

# Annex 6: Guatemala: National policy for prevention and protection of human rights defenders and other vulnerable groups (2009)

## INTRODUCTION

The Firm and Lasting Peace Agreements of 1996 provide a basic agenda for the judicial, political, economic, cultural and social transformation of the State, by means of the new public administration enshrined in democracy, peace and the constitutional rule of law which facilitate the protection of the individual, thus guaranteeing life, physical well-being, freedom, equality, non-discrimination, justice, security, peace and comprehensive development, with the common good as the ultimate aim.

In the last decade, the numerous and constant acts committed against human rights defenders, officers of the law, witnesses, journalists, trade unionists and media personnel have not only attracted national and international attention but have also given rise to countless recommendations to our country – both in agreements and independently - by international and Inter-American bodies as well as several visits by these bodies to Guatemala.

The governmental plan of the Constitutional President of the Republic, Engineer Álvaro Colom Caballeros, set forth in his First Government Report as part of the Security and Rule of Law Policy, establishes human rights as its third objective, emphasising the need to seek observance and compliance with the international conventions signed and ratified by the state on this issue. This constitutes a return to the mandate to generate a public policy of protection for human rights defenders, on which consultations are being held internally at state level and with civil society, with the support of the Office of the High Commissioner for Human Rights in Guatemala.

Our Government regrets, rejects and publicly condemns all action that directly or indirectly threatens the work of institutions or organisations that encourage, defend, protect or guarantee human rights and universal freedoms, committed by individuals or groups whose overriding interest is to instil a permanent atmosphere of terror and insecurity, preventing these sectors of society from developing in normal, safe conditions but above all collectively spreading a climate of terror, fear and silence.

The Global Human Rights Accord of 1994 contains the commitments and obligations adopted by the Government for the benefit of the Judiciary, the Human Rights Prosecutor, the Public Prosecutor's Office and the individuals or organisations that work in the field of human rights. Special prevention and protection measures need to be implemented to effectively guarantee their work, which contributes to democratic change by increasing citizens' participation, improving living standards and social, political and economic conditions, reducing social and political tensions and creating a peaceful, tolerant society in which to live.

The Government of Guatemala recognises the key role played by human rights defenders who, individually or collectively, encourage and defend civil, political, economic, social and cultural rights and contribute to guaranteeing the exercise of universal freedoms and the proper operation of democratic institutions. Their activities promote greater awareness and observance of human rights, safeguarding democracy and the Rule of Law.

Democracy does not simply consist of holding free elections on a regular basis but also entails the acceptance of other imperatives such as the separation of powers, the independence of the judiciary, the protection of human rights and the transparency of political funding. Participation and diversity are fundamental aspects of democracy.

The situation of vulnerability and risk faced by officers of the law in Guatemala must be viewed in the general and specific context of the observance, guarantee and exercise of human rights, in a fragile democracy that characterises Guatemala as a weak state and at the same time prevents some of the premises of the Rule of Law from being implemented, such as compliance with the law, equality before the law, legal security and certainty, the binding nature of the law for each and every person, and due process.

Therefore various factors contribute to impunity *de facto* or *de jure*, which make the judicial sector vulnerable regardless of the type of jurisdiction and powers. This is illustrated in various different ways, ranging from subtle acts such as corruption, internal and external pressures and meddling, to acts that threaten the

lives and physical well-being of magistrates, judges, experts, lawyers, victims, legal applicants, the police, joint plaintiffs, witnesses and/or prosecutors.

For this reason it is imperative to adopt a National Policy on Prevention and Protection that fully responds to the level of urgency, threat, risk and vulnerability associated with the professional or occupational activities of promoting, upholding, guaranteeing and protecting fundamental rights, the consequences of which have not been able to be addressed by the normal procedure established by the Constitution and other state legislation.

This Public Policy, in accordance with the National Policy on Human Rights and the National Action Plan on Human Rights, proposes dynamic, efficient mechanisms by means of a framework of reference, with the essential goal of strengthening existing national systems and programmes on protection, and setting up whatever other programmes are necessary for the state to meet its obligations.

The success of this initiative requires a commitment from the state, non-governmental organisations and society as a whole, with the hitherto continuous support of international cooperation. It should be reiterated that firm political determination from every state body is indispensable. They must draft comprehensive, sustainable solutions and translate these into public policies that establish single-minded, coordinated and institutional management of the forms of action that need to be undertaken.

Therefore, on issuing this National Policy on the Prevention and Protection of Human Rights Defenders and Other Vulnerable Groups, we are upholding the commitment we made in the National Agreement for the Advancement of Security and Justice,<sup>1</sup> which, amongst other points, contains **Policies and Institutions for Criminal Investigations and Investigations against Impunity (Topic IV)** for creating Comprehensive Protection Programmes for Officers of the Law and Human Rights Defenders.

## **V. Proposal**

The proposal is, in accordance with the duty of the state, to provide a strategic, coordinated, structured and permanent framework involving the public sector, civil society and international cooperation bodies that guarantees prevention and protection. This is understood as a standard service that creates, improves and strengthens the specialist infrastructure, in order to respond comprehensively with dynamic, efficient and effective mechanisms in line with the level of urgency, threat, risk or vulnerability to which human rights defenders, magistrates, judges, prosecutors, lawyers, witnesses, experts, journalists, trade unionists, media personnel and other vulnerable groups are exposed as a result of activities related to their professions or occupations, with the aim of avoiding irreparable damage.

The intention is to guarantee human rights under threat and ensure that regulations are in place to define the powers of the authorities, appropriate transfer of resources, their best use and the practical implementation of national, regional and/or global measures while the conditions of risk and vulnerability persist. This will help to counteract the state of defencelessness, lack of governmental control and impunity, and contribute to strengthening democratic institutions and the Rule of Law.

## **VI. Guiding Principles**

Every action related to prevention and protection in this policy shall be governed by the following guiding principles, which will serve as a conceptual guide and framework of reference for their implementation.

