



TILTED SCALES:

Social Conflict and Criminal Justice in Guatemala



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I. Executive Summary

Guatemala has made progress in the last decade addressing the legacy of thirty-six years of internal armed conflict, including by holding key actors responsible for atrocities.² However, the level of social conflict in Guatemala remains high in part because many of the issues that contributed to past discord remain unresolved. These issues include disputes over land titles and the exploitation of resources in historically indigenous territories. Social conflict has at times manifested in violence against both indigenous communities and individuals associated with business interests. In this setting, a wide variety of organizations – local and international, governmental and non-governmental – have reported a pattern of attacks, threats, and frivolous criminal charges against human rights defenders,³ specifically in the context of disputes over megaprojects⁴ in indigenous lands.⁵ These reports prompted the American Bar Association’s Center for Human Rights, Georgetown University Law Center’s Human Rights Institute and the Robert F. Kennedy Center for Justice and Human Rights to conduct a fact-finding mission in Guatemala to determine whether allegations of the misuse of the judicial system against human rights advocates were well founded. We interviewed government officials, civil society leaders, defense attorneys and community activists in Guatemala City from November 26-30, 2012.⁶ In addition, we reviewed court documents, official reports and press accounts concerning emblematic cases to evaluate the sufficiency of the evidence against defendants, the government’s response to credible threats against activists and the conduct of business personnel.

During the course of our visit, our team learned that despite the efforts of many justice sector personnel, the Guatemalan judicial system often does not effectively address, and in some instances exacerbates, social conflict. Attorney General Claudia Paz y Paz Bailey, who has led the Public Ministry (Prosecutor’s Office) since 2010, has been globally recognized for her strong stance against impunity and her willingness to prosecute prominent individuals for alleged crimes committed during the internal armed conflict. She has also sought to promote the rule of law by, *inter alia*, attempting to ensure that the use of force against protesters is not excessive. Despite the commendable efforts of Dr. Paz y Paz, some Public Ministry employees, namely local and rural prosecutors, are reported to pursue charges against human rights defenders (“defenders”) based on insufficient or incomplete information.

There is a generalized suspicion among non-governmental organizations that false charges are often brought against defenders by their opponents, such as companies managing megaprojects, their representatives, or powerful landowners, and that these charges are not always properly disposed of by the courts. Efforts to deal with serious crimes, including the murder of individuals perceived as opposing megaprojects, have not usually resulted in conclusive investigations. Among the Guatemalan human rights community, there is a widely-held belief that leaders have been convicted for misconduct committed by fringe elements of the protest movements without proof beyond a reasonable doubt. In two cases cited by local advocates, community leaders were convicted solely on the basis of witness testimony offered by

² See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2013: GUATEMALA (2013), available at <http://www.hrw.org/world-report/2013/country-chapters/guatemala>.

³ A human rights defender is defined as “every person who in any way promotes or seeks the realization of human rights and fundamental freedoms, nationally or internationally.” Inter-Am. Comm’n. H.R., *Second Report on the Situation of Human Rights Defenders in the Americas*, ¶12, OEA/Ser.L/V/II.Doc. 66 (Dec. 31, 2011). This definition includes but is not limited to community activists, members of civil society, attorneys and judicial officials. “The criterion used to identify whether a person should be considered a human rights defender is the activity undertaken by the person and not other qualities, such as whether or not they are paid for their work or whether or not they belong to a civil society organization.” *Id.* citing the Off. of the U.N. High Comm’r for Hum. Rts.

⁴ We use the term megaprojects to characterize a wide-range of activities, including the construction of hydroelectric dams, mining and other industrial projects.

⁵ UNIT FOR THE PROTECTION OF DEFENDERS OF HUMAN RIGHTS OF GUATEMALA (UDEFEQUA), Semesterly Report 3 (June 2011); Int’l Federation for Human Rights (FIDH), *Country Facts: Guatemala, Situation of Human Rights Defenders*, May 2011, available at http://www.fidh.org/-Guatemala,654-?id_mot=813 [hereinafter FIDH Country Facts]; PROCURADURÍA DE DERECHOS HUMANOS (GUATEMALAN HUMAN RIGHTS OMBUDSMAN’S OFFICE), *INFORME ANUAL CIRCUNSTANCIADO – RESUMEN EJECUTIVO* 2011 328 (Jan. 2012).

⁶ When expressly permitted and where applicable, we have indicated the names of interviewees and/or their organizational affiliation. Some interviews were conducted on a not-for-attribution basis.

police officers or relatives of the victims without supporting physical evidence.⁷ In addition to serious concerns about a pattern of criminalization,⁸ we learned that Guatemalan justice may also be compromised by an excessive use of pretrial detention; the failure to protect defenders, and delayed investigations of crimes

committed against them; targeted campaigns against judicial officers; and a failure on the part of international businesses to engage in constructive consultations with the local communities which are affected by their operations. The case synopses which are included in this report illustrate these patterns and themes.

II. Recommendations

a. To the Government of Guatemala:

- i. Respect and protect the rights of human rights defenders to peacefully protest and to be free from violence. Ensure that the military is not involved in activities to control demonstrations.
- ii. Ensure that threats and attacks against community leaders, protesters and corporate employees are promptly, thoroughly and impartially investigated, prosecuted and punished in accordance with the law.
- iii. Ensure that the authorities and third parties do not utilize the justice system to harass individuals and groups who are engaged in legitimate and lawful activities. Confirm that charges against human rights defenders are formulated with sufficient precision to conform with the principle of legality and that legal proceedings do not violate the presumption of innocence. Refrain from charging and prosecuting community leaders and other individuals merely on the basis of association or for acts of conspiracy not supported by evidence of criminal intent.
- iv. Authorize pre-trial detention only when strictly necessary to guarantee that the accused will not hinder a criminal investigation or evade justice, provided that there is prompt judicial review of the detention and sufficient evidence associating the accused with the alleged crime. Alternatives to preventative detention should always be considered.
- v. Strengthen law enforcement capacity to properly handle and preserve forensic evidence. Prosecutors should control investigations by police as required by law and arrive promptly at crime scenes to ensure proper handling of evidence.
- vi. To the fullest extent under the law, ensure public access to information regarding the status of complaints filed concerning alleged prosecutorial misconduct. Ensure that the criteria for archiving cases are public and decisions regarding whether or not to pursue investigations are justified in writing and filed.
- vii. Ensure that disciplinary proceedings against judicial operators are independent and removed from political considerations, and that disciplinary decisions are subject to independent review.
- viii. Fully implement protective orders for human rights defenders. Establish comprehensive protective measures for high-profile judges to ensure their safety and independence.
- ix. Effectively regulate extractive industry operations. Promote and facilitate peaceful, constructive dialogue between community and business leaders. Ensure that culturally and linguistically appropriate consultations are held with affected communities prior to permitting the development of megaprojects, in accordance with international human rights standards.⁹ Require the free, prior and informed consent of affected

⁷ UDEFEGUA report on Aberlardo Curup (2007) (reporting that the court summarily accepted the testimony of the victim's family members, notwithstanding the fact that they were unable to see the attacker's face, and rejected the defense's witnesses on the basis of unsubstantiated claims regarding their credibility) (on file with authors); UDEFEGUA report on Ramiro Choc and trial court judgment (2009) (indicating that activist leader who was attempting to mediate during an eviction was convicted of robbery solely on the basis of police testimony) (on file with authors).

⁸ Criminalization encompasses the manipulation of the organs of justice by the state or third parties for the illegitimate purpose of harassing or punishing a person for engaging in human rights-oriented activity. This includes, *inter alia*, filing spurious charges, opening groundless criminal investigations, fair trial violations, and any other forms of pressure or arbitrary action. See *Second Report on the Situation of Human Rights Defenders in the Americas*, *supra* note 3, ¶¶ 76-77.

⁹ See, e.g., Int'l Labor Org. Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 6, June 27, 1989, *ratified by Guatemala* June 5, 1996, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

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indigenous communities where their way of life is threatened, as required by the Inter-American Court of Human Rights.¹⁰

- x. Ensure that private security contractors are properly vetted according to principles of human rights due diligence.

b. To Community Leaders:

- i. Encourage compliance with relevant legal standards concerning peaceful assembly.
- ii. Promote dialogue that contributes to peaceful discussions and the settlement of disputes.

c. To Business Leaders:

- i. Ensure proper vetting and training of personnel according to principles of human rights due diligence.

- ii. Promote responsible dialogue and avoid the stigmatization of community members and human rights defenders.
- iii. Report payments made to host country governments and justly compensate communities adversely impacted by business activity.

d. To Lenders:

- i. Multilateral banks that funded projects involving the forcible displacement of communities during the internal armed conflict should provide reparations to affected communities equivalent to the profits and interest earned and consistent with existing reparations agreements.

