

SOVEREIGNTY AND LEGITIMACY OF INTERNATIONAL ACTORS IN THE GUATEMALAN CONSTITUTIONAL REFORM: THE ROLE OF THE CICIG

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ABSTRACT

This paper discusses the legitimacy of the role of the *Comisión Internacional Contra la Impunidad en Guatemala*, or the International Commission against Impunity in Guatemala – CICIG-, in the new Guatemalan constitutional reform process. This process started in April 2016 and it has been driven by the commission's leadership. This leadership and influence of a foreign actor within constitutional change presents new inquiries in the role of foreign actors in domestic settings and their impact on sovereignty. Therefore, this paper provides a new construction of sovereignty, based on the Guatemalan state-building experience and current needs, and analyses the role of the CICIG within this constitutional reform process and, lastly, attempts to draw certain conditionals on its role as a constitutional reform agent.

INTRODUCTION

Guatemala has called for a national dialogue for the reform of its constitution. This dialogue for reform started in April 2015.¹ This reform has been heavily influenced and promoted by a foreign actor, the *Comisión Internacional Contra la Impunidad en Guatemala*, or the International Commission against Impunity in Guatemala (CICIG). This new form of international body was created in 2007 and was a result of Guatemala's failure to address corruption and ascertain control over parallel powers entrenched within the state.²

After Guatemala's transition from military dictatorship to democracy between 1982 and 1986, the country has been since overridden by corruption that seems to plague all three powers of the state: executive, legislative and judiciary.³ However, after a series of recent events and cases, the CICIG has become a relevant key figure in the fight against corruption.

This notoriety by the CICIG has been achieved through its strategic coupling with the Guatemalan Prosecutor's Office, which led to the launch of a series of investigations of

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² *Acuerdo Entre La Organización de Naciones Unidas Y El Gobierno de Guatemala Relativo Al Establecimiento de Una Comisión Internacional Contra La Impunidad En Guatemala* [Agreement between the United Nations Organisation and the Government of Guatemala Relating to the Establishment of an International Commission against Impunity in Guatemala] Ratified 12 December 2006, n.d., Preamble; International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala" (Brussels, Belgium: International Crisis Group, January 29, 2016), 1.

³ Roddy Brett and Antonio Delgado, "The Role of Constitution-Building Processes in Democratization: Case Study Guatemala" (International Institute for Democracy and Electoral Assistance: Democracy-Building & Conflict Management, 2005), 8–9 and 37.

corruption by public officials. These investigations have steered to the resignation and prosecution of the President and Vice-president in 2015 over a series of corruption claims.⁴ Nevertheless, the Guatemalan judiciary, historically, has been weak and susceptible of influence by strong domestic actors. This has led Guatemala in a process for its reform since the 1996 peace accords, a process which still continues today.

Since its early years, the CICIG has pushed for the reform of the Guatemalan judiciary in order to strengthen it and combat corruption. The latest proposal of reform, nonetheless, promotes a series of changes and reform to the Guatemala Constitution.⁵ The CICIG, however, had already attempted to promote constitutional reform in 2011.

In this previous attempt, the CICIG was unsuccessful to promote such changes. This previous failure was due to the CICIG's failure to connect with all tiers of governance and civil society and a struggle with the judiciary. In 2016, after the resignation and prosecution of the former Guatemalan President and Vice-President and a series of other high-impact cases, the CICIG became a cohesive and relevant actor in pushing Guatemala's constitutional reform process.

This paper intends to present a study on the legitimacy of international actors, such as the CICIG, within the Guatemala constitutional reform process. This study would, as a result, need to engage on notions relating to sovereignty and legitimacy of international actors within domestic spheres. This is done in order to provide a series of conditionals of why the CICIG is legitimated to promote such changes in Guatemala.

Therefore, this paper attempts to draw the conceptual requisites for an international actor to act legitimately within a domestic constitutional reform process in Guatemala. For determining these conceptual requisites, this paper is divided as follows: *Part I* details how international law has evolved beyond its classical conception of mere inter-state law. As such, this paper details how international law has increasingly permeated itself with domestic law, thus allowing the creation of a new type of governance bodies, such as the CICIG. These new types of bodies present new limits and inquiries to the boundaries between domestic and international law, making therefore imperative a reconceptualization of sovereignty within this inter-relationship between both spheres of law.

Part II, thus, presents a theoretical study on the need to develop and reconceptualise the notion of sovereignty in accordance to a Guatemalan vision on engaging with international law. This paper presents a view of how sovereignty represents, particularly for Guatemala, a Janus-like link between the constitutional and international law embedded in the development and safeguard of its citizens. By taking this Janus-like approach, sovereignty therefore represents a link by which citizens not only delegate decision-making capacities to the state

⁴ New York Times, "Otto Pérez Molina of Guatemala Is Jailed Hours After Resigning Presidency," n.d., http://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html?_r=0.

⁵ ElPeriodico, "Iniciativa de Reformas Constitucionales Incluye 17 Temas [Initiative for Constitutional Reform Includes 17 Topics]," n.d., <http://elperiodico.com.gt/2016/04/25/pais/iniciativa-de-reformas-constitucionales-incluye-17-temas/>.

for their own benefit; but also identify and designates a role for international law in benefit of these same citizens.

Part III provides an analytical description of the CICIG. As such, this paper portrays that this new type of international organisation was created with the purpose to aid and strengthen the Guatemala state's capacity in fulfilling its duties to combat corruption and parallel powers. However, within this analysis, this paper displays occasions where this organisation may have infringed on sovereignty by affecting individuals' rights, and therefore its legitimacy to promote constitutional reform.

Part IV of this paper dwells exactly on the capacity of the CICIG to act within the Guatemala constitutional reform process. As such, this paper firstly identifies the differences between the two occasions by which the CICIG has promoted constitutional reform; and secondly, delivers the conditions by which international actors, such as the CICIG, may act within a domestic sphere with legitimacy in the reform process. Therefore, this study gives some considerations for the CICIG, and potentially other foreign actors, to act with legitimacy and insert themselves as a key player within this constitutional reform process.

1. THE DEVELOPING INTERACTION BETWEEN DOMESTIC LAW AND INTERNATIONAL LAW

During the second half of the 20th century, international law expanded significantly. This progressive expansion has been due to the increased activity of states in multiple fronts and the emergence of many new actors.⁶ This development has pressed the boundaries of international law, dealing not only with state relations, but also domestic regulations.⁷ This is displayed by the incremental activity in areas such as human rights, investment and trade, which continue to regulate evermore domestic provisions and activities. An example of this has been the creation of international and supranational courts, such as the Inter-American Court of Human Rights, which has ruled on not only the acts of the executive, but also on the effects of legislation and the conduct of domestic courts.⁸

As a result of this expansion, international law has ceased to be a law of 'coexistence' among nations; but has evolved to become a law of cooperation between them.⁹ This has allowed states to pursue common goals, and integration in certain cases, all coupled with the

⁶ Nico Krisch, "Global Governance as Public Authority: An Introduction," *ICON*, no. 10 (2012): 978–979.

⁷ Jean D'Aspremont, "The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order," in *The Practice of International and National Courts and (De-) Fragmentation of International Law*, ed. Ole Kristian Fauchald and Andre Nollkaemper (Hart Publishing, 2012), 142; Samantha Besson, "The Authority of International Law – Lifting the State Veil," *Sydney Law Review* 31 (2009): 349.

