

pflichtungen der Republik Guatemala liegt viel eher in seiner Anwendung als in einer positivistischen Analyse der Vereinbarkeit dieses Gesetzes mit den von Guatemala ratifizierten völkerrechtlichen Verträgen.

– Guatemala –

I. Brief History of the Genocide

Guatemala has been wrought by an armed confrontation for thirty-six years. In 1954, opponents to his government, sponsored by the United States¹ overthrew the democratically elected government of *Jacobo Arbenz Guzmán*;² the President was forced into exile. The Operation PBSUCCESS marks the beginning of a process of repression and intolerance that leaves no space for political participation.

After a rebellion of army officers in 1960,³ some of the rebels join together with students' groups and an armed grouping whose members are mainly belonging to the Partido Guatemalteco de Trabajadores (PGT)⁴ to found the Fuerzas Armadas Rebeldes (FAR)⁵ as an expression of the need to resolve the political conflicts by

1 Documents recently released by the CIA detail US involvement in the toppling of the *Arbenz* government. These include a training manual containing instructions on how to conduct a conference room assassination. See the study of the CIA history-staff member *Nicolas Cullather*, *Operation PBSUCCESS. The United States and Guatemala 1952-1954*, and Anonymous, *Training file of PBSUCCESS, A Study of Assassination* (available through <http://www.seas.gwu.edu/nsarchive/NSAEBB> [03/06/99]). About the overthrow of *Arbenz* see also the studies of REMHI (*Recuperación de la Memoria Histórica*), *Guatemala Nunca Más*, Vol. III (*El Entorno Histórico*). Guatemala 1998, pp. 15 et seq., and CEH, (*Comisión para el Esclarecimiento Histórico*), *Memoria del Silencio (TZ'INIL NA'TAB'AL)*. Guatemala 1999, Chapter I: *Causas y orígenes del enfrentamiento armado*, paras. 78 et seq.

2 For a brief summary of the government of *Jacobo Arbenz*, see CEH, *op.cit.*, paras. 49 et seq.

3 On the reasons of that rebellion, see CEH, *op.cit.*, Chapter I, paras. 137 et seq.

4 Guatemalan Workers' Party; for a brief summary of the revolutionary background and the role of the members of the PGT in the armed confrontation see CEH, *op.cit.*, Chapter I, paras. 337 et seq. and Chapter II Vol. 1: *Estrategias y mecanismos de las partes*, paras. 773 et seq.

5 Rebel(lious) Armed Forces.

other means than parliamentary opposition, the guerrilla war.⁶ During the 1970s, dissidents of the FAR form the Organización (Revolucionaria) del Pueblo en Armas (ORPA)⁷ and the Ejército Guerrillero de los Pobres (EGP).⁸ In February of 1982, the organisations FAR, ORPA, EGP and a faction of the PGT unite in the Unidad Revolucionaria Nacional Guatemalteca (URNG).⁹

As the armed resistance grows so does the number and gravity of the violations of human rights, in the name of a state-ordered counter-insurgency program, directed at eliminating the rebels as well as all support for them and where the civil population is the most affected.¹⁰ Between the years 1966-68, under the elected government of the Christian Democrat *Julio Méndez Montenegro*, death squads kill progressive leaders in the capital and a huge number of peasants in the countryside.¹¹ These killings continue under the regime of Colonel *Carlos Manuel Arana Ósorio*, from 1970 to 1974, with innumerable people being killed.

The most savage and concerted campaign of violence, however, occurs under the administrations of the Generals *Romeo Lucas García* and *Efraín Ríos Montt* when between the years 1978 to 1983, in reaction to growing opposition from civil society, religious groups, indigenous groups and the consolidation of the URNG followed by the intent of an offensive in mid-1981, the successive military govern-

6 For an autobiographical retrospective of a prominent comandante see *Julio César Macías* (nom de guerre *César Montes*), *La Guerrilla fue mi camino*. Guatemala 1998. See also REMHI, op.cit., pp. 32 et seq., and CEH, op.cit., Chapter I, paras. 145 et seq.

7 (Revolutionary) Organisation of the People in Arms.

8 Guerrilla Army of the Poor; for an analysis of a prominent EGP leader, who died in Mexico in 1995, see *Mario Payeras* (nom de guerre *Benedicto*), *Los Días de la Selva*. La Habana 1980 and the communiqué of ORPA, *Historia Nuestra*. Guatemala 1980. See also REMHI, op.cit., pp. 196 et seq., and CEH, op.cit., Chapter I, paras. 238 and 319.

9 Guatemalan National Revolutionary Union, see CEH, op.cit., Chapter II Vol. 1, para. 764.

10 For a description of the counter-insurgency program, which began in the early 1960s as a reaction to the Cuban revolution and the role of several U.S. entities, among them the police and intelligence program of the Public Safety Division of USAID (OPS) and the military counter-insurgency programs IMET and MAP, see generally NACLA, *And so victory is born even in the bitterest hours*. Berkley/New York 1974, pp. 117 et seq., and *Angela Delli Sante*, *Nightmare or Reality*. Guatemala in the 1980s. Amsterdam 1996, pp. 57 et seq. See also REMHI, op.cit., pp. 49 et seq., and CEH, op.cit., Annex I Vol. 1, Caso Ilustrativo No. 68: Los 28 desaparecidos de 1966 and, in the Report, Chapter I, paras. 191 et seq., Chapter II Vol. 1, paras. 214 et seq., Chapter II Vol. 2: Violaciones de los derechos humanos, paras. 466 et seq.