III. Background

a. Historical context

In Guatemala, ongoing social divisions are closely related to the country's decades-long internal armed conflict (1960-1996), which resulted in the deaths of over 200,000 people¹¹ and the violent dispossession of many people and communities from their ancestral lands.¹² In conjunction with pervasive legal uncertainty regarding land ownership and the absence of collective land titles, the development of megaprojects that utilize natural resources and directly impact rural areas has often led to discord.¹³ Other historical and political factors, such as the lack of implementation of the 1996 Peace Accords, appear to contribute to this state of affairs.¹⁴

The social conflict between indigenous activists and wealthy landowners or urban elite that existed during the internal armed conflict remains, with international corporations playing an ever more significant role. Indigenous communities claim that they continue to be repressed by more powerful actors.¹⁵ Many activists allege that former military personnel who committed crimes during the war continue to serve in government or as private guards for companies involved in megaprojects.¹⁶ Independent organizations and individuals associated with business interests have invoked labels used during the armed conflict, such as "communist" and "terrorist," in attempts to delegitimize community members that oppose their operations.¹⁷

¹⁰ See *Saramaka People v. Suriname*, Inter-Am. Ct. H. R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007) [hereinafter *Saramaka*].

¹¹ The U.N.-sponsored Historical Clarification Commission found that 83% of the documented victims of the internal armed conflict were indigenous persons. *Guatemala: Memory of Silence*, Guatemalan Commission for Historical Clarification (1999).

¹² James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Add.: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories*, ¶¶ 58-60, U.N. Doc. A/HRC/18/35/Add.3 (June 7, 2011) [hereinafter *Anaya report*]; FIDH Country Facts, *supra* note 5.

¹³ *Anaya report*, *supra* note 12, ¶¶ 62-63.

¹⁴ See, e.g., Interview with *Instituto de Estudios Comparados en Ciencias Penales* en Guatemala (ICCPG) staff in Guatemala City, Guatemala (Nov. 28, 2012); Anonymous interview in Guatemala City, Guatemala (Nov. 26, 2012).

¹⁵ See, e.g., Interview with community activists, in Guatemala City, Guatemala (Nov. 28, 2012 and Nov. 30, 2012).

¹⁶ UDEFEGUA, SEMESTER REPORT 3 (Oct. 2012).

¹⁷ See *Denuncia de la Fundación Contra el Terrorismo*, No. 5 Año 1 (June 2013), available at <http://www.scribd.com/doc/150686505/Suplemento-FCT-5-ano-I> (wherein the Foundation Against Terrorism accuses human rights defender Yuri Melini of fomenting violence and conflict, and analogizing groups opposed to mining to the "terrorism structures of the Cold War"); Raul Minondo *Ayau, Ánimo Ejército de Guatemala!*, EL PERIÓDICO, Oct. 26, 2012 (referring to leaders of particular indigenous NGOs as "terrorists") (on file with authors). See also Interview with anonymous judicial official in Guatemala City, Guatemala (Nov. 27, 2012).

b. Current environment

i. Megaprojects and frustration over the lack of consultation processes

Over the past decade, the Guatemalan government has approved an increasing number of megaprojects to utilize natural resources, such as the development of mines, oil fields, cement plants and hydroelectric dams in rural areas inhabited by mostly indigenous populations.¹⁸ These projects are established and operated primarily by foreign corporations, mainly from Spain, Russia, Canada, and the United States,¹⁹ which receive licenses from the Guatemalan government and establish local subsidiaries.²⁰ In some instances, the projects have resulted in the violent displacement of

indigenous people from their ancestral lands. Some projects have also reportedly been associated with the killing of community members and environmental contamination. Many communities have organized informal consultation processes in which the majority of voters reportedly rejected such projects, and some communities have declared their lands to be “mine-free zones.”²¹ The Guatemalan government has dismissed such votes, arguing that the projects benefit the nation as a whole.²² The continuation of megaprojects in the face of community opposition has furthered social conflict. This trend has been exacerbated by the ongoing failure of the Government of Guatemala and international entities to compensate communities displaced by the internal armed conflict and the development of megaprojects.

Chixoy Dam: Failure to Compensate Displaced Communities

According to a 1981 Inter-American Commission report,²³ local communities were violently displaced from their land to construct the Chixoy Hydroelectric Dam. Despite this and other press reports concerning the violence, the World Bank and the Inter-American Development Bank (IDB) provided nearly \$400,000,000 in loans for the construction of the dam.²⁴ According to diplomatic cables, the United States abstained from a vote on the IDB loan due to a failure by the Guatemalan Government to stop “indiscriminate violence.”²⁵ In 2009, the President of Guatemala, the World Bank, the IDB and the Office of the United Nations High Commissioner for Human Rights signed a report stating that the Chixoy Dam was built in a context of forced relocation and gross human rights violations and that both banks continued to disburse funds in full knowledge of these violations, in contravention of their own policies.²⁶ The U.N. High Commissioner for Human Rights, the Organization of American States and the Guatemalan Government signed a reparations plan in 2010 but the government has yet to implement the plan.²⁷

¹⁸ See JORIS VAN DE SANDT, CORDAID, MINING CONFLICT AND INDIGENOUS PEOPLES IN GUATEMALA 11, (2009), available at www.cordaid.org/media/publications/Mining_Conflicts_and_Indigenous_Peoples_in_Guatemala.pdf; Interview with Martin Sacalxot, *Defensoria de Pueblos Indígenas* (Indigenous Peoples’ Defenders Office), in Guatemala City, Guatemala (Nov. 26, 2012).

¹⁹ Interview with Ramon Cadena, Regional Director, International Commission of Jurists (ICJ), in Guatemala City, Guatemala (Nov. 27, 2012).

²⁰ Sacalxot interview, *supra* note 18. Anonymous interview, *supra* note 14. See also VAN DE SANDT, *supra* note 18, at 11.

²¹ See, e.g., Interview with Sacalxot, *supra* note 18.

²² *Id.*

²³ *Report on the Situation of Human Rights in Guatemala*, Inter-Am. Comm’n. H.R., OEA/Ser.L/V/II.53, doc. 21 rev. 2 (1981).

²⁴ Email from Barbara Rose Johnson, Center for Political Ecology, Staff, Senator Whitehouse (May 18, 2013) (detailing total figures for the cost of the Chixoy project based on information gathered from World Bank and Inter-American bank documents estimated at nearly \$400 million) (on file with authors); Project Completion Report on Guatemala Chixoy Project Loan 1065-GU, World Bank, Report No. 10258 (Dec. 31, 1991) (detailing two loans approved by the World Bank for \$72 million and \$44.6 million for the Chixoy Dam Project); Complimentary Loan Agreement between the Republic of Guatemala and the Inter-Am. Dev. Bank, Inter-Am. Dev. Bank, Complimentary Loan No. 302-A/OC-GU, Resolution No. DE-174/81 (Dec. 17, 1981) (detailing a loan agreement between Guatemala and the Inter-American Development Bank for \$25 million related to the Chixoy Hydroelectric Project).

²⁵ *Compare* DECLASSIFIED State Dept. Cable, Doc. No. 81State300101 (Nov. 9, 1987) (advising that the US abstain on a vote on the Inter-American Bank loans for the Chixoy Dam Project because of the human rights situation in Guatemala at the time), *with* DECLASSIFIED State Dept. Cable, Doc. No. 81State06933 (Oct. 14, 1987) (advising that the US vote in favor of the Inter-American Development Bank loans to Guatemala for the Chixoy Dam Project because of concern about the impact it would have on US-Guatemalan relations). The U.S. Senate’s draft 2014 Department of State and Foreign Operations Appropriations Bill includes provisions instructing the IDB and the World Bank “to allocate the equivalent of the total amount of interest and other fees received in connection with loans for the construction of the Chixoy Hydroelectric Dam to implement the April 2010 Reparations Plan.” Dept. of State, Foreign Operations, and Related Programs Appropriations Bill, 2014, S.1372, 113th Cong. Title V (1st Sess. 2013).

²⁶ *Plan de Reparación de Danos y Perjuicios Sufridos por las Comunidades Afectadas por la Construcción de la Hidroeléctrica Chixoy* (Reparations Agreement for Damages Suffered by those Affected by the Chixoy Hydroelectric Project) (April 2010).

