

Preliminary Briefing on the Upcoming Trial for the Murder of Berta Cáceres: Corporate Efforts by *Desarrollos Energéticos, SA (DESA)* to Undermine the Prosecution

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Beginning in July of 2018, international human rights organizations that had been following the case of assassinated Indigenous leader and environmental activist Berta Cáceres joined efforts to form an international observer mission for the upcoming trial scheduled to begin on September 10, 2018 of eight individuals accused of carrying out the assassination.

Among those awaiting trial are Sergio Rodríguez Orellana, manager of community and environmental affairs for DESA, Douglas Bustillo, a former military officer and ex-head of security for DESA, Mariano Díaz Chávez, an active (at the time of the assassination) military intelligence officer, Henry Hernández, a private security guard with prior military training, and four alleged hitmen. Roberto David Castillo Mejía, the executive president of DESA, has also been charged but will not be tried with the eight in the upcoming trial.

The persistent problem of structural impunity for grave human rights violations in Honduras¹ makes this case a significant test of the country's judicial institutions. Concerned that the authors of the crime would benefit from this impunity, Berta Cáceres' family and their supporters in Honduras and international civil society pushed for the formation of a group of international experts, known as the International Advisory Group of Experts or GAIPE by its Spanish acronym. GAIPE was charged with conducting an independent investigation into Berta Cáceres' murder. Over the course of a year, GAIPE made four site visits, interviewed over 30 individuals, and reviewed the evidence available. It then issued a report of its findings in November of 2017.

Beginning in July of 2018, DESA mounted an extraordinary public relations campaign to discredit the GAIPE report and to protect DESA executives from prosecution. This Preliminary Briefing describes the campaign and analyzes the arguments it presents.

Why does DESA's defense team attempt to discredit the GAIPE report?

GAIPE was an advisory group comprised of five experienced litigators of human rights cases. Berta Cáceres' family and COPINH commissioned the group in 2016 to

¹ Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (2015), OEA/SER.L/V/II.Doc.42/15; par. 263. Available at <http://www.oas.org/en/iachr/reports/pdfs/honduras-en-2015.pdf>

investigate her murder as a result of the family's interest in determining whether the individuals arrested by Honduran authorities were in fact the culprits.

GAIPE conducted months of research, reviewing legal documents and evidence seized by the public prosecutor's office, and carrying out extensive field visits and interviews. GAIPE's objectives² were to "prepare an independent, objective, and impartial analysis of the murder of Berta Isabel Cáceres Flores;" and "use international human rights standards in the analysis of ministerial and judicial proceedings." As part of its methodology, and in line with international standards, GAIPE stated that it would "keep confidential any information that could jeopardize the investigation and individual security."

In November 2017, GAIPE published a report with its findings. The report noted, "Despite the secrecy of the Public Prosecutor's investigation, GAIPE has been able to establish the participation of executives, managers, and employees of DESA; of private security personnel hired by the company; and of state agents and parallel structures to state security forces in crimes committed before, during, and after March 2, 2016, the day of the murder. Those crimes remain unpunished."³

The group found that that since May 2016, the Honduran public prosecutor's office has been in possession of evidence that implicates top-level DESA executives in the murder of Berta Cáceres and in a pattern of criminal behavior, but that prosecutors had failed to indict politically influential individuals.

This deepened suspicions that while international pressure had forced Honduran authorities to act on evidence and arrest the presumed material authors and some of the presumed intermediary authors of her murder, powerful and influential intellectual authors seemed to be protected by Honduran authorities. For over 825 days, the lawyers for Berta Cáceres' family have petitioned public prosecutors for access to the investigation and evidence in accordance with their rights under Article 16 of the Honduran Penal Processing Code. Under the Honduran legal system, victims have the right to participate in a prosecution represented by lawyers referred to as "private prosecutors." According to Berta Cáceres' family's legal team, on over 35 occasions, the public prosecutors have refused to comply with four court orders to provide that information to the family's lawyers, resulting in the suspension of eight hearings, and further raising concerns about whether authorities are protecting powerful actors.

² GAIPE Report page 9. <https://www.gaipe.net/wp-content/uploads/2017/10/GAIPE-Report-English.pdf>

³ GAIPE Report page 3. <https://www.gaipe.net/wp-content/uploads/2017/10/GAIPE-Report-English.pdf>

Who has DESA hired to form its defense and public relations team?

On March 2, 2018, DESA Corporation President David Castillo Mejia was arrested by Honduran police in the airport as he attempted to leave the country. In a May 8th arraignment, Castillo was charged with the murder of Berta Cáceres. Andrew Durkovic, the partner that leads the Washington, DC offices of the law firm Amsterdam & Partners LLP,⁴ attended this hearing as counsel to DESA, though it was not until May 15 that Amsterdam & Partners announced⁵ to the press that they had been retained by DESA to “assist with issues relating to the Honduran government’s prosecution of two DESA executives accused of responsibility for the 2016 murder of high-profile activist Berta Cáceres.”

