THE INAPPLICABILITY OF STATUTORY LIMITATIONS AND AMNESTY TO WAR CRIMES & CRIMES AGAINST HUMANITY, AND THE ADMISSIBILITY OF EVIDENCE FROM PRELIMINARY EVIDENTIARY HEARINGS ("ANTICIPOS DE PRUEBA")

AMICUS CURIAE BRIEF OF THE WAR CRIMES RESEARCH OFFICE AND THE ACADEMY OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, AND INTERNATIONAL EXPERTS ON INTERNATIONAL CRIMINAL AND HUMAN RIGHTS LAW

A FILING BEFORE THE SALA DE LA CORTE DE APELACIONES DEL RAMO PENAL DE PROCESOS DE MAYOR RIESGO Y EXTINCIÓN DE DOMINIO OF GUATEMALA

Case:	Esteelmer Francisco Reyes Girón and Heriberto Valdez Asig
Before:	Judge Carlos Enrique Casado Max Judge Gloria Dalila Suchite Barrientos Judge Rafael Morales Solares
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TABLE OF CONTENTS

I. INTRODUCTION

A. Statement of Interest

This brief is submitted by the War Crimes Research Office and the Academy of Human Rights and Humanitarian Law of the American University Washington College of Law, on behalf of a select group of leading academics, jurists, and practitioners specializing in international criminal and human rights law:[1]

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[1] The views expressed herein are those of individual *amici* and do not necessarily reflect the views of their respective institutions.

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Amici understand that the appeals in this case involve legal questions regarding the (non-) applicability of statutes of limitations and amnesties to war crimes and crimes against humanity, as well as the admission and consideration of evidence from preliminary evidentiary hearings (*anticipos de prueba*). As leading authorities on international criminal and human rights law, *amici* are interested in the development of these areas of law at both the domestic and international levels. *Amici* respectfully submit this brief to assist this Court in assessing these questions by sharing their professional understanding of how these legal issues have been addressed under international criminal and human rights law.

B. Summary of Argument

This *amicus* brief addresses three of the issues raised on appeal by defendants in the *Sepur Zarco* case, which concerns crimes committed by former members of the Guatemalan military in the context of the country's armed conflict. Specifically, this brief examines: (1) whether a statute of limitations is applicable to war crimes or crimes against humanity that were committed between 1982 and 1988; (2) whether prosecution of those accused of committing war crimes or crimes against humanity during the country's civil conflict is barred by Guatemala's amnesty laws of 1986 and 1996; and (3) whether the admission at trial of some victims' prior recorded testimony, taken during the preliminary investigation (*anticipos de prueba*) phase of the case, violated the defendants' fair trial rights.

None of these three issues present grounds for overturning the defendants' convictions for the following reasons:

Statutes of limitation

Statutes of limitations are not applicable to crimes against humanity and war crimes under customary international law. This principle has been widely adopted by courts in Latin America, and has been applied to crimes dating as far back as World War II. Although it may not be possible to determine the exact date by which this norm crystallized, both international instruments and domestic jurisprudence indicate that it was well established by 1982. Accordingly, no statute of limitations is applicable to the crimes committed at Sepur Zarco.

Amnesty

Guatemala's 1986 and 1996 amnesty laws do not bar prosecution of crimes against humanity and war crimes. Both laws are explicitly limited to political and related crimes, and the 1996 law further exempts crimes that are not subject to statutes of limitations. Moreover,

substantial jurisprudence from the Inter-American system and domestic courts holds that amnesty laws cannot be applied to the crimes of which defendants were convicted. Defendants are therefore not entitled to benefit from either law.

Prior Recorded Testimony

The admission at trial of some victims' prior recorded testimony was consistent with both Guatemalan and international law. Guatemalan law explicitly permits the admission at trial of testimony taken during the investigation phase of the case, provided that certain conditions are met. As the trial court concluded, all of the provisions of Guatemalan law – such as the requirements that the testimony be taken before a judge and be videotaped – were met in the *Sepur Zarco* case. In addition, the prior recorded testimony was admissible under international law, which recognizes that the use of such testimony does not violate a defendant's rights where there is evidence that the testimony is reliable and (1) the witness is unavailable, (2) there was a prior opportunity to cross-examine the witness, or (3) the testimony does not relate to the acts or conduct of the accused. Although testimony only needs to meet one of these tests to be admissible, the testimony in the *Sepur Zarco* case likely satisfied all three. First, as victims of sexual violence who were suffering from medical conditions stemming from the crimes and who were at risk of re-traumatization, the women were unavailable under international standards. Second, a public defender appointed to represent the interests of the defendants was given an opportunity to cross-examine the witnesses, and did in fact cross-examine at least some of them. Third, most of the prior recorded testimony relates to the acts of individuals other than the defendants or to the effect of the crimes on the victims – neither of which constitutes the acts or conduct of the defendants themselves. Finally, there were significant indicia that the testimony was reliable, including corroboration by *viva voce* testimony of other witnesses who were subject to cross-examination at trial. Admission of the prior recorded testimony was therefore proper and did not violate the defendants' rights.

C. Background and Summary of Relevant Facts

On February 26, 2016, Guatemala's Tribunal Primero de Sentencia Penal, Narcoactividad, y Delitos Contra el Ambiente found two former military officials, Lieutenant Colonel Esteelmer Reyes Girón and Heriberto Valdez Asig, guilty of several crimes committed between 1982 and 1988, during the country's armed conflict. Specifically, the Tribunal found former commander of the Sepur Zarco military base Lieutenant Colonel Esteelmer Reyes Girón guilty of murder, as well as crimes against the duties of humanity in the forms of (1) rape, (2) sexual and domestic servitude, and (3) humiliating and degrading treatment.[2] The Tribunal found former military commissioner Heriberto Valdez Asig guilty of forced disappearances, as well as crimes against the duties of humanity in the forms of (1) sexual violence and (2) humiliating and degrading treatment.[3]

The trial of Mr. Reyes and Mr. Asig was conducted over a period of more than three weeks in February 2016. During the trial, the Tribunal considered several forms of evidence, all

[2] Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Feb. 26, 2016, C-01-76-2012-00021, Sentencia, at 1, 492, 498 [hereinafter Sentencia].
[3] *Id*. at 1, 493, 502.

of which it evaluated according to the rules of *sana critica razonada*.[4] More than two dozen witnesses, including victims, victims' family members, and eyewitnesses, gave *viva voce* testimony in court or by means of video-conference technology.[5] The videotaped prior recorded testimony of another nineteen witnesses, primarily victims of various forms of sexual violence and forced labor, were played during the trial.[6] The Tribunal found that the prerecorded testimonies, which had been taken during the preliminary investigation (*anticipo de prueba*) phase of the case, met the requirements of Guatemalan law.[7] Oral testimony also was provided by more than a dozen experts, including: a gender anthropologist,[8] an expert who conducted physical and psychological examinations of the victims,[9] an expert on Guatemala's military,[10] an expert on international standards for assessing credibility in cases of human rights violations,[11] an expert who conducted psychosocial analyses of the victims,[12] an expert on crimes committed during times of conflict in Guatemala,[13] an expert on cultural destruction in Guatemala,[14] a linguistic anthropologist,[15] an expert on the sociology of Guatemala's military between 1982 and 1983,[16] an expert from Guatemala's historical registry,[17] eight forensic anthropologists,[18] two ballistic experts,[19] an economist,[20] and three experts to authenticate photographic evidence presented at trial.[21] Finally, over 200 documents;[22] more than 350 pieces of physical evidence;[23] and photographs, maps, and other visual materials were reviewed by the Tribunal.[24]

Both defendants appealed their convictions shortly after they were handed down.[25] Mr. Asig's appeal is predominantly based on an argument that the Tribunal engaged in a

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[4] *Id*. at 20. *Sana critica* (*i.e.*, sound judicial discretion) is the system the Inter-American Court of Human Rights and other Latin American courts use for evaluating the weight of evidence; courts are not constrained by evidentiary rules of legal proof, but must judge in accordance with the rules of logic and experience, and state the grounds for their evaluation. *See* Álvaro Paúl, *Sana Crítica: The System for Weighing Evidence Utilized by the Inter-American Court of Human Rights*, 18 BUFF. HUM. RTS. L. REV. 193, 193 (2012).

[5] *See* Sentencia, *supra* note 2, at 275-326, 348-52, 355-370.

[6] *Id*. at 198-275, 330-348, 352-55.

[7] *Id.* at 205-06, 209, 217-18, 222, 228-29, 234, 238, 243, 252-53, 260, 263-264, 267, 272, 275. In assessing the testimony of these witnesses, the Tribunal explicitly noted that the testimony met the requirements of Guatemalan law: Se cumple con las formalidades de ley que se requiere para su validación y legitimación de la diligencia. Se realizó por medio de declaración gravada en audio y video y ante juez competente para recibir el testimonio de la testigo. En la diligencia también participaron los sujetos procesales. *Id. See also infra* pp. 22-23.

[8] *Id.* at 20-41.

[9] *Id.* at 41-53.

[10] *Id*. at 53-69.

[11] *Id.* at 69-79.

[12] *Id.* at 79-91.

[13] *Id.* at 91-98.

[14] *Id.* at 98-109.

[15] *Id*. at 109-112.

[16] *Id*. at 112-132.

[17] *Id.* at 132-144.

[18] *Id*. at 144-70, 171-93.

[19] *Id*. at 170-71, 196-97.

[20] *Id*. at 197-198.

[21] *Id*. at 193-96.

[22] *Id.* at 370-435.

[23] *See id.* at 435-70.

[24] *See id.* at 471-472.

[25] Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Mar. 15, 2016, C-01076-2012-00021 Of. 2º, Appeal of Heriberto Valdez Asig, at 3-4 [hereinafter Asig Appeal]; Tribunal Primero de

misapplication of *sana critica razonada*, including because it considered the videotaped testimony that was taken during the preliminary investigation in its assessment of the defendants' guilt.[26] The Asig appeal notes specifically that the admission of pre-recorded testimony from the preliminary investigation was improper and a violation of due process.[27] Mr. Reyes's lawyer, Moises Galindo, filed an appeal citing the same issue regarding the admission at trial of the pre-recorded testimony, and noted in particular that Mr. Reyes had not been present when the testimony was taken.[28] That appeal also argues that the statute of limitations for the crimes with which the accused were charged had expired, as they had taken place 34 years earlier.[29] Mr. Reyes, unsatisfied with the appeal and accusing his lawyer of failing to defend his constitutional rights, filed a second self-drafted appeal thirteen days later.[30] Like his co-defendant, Mr. Asig, Mr. Reyes's predominant concern was with the admission of pre-recorded testimony from the preliminary investigation.[31] Mr. Reyes also argued that his prosecution was barred by a Guatemalan amnesty law.[32]

II. INAPPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

Under customary international law, statutes of limitation are not applicable to war crimes and crimes against humanity. This is evidenced by the relevant international instruments and decisions by international courts, as well as domestic laws, regulations, and court judgments from countries around the world. Each of these categories is explored, in turn, in detail below.

A. International Instruments and Jurisprudence

The principle that statutes of limitations do not apply to war crimes and crimes against humanity dates back to at least World War II. On December 20, 1945, the Allied Control Council[33] issued Control Council Law No. 10, which empowered each of the authorities then occupying Germany to try suspected war criminals for, *inter alia*, war crimes and crimes against humanity in their respective jurisdictions.[34] Law No. 10 further provided that "[i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any

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Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Mar. 17, 2016, C-01076-2012-00021 Of. 2º, Appeal of Esteelmer Francisco Reyes Girón by his attorney Moises Eduardo Galindo Ruiz [hereinafter Galindo Appeal].

[26] Asig Appeal, *supra* note 25, at 3-5.

[27] *Id.* at 5.

[28] Galindo Appeal, *supra* note 25, at 21-25, 27-32.

[29] *Id.* at 36-37.

[30] Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Mar. 30, 2016, C-01076-2012-00021 Of. 2º, Appeal of Esteelmer Francisco Reyes Girón [hereinafter Reyes Appeal].

[31] Reyes Appeal, *supra* note 30, at 22-26.

[32] *Id.* at 45-48.

[33] The Allied Control Council was created by the Allied Powers in order to coordinate governance of Germany between the several powers occupying it at the end of World War II. *See* Statement by the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic on Control Machinery in Germany *in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 14 (1945), https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

[34] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, *in* ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE, *supra* note 33, at 306.

statute of limitation in respect of the period from 30 January 1933 to 1 July 1945,"[35] thereby neutralizing any alleged time bar to war crimes and crimes against humanity.

Resolutions issued by various United Nations bodies in the 1960s worked to entrench the principle that statutes of limitation do not apply to war crimes and crimes against humanity. For instance, in 1965, the UN Commission on Human Rights adopted a resolution regarding the punishment of international crimes in which it observed that the UN "must contribute to the solution of the problems raised by war crimes and crimes against humanity, which are serious violations of the law of nations, and that it must, in particular, study possible ways and means of establishing the principle that there is *no period of limitation* for such crimes in international law."[36] The UN Economic and Social Council adopted a resolution the following year urging all States "to prevent the application of statutory limitation to war crimes and crimes against humanity."[37] Next, in 1967, the UN General Assembly passed a resolution on the issue, "[r]ecognizing that it is necessary and timely to affirm in international law, through a convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."[38] The resolution went on to recommend "that no legislative or other action be taken which may be prejudicial to the aims and purposes of a convention on the non-applicability of statutory limitation to war crimes and crimes against humanity pending the adoption of a convention by the General Assembly."[39]

The international convention envisioned by the 1967 General Assembly Resolution was drafted shortly thereafter as the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[40] During the drafting of the Convention, several countries, including Chile and Venezuela, expressed strong support for the inclusion of the non-applicability principle.[41] The final instrument expressly states that no statutory limitation is applicable to the following crimes, irrespective of when they were committed:

> (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

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[35] *Id.* art. II (5).
[36] UN Commission on Human Rights, Res. 3 (XXI), pmbl. (Apr. 9, 1965) (emphasis added), *quoted in* ICRC, *Customary International Humanitarian Law Database*, R. 160, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160.
[37] UN Economic and Social Council, Res. 1158 (XLI), ¶ 1 (Aug. 5, 1966), https://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0/761/38/IMG/NR076138.pdf?OpenElement.
[38] UN General Assembly, Res. 2338 (XXII), pmbl. (Dec. 18, 1967), https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/236/73/IMG/NR023673.pdf?OpenElement.
[39] *Id.* ¶ 5.
[40] *See* U.N. Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), U.N. Doc. A/RES/ 2391 (XXIII), 754 U.N.T.S. 73 (Nov. 26, 1968), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf.
[41] *See* ICRC, *Customary International Humanitarian Law Database*, R. 160, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160.

> (b) Crimes against humanity . . . as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed.[42]

The UN Convention entered into force on November 11, 1970, establishing the groundwork for the international legal norm well before the events at issue in the *Sepur Zarco* case.

The founding documents of several international or internationalized tribunals, including some established to prosecute crimes committed before or during the same time period as the events in *Sepur Zarco*, have explicitly incorporated the rule on the imprescriptibility of crimes against humanity or war crimes in their founding documents. For example, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, which was enacted to authorize trials of those responsible for grave domestic and international crimes in Cambodia during the period from 1975 to 1979, specifies that crimes against humanity have no statute of limitations.[43] Similarly, the Statute of the Extraordinary African Chambers in the Courts of Senegal, which was established to prosecute crimes committed in Chad from 1982 to 1990, provides that crimes against humanity and war crimes are not subject to any statute of limitations.[44] And the Rome Statute of the International Criminal Court – which has been ratified by 124 countries, including Guatemala[45] – states that crimes within the court's jurisdiction "shall not be subject to any statute of limitations."[46]

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[42] U.N. Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, *supra* note 40, art. I.