⁸ Alexandra Huneeus, "Constitutional Lawyers and the Inter-American Court's Varied Authority," *Law and Contemporary Problems* 79 (2016): 185; Ludovic Hennebel, "The Inter-American Court of Human Rights: The Ambassador of Universalism," *Quebec Journal of International Law* (Special Edition) (2011): 75; David Kosar and Lucas Lixinski, "Domestic Judicial Design by International Human Rights Courts," *American Journal of International Law* 109 (2015): 713.

⁹ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (United Kingdom: Cambridge University Press, 2003), 17–18.

exponential increase on the ratification of bilateral and multilateral treaties and the emergence of large amounts transnational regulatory networks.¹⁰

This new law of cooperation has led to the creation of: first, an array of new types of international actors and organisations, such as the United Nations (UN) and the Organisation of American States (OAS) and others; a series of specialised regimes with detailed objectives and adjudicatory bodies to oversee the compliance of states' duties, such as the Inter-American Human Rights System; and, lastly, as an effect of the previous, a deep impact of international law into domestic regulation and governance.¹¹ This has led, thus, to a blurring between the limits of domestic and international spheres of law.¹²

A case of such blurring comes, as previously mentioned, from the area of human rights. International Human Rights has expanded causing diverging effects within both the domestic and international fields.¹³ This is seen through the creation and development a series of international norms and standards that may even conflict with domestic provisions, and, even, the creation of international adjudicatory bodies that can supervise the compliance of such rules.¹⁴

In addition, human rights has aided in the establishment of standards and guarantees for the accountability of power.¹⁵ This has led human rights to become a tool for the legitimization of state activity, becoming entrenched not only in domestic law, but also in international law.¹⁶

As an example of such legitimization development in the international field is displayed by the International Court of Justice (ICJ) jurisprudence, which depicts a movement towards a normative relativity and higher regard of certain values based on the notion of an international community.¹⁷ This is firstly seen in the *Corfu Channel Case*, where it invoked 'elementary considerations of humanity' for determining the responsibility of the Albanian state.¹⁸ Additionally, in its advisory opinion regarding the *Reservation to the Genocide Convention*, the ICJ concluded that states have common higher moral interests based on the preservation of individuals and groups. As a result, individuals represent a major component of the international order. This view was later reaffirmed in the *Barcelona Traction Case*, which, nevertheless, the ICJ expanded its argument to depict the duties of states regarding

¹⁰ Ibid.

¹¹ "International Law Commission, *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Session, UN Doc A/CN.4/L.682 (13 April 2006)," n.d., 10–11.

¹² Martti Koskenniemi, "The Fate of Public International Law: Between Techniques and Politics," *Modern Law Review*, no. 70 (2007): 4; Gareth Davies, "International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism," *German Law Journal*, no. 13 (2012): 1204.

¹³ Davies, "International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism," 1204.

¹⁴ Bruno Simma, "Universality of International Law from the Perspective of a Practitioner," *European Journal of International Law* 20 (2009): 272.

¹⁵ Robert Howse and Ruti Teitel, "Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martii Koskenniemi)," *Temple International & Comparative Journal*, n.d., 378.

¹⁶ Daniel Moeckli, *International Human Rights Law* (Oxford University Press, 2010), 128–30.

¹⁷ Antonio Augusto Cancado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2010), 444.

¹⁸ *The Corfu Channel Case (United Kingdom v Albania) (Judgment)*, ICJ Rep 4, 22, 35 (1948).

themselves as a part of a community, namely obligations *erga omnes*.¹⁹ This led the way to the ICJ's *dictum* on the *Nicaragua Case*, where the court took a step away from the statist view of customary law, into a more natural law approach based on humanitarian conceptions of international law and community interest.²⁰ These humanitarian conceptions were later referred by the ICJ the *Wall Advisory Opinion*, which made clear that, 'the protection offered by human rights conventions do not cease in case of armed conflict'.²¹ This advisory opinion came to confirm the validity of human rights instruments in times of war, as previously expressed in *Nuclear Weapons Advisory Opinion*²² and later confirmed in the judgment of the *Case concerning armed activities on the territory of the Congo*.²³ This development of interpretation or international norms by the ICJ, has aided of a view of international law embedded with human rights and moral considerations.

This legitimacy development of international law is further displayed within the Latin American regional context. This is displayed by the fact that international human right instruments have become entrenched with not only regional international law, but also in domestic constitutional law.²⁴ In Latin America, human rights has aided to the return of democracy in the region.²⁵ After the ratification of the American Convention on human rights in 1979, human rights have injected themselves within Latin America as a language for the accountability of power.²⁶

With particular regard to Guatemala, this legitimation development is exhibited through the promotion and insertion of human rights language within its post-conflict building process. This is shown within the 1985 Guatemalan Constitution, as analyzed in the next part of this study, the 1987 Esquipulas regional peace process and in the Guatemalan peace accords.

¹⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Merits)*,] ICJ Rep 3, 32 (1970).

²⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)*, ICJ Rep 14, 83–86 (1986).

²¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)*, ICJ Rep 163, 83–86 (2004).

²² *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Rep 226, 240 (1996).

²³ *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Rep 168, 217, 243 (2005).

²⁴ Gonzalo Aguilar Cavallo, "La Internacionalización Del Derecho Constitucional [The Internationalisation of Constitutional Law]," *Estudios Constitucionales* 5, no. 1 (2007): 230–231.

²⁵ Flavía Piovesan et al., "Ius Constitutionale Commune Latinoamericano En Derechos Humanos E Impacto Del Sistema Interamericano: Rasgos, Potencialidades Y Desafíos [Latin American Ius Constitutionale Commune in Human Rights and the Impact of the Inter-American System: Traits, Potentials and Challenges]," in *Ius Constitutionale Commune En América Latina: Rasgos, Potencialidades Y Desafíos* [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges] (Mexico: Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014), 63.

²⁶ See *American Convention on Human Rights* opened for Signature in 10 July 1969, Organisation of American States Treaty Series No. 36 (entered into Force 18 July 1978), n.d. Article 2: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms"; Piovesan et al., "Ius Constitutionale Commune Latinoamericano En Derechos Humanos E Impacto Del Sistema Interamericano: Rasgos, Potencialidades Y Desafíos [Latin American Ius Constitutionale Commune in Human Rights and the Impact of the Inter-American System: Traits, Potentials and Challenges]," 63.

The Esquipulas process became the launch point for UN mediation in three Central-American peace processes: Nicaragua in 1990, El Salvador in 1992 and, lastly, Guatemala in 1996.²⁷ On each process, the UN was entrusted the task to verify the fulfilment of the peace accords on each country.

With particular regard to Guatemala, the peace process led to the signature of 14 peace accords. These include the 1994 Human Rights Accord and the 1996 Constitutional Reform Accord. These accords prescribed a series of policies to be taken by the state and brought the end of 35 years of armed conflict within Guatemala between the Guatemalan army and the guerrilla.²⁸

As a result of the negotiation process, the accords prescribed a range of policies to be taken into action by the government including the commitment to fight corruption and impunity.²⁹ The 1994 Human Rights Accord prescribed the initial role of the UN as part of the peace-building process and its role as aid in the fight against corruption.³⁰ The 1996 Constitutional Reform Accord promoted the need for constitutional reform of the Guatemala judiciary, a task that still continues today.³¹

Therefore, the Guatemalan peace accords opened the door for the involvement of international actors, such as the UN, in the process of Guatemalan post-conflict state-building, thus aiding to the development of the Guatemalan society.

