

2001

Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases

Nathanael Heasley

Rodger Hurley

Kara E. Irwin

Andrew H. Kaufman

Nadine Moustafa

See next page for additional authors

Recommended Citation

Heasley, Nathanael, et al. "Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases." *American University International Law Review* 16, no. 5 (2001): 1115-1194.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact mchamp@wcl.american.edu.

Authors

Nathanael Heasley, Rodger Hurley, Kara E. Irwin, Andrew H. Kaufman, Nadine Moustafa, and Alain Personna

IMPUNITY IN GUATEMALA: THE STATE'S FAILURE TO PROVIDE JUSTICE IN THE MASSACRE CASES

NATHANAEL HEASLEY
RODGER HURLEY
KARA E. IRWIN
ANDREW H. KAUFMAN
NADINE MOUSTAFA
ALAIN PERSONNA*

* The project would not have been possible without the cooperation of the lawyers, judges, and human rights advocates who met with us in Guatemala. We would like to thank all those who took time from their important work to help us in our research. In particular, we would like to thank the survivors and families of victims who met with us and shared their personal tragedies.

Acción Ciudadana, a non-governmental organization ("NGO") in Guatemala City working to strengthen civil society, hosted the delegation in Guatemala. *Acción Ciudadana's* Executive Director Manfredo Marroquinn and office manager Yolanda Hernandez provided extensive assistance in setting up our meetings and making other arrangements. Members of other organizations provided lengthy briefing sessions that helped our delegation understand the current political situation, including Paul Seils and Frank LaRue of CALDH, Helen Mack, Alejandro Sánchez, and Carmen Aida Ibarra of the Myrna Mack Foundation, Victor Ferrigno of *Proyecto Pro-Leyes*, and Professor Sergio Fernando Morales of San Carlos University.

The Myrna Mack Foundation also provided two investigators who helped in translation and other research. Otto Navarro and Astrid Escobedo were very helpful and accommodating of our packed schedule. Peter Barwick helped in translation, and was an especially good guide for our trip to Rabinal.

The members of the delegation were Michael Sweeney, former Crowley Fellow, now with Debevoise & Plimpton; and Crowley Scholars Nathanael Heasley, Rodger Hurley, Kara Irwin, Andrew Kaufman, Nadine Moustafa, and Alain Personna. The mission was organized by the Crowley Scholars. The Crowley Scholars also wrote the report, with editorial assistance provided by Michael Sweeney and Fordham Law Professors Peggy Healy, Martin Flaherty, and Tracy Higgins. Margaret Popkin, Executive Director of the Due Process of Law Foundation, participated in part of the mission, reviewed the draft report, and suggested a number of revisions. This report was carried out under the auspices of the Crowley Program in International Human Rights of Fordham University School of Law. Responsi-

PREFACE	1118
INTRODUCTION	1120
I. GUATEMALA'S LEGAL OBLIGATION TO PROVIDE TIMELY JUSTICE IN THE MASSACRE CASES	1123
A. INTERNATIONAL LAW	1124
1. <i>International Treaties</i>	1124
2. <i>Customary International Law</i>	1127
B. DOMESTIC LAW	1129
C. PEACE ACCORDS	1130
D. THE FRIENDLY SETTLEMENT AGREEMENT	1132
II. RECENT REFORMS OF GUATEMALA'S JUSTICE SYSTEM	1133
III. OBSTACLES TO THE FULFILLMENT OF GUATEMALA'S LEGAL OBLIGATIONS	1135
A. INTRODUCTION	1135
B. THE OBSTACLES TO JUSTICE	1136
1. <i>Intimidation</i>	1136

bility for the factual findings and conclusions of the report, however, rests solely with the Crowley Scholars.

In preparation for the mission, the delegation held weekly briefing sessions that were also attended by Professor Healy. Professor Healy provided much-needed guidance at crucial stages of the project, and assisted in fund-raising and mission planning. Her support was invaluable.

Dean John Feerick of Fordham Law School provided enormous support, both financial and moral, to the mission effort. Without Dean Feerick's vision and enthusiasm for the Crowley Program and this mission, this report would not have been possible. Jim Tolan, President of the Crowley Board of Directors, was also critical to the success of this mission. The delegation is deeply thankful to the Dean, Mr. Tolan, and all donors (both named and anonymous ones) to the Crowley Program.

In addition, we are grateful for the hospitality of Stephen Kaufman and Marina Pinto Kaufman, who graciously offered us the use of their home for our many meetings and writing sessions. Marina Pinto Kaufman was also a great help in preparing the Spanish version of the Report.

Finally, two law firms provided important resources. Debevoise & Plimpton contributed Michael Sweeney's participation in this project. Shearman & Sterling partially funded the trip, provided translation services for the report, and funded distribution of the report. Saralyn Cohen and Jean Campbell of Shearman & Sterling both put in significant time to the project. We thank all the above for their help, without which the project would not have been possible.

Please direct any questions or comments regarding this article to: guatemala-project@yahoo.com.

a.	Threats Against the Judiciary.....	1137
b.	Threats Against the Ministerio Público	1140
c.	Threats Against Witnesses and Human Rights Groups	1143
d.	Recommendations	1145
2.	<i>Corruption</i>	1146
a.	Corruption in the Judiciary	1147
i.	<i>Bribery</i>	1147
ii.	<i>Political Corruption / Trafficking of Influence</i>	1149
b.	Corruption in the Ministerio Público	1150
c.	Corruption of Witnesses by the Military	1153
d.	Non-Prosecution of Corruption.....	1153
e.	Recommendations	1154
3.	<i>Incompetence</i>	1156
a.	Incompetence in the Ministerio Público	1156
b.	Incompetence in the Judiciary.....	1160
c.	Recommendations	1163
4.	<i>Financial and Technical Resources</i>	1164
a.	Lack of Financial and Technical Resources.....	1164
b.	Coordination of Institutions and Resources	1166
c.	Recommendations	1169
5.	<i>The Inappropriate Classification of Military Secrets</i>	1170
a.	Military Culpability in the Massacre Cases	1171
b.	Lawmaking and Military Secrets	1172
c.	The Role of Judges and Prosecutors	1174
d.	Recommendations	1175
6.	<i>Misuse and Failure to Utilize Procedural Mechanisms</i> .	1176
a.	Failure to Efficiently Process Amparo Challenges	1177
b.	Identification of Victims	1178
c.	Certification of Conviction.....	1180
d.	Plea bargaining	1181
e.	Recommendations	1183
IV.	SUMMARY OF RECOMMENDATIONS.....	1185
A.	RECOMMENDATIONS TO ADDRESS OBSTACLES TO JUSTICE	1185
1.	<i>Intimidation</i>	1185
2.	<i>Corruption</i>	1185
3.	<i>Incompetence</i>	1186
4.	<i>Resource Management and Coordination/Lack of Resources</i>	1187
5.	<i>Definition of Military Secrets and Declassification</i>	1187
6.	<i>Misuse and Failure to Utilize Procedural Mechanisms</i> .	1188

B. CONCLUSION.....	1188
V. PERSPECTIVES FOR THE FUTURE: RECENT DEVELOPMENTS THAT COULD AFFECT PROSECUTION OF THE MASSACRE CASES	1189

PREFACE

From March 8 to March 20, 2000, a seven-person delegation of lawyers and law students visited Guatemala to research the progress of high-profile massacre cases through the Guatemalan legal system. Throughout the report where mention is made to “the delegation,” it is in reference to this group. Members of the delegation traveled widely in Guatemala, meeting with government officials, prosecutors and other attorneys, human rights advocates, and members of the judiciary, the military, Congress, and exhumation teams. The information contained in this report is as of March 2000. While some updates have been added since then, the report may not reflect all recent developments.

Before traveling to Guatemala, the delegation did extensive research into the history of Guatemala, the structure of the Guatemalan government, the history of the internal armed conflict, the recent reforms in the justice system, the international obligations of Guatemala and other relevant topics. The team used sources from Guatemala and the international community. Of particular help were *Guatemala: Never Again!*, the report of the Recovery of Historical Memory Project (“REMHI”), by the Archdiocese of Guatemala, and *Guatemala: Memory of Silence*, the report of the Historical Clarification Commission (“CEH”), a U.N.-sponsored truth commission. While not universally accepted, especially by parts of the military and the business sector, the REMHI and CEH reports are widely acknowledged as authoritative sources of information on the atrocities committed during the internal armed conflict.

Although REMHI documented over 400 massacres, the delegation focused on four specific massacres: Rio Negro, Plan de Sánchez, Dos Erres, and Cuarto Pueblo. The delegation chose these cases because they were representative as to the actors involved, the scope of alleged atrocities, and the actions or lack thereof taken to resolve them following the end of the internal armed conflict. They also provide examples of cases in different stages of the judicial process, and of

problems that judicial actors encountered at each stage of the investigation and prosecution of the massacre cases. The report also draws, where appropriate, on other cases that highlight particular problems. Through analysis of these cases, and wide-ranging interviews in Guatemala, the delegation was able to identify a broad range of problems that exist in the judicial system. This report focuses on these problems and the ways they contribute to the substantial delays in prosecuting those responsible for the atrocities of the internal armed conflict, and offers recommendations for overcoming those obstacles.

While in Guatemala, the delegation conducted over fifty interviews in Guatemala City and in the towns of Salama, Rabinal, Cobán, Flores, and San Benito with local prosecutors, judges, human rights advocates, survivors and relatives of victims of the massacres, and witnesses to the massacres. The interviewees were chosen based on their knowledge of relevant aspects of massacre cases, or their knowledge of the justice system or the government as it relates to the prosecution of massacre cases. These interviews served as a major source for this report.

The delegation recognizes that there have been significant reforms in the Guatemalan justice system since the end of the internal armed conflict. It is the hope of the delegation that this report will be of use in addressing the problems that continue to exist despite these reforms.

The helicopter came and flew over Cuarto Pueblo. At first, the people were frightened and left, but then the helicopter flew off and the people came back to the market. They didn't realize that the soldiers were approaching and surrounding the people. They had them congregated there for about two days. And the soldiers put wires red, red hot from the fire into them, stuck into their mouths and all the way down into their stomachs. They kicked others, not caring if it was a little child or a woman, or if she was pregnant. They didn't spare anyone there. – Case 920, Cuarto Pueblo, Ixcán, Quiché, 1982.¹

1. RECOVERY OF HISTORICAL MEMORY PROJECT (“REMHI”), GUATEMALA: NEVER AGAIN!, THE OFFICIAL REPORT OF THE HUMAN RIGHTS OFFICE, ARCHDIOCESE OF GUATEMALA (“ODHA”) 137 (1999) [hereinafter REMHI REPORT].

INTRODUCTION

During Guatemala's thirty-six year internal armed conflict, the Guatemalan military reportedly committed the vast majority of the 422 documented massacres, including that of Cuarto Pueblo where the military allegedly slaughtered over three hundred people as part of a counterinsurgency operation in 1982.² Under international and domestic law, Guatemala has a duty to investigate and a duty to provide an effective remedy for victims of the massacres by prosecuting the perpetrators of the massacres and providing reparations to the victims.³ The State has failed to fulfill this duty to provide timely justice. In only one massacre out of these 422 documented massacres, the Rio Negro massacre, has anyone been tried and convicted. Those convicted, sixteen years after the events occurred, were low-level participants in the massacre and neither planned nor ordered the killings.⁴

This report examines the Guatemalan State's failure to fulfill its legal duty to investigate and provide an effective remedy for violations of the right to life in the massacre cases.⁵ Beyond documenting

2. *See id.* at 134, 137 (observing that a majority of the massacres occurred in 1981-1982). The conflict began in 1960 and ended in 1996 with the signing of the Peace Accords. The REHMI report identified 422 massacres that occurred during the conflict, and concluded that the Army or state-backed paramilitary forces committed 90.52 percent of those massacres while the guerrillas committed the remaining 9.48 percent. The REHMI Report, however, does not purport to be an exhaustive chronicle of the massacres and suggests that more massacres may have occurred. *See id.* at 134 (defining massacres as "collective murders associated with community destruction"); *see also* Interview with Paul Seils, International Legal Director, Centro Para Accion Legal y Derechos Humanos ("CALDH") [Center for Legal Action and Human Rights], in Guat. City, Guat. (Mar. 10, 2000) [hereinafter Seils Interview] (on file with author).

3. *See infra* Part II (discussing Guatemala's international and domestic legal obligations to regarding violations of the right to life).

4. *See* 1 U.S. DEP'T. OF STATE, 1999 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, GUATEMALA 772 (1999) [hereinafter DOS REPORT] (explaining that although those convicted were only low-level participants, human rights groups consider the convictions important legal precedent).

5. Although the perpetrators of the massacres violated a number of human rights, this report, like the investigative efforts in Guatemala, focuses on the violation of the right to life. Other violations of human rights that occurred during the massacres include rape, torture and mass displacement. *See generally*, REMHI REPORT, *supra* note 1. This report does not imply that providing a remedy for vio-

this failure, the report identifies six specific obstacles that prevent the State from meeting its international obligations. Those obstacles are as follows:

1. intimidation of witnesses and officials;
2. corruption of officials;
3. incompetence of officials;
4. inadequate resources and resource management;
5. the lack of a definition of military secrets; and
6. misuse and failure to utilize procedural mechanisms.

The report illustrates these obstacles by using examples from the four massacre cases of Plan de Sánchez, Rio Negro, Dos Erres, and Cuarto Pueblo, as well as several other cases in which State actors allegedly violated the right to life. Finally, the report offers suggestions for overcoming the obstacles.

The four massacres discussed in this report occurred between 1980 and 1983, the bloodiest period of the internal armed conflict, known in Guatemala as *la violencia*.⁶ During *la violencia*, the Guatemalan army, under the direction of successive military dictators, carried out a brutal counterinsurgency policy to fight against the perceived threat of guerrilla insurgents. The hallmark of the army's counterinsurgency program was a "scorched earth" policy, in which the army burned indigenous Mayan villages and massacred or forcibly moved their inhabitants.⁷

During the Guatemalan peace negotiations and following the end of the conflict in 1996, quasi-governmental organizations and NGOs began to investigate the acts of violence committed during the conflict. The investigations included exhumations of clandestine mass graves in small villages around the Guatemalan countryside by fo-

lations of the right to life alone would be sufficient to meet Guatemala's international obligations.

6. See REHMI REPORT, *supra* note 1, at 290 (asserting that they recorded 41, 187 human rights violations between 1980 and 1983 and that nearly eighty percent of the massacres committed during the internal armed conflict were committed during those years).

7. See *id.* at Part Two (discussing the types of violence employed against the civilian population, the impact of militarization, and the planning that made the massacres possible).

rensic anthropologists.⁸ These investigations have produced data substantiating allegations of widespread violations of the right to life. The data, compiled in large part by the two truth commissions, the United Nations-led Commission for Historical Clarification (“CEH”), and the Catholic church-sponsored Recovery of Historical Memory Project (“REMHI”), indicate that approximately 150,000 people were killed and approximately 50,000 people were “disappeared” over the course of the conflict.⁹

REMHI compiled information on a total of 422 massacres in which approximately 14,000 victims were murdered.¹⁰ The REMHI Report also concluded that the army or state-backed paramilitary forces committed 90.52 percent of those massacres while the guerrillas committed the remaining 9.48 percent.¹¹ The victims of the massacres were mostly civilians.¹²

Under both international and domestic law, Guatemala is bound to investigate these violations of the right to life and provide an effective remedy by bringing the perpetrators to justice.¹³ The State has yet to initiate prosecutions in the vast majority of these massacre cases.

8. See, e.g., GRAHAME RUSSELL, *UNEARTHING THE TRUTH: EXHUMING A DECADE OF TERROR IN GUATEMALA*, (EPICA/CHRLA, May 1996).

9. See *Guatemala: Memory of Silence*, Report of the Commission on Historical Clarification, at <http://hrdata.aaas.org/ceh/report/english/concl.html> (last visited Apr. 3, 2001) [hereinafter *Guatemala: Memory of Silence*]; REMHI REPORT, *supra* note 1, at 294 (defining a forced disappearance as “the detention of a person whose fate is unknown because the detainee either becomes entrapped in a clandestine detention network or is executed and the body concealed”). See *id.* (citing the Truth Commission for El Salvador).

10. See REMHI REPORT, *supra* note 1, at 134 (explaining that the number of victims includes the dead and the disappeared).

11. See *id.* (noting that the total number of massacre victims may be as high as 18,000). The Guatemalan Army has admitted destroying 440 villages. See Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW. J.L. & TRADE AM. 365, 384 (1998) (citing RICHARD FENSKE, *THE SISTER PARISH MOVEMENT: EN LA BUENA LUCHA, IN THE GOOD STRUGGLE* 40 (1996)).

12. See REMHI REPORT, *supra* note 1, at 133.

13. See *infra* Part II (discussing Guatemala's legal obligation to provide justice, as provided in international law, domestic law, peace accords, and the friendly settlement agreement entered into with the Inter-American Commission on Human Rights).

For many years, particularly during the conflict, the State's criminal justice system was incapable of delivering justice because of a variety of institutional problems.¹⁴ During the last decade, however, the Peace Accords, completed in 1996, along with a number of institutional and legislative reforms, have strengthened Guatemala's judicial system.¹⁵ Although the Guatemalan judicial system has made great strides, at least on paper,¹⁶ the human rights violators responsible for the massacres continue to enjoy impunity for their actions.

Part I of this report discusses Guatemala's international and domestic legal obligations to investigate violations of the right to life. Part II briefly describes recent reforms of Guatemala's legal system. Part III identifies six specific obstacles that prevent the State from providing timely justice. The Report analyzes each obstacle by using examples from the Plan de Sánchez, Rio Negro, Dos Erres, and Cuarto Pueblo massacre cases as well as other high-profile cases. Part IV summarizes the delegation's recommendations to the State for overcoming the obstacles and complying with its obligations to provide justice in the massacre cases. Part V looks at recent developments in Guatemala and their implications for resolution of the massacre cases.

I. GUATEMALA'S LEGAL OBLIGATION TO PROVIDE TIMELY JUSTICE IN THE MASSACRE CASES

Guatemala is legally obligated to investigate the massacres,¹⁷

14. See Interview with Lic. Helen Mack, Director, Fundación Myrna Mack, Member of the Commission on Strengthening the Judiciary, in Guat. City, Guat. (Mar. 16, 2000) [hereinafter Mack Interview]; Interview with Dr. Eduardo Daniel Barreda Valenzuela, Justice, Supreme Court of Justice, Civil Section, in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Justice Barreda Interview].

15. See Mack Interview, *supra* note 14; see also Hendrix, *supra* note 11, at 410-19 (examining the Guatemalan government's overhaul of its Criminal Procedure Code).

16. See Interview with Frank LaRue, Director, CALDH, in Guat. City, Guat. (Mar. 11, 2000) [hereinafter LaRue Interview] (on file with author).

17. See American Convention on Human Rights, art. 1(1), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (Guatemala acceded May 25, 1978) [hereinafter American Convention], as interpreted by Velasquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C), No. 4, paras. 174-77 (1988),

prosecute the perpetrators,¹⁸ and make reparations to the victims' families¹⁹ in accordance with multiple legal mechanisms. Guatemala's legal obligation to investigate and provide an effective remedy in the massacre cases comes from the international treaties to which it has acceded, customary international law, and domestic law. The Peace Accords the State signed with the guerrillas at the end of the internal armed conflict and the friendly settlement agreements being negotiated under the auspices of the Organization of American States ("OAS") may provide additional sources for this legal obligation. This section reviews these legal obligations as they apply to the prosecution of the massacre cases.

A. INTERNATIONAL LAW

1. *International Treaties*

Guatemala is party to treaties that obligate it to investigate violations of the right to life and to provide effective remedies for those violations.²⁰ Such treaties include the International Convention on

available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm (last visited Apr. 4, 2001) (obligating the Guatemalan government to investigate all human rights violations occurring in its jurisdiction).

