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大会 2006 年 3 月 15 日题为“人权理事会”的  
第 60/251 号决议的执行情况

强迫或非自愿失踪问题工作组的报告

增 编

对危地马拉的访问 \*

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\* 本访问报告的内容提要以所有正式语文分发。报告本身载于内容提要附件，仅以原文和西班牙文分发。

## 内容提要

应危地马拉政府的邀请，强迫或非自愿失踪问题工作组于 2006 年 9 月 19 日至 21 日访问了该国。代表工作组进行这次访问的有主席兼报告员 **Santiago Corcuera** 和工作组成员 **Darko Göttlicher**。这次访问的目的是，根据国际人权标准、特别是大会 1992 年 12 月 18 日通过的第 47/133 号决议《保护所有人不遭受强迫失踪宣言》讨论危地马拉为解决过去的失踪事件而作出的努力。要求进行的这次访问是访问中美洲四个失踪案件数目很多的国家的计划的一部分，这些案件已拖了许多年未能解决。工作组感谢危地马拉政府迅速作出同意访问的答复。

代表团会晤了共和国副总统、最高法院院长、宪法法院院长、国家总检察长、总统设立的人权委员会主席(他同时兼任行政部门索寻国内武装冲突期间失踪人员委员会主席)、外交部副部长、人权监察员、共和国议会人权委员会主席、公共刑事辩护研究所主任、全国赔偿案主任和许多非政府人权组织的代表、失踪人士家属、红十字会国际委员会和危地马拉的国际社会代表。在访问之后，代表团举行了一次记者会。

本报告概述了宪法和法律关于危地马拉失踪案件的规定，包括危地马拉加入的若干国际人权条约。报告参照《保护所有人不遭受强迫失踪宣言》(《宣言》)分析了《刑法》界定强迫失踪罪行的规定。

报告接着审查危地马拉为解决失踪案件而采取的体制步骤和为保障受害者依《宣言》享有的权利而采取的措施。

关于伸张正义的权利及为了结束有罪不罚现象，报告提到了在提出的将失踪案件移交法办的法律框架和表示的政治意愿与取得的实际成果之间的差距很大，因为成效不大或无成效。工作组收到的报告事实上确认，直到本报告编写之时，还没有任何一个人因犯下强迫失踪罪行而被判罪。只有两个案件进入刑事指控阶段，而受到审判的只有其中一个。

关于知道失踪人员的命运的权利问题，工作组欢迎行政部门设立了一个索寻在国内武装冲突期间失踪人员委员会，并成立了一个筹备委员会，以致力通过法律设立一个同样的机构。行政部门的这一索寻委员会依其职权澄清工作组处理的失踪人员和其他人的命运或下落将会取得最佳结果。

报告还提到了全国赔偿方案和索寻委员会提议的全国索寻国内武装冲突期失踪人员计划(2006-2016 年)，两者均符合《宣言》。然而，委员会在报告中致力解释这些原则必须以综合的方式适用，而不是只限于分发赔偿金，如某些资料来源所说的，在大多数情况下却是如此。

根据工作组的调查结果，报告载有若干关注事项和工作组提出的供危地马拉国执行的建议。

本报告所载建议中。工作组特别强调下列建议：

- 通过一项法律，设立一个独立的索寻强迫或非自愿失踪受害者全国委员会，委员会应根据将由促进拟议设立索寻强迫或非自愿失踪全国委员会拟议立法高级别筹备委员会的法律草案通过这项法律；
- 法院在就强迫失踪案件作出判决时应适用国际标准，包括不适用时效法、这种罪行的持续性以及民事法庭是唯一可审讯强迫失踪案件的主管法庭；
- 索寻委员会提议的索寻国内武装冲突期间失踪人员全国计划(2006-2016 年)的 10 个方案应在所有有关行为者相互合作的情况立即执行；
- 此外，必须提供必要的资金，落实参与调查和惩处强迫失踪案件的机构和行为者的活动；
- 违反《宣言》中止实施的人身保护程序应重新适用，并应作出不懈的调查，努力澄清过去的强迫失踪案件；
- 应采取有效措施，防止一再对证人和参与调查强迫失踪案件的人权维护者进行恐吓和其他形式的攻击行动，以便上述行动者能不受任何胁迫，执行其任务；
- 工作组强烈建议，全面落实全国赔偿方案，这种赔偿方案应不限于发放赔偿金；
- 工作组代表团再次要求危地马拉政府和其他各方向其提供有关资料，以便工作组能澄清尚待工作组处理 2000 多个强迫失踪人员案件。

**Annex****REPORT OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY  
DISAPPEARANCES: MISSION TO GUATEMALA****(19-21 September 2006)****CONTENTS**

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## **I. INTRODUCTION**

1. At the invitation of the Government of Guatemala, the Working Group on Enforced or Involuntary Disappearances visited the country from 19 to 21 September 2006. The Working Group was represented by its Chairman-Rapporteur, Santiago Corcuera, and Working Group member Darko Göttlicher. In 1987, the Working Group undertook a visit to the country. The report on that mission (E/CN.4/1988/19/Add.1) included a recommendation that efforts should be made to improve the functioning of habeas corpus procedures, to protect the life of witnesses, as well as of individuals and members of organizations reporting cases, and to adopt effective measures to prevent and clarify disappearances. The purpose of the current visit was to discuss the efforts to address past disappearances in Guatemala in the light of international human rights standards, especially the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992. The mission was requested as part of a regional visit planned to four Central American countries with significant numbers of cases which have been outstanding for many years. The Working Group is grateful to the Government of Guatemala for its prompt positive response to the request.

