Impunity Watch is a Netherlands-based, international non-profit organization seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts periodic and sustained research into the root causes of impunity and obstacles to its reduction that includes the voices of affected communities to produce research-based policy advice on progress intended to encourage truth, justice, reparations and non-recurrence of violence. We work closely with civil society organizations to increase their influence on the creation and implementation of related policies.

Programme Guatemala | November 2014
By Haydeé Valley

# Policy Brief
# Amnesty: National Reconciliation Law or Decree Law 8-86?

## Summary

Amnesty, a legislative measure that aims to secure the cease of hostilities between fighting groups, constitutes a voluntary oblivion by the State concerning the unlawfulness of certain acts committed before such benefit is decreed, generally after a period of either an armed conflict or a dictatorship.

According to international standards on the matter of amnesty, oblivion over a certain type of criminal actions in order to procure peace and democracy *might never be granted in exchange for impunity over crimes of international transcendence* such as genocide, crimes against humanity (war crimes and crimes against humanity), torture or forced disappearance, among others. In spite of the validity of an amnesty, the rights for truth, justice and reparation prevail for the victims and their families. Thus, amnesty only applies to political crimes and related common crimes that should be clearly defined either by the very law that grants amnesty or by international law, since absolute extinction of criminal responsibility, criminal action and penalties for every category of crimes, would equal a grant of impunity and, therefore, an obstacle towards social reconciliation.

Thus, *amnesty for grave infractions against International Humanitarian Law or against International Human Rights Law is not valid.* A resolution that distorts the law in order to apply it in favor of someone accused of such crimes would be illegal and, therefore, sooner or later would be invalidated by an internal legal system or by a regional or an international court.

In countries where wide and unrestricted amnesties have been granted, these amnesties can't be legally used to evade criminal justice; thus, they might be valid yet not applicable. The Statutes of International Criminal Court for Sierra Leona (2002) and Lebanon (2006) established that such types of oblivion *should not be an obstruction for the criminal persecution* of those accountable for grave crimes. This same position was inarguably assumed by the Inter-American Human Rights System (Barrios Altos vs. Perú, Almonacid-Arellano et. al. vs. Chile, Pueblo de Moiwana vs. Surinam, Myrna Mack Chang vs. Guatemala, El Caracazo vs. Venezuela, Trujillo-Oroza vs. Bolivia, Masacre de Las Dos Erres vs. Guatemala cases and others), since amnesties for international crimes *are incompatible with the American Convention on Human Rights.*

Even though the currently valid Guatemalan law that concedes amnesty *only over political crimes and common crimes related to such* is the National Reconciliation Law (Decree 145-96 of the Republic's Congress), the events occurred in 2013 and 2014 concerning the case of the Ixil genocide show that a previously abolished law on the same subject matter (Decree Law 8-86) is being utilized in order to obstruct the administration of justice, *since its application is being claimed even though it can't proceed* and, even worse, *recognizing contents it never had.*

## Table of contents

## Amnesty

In order to secure the cease of hostilities between armed forces and groups after an armed conflict, public force generally recurs to diverse types of measures, such as decreeing the oblivion of certain illicit acts. This is legally known as amnesty. Guillermo Cabanellas De Torres defines it as: *"a measure through which the effects and sanctions for **certain crimes** are suppressed, mainly those committed against the State… 'An act of sovereign power that covers **certain** kinds of infractions with the veil of oblivion, thus abolishing the legal processes already initiated or that should be initiated, or abolishing the sentences against such crimes'"*[i].

The Office of the United Nations High Commissioner for Human Rights (OHCHR or OACNUDH in its Spanish initials) denominates "amnesty" to those legal measures with the following effect: *"a) The possibility of impeding criminal trial and, in some cases, civil action, against certain people or categories of people in relation to a **specific criminal conduct** committed before the authorization for amnesty; or b) The retrospective annulment of previously determined legal accountability*[ii]*"*. Both Cabanellas De Torres and OHCHR coincide in that this legal figure extinguishes criminal accountability over certain punishable acts that have been committed, or impedes the execution of validly imposed sanctions.

*An absolute extinction of criminal accountability, criminal action and sanction, for any category of crimes, would equate a granting of impunity.*

The power of States to grant amnesty in order to put an end to war, is recognized as a rule of common Humanitarian International Law. As a matter of fact, international practice –its validity and applicability are recognized in article 149 of the Political Constitution of the Republic of Guatemala[iii]– as well as the interpretation of the Geneva Convention of August 12 1949[iv], are reflected in rule 159 which establishes: *"When hostilities have ceased, authorities in power shall make the effort to concede the widest possible amnesty to those who participated in a **non-international armed conflict** or to persons deprived of liberty due to reasons related to the armed conflict, **except** for people who are suspect or have been accused of having committed **war crimes** or who have been condemned for them*[v]*"*. This rule complements article 6.5 of Protocol II amendment to the Geneva Convention on June 8 1977, concerning the better protection for victims of internal armed conflicts that take place within the borders of a single country, which reiterates the applicability of amnesty as long as it doesn't compromise the application of justice over grave illicit acts, such as war crimes[vi].

Alejandro Valencia Villa points to other characteristics of amnesty: *"Amnesty supposes the forgiveness of a crime… Amnesty benefits a plural number of people… Amnesty is granted through a law by the Republic's Congress… Amnesty extinguishes criminal records… Amnesty does not require a firm sentence in order to be granted…"*[vii].

As noted, the oblivion of illicit acts only proceeds when related to clearly specified occurrences, either in the same law that grants it (which would be ideal) or by international law, since an absolute extinction of criminal accountability, criminal action and sanction, for any category of crimes, *would equate a granting of impunity* and, therefore, an obstacle to social reconciliation.

## Obligation to administer justice

Amnesty has clearly defined limits. Rule 159 of common International Humanitarian Law establishes that *it does not proceed with regard to war crimes.* It does not proceed either with regard to *crimes against humanity or genocide*, and, in general, over illicit acts that might violate International Humanitarian Law or International Human Rights Law, particularly during transitional periods from an armed conflict to peace or from a dictatorship to democracy, due to the State's obligation to administer justice.

After a peace process, the trial of illicit acts is an obligation that becomes mandatory in order to compensate for the lack of justice administration during an armed conflict, and, mainly, in order to sanction grave crimes that might have been committed during such period; therefore, the rights to justice, truth and reparation (the objectives of a criminal process), along with the guarantees of non-recurrence, constitute the milestones of transitional justice[viii].