18. See International Covenant on Civil and Political Rights, art. 2(3)(b), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) hereinafter ICCPR] (Guatemala acceded Aug. 5, 1992) (stating that each State Party should "ensure that any person claiming a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities").

19. American Convention, *supra* note 17, art. 1(1), *as interpreted by Velasquez Rodriguez v. Honduras*, *supra* note 17, at paras. 174-77.

20. The governmental institution with responsibility for a specific international obligation is not individually bound by the treaties. Rather, these obligations are binding on the State as a whole. Thus, identifying the institution that is not in compliance with the State's international legal obligations in a particular situation is not legally material to a finding of State responsibility. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1990) [hereinafter Vienna Convention]; SIXTH REPORT OF THE DIRECTOR OF THE UNITED NATIONS MISSION FOR THE VERIFICATION OF HUMAN RIGHTS AND OF COMPLIANCE WITH THE COMMITMENTS OF THE COMPREHENSIVE AGREEMENT ON HUMAN RIGHTS IN GUATEMALA ("MINUGUA"), THE SITUATION IN CENTRAL AMERICA: PROCEDURES FOR THE ESTABLISHMENT OF A FIRM AND LASTING PEACE AND PROGRESS IN FASHIONING A REGION OF PEACE, FREEDOM, DEMOCRACY AND DEVELOPMENT, § IV, para. 55, at <http://www.minugua.guate.net/derhum/sixthrep>.

Civil and Political Rights (“ICCPR”),²¹ the American Convention on Human Rights (“American Convention”),²² and the Convention on the Prevention and Punishment of Genocide (“Genocide Convention”).²³ Additionally, the case law of the Inter-American Court of Human Rights (the “Inter-American Court”) binds the Guatemalan State following the accession of Guatemala to the jurisdiction of the Court in 1987.²⁴

Article 2(3) of the ICCPR obligates Guatemala to provide victims of human rights violations with an effective and enforceable remedy for those violations.²⁵ Guatemala did not become a signatory to the ICCPR until 1992, so the massacres that occurred in the early 1980’s could not be considered violations of the right to life under Article 6 of the ICCPR. Nevertheless, the massacres constituted violations of the right to life as articulated in several other documents (including the American Convention and the Guatemalan Constitution). Guate-

htm (last visited Apr. 4, 2001) [hereinafter MINUGUA SIXTH REPORT].

21. See ICCPR, *supra* note 18, art. 2(3) (obligating Guatemala to investigate human rights violations and provide remedies for victims of the violations).

22. See American Convention, *supra* note 17, art. 1(1) (requiring Guatemala to investigate all of the massacres).

23. See Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention] (Guatemala acceded Jan. 13, 1950); United Nations Treaty Series, Genocide Convention, Participants, at <http://untreaty.un.org/English/bible/EnglishInternetBible/partI/chapterIV/treaty1.asp> (last visited Apr. 3, 2001).

24. Guatemala acceded to the Inter-American Court’s jurisdiction on Mar. 9, 1987. See Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues, Illegitimate Tactics*, 40 VA. J. INT’L L. 1, n.205 (1990) (documenting the effects of Guatemala’s accession to the Inter-American Court’s jurisdiction).

25. ICCPR, *supra* note 18, art. 2(3). This articles provides as follows:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

malan citizens have had the right to an effective remedy for those claims under Article 2(3) of the ICCPR since 1992.²⁶ Therefore, Guatemala's failure to provide an effective remedy in almost all of the massacre cases is a violation of Article 2(3) of the ICCPR.

Similarly, the American Convention and the case law interpreting it obligate the State to protect the right to life²⁷ and to prosecute perpetrators who violate that right.²⁸ Article 25 requires the State to provide victims of human rights violations "simple and prompt recourse . . . to a competent court and an effective remedy for those violations."²⁹ Article 1(1) obliges States to ensure the free and full exercise of the rights recognized under the American Convention to all persons in their jurisdiction.³⁰ In *Velasquez-Rodriguez v. Honduras*, the Inter-American Court interpreted Article 1(1) of the American

26. See ICCPR, *supra* note 18, art. 2(3); see also Vienna Convention, *supra* note 20, art. 26 (providing that States are bound to comply with treaties to which they are a party). Guatemala is not a signatory to the Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter ICCPR Optional Protocol], which would allow the "[U.N.] Human Rights Committee to receive and consider . . . communications from individuals claiming to be victims of violations of any of the rights set forth in the [ICCPR]." See ICCPR Optional Protocol, preamble, adopted Dec. 16, 1966 (entered into force Mar. 23, 1976) A/RES/2200 A (XXI).

27. American Convention, *supra* note 17, art. 4.

28. *Id.* art. 25.

29. *Id.* Specifically, Article 25 provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court of tribunal for protection against acts that violate his fundamental rights recognized by the constitution of laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The State Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

30. See *id.* art. 1(1) (declaring, "[t]he State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination . . .").

Convention to require States to investigate every situation involving a violation of the rights protected by the Convention.³¹ The Court further expanded the duty under Article 1(1) to require the State to “attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”³²

Finally, to the extent that the massacres constituted genocide,³³ Articles IV and VI of the Genocide Convention subject the Guatemalan State to certain requirements. Article IV requires the State to punish perpetrators of genocide, whether those perpetrators are heads of state, public officials or private individuals.³⁴ Article VI requires that competent courts of the State judge those alleged to have committed acts of genocide.³⁵

2. Customary International Law

In order to supplement the more general language of human rights

31. See *Velasquez Rodriguez v. Honduras*, *supra* note 17, paras. 174-77 (1988) (stating, “[t]he State has a legal duty . . . to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation” and “[t]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention”).

32. *Id.* at paras. 161-67, 176; see also *Godinez Cruz v. Honduras*, Inter-Am. Ct. H.R. (Ser. C), No. 5, paras. 184-89 (1989), available at http://www1.umn.edu/humanrts/iachr/b_11_14d.htm (last visited Apr. 4, 2001).

33. The CEH Report, *Guatemala: Memory of Silence*, concludes that some massacres committed by the Army, including those in Rio Negro and Plan de Sánchez, constituted acts of genocide as defined by the Genocide Convention. See *Guatemala: Memory of Silence*, *supra* note 9, at paras. 108-23. The Report states that in the massacres where it has identified acts of genocide, the army and paramilitary forces aimed to “kill the largest number of [members of a particular Mayan] . . . group” *Id.* at para. 113. The Mayan population of Guatemala is comprised of twenty-three distinct ethnic groups that each speak a different language. These groups are divided geographically, so that a massacre in one area could eliminate much of an ethnic group’s population. See *id.* at Map of Linguistic Communities of Guatemala. Article II(a) of Genocide Convention defines genocide as “killing members of the group” “with the intent to destroy, in whole or in part, a national ethnical, racial or religious group.” Genocide Convention, *supra* note 23, art. II(a).

34. Genocide Convention, *supra* note 23, art. IV.

35. *Id.* art. VI.

treaties, the United Nations³⁶ has developed a large body of materials including the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (“U.N. Principles”),³⁷ and the U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (“U.N. Manual”).³⁸ These materials describe methods for combating impunity and addressing extra-legal, arbitrary, and summary executions. Although not directly binding on States, these materials are evidence of customary international law and provide persuasive authority that supplements the broader treaty terms that bind governments.³⁹

According to the U.N. Principles and the U.N. Manual, the Guatemalan State is responsible for providing thorough, prompt, and impartial investigations of the massacre cases by competent investigators who have adequate authority to conduct effective investigations.⁴⁰ Prosecutions should follow the investigations of the perpetrators and should involve the families of the deceased and their legal counsel.⁴¹ The U.N. Principles prohibit the use of blanket immunity and the defense of superior orders, whereby troops blame

36. Guatemala has been a member of the U.N. since November 21, 1945. See United Nations, *List of Member States*, at <http://www.un.org/overview/unmember.html> (last visited Apr. 3, 2001).

37. United Nations High Commissioner for Human Rights, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, E.S.C. Res. 1989/65, Annex, 1989 U.N. ESCOR Supp. (No. 1), U.N. Doc. E/1989/89 (1989) [hereinafter *U.N. Principles*].

38. UNITED NATIONS OFFICE AT VIENNA CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, UNITED NATIONS MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, U.N. Doc. ST/CSDHA/12, U.N. Sales No. 91.IV.1 (1991) [hereinafter U.N. MANUAL].

39. See Shabtai Rosenne, PRACTICE AND METHODS OF INTERNATIONAL LAW 19 (1984) (describing United Nations documents as peremptory norms of international law).

40. *U.N. Principles*, *supra* note 37, paras. 9-17; see also U.N. MANUAL, *supra* note 38, at 16 (calling these qualities “[t]he fundamental principles of any viable investigation into the causes of death”).

41. *U.N. Principles*, *supra* note 37, paras. 16-18; see also U.N. MANUAL, *supra* note 38, at 18-22 (explaining the grief families suffer and the attempt to involve them in order to minimize the grief).

their commanding officers for violations.⁴² Furthermore, commanding officers and other public officials may be held responsible for their subordinates' violations where there was a reasonable opportunity to prevent those violations.⁴³

The United Nations Special Rapporteur on Arbitrary and Summary Executions ("Special Rapporteur on Executions") has stated that governments have an obligation to conduct exhaustive and impartial investigations of alleged violations of the right to life, to identify and prosecute perpetrators, to compensate victims' families, and to prevent future violations.⁴⁴ Furthermore, governments have the duty to prosecute not only those who planned and carried out alleged arbitrary or summary executions, but also those in positions of authority who failed to prevent them.⁴⁵ Like the United Nations materials described above, the findings of the Special Rapporteur on Executions are evidence of customary international law.

B. DOMESTIC LAW

The State also has a legal obligation to investigate and prosecute the perpetrators of the massacres under its domestic law. The Guatemalan Constitution, in its Preamble, expresses a commitment "to promote the complete implementation of Human Rights."⁴⁶ More

42. See *U.N. Principles*, *supra* note 37, para. 19 (declaring that blanket immunity shall not be granted under any circumstances, including a state of war, siege, or other emergency).

43. *Id.*

44. See *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, Report by the Special Rapporteur, Mr. Bacre W'aly Ndiaye*, Submitted pursuant to Comm'n on Human Rights Res. 1995/73, U.N. Comm'n on Human Rights, 52nd sess., Agenda Item 10, at paras. 559, 565, U.N. Doc. E/CN.4/1996/4 (1996) (emphasizing the urgent need to set up an international human rights mechanism with enough resources to report publicly on the human rights situation and monitor human rights violations, in addition to assisting with the existing governmental obligations).

45. *Id.*

46. See POLITICAL CONSTITUTION OF THE REPUBLIC OF GUATEMALA OF 1985, preamble (amended 1993), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Guatemala, Booklet 3 (Gisbert H. Flanz ed. & Reka Koerner trans., 1997) [hereinafter GUATEMALAN CONSTITUTION].

specifically, other Articles of the Constitution recognize the following principles: the State's duty to guarantee justice (Article 2); every individual's right of free access to tribunals in order to claim his or her rights under the law (Article 29); the ability to prosecute human rights violators by filing a complaint (Article 45); adherence to the rule of law (Article 153); the principle that State officials⁴⁷ are "subject to the law and never above it" (Article 154); joint State liability for the acts of its agents (Article 155); the independence of the judiciary and its capacity to render and execute judgments (Article 203); and, the primary goal of the Ministerio Público [Public Ministry], to oversee "strict fulfillment of the country's laws" (Article 251).

In addition, the Guatemalan criminal procedure code mandates that human rights protected by the Constitution and international treaties must be respected in all judicial proceedings.⁴⁸ It also empowers the Ministerio Público to investigate any crime and to prosecute anyone guilty of that crime⁴⁹ and guarantees the continuity of the prosecution to its end.⁵⁰ Further, the penal code has been interpreted to require the State to provide justice in a timely manner, acknowledging that "tardy justice is the equivalent to a denial of justice."⁵¹

C. PEACE ACCORDS

The Guatemalan Peace Accords between the State and the coalition of the guerrilla organizations, the Unidad Revolucionaria Nacional Guatemalteca, were concluded in 1996. Twelve individual agreements make up the Peace Accords, which were finalized with the December 29, 1996 signing of the final agreement, the Accord

47. According to the head of a non-governmental organization that interprets the Guatemalan Constitution, these officials include military personnel. *See* Interview with Roberto Villeda Arguedas, Director, Centro por la Defensa de la Constitución [Center for the Defense of the Constitution], in Guat. City, Guat. (Mar. 16, 2000) [hereinafter Villeda Interview].

48. CÓDIGO PROCESAL PENAL, DECRETO NÚMERO 51-92 [CRIMINAL PROCEDURE CODE, DECREE NO. 51-92], art. 16 (Raúl Figueroa Sarti ed. 1998).

49. *See id.* at arts. 24-25. The Código Procesal Penal ("CPP") builds in a modicum of prosecutorial discretion, but it is limited to circumstances other than those involving serious rights violations. *Id.* art. 25.

50. *Id.* art. 19.

51. César Barrientos Pellecer, *Preface* to CÓDIGO PROCESAL PENAL, *supra* note 48, at XL.

for a Firm and Lasting Peace.⁵² The commitments undertaken by the State in the Peace Accords have implications for the massacre cases because they may be evidence of a legal obligation.

For example, Sections III and VIII of the 1994 Comprehensive Agreement on Human Rights, one of the agreements that make up the Peace Accords, commit the State to combat impunity and to provide compensation and assistance to the victims of human rights violations.⁵³ The Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society recognizes the importance of overcoming “deficiencies and weaknesses in civil institutions,” including corruption, lack of coordination of the branches of government, inefficiency in government institutions and administrative problems within the judiciary.⁵⁴ The same agreement also identifies the need for a judicial process that serves as “an instrument for ensuring the basic right to justice.”⁵⁵

President Alfonso Portillo, in his January 2000 inaugural address, reinforced the commitments expressed in the Peace Accords by an-

52. See MINUGUA, *Acuerdos de Paz* [Peace Accords], at <http://www.minugua.guate.net> (last visited Apr. 4, 2001) (listing the various United Nations documents comprising the Peace Accords).

53. See *Comprehensive Agreement on Human Rights, The Situation in Central America Procedures for the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace, Freedom, Democracy and Development*, Mar. 29, 1994, at §§ III, VIII, Guat.-Unidad Revolucionaria Nacional Guatemalteca [Guatemalan National Revolutionary Unit] (“URNG”), U.N. Doc. A/48/928-S/1994/448 [hereinafter *Comprehensive Agreement on Human Rights*], available at http://www.minugua.guate.net/acuerdos/human_rights.htm (last visited Apr. 4, 2001). Section III states that “[t]he Parties agree on the need for firm action against impunity,” and Section VIII provides that “[t]he Parties recognize that it is a humanitarian duty to compensate and/or assist victims of human rights violations . . . [to] be effected by means of government measures and programmes of a civilian and socio-economic nature” *Id.*; see also *Agreement on the Strengthening of Civilian Power and Role of the Armed Forces in a Democratic Society*, Sept. 19, 1996, Guat.-URNG, art. III(9), U.N. Doc. A/51/410-S/1996/853, available at <http://www.minugua.guate.net/acuerdos/StrengtheningCivilianPower.htm> (last visited Apr. 4, 2001) (asserting that reform should be geared toward preventing the cover up of impunity and to ensure justice).

54. *Agreement on Strengthening Civilian Power*, *supra* note 53, at preamble, art. III(8).

55. *Id.* art. III(9). This can be manifest by guaranteeing impartiality, objectivity, universality, and equality under the law. See *id.*

nouncing that his Government would assume the implementation of the Peace Accords as a policy of the State.⁵⁶ This action clarifies that the Peace Accords are an agreement⁵⁷ between the State and the guerrillas, rather than between only the administration that signed them and the guerrillas.

D. THE FRIENDLY SETTLEMENT AGREEMENT

NGOs have brought cases on behalf of victims of massacres and extra-judicial killings before the Inter-American Commission on Human Rights ("IACHR"), alleging violations of the right to life and requesting a remedy for those violations.⁵⁸ In a recent development, the Guatemalan State entered into friendly settlement negotiations with plaintiffs in forty-four of the cases brought before the IACHR.⁵⁹ As part of the negotiations, the State has expressed its intent to sign an agreement requiring it to fulfill three broad commitments: (1) to advance truth in the cases, the State must accept and has already accepted responsibility for violations of the right to life in the forty-four cases; (2) to achieve justice in those cases, the agreement will require the State to pursue domestic prosecutions of the perpetrators; and (3) the State must compensate the families of victims in the massacre cases and in other, extra-judicial killings.⁶⁰

56. Discurso de Toma de Posesión del Alfonso Portillo, Alfonso Portillo, Guat. City, Guat., Jan. 14, 2000 [hereinafter Portillo Inaugural Address].

57. The commitments outlined in the peace accords were undertaken by the parties to the accords, namely the umbrella guerilla group and the State. *See The Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements*, Dec. 29, 1996, Guat.-URNG, U.N. Doc. A/51/796-S/1997/114, available at <http://www.minugua.guate.net/acuerdos/Implementation.htm> (last visited Apr. 4, 2001).

58. *See* Telephone Interview with Ronalht Ochaeta, Guatemalan Ambassador to the Organization of American States (July 8, 2000) [hereinafter Ochaeta Interview] (on file with author).

59. *See* Andrés Oppenheimer, *Surprise: Praise for Guatemala*, MIAMI HERALD, Mar. 30, 2000, at 10A (describing actions taken by President Alfonso Portillo to address human rights violations); *see also* Statement of the Republic of Guatemala before the Inter-American Commission on Human Rights, Washington, D.C. (Mar. 3, 2000).

60. *See* Statement of the Republic of Guatemala before the Inter-American Commission on Human Rights, *supra* note 59 (outlining the three commitments agreed to by the State); *see also* Inter-American Commission on Human Rights,

The IACHR will oversee the State's compliance with these commitments.⁶¹ Currently, the State is in the process of negotiating individual reparation agreements with the victims or their representatives in these cases.⁶² These positive steps, however, do not relieve the State from its responsibility to pursue domestic criminal prosecutions in each of the cases. In fact, the State's forthcoming commitment in the friendly settlement to pursue prosecutions domestically in these cases only strengthens its preexisting legal obligation to do so. The individual settlements that may eventually be reached between the State and each of the forty-four individual plaintiffs would represent settlements of the petitions before the IACHR. These settlements would have the finality of a decision of the IACHR.⁶³ The effects of the State's commitments remain to be seen, however, because the Executive branch will have made the commitments encompassing the friendly settlement without the involvement of the Ministerio Público,⁶⁴ the prosecutorial arm of the government.

II. RECENT REFORMS OF GUATEMALA'S JUSTICE SYSTEM

In recent years, Guatemala has reformed procedural aspects of its criminal justice system by enacting the *Código Procesal Penal*

Organization of American States, *Press Release*, No. 2/00, para. III.C.9, at <http://www.cidh.oas.org/Comunicados/English/2000/Press2-00.htm> (last visited Apr. 4, 2001) [hereinafter IACHR, *Press Release*].

61. See IACHR, *Press Release*, *supra* note 60, at para. III.C.8 (noting that the Commission was pleased that Guatemala was willing to work together to promote and protect human rights, and to resolve as many cases as possible through friendly settlement). This process was invoked under Article 48(1)(f) of the American Convention, which states that the Commission shall help the parties reach a friendly settlement "on the basis of respect for the human rights recognized in [the] Convention." American Convention, *supra* note 17, art. 48(1)(f).

