Chapter 6
Whose Territory?
A Legal Appraisal of the Claim

This is not intended to be a legal treatise considering the strengths and weaknesses of Guatemala's claim to Belize's territory. For that I refer you to the Legal Opinion by Sir Eli Lauterpacht and three other distinguished international lawyers and jurists, including a recent President of the ICJ, as well as the submissions Belize made to the Panel of Facilitators in March and May 2001.[1] *You should read the Opinion of Manley O Hudson, one of the most eminent jurists of his time, written for the Government of Guatemala. You should also consult the* White Book *prepared by the Government of Guatemala stating its claim to the territory. What I want to do in this Chapter is simply to examine the arguments that Guatemala might advance in support of its claim and even assume (against facts and the law) that some of them are valid. Then I want to outline what the International Court of Justice will look at if the dispute is submitted to it, what are the facts and the law that it will consider and what the likely outcome of its deliberations would be. Like this Part's title, the headings to guide us through this maze will be stated as questions.*

[1] Papers by both countries are available online at the OAS website. The Lauterpacht Legal Opinion is available at https://flyoverprep.files.wordpress.com/2012/01/legal-opinion_-_guatemala_belize_2001.pdf. It is hereafter cited as "the Legal Opinion". A useful booklet stating Guatemala's case by Gustavo Orellana is available at www.minex.gob.gt.

What Belize, and Who "Owned" It?

The 1783 and 1786 treaties between Great Britain and Spain set the boundaries first from the Hondo to the Belize Rivers and then further south to the Sibun. Map 1 shows what Belize looked like according to those treaties. If a cartographer then had drawn a map showing the land that the British cutters actually possessed and worked, it would look very different. That is because the territory of Belize controlled by the British kept on growing during the 18th century and the beginning of the 19th, before and after those treaties. Similarly, maps showing the western areas of Belize actually worked by the British cutters over the 19th century would tell a very different story from a map depicting the boundary treaties with Guatemala and Mexico. The British cutters didn't just expand to the south, but to the west as well, sometimes in places beyond where the border now lies.

The map of Belize that we are all familiar with and that is universally used (even by Guatemala when it is claiming the territory as its 23rd department) is the one that represents the territory agreed by the 1859 and 1893 treaties with Guatemala and Mexico respectively. That, then, is the Belize we are talking about here.

The Maya lived and owned this land, as an undifferentiated part of a much larger entity covering parts of what are now Mexico, Honduras and Guatemala as well as Belize, before any European made a claim to it. The first Europeans to do so were the Spaniards, who assumed sovereignty over this land based on the immoral and racist theory that did not recognize indigenous people as human. It relied on the doctrine of "discovery" (and even today you can find school texts that talk about the "discovery" of America by Columbus) of supposedly empty land by European explorers. This concept proclaimed the view that lands inhabited by non-Christians were vacant or "unoccupied lands," and therefore open to a right of possession by Christians. In 1493 Roman Catholic Pope Alexander VI issued a "PAPAL BULL" or decree, "Inter Caetera," in which he authorised Spain and Portugal to colonize the Americas and its Native peoples as subjects. The decree asserts their rights to colonize,

convert, and enslave. This exclusive grant to those two countries, however, was contested by other European countries, and the Americas became a battleground for European powers rivalling each other to colonize different parts of it.

When the Spaniards invaded the area that now includes Belize, they faced very strong armed resistance from the Maya and, although they established small missionary settlements from Corozal to Cayo, they never settled the land, cultivated the earth or even extracted wood from its forests. That was left to the British, who from around the mid-17th century began to settle around the Belize River mouth to cut logwood and later expanded in all directions to find and cut mahogany. But the British did not at first claim the land as their own. For up to two centuries, they recognized Spain as the sovereign of the territory, and received by treaties from that country limited rights to cut wood from the Hondo River to the Sibun River. In the early 19th century, as Spain was being unceremoniously kicked out of all its colonies on the American main, the British inhabitants of Belize took advantage of the power vacuum and expanded even further, until by the second decade of the 19th century they had taken the Sarstoon and consolidated their hold on the land, both physically and legally.

But by then new actors had come into play, specifically the United Provinces of Central America (and later one of its constituent parts, Guatemala), which claimed that it had inherited the territory from Spain—by virtue of a legal principle called *uti possidetis*.[2]

Who Benefits from Uti Possidetis?

Chief Justice Hughes in the Guatemala/Honduras Boundary Dispute declared that the concept of *uti possidetis* at the time of the independence

[2] Unless otherwise stated, for statements of law I will rely on the presentation made by the government of Belize to the OAS during the Facilitation Process, in "Belize Refutes Guatemala's Claim," Oral presentations to the OAS, 20 and 21 May 2001, booklet published by the Government Printer, Belize; Response of Belize to Guatemala's statement, 30 April 2001.

of the former Spanish colonies only operated as between those States that were part of the Spanish colonial regime. The concept would not, therefore, have applied as against Britain, and would not have served to vest in Guatemala by mere succession a title capable of overriding Britain's possessory title. The ICJ categorically declared in the Libya v Chad case: "While there is no doubt that, at least in principle the doctrine of *uti possidetis juris* is applicable and applied among all the former Spanish colonies, one cannot say so regarding non-former Spanish territories."

But even if the doctrine applied to this case, what it affirms is that Guatemala succeeded at the moment of independence to the relevant parts of such Spanish territories as Spain may have retained title to at the moment of independence and over which it actually exercised authority. Even during the period of nominal Spanish authority, however, Spain would not have retained title to Belize in the face of adverse British possession outside the 1783 and 1786 treaty limits over the period from the late 19th century to 1821. So the doctrine of succession and of *uti possidetis* does nothing to help Guatemala. The reason why Guatemala could not inherit Belize from Spain was that by 1821 Spain had already lost sovereignty of that area through the *adverse possession* by Britain, known to Spain and not made the subject of protest or opposition by it, thus over-riding the boundaries set in the Treaties of 1783 and 1786. In short: Spain had no title to Belizean territory in 1821, so Guatemala could not have inherited it nor could Spain have granted it: you can't give what you don't have.

Before we leave the concept of *uti posidetis*, however, we must note that, while the doctrine was for many years the exclusive preserve of Latin American States, in more recent times it has acquired a universal application. In presenting the Belize case to the OAS, Eamon Courtenay said: "Distinguished Facilitators, the Republic of Guatemala is attempting to turn back the hands of the clock. It is seeking in 2001, to retroactively apply *uti possidetis juris* to a territory that was by 1817 no longer under Spanish sway. In the Burkina Faso v. Mali case, the ICJ ruled against this: "By becoming an independent state, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machine of State succession.

International law—and consequently the principle of *uti possidetis*—applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands." *Uti possidetis universalis* does not avail Guatemala in 2001. But it does avail us! It applies to the independent state of Belize "as it is, i.e. to the 'photograph' of the territorial situation then existing." *Uti possidetis* freezes our territorial title: Belize, an independent state as defined and delimited in the independence Constitution with all our land, sea and cayes. And we so submit".

What is Adverse Possession, Historical Consolidation and Acquisitive Prescription?

Adverse possession means that one country holds a piece of land against the wishes or presumed rights of another. The Legal Opinion, citing modern ICJ cases, explains that "sufficiently long adverse possession of a disputed territory by one State can override the claim or title of another State which may originally have possessed title but has not in fact exercised it". This relates, of course, to the earlier sovereignty of Spain, and certainly not to Guatemala, which never possessed title at all. Another ICJ case notes that "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title".

As to the concept of historical consolidation, at the OAS Belize declared: "We have here a classic example of a process of historical consolidation in which the fact of possession for virtually 200 years serves to establish and crystallise a title regardless of the circumstances in which possession came about. In the Eritrea/Yemen case the Tribunal spoke of the concept of "historic title" as being a "title that has been created, or consolidated by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by law as a title. Those titles too are historic in the sense that continuity and the lapse of a period of time is of the essence".

Possession, as we have seen, is important, but not any possession will do. The ICJ case of Botswana/Namibia (ICJ Judgment of 13 December 1999) set down four conditions for possession to be determining: possession was exercised *a titre de souverain* (as sovereign, here the British Crown); the possession was peaceful and uninterrupted; the possession was public; and the possession has endured for a sufficient length of time. All these conditions are met by the British possession of Belize, and the time (more than 200 years) exceeds the amount for any other case.

As to Acquisitive Prescription, here is an authoritative statement of the law on that:

> Prescription is a process of erosion and encroachment . . . But it is of the essence of the case that, in their inception, the acts concerned are illegal; any possession resulting from them is adverse and unlawful; and the whole process is contrary to the wishes of, and lacking in consent from, the real sovereign. The prescriptive title arises from the gradual change in the quality of these acts, or of their possession, produced by the combined effect of lapse of time or silence by the original sovereign. It is this last factor—tacit acquiescence amounting to a surrender of the title—that is the real and proximate cause of the change of sovereignty.[3]

Britain wrongfully and illegally, i.e. in contravention of the treaties with Spain, took all the territory between the Hondo and the Sarstoon, but precisely because of those illegal acts, the doctrine of Acquisitive Prescription confers sovereignty on Britain over that land, in accordance with the prevailing international law. British title to the territory of Belize, and Belize's title to it by virtue of State Succession, therefore, is unassailable under these principles of customary international law, which the ICJ enforces.