2. The delegation held meetings with the Vice-President of the Republic, the President of the Supreme Court of Justice, the President of the Constitutional Court, the General Attorney of the Nation, the President of the Presidential Commission on Human Rights (COPREDEH), who at the same time is the President of the Commission of the executive branch for the search of persons disappeared during the internal armed conflict, the Vice Minister of Foreign Affairs, the Human Rights Ombudsman, the President of the Human Rights Commission of the Congress of the Republic, the Director of the Institute for Criminal Public Defense, the Director of the National Reparations Programme and representatives of many non-governmental human rights organizations, relatives of the disappeared, the International Committee of the Red Cross and representatives of the international community in Guatemala. At the end of the visit, the delegation held a press conference.

3. The delegation expressed its gratitude and recognition of the full cooperation of the Guatemalan authorities in ensuring that all meetings requested were held, and that all discussions took place in an open and constructive manner. The delegation expressed its interest that the Government of Guatemala would provide information towards the clarification of cases. The delegation expresses also its deep appreciation for the assistance and support provided by the Office of the High Commissioner for Human Rights in Guatemala.

## **II. GENERAL OBSERVATIONS**

### **A. Purpose of the visit**

4. Following the invitation of the Government of Guatemala, the Working Group decided to conduct a mission to the country from 19 to 21 September 2006. The purpose of the mission was to support processes being put forward by the present administration in order to clarify past cases of disappearances which occurred in the context of the internal armed conflict between 1979 and 1986. According to the 1999 report of the Commission for Historical Clarification, during that period of time, there might have been as many as 45,000 victims of enforced disappearances.

5. The Working Group only received 3,152 cases of forced disappearances, of which 2,896 are still pending clarification with respect to the whereabouts or the fate of the victims. Between 1996 and 2005, the Working Group only received one new case of enforced disappearance, which shows the progress achieved following the Agreement on a Firm and Lasting Peace of 1996, which formally concluded the internal armed conflict.

6. The members of the Working Group who participated in this mission wish to express their deep gratitude for the great support given by the Government of Guatemala to ensure the success of this mission. It should be mentioned that the Working Group intended to include this mission to Guatemala in a regional visit to Central America at the beginning of 2007 to countries with large numbers of outstanding cases.

7. The members of the Working Group who participated in this mission stressed during the mission the humanitarian character of their mandate, with the main objective of assisting the families of disappeared persons in determining the fate or whereabouts of their relatives. Furthermore, the Working Group members highlighted that, in addition to its central mandate, they are entrusted to monitor States' compliance with their obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance and to provide to Governments assistance in its implementation.

## **B. Background**

8. Guatemala is situated in the north of Central America. The total area is 108,890 sq. km and the population is 14,655,189. According to the United Nations Human Development Index, Guatemala ranks near the bottom among the countries that have an intermediate development level. The wealth of the country is reportedly distributed very unequally.

9. The conflict from which disappearances arose in Guatemala began in 1960 when a small group of young army officers rebelled against the military Government, accusing it of corruption. The rebellion was put down, and the young officers fled to the mountains of eastern Guatemala where they began a guerrilla war. These guerrillas soon turned into a Marxist movement whose objective was to overthrow the Government and take power. It is important to highlight that the Guatemalan armed conflict did not originate as a result of inter-ethnic conflict. It was a conflict that occurred in the framework of the Cold War. The Mayan population was especially affected by harsh treatment of the army.

10. Disappearances started to occur in the mid-1960s, in areas where there was organized armed opposition to the Government, but then spread to all parts of the country, affecting all segments of the population.

11. The internal conflict in Guatemala came to an end on 29 December 1996 when the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) signed the Agreement on a Firm and Lasting Peace. The agreement brought into effect a number of previous agreements negotiated over a period of six years under United Nations auspices.

12. Separate agreements signed in 1995 and 1996 referred to the rights of Guatemala's majority indigenous population; socio-economic and land issues; demilitarization; constitutional reform; the legalization of the URNG; a partial amnesty for crimes committed during the conflict; a formal ceasefire; and a timetable for implementing the peace commitments. In January 1997 a Consultative Group of international donor countries and financing institutions was established, principally the World Bank, the Inter-American Development Bank (IDB), the Central American Bank of Economic Integration (BCIE), the United States of America, the European Union, Spain and Germany.

13. Early successes of the peace process included the demobilization of the guerrillas - whose numbers are estimated to have peaked at around 4,000 in 1978-1980 - and the reduction in size of the armed forces by one third to 31,000. However, implementation in other areas was slow and progress was undermined by the rejection of a package of 47 constitutional reforms (13 of which corresponded to the Peace Agreements in the Agreement on Constitutional Reforms) that was put to a referendum in May 1999.

14. The United Nations Verification Mission in Guatemala (MINUGUA), set up to monitor human rights conditions and the implementation of the peace accords, closed in December 2004 after 10 years in Guatemala. Its human rights verification functions were transferred to the Human Rights Ombudsman's Office, but financial constraints have reportedly complicated these tasks.

### **C. Political context**

15. Guatemala is a constitutional democratic republic. The executive consists of a president and vice-president elected by universal suffrage. Congress is unicameral, comprising 158 deputies. The highest judicial authority is the Supreme Court, but the Constitutional Court takes precedence in issues of constitutionality. Oscar Berger, the current President, was elected in December 2003. He has brought the Peace Accords back to the government agenda. On 25 February 2004, President Berger held a ceremony at the National Palace at which he symbolically "relaunched" the peace accords as Guatemala's national agenda, pledging to reinvigorate implementation with the support of a new National Peace Accords Commission composed of representatives of the three branches of State, political party delegates and respected civic leaders. The President sent to Congress a draft Law on the Peace Agreements, which was adopted, and consequently the Agreements became law.

16. The subject of enforced disappearances in Guatemala was included in the Comprehensive Agreement on Human Rights signed on 29 March 1994, under Commitment III, Commitment against Impunity, in which the State undertook to promote the legal amendments to the Criminal Code to describe enforced disappearance as a crime of particular gravity. The Government likewise undertook to support recognition in the international community of the definition of systematic enforced disappearances as a crime against humanity.

