Preliminary Observations by the Legal Observer Mission

Trial for the Murder of Berta Cáceres and the Attempted Murder of Gustavo Castro
Tegucigalpa, Honduras
October 1, 2018

Introduction

The objective of this summary is to document relevant information about the trial of 8 of the 9 people accused of the murder of Berta Cáceres and the attempted murder of Gustavo Castro, and to create a tool to allow Honduran society and the international community to follow the process.

The Legal Observer Mission ("the Mission") consists of 17 national and international organizations. Its fundamental goal is to observe the trial with a focus on the rights to due process, effective judicial protection, and access to justice, in order to ensure that the trial develops in accordance with international standards and Honduran law.

Below, the Legal Observer Mission presents its preliminary observations within the framework of its activities during its visit to Honduras on September 10-25, 2018.[1] *In addition, the Mission presents its preliminary observations regarding legal documents filed by the parties and recent meetings, with the goal of better understanding these documents and the context surrounding the trial.*

The Mission emphasizes that this document is an initial account of the process, not a complete report on the case, the investigation, or the trial. We hope to provide a final report at the end of the trial, which will also include information gathered about preliminary hearings and processes.

Parties to the Case

Defendants Accused of the Murder of Berta Isabel Cáceres Flores and the Attempted Murder of Gustavo Castro Soto, which occurred on March 2, 2016:

- Sergio Ramón Rodríguez Orellana
    - Represented by attorneys Celeste Aida Cerrato Chinchilla and Eduardo Jair López Zúniga (private defense attorneys)
- Mariano Díaz Chávez,
    - Represented by attorney Ritza Antúnez (private defense attorney)
- Douglas Geovanny Bustillo
    - Represented by attorney Gilberto Navas Izaguirre (private defense attorney)
- Henry Javier Hernández
    - Represented by attorney Abel Manzanares (private defense attorney)

[1] The Organizations that appear at the end of this document are those that had representatives present during the period upon which these Preliminary Observations are based. These representatives are responsible for Preliminary Observations that follow.

- Elvin Heriberto Rápalo Orellana
    - Represented by attorney Lucia Navas Flores (public defender)
- Óscar Aroldo Torres Velásquez
    - Represented by attorney Jennifer Dariella Mejía Medina (private defense attorney)
- Edilson Atilio Duarte Meza
    - Represented by attorney Andrés Fernando Martínez (public defender)
- Emerson Duarte Meza
    - Represented by attorney Andrés Fernando Martínez (public defender)

Prosecutors from Public Prosecutor's Office – Homicide Division[2]

- Ingrid Belinda Figueroa
- David Ismael Salgado Banegas

Victims Represented by Private Attorneys in their role as Private Prosecutors:

- Bertha Isabel Zúniga Cáceres, Laura Yolanda Zúniga Cáceres and Olivia Marcela Zúniga Cáceres, daughters of Berta Cáceres and María Austra Flores López, mother of Berta Cáceres.
    - Represented by attorneys Ronis Rodil Vásquez Florentino and Víctor Antonio Fernández Guzmán.
- Salvador Edgardo Zúniga Cáceres, son of Berta Cáceres.
    - Represented by attorneys Omar Menjivar Rosales and Melvin Ariel Madrid Rivas.
- Gustavo Castro, victim of attempted murder.
    - Represented by attorneys Kenia Oliva and Edy Tabora.

Procedural Role of the Victims

In civil law systems, crime victims can constitute themselves as private prosecutors In Honduras, article 16 of the Code of Civil Procedure (CCP) explicitly permits the victim to "constitute itself as a private prosecutor or plaintiff and intervene as such in the full process." As such, a victim who is constituted as a private prosecutor has the right to initiate criminal prosecution and to be assisted by the public prosecutor's office if the victim is low-income (CCP art. 96). In addition, victims can participate and suggest legal actions not ordered by the public prosecutor's office (CCP art. 97).