But Belize has an even stronger case based on an area of international law which is so beyond doubt that if the dispute were to go before the ICJ it would probably decide the matter on this alone: the law of treaties.

[3] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice.*

How Does the Law of Treaties Apply in this Case?

Here we will examine why and how the 1859 Treaty came into being, what have been the difficulties surrounding its implementation, what Guatemala's arguments are for saying it is void and what the ICJ would decide with regard to its validity.

In the middle of the 19th century, Britain was confident of its sovereignty over the territory, and was in no hurry to reach agreement with Guatemala over its boundaries. It was Guatemala that was very anxious to complete a boundary treaty with Britain. Why? The governments of the UPCA and later of Guatemala, although they believed they had inherited the Belize territory from Spain, did not challenge the British occupation, being busy fighting among themselves. They were also very worried about the US filibusters that were roaming the area, one of whom had succeeded in establishing a government in Nicaragua that was recognized by the USA! In the 1850s, this indeed became the chief preoccupation of the Guatemalan government, to the point that in 1848 it offered to place itself under the protection of Britain in the same way as the Miskito had done. And in 1856 it offered to cede the Belize territory to Britain in return for British protection against filibustering activity. This offer was still on the table when the 1859 Treaty began to be negotiated, but Britain refused to accept that any cession was involved, and merely wanted to reach agreement on what it considered long existing borders.

Britain took that position for two reasons: first, because it was convinced that it had an indisputable title to the territory, since the only sovereign it had originally recognized was Spain, and Spain was long out of the picture. The second reason had to do with the emerging Great Power in the hemisphere, the United States of America with its proclaimed Monroe Doctrine. Over the past couple decades there had been much hostility between Britain and the USA over Britain's activities in Central America, which the USA regarded as its backyard and over which it intended to keep control, not least because of the inter-oceanic canal it wanted to build in Nicaragua. Their differences were resolved in the Clayton-Bulwer

Treaty of 1850, whereby they both agreed they would never colonize or exercise any dominion over any part of Central America.

At the time of ratification, however, the parties agreed that this prohibition did not include "the British settlement in Honduras nor the small islands in the neighbourhood which may be known as its dependencies". But Britain, in 1852, declared Roatán, and five neighbouring islands of Honduras, a British "Colony of the Bay Islands," in blatant breach of the 1850 Treaty. It also kept interfering in Nicaragua, where the US had vital canal-related interests, and the two nations almost went to war, which was avoided by their concluding yet another treaty.

The Dallas-Clarendon Treaty of 1856 required Britain to give up its territorial and domineering pretentions in Nicaragua, Honduras and Costa Rica, but with regard to Belize it said that "Her Britannic Majesty's Settlement called Belize or British Honduras, on the shores of the Bay of Honduras, bounded on the north by the Mexican Province of Yucatán, and on the south by the River Sarstoon, was not and is not embraced in the [Clayton-Bulwer] Treaty".[4] The US was willing to agree that the borders of the British settlement extended to the Sarstoon because the rest of the treaty, requiring Britain's effective abandonment of Central America, was much more favourable to the USA and protected its vital interests.

That treaty, however, did not presume to fix the western border of Belize with Guatemala, but instead required Britain to ensure "that the limits of the said Belize, on the west, as they existed on the said 19th of April, 1850, shall, if possible, be settled and fixed between Her Britannic Majesty and the Republic of Guatemala, within two years from the exchange of the ratifications of this instrument; which

[4] This treaty was never ratified, due to differences that had nothing to do with the Belize clause and that included, for example, a clause prohibiting the introduction of slavery into the Bay Islands, a stipulation that was offensive to members of the US Senate: Williams, p. 228. Still, Britain decided to carry out the obligations it had assumed, and proceeded to negotiate treaties with the several Central American countries. And note that the judgment of the ICJ in the Qatar/Bahrain case (16 March 2001), para. 89, contains the following statement that exactly covers the situation: "The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature".

said boundaries and limits shall not at any time hereafter be extended". That latter point was indeed significant for Guatemala, which rightly feared that the British settlers, if given half a chance, would expand further west into Guatemalan territory—and the British government even hinted as much to them.

Faced with this imperial diktat, Guatemala was quite willing to agree to the border at the Sarstoon, but, as a matter of national pride, it asked Britain, as compensation, to at least promise to protect Guatemala from the rampages of filibusters, but Britain refused. Indeed, it gave very clear and categorical instructions to its negotiator, Charles Wyke: "[it is] absolutely necessary that the line of boundary to be established by the proposed Convention should be described therein not as involving any cession or new acquisition from the Republic of Guatemala . . . but, as it is in fact, simply the definition of a boundary long existing, but not hitherto ascertained".

Wyke, however, did not share the British government's view that the territory was indisputably British. He believed that Guatemala had rights over it, and that it would not give up such rights without some compensation or inducement. He therefore decided to create a new article that was not in the draft treaty given to him by the British government, one that would be seen by Guatemala as sufficiently beneficial to it for it to agree to the borders proposed. Wyke informed London about his plan and, although there was no time (no internet, phone or even telegram in those days) for a reply, he included that "inducement" clause in the Treaty as Article 7, the so-called "cart road commitment".

In Article 7, the Parties "mutually agree conjointly to use their best efforts" to take "adequate means for establishing the easiest communication (either by means of a cart-road, or employing the rivers, or both united, according to the opinion of the surveying engineers)," between Guatemala City and a place on the coast near Belize. The article states that the purpose of this is the improvement of commerce that would benefit both Parties. The article adds that "the limits of the two countries being now clearly defined, all further encroachments by either party

on the territory of the other will be effectually checked and prevented for the future".

After the treaty was signed, the Foreign Office stated that "Her Majesty's Government entirely approve of the Article admitted into the Convention by Mr Wyke, at the desire of the Guatemalan Government . . . and they would be glad to be made acquainted with the views of the Guatemalan Government as to the best means of giving effect to that Article".

But Article 7 was couched in extremely vague terms, and after the parties were unable to agree on how to build the road, they concluded a supplementary Convention on 5 August, 1863, whereby Britain undertook to ask Parliament for the sum of fifty thousand pounds. If Parliament agreed, it would pay this amount to Guatemala in five instalments, each depending on Britain being satisfied that Guatemala was proceeding with the road according to the approved plan. Guatemala agreed to accept the £50,000 pounds as a full discharge of Britain's obligations under Article 7. They committed to exchange ratifications within six months. In early 1864, Guatemala asked for one more year in which to ratify, but the British brusquely refused, and furthermore declared that the treaty "falls to the ground" because of Guatemala's non-compliance with the time stipulation. Guatemala in fact ratified the Convention almost two years later. Britain never ratified, but said that it had stood ready to do so, and that since Guatemala did not ratify in time, Britain's obligation under Article 7 had been discharged and that was an end of the matter.

Guatemala then claimed that the Treaty was a treaty of cession, disguised so as not to appear to violate the UK/US Treaty of 1850. In support of this contention, Guatemala will rely on what Wyke and other British officials wrote about Article 7. Apart from Wyke's position that we have noted, other British officials over the years have given substance to his remarks. In 1884, for example, the Law Officers of the Crown stated that prior to the 1859 Convention Guatemala claimed territory occupied by the British, that but for some inducement she would never have consented to Article 1 of that Convention, that Article 7 was, in fact, the fine paid to secure the consent, and that

there was "a moral obligation, if not something more, to take some steps to give effect" to Article 7. As we have detailed in earlier parts of this book, other similar concerns were repeated by British officials in succeeding years and into modern times. Without accepting that the treaty involved any cession, since Britain already had sovereignty over the territory, they admit that Article 7 represented an inducement for Guatemala to abandon a claim it believed, albeit falsely, to have over the territory.

Would the ICJ Regard the 1859 Treaty as One of Cession?

In the face of Guatemala's argument that the cession was disguised so as not to offend the US, the first obvious question the Court might ask is, why would Britain need to disguise from the US the fixing of the border at the Sarstoon, when the US had agreed to that already in 1856?

In any case, international law is clear about the interpretation of treaties. The cardinal rule is: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[5] The 1859 Treaty is very clear, in its title, preamble and in all its articles including article 7, that it is a boundary treaty and not a treaty of cession. In accordance with Article 31 of the Vienna Convention, therefore, what we have here is a straight-forward Boundary Agreement, no more.