²⁷ *Id.*

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International Labor Organization (ILO) Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, and other provisions of international law²⁸ enshrine the rights of indigenous peoples to participate in decision-making processes when state actions may directly impact their communities.²⁹ Prior to undertaking development projects that affect lands traditionally occupied by indigenous and tribal peoples, the state has a duty to consult these communities “in good faith and...with the objective of achieving agreement or consent.”³⁰ The Inter-American Court of Human Rights (the Inter-American Court) has stated that the obligation to consult is “a general principle of international law.”³¹ Consultation should incorporate a genuine dialogue with affected populations as part of a participatory process, with the goal of reaching an agreement.³² While current international law does not automatically grant communities a veto right over proposed projects, the Inter-American Court has held that projects threatening the right to life of an indigenous or tribal community with long-standing ties to the land require that the state not only engage in consultations, but that it “obtain the free, prior and informed consent of the community according to their customs and traditions.”³³ Thus, as a prerequisite to the development of megaprojects, governments are obliged under international law to – at a minimum – engage in prior consultations which are culturally adequate and in good faith in order to reach an agreement.

ii. *Protests, states of prevention and siege, and the use of the military*

As a result of the perceived failure of the government to pursue meaningful consultation processes, many protests over megaprojects have occurred in recent years. Some protests have resulted in violent conflict between community members, law enforcement, and private security forces.³⁴ The human rights defenders our team interviewed acknowledged that not all activists have demonstrated peacefully. However, they emphasized that disruptive activities are the exception and usually arise out of desperation, and that they often occur in response to perceived threats of violence or actual attacks against the community.³⁵

One cause of frustration is the sense that international standards and recommendations are being ignored on the ground. For example, the Inter-American Commission on Human Rights has issued a variety of precautionary (protective) measures in Guatemala, including those suspending the Marlin mine project in San Miguel Ixtahuacán by Goldcorp mining company,³⁶ and protecting fourteen indigenous communities in the Polochic Valley affected by land tenancy problems and displacement.³⁷ The lack of compliance with these and other precautionary measures has contributed to the desperation of communities affected by megaprojects.³⁸ Community leaders believe that the report of the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, has also been largely ignored; they say that the situation

²⁸ ILO Convention No. 169, *supra* note 9, at art. 16.2; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, A/RES/61/295 Ann. (Sept. 13, 2007) at art. 32(2). See, e.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H. R. (ser. C) No. 79 (Aug. 31, 2001); Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-Am. Ct. H. R. (ser. C) No. 245, ¶ 164 (June 27, 2012) [hereinafter Sarayaku].

²⁹ ILO Convention No. 169, *supra* note 9, at arts. 6, 7.

³⁰ *Id.* at art. 6(2).

³¹ Sarayaku, *supra* note 28, at ¶ 164.

³² See *id.* at ¶ 200. See also Anaya report, *supra* note 12, at ¶¶ 40-41.

³³ Saramaka, *supra* note 10, at ¶ 134 (cited in Sarayaku, *supra* note 28, at footnote 242).

³⁴ See, e.g. Evelyn De León, *Dos Capturados Por Muerte de Campesino en Barillas*, SIGLO21, May, 26, 2012, <http://www.s21.com.gt/capturas/2012/05/26/dos-capturados-muerte-campesino-barillas>; Evelyn De León, *Capturan a Responsable de Muerte de Campesino*, SIGLO21, May 27, 2012, <http://www.s21.com.gt/asesinato/2012/05/27/capturan-responsables-muerte-campesino>; Jeff Gray, *Amnesty International Weighs in on HudBay Case*, THE GLOBE AND MAIL, Mar. 5, 2010, available at <http://www.theglobeandmail.com/report-on-business/amnesty-international-weighs-in-on-hudbay-case/article9277534/>. See also Interview with anonymous NGO, in Guatemala City, Guatemala (Nov. 30, 2012).

³⁵ Sacalxot interview, *supra* note 18; Cadena interview, *supra* note 19; ICCPG interview, *supra* note 14; Interview with anonymous government official in Guatemala City, Guatemala (Nov. 28, 2012).

³⁶ Anaya report, *supra* note 12, *App.: La situación de los derechos humanos de las comunidades afectadas por la mina Marlin, en las municipalidades de San Miguel Ixtahuacán y Sipacapa, Departamento de San Marcos*, at ¶¶ 61-64; FIDH Country Facts, *supra* note 5. The precautionary measures were issued on May 20, 2010 and modified on Dec. 7, 2011. Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala, Precautionary Measures, PM 260-07, available at <http://www.oas.org/en/iachr/decisions/precautionary.asp> (under “2010” tab).

³⁷ *Procuraduría de los Derechos Humanos* (Human Rights Ombudsman’s Office), *Informe Anual 2011* 332 (2011).

³⁸ INTERNATIONAL COMMISSION OF JURISTS, ACCESO A LA JUSTICIA: EL CASO DE LAS COMUNIDADES DE LOS MUNICIPIOS DE SAN ANDRÉS Y LA LIBERTAD, DEPARTAMENTO DE PETEN, GUATEMALA 19 (2012).

has worsened since the Special Rapporteur's visit in June 2010, and that Guatemalan society is increasingly polarized.³⁹

In response to social conflicts, the government has declared multiple "states of prevention," "states of exception" and "states of siege." These declarations permit the restriction of certain Constitutional rights, such as freedom of assembly, while expanding the scope of military control.⁴⁰ In his report, Special Rapporteur Anaya expressed concern that states of prevention were being used indiscriminately at the expense of fundamental rights.⁴¹ Advocates also argue that declarations of states of prevention, siege or exception on several occasions have contributed to a climate where violence and even murder of defenders can take place with impunity. For example, protests in 2009 in the department of San Marcos over electricity distribution by a local subsidiary of Spanish company Union Fenosa reportedly resulted in an excessive use of police force that stemmed from the declared state of prevention.⁴² After states of prevention were implemented in the region, two defenders were subsequently assassinated.⁴³

At times, the military has become involved in responding to unrest, with lethal results.⁴⁴ For example, the army confronted a purportedly peaceful protest held by thousands of indigenous

persons in the department of Totonicapán on October 4, 2012, resulting in dozens wounded and the deaths of at least seven protesters.⁴⁵ In general, defenders have noted an increased military presence in indigenous areas, including a rise in the number of civil-military patrols.⁴⁶ Military involvement in internal security has reportedly been on the rise in recent years.⁴⁷ Special Rapporteur Anaya noted that an increased presence of armed forces in rural communities has contributed to an atmosphere of mistrust and conflict, and that it may reawaken these communities' memories of the years of war.⁴⁸

iii. Use of private security guards

Companies engaged in contentious megaprojects often employ private security forces which are sometimes perceived as deliberately intimidating the local population.⁴⁹ Such personnel, either independently or in collaboration with police, have reportedly undertaken law enforcement functions – such as detaining suspects and evicting individuals from land – under the pretense of lawful authority.⁵⁰ We were told that many of the leaders of these private security forces are ex-military officers who were active during the internal armed conflict,⁵¹ raising concerns that inadequate vetting has resulted in the hiring of individuals who may have been involved in human rights violations.⁵²

³⁹ See Interview with Claudia Samayoa, UDEFEGUA, in Guatemala City, Guatemala (Nov. 26, 2012).

⁴⁰ *States of Prevention: A Solution or a Cause of Violence?*, PEACE BRIGADES INT'L GUATEMALA PROJECT FIRST BULLETIN, No. 20 (Peace Brigades Int'l, Guatemala), 2010, at 10, available at http://www.pbi-guatemala.org/fileadmin/user_files/projects/guatemala/files/english/PBI_Boletin_20_eng.pdf.

⁴¹ Anaya report, *supra* note 12, at ¶ 66.

⁴² FIDH, Open Letter to the EU about Attacks against defenders of economical, cultural, and social rights in Guatemala (Feb. 5, 2010), available at <http://www.fidh.org/Open-Letter-to-the-EU-about>.

⁴³ *Id.*

⁴⁴ See *Pronunciamiento del Procurador de Derechos Humanos, Jorge Eduardo de León Duque, ante los lamentables hechos ocurridos en el Departamento de Totonicapán el jueves 4 de octubre de 2012* (Oct. 11, 2012) (on file with authors).

⁴⁵ See Nic Wirtz, *Violence After Totonicapán: Violence and the Military in Guatemala*, AMERICAS QUARTERLY, Oct. 23, 2012, available at <http://americasquarterly.org/node/4056> (reporting at least 7 dead). See also Romina Ruiz-Goiriena, *Soldiers' arrest marks shift in Guatemala*, MIAMI HERALD, Oct. 21, 2012. (reporting 8 dead). To their credit, the Human Rights Ombudsman's Office (Procuraduría de Derechos Humanos) and the Attorney General's Office (Ministerio Público) began a prompt investigation after the incident. The Human Rights Ombudsman, Jorge De León Duque, declared the culpability of the army for violations of the right to life and personal integrity of the dead and injured. The Attorney General, Claudia Paz y Paz, also condemned the use of the armed forces in protest situations. See *id.*; *Pronunciamiento del Procurador de Derechos Humanos*, *supra* note 44.