*After a peace process, the trial of illicit acts is an obligation that becomes mandatory in order to compensate for the lack of justice administration during an armed conflict, and, mainly, in order to sanction grave crimes that might have been committed.*

Regarding the performance of the Judicial Branch during the Internal Armed Conflict (IAC) that battered Guatemala for more than 36 years, from 1960 until 1996, the Historical Clarification Commission (CEH in its Spanish initials) concluded that: "*The country's judicial system, due to its provoked and deliberate inefficacy, did not guarantee compliance with the law, tolerating and even instigating violence. Either by omission or by action, the judicial branch contributed to the increase of social conflict in different moments of Guatemala's History. Impunity reached the point of taking over the State's own structure and became both a means and an end…*"[ix]. Therefore, after the cease of hostilities, the State was forced to make its judicial framework function as a demonstration of good will, in order to confront the existing structural problems.

Concerning the gravest crimes that could have been committed during the armed conflict, the Guatemalan Criminal Code (CP, in its Spanish initials, Decree 17-73 of the Republic's Congress) that became valid on September 15 1973, already contained some of them: crimes against humanity, article 378 (as war crimes, crimes against humanity or sexual violence crimes); and genocide, article 376. Later, it incorporated extrajudicial killing, article 132 BIS; torture, article 201 BIS; and forced disappearance, article 201 TER[x].

On repeated occasions, the Inter American Court of Human Rights (CorteIDH in its Spanish initials) has explained that: "*From the general obligation to guarantee the right to live, personal integrity and personal freedom, derives the obligation of* ***investigating cases of violations against these rights****; therefore, such obligation is derived from article 1.1. of the American Convention on Human Rights, along with the substantive right which must be protected and guaranteed*"[xi]. This same obligation is expressly established in article I of *the Convention on the Prevention and Punishment of the Crime of Genocide*[xii]. Both articles, of imperative compliance, reiterate the State of Guatemala's obligation to investigate crimes committed against individuals, specially when dealing with grave violations against International Humanitarian Law or International Human Rights Law, since both protect legal rights that contribute to preserve humanity.

Another important rule derived from common International Humanitarian Law, is rule 158 which establishes that: *"States must* ***investigate war crimes*** *possibly committed by its citizens or armed forces, as well as in its territory, and* ***take actions****, if proceeding, against those accused. They must, likewise, investigate other war crimes that might be of their competence and take action, if*

*proceeding, against those accused"*[xiii]. This precept, applicable to armed conflicts, either national or international, agrees with the principles cited above, due to the obligation of activating criminal jurisdiction when dealing with the commission of grave crimes.

In accordance to article 46 of the Political Constitution of the Republic of Guatemala, article 44 foresees that rights which have been explicitly recognized by the law shall be progressively surpassed as human rights evolve. Both precepts allow for the incorporation of the "constitutional block" to the national juridical system, "*…as a group of international rules referred to those rights that are inherent to any person, including all those liberties and faculties that, although not expressly mentioned in [the] formal [constitutional] text, respond directly to the concept of a person's dignity, since Law, being dynamic, possesses […] rules and principles which are evolving and whose integration with this concept allow for their interpretation as inherent to the human being*[xiv]*".*

*The CEH was also very clear regarding the limits of an amnesty: amnesty can only proceed when it concerns certain crimes, but when it comes to those others that cannot be forgotten, its sanction must be procured.*

In that sense, the fact that a human rights treaty becomes part of the constitutional block implies that the rest of dispositions that take part in the internal legal system must be coherent, not only with the Political Constitution of the Republic, *lex legum*, but also with such international instruments. This reasoning applies to the American Convention on Human Rights, to the Convention on the Prevention and Punishment of the Crime of Genocide, and to other treaties of same category, due to the "*conventionality control*" which *"every justice must perform* ex officio *among his or her respective competence and accordingly to his or her respective procedural rules*[xv]*"* in order to watch over the strict compliance of the State's national and international obligations regarding the protection of the human person. This affirms the compromise of investigating cases of violations against human rights, especially if they constitute international crimes.

## Political crimes and related common crimes

As the obligation of investigating, judging and sanctioning international crimes was unavoidable in order to secure the peace agreement in Guatemala, the Agreement on the Basis for the Legal Integration of Unidad Revolucionaria Nacional Guatemalteca (URNG) foresaw the authorization of a law that included the extinction of criminal responsibility as a legal figure, yet compatible with the need to combat impunity[xvi]. In order to make this commitment effective, the National Reconciliation Law was authorized, which granted amnesty without expressly calling it so.

In its 47th recommendation, the Historical Clarification Commission (CEH) clearly stated that the State of Guatemala must comply with the National Reconciliation Law, "*persecuting, proceeding with trial and punishing those crimes whose* ***criminal accountability can't be extinguished*** *according to such law, particularly, its article 8, 'the crimes of* ***genocide, torture and forced disappearance,*** *as well as those other crimes that do not prescribe or that do not admit the extinction of criminal responsibility, according with internal law or with those international treaties ratified by the State of Guatemala"*[xvii]. In this manner, the Commission was also very clear regarding the limits of an amnesty: amnesty can only proceed when it concerns certain crimes, but when it comes to those others that cannot be forgotten, its sanction must be procured.

Principle 24 of the United Nations' Updated Set of principles for the protection and promotion of human rights through action to combat impunity, states: *"Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question…"*. This means that for an author, accomplice or concealer of international crimes to be covered by an amnesty for crimes that might be forgotten, he or she must still be inexcusably condemned for the former in order to obtain such legal benefit.

Hernán Salgado Pesantes explains: "*The rational, ethical and moral principles of all human societies, would not admit [amnesty] to be conceded no matter the type of crime, under just any circumstance… Traditionally, amnesty has been applied to the so-called* ***political crimes****, which are reckoned to deserve a special more favorable treatment than common crimes, since political crimes imply an altruistic and selfless motive"*[xviii]*.* Therefore, the legal-political natured figure in Decree 145-96 of the Republic's Congress only covers political crimes and common crimes related to them, which are specified in its contents, in articles 2 and 4[xix].

*"…The rational, ethical and moral principles of all human societies, would not admit [amnesty] to be conceded no matter the type of crime, under just any circumstance…"*

According to the Constitutional Court (CC) political crimes are: *"those attempting against the* ***State,*** *its external or internal* ***security,*** *its* ***powers and authorities****, against the* ***Constitution or against the citizens' political rights*** *or the principles concerning the valid* ***regime****. The complementary subjective element of such illicit acts is the motive of achieving, through means inadmissible to the legal system,* ***the breaking of the legal and social order, varying the form of the existing Government or society's economic or political regime****…"*[xx]*.* Common related crimes are those directly, objectively, intentionally and causally related to the commission of a political crime[xxi]. The Political Constitution of the Republic of Guatemala, in its article 17 g) is clear in establishing that amnesty might only apply with regard to political crimes and related common crimes, and that the granting of amnesty is an exclusive attribution of the Republic's Congress, when public convenience demands it. Thus, if one of the criminal types contained in article 4 of the National Reconciliation Law is not related with a crime contained in article 2, it shall not be amnestied.