But Guatemala would argue that one must go beyond that. Article 32 of the Convention states that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31". A look at that "preparatory work" would reveal that Britain's negotiator believed, quite contrary to his government's firm and well-founded position, that Guatemala owned at least part of the territory, and that it was ceding that to Britain. That mistaken belief of Wyke cannot bind his government, whose own positions prior to signing the Treaty were clear that they had no doubts about British sovereignty. And the subsequent

[5] Vienna Convention on the law of treaties, 1969, Art. 31.

admissions of responsibility for compliance with Article 7 by British officials relate to it being an inducement for them to sign the Treaty, which at that time Britain was eager to complete to comply with their undertakings to the USA. Besides, as we shall see, Guatemala's negotiator himself did not regard the treaty as one of cession. In any case, the court would find that Britain already had sovereignty over the land by adverse possession and historical consolidation, and would confirm the treaty as a boundary treaty and no more.

If we assume, for the sake of argument and against all odds, that the Court finds that it was a treaty of cession, what might the result be?

Well first of all, if there was cession, what was the supposed compensation? We have seen the record where Guatemala's official request for compensation was protection from filibusters. In addition, Guatemala feared that the British cutters in the Belize territory, whose appetite for more land seemed insatiable (they were already cutting in areas acknowledged to be Guatemalan), would grab more of Guatemala's land. In such a scenario, that part of Article 7 that says "all further encroachments by either party on the territory of the other will be effectually checked and prevented for the future," begins to look like the kind of compensation Guatemala really wanted. This is in fact confirmed by the very Guatemalan who negotiated and signed the treaty, Foreign Minister Pedro Aycinena.

Aycinena wrote a formal letter to Congress to seek support for the Treaty.[6] He explained that Guatemala had a very questionable claim confined to only "an area of 40-60 miles of uninhabited territory, which in all honesty did not warrant foregoing far more important and lofty objectives in our foreign policy". He then considered the likely consequences if he did not sign the boundary treaty, and the real reason why he did:

> Even conceding the possibility that the British Government would relinquish its acquired possession and domain, the population would remain independent from us, because we would not have

[6] The letter, in the original Spanish language, is reproduced in Wayne M. Clegern, "A Guatemalan Defence of the British Honduras Boundary of 1859," *Hispanic American Historical Review*, vol. XL, no. 4, 1960, pp.575-581.

> the capacity to govern and dominate them and because, since we are cut off from that population by uninhabited territories and by the sea, we lack the means to communicate with it. It follows that such a *de facto* independent population could shortly become independent *de jure*, and instead of acquiring the extension of land we sought, we could well find ourselves facing a hostile neighbour, unchecked by any law or rule whatever. We would exchange our coexistence with a large and powerful nation—hence accountable for its own actions unto the world as a whole—for a motley crew of irresponsible adventurers and pirates who would lord themselves over the Gulf of Honduras, i.e. the lifeline of our Republic.

He not only admits that Britain "acquired possession and domain," but argues that it would be best for Guatemala to recognize British sovereignty, in order to have secure borders with a powerful nation. He went further, and asserted that without doubt Britain had sovereignty over a large part of the territory: "Of course, we admitted that we could not argue against the sovereignty already being exercised with full Spanish acquiescence in 1821, when we became independent, and that, in the case at hand, the issue would be limited to territorial occupation occurring only after that date". He added that "Even if we were to prove the point . . . that the limits were extended as far as the Sarstoon River after Independence, it was no less true that since we had never taken possession of these territories nor recognised them nor maintained agents to represent us in them, this would make it impossible for us to determine which part was occupied during Spanish rule and which part was occupied thereafter. And this difficulty made it really impossible for us to achieve a positive result with our claim".

Aycinena then explains how the 1859 Treaty was arrived at and why he signed it: "On [the President's] orders we began negotiations and, *following our recognition of the current boundaries of the British Establishment as the basis for said negotiations*, we proposed—after acknowledging its legal existence—opening an accessible road to this Capital in order to encourage travel and trade with said Establishment by way of our Atlantic Coast. This proviso was accepted by the British representative and included in the treaty approved by the President". He added that

the President considered the road "immensely beneficial for our agriculture and trade". Above all, he felt the treaty was good for Guatemala because it provided secure borders recognized by a Great Power. No question of the road being any kind of "compensation," indeed no suggestion that Guatemala was ceding any land that it had sovereignty over was even made.

There is a strong legal consequence of Foreign Minister Aycinena's declarations. The *Nuclear Tests* (*New Zealand v. France*), Judgment contains this important statement:

> It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made . . .

Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

In citing this statement, the *Legal Opinion* notes that "Sr Aycinena wished to be understood by the members of the House of Representatives as truthfully conveying the Government's genuine understanding of the

circumstances. It appears to us that Britain, as an 'interested State' was entitled to 'take cognizance' of the statement and 'place confidence in it".[7]

Faced with all this evidence, the ICJ is extremely unlikely to declare that the Treaty was one of cession. The purpose of the treaty was not to build a road; it was to agree a border, and all its clauses (even Article 7 refers to "the limits of the two countries being now clearly defined") were designed to fulfil that objective, and the parties in fact proceeded to do so.

Still, the Court might consider Guatemala's contention that, whatever the nature of the treaty (boundary or cession), an article of the treaty, for whatever reason it was there, was not carried out, and that this gives it the right to declare the entire treaty void. International law does provide for one Party to void a treaty in whole or in part: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part". A material breach of a treaty, for the purposes of this article, consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".[8]

The first obstacle Guatemala would face would be to prove that Article 7 was "essential to the accomplishment of the object or purpose of the treaty". Given all the evidence, the object and purpose of the treaty is to recognize and demarcate the border between the two countries, something that Guatemala considered beneficial to it, in order to prevent any further expansion by the British settlers, which it genuinely feared. That was the essential purpose; the road was an addition, an afterthought, and in no way conceivable as essential to the execution of the treaty. On that ground alone the Court would be bound to decide that there was no material breach and that the treaty could not be abrogated.

But even if we imagine the impossible, again for the sake of argument, and assume that the Court would be willing to regard Article 7 as material, it would then look at how and when Guatemala claims to have abrogated the Treaty. It did *not* do so in 1884, as is sometimes

[7] Legal Opinion, paras. 88 and 89.

[8] Vienna Convention on the Law of Treaties, Article 60.

alleged. At that time Guatemala merely protested against "the *de facto* occupation" by Britain of Guatemalan land, but did not denounce the Treaty, merely stating that "either the treaty of 1859 is in force or it has lapsed," and that *if* the latter, then "matters shall return to their former status".

Even if it had revoked the treaty in 1884, which it didn't, the presumed revocation would be totally overturned, in accordance with Article 45 of the Vienna Convention on the Law of Treaties: "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [article 60] if, after becoming aware of the facts: (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be". And after 1884, on many occasions, Guatemala insisted that the Treaty was still in force and demanded compliance. The well-documented fact is that well into the 20th century Guatemala "expressly agreed that the treaty is valid or remains in force," and thus it "must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation".

In 1929 the two governments appointed Commissioners to demarcate the boundary, and they agreed to accept markers established at Gracias a Dios and Garbutt's Falls "as indicating the exact position of the two terminal points". The Parties exchanged notes in August 1931, including the report of the Commissioners, and the Guatemalan said: "The Government of Guatemala agree to accept the concrete monuments erected at Garbutt's Falls and the Rapids of Gracias a Dios . . . These monuments, thus determined, form part of the boundary line between British Honduras and the Republic of Guatemala".

An Exchange of Notes is as much a binding international treaty as if it had been described as a "treaty" or "convention"—as is shown by the fact that it was registered with the League of Nations as a treaty pursuant to Article 18 of the Covenant of the League of Nations. Guatemala has never questioned the authenticity or validity

of the 1931 Exchange of Notes. It must, therefore, be taken as irrefutable evidence of the existence between Guatemala and Belize of a frontier extending between the two points defined in the agreement. The legal existence of this boundary is no less real because it was not fully demarcated or opened up, only because Guatemala insisted that Article 7 should be complied with—in other words, it was still insisting that the 1859 treaty was in force.

What is the Effect of Guatemala's Constitutional Court Declaring the Treaty Void?

Such a declaration has no effect on reality at all. International law has always been clear on that point, and it was expressly incorporated in the Vienna Convention on the Law of Treaties: Article 27 states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". But let us, again for the sake of argument, humour Guatemala's contention that the treaty is void. What happens then, would Belize lose any land? Nothing of the sort, and here's why.

For obvious reasons to do with the avoidance of wars and other hostilities, international law has always been very sensitive about borders. A recent and clear depiction of that principle of the inviolability of established borders is to be found in the ICJ case of Libya v Chad, involving a treaty of 1955 which laid down an agreed boundary. The Judges declared:

"The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would violate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasised by the Court . . .

"A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary . . . when a boundary has been the subject of agreement, the continued

existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed".

