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CHILE: TEAM PLAYER, FREE MARKET ECONOMIC POWER,
AND ENTRANT INTO THE ADVERSARIAL
CRIMINAL PROCEDURE SYSTEM

The Evolution of Chilean Trade Policy in the Americas: From Lone Ranger to
Team Player

Thomas Andrew O'Keefe, Esq.

Free Trade Agreements, Chile and the Entrepreneur

Rafael X. Zahralddin-Aravena, Esq.

Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for
Criminal Procedure Reform in Chile

Carlos Rodrigo de la Barra Cousino

ARTICLE

Innovation in Criminal Procedure in Latin America: Guatemala's Conversion
to the Adversarial System

Steven E. Hendrix

NOTES & COMMENTS

The Double Moral: Compliance of International Legal Obligations of
Reproductive Rights vs. Allegiance to the Catholic Church

Tania Jiyong Cho

The Legality of United States Military Operations Along the United States—
Mexico Border

John Flock



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INNOVATION IN CRIMINAL PROCEDURE IN LATIN AMERICA: GUATEMALA'S CONVERSION TO THE ADVERSARIAL SYSTEM

Steven E. Hendrix†

EXECUTIVE SUMMARY

Impunity, corruption and citizen security are top concerns in nearly every day's headlines among the major papers in Guatemala. In 1994, Guatemala began a major overhaul of its Criminal Procedure Code in part to address these concerns, based on earlier Guatemalan drafts dating back to 1961.

The new Code is a first of its kind in Latin America. It does away with the inquisitorial system, a document-based system originally from French law, in favor of an oral process and a new adversarial system. Major features of the new Code are shortened pre-trial detentions, plea bargaining, introduction of evidence through oral proceedings, the presumption of innocence and a right to defense, a right to use one's native language, and changes in appeal processes. Most striking is the advancement of community understanding of and participation in the criminal justice system, due to the new oral process.

To promote justice at the local level and make the new Code operational, Guatemala has found new institutional will. It is taking steps to investigate, prosecute, convict, sentence and put in prison, persons committing crime. Already, some important, high profile criminal prosecutions have begun. New justice centers are providing

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increased access to justice at the community level in Zacapa, Quetzaltenango, Escuintla, Petén and Nebaj, and others are set to come on line. New and innovative training programs to improve the quality of judges, prosecutors and litigators are also being implemented for the first time.

Guatemala is at a unique point in its history: there is an open window for reform for the first time in forty years. The promise is great, but the risk of failure is similarly great. Guatemala will have to make strides to show tangible results in the short term to keep the recently-signed peace accords alive. Meanwhile, it will have to ensure that reform proceeds over the longer term: the current situation was not created over night, and will not be solved in the short term. On the contrary, the Government of Guatemala, along with international donor partners, will have to stay the course for a number of years to effect real change.

I. INTRODUCTION

Guatemala is the northernmost country in Central America with a population of over 10 million. It borders Mexico to the north, Belize and the Atlantic Ocean to the east, Honduras and El Salvador to the south and the Pacific Ocean to the west. The capital, Guatemala City, has a population of about two million. The economy is the largest in Central America, with a gross domestic product (GDP) of about \$14.7 billion.¹

Roughly two thirds of Guatemalans live in poverty.² Indigenous people comprise about half the Guatemalan population. Illiteracy is high, running at 37 percent for males, 53 percent for females, and at least 80 percent among Mayan women, one of the highest rates for a population group in the hemisphere. About 90 percent of indigenous people are in poverty and 80 percent are in extreme poverty. Despite four percent annual gains in economic growth since 1986, Guatemala's rapid population growth has all but wiped this out, leaving per capita GDP at 12 percent below that achieved in 1980.³

1. See Juan Carlos Suchite (American Embassy in Guatemala City), *Guatemala Security & Safety Equipment Market (I)*, FT ASIA INTELLIGENCE WIRE: INDUSTRY SECTOR ANALYSIS (ISA), July 15, 1997, available in LEXIS, News Library.

2. See *INE: Majority Live Below Poverty line*, SIGLO NEWS, Oct. 22, 1997, at 2.

3. See U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *PEACE IN GUATEMALA: INCLUSION, LOCAL EMPOWERMENT, AND POVERTY REDUCTION: STRATEGIC PLAN, USAID ASSISTANCE TO GUATEMALA, FY 1997 - 2002*, at 6-7 (1997).

Business executives cite crime and insecurity as the principal economic problems facing the country.⁴ Kidnapping has become a prospering, post-war industry.⁵ Sales of car alarm systems have increased dramatically during the last three years due to the high level of car thefts and robberies.⁶ In 1996, car theft was the most reported crime, making up over half of all crime reported in Guatemala.⁷ Demand for personal safety and security products is expected to continue rising in

4. See Fernando Quiñonez, *Justicia para atraer inversión*, EL PERIÓDICO, Feb. 5, 1998, at 26; Carlos Ajanel Soberanis, *Criminalidad, principal preocupación de empresarios*, PRENSA LIBRE, Sept. 19, 1997, at 2 (citing the survey of 200 business executives, carried out by the Guatemalan Chamber of Commerce — the *Cámara de Comercio de Guatemala*). See also, Abner Guoz, *Inseguridad del país ahuyenta la inversión y aumenta los gastos*, EL PERIÓDICO, Nov. 30, 1997, at 4; Juan Carlos Ruiz, *En demanda de castigo*, SIGLO VEINTIUNO, Nov. 30, 1997, at 3; Botrán: *Sin seguridad, no hay inversión*, SIGLO VEINTIUNO, Jan. 14, 1998, at 8; *Insisten en el tema de seguridad*, SIGLO VEINTIUNO, Jan. 22, 1998, at 13; Haroldo Shetemul, *Sin seguridad no habrá desarrollo económico*, (interview with Jaime Botrán, President of CACIF) CRÓNICA, Jan. 23, 1998, at 15-16; Julieta Sandoval, *Inseguridad y crisis económica impiden que los acuerdos de paz sean notorios*, PRENSA LIBRE, Feb. 21, 1998, at 6. In tourist destination Panajachel, the Mayor cites violence as the source in that city's drop in tourist revenue. See *Menos turistas por violencia*, EL PERIÓDICO, Dec. 14, 1997, at 4; *La inseguridad, talón de Aquiles del Gobierno*, PRENSA LIBRE, Jan. 14, 1998, at 3 (calling citizen insecurity the "Achilles' heel" of the Arzú Administration). See also, Carlos Ajanel Soberanis & Carlos Castañaza Rosales, *Dos años de Gobierno: Seguridad, la tarea pendiente*, SIGLO VEINTIUNO, Jan. 13, 1998 at 3. President Arzú recognizes that there are grave problems in Guatemala's administration of justice. *Arzú admite graves problemas de seguridad*, PRENSA LIBRE, Jan. 21, 1998, at 71. After the rape of five American students in Guatemala, the President of the Congress, Rafael Barrios Flores, reported that such incidents contribute to the poor image of Guatemala and that tourism will be affected. *Ponen en duda la violación*, SIGLO VEINTIUNO, Jan. 20, 1998, at 3. That particular event led to the cancellation of other student trips to Guatemala from the United States, along with calls for a travel advisory, warning Americans about the dangers of tourist travel to Guatemala. See *EEUU: dos universidades cancelan viajes a Guatemala*, SIGLO VEINTIUNO, Jan. 21, 1998, at 1; Julie López & Edín Hernández, *Estados Unidos: Sigue peligro de Travel Advisory*, SIGLO VEINTIUNO, Jan. 20, 1998, at 3; *El Nuevo Herald critica a Gobierno guatemalteco*, EL PERIÓDICO, Jan. 21, 1998, at 3. The security situation, especially for tourists, is to the point where Interior Minister Rodolfo Mendoza suggests that tourist groups advise their embassies of their travel plans and that they have a roving security patrol accompany them on their travels as a precautionary measure. See Julie López & Edín Hernández, *Departamento de Estado: Se teme Travel Advisory*, SIGLO VEINTIUNO, Jan. 20, 1998, at 3.

5. See Jennifer Bauduy, *Kidnapping: a legacy of war, haunts nation in peace*, SIGLO NEWS, Dec. 10, 1997, at 4; *GV: 138 secuestros sólo en enero*, SIGLO VEINTIUNO, Jan. 26, 1998, at 5. See, e.g., Edgar Girón Castillo and Jorge Mario García, *Secuestradores desafían a las autoridades: plagian a 2 personas*, PRENSA LIBRE, Jan. 29, 1998, at 4.

6. See Suchite, *supra* note 1. This trend seems to be continuing into 1998. See *En cuatro días, 33 carros robados*, EL PERIÓDICO, Jan. 5, 1998, at 4. On the positive side, however, there may have been a slight decrease in car thefts from 1996 to 1997. Officially, in 1996, there were 5,303 car thefts. In 1997, there were 4,593 official reports of theft, a reduction of 760. See *Gándara se pone a la defensiva*, EL PERIÓDICO, Jan. 6, 1998, at 6; *Disminuyó robo de vehículos*, SIGLO VEINTIUNO, Jan. 6, 1998, at 8. The car phenomena continued into 1999. See Julio F. Lara, *Robacarros usan parqueos públicos*, PRENSA LIBRE, Feb. 8, 1999, at 8.

7. See Erick Campos, *Robo de vehículos es el delito que más denunciaron los guatemaltecos en 1996*, PRENSA LIBRE, Sept. 16, 1997, at 8.

the foreseeable future, with an estimated annual rate of growth of about 25 percent for the next three years.⁸ In this context, the U.S. recently signed an agreement on stolen cars with Guatemala.⁹ To summarize, Guatemala is experiencing a crime wave.¹⁰

In 1997 and 1998, bank robberies exploded in Guatemala.¹¹ From January to September 1997, there were more assaults on banks than in the prior four years combined (1993-1996), creating a "wild west" atmosphere.¹² In 1997, there were at least fifty assaults on banks.¹³ In 1996, there were only ten. From 1990 through 1996, there were fifty-seven.¹⁴ According to the Interior Minister, many of these have been carried out by former military police officers.¹⁵ Many of the same

8. Suchite, *supra* note 1.

9. See *Guatemala y EE.UU. firman convenio para devolución de vehículos robados*, PRENSA LIBRE, May 5, 1997, at 3.

10. See Myriam Larra, *PDH: Gobierno incapaz de controlar ola delincencial*, PRENSA LIBRE, Jan. 30, 1998, at 3. Vice President Luis Flores has called 1998 the "Year of Citizen Security." Flores: *Año de la seguridad*, SIGLO VEINTIUNO, Jan. 23, 1998, at 5.