### **1. Prevention**

The institutions responsible for guaranteeing security shall adopt effective, exhaustive strategies to prevent intimidation and/or attacks, identifying the potential factors or elements that generate violence, taking into account the periods of greatest vulnerability and risk, developing early-warning systems and emergency, contingency and crisis management plans.

### **2. Efficacy**

All the governmental and institutional bodies responsible for the different prevention and/or protection programmes established by national and international legislation shall work in a coordinated and cooperative manner to avoid any duplication of procedures and optimise material and human resources.

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<sup>1</sup> Signed on 15 April 2009 by the Congress of the Republic, the Executive Body, the Supreme Court of Justice and the Public Prosecutor's Office, with the support of the University of San Carlos de Guatemala, the Evangelical Alliance of Guatemala, the Archbishopric of Guatemala and the Human Rights Prosecutor. National Theatre of the Miguel Ángel Asturias Cultural Centre, Ciudad de Guatemala.

To achieve the anticipated results, the powers and responsibilities of central, autonomous and independent authorities shall be clearly defined to guarantee consistency and the appropriate allocation of budgetary and logistic resources, and any such mechanisms shall be implemented without re-victimizing the beneficiary or his/her family members.

### **3. Suitability**

Given the particularly urgent and serious nature and necessity of prevention and/or protection - precautionary, provisional and security measures and urgent appeals - the mechanisms for the coordination, adoption and provision of the protective measures shall be simple, accessible and processed in accordance with the needs of the beneficiaries, depending on the level of threat, risk or vulnerability. They should also comply in good faith with national and international obligations.

### **4. Jurisdiction**

With the exception of the requirements of ordinary legal procedures, the preventative and/or protective actions to enforce precautionary, provisional and security measures and urgent appeals shall not prejudice the substance of the matter and shall be adopted immediately to guarantee the non-violation and free exercise of human rights and universal freedoms. As these are precautionary measures, the rigour or ritual involved shall not be the same as for other protective mechanisms in Guatemalan legislation, but rather applied on the basis of the *pro persona* principle.

Likewise, administrative, legislative, political or any other type of measures should be developed to implement judicial measures for national prevention and/or protection that govern the action of public sector employees in situations of imminent danger or risk when exercising human rights. These should be simple, free of complicated procedures, cost-free and characterised by all other aspects that inform due process.

### **5. Voluntary nature**

The acceptance or withdrawal of the prevention and/or protection system adopted shall be voluntary, notwithstanding the reasons for exclusion given in each of the regulations governing the different mechanisms, at all times being based on the principle of legality. Therefore the adoption of precautionary, provisional and security preventative and/or protective measures should be in consultation with the beneficiaries in order to guarantee their relevance and allow them to do their work.

However, it is necessary to establish reasons for exclusion or withdrawal from this mechanism when the beneficiary commits unlawful acts or behaves in such a way that his/her safety or that of other people is endangered. The state institutions shall ensure due process is guaranteed at the time of withdrawing any such protective mechanisms.

### **6. Equal treatment and non-discrimination**

The national human rights institutions and organisations responsible for the mechanisms of prevention and/or protection shall observe the guarantee of equal treatment and non-discrimination during the process of requesting, adopting, providing or implementing the measures. Therefore no differences whatsoever shall be made due to gender, ethnicity, social or economic status, sexual preference or orientation, language, nationality, religion, political opinion or any other motive when providing this service.

### **7. Meetings and consultations**

It is essential that state institutions, beneficiaries and civil society – human rights organisations, trade unionists, journalists' associations and other vulnerable associations – establish channels for consultation and stable, respectful and constructive dialogue in order to identify needs and assess the performance of the preventative and/or protective measures.

### **8. Specialisation**

All the state institutions that coordinate and cooperate in the adoption and implementation of preventive and/or protective measures shall ensure that their security forces are qualified to properly defend vulnerable or threatened people. Therefore the process of selection, recruitment and training must be carried out with the utmost transparency and with the participation of the target population benefitting from the preventative and/or protective mechanisms and programs, equipping them with appropriate knowledge in this area and information on best practices in human rights, the duty of the state and international human rights law.

## 9. Confidentiality

All aspects relating to precautionary, provisional and security preventative and/or protective procedures shall be confidential in order not to compromise the safety or increase the level of vulnerability of the beneficiaries.<sup>2</sup>

## 10. Temporary nature

The preventative and/or protective measures shall have a fixed duration of six (6) months, which may be extended by an equal period. However, these measures shall be provided for any reasonable period during which the conditions that led to their implementation persist, assuming these are still serious and urgent and there is a need to prevent irreparable damage.

## 11. Graduation and proportionality

The prevention and/or protection system shall be adopted and implemented in accordance with the situation or degree of threat, danger or risk, according to the risk and/or vulnerability study and analysis.

## 12. Comprehensive and binding

All preventative and/or protective procedures shall be based on the link between the threat, danger or risk and the activity of the beneficiary; in other words, if they occur during or because of this activity. This principle shall inform the action and services that the national preventative and/or protective mechanisms and programmes offer the beneficiary, facilitating coordination, cooperation, information and follow-up of investigations undertaken by the Public Prosecutor's Office and the National Civil Police into the incidents that gave rise to them.

## VII. Cross-cutting issues

This section includes topics which should be implemented intrinsically, comprehensively and appropriately in every section of the National Policy on the Prevention and Protection of Human Rights Defenders and Other Vulnerable Groups.

### 7.1 Gender perspective and equality

The preventative and protective mechanisms should encompass the gender and equality perspective in order to guarantee equal opportunity, equal treatment and non-discrimination. This means implementing a gender analysis as part of the evaluation indicators for the National Policy for Prevention and Protection, as well as other governmental and state actions relating to this issue.

