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Impunity Watch is a Netherlandsbased, international non-profit organisation 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 nonrecurrence of violence. We work closely with civil society organisations to increase their influence on the creation and implementation of related policies.

Policy Brief: Regulatory and Practical Obstacles to Justice in Guatemala

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Summary

Despite enormous efforts to achieve progress towards justice in Guatemala, there are still some major obstacles to fighting impunity in the country, generating violence and social mistrust. According to IW's Monitoring findings from 2012, evident progress made by effective prosecutions can be observed, but at the same time new obstacles have arisen that question the judiciary's role in fighting impunity. Traditionally, efforts for reforming the justice sector in Guatemala have focused on promoting normative and institutional reforms, but little attention has been paid to some practical obstacles, whose effects on actual levels of impunity and the social perception of justice should be tackled immediately. Besides the challenges posed by several inadequate or inconvenient existing laws, practical obstacles, namely the judiciary's lack of independence, generalised reckless litigation strategies, an excessive use of procedures and formalistic actions, and the culture of exceptionalism are negatively affecting efforts against impunity in Guatemala. As a consequence of those obstacles, justice in Guatemala is still characterised by legal uncertainty and a politicised legal order susceptible to private interests. Both phenomena seem to contribute to a sustainable cycle of impunity, violence and lack of access to judicial remedies. Recommendations for normative and practical measures to combat such obstacles are provided at the end of this document.



General view on Justice in Guatemala

Despite enormous efforts made by the state, civil society and the international community in Guatemala, impunity is still one of the most persistent phenomena impeding the consolidation of a structural democracy and reconciliation. IW has identified that major challenges for overcoming impunity as a state policy include: limited state reform and the persistence of elite groups; misuse of and non-compliance with the law; limited state resources, capacity and control mechanisms; limited independence and willingness of the prosecution and judicial system; the persistence of racism and inequality in Guatemalan state and society; and a lack of institutional political will to combat impunity (IW, Recognising the Past, 2008).

Since late 2010, three specific factors have contributed to boost the state's capacity to prosecute human rights violations, namely: the work and criminal policies implemented by the current Attorney General; the ruling of the Supreme Court's Criminal Chambers recognising the automatic incorporation of international judgments regarding human rights; as well as a particular political opportunity presented during 2011, because of the *Dos Erres* Judgment and the end of judicial privileges of General (r) Efrain Rios Montt (along with the end of period as a Congressman). Each of these factors are part of a process supported technically and financially by the UNDP and other donors.

This outstanding progress in terms of criminal justice for human rights abuses has encouraged new prosecutions and achieving new goals, but also revealed the need to discuss about the role to be played by the judiciary in fighting impunity in Guatemala.

Judiciary and Impunity in Guatemala

The more progress is made in the prosecution of high profile cases (human rights violations, organised crime, violence against women, etc.), the more questions can be

asked about the role played by the judiciary, particularly its willingness and its capacity for combating structural impunity in Guatemala. According to IW's monitoring findings in 2012, impunity in Guatemala follows a cyclic pattern, the elements of which include social and legal structures that reproduce violence and social distrust in state authorities (see figure). Although the judiciary plays a critical role to break this cycle, some common practices tend to reproduce it.



The main obstacles to overcome the judicial effects of impunity in Guatemala are both practical and regulatory. However, most efforts have been deployed to tackle regulatory challenges, despite the fact that the practical obstacles actually produce deeper and longer-lasting effects in society.

Impunity Watch, Recognising the Past (2008):

[...] the Criminal Justice System not only violates victims' fundamental rights regarding access to swift and effective justice, but also permits the perpetrators to continue acting with complete impunity. This situation becomes even more serious when suspected perpetrators are holding public office. The lack of justice also favours the omnipresence of impunity in the public imagination: if the state tolerates the most serious crimes, how can one expect justice for other types of crime?