2. A GUATEMALAN VISION OF LEGITIMACY AND SOVEREIGNTY

Assuming that international law has shifted towards a law of cooperation between states concerned with the fate of their citizens; needless to say, the concept of sovereignty need to be reassessed and reconceptualised to fit such assumption.³² This assumption must take into account the need of why states engage with international law, whilst also taking into account their reasons and visions of their engagement with it.³³

States engage with international law, as well with other states, for a variety of reasons. Concretely for Guatemala, its constitution defines the reason of its engagement being that of: *'contributing to the maintenance of peace and liberty, the respect and defence of human*

²⁷ María José Castillo Carmona and Gustavo Adolfo Machado Loría, "Aspectos Generales Del Proceso de Integración Centroamericana: Un Breve Repaso Por Su Historia [General Aspects of the Central-American Integration Process: A Brief Review of Its History]," Cuadernos Centroamericanos Del ICAP (San José, Costa Rica: Instituto Centroamericano de Administración Pública, July 2013), 39–43.

²⁸ For the Guatemalan 14 documents comprising the Peace accords, see: <http://www.onu.org.gt/contenido.php?ctg=1393-1341-informacion-sobre-guatemala>

²⁹ See Peace Accord: 'Acuerdo Global sobre Derechos Humanos' in: <http://www.guatemalaun.org/bin/documents/Acuerdo%20Derechos%20Humanos.pdf>

³⁰ Ibid, Provision X.

³¹ See Peace Accord: Acuerdo Reformas Constitucionales in: <http://www.guatemalaun.org/bin/documents/Acuerdo%20reformas%20constitucionales%20y%20r%C3%A9gi men%20electoral.pdf>

³² Besson, "The Authority of International Law – Lifting the State Veil," 349.

³³ Martti Koskeniemi, "The Case for Comparative International Law," *Finnish Yearbook of International Law* 20 (2009): 4.

rights and the strengthening of democratic processes and international organisations that guarantee mutual and equitable benefit between states'.³⁴

Traditionally, sovereignty has been used to determine the centrality, or *summa potestas*, of states within the international system.³⁵ In addition, sovereignty has been coupled with the notion of non-intervention.³⁶ This has led to the belief that sovereignty is the recognition of a state's, and its institutions, to act without constraint within its territorial limits.³⁷ However, with the new developments within international law, as previously demonstrated, coupled with developments within domestic spheres of states, specifically regarding constitutional law, asserts the need to redefine such belief.

Briefly on constitutional law, or constitutionalism, this has gained particular recognition within legal scholarship and state-building.³⁸ As such, constitutionalism and constitutional provisions have become the language by which states define their political structures and provide accountability to the exercise of power.³⁹ Particularly, in Latin America, including Guatemala, due to its conflicting and dictatorial past, constitutionalism is heavily rooted in human rights notions.⁴⁰ This is displayed by: first, the introduction of an extensive human rights' charter within the constitution; second, the insertion of constitutional provisions giving special status to human rights treaties within the domestic legal order; and third, adaption of legal procedures for the safeguard of the newly recognised rights and the accountability of public power.⁴¹

As a direct result of this constitutional developments, Guatemala state-building has constructed a constitution with a pluralist sources of human rights with various levels of these

³⁴ *Constitución Política de La República de Guatemala 1986* [Political Constitution of the Republic of Guatemala 1986], n.d., Art. 149.

³⁵ Robert Jennings, "Sovereignty and International Law," in *State, Sovereignty and International Governance*, ed. Gerhard Kreijen (Oxford University Press, 2002), 28.

³⁶ Henry Shue, "Limiting Sovereignty," in *Welsh Humanitarian Intervention and International Relations*, ed. Jennifer Welsh (Oxford University Press, 2003), 15.

³⁷ *Ibid.*

³⁸ Dieter Grimm, "The Achievement of Constitutionalism and Its Prospects in a Changed World," in *The Twilight of Constitutionalism*, ed. Petra Dobner and Martin Loughlin (United Kingdom: Oxford University Press, 2010), 8.

³⁹ Marcelo Neves, *Transconstitutionalism* (Hart Publishing, 2013), 44.

⁴⁰ Anne Peters, "The Merits of Global Constitutionalism," *Indiana Journal of Global Studies* 16 (2009): 398.

⁴¹ Héctor Fix-Zamudio, "Breves Reflexiones Sobre La Naturaleza, Estructura Y Funciones de Los Organismos Jurisdiccionales Especializados En La Resolución de Procesos Constitucionales [Brief Reflexions on the Nature, Structure and Functions of the Jurisdictional Organisms Specialised in the Resolution of Constitutional Procedures]," in *Tribunales Y Justicia Constitucional: Memoria Del VII Congreso Iberoamericano de Derecho Constitucional [Constitutional Tribunals and Justice: Memories of the VII Ibero-American Congress on Constitutional Law]*, ed. Juan Vega Gómez and Edgar Corzo Sosa (Mexico: Universidad Nacional Autónoma de México, 2002), 207; Detlef Nolte and Almut Schilling-Vacaflor, "Introduction: The Times They Are a Changin': Constitutional Transformations in Latin America since the 1990s," in *New Constitutionalism in Latin America: Promises and Practices*, ed. Detlef Nolte and Almut Schilling-Vacaflor (England: Ashgate, 2012), 22; Pedro Salazar Ugarte, "La Disputa Por Los Derechos Y El Ius Constitutionale Commune [The Dispute for Rights and the Ius Constitutionale Commune]," in *Ius Constitutionale Commune En América Latina: Rasgos, Potencialidades Y Desafíos [Ius Constitutionale Commune in Latin-America: Traits, Potentials and Challenges]*, ed. Armin von Bogdandy, Héctor Fix-Fierro, and Mariela Morales Antoniazzi (Mexico: Instituto de Investigaciones Jurídicas de la Universidad Autónoma de México, Max-Planck Institut für Öffentliches und Völkerrecht and Instituto Iberoamericano de Derecho Constitucional, 2014), 41.

same rights, all centred in a vision and constructivist language that connect domestic law with the international.⁴²

Since both, international and constitutional law, are embedded in notions of human development; therefore, it becomes incoherent to define sovereignty as the state's absolute independent power to rule within its territory.⁴³ As a result, the capacity of the state to act, as well as its institutions, relies to its subjection and compliance to law.⁴⁴

This conception, of *summa potestas*, also denies the conception of Guatemala's constitutional and multi-level rule of law. This nature of a multi-level rule of law embedded in rights found its maximum expression in 2012, when the Constitutional Court recognised the doctrine of the *Bloque de Constitucionalidad*, or Constitutional Block.