11. See, e.g., *Policía identifica a tres presuntos asaltabancos*, PRENSA LIBRE, Oct. 20, 1997, at 6; Julio Revolorio, *Asalto número 42 al sistema bancario*, EL PERIÓDICO, Nov. 15, 1997, at 4; Donald González, *Muertos en asalto a banco*, SIGLO VEINTIUNO, Nov. 25, 1997, at 6; Alba Trejo, *Declaran alerta bancaria*, SIGLO VEINTIUNO, Nov. 30, 1997, at 6; Rodolfo Zelada, *Sucesos: Caen supuestos asaltabancos*, SIGLO VEINTIUNO, Dec. 3, 1997, at 5; Equipo Investigador, *Asalto a bancos: Lo que no se ha dicho*, SIGLO VEINTIUNO, Dec. 4, 1997, at 3; Rodolfo Zelada, *Capturan a presuntos asaltabancos*, SIGLO VEINTIUNO, Dec. 9, 1997, at 2; Rodolfo Zelada, *Sucesos: Capturan a presuntos asaltabancos*, SIGLO VEINTIUNO, Dec. 12, 1997, at 2; *Seguridad: Segundo asalto bancario del año*, SIGLO VEINTIUNO, Jan. 10, 1998, at 39.

12. See Equipo Investigador, *Bancos han sufrido más asaltos en 1997 que durante los últimos cuatro años juntos*, SIGLO VEINTIUNO, Sept. 18, 1997, at 3. In one case, for example, bank robbers attacked a bank within a few yards of a police station housing both the Treasury Police and the National Police. In that particular instance, the robbers were caught. See Guillermo Mendoza, *Dos muertos en frustrado asalto bancario*, EL PERIÓDICO, Nov. 25, 1997, at 4.

13. *Seguridad y Justicia: El año del terror*, PRENSA LIBRE, Dec. 30, 1997, at 4 (*Resumen noticioso Supp.*). From January to November, 1997, there were forty-five assaults on banks. See Mendoza *acepta que ha fallado*, EL PERIÓDICO, Nov. 29, 1997, at 4. The total figure for 1997 was put at 51 bank robberies. See *En 1997: Se esfumaron Q14 millones de la banca*, SIGLO VEINTIUNO, Jan. 5, 1998, at 5.

14. See Julie López, *Asalto a bancos y secuestro, delitos con la misma huella*, SIGLO VEINTIUNO, Nov. 30, 1997, at 21.

15. See Donald González, *Siguen asaltos a bancos*, SIGLO VEINTIUNO, Nov. 29, 1997, at 55; Luis Escobar, *Amílcar Pérez, ex Policía Militar Ambulante: Capturan a supuesto jefe de asaltabancos*, EL PERIÓDICO, Feb. 8, 1998, at 1. Ex-Army Lieutenant Carlos Enrique Chun Choc is a concrete example. Chun was formerly in military intelligence and counter-intelligence. Chun is now one of the leaders of a kidnapping gang, which is also engaged in car theft, especially of cargo trucks carrying coffee or cardamon. See *La trayectoria del ex militar Chun*, EL PERIÓDICO, Dec. 3, 1997, at 3. Attacks on coffee producers have become a serious problem. See Abner Guoz, *El azote de los cafetaleros*, EL PERIÓDICO, Feb. 5, 1998, at 3; Abner Guoz, *Caficultores piden mayor seguridad*, EL PERIÓDICO, Feb. 6, 1998, at 4. Other former military are involved in crime as well. See, e.g., *Asaltantes pertenecieron al Ejército*, EL PERIÓDICO, Dec. 10, 1997, at 4; Martín Juárez and Carlos Arrazola, *Ordenan captura de militar implicado en estafas*, EL PERIÓDICO,

individuals involved in kidnappings are also involved in bank robberies.¹⁶

Corruption is endemic in Guatemala and permeates all levels of government.¹⁷ Despite the authority to create special narcotics courts (in the 1992 narcotics law) to help control narcotics-related corruption, the Supreme Court has yet to establish them.¹⁸ U.S. Ambassador Donald Planty has claimed that judges accept payments in drugs from narco-traffickers.¹⁹ Others accuse judges of accepting bribes in kidnapping cases.²⁰

Although there are basic laws that aim at combating corruption, there is a lack of enforcement and compliance. Companies may encounter corruption at any level of business, both in the private and

Dec. 10, 1997, at 3. The Military Police (*Policía Militar Ambulante*) were finally disbanded in 1997, in accordance with the Peace Accords. See *Concluye desmovilización de la Policía Militar Ambulante*, SIGLO VEINTIUNO, Dec. 16, 1997, at 6; *Instalaciones de la PMA al poder civil*, PRENSA LIBRE, Dec. 17, 1997, at 4. Interestingly, Public Ministry officials have also been implicated in bank robberies. See *Indagan a oficiales del MP*, SIGLO VEINTIUNO, Feb. 5, 1998, at 8.

16. See López, *supra* note 14, at 21; Rodolfo Zelada, *Vinculan a asaltabancos con secuestro de Mynor Suárez*, SIGLO VEINTIUNO, Dec. 4, 1997, at 2; *Capturan a presunto jefe de asaltabancos*, SIGLO VEINTIUNO, Dec. 14, 1997, at 1.

17. See, e.g., Ramón Hernández S., *Protestan en Izabal contra juez señalado de corrupto*, PRENSA LIBRE, Dec. 3, 1997, at 91; *CSJ pide destitución de los magistrados de Sala Duodécima*, EL PERIÓDICO, Jan. 27, 1998, at 6; Carlos Arrazola and Martín Juárez, *Corrupción en el Ejército*, EL PERIÓDICO, Nov. 25, 1997, at 3; *Seguridad y Justicia: Un mal año para la justicia*, PRENSA LIBRE, Dec. 30, 1997, at 6 (*resumen noticioso Supp.*); *Ante denuncias de corrupción, ordenan investigar fiscalías*, PRENSA LIBRE, Jan. 4, 1998, at 8; Lucy Barrios and Marco Tulio Trejo, *Chichicastenango: Alcalde acusado de corrupto*, SIGLO VEINTIUNO, Jan. 10, 1998, at 3; Carlos Ajanel Soberanis, *Alejos Close: Urge depurar sección del IGSS*, SIGLO VEINTIUNO, Jan. 14, 1998, at 5; Carlos Ajanel Soberanis, *Contraloría: Más anomalías en el IGSS*, SIGLO VEINTIUNO, Jan. 21, 1998, at 4; *Despiden a otros 38 empleados de Migración*, EL PERIÓDICO, Jan. 24, 1998, at 6; *Caen oficiales del MP por supuestos vínculos con atracadores*, PRENSA LIBRE, Feb. 3, 1998, at 6; *Gobernación recibe dinero del crimen organizado: GV*, PRENSA LIBRE, Feb. 9, 1998, at 6; Carlos Ajanel Soberanis, *Por corrupción, despidos en la Contraloría*, SIGLO VEINTIUNO, Feb. 20, 1999, at 12. There is a perception that corruption is in part from the arrogance of power, with elites feeling that they are above the law and do not have to comply, reinforcing an image of an untouchable class, immune from the law. See, e.g., Edín Arguedas, *Ni la Presidencia se resiste al pinabete*, EL PERIÓDICO, Dec. 10, 1997, at 8.

18. See U.S. Dep't of State, Bureau for Int'l Narcotics & Law Enforcement Affairs, *International Narcotics Control Strategy Report*, March 1997, at 134 [hereinafter *Narcotics Report*]; Oneida Najarro, *Jueces de Sentencia piden crear tribunales de Narcoactividad*, PRENSA LIBRE, Feb. 22, 1998, at 7.

19. See Ramón Hernández S., *Planty: jueces cooperan con narcos*, PRENSA LIBRE, Oct. 19, 1997, at 6. See also, Oneida Najarro, *Descubren más anomalías contra magistrados de la Sala Duodécima*, PRENSA LIBRE, Jan. 7, 1998, at 4.

20. See, e.g., Edín Hernández, *Caso Beverly: Dicen que corrió dinero*, SIGLO VEINTIUNO, Dec. 14, 1997, at 3; *Sin lugar recurso contra liberación de Manzo*, PRENSA LIBRE, Jan. 6, 1998, at 9; Oneida Najarro, *supra* note 19, at 4; Marco Tulio Trejo, *El MP pone en duda imparcialidad de sala*, SIGLO VEINTIUNO, Feb. 16, 1999, at 2.

public sector.²¹ The President of the Supreme Court cites corruption as one of the major problems facing the Guatemalan justice system, including within the judicial branch.²² Within the Bar Association, it is practically impossible to disbar a member for unethical or illegal conduct.²³ In part to respond to concerns of incompetence and corruption by police, a new police force — the National Civilian Police (PNC) — was created, modeled on the Spanish *Guardia Civil* model.²⁴ Still, within weeks, new complaints of corruption emerged under the new police structure,²⁵ threatening to undermine the war on impunity.²⁶

21. See Juan Carlos Suchite (American Embassy in Guatemala City), *Guatemala Security & Safety Equipment Market* (2), FT ASIA INTELLIGENCE WIRE: INDUSTRY SECTOR ANALYSIS (ISA), July 15, 1997, available in LEXIS, News Library.

22. See Oneida Najarro, *El OJ está enfermo: La corrupción e impunidad lo agobian*, PRENSA LIBRE, Oct. 9, 1997, at 4. A former judge even heads a kidnapping gang. See *Justicia: Solicitan nuevamente orden de aprehensión contra ex juez*, SIGLO VEINTIUNO, Dec. 4, 1997, at 6.

23. See Maynor Amézquita, *Abogados: Un gremio difícil de sancionar*, SIGLO VEINTIUNO, Mar. 24, 1998, at 3 (noting the arcane procedural requirements needed to disbar an attorney. For example, at least 25 percent of the bar membership must vote on the issue. In the last two years, no member has received any disciplinary action).

24. See *New civilian police hit the streets*, SIGLO NEWS, July 16, 1997, at 2; *Police Academy Graduates 1,200 New Officers*, SIGLO NEWS, Nov. 5, 1997, at 3; Carlos Menocal, *Hoy inauguran nueva comisaría de la PNC*, EL PERIÓDICO, Nov. 16, 1997, at 2; Donald González, *PNC recibe armas de asalto*, SIGLO VEINTIUNO, Nov. 27, 1997, at 54; *España ratifica capacitación a la PNC*, SIGLO VEINTIUNO, Nov. 25, 1997, at 8; *Saldrán a la calle 3,200 agentes de la PNC*, PRENSA LIBRE, Feb. 18, 1998, at 75. See also, Edín Hernández, *PNC: Despliegue concluirá en 1999*, SIGLO VEINTIUNO, Feb. 7, 1998, at 9, (stating that deployment of the new PNC is as follows: May 1998 to Quetzaltenango, with 550 officers; August 1998 to Jutiapa (400 officers), Santa Rosa (330), Izabal (400), and San Marcos (570); November 1998 to Suchitepéquez (300) and Chiquimula (380); February 1999 to Zacapa (450), Retalhuleu (390), El Progreso (380) and Jalapa (380); May 1999 to Sololá (300) and Chimaltenango (300); August 1999 to Huehuetenango (300), Baja Verapaz (260), and Alta Verapaz (460); November 1999 to Sacatepéquez (360) and Totonicapán (300)).