⁴⁶ See Wirtz, *supra* note 45; ICCPG interview, *supra* note 14; Interview with community activists, in Guatemala City, Guatemala (Nov. 29, 2012).

⁴⁷ See Wirtz *supra* note 45; ICCPG Interview, *supra* note 14.

⁴⁸ Anaya report, *supra* note 12, at ¶ 67.

⁴⁹ Anonymous NGO interview; *supra* note 34; ICCPG interview, *supra* note 14.

⁵⁰ Anonymous NGO interview, *supra* note 34 (explaining that private security are not allowed to bring weapons to evictions per government order); see ICCPG interview, *supra* note 14.

⁵¹ Anonymous interview, *supra* note 14; ICCPG Interview, *supra* note 14.

⁵² Anonymous interview, *supra* note 14; ICCPG Interview, *supra* note 14.

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Some private security guards have reportedly engaged in abuses in areas where megaprojects are contested. For example, two security guards for a hydroelectric dam project in Barillas which has been opposed by many members of the neighboring community⁵³ were arrested in 2012 for killing one community member and injuring another.⁵⁴ In addition, the Head of Private Security for the San Rafael mining operation was arrested for, according to wiretap evidence,⁵⁵ ordering acts of violence to be committed against seven activists who had protested against the mine.⁵⁶ Additionally, private guards employed or contracted by an agricultural business were reportedly involved in the forced eviction of over 700 indigenous families from their lands in the Polochic Valley in 2011.⁵⁷ Private security officers for Canadian HudBay Minerals' local subsidiary have been accused of multiple abuses, including killing an indigenous activist who opposed the company's Fenix nickel mine; shooting and paralyzing another community member; and gang-raping eleven women during clashes between local protesters, mine security and police.⁵⁸

iv. Prosecutions

There have been dozens of informal community consultations regarding megaprojects in recent years. According to a governmental official, following over 90% of these consultations, criminal accusations have been brought against community leaders who participated.⁵⁹ Similarly, many community members

who participate in protests against megaprojects, as well as their lawyers, have reported being subsequently accused of crimes. According to government officials, such accusations are not necessarily related to protest activity, but participation in a protest seems to provoke other criminal charges – sometimes a few hours after the protest has ended,⁶⁰ or in relation to events that occurred decades prior.⁶¹ Another group reported that evidentiary standards required under the penal code are often evaluated inconsistently by judges.⁶² Activists have also reported that it is often difficult to learn the status of charges against them.⁶³

Our team heard that the majority of serious accusations against defenders who participate in peaceful protests are brought by persons affiliated with the megaproject in dispute.⁶⁴ Defenders reportedly have been falsely accused of forcing people to participate in a protest or of punishing others for not participating.⁶⁵ They have also been charged under laws related to terrorism or with other serious (“high impact”) crimes.⁶⁶ Regardless of the specifics of criminal allegations, the very fact that charges have been filed can have the effect of delegitimizing the work of peaceful defenders.⁶⁷ Defenders who are accused of crimes must also then divert time and resources away from their human rights work to their legal defense.⁶⁸

It must be noted that the Public Ministry has a legal obligation to investigate criminal accusations made by civilians to determine

⁵³ See text box entitled Barillas: Irregularities in Arrests and Detentions, *infra* §IV(a).

⁵⁴ De León, *Capturan a Responsable de Muerte de Campesino*, *supra* note 34.

⁵⁵ MiningWatch Canada, *Complaint Asks Ontario Securities Commission to Investigate Tahoe Resources After Wiretap Evidence Implicates Employees in Violence at Guatemala Mine*, MARKET WIRED, June 3, 2013, <http://www.marketwire.com/press-release/complaint-asks-ontario-securities-commission-investigate-tahoe-resources-after-wiretap-1797349.htm>.

⁵⁶ Mariela Castanon, *CALAS: Pedirán 28 años de prisión para exjefe de seguridad de minera*, LA HORA, July 8, 2013, available at <http://www.lahora.com.gt/index.php/nacional/guatemala/actualidad/180413-calas-pedirán-28-años-de-prisión-para-exjefe-de-seguridad-de-minera>.

⁵⁷ U.N. High Comm'r. for H.R., Guatemala, *Los desalojos en el Valle del Polochic* ¶ 53 (2013); Alberto Brunori, Representative, U.N. High Comm'n for H.R., Guatemala, *Palabras en el marco del foro "Acceso a la tierra y desalojos: Lecciones a partir del caso Polochic"* 4 (Jan. 13, 2012).

⁵⁸ Gray, *supra* note 34.

⁵⁹ Sacalxot interview, *supra* note 18.

⁶⁰ *Id.*

⁶¹ Official government documents (on file with authors).

⁶² See ICCPG interview, *supra* note 14.

⁶³ Interview with community activists and defense attorney in Guatemala City, Guatemala, Nov. 29, 2012.

⁶⁴ Sacalxot interview, *supra* note 18; E-mail from Human Rights Ombudsman's office representative, to Katharine Nylund, Fellow, Georgetown Law Human Rights Institute (Aug. 21, 2013) (on file with author).

⁶⁵ Anonymous interview, *supra* note 14.

⁶⁶ See, e.g., Sacalxot interview, *supra* note 18; anonymous interview, *supra* note 14. The Public Ministry reports that in such cases, its office promptly seeks the application of lesser charges. E-mail from Public Ministry official to Katharine Nylund, Fellow, Georgetown Law Human Rights Institute (Aug. 20, 2013).

⁶⁷ Interview with Claudia Samayoa, *supra* note 39; Interview with Edgar Perez, *Centro para la Acción Legal en Derechos Humanos* (CALDH), in Guatemala City, Guatemala (Nov. 27, 2012).

⁶⁸ Interview with Claudia Samayoa, *supra* note 39.

whether or not the legal requirements for pursuing charges are met; after such investigations, an average of 60% of charges against defenders are reported to be eventually dropped.⁶⁹ Nonetheless, there is a sense among the human rights community that many cases of this nature progress with unusual speed to the trial phase⁷⁰ while allegations of abuse against defenders are not seriously investigated or adjudicated.⁷¹ (However, the Public Ministry states that cases involving defenders advance on average at a pace no different than other cases, and that all cases are processed in accordance with the law.⁷²) Defenders report that charges against community activists may stall and remain on the books indefinitely.⁷³ According to a government official, some defenders have been charged and arrested multiple times without any clear basis in fact.⁷⁴ One defense attorney noted that during a recent state of exception which lasted seventy days, thirty-nine activists were arrested; all but four were later released because the arrests had been illegal.⁷⁵ Our team also heard reports of baseless complaints brought against individuals who had no involvement with protests, but were family members of activists, including people living outside of Guatemala⁷⁶ and in at least one case, an infant girl.⁷⁷

This pattern may have a chilling effect on freedom of expression and freedom of association. Indicted defenders, even if charges are dropped or are not pursued by authorities, often question

whether to continue with their work for fear that accusations or charges will be brought against them in the future.⁷⁸ Guatemala's Human Rights Ombudsman stated that it is undeniable that there is a pattern of accusations and stigmatization against defenders who participate in protests.⁷⁹

The pursuit of frivolous claims and subsequent convictions may in some cases be attributed to illicit influences on the judiciary. Guatemalan judges reportedly face extreme pressure and threats, especially in rural areas.⁸⁰ The combination of corruption and threats makes it difficult for judges and prosecutors to oppose the "tremendous phenomenon" of the criminalization of legitimate activities.⁸¹

v. *Accusations against community leaders and members of the justice sector*

In addition to threats and criminal proceedings against Guatemalan human rights defenders, widespread accusations in various forms of media are another form of harassment. Online social networks such as Facebook provide a platform for denouncing defenders,⁸² as do traditional newspapers.⁸³ A wide range of individuals are subject to disparaging remarks, from indigenous leaders to high-level government prosecutors and judges who defend human rights and the rule of law, many of whom have been labeled as "terrorists."⁸⁴

⁶⁹ See CIDSE, *Criminalization of Social Protest Related to Extractive Industries: Analyses and Recommendations 2* (June 2011) (citing figures from 2008).

⁷⁰ Sacalxot interview, *supra* note 18; Claudia Samayoa interview, *supra* note 39.