The Guatemalan Constitutional Court defines the Constitutional Block as a tool Tool "for [...] reception of international law, ensuring the coherence of domestic legislation with the State's external commitments and, at the same time, complementing the guarantee of Human Rights."⁴⁵

In brief, the notion of the Constitutional Block is a pluralist and multilevel interpretation of human rights treaties as part of a Constitution.⁴⁶ The inclusion of the doctrine of the Constitutional Block in Guatemalan constitutional law gives the constitution a developing and progressive character, all based in the developments of international law.⁴⁷ Moreover, the Constitutional Block gives new strength and impulse to the protection of human rights and the rule of law, by providing a new vision and sources to the procedures of constitutional review and protection of human rights, including social and economic.⁴⁸

⁴² Anne Peters, "The Merits of Global Constitutionalism," *Indiana Journal of Global Studies* 16 (2009): 398.

⁴³ Timothy Endicott, "The Logic of Power and Freedom," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford University Press, 2010), 250–252; Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International State Building* (Oxford University Press, 2007), 31.

⁴⁴ Endicott, "The Logic of Power and Freedom," 250–252.

⁴⁵ Corte de Constitucionalidad, Expediente 1822-2011, Inconstitucionalidad General Parcial por Omisión, 17 de Julio 2012, pp. 15

⁴⁶ Carpio Marcos, Edgar 'Bloque de Constitucionalidad Y Proceso de Inconstitucionalidad de Las Leyes, 4 Revista Iberoamericana de Derecho Procesal Constitucional , 2005, 79, 80; Meza Hurtado, Artemio 'El Denominado Bloque de Constitucionalidad Como Parámetro de Interpretación Constitucional ¿Es Necesario En El Perú?, No.8 & No.9 Revista Oficial del Poder Judicial , 2012, 143, 145; Góngora Mera, Manuel Eduardo 'La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana Y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano' en Armin von Bogdandy, Héctor Fix-Fierro y Mariela Morales Antoniazzi (eds), *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos*, Universidad Nacional Autónoma de México, Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht und Instituto Iberoamericano de Derecho Constitucional, Ciudad de México, 2014, 303; Góngora Mera, Manuel Eduardo, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, Inter-American Institute of Human Rights, San José, 2011, 170.

⁴⁷ Graciela Rodríguez Manzo, Juan Carlos Arjona Estévez, and Zamir Fajardo Morales, *Bloque de Constitucionalidad En México [The Constitutional Block in Mexico]* (Mexico: Comisión de Derechos Humanos del Distrito Federal, 2013), 26.

⁴⁸ Corte de Constitucionalidad, Expedientes Acumulados 4783-2013, 4812-2013, 4813-2013, Apelación de Sentencia de Amparo, 6 de julio 2016, pp. 45-48.

Making reference to the Guatemalan pluralist constitution, its article 141 states that: ‘sovereignty resides in the people who delegate it, for its exercise, to the legislative, executive and judiciary powers’.⁴⁹ In this instance, as the constitution defines it, sovereignty becomes an exercise by which the people delegates decision-making capabilities to the individual powers of the state. This is done in order to accomplish the goals set out in the own Guatemalan constitution.⁵⁰

Taking this conception of sovereignty, as regulated legal exercise of delegation of power for the benefit of the state’s citizens; sovereignty becomes an extension of this delegation in the international sphere. Therefore, states interact with other states in order to promote welfare and development for their own citizens.⁵¹ Consequently, sovereignty also entitles the recognition of nations and societies as member of larger political communities.⁵² This is also clearly identified by the Guatemalan constitution, stating that Guatemala will regulate its relations with other states in conformity with international law.⁵³

In the pursuit of this recognition and promotion of its citizens’ welfare, Guatemala has certainly become member of both universal and regional systems, such as the UN and Inter-American Human Rights systems. Under this conception, Guatemala has also negotiated a series of treaties and asked for international assistance in its fight against corruption. This has led, since the mid1990s, to the involvement of the United Nations in the process of institutional development and judicial strengthening in Guatemala.⁵⁴ This conception has been reiterated by the Guatemalan Constitutional Court by delivering an opinion stating that:

‘[W]hen the full observance of human rights is a universal concern, it is logical for a State to expand its obligations in that regard and to require the support of an international organization specialized in the field, such as the United Nations, which is Consistent with the obligations acquired by the State in different international instruments in the field of human rights, which affirm the universal concern for its validity.’⁵⁵

Taking the previous trait, of sovereignty becoming a link between a society with international law; the ratification of other international instruments, such as those promoting human development, do not restrict sovereignty but rather consolidate it.⁵⁶ This view of sovereignty places the individual in the centre between the interaction of international law and domestic

⁴⁹ *Constitution of Guatemala*.

⁵⁰ *Ibid.*, Art. 1.

⁵¹ James Crawford, “Sovereignty as a Legal Value,” in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge University Press, 2012), 128; John Tasioulas, “Human Rights, Legitimacy, and International Law,” *American Journal of Jurisprudence* 58 (2013): 20.

⁵² Héctor Faundez Ledesma, *El Sistema Interamericano de Protección de Los Derechos Humanos: Aspectos Institucionales Y Procesales [The Interamerican System on Human Rights Protection: Institutional and Procedural Aspects]* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 2004), 501; Crawford, “Sovereignty as a Legal Value,” 124.

⁵³ *Constitution of Guatemala*, Arts. 149–151.

⁵⁴ Amy Ross, “United Nations Verification Mission in Guatemala (MINUGUA),” in *The Oxford Handbook of United Nations Peacekeeping Operations*, ed. Joachim A. Koops et al. (Oxford University Press, 2015), 555.

⁵⁵ Corte de Constitucionalidad, Expediente 791-2007, Opinión Consultiva, 8 de mayo de 2007, pp. 7.

⁵⁶ Faundez Ledesma, *El Sistema Interamericano de Protección de Los Derechos Humanos: Aspectos Institucionales Y Procesales [The Interamerican System on Human Rights Protection: Institutional and Procedural Aspects]*, 501.

law.⁵⁷ Therefore, sovereignty is enhanced when an individual, or a society, may benefit directly from a dialectic approach of both domestic and international legal systems.⁵⁸ As a consequence, states by engaging with international instruments in a constructivist manner, or as tools that enhances the experience of local actors and norms with a pro-human view of this interaction, reveals the Janus-fold effect of sovereignty: first, as a delegation power to enhance the individual and society; and second, the capacity of the society to benefit from the developments that the international system poses.⁵⁹

Returning to the paper's case study, Guatemala, after its return to democracy period, the country encountered a new series of problems in its post-conflict building process.⁶⁰ One such problem has been corruption.⁶¹ This corruption has been linked to the many tiers of government and has affected the economical and institutional development of the country. Currently, the former president and vice-president of Guatemala, as well as a series of tax officials and private individuals, are being prosecuted by corruption charges linked to a major custom's fraud as displayed further in this paper.

In the pursuit of its own internal institutional consolidation and fight against corruption, Guatemala has engaged with the international system, particularly with the UN.⁶² This makes a clear example of how the international legal system has been connected to the needs and constitutional objectives of a state in its post-conflict building stage. This connection has resulted in a symbiosis of objectives that would lay down the stepping stones for the creation of a new type of international actors, the CICIG. This symbiosis, therefore, becomes a mechanism by which local or domestic shortcomings may be repaired and strengthen by international law, thus consolidating sovereignty again. This is considered from the perspective that corruption of state officials' affects negatively the delegation of power by the people, conceived as the real sovereign as the Guatemalan Constitution enacts. Therefore, the recognition of a state's incapacity of address certain issues, allowing the involvement of foreign actors to aid and provide assistance to redress that miss-link between population and their representatives actually repair the sovereign link and exercise for the delegation of their power.