Inter-American Court of Human Rights. Dos Erres Judgment v Guatemala (2009):

The Court notes that amparo legal regulations, the lack of due diligence and tolerance by the domestic tribunals when deciding them, as well as the lack of an effective judicial protection, have allowed the abusive misuse of amparo pleadings as a dilatory strategy.

IW. Report on Entrenched Interests in Guatemala (2013):

Social exclusion, impunity and clientelism have created an economy based on systematically utilizing public resources and public violence for private ends. In other words an economy of authoritarianism has emerged in which the private and the public sphere became increasingly indistinguishable.

Regulatory obstacles that favour judicial impunity

It is well known that the design of the justice system in Guatemala has flaws that favour impunity. Some initiatives for reforming justice institutions have been promoted by national and international, state and non-state actors. Initiatives for constitutional reform have focused on two major areas: improving the Guatemalan justice institutions and improving the domestic legal provisions by correcting loopholes, as well as changing troublesome laws.

Proposals to improve the Guatemalan institutions address the independence of the judiciary by strengthening the judicial profession and the evaluation system of the judges' performance, as well as removing administrative duties from judges and magistrates as a way of reducing their dependence on the Executive branch.

In order to improve the domestic legal provisions, some reforms have tried to incorporate several key international legal standards, such as the adhesion to the Rome Statute of the International Criminal Court and the promotion of a proper interpretation of existing laws, in order to fight the abuse of legal procedures, as pointed out by the Inter-American Court of Human Rights in *inter alia* its international judgments in the cases *Dos Erres, Chitay, Mack* and *Villagran*.

However, the implementation of normative proposals to improve justice in Guatemala has faced three problems: politicisation, superficiality, and the influence of entrenched interests. Systematically, proposals for constitutional reform of the judiciary have been trapped by political power games in Congress, where the Executive and different official and opposition factions extort, delay and trim any initiative to fit their private/partisan interests, or simply block any regulatory initiative as part of an opposition strategy to reduce the Government's freedom. This dynamic has led to a virtual paralysis of all legislative activity during the last year of President Colom's administration and the first year of President Perez Molina's Government.

In this scenario, groups holding entrenched legal and illegal interests are given a wide open political window to interfere and override any legal reform affecting their spheres of influence. Cooptation of political parties (totally or partially) plays a vicious role in fighting impunity due to the capacity of certain legal/illegal structures to block any attempted reform, changing its spirit and/or diminishing its impact (see IW, Report on Entrenched Interests in Guatemala, 2013).

General and specific institutional reforms are necessary in Guatemala, but they should be envisaged as a long-term, state policy. For this reason, attention should be paid to forging stable political alliances towards their approval. Social legitimacy of reforms should also be considered, as an effective way of exerting pressure on the lawmakers to address the issue in a straight and accountable manner, granting a better legal output.

On the other hand, apart from the intentional action of structures protecting the cycle of impunity, the superficiality of judicial reforms (as they were proposed) should also be taken into account. Certain specific parts of judicial reform initiatives will not produce their intended impact, since they attack symptoms, but not the causes of the problems producing impunity in Guatemala. It is yet to be proven how changing some procedures will grant real judicial independence. For instance, some measures proposed for Guatemala are relevant in the contexts from which they are proposed, but not necessarily relevant to the Guatemalan context. Although such measures may be effective, it is yet necessary to assess their suitability for the Guatemalan context prior and after their implementation.



National Reconciliation Law. Guatemala (art. 8):

Extinction of criminal responsibility included in this law will not be applicable to the crimes of genocide, torture and forced disappearance, as well as to all other imprescriptible crimes or crimes that do not allowing extinction of criminal responsibility, according to domestic laws or international treaties ratified by Guatemala.