Defendants in Pre-Trial Detention

Five of the defendants have been in pre-trial detention since May 2, 2016 (more than 2 years and 4 months); two others have been detained since January 12, 2017 (more than 1 year and 8 months) and another since February 8, 2017 (more than 1 year and 7 months). The observers were informed that, in accordance with art. 181 of the CCP, the maximum term of pre-trial detention for the first 5 defendants will end on November 2, 2018. If the trial has not concluded

[2] Fiscalía de los Delitos en Contra de la Vida

by then, these defendants would be released, although they could be subject to substitute measures of conditional liberty and would remain subject to the court process.

Criminal Court Process

At the end of the preliminary hearing on proposed evidence on September 4, Courtroom 1 of the Trial Court[3] confirmed that the trial for the murder of Berta Cáceres and the attempted murder of Gustavo Castro would begin on September 17 at 9:00 a.m. in Courtroom 1 of the National Criminal Trial Court.[4]

On September 17 at 9:00 a.m., in Courtroom 1 of the National Criminal Trial Court, family members of the victims and the accused arrived at court, together with members of COPINH, diplomatic representatives (from the embassies of the European Union, Mexico, the United States, Canada, Spain, and Germany, among others), members of national and international human rights organizations (representatives of this Legal Observer Mission), and national and international journalists.

Around 10:00 a.m. on the same day, the Court informed the people who were present and the victims' representatives of a schedule change. The court would be beginning an evidentiary hearing in a drug-trafficking case unrelated to Berta Cáceres. At 11:55 a.m., the three judges of the court, Esther Carolina Flores, Delia Lizeth Villatoro and Jocelyn Marie Donaire, began the trial in the case of those accused of being the material authors of the murder of Berta Isabel Cáceres Flores, indigenous Lenca woman and recognized leader in human and environmental rights, and the attempted murder of Mexican environmentalist Gustavo Castro Soto. The eight defendants and their attorneys, the public prosecutors, and the private victims' attorneys were all present.

However, immediately after opening the hearing the Court announced that they had received a request for recusal from one of the private prosecutors and that, because of this, the trial could not continue until the request for recusal was resolved. In addition, the Court noted that five constitutional challenges[5] which had previously been filed were still pending resolution. These include three constitutional challenges filed by the family's private prosecutors, one filed by members of COPINH and one filed by an attorney for a defendant. The Court suspended the hearing at 12:00 noon.

II. Examination of Legal Filings

A. Request for Recusal

[3] Tribunal de Sentencia
[4] Tribunal de Sentencia con Competencia Nacional Territorial en Materia Penal. The *Tribunales de Sentencia con Competencia Nacional Territorial*, are special courts that were first created to fight organized crime.
[5] Recursos de amparo

1. Criminal Complaints

The attorneys for Salvador Zúniga Cáceres filed a complaint with the Special Public Prosecutor's Office for Employees of the Justice Sector[6] against the judges of Courtroom 1 of the National Criminal Trial Court for abuse of authority, concealment, denial and delay of justice, and violating their duties as public officials.

Bertha Isabel Zúniga Cáceres and Laura Zúniga Cáceres, constituted as private prosecutors in their role as victims, also filed a complaint with the Special Prosecutor's Office for Employees of the Justice Sector on September 17, 2018. Like the first complaint, this complaint accused the judges of Courtroom 1 of abuse of authority, concealment, denial and delay of justice, and violating their duties as public officials.

The two complaints are very similar. In both cases the victims' attorneys repeatedly requested that employees of the Public Prosecutor's Office Homicide Division give them access to the evidence, as required by Honduran law. The complaints indicate that the judges issued rulings that obligated the public prosecutors to comply with the victims' attorneys' requests in 2017 and 2018, but the public prosecutors repeatedly failed to comply or only partially complied. Despite this, according to the allegations, the court did not file criminal complaints against the prosecutors with their superiors for contempt, as required by law.

