<sup>27</sup> The proposal was re-negotiated, and on 12 December 2006, the Secretary General and the Guatemalan government signed a new agreement which made the crucial concession of limiting CICIG's prosecutorial role to joining cases as a private prosecutor.<sup>28</sup>

### 3. Placing CICIG on the Spectrum of Recent International Criminal Justice Initiatives

To better understand CICIG and allow for a comparative analysis, it is important to contextualize it within the spectrum of other international criminal justice initiatives. After setting up the ad hoc tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR), the UN has rarely followed this purely international model; however, fact-finding commissions mandated by the Human Rights Council remain common, such as the 2009 commission to investigate the Gaza conflict.<sup>29</sup> Unlike the ICTY and ICTR, the Gaza commission was not created by the Security Council, and thus had few tools to elicit cooperation from states it was investigating, significantly limiting its effectiveness. In response to the drawbacks of purely international mechanisms, the UN experimented with 'hybrid' tribunals incorporating a combination of international and domestic law, personnel and operations. The goal of hybridization was to create mechanisms that had more local legitimacy, incorporated international practices into domestic legal systems, and trained local justice officials, all at a lower cost than international courts.<sup>30</sup> These hybrid mechanisms have been created through different legal paths: Security Council authorization with or without authority under Chapter VII of the UN Charter, and bilateral agreements between the host country and the UN Secretary-General.

Of the UN's hybrid mechanisms, only the International Independent Investigative Commission (UNIIC) in Lebanon was endowed with Chapter VII authority.<sup>31</sup> UNIIC was created in 2005 at the request of the Lebanese government to investigate the murder of former Prime Minister Rafik Hariri.<sup>32</sup> Chapter VII authority was particularly important to its mandate to compel

27 Corte de Constitucionalidad, Guatemala, *Opinión Consultiva*, Expediente No. 1250-2004, 5 August 2004.

28 CICIG Agreement, *supra* note 8.

29 UN Human Rights Council, 'United Nations Fact Finding Mission on the Gaza Conflict', available online at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm> (visited 27 July 2009).

30 N. Roht-Arriaza, 'Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Conflict Guatemala', 9 *Chicago Journal of International Law* (2008) 79–105, at 81.

31 SC Res. 1595, 7 April 2005.

32 *Ibid.*

cooperation from neighbouring states, such as Syria. UNIIIC acted under domestic law, used a mixed team of international and domestic investigators, and intended to pass over the results of its investigations to domestic institutions for prosecution.<sup>33</sup>

Other hybrid mechanisms have been created within peacekeeping operations by the Security Council without relying on Chapter VII of the UN Charter, reflecting the significant diplomatic challenges of securing such authority. In Sierra Leone, Cambodia and Bosnia, the UN superimposed a new tribunal, staffed with a mixture of international and domestic personnel, onto the domestic judicial system. The War Crimes Chamber (WCC) within the Court of Bosnia and Herzegovina and the related Special Department within the prosecutor's office were created in March 2005 to receive cases from the ICTY when it ceases operations in 2010.<sup>34</sup> The WCC is a permanent addition to the Bosnian court system empowered to try local cases as well as ICTY cases. Initially, the WCC and prosecutors were partially staffed by international personnel, but the international staff will be gradually phased out by 2010.

A second strategy has been to embed international judges and prosecutors directly into existing domestic institutions, and has been adopted by the Regulation 64 Panels in Kosovo, the Serious Crimes Investigation Team (SCIT) in Timor-Leste, and the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups in El Salvador (Joint Group) in the following ways:

- (i) The Regulation 64 Panels were created in 2000 in response to the dire state of the courts in Kosovo. Court facilities were badly damaged and court records were lost or destroyed.<sup>35</sup> In response, the UN mission administering Kosovo enacted Regulation 2000/64 to allow international judges and prosecutors to serve in Kosovo's judiciary when requested by the parties to a case.<sup>36</sup>
- (ii) The SCIT was established in February 2008 to assist Timor-Leste's Prosecutor General in completing outstanding investigations from the previous UN mission and to train Timorese counterparts.<sup>37</sup> While the SCIT retains investigatory powers, prosecution is carried out through the Timorese courts. The SCIT, authorized by the Security Council as a part of the United Nations Integrated Mission in Timor-Leste

33 D. Mehlis, 'Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)', UN Doc. S/2005/662, 19 October 2005, at 5.

34 B. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, at 6.

35 T. Perriello and M. Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, International Center for Transitional Justice, March 2006, at 9.

36 R.F. Carolan, 'An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment', 17 *Transnational Law & Contemporary Problems* (2008) 9–29, at 16; Nouwen, *supra* note 3, at 198.

37 'Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste', 12 February 2008 [SCIT Agreement].

(UNMIT),<sup>38</sup> lacks Chapter VII authorization, and is likely to suffer from the same problem as the Serious Crimes Unit (SCU) of the previous UN mission.<sup>39</sup> The SCIT can only investigate when the suspect is in Timor-Leste<sup>40</sup> and will therefore be unable to prosecute the many Indonesian military leaders accused of atrocities.

- (iii) The Joint Group was created in December 1993 between the Salvadoran Government and the United Nations to investigate death squads and illegal armed groups.<sup>41</sup> The Joint Group was composed of domestic and international investigators, but was only empowered to present a public report of its findings and refer information regarding crimes to the Salvadoran prosecutor.<sup>42</sup>

A final group of hybrid mechanisms, and the group into which CICIG fits, are those created through a bilateral agreement between the Secretary General and the host country. These agreements are a relatively new innovation within the UN and are created through the voluntary initiative of a host country seeking UN assistance. In 2009, the Pakistani government approached the UN to create a commission to investigate the assassination of former Prime Minister Benazir Bhutto.<sup>43</sup> The Bhutto commission was tasked with presenting a report to the Secretary-General on its findings, but ultimate responsibility for identifying and prosecuting the perpetrators remained with the Pakistani judicial system.