11 The number of victims of the first wave of repression varies from some hundred to several thousands of dead and disappeared persons; see CIIDH-AAAS, *Violencia Institucional en Guatemala, 1960-1996: Una reflexión cuantitativa*. New York 1999, pp. 16 and 41, and REMHI, op.cit., p. 54, and CEH, op.cit., Chapter I, para. 221, Chapter II Vol. 2, para. 137.

ments implement a plan of mass extermination¹² and destruction of hundreds of villages,¹³ leaving a huge part of the population internally displaced and forcing a large part to flee the country.¹⁴

In their final conclusions the Comisión para el Esclarecimiento Histórico (CEH)¹⁵ estimates that the number of persons killed or disappeared as a result of the armed confrontation as a whole reached a total of over 200,000.¹⁶ With reference to the refugees and displaced people the CEH estimates that the number varies from 500,000 to a million and a half people in the most intense period of the campaign of violence from 1981 to 1983, including those who were displaced internally and those who were obliged to seek refuge abroad.¹⁷ The CEH established that among the victims of these atrocities, 83 % belong to the Mayan population.¹⁸ To put these figures in their truly terrifying perspective it must be remembered that Gua-

12 For the acts of barbarism committed from Guatemalans against Guatemalans see CEH, op.cit., Chapter II Vol. 1, paras. 65 et seq., and more "specifically", Chapter II Vol. 2, paras. 538 et seq. (torture), paras. 384 et seq. (forced disappearances), Chapter II Vol. 3: Violaciones de los derechos humanos, paras. 1 et seq. (massive violations of women), paras. 136 et seq. (boys and girls as victims of the savage acts), and paras. 703 et seq. (massacres).

13 The so-called "operations of punishment and scorched earth"; see CEH, op.cit., Chapter II Vol. 1, paras. 25 and 46.

14 For the so-called "Operation of displacement" see CEH, op.cit., Chapter II Vol. 1, paras. 32 et seq.

15 Historical Clarification Commission of Guatemala. The CEH had been formed based on an agreement between the Government and the UNRG as part of the Peace Agreements (Acuerdo sobre el Establecimiento de la Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos y los Hechos de Violencia que han causado Sufrimientos a la Población Guatemalteca. Oslo, 23 June 1994, reprinted in: UN Doc. A/48/954-S/1994/751, Annex II, 1 July 1994). Her co-ordinator was the German Professor of International Law Dr. *Christian Tomuschat*. The CEH had been formed at the end of February 1997, but it only started its work in the middle of April 1997. Although the United Nations had provided generous support, the CEH was not a United Nations body. The CEH presented its Final Report Memory of the Silence on 25 February 1999 in the National Theatre in Guatemala City. This report includes seven volumes with about 3,400 pages, around 2,000 pages devoted to individual cases, and the remaining 1,400 pages dedicated to a systematic analysis of the conflict. On the impact of the public presentation of the report on 25 February 1999, and especially the co-ordinator's speech, see *Edgar Gutiérrez*, La disputa sobre el pasado, Nueva Sociedad No. 161 (May-June). Caracas, p. 162 (pp. 170 et seq.). On 27 April 1999, the secretary-general of the United Nations *Kofi Annan* transmitted the report to the General Assembly (see the letter of the secretary-general: UN Doc. A/53/928, Annex, 27 April 1999).

16 CEH, Memory of Silence. Summary presented on 25 February 1999 on the public presentation of the report in the cultural centre "Miguel Angel Asturias", National Theatre Guatemala City, Chapter Conclusions, para. 2.

17 Summary, op.cit., para. 66.

18 CEH, op.cit., Chapter II Vol. 2, para. 102.

temala is, today, a country of only around 10 million people. In consequence, the CEH faced with the massive extermination of the state-ordered program, concluded that agents of the State of Guatemala, within the framework of counter-insurgency operations carried out between 1981 and 1983, committed acts of genocide in four of the most affected regions by the "Counter-insurgency State".¹⁹

In 1985, the de facto Government of General *Oscar Mejía Víctores* allows free elections to be held. The Christian Democrat *Marco Vinicio Cerezo Arévalo* is elected. Many people hope that his administration would result in a decline in human rights abuses and so it does, initially. However, within two years the army loses patience with the burgeoning union, human rights movements, and especially with the *Comunidades Populares en Resistencia (CPR)*²⁰ in the mountains.²¹ In consequence, the repression, intimidating acts and attacks, such as the one which took place against the newspaper "La Epoca", the closing of the news agencies "Aquí El Mundo" and "Siete Días", remain as the violent features of governmental intolerance.²²

In 1962, the various guerrilla groupings began an unremitting armed campaign against the string of military governments and the handful of military-dominated civilian governments of recent years. This confrontation only ends on 29 December 1996 when the Government of the incumbent President *Alvaro Arzú Irigoyen*, and the URNG sign the *Acuerdo de Paz Firme y Duradera* in Guatemala City.²³ With the signing of this agreement, as well as the demobilisation of the members of the URNG, the situation of the human rights improved. However, after thirty-

19 Summary, op.cit., para. 122. See also in the Report, op.cit., Chapter II Vol. 3, paras. 849 et seq. On the Counter-insurgency State see *Edelberto Torres-Rivas*, *Construyendo la Paz y la Democracia: El Fin del Poder Contrainsurgente en: Desde el Autoritarismo a la Paz*. Guatemala 1998, pp. 9 et seq.