The complaint by the private prosecutors also includes other bases for the request for recusal:

- Not providing an adequate rational basis for judicial decisions, specifically regarding admissibility of evidence;
- Abruptly ending a hearing on September 4, 2018, before the victims' attorneys could make their planned statements;
- Not subpoenaing witnesses, arguing that the Court did not have sufficient resources, and requiring the parties to do this themselves;
- Discrimination against the indigenous Lenca people, in particular on August 31, 2018, when the judges knowingly permitted court staff to require indigenous people to remove their traditional dress before entering the courtroom.

The complaint also alleges that the courtroom security guards denied entrance to the courtroom to indigenous attendees, informing them that there were not enough seats available, specifically on August 31, 2018. At the same time, the guards allowed members of the diplomatic corps to enter and provided additional seats for them.

2. Summary of Request for Recusal

[6] Fiscalía Especial para el Enjuiciamiento de Funcionarios y Servidores del Sector Justicia

The request for recusal was filed against the judges of Courtroom 1 of the National Criminal Trial Court based in Tegucigalpa: Esther Carolina Flores, Delia Lizeth Villatoro, Jocelyn Marie Donaire and José Anaím Orellana.

The request for recusal was filed on September 17, 2018 by attorneys Omar Menjivar Rosales and Melvin Ariel Madrid Rivas, who represent Salvador Edgardo Zúniga Cáceres.

The request for recusal is based on the criminal complaint filed by the attorneys for Salvador Zúniga Cáceres. However, the attorneys for Bertha Zúniga Cáceres, Laura Zúniga Cáceres, Olivia Zúniga Cáceres and Austra Bertha Flores López filed a similar complaint on the same day.

3. Basis in Honduran Law

a. Legal Basis

The complaints are based on several articles in the Honduran criminal code, including article 346 (failure to comply) and article 388(5) (concealment). It is also based on article 269 of the CCP, which establishes that public employees should pursue criminal charges when they become aware of crimes during the exercise of their duties.

According to article 60 of the Honduran Constitution, all discrimination motivated by sex, race, class, or any other motive harmful to human dignity is punishable.

b. Procedural Basis

According to article 186 of the Law of the Organization and Attributes of the Courts[7] (abbreviated to "LOAT" in Spanish), "Judges and Magistrates, regardless of their rank, can only be recused for legitimate cause." Article 187 of the same law permits a private prosecutor in a criminal case to file a request for recusal, and article 85 of the CCP also states that the parties can file the request.

Article 188 section 3 of LOAT provides that there is cause for recusal when the person to be recused "is or has been the subject of a complaint or accusation of perpetrating, concealing, or being an accomplice to a crime or offense;" article 83 section 2 of the CCP has a similar provision.

According to article 88 of the CCP, once the request for recusal has been filed, the officials that it is directed against should give a report within 24 hours of the filing. According to this same article, "If in their report the officials subject to recusal believe that recusal is appropriate because the accusations are true and legitimate, they will recuse themselves from the

[7] Ley de Organización y Atribuciones de los Tribunales

process..." However, if the judges subject to recusal do not admit the request, the court having jurisdiction, in this case the National Criminal Appeals Court[8] will rule on the request for recusal within three days of receiving the report. According to several Honduran jurists consulted by the observers, the Court of Appeals needs more time in practice to resolve requests for recusal than the timeframe stated in the law.

