

# The Return of the Death Penalty: GUATEMALA

## *Executions return to Guatemala*

On 13 September 1996 at 0600 a.m. Pedro Castillo Mendoza and Roberto Girón were executed by firing squad for the rape and murder of four-year-old Sonia Álvarez García in Guanagazapa, Escuintla department. The execution was televised nationally. One of the prisoners was shot in the head after the firing squad's bullets failed to kill him.

All legal remedies had been exhausted. The execution took place after the Guatemalan Supreme Court rejected on 11 September a request by the Inter-American Commission for Human Rights (IACHR) to grant precautionary measures. The IACHR requested a suspension of the execution, on the grounds that such measures were not authorized by Guatemalan law.

Amnesty International and other organizations had grave concerns about the trial and procedures which led to the imposition of the death sentence. The UN Verification Mission (MINUGUA) made public their concerns regarding the violation of the right to fair trial, an area that falls within its mandate under the 1994 Global Human Rights Accord. The two prisoners were without a lawyer for the first nine days of their detention, a vital period for the collection of evidence, and were later defended by inexperienced law students, under the supervision of a lawyer. Although defence by law students in Guatemala may be permitted under Guatemalan law, Amnesty International considers this to be totally inappropriate in cases that carry the death penalty, as they deny the accused the right to competent counsel.

## *The debate about the death penalty in Guatemala*

### *Recent history on the application of the death penalty in Guatemala*

In practice, the judicial death penalty has rarely been carried out in Guatemala. Prior to the executions of September 1996, four were carried out in 1982. A further 11 in 1983 were carried out under emergency Decree 46-82, promulgated during a state of siege imposed when General Elfrain Rios Montt seized power in 1982. The decree established secret military tribunals empowered to impose the death penalty for a wide range of political offences. There were inconsistencies in the evidence against those executed and strong indications that they had “confessed” under torture. Most had no access to defence counsel, and a procedure to appeal was instituted only after widespread international protest following the first executions under the decree.

The decree was rescinded after General Rios Montt was overthrown in August 1983. In April of the same year the IACHR, with the case of Guatemala in mind, requested an advisory opinion from the Inter-American Court of Human Rights (Inter-American Court) in relation to the extension of the death penalty by a State Party to the American Convention on

Human Rights (American Convention). The Inter-American Court found that such an extension would amount to a violation of the American Convention, and, therefore, a failure of the State Party to fulfil its obligations.

### *Death penalty in Guatemalan legislation*

The Guatemalan Penal Code (1973) provides for a maximum of the death penalty for parricide, aggravated homicide and homicide of the President and Vice-President. The death penalty is mandatory for rape when death results and the victim is under 10 years of age. The death penalty is also mandatory in kidnapping cases when the victim is under 12 years of age or above 60 or when death results or the victim suffers serious physical injury or permanent psychological trauma.

Under the 1985 Constitution, the death penalty cannot be imposed on women, people over 60, those guilty of political crimes or related common crimes, or people extradited under the condition that the death penalty will not be applied or when a conviction is based on circumstantial evidence. A sentence can be imposed only after all appeals are exhausted. The Constitution states that Congress can abolish the death penalty.

In spite of the ruling of the Inter-American Court in 1983 that the extension of the death penalty would violate the American Convention, in March 1995 the Guatemalan Congress approved Decree 14-95, extending the death penalty to cover anyone convicted of kidnapping, including accomplices and those attempting to conceal such crimes. Kidnapping is understood to be a criminal act of the deprivation of freedom, usually with the intent to make financial, or other, gain. Paradoxically, statistics produced by the national police show that the incidence of kidnapping rose significantly immediately after Congress approved the Decree. The status of this legislation remains unclear, since the former President Ramiro de Leon Carpio neither ratified nor vetoed the law within the legally-specified period. Nevertheless, death sentences have already been passed on people convicted of crimes falling within its scope.

In July 1995, Decree 48-95 was introduced, making extrajudicial executions by members of the security forces or members of "subversive and terrorists bands" punishable by the death penalty when the victim is under 12 years of age or more than 60 years old, among other reasons. Forced disappearance was also made punishable by the death penalty, when the victim, as a consequence of forced disappearance, suffers serious injury, permanent psychological trauma or death.