The International community coincides in believing that extinction of persecution or sanction does not apply when dealing with grave crimes against humanity. Accordingly, the Inter American Court of Human Rights has considered that: *"****amnesty dispositions are inadmissible…*** *when they're intended to prevent investigation and sanction over those responsible for* ***grave violations to human rights*** *such as torture; summary, extralegal or arbitrary executions; and forced disappearances; all of them forbidden for contravening un-abolishable rights*[xxii]*".* In general, crimes committed by agents of the State against non-fighter citizens, civilian population, or a protected group, might be qualified as war crimes, crimes against humanity or genocide; and, in these types of crimes, international standards are applicable; thus, amnesty is not admitted as a *ius cogens* rule. Any contradicting action is, therefore, null by operation of law.

## The valid amnesty in Guatemala

As exposed above, amnesty is valid en Guatemala due to the National Reconciliation Law, which concedes total extinction of criminal accountability *solely and exclusively in the cases of political crimes and related common crimes*, as specified in its text. Therefore, when the Public Ministry (MP, in its Spanish initials) warns that it will criminally persecute an illicit act that is susceptible to oblivion, the MP is disabled for executing its constitutional obligation to act against public criminal acts or to continue an initiated process; thus, the benefit of amnesty is available since the preparatory procedures. Likewise, jurisdictional organs are liberated from their obligation to execute the sanction imposed.

This does not disable the MP from verifying if a crime is either political or a common one related to it, since its preliminary actions will allow them to determine which legal qualification should apply to the punishable act, in order to proceed with the correct claim before the competent Court of Appeal; all this should be done accordingly to the procedure established in article 11 of the applicable law, in which case the process should be dismissed. Because of confusion amongst defense attorneys, it should be noted that this procedure exclusively applies to illicit acts legally susceptible to oblivion. If the request is not made by the MP, the interested party should claim the benefit; this is due to the fact that it does not apply automatically, since the classifications of a criminal type as one that permits amnesty can only occur within the justice system.

*Amnesty laws characteristically possess retroactive effects; thus, the latest authorized law automatically abolishes any previous rule, not only if expressly stated but because of its subject matter.*

## Decree Law 8-86

Because of their purpose, amnesty laws characteristically possess retroactive effects; thus, the latest authorized law automatically abolishes any previous rule, not only if expressly stated but because of its subject matter. In the case of the National Reconciliation Law, its effects cover all years of internal conflict, from 1960 to 1996. In spite of the rules established in the Judicial Branch Law (Decree 2-89 of the Republic's Congress) regarding the abolishment of laws[xxiii], events occurred in the years 2013 and 2014, show that some attorneys –who have been known to recur to malicious litigation instead of developing appropriate defense arguments, have insisted on *applying abolished laws* and, even worse, *trying to recognize contents they never had.*

An example of this occurs with Decree 8-86[xxiv], which, with its scarce four dispositions and in spite of having been **expressly abolished** by Decree 133-97 of the Republic's Congress[xxv] –which left the National Reconciliation Law as the only law regulating the matter – is being utilized as a means of evading justice. Its first article stated the following:

> *General amnesty is hereby granted to all persons responsible or accused of having committed **political crimes and related common crimes**, during the period from March 23 1982 to January 14 1986. Therefore, no sort of criminal persecution or action might be taken or followed against authors and accomplices of such crimes, nor against those who might have committed the crime of concealing them; nor against those who might have intervened in any form in their repression or persecution.*

Even with the clarity of the disposition cited above, the CC has had to pronounce itself in order to clarify that granting amnesty for international crimes is not legally founded on Decree Law 8-86,

specially regarding the request carried out by Héctor Mario López Fuentes, retired army general involved in the "Ixil Genocide" case. Among its reasoning, the Court stated that: *"…amnesty is defined as a State renunciation to its punishing faculty, regarding criminal illicit acts which have been committed and motivated for* ***eminently political*** *circumstances… Amnesty is not applicable in this case, due to the fact that the claimed criminal acts belong to the sphere of acts that constitute* ***genocide, crimes against humanity and forced disappearance…*** *or must be excluded accordingly to international obligations to which the State of Guatemala is committed"*[xxvi].

In that sense, Decree Law 8-86 could have been cited when still valid, in order to avoid criminal persecution for political crimes and related common crimes, or for the crime of concealing them, if they had been committed during the time lapse between March 23 1982 and January 14 1986; thus, limiting any intent of trial and sentence for such illicit acts. However, this rule is no longer valid, even though its benefit continues through the National Reconciliation Law which, being more extensive, specifies those political and common related crimes susceptible to amnesty, which differ from all those other illicit acts qualified as international crimes.

*Decree Law 8-86 could have been cited when still valid, in order to avoid criminal persecution for political crimes and related common crimes, or for the crime of concealing them, during the Internal Armed Conflict.*

This is the reason why general López Fuentes's intent to request the recognition of an acquired right that never existed and, even further, trying to do so when concerning genocide, forced disappearance and crimes against humanity, was mistaken. The only thing he achieved was obstructing the victims' access to justice in the "Ixil Genocide" case. A still pending matter within this case –which, in essence, is the same request carried out by general López Fuentes– is the incident in which José Efraín Ríos Montt requested the extinction of criminal responsibility, in his favor. Details follow:

## Presentation

Founded on articles 32 2) of the Criminal Procedures Code (CPP) and article 1 of Decree Law 8-86, the defense attorneys hired by Ríos Montt presented an "exception" in order to claim the extinction of criminal accountability before the First Higher Risk Justice for Criminal, Drug Trafficking and Environmental Acts, Group "B", in order to obstruct the criminal process regarding the "Ixil Genocide"[xxvii]. This request was discussed in a hearing held on March 1 2012 and, in it, the Justice in charge dismissed this exception[xxviii].

