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## الجمعية العامة



مجلس حقوق الإنسان

الدورة الرابعة

البند ٢ من جدول الأعمال المؤقت

الحقوق المدنية والسياسية، بما في ذلك مسألتنا حالات  
الاختفاء والإعدام بإجراءات موجزة

تقرير المقرر الخاص المعني بحالات الإعدام خارج نطاق القضاء  
أو بإجراءات موجزة أو تعسفاً، السيد فيليب أليستون

إضافة\*

البعثة التي قام بها إلى غواتيمالا  
(٢١-٢٥ آب/أغسطس ٢٠٠٦)

\* يُعمم موجز تقرير هذه البعثة بجميع اللغات الرسمية. أما التقرير نفسه فيرد في مرفق هذا الموجز ويُعمم باللغة التي قُدم بها وبالإسبانية فقط.

## موجز

أهت غواتيمالا مواجهتها المسلحة عندما أقرت اتفاقات السلام في عام ١٩٩٦. وشكل ذلك نجاحاً كبيراً ولكن غواتيمالا لم تفلح في إتمام عملية الانتقال إلى مجتمع يكون فيه الحق في الحياة حقاً مضموناً.

فهناك الآن عدد من الظواهر العنيفة التي تصيب غواتيمالا، منها التطهير الاجتماعي، وسرعة ارتفاع حالات قتل النساء، والإعدام التعسفي، وقتل الأشخاص بسبب هويتهم الجنسية أو ميولهم الجنسية وقتل المدافعين عن حقوق الإنسان، واستخدام العنف في السجون. وفي بعض الحالات، تتحمل الدولة المسؤولية المباشرة. فهناك دلائل قوية على ارتكاب أفراد الشرطة لبعض أفعال التطهير الاجتماعي - حالات إعدام أعضاء العصابات، والمشتبه فيهم بارتكاب أفعال إجرامية، وغيرهم من "غير المرغوب فيهم". وقد سهّل حراس السجون أعمال القتل التي تمت على يد السجناء. وفي حالات أخرى، تتحمل الدولة المسؤولية غير المباشرة. فعجز نظام القضاء الجنائي عن تجاوز معدل إدانة أحادي الرقم في جرائم القتل يحمل الدولة مسؤولية بموجب قانون حقوق الإنسان عن مقتل الكثيرين على يد أفراد بصفتهم الشخصية.

وهناك ٥٠٠٠ حالة أو أكثر من حالات القتل سنوياً، ويجب أن تقع المسؤولية في هذا الأمر على عاتق الدولة. فغواتيمالا ليست دولة يمكن نعتها بالدولة الفاشلة ولا هي دولة فقيرة بوجه خاص. فإتساع نطاق حالات الإعدام خارج نطاق القضاء إنما يعزى إلى الافتقار الواضح للإرادة السياسية. بدليل أنه لم يتم سن تشريعات هامة. ولم تخصص الاعتمادات اللازمة في الميزانية.

وأمام غواتيمالا خياراً واحداً هو تحقيق الأهداف المنصوص عليها في اتفاقات السلام أو العودة إلى الأساليب الوحشية التي كانت تمارس في الماضي. فمن جهة، يُمكن لغواتيمالا أن تختار تطبيق نظام قضاء جنائي عملي قائم على حقوق الإنسان. ومن جهة أخرى، يمكن أن تلجأ إلى القضاء ذي الطابع العسكري، وإعدام المشتبه فيهم على يد أفراد الشرطة، وإفلات لجان الأمن الأهلية من العقاب.

وغواتيمالا واعية لمشكلاتها، وتفهم الحلول المتاحة أمامها، وقد التزمت في الماضي بجعلها حقيقة واقعة. ومع أن هذا التقرير يتضمن عدداً من التوصيات، إلا أن اهتمامه لا ينصب على التفاصيل، وإنما على ضرورة تحكم مجتمع وحكومة غواتيمالا في مستقبلهما.

## Annex

### REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON, ON HIS MISSION TO GUATEMALA (21-25 AUGUST 2006)

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## I. BACKGROUND

1. I visited Guatemala in August 2006 and met with government officials and members of civil society.<sup>1</sup> The problems and opportunities I saw are structured by two legacies. On the one hand, much of the violence plaguing Guatemala is structured by practices developed during past counter-insurgency efforts. On the other hand, the changes that are required are very much those committed to in the Peace Accords. The past is, thus, very important, and while the history is complex, its outline may be briefly summarized.

2. From 1962 to 1996, the country experienced an armed confrontation. During most of that period, the insurgents were weak and much of the Government's counter-insurgency effort was designed less to diminish its strength than to inhibit recruitment and deter further uprisings. The Government undertook a scorched-earth campaign against the civilian population of a number of Mayan indigenous regions, culminating in multiple acts of genocide between 1981 and 1983.<sup>2</sup> It is estimated that 81 per cent of the violations committed during the armed conflict took place in these three years.<sup>3</sup> By the mid-1980s the principal tactic of counter-insurgency had shifted to selective killing, in which individual civil society leaders were killed to impede social organization and deter political participation. The total death toll from the armed confrontation is estimated to have been over 200,000, with over 90 per cent of the killings committed by the Government.<sup>4</sup>

3. Attempts to negotiate a peaceful outcome to the armed confrontation began with the efforts of the Contadora Group (Mexico, Venezuela, Colombia and Panama) in the early 1980s.<sup>5</sup> Subsequently, the Esquipulas II Accord was signed by Central American presidents in 1987, pursuant to which the Comisión Nacional de Reconciliación (CNR) was established to engage in talks with the Unidad Revolucionaria Nacional Guatemalteca (URNG). The CNR comprised both governmental and civil society representatives, and conducted several broad-based yet quasi-officials rounds of discussion with the URNG from 1988-1993. The final, successful round of negotiations took place under United Nations-mediation directly between the Government and the URNG between 1994 and 1996, with the continuing involvement of civil society as well as Colombia, Mexico, Norway, Spain, the United States and Venezuela (Bolivarian Republic of).

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<sup>1</sup> Refer to appendix for details.

<sup>2</sup> Commission for Historical Classification (Comisión para el Esclarecimiento Histórico, CEH), *Guatemala: Memoria de Silencia* [CEH], Conclusions, paras. 108-123.

<sup>3</sup> CEH, Ch. II, vol. 2, para. 97.

<sup>4</sup> CEH, Conclusions, paras. 2, 15.

<sup>5</sup> For an overview of the peace process, see Jeremy Armon, et al. (eds.), *Negotiating Rights: The Guatemalan Peace Process* (1997), at <<http://www.c-r.org/our-work/accord/guatemala/contents.php>>.

4. This United Nations-mediated process led to a series of agreements dealing with human rights, the establishment of a truth commission, the rights of indigenous peoples, the agrarian situation, the role of the armed forces, the terms of a ceasefire, the constitutional and electoral regime, the integration of URNG forces, and mechanisms for verifying compliance with the agreements. The Peace Accords provided a comprehensive plan for transforming Guatemala from a country that relied on brutal counter-insurgency tactics to maintain order into a country that fully respected the civil, political, economic, social, and cultural rights of all of its citizens.

5. To assist Guatemala in realizing the potential of the Peace Accords, the United Nations Verification Mission in Guatemala (MINUGUA) was established in 1997. MINUGUA issued a series of reports based on thorough on-the-ground research that provided highly detailed information on compliance and made corresponding recommendations. MINUGUA's mandate expired in 2004. United Nations involvement continued when the High Commissioner for Human Rights established an office in Guatemala in 2005 at the invitation of the Government. Today, OHCHR and others in the international community continue to provide support for Guatemala's efforts to implement the Peace Accords and ensure respect for human rights. However, international involvement has decreased significantly since the Peace Accords were signed, and the possibilities for further progress rest squarely on the efforts of the Government and civil society of Guatemala. Today, despite the determined efforts by some, there are diminished expectations among the population and mounting calls for *mano dura* methods to deal with crime and disorder.