### **III. CONSTITUTIONAL AND LEGAL FRAMEWORK ON DISAPPEARANCES**

#### **A. The Constitution**

17. The Guatemalan Constitution contains a complete catalogue of human rights. Although, like most constitutions, it does not make a specific reference to the act of enforced disappearance, it does protect all of the basic rights that are violated by the commission of this offence. These rights are enumerated in the Declaration, where it is stated that “any act of enforced disappearance places the persons subjected thereto outside the protection of the law and ... constitutes a violation of ... inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life” (art. 1, para. 2).

18. Indeed, the Guatemalan Constitution protects persons from arbitrary detention, provides for the right to be informed of the causes of a detention and of the rights assisting the detained person, the right to be detained in public and official places of detention, with which clandestine places of detention are forbidden by the Constitution. The Constitution also provides for basic safeguards in cases of detention or any form of deprivation of liberty or threat thereof, including the guarantee of habeas corpus or personal exhibition before the courts. The Constitution provides that any officer who orders the hiding of a detainee or refuses to present him to a court of law or that in any manner evade this guarantee, shall be responsible for the crime of abduction and shall be sanctioned according to the law. In the event that the person is not found, the courts are mandated by the Constitution to order an immediate investigation until there is complete clarification of the location of the person. Additionally, the Constitution sets out the basic rights to adequate defence, presumption of innocence and public legal proceedings. Furthermore, the Constitution provides that prisoners must be treated as human beings, and therefore must not be subject to physical or moral torture or other cruel treatment or other actions contrary to human dignity. Moreover, the Constitution protects the right to life, whereby arbitrary and extrajudicial executions are contrary to the Constitution.

19. The above provisions ensure constitutional protection of persons against enforced disappearance.

20. The Constitution also enshrines the legal guarantee of *amparo*, which can be initiated against any threat of violation of human rights or to restore the enjoyment of the same, in case the violation has already occurred.

21. The Constitution stipulates the establishment of a commission on human rights of the Congress, and the institution of the ombudsman for human rights as a commissioner of Congress, which secures its autonomy by the Constitution of Guatemala.

#### **B. International human rights treaties**

22. Guatemala has assumed a range of obligations as a State party to, or through ratification of, the major international human rights instruments, notably those contained in the International



Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the first Optional Protocol to that Covenant, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child and its two Optional Protocols.<sup>1</sup>

23. Guatemala has also signed the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Guatemala is also a party to a number of international labour conventions.<sup>2</sup> Guatemala has also ratified the International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169).

24. However, Guatemala has yet to ratify the Rome Statute of the International Criminal Court, which renders enforced disappearances a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack.

25. At the regional level, Guatemala is party to the American Convention on Human Rights (Pact of San José), the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

26. It should be underlined that Guatemala ratified the Inter-American Convention on the Forced Disappearance of Persons which coincides in all essential concepts with the provisions of the Declaration.

27. The fact that the Constitution establishes "the general principle that international treaties and conventions on human rights accepted and ratified by Guatemala have pre-eminence over domestic law" places the Guatemalan Constitution in a leading progressive position among

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<sup>1</sup> Note that Guatemala has not lodged any reservation to these instruments. However, Guatemala has not made the declarations under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 22 of the Convention against Torture recognizing the competence of the respective treaty-monitoring bodies to receive and consider communications from individuals or groups.

<sup>2</sup> Including the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) of the International Labour Organization (ILO), as well as the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1948 (No. 98).

constitutions. It should be noted, however, that the Constitutional Court has stated that there can be no change to the Constitution arising from provisions of an international human rights treaty if it results in an effective amendment to the Constitution, due to the constitutional guarantee of the permanence and superiority of the Constitution. The decision provides that the Constitution may only be amended by a constitutional assembly or popular referendum (*Gaceta* No. 18, dossier No. 280-90, p. 99, sentence 19-10-90).

### **C. Enforced disappearance in the Criminal Code**

28. On 14 July 1995, Legislative Decree 48-1995 was enacted, whereby article 201 ter was added to the Criminal Code, thereby criminalizing the conduct of enforced disappearance.

29. In general terms, the definition of enforced disappearance coincides with the notion of this crime provided for by the Declaration. However, there are some elements that differ, and this should be highlighted.

30. The main aspect of the definition of enforced disappearance contained in the Criminal Code that is not in accordance with the Declaration is that the Criminal Code includes the possibility of acts being characterized as a disappearance even when committed by non-State actors (members of organized groups with terrorist, insurgent, subversive or any other criminal aim, when they commit kidnapping or abduction as members or collaborators of these groups) without the support, consent or acquiescence of the State.

31. The definition in the preamble of the Declaration, however, refers only to acts perpetrated “by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”. The definition in the Inter-American Convention on Forced Disappearance of Persons is similar.

32. The Working Group has previously noted that, although the inclusion of non-State actors acting without the support or consent of the Government may appear to advance the law, in the sense that it covers a wider area than the Declaration (i.e., abductions), the position and mandate of the Working Group is that enforced disappearance is restricted to a “State crime”. Some may consider that in other areas of human rights, the inclusion of non-State actors as perpetrators could offer more protection to the victims (i.e. in the case of discrimination or labour or environmental human rights).

33. The penalty provided for in the Criminal Code of 25 to 40 years of imprisonment seems concurrent with the Declaration, which provides that “all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness” (art. 4, para. 1).

34. However, it should be noted that the Declaration has “regard” to the International Covenant on Civil and Political Rights. The fact that the Criminal Code provides that the death penalty shall be imposed in cases “where at the time of the crime or during the crime, the victim

is seriously or very seriously injured, or suffers psychological trauma, or permanent psychological damage, or dies” is excessive. The position adopted by the International Covenant on Civil and Political Rights and its second Protocol are clearly oriented to the progressive abolition of the death penalty in all cases. Thus, the application of the death penalty, even for those found guilty of the extremely serious crime of enforced disappearance, is excessive.