4. International Legal Standards

a. Independence of the Judiciary

The following provisions from international agreements ratified or adopted by Honduras provide a right to an independent, impartial judiciary:

- Article 3[9] of the Inter-American Democratic Charter, Adopted by the Organization of American States (OAS), (Honduras is a member state);
- Article 8(1)[10] of the American Convention on Human Rights;
- Article 14(1)[11] of the International Covenant on Civil and Political Rights provides a right for all people to be heard publicly and with proper guarantees by a court that is competent, independent and impartial. This right has also been interpreted by the UN Human Rights Committee;[12]
- Article 8[13] of the Basic Principles on the Independence of the Judiciary;
- Article 11(1)[14] of the United Nations Convention Against Corruption, which has supported the Bangalore Principles of Judicial Conduct.[15]

Article 17[16] of the UN Basic Principles on the Independence of the Judiciary also provides procedural standards for situations when judicial conduct is in question, under which, "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure."

b. Prosecutors' Role

It is important to emphasize that the request for recusal is based on the criminal complaint against the judges for not sanctioning the prosecutors for failing to provide evidence to the victims' attorneys after being ordered to do so. International norms such as the United Nations

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[8] Corte de Apelación con competencia Territorial Nacional en Materia Penal
[9] http://www.oas.org/charter/docs/resolution1_en_p4.htm
[10] https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm
[11] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[12] Karttunen v. Finland, Communication No. 387/1989, doc. Cit., para. 7.2
[13] https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx
[14] https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
[15] https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf
[16] https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx

Guidelines on the Role of Prosecutors[17] and the United Nations Convention Against Corruption[18] govern the role and integrity of prosecutors.

According to these standards, "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system"[19] and States should "prevent opportunities for corruption."[20]

c. Discrimination and Inclusion

Regarding the presumed acts of racism against the indigenous Lenca people, the authorities who are present have an obligation to act *ex-officio* and proceed against the offenders. International standards against discrimination include:

- International Convention on the Elimination of All Forms of Racial Discrimination (for example, art. 5[21] "The right to equal treatment before the tribunals and all other organs administering justice")
- ILO Convention 169,[22] article 3 (protection against discrimination); article 8 (right to customs and institutions); article 9 (right to indigenous customs in criminal law).
- Value 5 of the Bangalore Principles of Judicial Conduct[23] (ensuring equality of treatment of all before the courts is essential to the due performance of the judicial office).
- UN Declaration on the Rights of Indigenous Peoples,[24] art. 5 (Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State).

5. Ruling on the Request for Recusal

On September 25, 2018, the National Criminal Appeals Court in the Department of Francisco Morazán denied the request for recusal filed by the attorneys Omar Menjivar Rosales and Melvin Ariel Madrid Rivas, and ruled that it was without merit. The appeals court held that the basis for recusal argued in the request did not apply in this case. According to the court, filing a criminal complaint does not in itself create a legitimate basis for recusal. In their ruling the judges affirmed that according to the jurisprudence of the Constitutional branch of the Supreme Court, there is only cause for recusal under article 83 section 2 of the CCP when after the

[17] https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx
[18] https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
[19] UN Guidelines on the Role of Prosecutors, article 12, https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx
[20] United Nations Convention Against Corruption, article 11, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
[21] https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx
[22] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
[23] https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf
[24] https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

complaint “an indictment has been filed against the challenged official and that it be admitted in a court for purposes of substantiation.” However, in this case the complaint was filed on the same day as the request for recusal.

The appeals court noted that this jurisprudence of the Supreme Court is found in at least three rulings on other constitutional challenges, and according to article 73 of the Constitutional Justice Law[25], “Three Supreme Court sentences that are in agreement in constitutional challenge cases constitute legal precedent. However, the Supreme Court can break from its own precedent, if it provides a reasoned basis for the innovation.” As such, the court held that there was no legal basis for the request for recusal.

The appeals court also affirmed that it had received the timely report of the judges who were the subject of the request for recusal. In their report, the lower court judges indicated that they did not believe there were sufficient grounds for recusal. The report by the judges was signed on September 19, 2018.

B. Constitutional Challenges[26]

As of the date of this report, five constitutional challenges have been filed with the Criminal Appeals Court in Francisco Morazán by the victims’ attorneys, the defense, and members of COPINH. The court has not yet ruled on the admissibility of two of the five constitutional challenges.

