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William Clark Harrell

American University Washington College of Law

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FIELD REPORT

The Death Penalty and Due Process in Guatemala

by William Clark Harrell*

On September 13, 1996, Guatemala applied its death penalty, which had not been utilized since 1983. Roberto Giron and Pedro Castillo were convicted in 1993 for the rape and murder of a four-year-old girl, but whether they were guilty or innocent of this heinous crime, the defendants were not afforded due process in their trial or appeals.

As Legal Director for the Centro para la Accion Legal en Derechos Humanos (CALDH) in Guatemala, I served along with Helen Duffy and attorneys from the Institute for Comparative Studies in Penal Science as counsel for Giron and Castillo in presenting their case to the Inter-American Commission on Human Rights, and witnessed firsthand the judicial irregularities in this case. It is my belief that the trials of these men and the events leading up to the executions are emblematic of a dangerous

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At least seven times in 1996, mobs publicly lynched suspected market-place thieves, literally burning suspects alive in the streets. There have been even more already this year. The March 1997 Report of the UN Human Rights Verification Mission in Guatemala (MINUGUA) commented on this situation and noted that the state has failed to prevent and punish such acts. Guatemalan citizens are frustrated with crime, corrupt police and dysfunctional courts. The Government is trying to satisfy

demands of the public to bring crime under control, and President Alvaro Arzu, in fact, was elected in 1995 after promising in his campaign to reinstitute the death penalty. Against this backdrop, it is not politically expedient in Guatemala to protect defendants' rights. International efforts to defend these rights or work for improvement in Guatemala's prisons have been criticized by the Guatemalan press, which has stirred up public outrage over the crime rate. The press has also raised nationalistic attacks on international human rights workers and compared the UN and the Organization of American States (OAS) to the Spanish Inquisition.

Clearly the crimes of rape and murder, especially when the victim is a child, must be remedied by the state. Legitimate public outrage demands it. Regardless of the nature of the crime, however, Guatemala must honor the principles of due process guaranteed by its Constitution. Whether or not the defendants were guilty, Roberto Giron and Pedro Castillo were denied due process, and thus their executions were unjust.

Denial of Due Process

Due process is protected in Guatemala by Article 12 of the Constitution. The Guatemalan Penal Procedure Code

dictates that a criminal defendant has the right to legal counsel at all times after arrest and the right to be immediately informed of his rights as set out in Articles 142 to 164. Giron and Castillo were afforded neither. They were arrested on April 18, 1993, but were not afforded legal representation until April 27th.

Without the assistance of legal counsel, the defendants made vaguely inculpatory statements during this critical phase. The police asked the defendants repeatedly if they had committed the

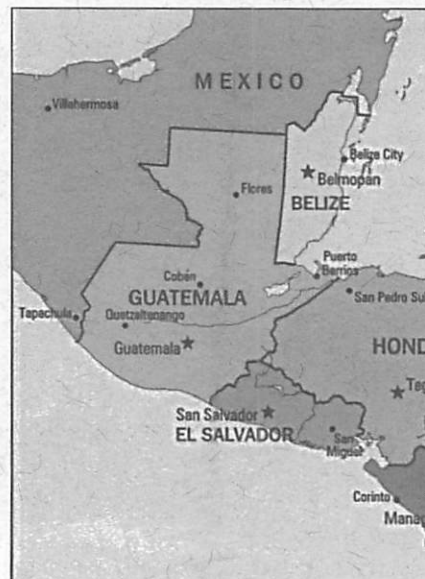
Giron and Castillo were arrested on April 18, but were not afforded legal representation until April 27th.

crime and why. The suspects denied it and could not remember where they were or what they were doing at the time of the incident. Ultimately, when asked why they had committed the crime, Giron said, "I do not know what happened to me." This was interpreted as a confession.