The causes of inequality, exclusion and discrimination that resulted in internal armed conflict are still part of daily life. This exposes women, *in particular those of indigenous origin, to the risk of violence triggered by multiple discrimination motivated by gender, ethnicity and class. This is particularly the case for female human rights defenders, lawyers, judges, prosecutors, journalists and media personnel.*<sup>3</sup>

In other words, this is about addressing the specific needs of women in terms of risk prevention and/or protection, given that their status as women makes them more vulnerable to, and a target of, other kinds of attacks and intimidations. This translates to different forms of violence based on gender; simply by their presence, women can arouse hostility and challenge cultural, religious or social taboos relating to the role that has been assigned by a patriarchal system to women in a particular country or society.

There may be various forms of aggression such as physical, verbal, psychological and even sexual harassment and rape. On other occasions it can take on the more subtle form of discrediting women's personal, moral or professional integrity.

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2 This right shall be exercised in accordance with Articles 24, 28, 29, 30, 31, 44 and 45 of the Political Constitution of the Republic of Guatemala. In the event that any invoked reservation is presented, the information shall be requested in accordance with the procedural regulations so a Guarantee Control Judge can raise the case, especially in military or diplomatic matters of national security, or with regard to details provided by private individuals under guarantee of confidentiality.

3 Violence against women goes unpunished, as the authorities do not investigate these cases nor arrest or punish the offenders. In this respect, the absence of the rule of law contributes to a never-ending series of violent acts against women, including murder, rape, domestic violence, sexual harassment and sexual exploitation. The institutions responsible for security and justice have not reacted with due diligence, particularly with regard to a recent series of brutal killings of women which continues to be unresolved. Report from the Special Rapporteur Yakin Ertürk on violence against women, its causes and consequences to the United Nations Economic and Social Council E/CN.4/2005/72/Add.3 of 10 February 2005.

Therefore the implementation of a preventative and/or protective mechanism for the beneficiary/ies should match the risk or threat, the needs of the woman/women, the context, and the occupation or profession of the woman/women. This applies both to challenging the cause of the threat and selecting the appropriate protection personnel.

## 7.2 Multiculturalism

When adopting prevention and protection mechanisms, there is a need to look beyond cultural alliances, most importantly because, as pointed out by Rapporteur Jean in his Mission in Guatemala, *“access to justice is limited by various factors including, inter alia, non-implementation by the courts of international human rights treaties and agreements and the lack of appropriate legislation. Indigenous peoples experience particular difficulty in accessing this for reasons such as discrimination, lack of court interpreters and non-recognition of the customary laws of their indigenous legal authorities. These factors result in impunity due to the violation of human rights.”*<sup>4</sup>

In its Conclusions presented in the Report on Guatemala: Justice and Social Inclusion, paragraph 434, the Inter-American Commission stated that:

*“The State should in turn ensure that indigenous peoples, women and children do not suffer from different forms of discrimination and social marginalization. The social exclusion that the Commission has witnessed in Guatemala includes lack of access to justice and obstacles to the effective exercise of civil, political, economic, social and cultural human rights of these sectors of society”.*

*“The elimination of all forms of discrimination, especially for reasons of gender, ethnicity and race, and different forms of intolerance, the promotion and protection of the human rights of indigenous peoples and respect for ethnic, cultural and religious diversity, contribute to strengthening democracy and citizen participation.”*

With this and the previous topics in mind, the remarks of the Special Rapporteur, Yakin Ertürk, on violence against women, its causes and consequences in her Report to the United Nations Economic and Social Council are particularly relevant:

*“The peace agreements signed in 1996 put an end to 36 years of civil war in Guatemala and included provisions designed specifically to protect the rights of women and indigenous peoples. Despite these achievements, inadequate implementation has prevented women and indigenous groups from benefiting from these provisions and has contributed to the atmosphere of insecurity and violence that still characterises Guatemalan society”.*

## 7.3 Justice

In order for every sector in the National Policy for Prevention and Protection to work without any kind of fear, it is not enough to simply offer them the necessary resources and protection. A judicial system also needs to be established in order to:

- a. Investigate serious past and present violations of human rights and prevent impunity
- b. Facilitate access to justice and prevent illegal forces from acting, as well as threats, intimidations and murder of human rights defenders, trade unionists, witnesses, journalists, victims and aggrieved parties, and officers of the law
- c. Provide adequate protection for officers of the law, representatives of the community and those who stand for the solidarity demonstrated by the active stance of citizens against acts of intimidation and the administration of justice.

Judges should act as the guardians of the rights and freedoms of every citizen and at the same time guarantee the legal protection of human rights, the fight against discrimination and impunity, and support the right to redress. As the legal system plays a fundamental role in promoting and protecting human rights it should be financially independent from other authorities. An equal balance should be struck in investments in the different areas of the Judiciary, whether these are the Public Prosecutor’s Office, defence lawyers or prosecutors.<sup>5</sup>

A key aspect to enable the legal system to win citizens’ confidence is its capacity to settle disputes in an effective and impartial way throughout the country. This will combat the uncertainty and lack of trust in the judicial system that is used as a pretext for privatising security and vigilante-style justice. These phenomena

4 See the Special Rapporteur’s Report on the Right to Food presented at the 64th session, paragraph 30, on Access to Justice and Human Rights Institutions E/CN.4/2006/44Add.1, 18 January 2006 (see report by the Special Representative of the Secretary General on the situation of defenders of indigenous peoples E/CN.4/2006/44/Add.1, page 16, human rights E/CN.4/2003/104/Add.2, Paragraph 63).

5 Horacio Ravenna, Access to Justice and Impunity, Regional Workshop on Democracy, Human Rights and the Rule of Law, organised by the office of the UN High Commissioner for Human Rights (UNHCHR) and the Ibero-American Institute of Human Rights (IIHR), San José de Costa Rica, Costa Rica, September 2005.

entail just as much risk as the attacks against which victims are trying to protect themselves. For this reason, the protection and strengthening of the administration of justice forms the basis of this policy to strengthen the rule of law.

#### 7.4 Democratic Security

The aim of this National Policy for Prevention and Protection is, inter alia, to try to gradually achieve the right level of protection and safety to enable its beneficiaries to freely exercise their human rights.