A constitutional challenge is a legal proceeding based on article 183 of the Honduran Constitution. According to the Constitution and Article 41 of the Constitutional Justice Law, a constitutional challenge is used to maintain or restore the exercise of rights under the Constitution or international instruments such as treaties and conventions.

The constitutional challenges were filed by several parties in the case with the goal of obtaining constitutional protection against judicial rulings that the parties considered violated their rights.

The constitutional challenges invoked the right to due process of law under article 90 of the Constitution, article 8 of the American Convention on Human Rights (ACHR), and article 14 of the International Covenant on Civil and Political Rights (ICCPR), two international treaties ratified by Honduras.

They also invoked the right to a legal defense, which is protected under article 82 of the Constitution and also under judicial guarantees established in article 8 de la ACHR, and article 14 of the ICCPR.

[25] Ley sobre Justicia Constitucional
[26] Recursos de amparo

They invoked the right to the truth, which guarantees that victims of severe human rights violations the right to obtain clarification of the events that occurred. According to the interpretation of the Inter-American Court of Human Rights, the right to the truth comes from the rights to judicial guarantees and judicial protection that are found in articles 8 and 25 of the ACHR.

In addition, one constitutional challenge invoked the right to an equal process that comes from the right to equality in article 60 of the Constitution. This right is also found in article 8 of the ACHR and article 14 of the ICCPR.

If the court finds that a constitutional challenge is admissible, then under article 58 of the Law of Constitutional Justice[27] it can either suspend the action (in this case, the trial) while the challenge is considered, or decide that the constitutional challenge will be resolved concurrently while the trial is ongoing. According to article 59 of the same law, precautionary measures such as suspending the trial will be declared "if maintaining the action will result in (...) a grave and imminent violation of a fundamental right; When continuing the action will make the constitutional challenge useless by making it difficult, burdensome, or impossible to restore things to their prior state (...)"

1. Constitutional Challenge 1: COPINH's Right to Appear as a Victim

a. Summary

The first constitutional challenge was filed on September 4, 2018 by Heidy Waleska Barahona Alachán, the legal representative of Lilian Esperanza López Benítez, Sotero Chavarría Fúnez, José Gaspar Sánchez Acosta, Francisco Gámez Gámez, Pascuala Vásquez and Francisco Javier Sánchez, all members of the board of directors of the Civic Council of Popular and Indigenous Organizations of Honduras (COPINH).

The constitutional challenge appeals a July 27, 2018 ruling which denied the members of COPINH the right to constitute themselves as private prosecutor in their capacity as victims in the criminal process. The challenge argues that this decision violates the right to due process of law.

The challenge requests that the members of the popular civil society ethnic group of the Lenca people who have formed COPINH be recognized as victims and be allowed to constitute themselves as a private prosecutor in the court process. In addition, it requests that the trial be suspended as a precautionary measure while the constitutional challenge is decided. On September 19, 2018, the parties were informed that this constitutional challenge was ruled to be admissible, but that the trial would not be suspended.

[27] Ley sobre Justicia Constitucional

b. Aspects of National Law

According to article 17, section 3 of the CCP, members of a civil organization can be recognized as victims when a crime affects the organization. Article 16 permits a victim to constitute itself as a private prosecutor and to participate in the criminal process. In this case, the petitioners affirm that they were affected spiritually, morally, and institutionally. However, the constitutional challenge notes that the court ruled on July 27, 2018, that a civil organization could only be considered a victim if the organization was affected financially, and in this case the organization was affected morally.