However, this symbiosis needs to define the capacity and the extent by which international actors can act within domestic spheres. In this line of ideas, Mathias Kumm has developed a theoretical framework by which international actors may act in domestic spheres.⁶³ For this,

⁵⁷ Ernst-Ulrich Petersmann, "'Fragmentation' and 'Judicialization' of International Law as Dialectic Strategies for Reforming International Economic Law," *Trade, Law and Development* 5 (2013): 235.

⁵⁸ Anne Peters, "Dual Democracy," in *The Constitutionalization of International Law*, ed. Jan Klabbers, Anne Peters, and Geir Ulfstein (OUP, 2009), 271.

⁵⁹ Gerald L. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55 (2003 2002): 1892.

⁶⁰ Brett and Delgado, "The Role of Constitution-Building Processes in Democratization: Case Study Guatemala," 12–18.

⁶¹ *Ibid.*, 36–37.

⁶² Ross, "United Nations Verification Mission in Guatemala (MINUGUA)," 556; Rajeev Pillay, "Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Guatemala" (New York: United Nations Development Programme: Evaluation Office, 2006), 15–22.

⁶³ Mathias Kumm, "The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law," *Indiana Journal of Global Studies*, no. 20 (2013): 607.

Kumm introduces a series of ‘formal, jurisdictional, procedural and substantive principles of cosmopolitan paradigm’ in order to give rise and allocate legitimacy to international actors.⁶⁴

These principles are: first, legality, meaning that states should apply international rules within their jurisdictions, unless it contradicts the other principles and breaches fundamental human rights; second, subsidiarity: in the sense of limiting the scopes of sovereignty and scope of international law; third, due process: stating that with subsidiarity, states may relinquish their sovereign duties and shields to international governance bodies, with the latter only acting when justified or in the existence of specific reasons and international capacity building; and lastly, respect for human rights and reasonableness: this idea is based on the assumption that international human rights instruments play a similar role to constitutional recognised rights. Also, these rights engage domestic values with international practice, joining international and domestic courts in a mutually beneficial enterprise.⁶⁵

Kumm’s approach, nonetheless, portrays legitimacy in procedural terms, accepting international law norms as intrinsically legitimate. This approach, moreover, submits states and other actors to a function based on results and under uniform human rights standards.⁶⁶ This may neglect the inherent interest and the reasons of why states engage with international and a dialogue of mutual recognition of rights and other features of domestic governance.

Another view on legitimacy is the one portrayed by John Tasioulas. For Tasioulas, legitimacy can be adopted from the theoretical inquiries on Raz’s conception on authority.⁶⁷ In such line of ideas, Raz portrays a notion of authority, specifically legitimate authority, and is grounded on the assumption that:

*‘[f]irst, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority’s directives than if he does not (I will refer to it as the normal justification thesis or condition, NJC). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition)’.*⁶⁸

Following Raz’s NJC, Tasioulas regards that neither consent nor democratic rules are benchmarks for legitimacy, rather they aid to the fulfilment of the NJC.⁶⁹ In this view, human rights become an additional instrument to address and assess the activity of states and

⁶⁴ Mathias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State,” in *Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunnof and Joel P. Trachtman (United Kingdom: Cambridge University Press, 2009), 272–274.

⁶⁵ *Ibid.*, 293–298.

⁶⁶ Nico Krisch, “The Case for Pluralism in Postnational Law,” in *The Worlds of European Constitutionalism*, ed. Grainne de Burca and J.H.H. Weiler (Cambridge University Press, 2011), 223.

⁶⁷ John Tasioulas, “Parochialism and the Legitimacy of International Law,” in *Parochialism, Cosmopolitanism and the Foundations of International Law*, ed. M.N.S. Sellers (Cambridge University Press, 2012), 17.

⁶⁸ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2012), 137–138.

⁶⁹ John Tasioulas, “The Legitimacy of International Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford University Press, 2010), 100.

international actors.⁷⁰ However, following this same NJC, human rights are not the only benchmark by which international actors can be assessed.⁷¹ This allows the domestic arena to feed and provide with guidelines and delimit the objectives of international actors in a form more of a dialogue. Therefore, Tasioulas portrayal on legitimacy expands on Kumm's procedural terms, providing them with some other substantive and normative parameters focused on the domestic environment and needs of states.

3. THE CICIG IN GUATEMALA

Due to the high levels of official involvement in corruption activities and enterprises in Guatemala, criminal prosecution has been slow and without any real dissociating effects.⁷² Consequently, in 2003 the Guatemalan Human Rights' Ombudsman pushed for the UN's involvement in the fight against corruption. This led to the negotiation of a first 'Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala'.⁷³ This first commission had a broader mandate than its contemporary, the CICIG. This original commission had broad powers of prosecution and investigation, which included crimes that affected human rights.⁷⁴

However, this commission never came to life, since the Guatemalan Constitutional Court delivered an opinion unfavourable to its mandate.⁷⁵ Due to the CICIACS broad powers, the court was of the opinion that its mandate was too broad and arrogated the function of the National Prosecutor's Office and the Judiciary.⁷⁶

After this unfavourable opinion from the court, this led Guatemalan officials, again, in 2006 to negotiate and ratify with the United Nations the creation of a new international body with a reduced mandate and with the objective to aid Guatemalan prosecutors and institutions in their fight against corruption.⁷⁷

This new body, named International Commission against Impunity in Guatemala (CICIG), is a new type international body that it is not dependant of the UN and is solely regulated by its constitutive instrument.⁷⁸ This body differs from a traditional international organisation in the sense that is a completely autonomous international institution with no states as part of it,

⁷⁰ Samantha Besson, "Human Rights: Ethics, Political ... or Legal? First Steps in a Legal Theory of Human Rights," in *The Role of Ethics in International Law*, ed. Donald Earl Childress III (Cambridge University Press, 2012), 217.

⁷¹ Tasioulas, "The Legitimacy of International Law," 15.

⁷² Brett and Delgado, "The Role of Constitution-Building Processes in Democratization: Case Study Guatemala," 11.

⁷³ *Agreement Between The United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala* ("CICIACS") signed 7 January 2004, n.d.

⁷⁴ *Ibid.*, Art. 2 and 3.

⁷⁵ File No. 1250-2004 (Advisory Opinion) (Corte de Constitucionalidad de Guatemala 2004).

⁷⁶ *Ibid.*

⁷⁷ *Acuerdo Entre La Organización de Naciones Unidas Y El Gobierno de Guatemala Relativo Al Establecimiento de Una Comisión Internacional Contra La Impunidad En Guatemala* [Agreement between the United Nations Organisation and the Government of Guatemala Relating to the Establishment of an International Commission against Impunity in Guatemala] Ratified 12 December 2006, Preamble.

⁷⁸ *Ibid.*

which not only acts within a domestic sphere of laws, but is also regulated by an international law agreement.⁷⁹ This gives this unique body the capacity to act directly within domestic criminal and administrative procedures.

Its constitutive instrument establishes that this new body has the objective of aiding, strengthening and contributing to the state's institutions in the investigation and prosecution of parallel institutions entrenched within the state.⁸⁰ In this capacity, this international body may bring charges against individuals and constitute itself as a complementary prosecutor in particular cases.⁸¹ The international commission may also recommend the Guatemalan state the adoption of public policies that may aid to the eradication of these parallel bodies and promote their prosecution and sanction.⁸² This has involved the promotion of reforms for the Guatemala legal system and judiciary, in both ordinary and constitutional level.