20 Communities of Peoples in Resistance.

21 CEH, op.cit., Chapter I, para. 473, and Chapter III: *Efectos y consecuencias del enfrentamiento armado*, paras. 327 et seq.

22 CEH, op.cit., Chapter I, para. 477. Some of the most notorious cases of repression from this era are today among the most egregious examples of impunity in Guatemala.

23 Agreement of a Firm and Durable Peace (reprinted in: UN Doc. A/51/796-S/1997/114, Annex II, 7 February 1997). Officially, according to the terminology of the *Acuerdo sobre el Definitivo Cese al Fuego*. Oslo, 4 December 1996 (Agreement on the Definitive Cease Fire, reprinted in: UN Doc. S/1996/1045, Annex I, 17 December 1996) and the *Acuerdo sobre el Cronograma para la Implementación, Cumplimiento y Verificación de los Acuerdos de Paz*, Guatemala, 29 December 1996 (Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements, reprinted in: UN Doc. A/51/796-S/1997/114, Annex I, 7 February 1997), the armed confrontation ended on 3 March 1997.

six years of state-repression it is still of serious concern. Against this backdrop, we may examine the current situation of human rights in Guatemala.

II. Current Human Rights Situation

Guatemala remains an unstable country racked by human rights abuses. Institutionalised political violence has been replaced by covert political violence committed by far right elements within the security forces of the state, or connected to members of these forces. Perhaps the most paradigmatic case for that situation is the death of the Auxiliary Bishop of the Diocese of Guatemala Monseñor *Juan José Gerardi Conderá* on 26 April 1998. Monseñor *Gerardi* was the Co-ordinator of the Oficina de Derechos Humanos del Arzobispado de Guatemala (ODHAG).²⁴ He was killed only two days after the ODHAG had presented the results of the project of the Recuperación de la Memoria Histórica (REMHI)²⁵ that informs on the violations of human rights during the armed confrontation and attributes direct responsibility to agents of the state for most of such crimes. The Auxiliary Bishop's death caused a deep shock on the national and international level, and is a paradigm for the current human rights situation in Guatemala, where human rights activists, judges, lawyers, politicians and peasants are all targets for extra-judicial (summary or arbitrary) executions, enforced (or involuntary) disappearances and torture (and other cruel, inhuman or degrading treatment or punishment) and as the statistics bear out, the incidence of such human rights violations is alarmingly high.

Evidence of the extent of the continuing human rights violations is given in the conclusions presented the recent report on human rights of the Misión de verificación de las Naciones Unidas en Guatemala (MINUGUA).²⁶ The Mission was established in order to verify the commitments of the Acuerdo Global sobre Derechos Humanos, signed between the Government of Guatemala and the URNG in México D.F. on 29 March 1994.²⁷ In its recent ninth report²⁸ MINUGUA notified,

24 Office of Human Rights of the Archbishopric of Guatemala.

25 Recovery of the Historical Memory: Guatemala. Never Again (see note 1).

26 United Nations Mission for the Verification of Human Rights.

27 Comprehensive Agreement on Human Rights (reprinted in: UN Doc. A/48/928-S/1994/448, Annex I, 19 April 1994). MINUGUA was established by General Assembly resolution 48/267 from 19 September 1994 (reprinted in: UN Doc. A/RES/48/267, 28 September 1994). Initially the mandate only referred to the verification of the Acuerdo Global sobre Derechos Humanos as well as to aspects of human rights of the Acuerdo sobre Identidad y Derechos de los Pueblos Indígenas, México D.F., 31 March 1995 (Agreement on Identity and Rights of Indigenous Peoples, reprinted in: UN Doc. A/49/882-

that within a period of nine months the Mission had received reports regarding 2,373 violations of human rights, among them 54 regarding the right to life, 404 regarding the right to personal integrity and security and 81 the right to personal liberty.²⁹ In the same period the Mission proved that 1,168 violations of human rights had been committed within their mandate, among them 80 cases regarding the right to life, 170 cases regarding the right to personal integrity and security and 63 to personal liberty.³⁰ According to MINUGUA, those responsible for these violations are, mainly, illegal groups, municipal authorities, agents of the Policía Nacional (PN),³¹ the army and agents of the Policía Nacional Civil (PNC)³² and, therefore, many of the cases proved by the Mission are considered as grave cases of extrajudicial executions, disappearances and torture.³³