In the Honduran system, victims have certain rights even if they are not constituted as a private prosecutor. These include being informed of the results of the court process even if they have not participated in it; being heard before each court action that could end or suspend the criminal case; participating in public hearings; and objecting to the supervising prosecutor who participates in the process, if proceedings are improperly administratively closed (CCP article 17).

c. International Legal Standard

*i. Participation of Victims in the Criminal Process**

In international criminal law, it is increasingly recognized that victims' participation in criminal proceedings can contribute to a more meaningful judicial process. The Rome Statute of the International Criminal Court (ICC), which has been ratified by Honduras, is one of the first international instruments that significantly increased the role of the victim in criminal proceedings. Article 68(3) of the Rome Statute gives victims the right to participate in the proceedings in the manner which the court deems appropriate, and article 89 of the ICC Rules of Procedure and Evidence permits victims to present their opinions and concerns in a written application to the court, and to be represented by a lawyer.

The ICC recognizes that both individuals and legal entities, such as organizations and institutions, can be recognized as victims, although with different legal parameters.[28] The ICC definition of victim focuses on the "harm suffered," the nature of which is determined by the judges. Harms can include physical, financial, psychological, and emotional injuries.[29] After making a determination of victimization, the judges consider if the individual who requested the status of victim has suffered injury and if this injury was the result of the crime being adjudicated by the Court.

[28] Regulation 85 of the Rome Statute
[29] International Criminal Court Policy Document: https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf

**Although these tribunals are limited to the prosecution of international crimes, their progressive approach to victims' participation is a positive example for domestic jurisdiction, particularly for those countries who have ratified the Rome Statute and incorporated its provisions into domestic legislation.*

2. Constitutional Challenge 2: Access to the Judicial Process and Live Transmission

a. Summary

The second constitutional challenge was filed on September 13, 2018 by Víctor Antonio Fernández Guzmán and Ronis Rodil Vásquez Florentino, the attorneys for Bertha Isabel Zúniga Cáceres, Olivia Marcela Zúniga Cáceres, Laura Yolanda Zúniga Cáceres, and María Austra Flores Cáceres, functioning as private prosecutors.

This constitutional challenge is based on the right to due process of law and the right to the truth. The challenge argues that these rights were violated by an August 10, 2018 judicial ruling that denied a request to video and audio record the proceedings and live-transmit them in real time.

According to the representatives, the murder of Berta Cáceres and the attempted murder of Gustavo Castro are high-impact crimes, acts of direct interest to the indigenous Lenca community and also of national interest and of very high international impact. The legal representatives request that the judges authorize audio and video recording as well as real-time audio transmission of the trial.

In addition, this constitutional challenge requests the precautionary measure of suspending the trial while the constitutional challenge is decided so that the principle of publicity, part of due process of criminal law, will be guaranteed.

b. Legal Points

The attorneys depend on CCP article 346, which grants all parties the right to request authorization for an audio or video record in all or part of a trial. The attorneys also base their argument on principles related to publicity of judicial hearings, particularly in the context of criminal law, that are found in international treaties ratified by Honduras.

c. International Legal Standards

i. Right to a Public Trial

Honduras has ratified international treaties that provide standards about the publicity of trials, and has incorporated these treaties into its national legislation through its Constitution. These treaties include:

- Article 8(5) of the American Convention on Human Rights
- Article 14(1) of the International Covenant on Civil and Political Rights
- Article 67 of the Rome Statute

ii. *Exceptions to the Right to a Public Trial*

Under the ACHR, the ICCPR and the ICC, there are exceptions and limitations to the right to a public trial.[30] The exceptions include considerations about the defendant's right to privacy, the need to maintain public order, national security, the safety of victims and witnesses, or special circumstances in which publicity would be harmful to the interests of justice. Special circumstances in which there can be a legitimate reason to exclude the public from judicial proceedings are considered in light of the judge's reasoning, the essential facts, and all of the evidence.[31]

d. Resolution of Constitutional Challenge

On September 25, 2018, the National Criminal Appeals Court in Francisco Morazán declared the constitutional challenge regarding the August 10, 2018 decision by the National Criminal Trial Court about taping and livestreaming the hearings non-admissible.