Mr. Antonio Arenales Forno, Guatemalan Secretary of Peace, **Speech to the UN Human** Rights Council (2012):

"The judicial process challenging the Amnesty, prevent or make impossible to carry out investigations and recording testimonies [...] The Government expects that the superior courts of Guatemala will settle the debate on the legal effects and scope of the Amnesty soon, in order to facilitate reconciliation processes" (A/HRC/WG.6/14/L.6)

Nevertheless, although regulatory obstacles favour impunity in Guatemala, practical obstacles have an even greater impact, due to their correspondence with certain social perceptions about the judiciary and its role in a socio-political community.

Practical obstacles that favour judicial impunity

According to IW, obstacles coming from common judiciary habits are posing greater challenges to fighting impunity in Guatemala than the regulatory ones. According to IW's Monitoring findings, the four major practical obstacles observed in Guatemala are the judiciary's lack of independence, the generalised use of reckless litigation strategies, an excessive use of procedures and formalistic actions, and the *culture of exceptionalism*.

a. Judiciary's lack of independence

Beyond the fact that the structure of Guatemalan state's institutions contributes to a judicial dependence on the Executive and Legislative branches, the daily practice of the judiciary itself reproduces a strict hierarchy, where lower judges tend to decide their cases according to orders given by higher judicial spheres, despite the formally recognised judicial independence in the cases they decide. Usually covert (but sometimes overt) pressure is exerted by higher judges connected to political and economic power on decisions to be made by lower judges. A key example of this situation is the Siekavizza case, in which a lower criminal judge requested the Constitutional Court's permission to determine which criminal code's provisions should be applied to the trial of a former magistrate for her participation in the disappearance of her daughter-in-law. When higher courts openly dictate specific daily procedural decisions to be made by lower judges, their actual independence to determine rights and duties among the parties to a criminal process is severely undermined.

Another pertinent example of pressure exerted upon judges when deciding criminal cases is provided by the Government itself, since some of its high agents have declared to the press that any judge processing members of the military for cases related to the armed conflict is committing a criminal offence and should be jailed, due to amnesty laws in force since 1996 (Secretary of Peace discussing progress in the Genocide case against a former Head of State). Despite the fact that Guatemalan law (National Reconciliation Law, art. 8) prohibits amnesty for gross human rights violations, it is the judge's task to make a decision on these matters, not the Government's.

In a country with a strict hierarchical structure, these kind of comments can clearly affect judges' willingness to decide cases and legal matters according to their own criteria. Therefore, judicial independence is profoundly threatened.

b. Generalised reckless litigation strategies

Reckless litigation can be regarded as a judicial tradition in Guatemala. Added to the inherent delay of judicial procedures in the country, every litigation action and mid-term decision is usually followed by a kafkian set of appeals and reconsideration pleadings filed at the deciding tribunal and its superiors. This way, the duration of any judicial process becomes irrationally long. Civil, administrative, fiscal, but particularly criminal trials are simply taking too long from start to end. Moreover, the virtual inexistence of sanctions against reckless and/or dilatory litigation strategies (neither the judges nor the Lawyers' Bar impose real sanctions), apart from the fact that disciplinary trials for lawyers are also very lengthy, make it especially convenient for lawyers and their clients to saturate every single trial with reconsiderations, objections and appeals, buying time for changing judges,







CICIG Report, "Impunity Judges" (2012):

Based on Guatemala's experience of abuse of judicial remedies, it is possible to identify a strictly procedural impunity. Although this strategy comes from a normative flaw, the abuse of judicial remedies as a dilatory measure turns judicial cases into complex and procedures, whose result may be unexpected and contrary to legitimate expectations of justice.

Inter-American Court of Human Rights. Rio Negro Massacres v. Guatemala Judgment (2012):

"[when dealing with] systematic and massive gross human rights violations, the state must use the proper legal tools for analysing the case, penal categories that correspond to the nature of the facts under investigation".

exerting the right influence, exhausting the other party, or 'disappearing' evidence.