Further evidence of the violation of human rights is provided in the Supplement II of the Report, where the Mission reports about the so-called phenomenon of "social cleansing" the extrajudicial executions of 19 persons in the north of the Department of Petén by death squads, the leaders of which are well known from the

S/1995/256, Annex, 10 April 1995). For the commitments settled down in the Acuerdo sobre el Cronograma para la Implementación, Cumplimiento y Verificación de los Acuerdos de Paz (op.cit.) in 1997 the General Assembly of the United Nations authorised the Mission to verify the Peace Agreements as a whole (UN GA Res. 51/198 B from 27 March 1997). This mandate was prolonged by GA Res. 52/175 from 18 December 1997 (reprinted in: UN Doc. A/RES/52/175, 25 February 1998). In adopting without a vote the draft resolution A/53/L.22/Rev.2, the General Assembly, in its resolution 53/93 from 7 December 1998 (reprinted in: UN Doc. A/RES/53/93, 11 February 1999) authorised the renewal of the Mission's mandate from 1. January 1999 to 31 December 1999. It underscored the importance of further complying with the commitments set out in the Peace Agreements, and called on the parties (this point is problematic, because one of the parties, the URNG, does not exist anymore as one of the parties in the armed confrontation, but today is a political party without participation in the Government) to implement the commitments they entered into in the Acuerdo Global sobre Derechos Humanos and those in the other Peace Agreements.

28 MINUGUA/9th Report: UN Doc. A/53/853, Annex and Supplement I and II, 10 March 1999. For an overview of the situation on human rights in Guatemala since November 1994 see: 8th Report: UN Doc. A/52/946, Annex and Supplement, 15 June 1998; 7th Report: UN Doc. A/52/330, Annex and Supplement, 10 September 1997; 6th Report: UN Doc. A/51/790, Annex and Supplement, 31 January 1997; 5th Report: UN Doc. A/50/1006, Annex and Supplement, 19 July 1996; 4th Report: UN Doc. A/50/878, Annex and Supplement, 24 February 1996; 3rd Report: UN Doc. A/50/482, Annex, 12 October 1995; 2nd Report: UN Doc. A/49/929, Annex, 29 June 1995; 1st Report: UN Doc. A/49/856, Annex and Corr. 1, 1 March 1995 and 27 March 1995.

29 MINUGUA/9th Report, paras. 12 et seq. and Supplement II.

30 Ibid.

31 National Police.

32 National Civil Police.

33 MINUGUA/9th Report, paras. 10 and 12.

past as state-backed killers and who, according to information obtained by the Mission, are still known to have very good contacts and relations with the army.³⁴

Consequently, MINUGUA's ninth Report on human rights concludes, "(...) the verification shows a stagnation in the situation of the respect to human rights in the country. Although not all the figures for the period are available, the tendency to the decrease of the number of violations that characterised the situation starting from the second semester of 1996 is interrupted.³⁵ The Mission ratifies that most of the verified violations do not obey to governmental directives dedicated to perpetrate or to hide them. Nevertheless, the existence of cases that encourage the hypothesis of the political motivation is an element of serious concern."³⁶

III. Current Situation of Impunity

The past decades have been characterised by political violence and violations of human rights on a massive scale and the almost total impunity which perpetrators of such crimes enjoyed, and, still enjoy.³⁷

In its Reports, MINUGUA has repeatedly pointed out a double lack in the fight against impunity. First, the persistence of deficiencies in the system of criminal investigation and the administration of justice and, second, the lack of will to prosecute and diligence in prosecuting human rights violations perpetrated by agents of the state. These conclusions are based on the negligent performance of the PN and PNC, as well as the miserable accomplishment of officers of the Ministerio Público (MP)³⁸ and the judicial organism in a high number of violations and criminal procedures investigated by the Mission, where significant advances do not exist.³⁹

Additionally, in 1997 MINUGUA noted in its sixth Report that one of the main causes of impunity in Guatemala was that many powerful criminals know that they may rely upon the help, protection or tolerance of agents of the state.⁴⁰ Fur-

34 MINUGUA/9th Report, Supplement II, paras. 19 et seq. See also MINUGUA/8th Report, Supplement, paras. 84 et seq.

35 MINUGUA/6th Report, paras. 166 et seq.

36 MINUGUA/9th Report, para. 86.

37 Concerning the psychosocial impact of the impunity and other consequences in the Guatemalan society, see CEH, op.cit., Chapter III, paras. 21 et seq.