[43] Cambodia, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 5 (2004), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[44] Senegal, Statute of the Extraordinary African Chambers within the Courts of Senegal, arts. 4, 9 (2013), *reprinted in* 52 I.L.M. 1028, 1030 (2013), http://www.jstor.org/stable/10.5305/intelegamate.52.4.1020. Statutes of other tribunals are similar. *See, e.g.*, United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, § 17.1, UNTAET/REG/2000/15 (June 6, 2000), http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf; United Nations Transitional Administration in East Timor, Regulation No. 2000/11 on the Organization of Courts in East Timor, § 10.1, UNTAET/REG/2000/11 (Mar. 6, 2000), http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg11.pdf.

[45] The States Parties to the Rome Statute, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[46] UN General Assembly, Rome Statute of the International Criminal Court, arts. 5, 29, July 17, 1998, 2187 U.N.T.S. 90, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter Rome Statute of the ICC]. *See also* Situation in the Republic of Kenya, Case No. ICC-01/09, Decision on the "Victims' request for review of Prosecution's decision to cease active investigation," ¶ 14 (Nov. 5, 2015) (affirming that none of the crimes over which the ICC has jurisdiction – which includes war crimes and crimes against humanity – are subject to statutes of limitations), https://www.legal-tools.org/doc/18b367/pdf/. The International Criminal Tribunal for the former Yugoslavia also has confirmed that war crimes and crimes against humanity belong to "the most serious category of crimes" for which there is no statute of limitations. *See e.g.*, Prosecutor v. Mrda, Case No. IT-02-59-S, Sentencing Judgement, ¶ 103 (Mar. 31, 2004), https://www.legal-tools.org/doc/d61b0f/pdf/.

International human rights bodies and criminal tribunals have consistently held that statutes of limitations do not apply to war crimes and crimes against humanity, regardless of whether their founding statutes contain such a provision. As early as 1976, for example, the European Commission of Human Rights expressly observed in a case concerning a 1970s trial for crimes committed during World War II that "the rules of prescription do not apply to war crimes."[47] The Commission further emphasized "that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned."[48]

The jurisprudence of the Inter-American Court of Human Rights is in accord. In 2001, the Court held in the *Barrios Altos* case that provisions on prescription are inapplicable to cases involving serious human rights violations such as torture; summary, extrajudicial or arbitrary execution; and forced disappearance.[49] The court reasoned that application of a statute of limitation in such cases would violate non-derogable international human rights norms requiring the investigation and punishment of serious human rights abuses.[50] A few years later, the Court explicitly confirmed that the rule on non-applicability of statutes of limitations applies to crimes against humanity:

> [A]s a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable. As explained in paragraphs 105 and 106 of this Judgment, crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished.[51]

Moreover, the Inter-American Court held that the proscription on statute of limitations for crimes against humanity is a *jus cogens* norm of international law, and therefore applies regardless of whether a country has ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[52]

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[47] X. v. Germany, App. No. 6946/75, Eur. Comm'n H.R., Decision (1976), http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-74567&filename=X.%20v.%20FEDERAL%20REPUBLIC%20OF%20GERMANY.pdf.

[48] *Id. See also* Yaman v. Turkey, App. No. 32446/96, Eur. Ct. H.R., Judgment, ¶ 55 (2004) ("[W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred."), http://hudoc.echr.coe.int/eng?i=001-67228.

[49] Case of Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

[50] *Id.*; *see also* Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 120, ¶ 172 (2005) (ordering El Salvador to "abstain from using figures such as . . . prescription or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction" in cases involving "serious human rights violations"), http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf.

[51] Almonacid-Arellano et al. v. Chile, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 152 (2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

[52] *Id.* ¶ 153.

Together, the above-described international instruments and caselaw confirm that there is no statute of limitations for serious international offenses, including crimes against humanity and war crimes. That principle has been widely incorporated into domestic law, including in countries in Latin America, as the next section describes in detail.

B. Domestic Laws and Jurisprudence

1. Legislation and Regulations

Dozens of countries have national laws providing that statutory limitations do not apply to severe human rights violations, including crimes against humanity. Others have incorporated these proscriptions in their military manuals. Such widespread adoption of the rule on the imprescriptibility of these crimes confirms the customary nature of this principle.

The importance of ensuring that individuals who commit war crimes and crimes against humanity are held responsible regardless of the passage of time is underscored by the incorporation of that principle in several national constitutions. For example, Venezuela's constitution provides that actions to punish crimes against humanity, serious violations of human rights and war crimes shall not be subject to statutes of limitation.[53] Similarly, the constitution of Rwanda – a country that was ravaged by such crimes – states that "[t]he crime of genocide, crimes against humanity and war crimes do not have a period of limitation."[54] Other countries have placed similar provisions in their constitutions.[55]

Many more countries have enacted legislation or adopted military manuals prohibiting the application of statutes of limitations to serious human rights violations, including war crimes and/or crimes against humanity. Argentina, Cuba, El Salvador, Trinidad and Tobago, and Uruguay, for example, have all adopted statutes providing that crimes against humanity and/or war crimes are not subject to statutes of limitations.[56] Peru incorporated the proscription on statutes of limitations into its military manual on international humanitarian law and human rights.[57] Indeed, every country in Central America has either adopted legislation on this issue or ratified the UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity.[58]

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[53] Venezuela, Constitución de la República Bolivariana de Venezuela, art. 29, https://www.oas.org/juridico/mla/sp/ven/sp_ven-int-const.html.
[54] Rwanda, The Constitution of the Republic of Rwanda, art. 13, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/64236/90478/F238686952/RWA64236.pdf.
[55] *See, e.g.*, Ecuador, Constitución de la República del Ecuador, art. 80, http://www.oas.org/juridico/pdfs/mesicic4_ecu_const.PDF; Ethiopia, Constitution, art. 28, http://www.africa.upenn.edu/Hornet/Ethiopian_Constitution.html.
[56] ICRC, *supra* note 41; Trinidad and Tobago, The International Criminal Court Act, 2006, § 12(1)(a)(vii) (2006), http://www.ttparliament.org/legislations/a2006-04.pdf.
[57] ICRC, *supra* note 41.
[58] *Id.*; Guatemala, Decree No. 145-1996, National Reconciliation Law (*Ley de reconciliacion nacional*), art. 8, Dec. 27, 1996; Status of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&clang=_en.

Many states also have made official statements ratifying the principle that war crimes and crimes against humanity should not be subject to periods of prescription. The International Committee of the Red Cross, in a review of national practices on the issue, describes several such statements.[59] For example, in 1991, the United States wrote a diplomatic note to Iraq stating that individuals guilty of war crimes "may be subject to prosecution at any time, without regard to any statute of limitations."[60] In a letter to the UN Secretary-General in 1993, Yugoslavia stated that "war crimes . . . are not subject to statutes of limitation."[61] And in 2000, upon signature of the Statute of the International Criminal Court, Egypt stated that it was a "well established principle that no war crime shall be barred from prosecution due to the statute of limitations."[62]

2. Jurisprudence

Domestic courts that prosecute international crimes have repeatedly held that statutes of limitation are not applicable to crimes against humanity. Many of these decisions concern crimes committed well before the events at Sepur Zarco, demonstrating that this principle may be applied to the crimes committed in this case.

Some of the earliest cases holding that statutes of limitations do not apply to grave international crimes arose out of the crimes committed during the Nazi era. In 1984, for example, the French Court of Cassation held in the *Barbie Case* that a defendant could be prosecuted for the detention, torture, murder, and deportation of approximately 1500 individuals between 1943 and 1944, notwithstanding the time that had passed between the crimes and the prosecution.[63] In support of its conclusion that statutory limitations were inapplicable to crimes against humanity, the French court expressly found that there is no human right or fundamental freedom to a statute of limitations for such crimes.[64] The following year, in a decision on an appeal of a different issue by the victims' representatives, the Court reaffirmed that, "[f]ollowing the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which might have been committed in the course of armed conflict" through the application of statutes of limitations, but only if "those acts were not of such a nature as to deserve the qualification of crimes against humanity."[65]

Similar conclusions repeatedly have been reached by courts in Latin America. For example, in 1989, an appeals court in Argentina held in the *Schwammberger Case* that a Nazi war criminal could be extradited to Germany to face trial for crimes committed during World War II.[66] Notably, in reaching its conclusion that crimes against humanity have no statute of

[59] ICRC, *supra* note 41.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] France, Court of Cassation (Criminal Chamber), Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie (1984), *reprinted and translated into English in* 78 I.L.R. 125, 125, 127, 138 (1988). The Court of Cassation is the highest court in France.
[64] *Id.*
[65] France, Court of Cassation (Criminal Chamber), Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie (1985), *reprinted and translated into English in* 78 I.L.R. 125, 127, 136 (1988).
[66] Argentina, Sala Tercera Penal de Cámara Federal de Apelaciones, *Schwammberger Case*, ¶¶ 4, 7 (1989), https://www.legal-tools.org/en/browse/record/115213/.

limitations under international law, the court cited the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, even though Argentina had not ratified the convention at the time of the decision, thereby suggesting that the principles embodied in the convention had developed into customary law.[67] The Supreme Court of Argentina subsequently affirmed that conclusion in a series of unrelated cases.[68] Moreover, in 2004, the Supreme Court of Argentina explicitly held that the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity affirmed pre-existing customary law, and thus that the principle of imprescriptibility had attained the status of customary law before its inclusion in the 1968 Convention.[69]

Chile's courts also have applied the principle of imprescriptibility to international crimes that occurred prior to the offenses in *Sepur Zarco*. For example, in a 2005 decision concerning the enforced disappearance of twelve advisors to President Salvador Allende in 1973, an appellate court in Santiago, Chile held that the rule on the non-applicability of statutes of limitations was a norm of international law that had been "accepted in the judicial practice of United Nations member states' national tribunals and international tribunals with jurisdiction over crimes against humanity."[70] The court of appeals therefore rejected the defense's argument

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[67] *Id.* ¶ 43. Argentina did not pass its own Law Concerning the Imprescriptibly of War Crimes and Crimes against Humanity until 1995 and did not accede to the UN Convention until 2003. ICRC, *supra* note 41; Status of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&clang=_en.

[68] *See, e.g.*, Argentina, Supreme Court, Case No. P/457/XXXI, Prosecutor v. Priebke, Ordinary Appeal Judgment, ¶¶ 66-71, 76-77 (1995) (ordering the extradition to Italy of a former German officer to stand trial for crimes against humanity for his role in the execution of hundreds of people in Rome during World War II), http://opil.ouplaw.com/view/10.1093/law:ildc/1599ar95.case.1/law-ildc-1599ar95?rskey=3oz0As&result=3&prd=ORIL; Argentina, Supreme Court, Case No. 11807/05, International Criminal Tribunal for the Former Yugoslavia v. Lukic, Decision on arrest, surrender, and extradition, ¶ 56 (2006), http://opil.ouplaw.com/view/10.1093/law:ildc/1083ar06.case.1/law-ildc-1083ar06?rskey=DUBO68&result=49&prd=ORIL#law-ildc-1083ar06-div4-56; Argentina, Supreme Court, Case No. M 2333 XLII, Riveros v. Prosecutor, ¶¶ 28, 37 (2007), http://opil.ouplaw.com/view/10.1093/law:ildc/1084ar07.case.1/law-ildc-1084ar07?rskey=3oz0As&result=6&prd=ORIL#law-ildc-1084ar07-div3-28.

[69] Argentina, Supreme Court of Justice, Chile v. Arancibia Clavel, Case No. 259, Judgment, ¶¶ 28, 32 (2004), http://opil.ouplaw.com/view/10.1093/law:ildc/1082ar04.case.1/law-ildc-1082ar04?rskey=3oz0As&result=4&prd=ORIL. The Court therefore held that no statute of limitations applied to crimes against humanity committed in Argentina between 1974 and 1978 against opponents of Chile's Pinochet regime. *Id.* ¶¶ 3, 37. Many of Argentina's early cases concerned crimes committed in, or related to, other countries. However, in 1986, Argentina enacted the Full Stop Law (*Ley de Punto Final*), which imposed a 60-day deadline for the lodging of formal charges for crimes committed during Argentina's "dirty war." Law 23.492 of Dec. 23, 1986, art. 1, *reproduced in* III TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 505 (Neil J. Kritz ed., 1995). In a decision rendered in March 2001, a federal judge in Argentina declared the Full Stop Law unconstitutional. Case No. 8686/2000, Juzgado Nacional en lo Criminal y Correccional Federal 4 (Mar. 6 2001), https://www.mpf.gov.ar/Institucional/UnidadesFE/Simon-Juzgado-4.pdf. In 2003, Argentina's legislature voted to annul the law altogether. Human Rights Watch, World Report, Argentina (2006), https://www.hrw.org/world-report/2006/country-chapters/argentina. Two years later, Argentina's Supreme Court declared the Full Stop Law unconstitutional. *Id.*

[70] Chile, Corte de Apelaciones de Santiago, María Barros Perelman Case, ¶ 11 (2005) ("Que, así entonces, si bien el instrumento internacional anterior aunque suscrito no ha sido ratificado por Chile, la imprescriptibilidad de los crímines de lesa humanidad surge en la actualidad como categoría de norma de Derecho Internacional General ("jus cogens"), esto es, conforme al acervo dogmático y convencional universal y de la aceptación en la práctica judicial

that the prosecution was time-barred,[71] even though Chile had not ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[72] Two years later, the Supreme Court of Chile came to a similar conclusion in a case regarding the 1973 death of a political prisoner.[73] In holding that the case could proceed, the Supreme Court of Chile observed that a key characteristic of crimes against peace, war crimes, and crimes against humanity under customary international law is that they are not subject to statutes of limitations.[74] Two years later, in another case concerning murders by the Chilean military, the Court explicitly confirmed that the non-applicability of statutes of limitations was already customary law by 1973.[75]

Courts in Peru have likewise found that defendants can be prosecuted for crimes against humanity that were committed before Peru ratified the UN Convention in 2003. For example, a Peruvian criminal court held in 2010 that prosecutions could proceed against members of a governmental death squad for a series of murders and forced disappearances committed in the 1990s.[76] In so holding, the court rejected the government's position that the rule against prescriptibility applied only to crimes committed after Peru ratified the UN Convention, instead concluding that the principles in the Convention had crystallized into a rule of customary law before the crimes occurred.[77]

Finally, just last year, El Salvador's Supreme Court concurred. In a judgment regarding the country's 1993 amnesty law, the Court found that the imprescriptibility of war crimes and crimes against humanity is a norm of customary law and therefore is applicable regardless of whether a country has ratified the U.N. Convention.[78]

C. Conclusion

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de los tribunales nacionales partícipes de la Organización de las Naciones Unidas, además de los tribunales internacionales con jurisdicción respecto de crímenes de lesa humanidad."); *see also* ICRC, María Barros Perleman, Court of Appeal of Santiago, Sept. 5, 2005, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=493DC542E28C46DEC125756F003BAADE&action=openDocument&xp_countrySelected=CL&xp_topicSelected=GVAL-992BU6&from=state.

[71] María Barros Perelman Case, *supra* note 70, ¶ 27.

[72] *Id.* ¶ 11.

[73] Chile, Supreme Court, Case No. 3125-04, Víctor Raúl Pinto v. Relatives of Tomás Rojas, Decision on Annulment, "Vistos" section (2007), http://opil.ouplaw.com/view/10.1093/law:ildc/1093cl07.case.1/law-ildc-1093cl07?prd=ORIL#law-ildc-1093cl07-div3-51.

[74] *Id.* ¶¶ 29-31.

[75] Chile, Supreme Court, Case of Fernando Polanco Gallardo et al., Causa No. 696/2008, Res. No. 15814 (2009), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=BE4A158268DF4766C12576D9005CFDE0&action=openDocument&xp_countrySelected=CL&xp_topicSelected=GVAL-992BU6&from=state.

[76] Peru, Third Criminal Chamber, Case No. 28-2001, Rivera Lazo and Ors., Incidental decision, ¶ 16 (2010), http://opil.ouplaw.com/view/10.1093/law:ildc/1887pe10.case.1/law-ildc-1887pe10?rskey=OeiZwm&result=82&prd=ORIL.