Human rights cases are not an exception to this rule. Considering the Genocide case only, IW has registered 35 dilatory pleadings and appeals in 16 months, 20 of which were rejected by tribunals, who found them "impertinent" (dilatory/non-sense) and/or openly "illegal". The remaining 15 pleadings are still pending a decision. There were virtually no consequences nor reprimaneds for the defendants / lawyers misusing these judicial procedures, with only 1 fine (out of 35 pleadings) imposed on the defendant's lawyers.

Systematic unsanctioned reckless litigation affects the length of the cases, delaying justice. Also, this judicial flaw implies that more human, economic and material resources are spent in every single case, making litigation more expensive for the judiciary, the Prosecution Office and the victims. Yet perhaps the most vicious effect is that it promotes impunity and a negative social perception of the judiciary and judicial procedures as a conflict resolution instrument, labelling it as an "ineffective system". Moreover, a negative perception of the judicial settlement of social disputes has proven to be a trigger for violence and private justice as an alternative for conflict resolution, generating even more impunity.

c. Excessive use of procedures and formalistic actions

As is expected in a *continental law country*, literal interpretation of legal statutes (exegesis) is regarded as a general rule for both judicial and non-judicial purposes. However, Guatemalan legal practice has developed a particular habit of using the results of exegetical interpretations as mandatory rules, despite eventual contradictions with generally accepted principles of legal logic. This leads to judicially-nonsensical decisions, some of which result in impunity in human rights cases.

For instance, in the Genocide case, some mid-term judicial decisions made in 2012 are based on arguments that challenge usual logical principles governing judicial behaviour. According to the judicial decision, it is possible to concede house arrest to a defendant charged with genocide, since the Criminal Procedural Code does not provide mandatory remanded custody for that specific crime, despite the fact that by definition, the crime of genocide would imply the perpetration of multiple murders, which in itself is a crime that demands obligatory remanded custody during trial. In legal logic, this decision goes against the principle of proportionality, since a more serious action is receiving a softer sanction. The following figure compares the real practice observed and its logical analysis.

Such decisions contribute to the incoherence of the judicial decisions, legal uncertainty as well as to a social perception of injustice, as a result of a lack of legal proportionality.

By providing a distorted perspective of justice in particular cases (including socially relevant human rights cases), this excessive legal formalism may contribute to impunity, since achieving adequate convictions for grave crimes demands an (often unnecessary) enormous amount of evidence, as well as the twisting of statutory and procedural law in such a way as to fit it in a rigid grammatical reasoning without any guarantees of predictable/logical outputs.

Moreover, this practice has been extended over such a large amount of time, that even some Guatemalan constitutional provisions may also contribute to impunity by openly obstructing criminal investigations, such as the rule stating that a judicial house search can only be conducted *from 6 to 18 hours* (Guatemalan Constitution, art. 23). The prohibition of unlawful interference to private life and home is internationally recognised as a human right (ICCPR, art. 17), but limiting the time for executing judicially authorised searches





¹ According to the case law and judicial precedent from the ICTR and ICTY, of course, the *actus reus* of genocide can be committed through a single murder or indeed through other acts including serious bodily harm. It is the *special intent* that is the key factor in the perpetration and prosecution of the crime.

Special Rapporteur on the Promotion of Truth, Justice, Reparation and Non-Recurrence, Pablo de Greiff. Report to HRC (2012):

Criminal trials that offer sound procedural guarantees and that do not exempt from the reach of justice those who wield power demonstrate the generality of law;

Impunity Watch Monitoring findings (2012):

Only when the parties to judicial cases are effectively discouraged of pleading exceptional rules to every single case, the set of domestic tribunals will acquire (in practice) their constitutionally provided authority to allocate legal rights and responsibilities within judicial procedures.

verges on an unparalleled excessive measure, which may impede legitimate criminal prosecutions.

Why, if previously authorised by a judge within a criminal investigation or trial, would a house search conducted during night time breach the right to private life and home?