62. See Interview with Lourdes Mylene Woolfolk Contreras and Carlos Roberto Sandoval Aldana, Lawyers for Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos [Presidential Commission in Charge of the Executive Branch Human Rights Policy] ("COPREDEH"), in Guat. City, Guat. (Mar. 15, 2000) (on file with author). COPREDEH is the governmental entity responsible for handling this task. See *id.*

63. See Ochaeta Interview, *supra* note 58.

64. See Interview with Victor Hugo Godóy, President, COPREDEH, in Guat. City, Guat. (Mar. 14, 2000) [hereinafter Godóy Interview].

("CPP"), a new criminal procedure code, and by restructuring State institutions. Congress enacted the CPP in 1994, which converted the criminal justice system from an inquisitorial to an adversarial system.⁶⁵ At the same time, the Ministerio Público was reorganized and given substantial independence from the Executive branch.⁶⁶ Part of that reorganization included increasing the number of prosecutors in the Ministerio Público from approximately thirty in 1994 to over 700 today.⁶⁷ The State has also recently restructured and improved the police forces, instituting the *Policia Nacional Civil* ("PNC"), the National Civilian Police. The PNC replaced former police forces, which were tainted by corruption and military infiltration.⁶⁸ The U.N., the European Union, and the United States have provided extensive amounts of international aid targeting these and further justice reform efforts in Guatemala.⁶⁹

The reforms and initiatives noted above indicate that Guatemala has improved its justice system, at least on paper.⁷⁰ The current sys-

65. An inquisitorial system relies on extensive pre-trial investigations and interrogations; the Judicial branch is largely responsible for conducting pre-trial investigations. In addition, much of the trial proceedings are written rather than oral. Conversely, under an adversarial system, prosecutors, not judges, are responsible for investigations, and the proceedings are largely oral. *See* Hendrix, *supra* note 11, at 392-94.

66. *See, e.g., id.* at 393.

67. *See* Interview with Luis Ramírez, Director, Instituto de Estudios Comparados en Ciencias Penales de Guatemala [Guatemalan Institute of Comparative Criminal Law], in Guat. City, Guat. (Mar. 15, 2000) [hereinafter Ramírez Interview] (on file with author).

68. *See* DOS REPORT, *supra* note 4, at 777-79 (describing generally the training and responsibilities of PNC members).

69. *See* Hendrix, *supra* note 11, at 413-18 (detailing the efforts of the U.S. Agency for International Development ("USAID") and MINUGUA, along with the efforts of the Guatemalan government, to implement reform); *see also* Interview with Brian Treacy, Coordinator General, USAID, Programa de Justicia [Justice Program], in Guat. City, Guat. (Mar. 15, 2000) [hereinafter Treacy Interview] (on file with author); Interview with Joséfina Coutiño, Asesora del Representante Residente [Advisor to the Resident Representative], United Nations Development Program ("UNDP"), in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Coutiño Interview] (on file with author).

70. *See, e.g.,* LaRue Interview, *supra* note 16; *see also* Interview with Miguel Ángel Racancoj, Diputado [Congressman], Presidente Comisión de Derechos Humanos [President, Human Rights Commission] (Mar. 13, 2000) [hereinafter Racancoj Interview] (on file with author); Ramírez Interview, *supra* note 67; Villeda

tem, therefore, theoretically provides a means for the State to fulfill its legal obligation to provide timely justice in the massacre cases. The State, however, has largely failed to put the system into practice.⁷¹ The challenge for Guatemala is not a radical restructuring, but rather to make its practices conform to the principles of justice already established.

III. OBSTACLES TO THE FULFILLMENT OF GUATEMALA'S LEGAL OBLIGATIONS

A. INTRODUCTION

Under international and domestic law, the Guatemalan State has a legal duty to investigate and provide an effective remedy in the massacre cases.⁷² The State's failure to comply with its duty to date has perpetuated a culture of impunity in which State agents who were responsible for the massacres need not fear punishment.⁷³ The unchallenged power of military and paramilitary forces that regularly performed clandestine operations gave rise to this culture of impunity.⁷⁴ Many of the intellectual authors of the violence retain power and status and remain free from investigation and prosecution.⁷⁵

The delegation, through its interviews and research, has identified a number of specific obstacles that prevent investigation and effective remedy in the massacre cases. The obstacles are as follows: (1)

Interview, *supra* note 47.

71. See, e.g., Ramírez Interview, *supra* note 67; see also Racancoj Interview, *supra* note 70; Villeda Interview, *supra* note 47.

72. See *supra* Part II (detailing the factors contributing to Guatemala's failure to fulfill its legal obligations under domestic and international law).

73. See REMHI REPORT, *supra* note 1, at xxxiii (stating that impunity stems from a lack of accountability).

74. See *id.*; see also MINUGUA SIXTH REPORT, *supra* note 20, at VI.135 (explaining the armed forces' expansion of influence without any controls). One of "the root causes of impunity is the autonomy enjoyed by the Army in its counterinsurgency and anti-subversive activities." RUSSELL, *supra* note 8, at 27 (citing the Fourth Report of the Director of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala, at 29, U.N. Doc. A/50/878 (1996)).

75. See REMHI REPORT, *supra* note 1, at xxxiii (describing the poor record of investigation and prosecution of crimes against humanity).

intimidation of witnesses and officials; (2) corruption of officials; (3) incompetence of officials; (4) inadequate resources and resource management; (5) the lack of a definition of military secrets; and (6) misuse and failure to utilize procedural mechanisms. This part of the report discusses these obstacles in the context of several massacre cases including Plan de Sánchez, Rio Negro, Dos Erres, and Cuarto Pueblo, and recommends State responses to deal with them.

B. THE OBSTACLES TO JUSTICE

1. Intimidation

One of the chief causes of the State's failure to investigate and provide an effective remedy in the massacre cases is intimidation of and threats against officials in the justice system and against witnesses.⁷⁶ Threats mainly come from former military personnel and former members of the now dissolved paramilitary Civil Patrols ("PACs") who fear prosecution.⁷⁷ Such threats affect the judicial process by reducing the will of prosecutors and judges to pursue cases vigorously and to adjudicate them impartially.⁷⁸ Threats against witnesses deter them from testifying and from urging prosecutors to move cases forward.

76. See *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity, Addendum, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Coomaraswamy*, U.N. ESCOR, 56th sess., at paras. 34-37, U.N. Doc. E/CN.4/2000/61/Add.1 (2000) [hereinafter *Report of the Special Rapporteur on the Independence of Judges and Lawyers*] (describing the threats and intimidation by judicial actors); see also DOS REPORT, *supra* note 4, at 768-77 (detailing incidents of threats against witnesses); Interview with Marco Antonio Aguilar Palma, Procurador Adjunto, Procurador de los Derechos Humanos [Adjunct Human Rights Ombudsman], in Guat. City, Guat. (Mar. 17, 2000) [hereinafter Aguilar Interview].

77. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76.

78. See, e.g., *id.* at para. 36 (finding that the vulnerability of judges to undue influence "had posed a serious threat to the independence of the judiciary, as it appears that judges have demonstrated an unwillingness to pursue cases concerning controversial violations of human rights, thus undermining the right to due process of law").

As part of the Guatemalan State's obligations under international law to promote timely justice in the massacre cases, the State has several specific obligations requiring it to combat intimidation. First, threats against the judiciary violate the U.N. Basic Principles on the Independence of the Judiciary.⁷⁹ Second, threats against lawyers or witnesses violate the U.N. Principles. Article 15 of the U.N. Principles calls for the protection of witnesses, complainants, and families of victims.⁸⁰ Article 4 requires that prosecutors be permitted to perform their functions without intimidation or improper interference.⁸¹ In addition, the U.N. Principles obligate prosecutors to prosecute cases of corruption and threats against judges, lawyers, and victims.⁸²

a. Threats Against the Judiciary

Substantial evidence suggests that threats against judges are common and affect all levels of the judiciary, including local judges in the Courts of First Instance,⁸³ Appeals Court judges, and Supreme Court Justices.⁸⁴ In the past three years, more than 160 judicial officials have complained to the Supreme Court about receiving death threats.⁸⁵ Judges presiding over cases involving military defendants have had threats mailed and phoned in to them,⁸⁶ and mock bombs

79. See United Nations, *Basic Principles on the Independence of the Judiciary*, at para. 2, U.N. Doc. A/CONF.121/22/REV.1 (1985) (stating that judges must be able to act independently of any influences, either direct or indirect).

80. *U.N. Principles*, *supra* note 37, art. 15.

81. *Id.* art. 18.

82. *Id.*

83. The Court of the First Instance is the first court in which a case is heard. Overseen by one judge, the court supervises the investigatory phase and handles the preliminary finding of sufficient cause to proceed with the case. See CODIGO PROCESAL PENAL, *supra* note 48, art. 47.

84. See DOS REPORT, *supra* note 4, at 770 (noting, for example, that observers found credible evidence of judicial bias and harassment of judges in the Xaman massacre case); see also Justice Barreda Interview, *supra* note 14; Interview with Luis Alfredo Morales López, Judge, Court of the First Instance, Salamá, in Salamá, Guat. (Mar. 15, 2000) [hereinafter Morales Interview].

85. FUNDACIÓN MYRNA MACK, THE CENTER OF POLITICAL ANALYSIS OF THE MYRNA MACK FOUNDATION REPORT (June 1999).

86. See, e.g., DOS REPORT, *supra* note 4, at 780 (discussing the various death threats received by judges in the Xaman massacre case and the Bishop Gerardi

delivered,⁸⁷ all with the implicit or explicit threat that they would be killed if they continued on the case.

The frequency and effect of such threats against the judiciary is difficult to measure. Many threats go unreported and judges are reluctant to acknowledge actions taken in response to threats. Even so, there are relatively visible responses of judges to threats, including resignations, requests for transfers, or recusal from cases.⁸⁸ It is clear from the number of threats and the reaction of some judges that the prosecution of massacre cases has been adversely affected.⁸⁹ The progress of court cases has been slowed and, in some instances, evidence has been suppressed and defendants freed as a result of the threats.⁹⁰ According to Jorgan Andrews, United States Department of State Human Rights Officer, these failures of the judiciary are attributable to continued threats from the military; “[a] military legacy [of intimidation] explains the timidity of the judiciary.”⁹¹

For instance, Judge Henry Monroy, the presiding judge on the Myrna Mack investigation, was threatened after ordering three senior military officials to stand trial for the murder of Myrna Mack.⁹² Ms. Mack, a Guatemalan anthropologist, was allegedly murdered by a member of the *Estado Mayor Presidencial* (“EMP”), the Presidential General Staff, and another assailant, in retaliation for her fieldwork on the massacres of indigenous communities by the military during the counterinsurgency.⁹³ Because of the threats, Judge Monroy sub-

murder case).

87. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, MYRNA MACK CASE, § 7 (Jan. 2000) (noting that the judge in the Myrna Mack case resigned two weeks after receiving the mock bomb).

88. See Morales Interview, *supra* note 84.

89. See Interview with Lic. Enrico Menéndez, District Attorney, Salama, in Salama, Guat. (Mar. 15, 2000) [hereinafter Menéndez Interview].

90. See *id.*

91. Interview with Jorgan Andrews, Human Rights Officer, United States Embassy, in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Andrews Interview] (on file with author).

92. See DOS REPORT, *supra* note 4, at 775 (reporting the sudden resignation of Judge Henry Monroy due to threats and intimidation).

93. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 87, § 2, at 2 (detailing the background of the Myrna Mack investigation).

sequently resigned, significantly slowing the advancement of that case.⁹⁴

In a more extreme example, one judge on the Rio Negro massacre case was almost killed, apparently by an army-backed mob.⁹⁵ That case stems from an alleged massacre by the Guatemalan military and PACs in the village of Rio Negro.⁹⁶ The military and PACs allegedly killed approximately 250 people, a significant portion of the village's population.⁹⁷ The case did not progress until three of the former PACs were caught attempting to cover up evidence in the mass graves.⁹⁸ Once incarcerated for the crime of grave robbing, they were charged with and convicted of murder for their role in the Rio Negro massacre, for which the court sentenced them to death.⁹⁹ An appellate court subsequently overturned the convictions and remanded the case for retrial.¹⁰⁰

During the September 1999 retrial of the three defendants, over 200 men arrived armed with clubs and stones at the courthouse in military vehicles.¹⁰¹ Nearly all the men were allegedly ex-PACs from Xococ, the home village of the defendants.¹⁰² According to various

94. *See id.*, § 7, at 1 (indicating that Judge Monr6y had received a mock package bomb and was the victim of other acts of intimidation that resulted in his resignation).

95. *See* DOS Report, *supra* note 4, at 772 (reporting how the trial court judge experienced death threats from mobs who were attempting to free three former PAC members).

96. *See id.* at 772 (summarizing the Rio Negro case and the attempts at prosecution related to it); *see also* Men6ndez Interview, *supra* note 89 (noting that Men6ndez is the prosecutor responsible for the Rio Negro case); Seils Interview, *supra* note 2 (CALDH provides legal advice for the Rio Negro victims and their families).

97. DOS REPORT, *supra* note 4, at 772.

98. *See* Interview with Jes6s T6cu, Founder, Widows and Orphans of Rabinal, in Rabinal, Guat. (Mar. 15, 2000) [hereinafter T6cu Interview].

99. DOS REPORT, *supra* note 4, at 772.

100. *See* Interview with representative of Widows and Orphans of Rabinal who requested anonymity, in Rabinal, Guat. (Mar. 15, 2000) [hereinafter Widows and Orphans of Rabinal Interview] (on file with author); *see also* REMHI REPORT, *supra* note 1, Versi6n Espa6ol, vol. III, at 188-91.

101. *See* Widows and Orphans of Rabinal Interview, *supra* note 100; *see also* REMHI REPORT, *supra* note 1, Versi6n Espa6ol, vol. III, at 188-91.

102. *See* Widows and Orphans of Rabinal Interview, *supra* note 100; *see also*

eyewitnesses, the men arrived at the courthouse in trucks belonging to the military base in Cobán.¹⁰³ They approached the jail, attempted to free the three defendants,¹⁰⁴ and threatened to kill the trial judge if the defendants were not released.¹⁰⁵ Eventually, police reinforcements arrived and dispersed the mob.¹⁰⁶ This incident was apparently a direct effort to intimidate the judge, as well as all the officials of the justice system involved in the proceeding. Moreover, the use of military vehicles for the transport of the rioters indicates the likelihood that the military organized and participated in the acts of intimidation.

Although the judiciary has attempted to address the problem of threats against judges, it has failed to combat the problem effectively. For example, when judges are assigned a security detail, they must pay for the room and board of their bodyguards—an expense that is impossible for most to bear, given their current salaries.¹⁰⁷ Once enacted, a new initiative to create a special protective unit under the control of the judiciary, specifically trained and assigned to protect judges, may relieve some of the problems.¹⁰⁸ Until judges are able to act without fear of reprisal, however, they will be unable to effectively fulfill their duties.

b. Threats Against the Ministerio Público

Reports of threats against officials of the Ministerio Público are also common.¹⁰⁹ Although threats occur at all levels of the Ministerio

REMHI REPORT, *supra* note 1, Versión Español, vol. III, at 188-91.

103. See Técu Interview, *supra* note 98. Jesús Técu is a survivor of the massacre at Rio Negro and the key witness in the Rio Negro case. *Id.*

104. See Seils Interview, *supra* note 2.

105. DOS Report, *supra* note 4, at 772.

106. *Id.* at 772.

107. See Morales Interview, *supra* note 84; Justice Barreda Interview, *supra* note 14.

108. See Justice Barreda Interview, *supra* note 14.

109. See Aguilar Interview, *supra* note 76; see also Menéndez Interview, *supra* note 89; Morales Interview, *supra* note 84; *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 34 (noting that, among other persons, prosecutors involved in human rights cases are “subjected to threats, intimidation and harassment”).

Público, most are directed against local prosecutors who have direct responsibility for prosecuting cases including the massacre cases.¹¹⁰ The effect of such threats is often a delay in the prosecution of those responsible. Prosecutors who are threatened in massacre cases may intentionally allow those cases to go uninvestigated or may actively impede prosecution by, for example, losing files.¹¹¹

According to some observers, the slow progress of the Dos Erres massacre case illustrates the effects of threats against prosecutors.¹¹² On December 6, 1982, the army allegedly entered the village of Dos Erres and ordered people to line up, separating the men and women.¹¹³ Soldiers allegedly blocked the roads to the village, preventing anyone outside the cordon from entering Dos Erres.¹¹⁴ On December 8, 1982, at three o'clock, residents of Las Cruces, a nearby village, heard detonations and shots from Dos Erres.¹¹⁵ At least 250 people were killed in the massacre.¹¹⁶

The investigation into the massacre began with an exhumation in 1994 after *Familiares de los Desaparecidos de Guatemala* ("FAMDEGUA"), Families of the Disappeared of Guatemala,¹¹⁷ filed

110. See Menéndez Interview, *supra* note 89.

111. See Telephone Interview with Lic. Mynor Mélgar, former lead prosecutor on many high-profile human rights cases, including the Myrna Mack and Dos Erres cases (Mar. 28, 2000) [hereinafter Mélgar Telephone Interview] (on file with author).

112. See Interview with Lic. Aura Elena Farfán, Member of the Board of Directors, *Familiares de los Desaparecidos de Guatemala* ("FAMDEGUA") [Families of the Disappeared of Guatemala], in Guat. City, Guat. (Mar. 14, 2000) [hereinafter Farfán Interview].

113. See Patricia Bernardi et al., *Exhuming Political Violence in Guatemala: Forensic Anthropology and the Investigation of Human Right Violations in "Dos Rs," El Peten, Guatemala* 20 (providing a description of the Dos Erres massacre and the events leading up to it as compiled from witness testimony); see also RUSSELL, *supra* note 8, at 41-44 (recounting the details of the Dos Erres massacre).

114. See Bernardi et al., *supra* note 113, at 20 (describing the soldiers' movement within the village prior to the day of the massacre).

115. *Id.*

116. RUSSELL, *supra* note 8, at 44.

117. FAMDEGUA is a human rights group that advocates on behalf of persons who were disappeared and killed during the internal conflict.

a complaint.¹¹⁸ The forensic anthropologists uncovered the remains of 162 bodies, some of which were found piled in a well.¹¹⁹ Despite the skeletal remains and other overwhelming evidence provided by the forensic anthropologists, the original local prosecutor refused to prosecute the case.¹²⁰ According to the private prosecutor for the victims,¹²¹ the primary reason the State prosecutor refused to bring the case was because he feared that he and his family would be in danger; former military personnel had threatened his life.¹²² Eventually, the case was able to proceed through the appointment of a special prosecutor.¹²³

The Bishop Juan Gerardi murder case,¹²⁴ however, illustrates that the appointment of a special prosecutor does not ensure that a case will be unimpeded by threats. Lic. Celvín Galindo, the special prosecutor on the case, was forced into exile after he began subpoenaing military officials.¹²⁵ Galindo reported that he received threats from

118. See Bernardi et al., *supra* note 113, at 22-30.

119. See *id.* at 32 (describing the anthropological study of the 162 recovered skeletal remains).

120. See Farfán Interview, *supra* note 112.

121. In the Guatemalan legal system, victims may be represented in proceedings by a *querellante adhesivo*, or private prosecutor. The private prosecutor may compel the public prosecutor to conduct specific investigations during the investigative phase through the judge of the Court of the First Instance. The private prosecutor may also introduce evidence and call witnesses at trial, and conduct examinations of prosecution and defense witnesses. See CÓDIGO PROCESAL PENAL, *supra* note 48, arts. 116-23. Because most victims lack the resources to pay a private prosecutor, one is not available for every massacre case, and even where there is a private prosecutor, it is still difficult to pursue investigations. See Farfán Interview, *supra* note 112.

122. See Farfán Interview, *supra* note 112.

123. In certain cases, the Attorney General may appoint a Special Prosecutor [Fiscal Especial] to handle significant or difficult cases. See Ley Organica del Ministerio Público, Decreto Número 40-94 [Organic Law of the Public Ministry, Decree No. 40-94], passed May 2, 1994, amended by Decreto Número 135-97 [Decree No. 135-97], passed Dec. 10, 1997, art. 44.