⁷¹ Claudia Samayoa interview, *supra* note 39; interview with Lic. Carlos Antonio Pop, *Fundación de Abogados Mayas*, in Guatemala City, Guatemala (Nov. 29, 2012).

⁷² Telephone interview with Public Ministry official (Aug. 20, 2013).

⁷³ See, e.g., Claudia Samayoa interview, *supra* note 39.

⁷⁴ Anonymous government official interview, *supra* note 35.

⁷⁵ Pop interview, *supra* note 71.

⁷⁶ Anonymous interview, *supra* note 14.

⁷⁷ Anonymous government official interview, *supra* note 35.

⁷⁸ Sacalxot interview, *supra* note 18.

⁷⁹ Interview with Jorge De León Duque, *Procurador de Derechos Humanos* (Human Rights Ombudsman), in Guatemala City, Guatemala (Nov. 26, 2012).

⁸⁰ Cadena interview, *supra* note 19.

⁸¹ *Id.*

⁸² See, e.g., De León Duque interview, *supra* note 79.

⁸³ See, e.g., Minondo Ayau, *supra* note 17.

⁸⁴ See, e.g., *id.*; Social media comments equating the non-governmental Guatemalan Human Rights Commission with terrorists (screenshots on file with authors); *Denuncia de la Fundación Contra el Terrorismo*, *supra* note 17.

Even statements that do not overtly call for violence against defenders may contribute to the denigration and intimidation of the human rights community in an environment where violent attacks against defenders are not uncommon. In this context, strong protections are needed for all human rights defenders. However, as noted above, orders such as precautionary measures

issued by the Inter-American Commission on Human Rights are reportedly not always fully implemented by the Guatemalan government.⁸⁵ There is some administrative protection for judicial officials through a specialized program; however, there are concerns that the program does not currently provide real security for high-level judges.⁸⁶

IV. Legal Standards under the Inter-American System of Human Rights

Guatemala ratified the American Convention on Human Rights in 1978 and subsequently acceded to the contentious jurisdiction of the Inter-American Court of Human Rights in 1987. It acceded to the Rome Statute creating the International Criminal Court in 2012. Articles 46 and 149 of the Guatemalan Constitution stand for the general principle that in human-rights related areas, the treaties and conventions ratified by Guatemala⁸⁷ have preeminence over internal law, and that Guatemala accepts and applies general international law, including customary international law.⁸⁸ The following legal standards are particularly relevant to the situation of human rights defenders in Guatemala.

a. Prohibition of Arbitrary Detention and Unjustified Pretrial Detention

The American Convention on Human Rights prohibits arbitrary detention and prolonged, unjustified pretrial detention. Article 7 requires prompt judicial review of the legitimacy and legality of

any detention.⁸⁹ Anyone “deprived of his or her liberty without a court order must be set free or immediately brought before a judge.”⁹⁰

Article 8 protects the right to the presumption of innocence, enshrining the principle that “every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.”⁹¹ Preventive detention without adequate justification or prolonged detention without trial⁹² violates of the presumption of innocence guaranteed in Article 8(2). In the foundational *Suárez Rosero Case*, the Inter-American Court ruled:

[T]he principle of the presumption of innocence – inasmuch as it lays down that a person is innocent until proven guilty – is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to

⁸⁵ Claudia Samayoa interview, *supra* note 39.

⁸⁶ See, e.g., Cadena interview, *supra* note 19 (explaining that there is a legal framework in place for the protection of journalists in Guatemala but no similar laws exist for the protection of high-level judges); interview with anonymous judicial official, in Guatemala City, Guatemala (Nov. 27, 2012).

⁸⁷ Judgments of the Constitutional Court of Guat. April 24, 2000 (Appendices to the application, judicial file, piece XIV, app. 30, f. 4148); May 8, 2000 (Appendices to the application, judicial file, piece XIV, app. 30, f. 4159), and June 20, 2000 (Appendices to the application, judicial file, piece XVI, f. 4403).

⁸⁸ *Preeminencia del Derecho Internacional* [Preeminence of International Law], *Constitución de La Republica de Guatemala*, art. 46 (Enero, 14, 1986) “Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno.” *Id.*; *De Las Relaciones Internacionales* [Pertaining to International Relations], *Constitución de La Republica de Guatemala*, art. 46. “Guatemala normará sus relaciones con otros Estados, de conformidad con los principios, reglas y prácticas internacionales con el propósito de contribuir al mantenimiento de la paz y la libertad, al respeto y defensa de los derechos humanos, al fortalecimiento de los procesos democráticos e instituciones internacionales que garanticen el beneficio mutuo y equitativo entre los Estados.” *Id.*

⁸⁹ *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 92(j) (Sept. 7, 2004).

⁹⁰ Nestor Jose Uzcategui et al., Case 12.661, Inter-Am. Comm’n. on H.R., Report. No. 88/10, Submission note of the Case to the Court and Report on the Merits, ¶ 223 (Oct. 22, 2010).

⁹¹ American Convention on Human Rights [hereinafter American Convention], Nov. 21, 1969, 1144 U.N.T.S. 143, art. 8(2).

⁹² *Id.* at Art. 7(5) (stipulating that a person detained according to the law “is entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings”); art. 8, §1 (guaranteeing that “everyone has the right to a hearing, with due guarantees and within a reasonable time”).

ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human

rights law . . . that preventive detention should not be the normal practice in relation to persons who are to stand trial. This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.⁹³

Barillas: Irregularities in Arrests and Detentions

In 2007, the community of Santa Cruz Barillas reportedly held an informal referendum which rejected the construction of a hydroelectric dam in their community by the company Hidralia Energia/Hydro Santa Cruz.⁹⁴ After a series of confrontations, in April 2012, a local court issued arrest warrants for twenty-three community members based on allegations of terrorism, incitement, and public disorder.⁹⁵ Subsequently, a community member who had refused to sell his land to the company was shot to death, and two others were injured, reportedly by a member of the company's private security force.⁹⁶ In response, a faction of armed individuals allegedly assaulted public officials and raided a military post. A "state of siege" was declared, thirty-three arrest warrants were issued and numerous individuals were subjected to pretrial detention.⁹⁷ According to the Office of the U.N. High Commissioner for Human Rights, nine individuals were arrested without a court order and were not brought before a court for at least two weeks, in violation of international law.⁹⁸ In September 2012, the trial court annulled the arrest orders against ten of the accused; and in January 2013, after they had spent about nine months in jail, the additional detainees were released and all charges against them were dropped.⁹⁹ Subsequently, the Public Ministry reportedly opened a disciplinary investigation against the local prosecutor.¹⁰⁰ The Guatemalan Human Rights Ombudsman also expressed concern about the legality of the detentions and asked the Supervisor of Tribunals to investigate four judges involved in the case.¹⁰¹

Thus, preventive detention combined with an unreasonable amount of time for holding a trial is an Article 8(2) violation.¹⁰² Pursuant to Inter-American Commission on Human Rights Resolution 1/08, *Principles and Best Practices on the Protection*

of Persons Deprived of Liberty in the Americas, "there shall be sufficient evidentiary elements that associate the accused with the facts of the case, in order to justify an order of preventative deprivation of liberty."¹⁰³

⁹³ Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (ser C) No. 35, ¶ 77 (Nov. 12, 1997).

⁹⁴ *Santa Cruz Barillas*, GUATEMALAN HUMAN RIGHTS COMMISSION (GHRC), <http://www.ghrc-usa.org/our-work/current-cases/santa-cruz-barillas/> (last visited July, 29, 2013).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Carolina Gamazo, *Levantando Estado de Sitio en Santa Cruz Barillas: Las detenciones ejecutadas fueron ilegales, dice Alberto Brunori*, EL PERIÓDICO, May 19, 2012, available at <http://www.elperiodico.com.gt/es/20120519/pais/212423/>.

⁹⁹ *Caso Barillas: Juzgado da marcha atrás en diez órdenes de captura*, EL PERIÓDICO, Sept. 25, 2012, <http://www.elperiodico.com.gt/es/pais/218359/>; *Libertad para los presos de Santa Cruz de Barillas*, PERIODISMO HUMANO (Jan. 13, 2013), <http://tomalapalabra.periodismohumano.com/2013/01/13/libertad-para-los-presos-de-santa-cruz-de-barillas/>.

¹⁰⁰ EL PERIÓDICO, *supra* note 99.

¹⁰¹ *En Santa Cruz Barillas hubo detenciones ilegales y violación de los derechos humanos*, PRENSA COMUNITARIA, Feb. 22, 2013, <http://comunitariapress.blogspot.fr/2013/02/cuatro-jueces-tachados-de-violacion-de.html>.