25. See Carlos Menocal, *Gobernación admite que 'hay PNC corruptos'*, EL PERIÓDICO, July 26, 1997, at 6; Julie López and Carlos Ajanel S., *¿Qué tipo de policías nos cuida?*, SIGLO VEINTIUNO, Dec. 7, 1997, at 28-29. See generally, Rachel Garst, *The New Guatemalan National Civilian Police: A Problematical Beginning*, WOLA BRIEFING SERIES: THE GUATEMALAN PEACE PROCESS, Nov. 1997. Ury Roitman, a former Israeli soldier and now owner of a prominent security firm in Guatemala, has been particularly critical of the new PNC. See Julie López, *Hay jefes policiales a quienes el zapato les queda muy grande*, SIGLO VEINTIUNO, Dec. 1, 1997, at 8. According to one article, sixty percent of criminal complaints in the Public Ministry's office of Administrative Crimes are registered against the police itself. See *Mayoría de denuncias en MP es contra policías*, SIGLO VEINTIUNO, Jan. 21, 1998, at 6; *MP investiga a policías civiles*, PRENSA LIBRE, Jan. 29, 1998, at 8.

26. See Julie López, *Seguridad: Un pilar tambaleante de la paz*, SIGLO VEINTIUNO, Dec. 29, 1997, at 3; *Policía Nacional: Detenciones ilegales*, SIGLO VEINTIUNO, Jan. 14, 1998, at 4. Former Presidential candidate, Alfonso Portillo (FRG) asserts there has been no real change with police policy, only a change in uniform. See Lucía Dubón, *Deploran segundo año de Gobierno*, EL PERIÓDICO, Jan. 17, 1998, at 4. See also, *Delincuentes aprovechan vacío en la Policía Nacional*, PRENSA LIBRE, Jan. 30, 1998, at 4 (listing additional complaints about the PNC).

In 1994, corruption in the Customs Service alone totaled about Q12 billion, the equivalent of 14 percent of GNP and twice the annual budget of the Guatemalan Government. The sheer enormity of this theft, argued José Rubén Zamora, editor of EL PERIÓDICO, is highly conducive to the preservation of a "culture of impunity."²⁷ Even the former Customs Director General, Rubén Alvarez Artiga, an ex-military Colonel, has been indicted for participating in tax fraud in the millions of quetzales.²⁸

A large contraband ring was dismantled in September 1996. It reached many parts of the military, National Police, Customs and Immigration. Though Guatemala's counter-narcotics programs were not directly involved, they were affected by the fall-out from the case through the dismissal of Vice Minister of Government Mario Rene Cifuentes and the third in command at the Treasury Police. Neither has been charged in connection with the case.²⁹

The criminal justice system will continue to have serious problems until something is done about the inadequate salaries. In 1997, judges received about Q5,660 per month and prosecutors about Q9,000 per month.³⁰ As then President of the Congress, Arabella Castro, noted, sports in Guatemala receive a higher national budget than the courts.³¹ More than forty criminal court judges have threatened massive resignation if salaries are not increased.³²

Strong public concern about violence and criminality is shaping public policy.³³ In the famous kidnapping, rape and murder case of

27. CENTRO EVANGÉLICO LATINOAMERICANO DE ESTUDIOS PASTORALES, *Guatemala in Context*, 14th Edit., Mar. 1997, at 7 [hereinafter CENTRO EVANGÉLICO]. See also, *Más despidos en Migración*, SIGLO VEINTIUNO, Nov. 24, 1997, at 5. *Compare GV crítica desempeño de autoridades de Gobernación*, SIGLO VEINTIUNO, Nov. 30, 1997, at 3.

28. See Walter Martín Juárez, *Militar evadió al fisco varios millones*, EL PERIÓDICO, Dec. 6, 1997, at 3; Julia Corado, *Justicia: Coronel Alvarez detenido por contrabando*, SIGLO VEINTIUNO, Dec. 6, 1997, at 6; Luis Escobar and Walter Martín Juárez, *Acusan a Alvarez Artiga de evadir Q100 millones*, EL PERIÓDICO, Dec. 9, 1997, at 4. (Quetzales 6.2 is about US\$1.00.)

29. See *Narcotics Report*, supra note 18, at 134.

30. See Julia Corado, *Justicia penal al borde del colapso*, SIGLO VEINTIUNO, June 22, 1997, at 8; Oneida Najarro, *Jueces de Paz piden incremento salarial*, PRENSA LIBRE, Oct. 18, 1997, at 6 (notes that Congress has approved salary increases: Trial Court judges will receive Q2,500, magistrates Q1,500, court supervisors Q2,000 and secretaries Q1,000.)

31. See Castro, *Me da tristeza que el deporte reciba más que la justicia*, SIGLO VEINTIUNO, June 22, 1997, at 8.

32. See Oneida Najarro, *43 jueces del área penal amenazan con renunciar*, PRENSA LIBRE, June 22, 1997, at 4. Justices of the Peace have also complained to the Court. See Najarro, supra note 30, at 6.

33. See *Narcotics Report*, supra note 18, at 136; *Pobladores de Ixcán Grande solicitan seguridad*, PRENSA LIBRE, Dec. 16, 1997, at 35; *Justicia: Población desconfiada y con poca información*, PRENSA LIBRE, Jan. 25, 1998, at 2.

Beverly Sandoval, twenty-one suspects were detained, of which 90 percent were former military.³⁴ Other cases involve six ex-police officers who were charged with the kidnapping of a minor³⁵ and the 1996 kidnapping and murder of Isabel de Botrán by the gang *Los Pasaco*, even when gang leader Guillermo López Linares (alias *El Negociador*, or Fernando Palacios Luna) was captured. Linares subsequently walked out of jail in a police uniform in obvious coordination with outside help.³⁶ In yet another case, the Vendors Committee for the Christmas Fair charged that Treasury Police (*Guardia de Hacienda*) were involved in a scheme to steal Christmas trees.³⁷ Similarly, police are accused of stealing cars being held as evidence or recovered from others as stolen property.³⁸ Such cases give the impression that the military and government are part of the cause of crime, rather than its solution.³⁹ This frustration is evidenced in popular phrases

34. Marco Tulio Trejo and Alba Trejo, *Pérez: El 90% de los secuestradores detenidos perteneció al Ejército*, SIGLO VEINTIUNO, Nov. 4, 1997, at 3; *Nationwide Sweep Nabs 21 Alleged Kidnappers*, SIGLO NEWS, at Nov. 5, 1997, at 3; Elder Interiano, *Fueron militares 19 de 21 detenidos por caso Beverly*, PRENSA LIBRE, Nov. 4, 1997, at 3; *Tribunal escuchará a hijo de militar presuntamente implicado en secuestro y asesinato de Beverly Sandoval*, LA HORA, Jan. 16, 1998, at 5.

35. See Walter Martín Juárez, *Seis ex policías serán juzgados por secuestro de menor*, EL PERIÓDICO, Nov. 15, 1997, at 6.

36. See Julie López, *Asalto a bancos y secuestro, delitos con la misma huella*, SIGLO VEINTIUNO, Nov. 30, 1997, at 21-22. The escape of *El Negociador* is not uncommon in Guatemala. See, e.g., Oneida Najarro, *Tres reos peligrosos se fugan de Pavón*, PRENSA LIBRE, Oct. 20, 1997, at 55; *Tres reos condenados por homicidio escapan de Pavón*, SIGLO VEINTIUNO, Oct. 20, 1997, at 2. *El Negociador* was later recaptured in El Salvador. Victims eventually had the opportunity to present evidence in a public forum. See Walter Martín Juárez, *Víctimas de secuestro identifican voz de Palacios*, EL PERIÓDICO, Mar. 24, 1998, at 3. Those that helped Palacios escape themselves ended up being subject to oral trial proceedings. See Edwin Palacios, *A juicio por fuga de El Negociador*, EL PERIÓDICO, Mar. 24, 1998, at 6.

37. See *Vendedores denuncian robo efectuado por GH*, SIGLO VEINTIUNO, Dec. 5, 1997, at 79.

38. See Walter Martín Juárez, *Una nueva forma de robar carros*, EL PERIÓDICO, Dec. 17, 1997, at 6. Ex-police officers are often cited in articles as now criminals. See, e.g., *CC deniega amparo a ex policía*, SIGLO VEINTIUNO, Jan. 17, 1998, at 2.

39. Former military on both sides of the conflict have been implicated. See Carlos Arrazola, *Desmovilizados forman bandas de delincuentes*, EL PERIÓDICO, Nov. 26, 1997, at 6 (discussing how former guerrillas now participate in gangs of criminals). See also Edín Hernández, *Asaltantes capturados son ex PMA*, SIGLO VEINTIUNO, Nov. 27, 1997, at 2; Donald González, *Siguen asaltos a bancos*, SIGLO VEINTIUNO, Nov. 29, 1997, at 55; Edín Hernández, *Ex guerrilleros presuntos asaltantes*, SIGLO VEINTIUNO, Nov. 26, 1997, at 2; Luís Escobar, *Detienen a dos militares con cocaína*, EL PERIÓDICO, Jan. 4, 1998, at 1; *Fiscalía investiga vinculación de militares con narcotráfico*, SIGLO VEINTIUNO, Jan. 13, 1998, at 4; *Acusan al Ejército de ofrecer sobornos en caso Xamán*, PRENSA LIBRE, Feb. 13, 1998, at 4; Julia Corado, *Condenan a 30 años de prisión a ex patrullero*, SIGLO VEINTIUNO, Feb. 4, 1998, at 2; Elder Interiano, *EMP será sometido a investigación*, PRENSA LIBRE, Feb. 4, 1998, at 2. *Contra*: Former military police officers have tried to emphasize that it is a small minority of former officials that are corrupt. Most dedicated themselves to upholding the law, according to that group. Donald González, *Ex PMA: Niegan*

such as "The Police take longer to catch the criminals than the Courts do in letting them free," or "The criminals enter one door and exit the other."⁴⁰

To underscore this point, a recent survey documented the widely held belief among Guatemalans that the Guatemalan justice system favors some groups more than others, undermining the public's confidence in the fairness of the justice process.⁴¹ In a specific survey in Quetzaltenango, a more indigenous population, citizens believed the system favored the non-indigenous (*Ladinos*) over the indigenous population, and the rich and powerful over the rest of the public.⁴²

Recent public opinion polls show discontent with the security situation in the country. In one poll conducted during the last week in May and the first week in June, 1997, 98.8 percent claimed they felt "insecure." More than a third of those, 35.4 percent, attributed this insecurity to the inadequate abilities of the Interior Ministry. Only 1.2 percent felt "secure."⁴³ A newspaper editorial headline proclaims "Guatemala: Kidnapping Capital of the World."⁴⁴ Attacks on American citizens have also put Guatemala's security situation into international papers.⁴⁵

Judges themselves feel insecure.⁴⁶ For example, Judge Olegario Labbé Morales began receiving death threats after his involvement in

vínculos criminales, SIGLO VEINTIUNO, Dec. 2, 1997, at 55. The perception of high levels of corruption leads to calls for major shake-ups in the justice sector. See, e.g. *Editorial: Urge depurar el sistema de justicia*, SIGLO VEINTIUNO, Dec. 16, 1997, at 10.