#### **IV. INSTITUTIONAL STEPS TO ADDRESS DISAPPEARANCES AND MEASURES TO GUARANTEE VICTIMS’ RIGHTS**

##### **A. The right to justice and to end impunity**

35. The Declaration provides that “all States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, which are found to be within their jurisdiction or under their control” (art. 14).

36. The Criminal Code is in line with the Declaration with respect to the provision that enforced disappearance is a crime of a continuing nature. It should also be stressed that, under article 8 of the Law of National Reconciliation of 27 December 1996, extinction of criminal responsibility was not given to the crime of enforced disappearance, which is in accordance with article 18 of the Declaration.

37. The Guatemalan legal framework establishes a sophisticated set of rules for establishing its prosecution and justice systems and institutions.

38. Chapter VI of the Constitution deals with the institutions for Public Prosecution Institution (Ministerio Público) and the General Attorney of the Nation (Procuraduría General de la Nación).

39. The Public Prosecution Institution is under the authority of the General Prosecutor (Fiscal General de la República) and has the power to initiate public criminal proceedings. The General Prosecutor is appointed by the President of the Republic, out of a group of six candidates proposed by a commission made up of the President of the Supreme Court of Justice, the deans of the law schools of the universities of the country, the President of the Board of Directors of the Bar Association, and the President of the Honour Tribunal of that bar association.

40. Investigating and fighting criminal offences is the responsibility of the National Civilian Police, created in 1997 by the Law of the National Civilian Police. In accordance with this law, the National Civilian Police is not under the command of the General Prosecutor, but under the President of the Republic through the Ministry of the Interior. The National Civilian Police is also in charge of the prevention of crime and the protection of the population in general.

41. Those accused of criminal offences are brought by the Public Prosecution Institution before the Judicial Body (Organismo Judicial) for trial and judgement.

42. The Criminal Procedure Code was amended in 1994 and is seen as one of the major reforms that predate the Peace Accords. It did away with the inquisitorial system and introduced to Guatemala the common-law adversarial system. It provides for the presumption of innocence, the right to be present at trial, the right to counsel, plea bargaining, and the possibility of release on bail.

43. The reform also changed the roles of important actors, placing control over investigation and prosecution of cases in the hands of prosecutors. The Public Prosecution Institution, as mentioned above, may initiate criminal proceedings on its own volition or in response to a complaint. The Code also stipulates the responsibilities of the Public Prosecutor's Office, including the direction of criminal investigation in coordination with the National Civilian Police, the gathering of evidence at the pretrial stage, and the presentation of its findings and petitions to the judge.

44. The provisions relating to an independent judiciary and to the general administration of justice are detailed, and guarantee its independence, from the budgetary and functional point of view.

45. The judiciary is composed of a Constitutional Court, a Supreme Court, appellate courts, lower courts and courts of special jurisdiction.

46. The above legal configuration would, in principle, appear to be synchronized with the Declaration where it provides that "each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits" (art. 13, para. 2).

47. The Declaration refers not only to "powers", which are sufficiently granted to the authorities under Guatemalan law, but also to "resources" to conduct the investigation effectively. During the various meetings held by the Working Group with both official and civil society players, a constant cause of deep concern was expressed by all parties regarding the lack of personnel and material resources to address the cases of disappearances which occurred during the internal armed conflict.

48. The General Prosecutor and his team explained that a significant obstacle to the success of the Public Prosecution Institution's role to effectively accuse and charge presumed criminals in general, including those presumably responsible for disappearances, is the fact that the Public Prosecution Institution has no direct control over the police officials who are empowered to conduct criminal investigations and arrests (under the command of the Ministry of the Interior). The Working Group was informed that the office of the General Prosecutor is, in fact, establishing a body of investigators that does not belong to the National Civil Police, although this is not strictly under its area of authority. Moreover, the General Prosecutor himself and all other players interviewed by the Working Group admitted that the investigatory police agents and the attorneys of the Public Prosecution Institution in most of the rural and suburban areas of the country, and even those working in the cities, lack the minimum technical training needed to conduct their functions effectively. On top of the lack of technical capabilities, all actors

interviewed expressed that the number of police agents and attorneys of the Public Prosecution Institution is absolutely insufficient to cope with the immense number of cases that have to be dealt with by them and that are occurring at the present, not considering the massive number of crimes that occurred during the internal armed conflict. This area of concern was also expressed by the President of the Supreme Court of Justice. She indicated that the judiciary is also incapable of coping with the number of cases before it, as a result of insufficient training of the judges and the small number of courts and limited legal staff.

49. Other sources expressed great concern about the lack of sufficient and effective guarantees of independence of the bodies in charge of conducting investigations of crimes perpetrated by State officials, including disappearances. It was indicated that investigations were not carried out directly by the office of the General Prosecutor, but by the National Civilian Police, which, despite the fact that the law provides that they should not be related to any political activity (article 2 of the Law of the National Civil Police), carries out its activities under the direct command of a Director General who is “under the immediate and exclusive authority of the Minister of the Interior” (article 3 of the Law of the National Civil Police). It would seem advisable that officials charged with carrying out investigations leading to the arrest of those responsible for crimes committed by State agents be chosen directly by the legislative authority and that they have budgetary and managerial independence similar to that enjoyed by the Defensor del Pueblo.

50. All the above factors result in a broad gap between an advanced legal framework and expressions of political will to bring to justice cases of disappearances, as against practical results. Reports received by the Working Group affirm that, in fact, up to the date of this report, there has not been a single person arrested or tried for the commission of the crime of enforced disappearance. There are only two cases which have made their way up to the stage of formulating an accusation, and one of them is in the arguments stage of the trial.