In 1996, following a rising feeling of public insecurity caused by a large number of kidnapping, armed robberies and mob lynchings, the death penalty was widely condoned by several sectors of Guatemalan society as a means of combatting common crime. Those opposing the death penalty have included some local human rights groups and the Catholic Church. Since

the executions which were carried out in September 1996, Congress has approved new legislation changing the method of execution from firing squad to lethal injection, thereby expressing their intention for the death penalty to remain in use as a penal punishment.

Amnesty International opposed the death penalty as a violation of the right to life and the ultimate form of cruel, inhuman and degrading punishment. Both these rights are protected by the American Convention. Amnesty International understands that the increase in violent crime, including that of kidnapping, calls for effective measures to be taken in order to ensure the safety of the population at risk. The organization has the greatest sympathy with the victims of such crimes, but it does not believe that the application of the death penalty will ever act as a deterrent to violent crime being carried out or that it will ever be an appropriate punishment. Indeed, the organization has found that the death penalty has not been effective in reducing levels of crime in countries which retain it. An indication of this is the fact, mentioned above, that kidnapping increased subsequent to the approval by Congress of Decree 14-95.

Studies have supported Amnesty International's position on the death penalty and have consistently failed to find convincing evidence that the death penalty deters crimes more effectively than other punishments. The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted by the United Nations (UN) in 1988 and updated in 1996, concluded: "Research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment and such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis".

As long as the death penalty is maintained there will always be a risk that innocent people will be executed. All criminal justice systems are vulnerable to discrimination and the possibility of judicial error must be taken into account. When the ability to obtain good legal representation becomes one of the most important factors in determining the outcome of a trial, questions of race, class and poverty can have a considerable effect upon the administration of justice.

***The obligations of Guatemala under international human rights law***

The Republic of Guatemala is a State Party to the American Convention and the International Covenant on Civil and Political Rights (ICCPR), both of which have specific provisions relating to the use and extension of the death penalty.

Under article 4(2) of the American Convention, States Parties are expressly prohibited from extending the death penalty to crimes other than those already contemplated in domestic legislation at the time of ratification.<sup>1</sup> Indeed, this matter was the subject of the third advisory opinion of the Inter-American Court,<sup>2</sup> the organ responsible for the application and interpretation of the American Convention. At the time the matter was put before the Inter-American Court for its consideration, the Guatemalan Government requested the Inter-American Court to refrain from issuing such an opinion. The request was rejected and in September 1983 the Inter-American Court unanimously decided that governments of States Parties to the American Convention could not extend the death penalty to crimes not already contemplated in domestic legislation at the time of ratification, even if a reservation had been made to article 4(4), as in the case of Guatemala. Subsequently, in May 1986, Guatemala withdrew its reservation to article 4(4), thereby committing itself to be fully bound by the American Convention. In March of the same year, Guatemala had accepted the jurisdiction of the Inter-American Court and declared its recognition of the competence of the Court on all matters relating to the future application or interpretation of the American Convention.

The matter of compatibility of domestic legislation with the American Convention was also the subject of a later consultative opinion (OC-14/94) of the Inter-American Court. In November 1993 the Court unanimously decided that the issuing of a law contrary to the obligations of a State Party to the American Convention would constitute a violation of the Convention itself. In the case of such a law affecting the protected rights and freedoms of given individuals, the Court decided that the state would be held to be internationally responsible, as would agents involved in its implementation.

Also the Guatemalan Constitution establishes in article 46 “the general principle that, in matters relating to human rights, the treaties and conventions ratified by Guatemala take precedence over domestic law”.

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<sup>1</sup>Article 4(2) “The application of such punishment shall not be extended to crimes to which it does not presently apply”.

<sup>2</sup>Advisory Opinion OC-3/82, September 8, 1983.