38 Public Prosecutors Office.

39 MINUGUA/9th Report, para. 62.

40 MINUGUA/6th Report, para. 33.

thermore the Committee on the Elimination of Racial Discrimination expressed its concern that officials of Guatemala continue to enjoy impunity from criminal prosecution for abusing and violating the human rights of poor people, especially indigenous people.⁴¹

As already mentioned, despite the protection or tolerance of agents of the state, impunity is often the result of the inadequacy of the legal processes brought to bear upon a given matter rather than an unwillingness to initiate them at all. The police are poorly trained and often corrupt (in large part due to the inadequate salary they receive). The judiciary is understaffed and the enormous shortfall is being partially filled by unqualified law students in their final year of studies. MINUGUA concludes in its recent ninth Report, that within the context of the protection of human rights, the persistence of flaws in the system of public security and of the administration of justice continues contributing to the impunity and weakens the validity from the right to personal security and the due process of law.⁴²

IV. Ley de Reconciliación Nacional

The armed confrontation was accompanied by a long series of amnesties and ended with the Ley de Reconciliación Nacional (LRN).⁴³ On 15 December 1996, the Government introduced the Bill No. 145-96 LRN in the Congress of the Republic as one of the compromises in the Acuerdo sobre Bases para la Incorporación de la Unidad Revolucionaria Nacional Guatemalteca a la Legalidad⁴⁴ and with a view to the Acuerdo de Paz Firme y Duradera, signed only 19 days later.⁴⁵ The Bill caused a great polarisation in the society, so great, in fact, that the protesting NGOs were expelled from the Congress; the LRN was promulgated on 18 December 1996 at closed doors.⁴⁶

41 Reprinted in: UN Doc. CERD/C/304/Add.21, 20 March 1997, para. 18.

42 MINUGUA/9th Report, para. 6.

43 Law of National Reconciliation, D-L No. 145-96 from 18 December 1996 (Diario de Centro América, Vol. 255 No. 54, p. 1546, in force since 27 December 1996).

44 Agreement on the Basis for the Legal Integration of the Guatemalan National Revolutionary Union, Madrid, 12 December 1996 (reprinted in: A/51/776-S/1997/51, Annex II, 20 January 1997, paras. 17 et seq.).

45 Agreement of a Firm and Durable Peace (see footnote 23).

46 Law of National Reconciliation, D-L No. 145-96 from 18 December 1996 (Diario de Centro América, Vol. 255 No. 54, p. 1546, in force since 27 December 1996).

This law declares the total extinction of criminal responsibility for political delitos or common delitos connected to political delitos, as much for the members of the URNG, as for agents of the state. The appeals of partial unconstitutionality against this law, impelled, after all, by the Alianza Contra la Impunidad (ACI)⁴⁷ were not successful.⁴⁸

The LRN covers category (1), Political delitos committed in the armed confrontation (Art. 2 LRN) and, category (2), common delitos⁴⁹ committed in the armed confrontation that were directly, objectively, intentionally and causally linked to the perpetration of political delitos (Art. 3 and 4 LRN). These provisions are clearly directed at benefiting the URNG, because Art. 2 and 4 LRN indicate precisely the delitos committed by the guerrilla, for they are strictly enumerated, referring to the delitos against the internal and external Security of the state in the Código Penal (CP)⁵⁰ and the Ley de Armas y Municiones.⁵¹ They do not include such acts as murder or other delitos against the personal integrity.

As already mentioned, the LRN was enacted in compliance with the Acuerdo sobre Bases para la Incorporación de la Unidad Revolucionaria Nacional Guatemalteca a la Legalidad. Since this agreement is supposed to promote the reinsertion of the insurgents to the civil society,⁵² it is somehow surprising that it also benefits agents of the state.⁵³ Art. 5 LRN covers common crimes perpetrated in

47 Alliance against Impunity. The Alliance's primary goal was to ensure that there is no amnesty for past human rights violations. They were pressing the government and the URNG not to include an amnesty in the Peace Agreements. ACI was formed in June 1996 by organisations from a wide spectrum of the society.

48 Corte de Constitucionalidad: Expedientes Acumulados No. 8-97 y No. 20-97 from 7 October 1997.

49 Guatemalan criminal law does not use the term "crime", but the term "delict" (= delictum: delito). Therefore, regarding the internal law, we may use the term *delito* (pl. *delitos*).

50 Guatemalan Criminal Code (D-L No. 17-73 from 27 July 1973: Diario de Centro América, Vol. 197 No. 1, pp. 1 et seq., in force since 15 September 1973).

51 Law of Weapons and Ammunition (Decree No. 39-89 from 29 June 1989: Diario de Centro América, Vol. 236 No. 85, pp. 2337 et seq., in force since 15 May 1990).

52 See note 44.

53 However, it was not until the end of 1997 that the Congress decreed: "(...) considering that after the signing of the peace (agreement) in December of 1996 and the promulgation of Decree No. 145-96 of the Congress of the Republic, Ley de Reconciliación Nacional, (it) is convenient to avoid the maintenance of legal figures that encourage impunity and polarise even more the Guatemalan society, (the Congress) annuls, for reasons of national urgency, Decree No. 32-88 of the Congress of the Republic and any other law or legal disposition issued prior to the year 1996 that grants amnesty for political *delitos* perpetrated by any person at any time" (Decree No. 133-97 from 10 December 1997: Diario de Centro América, Vol. 258 No. 16, p. 397, in force since 13 January 1998).

the armed confrontation by authorities of the state, members of its institutions or any other force established by law with the goal of preventing, impeding, prosecuting or repressing the crimes within the categories 1 and 2. According to Art. 5 LRN, these crimes are also considered political, unless there is no rational, objective connection to the aforementioned political goals or the offence is personally motivated.