6. While the Peace Accords are one of the legacies shaping Guatemalan society today, the armed confrontation has left its own legacy as well. Some of the practices characterizing the later phases of the counter-insurgency have re-emerged as desperate and lawless methods for "fighting crime". The practice of "social cleansing", for instance, reprises the practice of "selective killing". The partial character of the Peace Accords' implementation has also had second-order negative consequences. For instance, while the State disbanded the PACs and withdrew the military from much of the countryside, it did little to establish institutions of civilian governance to take their place, leaving a power vacuum that has facilitated the development of "lynching" as a means of providing order.

7. There are now more killings per day than there were during the post-genocide of the armed confrontation. The killing of women, the execution of selected individuals by elements within the police and military, gang and crime-related killings, social cleansing, and other acts of violence have created a widespread sense of insecurity among the population. There are 5,000 or more killings per year, and the responsibility for this must rest with the State. And the death toll is only the beginning of the cost, for a society that lives in fear of killing is unable to get on with its life and business in the ways that it wants. The rich can protect themselves, up to a point, but the rest of the society lives with the fear that a random killing could affect them or their loved ones at any moment.

8. Guatemala faces a choice: realize the vision of the Peace Accords or employ the brutal tactics of the past and never fully escape the armed confrontation of the past. The alternatives of

establishing a working system of criminal justice based on human rights or of falling back on the methods of counter-insurgency - and the worst tendencies of *mano dura* thinking - are both fully available to Guatemala, and whatever should happen over the next few years will not be the result of unbending fate or inflexible constraints but of the deliberate and consequential choices of government officials, politicians, civil society leaders, and regular people. The policies being followed today reflect decisions that have been taken deliberately, however hastily. Insofar as illegal tactics are employed by the State, it is with broad acceptance among the political and social elite as well as significant segments of the general population. There no doubt are “rogue officers”, but they do not characterize the problem. The options for the future are well understood. The armed confrontation gave Guatemalans a long and painful education in the use of brutal and lawless tactics. The provisions of the Peace Accords, the recommendations made by MINUGUA, the United Nations Human Rights Committee, the Inter-American Commission of Human Rights, OHCHR and others have given Guatemalans a ready familiarity with what is needed to provide democratic policing. When a country facing problems knows its options and has the resources to take its pick, it has no escape from the burden of deciding its future.

## II. LEGAL FRAMEWORK

9. In Guatemala, most murders remain mysteries: The perpetrators are not identified, much less convicted (see chapter IV). This introduces conceptual difficulties, but the legal implications are limited. As a legal matter, the failure to establish individual responsibility under domestic criminal law does not absolve the State of responsibility under international human rights law. Under the International Covenant on Civil and Political Rights (ICCPR), the State has legal obligations to both “respect” and “ensure” the right to life.<sup>6</sup> Thus, while there is no human rights violation without State involvement, this involvement may be by act or omission.

10. On the one hand, human rights law is violated when agents of the State - such as police officers or soldiers - arbitrarily deprive individuals of their lives (A/61/311, paras. 33-45). In general, the State may kill only in the form of capital punishment pursuant to the final judgement of a court. This requirement of due process is not a mere formality but, instead, a crucial safeguard on the use of violence by the State designed to avoid mistakes and abuses where life and liberty are at stake. The only exceptions are narrowly drawn to permit, for example, police officers to shoot to kill when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary). To permit police officers, among other State agents, to disregard these safeguards and execute suspects is absolutely prohibited by human rights law and would be to place entirely too much faith in both the discernment and incorruptibility of individual police officers.

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<sup>6</sup> International Covenant on Civil and Political Rights, arts. 2 and 6. Guatemala acceded to the ICCPR on 5 May 1992 and had assumed similar obligations under the American Convention on Human Rights on 25 May 1978.

11. In contrast, ordinary murders by private persons will, in most situations, constitute simple crimes and not give rise to any State responsibility (E/CN.4/2005/7, paras. 65-76). The State is obligated, however, to exercise due diligence in preventing such crimes. Once a pattern becomes clear in which the response of the Government is clearly inadequate, its responsibility under international human rights law becomes applicable. To meet its legal obligations, the State must effectively investigate, prosecute, and punish perpetrators. When such efforts prove ineffective, the State must take whatever measures are necessary to make them effective, including new legislation, training programmes, equipment, or budget allocations. The State incurs responsibility under international law insofar as any branch of Government - executive, legislative, or judicial - fails to honour the obligations that it has assumed under international law.

12. The scope of the State's responsibility under international law is, thus, much broader than the scope of the criminal offence of "extrajudicial execution" under Guatemala's criminal law. That criminal offence encompasses killings by agents of the State as well as killings by private persons with the authorization or acquiescence of agents of the State, but does not include murders for which impunity is conferred by Government inaction.<sup>7</sup> The concept of "extrajudicial execution" under international law does include such murders accompanied by impunity and addresses the responsibility of the State rather than of individual perpetrators. Thus, regardless of the extent to which State agents may be involved, the evidence shows that the State has responsibility under international human rights law for the widespread killings of gang members; gay, lesbian, transgender, and transsexual persons; human rights defenders; women; and prison inmates (see chapter III).

13. However, while the question of whether particular killings were committed by State agents is not critical to determining the State's responsibility under international law, it is key to determining the measures required for the State to prevent future such killings.

### **III. ANALYSIS OF THE KINDS OF EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS OCCURRING IN GUATEMALA**

14. In this chapter, I compile and assess the quantitative and qualitative data on the kinds of extrajudicial executions confronting Guatemala with which I was provided in discussions with government officials and members of civil society as well as in interviews of victims.

#### **A. Social cleansing: executions of gang members and other "social undesirables" by government officials and private citizens**

15. Guatemala is experiencing a high and rising murder rate. In 2001, there were 3,230 homicides; in 2002, 3,631; in 2003, 4,236; in 2004, 4,507; in 2005, 5,308; and by mid-

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<sup>7</sup> Código Penal (Decreto 17-1973), as amended by Decreto número 48-1995, art. 132 bis. *See also* Humberto Henderson, "La ejecución extrajudicial o el homicidio en las legislaciones de América Latina", *Revista IIDH*, vol. 43, pp. 281-298 (2006).

August 2006, there had been 2,905.<sup>8</sup> In other words, the homicide rate increased an alarming 64 per cent over five years.<sup>9</sup> (By comparison, the population increased by 8 per cent.<sup>10</sup>) In this context, it is natural that few believe that the criminal justice system is functioning properly. One response has been the emergence - or re-emergence - of social cleansing as a desperate and lawless means of confronting gang violence. Today, a significant number of youth are summarily executed for their presumed participation in crime or membership in gangs.

16. The principal gangs active in Guatemala are Mara 18 and Mara Salvatrucha, which also operate in other Central American countries and parts of the United States. Estimates as to the overall membership of youth gangs vary widely, from 165,000 to 200,000 according to the Ministry of Interior to no more than 35,000 according to the non-governmental Coordinadora Juventud por Guatemala.<sup>11</sup> There are no reliable statistics on how many murders involve gang members as perpetrators or victims. One report I received draws on data from the National Civil Police (Policía Nacional Civil, PNC) and attributes 40 per cent of the violent deaths in Guatemala to “fights between gangs”. Civil society organizations express strong doubts, however, with regard to the attribution by the authorities of the majority of the killings to “fights between gangs” as discounting the contributions of organized crime and of the security forces themselves.<sup>12</sup>

17. Incidents of social cleansing are not effectively investigated, so official data provide no insight into their prevalence. However, a detailed study by the Procuradía de los Derechos

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<sup>8</sup> These data are based on PNC figures and were provided to the SR by the PDH.