124. Bishop Gerardi, head of the Office for Human Rights of the Archdiocese of Guatemala ("ODHA") and the driving force behind the REMHI Report, was murdered two days after the release of that Report. See Francisco Goldman, *Murder Comes for the Bishop*, NEW YORKER, Mar. 15, 1999, at 60 (providing details of the events leading up to the murder of Bishop Gerardi).

125. See Farfán Interview, *supra* note 112.

anonymous sources and was subject to surveillance by military personnel.¹²⁶

Apparently as a result of threats against the Ministerio Público, prosecutors fail to prosecute cases vigorously. The responsibility to prosecute, thus, improperly falls to the victim, or the private prosecutor. For example, in the Rio Negro case, the case went forward only after the victims, with the help of NGOs, had developed the evidence and pressured the Ministerio Público.¹²⁷

c. Threats Against Witnesses and Human Rights Groups

In addition to threats against judges and prosecutors, it has been reported that the military and PACs frequently make threats against witnesses and victims to discourage them from testifying or pursuing investigations.¹²⁸ These threats have the effect of both deterring investigations before they have begun and delaying them once they are underway. Such threats are particularly effective because the witnesses have already suffered at the hands of those who are making the threats and have seen them carried out firsthand. Indeed, threats often appear to come from regional military bases or from former PACs living in the same village as the witnesses.¹²⁹

For example, according to Jesús Técu, a survivor and lead witness in the Rio Negro case who now works with the victims' families in the Plan de Sánchez case, the military has threatened witnesses and human rights groups in both cases.¹³⁰ Shortly after the exhumations of mass graves first began in Rabinal, the municipality in which both the villages of Plan de Sánchez and Rio Negro are located, the Regional Military Commander convened a meeting of the men from the

126. See DOS REPORT, *supra* note 4, at 775 (reporting how Galindo was not only subject to wiretapping and surveillance but was also threatened by "an unconfirmed plot to kidnap one of his children").

127. See Técu Interview, *supra* note 98.

128. See Monsignor Mario Rios Montt Interview, Director, ODHA, in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Monsignor Rios Montt Interview] (commenting that his office receives complaints of threats to witnesses); see also Ramírez Interview, *supra* note 67; Técu Interview, *supra* note 98.

129. See Técu Interview, *supra* note 98.

130. See *id.*

surrounding villages.¹³¹ He allegedly told them that if they proceeded with exhumations, *la violencia* and the massacres of the past would return.¹³²

Técu also alleged that troops in the same region have visited the sites of the exhumations and said to the victims' family members that, despite the recent shift in politics, "when the laws change, we will come back and kill the widows."¹³³ In spite of these explicit threats, local human rights activists have continued their efforts to exhume mass graves in their villages and to pressure the government to investigate and prosecute those responsible. Even so, according to Técu, threats have deterred some witnesses from testifying or pursuing investigations into the massacre cases.¹³⁴

In another case, Paul Seils, a legal advisor to the witnesses and families of the victims in the Cuarto Pueblo massacre, stated that the military called survivors of the massacre to a regional army base in the Ixcán, Military Zone 22.¹³⁵ Military personnel reportedly pressured the survivors not to continue with their complaint, implying that such action would trigger a return of *la violencia*.¹³⁶ The military also allegedly promised titles to land in the Ixcán to survivors who agreed to drop or not join the complaint against army personnel.¹³⁷ According to Seils, such actions by the military, an obvious attempt to obstruct judicial process, constituted both intimidation and corruption.¹³⁸

Even ex-military personnel can become the targets of these threats. In the Dos Erres case, two former *Kaibiles*, or special forces troops, became witnesses for the prosecution by testifying about the massacre that their unit had committed.¹³⁹ When the military learned that

131. *See id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. *See* Seils Interview, *supra* note 2.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Interview with Dos Erres Witnesses Who Requested Anonymity, in Flores, Guatemala (Mar. 17, 2000) [hereinafter Dos Erres Witness Interview].

the two men intended to testify, the military allegedly threatened their lives. Because of the threats, the two witnesses were forced to flee Guatemala; they have been granted temporary asylum in another country.¹⁴⁰

d. Recommendations

The government of Guatemala should address the problem of threats by providing greater protection for judges, prosecutors, and civilians involved in the prosecution of massacre cases. The judiciary has planned and funded a specially trained protective force, and should immediately implement this special protection force for at-risk judges, particularly those involved in the massacre cases. The Ministerio Público should also implement special protective measures to ensure that prosecutors are free from intimidation.

The Law for the Protection of Judicial Actors, passed by the Guatemalan Congress in 1996, requires that witnesses, judges, and prosecutors subject to intimidation be protected.¹⁴¹ The program lacks funds and, therefore, has not been implemented.¹⁴² The establishment of a well-funded and effective witness protection program is essential to ensure witnesses' sufficient confidence in their own safety to testify in massacre cases. Although witness protection is declared to be a priority, neither the Ministerio Público, the body responsible for funding the program, nor the police is effective in protecting witnesses.¹⁴³

Protection for those threatened by the military and former PACs is not enough. The PNC should implement a special investigative unit for threats against judicial actors, and prosecution of those cases should be a priority within the Ministerio Público. Aggressive prosecution of those who threaten judges and impede justice would deter future threats and reduce impunity. The Ministerio Público should

140. *See id.*

141. *See Ley Para la Protección de Sujetos Procesales y Personas Vinculadas a la Administración de Justicia Penal, Decreto Número 70-96 [Law for the Protection of Administrative Staff and Persons Related to the Administration of Criminal Justice, Decree No. 70-96], passed Aug. 27, 1996.*

142. *See Mack Interview, supra note 14.*

143. *See Menéndez Interview, supra note 89.*

focus attention on the investigation and prosecution of those responsible for the threats. Military personnel or government officials who are responsible for threats should be removed from their positions and prosecuted to the fullest extent of the law.

2. Corruption

The Guatemalan justice system was largely marginalized during the internal armed conflict.¹⁴⁴ Justice José Quezada, President of the Supreme Court, stated that “during the 36 year conflict . . . there was really no administration of justice.”¹⁴⁵ The State was reportedly pre-occupied with the insurgency and ignored the deterioration of judicial integrity.¹⁴⁶ As a result, corruption became a significant problem and now reportedly permeates every level of the justice system.¹⁴⁷ While government officials are allegedly responsible for much of the corruption, private landowners, PACs, and former military personnel may also improperly influence the functioning of the justice system.¹⁴⁸

Part of the Guatemalan State’s legal duty to investigate and provide an effective remedy in the massacre cases is found in the specific obligations it has concerning corruption. Guatemala has an obligation to remedy corruption under the Inter-American Convention Against Corruption (the “Convention Against Corruption”).¹⁴⁹ The OAS has promulgated the Convention Against Corruption, which

144. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 141.

145. Interview with José Quezada, President of the Supreme Court, in Guat. City, Guat. (Mar. 16, 2000) [hereinafter Justice Quezada Interview] (on file with author).

146. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 141.

147. See *id.*; see also Justice Barreda Interview, *supra* note 14; Hendrix, *supra* note 11, at 370 (quoting the former President of the Supreme Court as stating that corruption is “one of the major problems facing the Guatemalan justice system, including within the judicial branch”).

148. See Justice Barreda Interview, *supra* note 14.

149. See Inter-American Convention Against Corruption, Mar. 29, 1996, preamble, 35 I.L.M. 724, at <http://www.oas.org/EN/PROG/JURIDICO/english/Treaties/b-58.html> (last visited Apr. 3, 2001) (citing the “responsibility of States to hold corrupt persons accountable in order to combat corruption”).

recognizes the social cost of corrupt public institutions,¹⁵⁰ and calls for the adoption of specific measures to reduce its impact.¹⁵¹ Although Guatemala has not ratified the convention, the State is a signatory and is therefore obligated to use best efforts to comply with its principles until its ratification.¹⁵² Guatemala is therefore obligated to address this pervasive problem, particularly where corruption leads to violation of its other duties under international and domestic law. This duty is also set forth in the Comprehensive Agreement on Human Rights from the Peace Accords.¹⁵³

Corruption reportedly takes a variety of forms, all of which affect the resolution of massacre cases through improper influence by military personnel in both the judiciary and the Ministerio Público.¹⁵⁴ The most obvious form is direct corruption through bribes to prejudice specific judgments and resolutions of cases.¹⁵⁵ A more subtle form is the use of influence within the government to manipulate the assignment of prosecutors or judges, so that the officials most capable of handling complex massacre cases are not always assigned to such cases.¹⁵⁶ Both kinds of corruption greatly undermine the State's prosecution efforts.

a. Corruption in the Judiciary

i. Bribery

Bribery in the judiciary appears to be a significant problem. Judges' traditionally low salaries¹⁵⁷ have left the judiciary susceptible to corruption. In addition, most judges are not given adequate pro-

150. *See id.*

151. *See generally id.*

152. *See* Vienna Convention, *supra* note 20, art. 18 (obliging States to "refrain from acts which would defeat the object and purpose of a treaty" that they have signed but have not yet ratified).

153. *See supra* note 266 and accompanying text (setting forth Guatemala's duties under the *Comprehensive Agreement on Human Rights*).

154. *See* Mack Interview, *supra* note 14.

155. *See id.*

156. *See id.*

157. *See* DOS REPORT, *supra* note 4, at *18.

tection from intimidation and threats. If judges want protection, they themselves must pay for the room and board of their bodyguards,¹⁵⁸ which adds to the financial pressure. The State has recently initiated reforms through the Judicial Career Law, which will increase the wages, provide some training for judges, and change the way complaints about judges are handled.¹⁵⁹ While the effects of the Judicial Career Law remain to be seen, corruption through bribery reportedly continues to be a significant problem within the judiciary.¹⁶⁰

The problem of judicial corruption is illustrated by the Xaman massacre case. The massacre took place in October 1995 when a group of soldiers allegedly entered the village of Xaman and opened fire on the unarmed inhabitants who were gathered for a celebration.¹⁶¹ According to Lic. Claudia Samayóa, Director of the Rigoberta Menchú Foundation, at least one of the judges presiding over the case was offered 500,000 Quetzales (roughly US\$83,000 at the time) to make evidentiary rulings in favor of the defendants.¹⁶² When the judge refused the bribe, his life was threatened.¹⁶³ Because of that threat, the judge attempted to recuse himself from the case.¹⁶⁴

Such reports of corruption raise questions regarding other irregularities in the Xaman case.¹⁶⁵ For example, one judge ruled that despite the fact that the military opened fire on a group of unarmed civilians, killing eleven, the soldiers' actions were "unintentional."¹⁶⁶ They were merely found guilty of negligent homicide, a crime that

158. See Justice Barreda Interview, *supra* note 14; see also Morales Interview, *supra* note 84.

159. See *Ley de la Carrera Judicial*, Decreto Número 41-99 [Judicial Career Law, Decree No. 41-99], passed Oct. 27, 1999 [hereinafter *Judicial Career Law*].

160. See Quezada Interview, *supra* note 145.

161. See Interview with Claudia Samayóa, Director, Rigoberta Menchú Foundation, in Guat. City, Guat. (Mar. 14, 2000) [hereinafter *Samayóa Interview*].

162. See *id.* (stating that the judge wishes to remain anonymous); see also DOS REPORT, *supra* note 4, at 5.

163. See *Samayóa Interview*, *supra* note 161.

164. See *id.*

165. See DOS REPORT, *supra* note 4, at 770.

166. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 49; see also DOS REPORT, *supra* note 4, at 7-8.

does not exist under Guatemalan law.¹⁶⁷ Although it is difficult to ascertain the extent to which bribes influence such outcomes in specific cases, the problem appears to be pervasive.¹⁶⁸

ii. Political Corruption / Trafficking of Influence

According to Monsignor Mario Rios Montt, Director of the Human Rights Office of the Archdiocese of Guatemala (“ODHA”), most judges in recent years have obtained their appointments through political connections and favors, rather than through merit or ability.¹⁶⁹ This politicized process reportedly creates a system in which judges, who may not even be qualified for their positions, are indebted to government officials or private citizens who were influential in their appointment to the bench.¹⁷⁰ The “trafficking of influence” creates a lack of impartiality among judges,¹⁷¹ and may extend to the highest levels of the judiciary.¹⁷²

When a judge has been appointed through political connections, that judge may be asked to use his or her position improperly to alter the outcome of politically significant cases such as the massacre cases. A judge may dismiss cases, fail to issue arrest warrants, allow pre-trial release of suspects, make improperly favorable evidentiary rulings for the defense, or affect the prosecution through other administrative procedures of the court.¹⁷³ These abuses have reportedly

167. See Interview with Napoleon Gutiérrez Vargas, Justice, Supreme Court of Justice, Criminal Section, in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Justice Gutiérrez Interview]; see also *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76.

168. See DOS REPORT, *supra* note 4, at 767 (observing that intimidation of witnesses, prosecutors, and judges is a pervasive problem).

169. See Monsignor Rios Montt Interview, *supra* note 128.

170. See MINUGUA SIXTH REPORT, *supra* note 20, at para. 140; see also Interview with Javier Ménem, Director, Cobán office of MINUGUA, in Cobán, Guat. (Mar. 14, 2000) [hereinafter Ménem Interview].

171. See DOS REPORT, *supra* note 4, at 770.

172. See *id.* at 18 (noting that a 1996 firing of 500 employees by the judiciary has been criticized as politically motivated).

173. See DOS REPORT, *supra* note 4, at 781.

delayed and sometimes derailed the investigation and prosecution of massacre cases.¹⁷⁴

Much of the delay in the Rio Negro case¹⁷⁵ is allegedly the result of undue influence on the judges.¹⁷⁶ For example, judges reportedly have slowed the progress of the Rio Negro massacre case by employing administrative obstacles in response to political influence.¹⁷⁷ According to the prosecutor on the Rio Negro case, "when politics walks in the door, justice leaps out the window," and this apparently is what happened in the Rio Negro case.¹⁷⁸ Although there have been three convictions of former civil patrollers who participated in the massacre, the intellectual authors of the crime as well as other former military defendants named in the complaint have not been prosecuted.¹⁷⁹ The judiciary has failed to take the active role newly required by the CPP in supervising and expediting the investigation of the Rio Negro case.¹⁸⁰

Given the historic lack of effective supervision of the judiciary, a greater need for scrutiny of the courts is required.¹⁸¹ The judiciary has recently instituted a new review process for judges that may help curb incompetence and corruption.¹⁸² Additionally, the judiciary, the Ministerio Público, and the PNC are instituting training in judicial and prosecutorial ethics.¹⁸³ These steps, though welcome, are not likely to prove sufficient to address the problem of judicial corruption.

b. Corruption in the Ministerio Público

As with the judiciary, some prosecutors reportedly have been ap-

174. See Samayóa Interview, *supra* note 161.

175. See *supra* notes 95-108 and accompanying text.

176. See Seils Interview, *supra* note 2.

177. See *id.*

178. Menéndez Interview, *supra* note 89.

179. See Técu Interview, *supra* note 98 and accompanying text.

180. See CÓDIGO PROCESAL PENAL, *supra* note 48, arts. 24-31.

181. See Justice Barreda Interview, *supra* note 14.

182. See *id.*

183. See *id.*

pointed through political connections, sometimes with little regard for their abilities or training.¹⁸⁴ The politicized appointment process leaves prosecutors open to undue influence and corruption. Although it may be difficult to prove improper action in a particular case, a pattern of non-prosecution, apparent intentional mishandling of evidence and case files, and administrative delays raise questions regarding the professionalism and independence of prosecutors.¹⁸⁵

For example, a case against a former PAC member charged with the murder of presidential candidate Jorge Carpio and three others was dismissed due to the unexplained disappearance of key ballistic evidence from the Ministerio Público's custody.¹⁸⁶ Similarly, FAMDEGUA detailed a series of abuses that were the result of corruption or incompetence in the Dos Erres massacre case, including mishandling of case files and evidence that delayed prosecution.¹⁸⁷ Such delay tactics are common to massacre cases.¹⁸⁸

The Ministerio Público reportedly has engaged in subtle pressuring of witnesses to discourage them from testifying.¹⁸⁹ According to a survivor and lead witness in the Rio Negro case, prosecutors told witnesses that if they continued to go ahead with the case, they would be killed by the military.¹⁹⁰ Instead of taking steps to protect witnesses, prosecutors have relayed such second-hand threats, thereby discouraging victims and witnesses from testifying. Former military personnel, many of whom reportedly were participants in the atrocities of the internal conflict, permeate the Ministerio Público.¹⁹¹

184. See MINUGUA SIXTH REPORT, *supra* note 20, at para. 140 (outlining the deficiencies of the judiciary due to a lack of legal training, which, in turn, contributes to bad legal habits and practices); see also Monsignor Rios Montt Interview, *supra* note 128.

185. See Farfán Interview, *supra* note 112; see also Seils Interview, *supra* note 2; Técu Interview, *supra* note 98.

186. See *id.*

187. See Farfán Interview, *supra* note 112.

188. See Farfán Interview, *supra* note 112; see also Seils Interview, *supra* note 2; Técu Interview, *supra* note 98.

189. See Técu Interview, *supra* note 98.

190. See *id.*

191. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 141; see also LaRue Interview, *supra* note 16; In-

Where the military has infiltrated the Ministerio Público, they have the opportunity to mishandle cases, corrupt evidence, and use their position to learn the names and locations of witnesses.¹⁹² This undermines the mandate of the institution, as former military personnel are able to exert their influence to deter prosecution of massacre cases.¹⁹³ The military reportedly also exerts external influence through corruption and intimidation of prosecutors and judges.¹⁹⁴

Powerful landowners appear to have been another source of improper political influence on the impartial resolution of cases. These landowners exert significant control over local affairs. Some of the massacres, such as Pichec and Plan de Sánchez, occurred on land owned by private individuals. Landowners, some of whom have been implicated in oppression against the local indigenous people, have used their influence to impede investigation efforts.¹⁹⁵ In addition, landowners have allegedly threatened witnesses directly.¹⁹⁶

In one example, a local landowner, whose family owns a hydroelectric plant that powers much of southern Guatemala, allegedly used his influence to suppress the investigation of the Tres Aguas exhumation located on his property.¹⁹⁷ The prosecutor responsible for that

interview with Lic. Victor Ferrigno, Director of Proyecto Pro-Leyes [Pro-Law Project], in Guat. City, Guat. (Mar. 11, 2000) [hereinafter Ferrigno Interview] (on file with author); Interview with Lic. Miguel Meurth, Director, Centro De Analisis Forense y Ciencias Aplicadas [Center for Forensic Analysis and Applied Sciences], in Guat. City, Guat. (Mar. 14, 2000) [hereinafter Meurth Interview] (on file with author); Treacy Interview, *supra* note 69.

192. See Seils Interview, *supra* note 2; see also *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 34 (noting that the Special Rapporteur received allegations that the influence of the military had “hindered the speedy, impartial administration of justice, and in some [cases] thwarted due administration of justice”).

193. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 34-37 (relating incidents and circumstances where the judiciary was hampered from pursuing prosecutions due to threats).

194. See *supra* Parts IV.B.1.a, IV.B.2.a.i (detailing the types of threats experienced by the judiciary and the problems of bribery and corruption in the judiciary).

195. See Interview with Francisco de Leon, Acting Director of the ODHA team of forensic anthropologists, in Guat. City, Guat. (Mar. 14, 2000) [hereinafter de Leon Interview] (on file with author).