The fact that Giron and Castillo were not afforded legal counsel during their interrogation alone violates their procedural rights. The declarations made

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during this phase should have been excluded from trial not only on that basis, but because of the manner in which they were extracted. The interrogation was, as evidenced by the transcript and the defendants' accounts, suggestive and coercive, in violation of Article 12 of the Political Constitution of Guatemala. Moreover, one of the defendants was illiterate and could not read the "confession" that he allegedly



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ALUMNUS PROFILE

Alumnus Works Around the World for Human Rights

By Nicole Grimm

Françoise Roth, who received her LL.M. from WCL in 1993, has been working as a Legal Advisor for MINUGUA, the UN Human Rights Verification Mission in Guatemala, since 1995. MINUGUA was created in March 1994 by the Global Human Rights Agreement between the Guatemalan government and Guatemalan National Revolutionary Unity (URNG) rebels, and began work in November 1994. Its mandate is to verify the parties' compliance with the Agreement.

Before coming to Guatemala, Roth studied in her native France and interned with the UN Human Rights Centre in Geneva. She came to WCL in 1993 to pursue her LL.M. While at WCL, she co-founded and wrote for *The Human Rights Brief*, organized teams of student participants in the Rene Cassin Moot Court competition in Strasbourg, France, and interned for the International Human Rights Law Group. Her

studies at WCL gave her the opportunity to meet members of the international human rights community, including other LL.M. students, and WCL professors, who she felt were attentive, open to student initiatives, and willing to serve as professional contacts for students trying to enter the human rights field.

After completing her LL.M. degree, Roth accepted a full-time position with the Law Group. During her two years there, she helped to develop the Law Group's In-Country Empowerment Project in Kivu, Zaire. This unique program assists human rights organizations in the eastern part of Zaire by helping them to develop strategies for lobbying, defining their mandates, and develop projects. While working on the Empowerment Project, Roth coordinated the Project's Zaire activities with the Law Group's D.C. office. On an international level, she assisted in strategies for human rights lobbying by examining national



Photo Courtesy of Claudia Martin

Françoise Roth, with Javier Mena (behind), another Legal Officer at MINUGUA and an incoming LL.M. at WCL in Fall '97, and Will Harrell, (right) currently an LL.M. student at WCL.

governments and international organizations. She also collected information about human rights violations in Zaire for *Medecins Sans Frontieres* (Doctors Without Borders) and disseminated it to the

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signed and which constituted the principal evidence against him.

When the defendants were finally assigned legal counsel, it was in the form of two students from the San Carlos University of Guatemala. At the time, the Penal Procedure Code permitted substitution of a non-lawyer for a lawyer, however, this provision applied only in jurisdictions where there are fewer than four lawyers. Dozens of licensed attorneys practice in Esquintla, the jurisdiction where these defendants were tried.

The student attorneys were not assigned to the case until the early proceedings were completed. They were supervised by a faculty member who is a licensed attorney, but the student-faculty ratio in this clinical program was sixty to one. In addition to missing the early proceedings because they had not yet been assigned to the case, the students missed many of the subsequent proceedings following their assignment to the case, including the first scheduled hearing before the presiding judge.

This arrangement did not satisfy defendants' right to "effective assistance of counsel" as required by Article 146 of the Penal Procedure Code.

Nearly all witness statements were taken during the period when defendants were detained but had not been assigned legal counsel.

There were also due process problems during the trial itself. Nearly all witness statements were taken during the period when defendants were detained but had not yet been assigned legal counsel. These statements were used at trial as evidence against defendants, but the defendants were denied the right to confront and cross-examine these witnesses because the judge refused to allow them to be called to testify at trial.

After the conviction, a series of appeals and requests for injunctions seeking a stay of execution for the condemned ensued. Lawyers and judges, long subject to threats and attacks in Guatemala, received direct and indirect threats of violence for filing or hearing motions to stay the executions. It is therefore not surprising that each attempt to reverse or stay the sentence was rejected by the courts. President Arzu rejected a clemency plea from the condemned and his position was not wavered by a similar appeal from the Guatemalan Conference of Bishops and Pope John Paul II himself.