<sup>9</sup> The homicide rate includes acts of social cleansing. Based on the PDH’s count of likely social cleansing victims over the years studied, roughly nine percentage points of this increase may be due to acts of social cleansing.

<sup>10</sup> United States Census Bureau, International Data Base, Table 001 for Guatemala, *available at* <http://www.census.gov/ipc/www/idbprint.html>

<sup>11</sup> *Informe al Señor Philip Alston* (Agosto 2006) [*Informe*], p. 38. (This report was drafted by Casa Alianza, Centro para la Acción Legal por los Derechos Humanos (CALDH), Centro Internacional para Investigaciones en Derechos Humanos (CIIDH), Coordinadora Nacional de Organizaciones Campesinas (CNOG), Grupo de Apoyo Mutuo (GAM), Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG), Movimiento Nacional por los Derechos Humanos (MNDH), Oficina de Derechos Humanos del Arzobispado de Guatemala (ODHAG), Organización de Apoyo a una Sexualidad Integral frente al SIDA (OASIS), and Plataforma Agraria.)

<sup>12</sup> The relationships between the gangs, organized crime, and deviant elements of the security forces are widely commented upon but difficult to disentangle. One interlocutor who had investigated this matter was of the opinion that there is some cooperation between the gangs and small-scale organized crime, with gang members being hired as informants, lookouts, or hit men. In contrast, he suggested, the large-scale organized crime of international drug traffickers cooperates closely with deviant elements in the police and military but views gangs as a nuisance or unwelcome competition.

Humanos (PDH) provides a rough picture.<sup>13</sup> The PDH systematically reviewed newspaper stories concerning violent deaths and tabulated the characteristics of each reported death. It found that in 2005, 63 murder victims had been dispatched with a final kill shot (*tiro de gracia*) and that the corpses of 305 murder victims showed signs of torture.<sup>14</sup> Between January and June 2006, the numbers were 151 (kill shots) and 435 (torture). In 2005, the bodies of 12 per cent of all murder victims - 648 of 5,338 - were found in a location other than where they died. Information about the victims does not provide sure information about the perpetrators. However, as the PDH noted, gangs typically kill quickly and flee quickly to avoid being captured or killed, suggesting that other, less vulnerable groups engaged in execution for purposes of intimidation are responsible for these murders.

18. Many of my interlocutors suggested that most instances of social cleansing are carried out or at least initiated by private individuals. A paradigmatic example often given is that of the shopkeeper being extorted by gang members and opting to contract with either private hit men or off-duty police officers to execute the gang members. One particularly disturbing expression of the problem of social cleansing by private individuals is that there is a Guatemalan website that permits users to anonymously denounce individuals as gang members and makes publicly available their names and street addresses.<sup>15</sup> Most such interlocutors also believed that police officers are involved in a more official capacity but tended to see this as a less common phenomenon. The inquiries that I made were not such as to be able to gauge the relative frequency of official versus non-official social cleansing; however, those that I met who shared first-hand knowledge of social cleansing located the responsibility with the police, and it is this kind of social cleansing that I will discuss in greater depth here.

19. Based on my interviews with victims and others, I must conclude that allegations that personnel working for the División de Investigación Criminal (DINC) of the PNC are engaged in social cleansing are highly credible. The pattern is that the police will recruit an informant by agreeing to overlook the informant's past or present criminal activities in exchange for cooperation and will then demand information regarding the identities and locations of gang members, suspected criminals, and other targets. Police will then drive to the location provided, typically without uniforms and in an unmarked vehicle, apprehend the person identified by the informant, and kill him or her at another location, sometimes following torture.<sup>16</sup>

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<sup>13</sup> PDH, *Las Características de las Muertes Violentas en el País* (Febrero 2006) provides data for 2004-2005; a PDH report prepared for the SR provides some updates for January to June 2006.

<sup>14</sup> Note that a *tiro de gracia* is also counted as a sign of torture.

<sup>15</sup> See [www.unidoscontralasmareas.com](http://www.unidoscontralasmareas.com) last viewed 30 October 2006. When I last viewed the site, there were details on 113 purported gang members. The exhortations to engage in social cleansing in the site's discussion forums illustrate the dangers inherent in this kind of anonymous, public denunciation.

<sup>16</sup> The conclusions I reached based on interviews align with those reached by the PDH based on the much larger number of complaints that it has received of forced disappearances and extrajudicial executions by the PNC. With respect to forced disappearances by the PNC, the PDH

20. One person I spoke with was a man in his early twenties who reported that he had been retained as an informant by DINC. As an informant, he was witness to a number of incidents of social cleansing. In one incident, a suspected car thief was arrested at his home during the night, without an arrest warrant, and his dead body was subsequently found with signs of torture. In other incidents, the people killed were said to be distributing marijuana. In another incident, he took part in a burglary carried out by DINC policemen in which they kidnapped the residents of the apartment, who were not seen again. When another informant told him that the police wished to harm him, he went into hiding; that informant was found dead with a bullet in his head after going to a meeting with those controlling him in DINC. The detailed accounts of this interlocutor were buttressed by those of a number of other individuals with whom I spoke. One individual had been tortured by the police for gang activity. Another had been taken away by police officers in an unmarked vehicle and threatened with death. Another well-connected individual confirmed the involvement of DINC in such activities.

21. The evidence shows that social cleansing is more than the actions of a few rogue officers. This does not mean that it has risen to the level of officially-sanctioned policy, but the frequency and regularity of social cleansing does indicate that it presents an issue of institutional responsibility.<sup>17</sup> Neither can the well-documented involvement of the police in social cleansing prior to the Peace Accords be overlooked. The practice of social cleansing today appears to represent the reintroduction of practices of selective killing and social cleansing that emerged in the later phases of the armed confrontation.<sup>18</sup> During the armed confrontation, intelligence services of the police and military were often involved both in gathering information on possible threats to the State and in eliminating them - without recourse to any judicial process. Today, not only is the modus operandi similar but some of the same intelligence institutions appear to be involved. In

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received 9 complaints in 2004 and 23 in the first half of 2005. With respect to extrajudicial executions by the PNC, the PDH received 21 complaints in 2004 and 28 in the first half of 2005. PDH, *Las Características de las Muertes Violentas en el País* (Febrero 2006). Based on these complaints, the PDH identified four elements characterizing the conduct of the PNC alleged by victims and their family members: “1. Las víctimas de desaparición fueron detenidas de forma arbitraria, previamente. 2. La última vez que se les vio fue cuando agentes de la PNC les capturaban. 3. Utilización de vehículos sin placas e incluso patrullas con la identificación de la dependencia policial a la que pertenecen. 4. Ausencia de resultados de las investigaciones que permitan identificar a los responsables de los hechos.” PDH, *Las Características de las Muertes Violentas en el País* (Febrero 2006).

<sup>17</sup> The study by the PDH shows a dramatic increase in murders that carry the indications of social cleansing in 2005 and 2006 as compared to 2004. This too provides some evidence that the practice reflects a shift in institutional practice rather than the capricious brutality of individual officers. However, the significant shift in the percentage of murders that went unreported in the press suggests the need for further research before drawing strong conclusions about trends. In 2004, 33 per cent of murders recorded by the PNC were covered by the media; in 2005, 66 per cent of murders recorded by the PNC were covered by the media. PDH, *Las Características de las Muertes Violentas en el País* (Febrero 2006).