40. Miguel Ignacio Acabal, *Sugieren capacitación de jueces y fiscales para agilizar la justicia*, PRENSA LIBRE, Nov. 3, 1997, at 20. Supreme Court President Angel Alfredo Figueroa takes strong exception to these views. He notes that Courts cannot hold suspects unless there is evidence. See *Figueroa: jueces no protegen a delincuentes*, PRENSA LIBRE, Jan. 30, 1998, at 20. The public is growing uneasy about criminals who do not serve out their entire sentences, but instead are released early. See, e.g., Carlos Castañaza and Carlos Ajanel Soberanis, *Justicia: Las sentencias que pocos cumplen*, SIGLO VEINTIUNO, Feb. 5, 1998, at 3.

41. See *infra* note 79, at IV-6.

42. See Development Associates, Inc., *Indicators of Political Values in Quetzaltenango: Democratic Attitudes and Participation* vii (Oct. 1997)(draft report, on file with the *Southwestern Journal of Law and Trade in the Americas*).

43. *Guatemaltecos se sienten desprotegidos ante ola de violencia, según encuesta de GV*, PRENSA LIBRE, June 9, 1997, at 4.

44. Eduardo Weymann, *Guatemala: capital mundial del secuestro*, EL PERIÓDICO, Dec. 12, 1997, at 12.

45. See, e.g., Juanita Darling, *Attack on Americans puts Guatemalan justice in spotlight*, ATLANTA J.-CONST., Apr. 25, 1998, at A5.

46. See, e.g., *Juez denuncia amenazas de muerte*, SIGLO VEINTIUNO, Jan. 15, 1998, at 6; Oneida Najarro & Raul Matias, *Envían bomba a juez*, PRENSA LIBRE, Feb. 13, 1999, at 6; Julia Corado, *CSJ solicita seguridad para jueces*, SIGLO VEINTIUNO, Feb. 13, 1999; Manolo Acabal, *PNC protege a jueces amenazados*, SIGLO VEINTIUNO, Feb. 14, 1999.

the case of ex-military officer Cándido Noriega Estrada.⁴⁷ That same judge was later fired, after letting Noriega free of 156 criminal charges.⁴⁸ In a similar vein, the Public Ministry has assessed witness protection programs, but lacks funding to provide such security.⁴⁹ Still, the need is critical.⁵⁰ In many cases, victims and their family members must flee the country out of fear and intimidation if they report crime to authorities.⁵¹ Prosecutors, too, receive death threats.⁵² After the assassination of one prosecutor, twenty-five threatened resignation if security measures were not take.⁵³ According to

47. See Juez Labbé pide traslado por supuestas amenazas, PRENSA LIBRE, June 17, 1997, at 6.

48. See Oneida Najarro, *La CSJ destituye al juez Olegario Labbé*, PRENSA LIBRE, June 21, 1997, at 3; Julia Corado, *Corte Suprema de Justicia destituye a juez de Quiché*, SIGLO VEINTIUNO, at June 21, 1997, at 6.

49. See *Proteger a testigos puede costar al MP Q10 millones anuales*, SIGLO VEINTIUNO, Oct. 11, 1997, at 4; *Protección a testigos ¿Ley muerta?*, PRENSA LIBRE, Oct. 10, 1997, at 2. The need for protection is great. See, e.g., *Asesinan a testigo de juicio contra tres policías sentenciados a muerte*, SIGLO VEINTIUNO, Oct. 9, 1997, at 2; Miguel Ignacio Acabal, *Falta de fondos paraliza protección q testigos*, PRENSA LIBRE, Feb. 14, 1998, at 2; *Denuncian falta de ayuda a sobreviviente de masacre*, SIGLO VEINTIUNO, Feb. 13, 1998, at 75; Carlos Ajanel Soberanis, *Caso Xamán: Acusan de chantaje a la MINUGUA*, SIGLO VEINTIUNO, March 10, 1998, at 6; see also *Piden protección de testigos*, SIGLO VEINTIUNO, Feb. 13, 1999, at 2.

50. See, e.g., *Amenazan a testigo de caso Moreno*, SIGLO VEINTIUNO, Dec. 1, 1997, at 6; Carlos Ajanel Soberanis, *Testigos: Cuando el miedo no deja hablar*, SIGLO VEINTIUNO, Jan. 4, 1998, at 3; Walter Martín Juárez, *Fiscal denuncia a Medrano por amenazas*, EL PERIÓDICO, Feb. 12, 1998, at 2; *Sobreviviente de masacre está protegido por el Gobierno*, SIGLO VEINTIUNO, Feb. 12, 1998, at 2; Carlos Ajanel Soberanis & Carlos Castañaza Rosales, *Para silenciar a los inocentes*, SIGLO VEINTIUNO, Apr. 1, 1998, at 3.

51. See, e.g., Julio Revolorio and Ricardo Miranda, *Amenazan a víctimas de secuestro*, EL PERIÓDICO, Nov. 14, 1997, at 3; Ramón Hernández, *MP denuncia amenazas del cartel Luciano para evitar juicio este viernes en Amatitlán*, PRENSA LIBRE, Jan. 7, 1998, at 4; *Amenazan de muerte a testigos del caso El Canguro*, EL PERIÓDICO, Jan. 25, 1998, at 1; *Testigos serán conducidos por la Policía*, EL PERIÓDICO, Jan. 30, 1998, at 7; Marco Tulio Trejo & Rodolfo Zelada, *Protección a testigos: El dilema de colaborar con la justicia*, SIGLO VEINTIUNO, June 19, 1998, at 3; Marco Tulio Trejo & Rodolfo Absalom Flores, *Oficina aún no existe: Valladares de la protección a testigos*, SIGLO VEINTIUNO, June 20, 1998, at 3.

52. See Luis Eduardo de León, *Justicia: Guatemala, el país de las eternas amenazas*, CRÓNICA, Oct. 24, 1997, at 24; Ramón Hernández, *MP denuncia amenazas del cartel Luciano para evitar juicio este viernes en Amatitlán*, PRENSA LIBRE, Jan. 7, 1998, at 4; *Fiscales desunidos en su lucha por seguridad*, EL PERIÓDICO, June 16, 1998, at 5. The situation has gotten to the point where prosecutors, in some instances, are asking for "danger pay." See, e.g., *Fiscal del caso Beverly quiere bono de riesgo*, EL PERIÓDICO, June 19, 1998, at 5.

53. See Rolando Antonio Castillo López, *Fiscales reanunciarán en bloque*, PRENSA LIBRE, May 23, 1998, at 2; Francisco Mauricio Martínez, *Fiscales serán protegidos*, PRENSA LIBRE, May 24, 1998, at 4; Mario Ramos, *Dos capturados por asesinato de fiscal*, EL PERIÓDICO, May 26, 1998, at 6; Marco Tulio Trejo, *González Rodas: PNC dará protección a los fiscales*, SIGLO VEINTIUNO, May 24, 1998, at 6; Edwin Palacios, *Se prevé desbandada de fiscales del MP*, EL PERIÓDICO, June 8, 1998, at 7; Edwin Palacios, *MP contratará a policías privados*, EL PERIÓDICO, June 9, 1998, at 4. Prosecutor Fernando Mendizábal, chief of the office of special cases, and lead prosecutor in the Los Pasaco, El Canguro, Beverly Sandoval and Alfredo Moreno cases, is resigning

MINUGUA Director Jean Arnault, the perception of citizen insecurity is a threat to the peace process.⁵⁴

The public is also very suspicious as to whether human rights abuses by government authorities continue.⁵⁵ On June 11, 1997, Congress heard testimony from Interior Minister Rodolfo Mendoza and Defense Minister Julio Balconi to the effect that the *Estado Mayor Presidencial* (a military police force under the command of the President) was not involved in the disappearance of Juan José Cabrera Rodas, alias *Mincho*, during the capture of Rafael Augusto Baldizón Núñez (alias *Comandante Isaías*), accused of the kidnapping of Olga Alvarado de Novella.⁵⁶ Interestingly, that particular case is causing loss of prestige not only for the government, but also for the former guerrillas, since Rodrigo Asturias Amado (alias Gaspar Ilom), a guerrilla leader, is implicated in the de Novella kidnapping.⁵⁷ Also compromised was the United Nation's human rights verification mission in Guatemala (MINUGUA), that knew about Mincho, but did not reveal its information.⁵⁸ The shocking murder of Catholic Bishop Juan Gerardi Conedera on April 24, 1998, days after his human rights report to the nation, renewed fear of abuse.⁵⁹ Within two weeks, the

due to security and other issues. See *Editorial: Cuando el fiscal prefiere retirarse*, SIGLO VEINTIUNO, June 10, 1998, at 14; Marco Tulio Trejo, *Mendizábal se acogerá al retiro voluntario*, SIGLO VEINTIUNO, June 10, 1998, at 2. The Public Ministry has discussed getting private security and life insurance for prosecutors. See, e.g., *Protección y seguro de vida para los fiscales*, SIGLO VEINTIUNO, June 19, 1998, at 8.

54. See Leonel Arana Paredes, *Justicia: Inseguridad contra la paz*, SIGLO VEINTIUNO, Dec. 10, 1997, at 5.

55. See Lucy Barrios de Méndez, *Mendoza y Balconi niegan que el EMP participe en comando antisequestros*, SIGLO VEINTIUNO, June 12, 1997, at 3. The *Comisión de Esclarecimiento Histórico* (Commission for Historical Verification) created under the Peace Accords, is tasked with reviewing and reporting on human rights abuses during the war (prior to December 1996). See *Amplían plazo para entregar informe de CEH*, SIGLO VEINTIUNO, May 2, 1998, at 6.