Art. 8 LRN serves to narrow the scope of the rather comprehensive and general declaration of extinction of criminal responsibility provided in the forgoing Art. 5 LRN by excluding certain circumstances from the extinction of criminal responsibility. Regardless of what is contained in previous articles, the extinction of criminal responsibility established in the LRN does not apply to

- Exception N°1: the delitos of (a), genocide (b), torture, and (c), forced disappearance, as well as
- Exception N°2: delitos that according to (a), internal law, or (b), international treaties ratified by the Republic of Guatemala do not come under the statute of limitations or do not allow the extinction of criminal responsibility.

Genocide (Art. 376 CP), torture (Art. 201bis CP) and forced disappearance (Art. 201ter CP) are crimes under national law. However, torture and forced disappearance are only since 1995 delitos under national law.⁵⁴ Art. 15 of the Constitución Política de la República de Guatemala (CPRG)⁵⁵ states that the law does not have retroactive effects, except in criminal matters when it favours the defendant. Therefore, only Art. 376 CP (genocide) can be applied to the atrocities committed during the armed conflict. By this, except genocide, the atrocities are mere "common delitos" under national law: murder (Art. 123-7 CP), assault (Art. 144-151 CP), rape (Art. 173-5 CP), kidnapping (Art. 201 CP), illegal detention (Art. 203-5 CP), etc. Therefore, concerning the national criminal law, the scope of Exception N°1 is reduced to the delito of genocide.

The scope of Exception N°2(a) is even more limited, as there do not exist any legal provisions under national law prohibiting the extinction of criminal responsibility and the only delitos which do not come under the statute of limitations are delitos related to abuses perpetrated by prison guards (Art. 21.2 CPRG).

54 Later, Art. 1 of the Decree No. 33-96 from 22 May 1996 modified the delito of forced disappearance.

55 Political Constitution of the Republic of Guatemala.

Concerning Exception N°2(b), the judge may directly apply international treaties ratified by the Republic of Guatemala. This is not only stated in Art. 8 LRN but is established by Art. 46 CPRG, which states, as a general principle, that in matters of human rights, international treaties and conventions accepted and ratified by Guatemala have pre-eminence over internal law. Exception N°2(b) is perhaps the most confusing and capable of being interpreted in various ways. A restrictive interpretation would include only those crimes identified in international treaties that specifically prohibit statutory limitations or the extinction of criminal responsibility. Such a treaty is the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁵⁶ The Republic of Guatemala, however, has not ratified this convention. Despite this, in the opinion of the secretary-general of the United Nations, the norms contained within this convention have achieved the status of customary international law, and therefore, as MINUGUA concludes in its seventh Report on human rights, should be included in the scope of Art. 8 LRN.⁵⁷

V. Note

In Guatemala, many refer to the LRN as a legal instrument which has avoided the impunity for serious violations of human rights perpetrated during the armed confrontation, as long as the responsible for these violations did not benefit from this law.⁵⁸ Nevertheless, this seems to be a jumped conclusion. In that context, we should remind what was indicated above when we were referring to the current situation of impunity in Guatemala. The main reason of the persisting impunity for past human rights violations in Guatemala is the deplorable situation of the administration of justice after thirty-six years of armed confrontation. Therefore, those responsible for these violations, simply do not have any need for being discharged from their criminal responsibility by a law. Consequently, only in the future we will see if this law will impede impunity or, rather, is a backing instrument for it. Due to the way how Art. 8 incorporates international law in the LRN, it is there where the international law, in the field of human rights, will face with the impunity for serious violations of the human rights of the past.

Obviously this is not the right place to come to grips with the international law that prohibits the extinction of criminal responsibility for certain crimes commit-

56 UNTS Vol. 754, pp. 73 et seq.

57 MINUGUA/7th Report, Supplement I, para. 124.

58 *William Ramírez*, *Derechos humanos en Guatemala. Evidencias de impunidad o impunidad en evidencia*, Nueva Sociedad No. 161 (May-June). Caracas, p. 145 (157).

ted during the armed confrontation and is part of the national law in Guatemala.⁵⁹ Nor are we going to begin a discussion on the hierarchy of the international law and internal law in the system of laws in Guatemala. However, within this context, it is important to note that MINUGUA concluded sibyllinically in its seventh Report that the Government of Guatemala did not violate any treaty of human rights ratified by the State of Guatemala,⁶⁰ and that's perfectly correct indeed. The riddle of the LRN must be solved much more through the application of this law vis-à-vis Guatemala's obligations under international law than analysing its compatibility with the treaties ratified by the State of Guatemala with a pure positivist view.

– Guatemala –

I. Breve Historia del Genocidio

Guatemala ha sido devastada por un enfrentamiento armado durante treinta y seis años. En 1954, el gobierno democráticamente electo de *Jacobo Arbenz Guzmán* fue derrocado por opositores a su gobierno,¹ patrocinados por los Estados Unidos;² el presidente salió al exilio. La Operación PBSUCCESS marca el inicio de un proceso de intolerancia, cierre de los espacios de participación política y represión masiva.