[77] *Id.*

[78] Naomi Roht-Arriaza, *El Salvador's Constitutional Court Invalidates Amnesty Law; Will Prosecutions Follow?*, INTLAWGRRLS (July 19, 2016), https://ilg2.org/2016/07/19/el-salvadors-constitutional-court-invalidates-amnesty-law-will-prosecutions-follow/.

As the forgoing review of both international and domestic law demonstrates, it is well established under customary international law that statutes of limitation are inapplicable to cases involving war crimes and/or crimes against humanity. While it may not be possible to pinpoint the precise date on which this norm crystallized, the jurisprudence of both international bodies and domestic courts suggests that it was well established by 1982, when the crimes committed in Sepur Zarco began. There is thus no bar under international law to applying this principle to the *Sepur Zarco* case.

III. INAPPLICABILITY OF AMNESTY TO WAR CRIMES AND CRIMES AGAINST HUMANITY

On appeal, Mr. Reyes argues that his convictions must be overturned because they are barred by an amnesty law.[79] As explained in detail in the sections below, however, amnesty is not available for the crimes of which he was convicted. First, the 1986 amnesty decree he cites[80] has already been held inapplicable to international crimes by a Guatemalan appellate court. Even if Mr. Reyes's argument were interpreted to invoke Guatemala's 1996 National Reconciliation Law (NRL), the terms of the NRL itself preclude the application of amnesty to crimes that have no statute of limitations, such as war crimes and crimes against humanity. Moreover, both the 1986 and 1996 amnesty laws apply only to political crimes and crimes related to political crimes, and thus are not applicable to the crimes committed in Sepur Zarco. Second, it is well established under the jurisprudence of the Inter-American Court of Human Rights, international criminal tribunals, and domestic courts that amnesty laws may not be invoked to preclude prosecution for Mr. Reyes's crimes. Because amnesty is not available to Mr. Reyes, his convictions should be upheld.

A. Guatemala's 1986 Amnesty Decree and the 1996 National Reconciliation Law

In 1986, four days before a new civilian president took power, General Óscar Humberto Mejía Victores issued Decree 8-86 to grant amnesty for certain crimes committed during his administration and that of his predecessor, Ríos Montt.[81] The decree indemnified anyone responsible for, or accused of, political and related common crimes committed between March 23, 1982 and January 14, 1986.[82] The 1986 decree was expressly repealed by Guatemala's Congress in 1997.[83]

Despite the decree's repeal, former President Ríos Montt, who had been indicted for genocide and crimes against humanity for his role in the death of more than 1700 individuals in

[79] Reyes appeal, *supra* note 30, at 45-48.
[80] *Id.* (citing Decree 8-86).
[81] Guatemala, Decree No. 8-86, Jan. 10, 1986 [hereinafter 1986 Decree]; Gigi Alford, *Defunct Amnesty Decree Haunts Guatemala Genocide Case*, Freedom House (Dec. 13, 2013), https://freedomhouse.org/blog/defunct-amnesty-decree-haunts-guatemala-genocide-case; Amnesty International, *Guatemala: The right to truth and justice* 4 (1996), https://www.amnesty.org/en/documents/amr34/026/1996/en/.
[82] 1986 Decree, *supra* note 81, art. 1; Alford, *supra* note 81; Amnesty International, *supra* note 81, at 4.
[83] Haydeé Valey, *Amnesty: National Reconciliation Law or Decree Law 8-86?*, at 6, IMPUNITY WATCH (2014), http://www.impunitywatch.org/docs/Amnistia_version_ingles.pdf.

1982 and 1983, argued that the amnesty law applied to him and precluded his prosecution.[84] Although an appellate court held that the law was inapplicable and convicted Montt in May 2013, the Constitutional Court of Guatemala overturned the conviction ten days later and ordered a new trial.[85] The Constitutional Court also ordered the appellate court to elaborate on its decision that the 1986 amnesty decree was inapplicable.[86] Two years later, the appellate court unanimously ruled that genocide and crimes against humanity are not political crimes or common crimes within the terms of the 1986 decree and, moreover, that Guatemala has a duty under international law to investigate, prosecute, and punish the perpetrators of such crimes.[87] The court therefore held that the charges against Montt could proceed.[88] For the same reasons, the 1986 decree would likewise be inapplicable to the crimes committed in Sepur Zarco.

In 1996, Guatemala passed the NRL as part of the process to formally end the nation's 36-year-long civil war.[89] Among its terms, the NRL allows for the "total extinction of criminal responsibility for political crimes committed during the internal armed conflict" and "the total extinction of criminal responsibility for common crimes . . . connected to" such political crimes.[90] However, the extinction of criminal responsibility expressly does not apply to crimes of genocide, torture, and forced disappearance, or to crimes which are not subject to statutes of limitations or which, in conformity with internal law or international treaties ratified by Guatemala, do not allow for the release from criminal responsibility.[91] As explained in section II, *supra*, war crimes and crimes against humanity are not subject to statutes of limitations and therefore are not subject to amnesty under the NRL.

Neither the 1986 decree nor the NRL is applicable to the crimes of which the defendants were convicted for an additional reason: the language of both laws explicitly grants amnesty only for political crimes and related common crimes. Although the 1986 decree does not define these terms, the NRL provides a demonstrative list of political crimes, which includes, among others, the crimes of taking up arms against the state; rebellion; sedition; public intimidation; and terrorism,[92] as well as crimes perpetrated to prevent or prosecute such offenses.[93] Such offenses relate to the integrity of the state: as the Constitutional Court explained in reviewing the constitutionality of the NRL, political offenses are those that are committed "against the State, its external or internal security, its power and authority, against the Constitution or citizens' political rights or the principles of the prevailing regime."[94] Such offenses are not similar to

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[84] Sophie Beaudoin, *Guatemalan Court Rules out Amnesty for Genocide and Crimes Against Humanity*, INT'L JUST. MONITOR (Oct. 14, 2015), https://www.ijmonitor.org/2015/10/guatemalan-court-rules-out-amnesty-for-genocide-and-crimes-against-humanity/.
[85] *Id.*; Alford, *supra* note 81.
[86] Beaudoin, *supra* note 84; Alford, *supra* note 81.
[87] Beaudoin, *supra* note 84.
[88] *Id.*
[89] Guatemala, Decreto número 145-1996, Ley de reconciliación nacional, Dec. 27, 1996 [hereinafter National Reconciliation Law].
[90] *Id.* arts. 2, 4, 5.
[91] *Id.* art. 8.
[92] *Id.*, art. 2; Guatemalan Criminal Code, Decree No. 17-73, arts. 359, 385, 387, 389, 391 [hereinafter Guatemalan Criminal Code].
[93] National Reconciliation Law, *supra* note 89, art. 5.
[94] Guatemala, Constitutional Court, Sentencia No. 8-97 and 20-97 (Oct. 7, 1997), https://app.vlex.com/#vid/424072882 ("Como delitos políticos, los que atentan contra el Estado, su seguridad

crimes against humanity, which concern attacks on civilian populations. Indeed, the article in the Guatemalan Penal Code that criminalizes crimes against the duties of humanity is not included in the list of political crimes in the NRL,[95] nor in its list of related common crimes.[96]

Decisions of the Guatemalan courts confirm that amnesty provisions covering "political offenses" do not apply to crimes against humanity. For example, in an October 2013 decision concerning application of the 1986 decree, the Constitutional Court of Guatemala observed that amnesty decrees concern criminal offenses "motivated by eminently political circumstances" and thus do not apply to genocide, crimes against the duties of humanity, and forced disappearances.[97] The Constitutional Court therefore denied an appeal by former general Héctor Marop López Fuentes, who had argued that the decree precluded his prosecution for crimes committed in the 1980s.[98] As mentioned earlier, two years later, in the case against former President Ríos Montt, a Guatemalan appellate court unanimously ruled that the genocide and crimes against humanity are not political crimes or common crimes within the terms of the 1986 decree.[99]

These Guatemalan decisions are consistent with analyses of the NRL by international experts and tribunals. For instance, an independent expert on the situation of human rights in Guatemala observed, in a 1997 report to the UN Commission on Human Rights, that although Guatemala's NRL generally "leaves it to the courts to determine which acts committed" during the armed conflict could be subject to amnesty, crimes against humanity "are excluded from" the law.[100] More recently, the Inter-American Court of Human Rights reviewed the potential application of the NRL to the massacre in Las Does Erres.[101] The Court observed that, under international law, the NRL could not be applied to the crimes committed at Las Dos Erres because amnesty laws may not be used "to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary executions and forced disappearance."[102] The next section analyzes in greater detail the status of amnesty provisions under international law.

B. Customary International Law

The consistent practice of both international and domestic tribunals, including many courts in Latin America, confirms that amnesties are not applicable to serious international

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externa e interna, los poderes y autoridades del mismo, contra la Constitución o derechos políticos de los ciudadanos o principios del régimen imperante.").

[95] *See* Guatemalan Criminal Code, *supra* note 92, art. 378; National Reconciliation Law, *supra* note 89, art. 2.

[96] *See* Guatemalan Criminal Code, *supra* note 92, art. 378; National Reconciliation Law, *supra* note 89, art. 2.

[97] Guatemala, Constitutional Court, Expediente 1933-2012, Apelación de Sentencia de Amparo, at 5 (2013), https://app.vlex.com/#vid/470258858.

[98] *Id.* at 3, 6.

[99] Beaudoin, *supra* note 84.

[100] Commission on Human Rights, Report by the Independent Expert, Mrs. Mónica Pinto, on the situation of human rights in Guatemala, submitted in accordance with Commission resolution 1996/59 and Economic and Social Council decision 1996/270, ¶ 100, U.N. Doc. E/CN.4/1997/90 (1997), http://repository.un.org/bitstream/handle/11176/216339/E_CN.4_1997_90-EN.pdf?sequence=3&isAllowed=y.

[101] Case of the "Las Dos Erres" Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶¶ 125-35 (Nov. 24 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_211_ing.pdf.

[102] *Id.* ¶ 129.

crimes. This principle is further reflected in several international instruments. Application of the principles developed in these international materials confirms that neither the 1986 nor the 1996 amnesty law may be applied to the crimes in the *Sepur Zarco* case.

1. International Jurisprudence and Instruments

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have consistently held that amnesty laws are inapplicable to grave human rights abuses. These decisions are rooted in the State's duty to investigate and punish human rights violations. As the Inter-American Court held in the *Velásquez Rodríguez Case* in 1988, a State Party's obligation under Article 1(1) of the American Convention on Human Rights to ensure the free and full exercise of the rights recognized by the Convention entails the obligation to "prevent, investigate and punish any violation of the rights recognized by the Convention."[103] States therefore have a legal duty to take reasonable steps to prevent human rights violations and to carry out investigations of violations committed within their jurisdictions, to identify those responsible, and to impose appropriate punishment.[104]

Four years later, in 1992, the Inter-American Commission on Human Rights applied the principle espoused in the *Velásquez Rodríguez Case* when it held that application of El Salvador's 1987 amnesty law to bar prosecution of a 1983 massacre by military and paramilitary forces violated the State's obligation to investigate and punish the alleged perpetrators.[105] The Inter-American Court later extended the same principle to war crimes and crimes against humanity committed during El Salvador's armed conflict in the *El Mozote* case.[106] Significantly, the Court recognized that although amnesty laws may be justified to facilitate peace following a conflict, and are even encouraged by Additional Protocol II to the 1949 Geneva Conventions, they are nonetheless cabined by the international humanitarian law requirement to investigate and prosecute war crimes.[107] The court thus held that "persons suspected or accused of having

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[103] Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988), http://hrlibrary.umn.edu/iachr/b_11_12d.htm. Although the Court spoke in terms of "any violation" of the American Convention, the *Velásquez Rodríguez Case* itself involved arbitrary arrest, torture, and enforced disappearances.

[104] *See id.* ¶¶ 166, 174.

[105] Las Hojas Massacre (El Salvador), Case No. 10.287, Inter-Am. Comm'n H.R., Report No. 26/92, Analysis ¶¶ 9-11, Conclusion ¶ 3 (1992), https://www.cidh.oas.org/annualrep/92eng/ElSalvador10.287.htm. Numerous decisions of the Inter-American Commission are in accord. *See, e.g.*, Santos Mendoza et al. v. Uruguay, Case Nos. 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter.-Am Comm'n H.R., Report No. 29/92, ¶¶ 3, 50-51 (1992), http://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm; Garay Hermosilla et al. v. Chile, Case No. 10.843, Inter.-Am. Comm'n H.R., Report No. 36/96, ¶¶ 73-78, 105 (1996), http://hrlibrary.umn.edu/cases/1996/chile36-96.htm.

[106] Case of the Massacres of El Mozote and Nearby Places v. El Salvador, Judgment of Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶¶ 284, 296 (Oct. 25, 2012), http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf.

[107] *See id.* ¶¶ 285-86. Other decisions of the Inter-American Commission and the Inter-American Court have similarly rejected claims that national reconciliation and peace justified amnesties for serious international crimes. *See, e.g.*, Santos Mendoza et al. v. Uruguay, *supra* note 105, at ¶¶ 22, 46, 49, 51. The International Committee of the Red Cross, the guardian of the Geneva Conventions and Protocols, also has affirmed that the provision encouraging amnesties after the conclusion of hostilities "does not seek to be an amnesty for those having violated international law." Dr. Pfanner, Chief of the Legal Division, International Committee of the Red Cross, to Douglass

committed war crimes, or who have been convicted of this cannot be covered by an amnesty," nor are amnesties applicable to crimes against humanity.[108]

Similarly, in the 2001 *Barrios Altos* case, the Inter-American Court held that Peru's amnesty laws lacked legal effect and could not be invoked to obstruct the investigation and punishment of those responsible for an attack that killed 15 people and wounded others.[109] The Court further observed that amnesty provisions that prevent the investigation and punishment of those responsible for serious human rights violations, including extrajudicial executions and forced disappearances, are prohibited.[110]

The decisions of the Inter-American system are consistent with those of other international tribunals. For example, in 1998, the International Criminal Tribunal for the Former Yugoslavia observed that *jus cogens* norms of international law may not be subject to amnesty laws because such laws "violat[e] the general principle" of the norm.[111] Thus, even if a State enacts an amnesty law, subsequent regimes may hold responsible the perpetrators of those crimes. Six years later, the Special Court for Sierra Leone observed that "there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law."[112] Accordingly, the Court noted that "the grant of amnesty in respect of such crimes . . . is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole."[113] Similarly, the European Court of Human Rights noted in a 2004 case that it is of "the utmost importance for the purposes of an 'effective remedy' . . . that the granting of an amnesty or pardon should not be permissible" for crimes of ill-treatment by state agents.[114] Several years later, the European Court further observed that "granting amnesty in respect of international crimes – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law."[115] Applying this principle, the Court held that the Croatian government's prosecution of a military officer for war crimes, despite an earlier amnesty, did not violate the petitioner's rights.[116]

Cassel, Executive Director of the International Institute of Human Rights, University of DePaul School of Law, *quoted in* Lucio Parada Cea et al. v. El Salvador, Case No. 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, ¶ 116 & n.85 (1998), http://hrlibrary.umn.edu/cases/1998/elsalvador1-99.html.

[108] Case of the Massacres of El Mozote and Nearby Places v. El Salvador, *supra* note 106, at ¶¶ 285-86. *See also* Case of the Serrano-Cruz Sisters v. El Salvador, *supra* note 50, at ¶¶ 2, 172 (ordering that El Salvador "abstain from using figures such as amnesty . . . or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction" in a case involving the forced disappearance of two children).

[109] Case of Barrios Altos v. Peru, *supra* note 49, at ¶¶ 2, 44.

[110] *Id.* ¶ 41.

[111] *See* Prosecutor v. Furundžija, Case No. IT- 95-17/1-T, Judgment, ¶¶ 154-55 (Dec. 10, 1998) (discussing *jus cogens* norm of torture), https://www.legal-tools.org/doc/e6081b/pdf/.