These UN mechanisms can be contrasted with technical assistance programmes between host countries and international donors, which usually focus on strengthening weak legal systems via training and equipment. For example, the Regional Criminal Justice Initiative (RCJI) created by the United States and Bulgaria placed experienced US prosecutors in local institutions to suggest legislative amendments and train officials: similar institution building functions to UN initiatives.<sup>44</sup>

In the remainder of the article, we compare CICIG's mandate, powers and activities to the international initiatives described above. Ultimately, CICIG's two innovations — its level of integration into the local judicial system and its combination of powers to promote prosecutions and tools to reform

38 SC Res. 1704, 25 August 2006, at 4(i).

39 See C. Reiger and M. Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transitional Justice, March 2006.

40 SCIT Agreement, *supra* note 37, at 4.3.5.

41 Letter dated 7 December 1993 from the Secretary-General to the President of the Security Council, UN Doc. S/26865.

42 'Report of the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups in El Salvador', 28 July 1994, attached to Letter dated 22 October 1994 from the Secretary-General to the President of the Security Council, UN Doc. S/1994/989, at 10.

43 Letter dated 2 February 2009 from the Secretary-General to the President of the Security Council, UN Doc. S/2009/67.

44 Regional Criminal Justice Initiative, Rule of Law Initiative Programs — Bulgaria, available online at <http://www.abanet.org/rol/europe.and.eurasia/bulgaria.programs.html> (visited 27 July 2009).

institutions—make it superior to all other mechanisms and a model worth replicating.

#### 4. CICIG's Powers and Activities

An analysis of CICIG's operations sheds light not only on the strengths and limitations of its powers but also on the general challenges faced by hybrid commissions that operate within a dysfunctional legal system. As we described earlier, CICIG's mandate is to support and strengthen Guatemala's legal institutions, to identify the structures and financing of illegal security forces and clandestine security organizations, and to promote their dismantling and prosecution.<sup>45</sup> CICIG has five main powers to carry out this mandate, namely the authority: to investigate persons and promote their prosecution, to sanction public servants, to recommend reforms, and to request documentation and cooperation from government officials.<sup>46</sup> These five powers can be broadly grouped into two categories: powers related to promoting individual prosecutions and powers related to institutional reform.

The main disadvantage with CICIG's embedded approach is that without independent prosecutorial powers, it is faced with the very real prospect of limited prosecutorial successes. In addition, balancing the inherent tension between its need to develop public support and its desire to maintain confidentiality has been difficult and will be a key challenge for any hybrid commission following CICIG's model. In analysing CICIG's powers and comparing it to other relevant criminal justice entities, we argue that future mechanisms based on CICIG's model should: (i) establish clear guidelines delineating which cases fall within the commission's mandate; (ii) at the outset, develop a relationship with civil society actors and set out a clear outreach strategy; (iii) focus on strategies to protect the security of its staff and witnesses; and (iv) place equal emphasis on developing institutional reform tools as promoting domestic prosecutions.

##### A. CICIG's Powers to Promote Prosecutions

CICIG's activities during the first two years of its mandate show that hybrid mechanisms completely embedded in a host country's legal system can achieve real success in promoting criminal prosecution despite having limited enforcement tools and no ability to independently prosecute. CICIG's investigations and its work promoting prosecutions have received the most public scrutiny. Moreover, its involvement in criminal trials has often shown its dependence on Guatemalan institutions. However, its strategy of investigating and promoting the prosecution of a small number of emblematic cases has been

45 CICIG Agreement, *supra* note 8, at Art. 1.

46 CICIG Agreement, *supra* note 8, at Art. 3.

successful, and CICIG's involvement in eight high-profile cases has proven that the Guatemalan judicial system can be used to prosecute powerful individuals.

### 1. Investigations

CICIG's Commissioner, Carlos Castresana, has emphasized concentrating CICIG's resources on investigating and prosecuting a small number of strategic cases. Half-way through its mandate, in August 2009, CICIG was investigating 39 individual 'high-impact' cases.<sup>47</sup> The complaints not investigated have been either clustered into categories to be the subject of thematic reports by CICIG or were deemed to fall outside CICIG's mandate. CICIG's most high-profile investigation was into the controversial May 2009 murder of Rodrigo Rosenberg, an attorney who before his death recorded a video accusing Guatemalan President Álvaro Colom of ordering his murder. Subsequent information arose accusing the main opposition party of taking advantage of the crisis to destabilize the Colom administration.<sup>48</sup> The desire by most Guatemalans to involve CICIG in the politically delicate investigation of Rosenberg's murder attests to CICIG's recently established legitimacy in Guatemalan public opinion. Moreover, the ability of CICIG to successfully investigate the Rosenberg case and demonstrate that, incredibly, Rosenberg had planned his own murder averted a full blown political crisis.

However, CICIG's investigative activities could have been improved by the Commission being more proactive in explaining the exact dimensions of its mandate and its case selection criteria, and utilizing, to a much a greater extent, civil society as a resource for information.