196. See Ménem Interview, *supra* note 170.

197. See de Leon Interview, *supra* note 195.

case obtained a fifteen-day warrant to initiate the exhumation. According to Lic. Francisco de Leon, Acting Director of the ODHA exhumation team, the prosecutor allowed that warrant, and two subsequent warrants, to expire because of the landowner's influence.¹⁹⁸ Although the exhumation was eventually allowed to proceed, this provides an example of the political influence used on local prosecutors to slow down and discourage investigations.

c. Corruption of Witnesses by the Military

In addition to alleged threats against witnesses, military personnel have apparently improperly influenced witness testimony through bribery. For example, in the Cuarto Pueblo massacre case, the military allegedly promised land and animals to the victims and survivors of massacres to deter them from pursuing their cases.¹⁹⁹ Bribery, coupled with threats of reprisal,²⁰⁰ has greatly limited public willingness to assist in the prosecution of the massacre cases.²⁰¹

d. Non-Prosecution of Corruption

Despite the evidence of widespread corruption in the judiciary, and in the Ministerio Público, as well as attempted bribery of witnesses and survivors of the massacres by the military, the State has failed to investigate or prosecute these acts.²⁰² The inaction of the Ministerio Público and the judiciary has permitted those responsible for the massacres to enjoy continued impunity.

Numerous complaints of corruption were filed with the office of the Human Rights Ombudsman.²⁰³ Although the Ombudsman's office is empowered to investigate cases of corruption, it does not have the

198. *See id.*

199. *See* Seils Interview, *supra* note 2.

200. *See supra* Part IV.B.1 (describing the intimidation brought to bear on officials of the justice system by former members of the military).

201. *See* Ménem Interview, *supra* note 170.

202. *See* Aguilar Interview, *supra* note 76; *see also* Hendrix, *supra* note 11, at 369 (stating that although there are basic laws against corruption, there is a lack of enforcement and compliance); DOS REPORT, *supra* note 4, at 780.

203. *See* Aguilar Interview, *supra* note 76.

resources to handle those investigations.²⁰⁴ Even if the office had such resources, the Ombudsman does not have the mandate to prosecute those responsible.²⁰⁵ To the extent that this corruption goes unpunished, it will remain an obstacle to the effective investigation and prosecution of the massacre cases.

e. Recommendations

To address the problem of corruption, the State must target both those who traffic in influence and bribe government officials and those who accept bribes. The State should establish an independent office to investigate and prosecute those who bribe judicial officers or otherwise attempt to influence the judiciary, the Ministerio Público, or witnesses.²⁰⁶ Such an office should also prosecute those who accept bribes or who yield to other forms of influence.²⁰⁷ It should also be empowered to take complaints directly from the public. To ensure transparency, this office should include representatives from the office of the Human Rights Ombudsman²⁰⁸ and human rights NGOs, and publish reports for public dissemination.

The politicized appointment process leaves prosecutors open to influence and corruption. Although there is an initiative to appoint prosecutors through a training program, thus creating a merit-based appointment process, it only applies to new prosecutors. Current prosecutors in the Ministerio Público, who have been appointed through a politicized process, are not subject to the training program. Therefore, this initiative does not sufficiently combat corruption in the Ministerio Público.

204. *See id.*; *see also infra* Part IV.B.4.a (discussing the lack of resources Guatemalan legal institutions have and its deleterious effect on the administration of justice).

205. *See* Aguilar Interview, *supra* note 76.

206. *See Report of the Special Rapporteur on the Independence of Judges and Lawyers, supra* note 76, at para. 169 (f) (providing recommendations to deal with “judicial corruption and influence peddling”).

207. *See id.*

208. The Office of the Human Rights Ombudsman operates semi-independently from other branches of the government to assist other State institutions with human rights issues. *See* Aguilar Interview, *supra* note 76.

Every attempt should be made to diminish the ability of military personnel involved in the massacres to influence the judiciary and the Ministerio Público. The State should remove former military personnel from their positions in the government who are using their influence to affect the judicial process. Civil servants who are accused of crimes related to these massacre cases should also be removed from positions where they may have influence over such cases.²⁰⁹

Judges and prosecutors must be better protected from undue influence. The implementation of protection programs in conjunction with an increase in salaries for judges, when effectuated, may make them less susceptible to the military's agenda. Furthermore, the State should focus on investigating and possibly prosecuting improprieties by judges to curb the effects of threats and bribes.

The constitutionally mandated term for judges is five years, with the possibility of reappointment. The imposition of such a short term politicizes the position of judges and leaves them vulnerable to corruption. The legislature should amend the Constitution to confer lengthier terms on judges in order to reduce the influence of corruption.²¹⁰

The judiciary and the Ministerio Público should take a greater role in supervising the ethical education of judges and prosecutors. Judges and prosecutors need better training in ethics, and special rules should be promulgated regarding the professional conduct of judges and prosecutors. The judiciary should remove judges who violate the rules of the court by accepting bribes or by improperly using their positions to derail prosecution of the massacre cases.

The implementation of the newly approved Judicial Career Law is a first step in limiting corrupt practices within the judiciary.²¹¹ One positive sign is the judiciary's implementation of the recommendations of the Commission on the Strengthening of Justice, in particular with respect to separating responsibility for the administrative and judicial functions of the judiciary. Such structural reform should im-

209. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 169 (b).

210. *See* Justice Quezada Interview, *supra* note 145.

211. *See* Judicial Career Law, *supra* note 159, arts. 39-41 (providing a list of actions prohibited by judges).

prove the system's ability to discipline and remove judges where appropriate.

3. *Incompetence*

The incompetence of some lawyers and judges in the Ministerio Público and the judiciary has also contributed to the State's failure to effectively investigate and prosecute massacre cases. Some prosecutors lack the skills to investigate and prosecute a case effectively under the recently introduced adversarial system. Judges may compound the problem by mishandling procedures and misapplying the law. To the extent it has permitted incompetence in the justice system, the State has violated its obligation under Article 2(3) of the ICCPR to give its citizens a right to bring their claims of a violation of the right to life to a competent judicial, administrative, legislative, or other authority provided for by the State's legal system.²¹² Furthermore, the U.N. Principles and the U.N. Manual underscore the duty of the State to competently investigate alleged violations of the right to life.²¹³

a. *Incompetence in the Ministerio Público*

The State's legal duty to investigate and provide an effective remedy in the massacre cases is further affected by the reported incompetence in the Ministerio Público. Many people within the judiciary, the Executive branch, international organizations, and NGOs whom the delegation interviewed, have referred to the Ministerio Público as "the weakest link in the criminal justice system."²¹⁴ The problems within the Ministerio Público begin with the inadequate education

212. ICCPR, *supra* note 18, art. 2(3); *see also supra* Part II.A.1 (outlining the international treaties that compel Guatemala to examine violations of "the right to life" and remedies for such violations).

213. *See supra* Part I.A.2 (detailing those materials put out by the United Nations to supplement the treaties that bind governments by providing "persuasive authority" through "customary international law").

214. *See* Interview with Steve E. Hendrix, Asesor Jurídico y Coordinador de Programas de Justicia, Oficina de Iniciativas Democráticas [Judicial Advisor and Coordinator of Justice Programs, Office of Democratic Initiatives], USAID, in Guat. City, Guat. (Mar. 14, 2000) [hereinafter Hendrix Interview]; *see also* Monsignor Rios Montt Interview, *supra* note 128; Andrews Interview, *supra* note 91; Aguilar Interview, *supra* note 76; LaRue Interview, *supra* note 16.

prosecutors receive in law school.²¹⁵ Neither the *Colegio de Abogados de Guatemala*, the Guatemalan Bar Association, nor any other organization regulates the quality of legal education.²¹⁶ Instructors often teach from outdated texts, some of which date back several decades.²¹⁷ In addition, the Adjunct Human Rights Ombudsman and law professor, Marco Antonio Aguilar Parma, notes that many lawyers hold positions within the Ministerio Público in low regard. The perception among lawyers is that lawyers who have difficulty getting private clients seek employment with the Ministerio Público as a last resort.²¹⁸ This perception undermines morale within the Ministerio Público and prevents it from attracting quality candidates.²¹⁹

A lack of training in criminal procedure under the new CPP, which gives prosecutors significantly more responsibility in investigating cases, exacerbates the incompetence of some prosecutors.²²⁰ For example, prosecutors often fail to follow the procedures for preserving evidence by effectively sealing off crime scenes and preserving the chain of custody for physical evidence.²²¹ This mishandling results in evidence that is unusable or questionable at trial.²²² More generally, many prosecutors have not effectively carried out

215. See Mack Interview, *supra* note 14; see also Aguilar Interview, *supra* note 76. Aguilar teaches law part-time at the San Carlos University. See *id.*

216. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at paras. 73-76 (noting the lack of uniform standards in legal education and the lack of testing of new lawyers prior to admittance to the bar to ensure adequate qualifications to practice law); see also Mack Interview, *supra* note 14.

217. See Mack Interview, *supra* note 14; cf. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at paras. 73-76.

218. See Aguilar Interview, *supra* note 76; see also Andrews Interview, *supra* note 91.

219. See *id.*

220. See Hendrix, *supra* note 11, at 365 (noting that the new Code is the "first of its kind in Latin America," and supplants an "inquisitorial system" with an "adversarial system"); see also Justice Quezada Interview, *supra* note 145.

221. See de Leon Interview, *supra* note 195; see also Andrews Interview, *supra* note 91; Treacy Interview, *supra* note 69; Menéndez interview, *supra* note 89.

222. See de Leon Interview, *supra* note 195; Andrews Interview, *supra* note 91; Treacy Interview, *supra* note 69; Menéndez Interview, *supra* note 89 (stating that evidence that is "fruit from a poisonous tree" is unusable at trial).

their new investigative responsibilities under the adversarial system.²²³

In addition to inadequate training, some prosecutors suffer from a lack of commitment to their role. This may be true for several reasons.²²⁴ Because prosecutors receive relatively low salaries compared with the salaries that lawyers in private practice receive, the prestige and satisfaction from working in public service is an important part of their compensation in many countries. In Guatemala, however, prosecutors are held in low regard and do not receive the status and benefits conferred on prosecutors in other countries, so they often do not take pride in representing a State with a history of corruption and repression.²²⁵

As a result, some prosecutors seem to fail to understand or willfully ignore their role as a representative of the State and the State's responsibility to bring prosecutions.²²⁶ The lack of commitment to their role as representatives of the State is reflected in prosecutors' tendency to wait for victims or their family members to lodge complaints before they investigate a crime. This is true even though they are empowered to begin investigations themselves²²⁷ and often have sufficient evidence in the massacre cases to do so.²²⁸

The mishandled investigation and lack of prosecutions in the Cuarto Pueblo massacre case are examples of the apparent incompetence of the Ministerio Público. The massacre at Cuarto Pueblo in the Ixcán region of the department of Quiché occurred over three days in March 1982, principally on March 14, 1982, a market day when residents from the surrounding countryside were gathered for shopping. At the height of the massacre, soldiers allegedly shot civilians from military helicopters and the ground. In an attempt to conceal the evi-

223. See *infra* notes 229-238 and accompanying text; see also *supra* note 65 and accompanying text (emphasizing that it is the prosecutor's role to conduct pre-trial investigations); LaRue Interview, *supra* note 16; Ramírez Interview, *supra* note 67; Mack Interview, *supra* note 14; Morales Interview, *supra* note 84.

224. See Mack Interview, *supra* note 14.

225. See Meurth Interview, *supra* note 191; Mack Interview, *supra* note 14.

226. See Mack Interview, *supra* note 14; Seils Interview, *supra* note 2; Farfán Interview, *supra* note 112; Ramírez Interview, *supra* note 67.

227. See CÓDIGO PROCESAL PENAL, *supra* note 48, arts. 24-25.

228. See Seils Interview, *supra* note 2.

dence of the massacre, the soldiers then allegedly took the more than 300 bodies, placed them in a nearby church and set the church on fire.²²⁹

The criminal investigation into the massacre began with a request by the local justice of the peace for an exhumation on May 25, 1995.²³⁰ The evidence from that exhumation was transferred to Guatemala City for analysis, but no record of the chain of custody for that evidence exists.²³¹ Although the analysis yielded no positive identifications, a fact that the prosecutor cited as the major obstacle in prosecuting those responsible, the prosecutor personally took the testimony of forty-one witnesses to the massacre.²³² According to the prosecutor, the statements by these witnesses are consistent with each other and the physical evidence.²³³

On October 16, 1996, the prosecutor sent a letter to the Minister of Defense requesting information about the operations in Military Zone 22 in the Ixcán on March 14, 1982. The Minister did not reply until July 24, 1997, after the prosecutor had sent a third letter requesting the information. The Minister responded that he could not answer the prosecutor's questions because the military base, Zone 22, did not exist until March 23, 1983. The prosecutor requested no further information from the Defense Minister and never confronted him with the overwhelming evidence of the operation of numerous military bases in the Ixcán region on March 14, 1982.²³⁴

The prosecutor then sent a letter to his superior, the Attorney General, asking him how to proceed and requesting that the Attorney General appoint a special prosecutor to the case. The prosecutor

229. *See id.* Paul Seils is the international legal director for CALDH, which serves as a legal advisor for the victims of the Cuarto Pueblo massacre. *Id.*

230. *See* Interview with Lic. Mynor Eliséo Ogáldez, District Attorney for Alta Verapaz, in Cobán (Mar. 15, 2000) [hereinafter Ogáldez Interview]. Lic. Ogáldez is the district attorney responsible for the Cuarto Pueblo massacre case. During the delegation's meeting with Lic. Ogáldez, he looked through his office's case file on Cuarto Pueblo and gave the delegation a detailed account of the massacre itself and the steps his office has taken to investigate it.

231. *See id.*; *see also* Ménem Interview, *supra* note 170.

232. *See* Ogáldez Interview, *supra* note 230.

233. *Id.*

234. *Id.*

never received a response to that letter and has not proceeded further with the investigation in the Cuarto Pueblo massacre case.²³⁵ The prosecutor stated to the delegation that he has not proceeded with the case because he believes that judges, conditioned under the inquisitorial system, will not accept circumstantial proof of death.²³⁶ Even without identifications of victims, the prosecutor has forty-one consistent eyewitness accounts of the massacre stating that there were operational military bases in the Ixcán area at the time, at least twelve eyewitnesses who are eager to testify,²³⁷ ample physical evidence of a massacre, and corroborating evidence in the REMHI report²³⁸ and other public records. The failure to proceed with the prosecution in the face of such substantial evidence reflects either incompetence or lack of commitment to the prosecutorial role.

b. Incompetence in the Judiciary

The lack of adequate training for judges affects all levels of the judiciary beginning with justices of the peace. Each municipality in Guatemala has at least one justice of the peace, who may be the only judicial actor within the municipality.²³⁹ Justices of the peace adjudicate certain types of minor cases.²⁴⁰ In addition, Article 308 of the CPP empowers justices of the peace, under the direction of the Ministerio Público, to begin investigations on larger cases where they are the only judicial actor in the municipality.²⁴¹ For the most part, justices of the peace have no formal legal training, and most are not

235. *See id.*

236. *Id.* There is no physical evidence of the death of individuals because none of the bodies have been identified due to the fact that only charred fragments remained of their skeletons. *See id.*; *see also infra* Part IV.B.6.b (noting that without positive identification of victims, the prosecution's investigation into the massacre is slow to proceed).

237. *See* Seils Interview, *supra* note 2.

238. *See* REMHI REPORT, *supra* note 1, at 137 (stating that the Army was in constant contact with the base, and a helicopter provided air support for the mission). This illustrated that the massacre was the "result of strategic plans and tactics in a campaign directed by the officers and carried out by the troops." *Id.*

239. *Legal System of Guatemala*, 40 ST. LOUIS U. L.J. 1363, 1365 (1996).

240. *See id.*

241. *See* Ogáldez Interview, *supra* note 230; *see also* CÓDIGO PROCESAL PENAL, *supra* note 48, art. 308.

lawyers.²⁴² This lack of training has led to serious procedural errors, including the mishandling or destruction of evidence, as in the Cuarto Pueblo case.²⁴³ Although the Judicial Career Law requires that all justices of the peace become lawyers within the next three years,²⁴⁴ the prospects for this massive undertaking do not appear good.²⁴⁵ In the meantime, most justices of the peace are reportedly unqualified to carry out their duties.²⁴⁶

Judges of the First Instance and judges in the courts of appeals also suffer from a lack of training, particularly with regard to the change from the inquisitorial to the adversarial system. Under the old inquisitorial system in Guatemala, judges were responsible for both investigating and adjudicating cases.²⁴⁷ Under the newly instituted adversarial system, judges are no longer responsible for investigating cases and only adjudicate.²⁴⁸

According to Justice Barreda of the Guatemala Supreme Court, many judges have been reluctant to relinquish the power over the procedural aspects of investigations and prosecutions that the inquisitorial system afforded them, even though such judges do not adequately fulfill those duties.²⁴⁹ Judges also need to adapt to the new oral proceedings of the adversarial system as opposed to the largely written proceedings of the inquisitorial system.²⁵⁰ Given Guatemala's generally deficient system of legal education and the difficulties associated with switching to a new criminal procedure code, many

242. See Hendrix Interview, *supra* note 214.

243. See *supra* notes 230-236 and accompanying text. The justice of the peace who initiated the investigation into the Cuarto Pueblo massacre took no steps to record the chain of custody for the evidence recovered at the site of the massacre. See *id.*

244. Judicial Career Law, *supra* note 159, art. 56.

245. See Hendrix Interview, *supra* note 214.

246. See *id.*; see also Ménem Interview, *supra* note 170 (stating that a justice of the peace failed to preserve the chain of custody for evidence in the Cuarto Pueblo case).

247. Hendrix, *supra* note 11, at 393.

248. See *id.* (noting that in addition to moving from an inquisitorial to an adversarial system, judges are also receiving new training programs).

249. See Justice Barreda Interview, *supra* note 14.

250. Hendrix, *supra* note 11, at 365.

judges fail to understand and implement the provisions of the new code and constitutional protections for defendants.²⁵¹

This lack of training has multiple effects. According to Enrico Menéndez, District Attorney for Salama, the lack of training for judges of the first instance has led to lost cases for the State.²⁵² As a result of their inadequate understanding of the law, judges have failed to issue arrest and search warrants in a timely manner, jeopardizing investigations and arrests.²⁵³ Lic. Menéndez also stated that defendants are detained without being charged or informed of their rights.²⁵⁴ When a defendant is finally tried, presiding judges often have incomplete knowledge of key legal principles such as presumption of innocence for defendants.²⁵⁵

The lack of knowledge of the law apparently extends to both substantive law and procedure. The actions taken by the judge in the Xaman massacre case illustrate this point. The judge convicted the defendants of negligent homicide with complicity, a crime that does not exist in Guatemalan law.²⁵⁶ One Justice of the Supreme Court of Justice commented that not only was the fabrication of a crime absurd, but so was the sentence of negligent homicide in a case where thirteen people were killed in a barrage of 288 bullets.²⁵⁷

251. See Treacy Interview, *supra* note 69; see also Quezada Interview, *supra* note 145 (stating that a lack of training for judges has led to many due process and human rights problems); Justice Barreda Interview, *supra* note 14. Justice Barreda also stated that judges delegate some of their key duties to unqualified staff, who further contribute to the incompetent handling of cases. See *id.*; see also Ramírez Interview, *supra* note 67.

252. See Interview with Luis Alfredo Vasquez Menéndez.

253. See Menéndez Interview, *supra* note 90.

254. See *id.*

255. See *id.*

256. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at paras. 48-49 (noting that the United Nations Verification Mission in Guatemala found that the ruling in the Xaman case "served to increase the climate of impunity in the country."); see also DOS REPORT, *supra* note 4, at 770.