59 Insofar, a referral to the Study of *Kai Ambos*, *Straflosigkeit von Menschenrechtsverletzungen*, Freiburg i.Br. (1997), *Impunity and human rights violations*, pp. 361 et seq., should be enough.

60 MINUGUA/7th Report, Supplement I, para. 118a.

1 Para un breve resumen del gobierno de *Jacobo Arbenz* véase CEH (Comisión para el Esclarecimiento Histórico), *Memoria del Silencio (TZ'INIL NA'TAB'AL)*, Guatemala (1999) Capítulo I: Causas y orígenes del enfrentamiento armado, párrs. 49 y ss.

2 Documentos recientemente desclasificados de la CIA demuestran detalladamente el papel de los Estados Unidos en el derrocamiento de *Arbenz*. Éstos incluyen un manual de entrenamiento que contiene instrucciones cómo se debe llevar a cabo un asesinato en un cuarto de conferencia, etc. Véase el estudio del miembro de la sección histórica de la CIA *Nicolas Cullather*, *Operation PBSUCCESS. The United States and Guatemala 1952-1954* y el anónimo *Training file of PBSUCCESS, A Study of Assassination* (<http://www.seas.gwu.edu/nsarchive/NSAEBB> [03/06/99]). Sobre el derrocamiento de *Arbenz* véase también los estudios de REMHI (Recuperación de la Memoria Histórica), *Guatemala Nunca Más*, Vol. III (El Entorno Histórico). Guatemala 1998, págs. 15 y ss. y, CEH, op.cit., Capítulo I, párrs. 78 y ss.

Strafrecht in Reaktion auf Systemunrecht

Vergleichende Einblicke in Transitionsprozesse

Criminal Law in Reaction to State Crime

Comparative Insights into Transitional Processes

Herausgegeben von

Albin Eser • Jörg Arnold

1

Internationales Kolloquium

International Colloquium

Freiburg im Breisgau

2.-5. Juni 1999 / June 2-5, 1999

unter Mitarbeit von

Nora Karsten • Helmut Kreicker

Jan-Michael Simon • Julie Trappe



J. Nr. 26190

Freiburg im Breisgau 2000

ideu 93562

Professor Dr. Dres. h.c. Albin Eser, M.C.J.

Universität Freiburg
Direktor des Max-Planck-Instituts
für ausländisches und internationales Strafrecht

Privatdozent Dr. iur. Jörg Arnold

Forschungsgruppenleiter am Max-Planck-Institut
für ausländisches und internationales Strafrecht
Günterstalstr. 73
D-79100 Freiburg i.Br.

Die Deutsche Bibliothek - CIP-Einheitsaufnahme

Strafrecht in Reaktion auf Systemunrecht : vergleichende Einblicke
in Transitionsprozesse / hrsg. von Albin Eser ; Jörg Arnold. -
Freiburg im Breisgau : Ed. iuscrim, Max-Planck-Inst. für Ausländisches
und Internat. Strafrecht.

(Beiträge und Materialien aus dem Max-Planck-Institut für
Ausländisches und Internationales Strafrecht Freiburg i. Br. ; Bd. S 82)

1. Internationales Kolloquium : Freiburg im Breisgau, 2. - 5. Juni 1999 /
unter Mitarb. von Nora Karsten - 2000
ISBN 3-86113-938-3

© 2000 edition iuscrim
Max-Planck-Institut für ausländisches
und internationales Strafrecht
Günterstalstraße 73, D - 79100 Freiburg i.Br.

Alle Rechte vorbehalten

Printed in Germany/Imprimé en Allemagne

Herstellung: Reprodienst GmbH • Gündlinger Str. 8
D - 79111 Freiburg i.Br.

ISBN 3-86113-938-3

Preface

This volume documents the international colloquium carried out by the Max Planck Institute for Foreign and International Criminal Law within the framework of the legal-comparative project "*Criminal Law in Reaction to state Crime - Comparative Insights into Transitional Processes*", June 1999 in Freiburg, Germany. The research project pursues the question of how various legal systems react to state-controlled injustice committed prior to a change of political system. The exact objective of the project, the issues to be looked into, as well as first results of the research are elucidated in the following recited preface.

The present Colloquium Volume which followed from a reader compiled for the conference, contains short reports by the project staff on the manner state crime was dealt with in Argentina, Belarus, Brazil, Bulgaria, Chile, China, Czech Republic, Germany, Estonia, Georgia, Ghana, Greece, Guatemala, Korea, Lithuania, Mali, Poland, Portugal, Russia, Spain, South Africa, Hungary and Uruguay. The inclusion of the opening and introductory lectures, a discussion report, a lecture on criminal prosecution in third countries, as well as the concluding remarks and a résumé of the conference in this volume does not give a complete picture of the course of the conference; it does, however, document the most essential aspects. In this way, unparalleled information on the latest developments of international discussion on criminal law's method of dealing with the totalitarian and authoritarian past of certain countries is conveyed, as the participants in the colloquium are representatives from over 20 countries throughout the world included in the study. The short overviews provide an impression of the conditions under which and the most varying manner in which the individual countries determine the role of criminal law during the transition process, the partially very contrasting positions of the participants becoming more perceptible by means of scientific discourse.