That legal ruling would clearly apply to this case, where, unlike the treaty in the Libya/Chad case, which was no more than 40 years old, the 1859 treaty is like 160 years old, and its boundary provisions have been applied over the whole of that period, respected by both countries. The boundary has stood, it has been confirmed and demarcated, and the people of southern Belize living between the Sibun and the Sarstoon have known for all those years that they are living in Belize and not in Guatemala. If treaties mean anything, and if international law is to have any function in ensuring stability and certainty, then this border has long assumed the necessary permanence to be fixed and immutable as a matter of law. And its fate cannot, as a matter of reason or justice, depend on further labyrinthine historical disputes as to the fulfilment or non-fulfilment of the vague, and non-essential, requirements of Article 7.

It can be said with confidence that if the issue of title were to come before the International Court of Justice, that Court would dispose of the question simply by reference to the treaties of 1859 and 1931. The Court would not follow Guatemala into the complicated, controversial and now manifestly irrelevant and illusory historical web that it has chosen to weave.

Has There Been Enough Actual Display by Belize?

Long before the Spanish military men in Guatemala even began to think about taking control of Central America away from the Spanish King, the British settlers were demonstrating their possession and use of the land. For reasons of space we shall concentrate on only a few examples in the area between the Sibun and Sarstoon:

- By 1779 when the Spanish drove away the settlers, a few of them had already gone as far as Deep River—many miles south of the Sibun.

• In 1802 settlers had occupied not only the south side of the River Sibun but also other places "further to the southward, as Stand Creek, Deep River, etc."

• Also in 1802 the Honduras Merchants Committee reported that the southern advance of settlers had brought them nearly in sight of the Spanish fortifications of Omoa—a place so far to the south of the Sarstoon as to be in the territory of what is today Honduras.

• Marshall Bennet, one of the leading merchants, told the Foreign Office that by 1805 the settlers were at the "Gorda," the earlier name for the Sarstoon.

• In 1806 the settlers sought protection for the mahogany cutters in the southern rivers, namely, Deep River, Golden Stream and Rio Grande. At that time, further north, but still south of the Sibun, 38 settlers were said to be living at Mullins River. South of that river was Stann Creek, which was the usual watering place for ships of the British fleet. It was occupied by woodcutters who shipped considerable quantities of wood from there.

• In 1814 settlers were reported to be by the Moho River—only a little more than 15 nautical miles north of the Sarstoon. In 1825 Superintendent Codd officially wrote to London maintaining that the southern boundary was the Sarstoon.

• A map headed "Sketch of that part of Yucatan at present possessed by the British, 1826," shows the northern part of Belize shaded red to indicate the area covered by the 1783 Treaty, the central part coloured yellow to indicate the area covered by the Treaty of 1786 and the southern part coloured blue "held by force of arms since 1798, the last attack of the Spaniards". The southern part extends to the River Sarstoon.

• On 24 November 1827 Superintendent Codd, reported to Viscount Goderich that the British had established a Garrison at the Sarstoon.

• A very large map entitled "Mexican Yucatan" of 1834 includes the River Sarstoon, on which is inscribed "Sarstoon The Southern

British Boundary". Slightly further to the west is the inscription "Supposed position of "Gracias a Dios Falls—Their true position to be determined by British and Guatemalan Commissioners". Towards the top right-hand corner (NE) there is the inscription: "All Keys and Islets which are situated between the Hondo and the Sarstoon are in actual British occupation, and must be comprehended in the Treaties.

• In 1837, the Superintendent began to make crown grants of land outside the 1786 limits, two on the Sarstoon.[9]

There is more, a lot more,[10] but the picture is abundantly clear—Britain had undisputed and undisturbed possession of the area up to the Sarstoon as required by international law to ground its claim to sovereignty, before Guatemala even came into existence.

Didn't Guatemala Contest Britain's Occupation?

Quite the contrary. In addition to the positive evidence of Britain's authority in the territory, there have been numerous instances of specific Guatemalan acknowledgement of Britain's title to the whole of the country:

- In 1896 discussions took place between Guatemala and British Honduras regarding the possibility of constructing a railway line connecting the Guatemalan province of Petén with the Atlantic Coast in British Honduras. Guatemala made no reservations regarding Britain's title in British Honduras.
- In 1902 the Guatemalan commander stationed in a village near Garbutt's Falls sought permission to pass through British Honduras in order to proceed to Yolloché, a place in Mexico.
- Guatemala wrote to Britain on 13 December 1928 seeking the waiver by Britain of import taxes on mahogany being shipped

[9] Bolland and Shoman, p. 59 Sources for all other examples noted as well as many others are in Legal Opinion, paras. 97-122.

[10] See "Response of Belize to Guatemala's statement of 30 March 2001," 31 April 2001.

along a river in British Honduras and then to pass along the River Sarstoon to the sea. In that official note, the Sarstoon River was said to form "the boundary between the Republic of Guatemala and the British colony of Belize".

- In the 1931 Exchange of Notes, Guatemala acknowledges British title to Belize.
- The Heads of Agreement concluded between Britain, Belize and Guatemala in 1981 were developed on the basis that Guatemala acknowledged the full territorial extent of Belize, including the islands and seas.
- On 13 February, 1992, the Foreign Minister of Guatemala wrote to the Foreign Minister of Belize apologizing for an advertisement for tenders for oil exploration in an area including Belizean waters, off the coast of the southern part of the area between the Sibun and Sarstoon Rivers, explaining that it was done without the knowledge or approval of his ministry, that the area will not be appropriated for tender to any company whatsoever, and that future tenders will not repeat the error. That's pretty incontrovertible proof of Guatemala's recognition of Belizean sovereignty over the area between the Sibun and the Sarstoon Rivers.
- In August, 1992 Belize and Guatemala signed a "Joint Project to Renew and Extend The Road Network Linking Belize And Guatemala" . The agreement recognises that, for example, Pueblo Viejo is "in the Toledo District [of Belize]" and that Benque Viejo del Carmen is "in Belize," and it refers to Melchor de Mencos, in Guatemala, as being "at the border with Belize".
- On 16 April 1993, Belize and Guatemala issued a joint press release following a ministerial meeting arising out of the illegal felling by Guatemalans of mahogany trees within the territory of Belize. Guatemala accepted that the logs had been felled in Belize's territory. Such an acknowledgement cannot be reconciled with the present position of Guatemala.[11]

[11] For the several examples, see "Response of Belize to Guatemala's statement of 30

Again, there is more, much more, but for reasons of space I will again refer you to the presentation Belize made to the OAS in 2001.

Can Guatemala Claim Our Cayes and Maritime Areas?

Belize does not dispute that Spain did not grant the British any rights south of the Sibun, and nor does it dispute that it likewise did not grant any rights to most of the offshore islands. But Britain, and its successor Belize, claim sovereignty to both areas through the same principles: occupation, acquisitive prescription, historical consolidation and above all treaty. So, whatever is said, or not, about the cayes in these treaties with Spain is not relevant to Guatemala's claim.

Considering that the British settlers were overstepping the Spanish treaty limits on the land before the ink was dry on any of the relevant treaties, indeed before those treaties were even written, it would be naïve to assume, considering the limitations placed on agriculture, that they did not use the islands all along the coast for fishing, turtling and other pursuits. Also there are specific facts and maps that prove beyond doubt British occupation and use of the cayes. The taking of possession in contradiction to any right held by Spain over the islands and cayes of Belize was the first step in the process of acquisition of title by the British through adverse possession which by passage of time and exercise of authority and acts of occupation crystallized into a firm title. The argument of Guatemala, that both the permissive and the prohibitive language of the treaties of 1783 and 1786 excluded the islands specifically and by implication, is rendered ineffectual because any intent of these treaties was overtaken by the uncontroverted fact of British possession for a long period prior to 1850.

Here are just a few examples:

- In October 1821 the Magistrate's Meeting issued a notice to mariners "that a Light House is erected on Half Moon Key

March 2001," delivered to the OAS, at para. 50 (ii), (iii), (xi), (xii), (xiv), (xv), (xvii), (xviii).

and will exhibit a light from Dec. 1st, 1821," and the British Secretary of State gave specific approval of this in December.[12]

- The map of British Honduras annexed to the Memorial dated 1834 states: "All keys and islets which are situated between the 'Hondo' and the 'Sarstoon' are in actual British occupation and must be comprehended in her Treaties".[13]
- A Colonial Office memorandum of 1835: "With respect to the Islands and Keys, the British claim might be defined as embracing all the Islands and Keys within thirty miles of the coast between the mouth of the Hondo and the mouth of the Sarstoon, or in other words, the Islands and Keys comprehended between $15^{0}55'$ and $18^{0}30'$ N.Lat; between the Meridian of the Easternmost point of Light House Reef. This would include all the Islands of which there has been any occupation or any question of claim by Great Britain".[14]
- The Clayton-Bulwer Treaty of 1850 referred to "the British settlement in Honduras (commonly called British Honduras, as distinct from the State of Honduras), nor the small islands in the neighbourhood of that settlement, which may be known as its dependencies. To this settlement, and these islands, the Treaty we negotiated was not intended by either of us to apply".
- In 1851, there is a document evidencing the willingness of the Governor to grant a lease for a period of ten years over the cayes in Glover's reef, and in 1858, the Governor granted a lease of "Long Kaye".[15]

These instances are clear indicators not only of presence, but also of the exercise of sovereignty over the islands and cayes of Belize.

