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ICJ Position on the Draft Laws on Military Justice in Guatemala

In 2002, a draft Code on Military Justice was presented to the Guatemalan Congress. The Congressional Defence Commission divided the Code into four laws without changing the content. One of such laws, the draft military criminal law (*ley penal militar*) received preliminary approval by the full house in 2005.

The ICJ conducted a detailed analysis of the draft laws and found a number of provisions that run contrary to international human rights and standards on the administration of justice. In particular, granting military courts jurisdiction for all crimes by current and former military personnel flies in the face of developments in case-law and doctrine in the last decades. The ICJ is also worried that, if approved in their current form, the draft laws would automatically transfer all cases pending, i.e. that have not entered the trial phase, in ordinary courts to military tribunals.

Military tribunals pose serious challenges to international human rights law. In particular, military tribunals have consistently proved inadequate to try human rights violations carried out by members of the armed forces, which has generally resulted in impunity for the most heinous crimes. Also, military courts, because they are part of the armed forces, cannot fully guarantee the rights of the accused. Therefore, consensus has been reached on the need to limit the jurisdiction of military tribunals to crimes of a strictly military nature, i.e. those acts when a legally protected interest of military order is affected. All other crimes, particularly human rights violations, should always be tried by ordinary courts.

In a legal memorandum addressed to the Guatemalan Congress, the ICJ concludes that, if approved in their current form, the draft laws would entail a significant step back in the fight against impunity in Guatemala. Therefore, the ICJ called on the legislators to introduce a number of key reforms to the draft laws to make them compatible with Guatemala's international human rights obligations:

- 1) Clearly specify that the jurisdiction of military tribunals will be limited to active members of the armed forces for crimes of a strictly military nature and to retired military officers for the same crimes as long as they were carried out while they were active.
- 2) Expressly exclude from the jurisdiction of military tribunals ordinary crimes carried out by military personnel and state that such crimes shall fall under the exclusive competence, both in the investigative and trial phases, of the ordinary justice system. The draft law on military procedure should restate article 1 of

Decree 41-96, which amended article 2 of the Code of Military Justice, and states: “In those cases of ordinary or related crimes or offences carried out by military personnel, the Code of Criminal Procedure shall be applied and they will be judged by the courts specified in the Law on the Judiciary”.

3) State that under no circumstances will a military court exercise jurisdiction over a member of the armed forces for human rights violations as defined in the Constitution of Guatemala, the treaties which the country is a party to and the international human rights system.

4) Clearly define what constitutes a military crime, in full compliance with the principle that crimes shall only be considered to have a military nature when a legally protected interest of military order is affected.

5) Reiterate the prohibition contained in article 219, second paragraph of the Constitution, which states that no civilian may be tried by military courts.

6) Remove Article 7 of the draft law on military procedure, which would transfer from ordinary courts to military courts all cases that have not reached the trial phase. This transfer would entail a formula for impunity for human rights violations in violation of Guatemala’s obligations under international law.

7) Review the draft law on the organisation and functioning of military courts (*proyecto de ley de organización y funcionamiento de la jurisdicción militar*), particularly articles 11, 14 and 15, which require that all military judges be member of the armed forces, for such a requisite would compromise the right to a fair trial by an independent and impartial tribunal.

This document is a summary of the ICJ’s position. The full legal memorandum is available (in Spanish) at: www.icj.org/news.php3?id_article=3923&lang=es