56. See Méndez, *supra* note 55, at 3.

57. See Asturias y sus abogados se reúnen para planificar su posible defensa, SIGLO VEINTIUNO, Sept. 9, 1997, at 3.

58. See *Gobierno contempla solicitar revisión del papel de Minugua*, PRENSA LIBRE, Oct. 8, 1997, at 6; Edward Hegstrom, *U.N. official in Guatemala draws fire from right, left*, MIAMI HERALD, May 17, 1997, at 20A. Other criticisms have been leveled at MINUGUA regarding MINUGUA's public opinions on the *Estado Mayor Presidencial*, EMP. See, e.g., Rafael Amado Deras and Myriam Larra, *Gobierno reclama errores a Minugua*, PRENSA LIBRE, Oct. 18, 1997, at 3; Edin Hernández, *Gobierno pide a MINUGUA aclarar fundamentos jurídicos del informe*, SIGLO VEINTIUNO, Oct. 18, 1997, at 3. More recently, MINUGUA has been attacked for overstepping its role as human rights observer. See, e.g., Oneida Najarro, *OJ: MINUGUA debe atender verificación*, PRENSA LIBRE, May 24, 1998, at 7; *Conflicto bananero: Piden que cese intromisión de MINUGUA*, SIGLO VEINTIUNO, May 24, 1998, at 6.

59. See Martha Brant & Brook Larmer, *The Death of a Bishop*, NEWSWEEK, May 11, 1998, at 10, 11; Ochaeta, *Vielman es inocente*, SIGLO VEINTIUNO, May 2, 1998, at 6; Walter Martín

Mayor of Santa Cruz del Quiché was also assassinated.⁶⁰ To be sure, one class of individuals, the homosexual community, asserts that human rights abuses continue under the new regime.⁶¹ Also, children in prison appear to be a particularly vulnerable group for human rights abuses.⁶² Finally, the Army is once again being used in a law enforcement role.⁶³

Branches of government have in the past blamed each other for the problems in the justice sector. For example, Vice President Luis Flores Asturias and Interior Vice Minister Salvador Gándera openly criticized the court for public insecurity and inability to administer justice. In response, Court President Ricardo Umaña Arragón sent a letter to President Alvaro Arzú Irigoyen, asking the President to rein in his men.⁶⁴ Similarly, the Human Rights Ombudsman has accused the Public Ministry of being responsible for the problems of the justice sector.⁶⁵

Curiously, even new legislation seems to be adding to the problem of institutional coordination and clarification of roles in law enforcement.⁶⁶ Then Attorney General, Héctor Hugo Pérez Aguilera, sent a letter to the Congress complaining about unconstitutional and unlawful aspects of the new Civil National Police Law, giving too much power to the police at the expense of the Public Ministry.⁶⁷ Congress, for its part, demands that the Executive branch draft an emergency plan to reign in violence.⁶⁸

Juárez, *Dudas sobre implicación de sospechoso en el caso Gerardi*, EL PERIÓDICO, June 9, 1998, at 3.

60. See *Acusan a ex alcalde de haber matado a Yat Zapeta*, SIGLO VEINTIUNO, May 8, 1998, at 4; Lucy Barrios, *Alcaldes piden seguridad para ejercer funciones*, PRENSA LIBRE, May 16, 1998, at 4.

61. For example, on October 4, 1997, Luis Palencia, a homosexual, alias María Conchita, was shot by an unknown assassin. See *Miedo entre la comunidad homosexual*, EL PERIÓDICO, Nov. 16, 1997, at 8; Guillermo Mendoza, *Se comprarán 216 millones de municiones*, EL PERIÓDICO, Nov. 18, 1997, at 3. Homosexual groups continue to receive death threats. See Abner Guoz, *¿Quién protege a los homosexuales?*, EL PERIÓDICO, Nov. 18, 1997, at 2.

62. See Olga López Ovando, *Human Rights Watch señala abusos contra menores*, PRENSA LIBRE, Oct. 21, 1997, at 28.

63. See Donald González, *Fuerzas combinandas: Iniciaron operativo en Izabal*, SIGLO VEINTIUNO, Jan. 18, 1998, at 47.

64. See Oneida Najarro and Giovanni Bautista, *CSJ denuncia intromisión del Organismo Ejecutivo*, PRENSA LIBRE, June 9, 1997, at 3.

65. See Pérez Aguilera, *No pueden culpar sólo a fiscales por deficiencias en la justicia*, PRENSA LIBRE, Oct. 27, 1997, at 4.

66. See Garst, *supra* note 25, at 5.

67. See Edgar Leonel Arana Paredes, *La carta del fiscal despierta atención de los diputados*, SIGLO VEINTIUNO, June 17, 1997, at 6.

68. See *Editorial: El Congreso se une al clamor por una seguridad efectiva*, PRENSA LIBRE, Jan. 21, 1998, at 10. Similarly, President Arzú has asked Interior Minister Rodolfo Mendoza to

President Clinton has listed Guatemala as a major illicit drug-producing or drug-transit country, in accordance with Section 490(h) of the Foreign Assistance Act of 1961.⁶⁹ With U.S. government support, the Guatemalan government counter-narcotics officials seized almost four metric tons of cocaine in 1996, a 400 percent increase over 1995.⁷⁰ The Guatemalan government itself estimates that at least one out of four Guatemalan adults suffers from some sort of chemical dependency, principally alcohol abuse. Illicit drug use has not been effectively documented, but government officials believe it has increased steadily since 1990 and contributes to the extremely high level of violence in the country, especially within the capital city.⁷¹

The actual level of crime, however, is difficult to quantify.⁷² One account listed Guatemala as the country suffering from the second

come up with a new security plan. See Abner Guoz, *Arzú pide a Mendoza nuevo plan de seguridad*, EL PERIÓDICO, Jan. 22, 1998, at 4; Myriam Larra and Pavel Arellano, *De show califican plan de seguridad*, PRENSA LIBRE, Jan. 24, 1998, at 2; Abner Guoz, *Gobierno presenta plan de seguridad*, EL PERIÓDICO, Feb. 7, 1998, at 3.

69. See Letter from the President to the Chairmen and Ranking Members of the House Committees on Appropriations and International Relations and the Senate Committees on Appropriations and Foreign Relations (Dec. 2, 1996) printed in *Narcotics Report*, *supra* note 18, at vii. U.S. Ambassador Donald Planty has pledged continued support for Guatemala's war on drugs. See Ramón Hernández S., *Planty llama a unir esfuerzos en guerra contra narcotráfico*, PRENSA LIBRE, Jan. 16, 1998, at 8. In 1998, narcotics continued to be a major problem in Guatemala. See Ramón Hernández S., *Ruta marítima del Pacífico a merced de los narcos*, PRENSA LIBRE, Feb. 15, 1998, at 4; *Departamento de Estado: En Guatemala se trafica efedrina*, SIGLO VEINTIUNO, Feb. 12, 1998, at 4. Still, Guatemala received full certification for 1997, due to its strong eradication and interdiction programs and law enforcement efforts against narcotics traffickers. See Memorandum from Drew Oltyan and Debbie Bedford of the State Department Anti-narcotics Office (NAS) 1 (May 5, 1998) (on file with the *Southwestern Journal of Law and Trade in the Americas*).

70. See *Narcotics Report*, *supra* note 18, at 132.

71. See *id.* at xx. Quetzaltenango also has problems with drug traffickers. See, e.g., Ramón Hernández, *A luz tráfico de drogas en Xela*, PRENSA LIBRE, Mar. 18, 1998, at 91.

72. See Jennifer Bauduy, *Kidnapping: a legacy of war, haunts nation in peace*, SIGLO NEWS, Dec. 10, 1997, at 4 (noting that President Arzú believes the level of national violence has been exaggerated by the press in a drive to sell newspapers). Other factors influencing people's perception of the level of crime may include: (1) new found freedom of the press to report crime — previously the press may have felt pressure from government to avoid reporting crime which could have been considered a criticism of the government; (2) as public perceptions change for the positive, they may be more included to report crime that previously went unreported, making the statistics appear worse; and (3) the police may be doing a more effective job in recording criminal activity, again resulting in increased statistical occurrence of crime, without necessarily changing actual crime levels. Other factors which may indicate the crime explosion is real include: (1) similar phenomena in other post-war societies like El Salvador and South Africa; (2) a demographic explosion of youth in prime crime years, ages 16 to 28; and (3) that statistics and public opinion agree that crime is in fact increasing. Otilia Lux de Cojtí claims that victims are still reluctant to report human rights abuses that occurred in the past two decades to the Comisión de Esclarecimiento Histórico. See *Persiste temor para denunciar violaciones a Derechos*

highest level of crime in Latin America.⁷³ According to official government sources, there were thirty kidnappings between January 1, 1996 and May 30, 1997,⁷⁴ and seventy between January 1 to December 10, 1997.⁷⁵ As of February 21, 1997, there were 227 individuals in crim-

Humanos, PRENSA LIBRE, Nov. 5, 1997, at 19 (suggesting that if Lux is correct, this may indicate at least the potential for under-reporting of other criminal activity).

73. See *Segundo lugar en criminalidad*, SIGLO VEINTIUNO, Dec. 11, 1997, at 3 (reporting the results of a study by Raúl Zepeda entitled "Violencia y Seguridad Ciudadana." According to the article, Guatemala had 49 homicides in 1996 per 100 thousand population. Colombia was in first place with 89 per 100 thousand population. Following Guatemala in the list were Brazil, Mexico and Venezuela, each with rates of less than 20 per 100 thousand. The worst cities in Guatemala were Escuintla (16.5 per ten thousand), Isabal (12.7 per ten thousand), Jutiapa (11.4 per ten thousand), Santa Rosa (11.1 per ten thousand) and the Capital (10.1 per ten thousand)). As a point of comparison, the murder rate in the United States was 7.4 per 100 thousand in 1996. See THE WORLD ALMANAC AND BOOK OF FACTS: 1998, at 959 (World Almanac Books, 1997); Randolph E. Schmid, Associated Press, *Murder rate lowest since 1969*, DETROIT NEWS (Oct. 5, 1997) <<http://www.detnews.com/1997/nation/9710/05/10050089.htm>>. In other words, the murder rate in Guatemala is six to seven times what it is in the United States. Escuintla has a murder rate of more than twenty times the U.S. rate. The Zepeda report also cites an increase in sexual assaults in Guatemala, from 152 reported cases in 1995, to 231 in 1996. See *Aumentan denuncias por acoso sexual*, SIGLO VEINTIUNO, Dec. 12, 1997, at 4.

74. See Samuel Flores, *El FBI asesará a policías del Istmo para combatir el secuestro*, PRENSA LIBRE, May 30, 1997, at 3.