257. See Justice Gutiérrez Interview, *supra* note 167; see generally *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 50.

c. Recommendations

The problems caused by incompetence in the Ministerio Público cannot be remedied unless it attracts qualified lawyers and trains those lawyers to work effectively under the new criminal procedure code. One way to do that is by increasing the salaries of prosecutors. An increase in salary would not only attract candidates who would otherwise aim for higher paying fields,²⁵⁸ it would alleviate the pressure on prosecutors to take private cases to supplement their income.²⁵⁹ In addition, prosecutors must be trained in investigative techniques, preservation of evidence, and the traditional skills involved in being an effective trial attorney under the adversarial system.²⁶⁰ These measures may eventually improve the status of the position of prosecutor, which would, in turn, attract more qualified candidates.

Judges must also receive better training. Although the Judicial Career Law and the judges' school set up by the Agreement of the Magistrates of the Supreme Court are promising initiatives that may raise the level of competence within the judiciary, most judges will not receive training under this arrangement.²⁶¹ New candidates for judicial and justice of the peace positions are chosen by the judges' school²⁶² and are required to attend the school, which offers courses designed to teach the practical, rather than theoretical, aspects of the law and the process of judging.²⁶³ Specifically, the Judicial Career Law requires all new judges to pass a test before being considered for a judicial post and provides for periodic evaluation of judges.²⁶⁴ One serious limitation of the reforms is that these new and ambitious training programs only apply to new judges, so that incompetent

258. See Aguilar Interview, *supra* note 76.

259. See Meurth Interview, *supra* note 191. Although prosecutors are prohibited from taking private clients, many currently do. See *id.*

260. See Aguilar Interview, *supra* note 76.

261. Only judges taking new positions are required to undergo training. See Judicial Career Law, *supra* note 159, art. 18.

262. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 64.

263. See *id.*

264. Only judges taking new positions are required to undergo training. See Judicial Career Law, *supra* note 159, art. 18.

judges already serving on the bench need not undergo any additional training and may remain on the bench.²⁶⁵ For this reason, the State should require all judges to undergo training.

4. *Financial and Technical Resources*

The State has further failed to comply with its duty to prosecute and provide an effective remedy in the massacre cases through its inadequate funding of the criminal justice system and its lack of coordination among the institutions that make up that system. Article II of the Comprehensive Agreement on Human Rights, entitled "Strengthening Institutions for the Protection of Human Rights," elaborates on that duty, stating:

The Parties consider that any behavior that limits, restricts or impairs the function assigned to the judiciary, the Counsel for Human Rights [Human Rights Ombudsman] and the Public Prosecutor's Office in respect of human rights undermines fundamental principles of the rule of law and that, accordingly, those institutions must be supported and strengthened in the exercise of those functions.²⁶⁶

This commitment to strengthen the institutions involved in criminal justice and human rights is of little use without adequate funding for each institution and a commitment to coordinate these institutions.

a. Lack of Financial and Technical Resources

The Guatemalan institutions involved in the administration of justice are drastically under-funded.²⁶⁷ For example, the Guatemalan Constitution mandates that the judiciary's budget may not be less than two percent of the entire budget,²⁶⁸ a percentage lower than that allocated to physical education and sports.²⁶⁹ The Constitution gives

265. See Justice Quezada Interview, *supra* note 145.

266. *Comprehensive Agreement on Human Rights*, *supra* note 53, art. II.

267. See Ogáldez Interview, *supra* note 230; see also Coutiño Interview, *supra* note 69.

268. See GUATEMALAN CONSTITUTION, *supra* note 46, art. 213.

269. See *id.* at art. 91 (allocating no less than three percent of the State's budget to physical education and sports).

Congress broad discretion to set the judiciary's budget, as is the case in many countries. This broad discretion, however, is in the hands of a Congress whose members may have a vested interest in preventing the effective administration of justice because some of them may have participated in the massacres.²⁷⁰ A strong commitment to increase the judiciary's budget may not exist because this budgetary power rests in the hands of people who may not want the judiciary to adjudicate certain cases. Moreover, whatever the percentage allocated to the judiciary, the total budget is limited by the inadequate tax base and tax collection efforts.²⁷¹

Substantial international aid has poured into Guatemala for the purpose of strengthening the administration of justice.²⁷² International donors have filled in the budgetary gaps to a certain extent with financial and technical resources. For instance, the United States Agency for International Development ("USAID") has instituted several justice centers throughout Guatemala that seek to integrate all of the resources necessary to the administration of justice.²⁷³ Centers that have benefited from this international aid have centralized resources, computerized case management systems, trained intake and investigation units in the local prosecutor's offices, and specially

270. See REMHI REPORT, *supra* note 1 at xxxiii (describing how impunity has allowed those responsible for the violence to retain their positions of power and privilege, thus influencing the conduct of the Army, police, military commissions, and civil patrol, contributing to further violence against the people); see also *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 141; *supra* Part IV.A and IV.B.2 (discussing how obstacles such as corruption and lack of financial and technical resources hinder the fulfillment of Guatemala's legal commitments).

271. See Hendrix Interview, *supra* note 214. USAID in Guatemala estimates that only 6,000 people paid taxes last year. *Id.*

272. See Hendrix, *supra* note 11, at 413-18 (citing USAID as the principal donor assisting the Guatemalan government to reform its justice system, but noting the contributions of other donors such as MINUGUA, the Canadian, Dutch, and Spanish governments, the Inter-American Development Bank, and the European Union); see also *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 78; Coutiño Interview, *supra* note 69.

273. See Steven E. Hendrix, *Guatemalan "Justice Centers": The Centerpiece for Advancing Transparency, Efficiency, Due Process, and Access to Justice*, 15 AM. U. INT'L L. REV. 813, 819-20 (2000) (outlining USAID initiatives that called for not only training, but the creation of functionally integrated institutions and procedures to gain support from the community and municipalities).

trained court clerks.²⁷⁴ USAID considers the program a success as measured by the difference between the number of cases lost by the courts in Guatemala before the institution of the justice centers (1,061) and the number lost after the justice centers (one).²⁷⁵

The effectiveness of the USAID program illustrates how additional resources can assist with the effective investigation and prosecution of the massacre cases. Unfortunately, courts and prosecutors' offices outside of the city are suffering from a serious lack of financial and technical resources and still have the dismal "before" statistics highlighted by USAID.²⁷⁶ For example, in Cobán, the prosecutor's office for Alta Verapaz has three prosecutors who each year must collectively handle 6,000-7,000 violent crimes committed in their office's jurisdiction, in addition to massacre cases for which investigations have begun in the last few years.²⁷⁷ Although special prosecutors are generally the most effective prosecutors, they also are often overburdened.²⁷⁸ For example, Mario Leal, a special prosecutor, handles two high-impact cases with more than forty defendants—the Dos Erres massacre case and the Gerardi case.²⁷⁹ Furthermore, the Human Rights Ombudsman's Office has received the same budget for the past four years and has had to rely on international money to function.²⁸⁰

b. Coordination of Institutions and Resources

Some government actors and international donors suggest that the institutions in the justice system have adequate funding.²⁸¹ Rather than inadequate funding, they suggest that the real problem is two-

274. *Id.* at 825.

275. *Id.* at 828.

276. See Hendrix Interview, *supra* note 214; see also Ramírez Interview, *supra* note 67; Ogáldez Interview, *supra* note 230.

277. See *id.*

278. Andrews Interview, *supra* note 91.

279. *Id.*; see also Interview with Lic. Mario Leal, Special Prosecutor in the Dos Erres case, in Guat. City, Guat. (Mar. 14, 2000) [hereinafter Leal Interview].

280. Aguilar Interview, *supra* note 76.

281. Hendrix Interview, *supra* note 214; see also Aguilar Interview, *supra* note 76.

fold: (1) the lack of coordination among institutions;²⁸² and (2) the inability of institutions to absorb technical assistance.²⁸³ As to the former, examples abound. For instance, prosecutors in the Ministerio Público often have problems investigating because they lack technical, human, and financial resources.²⁸⁴ The PNC could assist with these investigations, but the communication between the two institutions is so deficient that such cooperation rarely occurs.²⁸⁵ Luis Ramírez, Director of the Institute of Comparative Penal Studies of Guatemala, stated that “the police should be under the lead of prosecutors, but this does not happen in practice.”²⁸⁶ This lack of coordination has hindered the progress of the massacre cases because their investigations and ultimate prosecutions require cooperation among the initial investigators on the cases, the prosecutor currently handling the case, the PNC, the Human Rights Ombudsman, and other institutions with relevant information or expertise.

In the Dos Erres massacre case, for example, a lack of communication between the prosecutor and the PNC led to significant delays.²⁸⁷ The special prosecutor in the case stated that he requested a detention order for several defendants from the judge on the case

282. Ferrigno Interview, *supra* note 191; *see also* Justice Barreda Interview, *supra* note 14; Aguilar Interview, *supra* note 76.

283. Hendrix Interview, *supra* note 214. MINUGUA has highlighted these problems, stating,

[d]isparities have been noted in the capacity of national institutions to absorb international cooperation and to use the technical assistance provided. This means that the substantial effort made by one institution may be counteracted by deficiencies in the functioning of another. This problem suggest that, at a time of far-reaching institutional change, there is a need to create opportunities for dialogue and inter-institutional cooperation which are genuinely able to overcome the compartmentalization of State responsibilities.

MINUGUA SIXTH REPORT, *supra* note 20, §V, at para. 95.

284. *See supra* Part IV.B.4.a; *see also* Leal Interview, *supra* note 279 (discussing obstacles to the fulfillment of Guatemala’s legal obligations).

285. *See* Mack Interview, *supra* note 14; *see also* Ramírez Interview, *supra* note 67.

286. *Id.*

287. Interview with Sara Romero, Assistant to Special Prosecutor Mario Leal, in Guat. City, Guat. (Mar. 13, 2000) [hereinafter Romero Interview] (on file with author).

who sent it to the police chief.²⁸⁸ The prosecutor attempted several times, to no avail, to have the police execute the order. The local police chief responded to those requests by saying that he did not have any time to carry out the order.²⁸⁹ The police chief never executed the order and ignored the prosecutor's repeated requests because no effective channel of communication between the PNC and the Ministerio Público existed.²⁹⁰ The lack of systemic coordination between the institutions has, therefore, allowed the defendants to remain free.²⁹¹

The Guatemalan government has made efforts to address these problems. The Peace Accords set up the Commission for the Strengthening of Justice ("CSJ") to make recommendations for the creation of a national policy on criminal justice that would affect all institutions involved in the administration of justice.²⁹² The CSJ consisted of representatives of the judiciary, the Ministerio Público, the Interior Ministry, the deans of San Carlos Law Faculty and Rafael Landivar Law Faculty, the PNC, and two private citizens.²⁹³ Once the CSJ fulfilled its mandate, it reconvened as the Ad Hoc Judicial Strengthening Committee in order to implement the recommendations of the CSJ.²⁹⁴ Following the inauguration of President Portillo, this committee was again convened, this time as the National Commission for the Strengthening of Justice ("NCSJ").²⁹⁵

Helen Mack, a member of the NCSJ has stated that however well intentioned the NCSJ is, it has had only limited success.²⁹⁶ In addition to trying to tackle the formidable structural problems in the criminal justice system, the NCSJ has had trouble reaching consensus about

288. Leal Interview, *supra* note 279.

289. *Id.*

290. *Id.*

291. Romero Interview, *supra* note 287.

292. *Agreement on the Strengthening of Civilian Power*, *supra* note 53, at preamble, art. IV(15).

293. *See id.*; *see also* Justice Barrera Interview, *supra* note 14.

294. *See Agreement on the Strengthening of Civilian Power*, *supra* note 53, at preamble, art. IV(15).

295. *See id.*

296. *See* Mack Interview, *supra* note 14. Helen Mack was one of two individuals serving on the Committee and related the difficulties facing the Committee to the delegation. *See id.*

its initiatives.²⁹⁷ All but two of the members of the NCSJ are selected from particular institutions and regard their role as representative of their institutions' interests.²⁹⁸ Many members claim that they need approval from their institution before they can approve a proposal within the NCSJ.²⁹⁹ These tactics serve to stall progress in the NCSJ, thus slowing down the reform process.³⁰⁰

The second problem related to coordinating resources, the lack of capacity to absorb resources, is illustrated by the example of the Ministerio Público reportedly spending only seventy percent of its entire budget last year.³⁰¹ The Ministerio Público could have used the other thirty percent of its budget but apparently lacks the capacity to deploy the resources, including the international technical assistance it receives. The lack of absorptive capacity in the Ministerio Público is the result of inefficiency and the lack of a coordinated policy to address crime in Guatemala.³⁰²

c. Recommendations

Guatemala's inadequate tax base and poor tax collection mechanisms affect all institutions of government. Greater resources would improve the functioning of all such institutions as long as those institutions can absorb those resources.³⁰³ With respect to the judiciary, however, the budget should be fixed at a higher level to reduce political influence and adequately fund courts in both the city and the countryside.

In addition to providing adequate funding, the State needs to coordinate those funds and other resources in a timely manner so that they can be deployed effectively to improve the criminal justice system. Although the NCSJ may serve as a mechanism for coordinating resources among the institutions in the criminal justice system, the

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. Ferrigno Interview, *supra* note 191.

302. Hendrix Interview, *supra* note 214.

303. Ferrigno Interview, *supra* note 191; *see also* Hendrix Interview, *supra* note 214.

institutional entrenchment of its members must first be addressed. Charging a well-functioning NCSJ with the administration of all international aid would help eliminate waste and the problems related to absorptive capacity. It would also assist in coordinating the State's institutions.

With respect to the massacre cases, the problems of coordination may best be dealt with by the establishment of a war crimes unit within the Ministerio Público. The creation of such a unit would provide relief to local departmental prosecutors. This would be especially helpful for rural prosecutors who often lack both the resources and technical capacity to prosecute those crimes. Members of the war crimes unit would receive special training in both international and domestic law governing such crimes. The unit would need its own prosecutors, investigators, security personnel, and perhaps forensic experts, although forensic reports that conform to international standards are already on file in many departmental court houses and prosecutors' offices.³⁰⁴

5. *The Inappropriate Classification of Military Secrets*

Another way the State is failing to comply with its legal duty to investigate and provide an effective remedy in the massacre cases involves the definition of "military secrets." The military, including its intelligence agencies, has used the excuse of protecting military secrets as a pretext to deny investigators basic information regarding military units that operated near the sites of the massacres and that may have been perpetrators of those human rights violations.³⁰⁵ As a

304. See Interview with Lic. Mariana Valdezón, Founder of the Fundación de Antropología Forense de Guatemala [Foundation for Forensic Anthropology of Guatemala], and Director of the Equipo de Antropología Forense de la ODHA [Forensic Anthropology Team of the ODHA], in Guat. City, Guat. (Mar. 20, 2000) [hereinafter Valdezón Interview] (on file with author). Lic. Valdezón stated to the delegation that due to the intensive training received in forensic anthropology by different local archeologists conducting exhumations, nearly all the reports currently submitted comply with the Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions ("Minnesota Protocol"), promulgated by the U.N. Manual. See U.N. MANUAL, *supra* note 38 (emphasizing the need for developing and adopting international standards for the investigation of deaths in countries where extra-legal, arbitrary, and summary executions are alleged to have occurred).

305. See Interview with Lic. Alejandro Sánchez, Staff Attorney, Fundación

result, the investigations have regularly broken down before reaching the culpable military personnel.³⁰⁶ The military's definition of military secrets does not appear to have any limits. It is not one that legitimately can be defended as protecting military secrets while simultaneously adhering to the constitutional requirement that officials be legally responsible for their official conduct.³⁰⁷

a. Military Culpability in the Massacre Cases

The CEH has determined that the army, either acting by itself or in collaboration with other forces, was responsible for eighty-five percent of all human rights violations and acts of violence registered in the internal conflict.³⁰⁸ REMHI has determined that 422 massacres took place during the internal conflict, with an estimated 14,000 victims.³⁰⁹ Reports implicate the Army in 90.52 percent of the massacres,³¹⁰ yet not a single commissioned military officer has ever been indicted, let alone prosecuted for a role in the massacres.³¹¹ The abuse of the military secrets justification by the military and its intelligence agencies is a significant reason for the continuation of impunity in the massacre cases.³¹²

Myrna Mack, in Guat. City, Guat. (Mar. 11, 2000) [hereinafter Sánchez Interview] (on file with author); see also Interview with Lic. Victor Moreira, Deputy Director of the Secretaría de Análisis Estratégico, in Guat. City, Guat. (Mar. 16, 2000) [hereinafter Moreira Interview] (on file with author).

306. See Sánchez Interview, *supra* note 305.

307. See GUATEMALAN CONSTITUTION, *supra* note 46, art. 154 (providing that "officials are depositories of authority, legally responsible for their official conduct, subject to the law and never above it.").

308. *Guatemala: Memory of Silence*, *supra* note 9, at II.82.

309. See REMHI REPORT, *supra* note 1, at 134 (defining massacre as the "collective murders associated with community destruction"). The total number of murders, however, may be as high as 18,000 if the disappeared are also included. See *id.*

310. See *id.* (estimating that fifty-five percent of the military forces deemed responsible for the massacres acted alone).

311. See LaRue Interview, *supra* note 16.

312. See Moreira Interview, *supra* note 305; see also FUNDACION MYRNA MACK, SECRETO DE ESTADO [STATE SECRET] 6 (Ariel Garrido ed. 1999).

b. Lawmaking and Military Secrets

The Guatemalan Constitution requires that government records be available to the public, except when the records involve military or diplomatic matters concerning national security.³¹³ The Constitution does not define the parameters of national security matters, also referred to as “military secrets.”³¹⁴ Although Congress has the authority to define the term “military secrets” more precisely, it has not passed a law on this matter to date.³¹⁵ Instead, the Ministry of Defense and the *Departamento de Información y Divulgación del Ejército* (“DIDE”), the public information office of the Army, have traditionally controlled the parameters of that term.³¹⁶

In addition, Congress has not passed a law on declassification of State-controlled information.³¹⁷ Once classified as a military secret, information may be shielded indefinitely. Declassification would allow the State to release basic information about past locations, functions, and personnel of military units that is material to the prosecution of the massacre cases. At the present time, Guatemala does not

313. See GUATEMALAN CONSTITUTION, *supra* note 46, at art. 30. According to Colonel Douglas Barrera Guerra, the officer in charge of the Departamento de Información y Divulgación del Ejército (“DIDE”) [Army Chief of Information and Dissemination], the Army’s public information office, the Army’s policy is to respond to requests for information by the Ministerio Público within twenty-four hours. See Interview with Colonel Douglas Barrera Guerra, in Guat. City, Guat. (Mar. 16, 2000) [hereinafter Col. Barrera Interview]. Colonel Barrera added that the army destroys its files every ten years, so it no longer possesses information on the massacre cases sought by the Ministerio Público. See *id.* Colonel Barrera also noted that until recently the army did not maintain many written records. He suggested that the oral tradition comes from the indigenous roots of the Army. See *id.*

314. See GUATEMALAN CONSTITUTION, *supra* note 46, art. 30. In a country under a common law system, the Judicial branch as interpreter of the law would more precisely define a general term in a constitution. See BLACK’S LAW DICTIONARY 276 (6th ed. 1990). Under Guatemala’s civil law system, however, Congress rather than the Judicial branch has this authority. See Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43 LA. L. REV. 45, 45-46 (1982).

315. See Mack Interview, *supra* note 14 (suggesting the judiciary should control the definition of military secrets).

316. See *id.*; see also FUNDACION MYRNA MACK, *supra* note 312, at 10-11. According to Col. Barrera, however, each ministry sets its own policy as to what constitutes a military secret. See Col. Barrera Interview, *supra* note 313.