According to Guatemalan prosecutors and judges questioned by IW, the rigid application of this provision has enabled impunity in important criminal cases by facilitating suspects' runaway, information leaks, loss of evidence or judicial dismissals of evidence collected during these operations.

d. The *culture of exceptionalism*, concentration of judicial decisions and the rise of a *Super-Tribunal*

It is hence clear that Guatemalan justice is *de facto* obstructed by the systematic misuse of exceptional procedures fostered by formalistic literal interpretations of legal statutes, lack of internal judicial independence, and reckless litigation strategies. Particularly, there is also an abusive misuse of constitutional remedies as a way for delaying and/or reversing adverse judicial decisions. As a consequence of this culture, constitutional human rights are systematically degraded to procedural *wildcards* to be played in a wide range of unnecessary circumstances.

When justice provides no logical results, society will not appeal to a whimsical system, while private justice and violence will be consequently encouraged as informal yet reliable means for conflict resolution.

The main impact of exceptionalism on justice is the virtual reduction of the entire Guatemalan legal system (both statutory and procedural law) to the constitutional laws and, consequently, the reduction of the whole judicial branch to the Constitutional Court. By such a reductionism, this particular Court is given an omnipotent power to rule in any judicial case regardless of its original nature (civil, criminal, fiscal, labour, etc.) since, as a matter of fact, all cases will not be considered finished until a judgment is delivered by the Constitutional Court within an *Amparo* (subjective constitutional protection) case.

In a country with serious problems of lack of judicial independence and entrenchment of private (legal/illegal) interests into public affairs (see IW, Report on Entrenched Interest in Guatemala, 2013), an excessive concentration of power in one particular judicial institution (the Constitutional Court) to determine legal rights and responsibilities represents a wide open door to corruption, partiality, impunity and the politicisation of justice, among other phenomena contrary to the principles of equality before the law, the rule of law and the necessary checks and balances of a democratic state.

This cumbersome circle of influences and entrenched interests is reinforced by the revolving door that permits the appointment of practicing lawyers as High Courts' justices. By means of these legal provisions, it is impossible to regulate that some judges and former judges' combine the exercise of a judicial position with their private legal practice.

Currently, the continuation of the Genocide case, a tax revenues law and a Rural Development Law are simultaneously pending crucial decisions by the Constitutional Court, showing the level of actual power concentrated in this particular organ. According to IW's Monitoring findings, this power is not observed in any other Guatemalan Court.

In such a scenario, the appointment of the Constitutional Court's Justices becomes critical, since some persons or structures can guarantee a practical immunity/impunity for themselves and their partners. Normative changes, such as changing the High Courts' appointment procedure, are however not enough to prevent active/passive miscarriage of



IW Monitoring findings (2012):

During the preliminary stages of the Genocide case taking place before Guatemalan criminal courts, IW registered 35 dilatory pleadings and appeals in 16 months.

Guatemalan Constitution, art.216:

"To be appointed as Supreme Court Justice, it is required to [...] have served a whole period as judge of appeals or equivalent tribunals, or demonstrate more than ten years of private legal practice"

"When they talk about justice, we are overwhelmed, because we don't even know the first steps necessary to proceed [...] we are frightened to start a judicial process [...] Knowledge would empower us as victims"

(Santa Lucía Coztumalguapa's group member)

"It is generally known that judges and others have no political will to decide [human rights] cases; therefore cases show no progress"

(Coban's social leader)

justice, since the core problem is the excessive concentration of judicial power by a super Court capable of interfering with any other tribunal/state branch.

Likewise, decentralisation of actual judicial power will not be enough as long as there is abuse of exceptional procedures as a systematic way of delaying/reversing decisions by the parties to a particular case.

Only when the parties to judicial cases are effectively discouraged from pleading exceptional rules to every single case will the set of domestic tribunals acquire (in practice) their constitutionally provided authority to allocate legal rights and responsibilities within judicial procedures.

By decentralising the judicial decision centres, the traffic of influences, corruption and judicial cooptation is discouraged, generating a window of opportunity for effective judicial independence, equal access to justice and the combat of sources of impunity.