Among the arguments claimed by the Justice that led to his decision, we find: "*…specifically, this law [National Reconciliation] refers us to three types of crimes: political crimes, common crimes related to those political crimes, and article 8 which regulates the scope of those crimes and clearly states that the extinction of criminal accountability can't proceed when dealing with internationally recognized crimes. Logically, what is being claimed in this case is the validity of Decree Law 8-86, but it should be noted that Decree number 133 of 1997, besides what is said in its considerations, establishes in article 1:* ***Decree 32-88 of the Republic's Congress as well as any other disposition conceding amnesty prior to 1996 for political crimes and related common crimes*** *committed by any person and in any time period,* ***are hereby abolished****; thus, noting that this law leaves the National Reconciliation Law as valid, which…separates all three different categories of crimes…*[xxix]*".*

**Incidents**

The resolution emitted by Justice B was **appealed** by the defense; thus, the process was elevated to the First Court of Appeal for Criminal, Drug Trafficking and Environmental Acts which, in a resolution dated June 15 2012, dismissed it; in consequence, it confirmed the prior resolution, dismissing the exception. Against this decision, on August 10 2012, the defense presented a constitutional writ of "amparo", claiming that the exception should have been accepted because it was not founded upon the National Reconciliation Law, but upon Decree Law 8-86, which *"granted amnesty to all members of the armed forces and the armed guerrillas, without exceptions, regarding those crimes stated in [such Decree Law]…, with no need to manifestly express themselves in order to obtain it or having to carry out any type of procedures in order to obtain its benefits… The condition granted by this decree [to Ríos Montt] did not vary in spite of the modifications that could have taken place, because [he] acquired these rights at the moment they were granted…"*[xxx].

The writ of Amparo was received by the Chamber of Amparo and Antejuicio in the Supreme Court of Justice (CSJ in its Spanish initials), and a resolution was emitted on April 16 2013. In its sentence, the Chamber stated that: *"the dilemma for solving this case consisted in determining whether the Court of Appeal **damaged the petitioner's rights by having applied the National Reconciliation Law…and not Decree 8-86…"**.* The chamber also considered that: *"the Court of Appeal did not explain the reasons why the cited disposition [Decree Law] is not valid for this case, but instead opted to only cite article 8 of the National Reconciliation Law… Article 11 Bis of the Criminal Procedures Code forces resolutions to contain a clear and precise **foundation and explanation for decisions**; therefore, its absence an utter formal defect… the legal issue submitted to such authority was eluded… in order to repair the damage caused by the lack of foundation, the Court of Appeal must indicate with accuracy the reason why the Decree Law is not applicable to the petitioner and, if considered important, why the National Reconciliation Law is indeed applicable…"*[xxxi]. The Chamber granted the amparo; therefore, the resolution emitted by the First Court of Appeal dated June 15 2012 was left suspended and the Court was ordered to emit a new resolution in five days.

*"…Even if it is actually true that the request for the extinction of criminal accountability was founded upon Decree 8-86, this would be impossible to accept since this rule is not valid…"*

Against the Chamber's decision, the Association for Justice and Reconciliation (AJR) and the Public Ministry presented an **appeal**. In its petition, the former argued that the action was taken due to the fact that *"…even if it is actually true that the request for the extinction of criminal accountability was founded upon Decree 8-86, this would be impossible to accept since this rule **is not valid…**"*[xxxii].

The petition was accepted and resolved by the Constitutional Court in a sentence dated October 22 2013, in which it stated: *"The authority [First Court of Appeal]… damaged the petitioner's rights… it is obvious that the conclusions… **lack a factual and legal motive**, since it merely transcribed article 8 of the National Reconciliation Law… when what was being debated for decision was the application of a rule –Decree 8-86– … thus, the authority's obligation was to analyze each of the arguments upon which the appeal was supported, aimed at evidencing the applicability of the Decree Law… By eluding its obligation to establish the foundation of judicial resolutions in the manner established by article 11 of the criminal procedures law, it varied the process's formalities, therefore violating the imperative principle contained in article 3 of the cited law and, thus, causing a violation to the rights of defense and due process, which are constitutionally guaranteed"*[xxxiii].

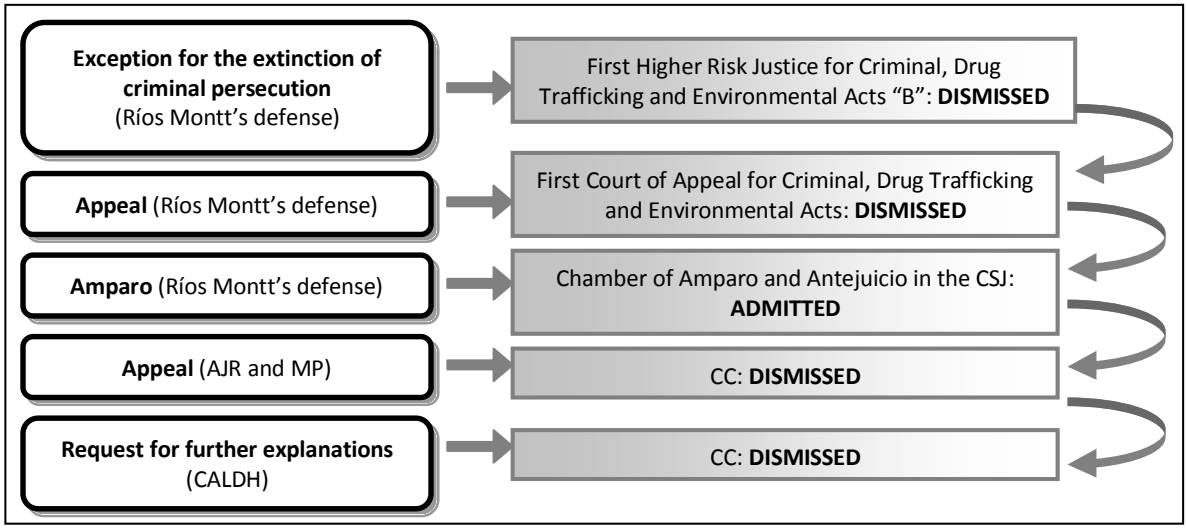
In consequence, the sentence of amparo emitted by the Chamber of Amparo and Antejuicio, was confirmed.