The development of the CICIG, however, has not been a smooth ride. Since its start, the international commission has been led by 3 commissioners. The CICIG began its operation in 2007 with a sceptical and divided opinion from the Guatemalan society.⁸³ During its initial years, the CICIG faced both institutional challenges and indifference by Guatemalan politicians and officials.⁸⁴ The new CICIG commenced activity at the same time as a new president took power. Although the newly-elected president showed his support for the new international commission, his focus of attention was on social programmes.⁸⁵

In these initial years, during the term of the first commissioner between 2007 and 2010, the commission focused on consolidating its mandate within Guatemala.⁸⁶ During this initial stage, the CICIG met strong indifference from local authorities, particularly from the National Criminal Prosecutor Office.⁸⁷ During this same period, the CICIG started to take on individual cases. Initial results were positive; however the commission found new hurdles by encountering some opposition by local criminal prosecutors.⁸⁸

Throughout the period of the second commissioner, between 2010 and 2013, the CICIG faded from public view and faced a series of hurdles on its role in Guatemala. This was due as a result of the appointment of a new Criminal Prosecutor, who took on the charge against

⁷⁹ On the nature of traditional international organisations see: International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries* Sixty Third Session, 2011, n.d., 6–8.

⁸⁰ *Acuerdo Entre La Organización de Naciones Unidas Y El Gobierno de Guatemala Relativo Al Establecimiento de Una Comisión Internacional Contra La Impunidad En Guatemala* [Agreement between the United Nations Organisation and the Government of Guatemala Relating to the Establishment of an International Commission against Impunity in Guatemala] Ratified 12 December 2006, Art. 1(a).

⁸¹ *Ibid.*, Art. 3 (b) (d) and (e).

⁸² *Ibid.*, Art. 2(b) and (c).

⁸³ Washington Office on Latin America, “THE CICIG: An Innovative Instrument for Fighting Criminal Organizations and Strengthening the Rule of Law” (Washington Office on Latin America, June 2015), 9.

⁸⁴ Open Society Justice Initiative, “Against the Odds: CICIG in Guatemala” (Open Society Foundation, March 2016), 39–40.

⁸⁵ *Ibid.*, 39.

⁸⁶ International Crisis Group, “Crutch to Catalyst? The International Commission Against Impunity in Guatemala,” 2–3.

⁸⁷ Open Society Justice Initiative, “Against the Odds: CICIG in Guatemala,” 43.

⁸⁸ *Ibid.*

corruption and war crimes.⁸⁹ As a result, the CICIG was relegated and lost any substantial role in the media. Nevertheless, the CICIG began to pair itself with the new Criminal Prosecutor, starting a mutually benefiting dialogue between the institutions.⁹⁰

During this period, particularly in 2011, the CICIG promoted its first attempt to reform the Guatemalan constitution.⁹¹ However, this reform attempt was unsuccessful due to the environment by which the CICIG and its commissioner were submerged within. In 2010, Guatemalan courts ruled against certain motions of the CICIG. This led to a backlash from the commissioner asserting that certain Guatemalan judges were obstructing justice.⁹² Consequently, the Supreme Court of Guatemala called onto the commissioner to respect the work of judges and stop interfering with judicial decision-making.⁹³ The response of the commissioner was through the development of a report called '*Jueces de la Impunidad*' or in English 'Judges of Impunity' in 2012. This report named publicly judges who had, in the view of the CICIG, links with criminal structures.⁹⁴

This response of the CICIG became problematic. The report named publicly a series of judges and their supposed 'involvement' in criminal activities. However, the CICIG's report was based on non-favourable rulings by the judges and newspaper articles. After the publication of the report, the CICIG did not act or bring any charges against these.⁹⁵ In this view, not only the CICIG violated its own mandate, by not bringing the cases of the judges into court; but it also violated a series of human rights by publishing a document by which affected the right of reputation of the judges and their right for judicial review, guaranteed by the Guatemalan constitution and other international instruments.

Using Kumm's procedural terms within a broader NJC notion of authority, it may be mentioned that the CICIG, in this occasion of publishing the judges' report, acted outside its own scope and objectives, thus hindering Guatemalan sovereignty. Although the CICIG has the capacity to publish such reports, it did not later pursue any legal action as ordered by its constitutive instrument. Therefore, this report became a direct attack on the judges' role in the system and their perception from the public. This hinders both Kumm's principles on legality and respect for human rights. As a consequence, the local government started to doubt on the role of the CICIG, leading to a public campaign against the CICIG by part of various actors, thus, ultimately heading to the resignation of the second commissioner.⁹⁶

Although some cases were brought under the Guatemala Constitutional Court regarding the commissioner's acts and report; the constitutional court declared that it did not have

⁸⁹ Ibid., 57.

⁹⁰ International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala," 4.

⁹¹ For Reform Proposals see: http://www.cicig.org/index.php?page=reforma_constitucional

⁹² International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala," 5.

⁹³ Open Society Justice Initiative, "Against the Odds: CICIG in Guatemala," 61.

⁹⁴ Comisión Internacional contra la Impunidad en Guatemala, "Los Jueces de La Impunidad [Judges of Impunity]" (Comisión Internacional contra la Impunidad en Guatemala, November 2012).

⁹⁵ Open Society Justice Initiative, "Against the Odds: CICIG in Guatemala," 60.

⁹⁶ Ibid., 58.

jurisdiction to review its acts due to commissioner's and commission's immunity.⁹⁷ With this, the Guatemalan Constitutional Court left exposed potential future judges to recur the acts of the commissioner and the commission, thus leaving a vacuum in the protection of their rights.⁹⁸ As a result, the CICIG acts may be questioned on their legitimacy and legality, due that they not only infringed on human rights, but also led to a vacuum on the protection of these in a domestic setting.

This conflict with the judiciary, the CICIG failed to fulfil the NJC and provide an authoritative push for constitutional reform in 2011. By creating a deconstructive dialogue between it and the judiciary, it also gained animosity from other tiers of government and public view. This led the CICIG to stand alone and without any legitimacy to promote judicial reform.

In 2013, a new commissioner assumed the leadership of the CICIG. As a first act, the new commissioner distanced himself from the work of his predecessor.⁹⁹ This move was done by stating that the 2012 report on judges was elaborated using 'rumours'.¹⁰⁰ With this distancing the commissioner succeeded in coupling himself with a new National Criminal Prosecutor and domestic judges.¹⁰¹ With this new coupling, the CICIG started to investigate certain key cases, including the previously mentioned tariffs' fraud case involving the President, Vice-President, a series of high rank tax officials and private companies in 2015.¹⁰²

The investigation of this case led to a series of large manifestations of tens of thousands of citizens in the streets by part of civil society from April up to August 2015.¹⁰³ These series of manifestations by part of the public steered to the eventual resignation of the former heads' of state in the following months. With the resignation of the two former heads of states, it cleared the path for the Prosecutor's Office and the CICIG to prosecute these.¹⁰⁴ This event, with a series of other high-impact cases led by both the Criminal Prosecutors' Office and the CICIG, has placed the latter in a unique position. This position was of becoming a central figure and leader in a new series of constitutional reforms within Guatemala.