And here's the clincher: even the Guatemalan negotiators understood the territory which the treaty said "belongs to Her Britannic Majesty"

[12] Burdon's archives, vol 2, p. 241 and 244.
[13] "Response of Belize to Guatemala's statement of 30 March 2001," para. 41 (xiii).
[14] FO72/452, p.252, Legal Opinion, para. 184.
[15] "Response of Belize to Guatemala's statement of 30 March 2001," para. 93.

to include all the islands and cayes off the coast. Indeed, when the Guatemalans were trying to negotiate a boundary treaty with Britain in 1857, this is how Martín (the Guatemalan negotiator) described part of that territory: "to the east from the mouth of the Sarstoon River the entire coast *and the adjacent islands*".[16] So said Guatemala! Martín's British counterpart, Stevenson, described that part of the boundary as follows: "East, from the Hondo to the Sarstoon, on the shores of the Bay of Honduras, *including all the Cays and islets off the mainland within the same latitude*."

Both the British and Guatemalan negotiators specifically mentioned the cayes, but the final treaty didn't because, as Secretary of State Lord Malmesbury stated, "it has been deemed unnecessary to describe, in a treaty with Guatemala, the sea-frontier, or any more of the land frontier than that which relates to the territory of Guatemala".

In the discussions between Guatemala and Britain regarding the boundary, therefore, both sides produced drafts which acknowledged that the British possessions included all the cayes and islands off the mainland. There is certainly nothing in the preparatory work of the Convention to suggest that "territory" must be construed as excluding the islands and cays offshore the area of Belize defined in the Convention. This is indeed the normal, accepted manner of interpreting treaties regarding territory; the islands and cays belong to it as natural appurtenances by reason of their proximity to the coast and the absence of possession by any competing claimant. It is after all entirely logical. Land has always been taken to include territorial seas in international law, an area of (originally) three nautical miles, but how could this operate if islands immediately off the coast would not be part of the territory of the sovereign? Were it intended to be otherwise, a treaty would have to say so specifically.

The 1859 Treaty states that "It is agreed and declared between the High Contracting Parties that all the territory to the north and east of the line of boundary above described, belongs to Her Britannic Majesty; and that all the territory to the south and west of the same belongs to the Republic of Guatemala". All those cayes, from Ambergris

[16] Mendoza, p. 128.

to the last of the Sapodilla cayes, are north and east of the boundary, so obviously they belong to Belize. Should Guatemala try to argue otherwise to the ICJ, they will be laughed out of court.

Once the Court decides that all the territory described in the 1859 Treaty is under the sovereignty of Belize, the maritime areas will be allocated to Belize and Guatemala respectively in strict accordance with the law and with the practice of the ICJ and The International Tribunal for the Law of the Sea. No special preference will be shown to either country. As it is, there is no maritime boundary between the two countries, in the same way that there is no maritime boundary between Belize and Mexico. In both cases we will need to create that boundary—in the case of Mexico, hopefully by agreement, but in the case of Guatemala it will have to be by decision of the Court. Even if there were no claim to our territory by Guatemala, if we could not agree on a maritime boundary we would have to ask either the ICJ or The International Tribunal for the Law of the Sea to define that boundary, and they would do so under the same law and principles as the ICJ will if the peoples of both countries decide to submit the dispute to the ICJ under the Special Agreement. That is to say we cannot lose any maritime areas as a result of the ICJ defining the maritime boundaries between Belize and Guatemala.

Of course Belizeans are naturally worried about losing something, and there was much concern a while back when some talk show people stated categorically that the recent decision of the ICJ in the Territorial and Maritime Dispute between Nicaragua and Colombia[17] provided a dangerous precedent for Belize. Some people have argued that the Court's judgment was "Solomonic," expressing the fear that the ICJ will decide to give half, or a part, to Guatemala simply to appease that country.

In the first place, the ICJ does not operate like that. It applies the law, however the chips might fall. When we take a close look at that case, we see that the Court's decision was NOT Solomonic, but based on

[17] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p. 624

the principles of international law, especially the provisions of the UN Conference on the Law of the Sea (UNCLOS).

The first thing of note in the judgment is that the Court reaffirms that Nicaragua's claim to sovereignty over certain islands could not be considered, because the question of sovereignty over them had been determined by a 1928 treaty. In our case, the 1859 Treaty states what the agreed border is in no uncertain terms, and as we have seen above, this will include the islands and appurtenant seas, and this no doubt is what the Court will say to Guatemala.

The Court then said that it must decide the issue on the question of *effectivités*, or effective possession, and ruled that for many decades Colombia continuously and consistently acted as if it were sovereign in those areas, and that Nicaragua could prove no such acts of sovereignty.

In the case of Belize, there is no doubt that, not just for decades, but for almost two centuries, Britain and Belize can prove that, in respect to the continental area from the Hondo to the Sarstoon, and in respect to all our islands, we have acted as sovereign over those areas, and Guatemala has not, as we have seen extensively above.

Our case is even stronger, because apart from our exercise of effective occupation and control over our continental land and islands, the 1859 Treaty (unlike the 1928 Treaty in the Nicaragua/Colombia case) explicitly states that "all the territory to the north and east of the line of boundary above described belongs to her Britannic Majesty," and all our islands lie to the east of the line of boundary agreed.

In determining the division of maritime areas between Columbia and Nicaragua, the Court followed legal rules and precedents, and took into account the configuration of the coasts and islands in a scientific way, but always guided by a fundamental principle of UNCLOS in those matters, which is that of equity.

Article 59, which deals with the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone, states that

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Article 74, which deals with the delimitation of the exclusive economic zone between States with opposite or adjacent coasts, states that

> The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

And so, in delimiting the maritime boundary between Colombia and Nicaragua, the Court followed the three-stage methodology based on its case law:

(i) constructing a provisional median line for opposite coasts and equidistance line for adjacent coasts;

(ii) examining the relevant circumstances which may require an adjustment or shifting of the provisional line to produce an equitable result; and

(iii) conducting a disproportionality test, assessing whether the effect of the line is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts.

As the Court noted, quoting from its 2009 judgment in the *Romania v. Ukraine* case, the legal concept of "relevant area" must be taken into account, and clarified that

> The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other

> means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

This point about disproportionality is especially relevant to the Belize/Guatemala case, as a quick look at a map will reveal. In the Nicaragua/Colombia case, the lengths of the relevant coasts are 531 km (Nicaragua) and 65 km (Colombia), a ratio of about 1 to 8.2 in favour of Nicaragua. This is largely why Nicaragua got more waters than Columbia. In our own case, the coastal equivalents are much more favourable, almost four times better: Belize's coastal front is 155 nm and Guatemala's coastal front open to the Caribbean is 5 nm, giving a ratio of 31:1 in favour of Belize.[18]

But the real point we are making here is that the Court will not act outside of the law, written or case law, and in this case it just so happens that the law favours Belize.

Can Guatemala Show Any Exercise of Sovereignty Over Any Part of Belize?

The short, and only, answer is no, but let us examine some of their claims to that effect. Throughout the period in which Britain was acquiring and consolidating its possessory title in the area, there is no evidence of any conflicting presence of Guatemala or assertion of authority by it—evidence of which would be necessary if Guatemala were to be able to establish title. Knowing this, they have tried to allege such evidence, but none of it holds water, as for example:

- The grants of land made by UPCA in 1834 to the Eastern Coast of Central America Commercial and Agricultural Company and to Colonel Galindo were immediately rejected by Britain, the grantees never tried to apply them on the ground, they came to nothing, which is what they were, and Guatemala never again tried any such thing.

[18] Email communication from Lindsay Belisle, 16 January 2018.