This sentence had two opposing views: Justice Mauro Roderico Chacón Corado and Justice Gloria Patricia Porras Escobar. In their reasoned votes, Justice Porras Escobar stated that: *"the damage against the petitioner is limited to denouncing that the Court of Appeal, in emitting its resolution, applied the National Reconciliation Law to the case, instead of Decree Law 8-86; however… this Court did not examine this supposed damage and instead deviated its analysis to an aspect that was not claimed by the petitioner: the supposed lack of foundation".* And she concludes that: *"the decision in question was indeed duly founded… both the trial justice and the Court of Appeal complied with applying* ***positive valid law*** *to their resolutions… the granting of this petition is useless, since the authority is being obliged to emit a resolution that once again examines the supposed application of Decree Law 8-86… in emitting a new resolution, the Court in question will not be able to arrive to a different decision…"*[xxxiv]**.**

*"…The decision in question was indeed duly founded… both the trial justice and the Court of Appeal complied with applying positive valid law to their resolutions…"*

As can be reckoned, the request for the extinction of criminal persecution derived in a nonsensical discussion since the Justice for Court B had properly complied with clearly explaining the reasons why it could not grant Ríos Montt's request to remove his alleged accountability for genocide and crimes against humanity due to such measures being in direct violation of not only valid national law but also international law standards. On October 24 2013, the Center for Legal Action in Human Rights (CALDH, in its Spanish initials) and the AJR requested the CC for further explanations, but were rejected[xxxv].

**Fig. 1. Presentation and incidents**




Source: elaborated by IW

## Execution

After the *amparo* resolution in favor of Ríos Montt was firm, on November 5 2013 the CC sent the order of execution and the respective file back to the Supreme Court of Justice, in order for it to submit it back to the Appeal Court who was to comply with the CC's order to emit a new "*properly*

*founded*" resolution. On November 26 the Appeal Court received the documents; therefore, having five days to emit a new resolution[xxxvi].

Since the titular magistrates for the Appeal Court had excused themselves from carrying on with the case, the Court had to be integrated with the substitute magistrates. However, one of them, Frank Manuel Trujillo Aldana, excused himself due to being a sibling of Héctor Efraín Trujillo Aldana, who, as a substitute magistrate in the CC, signed the sentence confirming the amparo in favor of Ríos Montt; thus, the Appeal Court could not be integrated[xxxvii].

On November 15 2013, the Appeal Court was finally integrated, with Axel Manuel Romero Gerardi as magistrate. However, on November 29 2013 he excused himself and, in consequence, the Court was left incomplete. Since then, sixty magistrates excused themselves one after the other, using laughable excuses not even founded on those causes established in the Judicial Branch Law. President Magistrate Martínez Ruiz sent the CJS a brief detailing the supposed reasons of the justices to excuse themselves, requesting that the case be re-assigned to another court, which happened on January 9 2014[xxxviii].

*When sixty magistrates excused themselves one after the other, the President Magistrate of the First Court of Appeal, sent the CJS a brief requesting that the case be re-assigned to another court.*

On February 13 2014, the CSJ sent the file to the Second Court of Appeals Criminal, Drug Trafficking and Environmental Acts, who received it the following day. Yet, this Court also excused itself arguing that the process was in charge of a Higher Risk system, thus, a Higher Risk court should be in charge in complying with the CC's orders. On February 18, the court sent the file back to the CSJ for it to be re-sent to the correct justice[xxxix].

On February 20, the CSJ sent the file to the Court of Appeals for Higher Risk Criminal Cases and Expired Ownership. This was the third Appeal Court in charge of complying with the CC's order. However, on February 25 the titular magistrates excused themselves, alleging they were familiar with the case[xl]. This time, a period of 24 hours was granted for the parties to place their arguments regarding such excuses; while doing so, both the defense and the accusing attorneys opposed the court's position. In this opportunity, Attorney Francisco García Gudiel questioned the magistrates' decision stating that: *"…what they are doing is evading their responsibilities"*[xli].

By March 4 2014, the Higher Risk Court was finally integrated, but only in order to evaluate the excuses presented by the titular magistrates, in compliance with article 127 of the Judicial Branch Law. On March 6 the substitute magistrates dismissed the titular magistrates' excuses, since emitting a judicial resolution is different from stating an opinion; in consequence, the magistrates were ordered to analyze the case and decide whether amnesty according to Decree Law 8-86 was indeed applicable to Ríos Montt[xlii].

On March 11 2014, Ríos Montt's defense recused the titular magistrates of the Higher Risk Court, after they had been confirmed as responsible of complying with the CC's order. An incident was opened in order to oversee the petition, as ordered by article 131 of the Judicial Branch Law. According with statements made by Attorney Jaime Ernesto Hernández Zamora, the recusal was presented because: *"The magistrates had argued they wouldn't be able to be objective, since they had previously stated their position regarding the subject matter*[xliii]*"*. This only evidenced the intention to obstruct compliance with the CC's order.

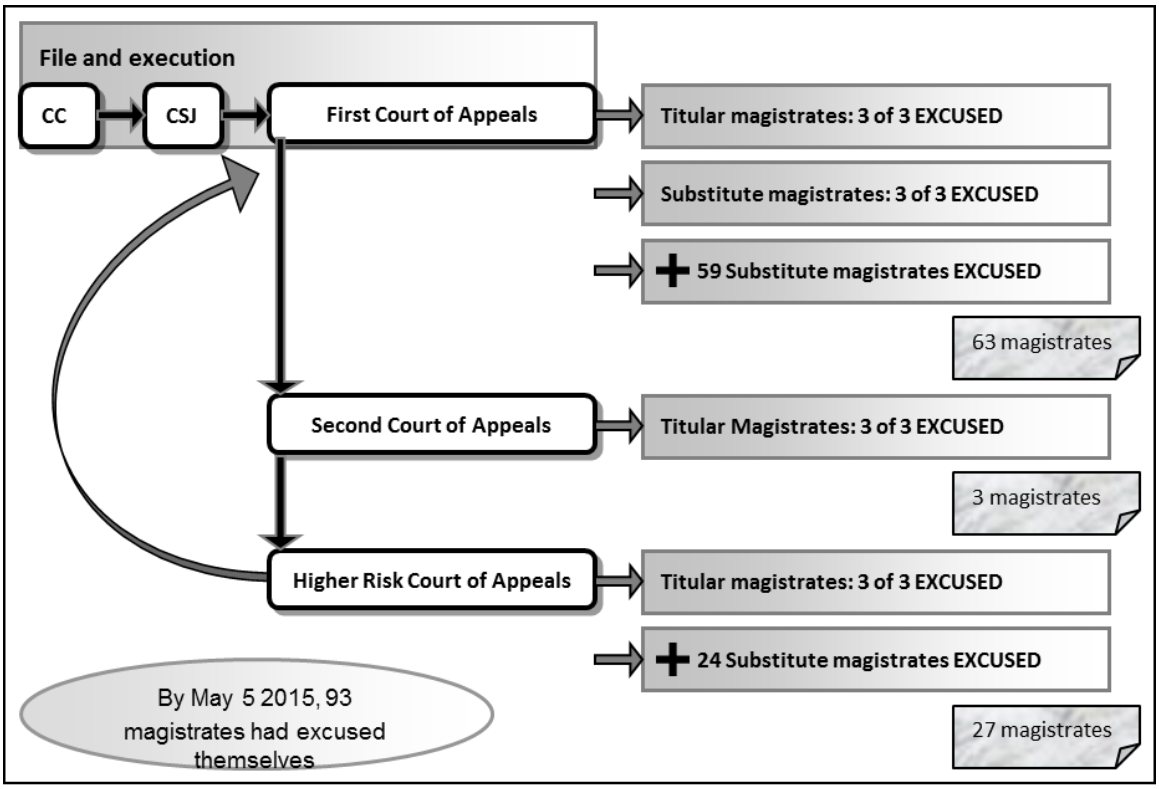
On March 13, the recused magistrates denied the allegations claimed against them by the defense. The titular, Ranulfo Rafael Rojas Cetina, stated: *"It is stated that we have dismissed almost all of Mr. Ríos Montt's requests, and we do not accept their arguments since we have always attended to legal rules without caring who the particular person is*[xliv]*".*