<sup>18</sup> *Guatemala: Nunca Más* (REMHI), vol. 2, Ch. 3.

particular, the Cuerpo de Detectives of the Policía Nacional, a predecessor of the PNC's DINC, was named by Project for the Recovery of Historical Memory (Recuperación de la Memoria Histórica, REMHI) as having been involved in social cleansing operations during the armed confrontation.<sup>19</sup> While efforts to clean up the PNC have been made, resulting in the expulsion of over 100 policemen in 2005 and an even higher number in the first eight months of 2006, groups engaged in social cleansing evidently continue to operate.<sup>20</sup>

### **B. “Femicide”: the unexplained surge in murders of women**

22. The recent upward trend in murders of women is an issue that has provoked outrage in Guatemalan society. The number of women murdered has been increasing year by year, as has the proportion of murder victims who are women. In 2001, there were 303 homicides of women; in 2002, 317; in 2003, 383; in 2004, 531; in 2005, 665; and by mid-August 2006, there had been 359.<sup>21</sup> In other words, the female homicide rate increased by 117 per cent over five years. (By comparison, the female population increased by 8 per cent.<sup>22</sup>)

23. These murders of women are collectively referred to as “*femicidio*”, suggesting that they constitute a discrete phenomenon. However, the causes of this upward trend remain poorly understood. I asked numerous interlocutors what they understood the causes of this upsurge to be, and I received a very large number of hypotheses, including:

- As more women enter areas of life traditionally reserved for men, they are targeted to put them in their place;
- As more women enter areas of life traditionally reserved for men, they become more exposed to the kinds of murder men have traditionally suffered;
- In connection with organized crime, women are killed to put pressure on their husbands or boyfriends;
- Men feel increasingly free to rape and murder women given the climate of impunity;
- Police are increasingly engaged in the social cleansing of gang members and associates and, in doing so, do not grant women any special dispensation.

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<sup>19</sup> REMHI, vol. 2, Ch. 1.

<sup>20</sup> Ministerio de Gobernación, “Cuadros estadísticos de expedientes conocidos y elementos involucrados durante el año 2005 [y 2006]”.

<sup>21</sup> *Informe*, p. 38, based on data from the PNC.

<sup>22</sup> United States Census Bureau, International Data Base, Table 094 for Guatemala, *available at* [www.census.gov/ipc/www/idbprint.html](http://www.census.gov/ipc/www/idbprint.html).

24. It is likely that individual women have indeed been killed for each of these reasons. However, there is a risk that the term *femicidio* may obscure the diversity of crimes involved. This matters because, without an analysis that distinguishes between the various reasons that women are killed, it will be impossible to strategically confront the problem by reforming institutions or productively mobilizing outrage.

25. In Guatemala, the concept of *femicidio* is often explicated by comparison to the murders of women in Ciudad Juárez, Mexico. When my predecessor, Asma Jahangir, visited Mexico in 1999, she concluded that, “The events in Ciudad Juárez ... constitute[d] a typical case of gender-based crimes which thrive on impunity”, observing that it appeared that “many of the crimes were never investigated for the sole reason that the victims were ‘only’ young girls with no particular social status and who therefore were regarded as expendable” (E/CN.4/2000/3/Add.3, para. 89). It remains unclear, however, whether the murders of women in Guatemala fit the same profile.

26. The hypothesis that the rising number of female murder victims is due to the increasing use of social cleansing would point in another direction. The fact that a significant and rapidly growing number of female murder victims show signs of intimate violence is often cited as indicating that these are gender-based crimes. However, when these murders are placed in the broader context of murders involving torture and other abuse, the data lead to more equivocal conclusions. A PDH study based on media reports showed that, among those murder victims who experienced torture or abuse, the acts committed by the perpetrators were generally similar whether the victim was male or female. Of those bodies showing signs of torture or abuse, roughly 40 per cent of both male and female corpses showed signs of strangulation, about 15 per cent of female corpses were left naked and about 11 per cent of male corpses were. The one notable distinction was that while 15 per cent of the female corpses showed signs of sexual abuse, none of the male corpses did. The increase in female homicides involving abuse or torture shown in the PDH study would account for at least two fifths of the increase in total female homicides shown in police statistics. Finally, the PDH study found that, in 2005, 18 per cent of homicide victims whose bodies showed signs of torture or other physical abuse were women, while only 10 per cent of all homicide victims were women. The most obvious explanation of these data is that while women have been relatively immune from some forms of social violence, both men and women are being targeted by social cleansing. It is impossible to be sure of any explanation for this pattern of violence against women without effective investigations and prosecutions, but it appears likely that at least some of it is due to social cleansing rather than gender-specific reasons. Further research is needed, and strategies must be adopted to confront the full range of threats to women’s lives.

### **C. Lynching: private violence filling a power vacuum left by the State**

27. The lynching of suspected criminals by private individuals has been a persistent problem since the end of the armed conflict and its one that further illuminates a failure to fully transition from the era of armed confrontation. The most reliable data are those compiled by MINUGUA from 1996 to 2001. During those years, the annual number of lynchings ranged from 35 to 105, the number resulting in death ranged from 13 to 29, and the number of persons killed ranged from 23

to 54.<sup>23</sup> I have not found reliable statistics for 2002 to 2005, but, at the time of the visit, there had been 13 deaths from lynching in 2006. MINUGUA conducted an exceptionally thorough and well-reasoned study of lynching, and this continues to structure nearly all serious discussion of the phenomenon.

28. MINUGUA's study began with a general observation that the areas in which lynching is most widespread are areas that suffer disproportionate poverty, are predominantly indigenous, have a weak State presence, and experienced the most human rights violations during the armed confrontation. In seeking to explain this pattern, the study began by disproving several superficially plausible hypotheses. First, lynching is not the result of indigenous cultural traditions. Indeed, it found that lynching is a relatively recent phenomenon neither required nor permitted by the indigenous systems of justice. Second, lynching is not a simple continuation of the armed confrontation at a lower intensity. It found that lynchings are typically motivated neither by revenge for past violence nor by political or ideological agendas: 55 per cent are in response to crimes involving personal property. Third, lynchings are not opportunistic attacks on the vulnerable facilitated by the absence of State institutions: the vast majority of victims are men between the ages of 18 and 40.

29. The facts found by MINUGUA demonstrated that the pattern of lynching best supported an explanation grounded in Guatemala's incomplete transition from the period of armed confrontation. During the armed confrontation, the rural areas were heavily militarized, and roughly one million civilians were incorporated into *Patrullas de Autodefensa Civil* (PACs). The imposition of this counter-insurgency apparatus displaced indigenous systems of governance and justice, and its removal - without an adequate influx and integration of police, prosecutors, and courts - left a power vacuum. Two facts found by MINUGUA strongly suggest that this power vacuum has been filled in part by the (demobilized) PACs and that lynching has been one result. First, in many cases, the persons who instigate or perform lynchings are either former members of the PACs or former soldiers. Second, the manner in which lynchings are carried out is similar, and in more than superficial aspects, to the manner in which the PACs conducted counter-insurgency operations during the armed confrontation.

30. This analysis led MINUGUA to very clear policy prescriptions that remain valid today. First, lynching can be combated by revitalizing indigenous systems of justice. Second, lynching can be combated by extending the presence of State criminal justice institutions geographically and by better adapting their working methods to the needs of rural communities. Both measures would respond to the power vacuum left by the incomplete transition from the armed confrontation.