¹⁰² Compare anonymous interview, *supra* note 14 (explaining that in Guatemala, a detention is deemed illegal if twelve hours pass without the detained person seeing a judge), with ICCPG interview, *supra* note 14 (noting that some accused persons are detained for years at a time without being charged).

¹⁰³ See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, CIDH Res. 1/08, Principle III. 2 (Mar. 13, 2008).

b. Independence of Judicial Authorities

Article 8 of the American Convention guarantees the right to a trial before an independent and impartial tribunal. The Inter-American Court has held that, to fulfill their obligations under this article, States must ensure that judges are provided guarantees against “external pressures.”¹⁰⁴ The independence of the judiciary depends upon, *inter alia*, an appropriate process for their appointment and removal.¹⁰⁵ According to the Inter-American Commission on Human Rights:

The UN Special Rapporteurship on the Independence of Judges and Lawyers has expressed its concern regarding the important and even decisive role that legislative or executive branches play in imposing disciplinary measures on judges in some States. In this respect, in order to remedy problems of this type, the [Inter-American Commission], like the UN Human Rights Committee, considers it advisable for States to establish an independent body whose functions include appointing, promoting, and imposing disciplinary measures on judges at all levels[.]¹⁰⁶

Reprisals Against Justice Barrientos and Attorney General Paz y Paz

In 2012, Supreme Court Justice César Barrientos and Attorney General Claudia Paz y Paz were accused of criminal collusion by Moises Eduardo Galindo Ruiz, defense attorney for Hector Mario Lopez Fuentes, who was on trial in 2012 for genocide and other crimes against humanity allegedly committed during Guatemala’s internal armed conflict.¹⁰⁷ Guatemalan law establishes that allegations of criminal activity by specific, high-level government officials should be brought via the *antejuicio* mechanism.¹⁰⁸ While any person may allege a claim through this process, the law is clear that *antejuicio* complaints are not to be used for spurious, political or illegitimate reasons.¹⁰⁹ Mr. Galindo alleged that at one point during Mr. Lopez Fuentes’ trial, Justice Barrientos and Dr. Paz y Paz held an *ex parte* meeting with the presiding trial court judges in which they instructed their colleagues to disobey the Constitution and laws of the land, in prejudice to his client.¹¹⁰ The *antejuicio* did not provide any specific quotes to substantiate the allegations. Rather, it focused on Mr. Galindo’s concern that his client had not been granted amnesty.¹¹¹ Justice Barrientos, Dr. Paz y Paz and other judicial authorities, as well as their families, have reportedly been subjected to violent threats and public campaigns to discredit their impartiality.¹¹² Dr. Paz y Paz and members of her family have been named in a number of criminal complaints related to the internal armed conflict.¹¹³

In addition to protecting the independence of judges, States have an obligation to protect the independence of other judicial authorities, including prosecutors. The Inter-American Commission has stated that judicial authorities are responsible for ensuring that “victims of human rights violations have access to justice” and that court proceedings are “consistent

with international standards.”¹¹⁴ Therefore, States have an obligation to protect judicial authorities “from attacks or acts of intimidation against them or their families, as well as other types of actions that directly or indirectly undermine their independence and impartiality.”¹¹⁵

¹⁰⁴ Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 75 (Jan. 31, 2001).

¹⁰⁵ *Id.* at ¶¶ 73-75.

¹⁰⁶ *Second Report on the Situation of Human Rights Defenders*, *supra* note 3, at ¶ 375.

¹⁰⁷ *Penal Antejuicio contra Cesar Barrientos y Claudia Paz y Paz, Juzgado Cuarto de Primera Instancia Penal Narcoactividad y Delitos contra el Ambiente Guatemala*, No. 01069-2012-00386 (April 8, 2012) (on file with authors).

¹⁰⁸ *Id.*; *Ley en Materia de Antejuicio, Decreto* No. 85-2002, art. 3.

¹⁰⁹ *Ley Antejuicio*, *supra* note 108, at art. 4.

¹¹⁰ *Penal Antejuicio*, *supra* note 107.

¹¹¹ *Id.*; *Ley Antejuicio*, *supra* note 108, at art. 13.

¹¹² *Denuncia de la Fundación Contra el Terrorismo*, *supra* note 17 (“Es importante también mencionar que estos grupos desestabilizadores violentos actúan con la mayor impunidad, al saberse protegidos por la Fiscal General Claudia Paz y Paz, quien en varias oportunidades ha demostrado su indiferencia ante los actos violentos de estas organizaciones que son parte del linaje de los grupos terroristas de antaño[.]” [“It is important to also mention that these violent destabilizing groups act with the utmost impunity, knowing that they are protected by Attorney General Paz y Paz, who on various occasions has demonstrated her indifference to the violent acts of those organizations that are part of the lineage of terrorist groups from the past[.]”]). See also Letter from Dr. Cesar Barrientos, President of the Criminal Chamber, Corte Suprema de Justicia (Guat.) to Dr. Francisco Dal’ anesse Ruiz, Commissioner, *Comisión Internacional Contra la Impunidad en Guatemala* (Nov. 6, 2012) (on file with authors).

¹¹³ Legal complaints, 2011-2012 (on file with authors).

¹¹⁴ *Second Report on Human the Situation of Rights Defenders*, *supra* note 3, at ¶ 349.

¹¹⁵ *Id.* at ¶ 353.

c. Duty to Investigate and Prosecute and Duty to Protect the Physical Integrity of Citizens

Article 8 (Right to a Fair Trial) and Article 25 (Right to Judicial Protection) of the Inter-American Convention on Human Rights require States to investigate and prosecute violations of rights. This is derived from the general obligation to guarantee the rights to life, personal integrity, and personal liberty grounded within Article 1(1) of the Convention as well as Articles 4 and 5. The duty to investigate requires States to diligently pursue justice when violations of rights occur.¹¹⁶ A State's failure to investigate a human rights violation can result in impunity and create a context in which additional rights violations become more likely.¹¹⁷ When a State willfully or negligently fails to investigate a rights violation, it is also complicit in the violation by assisting in the evasion of justice.¹¹⁸ Finally, a State's failure to provide judicial protection and investigate a violation denies victims, family members and society at-large the right to know the truth.¹¹⁹

A violation of the right to judicial protection occurs when the state fails to conduct a serious, impartial and effective investigation of the initial rights violation, including a failure to investigate and prosecute suspects.¹²⁰ The Inter-American Court has held that failure to satisfy the guidelines of the United Nations Manual on Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions¹²¹ constitutes evidence of a failure to investigate. Under these guidelines, a State must meet basic minimum requirements when addressing a potential violation of the right to life, including:

Identification of the victim, gathering and preserving evidence pertaining to the death so as to help in possible prosecution of those responsible;

identification of possible witnesses and obtaining their statements regarding the death; determination of the cause, manner, place and time of death, as well as any pattern, or practice that might have caused the death; establishing the distinction among natural death, suicide, and homicide; identification and capture of the person or persons involved in the death, and bringing the alleged perpetrators before a competent tribunal established by law.¹²²

Moreover, the Inter-American Court examines the totality of the facts of a case to determine whether a violation of judicial protection has occurred.¹²³ This entails a review of the procedural investigation guidelines in place, the adequacy of a state's efforts to carry out those procedures, and the role, if any, of a state or its agents in willfully or negligently obstructing an investigation.¹²⁴

In *Gonzalez et al. ("Cotton Field") v. Mexico*, where two women and one minor girl were found dead outside of Ciudad Juárez, Mexico, the Inter-American Court found a violation of the right to judicial protection. The court noted a failure to secure the scene of the crime¹²⁵ and gather relevant evidence,¹²⁶ and an unjustified delay and absence of substantial progress in the investigations.¹²⁷ In addition, it found procedural irregularities between various law enforcement bodies, including a failure to exchange information between offices engaged in similar investigations and to address the epidemic of similar (in this case, gender-based) violence at the time.¹²⁸ Finally, it held that the State failed to hold those responsible for the irregularities accountable.¹²⁹

¹¹⁶ *Gonzalez et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment., Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 289 (Nov. 16, 2009).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at ¶ 291.

¹¹⁹ *Valle Jaramillo et al. v. Colombia*, Merits Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 146 (Nov. 27, 2008).

¹²⁰ *Juan Humberto Sanchez v. Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment., Inter-Am. Ct. H.R. (ser. C) No. 102, ¶ 127 (June 7, 2003).

¹²¹ U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution, U.N. Doc E/ST/CSDHA/12 (1991).

¹²² *Sanchez, supra* note 120, at ¶ 127.