⁹⁷ File 3726-2009: Amparo contra Comisión Internacional contra la Impunidad (judgment) (Corte de Constitucionalidad de Guatemala 2009); File 3720-2009: Amparo contra el Comisionado Internacional contra la Impunidad en Guatemala (judgment) (Corte de Constitucionalidad de Guatemala 2009).

⁹⁸ *Constitution of Guatemala*, Art. 29 (right to judicial protection); *American Convention on Human Rights* opened for Signature in 10 July 1969, Organisation of American States Treaty Series No. 36 (entered into Force 18 July 1978), Arts. 8 (right to a fair trial), 13 (freedom of thought and expression), 25 (right to judicial protection).

⁹⁹ Comisión Internacional contra la Impunidad en Guatemala, "Comunicado de Prensa 057: El Comisionado Iván Velásquez Gómez, a La Opinión Pública [Press Communication 057The Commissioner Iván Velásquez Gómez, to the Public Opinion]," n.d., <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=455&cntnt01returnid=1077>.

¹⁰⁰ Ibid.

¹⁰¹ International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala," 6.

¹⁰² New York Times, "Guatemala's Embattled President," n.d., <http://www.nytimes.com/2015/08/27/opinion/guatemalas-embattled-president.html>.

¹⁰³ New York Times, "Guatemala: President Is Urged to Resign," n.d., <http://www.nytimes.com/2015/08/28/world/americas/guatemala-president-is-urged-to-resign.html>.

¹⁰⁴ The Washington Post, "Otto Perez Molina, Guatemalan President, Reigns amid Corruption Probe," n.d., <http://www.washingtontimes.com/news/2015/sep/3/otto-perez-molina-guatemala-president-resigns-amid/?page=all>.

4. LEGITIMACY OF INTERNATIONAL ACTORS IN CONSTITUTIONAL REFORM

In late 2015, Guatemala celebrated its elections for a new president and congress. Under public scrutiny, the newly elected president promised in his campaign to fully support the CICIG's mandate.¹⁰⁵ As a result of his promise in the electoral campaign, in April 2016, the new Guatemalan President travelled to the UN's Headquarters in New York, to negotiate an extension of the CICIG's mandate in Guatemala up to the year 2020.¹⁰⁶

With the election of a new president and the development of a series of high impact cases, the CICIG called for a new constitutional reform process.¹⁰⁷ This initiative was taken by the newly elected Guatemalan President, announcing a call for a national dialogue for constitutional reform. This national dialogue started in April 2016, commemorating a year after the manifestations that led towards to resignation of the previous president and vice-president.¹⁰⁸

On the issue of constitutional reform, this has been heavily overdue, as previously mentioned. The reform of the judicial system has a continuing issue since the signing of the Guatemalan peace accords in 1996 and a personal enterprise for the CICIG's commissioners.¹⁰⁹ However, under the CICIG's presence, it has promoted to constitutional reform in two occasions, 2011, under the previous commissioner, and currently in 2016 with the current one.

In the topic of constitutional reforms, these are namely decision-making processes agreed by political actors shaped by their own societies.¹¹⁰ Reforms, however, are tools which allow the review and exposure of the constitutional system.¹¹¹ Therefore, reform procedures, particularly those of constitutional nature, need to provide a critical reflection on the reality of the state's power structures and their accountability.¹¹² Consequently, the nature and context of the reform procedures needs to be precise and avoid any collateral and unwanted

¹⁰⁵ TeleSur, "By 2022 Guatemala Will Not Need CICIG: Jimmy Morales," n.d., <http://www.telesurtv.net/english/news/By-2022-Guatemala-Will-Not-Need-CICIG-Jimmy-Morales-20150908-0029.html>.

¹⁰⁶ Comisión Internacional contra la Impunidad en Guatemala, "Comunicado de Prensa 057: El Comisionado Iván Velásquez Gómez, a La Opinión Pública [Press Communication 057The Commissioner Iván Velásquez Gómez, to the Public Opinion]."

¹⁰⁷ Prensa Libre, "Cicig Convoca a Diálogo Nacional Para Reformar La Justicia [CICIG Calls for National Dialogue to Reform Justice]," n.d., <http://www.prensalibre.com/guatemala/politica/cicig-anuncia-dialogo-nacional-hacia-la-reforma-de-la-justicia>.

¹⁰⁸ Comisión Internacional contra la Impunidad en Guatemala, "Comunicado de Prensa 023: Anuncian Diálogo Nacional: Hacia La Reforma de La Justicia En Guatemala [Press Communication 023: Call for National Dialogue: Towards the Reform of Justice in Guatemala]," n.d., <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=699&cntnt01returnid=67>.

¹⁰⁹ Brett and Delgado, "The Role of Constitution-Building Processes in Democratization: Case Study Guatemala," 24.

¹¹⁰ Claude Klein and Adrás Sajó, "Constitution-Making: Process and Substance," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Adrás Sajó (Oxford University Press, 2012), 420.

¹¹¹ *Ibid.*, 438.

¹¹² Mathias Kumm, "Taking 'the Dark Side' Seriously: Constitutionalism and the Question of Constitutional Progress. Or: Why It Is Fitting to Have the 2016 ICON-S Conference in Berlin," *ICON* 13 (2015): 780.

effects.¹¹³ As such, the actual process of reform becomes paramount for any actual significant change.¹¹⁴

In this process of reform, participation of different groups may feed into legitimacy for the acceptances of constitutional change.¹¹⁵ As a caveat of the previous, public participation may bring the loss of coherency in the amendment process through the introduction of self-interested groups.¹¹⁶ This may lead towards a failure to reach a common platform of agreement and actually launch any common proposals.¹¹⁷ This is seen in the case of the CICIG 2011 proposal, which did not gather any political support from the state nor the public.

In 2011, as previously described, the CICIG was in a moment of stress with other bodies of governance. In this moment, the CICIG was submerged in a feud against the judiciary and faded from the public view. Under these circumstances, a lack of leadership by part the CICIG and its failure to represent a cohesive and legitimate body to civil society and other governance institutions, led to its reforms proposals to dwindle. In other words, the CICIG was launching a reform process in moment of institutional public duress, timely inadequate to promote change.¹¹⁸

Taking Raz's NJC, the 2011 CICIG's attempt to promote reform, therefore, did not present any conditionals for it to become a legitimate actor for constitutional reform. The feud with the judiciary, leading to the release of the judges' report together with public image disarray, did not allow the CICIG to become a central player for reform. In addition, the CICIG in this previous effort inserted itself as the main reform actor, providing its own reforms to the constitution in 2011. Although the CICIG is entitled by its mandate to propose such constitutional reforms, it had not asserted itself as the actor to promote such.

The 2016 proposals saw a change on the CICIG's role and authority stance on the reform process. After the revealing of the president's and vice president's corruption suits, civil society manifested their deep discontent to leaders, leading to mass protests. This led to the election of a political outsider as president and the CICIG to gain a legitimate status from public society. As such, although the CICIG promoted the need for a national dialogue for constitutional reform, this was easily taken by the newly-elected Guatemalan President and Congress. By it, the CICIG not only became a leading voice for the reform process, but also a legitimating actor to it.

This new instance of potential reform varies from the 2011 attempt, in the sense that now involves all major Guatemalan governance bodies. The reform dialogue not only has included

¹¹³ Klein and Sajó, "Constitution-Making: Process and Substance," 438.