On the one hand, the documentation enables a first insight into the If and How of criminal law's reaction to state crime in countries involved in the project. On the other hand, however, the abridged information from the countries facilitates an answer to the question of classification to certain models of criminal law's critical look at the past. However, in view of the model character of criminal law's reaction to state crime, in order not to fixate oneself from the start, the short reports are provided in alphabetical order.

The diversity of the conference proved scientifically extraordinarily fruitful. In any event, it was not easy to grasp the entire scientific return in a self-contained volume, not lastly due to linguistic difficulties. All contributions are found in German and English, several in Spanish and French as well. We would like to thank the translators at *Arend & Sharpe*, Kelkheim, as well as Ms. *Fernanda Strasser*, Munich, Ms. *Wiechmann*, Berlin, Mr. *Korolkow*, Geilenkirchen, and Ms. *Angela Delli Sante*, Berlin, for their efforts. However, it became apparent once again that the translation of legal texts by non-jurists is problematic. Great efforts were called for on the side of the staff of the Max Planck Institute to examine and edit the texts with regard to their legal content. On the scientific level, particularly *Nora Karsten*, *Helmut Kreicker*, *Jan-Michael Simon* and *Julie Trappe* receive merit for their outstanding services. On the secretarial level, our thanks go to *Brigid Wefelnberg* for her assistance with translations for this Colloquium Volume.

Our special thanks go as well to *Petra Lehser* and *Christa Wimmer* for their brilliant editorial work. Not lastly, we thank *Fred Münch* for editing the short overviews for the Reader.

Freiburg, August 2000

Albin Eser

Jörg Arnold

Inhaltsverzeichnis / Contents

Vorwort / Preface <i>Albin Eser • Jörg Arnold</i>	V
Geleitwort zum Gesamtprojekt / Introduction to the Project as a Whole	XIX
Abkürzungsverzeichnis / Abbreviations	XXXIII
 Teil I: Eröffnung und Einführung / Inauguration and Introduction	 1
Eröffnungsansprache / Opening Address <i>Albin Eser</i>	3
Einführungsvortrag / Keynote Address Modelle strafrechtlicher Reaktionen auf Systemunrecht/ Models of Criminal Law Reactions to State Crime <i>Jörg Arnold</i>	11
 Teil II: Kurzberichte zu den beteiligten Ländern / Short Reports to the Countries Included in the Study	 27
Argentinien / Argentina <i>Marcelo A. Sancinetti</i>	29
Brasilien / Brazil <i>Fauzi Hassan Choukr</i>	57
Bulgarien / Bulgaria <i>Nikola Filchev • Lasar Gruev</i>	63
Chile <i>Salvador Millaleo Hernández</i>	71
Volksrepublik China / People's Republic of China <i>Thomas Richter</i>	79

Deutschland / Germany <i>Helmut Kreicker • Martin Ludwig</i>	89
Estland / Estonia <i>Jüri Saar • Jaan Sootak</i>	105
Georgien / Georgia <i>Siegfried Lammich</i>	119
Ghana <i>Novisi G. Vukor-Quarshie</i>	127
Griechenland / Greece <i>Stéphanos Emm. Kareklás</i>	137
Guatemala <i>Jan-Michael Simon</i>	147
Korea <i>Byung-Sun Cho</i>	183
Litauen / Lithuania <i>Siegfried Lammich</i>	193
Mali <i>Kumelio Koffi A. Afandé</i>	201
Polen / Poland <i>Ewa Weigend • Andrzej Zoll</i>	223
Portugal <i>Peter Hünerfeld</i>	233
Rußland / Russia <i>Ludmila Borissowna Obidina</i>	247
Spanien / Spain / España <i>Carlos Pérez del Valle • Miguel Torres Ayuso</i>	259
Südafrika / South Africa <i>Barbara Huber • Dirk Umbreit</i>	273

Tschechische Republik / Czech Republic	
<i>Lumír Crha • Jiří Pipek</i>	291
Ungarn / Hungary	
<i>Judit Udvaros</i>	309
Uruguay	
<i>Gonzalo D. Fernández</i>	325
Weißrußland / Belarus	
<i>Wladimir Khomitsch</i>	341
Teil III: Strafverfolgung in Drittstaaten / Prosecution in Third Countries	353
Vortrag / Lecture / Exposición:	
Straflosigkeit und Drittländer oder der Beginn der juristischen Postmoderne (am Beispiel der Fälle Chile und Argentinien)/ Exemption from Punishment and Third Countries or the Beginning of the Juridical Post-modern Era (Taking the Examples of Chile and Argentina)/ Impunidad y Terceros Países o el Comienzo de la Postmodernidad Jurídica (a Propósito de los Casos Chileno y Argentino)	
<i>Roberto Bergalli</i>	355
Teil IV: Diskussion und Schlußvorträge / Discussion and Final Considerations	405
Diskussionsbericht / Summary of the Discussions	
<i>Helmut Gropengießer</i>	407
Schlußbetrachtungen / Final Considerations	
<i>Albin Eser</i>	417
Resümee / Résumé	
<i>Jörg Arnold</i>	427