317. See FUNDACION MYRNA MACK, *supra* note 312, at 24-25.

have a declassification policy of any kind.³¹⁸

This lack of legal definition of “military secrets,” as well as the lack of a declassification policy, has had an important impact on the prosecution of the massacre and other cases. For instance, the Defense Ministry, and in particular the *Estado Mayor Presidencial* (“EMP”), the State security apparatus,³¹⁹ used protection of military secrets as an excuse not to provide information in the Myrna Mack murder case.³²⁰ In the investigation into the EMP superiors who allegedly ordered the killing, the prosecution asked the military for basic information such as vehicle and events logs of the EMP.³²¹ The military withheld the information on the grounds that it constituted military secrets,³²² and the Judicial branch refused to compel the military to cooperate.³²³ Due to this and other obstructions of justice the Ministerio Público has been unable to successfully prosecute the intellectual authors of the Mack murder.³²⁴

At other times, the military has simply refused to respond to requests for information without formally invoking the military secrets pretext. For example, in the Cuarto Pueblo case a prosecutor wrote to the Defense Ministry seeking basic information about military personnel at a military base in the area where military helicopters allegedly participated in a massacre of approximately 300 people.³²⁵ The Defense Ministry reportedly stonewalled the prosecutor’s repeated requests for information before finally responding that the military

318. See Moreira Interview, *supra* note 305.

319. See REMHI REPORT, *supra* note 1, at 105, 107-08 (discussing the Army’s control of the *Estado Mayor Presidencial* (“EMP”), the State security apparatus).

320. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 87, § 2, at 5-6 (discussing Helen Mack’s failed attempts to gain access to shielded information, upheld by domestic courts as military secrets).

321. *Id.* at 6.

322. See *id.* (discussing the need for information in understanding the EMP’s organizational structure and practices).

323. See *id.* (reviewing the judicial authority under the Criminal Procedure Code to review documents in camera to determine validity of military secret assertions but failure of judiciary to make such inquiries).

324. See *id.* (reporting the inability to gain redress in domestic forum).

325. See Ogáldez Interview, *supra* note 230.

base did not exist at the time of the massacre.³²⁶

c. The Role of Judges and Prosecutors

An additional problem related to the classification of military secrets involves judges' failure to exercise their power to review military secrets in confidence. Under the Guatemalan Constitution, all State organizations must provide judges the assistance they need to carry out justice.³²⁷ Furthermore, the CPP authorizes a presiding judge to review in confidence records withheld on grounds of military secrecy and to decide if such withholding is appropriate.³²⁸ A judge may also place the records in the court file on a confidential basis in order to make use of the information in the trial.³²⁹

In theory, this judicial authority provides a check on the expansive definition of military secrets. Nevertheless, although judges have such authority in relation to the military, they often do not employ it because they fear retaliation from military personnel.³³⁰ In the *Myrna Mack Case*, the Judicial branch did not compel submission of the EMP records even though this method of confidential review was available.³³¹ This may be due to the intimidation of judges in cases involving military personnel. For instance, the judge in Cubulco, Baja Verapaz was kidnapped for a day, apparently in order to pressure him to be lenient with the military and PAC perpetrators of the Rio Negro and Plan de Sánchez massacres.³³²

Prosecutors may also be reluctant to aggressively seek information from the military regarding ostensible military secrets. For example, one special prosecutor who subpoenaed high-ranking military personnel to testify in the Dos Erres massacre case subsequently lost his job when the Attorney General refused to renew his appointment.³³³

326. *See id.*

327. GUATEMALAN CONSTITUTION, *supra* note 46, art. 203.

328. CÓDIGO PROCESAL PENAL, *supra* note 48, art. 244.

329. *See id.*

330. *See* Justice Barreda Interview, *supra* note 14; *see also* Mack Interview, *supra* note 14.

331. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 87, § 2, at 6.

332. *See* Menéndez Interview, *supra* note 89.

333. *See* Mélgar Telephone Interview, *supra* note 111; *see also* Farfán Inter-

d. Recommendations

The State can address its failure to comply with its legal duty under international and domestic law to provide timely justice in the massacre cases by defining the parameters of “military secrets.”³³⁴ In compliance with the Peace Accords, Congress should pass a statute clearly defining that term.³³⁵ By doing so, the State can also meet its obligation under Article 203 of the Constitution, which requires State organizations to provide the judiciary with the assistance it needs to do its job.³³⁶ Defining military secrets, combined with adhering to the CPP Article 244 provision permitting confidential review of military documents by a judge, will allow the State to appropriately balance national security concerns with its obligation to provide justice.

The president must fulfill his or her constitutional mandate to execute any law passed by Congress³³⁷ and ensure that the Defense Ministry, including the military, obeys it. The president has further authority to ensure compliance through his or her role as supreme commander of the armed forces.³³⁸ Once the Defense Ministry, including the EMP, has clear instructions on what constitutes a military secret, it will be obliged to turn over non-secret material information concerning specific massacre cases to the Judicial branch. That information will then be available in open court or to the judge in confidence, depending on the nature of it.

The State can also address its failure to comply with its legal duty under international and domestic law to provide timely justice in the massacre cases by enacting legislation on declassification of State-controlled information. The Peace Accords call on Congress to carry out this task.³³⁹ A declassification policy would help make material

view, *supra* note 112.

334. See Mack Interview, *supra* note 14; see also FUNDACION MYRNA MACK, *supra* note 312, at 24-25.

335. See also *Agreement on the Strengthening of Civilian Power*, *supra* note 53, at IV.E.52(b) (stating need for a law regulating the classification, declassification, and access to military information).

336. GUATEMALAN CONSTITUTION, *supra* note 46, art. 203.

337. *Id.* art. 183(a); see also *id.* art. 183(e) (requiring the President to “approve, promulgate, execute, and cause the execution of the laws”).

338. *Id.* art. 183(c).

339. See *Agreement on the Strengthening of Civilian Power*, *supra* note 53, at

information available to the victims and their families in massacre cases.³⁴⁰ It would allow the State to release basic information about past locations, functions, and personnel of military units, for example, that is material to the prosecution of the massacre cases.

The *Secretaria de Analisis Estrategico* (“SAE”), the Secretariat of Strategic Analysis for the Office of the President, the recently restructured civilian intelligence service, is working on a definition of military secret and a policy for declassification.³⁴¹ SAE Deputy Director Victor Moreira noted, however, that those policies will only govern the activities of the SAE.³⁴² The Ministry of Defense, including the military and intelligence agencies, reportedly possess information vital to the prosecution of the massacre cases and should be required to adopt commensurate policies to ensure that information is available to the prosecutors.³⁴³

6. *Misuse and Failure to Utilize Procedural Mechanisms*

Through the misuse of, and failure to utilize, legal procedural mechanisms, the State further fails to comply with its legal duty to investigate and provide an effective remedy in the massacre cases. The Ministerio Público and members of the judiciary appear to misuse several procedural tools to significantly delay or deter the investigations and prosecutions of those responsible for the massacres. They misuse procedure through formalism—using the pretense of applying laws and procedures to ultimately undermine the effective prosecution of massacre cases.³⁴⁴ For victims and their families, this formalism prevents effective use of the system by creating impediments in filing cases and pursuing investigations in massacre cases.³⁴⁵

III.8-11.

340. See Moreira Interview, *supra* note 305.

341. *Id.*

342. *Id.*

343. See DOS REPORT, *supra* note 4, at 772 (detailing existence of the “military diary,” an alleged military intelligence dossier recording the military’s abduction, torture, and killing of Guatemalans during the period 1983-1985).

344. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *supra* note 76, at para. 48.

345. See Interview with Lic. Nery Rodenas, Coordinator of ODHA, in Guat. City, Guat. (Mar. 16, 2000).

Although the strict adherence to these procedures creates the appearance of conformity with the law, the way in which the procedures are applied prevents the timely administration of justice.

This adherence to formalism contributes to extensive delay in the justice system. It may take years from the filing of the complaint to the beginning of the investigation and exhumation procedure.³⁴⁶ In the Rio Negro case, five years elapsed from the filing of the complaint to the beginning of the exhumation, and an additional five years went by before the beginning of the trial.³⁴⁷ The Pichec massacre case only recently began the exhumation phase, over five years after the complaint was filed, and a trial is not likely to begin in the near future.³⁴⁸ These cases, like most of the massacre cases, come from incidents that occurred in the mid-1980s, meaning that the investigations were begun at least a decade after the killings.³⁴⁹ Both Rio Negro and Pichec are examples of investigations that began after a victim or witness filed a complaint, but complaints have not been filed in most cases. Despite knowledge and evidence of past crimes, the Ministerio Público has failed to accept its responsibility to investigate cases and pursue investigations where they have not received specific complaints.

a. Failure to Efficiently Process Amparo Challenges

Some of the delay in massacre cases is attributable to the use of the *amparo*, a special appeal that defendants can raise at any time during the case.³⁵⁰ These appeals must be based on constitutional grounds, and serve to protect the constitutional rights of the defendant.³⁵¹ The defendant may file the *amparo* at any time during the

346. See de Leon Interview, *supra* note 195.

347. See Rio Negro case file (on file with Crowley International Human Rights Program, Fordham University School of Law).

348. See Pichec case file (on file with Crowley International Human Rights Program, Fordham University School of Law).

349. See *supra* note 6 and accompanying text.

350. La Ley de Amparo, Exhibición Personal y de la Constitucionalidad, Decreto 1-86, art. 8.

351. *Id.*

trial to challenge the constitutionality of a trial court's decision.³⁵² It is heard by the Court of Appeals, and may be appealed further to the Supreme Court, and then to the Court of Constitutionality.³⁵³ While the *amparo* provides an important protection for defendants' constitutional rights, the process is very time consuming. Since the *amparo* must be resolved before the case can proceed, its misuse is criticized as one method by which defendants may slow their proceedings and delay final justice.³⁵⁴

The method by which the courts handle *amparo* challenges is lengthy, adding significant delays during trial.³⁵⁵ Because the *amparo* proceeding may be raised at any time during trial or appeal, these delays compound the frustration of timely justice.³⁵⁶

b. Identification of Victims

Another source of delay in the massacre cases is the Ministerio Público's insistence on identifying victims before investigating or prosecuting massacre cases.³⁵⁷ The Ministerio Público reportedly lacks the technical resources and training to identify victims itself.³⁵⁸ In addition to a lack of resources for identifying victims, the Ministerio Público faces difficulty in identifying victims because of a lack of medical records and DNA testing capability.³⁵⁹ Despite the difficulty in identifying victims, some prosecutors will only pursue an investigation if the victims have been positively identified.³⁶⁰

Lic. Mynor Eliséo Ogáldez, the District Attorney in Alta Verapaz responsible for the prosecution of the Cuarto Pueblo massacre, highlighted this reluctance to prosecute without positive identification of

352. See Mélgar Telephone Interview, *supra* note 111.

353. *Id.*

354. See MINUGUA SIXTH REPORT, *supra* note 20, § IV, para. 70.

355. See *id.* (criticizing judges for allowing remedies that inevitably delay proceedings).

356. See *id.*

357. See Meurth Interview, *supra* note 191.

358. *Id.*

359. *Id.*

360. See Ogáldez Interview, *supra* note 230.

victims.³⁶¹ The identification of the bodies of Cuarto Pueblo massacre victims is difficult because the perpetrators burned the bodies beyond recognition. According to Lic. Ogáldez, he cannot prosecute the Cuarto Pueblo massacre without identification of the victims.³⁶² He stated, "Guatemala . . . civil registrations records . . . legally prove a person's status [as dead or alive]. Because no one killed in the Cuarto Pueblo massacre was identified, they are all still legally alive."³⁶³ Lic. Ogáldez asserted that he did not bother to pursue the investigation because the courts would not accept a prosecution for a murder of person who is still legally alive.³⁶⁴ Other prosecutors, like Lic. Ogáldez, use this reasoning when explaining to victims and their advocates why massacre cases have not proceeded.³⁶⁵

Prosecutors have not pursued cases in which as many as 1,000 bodies were found in a mass grave if those bodies could not be positively identified, even when overwhelming evidence from other sources, including eyewitness testimony and forensic evidence supports the murder charge.³⁶⁶ For example, in the Rio Negro case the defendants were convicted of murdering only two people because those two victims were the only two out of the 250 victims of the massacre who were identified. No one was convicted of the other murders.³⁶⁷

Identification is a lengthy process, and the Ministerio Público has insufficient resources for that process.³⁶⁸ Thus, the formalistic insistence on identifying victims despite overwhelming evidence of massacres impedes progress in the massacre cases, and is unnecessary in light of the other evidence available to the Ministerio Público. Con-

361. See *supra* Part IV.B.3; see also Meurth Interview, *supra* note 191.

362. See Ogáldez Interview, *supra* note 230.

363. *Id.*

364. *Id.*

365. See Seils Interview, *supra* note 2; see also Ménem Interview, *supra* note 170; Meurth Interview, *supra* note 191.

366. See Ménem Interview, *supra* note 170.

367. See Rio Negro case file (on file with Crowley International Human Rights Program, Fordham University School of Law).

368. See *supra* Part III.B.4.b (explaining how inadequacy of financial and technical resources impedes proper prosecution and remedies); see also Meurth Interview, *supra* note 191.

tinued insistence on identification before proceeding with investigation and prosecution, if sufficient additional evidence exists, violates the right to an effective remedy provided for under international law.³⁶⁹

c. Certification of Conviction

The requirement of a certification of conviction from the Execution of Sentence Court, the court that oversees the final step in a conviction, is another opportunity for delay after a conviction is obtained. The certification of conviction is issued by the Execution of Sentence Court as the final procedure before a guilty party is incarcerated.³⁷⁰ While the certification of conviction does not impede the prosecution of a defendant, prosecutors sometimes delay prosecution of other defendants until the court certifies the sentence of the first defendant. This poses a particular problem in the massacre cases; the delay from the initial charge to final judgment can be many years, during which time witnesses and other evidence may become unavailable.

A case is turned over to the Execution of Sentence Court only when the appeals process is exhausted.³⁷¹ This court does not impose a sentence, but supervises the sentence of the trial court. The Execution of Sentence Court enforces the correct length of sentence and handles complaints about prison conditions.³⁷² While the supervision of the sentence is an important protection for the defendant, the actual imposition of the sentence by the Execution of Sentence Court is a mere formality since the sentence has already been imposed by the trial or appeals court.³⁷³

The Rio Negro case provides an example of how prosecutors may have misused the certification process. Many of the defendants who were named in the initial complaint are still in the military and could be easily found. Despite obtaining three convictions in that case, the

369. See *supra* Part II.A.1 (discussing the various international treaties that require Guatemala to provide adequate remedies for violations of the right to life).

370. See *CÓDIGO PROCESAL PENAL*, *supra* note 48, arts. 492-505.

371. See *id.*

372. See *id.*

373. See *id.*

prosecutor has not proceeded against other defendants, claiming that a certification of conviction must first be obtained from the Execution of Sentence Court.³⁷⁴ In fact, the CPP does not require certification of conviction before other defendants can be prosecuted.³⁷⁵ By incorrectly suggesting that further prosecutions cannot take place until all the appeals have been exhausted and the sentence has been certified, the courts are further delaying the prosecution of the higher-level participants. This continued impunity constitutes the State's failure to comply with its legal obligations. If this practice of requiring a certification of conviction continues, the likelihood of obtaining high-level convictions of those responsible for the massacres will be further diminished.³⁷⁶

d. Plea bargaining

Plea bargaining represents a potentially useful procedural tool for obtaining convictions in massacre cases. But prosecutors have used plea bargaining in only one of the massacre cases to date,³⁷⁷ and have failed to bring the intellectual authors of massacres to justice. By failing to use plea bargains, prosecutors forfeit an important opportunity to secure cooperation agreements of low-level actors that would allow the use of testimony essential for convictions of high-level perpetrators and intellectual authors.

Part of the reluctance to use plea bargaining may result from the historical prohibition on the practice.³⁷⁸ Plea bargaining was not contemplated under the former penal procedure code. The code was revised in 1994 to permit plea bargaining in some cases.³⁷⁹ Despite the change in law, however, there has not been any significant plea bargaining in massacre cases.³⁸⁰

Article 25 of the CPP outlines the situations in which plea bar-

374. See Técu Interview, *supra* note 98.

375. See generally CÓDIGO PROCESAL PENAL, *supra* note 48.

376. See Técu Interview, *supra* note 98.

377. See *supra* note 139 and accompanying text; see also *infra* notes 386-394 and accompanying text.

378. See Menéndez Interview, *supra* note 89.

379. See CÓDIGO PROCESAL PENAL, *supra* note 48, art. 25.

380. See Sánchez Interview, *supra* note 305.

gaining may be used.³⁸¹ While it does prohibit plea bargaining in some situations for certain defendants, it does not categorically prohibit the practice.³⁸² Because Guatemala lacks any national legal doctrine on plea bargaining,³⁸³ prosecutors sometimes intentionally narrowly interpret Article 25 of the CPP to avoid plea bargaining to secure the convictions of high-level military perpetrators or intellectual authors.³⁸⁴ For prosecutors who are the targets of intimidation or corruption, or for those who simply lack the political will, the claim that plea bargaining is not available provides a convenient excuse for not prosecuting those responsible for the massacres.³⁸⁵

The first plea bargaining agreement in a massacre case occurred in the year 2000 with the Dos Erres case in the department of Peten.³⁸⁶ Two *Kaibiles*, non-commissioned special-forces soldiers, who allegedly guarded the perimeter for the military unit involved but did not directly participate in the killings, offered their testimony in return for asylum.³⁸⁷ On March 17, 2000, the two former soldiers testified in a closed hearing before the Judge of the First Instance of San Benito, Peten.³⁸⁸ In the presence of the judge, the special prosecutor, the plaintiff's prosecutor, and a public defender, they provided detailed testimony of the massacre and its participants.³⁸⁹

Each witness gave his uninterrupted testimony and was then ques-

381. See CÓDIGO PROCESAL PENAL, *supra* note 48, art. 25.

382. *See id.*

383. *See Hendrix, supra* note 11, at 400 (asserting that Guatemala lacks legal doctrine, case law or Latin American comparative law on plea bargains).

384. *See Mélgar Telephone Interview, supra* note 111.

385. *Id.*

386. *See generally* Leal Interview, *supra* note 279.

387. *Id.*

388. *See* Dos Erres Witness Interview, *supra* note 139.

389. *See* Leal Interview, *supra* note 279. Under Article 348 in the CPP, in special circumstances anticipatory evidence can be provided in a pre-trial hearing. *See* CÓDIGO PROCESAL PENAL, *supra* note 48, art. 348. This procedure is usually reserved for circumstances where the witness is unable to attend the trial. In the case of Dos Erres, however, the witnesses believed their lives would be in danger if they testified during the actual trial. The prosecutor admitted that it would be difficult to guarantee the safety for them and their families and thus requested the anticipatory evidence hearing. *See* Leal Interview, *supra* note 279.

tioned by the prosecutor, private prosecutor, and public defender.³⁹⁰ The witnesses named defendants, both soldiers and commissioned officers, as participants in the killings.³⁹¹ As a consequence of this “anticipatory evidence,” the prosecutor requested, and the judge issued, arrest warrants. Currently, the PCN is in the process of executing these warrants.³⁹²

Plea bargaining in massacre cases is controversial. Some victims groups oppose offering leniency to anyone involved with such atrocities.³⁹³ Reportedly, however, many victims feel that the true target of prosecutions should be the intellectual authors and the commanders who carried out the orders, and that lesser sentences for rank-and-file soldiers and civil patrollers would be an acceptable trade-off.³⁹⁴ The plea bargaining in the Dos Erres case serves as an example of the potential benefits of such a compromise.

e. Recommendations

An effective criminal policy adopted by the State would help address the specific problems highlighted above, and the endemic problems within the system. The adherence to formalism in the justice system that impedes effective resolution of the massacre is the result of a failure to address the systematic problems through executive attention. The State must establish effective policies that address the delays in the system, and make those policies clear to every level of the criminal justice system.