The Appeals Court affirmed that this challenge deals with questions of mere legality which correspond to be judged by the ordinary courts and that, although they are linked to constitutional regulations, they must be resolved by the ordinary courts (in this case, the National Trial Court presiding over the trial). For this reason, the Court of Appeal declared the constitutional challenge non-admissible as it considers there to already be a decision of the competent jurisdictional body.

3. Constitutional Challenge 3: Inadmissibility of Evidence (1)

a. Summary of Constitutional Challenge

The third constitutional challenge was filed on September 13, 2018 by Omar Menjivar Rosales and Melvin Ariel Madrid Rivas, attorneys for Salvador Eduardo Zúniga Cáceres, constituted as private prosecutor. The constitutional challenge is based on the rights to a legal defense, to the truth, and to due process of law. It argues that these rights were violated by an oral judicial ruling on September 3, 2018 in which the court found that the majority of the evidence proposed by these attorneys was inadmissible.

[30] American Convention on Human Rights, article 8(5); ICCPR, article 14(1)
[31] UN Human Rights Committee, General Comment 32, paragraph 29; Rome Statute, article 68.

The constitutional challenge argues that the excluded evidence was essential to proving the private prosecutor's theory of the case. It states that the evidence was found to be inadmissible despite the fact that it complied with the legal requirements of usefulness, relevance, and proportionality. It argues that the failure to admit the evidence was arbitrary, unjustified, and shows the tribunal's intention to only admit evidence relating to the moment of the murder of Berta Cáceres on March 2, 2016, and to reject any other piece of evidence that refers to the context in which the murder occurred, including possible preparations for the murder. The attorneys request that the witnesses and expert evidence found inadmissible should be admitted. They also request a precautionary measure of suspending the trial while the constitutional challenge is being decided.

b. Legal Points

CCP article 199 defines the requirements for evidence to be admitted in legal processes in Honduras.

c. International Legal Standards

Honduras is part of the Rome Statute: art. 69(3)(4) (admissibility of evidence "necessary for the determination of the truth").

4. Constitutional Challenge 4: Inadmissibility of Evidence (2)

a. Summary of the Constitutional Challenge

The fourth constitutional challenge was filed on September 14, 2018 by Víctor Antonio Fernández Guzmán and Ronis Rodil Vásquez Florentino, attorneys for Bertha Isabel Zúniga Cáceres, Olivia Marcela Zúniga Cáceres, Laura Yolanda Zúniga Cáceres, and María Austra Flores Cáceres, acting as private prosecutors. The constitutional challenge is based on the rights to legal defense, to the truth, and to due process of law. The constitutional challenge notes that the majority of the evidence, including witnesses, documents, and experts proposed by these attorneys was found inadmissible in a preliminary hearing.

Like the previous Constitutional Challenge, it argues that the failure to admit the evidence was arbitrary, unjustified, and shows the tribunal's intention to only admit evidence relating to the moment of the murder of Berta Cáceres. The challenge requests that this evidence be admitted, as it is determinative and necessary to sustain the private prosecutors' theory of the case. The challenge also requests the precautionary measure of suspending the trial while the constitutional challenge is considered.

b. Legal Issues

See section 3(b).

c. International Legal Standards

See section 3(c).

5. Constitutional Challenge 5: Appeal of the Decision to Allow a Second Legal Victim

a. Summary of Constitutional Challenge

The fifth constitutional challenge was filed on August 13 by Jair López and Celeste Cerrato, attorneys for the defendant Sergio Rodríguez. It requests that the court's decision of July 27, 2018 be annulled. The July 27 decision allowed the victim Salvador Eduardo Zúniga Cáceres to constitute himself as a private prosecutor represented by attorneys Omar Menjivar Rosales and Melvin Ariel Madrid Rivas. The challenge argues that this decision violates the right to an equal process. This constitutional challenge was found admissible, but the judges decided not to suspend the trial, which means that the constitutional challenge will be decided concurrently with the ongoing trial.

b. Legal Issues

The constitutional challenge argues that the attorneys for the other children and the mother of Berta Cáceres, on one hand, and the attorneys for her son, on the other, essentially form the same legal team with the same goals. It states that the parties are only dividing their representation into two legal teams to have more time and resources in the trial. This creates an advantage for the victims over the defendant.