Broad discretion in case selection, and resulting public frustration and mandate creep, are problems common to hybrid mechanisms. CICIG discarded 49 of the 64 complaints received in its first year for falling outside its mandate, with limited explanation. Guatemalans expressed confusion over its role as private prosecutor and what cases were within its mandate.<sup>49</sup> The Regulation 64 Panels in Kosovo and the Bosnian WCC faced similar problems. Regulation 64 Panels can be requested by any party to the proceedings due to a general fear of bias or judicial intimidation, but the use of the Panels has at times appeared arbitrary and ad hoc. With Regulation 64 Panels working on cases ranging from serious humanitarian crimes to traffic accidents and illegal woodcutting, 'the deployment of [international justices and prosecutors] has not always been strategic.'<sup>50</sup> Similarly, the lack of a clear prosecutorial strategy in Bosnia

47 For a description of other cases under investigations, see International Commission against Impunity in Guatemala, *Two Years of Work: Our Commitment is to Justice*, 2009, available at <http://cicig.org/index.php?page=two-years-of-work> (visited 21 December 2009).

48 International Commission against Impunity in Guatemala, *One Year Later*, Guatemala, September 2008, 4.

49 Inter-American Dialogue's Latin America Advisor, 'Will Guatemala's Anti-Impunity Commission be Successful?' 7 May 2008.

50 Perriello and Wierda, *supra* note 35, at 17.

has contributed to unrealistic expectations by the public about what the WCC can accomplish, negative press coverage, vulnerability of the WCC to groups pressing for the selection of particular cases, and accusations of bias.<sup>51</sup> UNIIIC was an exception only because its mandate — to investigate the assassination of Prime Minister Hariri — was highly specific and thus easy to convey. To avoid public frustration, future mechanisms should develop a clear and publicly accessible strategy for case selection.

CICIG's activities, especially at the outset, could have better drawn on civil society resources. CICIG took two years to establish a centralized telephone number and email address to receive information from the Guatemalan public and as long to launch a website.<sup>52</sup> During these two years, its predominant means of communication was via media interviews with Commissioner Castresana, and it only published one report on its activities, which was not made publicly available. Even after these initial two years, in September 2009, it only released an executive summary of its activities to date, which was not initially translated into English or posted on its website.<sup>53</sup> CICIG's lack of coherent communication strategy likely contributed to significant early criticism from the Guatemalan public for its perceived lack of results.<sup>54</sup> While CICIG had gained a base of public support by June 2009,<sup>55</sup> such support was obtained not through proactive engagement but by civil society's sense of necessity, rallying around a tool for change in an otherwise dire domestic situation. The Regulation 64 Panels and WCC also engaged in limited outreach, resulting in a general lack of public awareness about the WCC's work in Bosnia, a crystallization of opinions about the Regulation 64 Panels along ethnic lines in Kosovo, and negative and biased media coverage about the mechanisms in both countries.<sup>56</sup>

Ultimately, such lack of engagement with civil society highlights a tension inherent to hybrid commissions tasked with investigating politically delicate cases and staffed by prosecutors accustomed to operating in relative secrecy. While the criminal justice process requires prosecutors and investigators to maintain confidentiality and anonymity, operating a hybrid commission requires outreach and engagement with civil society. The United Nations High Commissioner for Human Rights (OHCHR) has emphasized that 'outreach is crucial to the success of the demonstration effect,'<sup>57</sup> and in promoting

51 Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, 11 February 2007, at 8–11; Ivanišević, *supra* note 34, at 34.

52 Prensa Libre, 'Cicig recibe desde hoy información por teléfono y correo electrónico', 14 May 2009.

53 CICIG, *Dos Años de Labores: Un Compromiso con la Justicia, Resumen Ejecutiva*, September 2009.

54 See e.g. Op-Ed, Prensa Libre, 'A medio mandato y sin resultados', 9 September 2008; Op-Ed, Prensa Libre, 'Diputados critican a la Cicig tras presentación de informe de primer año', 9 September 2008; Op-Ed, El Periódico, 'A qué vino la CICIG', 12 September 2008.

55 Siglo XXI, 'Unas 38 entidades se unen a favor de CICIG', 3 July 2009.

56 Perriello and Wierda, *supra* note 35, at 30–32; Human Rights Watch, *supra* note 53, at 47–49.

57 Office of the United Nations High Commissioner for Human Rights, *Rule-of-law Tools for Post-conflict States: Maximizing the Legacy of Hybrid Courts* (New York and Geneva: United Nations, 2008), 18.

increased use of the legal system to resolve conflicts. The OHCHR further notes that ‘outreach should be covered by the core budget of future hybrid courts,’ and ‘surveys conducted in Rwanda, Uganda and Sierra Leone have illustrated a close relationship between knowing about a court and supporting it.’<sup>58</sup> UNIIC is an example of a mechanisms tasked with confidential investigatory work which at the same time took the initiative to involve civil society in its work from the outset and to inform it of its activities. UNIIC regularly held press conferences informing the public about its work and set up hotlines to facilitate the relay of information from the public soon after initiating operations.<sup>59</sup> In addition, UNIIC kept the Security Council and the Lebanese community abreast of its activities through regular, publicly accessible reports.<sup>60</sup> UNIIC used outreach to position itself as an effective ‘interface’ between the Lebanese public and judicial authorities and to highlight the level of cooperation it had obtained with Lebanese officials. As a result, UNIIC was able to counter public mistrust of the judicial system and boost Lebanese confidence in their own institutions.<sup>61</sup> Another potential model for engaging civil society is the Court Support Network in Bosnia, which was created by the WCC to set up ‘a national network of information offices run by local NGOs designated by the Court.’<sup>62</sup> Though unfortunately underutilized by the WCC, organizing local NGOs could be a promising avenue for new mechanisms looking to quickly initiate outreach. Future mechanisms should develop a clear communications strategy not only to receive information from local sources but also to garner the support of civil society, which is often crucial in pressuring for government cooperation. Appointing an outreach officer or outreach team is of critical importance.