[112] Prosecutor v. Kallon and Kamara, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), ¶ 82 (Mar. 13, 2004).

[113] *Id.* ¶ 73.

[114] Yaman v. Turkey, App. No. 32446/96, Eur. Ct. H.R., Judgment, ¶ 55 (2004), http://hudoc.echr.coe.int/eng?i=001-67228.

[115] Marguš v. Croatia, App. No. 4455/10, Eur. Ct. H.R., Judgment, ¶ 130 (2014), http://hudoc.echr.coe.int/eng?i=001-144276.

[116] *Id.* ¶ 139.

Finally, the principle that amnesty is inapplicable to serious international crimes is demonstrated through various international instruments. Numerous resolutions of the United Nations Commission on Human Rights have recognized that "amnesties should not be granted to those who commit violations of human rights and international humanitarian law."[117] In addition, the founding documents of numerous international tribunals explicitly prohibit the application of amnesty laws to crimes within the jurisdiction of the courts, including those of the Special Tribunal for Lebanon,[118] the Special Court for Sierra Leone,[119] and the Extraordinary Chambers of the Courts of Cambodia.[120]

2. State Practice

As the Inter-American Court noted in *El Mozote*, several State Parties to the American Convention, "through their highest courts of justice," have recognized "the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States."[121] For instance:

- In the *Simon* case, Argentina's Supreme Court of Justice held that "any regulation of domestic law which, invoking reasons for 'pacification[,]' provides for the grant of any form of amnesty to allow impunity for serious human rights violations perpetrated by the regime that the provision benefits, is contrary to clear and binding provisions of international law, and must be effectively suppressed."[122] The Court

[117] *E.g.*, UN Commission on Human Rights, Res. 2002/79 (2002), http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4940; UN Commission on Human Rights, Res. 2004/72 (2004), http://www.refworld.org/docid/43f313869.html; UN Commission on Human Rights, Res. 2005/81 (2005), http://www.refworld.org/docid/45377c930.html.

[118] *See* Statute of the Special Tribunal for Lebanon, art. 6 ("An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution."), *annexed to* UN Security Council Res. 1757 (2007), https://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/225-security-council-resolution-1757; *see also* Agreement between the UN and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, art. 16 (2007) ("The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution."), *annexed to* UN Security Council Res. 1757.

[119] Statute of the Special Court for Sierra Leone, art. 10 (2002) ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."), http://www.rscsl.org/Documents/scsl-statute.pdf.

[120] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 40 (2004) ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf; *see also* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 11(1) (2003) ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement."), https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.

[121] Case of El Mozote and Nearby Places v. El Salvador, *supra* note 106, at ¶ 283.

[122] *See* Case of Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 163 (Nov. 24, 2010) (*citing to* Supreme Court of Justice of the Nation of Argentina, Case of Simon, Julio Héctor et al. s/illegal deprivation of liberty, etc., Causa 17.768, Order of June 14, 2005, Considering Clause 31), http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.

therefore revoked the challenged amnesty laws.[123]

- In the *Lecaros Carrasco Case*, the Supreme Court of Chile invalidated the application of a Chilean amnesty law to a kidnapping case, which the court considered to be a crime against humanity.[124] The court held that amnesty may not be invoked to extinguish criminal responsibility in such cases, and that amnesty laws "must be interpreted in a way that conforms with the protective covenants of fundamental rights of the individual and sanctions the serious violations committed against them."[125] Other decisions of the Chilean Supreme Court have explicitly held that amnesties are not applicable to war crimes.[126]

- In the *Case of Santiago Martín Rivas*, the Constitutional Court of Peru held that "the obligation of States to investigate the facts and punish those responsible for the violation of human rights . . . includes not only the nullity of those processes where the amnesty laws had been applied, after the declaration that such laws had no legal effect, but also any practice intended to prevent the investigation and punishment for violations of the rights to life and personal integrity."[127] The Court further declared the amnesty laws cannot be "used to 'guarantee' impunity for serious violations of human rights," including crimes against humanity.[128] The Court ultimately held that the "amnesty laws in question are null and void."[129]

- In the *Case of de Nibia Sabalsagaray Curutchet*, the Supreme Court of Justice of Uruguay stated that "the unlawfulness of an amnesty law enacted for the benefit of military . . . officials who committed serious violations of human rights . . . has been declared by courts, of both the international community and the States that went through similar processes experienced by Uruguay during the same period in time."[130]

- In 2016, El Salvador's Supreme Court ruled that the country's 1993 amnesty law is unconstitutional as applied to crimes against humanity and war crimes, as it violates

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A copy of the *Simon* decision is available here: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=553B2BD049AB97D0C1257125004B1BBE&action=openDocument&xp_countrySelected=AR&xp_topicSelected=GVAL-992BU6&from=state.

[123] *See* Case of Gomes Lund et al. v. Brazil, *supra* note 122, at ¶ 163.

[124] *See id.* ¶ 165 (citing Supreme Court of Justice of Chile, Case of Claudio Abdón Lecaros Carrasco followed for the crime of aggravated kidnapping, Rol No. 47.205, Recurso No. 3302/2009, Order 16698, Judgment of Appeals, and Order 16699, Judgment of Replacement, of May 18, 2010).

[125] *Id.*

[126] *See, e.g.*, Víctor Raúl Pinto v. Relatives of Tomás Rojas, Decision on Annulment, *supra* note 73, ¶ 21 ("amnesties are not applicable to war crimes"); *see also* Supreme Court of Chile, Case of Fernando Polanco Gallardo et al., Causa No. 696/2008, Res. No. 15814, p.6 (subsection nine), 34 (subsection five) (May 25, 2009) (confirming that amnesty laws are inapplicable to war crimes), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=BE4A158268DF4766C12576D9005CFDE0&action=openDocument&xp_countrySelected=CL&xp_topicSelected=GVAL-992BU6&from=state.

[127] *See* Case of Gomes Lund et al. v. Brazil, *supra* note 122, at ¶ 166 (*citing* Constitutional Court of Peru, Case of Santiago Martín Rivas, Extraordinary Remedy, Case file No. 4587-2004-AA/TC, Judgment, ¶ 63 (Nov. 29, 2005)).

[128] *Id.*

[129] *Id.*

[130] *Id.* ¶ 167 (*citing* Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, Judgment No. 365/09, Order of Oct. 19, 2009, Considering clause III.2, ¶¶ 8-9).

the country's obligations to investigate and prosecute such crimes under international law.[131]

Countries outside of Latin America have taken the same position, as demonstrated by the following:

- Poland's 1998 Act on the Institute of National Remembrance (1998) states: "The provisions of acts and decrees issued before 7 December 1989 providing for amnesty or abolition shall not apply to perpetrators of war crimes, crimes against humanity or communist crimes."[132]

- The Federation of Bosnia and Herzegovina's 1999 Law on Amnesty exempts from criminal prosecution all persons who committed criminal acts during the 1991-1995 war in the country's territory, "except for criminal acts against humanity and international law."[133]

- The Central African Republic's 2008 Amnesty Law expressly excludes form its scope "[t]hose having voluntarily committed or attempted to commit theft, rape, pillage, arson, voluntary destruction, sabotage, [or having imposed or tried to impose] barriers to the freedom of movement;" and "[t]hose who voluntarily committed or attempted to commit murder, attacked or tried to do harm, executed or attempted to execute acts of violence, threats, torture, cruel, inhuman or degrading treatment or any other damage to the physical or moral integrity of individuals and property."[134]

While several of the above-mentioned court decisions and provisions post-date the adoption of Guatemala's amnesty laws, they are reflective of a principle that has been increasingly recognized since the 1980s.

C. Conclusion

As established above, the terms of Guatemala's 1986 and 1996 amnesty laws provide that amnesty is not available to those who committed serious international crimes rather than political crimes. In addition, the 1996 law explicitly does not apply to crimes that are not subject to statutes of limitations, such as war crimes and crimes against humanity. Furthermore, even in the absence of such language, amnesty would be prohibited for war crimes and crimes against humanity under the well-established jurisprudence of the Inter-American Court of Human Rights, international criminal tribunals, and other domestic courts. For all of these reasons, no amnesty is available to the defendants in the *Sepur Zarco* case.

IV. ADMISSIBILITY OF EVIDENCE FROM PRELIMINARY EVIDENTIARY HEARINGS

[131] *See Court throws out El Salvador civil war amnesty law*, BBC NEWS (July 15, 2016), http://www.bbc.com/news/world-latin-america-36800699; Roht-Arriaza, *supra* note 78.
[132] *See* ICRC, *Customary International Humanitarian Law Database*, R. 159, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159 (citing Poland, Act on the Institute of National Remembrance, art. 4(1)(3), 1998).
[133] *Id.* (citing Bosnia and Herzegovina, Federation, Law on Amnesty, art. 1, 1999).
[134] *Id.* (citing Central African Republic, Amnesty Law, art. 7, 2008).

("ANTICIPOS DE PRUEBA")

The *Sepur Zarco* case featured over 70 witnesses, including victims, eyewitnesses, and defense witnesses, as well as a plethora of experts. While the vast majority of these witnesses provided *viva voce* evidence to the court, 19 witnesses, nearly all of them victims of various forms of sexual violence and forced labor, testified via pre-recorded testimony that had been taken during the preliminary investigation (*anticipos de prueba*). The defense objected vigorously to the admission of this evidence on the basis that its consideration, without an opportunity for cross-examination at trial, violated the due process rights of the defendants. These objections were rejected by the trial court on the basis that the pre-recorded testimony had been properly taken in compliance with the requirements of Guatemalan law. This issue is now before this Court on appeal.

As the discussion below explains, it is the considered position of *amici* that the admission of prior recorded testimony in the *Sepur Zarco* trial was consistent with both Guatemalan law and international criminal and human rights law. First, as the trial court noted, the prior recorded testimony that was introduced at trial was taken and admitted in accordance with the requirements of the Guatemalan Code of Criminal Procedure. That Code provides specific circumstances under which testimony may be taken prior to trial, as well a series of procedural requirements to ensure that the fair trial rights of defendants are respected. The prior recorded testimony in the *Sepur Zarco* case met all of these requirements and therefore was properly admitted under Guatemalan law. Second, the admission of this testimony was consistent with international standards that have been applied at international criminal tribunals and human rights bodies. These institutions have defined three separate tests for determining when prior recorded testimony may be admitted consistent with a defendant's due process rights, namely where (1) a witness is unavailable, (2) a witness has been previously cross-examined, or (3) the testimony relates to matters other than the acts and conduct of the accused, provided, under each test, that the court determines that the testimony is reliable. Although only one of these tests must be satisfied in order for testimony to be admissible, the prior recorded testimony in the *Sepur Zarco* case meets all three tests and therefore was properly admitted under international legal standards.

A. Guatemalan Approach

The Guatemalan Criminal Procedure Code (*Codigo Procesal Penal*) permits, in certain circumstances, the admission at trial of testimony that was recorded during the pre-trial stage of a criminal case. Through a series of interrelated provisions, the Code specifies the reasons for which prior recorded testimony may be taken, as well as the procedures that must be followed in order to ensure that the fair trial rights of a defendant are respected.

Article 317 of Guatemala's Criminal Procedure Code is the primary provision regulating the taking of testimony during the pre-trial phase for later admission at trial. That article provides, in part, that evidence may be received at the pre-trial phase where the evidence is unlikely to be available at trial due to an obstacle that is difficult to overcome.[135] Article 317

[135] Congress of the Republic of Guatemala, Decree No. 51-92, Guatemala Criminal Procedure Code, art. 317 ("cuando deba declarer un órgano de prueba que, por algún obstáculo difícil de supercar, se presume que no podrá

explicitly provides that oral testimony is among the types of evidence that may be received during the pre-trial phase where there is a concern for the witness's life or physical well-being, and specifies that such testimony shall be recorded in compliance with the provisions in sections 218*bis* and 218*ter* of the Code.[136] The former provision confirms that testimony may be given by audiovisual means where there is a risk to the witness,[137] while the latter reiterates that such testimony may be received during the pre-trial phase of the proceedings.[138]

Once grounds for receiving pre-trial testimony have been established, the Guatemalan Criminal Procedure Code further specifies the procedures that must be followed in taking that testimony. Together, Articles 218*ter* and 317 impose the following requirements:

- advance notification of the parties and the presence of the defendant or the defendant's attorney;
- verification of the identity of the person providing the testimony;
- verification that the testimony is given voluntarily and not under coercion; and
- an opportunity for cross-examination by the parties.

Both articles explicitly specify that if a defendant has not yet been identified, a public defender may be assigned to guarantee the legality of the process[139] by exercising the rights of the defense. After the testimony has been recorded, the parties must be given access to the recordings and related records.[140]

Finally, Article 364 of the Criminal Procedure Code establishes that the testimony of a witness who testified during the preliminary investigation is admissible at trial where, *inter alia*, the witness has died or is unable to testify.[141] In evaluating this and other evidence against the accused, a court is required to use sound judicial discretion (*sana critica razonada*).[142]

The trial court in the *Sepur Zarco* case specifically found that the prior recorded testimony admitted at trial conformed to these legal requirements.[143] First, the statements were reportedly obtained due to concerns that the victims might not be available at trial due to their

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hacerlo durante el debate") [hereinafter Guatemala Criminal Procedure Code], http://www.cicad.oas.org/fortalecimiento_institucional/legislations/PDF/GT/decreto_congresional_51-92_codigo_procesal_penal.pdf. This formulation regarding the unavailability of evidence is similar to recent rules adopted by international and internationalized criminal tribunals. *See infra* pp. 27-28.

[136] Guatemala Criminal Procedure Code, *supra* note 135, art. 317. Article 317 actually refers to 216*bis*, but there is no such provision. 218*bis* and 218*ter* both concern testimony by audiovisual means, and it is logical to infer that Article 317 meant to refer to 218*bis*.

[137] *Id.* art. 218*bis* ("Cuando debido a otras circunstancias, la declaración del testigo, perito u otra persona relevante en el proceso, constituya un riesgo.").

[138] *Id.* art. 218*ter* ("La declaración a través de videoconferencia u otros medios audiovisuales de comunicación, podrá realizarse durante el debate oral y público o en carácter de anticipo de prueba.").

[139] *Id.* ("En caso de no existir imputado, igualmente se hará comparecer a un defensor público de oficio, para garantizar la legalidad de la declaración testimonial en esta forma."); *id.* art. 317 (same).

[140] *Id.* art. 218*ter*.

[141] *Id.* art. 365.

[142] *Id.* art. 385; *see also supra* note 4.

[143] *See, e.g.*, Sentencia, *supra* note 2, at 214, 217, 222, 228, 234, 263.

advanced age.[144] Indeed, one of the victims, Magdalena Pop, passed away in the period between when she gave her testimony and the trial.[145] The potential unavailability of the *Sepur Zarco* victims due to death or other age-related impairments plainly satisfies the criteria in Article 317 of an obstacle that is difficult to overcome and a fear regarding the life or physical integrity of a witness, as well as the criterion in Article 218*bis* of a risk to the witness, thereby necessitating the recording of their testimony. An alternative basis for taking the victims' testimony—namely, the need to protect victims of sexual assault from the unique re-traumatization that may result from testifying at trial, including the physical manifestations of such trauma[146]—also could have fulfilled these criteria.