- Apart from that, there has been no official action by Guatemala to even have a token presence as sovereign on any part of Belizean land—until the appearance of President Ydígoras Fuentes in Benque Viejo del Carmen in 1958 declaring that it was Guatemalan territory and he had come to take possession, but that was no more than an absurd gesture.
- A map, dated 1832, of the Departamento de Verapaz, by M. Rivera Maestre, engraved in Guatemala, marks the name "Verapaz" vertically from north to south within Guatemala and as hardly touching the southern part of British Honduras. It does not show any Guatemalan settlement anywhere in the eastern area between the rivers Hondo and Sarstoon (unnamed). The most easterly town in Verapaz is Cajabon. This is the map referred to in the award in the Guatemala/Honduras Boundary case, 1933, as being an officially published map.[19]
- Guatemala asserts that the territorial division of Guatemala into seven departments in 1839 included two districts, Izabal and Petén, and that "the latter comprised the coasts located between the Sibun and Sarstoon rivers". Although Guatemala refers to an enactment of the Assembly of the State of Guatemala of 12 September 1839, nowhere does it state that one of these districts "comprised the coasts located between the Sibun and Sarstoon rivers," as they have falsely asserted. What is more, the Table accompanying the law lists nine villages or settlements existing in the "Comandancia del Petén," and not one of them is within the established boundaries of Belize. Indeed, they are far from the border, indicating that even the areas within present-day Guatemala near to Belize's border were not inhabited by Guatemalans or administered by the Guatemalan authorities. Moreover, even had the enactment said what Guatemala falsely claims that it said, such a statement would, in the absence of any evidence of administrative conduct in the area, amount to mere assertion and no more, with absolutely no legal effect.[20]

[19] Response of Belize to Guatemala's statement, 30 April 2001, para. 70.
[20] Ibid., para. 58.

- There is an 1876 map of Guatemala, the significance of which derives from the fact that it is stated to be "Levantado y publicado por orden del Smo. Gobierno" ("made and published by order of the Government"). The map clearly shows the southern boundary line along the River Sarstoon and from the point of the meeting between that river and the River Gracias a Dios, the straight line drawn in a north-north-westerly direction. The region to the east of the boundary is called "Belize". There is no indication of any Guatemalan town or settlement anywhere in Belize. The area of the Republic is stated to be 38,800 square miles and manifestly does not include Belize.[21]
- There are many other maps that you can see references to in the Legal Opinion, along with the statement that "They may be treated as evidence of the general understanding of the position and, in some cases, also of official understanding. The absence from them of any indication of Guatemalan settlement or activity in the area confirms what is already evident, namely, that the area was never—and was never believed, even by Guatemala—to have been in its possession".[22]
- There have been a number of protests by Guatemala against British and Belizean sovereignty over the territory, especially since 1945, when the Guatemalan Constitution said that Belize is part of its territory, and until today. These by themselves have absolutely no effect in international law, a well-established rule reiterated by Justice Hughes, the President of the Arbitral Tribunal in the Guatemala/Honduras Case, 1933: "no State can acquire jurisdiction over territory in another by mere declarations on its own behalf". The mere repetition of protests and assertions by Guatemala, unaccompanied by any further action, has been ineffective in establishing any rights for Guatemala over any territory of Belize whatsoever.[23]

[21] Ibid., para. 71.
[22] Legal Opinion, para. 48.
[23] Ibid., paras. 157 and 158.

Self-Determination Trumps All

So far we have looked at the law strictly on the basis of the customary and treaty law relating to sovereignty, which would apply in a case between Guatemala and Britain, if for example Britain were still sovereign over this territory. But when we include the factor of Belize's independence through its exercise of the peoples' right to self-determination, the outcome of the case at the ICJ becomes even clearer.

In the six years we fought for our independence a the UN, we hardly bothered to explain the legal issues we have dealt with in this Chapter, but rather based our case squarely on the right to self-determination as set out in Resolution 1514 (1960), Declaration on the Granting of Independence to Colonial Countries and Peoples, and subsequent law and practice (see Chapter 3). When Belize presented its case at the OAS during the Facilitation Process, self-determination was an integral part of its submission, and Janine Coye-Felson emphasised that "It is a general principle of international law relating to the succession of Sates that a boundary having the status of an international frontier at the time of decolonisation shall be maintained. The ICJ reaffirmed this principle in the Burkino/Faso judgment".

As noted in Chapter 3, we successfully turned the tables on Guatemala at the UN, when it tried to argue that (its) territorial integrity trumped Belize's right to self-determination under paragraph 6 of Resolution 1514: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Guatemala tried to argue that this meant that its supposed right to territorial integrity of the Belize territory that it said belonged to it overruled Belizean peoples' right to self-determination, but it ended up not getting a single vote in its favour. That is because that paragraph was understood by States as an important prohibition on the dismemberment of non-self-governing territories by the administering power prior to independence. Indeed, in the pro-Belize resolutions (1975-1980) this recognition that territorial integrity forms part of the full exercise of the right of the peoples of colonial territories to self-determination was repeated 17 times as an inalienable right to territorial integrity.

In Belize's UN campaign it also relied on UN General Assembly Resolution 2625 of 1970, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States," which states that the territory of a colony "has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony . . . have exercised their right of self-determination". Because of that clause and the supporting laws and practices, the UK could not have forced Belize to give up any territory before independence, and now, after independence, the ICJ would not dream of dismembering Belizean territory and violating the consistent law and practice of the UN and the ICJ since the 1960s.

When the ICJ was considering its Advisory Opinion on the legal results of the construction of a wall in the occupied Palestinian territory in 2004, Belize made an oral statement at the hearings, and declared that

> The results of the construction of the wall forces us to note that the despoilment of land is contrary to the principle banning the acquisition of territories by force and to the Palestinians' right to self-determination whose permanent sovereignty over their natural resources and economic activities have been denied. Moreover, the wall leads to a *de facto* creeping annexation process and violates the territorial sovereignty of the occupied people.[24]

The Court found that the route taken by the wall caused the departure of Palestinian populations from certain areas and risked "further alterations to the demographic composition of the Occupied Palestinian Territory," and that the construction of the wall "severely impedes the exercise of the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right".[25]

[24] "Public sitting held on Tuesday 24 February 2004, at 10 a.m., at the Peace Palace, President Shi presiding, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," ICJ, CR 2004/3.

[25] Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p 136, para 122.

This relatively new (since the 1950s) right to territorial integrity as a part of the right to self-determination is so embedded in the law now that it alone made it possible for Belize to win its independence with all its territory, and it is certainly an element that the ICJ will take into consideration if it hears the case, further reinforcing the decision it would already have reached by other legal rules and principles that Belize is sovereign over all its territory as defined in its Constitution.

Does Guatemala Know It Has No Case?

Of course it does. Apart from what any of their own lawyers must have told their government, they have had expert advice by top international lawyers warning them that they would lose if they took the case to the ICJ—indeed even if it were to be decided *ex aequo et bono*!

The most distinguished jurist to have so advised Guatemala was Manley O Hudson. He wrote an Opinion[26] of 286 pages, his essential conclusion being "The writer cannot advise the Government of Guatemala to seek to bring the whole dispute to the Court for judgment. This view is based on the writer's fear that it is highly improbable that the Court would give a judgment in Guatemala's favour". Addressing the issue of its supposed inheritance from Spain, Hudson says that "Guatemala might have some difficulty in persuading the Court that the Convention of 1859 was, in effect, a treaty of cession. It would first be necessary to show that Guatemala, as successor to Spain, was vested with the Spanish rights in Belize subject to the British rights granted by Spain. In this period from 1821 to 1850 or 1859, there is little evidence available of actual *de facto* possession by Guatemala of the area within the boundary of the territory of Belize as fixed in 1859. In the absence of such evidence, a favorable decision by the Court on the issue of Guatemala's succession to Spain as territorial sovereign is by no means certain". He drives home the point: "As a matter of fact, the British position in Belize was greatly extended after the Spanish

[26] Hudson, Manley O., "Opinion on the Belize Dispute Submitted to the Government of the Republic of Guatemala," June 30, 1950, Judge Hudson Papers, Harvard Law School Library.

treaties of 1783 and 1786, and the encroachments were maintained from 1821 to 1850 or 1859 without effective opposition from Guatemala".

He considers Guatemala's contention that the treaty was a disguised treaty of cession, but after relating the words of the treaty, he tells Guatemala that "This language is so definite, and so cast in terms of the years preceding the signature of the Convention, that the Court would probably be reluctant to disregard it". Again, he drives the nail in the coffin: "Even if Guatemala should succeed in convincing the Court that the Convention of 1859 was a treaty of cession, it would be very difficult to show conclusively that the cession is not today effective . . . some seventy years elapsed between the British repudiation of Article 7 of the Convention of 1859 and the denunciation of the Convention by Guatemala, and on several occasions during these seventy years Guatemala seems to have acknowledged British sovereignty within the boundary as fixed in 1859. These facts would almost certainly be taken into account, and the Court might thus be disposed to say that the cession has not been nullified". In other words, even in the very unlikely event of the ICJ deciding that it was a treaty of cession, the court would say, fine, but the cession remains effective, and the territory, all of it described in the treaty, accordingly belongs to Belize.