Finally, CICIG’s experience highlights the need to dedicate significant resources towards witness and staff security. CICIG essentially needed to build a witness protection program from scratch.<sup>63</sup> In May 2008, CICIG negotiated an agreement with Spain for the relocation of protected witnesses,<sup>64</sup> and successfully pressured for legislative reforms enhancing identity protection for witnesses in organized crime cases.<sup>65</sup> In January 2009, CICIG completed training of 48 police officers to create an elite group of agents responsible for protecting witnesses.<sup>66</sup> Witness and staff protection has also been a priority at

58 *Ibid.*

59 Mehlis, *supra* note 33, at 12.

60 UN News Centre, ‘Reports by the UN International Independent Investigation Commission’, available online at <http://www.un.org/apps/news/docs.asp?Topic=Lebanon&Type=UNIIC±Report> (visited 27 July 2009).

61 Mehlis, *supra* note 33, at 12–13.

62 Ivanišević, *supra* note 34, at 35.

63 International Commission against Impunity in Guatemala, *supra* note 50, at 3.

64 Prensa Libre, ‘Testigos protegidos viajarán al exterior’, 19 May 2008.

65 El Periódico, ‘Congreso aprueba de urgencia varias reformas al Código Penal’, 15 April 2009.

66 Diario de Centro América, ‘Capacitan a equipo élite para protección de testigos’, 20 January 2009.

the Bosnian WCC, and the court has even received criticism for being too willing to allow closed sessions for witness protection.<sup>67</sup> Protective measures at the WCC also include applying pseudonyms and using voice distortion technology to shield their identity while in court, as well as providing witnesses with psychological counselling.<sup>68</sup> The UN mission in Kosovo devoted substantial resources towards witness and victim protection, but the specialized police division created for witness protection suffers from financial and logistical setbacks, and intimidation and attacks of witnesses remain frequent.<sup>69</sup> UNIIIC also emphasized the need to take great care in conducting confidential witness interviews to protect their identity.<sup>70</sup> The experience of all four commissions emphasizes the importance of, as well as the significant difficulty in assuring, witness protection. Unless witnesses and victims feel sufficiently protected they are unlikely to provide crucial information and cooperation necessary for a successful investigation.

## 2. Promoting Prosecution

CICIG's involvement as a private prosecutor in high-profile cases represents one of its most significant achievements on at least three levels. First, CICIG has proven that the Guatemalan criminal justice system can be made to work. In a relatively short period of time, CICIG has successfully put together investigations, ensured the detention of perpetrators, and advanced to trial several cases against powerful individuals. As of July 2009, CICIG had been admitted as a private prosecutor in eight cases: (i) a case against the daughter of a member of the Guatemalan Congress for human trafficking and illegal adoptions; (ii) the murder of 11 people in Zacapa during a clash between drug traffickers; (iii) a case against four members of the National Civilian Police who engaged in extortion and assault; (iv) a case against Senior Prosecutor Álvaro Matus for obstructing justice and destroying evidence; (v) a case against General Enrique Ríos Sosa, son of former Guatemalan General Efraín Ríos Montt, and five other ex-military officials for embezzlement; (vi) a case against the kidnappers of Gladys Monterroso, wife of the Human Rights Ombudsman; (vii) a case against ex-President Alfonso Portillo for embezzlement; and (viii) an embezzlement case against ex-Defence Minister Eduardo Arévalo Lacs.<sup>71</sup> In all eight cases, the accused are directly and visibly connected to government institutions, politicians or drug-trafficking organizations.

67 Human Rights Watch, *supra* note 53, at 30.

68 Ivanišević, *supra* note 34, at 17–20.

69 Perriello and Wierda, *supra* note 35, at 26.

70 Mehlis, *supra* note 33, at 13.

71 Comisión Internacional Contra la Impunidad en Guatemala, 'Cases: CICIG as a Complementary Prosecutor', available online at <http://www.cicig.org> (visited 27 July 2009); Prensa Libre, 'Gladys Monterroso acepta que la Cicig sea querellante', 17 June 2009; Prensa Libre, 'Aceptan a Cicig como querellante adhesivo en proceso contra Arévalo Lacs', 6 July 2009.

CICIG's work has initiated trials of very powerful individuals in Guatemala, including a former head of state ex-President Alfonso Portillo — a rare achievement.<sup>72</sup> The symbolism of the Portillo case is particularly salient in a country known for widespread impunity. Prosecutors have even frozen European bank accounts of Portillo and his family.<sup>73</sup> The June 2009 detention of ex-Defence Minister Lacs was another important symbolic moment. Of the string of military officials charged with embezzlement during the Portillo administration, Lacs was the first whose bail was set at the maximum allowable under law, a sign of CICIG's success in emboldening the judicial system.<sup>74</sup> CICIG's ability to push the criminal justice system to place hitherto untouchable ex-military leaders under arrest demonstrates that CICIG is starting to create cracks in the wall of impunity. Moreover, in September 2009, CICIG's investigation into the high-profile assassination of the lawyer Rodrigo Rosenberg bore fruit with the arrest and detention of 11 individuals accused of involvement in the murder, including a number of police officials.