Second, the defendants do not contest that the procedures required by Articles 218*ter* and 317 of the Guatemalan Criminal Procedure Code were followed, including, for example, verification of the witnesses' identities and confirmation that their testimonies were given voluntarily.[147] Nor do the defendants contest that they had access to the recordings of the testimony prior to trial. Instead, Mr. Reyes argues that the prior recorded testimony was not proper because neither the defendants nor their attorneys were present when the testimony was recorded, which he claims was required by Article 248 of the Guatemalan Criminal Procedure Code.[148] His appeal, however, fails to note that where, as here, the testimony of a witness is taken before a defendant has been identified, Articles 218*ter* and 317 specifically permit the attendance of a public defender instead of the defendant or his attorney. In the *Sepur Zarco* case, a public defender was appointed and cross-examined the victims during the taking of their pre-trial testimony.[149] Moreover, Article 364 provides that the testimony of a witness who testified at a preliminary hearing is admissible at trial where, *inter alia*, the witness has died or is unable to testify.[150] There is no debate that one of the witnesses, Magdalena Pop, died prior to the trial[151] and thus her testimony was properly admitted under Article 364. The other sexual violence victims, although physically present at trial, were unavailable due to the significant harm testifying likely would have had on their physical and mental well-being. As the expert testimony presented at trial established, these victims were suffering from post-traumatic stress

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[144] Jo-Marie Burt, *Victim Witnesses Tell of Atrocities at Sepur Zarco*, International Justice Monitor (Feb. 9, 2016), https://www.ijmonitor.org/2016/02/victim-witnesses-tell-of-atrocities-at-sepur-zarco/.
[145] *Id.*; *see also* Sentencia, *supra* note 2, at 260-64, 289-90
[146] *See* Sentencia, *supra* note 2, at 52 (expert testimony of Karen Denisse Peña Juarez), 88 (expert of testimony Mónica Esmeralda Pinzón Gonazález); *see also infra* pp. 23 & notes 152-57. The 2009 law that added this section explicitly stated that the law was necessary in order to protect witnesses in criminal proceedings. Congress of the Republic of Guatemala, Decree No. 17-2009, Law on Strengthening Criminal Prosecution, https://www.oas.org/dsp/documents/trata/Guatemala/Legislacion%20Nacional/Ley%20de%20Fortalecimiento%20de%20la%20Persecucion%20Penal%20de%20Guatemala%20DECRETO%20DEL%20CONGRESO%2017-2009.doc. For an analysis of how international criminal courts and human rights bodies have addressed similar criteria, *see infra* section IV.B.1.
[147] *See* Asig Appeal, *supra* note 25, at 5; Galindo Appeal, *supra* note 25, at 21-22.
[148] Galindo Appeal, *supra* note 25, at 21-22, 25; Reyes Appeal, *supra* note 30, at 21-26, 33.
[149] Jo-Marie Burt, *"Your Husband Isn't Coming Back:" More Stories of Abuse at the Sepur Zarco Trial*, INT'L JUST. MONITOR (Feb. 23, 2016) (describing appointment of public defender and cross-examination), https://www.ijmonitor.org/2016/02/your-husband-isnt-coming-back-more-stories-of-abuse-at-the-sepur-zarco-trial/.
[150] Guatemala Criminal Procedure Code, *supra* note 135, art. 364. The *Sepur Zarco* tribunal confirmed that it considered Article 364. Sentencia, *supra* note 2, at 507.
[151] Guatemala Criminal Procedure Code, *supra* note 135, art. 364; *see also* Sentencia, *supra* note 2, at 260, 289-90; Reyes Appeal, *supra* note 30, at 22.

disorder[152] that manifested in a variety of physical and psychosomatic sequela,[153] including mental illnesses and suicidal tendencies.[154] The experts underscored that it was critical to avoid re-victimization of the witnesses,[155] which could occur through repeated retelling of the abuses they suffered,[156] and that the victim witnesses would be negatively affected if they were forced to relive their traumatic experiences.[157] Under such circumstances, the victims would arguably be considered unavailable within the meaning of Article 364. Such an interpretation also would be consistent with international law, as described below in section IV.B.2.[158]

Mr. Asig principally argues that the admission of the victims' prior recorded testimony turned the proceedings against him into a summary procedure,[159] an argument Mr. Reyes likewise makes.[160] This argument ignores the plethora of evidence, including over 200 documents;[161] more than 350 pieces of physical evidence;[162] and photographs, maps, and other visual materials,[163] that was admitted during the three-week trial and reviewed by the Tribunal in reaching its decision. The statements made in the victims' prior recorded testimony also were corroborated by both the prior recorded and *viva voce* testimony of other witnesses, including another sexual violence victim, other human rights victims, eyewitnesses, and family members.[164] In addition, the defendants were given an opportunity to present their version of events to the Tribunal, including through the testimony of defense witnesses.[165] The surfeit of evidence presented against the defendants during the three-week trial and the opportunity the defendants had to present their version of events dispel any argument that the trial against them was a summary procedure.

In sum, the admission of prior recorded testimony during the *Sepur Zarco* trial complied with Guatemalan law. Defendants do not dispute that this testimony complied with the requirements of Articles 218*bis*, 218*ter*, 317, and 364 of the Guatemalan Criminal Procedure Code. Instead, defendants argue that the testimony failed to comply with Article 248, without acknowledging that Article 364 permitted the admission of the testimony because the women were unavailable, and that the admission of the testimony rendered the proceedings summary, an argument that plainly fails in light of the abundance of evidence presented at trial and the

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[152] Sentencia, *supra* note 2, at 52 (testimony of expert Karen Denisse Peña Juarez); *id.*, at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[153] *Id.*, at 52 (testimony of expert Karen Denisse Peña Juarez).
[154] *Id.*, at 84, 90 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[155] *Id.* at 52; *id.* at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[156] *Id.* at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[157] *See id.* at 52-53 (testimony of expert Karen Denisse Peña Juarez).
[158] *See* pp. 33-37. Mr. Reyes argues that the admission of the prior recorded testimony also violated human rights obligations guaranteed under international law. *See, e.g.*, Reyes Appeal, *supra* note 30, at 27, 33; Galindo Appeal, *supra* note 25, at 27. The propriety of the admission of prior recorded testimony under international law is considered in section IV.B.2. *See* pp. 33-37.
[159] Asig Appeal, *supra* note 25, at 5.
[160] Galindo Appeal, *supra* note 25, at 22; Reyes Appeal, *supra* note 30, at 32.
[161] Sentencia, *supra* note 2, at 370-435.
[162] *See id.* at 435-70.
[163] *See id.* at 471-472.
[164] *See, e.g., id.* at 206(w), 209(o), 213(m), 214(w), 218(q), 222(i), 222(p), 229(o), 233(ñ), 233(u), 238(g), 238(n), 243(n), 243(s), 252(q), 252(y), 260(u), 260(A.1), 264(l), 267(n), 272(p), 275(j), 277, 279, 286, 323-26.
[165] *See* Guatemala Criminal Procedure Code, *supra* note 135, art. 370; Sentencia, *supra* note 2, at 356-70.

opportunity the defendants had to present their version of events. The decision of the trial court to admit prior recorded testimony of the victim witnesses should be affirmed.

B. Jurisprudence of International Criminal Tribunals and Human Rights Bodies

International adjudicatory bodies, including criminal tribunals and human rights bodies, permit the admission at criminal trials of previously recorded testimony in limited circumstances relevant to the *Sepur Zarco* case, as described in more detail below. Although the use of prior recorded testimony departs from the general principle that trial testimony should be provided orally, these bodies have concluded that such use may be consistent with a defendant's right to a fair trial provided that certain conditions are met. Indeed, these bodies have observed that the admission of prior recorded testimony may even enhance certain trial rights, such as the right to a trial without undue delay, since admission of such testimony may increase the efficiency of trial proceedings.[166]

The following sections describe the conditions under which international criminal courts and human rights bodies have found prior recorded testimony to be admissible in criminal trials. These institutions have recognized three separate categories of pre-recorded testimony that may be used if the testimony is otherwise found reliable, including where the witness (1) is unavailable, (2) was previously cross-examined by the defense, or (3) provided testimony about issues other than the acts and conduct of the accused. As explained in more detail below, international criminal courts and human rights bodies have developed somewhat different tests for determining whether prior recorded testimony falls into one of these categories, no doubt due to their different functions: international criminal courts try criminal cases and therefore must make decisions about what evidence to admit, whereas international human rights bodies review domestic trials and the evidence that was admitted in those trials for conformity with human rights standards.[167]

In applying the foregoing categories, international courts have highlighted the propriety of balancing the rights of defendants with the rights of victims and the public.[168] In particular,

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[166] *See, e.g.*, Prosecutor v. Nuon and Khieu, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgement, ¶¶ 286-87 (Nov. 23, 2016), https://www.legal-tools.org/doc/e66bb3/pdf/; Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶¶ 13-14, U.N. Doc. A/54/187/S/1999/846 (1999), http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1999_en.pdf.

[167] The majority of this jurisprudence has been developed outside of Latin America. Decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are primarily relevant to the second test regarding the opportunity for cross-examination, and are discussed in that section.

[168] *See, e.g.*, Al-Khawaja et al. v. United Kingdom, App. Nos. 26766/05 and 22228/06, Eur. Ct. H.R., Judgment, ¶ 118 (2011) (in assessing whether a trial was fair, the European Court of Human Rights must "look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted"), http://hudoc.echr.coe.int/eng?i=001-108072; Prosecutor v. Milosević, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92*Bis*(d) – Foca Transcripts, ¶ 46 (June 30, 2003) ("In determining the appropriate protective measures in a case the Trial Chamber must balance the right of the accused to a fair and public trial and the protection of victims and witnesses."), https://www.legal-tools.org/uploads/tx_ltpdb/Decision_on_Prosecution_Motion_for_the_Admission_of_Transcripts_in_lieu_of_Viva_Voce_Testimony_Pursuant_to_92bis_D__-_Foca_Transcripts.htm; *cf.* Prosecutor v. Gbao et al., Case No. SCSL-

criminal trials may implicate the "life, liberty or security" of victims and other witnesses, and states therefore have a duty to organize their criminal proceedings in such a way as to avoid unjustifiably imperiling those interests.[169] Cases concerning sexual offenses raise special concerns, since these proceedings often are an ordeal for the victim and raise the prospect of re-victimization.[170] International courts therefore have underscored the need to implement measures to protect victims of sexual crimes, including measures that protect the victim's private life.[171] These concerns often are cited by international courts as they consider the admission of prior recorded testimony.[172]

The pre-recorded victim testimony that was introduced in the *Sepur Zarco* case meets the criteria for admission under each of the three categories, though testimony needs to satisfy the criteria of only one category in order to be admissible. First, the sexual violence victims were unavailable, in one instance due to death and in the others due to ongoing medical conditions stemming from their sexual enslavement. Second, the victims were subject to cross-examination by an attorney for the defense at the time their testimony was recorded. And third, the victims' testimony related almost entirely to the acts and conduct of individuals other than the accused. The trial court's admission of pre-recorded testimony in the *Sepur Zarco* case was therefore consistent with international practice and human rights norms, and should be affirmed.

1. Prior Recorded Testimony of an Unavailable Witness

The rule permitting admission of prior recorded testimony where a witness subsequently becomes unavailable has been widely adopted. Nearly every international or internationalized criminal court post-Nuremberg has had an explicit rule allowing the use of such testimony,[173]

2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, ¶ 34 (Oct. 10, 2003) ("the concept of a fair trial must be understood as fairness to both parties and not just to the Accused"), http://www.rscsl.org/Documents/Decisions/RUF/09-048/SCSL-03-09-PT-048.pdf.

[169] Doorson v. The Netherlands, App. No. 20524/92, Eur. Ct. H.R., Judgment, ¶ 70 (1996), http://hudoc.echr.coe.int/eng?i=001-57972.

[170] S.N. v. Sweden, App. No. 34209/96, Eur. Ct. H.R., Judgment, ¶ 47 (2002); B. v. Finland, App. No. 17122/02, Eur. Ct. H.R., Judgment, ¶ 43 (2007), http://hudoc.echr.coe.int/eng?i=001-80205; Aigner v. Austria, App. No. 28328/03, Eur. Ct. H.R., Judgment, ¶¶ 37 (2012), http://hudoc.echr.coe.int/eng?i=001-110804. As the ICTY has explained, "rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim." Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 46 (Aug. 10, 1995), https://www.legal-tools.org/uploads/tx_ltpdb/TadicD._ICTYTCDecisiononProsecutorsMotionRequestingProtectiveMeasures_10-08-1995__E__05.htm. Testifying in public also may result in rejection by the victim's family and community. *Id.*

[171] S.N. v. Sweden, *supra* note 170, ¶ 47 (2002); B. v. Finland, *supra* note 170, at ¶ 43; Aigner v. Austria, *supra* note 170, at ¶ 37. The ICTY has similarly underscored the importance of protective measures for victims of sexual violence. *See, e.g.*, Prosecutor v. Tadić, *supra* note 170, at ¶ 45.

[172] *See, e.g.*, Prosecutor v. Milosević, *supra* note 168, at ¶¶ 46-48.

[173] *See, e.g.*, International Criminal Court, Rules of Procedure and Evidence, Rule 68(2)(c) [hereinafter ICC Rules], https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence *as amended*, Rule 92 *quater* [hereinafter ICTY Rules], http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf; Special Court for Sierra Leone, Rules of Procedure and Evidence *as amended*, Rule 92 *quater* [hereinafter SCSL Rules],

and human rights bodies, although lacking explicit rules on the matter,[174] have concluded that the admission of prior recorded testimony in domestic criminal trials is appropriate in certain circumstances.[175] As the International Bar Association has explained, the "policy reason for such a rule is to ensure that the chambers are not denied access to relevant and probative evidence on account of unanticipated circumstances, such as the death or unavailability of a witness."[176]

The admission of an unavailable witness's prior recorded testimony is not limited to situations where a witness is physically unavailable, such as due to death or incarceration, but also extends to situations in which a witness is mentally unable to participate in the proceedings or would face serious harm by participating. Over the past twenty years,[177] international criminal tribunals have adopted a series of increasingly liberal rules permitting the use of prior recorded testimony due to a witness's unavailability. The rules of procedure of two of the first post-Nuremberg tribunals, the International Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), for example, did not initially include any rule permitting

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http://www.rscsl.org/Documents/RPE.pdf; Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 158 [hereinafter STL Rules], https://www.stl-tsl.org/images/RPE/20140403_STL-BD-2009-01-Rev-6-Corr-1_EN.pdf.

[174] *See generally, e.g.*, Eur. Ct. H.R., Rules of Court (2016), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf; UN Human Rights Committee, Rules of procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.10 (2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f3%2fREV.10&Lang=en.

[175] *E.g.*, Bielaj v. Poland, App. No. 43643/04, Eur. Ct. H.R., Judgment, ¶¶ 56-65 (2010), http://hudoc.echr.coe.int/eng?i=001-98439; Brzuszczynski v. Poland, App. No. 23789/09, Eur. Ct. H.R., Judgment, ¶¶ 82-91 (2013), http://hudoc.echr.coe.int/eng?i=001-126352; Gossa v. Poland, App. No. 47986/99, Eur. Ct. H.R., Judgment, ¶¶ 54-55, 60 (2007), http://hudoc.echr.coe.int/eng?i=001-78870; Makuszewski v. Poland, App. No. 35556/05, Eur. Ct. H.R., Judgment, ¶¶ 41-47 (2009), http://hudoc.echr.coe.int/eng?i=001-90577. The difference between the rules of international criminal courts and international human rights bodies is likely due to their different functions, since international criminal courts need rules to govern the conduct of trials whereas human rights bodies review the fairness of prior criminal proceedings at the domestic level.

[176] INT'L BAR ASS'N, *Evidence Matters in ICC Trials* 41 (2016), http://www.ibanet.org/ICC_ICL_Programme/Reports.aspx#2016.