31. This rigorous, solution-oriented analysis by MINUGUA also leads to some broader reflections. First, the analyses of many of the phenomena of violence afflicting Guatemala appear disappointingly incomplete in comparison and, thus, far less capable of suggesting policy

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<sup>23</sup> MINUGUA, "Los Linchamientos: Un Flagelo que Persiste" (July 2002), p. 6.

responses. Second, despite the problem of lynching being well-understood and persuasive solutions having been precisely articulated in a well-documented report, the recommended reforms have not been adopted, and lynching remains a significant problem.

#### **D. Impunity for attacks targeting people for being gay, lesbian, transgender, or transsexual**

32. There has been impunity for murders motivated by hatred towards persons identifying as gay, lesbian, transgender, and transsexual. Credible information suggests that there were at least 35 such murders between 1996 and 2006.<sup>24</sup> Given the lack of official statistics and the likely reticence if not ignorance of victims' family members, there is reason to believe that the actual numbers are significantly higher.

33. In most cases, there is no credible information regarding the identity of the murderer. In the absence of effective investigations, it cannot be said with certainty that all of these killings have been motivated by the sexual identity of the victim, but the circumstances - e.g., the killers firing from a car in an area of Guatemala city known to be frequented by transgender sex workers - often suggest this to be the case. In those cases with witnesses, both government officials and private citizens have been implicated.

34. I spoke with one individual, Sulma, who was herself attacked and whose friend was killed. On 16 December 2005, around 11.30 p.m., Paulina and Sulma - both transgender persons - were approached in a central area of the capital by four persons riding motorbikes and wearing police uniforms. Without saying a word, the four persons opened fire on them. Paulina died of her injuries in the hospital three hours later. Sulma was severely injured but survived. She was granted police protection. However, the policemen guarding her at the hospital repeatedly told her that she should stop making statements on the incident to investigators and others, as she was putting her life at risk by doing so. Uncertain whether this was well meant advice or veiled death threats, she moved to a secret location. At the same time, she successfully applied for interim measures of protection from the Inter-American Commission of Human Rights. While there is a case file concerning the lethal attack on Paulina and Sulma opened at the Prosecutor's Office, the proceedings had not made any progress at the time of my visit to Guatemala. Even before my visit, on 10 February 2006, I had already sent a communication to the Government of Guatemala, seeking information on the investigations into this crime and the measures taken to protect Sulma. To date, I have not received a reply.

#### **E. Attacks on human rights defenders**

35. The situation of human rights defenders in Guatemala is indicative of the broader human rights problems in the country. Death threats, fears of imminent extrajudicial execution and assassinations of

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<sup>24</sup> Jorge López Sologastoa, *Guatemala: El Rostro de la Homofobia* (Organización de Apoyo a una Sexualidad Integral frente al SIDA, 2006).

human rights defenders are alarmingly common. From 2000 through mid-August 2006, at least 64 human rights defenders have been murdered.<sup>25</sup> Those defenders most frequently assassinated, such as trade unionists, peasant workers (*campesinos*), indigenous leaders or environmental activists, have been upholding economic, social or cultural rights. Defenders seeking truth and justice for human rights violations committed during the internal armed conflict have also been particularly targeted.

36. Few attacks against human rights defenders are investigated and even fewer result in convictions, and the killing of human rights defenders has increased in large part due to the failure to investigate and punish those responsible. A large number of killings are preceded by death threats or acts of intimidation which are not investigated. Effective investigation of these death threats could prevent a subsequent killing. More broadly, if coupled with effective prosecution for assassinations, it could rupture the culture of impunity and deter future killings. The establishment of CICIG would be a positive step, but it is neither designed to be nor can be a substitute for effective prosecutions by the Ministerio Público (see chapter IV).

#### **F. The State's responsibility for prison violence**

37. According to information provided by the Dirección General del Sistema Penitenciario (DGSP), there were 3 violent deaths of persons in its custody in 2001, 18 in 2002, 9 in 2003, 4 in 2004, 42 in 2005, and there had been 18 in 2006 as of July. The unusually high figure for 2005 is related to the riots that occurred at multiple prisons on 15 August 2005, in which 25 inmates were killed. Statistics were not provided on the identities of the perpetrators or on whether they were inmates or guards. There were also a number of killings in juvenile detention centres, which are subject to the Secretaría de Bienestar Social rather than the DGSP.

38. Many of the violent deaths in custody indicate either actions or omissions that could reasonably be expected to result in death. One such incident occurred shortly before my visit, and I discussed it with both government officials and members of civil society. The killings at the Etapa II juvenile detention centre on 22 June 2006 appear to have been part of a cycle of retaliation. On 6 September 2005, a hand grenade and several firearm shots were fired in the Etapa II youth detention centre in San José Pinula, resulting in the death of 1 detainee and injuries to 13 others. Reports indicate that the perpetrators were members of Mara 18 and attack was directed against members of Mara Salvatrucha. On 19 September 2006, men believed to be associated with Mara Salvatrucha and carrying firearms entered the Etapa II centre and killed 12 detained members of the Mara 18.

39. On 22 June 2006, it was again the turn of the Mara 18 detainees to kill detainees of the rival gang held at Etapa II. This time the attack was particularly brutal, involving not only the use of firearms but also stoning and severing of limbs. It resulted in three dead and six wounded. The attack and its preparation were partially recorded on the closed circuit cameras of the detention centre. The recording has been seized by the PDH, which has shown it at a press conference and published a report on the incident. The report found that some wardens contributed to arming the killers and enabling

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<sup>25</sup> *Informe*, p. 12.

them to enter the cells of the victims, while the prison authorities and the police failed to intervene to stop the killing. At 5.53 p.m. wardens hung blankets in front of the entry of the section where members of the Mara 18 are detained, obstructing the view for both the closed circuit cameras and the guard on the turret overlooking the wing. During the following 40 minutes until the violence started, nothing was done to remove them. During those 40 minutes, wardens brought several unidentifiable objects into the section holding members of the Mara 18. Ten minutes before the violence started, the guard on the turret had left for his dinner. No colleague replaced him. At 6.36 p.m. three members of the Mara 18 emerged from behind the blankets and entered the area of the Mara Salvatrucha. The report notes that it appears from the video that a warden had unlocked the doors to the Mara Salvatrucha section. During the following 40 minutes the gang members shot and attacked their victims with stones, severing limbs and crushing skulls. Forces of the PNC entered the detention facility when the violence started, but inexplicably withdrew after 2 minutes and returned only 41 minutes later. When investigators of the Ministerio Público recorded the crime scene, they did not inspect the dormitories in which the attack had obviously been prepared. They also left behind skull fragments, stones used as weapons and ammunition shells.

40. The motives of the guards who facilitated the killings are unclear. However, in the days before the incident, members of the Mara 18 detained at Etapa II spoke about a “party” (*fiesta*) they were soon going to have and threatened a warden who was refusing to do them a favour that he might be victimized at their “party”. The problem, however, goes beyond the corruption or intimidation of a few guards. Too much power has been ceded to the gangs in the detention system, and in some instances this appears to have amounted to an unlawful but de facto delegation of authority from government officials to gang leaders.