At the same time, it aims to ensure that safety measures are efficiently put into practice whenever circumstances demand them [...] **establishing special units of the National Civil Police and Public Prosecutor's Office**, with the necessary resources and capabilities, so they can work in a coordinated way to investigate these incidents with due diligence (...).<sup>6</sup>

However, ideally Democratic Security would be developed, which entails the existence of a state capable of promoting development which, in turn, leads to better welfare for the population. This should translate into development policies i.e. the target of reference should be the human being in the fullest sense, as an individual who interacts with his/her social and natural environment, based on national interests. In other words, respect for the essential dignity of human beings, improving their quality of life and fully developing their potential are essential requirements for security at every level.

Therefore achieving Democratic Security entails providing the essential conditions to guarantee protection and security for every individual in exercising their universal freedoms and human rights, strengthening and guaranteeing the rule of law across the whole country by reinforcing and legitimising democratic authority, allowing institutions to freely exercise their authority, facilitating the rule of law and the active participation of the country's citizens in matters of common interest.

Democracy cannot be sustainable without strict adherence to the principles of non-discrimination, including the protection of people who belong to national, ethnic, religious or linguistic minorities or indigenous peoples, and by constantly striving to eliminate extreme poverty, underdevelopment, marginalisation, economic inequality and social exclusion.<sup>7</sup>

#### 7.5 Prioritisation of vulnerable groups

The National Policy for Prevention and Protection should focus on the target population in order to comply with the recommendations of human rights mechanisms laid down both in agreements and created independently. Above all the policy should effectively guarantee their work, which contributes to democratic transformation, increasing citizens' participation and improving living, social, political and economic conditions, reducing social and political tensions and creating an environment of tolerance and peaceful coexistence.

There is no doubt that one of the tasks required for the democratic consolidation of our country will be precisely this strengthening of the system for the protection of human rights, in which once again the involvement of society will play a key role.

It will therefore need to address certain categories or sectors of society that are at risk of violence – to their lives, physical well-being, safety or freedom – such as:

- a. Leaders or activists of political groups, especially opposition parties
- b. Leaders or activists of social, civic and community associations, trade unions, farming associations and ethnic groups
- c. Leaders or activists of human rights organisations
- d. Victims of crime, the abuse of power and/or witnesses of examples of human rights violations or infringements of international humanitarian law, regardless of whether or not they have initiated the respective criminal, disciplinary or administrative processes
- e. Journalists and media personnel who publicise, defend, preserve and restore human rights and promote the implementation of International Humanitarian Law, or who exercise the right to freedom of speech
- f. Mayors, councillors and trade unionists who are at risk due to the legitimate exercise of their profession.

**These persons are a priority whenever a complaint has been lodged with the competent bodies and there is no national protection mechanism in place to protect them.**

6 OAS, General Assembly, Resolution AG/RES. 2067 (XXXV-0/05), of 7 June 2005, cited in the Report on the Situation of Human Rights Defenders, Page 38.

7 Democratic Communities, *Declaration of Santiago*, April 2005.

## 7.6 Comprehensive nature of human rights

In order for the Prevention and Protection Programme of this policy to be effective and produce the anticipated results, it must be backed up by a **strong political commitment from the state**.

The programme is part of the **National Policy on Human Rights and the National Human Rights Plan**, which is a political priority in all the decision-making institutional bodies at both central and local levels. It should ensure the existence of regulations that clearly define the powers and responsibilities of the central and decentralised authorities, and guarantee a consistent transfer of competences and resources from national to local bodies.<sup>8</sup>

*"...we will not have development without security, we will not have security without development, and we will not have either security or development if human rights are not respected"*<sup>9</sup>

The observance, promotion and protection of human rights is an intrinsic element of any democratic system, so we can state that there is an indivisible relationship between democracy, the rule of law and human rights. Thus to the extent to which a democratic regime can guarantee the rule of law and respect for human rights for all the inhabitants of a state, the strengthening of any of these elements has a direct impact on the strength of the others. For example, the strengthening of democratic institutions and full implementation of the rule of law increase the possibility that human rights will be respected, promoted and protected.

## 7.7 The fight against corruption and impunity

According to the expert Rooke, corruption facilitates and causes human rights abuses and is the enemy of good government. What is needed to fight against corruption is to foster transparency, accountability, the participation of civil society and fundamentally, the political will to attack and change the institutional systems that foster, facilitate or allow structural corruption to become established.

The United Nations Rapporteur Lois Joinet recognises four main principles on the subject of the violation of civil and political rights:

1. The right to know
2. The right to justice
3. The right to redress
4. The guarantee that offences will not recur.<sup>10</sup>

On the subject of economic, social and cultural rights, their Rapporteur, Magistrate El Hadji Guise, showed that the practices that lead to violations of Economic, Social, and Cultural rights (ESC) include debt, structural adjustment programmes, corruption, fiscal and customs fraud and other economic crimes. The consequences may be:

1. Violations of collective or community rights
2. Violations of individual ESC rights
3. Violations of the ESC rights of vulnerable groups.<sup>11</sup>

The French legal expert Joinet, in his *"Final Report on the Question of Impunity of the Perpetrators of Human Rights Violations"*, which was presented to the UN Human Rights Commission in 1998, attempts the following definition:

*"Impunity is understood as the impossibility, de jure or de facto, of calling the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted including being sentenced to make reparations to their victims."*

Impunity, understood as *"non-accountability"*, *"absence of punishment"* or *"immunity from sentencing"* can manifest itself in two ways, which are not mutually exclusive: a) statutory impunity and b) structural impunity.<sup>12</sup>

8 IACHR "Report on the Situation of Human Rights Defenders in the Americas", Organisation of American States (2006), Page 39.

9 Report from the Secretary General, *A Wider Concept of Freedom: Development, Security and Human Rights for All*, A759/2005/paragraph 17.

10 E/CN.4/Sub.2/1997/20/Rev.1.

11 E/CN.4Sub.2/1997/Rev.1.

12 Kai Ambos, the classification of impunity. In *"Impunity and International Criminal Law."* Editorial Ad-Hoc. Buenos Aires, Argentina (1999).