Finally, by promoting the prosecution of recent criminal acts or embezzlement, CICIG is also likely to convict powerful individuals who were responsible for mass atrocities committed during the internal armed conflict. Prosecuting human rights violators for corruption and embezzlement has been a strategy used against several former heads of state, including Chilean dictator General Pinochet and Peruvian ex-President Alberto Fujimori. Furthermore, prosecuting successful corruption cases against powerful individuals in Guatemala may embolden the judicial system to directly prosecute violators for human rights abuses in the future.

CICIG's experience shows the value of equipping international criminal justice mechanisms with a broad range of tools to counteract their limited enforcement powers. The utility of CICIG's power to participate in cases as a private prosecutor is mitigated by its dependence on Guatemalan institutions and officials. CICIG's case against ex-Senior Prosecutor Matus provides an example of the difficulties it has faced. In January 2009, CICIG accused Matus of obstruction of justice during the investigation of the death of Víctor Rivera, a government advisor investigating the murder of three Salvadoran parliamentarians.<sup>75</sup> CICIG clashed with the prosecutors assigned to the case as they brought only two of the four charges CICIG had suggested.<sup>76</sup> Matus was released on bail for a mere US \$2,000, an amount which Castesana labelled a

72 See Roht-Arriaza, *supra* note 30; see also E. Lutz and C. Reiger, *Prosecuting Heads of State* (New York: Cambridge University Press, 2009).

73 Prensa Libre, 'Inmovilizan cuentas a familia de Alfonso Portillo', 19 January 2009.

74 Prensa Libre, 'Ex ministro de Defensa Eduardo Arévalo Lacs queda detenido en el Preventivo de la zona 18', 25 June 2009.

75 El Periódico, 'La CICIG logra orden de captura del ex fiscal Matus', 31 January 2009.

76 El Periódico, 'CICIG espera que el MP rectifique su posición en el caso Matus', 5 February 2009.

'mockery of justice' and which caused CICIG to demand that the judge recuse himself due to concerns of impartiality.<sup>77</sup>

Equally troubling, CICIG is dependent on the judicial system's willingness to admit it as a party to any criminal proceedings. For example, in April 2009, Guatemala's Public Prosecutor, at CICIG's request, formally indicted Portillo. CICIG sought to join the case as a private prosecutor.<sup>78</sup> However, Judge Irma Leticia Valenzuela rejected CICIG's request, agreeing with Portillo's defence that the acts allegedly committed by the ex-President did not involve links with organized crime and CICIG therefore lacked jurisdiction.<sup>79</sup> This decision effectively turned CICIG's substantive claims against Portillo—that he was part of a web of corruption and illegal activities within the Guatemalan state—into a threshold issue for establishing CICIG's jurisdiction over the case. In response, CICIG accused Judge Valenzuela of obstruction of justice and appealed the decision to the Supreme Court of Justice. By June 2009, Judge Valenzuela had resigned from the case and CICIG had been admitted as a private prosecutor,<sup>80</sup> but the case is illustrative of the procedural hurdles CICIG has faced when participating in criminal trials. To confront such hurdles, CICIG has needed to use the full array of its powers, including the power to initiate investigations, to participate in prosecutions and to discipline obstructionist personnel.

CICIG's participation in eight active, high-profile cases after only two years of operations is also a significant achievement when compared to the activities of similar international mechanisms. UNIIC spent four years engaged in intensive investigations of the murder of Prime Minister Hariri, and while the results of those investigations have been passed on to the STL, the tribunal has yet to issue any indictments. The SCU, predecessor to the current SCIT in Timor-Leste, faced serious setbacks in getting perpetrators into court. Of the 391 persons it indicted during its operations, 309 remained outside of Timor-Leste's jurisdiction at the time of the SCU's closing.<sup>81</sup> Furthermore, the SCU's high-profile indictments were mainly of Indonesian military officers whom it could not arrest or compel to appear in court.<sup>82</sup> While CICIG has not faced the jurisdictional challenges of the Timor-Leste and Lebanese commissions, it has also benefited from the wider range of powers in its mandate. CICIG's ability to become a private prosecutor and publicly demand the disciplining and removal of uncooperative personnel has helped it overcome its otherwise weak enforcement mechanisms.

77 El Periódico, 'Juez rechaza recusación planteada por la CICIG', 19 February 2009; Christian Volkel, World Markets Research, 'Guatemala Impunity Dispute Pits UN-Backed Commission Against Judiciary', 19 February 2009.

78 El Periódico, 'La Cicig acusa a Portillo', 3 April 2009.

79 Prensa Libre, 'Rechazan a la Cicig como querellante adhesivo en proceso contra Portillo', 26 May 2009; El Periódico, 'Cicig acusa por prevaricato y obstrucción de justicia a juez quinto', 4 June 2009.

80 Comisión de Derechos Humanos de Guatemala, 'Informe Seminal Sobre Derechos Humanos', No. 43/09 (26 June 2009), at 3.

81 Reiger and Wierda, *supra* note 39, at 20.

82 *Ibid.*, at 21.