41. The human rights law on deaths in custody involves the situation-specific application of the due diligence standard. Many inmates who suffer violent deaths in custody do so at the hands of other inmates. This does not, however, absolve the State of legal responsibility under international law. As discussed above, the State’s obligation to respect and ensure the right to life requires exercising due diligence by taking measures to prevent murders. In most contexts, exercising due diligence primarily entails the investigation, prosecution, and punishment of murderers so as to deter future crimes. However, in the custodial context, this obligation has more far-reaching implications. The controlled character of the custodial environment permits the State to exercise unusually comprehensive control over the conduct of government officials - police officers, prison guards, soldiers, etc. - in order to prevent them from committing violations. The controlled character of the custodial environment also permits the State to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates’ freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings - the State must exercise “due diligence” in preventing abuse - the level of diligence that is due is considerably higher in the custodial context (A/61/311, para. 51). This obligation to exercise due diligence is breached both when prison officials permit inherently dangerous situations to develop and when they tacitly delegate their powers and responsibilities to gangs or individual inmates.

#### IV. HOW THE STATE HAS FOSTERED IMPUNITY FOR MURDER

42. Guatemala has a single-digit conviction rate for murder.<sup>26</sup> The implication is obvious and disturbing: Guatemala is a good place to commit a murder, because you will almost certainly get away with it.

43. To understand the causes of this low conviction rate, I spoke with officials of the principal organs of Guatemala's criminal justice system, including the Policía Nacional Civil (PNC), the Ministerio de Gobernación (which oversees the PNC), the Ministerio Público (which prosecutes criminal cases), and the Supreme Court of Justice. These institutions are responsible for the various phases of the criminal justice process, from crime detection and prevention, to investigation and prosecution, to the adjudication of individual criminal responsibility.

44. The PNC is responsible for crime detection and prevention, but with rising crime rates the public has little confidence in its efforts.<sup>27</sup> In our discussion, the Ministro de Gobernación argued that the principal failings of the PNC were due to a lack of resources. Guatemala has 19,000 police officers, 5,000 of which participate in specialized units - largely devoted to protecting government buildings, foreign embassies, and individuals - rather than in general crime prevention. Of the

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<sup>26</sup> Dividing the number of crimes recorded by the number of convictions achieved in a particular year does not provide an accurate calculation of the conviction rate, inasmuch as some convictions will be for earlier years, and some unresolved cases will result in convictions in later years. To accurately calculate the (current) conviction rate for a given year requires dividing the number of crimes recorded in that year by the number of convictions that have been achieved *for those crimes* today. This calculation cannot be performed in Guatemala, because the databases of the various institutions of justice are not integrated, making it impossible to trace individual cases as they move from a complaint to a final disposition. While this should be remedied, in the meantime a study tracing a random sample of murders through the system would be invaluable in clarifying both the extent of impunity and in more precisely identifying the bottlenecks in the system.

Some general insight may, nevertheless, be gleaned from the data that the Ministerio Público was able to provide. The Ministerio Público recorded 8,003 crimes against life (*delitos contra la vida*) in 2005. In that year, the Ministerio Público filed charges in 480 cases of crimes against life. In 97 cases involving 111 victims, the defendant was found guilty (*sentencia condenatoria*), and in 34 cases involving 34 victims the defendant was found not guilty (*sentencia absolutoria*). In an additional 55 cases involving 90 victims, a judgement was pending (*pendiente de dictarse sentencia*), and in 294 cases involving 349 victims, the charges remained in process (*acusaciones en trámite*).

Thus, convictions were reached for 1.4 per cent of the victims of crimes against life. If all pending judgements and outstanding charges should result in convictions, the conviction rate would still rise to only 6.9 per cent. It would seem quite unlikely that any reasonable measure of the conviction rate for crimes against life - or for that subset constituting homicides - would exceed a single digit.

<sup>27</sup> In a survey conducted in the municipality of Antigua in August 2006 of a representative sample of 410 residents, only 10 per cent believed the actions of the PNC against crime to be "adecuada" or "muy adecuada". *Informe de un Estudio Cuantitativo de Victimización en el Municipio de Antigua Guatemala*, designed and executed by Aragón & Asociados a solicitud de l'Asociación para la Prevención del Delito (APREDE).

remaining 14,000, approximately 7,000 are serving each day, and 3,500 during a given shift. A number of my interlocutors suggested that, for Guatemala to be in line with the policing levels achieved in El Salvador, it would require between 35,000 and 38,000 police - a doubling of the force. The Government has supplemented the number of police by instituting joint patrols between the PNC and the military. Several thousand soldiers are participating in these joint patrols, and a typical patrol will consist of 10 soldiers and 2 police officers. Notwithstanding the need to end the use of social cleansing by elements with the police, as discussed in chapter III (A), there is no question but that Guatemala needs a far larger police force, but enlargement would need to be accompanied by thoroughgoing reform of existing arrangements. It is, however, far from clear that the use of large patrols comprising primarily persons untrained in policing techniques is beneficial even as a short-term measure; moreover, this remilitarization of policing marks a significant step back from the aspirations expressed in the Peace Accords.

45. The challenges of investigation and prosecution confront three key obstacles: a problematic division of responsibility, severely limited resources, and endemic corruption.

46. Responsibility for investigating crimes is shared by the PNC and the Ministerio Público, and the latter then prosecutes suspected perpetrators. The majority of investigative personnel are employed by the PNC. However, by law the PNC investigators must comply with the direction of those from the Ministerio Público in investigating crime scenes. This arrangement requires close cooperation between the investigators of the PNC and of the Ministerio Público. Despite an inter-institutional accord on improving criminal investigations reached by the two bodies in 2004, by all accounts the level of coordination and cooperation is often unsatisfactory, making many investigations inefficient and often unproductive in terms of successfully pursuing prosecution. While disappointing, the failure of a system in which a single function is divided between institutions with inevitably competing interests is unsurprising and deeper reforms should be considered. One possible model, from which much might be learned, is the approach taken by Chile in establishing a system of investigative prosecutors.

47. Limited resources are another cause of inefficient investigations that often produce insufficient evidence for effective prosecution. I was informed that there are roughly 350 investigators working for the PNC and roughly 100 working for the Ministerio Público. The latter receives 250,000 complaints each year, and while not all require the attention of an investigator, the gap between resources and requirements is enormous. It is understandable that government officials believe that at least 700 additional investigators are needed.

48. Another problem caused by a lack of resources, along with inadequate training, is that investigations rely overwhelmingly on testimonial rather than physical evidence. The provision of better forensic resources is vital, because, not only is testimonial evidence generally of less probative value than physical evidence, but reliance on the former produces the expected incentives for the police to coerce confessions and for criminals to intimidate witnesses. Congress has passed a bill to establish a National Forensics Institute, there is no guarantee that that institute

will have adequate resources to make a difference. As one government official noted, Guatemala needs more laboratories, not more legislation.

49. That many investigations and prosecutions have been impeded by officials corrupted either by intimidation or financial inducement is widely acknowledged in and out of Government. In Guatemala, as in many countries, there are networks of personal connections, trust, and loyalty that lead government officials to do favours for their friends and associates in private life. There have also been indications, however, that some corruption is less personal and more organized, with “illegal groups” and “clandestine apparatuses” associated with organized crime and elements of the military infiltrating criminal justice institutions to ensure impunity for their actions, including murders of rivals as well as of those who seek to expose their crimes. In my discussions with the Minister of Defence, I was disturbed by the apparent evasion of responsibility for ensuring that military personnel were not involved in organized crime. I was informed first that the Ministerio Público could not take action without a referral from the Department of Military Justice, then that the Department of Military Justice took no proactive steps to identify criminal activity but would only initiate investigations upon receiving a complaint, and finally that the problem could not be too bad because the Ministerio Público was not investigating any cases against drug traffickers in the military. This circular reasoning does little to dispel the widespread belief that military personnel are involved with drug traffickers, organized crime, and clandestine groups. Whatever the precise contours of the problem, the fact of corruption is undisputed and must be addressed. It is both a cause and a consequence of impunity.