### A. Statutory or legal impunity – *de jure*

The source of statutory or legal impunity, as its name indicates, is found in a law that entails the state's express abdication of the aims and sanctions inherent in its punitive authority.<sup>13</sup> We believe it is important to note that there are gaps in the substantive or civil procedural law that prevents the state from exercising *ius puniendi*.

More specifically, in his appeal against the "law against victims", Joinet pointed out that these serious offences often go unpunished by virtue of judicial impunity ("*de jure*") that makes use of institutions such as prescription, pardon and amnesty.

The Vienna Declaration and Plan of Action are explicit in calling for the abolition of laws that protect the impunity of the most serious human rights violations.

It should be borne in mind that the measures that impeded access to justice for these serious crimes through pardons or amnesties were regarded as being against the American Convention on Human Rights in the Inter-American system.

### B. Structural impunity – *de facto*

It is well known that it is not only in the judicial system that the issue of impunity needs to be tackled. As well as impunity *de jure* there is also impunity *de facto*, and though the legislative framework clearly defines people's human rights and the legal obligations of the state that are part of its duty to guarantee constitutional order, this framework should provide the inspiration for public policies to protect and defend human rights.

This concerns the protection of victims, their families, witnesses, the civil parties in lawsuits and lawyers, civil servants and magistrates involved in protecting and defending these people.

Once again, there should be no impunity for those who work against these people by putting obstacles in the way of processes that seek the truth, justice and redress. This requires a vigilant attitude from a democratic state imposing the rule of law which is the only body capable of guaranteeing the functions of building dignity, protecting memory, truth and justice.

Structural impunity comes from a series of factors of an endogenous or exogenous nature which affect the duties of criminal justice. Despite the existence of a legal system which should be capable of reacting with criminal sanctions or exercising *ius puniendi*, these factors lead to the state adopting a negligent approach to the investigation and punishment of those responsible for serious human rights violations, thus making the duty of criminal justice illusory. At the same time, this situation undermines the credibility of, and society's trust in, the institutions responsible for ensuring justice is done, creating a spiral of impunity that can end up affecting the rule of law in its entirety.<sup>14</sup>

According to Pablo Saavedra Alessandri, the **exogenous factors** – those found outside the legal or judicial sphere – which promote structural impunity are expressed in: a) the absence of complaints about punishable deeds due to the fear of reprisals or other negative consequences, and b) a simple lack of trust in the judicial system as a viable alternative that is capable of solving the disputes that are brought before it. Meanwhile the **endogenous factors** – those found within the legal system – are expressed in: a) the existence of special legislation for sentencing certain crimes b) insufficient investigative action by the authorities c) a lack of cooperation from the authorities d) an overloaded criminal justice system.<sup>15</sup>

Meanwhile, according to the legal expert Manuel E. Ventura Robles, the concept of 'impunity' does not, in its strictest sense, describe a legal matter but rather a phenomenon of legal, social, cultural, psychological and even economic dimensions. In general terms, this can be understood as the lack of sentencing, non-accountability or the absence of punishment, which evidently run counter to the widely-understood concepts of impunity, imputability and immunity.<sup>16</sup>

We know that during the internal armed conflict there were massive, systematic, extremely serious violations of human rights which contributed to the collapse of law and public order, with a culture of fear and silence prevailing for more than three decades.

13 Definition provided by Dr Sergio Garcia Ramirez in International Jurisdiction, Human Rights.

14 Kai Ambos, the definition of impunity. In "*Impunity and International Criminal Law.*" Editorial Ad-Hoc. Buenos Aires, Argentina (1999).

15 Pablo Saavedra Alessandri, Secretary of the Inter-American Court of Human Rights, in Response to the Jurisprudence of the Inter-American Court to the Various Forms of Impunity in Serious Violations of Human Rights and their Consequences. Page 399 (2004).

16 Manuel Ventura Robles is a Judge at the Inter-American Court of Human Rights and spoke on Jurisprudence of the Inter-American Court of Human Rights and the Subject of Justice in relation to Access to Justice and Impunity at the "Regional Workshop on Democracy, Human Rights and the Rule of Law", invited by the Office of the UN High Commissioner for Human Rights (UNHCHR), between 5 and 7 September 2005, "Access to Justice and Impunity".

Improving awareness of human rights and the rule of law and restoring confidence in state institutions is the way to gradually build a culture of justice, one that addresses the development of human abilities and long-term sustainable development, while fighting against impunity.

## **VIII. Strategic objectives**

### **General Objective**

The democratic rule of law is strengthened through the implementation of an comprehensive, well-structured public policy that is driven by the different state sectors and civil society and effectively addresses the problem of security. It should guarantee a favourable environment for the work of human rights defenders, trade unionists, officers of the law, parties to proceedings, victims of crime, journalists and media personnel as well as other vulnerable groups, helping to consolidate democracy.

This policy establishes the framework for strengthening the institutional capabilities of the state and civil society, ensuring that human rights are better respected, promoted, protected and guaranteed, and also ensuring that the State of Guatemala guarantees effective compliance with the protection measures called for by the United Nations Rapporteurs and Special Representatives, the UN Special Mechanisms and the Inter-American Commission and Court of Human Rights, and also develops a national mechanism for prevention and protection.

### **Specific Objectives**

#### **Specific objective 1: the fight against corruption and impunity**

The institutions responsible for security and justice, and for their supervision and monitoring, shall adopt effective and exhaustive strategies to prevent corruption. To do so, a monitoring mechanism shall be defined to reduce power and create a counter-power, limiting the opportunities that make civil servants and public sector workers in the national security or intelligence services vulnerable to corruption and cronyism.