Shortly after, on May 12, the substitute magistrate became part of the long list of justices who excused themselves from taking on the case. Thus, the file was sent back to the CSJ's Secretary for it to give the file to another justice, since the Higher Risk Court was not able to get integrated with any of the 24 substitute magistrates who were called. *By that date, the total number of justices who evaded their responsibility had reached 93*[xlv].

On July 7 2014, the CSJ sent the file back to the First Court of Appeal, which was the original competent court, in order for it to comply with its obligation. Currently, the case is in charge of this court, which remains un-integrated[xlvi].

*By May 12 2014, 93 was the total number of justices who excused themselves in order not to emit a new resolution explaining that Decree 8-86 was not applicable to genocide and crimes against humanity.*

**Fig. 2. Execution**




Source: elaborated by IW

## As conclusion

Everything that happened after the exception of extinction of criminal accountability was presented by Ríos Montt in the "Ixil Genocide" case, evidences the lack of objectivity and impartiality of the justices who excused themselves from complying with the Constitutional Court's order. This created an obstruction of justice, which was made worse by the malicious litigation practices carried out by the defense attorneys who, instead of presenting suitable evidence against the MP's allegations, chose the strategy of presenting frivolous and non-proceeding appeals.

Whoever ends up in charge of complying with the CC's order to emit a new resolution should be aware that, just like any other person in his position, Ríos Montt could have been subject to amnesty in the appropriate moment under the rule of Decree 8-86 (currently abolished) for political crimes and related common crimes committed during the Internal Armed Conflict, as well as for their concealing. *However, amnesty could never have been granted for international crimes such as genocide, since these crimes not only possess a different nature but do not admit the extinction of accountability*. Currently, he also can't be amnestied over the National Reconciliation Law and valid international law, since it belongs to the *ius cogens* rule, meaning that amnesty is not admitted when concerning criminal acts such as genocide, crimes against humanity, forced disappearance or torture, all considered grave offenses against humanity that all States are obliged to investigate, persecute and sanction.

*It is a ius cogens rule, meaning that amnesty is not admitted when concerning criminal acts such as genocide, crimes against humanity, forced disappearance or torture, all considered grave offenses against humanity.*

**Abbreviations and acronyms (in their Spanish form)**

| | |
|---|---|
| AJR | Association for Justice and Reconciliation |
| CALDH | Center for Legal Action in Human Rights |
| CP | Criminal Code |
| CPP | Criminal Procedures Code |
| CEH | Historical Clarification Commission |
| CICR | Red Cross International Committee |
| CAI | Internal Armed Conflict |
| CC | Constitutionality Court |
| CorteIDH | Inter American Court of Human Rights |
| CSJ | Supreme Court of Justice |
| MP | Public Ministry |
| OACNUDH | The Office of the United Nations High Commissioner for Human Rights |
| ONU | United Nations |
| URNG | Unidad Revolucionaria Nacional Guatemalteca – National Guatemalan Revolutionary Unity |

## Notes

[i] Cabanellas De Torres, Guillermo. "Elemental Legal Dictionary". Argentina: Heliasta, 2006, page 31

[ii] OHCHR. "Rule-of-Law Tools for Post-Conflict States. Amnesties". New York and Geneva: United Nations, 2009, page 5, http://www.ohchr.org/documents/publications/amnesties_sp.pdf (consulted on 22/10/2014).

[iii] This article 149 states that: "*Guatemala shall lead its relations with other States, accordingly to* ***international principles, rules and practices,*** *with the purpose of contributing to peace and freedom, to the respect and defense of human rights, to the strengthening of democratic processes and international institutions, in order to secure and guarantee mutual and equal benefit among states".*

[iv] These Conventions were approved by Legislative Decree 881 dated April 16 1952, ratified on April 21 1952 and deposited before the UN on May 14 1952.

[v] Henckaerts, Jean-Marie and Louise Doswald-Beck. "International Humanitarian Common Law", Volume I: Rules, Argentina: Red Cross International Committee (CICR), 2007, page 691.

[vi] Article 6.5 establishes that: "*After the cease of hostilities, authorities in power must procure conceding the widest possible amnesty to all persons involved in an armed conflict or who are imprisoned or detained due to motives related to such armed conflict*".

[vii] Valencia Villa, Alejandro. "Amnesties for human rights violations in Guatemala" (Policy Brief), Guatemala: Impunity Watch, 2014, page 7.

[viii] Hernando Valencia Villa explains that: "*Under [such] neologism taken from the English language, we currently include all the set of theories and practices derived from those political processes through which societies try to come to terms with a past full of atrocities and impunity and provide justice to victims of dictatorships, civil wars and other wide spectrum or long term crisis, with the purpose of moving forward or return to democratic normalcy".* Valencia Villa, Hernando; "An introduction to transitional justice", keynote lecture imparted on the "Julio Cortázar" Latin American Professorship on the University of Guadalajara, Mexico, October 26 2007.

[ix] CEH, Report "Guatemala: Memory of Silence", Volume V "Conclusions and Recommendations", Guatemala: F&G Editores, 1999, conclusion 10, page 23.

[x] Both article 132 BIS and article 201 BIS were added by Decree 48-95 of Guatemala's Congress; article 201 TER was added by Decree 33-96 of Guatemala's Congress.

[xi] CorteIDH. Sentence for the case "González and others (Cotton Field) vs. México", dated November 16 2009, page 75, paragraph 287, http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf (consulted on 10/23/2014). See also the sentences for cases: "Pueblo Bello Massacre vs. Colombia", dated January 31 2006, paragraph 142; "Heliodoro Portugal vs. Panama", dated August 12 2008, paragraph 115; and "Perozo and others vs. Venezuela", dated January 28 2009, paragraph 298. Article 1.1 of the American Convention on Human Rights states that: "*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms…*".