¹²³ *Gonzalez, supra* note 116, at ¶ 294.

¹²⁴ *Id.* at ¶ 295.

¹²⁵ *Id.* at ¶ 297.

¹²⁶ *Id.* at ¶ 206.

¹²⁷ *Id.* at ¶ 352.

¹²⁸ *Id.* at ¶ 359.

¹²⁹ *Id.* at ¶ 378.

El Naranjo: Failure to Investigate

In 2004, in the community of El Naranjo, local leaders established a curfew forbidding the sale of alcohol after 9:00 pm in an attempt to prevent conflict between community members and individuals working for a powerful local family. On November 21, 2004, members of the family were shot and killed after a conflict erupted over attempts to enforce the curfew.¹³⁰ According to official documents, several community leaders were charged with “extra-judicial execution” and tried. Between September 2005 and December 2007, five of the community leaders facing trial were murdered.¹³¹ Before their murders, each of the five reported receiving both verbal and physical threats from individuals affiliated with the powerful family in question.¹³² According to statements from family members of the accused and community leaders, the police did not investigate the reported threats, and following the murders, did not investigate statements made by witnesses who claimed that individuals affiliated with the family were responsible.¹³³ In addition, statements made by community members to the Human Rights Ombudsman’s Office (Procuraduría de los Derechos Humanos), the local prosecutor, and law enforcement alleged that police permitted improper tampering with, and only conducted a cursory investigation of, the crime scenes.¹³⁴ According to reports from community members, no one has been charged for any of the five murders.¹³⁵

V. Other Relevant Legal Standards and Principles: Responsibility of Non-State Actors

Although governments have an affirmative duty to protect human rights, international law and standards establish that non-state actors have responsibilities to respect human rights.¹³⁶ In the era of globalization, the international community has increasingly focused on the responsibilities of corporations. Transnational corporate actors may be held liable for aiding and abetting human rights violations. They may also be liable for public statements amounting to hate

¹³⁰ Report from the Procuraduría de Los Derechos Humanos Barrio Santa Ana (Oct. 27, 2005) (describing the basic details of the case and murders) (on file with authors).

¹³¹ Report from the Advisory Board of Development for El Naranjo [COCODES in Spanish] (Dec. 8, 2007) (stating that members of the COCODES were killed following the incident in 2004) (on file with authors).

¹³² *Id.* (Dec. 8, 2007) (stating that before their murders each victim reported receiving threats from individuals affiliated with the family) (on file with authors).

¹³³ Report from the National Civil Police Division of Criminal Investigation Crimes Against Human Rights Unit, Oficio No. 79-2007 (Dec. 10, 2007) (providing witness statements alleging suspicious activity before Felipe Alvarez’s murder, and statements that Felipe Alvarez reported he was being followed prior to his murder) (on file with authors); Complaint from UDEFEGUA, No. 14-2007 (Dec. 8, 2007) (stating a failure to investigate the murder of Felipe Alvarez, alleging a connection between the murders of the COCODES members and individuals affiliated with the family, and reporting that threats were made to COCODES members prior to their murders) (on file with authors).

¹³⁴ Report from the National Civil Police Division of Criminal Investigation Crimes Against Human Rights Unit, Oficio No. 79-2007 (Dec. 10, 2007) (providing witness statements alleging improper tampering of the crime scene for Felipe Alvarez’s murder) (on file with authors); Complaint from UDEFEGUA, No. 14-2007 (Dec. 8, 2007) (on file with authors) (stating that the police did not investigate threats made to those murdered and have since failed to thoroughly investigate the murders); Letter from UDEFEGUA to Adela de Torrebiarte, Minister of Government (Dec. 13, 2007) (stating that the crime scene of Felipe Alvarez was tampered with, that those murdered were threatened before their murder, and that police have failed to properly investigate the murders of the COCODES members) (on file with authors).

¹³⁵ Public memorandum from COCODES el Naranjo (Dec. 11, 2007) (stating that at the time the original trial related to the deaths of the family members had been delayed) (on file with authors).

¹³⁶ See, e.g., Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.businesshumanrights.org/media/documents/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter “Guiding Principles”]; VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, available at www.voluntaryprinciples.org. See also the EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) (voluntary coalition between states and corporations emphasizing local community engagement), available at www.eiti.org.

speech against community members if such conduct is intended to incite violence and is knowingly made in the context of imminent violence.¹³⁷

International criminal jurisprudence has established that a private actor with legal and financial control over other private actors, i.e., in the context of an employer-employee relationship, may be held responsible for crimes committed by these subordinates. In *Prosecutor v. Alfred Musema*,¹³⁸ the International Criminal Tribunal for Rwanda found that a business owner had *de jure* authority over his employees while they were on his factory's premises and while they performed their professional duties off-site. This authority, combined with the fact that the defendant was present at the crime site in question, led the court to hold him liable for the criminal acts of his subordinates. The tribunal also noted that the defendant was in a position to attempt to discipline employees for bad acts but failed to do so. Similarly, he did not prevent or punish the use of, *inter alia*, company property and uniforms in the commission of these crimes.¹³⁹

Non-state actors can minimize their human rights impacts by adopting human rights policies and procedures and conducting ongoing human rights due diligence of their operations. The United Nations Guiding Principles on Business and Human Rights ("Guiding Principles")¹⁴⁰ emphasize human rights due diligence as a means of identifying, preventing, mitigating and

accounting for human rights impacts.¹⁴¹ The Guiding Principles have been well-received by a wide coalition of stakeholders including the international business community, governments and civil society.¹⁴² While the Guiding Principles are voluntary, many businesses find it prudent to adhere to them to reduce legal liability.¹⁴³

The Guiding Principles establish a baseline for conducting business operations in a manner that will not contribute to human rights violations. These standards exist "independently of States' abilities and/or willingness to fulfill their own human rights obligations, and ... over and above compliance with national laws and regulations protecting human rights."¹⁴⁴ Of particular relevance to the Guatemalan context, the Guiding Principles emphasize the responsibility to take additional precautions in conflict settings.¹⁴⁵ Finally, the Addendum to the Guiding Principles regarding responsible contracts notes that, in any business contract, including between the state and the private sector (such as in megaprojects), arrangements for security at the project site must be in accordance with human rights standards.¹⁴⁶

The Voluntary Principles on Security and Human Rights ("Voluntary Principles") also call upon companies to assess the human rights records of private security forces. The Voluntary Principles initiative is a collaborative effort of non-governmental organizations, companies in the extractive and energy sectors, and

¹³⁷ See American Convention art. 13(5), *supra* note 91; *Annual Report of the Special Rapporteur for Freedom of Expression* 161-162 (2004), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=459&IID=1>. Cf. Guiding Principles, *supra* note 136, at Nos. 17 (due diligence) and 21(c) (explaining that businesses should "not pose risks to affected stakeholders" in their external communications).

¹³⁸ *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment ¶¶ 880-882 (Jan. 27, 2000).

¹³⁹ *Id.* at ¶ 880.

¹⁴⁰ The Guiding Principles, *supra* note 136, were endorsed by the U.N. General Assembly by consensus. Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 (June 16, 2011). The United States co-sponsored this resolution. *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights: General Statement by Daniel Baer, Deputy Assistant Secretary of State for Democracy, Human Rights & Labor*, MISSION OF THE UNITED STATES, GENEVA (June 16, 2011), available at <http://geneva.usmission.gov/2011/06/16/humanrightsandtransnationalcorps>.

¹⁴¹ Guiding Principles, *supra* note 136, No. 17.

¹⁴² *Id.* at ¶ 7 (Mar. 21, 2011).

¹⁴³ E-mail from Katie Shay, Legal and Policy Associate, International Corporate Accountability Roundtable (ICAR), to Katharine Nylund, Fellow, Georgetown Law Human Rights Institute (July 2, 2012) (on file with authors). Transnational corporations may be held legally liable in domestic courts for human rights abuses committed by local subsidiaries. Canadian company HudBay is currently defending itself in Ontario courts for the alleged abuses discussed *supra* § III(b)iii. The plaintiffs in three separate cases allege that HudBay was negligent in hiring and/or supervising its security personnel. See <http://www.chocversushudbay.com/legal-documents>.

¹⁴⁴ Guiding Principles, *supra* note 136, at No. 11, Commentary.

¹⁴⁵ See *id.* at No. 7 (discussing state responsibility to ensure that business enterprises are not involved with human rights abuses in conflict-affected areas).

¹⁴⁶ *Id.*, Add. 3, *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*, at Principle 6, ¶¶ 43-46, available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>.