75. See Bauduy, *supra* note 72, at 4. But see Flores, *supra* note 74, at 3 (detailing the account of a private group known by the Spanish acronym FADS (*Familiares y Amigos contra la Delincuencia y el Secuestro*, or Relatives and Friends against Crime and Kidnapping) which reported that over two hundred cases occurred between January 1 to May 30, 1997). FADS declared the year 1997 to be a failure in administration of justice, and placed the lion's share of the blame on the Public Ministry. See Julia Corado, *FADS evalúa la administración de justicia*, SIGLO VEINTIUNO, Dec. 29, 1997, at 5. Another private voluntary organization, GV (*Guardianes del Vecindario* or Neighborhood Watch) reported nineteen kidnappings in just six days in March 1997. See Samuel Flores, *Guardianes del Vecindario denuncia 19 secuestros en los últimos seis días*, PRENSA LIBRE, March 10, 1997, at 3. The same group, GV, reported nine kidnappings in eight days in February 1997. See Elder Interiano and Samuel Flores, *Recrudece ola de secuestros; reportan nueve casos en 8 días*, PRENSA LIBRE, February 26, 1997, at 2. GV puts the total at 1,400 kidnappings for 1997. See *Seguridad y Justicia: El año del terror*, PRENSA LIBRE, Dec. 30, 1997, at 4 (*Resumen noticioso* Supp.). See also GV: *138 secuestros sólo en enero*, SIGLO VEINTIUNO, Jan. 26, 1998, at 5 (where GV reports that the kidnappings in January, 1998 totaled 138). Compare Carlos Canteo, *En siete días han plagiado a un industrial, seis estudiantes, dos profesionales y dos ancianos*, SIGLO VEINTIUNO, Feb. 26, 1997, at 3 (which puts the figure at eleven persons kidnapped in just seven days).

GV also claims that the number of extortion cases is eight times that of kidnappings, although government sources claim it does not exceed three times. See Julie López, *Policía Nacional Civil: casos de extorsión triplican a los de secuestro*, SIGLO VEINTIUNO, Nov. 17, 1997, at 3. Still another account claims there were 965 kidnappings between January 1 and August 31, 1997. See *GV reporta 183 plagios en agosto*, PRENSA LIBRE, Sept. 5, 1997, at 3. A total of 1,200 are claimed for the period January through November 1997. See *Aparente descenso de los plagios*, SIGLO VEINTIUNO, Nov. 30, 1997, at 22. While GV rejects official government estimates as ridiculous, GV is also a political advocacy group with an opposition agenda, and is consequently discounted by the Government.

inal detention, pending trial, on charges of kidnapping.⁷⁶ Regardless of statistical source, however, most seem to agree that in 1997 kidnappings declined, while bank robberies increased.⁷⁷ Meanwhile, Guatemala suffers from at least one rape per day.⁷⁸

Act	1992	1996	Total for years 1992 through 1996
Deaths through violence	2,699	3,281	16,107
Wounded in act of violence	4,557	5,162	28,796
Robbery	no information	4,530	12,555*
Vehicle theft	4,455	6,121	31,454
Total	11,711	19,094	88,852

*"Segundo lugar en criminalidad," SIGLO VEINTIUNO (Dec. 11, 1997) 3, reporting the results of a study by Raúl Zepeda entitled "Violencia y Seguridad Ciudadana" (The article cites this data as coming from MINUGUA). *only 1994 to 1996

The U.S. Agency for International Development has commissioned its own attitudinal survey of Guatemalan values on democracy, civil society and justice.⁷⁹ In that review, 22 percent of Guatemalans reported that they, or some member of their family, had been the victim of a robbery, assault or kidnapping in the last 12 months.⁸⁰ Nearly half the residents of the Guatemala City metropolitan area indicated they had been the victim of a crime within the last year.⁸¹ In urban areas, 29 percent of individuals indicated they, or a family member, had been victims of crime, while the figure fell to 15 percent for rural areas.⁸² Interestingly, indigenous status is negatively related to being a

76. See Julie López and Carlos Canteo, *De 230 secuestradores consignados sólo hay tres condenados a prisión*, SIGLO VEINTIUNO, Feb. 21, 1997, at 3.

77. See *Aparente descenso de los plagios*, SIGLO VEINTIUNO, Nov. 30, 1997, at 22. But see *1997 con más secuestros*, EL PERIÓDICO, Dec. 29, 1997, at 20 (where GV argues that kidnappings actually increased from 973 in 1996 to 1,638 in 1997). The year 1998 has also seen kidnappings reappear. See Ramón Hernández S., *Pérez Aguilera: hay un repunte de secuestros*, PRENSA LIBRE, Jan. 16, 1998, at 3.

78. See *En Guatemala ocurre una violación cada día*, SIGLO VEINTIUNO, Jan. 24, 1998, at 3 (citing an official record of 165 cases in 1997).

79. See generally Development Associates, Inc., *Third Report: Guatemalan Values and the Prospects for Democratic Development, with emphasis on Civil Society Participation, Local Government and the Justice System* (Sept. 1997) (draft report, on file with *Southwestern Journal of Law & Trade in the Americas*) [hereinafter DIMS].

80. See *id.* at III-2.

81. See *id.* Another study gave similar results: In Guatemala City, one in three reported that either the respondent personally, or a member of the respondent's household (defined as people actually living in the same house) had been a victim of a crime in the last six months. The figure fell to 19 percent outside Guatemala City. See CID-Gallup de Centroamérica, *Guatemala: Public Opinion Poll Report*, July 1997, at 19.

82. See DIMS, *supra* note 79, at III-3. This coheres with data from El Salvador and Guatemala that show that metropolitan respondents are less likely to believe in the system, i.e. that

crime victim — it is more likely for a ladino than an indigenous person to be a crime victim.⁸³ There is also a positive relationship between level of education and probability of being a crime victim.⁸⁴

The extent of child kidnapping, especially for purposes of foreign adoption, has been debated in the press.⁸⁵ In at least one case, an attorney and medical doctor were charged with falsifying records for the “export” of stolen children.⁸⁶

Murder and deaths connected with other crime are also on the increase in Guatemala. Most of these incidents involve fire arms. From January 1 to November 15, 1996, 5,000 people lost their lives violently in Guatemala. From January 1 to November 30, 1997, the figure increased to 6,652. Thus, in 1997, roughly twenty people a day died of violent crime in Guatemala.⁸⁷

Linguistic concerns further complicate administration of justice in Guatemala. Beyond Spanish, the country has at least 22 ethnic groups, speaking 20 languages derived from Maya, Garifuna and Xinka.⁸⁸ Consequently, language differences greatly complicate attempts to advance access to justice, especially for those most likely to be monolingual in a language other than Spanish — indigenous groups, the poor, women and children.

These disadvantaged groups have differing experiences with the justice system, perhaps in part as a result of their economic, social, racial and linguistic status. According to one survey, indigenous people who can be identified as such by the wearing of traditional dress perceive the greatest level of inequality of treatment by police and courts, favoring ladinos.⁸⁹ Similarly, the average level of confidence in

judges are honest. See J. Michael Dodson, Donald W. Jackson and Laura Nuzzi O'Shaughnessy, *Comparing the Survey Results from El Salvador and Guatemala*, Nov. 1997, at 2. *Contra*: it may be that more poor people on public buses, for example, are crime victims than university-educated residents of zones 10, 14 and 15 — the higher income areas of Guatemala City: the poor are often less vocal and less polled.

83. See DIMS, *supra* note 79, at III-5.

84. See *id.*

85. See, e.g., Danilo Valladares, *Investigan supuestas adopciones ilegales*, EL PERIÓDICO, Feb. 20, 1998, at 8. The level of abuse, according to the Public Ministry, is actually quite low. See *Archivan expedientes de adopciones*, SIGLO VEINTIUNO, Mar. 13, 1998, at 11.

86. See Rolando Quemé Velásquez, *Quetzaltenango: Alarma por robo de menores*, SIGLO VEINTIUNO, Dec. 5, 1997, at 79.

87. See Edín Hernández, *Violencia deja 20 muertos diarios*, SIGLO VEINTIUNO, Dec. 8, 1997, at 3.

88. See Ana Montes Calderón, *Diagnóstico del Sector Justicia en Guatemala*, (IDB Consultant Report, Sept. 1996) at 7 [hereinafter Montes Calderón, *Diagnóstico*].

89. See DIMS, *supra* note 79 at III-10. Fortunately, however, the gap is closing, comparing data from 1993 with 1997. See *id.* at III-11.

the justice system for men is much higher than for women.⁹⁰ Finally, there is an inverse relationship between level of confidence in the justice system, and level of education — less educated people have more confidence in the system than more educated ones do.⁹¹

Guatemala today has sixty one appellate judges, 170 trial judges (*jueces de primera instancia*), 253 criminal justices of the peace and 2,603 support staff members (*auxiliares de justicia*).⁹² There are a total of 480 courts in place.⁹³

II. HISTORICAL CONTEXT OF SOCIAL CONFLICT AND ABUSE OF LAW.

The original Spanish colonization did not promote a rule of law in Guatemala.⁹⁴ According to the Catholic Priest Bartolomé de las Casas, a contemporary and friend of Christopher Columbus,⁹⁵ the Spanish committed extraordinary human rights abuses in Guatemala against pregnant women, mothers of newborn babes, children and old men.⁹⁶ He further alleges that don Pedro de Alvarado (one of Cortes' officers, who was in charge of the campaign in Guatemala) was responsible for “butchery and destruction” and the deaths of “four or five million souls over the fifteen or sixteen years, from 1524 to 1540.”⁹⁷

In the 19th and 20th centuries, long-term reigns of strongmen gave the country political stability. However, political opposition was brutally repressed, and the small aristocratic class held power zealously.⁹⁸

90. See *id.* at III-19.

91. See *id.* These results are very similar to another study of both El Salvador and Guatemala which found that less educated respondents are more likely to believe that judges are honest. See Dodson, *supra* note 82, at 2. More educated respondents are more likely to believe that their judges are subject to political control. *Id.* at 3.

92. See Julia Corado, *Descubren anomalías en 500 resoluciones judiciales*, SIGLO VEINTIUNO, Oct. 8, 1997, at 6.

93. Former Court President Ricardo Umaña asserts the country needs 240 more courts. See *OJ necesita 240 nuevos juzgados*, SIGLO VEINTIUNO, Mar. 22, 1998, at 6.

94. For a general introduction to Spanish colonization in the Americas, see generally EDWIN WILLIAMSON, *THE PENGUIN HISTORY OF LATIN AMERICA* 3-166 (1992). For an overview of Guatemala's history, see generally JIM HANDY, *GIFT OF THE DEVIL: A HISTORY OF GUATEMALA* (1984).

95. See Anthony Pagden, *Introduction to BARTOLOMÉ DE LAS CASAS, A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES XV* (Penguin Classics Ed., 1992)[hereinafter DE LAS CASAS].

96. See DE LAS CASAS, *supra* note 95, at 59.

97. *Id.* at 62.