[xii] This article states that: "*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to* ***punish***". The Convention was approved through legislative Decree 704 dated November 30 1949, ratified on December 13 1949 and deposited before the UN on January 13 1950.

[xiii] Henckaerts, Jean-Marie and Louise Doswald-Beck, *op. cit.*, page 687.

[xiv] CC. Sentence for the file numbered 1822-2011, dated July 17 2012, unconstitutionality by omission of article 201 Bis of the Criminal Code, consideration IV.

[xv] CC. Sentence for the file numbered 2151-201, dated August 23 2011, appeal of an action of "amparo". In this sentence, consideration IV, the CC cites the sentence emitted by the CorteIDH over the case "Almonacid Arellano and others vs. Chile", dated September 26 2006, which states the following: "*The Court[IDH] is conscious that internal justices and tribunals are subject to the rule of law and are, therefore, obliged to apply the legal system's valid rules. However, once a State has ratified an international treaty such as the American Convention [on Human Rights], its justices, as part of the State apparatus, are also subordinated to it, which forces them to oversee for the Convention to be applied and never undermined by laws that are opposed to its objective and end".*

[xvi] Paragraph III.A.20 of the Agreement states that: "*Aiming to promote national reconciliation without neglecting the need to combat impunity, the National Reconciliation Law shall include a legal figure that will allow URNG members to be integrated into lawful life".*

[xvii] CEH, *op. cit.*, page 72. As explained before, article 149 of the Republic's Political Constitution – which is an internal rule – recognizes full applicability of international common law.

[xviii] Salgado Pesantes, Hernán; "Lessons in Constitutional Law", Ecuador: Ediciones Abya-Yala, 2003, Volume 1, Second edition, pages 144 and 145.

[xix] Article 2 of the National Reconciliation Law determines which political crimes admit extinction of criminal accountability; these are crimes against the State's security, institutional order and public administration, contained in articles 359, 360, 367, 368, 375, 381, 385 a 399, 408 to 410, 414 to 416 of the Criminal Code, as well as crimes established in title VII of the Weapons and Ammunition Law (valid in its time, since currently the subject matter is regulated by Decree 15-2009 of the Republic's Congress). For further information, see: Valencia Villa, Alejandro; *op. cit*, footnote 6, pages 2 and 3. Article 4 of the National Reconciliation Law lists all common crimes related to political crimes, as follows: "*articles 214 to 216, 278, 279, 282 to 285, 287 to 289, 292 to 295, 321, 325, 330, 333, 337 to 339, 400 to 402, 404, 406 and 407 of the Criminal Code*". For further information see: Valencia Villa, Alejandro; *op. cit.*, footnote 7, page 3.

[xx] CC. Sentence dated October 7, consideration II, within the accumulated files 8-97 and 20-97, concerning the action of partial general unconstitutionality against the National Reconciliation Law.

[xxi] Article 3 of the National Reconciliation Law.

[xxii] CorteIDH. Sentence for the case "Barrios Altos vs. Peru", dated March 14 2001, page 15, paragraph 41, http://www.corteidh.or.cr/docs/casos/articulos/Seriec_75_esp.pdf (consulted on 10/23/2014). See also sentences for the cases "Velásquez Rodríguez vs. Honduras", dated July 29 1988, paragraph 166; "Almonacid Arellano and others vs. Chile", dated September 26 2006, paragraph 110; and "Gomes Lund and others ("Guerrilha do Araguaia") vs. Brasil", dated November 24 2010, paragraph 137.

[xxiii] Article 8 states that: "*Laws are to be abolished by posterior laws: a) By **express declaration** in the new law; b) Partially, by incompatibility of rules between the latter and the former; c) Totally, by a new law that completely regulates the subject matter previously regulated in the former law; d) Totally or partially, by a declaration of unconstitutionality dictated in a firm sentence by the Court of Constitutionality. The declaration of abolishment of a law does not make previous laws valid".*

[xxiv] This law was authorized on January 10 1986 and became valid on the 14 of that same month and year.

[xxv] Its article 1 states: *Decree 32-88 of the Republic's Congress is hereby abolished, as well as any other law or legal disposition previous to 1996 that might concede an amnesty for political crimes and related common crimes, committed by any person in any time".*

[xxvi] CC. Sentece for the file numbered 1933-2012, dated August 13 2013, concerning the appeal of the action of "amparo" presented by López Fuentes, consideration III.

[xxvii] The attorneys in charge were Francisco José Palomo Tejeda and Luis Alfonso Rosales Marroquín, and the justice in charge was Miguel Ángel Gálvez Aguilar.

[xxviii] With information from: Prensa Libre Newspaper, "Ríos Montt is denied amnesty and the genocide process will go on", news in the Justice Section dated March 01 2012, http://www.prensalibre.com/noticias/justicia/MP-cierre-amnistia-Rios-Mott_0_655734584.html (consulted on 10/24/2013).

[xxix] CC. Sentence for accumulated files 1523-2013 and 1543-2013, dated October 22 2013, dissident reasoned vote by magistrate Gloria Patricia Porras Escobar, page 6.

[xxx] *Ibíd*., page 2.

[xxxi] *Ibíd*., page 4.

[xxxii] *Ibíd*., page 5.

[xxxiii] *Ibíd*., pages 20 and 21.

[xxxiv] *Ibíd.*, dissident reasoned vote by magistrate Gloria Patricia Porras Escobar, pages 5 and 8.

[xxxv] With information from: La Hora Newspaper, "Amnesty for Ríos Montt will not be decided by the Court of Appeals", news dated October 25 2013, http://www.lahora.com.gt/nacional/guatemala/actualidad/185854-amnistia-a-rios-montt-no-sera-decidida-por-sala-de-apelacion (consulted on 05/16/2014).

[xxxvi] With information from: Emisoras Unidas Radio News, "Ríos Montt Case: Court receives file", news on the National Section, dated November 26 2013, http://noticias.emisorasunidas.com/noticias/nacionales/caso-rios-montt-sala-recibe-expediente; and Contrapoder Magazine, "Court receives file concerning amnesty for Ríos Montt", news on the Current News section, no date, http://www.contrapoder.com.gt/es/edicion30/actualidad/910/Sala-recibe-expediente-acerca-de-amnist%C3%ADa-a-R%C3%ADos-Montt.htm (consulted on 10/24/2014).