In the light of the consultative opinions of the Inter-American Court, there remains no doubt that the implementation of Decree 14-95 and Decree 48-95 breach the American Convention. Amnesty International considers that by introducing such legislation the Guatemalan Government is undermining the commitments it freely undertook on ratifying the American Convention. The Guatemalan Government reiterated and strengthened its commitments to the protection and promotion of human rights when it freely accepted the jurisdiction of the Inter-American Court and withdrew its previous reservation to article 4(4).

As a member state of the Organization of American States (OAS), Guatemala was present when the General Assembly adopted, in 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. The adoption of this treaty provided states wishing to do so with a means of reinforcing their national decisions to abolish the death penalty. The Protocol has now been ratified by four states and signed by a further three. Indeed, of the 25 States Parties to the American Convention, 16 have abolished the death penalty for either all or ordinary crimes and a further two have become *de facto* abolitionist countries.

In 1995 Guatemala ratified the ICCPR and thereby accepted the competence of the Human Rights Committee in matters relating to its implementation. Article 6 of the ICCPR has been interpreted by the Committee as referring “generally to abolition in terms which strongly suggest [...] that abolition is desirable”<sup>3</sup>. Under Article 6 states are also obliged to limit its use and, in particular, to impose it only for the “most serious crimes”. The UN General Assembly has reiterated the desirability of abolition<sup>4</sup>.

Indeed, both the Human Rights Committee and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions<sup>5</sup> have expressed their concern in relation to the moves taken in 1995 to extend the application of the death penalty in Guatemala. Amnesty International is unaware of any positive steps taken by the Guatemalan Government in the light of the concerns raised and is deeply concerned that death sentences have already been passed for kidnapping, a crime which falls under the scope of new legislation.

In March 1996 the Human Rights Committee examined the initial report of Guatemala and on the basis of its findings made a series of recommendations to the government. The Committee urged the Guatemalan Government to “restrict the application of the death penalty

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<sup>3</sup>Human Rights Committee, General Comment No.6, para. 6.

<sup>4</sup>Resolution 32/61 states that “the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment”.

<sup>5</sup>UN Doc. E/CN.4/1996/4, 25 January 1996.

to those crimes which might be considered most serious". Among others, the Committee also recommended that there be a thorough review of the legal framework for the protection of human rights to ensure full conformity with the ICCPR and that the independence of the judiciary be ensured and a law regulating it be enacted.

The executions of Pedro Castillo Mendoza and Roberto Girón were carried out only 6 months after the Human Rights Committee had communicated its concerns and recommendations to the Government of Guatemala. Both the American Convention and the ICCPR provide that amnesty, pardon or commutation may be granted in all cases carrying the death sentence. Such measures are also required by the UN Safeguards guaranteeing protection of the rights of those facing the death penalty (UN Safeguards) adopted by the Economic and Social Council in 1984. On the basis that due process had not been followed the IACHR requested the Government of Guatemala to take out precautionary measures, i.e., to grant a stay of execution. The request was rejected on the grounds that no such measures were authorized under Guatemalan law. Amnesty International considers that the refusal of Guatemala to cooperate with the IACHR in this instance is unacceptable as it impedes the IACHR from carrying out the functions for which it was created, to promote and protect human rights, as set out, in the case of Guatemala, in the American Convention. A request for clemency from Pope John Paul II was also rejected.

### ***Current death row cases***

Amnesty International has received information regarding more than one hundred and fifty people who are currently in detention on a variety of charges, mainly killings and kidnapping, and who face the risk of being sentenced to death. In many of these cases the appellate processes have not yet been completed.

At the time of writing this report, Amnesty International has information regarding five people currently under sentence of death in Guatemala.

Aníbal Archila Pérez, Miguel Angel López Caló and Miguel Angel Rodríguez Revolorio, were policemen convicted of the murder of two men on the outskirts of Guatemala City in February 1995. On 14 March 1997 petition for *amparo* was made before the Constitutional Court. At the time of writing the petition is still pending. Amnesty International is deeply concerned by information it has received which shows that due process has not been followed to date in this case.