51. In this regard, and as a result of the continuing nature of the crime of enforced disappearance, it should be reiterated that the persons responsible for this crime can and must be subject to legal proceedings and sanctions even if the law creating the crime was adopted after the initial act causing the disappearance, or if after the enactment of the law the whereabouts or fate of the victim is still unknown. During the Working Group’s meeting with the President of the Constitutional Court, the Working Group addressed this important issue, and was made aware that the Constitutional Court was due to decide on this key legal interpretation in the case known as *Choatulum*, regarding the enforced disappearance of six persons between 1982 and 1984 in the village of Chimaltenango.

52. Pursuant to the Declaration, “persons who have or are alleged to have committed [enforced disappearances] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction”. As mentioned above, the Working Group is aware of the fact that the peace accords and the Law of National Reconciliation exclude the possibility of amnesties to persons having committed crimes against humanity, including enforced disappearances that occurred during the internal armed conflict. However, certain similar measures are contrary to the Declaration even if not contained in a law, if such situations in fact lead to impunity. That is to say, impunity could be understood

as a “de facto amnesty”, contrary to the Declaration. Therefore, the situation above (regarding lack of resources, lack of sufficient investigators, and police agents without appropriate professional training and the perceived lack of will of some actors, to investigate, arrest, bring to justice and punish persons responsible for gross violations of human rights, including disappearances) gives rise to an atmosphere of impunity, which is unacceptable in the light of the Declaration. The Working Group is very concerned by reports referring to the fact that impunity leads to a situation where perpetrators of gross violations of human rights, including disappearances, committed during the armed conflict, live close to the victims of such violations. This leads to an atmosphere of fear and community distrust.

53. An atmosphere of impunity is also contrary to the appropriate measures that States must adopt in order to prevent acts of enforced disappearance, as provided for in article 3 of the Declaration, and therefore to comply with the guarantee of “no repetition”. The Human Rights Ombudsman delivered to the Working Group a report where it is indicated that the impunity that has prevailed with respect to the phenomenon of enforced disappearance during the internal armed conflict, is probably one of the causes that this phenomenon has reappeared recently and is in its initial phase; so that the efforts that governmental authorities may put into practice to combat these practices will be decisive to avoid that they become common practice. Their report asserts that the Office of the Human Rights Ombudsman received 9 reports of disappearances in 2004 and 23 reports of the same crime in 2005. During the mission which is the subject matter of this report, the Working Group received five new reports of cases of enforced disappearances which purportedly occurred in recent years. The Working Group will analyse these cases in accordance with its methods of work to check whether they comply with admissibility requirements and, if so, transmit them to Guatemala.

54. One essential element of the right to justice is the right of the complainant, counsel, witnesses and those conducting the investigation of cases of enforced disappearances, to be protected against ill-treatment, intimidation or reprisal, as provided under article 13 of the Declaration.

55. The Working Group received a detailed report prepared by several human rights organizations, which refers to cases of attacks, acts of intimidation, threats and reprisals to several organizations and individuals, which include at least five organizations working on the filing of legal actions and investigation of cases of enforced disappearances, including activities of exhumations, searches for disappeared persons, and related actions. The Working Group was also informed by the Human Rights Ombudsman of acts of such a nature against regional and central agencies of his Office, in connection with cases related to enforced disappearances, including the protection of documentation of the archives of the National Police, with which this report deals below.

56. The Working Group wishes to express its deep concern regarding such acts of intimidation and reprisal since, as mentioned above, they are contrary to the Declaration. Therefore, they should be prevented and punished in accordance with the Declaration in order to reduce the present atmosphere of impunity which was noted by the persons involved in the protection and promotion of human rights who were interviewed by the Working Group.

57. In this connection, the Working Group welcomes the fact that, in April 2005, the Office of the General Prosecutor created a Human Rights Office to investigate crimes committed by members of illegal clandestine groups and attacks against human rights defenders. The Office merged and superseded three *fiscalías especiales*, or Special Offices, for human rights defenders, journalists and trade unionists, and administrators of justice. The Working Group was informed by the General Prosecutor that this new branch within his office was aimed at reducing attacks on human rights defenders, bringing those responsible to justice and investigating past and present human rights violations. The Working Group respectfully expressed to the Fiscal General, based on the above-mentioned reports of intimidation and attacks on human rights defenders, that this recently created office should measure progress not simply by its establishment, but by delivering concrete results.

### **B. Right to know the fate or whereabouts of disappeared persons**

58. Article 9 of the Declaration provides that “the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7”.

59. Furthermore, article 13 of the Declaration states that “each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation”.

60. The Guatemalan legal framework contemplates rights and remedies that are concurrent with the above provisions of the Declaration. Specifically, as mentioned before in this report, the Constitution provides for basic safeguards such as the guarantee of habeas corpus or personal presence before the courts. The Constitution provides that any officer who orders the hiding of a detainee or refuses to present him to a court of law or in any manner evades this guarantee, shall be responsible for the crime of abduction and sanctioned according to the law. In the event that the person is not found, the courts are mandated by the Constitution to order the immediate investigation until its total clarification.

61. However, this is another area where legal provisions and actual results are very distinct. The Working Group was informed that thousands of habeas corpus applications had been initiated with the competent authorities before and after the end of the internal armed conflict, which were all declared null and void (*sin lugar*), and were sent to the archives.

62. Before the amendment of the Criminal Procedural Code in 1994, investigations were carried out by the criminal courts. Such functions were assigned to the Public Prosecution Institution, as mentioned above. As a result of that, the Working Group was informed that the

relevant documentation regarding all habeas corpus petitions initiated before 1994 were transferred en masse to the Public Prosecution Institution. However, according to the Human Rights Ombudsman, there is no information available in order to learn the status of such proceedings and the identity of the agents of the Public Prosecution Institution in charge of their review.

63. This situation is contrary to article 13 of the Declaration, which provides that an investigation should be conducted for as long as the fate of the victim of enforced disappearance remains unknown.