[xxxvii] The titular magistrates were Jorge Mario Valenzuela Díaz, Rudy Marlon Pineda Ramírez (both are currently magistrates in the Supreme Electoral Tribunal) and Áxel Otoniel Maas Jácome. The substitute magistrates who confirmed their intervention were: Ramón Francisco González Pineda and Frank Martínez Ruiz (supporting magistrate who overtook as president). With information from: Emisoras Unidas Radio News, "Court calls for substitute magistrates to analyze amnesty for Ríos Montt", news on the National Section, dated November 12 2013, http://noticias.emisorasunidas.com/noticias/_nacionales/sala-convoca-magistrados-suplentes-para-conocer-amnistia-rios-montt (consulte don 10/24/2014); and "Ríos Montt Case: Court of Appeals gets integrated", news on the National Section, dated November 14 2013, http://noticias.emisorasunidas.com/noticias/nacionales/caso-rios-montt-sala-apelaciones-queda-integrada. And Prensa Libre Newspaper, "Magistrate decides to distance himself from the Ríos Montt Case", News on the Justice section, dated November 15 2013, http://www.prensalibre.com/noticias/justicia/Magistrado-decide-separarse-caso_0_1030097014.html (consulted on 10/24/2014).

[xxxviii] With information from: Prensa Libre Newspaper, "Court of Appeals, integrated", News on the Political section, dated November 16 2013, http://www.prensalibre.com/noticias/politica/Integrada-sala-Apelacion_0_1030696974.html; "Magistrate excuses himself from the Ríos Montt amnesty case", news on the Justice section, dated November 9 2013, http://www.prensalibre.com/noticias/justicia/magistrado_Romero_Gerardi-amnistia-Rios_Montt-genocidio_0_1038496363.html; and "Court explains excuse from Ríos Montt case", news on the Justice section, dated January 10 2014, http://www.prensalibre.com/noticias/justicia/Sala-razona-inhibitoria_0_1063693662.html (consulted on 10/24/2014).

[xxxix] The Second Court of Appeals was integrated by the titular magistrates Artemio Rodulfo Tánchez Mérida, Fausto Corado Morán, and Héctor Ricardo Echeverría Méndez. With information from: La Hora Newspaper, "Court receives file for Ríos Montt amnesty", news on the Current News section, dated February 15 2014, http://issuu.com/lahoragt/docs/diario_la_hora_15-02-2014; Siglo 21 Newspaper, "Second Court receives amnesty case", news on the National section, dated February 15 2014, http://www.s21.com.gt/nacionales/2014/02/15/sala-segunda-recibe-proceso-amnistia; and Prensa Libre Newspaper, "Court rejects analyzing case against generals accused of genocide", news on the Justice Section, dated February 18 2014, http://www.prensalibre.com/noticias/justicia/derechos_humanos-conflicto_armado-genocidio-militares_0_1087091513.html (consulted on 10/24/2014).

[xl] The titular magistrates were Ranulfo Rafael Rojas Cetina, Hugo Roberto Jáuregui, and Aura Marina Guadrón Díaz. They excused themselves citing a resolution dated October 8 2012, through which they denied the application of article 11 of the National Reconciliation Law, which denied the dismissal of the "Ixil Genocide" case against Ríos Montt, López Fuentes and Rodríguez Sánchez. With information from: Prensa Libre Newspaper, "CSJ assigns Ríos Montt case to Higher Risk Court", news on the Justice section, dated February 20 2014, http://www.prensalibre.com/noticias/justicia/caso_rios_montt-traslado_de_expediente-sala_de_mayor_riesgo_0_1088291323.html; and "Court rejects analyzing Ríos Montt amnesy request", news on the Justice section, dated February 26 2014, http://www.prensalibre.com/noticias/justicia/Sala-rechaza-conocer-solicitud-amnistia_0_1091890819.html (consulted on 10/24/2014).

[xli] With information from: Siglo 21 Newspaper, "Legal action against magistrates", news on the National Section, dated February 27 2014, http://www.s21.com.gt/nacionales/2014/02/27/accionan-contra-magistrados (consulted on 10/24/2014).

[xlii] The substitute magistrates who integrated the Higher Risk Court in order to analyze the excuses presented by the titular magistrates were Ramón Francisco González Pineda, Frank Manuel Trujillo

Aldana, and Luis Felipe Lepe Monterroso. With information from: Siglo 21 Newspaper, "Ríos Montt case: new set of justices integrated", news on the National Section, dated March 5 2014, http://www.s21.com.gt/nacionales/2014/03/05/caso-rios-montt-se-integra-nueva-terna; Prensa Libre Newspaper, "Substitute magistrates will analyze excuse from Ríos Montt amnesty case", news on the Justice section, dated March 4 2014, http://www.prensalibre.com/noticias/justicia/rios_montt-amnistia-excusa-sala_de_apelaciones_de_mayor_riesgo_0_1095490562.html; and Publinews Newspaper, "Ríos Montt Case: ordered to analyze amnesty", news on the National section, dated March 7 2014, http://www.publinews.gt/index.php/caso-rios-montt-ordenan-que-se-conozca-la-amnistia/ (consulted on 10/24/2014).

[xliii] At the same time, the defense presented **an appeal** (recurso de reposición) against the resolution that dismissed the titular magistrate's excuses, arguing that the substitutes were not entitled to order the titulars to emit a new resolution regarding the amnesty in Decree Law 8-86. With information from: Prensa Libre Newspaper, "Ríos Montt recuses titular justices in Court", news on the Justice section, dated March 12 2014, http://www.prensalibre.com/noticias/justicia/Rios-Montt-recusa-titulares-sala_0_1100289977.html (consulted on 10/24/2014).

[xliv] With information from: Nodal, "Guatemala: magistrates reject recusal requested by Dictator Ríos Montt", news on the Guatemala section, dated March 14 2014, http://www.nodal.am/2014/03/guatemala-magistrados-rechazan-pedido-de-recusacion-presentado-por-el-dictador-rios-montt/ (consulted on 10/24/2014).

[xlv] With information from: Prensa Libre Newspaper, "No one wants to analyze Efraín Ríos Montt amnesty", news on the Justice section, dated May 3 2014, http://www.prensalibre.com/noticias/justicia/Nadie-resolver-amnistia-Rios-Montt_0_1137486255.html (consulted on 10/24/2014).

[xlvi] With information from: Prensa Libre, "Once again, Court receives genocide case", news on Justice section, dated July 9 2014, http://www.prensalibre.com/noticias/justicia/genocidio-expediente-Rios_Montt-proceso-amnistia_0_1171683180.html (consulted on 10/24/2014).