[177] Prior recorded testimony also was permitted in many World War II era trials. The Charter of the International Military Tribunal for the Far East and the Ordinance establishing military tribunals in the U.S.-controlled portion of Germany broadly permitted the admission of any evidence which the tribunal deemed to have probative value and explicitly permitted the admission of certain forms of prior recorded testimony, including affidavits, depositions, and signed statements. Charter of the International Military Tribunal for the Far East, art. 13(c)(3), (4), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf; Military Government, United States Zone, Ordinance No. 7 on the Organization and Powers of Certain Military Tribunals, art. VII (1946), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XXIII (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf. The Charter of the Nuremberg Tribunal likewise contained a broad provision permitting the admission of probative evidence, and, although there was no specific provision regarding prior recorded testimony, the tribunal permitted the admission of such testimony in several cases, including where the witness was unavailable. Charter of the International Military Tribunal, art. 19, *annex to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 82 U.N.T.C. 280, http://www.refworld.org/docid/47fdfb34d.html; Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS 242 (1993) (describing case in which affidavit by witness who was effectively unavailable due to age and location in Mexico City was admitted in evidence).

the admission of such testimony.[178] In 2006 and 2007, respectively, the ICTY and the SCSL adopted identical rules to permit the admission of an unavailable witness's prior recorded testimony in certain circumstances:

> The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:
> (i) is satisfied of the person's unavailability as set out above; and
> (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.[179]

These rules explicitly apply to individuals who are unavailable due to either physical or mental conditions. More recently, international and internationalized tribunals have adopted broader rules that include a catch-all category permitting the admission of the prior recorded testimony of a witness who is unavailable for good reason. For example, the rules of the ICC permit prior recorded testimony where it "comes from a person who . . . is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally."[180] As described in more detail below, these catch-all provisions have been interpreted to include witnesses who are unavailable due to concerns about the witness's safety and psychological well-being.

In assessing whether a witness is unavailable, international criminal courts have held that the effects on a witness of testifying in a case must be taken into account. For example, the ICTY found a witness unavailable in *Prosecutor v. Karadžić* where the witness suffered from post-traumatic stress disorder (PTSD) and there was medical evidence that testifying at trial "could possibly aggravate that medical condition."[181] Similarly, an appeals court in Bosnia and

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[178] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence (1994), http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_original_en.pdf; Special Court for Sierra Leone, Rules of Procedure and Evidence (2003), http://www.rscsl.org/Documents/RPE-030703.pdf.

[179] ICTY Rules, *supra* note 173, Rule 92 *quater*; SCSL Rules, *supra* note 173, Rule 92 *quater*. The other international criminal tribunal of this era, the International Criminal Tribunal for Rwanda, never adopted any rule permitting the admission of prior recorded testimony due to unavailability of the witness, but some decisions permitted the admission of such evidence. *See generally* International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence *as amended* [hereinafter ICTR Rules], http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf; *see also* Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Urgent Motion for Admission of CN's Statement into Evidence, ¶¶ 10-12 (Mar. 20, 2009), https://www.legal-tools.org/doc/ab338f/pdf/.

[180] ICC Rules, *supra* note 173, Rule 68(2)(c). The Rules of the Special Tribunal for Lebanon likewise have a broad catch-all unavailability provision. *See* STL Rules, *supra* note 173, Rule 158.

[181] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92 *quater*, ¶¶ 2, 18-19 (Nov. 26, 2013), https://www.legal-tools.org/doc/87a1ba/pdf/. Similarly, the ICTY found a witness unavailable in *Prosecutor v. Hadžić* where she suffered from, *inter alia*, PTSD and a medical doctor stated that she was "not fit for testifying" because "it would worsen her condition" and "any further exposure to stress may have grave consequences." Prosecutor v. Hadžić, Case No. IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* and Prosecution Motion for the Admission of the Evidence of GH-083 Pursuant to Rule 92 *quater*, ¶ 101

Herzegovina, held that a victim of sexual violence was unavailable and that her prior testimony could be admitted where medical evidence indicated that she suffered from PTSD and could not testify.[182] More recently, the ICC held in *Prosecutor v. Bemba Gombo* that, in determining unavailability, the Court may consider the "safety, physical and psychological well-being, dignity and privacy of witnesses," and may refrain from calling a witness to testify where testifying "would in all likelihood entail negative consequences for the witness."[183] Applying those criteria, the ICC in *Bemba Gombo* permitted the admission of the prior recorded testimony of a witness, finding that requiring the witness to testify before the Court "would place her under unnecessary hardship that is disproportionate to the purported significance of her evidence."[184] In so holding, the Court observed that "the term 'unavailable' . . . must be interpreted broadly" in order to fulfill the purposes of the rule.[185]

International human rights bodies also have found witnesses to be unavailable in a wide variety of contexts, including in circumstances where necessary to avoid mental harm.[186] For example, in *Scheper v. The Netherlands*, the European Court of Human Rights observed that one victim who allegedly had been raped was unavailable at trial where she refused to give testimony in order to avoid the ordeal and mental distress of being confronted with the defendant.[187] And in *Aigner v. Austria*, the European Court of Human Rights held that the need to protect a victim

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(May 9, 2013), https://www.legal-tools.org/doc/cf5ea2/pdf/. Elsewhere in that same decision, the ICTY declined to find unavailable a different witness who also suffered from PTSD but there was no medical documentation that the witness might be re-traumatized if forced to testify. *Id.* at ¶ 99; *see also* Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Decision on Prosecution's Motion to Admit the Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, ¶¶ 25-30 (Sept. 7, 2011), https://www.legal-tools.org/doc/98b425/pdf/. These decisions indicate that a witness may be found unavailable where a medical professional concludes that a witness should not testify due to the condition and/or in order to avoid re-traumatization. *Compare* Prosecutor v. Hadžić, ¶ 101 (witness was unavailable where a doctor concluded that the witness was not fit for testifying because it would worsen her condition), *with* Prosecutor v. Tolimir, ¶ 30 (witness was not unavailable where doctor did not state that the witness was incapable of testifying).

[182] Prosecutor v. Radić et al., Case No. X-KR-05/139, Second-Instance Verdict, ¶¶ 80-85 (2011), http://www.worldcourts.com/wcsbih/eng/decisions/2011.03.09_Prosecutor_v_Radic.pdf. Certain cases in the courts of Bosnia and Herzegovina are heard before internationalized panels that include at least one international judge. *See* Assembly of Republic of Kosovo, Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (2008), http://www.kuvendikosoves.org/common/docs/ligjet/03-L-053%20a.pdf. The appellate panel that heard the Radić case was an internationalized panel.

[183] Prosecutor v. Bemba Gombo et al., Case No. ICC-01/05-01/13, Corrected public redacted version of Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence,' ¶ 18 (Nov. 12, 2015), https://www.legal-tools.org/doc/e90368/pdf/. *See also* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Public Redacted version of Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ¶¶ 10-11 (Feb. 24, 2017) (concluding that witness is unavailable where the witness "suffer[ed] from several medical conditions" and psychologists submitted a report that "the witness is unavailable for testimony"), https://www.icc-cpi.int/CourtRecords/CR2017_00954.PDF.

[184] Prosecutor v. Bemba Gombo et al., *supra* note 183, at ¶¶ 18, 23.

[185] *Id.* ¶ 16.

[186] *E.g.*, Bielaj v. Poland, *supra* note 175, at ¶¶ 13, 22, 56-59 (victim-witness was unavailable because he refused to testify at trial because he did not request the prosecution and did not want to ruin his relationship with the perpetrator and his wife); Brzuszczynski v. Poland, *supra* note 175, at ¶ 82 (witness was unavailable due to death); Al-Khawaja et al. v. United Kingdom, *supra* note 168, at ¶ 124 (2011) (a witness's objective fear, including fear of death, injury, or financial loss, may constitute good cause).

[187] Scheper v. The Netherlands, App. No. 39209/02, Eur. Ct. H.R., Decision as to Admissibility, The Law (2005) (rape victim was unavailable where she refused to testify in order to avoid the distress of testifying), http://hudoc.echr.coe.int/eng?i=001-68825.

of sexual violence from the ordeal of testifying constitutes good cause for a victim-witness's unavailability at trial.[188]

If a witness is unavailable to testify, both international criminal tribunals and human rights bodies require satisfaction of an additional criterion, namely that the admission of the witness's prior recorded testimony is reliable and thus does not violate the rights of the defendant.[189] In assessing the reliability of prior recorded statements, international criminal courts evaluate the circumstances under which the statement was obtained and recorded, and have been more likely to admit the statement when it was, *inter alia*, (1) obtained by the prosecution in the ordinary course of its investigations; (2) given voluntarily; (3) given under oath or declared to be true and accurate by the witness at the time; (4) given in the witness's native language and/or with the assistance of an approved interpreter; (5) given after the witness was advised to be truthful and honest and after being warned about the potential consequences of false testimony; and (6) subjected to cross-examination.[190] International criminal courts also have considered other factors indicative of reliability, such as the internal consistency of the statement and whether other evidence corroborates the information in the statement.[191] In the human rights context, a similar test looks to whether there were sufficient counterbalancing factors to compensate for the difficulties admission of a prior recorded statement placed on the defense, with more critical testimony requiring more significant counterbalancing measures.[192] Such counterbalancing measures may include, *inter alia*, identification of the witness to the

[188] Aigner v. Austria, *supra* note 170, at ¶¶ 37-39. Recently, the Grand Chamber of the Court took an even broader position, holding in *Schatschaschwili v. Germany* that there is no requirement of good cause for the unavailability of a witness, and that the presence of absence of good cause is a factor to be weighed when assessing the overall fairness of a trial. Schatschaschwili v. Germany, App. No. 9154/10, Eur. Ct. H.R., Judgment, ¶ 113 (2015), http://hudoc.echr.coe.int/eng?i=001-159566. In light of the decisions in *Scheper* and *Aigner*, the unavailability of a victim of sexual violence in order to avoid the mental ordeal of testifying or the potential for re-traumatization would constitute good cause and weigh in favor of admitting the victim's prior recorded testimony.

[189] ICTY Rules, *supra* note 173, Rule 92 *quater;* SCSL Rules, *supra* note 173, Rule 92 *quater*; ICC Rules, *supra* note 173, Rule 68(2)(c)(i); STL Rules, *supra* note 173, Rule 158(A)(ii).

[190] *E.g.*, Prosecutor v. Bemba Gombo et al., *supra* note 183, at ¶ 20; Prosecutor v. Hadžić, *supra* note 181, at ¶ 17; Prosecutor v. Karadžić, *supra* note 181, at ¶ 12; Prosecutor v. Ayyash et al., Case No. STL-11-01, Official Transcript of the Pre-Trial Conference (Open Session) Held on 9 January 2014 in the Case of Ayyash et al., at 15:9-17 (Jan. 9, 2014), https://www.legal-tools.org/doc/85f348/pdf/; Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, ¶ 16 (Mar. 27, 2015), https://www.legal-tools.org/doc/845698/pdf/; Prosecutor v. Haradinaj, Case No. IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *Quater* and 13th Motion for Trial-Related Protective Measures ¶ 8 (Sept. 7, 2007), https://www.legal-tools.org/doc/3d301b/pdf/. Where a statement is written, courts have also considered whether the statement was signed by the witness. Prosecutor v. Ayyash et al., Public Transcript of Pre-Trial Conference, at 15:12-13.

[191] *E.g.*, Prosecutor v. Hadžić, *supra* note 181, at ¶ 17; Prosecutor v. Karadžić, *supra* note 181, at ¶ 12; Prosecutor v. Ayyash et al., Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, *supra* note 190, at ¶ 16; Prosecutor v. Bemba Gombo et al., *supra* note 183, at ¶ 21; Prosecutor v. Haradinaj, *supra* note 190, at ¶ 8. The ICTY and the STL have held that a prior recorded statement admitted based on the witness' unavailability cannot be the sole basis of a fact necessary for conviction; there must be some corroboration of that fact. *E.g.*, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, ¶ 13 (Feb. 16, 2007), https://www.legal-tools.org/doc/f842c1/pdf/; Prosecutor v. Hadžić, *supra* note 181, at ¶ 24; Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Decision on Trial Management and Reasons for Decision on Joinder, ¶ 93 (Feb. 25, 2014), https://www.legal-tools.org/doc/fd7256/pdf/.

[192] Schatschaschwili v. Germany, *supra* note 188, at ¶¶ 107, 114-16; Brzuszczynski v. Poland, *supra* note 175, at ¶ 81; Bielaj v. Poland, *supra* note 175, at ¶¶ 61-63; Al-Khawaja et al. v. United Kingdom, *supra* note 168, at ¶ 147.

defendant so that the defendant may investigate and challenge the witness's reliability, prior opportunities for cross-examination by the defendant, the availability of a video recording of the witness's testimony so that the court and parties may observe the witness's demeanor and form their own impression of his or her reliability, the opportunity for the defendant to give his or her version of the events to the court during the trial and to challenge the witness's version, evidence corroborating the witness's statement, and careful assessment by the court of the statement of the witness.[193] Finally, some international courts and human rights bodies have held that the prior recorded testimony of an unavailable witness may not be the sole or decisive evidence against the accused.[194] These factors are non-exhaustive and not all of them have to be satisfied; if one or more factors are absent, a court may still admit the prior testimony and take the absent factor into account when assessing the weight to accord the statement.[195]

The trial court in the *Sepur Zarco* case properly admitted the videotaped testimony of the victim witnesses, regardless of which test for unavailability is used. First, the victim witnesses were unavailable. One of these witnesses, Magdalena Pop, died in the period between when her testimony was taken and trial, and thus was plainly unavailable.[196] The other witnesses in the *Sepur Zarco* case were unavailable because, like the witnesses in *Karadžić*, *Hadžić*, and *Bemba Gombo*, they suffered from a mental condition that could have been aggravated by testifying at trial. The expert testimony given in the *Sepur Zarco* case established that the victim witnesses have post-traumatic stress disorder.[197] Individual examinations of each of the victim witnesses

[193] Brzuszczynski v. Poland, *supra* note 175, at ¶ 88; Gossa v. Poland, *supra* note 175, at ¶ 62; Al-Khawaja et al. v. United Kingdom, *supra* note 168, at ¶¶ 147, 154-58; Schatschaschwili v. Germany, *supra* note 188, at ¶¶ 126-31.
[194] *See, e.g.*, Rouse v. Philippines, Views on Communication No. 1089/2002, ¶ 7.5, U.N. Doc. CCPR/C/84/D/1089/2002 (Aug. 5, 2005), http://juris.ohchr.org/Search/Details/1177; Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 96 (Jan. 30, 2015), https://www.legal-tools.org/doc/4c28fb/pdf/. The European Court of Human Rights used to have a similar rule. *See, e.g.*, Bielaj v. Poland, *supra* note 175, at ¶ 55; Gossa v. Poland, *supra* note 175, at ¶ 55. More recently, however, the European Court has held that there is no absolute rule on this issue, and that a conviction may be solely or decisively based on the evidence of unavailable witnesses if the evidence is sufficiently reliable, the court subjects the testimony to searching scrutiny, and there are adequate counterbalancing measures. *See, e.g.*, Brzuszcnski v. Poland, *supra* note 175, at ¶¶ 81, 84; Al-Khawaja et al. v. United Kingdom, *supra* note 168, ¶ 147. Significantly, the Extraordinary Chambers of the Courts of Cambodia have adopted this later jurisprudence of the European Court. *See, e.g.*, Prosecutor v. Khieu and Nuon, *supra* note 166, at ¶ 296.
[195] Prosecutor v. Hadžić, *supra* note 181, at ¶ 17; Prosecutor v. Karadžić, *supra* note 181, at ¶ 12; Prosecutor v. Ayyash et al., Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, *supra* note 190, at ¶¶ 17-19 (admitting prior recorded statement that was primarily about the impact of the attack on the witness, even though several factors for admission were absent). In addition to these factors, international criminal courts also consider whether the prior recorded statement concerns the acts and conduct of the accused, a factor which weighs against admission but does not preclude it. *See* ICTY Rules, *supra* note 173, Rule 92 *quater;* SCSL Rules, *supra* note 173, Rule 92 *quater*; ICC Rules, *supra* note 173, Rule 68(2)(c)(ii); STL Rules, *supra* note 173, Rule 158(B); Prosecutor v. Bemba Gombo et al., *supra* note 183, at ¶ 21 (admitting prior recorded statement that went to proof of acts and conduct of the accused); Prosecutor v. Karadžić, *supra* note 181, at ¶ 31 (admitting prior recorded statement despite the fact that portions of it went to the acts and conduct of the accused); Prosecutor v. Haradinaj, *supra* note 190, at ¶¶ 10, 14 (admitting prior recorded statement even though it went to the acts and conduct of the accused). Because there is also a separate category for admission of statements that do not concern the acts and conduct of the accused, irrespective of the witness's availability, issues regarding this criterion (such as the definition of the term "acts and conduct of the accused") are addressed in the section about that category for admission. *See* section IV.B.3, *infra*.
[196] Sentencia, *supra* note 2, at 260, 289-90.
[197] *Id.* at 52 (testimony of expert Karen Denisse Peña Juarez); *id.* at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).