Effects of obstacles to Justice in Guatemala

As a consequence of regulatory and practical judicial obstacles, justice in Guatemala is characterised by its legal uncertainty and its adjustable (politicised) legal order. Both phenomena contribute to a vicious cycle of impunity, violence and lack of access to justice.

Legal uncertainty comes from the fact that Guatemalan laws (including their creation and implementation) do not meet reasonable standards of coherence, certainty and logic enough for generating social trust towards the judicial system and the judiciary. On the contrary, fear, discontent, lack of ownership and doubts about legal efficacy are common social perceptions towards both the Guatemalan justice system and the judiciary.

Adjustable (politicised) legal order means that the excessive concentration of actual judicial power and the lack of judicial independence may unduly influence judicial decisions, prioritising political, instead of legal reasoning. Therefore, legal reasoning in a particular case becomes unimportant, as long as the decision is convenient.

This perception is reinforced by the social feeling that having some economic, political or social power is a necessary prerequisite in order to effectively access justice.

According to IW's Monitoring findings, the less power people have, the less they feel that justice is accessible to them. Indeed, according to social perceptions, justice in Guatemala is conditional upon levels of influence and money.

Regarding human rights cases, delays, uncertainty, too many formalistic procedures and the influence deployed by the defendants before the courts corrode the victims' optimism in obtaining justice. Most local victims' organisations think that only those human rights cases that are politically/financially supported by international cooperation have a chance to succeed, not because of the victims, but because of their sponsors' influence.

"Victims are losing their spirit and their trust in justice, because cases show no progress. Justice loses credibility with the victims. It's even harder when people don't have much money or if they don't speak Spanish" (Coban's social leader)

Special Rapporteur on the Promotion of Truth, Justice, Reparation and Non-Recurrence, Pablo de Greiff. Report to HRC (2012):

Judicial institutions,
particularly in contexts in
which they have
traditionally been
essentially instruments of
power, show their
trustworthiness if they can
establish that no one is
above the law

Recommendations

The complex nature of regulatory and practical obstacles to justice in Guatemala can only be overcome by a combination of measures to be taken by a wide range of national, international, state and non-state actors, according to their different roles and influence on society.

Measures to tackle the abovementioned obstacles can be divided into legal reforms and practical measures.

Legal reforms should be implemented as *state policies*, not attached to governmental programmes, in order to guarantee their long-term implementation and support. Additionally, any legal reform should demonstrate its *suitability and adequacy*, taking into account Guatemala's ethnic, geographic and economic diversity, as well as the social context in which such reform will be implemented. Finally, any legal reform should be the *result of a transparent and inclusive process*, avoiding eventual cooptation by groups holding entrenched interests, while promoting ownership by a wide scope of civil society actors in both urban and rural areas.

Practical measures for tackling obstacles to justice in Guatemala should include training to judicial operators, political support and the improvement of the judiciary's accountability, among others.

Capacity-building initiatives to judicial operators should focus on **practical techniques** instead of the usual theoretical training. All capacity-building efforts should include relevant international standards, but also **legal thinking**, **argumentation techniques and procedural principles**. Finally, training should include a **specific evaluation and follow-up strategy** in order to verify the content's actual implementation by trainees.

To effectively promote and guarantee healthy levels of judicial independence, national and international *political support to the Judiciary* should include a well informed permanent process, where judges and other judicial operators can freely express their concerns and *identify the major obstacles to their independence and authority*, focusing on practical (not normative) challenges to their social function. Nevertheless, political support should always be accompanied by an *effective accountability system*, through which national and international supporters of the Guatemalan judiciary are able to *demand adequate behaviour of the judiciary*, *according to their democratic role* and the social expectations of the judiciary in combating impunity and strengthening the rule of law in Guatemala. This means implementing a *quid-pro-quo* among the judiciary and Guatemalan society, in which *socio-political support to the judiciary is built upon the judges' verifiable commitment to independence, technical capacity and honesty*.

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