## B. CICIG's Institutional Reform Powers

While the Guatemalan public and media have focused on CICIG's prosecution activities, CICIG's success in advancing institutional reform will likely be the most permanent impact it has on Guatemalan institutions. Prosecution of criminals is not enough and '[t]he need to leave a legacy is now firmly accepted as part of United Nations policy.'<sup>83</sup> CICIG has made significant use of its authority to promote institutional reform, including recommending laws, disciplining public officials and collaborating with Guatemalan institutions to build institutional capacity. CICIG's combination of powers to promote prosecutions and institutional reform represents a union of the best aspects of bilateral technical assistance programmes and UN criminal justice mechanisms and is a unique and valuable innovation. While technical assistance programmes provide tangible benefits to weak legal systems, such programmes lack disciplinary powers and the capacity for public censure. Thus, while technical assistance programmes can support reformist and competent personnel, such programmes are not well positioned to discipline underperforming personnel, maintain sustained pressure for reform, or create a platform for publicly condemning obstructionist government officials. CICIG also builds on hybrid UN mechanisms by complimenting the goal of promoting criminal prosecutions with an explicit emphasis on advancing institutional reform and capacity building. As noted by the OHCHR, '[i]n past initiatives in Kosovo, Timor-Leste and Sierra Leone, the issue of legacy was not specifically incorporated in the mandate .... The lack of a specific mandate on legacy or capacity-building often meant that prosecutors and judges simply focused on the task at hand of trying cases.'<sup>84</sup> Even in Bosnia, 'collaboration between international and national prosecutors is not systematic and proceeds informally' despite the WCC's mandate to hand over all operations to national personnel by 2010.<sup>85</sup>

### 1. Legislative Proposals

CICIG's legislative reform proposals focus attention on flaws in Guatemalan law and provide civil society with concrete proposals to advocate for in the Guatemalan Congress. CICIG reviewed Guatemalan security, criminal and procedural law to investigate bottlenecks contributing to the paralysis of the judicial system. CICIG has presented two packages of legislative reforms to Congress in September 2008 and in March 2009.<sup>86</sup> By August 2009, Congress had enacted

83 Office of the United Nations High Commissioner for Human Rights, *supra* note 59, at 5.

84 *Ibid.*, at 7.

85 Human Rights Watch, *supra* note 53, at 6–7.

86 El Periódico, 'CICIG entrega paquete de reformas de ley a la UNE', 23 September 2008; El Periódico, 'CICIG lleva al Congreso segundo paquete de leyes para reformar', 13 March 2009. For a summary of the proposed reforms, see 'Activities of the International Commission against Impunity in Guatemala: Report of the Secretary-General', UN Doc. A/64/370, 23 September 2009, at 4.

several of CICIG's proposals, such as reforms to the Arms and Ammunitions Law, a law to create high impact courts to hear sensitive cases, extending CICIG's mandate, and reforms to the Organized Crime Law and Penal Code.<sup>87</sup> A number of other legislative reforms suggested by CICIG remain on Congress' legislative agenda, such as amending the remedy of *amparo*, a type of injunctive relief which frequently delays criminal proceedings. Widespread support of CICIG's legislative reform proposals from civil society was instrumental in convincing the Congress to adopt the measures.<sup>88</sup> CICIG also engaged in a high-profile campaign to propose criteria for election of Supreme Court judges and even published memoranda opining on which candidates did not merit election to the Supreme Court.

While legal reform is an essential element of the legacy of a criminal justice mechanism,<sup>89</sup> CICIG is unique for explicitly incorporating legal reform powers into its mandate. UNIIC, the SCIT, the Bosnian WCC and the Regulation 64 Panels do not include domestic legal reform as part of their mandate. Recommending legal reform is instead part of the activities of technical assistance programmes such as the RCJI and fact-finding missions such as the Joint Group in El Salvador. CICIG's model is valuable in that it combines the focus on promoting prosecutions common to other UN mechanisms with an explicit mandate to propose legal reforms more common to technical assistance programmes.

## 2. Administrative Disciplining

CICIG has had real success in disciplining government and judicial officials who are non-cooperative, obstructionists or corrupt. The administrative proceedings power has been used not only to remove roadblocks in CICIG's cases but also to serve the broader goal of removing corrupt officials from public office. CICIG has reported to the Interior Ministry (*Ministerio de Gobernación*) the names of 1,700 allegedly corrupt police officers who were subsequently purged.<sup>90</sup> CICIG also reported the names of at least 10 public prosecutors who committed offences or obstructed CICIG's work, including Attorney General Juan Luis Florido,<sup>91</sup> Senior Prosecutor Álvaro Matus and Administrative Crimes Prosecutor Patricia Lainfiesta,<sup>92</sup> resulting in a series of 'resignations'. CICIG's claims of obstruction of justice against Judge Leticia Valenzuela very likely led to her decision to resign from the Portillo case.<sup>93</sup> CICIG's activities have also placed pressure on the Public Prosecutor to independently review

87 Siglo XXI, 'Castresana: sin herramientas no resolveremos los casos', 27 July 2009; El Periódico, 'Congreso aprueba de urgencia varias reformas al Código Penal', 15 April 2009; La Prensa Libre 'Aprueban leyes de Cicig, y bonos dan el primer paso', 5 August 2009.

88 Prensa Libre, 'Leyes de Cicig se aprobarían de urgencia', 25 July 2009.

89 Office of the United Nations High Commissioner for Human Rights, *supra* note 60, at 37.

90 El Periódico, 'CICIG aconseja depurar a la mayoría de la cúpula de la Policía', 31 July 2008.

91 Siglo XXI, 'Florido reacciona contra la CICIG', 31 July 2008.

92 Prensa libre, 'Fiscal Patricia Lainfiesta renunciará a cargo', 13 August 2008.

93 Siglo XXI, 'Jueza Valenzuela ya no conocerá el caso Portillo', 13 June 2009.

and investigate judicial authorities. The Public Prosecutor's moves to dismiss a judge for obstructing justice in a narcotics trafficking case, occurring shortly after CICIG's very public censure of Judge Valenzuela, is an example of CICIG's 'demonstration effect' on Guatemalan institutions.<sup>94</sup>

The power to recommend disciplinary proceedings against named government officials is unique to CICIG. Other than the capacity to sanction their own staff, none of the international mechanisms or technical assistance programmes reviewed in this article possesses a similar power. CICIG's experience shows that the power to recommend civil servants for administrative disciplining can have a significant impact even in the absence of explicit enforcement mechanisms.