One of the disturbing departures from normal procedure was that the Professional Responsibility Office (*Oficina de Responsabilidad Profesional - ORP*) of the National Police conducted the initial investigation, in place of the appropriate office of the Public Ministry, under whose responsibilities such matters lie. Identification of the defendants was made by matching

their photographs, without either the judge or the defence lawyers being present. The absence of judicial supervision of the procedure and without legal counsel means that there was no effective oversight of the crucial identification process to ensure that witnesses were not subject to suggestive influence. Despite the procedure not being in accordance with the Guatemalan Criminal Procedures Code, they were accepted when the sentence of death was passed on Aníbal Archila Pérez, Miguel Angel López Caló and Miguel Angel Rodríguez Revolorio. Even when the defendants were arrested, their basic rights were not respected, relating to the issuing of an arrest order and the right to be informed of their rights after arrest. Subsequent to the initial investigation, the Public Ministry carried out its own investigation but based it on the findings of that carried out by the ORP and did not take into account the defendants' claims that it was not their patrol car, but another, that was operating in the area where the crime was carried out. Finally, the process has been concluded with unusual speed, with the death sentence being passed only three months after the case was opened.

Manuel Martínez Coronado, was sentenced to death having been found guilty of the killing, in May 1995, of seven family members, including three children, in the village of El Palmar, Quezaltepeque, department of Chiquimula. A petition for *amparo* is currently pending before the Constitutional Court.

On 18 February 1997, Luis Alberto Xiquén Ramos, a former soldier, was sentenced to death by the Petén Sentence Tribunal for the rape and murder of a girl under 10 years' of age in the Melchor de Mencos area of Petén in March 1996. The prisoner's lawyer has presented an appeal for his defence which at the time of writing is pending before a Petén Appeals Court.

There has been much public debate following the decision of Sentence Tribunal 5 not to pass death sentences in relation to the kidnapping of the child Eddy, or Eddín, Ortiz, as the convictions were made on the basis of circumstantial evidence. Freddy Stanley Edwards Valencia and Jorge Francisco Espinoza Rossati were sentenced to 30 years' imprisonment, having been found guilty of the kidnapping of Eddy, or Eddín, Ortiz. In addition, Gustavo Enrique Flores Pelaez and Alex Rene Yoc Flores were sentenced to 20 years' imprisonment, for being accomplices to the crime, as was Maria Julia Canizales for concealing the crime. The decision of Sentence Tribunal 5 was going to be appealed at the time of writing this report.

Also pending before the Supreme Court of Justice is the appeal made by the Public Ministry following the decision of Appeals Court 9, Sacatepéquez, in January 1997 to reduce death sentences passed on Carlos Enrique Tórtola Escobar, César Augusto Soto Rivera and Marco Antonio Fuentes Marroquín to 50 years' imprisonment, having found that the application of the death penalty would constitute a violation of the American Convention. This decision is based on the fact that when Guatemala ratified the American Convention the Guatemalan Penal Code did not provide for the application of the death penalty for kidnapping. Following the

decision of the Appeals Court there has been much public outcry and one of the Judges of the Appeals Court has received a death threat.

In the light of the concerns raised by the Human Rights Committee in relation to the delays and failures of the process of law in Guatemala, it is the responsibility of the Guatemalan Government to take steps to ensure that executions are not carried out where there is any doubt regarding the fair and just administration of justice in death penalty cases. Moreover, the UN Safeguards emphasise that the strictest possible standards must be observed in cases where the accused faces the death penalty. Article 4 states: "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." Article 5 declares: "Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."



***Amnesty International recommendations to the Guatemalan authorities on the abolition of the Death Penalty***

1. The Government should abolish the death penalty and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

2. Pending abolition the Government should declare an immediate moratorium on all executions.

3. Pending abolition, the Government should repeal Decrees 14-95 (or clarify that it has never come into force) and 48-95 and commit itself not to introduce any extensions of the death penalty.

4. Pending abolition, the Government and the appropriate judicial bodies should ensure all defendants in death penalty cases enjoy all the safeguards and fair trial rights set out in the American Convention on Human Rights, the ICCPR and the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, and other international standards. The defence of those charged with crimes which could carry the death penalty should only be undertaken by qualified, practising lawyers.