The fight against corruption must be one of the main objectives of the new mandate of the Ministry of the Interior and the reform process of the National Civil Police, so it is essential to tackle this issue head-on. In this fight it must first be understood that efficiency and corruption are antagonistic, since in order for an individual or collective to take advantage of what is public for personal or private gain they are unlikely to be efficient at what they do. Secondly, corruption is the main cause of distrust, discredit or lack of institutional legitimacy vis-à-vis citizens and thirdly, the beneficiaries of corruption, on seeing their interests served, turn into the main opponents of change.

The fight against corruption and impunity as a public policy and the process of supporting and promoting the International Commission Against Impunity in Guatemala (CICIG) should focus on the fundamental objective of tackling and breaking up illegal security forces and clandestine security organisations (CIACS), eradicating impunity and strengthening the legal system.

Our government has already started supporting and promoting the CICIG through the creation of the Presidential Commission for the Support of the International Commission Against Impunity in Guatemala, as an interim measure, through Governmental Agreement No. 65-2009.

The state investigation and criminal justice system will be strengthened in every aspect, primarily enabling it to penalise homicides and other violent actions against individuals who, like trade unionists, judges, witnesses, joint plaintiffs, victims, magistrates, journalists, media personnel and human rights defenders, are victims of intolerance and above all, impunity.

#### **Specific Objective 2: Improving and strengthening mechanisms and programmes for prevention and protection**

The intention is to develop preventative mechanisms and to improve and strengthen existing protective mechanisms and programmes for the benefit of human rights defenders, parties to proceedings, media personnel and other vulnerable groups whose lives, physical well-being, freedom, security or other universal freedoms are threatened or at imminent risk of violence as a result of common crime, organised crime, illegal or clandestine security forces working in parallel to the official forces.

We have taken the first steps by passing the Central American Convention for the Protection of Victims, Witnesses, Experts and other Persons involved in criminal investigations and prosecutions, especially drug-related activities and organised crime.

The essential mechanism for protecting the lives and other rights of our citizens is to strengthen the rule of law across the whole country. However, many Guatemalans need special attention as they are the direct and immediate victims of violence generated by organised crime or illegal groups whose intention is to spread fear, terror and impunity and hence make the law inoperable.

It is therefore essential for the state and civil society to jointly design, promote and implement a National Plan of Action on prevention and protection that contains mechanisms to promote and orchestrate the United National Declaration on Human Rights Defenders and action to protect the victims of serious crimes and the abuse of power: judges, lawyers, public prosecutors, human rights defenders, journalists and media personnel.

### **Specific Objective 3: the Culture of Human Rights**

The intention is to promote a culture of human rights in which public servants publicly recognise the legitimate function of human rights defenders, trade unionists, journalists, media personnel, officers of the law and other parties to proceedings. To do so the periods of greatest vulnerability must be taken into account, and support and protection made evident, but most importantly a culture of non-violence should prevail, encouraging the peaceful resolution of conflicts and coexistence as the fundamental basis for the prevention and prosecution of crime.

## **IX. Action to be taken**

To achieve these specific objectives, governmental and non-governmental institutions, with the collaboration of the international community, shall pursue the following action:

### **9.1 Establish a programme against corruption and impunity**

A programme against corruption and impunity that has a legislative and institutional framework shall be developed in order to take following action:

- a. Develop mechanisms for public complaints to be made to the legal system – a dedicated telephone line or email address for acts relating to offences, the abuse of police power or acts of political intimidation and persecution, or those of illegal or clandestine forces operating in parallel to the official security forces.
- b. Mechanisms for the public to complain to the legal system about acts related to violations of human rights and international humanitarian law, corruption and criminal acts that involve *de jure* and *de facto* impunity.
- c. Continue the process of declassifying archives, documents, information and intelligence of the state security forces from the period of the internal armed conflict.
- d. Support and strengthen the process of Historical Clarification, the Dignification of Victims and National Reconciliation.
- e. In accordance with Article 30 of the Political Constitution of the Republic of Guatemala, Article 244 of the Criminal Procedure Code, Legislative Decree 92-94, and the Law on Access to Information 57-2008 of the Congress of the Republic, state institutions are required to hand over information for human rights cases requested by public prosecutors and judges to support judicial investigations and processes, without state secrecy and national security becoming obstacles or mechanisms of impunity.
- f. Public mechanisms to legitimise and strengthen the legal system, the culture of peace and human rights in order to improve governance and maintain democracy.
- g. Information and awareness-raising campaigns about the importance of the CICIG Convention and the cooperation of the international community in the fight against impunity.
- h. The creation of alliances with the media so they can adequately inform the public about the results of investigations and procedural activities intended to legitimise and enhance the validity of the legal system.
- i. Develop actions to cleanse the Public Administration, especially the General Directorate of Migration and the ports and airports department – the main focus of human trafficking. This criminal activity is the third source of revenue internationally after drugs and arms trafficking.
- j. Promote and strengthen judicial independence and fiscal autonomy, carrying out a cleansing process and prosecuting any officers of the law involved in acts of corruption and the perpetration of criminal acts, thus encouraging access to justice.
- k. Review, reform or repeal any legislation that provides incentives for corruption and impunity, promoting legal initiatives and sanctioning and enacting laws that allow them to be fought and punished. These acts specifically include illegal enrichment, international bribery, undue use of reserved or privileged information by public sector employees for their own personal gain, the diversion of assets or property, cash or securities given to public sector employees for their own benefit or that of third parties during the course of their job.