Although we have covered the following points already, let us see what Judge Hudson told Guatemala almost 70 years ago about certain issues:

- "It cannot confidently be hoped that the Court would reach the conclusion that the failure of Article 7 operated to render the Convention of 1859 wholly void. Not only do the indefinite terms of Article 7 militate against that conclusion, but also *the respect which both parties gave to the Convention as an accomplished settlement of boundary problems during the greater part of the ninety years which have elapsed since 1859*. Note has to be taken, also, of the demarcation of the 1859 boundary made by commissioners appointed by the parties as late as 1928, and agreed to by the Governments' exchange of notes of 25 – 26 August 1931". Indeed, he added, "If the right of denunciation became exercisable upon the British repudiation of Article 7 in 1867,

Guatemala's denunciation in 1939 or later would seem to have been tardy for the purpose of putting an end to the situation created by the Convention of 1859".

- As to the permanence of the boundary, Judge Hudson advised them: "With respect to those provisions of the Convention which were fully executed, in the sense that they called for no continuing performance, the view might be taken that the situation created by these provisions was not disturbed by the denunciation. The Court might take the view that Article 1, regarded as a cession of territory, was fully executed upon the entry into force of the Convention, and the conclusion might then be drawn that a denunciation effected long after the entry into force of the Convention would not destroy the effect of Article 1. In the situation which now obtains, there would seem to be little reason for entertaining a hope that the Court would come to the conclusion that the failure of the provision in Article 7 and Guatemala's denunciation on the ground of that failure, obliterated the boundary fixed by Article 1 of the Convention of 1859".
- But, as we ourselves have seen, Britain did seem to act unfairly with regard to its obligations agreed in Article 7. This naturally led Judge Hudson to ask whether if the matter were presented to it the Court might declare Guatemala to be entitled to some compensation because of the United Kingdom's failure to implement Article 7 of the Convention of 1859. After relating the facts, Hudson concluded that "On these facts, a legal basis exists for a claim by Guatemala to compensation from the United Kingdom. If the case were brought before the Court at the Hague, it could be hoped that such a claim would be upheld by the Court on legal grounds. Yet if this single phase of the dispute were put before the Court by a special agreement (compromis) entered into by Guatemala and the United Kingdom, the result might be construed as a tacit abandonment by Guatemala of its claim to the territory of Belize".

It is no doubt for this latter reason that Guatemala has not tried to take the UK to court for its part in the failure to comply with Article 7. Maybe it can still do so after it has lost its case against Belize. And maybe that is what it was hinting at when it sent a note to the British FCO on 29 October 2017, informing of the convoking of the referendum to decide whether the case against Belize should be referred to the ICJ. That note includes this very odd sentence: "The legal claim by Guatemala about everything that occurred, and the consequences of all that occurred, before the independence of Belize, is not the subject of this claim". To me, this sounds as if they are reserving their case against the UK, which they can pursue after their claims on Belize are rejected, but that has nothing to do with us.

To put it in a nutshell: even if Belize once belonged to Guatemala, and even if by treaty they sold it to the UK for a road, and even if it was the UK's fault alone that they did not pay the compensation (none of which is true), the ICJ would still rule that Guatemala had no rights to the territory, that the UK had completed its sovereignty over it and that this full sovereignty, to all the land and insular territories and to any maritime areas pertaining to these territories, passed to Belize upon attaining independence.

What Can We Realistically Expect an ICJ Judgment to Be?

Looking at what the ICJ would be likely to decide based on international law, the land and islands and territorial seas allocated to Belize will remain the same. Guatemala would be given access to the high seas through the territorial seas of Belize and Honduras. And the Court may decide, in strict accordance with the UN Convention on the Law of the Sea, to grant Guatemala an EEZ, but certainly not an area as large as that in the Facilitators Proposals, partly because Honduras's generous offer would no longer be on the table.

In those Proposals, Belize, in the spirit of compromise, was giving up the right to claim a strip of land which now falls in Belize because the line from Garbutt's Falls goes to Aguas Turbias, which is not exactly due north as stated in the 1859 treaty. This was fully explained

to the Belizean people at the time, but they were deprived of the opportunity to decide whether to accept the Proposals because of Guatemala's refusal to abide by the solemn agreement to submit that question to referendum. If the Proposals had been accepted, Belize would have avoided all the problems it has had in the 15 years since with the Guatemalan government claiming there are no borders and that the Sarstoon River belongs to Guatemala.

Now, it's a different matter. If the peoples of both countries agree to submit the dispute to the ICJ, Belize will not make any concessions whatsoever. Guatemala will have to pay the price of violating its agreement to submit the Proposals to referendum and all the other acts of bad faith and aggression that have cost Belize dearly over the past 15 years. Belize will argue, with a good chance of success, that although the line from Garbutt's Falls to the Mexican frontier is not in accordance with the 1859 Treaty, that line has been accepted and recognized, in official maps and by actions, by both countries for so many years that it has acquired a life of its own, quite apart from the treaty. It must therefore be recognized as part of Belize's western border, and Guatemala will be estopped from saying otherwise.

Assuming, as we must, that the Court will act in accordance with the law and practice it has applied over seventy plus years, all the land territory that Belize now occupies, including the strip of land between Garbutt's Falls and Aguas Turbias, and all its islands and reefs, will be accorded to Belize, as well as all the territorial sea, contiguous zone, continental shelf and exclusive economic zone it is due under the United Nations Convention on the Law of the Sea. Considering the history of the ICJ and its predecessor, the Permanent Court of International Justice—a jurisprudence of almost a century—no other result is conceivable.

You have seen the evidence they will have to examine, and the law they have no choice but to apply. You have read the opinions of some of the most brilliant and experienced international lawyers and judges, one of whom was a very recent President of the ICJ, who have all expressed full confidence in the strength of Belize's case and the total invalidity of Guatemala's. You have even been privileged to see the

private Opinion given to the Guatemalan government itself by one of the most brilliant and celebrated jurists of all time, a former judge of the Permanent Court of International Justice, a member of the International Law Commission and a highly respected academic and practitioner, Manley O Hudson. And he told Guatemala the same thing, that it really has no case.

What is to Be Done?

First of all, is doing nothing an option? Doing nothing means living with the *status quo*, or the present situation. That means that the government of Guatemala will continue to maintain that there are no borders between Guatemala and Belize and that the area between the Sibun and Sarstoon is disputed territory, but that the Sarstoon River is not even in dispute, because it belongs in its entirety to Guatemala. Everybody knows the consequences of that present situation. On the Sarstoon, it means constant provocation and humiliation, with Guatemalan armed forces challenging Belizean civilians and military alike, a powder keg waiting to explode. Along the western border, it means daily and constant violations of Belize's sovereignty by illegal intruders from Guatemala and the despoiling of Belize's resources. There, the regular confrontations between BDF defenders and Guatemalan attackers now and then end in exchange of gunfire, sometimes with fatal consequences. The situation is extremely volatile, and no one can predict when it will be "the fire next time".

We didn't start the fire. First, the fight was between the Spanish and the Maya, then between the British and the Maya and Spanish, then between the Guatemalans and the British, then between the Belizeans and the British and the Guatemalans, and now who's left in the ring are Belize and Guatemala. And we are the ones called upon to end this fight.

We need to end it because if we don't we will continue to lose our resources and forever live under the threat of losing much more. Ending the claim will not stop the depredations, but Belize will be able to deal with them more effectively. Consider the impact of activities by invading Guatemalans just on the Chiquibul Forest (over 437,000 acres), which shares a 27-mile border with Guatemala. Illegal logging affects approximately

112,600 acres and extends up to 10.5 miles inside Belize. Gold panning occurs 6.5 miles inside the Chiquibul National Park, causing serious water pollution. Deforestation as a result of agricultural farming destroyed over 10,000 acres of forest between 1987 and 2016. Illegal hunting of game birds and mammals is on the increase. Cattle ranching, a major cause of deforestation, is a new growing threat: in March 2017 there were 14 confirmed pastures. Marijuana cultivation is becoming more evident in southern Chiquibul, and there is the constant threat of the invaders bearing firearms. In 2014, for example, during the construction of the Valentin observation post, over 30 men crossed the border to threaten the workers on site.[27]

Nobody denies that, on a daily basis, Belize is losing resources as a result of the claim, and that until it ends there will be greater losses. Only Guatemala profits from the continuance of the claim, and the longer it takes to solve the more they gain and the more Belize loses. There is an urgent need to end the claim, and doing nothing is not an option unless Belizeans don't care about the losses or about the dangers manifest in not ending the claim.

Indeed, doing nothing may have other, legal, consequences. If, for example, the Guatemalan military become more brazen in their insistence that they own the Sarstoon, merely protesting their actions may not be enough. Consider the words of Sir Gerald Fitzmaurice, Judge of the ICJ:

> In short, protests, in order to preserve (or rather to go on preserving) the rights of the protesting State, and prevent the acquisition of a prescriptive right by the acquiring State, must be effective. Put in another way, this means that diplomatic protests will not indefinitely preserve rights or prevent the process of prescription unless they constitute the sole lawful means in the circumstances by which the State concerned can act, and can endeavour to keep its position intact. *If, however, other means are available, e.g. a proposal for reference to international adjudication, or taking the matter before some competent*

[27] 2016 State of the Chiquibul Forest, FCD; Cattle Ranching in the CMM, FCD, July 2017.