64. As a result of the above, the Working Group sees as a positive sign that, in the absence of an agreement in the Congress, a presidential decree was issued to create a Commission for the Search for Persons Disappeared during the Internal Armed Conflict (Search Commission) and that a parallel preparatory commission is in place to work on the establishment of an equivalent body through an act of legislation. The latter would establish stronger institutional autonomy, both financially and legally, and would more strongly secure its stability. This preparatory commission works in an integrated way with representation from the Government, the Human Rights Ombudsman and civil society. The Working Group respectfully calls on the different parliamentary factions of Congress to continue efforts to achieve consensus in order to enact the necessary legislation.

65. In the meantime, the Working Group hopes that the establishment of the Search Commission of the executive branch will render the best results within its power to clarify the fate or whereabouts of disappeared persons that are before the Working Group, as well as any others.

66. The Search Commission was established as a temporary body, for a period of one year that may be extended, by means of Governmental Decree 264-2006, dated 26 May 2006. The Search Commission is made up of five high officers of the executive branch, including the President of the National Reparations Programme. The Commission is chaired by the Presidential Commission for the Coordination of Human Rights Policies (Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos, COPREDEH).

67. Along with a copy of the governmental decree, the Working Group received from COPREDEH a copy of a document called the National Plan (2006-2016) for the Search of Persons Disappeared during the Internal Armed Conflict proposed by the Search Committee. This Plan is lengthy and comprehensive. It refers to 11 ruling principles that include the rights to information, truth, justice, legal aid, and integral reparation, among other principles. Additionally, the Plan refers to 10 programmes intended to search for disappeared persons, carry out exhumations and inhumations, assist and accompany families of the victims, protect victims, witnesses and defenders, ensure reparations are carried out, keep records and documentation, among other things.

68. The governmental decree provides that the Human Rights Ombudsman, the General Prosecutor of the Nation and a representative of the judiciary may participate in the respective meetings, but without voting rights. Furthermore, the Search Commission may receive technical



assistance from international organizations, such as the Office of the United Nations High Commissioner for Human Rights and/or the International Committee of the Red Cross. Finally, the Search Commission has the power (but not the obligation) to call for the establishment of a Support Board made up of representatives of civil society organizations.

69. Some representatives of non-governmental organizations questioned the establishment of the Search Commission, since, in their view, it lacks sufficient guarantees of independence, as a result of the fact that the Human Rights Ombudsman has no voting privileges and that members of civil society were not included as active members of the same. However, the President of the Commission informed the Working Group that members of civil society organizations were not included as formal members of the Commission because they declined to participate.

70. Based on the foregoing, the Working Group calls on all those involved (executive branch, Human Rights Ombudsman and civil society) to keep channels of frank and transparent communication open to ensure constructive co-participation in a common goal, which should be finding victims of enforced disappearances or their fate and the integral reparation to them and their loved ones. In accordance with international law and specifically with the Declaration on the Protection of Persons against Enforced Disappearances the State has the primary responsibility to comply with international obligations. However, the Working Group considers it essential to recognize and emphasize that civil society also has a responsibility to address the resolution of enforced disappearances, including providing information to the Working Group to clarify cases that are still pending.

71. In connection with the search of disappeared persons, the Working Group wishes to commend the establishment, work and results of the National Commission for the Search for Disappeared Children, established by the International Research Centre on Human Rights, the Office of Human Rights of the Archbishop of Guatemala, the association “Where are the children?”, the association Casa Alianza, the Mutual Support Group, Rigoberta Menchú Tum and the Human Rights Ombudsman. We were informed of the achievements of this organization, such as 1,280 documented cases, 324 clarified cases, 131 family reunions, 108 exhumations, 1,000 persons receiving some kind of psychosocial treatment, and 600 persons receiving permanent psychosocial treatment. The Working Group wishes that similar results could be achieved with respect to the pending cases before it, as well as any others.

72. The Working Group wishes to remind all those persons involved in the possible clarification of cases before it that, under its methods of work, the Working Group may consider a case clarified when the competent authority specified in the relevant national law pronounces, with the concurrence of the relatives and other interested parties, on the presumption of death of a person reported missing. In this connection the Working Group learned that a draft law on the declaration of death as a result of enforced disappearance is under consideration by the National Congress. The Working Group wishes to encourage the Congress to advance in the review of this law, in light of the principles of the Declaration. That is to say, the declaration of death as a result of enforced disappearance should be a measure aimed to enable the families of the victims to carry out legal proceedings regarding estate transfers and facilitate inheritance issues, guardianship of minors, family affairs and other civil and commercial matters, without prejudice to the rights of the victims to truth, justice and reparations, and therefore, without prejudice to

the State's obligations to continue with the investigations of pending cases, to uphold the prosecution and punishment of those responsible of the crime, and to adopt the necessary measures to satisfy the rights of victims and their loved ones.

### **C. The right to integral reparation**

73. The Declaration, for which the Working Group has a mandate to monitor the implementation, refers to the fundamental right of integral reparation. This includes the right to truth, to justice, to moral reparation and psychosocial rehabilitation, as well as to appropriate monetary compensation. These principles are fully contemplated in the basic documents of the Guatemala National Reparations Programme and the proposed National Plan (2006-2016) for the Search for Persons Disappeared during the Internal Armed Conflict, proposed by the Search Committee.

74. Chapter 5 of the Programme lists the following measures of reparation: (a) material reparation (including restitution of land, legal title over land, housing restitution, and productive investments); (b) economic indemnification; (c) rehabilitation and psychosocial reparation (including rehabilitation of persons with disabilities, recovery of cultural identity, education, attention to disappeared children and attention to the elderly); and (d) dignifying of victims (including the establishment of the Day for Dignifying Victims, broadcast and promotion of the programme, museums, monuments, fortification of a culture for peace and exhumations).