In order to address the significant delays in the massacre prosecutions, Guatemala must increase the efficiency of the court process. One possible solution is to definitively include massacre cases in the jurisdiction of the regional courts recently established to deal with high-level crimes and narcotics trafficking. Jurisdiction alone is not

390. See Dos Erres Witness Interview, *supra* note 139. The public defender’s participation is required to protect as much as possible the rights of the potential defendants who might be named during the hearing. See Leal Interview, *supra* note 279.

391. See Dos Erres Witness Interview, *supra* note 139.

392. See Leal Interview, *supra* note 279.

393. See Interview with Grupo de Apoyo Mutuo (“GAM”), in Guat. City (Mar. 17, 2000) [hereinafter GAM Interview] (on file with author).

394. See Técu Interview, *supra* note 98.

enough, however. The judges and prosecutors in these courts should be given special training on the law specific to massacre cases and on methods for handling complex cases.

Although the *amparo* is an important protection for defendants, and is protected by the Constitution, the use of the *amparo* by defendants slows down the legal system, which impedes timely resolution of the massacre cases. The procedure governing *amparo* appeals should be re-evaluated in light of the significant delays it causes in the judicial process. The process should be streamlined to facilitate the timely resolution of spurious constitutional challenges.

In massacre cases, the Ministerio Público should initiate prosecutions where there is sufficient evidence of a crime committed, even when the victims have not been identified. The adherence to formalism concerning identification is unnecessary in light of the other evidence available to the Ministerio Público. Although not necessary for prosecution, the Ministerio Público should commit more resources to forensic investigations to ensure identification of the victims both to speed prosecutions and to provide truth for the victims.

The Attorney General should formally issue guidelines to his or her prosecutors explaining the legality of pursuing subsequent defendants prior to obtaining a certification of conviction for the initial defendants.³⁹⁵ Furthermore, the Attorney General should explicitly inform prosecutors that this policy applies to all crimes, including massacre cases. Local prosecutors should pursue the investigation and prosecution of every person named in a complaint, as required by law.

Finally, plea bargaining should be used as a tool in the prosecution of other massacre cases, as it was in the Dos Erres massacre case. The Ministerio Público should use plea bargains to the extent that they are offered to secure convictions of those ultimately responsible for these crimes, the practice should be pursued by the Ministerio Público generally, and in particular by those local prosecutors who have the opportunity to get valuable testimony through cooperation

395. See Ley Orgánica del Ministerio Público, Decreto Número 40-94, passed May 2, 1994, amended by Decreto Número 135-97, passed Dec. 10, 1997, art. 11 (providing the Attorney General with the ability to issue guidelines to all prosecutors and other officials under his authority).

agreements. The Ministerio Público should develop specific plea bargaining policies for local prosecutors, clarifying both the legality of the practice under Article 25 of the CPP, and specifying which cases should make use of the practice to facilitate the conviction of the highest-level perpetrators.

IV. SUMMARY OF RECOMMENDATIONS

A. RECOMMENDATIONS TO ADDRESS OBSTACLES TO JUSTICE

This report identifies six specific obstacles that prevent the State from providing timely justice in the massacre cases: intimidation; corruption; incompetence; resource management/lack of resources; the lack of a definition for the term “military secrets;” and the misuse and failure to utilize procedural mechanisms. While the obstacles have been categorized as separate and mutually exclusive problems, in reality they overlap and interact with each other in a variety of ways.

1. Intimidation

- The Ministerio Público should address intimidation of judicial actors by providing better security to them as required under the Protection of Judicial Actors Law. The Ministerio Público claims that this decree has not been implemented due to lack of funding. It is the responsibility of the Ministerio Público to implement the programs and request funds from Congress.

- The Executive and Legislative branches should support protection of judicial actors by fully funding the Protection of Judicial Actors Law. International funding for this program would help reduce these threats and intimidation.

- The judiciary should complement these steps by implementing its own security initiatives to ensure the safety of judicial actors.

- The Ministerio Público should assume an aggressive policy of investigation and prosecution of those who threaten judicial actors.

2. Corruption

- The State should establish an independent body with investigative and prosecutorial powers to address corruption within the legal

system. That office should be empowered to take complaints directly from the public, and should include representation from civil society through private individuals or NGOs. Reports from this office should be public to ensure transparency.

- The Ministerio Público should confront corruption with vigorous investigation and prosecution. Otherwise, corruption will only continue to expand.

- The judiciary should implement strong internal review procedures for judges who abuse their positions.

- The State should undertake initiatives to diminish the influence of military personnel in the judiciary and the Ministerio Público who may have been involved in the massacres. The State should remove those former military actors who are not carrying out the functions of their office, or who are using their influence to affect the judicial process.

- The State should provide better protection for judges and prosecutors, and increased salaries, to ensure that the effects of corruption are minimized.

- Longer terms for judges should be provided in order to reduce or eliminate undue political influence.

3. *Incompetence*

- To address the problem of insufficient legal education, the Guatemalan Bar Association and the State should collaborate to modernize and standardize legal education, including graduation requirements. The recommendations to expand law school curricula put forth by the NCSJ, and adopted by the Universities of San Carlos and Rafael Landívar, should be extended to the other law faculties.

- To address the problem of incompetence in the judiciary, the Judicial branch should require additional education for all current judges analogous to that required in the school for new judges.

- A similar training program should be initiated for prosecutors. Training should focus on both investigative duties and courtroom responsibilities.

4. *Resource Management and Coordination/Lack of Resources*

- The State should increase its tax base and implement more effective enforcement mechanisms to ensure compliance with tax collection. Without additional money, the State will be constrained from implementing sustained reform in the justice system.

- The budgets of both the Ministerio Público and the judiciary should be increased so they can effectively handle their current caseload, in addition to massacre cases that may reach the courts in the future.

- The State should implement a comprehensive criminal policy to help target the areas in the system most in need of additional resources and address the problems of coordination of resources and absorptive capacity. The current NCSJ, previously discussed in relation to the need for a national criminal policy, is well-positioned to develop this policy, and should be given the mandate to do so.

- The Ministerio Público should establish a well-trained and fully funded war crimes unit to handle massacre cases. This unit would allow the prosecutors to more effectively investigate and prosecute the massacre cases.

5. *Definition of Military Secrets and Declassification*

- Congress should develop a law defining “military secrets” in order to facilitate access to material information that the military possesses about the massacres.

- The President must then execute such a law enacted by Congress and ensure that the Defense Ministry, including the military, obeys it.

- The judiciary should exert its powers under Article 244 of the CPP, which allows the court to conduct confidential reviews of sensitive materials. This would make material evidence available in the massacre cases, while recognizing national security concerns.

- A declassification procedure should be established by law to facilitate efforts by judicial actors to obtain information from the State in general and the Ministry of Defense specifically. This would be particularly useful in efforts to establish intellectual authorship in the massacre cases. That law should include procedures that allow private citizens to access that information.

- The Ministry of Defense should be required to adopt the SAE declassification policies to ensure that military information is available to the prosecutors.

6. *Misuse and Failure to Utilize Procedural Mechanisms*

- The State should adopt a comprehensive criminal policy to ensure effective and efficient prosecution of the massacre cases.

- The Ministerio Público should carry out its responsibility to initiate investigations and prosecute the massacre cases. The Ministerio Público should correct the institutional tendency to wait for victims to initiate prosecutions and, instead, initiate investigations itself.

- While the process of *amparo* is an important constitutional protection, the mechanism for handling *amparo* appeals should be streamlined, so that the constitutional challenges do not derail timely justice.

- The judiciary should make clear that the massacre cases fall within the jurisdiction of the proposed special narcotics and high-level crimes courts.

- To the extent that plea bargains are offered to secure convictions of the intellectual authors of the massacres, plea bargains should be pursued by the Ministerio Público. In particular, local prosecutors who have the opportunity to get valuable testimony through cooperation agreements should use this important tool.

B. CONCLUSION

Under international and domestic law, Guatemala has an obligation to investigate and provide an effective remedy in the massacre cases. The State has failed to comply with that duty largely because of the six obstacles to justice described above. The recommendations discussed in this Report cannot be effective, however, unless the State develops the political will to provide timely justice in the massacre cases. New developments in Guatemala have the potential to advance the massacre cases, but their success in doing so still remains to be seen.

V. PERSPECTIVES FOR THE FUTURE: RECENT DEVELOPMENTS THAT COULD AFFECT PROSECUTION OF THE MASSACRE CASES

Upon assuming office in January 2000, President Alfonso Portillo announced a number of initiatives that could have important ramifications for the future resolution of the massacre cases. A significant portion of his inaugural address focused on human rights.³⁹⁶ President Portillo stated in his address that the Peace Accords are “State treaties.”³⁹⁷ This designation clarifies that the Accords are a contract between the State and the guerrillas, rather than only between the previous administration that signed them and the guerrillas.

President Portillo also promised to implement the recommendations of the CEH Truth Commission, including the establishment of a Peace and Harmony Foundation.³⁹⁸ The Foundation would oversee the implementation of the CEH recommendations. One year later, due in part to opposition from Congress, this foundation still had not been established.³⁹⁹ In his speech, the President also observed that in Guatemala, “a climate of structural impunity persists,” and that his government was committed to the “construction of a national justice system and the implementation of a consensual State criminal policy.”⁴⁰⁰ The President also announced that he would immediately initiate an investigation regarding the alleged role of state agents in the assassination of Bishop Juan Gerardi.⁴⁰¹

Even though the Ministerio Público is largely institutionally independent of the Executive branch, shortly after President Portillo’s inaugural speech, various arrests were made in the Gerardi case, including that of two military officers.⁴⁰² This could indicate that the

396. See Portillo’s Inaugural Address, *supra* note 56.

397. *Id.* at 10.

398. *Id.* at 13.

399. See Telephone Interview with Carmen Aida Ibarra, Myrna Mack Foundation, in Guat. City, Guat. (Jan. 25, 2001) (on file with author).

400. Portillo Inaugural Address, *supra* note 56, at 14.

401. See *id.* at 10.

402. See Elder Interiano et al., *Tres capturados por asesinato de monseñor Girardi* [Three Captured in the Murder of Monseñor Girardi], PRENSA LIBRE, Jan. 22, 2000 (on file with the authors) (reporting on the impact of these arrests after it

President's commitment to human rights had effects on the justice system. As of January 2001, according to COPREDEH, the trial of the two military officers was scheduled for late February.⁴⁰³

President Portillo made these commitments on other occasions as well, including during a private meeting with human rights NGOs in Washington, D.C. prior to his election, where he invited the human rights community to visit Guatemala and hold him accountable to these commitments.⁴⁰⁴ International human rights NGOs and foreign governments should accept President Portillo's invitation by sending delegations to further examine the progress of the massacre prosecutions. The domestic and international attention generated by visits to Guatemala could pressure its government to advance the massacre cases. This could also provide support for the judicial actors involved in the proceedings.

On March 3, 2000, Guatemala presented its offer of the friendly settlement at the IACHR.⁴⁰⁵ As discussed earlier, the offer contained three basic components: (1) an admission of State culpability; (2) a commitment to support domestic criminal proceedings against those responsible; and (3) an offer to negotiate reparations with family members of the victims.⁴⁰⁶ While the friendly settlement should be commended, it remains little more than a symbolic gesture until it bears fruit. Because neither the Ministerio Público nor the judiciary signed the agreement,⁴⁰⁷ they are arguably not directly bound by it.⁴⁰⁸

Even so, one Guatemalan human rights activist suggested that this international civil settlement might have positive effects on the domestic criminal prosecution of massacre cases.⁴⁰⁹ With respect to the

was believed that the investigation had come to a standstill).

403. Letter from Victor Hugo Godóy, President, COPREDEH (Feb. 1, 2001) (on file with the American University International Law Review).

404. See Interview with Alfredo Forti, Advisor to President Portillo, Guat. City, Guat. (Jan 17, 2000) (on file with author).

405. See Andres Oppenheimer, *Surprise: Praise for Guatemala*, MIAMI HERALD, Mar. 30, 2000, at 10A (reporting that the IACHR characterized the offer as "an example for the hemisphere").

406. See Farfán Interview, *supra* note 112.

407. See Godóy Interview, *supra* note 64.

408. *Id.*

409. See Farfán Interview, *supra* note 112.

Dos Erres massacre, some of the government's commitments under the friendly settlement were fulfilled as of December 2000. The government reiterated the State's responsibility,⁴¹⁰ and a commission was established to identify and compensate the victims of the massacre.⁴¹¹ Unfortunately, the most important procedural advances have yet to occur, since the arrest warrants were issued in March 2000.⁴¹²

Strong Executive branch support for the criminal proceedings could provide added impetus to resolve the massacre cases. In Guatemala, as in all democracies, constitutionally mandated separation of powers exists among the different branches of government,⁴¹³ but determined political will in the Executive branch reverberates throughout other branches of government. The president also has substantial influence over the various components of the State through the power to appoint and remove officials, and influence over budgetary matters.⁴¹⁴

As mentioned by the human rights organization FAMDEGUA, the friendly settlement presents both an opportunity and a challenge for Guatemalan human rights organizations.⁴¹⁵ Attention and publicity generated around the friendly settlement could have a positive impact on the massacre cases. While the CEH and REMHI reports received widespread public attention, neither report was an official admission of State culpability for the many massacres for which the State was held responsible. The admission of State responsibility could spark an increase in public interest and support for domestic prosecution of the massacre cases.

Domestic prosecutions may also move ahead due to the scheduled

410. *See* Informe General del Gobierno de Guatemala en Relación al Caso C.I.D.H. 11.681 Aldéa Las Dos Erres, [Guatemalan Government General Report Regarding the C.I.D.H. Las Dos Erres case 11.681], COPREDEH (2000).

411. *See id.*

412. *See id.*

413. *See* GUATEMALAN CONSTITUTION, *supra* note 46, arts. 157, 183 (establishing the functions of the Executive and Legislative branches of the Guatemalan government).

414. *See id.* art. 183(j) (providing that the President shall annually submit a budget to Congress for "expenditures of the State").

415. *See generally* Farfán Interview, *supra* note 112.

initiation of two regional tribunals this year,⁴¹⁶ one each for the western and eastern regions of Guatemala.⁴¹⁷ These regional tribunals will adjudicate cases involving murder, kidnapping, drug trafficking, robbery, and car theft.⁴¹⁸ It is unclear, however, whether the jurisdiction of the regional tribunals will extend to the massacre cases.⁴¹⁹ Justice Napoleon Gutierrez of Guatemala's Supreme Court of Justice stated that he is not sure whether the tribunals could adjudicate massacre cases, while the President of the Supreme Court stated that the tribunals would have jurisdiction over those cases.⁴²⁰

The regional tribunals will have safeguards to deal with at least four of the obstacles to justice in the massacre cases. First, the United States Embassy in Guatemala will assist the State with security measures for the protection of judicial actors; this should decrease threats.⁴²¹ Second, corruption and incompetence should be less of a problem because the judges, prosecutors, and their staffs will be carefully selected based on their past performance and integrity.⁴²² Third, the regional tribunals will have better technical resources than other prosecutorial offices and courts because they will be centralized and coordinated.⁴²³ Fourth, more financial resources will go to training and increased salaries.⁴²⁴ Thus, if the regional tribunals do in fact have jurisdiction over the massacre cases, and if they function according to their mandate, they are likely to be more effective in adjudicating massacre cases than courts of the first instance have been.

Another initiative under the new government that could contribute to the advancement of the massacre cases is the dismantling of the

416. See Justice Gutiérrez Interview, *supra* note 167.

417. *Id.*

418. *Id.*

419. *Id.*; see also Quezada Interview, *supra* note 145 (reporting that the President of the Supreme Court of Justice stated that these tribunals would have jurisdiction over massacre cases).

420. Quezada Interview, *supra* note 145.

421. Justice Gutiérrez Interview, *supra* note 167.

422. *Id.*

423. *Id.*

424. *Id.*

EMP and the Presidential General Staff, and the restructuring of the SAE.⁴²⁵ The EMP has long been regarded as the center of clandestine military intelligence and operations.⁴²⁶ By restructuring and demilitarizing the SAE, President Portillo proposes to establish something similar to a National Security Council—an institution that will provide the president with strategic analysis on major issues affecting governability.⁴²⁷ This distinguishes the restructured SAE from the former EMP, which often ordered, as opposed to advised, the president.⁴²⁸

The other primary objective of this initiative is to dismantle the infamous *archivo*, the military information center that spied upon, maintained illegal records on, and directed illegal actions against private citizens.⁴²⁹ A successful dissolution of the EMP could result in less interference by the military in the investigation and prosecution of massacre cases.⁴³⁰ As part of a larger project of demilitarization, the dismantling of the military intelligence apparatus could contribute to the strengthening of the rule of law in Guatemala.

When President Portillo's new civilian team took over the SAE offices, however, much of the files, computer disks, and other records were missing.⁴³¹ The director of the SAE, Edgar Gutierrez, filed a complaint with the Ministerio Público,⁴³² which opened an investigation that has yet to produce any results regarding the whereabouts of the missing files.⁴³³ If recovered, those files could contain information regarding the massacres themselves and the military's efforts to

425. See Alfonso Portillo *asumió la Presidencia* [Alfonso Portillo Assumes the Presidency], PRENSA LIBRE, Jan. 15, 2000 (on file with the authors).

426. See REMHI REPORT, *supra* note 1, at 107-08 (containing a detailed description and analysis of role of EMP).

427. See Moreira Interview, *supra* note 305.

428. See *id.*

429. *Id.*

430. See Mélgar Telephone Interview, *supra* note 111.

431. See *Secretaría de Análisis Estratégico Denuncia Anomalías Encontradas* [Secretariat of Strategic Analysis Denounces Found Anomalies], PRENSA LIBRE, Jan. 25, 2000 (on file with the authors).

432. See *id.*

433. See *Buscan archivos extraviados de varios casos* [Lost Files From Many Cases are Sought], EL PERIÓDICO, Jan. 27, 2000 (on file with the authors).

obstruct their investigations.⁴³⁴ The SAE's plan to establish a declassification policy, discussed above, could then open those files and facilitate future requests by prosecutors for information regarding military operations purportedly linked to the massacres cases.⁴³⁵

Despite these positive developments, commentators suggest that the massacre cases will never advance under President Portillo⁴³⁶ because the founder of his party, and current President of the Congress, is the former military dictator General Efraín Ríos Montt.⁴³⁷ Both the CEH and REMHI reports agree that when General Ríos Montt was in power, more human rights abuses were committed than at any other time in the course of Guatemala's thirty-six-year internal armed conflict.⁴³⁸ FAMDEGUA, which is acting as the private prosecutor in the Dos Erres massacre, has accused General Montt of being the intellectual author of that massacre.⁴³⁹ The former general has repeatedly denied any knowledge of the massacres that occurred while he was Chief of State, or has blamed the insurgency for the massacres.⁴⁴⁰

President Portillo's initiatives in the area of human rights could help to advance the massacre cases and spur judicial reform generally. The Portillo administration should be congratulated on these first steps, but also reminded that they are only a beginning. If these massacre cases move forward, that will be concrete advancement without precedent for this government. However, until these and other major human rights cases, such as the assassination of Bishop Gerardi, are resolved, the promise of President Portillo's first steps and good intentions will remain unfulfilled.

434. See Moreira Interview, *supra* note 305.

435. See *id.*

436. See generally Samayóa Interview, *supra* note 161; see also LaRue Interview, *supra* note 16.

437. See *Dieciocho años desde el Golpe de Ríos Montt*, [Eighteen Years Since the Ríos Montt Coup], EL PERIÓDICO, Mar. 23, 2000 (on file with the authors).

438. See generally *Guatemala: Memory of Silence*, *supra* note 9; see also REMHI Report, *supra* note 1 (describing the nature of the atrocities committed during the Guatemalan civil war).

439. See *En España Fueron Presentadas Otras Dos Querellas Contra Militares* [Two Demands Filed Against Military Personnel in Spain], PRENSA LIBRE, Jan. 29, 2000 (on file with the authors).

440. See *supra* note 437 and accompanying text.