### 3. Institutional Capacity-building

Another of CICIG's achievements, and one which may well define its legacy, has been in building the capacity of Guatemalan institutions. To successfully prosecute any crime, CICIG must work with three Guatemalan institutions: the National Civilian Police, the Ministry of the Interior, and the Public Prosecutor. In 2008, the Ministry of the Interior assigned 30 police officers to CICIG to create a joint unit.<sup>95</sup> In September 2008, CICIG created a Special Prosecutors Office (SPO) located within the Public Prosecutor's headquarters and staffed by prosecutors, investigators and 20 police officers vetted and trained by CICIG.<sup>96</sup> The SPO works side-by-side with CICIG's professionals in constructing investigations and prosecutions. One recent initiative of the SPO was the creation of a Communications Monitoring Center for wiretapping and intercepting communications related to organized crime.<sup>97</sup> CICIG not only works through Guatemalan institutions but also seeks to improve coordination among them. For example, CICIG facilitated the creation of joint investigation teams between the Public Prosecutor and the police to overcome mutual distrust between the two institutions,<sup>98</sup> and in March 2009 President Colom created a three-year Presidential Commission to support CICIG and learn from its experiences.<sup>99</sup>

The ultimate goal of these arrangements is for CICIG to operate through its representatives within existing Guatemalan institutions. This approach has the immediate benefit of allowing CICIG to use the legally established powers of all three institutions to carry out arrests and prosecution, instead of requiring CICIG to establish those powers on its own. One potential shortcoming is

94 El Periódico, 'MP pide antejuicio contra Juez de Cobán,' 29 June 2009.

95 International Commission against Impunity in Guatemala, *supra* note 50, at 5.

96 'Report of the Secretary-General,' *supra* note 88, at 3; International Commission against Impunity in Guatemala, 'Two Years of Work,' *supra* note 49.

97 Comisión Internacional Contra la Impunidad en Guatemala, 'CICIG: Special Prosecutors,' available online at <http://www.cicig.org> (visited 27 July 2009).

98 International Commission against Impunity in Guatemala, *supra* note 50, at 5.

99 Acuerdo Gubernativo no. 65-2009, Presidencia de la República, Guatemala, 5 March 2009.

that when CICIG leaves, instead of having promoted broad institutional change it may only leave a nucleolus of trained personnel within each institution. However, CICIG's strategy of intensively training and collaborating with a small group who can then spread new methodologies from within is more likely to bring about measurable outcomes. Since 2004, Guatemala has had seven directors of the PNC,<sup>100</sup> and the Interior Ministry has experienced constant turnover.<sup>101</sup> This instability has made high-level institutional cooperation difficult, but has not impeded CICIG's project to embed a small nucleus of trained personnel within the PNC and the Prosecutor's Office.

Like a bilateral technical assistance programme, CICIG strengthens Guatemalan police and prosecutors through a 'demonstration effect' approach. For example, the RCJI US–Bulgaria technical assistance scheme undertook institutional reform activities by placing American counterparts within Bulgarian institutions to facilitate mentoring and training and draft legislative amendments to Bulgarian laws.<sup>102</sup> CICIG's experience demonstrates the importance of international criminal justice mechanisms having a panoply of powers to reform institutions, build local capacity, and discipline uncooperative or corrupt personnel. These activities are of equal importance to CICIG's powers to promote prosecutions, as 'the success of [international commissions] should be measured not only (or even principally) by how many prosecutions they secure, but also how well they succeed in changing the possibilities for justice at home.'<sup>103</sup>

## 5. Framework Issues: Other Lessons to be Learnt

Apart from its substantive work and powers, several other observations can be drawn about CICIG's model that the UN should carefully consider. First, the lesson of the protracted birth of CICIG is that, as soon as possible, an advisory opinion from the domestic court system should be sought. Investing time to assure that any similar new mechanism comports with local law will not only strengthen its legitimacy but also avoid delays.

Second, CICIG has been plagued by legal uncertainties surrounding immunities for its staff. The CICIG Agreement provides immunity from arrest, detention, interference with personal baggage, and legal suits related to written or oral statements made in the course of work only to international staff.<sup>104</sup> Local staff have been especially vulnerable to intimidation by the police and fear possible legal actions initiated before Guatemalan courts. The unequal legal treatment of domestic and foreign staff has caused significant unease within Guatemalan civil society. It has even lead to baseless claims that the

100 'Report of the Secretary-General', *supra* note 88, at 6.

101 International Commission against Impunity in Guatemala, 'Two Years of Work', *supra* note 49.

102 Regional Criminal Justice Initiative, *supra* note 45.

103 Roht-Arriaza, *supra* note 30, at 106.

104 CICIG Agreement, *supra* note 8, Art. 10.

UN declined to grant local personnel immunities. The uncertainty derives from the *sui generis* nature of CICIG. If it were a standard UN body, its staff would enjoy immunities under the Convention on the Privileges and Immunities of the UN, which guarantees immunities for UN staff performing missions.<sup>105</sup> But since it is not a normal UN body, it appears that only the domestic government can grant such immunities to CICIG staff appointed locally.<sup>106</sup> The Guatemalan Historical Clarification Commission of the 1990s suffered similar immunity problems that were eventually solved by an agreement and statute conferring immunities on all Commission staff.<sup>107</sup> In our opinion, the UN should only enter into agreements when the local state provides immunities for all staff members.