75. The entire conceptual framework was explained in detail to the Working Group by the director of the programme. The Working Group endeavoured to explain that those principles should be applied in practice in a comprehensive manner, and not be restricted to the delivery of money, as some sources reported occurs in the majority of cases at the present time. This incomplete application of the right to reparation has apparently sometimes led to the disintegration of families of victims of disappearance. The Working Group respectfully requested the Director of the programme to provide it with a report on the actual and integral application of the programme, including, but not limited to, the payment of monetary compensation. No such information had yet been received to date by the Working Group.

76. The Declaration refers to the right to truth and information from the results of investigations. This right forms an integral part of the right to reparation.

77. As regards clarification of its recent history, Guatemala took important steps to advance knowledge of the past and the objective interpretation of what really occurred during the long internal armed conflict. The two essential documents in this regard are "Guatemala - Memory of Silence" (*Informe Guatemala Memoria del Silencio*) issued by the Commission for Historical Clarification, and "Guatemala, Never Again" (*Guatemala Nunca Más*) issued by the Inter-diocese Project for Historic Recovery (REMHI).

78. In addition, the National Plan (2006-2016) proposed by the Search Committee includes two programmes to the right to truth and information. One of them, of course, is related to the search of disappeared persons; the other refers to the right to habeas corpus, keeping of records, documentation and archives related to the phenomenon of enforced disappearances.

79. With respect to the first programme, connected to the search for disappeared persons, it is essential that all those persons involved in the Search Commission and with actual or potential participation in the High-Level Preparatory Commission for Promoting Proposed Legislation for the Creation of the National Commission for the Search for Victims of Enforced or Involuntary Disappearance (e.g. governmental agencies, non-governmental organizations, and the Office of the Human Rights Ombudsman) collaborate with each other, to share all information that they may have available related to the disappeared persons, so that a single national registry of disappeared persons can be put together as soon as possible. It is evident that, in order to adopt effective measures for the search of persons that may lead to clarification of cases, the first element that has to be present is the information regarding the persons that are being searched for and the actual circumstances of the disappearance.

80. This is why it is of the utmost importance that archives and official documents, both from the National Police and the Armed Forces, which may contain essential information for the investigation and potential clarification of disappearances committed during the internal armed conflict, be preserved and cared for scrupulously. Preferably this will be done by a body granted with acting and budgetary autonomy, in order to guarantee that such preservation is not at stake as a result of political factors, such as changes of Government or similar circumstances. In this sense the Working Group welcomes the finding and safekeeping of the above-mentioned archives related to the activities of the National Police during the internal armed conflict.

81. In addition, it would be very positive if the Congress of the Republic issued a law on transparency and effective access to information to guarantee the availability of such information to researchers and families of the disappeared, as well as to the general public, except in cases where secrecy is justified or confidentially is required. Adequate legislation in this area would secure effective implementation of the programme of documentation and archives referred to in the National Plan (2006-2016) proposed by the Search Committee.

82. Also, the Working Group welcomes the enactment of the law that created the Institute of Forensic Anthropology, which should surely play an essential role in the identification of bodies of disappeared persons, contribute to the clarification of cases and fulfil the right of families to mourn and give the bodies of their loved ones the treatment that may be in accordance with their cultural convictions.

## **V. CONCLUSIONS, CONCERNS AND RECOMMENDATIONS**

### **A. Conclusions and concerns**

83. The report of the Working Group on the Guatemala mission encompasses an overview of the present constitutional, legal and institutional framework established by the authorities of Guatemala aimed at dealing with the great number of cases of enforced disappearances committed during the internal armed conflict from 1960 to 1996.

84. Although enforced disappearances are no longer a systematic practice in the policy of the democratic Government of Guatemala, the problem of the thousands of unresolved cases remains one of the most serious issues in the country and represents a priority for the State

to resolve. According to the assessment of the Commission for Historic Clarification, among the 200,000 people killed during the internal armed conflict there were approximately 45,000 persons forcibly disappeared.

85. The Working Group hereby reiterates its gratitude to the Government of Guatemala for its invitation to visit the country and discuss the progress in various activities undertaken on all relevant levels facing the problem of enforced disappearances. The Working Group also wishes to express its gratitude for the wonderful hospitality of the State and for the excellent cooperation of all officials with whom the Working Group met during the mission.

86. The Working Group previously visited Guatemala in 1988. Its members visiting Guatemala in September 2006 could assess the current progress in the State efforts in comparison with the previous report of the Working Group.

87. The Working Group considers that the extent of the problem is so great that it needs a highly unified and well coordinated effort by all relevant institutions of the executive, legislative and judicial authorities, including relevant civil society institutions, working together, to ascertain the fate or whereabouts of the victims.

88. While the Working Group recognizes the good intentions of the State actors, it also expresses its concern at the lack of coordination in the realization of various programmes and activities between non-governmental organizations and State actors because of lack of mutual trust and consensus among them.

89. The Working Group is concerned about the lack of economic and material resources and investigators, judges, and police agents with appropriate professional training and in some cases about the lack of will of some actors to investigate, arrest, process and punish persons responsible for gross violations of human rights, including enforced disappearances. The Working Group is concerned about the lack of resources for the relevant State institutions (judiciary, police, ombudsman, etc.) with regard to their activities to investigate and address enforced disappearances, and also about the lack of resources for the implementation of various programmes dealing with enforced disappearances. The lack of resources is a very considerable obstacle to the effectiveness of the State in undertaking measures related to enforced disappearances.

90. The Working Group is also concerned about the lack of sufficient and effective guarantees of the independence of the institution in charge of conducting investigations of the crimes of disappearance perpetrated by State officials.

91. Impunity is of particular concern to the Working Group. It considers that impunity is contrary to the appropriate measures that States must adopt in order to prevent acts of enforced disappearance, as provided for in article 3 of the Declaration, and therefore comply with the guarantee of “no repetition”.

92. While the Working Group noted the good will of the State to implement international human rights standards on the national level, and in spite of the relatively good progress the State has achieved in the realization of human rights compared to the previous period, especially

regarding the establishment of the national institutions and bodies addressing the problem of enforced disappearances, the Working Group expresses its deep concern about many obstacles that seriously hinder any real results.