revealed that they suffer from a variety of physical and psychosomatic sequela as a result of their sexual enslavement,[198] including mental illnesses and suicidal tendencies.[199] The experts cautioned that the victim witnesses need psychological treatment, and that the victim witnesses would be negatively affected if they were forced to relive their traumatic experiences.[200] Indeed, the experts underscored that it was critical to avoid re-victimization of the witnesses,[201] which could occur through repeated retelling of the abuses they suffered,[202] such as at trial. In light of this medical evidence, the victim witnesses were plainly unavailable under the test developed by international criminal courts. This evidence of potential mental harm on the part of a victim of sexual violence would also constitute good cause under the test developed by the European Court of Human Rights in cases such as *Scheper v. The Netherlands* and *Aigner v. Austria*.[203]

Second, there is substantial evidence that the prior recorded testimony of the victim witnesses is reliable and that there were sufficient counter-balancing measures in place during the trial to protect the defendants' rights. First, the statements were officially obtained in the ordinary course of the criminal investigation—specifically during the preliminary investigation (*anticipos de prueba*)—in the presence of a competent judge and in compliance with the Guatemalan law.[204] Representatives of the parties were present at and participated in the process,[205] and the witnesses were cross-examined by a representative for the defense.[206] The identities of the witnesses were known to the defendants,[207] giving the defendants the opportunity to investigate the backgrounds and credibility of the witnesses. The witnesses' statements were given in their native language.[208] Defendants do not dispute that the statements were given voluntarily and declared to be true and accurate after each witness was warned about the potential consequences of false testimony.[209] The statements also were videotaped,[210] providing the court an opportunity to assess the credibility of the witnesses, a task that it carefully undertook.[211] Experts confirmed that the victims' testimonies were credible and

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[198] *Id.* at 52 (testimony of expert Karen Denisse Peña Juarez).
[199] *Id.* at 84, 90 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[200] *See id.* at 52-53 (testimony of expert Karen Denisse Peña Juarez).
[201] *Id.* at 52 (testimony of expert Karen Denisse Peña Juarez).; *id.* at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[202] *Id.* at 88 (testimony of expert Mónica Esmeralda Pinzón Gonazález).
[203] *See supra* p. 29.
[204] *See, e.g.*, Sentencia, *supra* note 2, at 214, 217-18, 222, 228, 234, 263; Guatemala Criminal Procedure Code, *supra* note 135, art. 317; *see supra* pp. 22-24.
[205] Sentencia, *supra* note 2, at 214, 218, 222, 228-29, 234, 263-64.
[206] Guatemala Criminal Procedure Code, *supra* note 92, art. 317; Burt, *supra* note 149 (describing cross-examination). At the time of the preliminary investigation, the defendants had not yet been identified. A public defender was therefore appointed pursuant to the provisions of the Guatemala Criminal Procedure Code, and that public defender conducted the cross-examination. Burt, *supra* note 149.
[207] *See, e.g.*, Sentencia, *supra* note 2, at 218, 222, 228-29.
[208] *See* Burt, *supra* note 149, summary of trial on February 16 (noting that a linguist was needed to interpret the language used by the victims in their videotaped testimony); Maya Thomas-Davis, "Guatemala: Justice for Sepur Zarco sex slavery victims, ALJAZEERA (Mar. 3, 2016) (indicating that the victims only speak Q'eqchi and do not speak Spanish), http://www.aljazeera.com/indepth/features/2016/03/guatemala-justice-sepur-zarco-sex-slavery-victims-160303072107762.html.
[209] *See generally* Asig Appeal, *supra* note 25; Galindo Appeal, *supra* note 25; Reyes Appeal, *supra* note 30; *see also* Guatemala Criminal Procedure Code, *supra* note 135, arts. 218*ter*, 219.
[210] Sentencia, *supra* note 2, at 214, 217-18, 222, 228, 234, 263.
[211] *See, e.g.*, *id.* at 214, 218, 222, 229, 234, 264.

internally consistent,[212] which the trial court likewise found to be true.[213] The court also explicitly found that the statements were corroborated by other evidence.[214] Indeed, several other witnesses gave *viva voce* testimony at trial, including one woman who also experienced sexual violence,[215] and confirmed the information provided in the prior recorded testimony.[216] Documentary and physical evidence also was admitted and provided corroboration of the victims' testimony.[217] Finally, the defendants had the opportunity to give their version of events at the trial, including through the presentation of defense witnesses.[218] These measures were sufficient to ensure the reliability of the videotaped testimony and ameliorate any difficulties to the defendants from the victims' unavailability at trial, particularly as the victims' videotaped testimony was not the sole or decisive evidence against the defendants. The trial court's admission and consideration of the victim-witnesses' prior recorded testimony was therefore proper under international norms permitting the use of prior testimony of unavailable witnesses.

2. Prior Recorded Testimony of a Witness that could have been Cross-Examined during Another Phase of the Proceedings

Several international criminal tribunals and human rights bodies also permit the use of a witness's prior recorded testimony where the witness was, or could have been, cross-examined during another phase of the proceedings. As these courts have recognized, although the guarantee of a fair trial is generally ensured by the presentation of "evidence . . . at a public hearing, in the presence of the accused, with a view to adversarial argument," other means of introducing evidence may be appropriate in order to satisfy other important aspects of a fair trial, such as conducting efficient trials or protecting witnesses, so long as the rights of the accused are respected.[219]

As international courts have recognized, cross-examination at trial is not an end in itself, but a means of ensuring that a defendant has an effective opportunity to challenge the evidence against him or her.[220] Cross-examination may reveal inconsistencies, inaccuracies, and other frailties in the memory of even the most honest witness.[221] Cross-examination also permits the fact-finder to observe the witness during testimony and thereby assess his or her credibility.[222]

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[212] *See, e.g., id.* at 53 (expert opinion of Karen Denisse Peña Juarez), 69-79 (expert opinion of Arsenio García Cores).
[213] *E.g., id.* at 52-53, 213-14, 218, 222, 229, 233-34, 264.
[214] *E.g., id.* at 213-14, 218, 222, 229, 233-34, 264, 411-12.
[215] *Id.* at 323-26 (Petrona Choc Cuz).
[216] *E.g., id.* at 279-82 (Mateo Rax Maquin), 287-89 (Santos Be Xol), 289-290 (Arturo Choc Chub).
[217] *E.g., id.* at 410-11 (birth and death certificates), 411-12 (certificate of the Migration Control Unit "Dirreción General de Migración"), 412 (government records of compensation paid to victims of sexual violence), 417 (government documents regarding delivery of remains of victim's husband), 472 (map).
[218] *See* Guatemala Criminal Procedure Code, *supra* note 92, art. 370; Sentencia, *supra* note 2, at 356-70.
[219] *See, e.g.*, Aigner v. Austria, *supra* note 170, at ¶ 35; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the admissibility of four documents, ¶ 22 (June 13, 2008) (noting that the ICC statute provides for a "wide range of other evidential possibilities," particularly to account for the "potential vulnerability of victims and witnesses"), https://www.legal-tools.org/doc/2855e0/pdf/; Doorson v. The Netherlands, *supra* note 169, at ¶ 70 ("principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify").
[220] Al-Khawaja et al. v. United Kingdom, *supra* note 168, at ¶ 127.
[221] INT'L BAR ASS'N, *supra* note 176, at 34 n.114.
[222] *See id.*

These aims can be satisfied where the defendant is given an opportunity to examine the witness at some point during the proceedings, even if the opportunity is not at trial.[223] Actual cross-examination is not required, but merely the opportunity for cross-examination.[224] In addition, while cross-examination by the defendant or his counsel is preferable, cross-examination by another party with similar interests to the defendant may be sufficient.[225] For example, the ICTY has held that cross-examination by one defendant in one case is sufficient to preserve the rights of a second defendant in a second case where those defendants share a common interest.[226] And the ICC has held that the prior recorded testimony of "victims of multiple rapes who have been significantly traumatized by their experiences" may be admitted at trial without cross-examination where the victims were cross-examined in a separate proceeding against a different defendant.[227] The Inter-American Court of Human Rights does not appear to have addressed these questions, but in other cases regarding fair trial rights, the Court has found persuasive the jurisprudence of the European Court of Human Rights,[228] which also has held that prior opportunities for cross-examination are sufficient.[229]

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[223] *E.g.*, S.N. v. Sweden, *supra* note 170, at ¶ 44 (observing that "the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with [the European Convention on Human Rights], provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings."); B. v. Finland, *supra* note 170, at ¶ 41; Aigner v. Austria, *supra* note 170, at ¶ 35; *see also* H.R. Comm., *General Comment No. 32*, ¶ 39, U.N. Doc. ICCPR/C/GC/32 (Aug. 23, 2007) (noting that a defendant should have an opportunity "to question and challenge witnesses against them *at some stage of the proceedings*") (emphasis added), http://www.refworld.org/docid/478b2b2f2.html.

[224] *See, e.g.*, B. v. Finland, *supra* note 170, at ¶¶ 7, 45 (no violation of defendant's rights where defendant was shown videotapes of the victims' testimony and was offered the opportunity to put questions to the victims, an opportunity she did not use); S.N. v. Sweden, *supra* note 170, at ¶¶ 13, 49 (no violation of defendant's rights where defense counsel requested opportunity to interview victim but was not informed of interview time and subsequently agreed that the interview could go forward without him).

[225] *Cf.* Schatschaschwili v. Germany, *supra* note 188, at ¶ 155 (finding that a defendant's rights had been violated where, *inter alia*, the authorities could have, but did not, appoint counsel to represent the interests of the accused during the examination of the witnesses, which occurred in the course of the investigation).

[226] *E.g.*, Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 27 (Feb. 16, 1999), http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm; Prosecutor v. Naletilić and Martinović, Case No. IT-98-34, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During Testimony of Certain Blaskić and Kordić Witnesses, Discussion section (Nov. 27, 2000), http://www.icty.org/x/cases/naletilic/tdec/en/01127AE114133.htm.

[227] Prosecutor v. Milosević, *supra* note 168, at ¶¶ 1, 16, 47-48.

[228] *E.g.*, Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 157, 179 (Nov. 25, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf. It is worth noting that decisions by the Inter-American Court of Human Rights finding violations of a defendant's right to cross-examine the witnesses against him or her have almost exclusively arisen in the context of trials that had no guarantees of due process. *See, e.g.*, Castillo Petruzzi v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶¶ 1, 86.10, 86.16. 86.20, 86.29, 86.30, 86.35, 86.46, 86.48 (May 30, 1999) (defendants tried before "faceless" military tribunals where, *inter alia*, defendants could not confer in private with their attorneys prior to the preliminary hearings, defense counsel were permitted to view case files for one hour or less and to provide their arguments the same day they saw the file, and some defendants had hoods over their heads or were blindfolded during the proceedings), http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf; Lori Berenson Mejía v. Perú, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119, ¶¶ 88(26), 88(27) (Nov. 25, 2004) (defendant was convicted by a court of "faceless" judges, her defense attorney was given only 2 hours to review the case file and prepare arguments and was permitted to speak for only a few minutes, and the defendant was not allowed to speak privately to her attorney), http://www.corteidh.or.cr/docs/casos/articulos/seriec_119_ing.pdf; García-Asto and Ramírez-Rojas v. Peru,

Moreover, international courts have noted that the hardship to a defendant due to the lack of cross-examination at trial may be counterbalanced by other measures.[230] Common counter-balancing measures include: recording the witness's interview on audiotape or videotape and playing those recordings in court so that the parties and the court may better assess the witness's credibility; ensuring the defendant has ample opportunity to provide the court with the defendant's version of events and to point out any inconsistencies in the prior recorded statements or between the prior recorded statements and testimony of other witnesses; careful treatment by the courts of prior recorded statements; and the presence of corroborative evidence supporting the statement, which may be supplied by further factual evidence or expert opinions.[231] For example, in *S.N. v. Sweden*, the European Court of Human Rights found that a defendant had been able to sufficiently challenge a victim's statements and credibility where those statements were introduced in court through the playing of audiotapes and videotapes.[232] The European Court of Human Rights also found it significant that the domestic court carefully reviewed the witness's testimony.[233]

Where the defense had an opportunity to cross-examine a witness at another stage of the proceedings, there is no separate requirement that the witness also be unavailable at trial in order to admit the witness's prior recorded testimony.[234] The ICC's Rules of Procedure and Evidence, for example, explicitly permit the introduction of previously recorded testimony where "[b]oth

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Preliminary Objection, Merits, Reparations and Costs, Order, Inter-Am. Ct. H.R. (ser. C) No. 137, ¶¶ 97(13), 97(26), 149 (Nov. 25, 2005) (non-public proceedings were held in a prison by "faceless" judges who never reviewed the alleged evidence of wrongdoing), http://www.corteidh.or.cr/docs/casos/articulos/seriec_137_ing.pdf; Ricardo Canses v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶¶ 161, 164 (Aug. 31, 2004) (defendant convicted in proceeding in which the defendant was not presumed innocent and was not permitted to present witnesses on his behalf), http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf. Such decisions do not address the propriety of admitting prior recorded testimony in proceedings with all of the normal guarantees of due process, as occurred here.

[229] *E.g.*, S.N. v. Sweden, *supra* note 170, at ¶ 44; B. v. Finland, *supra* note 170, at ¶ 41; Aigner v. Austria, *supra* note 170, at ¶ 35.

[230] B. v. Finland, *supra* note 170, at ¶ 43; S.N. v. Sweden, *supra* note 170, at ¶ 47; *cf.* Schatschaschwili v. Germany, *supra* note 188, at ¶ 145 (discussing counterbalancing measures in the case of an absent witness). Recent caselaw confirms that the prior recorded testimony may be the sole or decisive evidence of guilt if there are sufficient counterbalancing measures. *See, e.g.*, A.G. v. Sweden, App. No. 315/09, Eur. Ct. H.R., Decision, The Court's Assessment (2012) (no violation of defendant's rights even though the victim's prior recorded statements were the decisive evidence on which the court based its findings of guilt where two other witnesses and physical evidence – sketches – supported the victim's statements although neither of the other witnesses saw the alleged acts), http://hudoc.echr.coe.int/eng?i=001-108828; Aigner v. Austria, *supra* note 170, at ¶ 35; S.N. v. Sweden, *supra* note 170, at ¶¶ 46, 52 (no violation of defendant's rights where video of witness's interview was played in court, thereby enabling the defendant to challenge the witness's statements and credibility); *cf.* Al-Khawaja, *supra* note 168, at ¶ 147.

[231] A.G. v. Sweden, *supra* note 230, The Court's Assessment; B. v. Finland, *supra* note 170, at ¶ 44; S.N. v. Sweden, *supra* note 170, at ¶¶ 52-53; Schatschaschwili v. Germany, *supra* note 188, at ¶¶ 126-28, 146-50; Aigner v. Austria, *supra* note 170, at ¶ 43.

[232] S.N. v. Sweden, *supra* note 170, at ¶¶ 15, 17, 52; *see also* Accardi and Others v. Italy, App. No. 30598/02, Decision, The Law ¶ 1(a) (2005) (where video recording was introduced at trial, court could observe the witnesses under questioning and the defendants could submit their comments), http://hudoc.echr.coe.int/eng?i=001-70733.

[233] S.N. v. Sweden, *supra* note 170, at ¶¶ 18, 53.