Tilted Scales: Social Conflict and Criminal Justice in Guatemala

the governments of the United States and United Kingdom.¹⁴⁷ The Voluntary Principles guide the extractive industries on providing security for their operations in a manner that respects human rights.¹⁴⁸ According to these Principles, a comprehensive risk assessment by a company utilizing security should include consideration of the potential for violence in a particular environment or social context, the human rights records of public and private security forces and the ability of local prosecutors and judicial officials to hold accountable those responsible for human rights abuses.¹⁴⁹

The Extractive Industries Transparency Initiative (EITI) is another international standard which is particularly relevant in the megaproject context.¹⁵⁰ The EITI encourages companies to disclose payments to governments, and requires countries which have signed on to the EITI to disclose receipts.¹⁵¹ Guatemala is an EITI candidate but has not yet fully implemented the Initiative.¹⁵²

Some countries also establish rules for companies operating abroad. For example, in the United States, the Dodd-Frank Act requires publicly-traded companies that engage in “the commercial development of oil, natural gas, or minerals” to disclose payments including taxes, royalties and license fees made to foreign governments.¹⁵³

Mining companies operating in Guatemala are exempt from certain taxes and owe one percent of gross royalties to the government.¹⁵⁴ The percentage of royalties that these companies are required to pay by law has steadily decreased over the last century.¹⁵⁵ The issue of costs and benefits for foreign companies and the Guatemalan people is a source of contention in many of the impoverished communities affected by mining operations.¹⁵⁶ Compliance with the EITI standards and, where relevant, domestic law regarding reporting could help foster an informed, fact-based discussion regarding burden sharing and the fair allocation of resources.

¹⁴⁷ The Voluntary Principles on Security and Human Rights 1, available at http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

¹⁴⁸ U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, FACT SHEET: VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS: (Dec. 20, 2012), available at <http://www.state.gov/j/drl/rls/fs/2012/202314.htm>.

¹⁴⁹ Voluntary Principles, *supra* note 147, at 2-3.

¹⁵⁰ See The EITI Standard, *The Extractive Industries Transparency Initiative*, available at http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf.

¹⁵¹ *Id.* at 8.

¹⁵² See EITI country list, available at <http://eiti.org/countries>. See EITI Guatemala page, available at <http://eiti.org/Guatemala>.

¹⁵³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1504 (2010), available at <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.

¹⁵⁴ Ley de Minería (Mining Law), Decree 48-97, 1997 (Guat.), art. 63, available at http://www.sice.oas.org/investment/NatLeg/GTM/Mineria_s.pdf.

¹⁵⁵ See VAN DE SANDT, *supra* note 18, at 11.

¹⁵⁶ Anonymous NGO interview, *supra* note 34. See generally VAN DE SANDT, *supra* note 18.

El Tambor Mining Project: Inflammatory Rhetoric and Breakdown in Dialogue

In March 2012, community members allegedly blockaded the El Tambor mining project near San José de Golfo in protest to publicize their concerns about potential environmental contamination from the mine and the failure of the government to hold an official consultation process.¹⁵⁷ The mine is operated by EXMINGUA, a local subsidiary of the Nevada-based company, Kappes, Cassidy & Associates (KCA).¹⁵⁸ The company alleges that it has completed an extensive environmental and social impact assessment that demonstrated that the mine will not contaminate the local environment and will contribute to the economic development in the area. However, a third-party review of the environmental impact assessment indicated that KCA did not evaluate all relevant concerns and therefore it could not sufficiently establish that the mine would not have adverse environmental impacts.¹⁵⁹

In June 2012, community activist Yolanda Oqueli was shot and wounded in a drive-by attack upon returning home from the protest,¹⁶⁰ to date, no one has been arrested for the crime. In July 2013, shots were reportedly fired outside of Ms. Oqueli's home while she and her children were inside. This incident occurred several hours after a fellow human rights defender, Santos Fidel Ajau Suret, was shot and killed on his way home from a peaceful protest. Local spokespeople have also reportedly filed repeated complaints about threats received. Moreover, protesters allege that they were intimidated and provoked by a group of uniformed EXMINGUA employees on November 13, 2012.¹⁶¹

Throughout November 2012, the president of KCA, Dan Kappes, distributed several open letters to advocacy groups in Guatemala and the United States, accusing non-governmental organizations that support those opposed to the mine of violating the human rights of the company and of local citizens.¹⁶² He also accused non-governmental organizations of paying locals to engage in protests, without providing any evidence to substantiate this claim.¹⁶³ In one letter, Mr. Kappes asserted that the "people who oppose us are the same type of people who supported the [Guatemalan] civil war.... They want to keep the people poor, uneducated, and totally submissive."¹⁶⁴ This letter was widely distributed, and many copies of it were plastered on a stadium the day that various activist groups had gathered there to discuss attacks on human rights defenders. Several human rights groups expressed concern that Mr. Kappes' assertion could inflame social conflict and marginalization in an already fraught environment.

According to press reports, on December 7, 2012, a violent confrontation ensued between the National Civil Police (PNC) and protesters.¹⁶⁵ EXMINGUA employees allegedly arrived with the PNC. The police gave verbal orders but, according to available information, no warrants were issued by a judge to carry out the ensuing eviction.¹⁶⁶ The Human Rights Ombudsman's Office reportedly stated that the ongoing protest was legal, as it was authorized by the Ministry of the Interior until December 10, 2012.¹⁶⁷ According to press reports, police used anti-riot agents, including tear gas, and several people, including children, needed to be hospitalized for resulting injuries. There were reports that children, women, and elderly persons were beaten by police.¹⁶⁸

¹⁵⁷ Front Line Defenders, *Guatemala: Attempted killing of human rights defender Ms Telma Yolanda Oqueli Veliz del Cid*, June 12, 2012, <http://www.frontlinedefenders.org/node/18656>.

¹⁵⁸ Amnesty Int'l., *Yolanda Oqueli: Community leader who opposes mining shot and wounded*, Jan. 3, 2013, <http://www.amnesty.ca/get-involved/take-action-now/guatemala-yolanda-oquel%C3%AD>.

¹⁵⁹ *San Jose del Golfo and San Pedro Ayampuc*, GHRC, <http://www.ghrc-usa.org/our-work/current-cases/san-jose-del-golfo/> (last visited July 29, 2013).

¹⁶⁰ Amnesty Int'l., *supra* note 158.

¹⁶¹ *Id.*

¹⁶² Letter from Daniel Kappes, President, Kappes, Cassidy & Associates (KCA), to Board of Advisors and Board of Trustees of the Guatemala Human Rights Commission (GHRC) (Nov. 11, 2012) (on file with authors); letter from Daniel Kappes, President, KCA, to Board of Advisors, Center for International Environmental Law (CIEL) (Nov. 3, 2012) (on file with authors).

¹⁶³ *See id.*

¹⁶⁴ Letter from Daniel Kappes to GHRC, *supra* note 162.

¹⁶⁵ Grahame Russell, *New Acts of Repression Target Land Defenders in Guatemala*, RABBLE.CA, Dec. 12, 2012. <http://rabble.ca/news/2012/12/new-acts-repression-target-environmental-defenders-guatemala>.

¹⁶⁶ *Id.*

¹⁶⁷ Francisca Gomez Grijalva, *Represión Continua*, PRENSA LIBRE (Dec. 12, 2012), http://www.prensalibre.com/opinion/Represion-continua_0_827317280.html.

¹⁶⁸ *Id.*

VI. Conclusion

The situation of human rights defenders in Guatemala is precarious. Defenders, including community activists, attorneys, and judges face a variety of serious risks. Many believe that legitimate actions (such as peaceful protests) have been essentially criminalized by a pattern of spurious charges against defenders. The fear of criminal prosecution and incarceration may have a chilling effect on defenders' activities. Moreover, activists report that defenders often receive violent threats, and some have been physically attacked and killed without sufficient investigation on the part of the government. Defenders must also contend with widely published derogatory and inflammatory statements against them, which are often distributed via online networks and in mainstream newspapers. The social divisions in Guatemala run deep and are inextricably related to the history of internal armed conflict. In such an environment, greater protection of the rights and freedoms of human rights defenders must be a priority.

Progress can be seen in some parts of government, such as at the highest levels of the Public Ministry. However, further action is needed. Local prosecutors and police should respect and protect the rights of defenders to peacefully protest and to be free from violence. The government should ensure that consultations are held with affected communities prior to permitting the development of megaprojects. Moreover, businesses and other members of the private sector should engage in responsible, constructive dialogue with local communities and follow international standards of human rights due diligence. Only with the commitment of all actors in Guatemala can the country move beyond its history of conflict to a future where human rights are ensured.

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