In addition to the constitutional rules on equality, the motion is based on CCP article 13, which establishes that judges should guarantee equality of the parties in a criminal trial as part of procedural due process.

c. International Legal Standards

Honduras has ratified the ACHR, including article 8.2 ("full equality" of the parties during the judicial process); and the ICCPR including article 14(1)(3) (all people are equal before the courts, complete equality before the courts).

III. Access to the Court and Courtroom

A. Access to the Court

The observers present at the trial noticed a series of possible obstacles to access to justice for the victims and for the publicity of the hearings. The court room was too small to accommodate

all of the victims, observers, and members of the public who wished to attend. Berta Cáceres' family members had to share seats, and some could not enter the courtroom. The court tried to accommodate additional people by adding additional chairs, but this was insufficient.

Nina Lakhani, one of the only international reporters who closely covered the case, told the observers that she was denied access to the courtroom three times before being able to enter.

B. Live Transmission and Overflow Seating

Given the limited capacity of the courtroom, a multitude of people interested in the case gathered outside the court. Despite a request by the victims' attorneys to live-transmit the hearing, the judge did not provide an overflow room or areas where the public could see or watch a live transmission of the hearing.

IV. Defamation Campaigns in the Context of the Hearing

A. Campaigns Against Human Rights Defenders

The observers noted that, approximately 10 days before the trial, Víctor Antonio Fernández Guzmán, an attorney for the victims, was defamed in a video on social media. The video seems to be an attempt to stigmatize, intimidate, and discredit Mr. Fernández Guzmán's work. On September 21, the Office of the UN High Commissioner for Human Rights in Honduras issued a press release noting their concern about campaigns of disparagement against human rights defenders, specifically mentioning Mr. Fernández Guzmán and his brother, Martín Fernández Guzmán, both members of the Movimiento Amplio para la Dignidad y Justicia (MADJ), and Father Ismael Moreno, Director of the Equipo de Reflexión, Investigación y Comunicación (ERIC) and Radio Progreso. All of them have received protective measures from the State and/or the Inter-American Commission on Human Rights (IACHR). These human rights defenders have faced defamation campaigns on various occasions in the past. We consider it important to note that ERIC is one of the organizations that forms part of the Legal Observer Mission.

B. Defamation Campaign Against International Journalist: Nina Lakhani

The day that the trial began, Nina Lakhani, a prominent independent journalist for The Guardian, and the only English-language journalist covering the trial on the ground, was attacked by a campaign of disparagement that claimed that Lakhani was involved in a violent insurgency. Lakhani had recently published several articles about the trial and is writing a book about Berta Cáceres. The journalist mentioned that she had also been attacked in the past after publishing articles about Berta Cáceres.

C. Paid Political Advertisement

The firm Amsterdam & Partners, attorneys representing Desarrollos Energéticos S.A. (DESA), ran a paid political advertisement in various media on August 17, 2018, stating that COPINH has a radical political agenda, and that COPINH is anti-development and opposed to the rule of law.

Organizations from the Observer Mission whose representatives participated in the preparation of this document and in activities in Honduras during the period from September 10-25, 2018:

Abogados sin Fronteras Canadá (ASFC)
The Canadian Centre for International Justice (CCIJ/CCJI)
Centro de Investigación y Promoción de los Derechos Humanos (CIPRODEH)
Equipo de Reflexión, Investigación y Comunicación (ERIC)
La Comisión de Derechos Humanos de Guatemala/EE.UU (GHRC-USA)
La Plataforma Internacional contra la Impunidad
The Promise Institute for Human Rights of the UCLA School of Law