98. See NATIONAL DEMOCRATIC INSTITUTE FOR INT'L AFFAIRS, *THE 1990 NATIONAL ELECTIONS IN GUATEMALA* 8 (1991)[hereinafter NATIONAL DEMOCRATIC INSTITUTE]. See also, Mi-

In 1944, a new Constitution was enacted, representing a dramatic break with the past. This new Constitution introduced to Guatemala the Jeffersonian principle of popular sovereignty and individual rights, a fair and honest political system, and noble social guarantees.⁹⁹ In March 1945, Juan José Arévalo became a democratically-elected president.¹⁰⁰ In 1950, Jacobo Arbenz Guzmán became the second democratically-elected president.¹⁰¹

Because of Arbenz policy of agrarian reform (which could have potentially damaged United Fruit, a U.S. company), among other issues, the U.S. began to plot his overthrow.¹⁰² Senator Henry Cabot Lodge, whose family owned stock in United Fruit, was a major supporter of this effort.¹⁰³ Also on board were John Moors Cabot, the Assistant Secretary of State for Inter-American Affairs, whose family also held shares,¹⁰⁴ Secretary of State John Foster Dulles (who had done legal work for United Fruit) and Allen Dulles, then head of the CIA (who also had done legal work involving United Fruit).¹⁰⁵

A. Return of Repression: 1954-1985

In the period 1954 to 1996, Guatemala experienced severe problems in terms of democratic government and the rule of law. After the Arbenz coup, Col. Carlos Castillo Armas came to power, handpicked by the U.S. to be Guatemala's "liberator."¹⁰⁶ However, despite continued American aid, the situation within Guatemala deteriorated. Many of the new officials considered Castillo Armas' victory a license to steal money. In collaboration with American gangsters,

GUEL ANGEL ASTURIAS, *EL SEÑOR PRESIDENTE* (Editora Nacional, 1979)(1932)(Nobel Prize winner Miguel Angel Asturias describes such a military dictatorship).

99. See STEPHEN SCHLESINGER AND STEPHEN KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* 33 (1990) [hereinafter *BITTER FRUIT*].

100. See *id.* at 37.

101. See *id.* at 46. Arbenz won with 65 percent of the vote against General Miguel Ydígoras Fuentes, an ally of the former dictator General Jorge Ubico, the nation's last old-style military dictator prior to Guatemala's 1944 revolution. See *id.* at 46, 112A. Arbenz' main rival had been Col. Francisco Arana, who with Arbenz was a hero in Guatemala's October Revolution. See *id.* at 43. Arana was assassinated prior to the election in a plot involving the chauffeur of Arbenz' wife. Although it is not sure whether Arbenz himself was involved, the assassination was certainly done in his interest. See *id.* at 44-45.

102. See NATIONAL DEMOCRATIC INSTITUTE, *supra* note 98, at 10. According to recently declassified documents, the Central Intelligence Agency (CIA) drafted a plan to assassinate fifty-eight Guatemalan leaders connected with the Arbenz Government. See *CIA planeó matar a 58 funcionarios de Arbenz*, *PRENSA LIBRE*, May 24, 1997, at 2.

103. See *BITTER FRUIT*, *supra* note 98, at 83.

104. See *id.* at 106. John's brother Thomas was a president of United Fruit in 1948.

105. See *id.*

106. *Id.* at 192A, 234.

casino gambling became a major problem.¹⁰⁷ In 1957, Castillo Armas was assassinated and was followed as President by Miguel Ydígoras, an early ally of Castillo Armas.¹⁰⁸

In 1963, Ydígoras was deposed by then Defense Minister Peralta Asurdía, a more reactionary politician who had received backing from the U.S.¹⁰⁹ His forces murdered hundreds of anti-government activists. Many simply "disappeared."¹¹⁰

In 1966, Peralta Asurdía kept his promise of holding elections. However the principle candidate, a centrist, Mario Méndez Montenegro, was found dead four months prior to the election. His brother, Julio César Méndez Montenegro, stepped forward in his place and won the elections. However, he was soon reduced to a figurehead and was forced to give the military a free hand, which benefitted from \$6 million in U.S. military aid and \$11 million in American military equipment.¹¹¹

During that presidency, Col. Carlos Arana Osorio, a veteran of U.S. Green Berets training, introduced political assassination on a mass scale. Thousands of people suddenly met death at the hands of unseen gunmen. Many had been middle-class professionals who had supported Arévalo and Arbenz.¹¹²

From 1966 to 1970, the United States allocated more than \$2.6 million for police instruction and equipment under the U.S. Office of Public Safety (OPS) Program. By 1970, over 30,000 Guatemalan police had benefitted from OPS training. At the time, Guatemala had the second-largest American police assistance program in the hemisphere after Brazil, which had twenty times the population.¹¹³

Amid a growing guerilla movement, Arana went on to become the next president, running as the "law and order" candidate in an election controlled by the military. Arana was followed by conservative general Kjell Eugenio Laugerud García. In 1978, after a fraudulent election, Fernando Romeo Lucas García became President, promising a "harsh campaign against guerilla groups."¹¹⁴ During that time, death squads linked to the Army reached into every sector of national life, on a daily basis. According to René de León Schlotter,

107. See *id.* at 234.

108. See *id.* at 235-7.

109. See *id.* at 244.

110. *Id.*

111. See *id.* at 245.

112. See *id.* at 245-6.

113. See *id.* at 247.

114. *Id.* at 248-9.

ruption, with government officials including Cerezo himself purchasing large homes with public funds.¹³²

In 1986, with the new 1985 constitution and formal democratic elections,¹³³ the U.S. Agency for International Development began work in the Guatemalan justice sector through the Regional Administration of Justice Project. This project was implemented through the Latin American Institute for the Prevention of Crime and the Treatment of the Offender (ILANUD),¹³⁴ located in San José, Costa Rica. ILANUD contracted with Florida International University¹³⁵ in a project to advance training and seminars and eventually a sector assessment in 1987-88. However this was rejected by the Supreme Court.¹³⁶ Indeed, the court banned everyone involved in the assessment from future work and forbid the circulation of the assessment.¹³⁷

Unfortunately, human rights problems continued to persist.¹³⁸ According to the International Human Rights Law Group, in the 1980's, Guatemala was the most repressive country in the hemisphere. Successive military rulers killed tens of thousands of people, mostly Mayan from the highlands. In addition, they drove hundreds of thousands more into internal and external exile, razed some four hundred villages, and killed or kidnapped thousands of people in Guatemala City. Whether civilian criminal justice could enforce respect for human rights and establish the rule of law was, at the very least, an open question.¹³⁹

From 1987 to 1990, USAID contracted with the Harvard Law School's Center for Criminal Justice. That project focused on training, problem identification and implementation of a pilot court program in

132. See *id.* at 16.

133. See Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y Tratamiento del Delincuente (ILANUD), *La Administración de Justicia Penal en Guatemala*, Mar. 1988, at 31 [hereinafter ILANUD].

134. See Brian Treacy, *Retaking Stock: An Update to a 1991 Justice Sector Reform Stocktaking 2* (1996) (draft, on file with the *Southwestern Journal of Law & Trade in the Americas*) [hereinafter Treacy], lists 1986 as the start date. The actual ILANUD-USAID agreement was signed March 22, 1985. See ILANUD, *supra* note 133, at 1.

135. See USAID/Guatemala, *Stocktaking of 1986-1991 Administration of Justice Program*, Oct. 1991, at 3 [hereinafter USAID/Guatemala, *Stocktaking*].

136. See Treacy, *supra* note 134, at 2.

137. See USAID/Guatemala, *Stocktaking*, *supra* note 135, at 3.

138. For an overview of the human rights record in Guatemala, see generally Robert E. Lutz, *A Piece of the Peace: The Human Rights Accord and the Guatemalan Peace Process*, 2 S.W. J. L. & TRADE AM. 183 (1995).

139. See KENNETH ANDERSON, INTERNATIONAL HUMAN RIGHTS LAW GROUP, MAXIMIZING DENIABILITY: THE JUSTICE SYSTEM AND HUMAN RIGHTS IN GUATEMALA iii (1989).

Tonicapán.¹⁴⁰ However, the Guatemalan counterpart institutions did not follow up on the activities and project advances were not sustained.¹⁴¹

In 1981, the President of the Court had requested assistance from ILAUND to introduce oral proceedings to Guatemala. B. Julio Maier and Alberto Martín Binder Barzizza, both Argentines, began work with the Court to draft new legislation. The commission included justices of the peace, trial court judges and appellate level judges.¹⁴² In 1986, Binder and Barzizza completed additional work on another draft based on a new Criminal Procedure bill that was pending in the Argentine legislature.¹⁴³ In 1988, the *Código Procesal Penal Modelo para Iberoamérica* was published (in Río de Janeiro, Brazil, by Jaime Bernal Cuéllar, Fernando de La Rúa, Ada Pellegrina and Julio Maier), adding greater weight to the need for reform.¹⁴⁴ In 1990, Binder and Maier finished another draft bill.¹⁴⁵ This finally led to Supreme Court President Edmundo Vásquez Martínez' presentation of a new bill to Congress on May 23, 1990.¹⁴⁶

In 1990, lay preacher Jorge Serrano Elías became the second consecutive democratically-elected president in Guatemala.¹⁴⁷ However, his government quickly became one of the most corrupt in Guatemala's history.¹⁴⁸

Congress initially objected to the legislation, noting the Argentine participation in the latest draft, even though it reflected input from the earlier drafts carried out by Guatemalans.¹⁴⁹

To a very significant degree, the ILANUD and Harvard efforts represented USAID's testing the water in a new and sensitive priority area.¹⁵⁰ In 1990, USAID followed the Harvard activity with the "Improved Administration of Justice Project" (IAOJ). This project was

140. See Treacy, *supra* note 134, at 3. For an in depth description of the pilot court programs, see CHECCHI AND COMPANY CONSULTING, EVALUACIÓN DEL PROGRAMA EXPERIMENTAL DE JUZGADOS PILOTOS (Feb. 1991).

141. See Treacy, *supra* note 134, at 3.

142. See ALBEÑO OVANDO, *supra* note 121, at 45; PAR USEN, *supra* note 120, at 36.

143. See ALBEÑO OVANDO, *supra* note 121, at 46.

144. See *id.*; CÉSAR R. BARRIENTOS PALLECER, DERECHO PROCESAL PENAL GUATEMALTECO 21 (2nd ed., 1997) [hereinafter BARRIENTOS PALLECER].

145. See BARRIENTOS PALLECER, *supra* note 144, at 20.

146. See ALBEÑO OVANDO, *supra* note 121, at 46.

147. The Jorge Serrano presidency represented the first transfer of power from one civilian government to another in more than 35 years. See NATIONAL DEMOCRATIC INSTITUTE, *supra* note 98, at vii.