50. In December 2006, the Government reached an agreement with the United Nations to establish the International Commission against Impunity in Guatemala (Comisión Internacional Contra la Impunidad en Guatemala, CICIG). A similar agreement had been reached in 2004 whereby a similar body would act as an independent prosecutor for cases involving human rights violations, organized crime, drug trafficking, and corruption, but this agreement was rejected by the Congress and the Corte Constitucional as an affront to Guatemala’s sovereignty. CICIG is to have a less expansive mandate, acting not as an independent prosecutor but as a *querellante adhesivo* or, that is, as a “third-party prosecutor” intervening in a prosecution on behalf of the victim. Traditionally, such third-party prosecutors have played a key role in pushing cases through the system, and this arrangement has the potential to make a difference. The establishment of CICIG, while important, is not a panacea. To end widespread impunity will continue to require major reforms to the PNC and the Ministerio Público.

51. Another reform that must be introduced to overcome impunity in cases involving powerful perpetrators is the introduction of an effective witness protection programme for these kinds of cases. It is difficult for the PNC to gather evidence or for the Ministerio Público to sustain prosecutions when witnesses may be intimidated from providing testimony. There are currently multiple systems of witness protection in Guatemala. One is administered by the

Ministerio Público. While this system should be preserved and strengthened, its association with a body widely believed to be corrupted by clandestine groups makes it inherently unsuitable for protecting witnesses involved in some cases. Another system provides witness protection when orders for precautionary measures are received from the Inter-American Commission for Human Rights. These are received and processed by the presidential human rights body the Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH), which in turn arranges for officers from the PNC to watch over the witness. This system is also highly problematic when witnesses are involved in cases concerning clandestine groups or the police. One possibility for reform would be to establish a witness protection programme under the PDH. At a minimum, the current requirement that the PDH pass on complaints to the implicated Government agencies must be changed to avoid endangering complainants.

52. If Guatemala is to stop being a good place to commit murder, its criminal justice system institutions must be reformed so that more crimes are effectively investigated, more suspects are successfully apprehended, and more cases effectively prosecuted. This will require major budget increases, the implementation of long overdue reforms, a relentless campaign against corruption, and serious inter-institutional cooperation. More simply, it will require a society-wide focus on the bottom line: The State must meet its obligation to apprehend and convict criminals.

## **V. THE OPTIONS FOR MAINTAINING ORDER AND CONTROLLING CRIME**

53. As I noted at the beginning of this report, Guatemala faces a choice: Realize the vision of the Peace Accords or employ the brutal tactics of the *mano dura* and never fully escape the armed confrontation of the past. This chapter briefly outlines the character and implications of those options and seeks to clarify that the only obstacle to completing the transition from the brutality of an earlier era to a criminal justice system based on the rule of law is the distinct lack of political will.

54. One approach to crime control that meets considerable support is that of the *mano dura*, cracking down on undesirable elements with an iron fist. In its more respectable forms, *mano dura* policy prioritizes harsh punishment and heavily-militarized sweeps over prevention, prosecution, and rehabilitation. In its more extreme forms - what one interlocutor termed “*super mano dura*” - it prioritizes force over legal process. There is a sense that a swift and brutal response to crime is more likely to be effective than the inherently more lengthy process of investigation, arrest, prosecution, trial, and punishment. Indeed, given the failings of the criminal justice system, turning to on-the-spot executions of suspected criminals appears to some as the only available option.

55. However, not only does the summary execution of criminal suspects and other “undesirables” violate international law, but Guatemala’s own recent history demonstrates the

concrete danger of this approach to crime control. To the outside observer, the rhetoric of *mano dura* bears an uncanny resemblance to that of the “national security” doctrine that was implemented in many Latin American States in the 1970s and early 1980s and brought unqualified disaster. In concrete terms, moreover, the methods are difficult to distinguish from the tactics of counter-insurgency. The “selective killing” that swept Guatemala throughout the 1980s and early 1990s is notably similar to the “social cleansing” plaguing Guatemala today. Similarly, the lynchings taking place throughout the country today are strongly reminiscent of the counter-insurgency practices of the PACs during the armed confrontation. To the outside observer, it is difficult to understand why the continuing use of these practices is not a matter of universal concern. Unfortunately, however, it appears that even for many who suffered greatly during the armed confrontation, the methods of counter-insurgency remain the most obvious means of maintaining “order”. It would be prudent for all Guatemalans to carefully consider whether they want Guatemala to move fully beyond its legacy of armed confrontation or for it to, instead, remain in a permanent state of low-intensity lawless violence.

56. The other approach to crime control that Guatemala might choose is that pursued by other countries in the region to good effect and reflected in the Peace Accords and international human rights law: Guatemala can develop a working criminal justice system aimed at ensuring the rule of law. Almost all of the formal rhetoric of the political parties endorses this approach. The tragic reality, however, is that almost every component of the current system is radically under-funded, dysfunctional, or both. Congress bears an enormous responsibility for this state of affairs, but those in Government, civil society, and the private sector could also do far more.

57. Many in Government are genuinely committed to a system of criminal justice based on prevention, prosecution, and rehabilitation. Partly due to Congress’s failure to provide adequate resources and to enact necessary legislation, this commitment does not always bear fruit. In the domain in which government officials would appear to have the most potential to create change - the reform of institutional structures, policies, and working methods - their efforts often appear tangential to the root problems. There are many institutions, round tables, and commissions developing plans, policies, studies, and frameworks, but too often these remain just words. Many of the concrete steps taken, such as establishing specialized units to deal with particular high-profile problems, are too often small projects that do more to assuage criticism than create results. In Government and in civil society there is a worrying tendency to avoid confronting vested interests that would impede the reform of existing institutions by conjuring up new institutions that are not (yet) occupied by vested interests. Those who reject the counterproductive brutality of the *mano dura* and believe in the rule of law must think more strategically and build the coalitions necessary to make that vision a reality.

58. There is, however, little political will to end impunity and implement a working justice system capable of ensuring the rule of law. There is diffidence among the elite and in Congress regarding the commitments made in the Peace Accords related to security and the criminal justice

system. For the wealthy, effective policing and criminal justice is a low priority in part due to their reliance on private security guards. (There are roughly 100,000 private security guards in Guatemala, more than five times the number of police.) The lack of political will to establish a functioning criminal justice system in part reflects a sense that the State has very limited responsibilities to society, and that it is wholly appropriate for even security and justice to be private rather than public goods. There is a sense that the State has fulfilled its responsibilities so long as it protects the borders and refrains from killing innocent people. This understanding of State responsibility is incompatible with the content of that concept under international law (see chapter II).

59. The Congress has demonstrated little political will to establish a functioning criminal justice system, often allowing key legislation to linger for years. In addition, the inadequacy of the resources allocated to the institutions constituting the criminal justice is a justified complaint of nearly every interlocutor in and out of Government. This complaint is widely articulated by comparing the resources available in Guatemala to those available in other countries, especially El Salvador, a neighbouring country that also emerged from a devastating civil war in the recent past. As discussed above, Guatemala has, even after accounting for the difference in population, far fewer police officers, criminal investigators, prosecutors and judges than El Salvador. When government officials complain about a lack of resources, it serves in part as a convenient excuse: Yes, people get away with murder, but you cannot expect more when I have so few employees, such poor equipment, etc. As an excuse, it is indeed somewhat self-serving: one would imagine that Guatemala could do better than a single-digit conviction rate for murder without spending an additional dollar. Nevertheless, the resources provided to the PNC, the Ministerio Público, and the courts are woefully inadequate and place a harsh upper limit on how effective the criminal justice system will be.