[234] *See* ICC Rules, *supra* note 173, Rule 68(2)(a); *see also* S.N. v. Sweden, *supra* note 170, at ¶ 48 (witness did not testify at trial because of general court practice against letting children give evidence in person, and thus not because the witness was unavailable).

the Prosecutor and the defence had the opportunity to examine the witness during the recording,"[235] without any requirement that the witness be unavailable, which is covered by a separate provision.[236] The European Court of Human Rights also has held that a defendant's rights were not violated where there was a prior opportunity for cross-examination, without any additional finding of unavailability.[237]

In the *Sepur Zarco* case, the defense had an opportunity to cross-examine the witnesses when their testimony was taken. As explained in section IV.B.1, above, although the specific defendants had not yet been identified at the time the testimony was recorded, a public defender was appointed pursuant to the provisions of Article 317 of the Guatemalan Criminal Procedure Code.[238] That public defender cross-examined the witnesses; for example, Cecilia Caal was examined by the public defender after her testimony.[239] Such cross-examination is similar to the cross-examination by separate defendants that was found sufficient by the ICTY.[240] Indeed, the argument for admission is even stronger here since the public defender did not simply share a common interest with the defendants, as was the case in the prosecutions before the ICTY and ICC, but was appointed to represent the interests of the defendants themselves.

In addition, consistent with international law, any potential hardship to the defendants was properly counterbalanced by other measures. As in *S.N. v. Sweden* and *Accardi and Others v. Italy*, the pre-trial testimony of the *Sepur Zarco* victims was recorded on videotape and played in court, providing the defendants an opportunity to challenge their statements and credibility and the court an opportunity to assess the victims' credibility for itself.[241] The defendants had ample opportunity to provide the court with their version of events: several witnesses testified on behalf of the defense, as did defendant Heriberto Valdez Asig.[242] The trial court carefully reviewed each victim's prior recorded testimony, citing multiple reasons that the court found the testimony credible.[243] Finally, the trial court noted that the victim's prior recorded testimony was corroborated by other evidence, often citing specific testimony that corroborated particular aspects of the victims' testimony, including expert opinions. For example, the court found convincing the expert opinions of Karen Denisse Peña Juarez and Arsenio García Cores that the victims' testimonies were congruent and credible and that the victims had been subjected to violent acts from which they suffer ongoing symptoms.[244]

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[235] ICC Rules, *supra* note 173, Rule 68(2)(a).
[236] *Id.* Rule 68(2)(c).
[237] *E.g.*, S.N. v. Sweden, *supra* note 170, at ¶ 48 (witness did not testify at trial because of general court practice against letting children give evidence in person, and thus not because the witness was unavailable).
[238] *See* Guatemala Criminal Procedure Code, *supra* note 135, art. 317; Burt, *supra* note 149, summary of Feb. 15, 2016.
[239] Burt, *supra* note 149, summary of Feb. 15, 2016.
[240] *E.g.*, Prosecutor v. Aleksovski, *supra* note 226, at ¶ 27; Prosecutor v. Naletilić and Martinović, *supra* note 226, Discussion section.
[241] S.N. v. Sweden, *supra* note 170, at ¶¶ 15, 17, 52; Accardi and Others v. Italy, *supra* note 232, The Law ¶ 1(a) (where video recording was introduced at trial, court could observe the witnesses under questioning and the defendants could submit their comments).
[242] Sentencia, *supra* note 2, at 356-70.
[243] *Id.* at 204-06, 208-09, 213-14, 217-18, 221-22, 228-29, 233-34, 237-38, 242-43, 251-53, 259-60, 263-64, 266-67, 271-72, 275.
[244] *Id.* at 51(b), 52(e), 52(n), 53(t)-(z), 78(b), 78(d), 79(s), 79(u).

For the foregoing reasons, there was no violation of the defendants' rights under international law. Appointed counsel for the defense had an opportunity to, and did, cross-examine the witnesses when they provided their testimony. In addition, there were numerous counterbalancing measures to offset any potential difficulties to the defense, including the playing of the videotaped testimony at trial, a full opportunity for defendants to provide their version of events, and a careful analysis by the tribunal of the victims' testimony, including the extent to which it was corroborated. Under these circumstances, admission of the victims' prior recorded testimony at trial was consistent with international norms.

3. Prior Recorded Testimony of a Witness that Relates to Matters other than the Acts and Conduct of the Accused

A third category of prior recorded testimony, namely testimony about issues other than the acts and conduct of the accused, is commonly permitted by international criminal tribunals. Nearly every international or internationalized criminal tribunal of the modern era has a rule permitting the admission of such testimony. For example, the ICTY's Rules of Procedure and Evidence were amended in 2000 to permit a trial chamber to "dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."[245] The Special Court for Sierra Leone, and the Special Tribunal for Lebanon have nearly identical rules,[246] while the International Criminal Tribunal for Rwanda and the International Criminal Court have adopted even broader rules that do not contain a requirement that the testimony have been given in proceedings before the court.[247]

In applying these rules, international criminal courts have given the term "acts and conduct of the accused" a narrow construction. As the ICTY explained in the case against Slobodan Milosević:

> The phrase acts and conduct of the accused in Rule *92bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.[248]

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[245] ICTY Rules, *supra* note 173, Rule 92 *bis*.
[246] SCSL Rules, *supra* note 173, Rule 92 *bis*; STL Rules, *supra* note 173, Rule 155.
[247] ICTR Rules, *supra* note 179, Rule 92 *bis*; ICC Rules, *supra* note 173, Rule 68(2)(b).
[248] Prosecutor v. Slobodan Milosević, Case No. IT-02-54, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*Bis*, ¶ 22 (Mar. 21, 2002), https://www.legal-tools.org/uploads/tx_ltpdb/MIED401_05.HTM. Decisions of other tribunals are in accord. For example, the ICC has held that "[t]he phrase 'acts and conduct of the accused' should be given its ordinary meaning and, as previously held, refers to the 'personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged'." Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ¶ 10 (Jan. 12, 2017), https://www.legal-tools.org/doc/aa6548/pdf/.

Later that same year in another case, the ICTY created a list clarifying the types of testimony that fall within the term "act or conduct of the accused," namely any statement used to establish:

> (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or
> (b) that he planned, instigated or ordered the crimes charged, or
> (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
> (d) that he was a superior to those who actually did commit the crimes, or
> (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
> (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[249]

By contrast, the prior recorded testimony regarding "the acts and conduct of others for which the accused is charged in the indictment with responsibility" may be admitted.[250] Testimony is particularly likely to be admitted where "no reference is made to the accused."[251] For example, international courts have held that testimony did not relate to the acts or conduct of the accused where it was by victims who described the rape and mistreatment of themselves and others, but did not implicate the defendant;[252] concerned the targeting of certain individuals by UPC soldiers but did not reference the accused, who was the UPC's chief of staff;[253] and described the killing of a man by a sniper but did not indicate the source of the shot or otherwise implicate the defendant's responsibility.[254] Other examples of testimony that have been held not to relate to the acts or conduct of the accused include testimony linking phone numbers to specific defendants, even though that testimony was an integral part of the prosecution's case in order to prove that the defendants were in contact with telephone networks used in the preparation of an attack;[255] and testimony by a victim regarding the impact of an attack on the victim.[256]

In order to be admissible, it is not necessary that testimony entirely avoid any reference to the accused. Prior recorded testimony that mentions the defendant may be admitted where the reference is peripheral and therefore does not concern the acts or conducts of the accused. For example, the ICC held that testimony did not relate to the acts or conduct of the accused where it mentioned that the defendant was part of a group of gang members but did not attribute specific

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[249] Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), ¶ 10 (June 7, 2002), https://www.legal-tools.org/doc/0f588c/pdf/; *see also* Prosecutor v. Milosević, *supra* note 168, at ¶ 11.
[250] Galić, *supra* note 249, at ¶ 10; Milosević, *supra* note 168, at ¶ 11.
[251] Ntaganda, *supra* note 248, at ¶ 11.
[252] Milosević, *supra* note 168, at ¶¶ 16, 19, 26.
[253] Ntaganda, *supra* note 248, at ¶ 11.
[254] Galić, *supra* note 249, at ¶ 18.
[255] Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Decision on the Prosecution Motion to Admit Ten Witness Statements Relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit, ¶¶ 14-15, 25-26 (Jan. 31, 2017), https://www.legal-tools.org/doc/dc3830/pdf/.
[256] Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH007, PRH115, PRH396 and PRH661, ¶¶ 3, 16 (May 14, 2015), https://www.legal-tools.org/doc/f7fc0d/pdf/.

acts to the defendant.[257] In addition, testimony may include information about the acts or conduct of the accused where it corroborates other *viva voce* testimony, and is therefore not intended as direct proof.[258]

Once it has been determined that the prior recorded testimony does not concern the acts or conduct of the accused, international and internationalized courts impose additional criteria before the testimony may be admitted. The ICC's Rules of Procedure and Evidence require the court to consider whether the testimony concerns issues that are not materially in dispute, is of a cumulative or corroborative nature, relates to background information, would promote the interests of justice, and has sufficient indicia of reliability.[259] Analogous rules at the ICTY, ICTR, and STL provide factors in favor and factors against admitting such testimony.[260] Factors in favor of admitting such testimony include whether it: is cumulative of other testimony; provides background information; concerns the impact of crimes upon victims; relates to the accused's character; or was subjected to cross-examination at the time made.[261] Factors against include whether the testimony is unreliable or its prejudicial effect outweighs its probative value, or whether there is an overriding public interest in the evidence being presented orally.[262] In addition to these factors, international and internationalized courts require that the statement meet particular rules to ensure reliability, such as a statement by the witness that the testimony is true and correct.[263]

The prior recorded testimony admitted in the *Sepur Zarco* case was admissible under international standards because it did not relate to the acts or conduct of the defendants. The majority of the victims' statements did not make any reference to the accused.[264] Instead, the witnesses described the acts and conduct of other soldiers, as well as the impact on them as victims. For example, witness Magdalena Pop identifies Raul Juc as the soldier who raped her, but does not link him to defendants or otherwise attribute responsibility to defendants for the acts of Raul Juc.[265] Rosa Tiul's pre-recorded testimony spoke to her experiences of sexual violence and to the general conditions at the base and in the area.[266] Other testimony mentions the defendants only peripherally. For example, Felisa Cuc indicates only that Mr. Reyes was in the camp and once suffered an accident when he went to see a grave;[267] her testimony does not

[257] *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf, ¶ 12 & n.17 (Feb. 27, 2017), http://www.legal-tools.org/doc/ae7fe1/.
[258] *Id.*
[259] ICC Rules, *supra* note 173, Rule 68(2)(b)(i).
[260] ICTY Rules, *supra* note 173, Rule 92 *bis*; ICTR Rules, *supra* note 179, Rule 92 *bis*; STL Rules, *supra* note 173, Rule 155(A).
[261] ICTY Rules, *supra* note 173, Rule 92 *bis*; ICTR Rules, *supra* note 179, Rule 92 *bis*; STL Rules, *supra* note 173, Rule 155(A)(i).
[262] ICTY Rules, *supra* note 173, Rule 92 *bis*; ICTR Rules, *supra* note 179, Rule 92 *bis*; STL Rules, *supra* note 173, Rule 155(A)(ii).
[263] ICTY Rules, *supra* note 173, Rule 92 *bis*; ICTR Rules, *supra* note 179, Rule 92 *bis*; STL Rules, *supra* note 173, Rule 155(B).
[264] *See, e.g.*, Sentencia, *supra* note 2, at 206-08 (Manuela Bá), 209-13 (Rosa Tiul), 214-17 (Candelaria Maas Sacul), 218-21 (Vicenta Col Pop), 234-37 (María Bá Caal), 243-51 (Demacia Yat), 260-64 (Magdalena Pop), 264-67 (Antonia Choc), 272-75 (Matilde Sub).
[265] *Id.* at 261.
[266] *Id.* at 321, 322, 328, 329, 408-09, 417, 477.
[267] *Id.* at 258.

directly implicate him in any crime.[268] Another victim, in addition to her other testimony, mentions an act of one of the defendants[269] for which he was neither tried[270] nor convicted.[271] All of these types of testimony are admissible under international standards because they do not concern the acts or conduct for which the accused were tried.[272]

Finally, the prior recorded testimony meets the additional requirements imposed by international and internationalized tribunals. The victims' prior recorded testimony was cumulative and corroborative of other *viva voce* testimony,[273] including testimony by a victim of sexual violence who was subject to cross-examination at trial.[274] Much of the testimony concerned the impact of the crimes upon the victims. The testimony was subject to cross-examination at the time that it was given, as explained in detail in the section on cross-examination.[275] And the testimony has sufficient indicia of reliability: the court carefully examined each witness's statement and explained the reasons that it was credible;[276] expert witnesses testified as to the credibility of the statements;[277] and the court found that each statement was corroborated by other evidence.[278] Finally, defendants do not dispute that the victims affirmed that their testimony was true and accurate and met all of the other requirements of Guatemalan law designed to ensure the reliability of such statements.[279]

C. Conclusion

As the foregoing sections demonstrate, the *Sepur Zarco* court properly admitted the pre-recorded testimony of victims in accordance with both Guatemalan and international law. First, the *Sepur Zarco* court explicitly found that the testimony satisfied the provisions of Guatemalan law, including the requirements that the testimony be taken before a judge, in the presence of the parties' representatives, and videotaped. Indeed, defendants have not contested that such requirements were fulfilled, instead arguing that the law required their own presence or that of their attorneys, rather than a public defender. But defendants fail to acknowledge other provisions of Guatemalan law that explicitly permit the use of a public defender in circumstances where, as here, no defendant had been identified at the time of the investigation and admit such

[268] *See id.* at 253-59 (testimony of Felisa Cuc).
[269] *See id.* at 222-28 (testimony of Rosario Xo describing Mr. Asig's involvement in her husband's disappearance).
[270] *See id.* at 1.
[271] *See id.* at 502.
[272] Five victims' statements arguably included information about acts and conduct of the accused. Sentencia, *supra* note 2, at 198-204 (Margarita Chub Choc), 222-28 (Rosario Xo), 229-33 (Carmen Xol Ical), 238-43 (Cecilia Caal), 267-71 (Catarina Caal Rax). Although those portions of their statements may not be admissible under this category, they would still be admissible because the statements were previously subject to cross-examination and because the witnesses are unavailable.
[273] *E.g.*, Sentencia, *supra* note 2, at 279-82 (Mateo Rax Maquin), 287-89 (Santos Be Xol), 289-290 (Arturo Choc Chub).
[274] *Id.* at 323-26 (Petrona Choc Cuz).
[275] *See supra* p. 36.
[276] *See supra* pp. 32, 36.
[277] *See id.*
[278] *See id.*
[279] *See supra* p. 23. It is appropriate to apply Guatemala's procedural rules regarding such oaths rather than those of the international tribunals since the statements were taken for admission before the Guatemalan courts and no prosecutor or court official would have anticipated a reason to apply the procedural rules of any of the international courts.

pre-recorded testimony at trial. Second, the testimony meets the criteria for admission under international law because it was reliable and (1) given by unavailable witnesses, (2) previously subjected to cross-examination, and (3) not related to the acts or conduct of the accused. Evidence indicating that the pre-recorded testimony was reliable includes that:

- the victims confirmed that their testimony was voluntary and truthful;
- the victims were warned about the consequences of providing false testimony;
- the victims testified in their native language;
- the testimony was obtained in the ordinary course of the investigation;
- at least some of the women were cross-examined when they provided their testimony;
- the testimony was internally consistent, as both experts and the court found; and
- the testimony was played at trial, permitting the judges to observe the witness' demeanor and form their own impressions of the witness' reliability.

Moreover, the prior recorded testimony was not the sole evidence for the convictions. A wide array of prosecution experts and eyewitnesses, as well as another sexual violence victim, provided *viva voce* testimony and were subject to cross-examination at trial. In addition, documentary and physical evidence corroborated the victims' testimony. Given all of this other evidence, the trial court's finding that the prior recorded testimonies were credible was reasonable. For all of these reasons, the decision to admit the pre-recorded testimony in lieu of in-court testimony was appropriate and did not violate of the defendants' right to a fair trial in this case.