148. See CENTRO EVANGÉLICO, *supra* note 27, at 2.

149. See ALBEÑO OVANDO, *supra* note 121, at 46-7.

150. See USAID/Guatemala, *Stocktaking*, *supra* note 135, at 4.

terminated abruptly in December 1991 when counterparts were unwilling to collaborate.¹⁵¹ USAID concluded that its future work in the justice sector should use as its centerpiece a new Criminal Procedures Code,¹⁵² and further USAID assistance to the justice sector was conditioned on reforming the antiquated criminal procedure code.¹⁵³

A new version of the bill was prepared by Guatemalan Attorneys Alberto Herrarte and César Ricardo Barrientos Pellecer, with strong support from two members of Congress, Jorge Skinner Klee and Arabella Castro Quiñones.¹⁵⁴ In 1993, the President attempted to dissolve Congress and the Supreme Court through a "self-coup" (*autogolpe*). Instead, this led to the resignation of the President and Congressional elections for a transition period. Ramiro de León Carpio, the former Human Rights Ombudsman, became President.¹⁵⁵ Shortly thereafter, USAID resumed support for the justice sector.¹⁵⁶ The in-coming government reinvigorated negotiations with the *Unión Revolucionaria Nacional Guatemalteca* (URNNG).¹⁵⁷ Further, new Court President Edmundo Vásquez Martínez submitted the bill to reform the criminal procedure code. The bill was accepted and passed in September 1992,¹⁵⁸ as the first piece of legislation after the Jorge Serrano coup.¹⁵⁹

C. *The "Firm and Lasting Peace"*

In 1996, Alvaro Arzú was elected by a narrow margin over Alfonso Portillo, a populist supported by the traditional right. Arzú fo-

151. See Treacy, *supra* note 134, at 3.

152. See USAID/Guatemala, *Stocktaking*, *supra* note 135, at 20; BARRIENTOS PALLECER, *supra* note 144, at 23.

153. See Unclassified cable from the U.S. Embassy in Guatemala to James Michel, the Assistant Administrator for Latin America at the Agency for International Development's office in Washington (May 7, 1992) (on file with the *Southwestern Journal of Law & Trade in the Americas*).

154. See ALBEÑO OVANDO, *supra* note 121, at 47; BARRIENTOS PALLECER, *supra* note 144, at 22.

155. See CENTRO EVANGÉLICO, *supra* note 27, at 2; HUMAN RIGHTS WATCH/AMERICAS, HUMAN RIGHTS IN GUATEMALA DURING PRESIDENT DE LEON CARPIO'S FIRST YEAR 3 (1994).

156. Later in 1993, USAID provided some technical assistance to the new court. See, e.g., DPK Consulting, Technical Assistance to the Organismo Judicial Unidad de Planificación y Transformación de la Justicia Penal, (Oct. 12, 1993)(draft, on file with the *Southwestern Journal of Law & Trade in the Americas*). This renewed assistance was provided via the National Center for State Courts. Later, in 1994, a new project, referred to as "CREA - Centro de Apoyo a la Reforma del Estado de Derecho" came on line. In English, the project was called the Judicial Sector Reform Support Project (JSRSP). See, e.g., U.S. Agency for International Development, *Project Paper* (July 14, 1993).

157. See Montes Calderón, *Diagnóstico*, *supra* note 88, at 3.

158. See ALBEÑO OVANDO, *supra* note 121, at 47.

159. See BARRIENTOS PALLECER, *supra* note 144, at 26.

cused an enormous amount of energy on getting a final peace settlement signed during his first year in office.¹⁶⁰

Today the war is over, but peace will not be easy. Dennis A. Smith writes:

One of the key components of peace-building will be to promote national reconciliation. This will not be an easy task in a land haunted by so much death. How to build a nation where torturers and tortured somehow can be reconciled? Will those responsible for grave and massive human rights violations be identified by name? Will they be called upon to assume responsibility for their deeds?¹⁶¹

III. NEW LEGAL FRAMEWORK: THE NEW CODE.

A. *Overview of Criminal Procedure in France, Spain and Latin America.*

By way of introduction to the topic of criminal procedure reform, a short introduction to comparative criminal law is required. The Anglo-American system is usually referred to as an "adversarial" system (literally in Spanish an "accusatorial" system), while the system used in Continental Europe and Latin America is referred to as "inquisitorial."¹⁶² The word "inquisitorial" does not refer to the legacy of the Inquisition, but to the extensive pretrial investigation and interrogations that are designed to ensure that no innocent person is brought to trial. In this sense, it is an "official inquiry" rather than the adversarial system's "contest" or "dispute."¹⁶³ One person, the judge, is responsible for the prosecution, defense and judgement.¹⁶⁴

Under the inquisitorial system, an examining magistrate (Spanish: *juez de instrucción*, French: *juge d'instruction*), a civil servant, prepares a pretrial investigation of background information (called "the instruction").¹⁶⁵ In theory, this is done in a neutral fashion (in French: *à charge et à décharge*).¹⁶⁶ The examining magistrate has the

160. See CENTRO EVANGÉLICO, *supra* note 27, at 2.

161. *Id.* at 3.

162. PAR USEN, *supra* note 120, at 41; Michael E. Tigar, The Educative Function of Criminal Law: Cuban Reforms in Comparative Perspective 1 (1979) (preliminary draft, on file with *Southwestern Journal of Law & Trade in the Americas*) [hereinafter Tigar].

163. ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 125 (1993) [hereinafter FAIRCHILD].

164. See EUGENIO NEIRA ALARCÓN, MANUAL DE PROCEDIMIENTO PENAL CHILENO 15 (1992)[hereinafter NEIRA ALARCÓN].

165. NEIRA ALARCÓN, *supra* note 164, at 14; Tigar, *supra* note 162, at 4; TULLIO CHIOSSONE, MANUAL DE DERECHO PROCESAL PENAL 22 (1989) (regarding Venezuelan legislation) [hereinafter CHIOSSONE].

166. See Tigar, *supra* note 162, at 4.

aid of the judicial police (Spanish: *Policia Judicial*, French: *Police Judiciaire*)¹⁶⁷ and other court officials to carry out investigations.¹⁶⁸ This "instruction" is a cumbersome, bureaucratic process which may take a great deal of time.¹⁶⁹

The instruction is carried out in secret, in theory to protect the accused from adverse publicity prior to a determination that the government has a strong case for prosecution.¹⁷⁰ In this sense, the instruction is somewhat similar to a grand jury hearing in the U.S., which are secret and weigh evidence to decide whether the accused should be indicted. However, grand jury hearings are very short, and only designed to avoid frivolous actions, and thus are quite distinct in purpose from the instruction.¹⁷¹

Basic to the inquisitorial system as it exists today in "civil law" countries is that its processes cannot be aborted by the accused's "guilty" plea.¹⁷² Even if the accused does admit guilt, the inquiry must continue through a formal trial to decide the proper application of the law to the facts.¹⁷³ A formal trial is also necessary to decide what punishment, if any, or rehabilitation steps are needed.¹⁷⁴

The process of investigation (*instrucción*) consumes an inordinate amount of time, during which the person under investigation, at least in major crime cases, will likely remain in jail, or if at liberty, under a public cloud of suspicion.¹⁷⁵ The potential for abuse in a lengthy, secret pretrial proceeding is obvious. Often, the accused may remain in jail, without even possibility of bail, while the instruction is going on. In 1984 in France, for example, 51.9 percent of those in detention were awaiting trial rather than serving sentences.¹⁷⁶

The complete record of pretrial proceedings under the instruction is called the "*dossier*." The dossier also serves to inform judges, defense attorneys and others about the testimony of key witnesses and the evidence to be presented at trial.¹⁷⁷

167. Articles 120-123, Código Procesal Penal, Decreto 52-73 (repealed).

168. Articles 124-141, Código Procesal Penal, Decreto 52-73 (repealed).

169. See Tigar, *supra* note 162, at 14-15.

170. See FAIRCHILD, *supra* note 163, at 126; Compare with Argentina: Jorge R. Moras Mom, *Manual de Derecho Procesal Penal* 143, 152 (1993).

171. See FAIRCHILD, *supra* note 163, at 126.

172. *Id.* at 127.

173. See *id.*

174. See Tigar, *supra* note 162, at 5.

175. For the case of France, see Tigar, *supra* note 162, at 6.

176. See FAIRCHILD, *supra* note 163, at 126-127.

177. See *id.* at 127.

The first Criminal Procedure Code in Guatemala dates from 1873 and was based on Spanish law.¹⁷⁸ That code, in effect until 1973, followed the inquisitorial model: nearly all of the process was in writing. Further, the same judge that conducted the investigation then qualified evidence and proceeded through the trial and sentencing.¹⁷⁹

In Guatemala, under the old criminal procedure code, criminal complaints were usually presented to a justice of the peace (*juez de paz*), especially in rural areas. In theory, that judge would then issue a report to the instruction judge in the nearest municipality.¹⁸⁰ The instruction judge would then have fifteen days (the *sumario*), while the case is "under investigation" (*sobre averiguar*) to decide probable cause.¹⁸¹ The case would either be sent to a sentencing judge (*juez de sentencia*) or the process would be suspended for lack of evidence.¹⁸²

B. Performance Under the Inquisitorial System in Guatemala.

The inquisitorial system in Guatemala did not perform well. Citizens who were illiterate or only spoke an indigenous dialect were at a great disadvantage in written procedures. Translators and public defenders were extremely scarce in rural areas. Judges generally based verdicts on second-hand renderings of testimony taken by poorly prepared clerks, often leading them to adopt formalistic interpretations of the law.¹⁸³

Serious problems existed with the implementation of the inquisitorial system in Guatemala, in place until 1994. Such problems can be summarized as follows:¹⁸⁴

- (a) No assurance of a right to defense.
- (b) Violation of the presumption of innocence, given that the majority of prisoners held were in pre-trial detention, without having been convicted.

178. Decreto No. 551 was signed by then President José María Reyna Barrios (Jan. 7, 1898), based on the Ley de Enjuiciamiento Criminal (Sept. 14, 1882) from Spain. See ALBEÑO OVANDO, *supra* note 121, at 35.

179. See ALBEÑO OVANDO, *supra* note 121, at 35-36.

180. See WASHINGTON OFFICE ON LATIN AMERICA (WOLA), HABITS OF REPRESSION: MILITARY ACCOUNTABILITY FOR HUMAN RIGHTS ABUSE UNDER THE SERRANO GOVERNMENT IN GUATEMALA: 1991-1992 23 (1992) [hereinafter WOLA]. For Chile, compare NEIRA ALARCÓN, *supra* note 164, at 17; For Venezuela, compare CHIOSSONE, *supra* note 165, at 217.

181. GUAT. Cód. PROC. PEN., art. 310 & 527, Decreto 52-73 (repealed); WOLA, *supra* note 180, at 23. For Chile, compare NEIRA ALARCÓN, *supra* note 164, at 17; For Venezuela: CHIOSSONE, *supra* note 165, at 217.

182. See WOLA, *supra* note 180, at 23.

183. *Id.* at 24.

184. BARRIENTOS PALLEGER, *supra* note 144, at 20.