93. The Working Group wishes to reiterate and emphasize again the existing gap between the advanced legal framework and good political will to bring to justice cases of disappearances, versus the actual results. The Working Group took note with great concern that, to date, there has not been one person convicted for the commission of the crime of enforced disappearance.

94. The Working Group is concerned about reports of thousands of habeas corpus applications regarding cases of disappearances during the internal armed conflict being declared null and void (*sin lugar*) and investigations on those cases were therefore suspended by the authorities.

95. The Working Group expresses its concern for the safety and preservation of the archives of the National Police and the Armed Forces, which are of the utmost importance and which may contain essential information for the investigation and potential clarification of enforced disappearances committed during the internal armed conflict.

96. Intimidation is closely connected to the situation of impunity. The Working Group expresses its deep concern about recurring attacks and other acts of intimidation against members of civil society organizations, members of the judiciary, officers of the Human Rights Ombudsman, lawyers, human rights activists, members of victims' families, among others involved in cases of enforced disappearances.

97. It is also a matter of concern to the Working Group that the definition of enforced disappearance contained in the Guatemala Criminal Code, is not in line with the definition in the Declaration, inasmuch as acts committed by non-State actors and without the support, consent or acquiescence of the State are also considered enforced disappearances.

98. The Working Group is deeply concerned about the fact that the Criminal Code provides for the death penalty in the cases of enforced disappearances "where at the time of the crime or during the crime, the victim is seriously or very seriously injured, or suffers psychological trauma, or permanent psychological damage, or dies". The Working Group reiterates that the application of the death penalty in all cases, even for those persons found guilty of the crime of enforced disappearances, is not in accordance with the accepted development of international law.

## **B. Recommendations**

99. **The Working Group recommends that the State undertake all necessary measures to harmonize domestic laws with international human rights instruments, especially with the Declaration for the Protection of All Persons from Enforced Disappearance, and to ensure the full implementation of international law in practice. Particularly, the Working Group recommends that the element of non-State actors as potential perpetrators of enforced disappearance be eliminated from the legal definition of the crime. Also, the death penalty should be eliminated for enforced disappearance.**

**100. Other legislative measures should include:**

**(a) The adoption of a law to create an independent National Commission for the Search for Victims of Enforced or Involuntary Disappearances, along the lines of a draft law to be prepared by the High-Level Preparatory Commission for Promoting Proposed Legislation for the Creation of the National Commission for the Search for Victims of Enforced or Involuntary Disappearance;**

**(b) Adoption of a law on access to public information, which in turn could serve as the legal protection for the Armed Forces and National Police Archives (with its 50 million documents). This law should provide for the establishment of a body granted with acting and budgetary autonomy, in order to guarantee that preservation of such archives is not at jeopardy as a result of political factors, such as changes of Government or similar circumstances; and**

**(c) Approval of a law on the declaration of death as a result of enforced disappearance, without prejudice to the rights of the victims to truth, justice and reparations, and therefore, without prejudice to the State's obligations to continue with the investigations of pending cases, to uphold the prosecution and punishment of those responsible for the crime, and to adopt the necessary measures to satisfy the rights of victims and their loved ones.**

**101. Other measures should include:**

**(a) Training justice officials, especially prosecutors and judges, in aspects of the crime of enforced disappearance under international law, as well as in techniques for effective investigation and criminal prosecution for enforced disappearances; and**

**(b) The application by courts of international standards in their decisions regarding cases of enforced disappearances, including the non-applicability of statutes of limitation, the continuing nature of the crime and the fact that civilian courts should be the competent courts to hear enforced-disappearance cases.**

**102. Good cooperation and coordination between all State institutions and other non-governmental actors is crucial in order to create a systematic approach to the complex problem of addressing the cases and legacy of enforced disappearance in Guatemala. The 10 programmes of the National Plan (2006-2016) for the Search of Persons Disappeared during the Internal Armed Conflict, proposed by the Search Committee should comprehensively be put into practice without further delay, within an atmosphere of mutual cooperation amongst all relevant actors.**

**103. The National Plan (2006-2016) proposed by the Search Committee should be reviewed and approved by Congress.**

**104. An annual report on the implementation of the National Plan (2006-2016) should be prepared by all participants and submitted for consideration by Congress. Thereafter, the annual report should be made available to the general public.**

105. In a cooperative environment among all players, a single and unified Public National Registry of Victims of Enforced Disappearance should be established.

106. Additionally, necessary resources should be supplied for the realization of all activities of all those institutions and actors involved in the process of the investigation and punishment of enforced disappearances.

107. Along with the concerns expressed by the Human Rights Committee (CCPR/CO/72/GTM), the Working Group calls on the State to “give special priority to investigating and bringing to justice the perpetrators of the human rights violations, including police and military personnel” (para. 13).

108. Habeas corpus procedures that have been suspended in contradiction with the Declaration should be reopened and investigations should be effortlessly continued in order to endeavour to clarify past cases of enforced disappearances.

109. The Working Group urges the State to take effective measures to prevent the repetition of acts of intimidation and other forms of attacks on witnesses and on human rights defenders involved in the investigation of cases of enforced disappearance, so that the above-mentioned actors are able to carry out their functions without persecution of any kind.

110. In spite of the National Reparations Programme, which has existed since the beginning of 2003, reparation measures have still not been applied for most of the victims. The Working Group strongly recommends the comprehensive application of the Programme, which should not be limited to the payment of monetary compensation.

111. The Working Group reiterates its request that the Government of Guatemala and others with relevant information provide it to the Working Group for the clarification of the nearly 3,000 remaining cases of disappeared persons still pending with the Working Group.

112. Guatemala is encouraged to seek the advice and technical assistance of the various bodies of the United Nations, in particular the Office of the High Commissioner for Human Rights, in the effective implementation of the above recommendations.

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