- l. Legislate against and punish vexatious litigation, i.e. the malicious use of judicial resources by litigant lawyers who represent defendants on charges of corruption or other criminal acts with the aim of complicating the process and thus absolving those responsible from any criminal sanctions. Vexatious litigation also includes the fraudulent use of resources that have been created to ensure due criminal process and judicial guarantees.
- m. Redefine the Public Prosecutor's policy against crime, and strengthen the prosecutors' offices dealing with corruption and crimes against officers of the law, human rights activists, trade unionists, journalists and crimes from the past.
- n. Reform Criminal Code Decree 17-73 of the Congress of the Republic on criminal acts and crimes that threaten Freedom of Speech and Freedom of the Press, as legally protected rights.
- o. Develop a national strategy to fight against organised crime.
- p. Implement the law against organised crime to positive effect and develop the Directorate General for Civil Intelligence.
- q. Prevent and combat corruption in the private sector, promoting improvements to auditing and accountability regulations in the private sector and, where necessary, providing for effective civil, administrative or criminal sanctions that are proportionate and dissuasive in the event of any breach of these measures.
- r. Approve, sanction and enact Initiative 4021 of the Congress of the Republic which proposes a law on asset recovery.
- s. Include in the Criminal Code the offences listed in the Inter-American Convention Against Corruption (Decree 15-2001) and the United Nations Convention Against International Organised Crime (Decree 87-2003), ratified by the Congress of the Republic, such as: bribery of foreign public sector employees and cronyism, illegal enrichment, bribery in the private sector, embezzlement or misappropriation of assets in the private sector, money-laundering of criminal gains, receiving of stolen goods, undue use of reserved or confidential information, diversion of assets, illegal profit, failure to declare, failure to transfer rights, criminalisation of acts of corruption committed in the private sector, and accounting crimes.
- t. Reform the sentences for cases of corruption envisaged in Criminal Code Decree 17-73 of the Congress of the Republic on crimes committed by public sector employees, increasing them in proportion to the damage or social impact caused.
- u. Review and reform administrative legislation – the Civil Service Law, the law on honesty and liability of public servants and public sector employees, the Organic Budget Law, the State Contracting Law, the Accounting Control Law including taxation and customs, especially the section on evasion.
- v. Propose a law to protect people who report acts of corruption.
- w. Reform Decree 70-96 on Protecting Parties to Proceedings and People involved in the Criminal Justice Administration, bringing it into line with international best practice.
- x. Re-initiate work on a Law on Comprehensive Assistance for the Victims of Crime.
- y. Implement the AFIS system established in the Law on the National Citizens' Register as an essential tool for the Ministry of the Interior and the Public Prosecutor's Office.
- z. Implement the recommendations of the Group of Experts on Maritime Drug Trafficking held in the City of Mexico in 2005.<sup>17</sup>
- aa. Review and combat the privatisation of police work – paramilitary-type neighbourhood groups, vigilantes – and the large market in services offered by security companies which allows private vigilantes or bodyguards to be contracted, over whom there is no control.

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<sup>17</sup> **Inter-American Committee on Ports** GROUP OF EXPERTS ON THE OAS/Ser.L/XIV.4 MARITIME DRUG TRAFFICKING CICAD/doc.3/05 of 25-27 October 2005 Mexico City, Mexico. Original: English FINAL REPORT (preliminary version)

- **Recommendation 3.** – Effective controls at ports and of maritime drug trafficking.
- **Recommendation 4.** – Systems of gathering data currently used in ports.
- **Recommendation 6.** – Establishment of an inter-institutional council or committee to coordinate the joint implementation of anti-drug security in ports.
- **Recommendation 11.** – Effective, systematic control of chemical cargo passing through ports in order to prevent its illegal diversion.
- **Recommendation 12.** – Strengthening of security in the free zones of ports and in free ports.

- bb. Prevent, combat and punish the practice of lynching.
- cc. Draw up a guide for contracting private security and surveillance services.
- dd. Create a State or National Register of Public Security Personnel and National Civil Police, the National Army and the Secretariat of Administrative and Security Matters.
- ee. Create a State or National Register of Arms and/or Equipment – weapons belonging to the security forces.<sup>18</sup>
- ff. Establish a Directorate General for Control of Arms and Ammunition – DIGECAM.
- gg. Create a State or National Register for Private Security and Surveillance Services.
- hh. Establish a Supervisory Authority for Private Security and Surveillance.

## **9.2 Creation of a prevention and protection system**

- a. Mapping of the current distribution of competences and powers between the different institutions responsible for providing and implementing protection mechanisms and programmes.
- b. Diagnosis of the main obstacles or problems, challenges and goals of the special protection services (the state's duty to guarantee protection) provided for human rights defenders, trade unionists, judges, prosecutors, lawyers, victims of crime, witnesses, journalists and media personnel.
- c. Systematically determine the powers and competences of the institutions responsible for protection mechanisms and programmes, with the participation of civil society, placing priority on the needs of beneficiaries.
- d. Instigate and approve by Government Accord a Prevention and Protection Programme for Human Rights Defenders and other Vulnerable Groups.
- e. Design the regulations for the Prevention and Protection Programme and obtain approval from the Ministry of the Interior.
- f. Design the manual for the Prevention and Protection Programme for Human Rights Defenders and other Vulnerable Groups and obtain approval from the Ministry of the Interior.
- g. Instruct the authorities – public sector employees – by means of directives or circulars in order to facilitate open dialogue at the very highest level with civil society organisations so they are not perceived as the 'enemy' or 'anti-establishment'.
- h. Recognize the importance of women in the defence, promotion and implementation of human rights, guaranteeing them protective measures that accommodate gender and cultural identity.
- i. Strengthen economic and human resources and logistics to protect parties to proceedings and people associated with the criminal justice system within the Public Prosecutor's Office, in accordance with Decree 70-96.
- j. Develop a coordination mechanism for precautionary and provisional measures and urgent action by the Ministry of the Interior and the Presidential Human Rights Commission that includes the participation of other governmental, state and civil society bodies in order to evaluate, monitor and verify compliance with these measures.
- k. Encourage the participation of state and civil society institutions and bodies in putting together an Early Warning System,<sup>19</sup> in accordance with the state's duty to provide prevention, protection, preservation and restoration of the human rights and universal freedoms of the beneficiaries.
- l. Ensure and strengthen the financial, budgetary and administrative independence of COPREDEH and hence the unity and protection of human rights defenders.
- m. Strengthen the National Civil Police, especially in terms of human rights, crime prevention, gender, multiculturalism, executive security, the security of premises and preventative intelligence.
- n. Establish, as a permanent mechanism, the Body of Analysis on Attacks of Human Rights Activists set up by Ministerial Agreement No. 103-2008 of the Ministry of the Interior, and include in its members a representative from the Presidential Human Rights Commission.
- o. Carry out a purge of the state security forces.