The Commission Responds

On August 13, 1996, defendants' counsel filed a Petition for Precautionary Measures with the Inter-American Commission on Human Rights of the OAS (the Commission) under Article 29 of the Commission's Regulations. This is an equitable remedy that permits the

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Commission in urgent cases to request Member States to take all measures necessary to protect the life and integrity of persons. We argued that the above inconsistencies in the criminal procedure were contrary to Guatemalan law and the dictates of the American Convention on Human Rights (the Convention), of which Guatemala is a party, and that Petitioners were at imminent risk of loss of life without due process.

The Commission did not request Article 29 Precautionary Measures immediately, but instead issued a communication requesting that the Government of

The Commission should be empowered to sanction governments who disregard its mandates.

Guatemala answer questions regarding the procedural anomalies alleged by Petitioners. The Commission set out two provisions in its request: first, that Guatemala must reply within two weeks; and second, that if Guatemala set an execution date within those two weeks, the Commission would make its final determination on the merits whether to order Precautionary Measures with or without the Government's input.

The Government responded within the prescribed period, but before the Commission could analyze its reply and make a determination, Guatemala announced at 4:30 p.m. on September 9, 1996 that the execution would transpire at dawn the following morning. Counsel for the Petitioners contacted the Commission that night and reiterated our request for Precautionary Measures. Pursuant to Article 29(3) of the Commission's Regulations, the Chairperson of the Commission issued a Request for Precautionary Measures that asked the Government to suspend the execution until the Commission had an opportunity to review the case and reach a decision on its merits.

Just after midnight, the Commission communicated this request to Guatemala's Execution Judge, the Minister of Foreign Affairs, the Permanent Representative of Guatemala to the OAS, and the President of Guatemala. At 3:30 a.m., the Execution Judge told reporters that as no further appeals

were possible, the execution would proceed at dawn. Moments later, three judges from Guatemala's Supreme Court arrived at the prison, and ten minutes later, the Execution Judge announced that the execution was stayed, citing international pressure as the rationale.

Although the Guatemalan Government acknowledged receipt of the Request for Precautionary Measures, on September 12, 1996, it transmitted a letter to the Commission from the President of both the Judicial Branch and the Supreme Court which concluded that Guatemalan domestic law does not provide for the implementation of Precautionary Measures and that the Supreme Court would therefore allow the execution to be carried out. Their position was essentially that the Commission had no binding authority. At 4 p.m. that day, the Execution Judge announced once again that the executions would proceed the next day at dawn. He further threatened judicial recourse against any lawyer who dared to file any more motions for a Stay of Execution. The Commission was notified of Guatemala's decision and did not take further action.

The *Giron & Castillo* case calls into question the authority of the Inter-American Commission on Human Rights. Are countries obliged to adhere to Commission pronouncements only when it is politically convenient? How

will the Commission sustain such a challenge to its authority? I would argue that the current Statute of the Commission should be reexamined. The

Until the court system is improved, Guatemala should be prohibited from applying the death penalty in any case.

Commission should be empowered to sanction governments who disregard its mandates, or, in the alternative, cases involving impending loss of life should be directly transferable to the Inter-American Court of Human Rights.

Under the Guidelines of the UN's Economic and Social Council (ECOSOC), in cases where a criminal defendant faces the possibility of execution, that defendant is entitled to a heightened level of due process protections. MINUGUA has observed repeatedly that the Guatemalan court system is inefficient, under-resourced, and plagued by corruption. Until the court system is improved, Guatemala should be prohibited from applying the death penalty in any case.

The Press and Human Rights Groups

The Guatemalan press corps is fraught with corruption and a lack of professional ethics. According to one exiled Guatemalan journalist who wishes to remain anonymous, "For years a

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This excerpt from an editorial by Estuardo Zapeta which appeared in *Siglo XXI* (21st Century), a daily newspaper in Guatemala City, on September 12, 1996, demonstrates the frustration and resentment felt by Guatemalans over the criticism of international human rights workers:

"A todos esos extranjeros, que para principiar no hablan bien el español y ya quieren venir a darnos lecciones y a contarnos las costillas, he aquí mi mensaje: Go home (sin traducción). Váyense por la misma puerta por la que entraron. No los queremos aquí. Nosotros no pedimos que ustedes vinieran ni les hemos dado la bienvenida; losers (sic) que en sus países son unos fracasados y aquí quieren ser Robin Hoods y Madres Teresas."