> *international organisation, a mere continuance of diplomatic (i.e. paper) protests will not serve indefinitely to keep the position open*.[28]

The UN General Assembly resolutions of 1975 to 1980 did not define our borders under international law, nor did our admission to the United Nations, nor Guatemala's recognition of our independence, nor expressions of support for our territorial integrity by several international organizations. Some Belizeans do not want to accept this hard fact, but facts are stubborn, they won't just go away if we ignore them. A neighbour with much more military power than us claims our territory, and just proclaiming that the claim is unfounded won't make it go away. And we certainly do not have the resources nor the power to stop incursions from the citizens of a neighbour that insists there are no borders between us.

It may get worse. You have seen in these pages that in the 1970s when British forces were in Belize determined to defend the territory, they admitted that at certain times if the Guatemalan military had so decided they could have taken the Toledo district and the British, with all their power, would have found it impossible to stop them. Think of what happened just last April 2016, when the Guatemalan Minister of Defence ordered troops sent to the border on the pretence that the BDF had deliberately killed a Guatemalan minor. The aggressions of the Guatemalan military along the Sarstoon may have cooled off, but they still maintain, against clear historical evidence, that the entire River belongs to them. If the Guatemalan military were ever to decide to cross the Sarstoon in force, how far will they get before we could stop them? And then how would we displace them from wherever they have reached?

Putting aside for now these apocalyptic possibilities, consider also that until we settle our land borders with Guatemala we cannot agree our maritime borders either, since these depend on the land. Apart from the potential conflicts this may give rise to, the uncertainty will surely affect our ability to protect the resources of the sea in certain areas, resources we desperately need for our economic and social development. More generally, not settling the dispute will sour relations between two neighbours and block the opportunities we have for cooperating for our mutual economic

[28] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, pp. 158-159, cited in Legal Opinion, para. 158. Emphasis added.

development. The unresolved claim has bred uncertainty, and uncertainty creates fear. Our people, especially those on the front line, have suffered the consequences, and the claim has undoubtedly affected the investment climate and development opportunities.

We cannot just let the matter ride. We cannot surrender. We must continue to struggle.

Belize vs. Guatemala: not a fair fight, you might think, with one having 350,000 people and the other 17,000,000; one with an army of 1,000 and the other with 35,000; one with a defence budget of less than 20 million USD and the other over 200 million.

But Belize has faced off against bigger adversaries before and come out on top. In its struggle for independence, the British and the USA tried first to get Belizeans to agree to be dominated by Guatemala and then to give territory to Guatemala. They both leaned hard on Belize, but we did not give in. We persisted and gained independence with our territory intact.

So we can win, have no doubt. But we have to assemble the necessary resources that will enable us to win.

We learn from the past. One of the most important lessons is that a people divided can easily be defeated, and so we need to develop, support and cherish unity among our peoples. To accomplish unity, there must be dialogue, understanding, tolerance. We need to work together, across political parties, across class, across ethnicity, beyond all differences, and conciliate a common position that will ensure that this claim is resolved and forevermore cease to be a burden on us or on future generations. It is important to remember that as Belizeans we have more in common, including the persistent threat from Guatemala, than whatever seems to divide us.

What can be done to end the claim? All the means for pacific settlement of disputes under Article 33 of the UN Charter have been tried, and all have failed, and will continue to fail unless Belizeans are prepared to cede land, because Guatemalan governments have made it clear that constitutionally and legally they cannot agree to any settlement that does not involve cession of Belizean land to Guatemala. Under Article 35, Belize can bring the dispute to the attention of the Security Council or

the General Assembly. If it is brought to the General Assembly, the best that body can do, in accordance with Articles 11 and 12, is to "call the attention of the Security Council to situations which are likely to endanger international peace and security" (Article 11 (3)). Under Article 24, "Members confer on the Security Council primary responsibility for the maintenance of international peace and security," and it is the only organ of the UN capable of making binding decisions on these matters.

Under Article 37, "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council". The Security Council can recommend how to settle the dispute, and Article 36 (3) declares that "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court". Furthermore, Article 94 (2) declares that "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment".

The international architecture for the settlement of disputes in this case, therefore, suggests that the only serious option for achieving an enforceable settlement of the dispute is by recourse to the ICJ.

If all goes according to plan, Belizeans will decide, by casting their votes in a referendum, whether to submit Guatemala's territorial claim to the International Court of Justice. That decision will weigh heavily on the present and on future generations of Belizeans, and should not be taken lightly. It is the responsibility firstly of the government, but also of all Belizeans, of civil society, media houses, educators, students, workers, and all conscious people, to ensure that the facts are widely known, to promulgate expert opinion on the legal issues involved, and to encourage open and reasoned debate on the issue. Let conflicting opinions be allowed to air and compete for acceptance. Let the consequences of our actions be known.

Some learned and respected Belizeans have declared "We know exactly where our land boundary is and we don't need the ICJ to tell us that".

I absolutely agree with that statement, in the sense that, yes, we know where the boundaries are, and we don't need the ICJ to give us that factual information. The Guatemalan State, however, maintains there are no borders, and *it* definitely needs the ICJ to "tell it that," to declare the boundaries and compel Guatemala to respect them. Guatemala has signed a Special Agreement by which it agrees to accept the decision of the Court as final and binding, and undertakes to comply with and implement it in full and in good faith.

People are free to think and proclaim that we should not go to the ICJ because we might lose something, or because we are really being tricked or forced into going by someone or other, or simply because we know Belize is ours and we don't need anyone to tell us that. Assuming that the persistence of the claim is harmful to Belize, such people have a duty to say how, then, we can end the claim, and I for one, and I guess everyone else, is willing to listen and be convinced. We should not shy away from fighting for our rights. We really do need to take this claim seriously and be prepared to do everything necessary to end it, with no compromises, no concessions, no surrender. And we need to do it soon. My own conviction, backed up by the facts and the law that I have laid out in this book, is that if we go to the ICJ we cannot lose what we already have (sovereignty and effective jurisdiction over our land and islands), but that we will gain what we do not have: Guatemala's recognition of that sovereignty, and a rightful delimitation of our maritime areas with Guatemala. But we have to be prepared to fight for it, and if we fight we shall win.

Afterword

The referendum to decide whether to submit the dispute to the ICJ, as specified in the Special Agreement, was held in Guatemala on 15 April 2018. On the night of the election, social media went viral with the news that less than half of one percent of the people turned out to vote, but the following morning the Supreme Electoral Tribunal announced, as preliminary results, that almost 2 million people voted, or above 25% of the electorate, and that over 95% voted "Yes".[1]

Belize, in accordance with its respect for the fundamental principle of international law of non-interference in the internal affairs of States, will of course accept the official results. Indeed, on 16 April 2018 a Government of Belize Press Release stated that it "acknowledges the results as a step further toward permanently settling the age-old dispute. This act of civic expression in Guatemala was conducted smoothly and efficiently in a way that contributes further to the strengthening of democracy, peace and security in Guatemala as well as in the region". The release states further that, "In accordance with the Special Agreement, the Government of Belize is committed to conducting its own referendum for the electorate to decide whether we should submit Guatemala's claim to the ICJ for a final settlement. A date for this will be set after the national re-registration exercise has produced a new and robust electoral roll".[2]

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[1] *Tribunal Supremo Electoral de Guatemala* (Supreme Electoral Tribunal), *16 de abril del 2018*, http://resultados2018.tse.org.gt/consulta/panel/index.php

[2] Government of Belize Press Office press release of 16 April 2018

The British Ambassador to Guatemala, Carolyn Davidson, welcomed the result and congratulated the people of Guatemala for participating and demonstrating their commitment to democratic values, thereby confirming that the ICJ route is the best way to resolve any differences. She added that the British Government supports this process as the route agreed upon jointly by Guatemala and Belize, and encouraged "the government of Belize to hold their referendum soon to maintain the momentum towards a lasting and peaceful solution to this dispute. Legal certainty between the two countries will boost peace, investment and social development".[3]

The ball is now in Belize's court: shall we or shall we not go to the Court? Belizeans will have enough time to decide, since the re-registration exercise will not be complete for several months, and there will, no doubt, be robust discussion and many conflicting views expressed in an atmosphere of respect and civility. One thing is certain: Belizeans do not deserve to have this claim hanging over their heads, threatening their wellbeing and endangering their security any longer. They have the power to decide how best to end this claim. Power to the people.

[3] British Embassy, Guatemala City, press release, 16 April 2018, https://www.gov.uk/government/news/united-kingdom-welcomes-result-of-guatemalan-referendum