<sup>18</sup> This aspect has already been addressed in Articles 82 and 83 of Initiative 3902 which recommended passing the Arms and Munitions Law at the plenary of the Congress of the Republic on 7 October 2008.

<sup>19</sup> A system of generating an alert that would allow the identification of risks and threats of common, organised and/or trans-national crime against public safety or the safety of vulnerable sectors, in accordance with the social, political or cultural context, in order to ensure a rapid, effective response to risk prevention and counteract threat, risks or criminal activities, reducing the vulnerability of people, assets or institutions.

- p. Professionalise the security forces and corps so they are properly equipped to provide protection to people at risk and vulnerable people, by creating elite forces.
- q. Focus on preventative and protective actions.
- r. Set up a committee within the structure of the Ministry of the Interior to draw up studies on risks, threats and/or vulnerability, upgrading the prevention and protection systems for these vulnerable groups.
- s. Promote risk or conflict studies at a local and regional level so that their results offer increased opportunities for clearer and better national, departmental and municipal prevention policies.
- t. Draw up security, protection, emergency, contingency and crisis management plans.
- u. Implement, with the collaboration of civil society, an observatory to protect human rights defenders, officers of the law, trade unionists, journalists and media personnel.
- v. Promote and implement administrative, legislative, political and any other kind of measures to develop or perfect judicial protective mechanisms nationwide, which govern the actions of civil servants and public sector employees in situations of imminent risk or threat when defending human rights. These should be cost-free and based on simplicity, economy of procedure and other aspects that inform due process.
- w. Develop informal mechanisms and fora for conflict resolution between individuals or groups from civil society organisations and civil and/or military authorities.
- x. Promote the activities of human rights defenders and officers of the law.
- y. Encourage the adoption of national and international cooperation agreements to guarantee protection in the event that the protected person and his/her family are obliged to leave the country.
- z. Strengthen the security division of the Judicial Body (USOJ) and create within the Ministry of the Interior, or using a new model available to the executive body,<sup>20</sup> a Judicial Security Division to guarantee the secure execution of judicial processes and the protection of magistrates, judges and their families. This Judicial Security Division should have the following structure: 1) Judicial Operations 2) Centre for the Analysis of Judicial Security 3) Judicial Services 4) Protection Intelligence Office 5) an administration office.
- aa. Create an elite security corps to protect judges and prosecutors responsible for pursuit, indictment and prosecution of alleged members of organised crime groups.
- bb. Provide regular training for the security staff of the Judicial Body and the Public Prosecutor's Office in security techniques and protective systems.

### **9.3 Programme to instil a culture of Human Rights**

- a. Issue a public statement from the Government of Guatemala in which it recognises the importance for the country as a whole of the work carried out by human rights defenders, officers of the law, journalists and media personnel.
- b. Provide regular public recognition for the legitimacy of the activities of human rights defenders, farmers' leaders, trade unionists, media personnel and journalists.
- c. Strengthen human rights infrastructure by creating a National Human Rights Commission in accordance with the Paris Principles on National Human Rights Institutions.
- d. Raise awareness and train members of the police forces on the respect and protection of human rights defenders, officers of the law, journalists and media personnel, to ensure that security measures, whether precautionary or provisional, are effectively put into place during the time warranted by the situation of risk.
- e. Form alliances with the mass media to run awareness-raising campaigns on respect for and the protection of officers of the law, human rights defenders and journalists.
- f. Run strategic campaigns to raise the media's awareness of the importance of the activities of human rights defenders, judges, prosecutors, litigant lawyers, public defence lawyers, the police, journalists and media personnel.
- g. Undertake educational and awareness-raising activities aimed at all public servants and state employees and at society in general in order to make them aware of the role played by human rights defenders, judges, prosecutors, litigant lawyers, public defence lawyers, the police, trade unionists, journalists and media personnel.

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20 The National Security and Justice Accord refers to the creation of a Ministry of Public Security and a Ministry of Justice.

- h. Coordinate, between human rights prosecutors, the Presidential Human Rights Commission and the National Institute of Public Administration, a national programme on the culture of human rights for public servants and public sector employees.
- i. Review and update the curriculum in the state educational system to encourage and promote human rights, with an across-the-board focus on gender and multiculturalism.
- j. Publish and disseminate state reports on mechanisms adopted, both in agreements and independently.
- k. Promote the implementation of best practice in human rights in the state security forces avoiding, above all, the excessive use of force in public demonstrations or evictions by using the appropriate measures for planning, prevention and investigation.
- l. Implement the United Nations Declaration on Human Rights Defenders.
- m. Promote the decentralisation of public human rights policy.
- n. Promote the National Plan of Action on Human Rights, creating the relevant Governmental Accord and subsequently ratifying it before the UN General Secretary.
- o. Promote a programme for a Culture of Peace and National Reconciliation.
- p. Instigate the process of disarmament and control of firearms possession. To do so it will be necessary, inter alia, to regulate the possession of firearms on the public highway, public places and recreational areas in order to instigate periods when carrying firearms is prohibited.
- q. Develop national disarmament campaigns.
- r. Train the police in the subject of human rights and care for victims, depending on the type of crime, in order to generate a culture of respect for and promotion of human rights.
- s. Re-focus the Local Security Councils to perform crime-prevention tasks rather than act as vigilantes, paramilitary patrols and/or people's courts under the pretext of being indigenous tribunals or applying vigilante-style justice.

*Signed on 15 April 2009 by the Congress of the Republic, the Executive Body, the Supreme Court of Justice and the Ministry of the Interior, with the support of the University of San Carlos de Guatemala, the Evangelical Alliance of Guatemala, the Archbishop of Guatemala and the Human Rights Prosecutor. National Theatre of the Miguel Ángel Asturias Cultural Centre, Ciudad de Guatemala.*