"To all those foreigners who first of all do not speak Spanish well and who want to come here and give us lectures and count our ribs, here is my message: Go home (without translation). Go out the same door you came in. We do not want you here. We never asked you to come nor did we welcome you; Losers who in your countries are complete failures and here you want to be Robin Hoods and Mother Teresas."

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group of journalists tried to professionalize the field. Now the only Guatemalan journalists who are not dead or in exile are *faferos* (corrupt) and *orejas* (government informants).³ The press coverage of events leading to the execution of these defendants was highly sensationalized. Many news outlets launched *ad hominem* attacks against the condemned and the attorneys representing them.

The momentum to publish accounts of the execution was so great that newspaper headlines on the morning of September 13th announced that the execution of Giron and Castillo had occurred. The press was embarrassed and enraged when the Stay of Execution was issued, because the announcement came too late to stop the release of the morning issue. The press pushed for a speedy execution, and yet, when a judge barred cameras and recorders from the execution, they threatened to hold the process up while they sought a court order to allow cameras. To avoid this delay, the judge relented and allowed the executions to be filmed, and the photographs and video footage were aired repeatedly for days.

The executions took place on September 13, 1996, and were performed by a firing squad. After a forensic doctor determined that Giron and Castillo had both survived the initial gunshots, however, he requested the squad leader to deliver a pistol shot to each man's head. This method of execution sparked a great deal of controversy in Guatemala, and in October 1996, this controversy inspired the Guatemalan Congress to pass unanimously a law changing the method of execution to lethal injection.

Guatemala has a vibrant human rights community, but the emotions driving this case led many of its members to avoid speaking out even though many agree that the defendants had been denied due process. Virtually every human rights group in Guatemala declined to issue a statement on this case because, as one prominent human rights activist stated, "The political costs are just too high."

Conclusion

Pedro Castillo and Roberto Giron are dead, but the issue is not. The

lawyers of the deceased have requested a hearing during the next session of the Commission. They will argue that the execution of the Petitioners was in violation of the right to due process

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and the right to life. The outcome of this process remains crucial because the death penalty is being sought in more than seven cases currently pending in Guatemala. This will no doubt continue to be a key issue for some time.

The execution of two defendants tried and convicted without due process has dire implications for Guatemala, which is at a critical turning point. Peace accords signed on December 29, 1996, have terminated the 36-year bloody civil war, the longest war in Central American history, between the government and leftist insurgents. During the war, Guatemala had one of the worst human rights records in Central America, but times supposedly have changed since the early 1980's when Military Dictator General Rios Montt ignored an order from the Inter-American Court to cease executions by "special tribunals" (see Advisory Opinion #3 of the Court). Guatemala has begun a long-awaited process of reconciliation, and for this to succeed, the Guatemalan State must lay the institutional foundations for the legitimate administration of justice with consistent respect for the rule of law to ensure a democratic future. ☺

** William Harrell received his J.D. from WCL in 1990 and is currently pursuing his LL.M. at WCL. At the time of submission of this article, he was the Legal Director of CALDH, a Guatemalan NGO. He is currently representing several petitioners in cases pending before the Inter-American Commission and Court. The opinions expressed herein do not necessarily reflect the opinions of the Editorial Board or the Center for Human Rights and Humanitarian Law.*

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For more information, contact:

Robert Guitteau, Jr.
Executive Director
Center for Human Rights &
Humanitarian Law
4801 Massachusetts Ave, NW
Washington, DC 20016-8181
Phone: (202) 274-4180
Fax: (202) 274-4130
E-mail : humlaw
@american.edu
Website: www.wcl.american.edu/
pub/humright/home.htm