¹¹⁴ Justin Blount, "Participation in Constitutional Design," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar Publishing Limited, 2011), 38.

¹¹⁵ *Ibid.*, 39; Jennifer Widner and Contiades Xenophon, "Constitution-Writing Processes," in *Routledge Handbook on Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (Routledge, 2012), 65.

¹¹⁶ Blount, "Participation in Constitutional Design," 40.

¹¹⁷ *Ibid.*

¹¹⁸ Klein and Sajó, "Constitution-Making: Process and Substance," 425.

the three main states powers: executive, legislative and judicial, but also the human rights *ombudsman*, the National Prosecutors' Office and has also called on the public, including the College of Lawyers, to participate in a series of roundtables.¹¹⁹ Going even further, the CICIG has included and presided a roundtable with indigenous leaders in order to include the recognition of indigenous customary law within the constitutional reform process.¹²⁰

In this new push for reform, the CICIG has become a cohesive and authoritative actor for change, contrary to the 2011 attempt. This is also displayed within the new proposals for constitutional reforms. Although the 2016 proposals due reveal certain similarities to the 2011 ones; the new proposals have incorporated another proposal for constitutional reform presented in 2011 by a series of universities and a local think-tank.¹²¹ This move had, thus, taken on-board the academic sector and other actors into the reform context.

Since the public opinion of the CICIG is in an all-time high, as a result of the exposure of major criminal structures within the states, being the latest, again linked to the former heads of state, bribery for the attainment of a contract to lease of one of Guatemala's commercial seaports;¹²² this has certainly placed the CICIG as a legitimate actor within the new domestic reform process.

As a result, the current success of the CICIG on starting a serious potential reform on the Guatemalan constitution derives from the following: first, since the appointment of the new commissioner, the CICIG detached itself from the work of the previous commissioner, creating better ties with the judiciary. The CICIG has used advantageously its position to make allies in order to investigate and prosecute a series of high impact cases. This has enhanced the CICIG perception of the public, making it a reference for the fight against corruption and legitimacy. Second, due to this perception as a reference on the fight against corruption, the new President has supported and pushed the CICIG's efforts in pursuit of its objectives. This has led the CICIG to become a key institutional player in the push for reform. Thirdly, after attaining public support, from both civil society and different tiers of government, the CICIG called for a dialogue for constitutional reform. In this dialogue, the CICIG has sidestepped its role of the main actor for change, allowing other actors, such as the President, to take leadership in this role. However, within this new dialogue, the CICIG took the role of a technocratic and advisory body capable to reach effectively different tiers of

¹¹⁹ ElPeriodico, "Velásquez Y Aldana Se Reúnen Con Directiva Del CANG [Velásquez and Aldana Meet with the Directive of the College of Lawyers]," n.d., <http://elperiodico.com.gt/2016/05/04/pais/velasquez-y-aldana-se-reunen-con-directiva-del-cang-2/> It is to be noted that days after, proposal of the constitutional reforms started to circulate among the members of the college. .

¹²⁰ ElPeriódico, "Abogan Por Inclusion de Indigenas Y Discapitados [Advocate of the Inclusion of Indigenous and the Disabled]," n.d., <http://elperiodico.com.gt/2016/04/30/pais/abogan-por-inclusion-de-indigenas-y-discapitados/>.

¹²¹ For a study on the 2011 proposals from the academic sector see: Lorena Escobar Noriega, "La Reforma Constitucional En Seguridad Y Justicia [The Constitutional Reform in Security and Justice]," *Momento: Asociación de Investigación Y Estudios Sociales, Derecho Constitucional*, 27 (2012): 1.

¹²² Comisión Internacional contra la Impunidad en Guatemala, "Comunicado de Prensa 025: Nuevo Caso de Corrupción En Portuaria Quetzal Víncula a Exgobernantes [Press Communication 025: New Corruption Case in Quetzal Port Links Former Rulers]," n.d., <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=701&cntnt01returnid=67>.

population, such as indigenous groups. This has allowed the CICIG to keep itself not as a leader, rather as a necessary and legitimating actor of the reform process.

The three previous conditionals by which the CICIG has, from the time being, created high expectation for constitutional reform fulfils the NCJ, without any wrongdoings on Kumm's procedural principles. The CICIG has the mandate to promote such changes, based on a notion that it corrects the domestic shortcomings, by which now is being faced by the judiciary in its fights against corruption, thus has, since the time of the new commissioner, been creating a scenario where it has the authority to do so, without any doubt of its role.

5. FINAL REMARKS AND CONCLUSION

With regard to the topic of sovereignty, the CICIG does not present an intromission to Guatemala's sovereignty. This is demonstrated by the fact that the National Prosecutor Office with the aid of the CICIG served as catalysts to prosecution of corrupt officials and reestablishment of the delegation of power link in Guatemala. In this sense, the CICIG acting in conjunction with domestic authorities and civil society through large manifestations became a factor and a trigger for the reestablishment of sovereignty affected by corruption.

In relation to the new reform process, this has assembled almost all the apparatus of the state with civil society, with the CICIG in the middle leading the discussion. This involvement of all actors, including the CICIG, has created high expectancy for actual change.

However, the ultimate bar success for this reform process, would be actual approval of reform of the constitution. The nearest occasion was the 1999 unsuccessful reforms, which did not achieve popular support. This was displayed by low numbers in the referendum process, with the majority of voting supporting a negative posture towards reform.¹²³

This previous reform process, however, portrayed serious deficiencies. This was displayed by the complexity of the questions, which the population was required to vote for, and a failure to promote publicly the debate and the intention of reform.¹²⁴ Therefore, the CICIG, as well as the other governmental institutions pushing for reform, should need to take into account the failure of these previous experiences in order to not repeat the failure of the previous attempt.

Nevertheless, although the CICIG has not accomplished any constitutional change within Guatemala; internationally, the CICIG has become a referent for change. In neighbouring Honduras, another country plagued by corruption issues, the current government has ratified with the Organisation of American States the creation of a somewhat similar international body.¹²⁵ In this new effort, the OAS ratified a treaty with the Honduran government in order

¹²³ Brett and Delgado, "The Role of Constitution-Building Processes in Democratization: Case Study Guatemala," 29.

¹²⁴ *Ibid.*, 28.

¹²⁵ For more information see: Eric L. Olson and Katherine Hyde, "Nine Questions and Observations about Honduras's New Anti-Corruption Mechanism" (Woodrow Wilson International Center for Scholars: Latin American Program, October 5, 2015), <https://www.wilsoncenter.org/article/nine-questions-and-observations-about-hondurass-new-anti-corruption-mechanism>.

to aid for a ‘dialogue’ for the reform of the Honduran judiciary in order to aid in the fight against corruption.¹²⁶

The creation of this new body, under a different international organisation, reflects the partial success of the CICIG in actual becoming a key figure. This enhances the perceptive of the CICIG as a promoter and cohesive actor within domestic constitutional reform.

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¹²⁶ Organización de Estados Americanos, Misión de Apoyo contra la Corrupción y la Impunidad en Honduras (MACCIH), see: <https://www.oas.org/documents/spa/press/Mision-Apoyo-contra-Corrupcion-Impunidad-Honduras-MACCIH.pdf>

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