60. It is important to emphasize that, while limited resources may provide some excuse for particular Government agencies, it provides no excuse at all for the State as a whole. Guatemala is not an exceptionally poor country, and it could readily afford a criminal justice system on par with that provided in other Central American countries. While Guatemala's per capita gross domestic product is significantly less than those of Belize, Costa Rica, and Panama, it is roughly equal to that of El Salvador, twice that of Honduras, and nearly three times that of Nicaragua.<sup>28</sup>

61. The reason the executive branch of the Guatemalan State has so little money to spend on the criminal justice system is that the legislative branch, the Congress, imposes exceptionally low taxes. Again, to put this in perspective, as a percentage of GDP, Guatemala's total tax revenue has

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<sup>28</sup> UNDP, *Human Development Report 2005*, table 14: GDP per capita expressed in US dollars: Costa Rica, 4,352; Panama, 4,319; Belize, 3,612; El Salvador, 2,277; Guatemala, 2,009; Honduras, 1,001; Nicaragua, 745.

hovered on the high side of 10 per cent of the gross domestic product (GDP),<sup>29</sup> and according to the latest estimates, tax revenue amounted to 9.6 per cent of GDP in 2005.<sup>30</sup> In regional comparison, its tax revenue is a lower percentage of GDP than that of Belize, Costa Rica, El Salvador, Honduras, or Nicaragua, and radically lower than that of the countries of South America.<sup>31</sup> Neither would higher taxation need to impose any greater burden on the poorer segments of the population given that Guatemala has higher income inequality than every other country in the region, including Costa Rica, El Salvador, Honduras, Nicaragua and Panama.<sup>32</sup>

62. It is precisely because Guatemala could so readily afford a far better criminal justice system that it is impossible to fully distinguish the issue of resources from the issue of political will. The lack of resources is due to a lack of political will: rather than funding a high-quality criminal justice system, Congress has decided to impose very low levels of taxation and, thus, to starve the criminal justice system and other parts of Government. Insofar as impunity is due to a lack of resources, it is also due to a lack of political will.

## VI. CONCLUSIONS AND RECOMMENDATIONS

63. **Guatemalans are not ignorant of the problems confronting their country and are aware of the policies that could be pursued to ameliorate those problems. First, Guatemala has the detailed plan for social transformation provided in the Peace Accords. Moreover, Guatemala has received copious recommendations from the international community on how to realize the commitment made in the Peace Accords and its obligations under international human rights law. In addition to the many reports by government commissions and national and international non-governmental organizations, there have been a multitude of reports from MINUGUA, OHCHR, the United Nations Human Rights Committee, and the special procedures of the former Commission on Human Rights, now the Human Rights Council. The question today is less what should be done than whether Guatemala has the will to do so. Thus, with the understanding that other reports have already provided sound and widely-understood recommendations regarding nearly every facet of the problem of extrajudicial**

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<sup>29</sup> IMF, *Guatemala: Statistical Annex*, Country Report No. 05/361 (October 2005), table 19 at <<http://www.imf.org/external/pubs/ft/scr/2005/cr05361.pdf>>

<sup>30</sup> Estimated tax revenue and gross domestic product figures are from the Banco de Guatemala, at <<http://www.banguat.gob.gt/inc/main.asp?id=646&aud=1&lang=1>>. The estimated GDP for 2006 was not available at the time of writing.

<sup>31</sup> Economic Commission for Latin America and the Caribbean (CEPAL), *Datos del Estudio Económico De América Latina y el Caribe*, at <<http://www.cepal.org/cgi-bin/getprod.asp?xml=/de/noticias/paginas/6/26726/P26726.xml>>

<sup>32</sup> UNDP, *Human Development Report 2005*, table 15 (no data for Belize). It is notable as well that the International Monetary Fund has reached the same conclusion. See the statement of Rodrigo de Rato, Managing Director of the IMF, made at the end of his visit to Guatemala in February 2006 at <<http://www.imf.org/external/np/sec/pr/2006/pr0640.htm>>

**executions facing Guatemala today, I will be sparing in my recommendations and succinct in my conclusions:**

- **Many kinds of violence afflicting Guatemala are poorly understood, impeding efforts to craft solutions and mobilize coalitions for change;**
- **Continuities between current violations and those from the period of armed confrontation are surprisingly widespread and should be the cause of great concern among both the national and international community;**
- **The resort to executions of suspects and other persons considered socially undesirable as a strategy for ensuring order and reducing crime should be absolutely and categorically rejected at every level of Government;**
- **While there is insufficient information to reliably determine how many killings are committed by State agents versus private individuals, both appear to be widespread. Any strategy to confront these killings must have two prongs:**
  - **Relentlessly root out the practice of social cleansing by government bodies;**
  - **Reform and expand the criminal justice system - especially the PNC and the Ministerio Público - to effectively investigate and prosecute murders;**
- **A lack of political will and of resources allocated to criminal justice has made effective crime control impossible. Guatemala must fully accept the scope of State responsibility under international law and take the necessary measures - including costly measures - to bring crime under control in a manner that is effective and just;**
  - **Congress should enact the legislation required to implement CICIG and the package of security-related legislation needed to realize the Peace Accords;**
  - **Congress should greatly increase the funds allocated to the institutions of the criminal justice system;**
- **A witness-protection programme adequate to address the needs and fears of witnesses, including victims, to human rights violations in which the State or other powerful actors are implicated. This might be established under the supervision of the PDH;**

- **The counterproductive division of responsibility for conducting investigations between the Ministerio Público and the PNC must be ended. Establishing a system of investigative prosecutors is one possibility that should be considered;**
- **Foreign donors are playing a complex, and in some ways problematic, role: rather than funding projects that the State cannot afford, they are funding projects that the State has simply opted not to be able to afford. Insofar as these projects benefit those with the least power over the legislative agenda, such foreign assistance is commendable. Moreover, foreign assistance makes up a relatively small proportion of the Government's budget, and its withdrawal would not necessarily stimulate more responsible fiscal policies. Nevertheless, the donor community should carefully consider whether its assistance is doing as much as possible to push the State to assume its own responsibilities.**

64. **At the end of the day, even the crisis in relation to extrajudicial executions can be attributed in good part to the Government's failure to behave in a fiscally responsible manner. The refusal of the elites to raise the overall level of income derived from taxation to a level at which an honest and effective police force and system of justice can be afforded, along with a system which respects core economic, social and cultural rights, has produced predictable and sometimes disastrous results. After all, even Governments get what they pay for.**

## **Appendix**

### **PROGRAMME OF VISIT**

Upon invitation of the Government of Guatemala, I visited Guatemala from 20 to 25 August 2006. I met with government officials, including the President; the Vice-President; the Minister of the Interior; the Minister of the National Defence; the Minister of the Ministerio Público; the Director of the National Civil Police; the Vice-Minister of Foreign Relations; the Director of the Penitentiary System; the Director of the Public Defence Institute; and the President of COPREDEH, the Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos. I met with a number of members of the National Congress, with a number of justices of the Supreme Court of Justice, and with the Human Rights Ombudsman. I also met with representatives of the diplomatic community in Guatemala and with numerous representatives of civil society. To all the persons met I express my gratitude for the assistance offered. I am particularly indebted for the invaluable assistance of the office in Guatemala of the Office of the United Nations High Commissioner for Human Rights.

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