Third, as the immunities debate demonstrates, CICIG's model brings inherent uncertainties about classifying its legal personality within the UN. As one of the few hybrid criminal justice initiatives created through a bilateral agreement with the Secretary-General, CICIG is unique in part because it required a relatively limited diplomatic effort to establish. However, since CICIG does not derive its mandate from a UN organ, it does not receive funding from the regular UN budget and must rely on voluntary contributions from UN member states. Furthermore, since it is not a UN body, CICIG has had a lower stature within the UN, relying on support from the Department of Political Affairs. In November 2008, the UN General Assembly passed a resolution endorsing CICIG,<sup>108</sup> but ongoing uncertainty has prevailed about its relationship to the UN. Such uncertainty has led to bureaucratic problems, for example, complicating CICIG's hiring of international staff given its inability to bestow UN benefits such as pensions and diplomatic passports,<sup>109</sup> as well as political problems in rallying support for CICIG within the UN. The Guatemalan Historical Commission experienced similar personality uncertainties and overcame them by contracting staff via the UN Office for Project Services (UNOPS), a creative solution which CICIG has not been able to execute.<sup>110</sup>

In contrast, UNIHC received immediate recognition and funding from the UN because it was authorized under Chapter VII of the UN Charter. It therefore had the ability to compel other member states to cooperate with its investigations. The troubled experience of the SCIT and the Gaza commission in securing cooperation from Indonesia and Israel, respectively, suggests that without such authority, commissions that need to investigate and prosecute perpetrators located abroad will generally fail to accomplish their mandate. Since it

105 UNTS Vol. 1 No. 4, 13 February 1946, Art. 22.

106 See 'The Vienna Convention on Diplomatic Relations', 18 April 1961; GA Res. 22A(I), 13 February 1946.

107 See Tomuschat, *supra* note 25, 1002.

108 GA Res. 63/19, 10 November 2008.

109 See 'Report of the Secretary-General', *supra* note 88, at 7.

110 See Tomuschat, *supra* note 25, at 1005.

similarly lacks Chapter VII authority, CICIG's structure is most likely to be successful only when used to combat domestic criminals located in the host country.

## 6. Conclusion

Recent experience has suggested that the UN is likely to receive increased requests to help consolidate the rule of law in weak legal systems, particularly in post-conflict situations, as a corollary to its peacekeeping efforts. The 2006 CICIG Agreement, the 2008 SCIT Agreement, and the 2009 creation of the Bhutto commission suggest that UN-backed mechanisms for criminal justice assistance have the potential to become a growth area for the international community. CICIG's activities over the past two years have shown its potential to serve as a model for future initiatives.

CICIG's innovation, and key advance in the international criminal justice system, is twofold. First, CICIG is unique as a hybrid mechanism that operates completely within the domestic legal system of its host country. Through its funding and staff, CICIG maintains the advantages of an international mechanism, namely independence, objectivity and expertise. However, CICIG is a hybrid because it is neither entirely national nor international and also because it combines the independent investigatory and limited prosecutorial powers of a tribunal with ultimate deference to the domestic judicial system characteristic of a commission. The requirement that CICIG refers all of its cases to Guatemalan prosecutors and only participates in such cases as a private prosecutor allows CICIG to train local personnel and build capacity to a much greater extent than other hybrid mechanisms. It is hoped that CICIG will exemplify the 'demonstration effect' whereby its actions are a catalyst for broader endogenous legal reform.

CICIG's second innovation, and another aspect of its 'hybridness', is its incorporation of both powers to foster prosecutions and strong institutional reform tools. By successfully investigating and assisting in the prosecution of a small number of emblematic cases, it has the potential to assist in dismantling organized crime. However, it also retains key institutional reform functions to overcome systematic legal weaknesses and obstructionist officials.

The first of these advances—its highly embedded nature—is also its Achilles' heel and the source of its greatest challenge, namely its reliance on cooperation from Guatemalan institutions. How CICIG can deal with this challenge is likely to define its success to a significant extent, but should not ultimately be determinative of its legacy. Its institutional reform functions and capacity building endeavours should provide Guatemala with significant benefit even if its investigatory and prosecutorial roles are not totally successful. CICIG's unique hybrid nature and array of powers have contributed to its significant achievements. Those successes include proving that the Guatemalan judicial system can be used to detain and prosecute high-profile individuals,

successfully promoting legislative reform, disciplining senior legal officials and building institutional capacity.

A critical analysis of CICIG also suggests several additional steps that should be taken by future mechanisms building on its model. Clear guidelines for case selection and strong avenues for communication with, and outreach to, local civil society should be established from the outset. Additionally, CICIG's experience suggests that a bilateral agreement between the UN Secretary-General and the state concerned is likely to only be successful in combating domestic criminal activities, and the international community should be cautious in creating similar mechanisms in contexts involving international conflict and international criminal acts. Moreover, the UN should only sign such an agreement if it has been vetted by the local judicial system and provides legal immunities for all staff. Finally, in the near future, bilateral agreements will likely continue to suffer from legal uncertainties within the UN, and there is a desperate need for the UN to treat these mechanisms as a recognized class of institutions rather than as a series of *sui generis* entities. However, whether and how CICIG's model will be replicated will depend ultimately on the perceived accomplishments of CICIG itself. The final two years of CICIG's mandate will provide insights on its success in further spurring reform within Guatemala's legal system and in leaving a legacy of improved criminal justice practices after its departure.