Amsterdam & Partners commissioned a high-profile Canadian criminal defense lawyer, Brian Greenspan, to review the investigation of their client’s role in the crime. On July 18, 2018, Amsterdam & Partners released that review to the press.

The publication of Greenspan’s work was followed by an aggressive outreach campaign led by New York-based public relations firm Uncommon Union and its CEO, Elizabeth Schaeffer Brown. The focus of the campaign is to discredit GAIPE’s investigation because, according to Amsterdam’s press release, “[t]he GAIPE report almost single handedly shaped what we have all been reading about the Berta Cáceres murder for more than a year now[.]” The report has also been extensively referenced in communications from the Inter American Commission on Human Rights of the Organization of American States, the Office of the High Commission for Human Rights of the United Nations, the European Parliament and broadly supported by international human rights organizations.⁶

Schaeffer Brown’s communications are not forthright. To an unsuspecting reader, Uncommon Union would appear to be a non-governmental organization advocating for

⁴ According to Durkovic’s Amsterdam & Partners online biography: “His practice draws on a broad spectrum of legal and other non-traditional advocacy strategies to protect and advance clients’ interests, including traditional litigation/arbitration, political advocacy, and media-based initiatives.”

<https://www.amsterdamandpartners.com/es/staff/andrew-j-durkovic/>

⁵ Amsterdam and Partners Website:

<https://www.amsterdamandpartners.com/es/amsterdam-partners-llp-retained-by-desarrollos-energeticos-s-a-desa-to-advise-on-agua-zarca-case/>

⁶ UN Human Rights and IACHR Urge Honduras to Investigate Crimes against Human Rights Defenders. Press Release. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2017/176.asp Members of the European Parliament statement to the Government of Honduras. 2018. Available at: https://www.protectioninternational.org/sites/default/files/sites/default/files/Letter_to_Gov.Honduras_EN.pdf

justice. To our knowledge she has not disclosed in her communications that she works with a public relations firm, or who hired her to undertake the campaign. She did not clarify that the so-called “Greenspan Report” at the center of her communications is a review commissioned by lawyers retained by two of the men accused of Berta’s murder.

In referring to Brian Greenspan’s review as the “Greenspan Report,” both Amsterdam & Partners and Uncommon Union sought to create a false equivalency between the GAIPE report and Greenspan’s review. There is no equivalency. Greenspan was commissioned by the team representing men implicated in the murder of renowned human rights defender Berta Caceres and a series of other criminal acts. As noted above, the GAIPE was created at the request of Berta Caceres’ family to conduct an independent and impartial investigation into her murder.

Does Greenspan identify problems with the investigation or prosecution of DESA employees?

Greenspan briefly expresses concerns regarding the handling of the crime scene and ballistics evidence, and the investigative capacities generally in Honduras. However, it is important to note that the prosecutions for the murder are primarily based on forensic evidence gathered from telecommunications, searches of the homes of the accused and offices of DESA, witness testimony and other evidence unrelated to the crime scene.

Greenspan also refers to the public prosecutor’s offices’ repeated refusal to share information from the investigation with the defense lawyers. The problem of denial of access to evidence by prosecutors has also been the subject of frequent protests in court and to the press by Berta Caceres’ family and organization, COPINH. They fear this practice could both protect intellectual authors and provide grounds for due process appeals should the accused be found guilty. In the review, Greenspan refers to this problem, asserting as a point of fact that the public prosecutor is withholding exculpatory evidence, though he does not clarify what the information is or how it is known to exist.

After citing deficiencies in the investigation presented by GAIPE, Greenspan develops a generalized discussion of deficiencies in Honduran police investigative practices. Pages three and four of Greenspan’s review enter into a very detailed description of Inter-American Commission on Human Rights (IACHR) comments on the quality of police investigations, taken from merits (case) reports on the murder of a Honduran human rights defender and the murder of a Honduran politician. This is followed by a

similar presentation of another Honduran IACHR case related to lack of due process in detention without judicial proceedings during the 1980's. The specific deficiencies in those cases are listed in Greenspan's text in such a way that a reader skimming the document could easily become confused and believe that the deficiencies listed from those two cases were deficiencies identified by the IACHR in the investigation into Berta's murder that resulted in the prosecution of Greenspan's clients.

Greenspan mischaracterizes human rights standards and GAIPE's compliance with the Lund-London Guidelines

Greenspan seeks to discredit the GAIPE report by asserting that it did not comply with the Lund-London Guidelines for fact finding investigations, but he fails to accurately describe any violation of those guidelines. The only discernible specific criticisms were the assertion that GAIPE did not substantiate its findings with references to the evidence used to arrive at the findings, and that the language was "strongly accusatory." Further, the Lund London guidelines are presented as international standards, which they are not, they are guidelines developed by the International Bar Association and the Raoul Wallenberg Institute.

With regard to Greenspan's assertion that the language used in GAIPE's report was "strongly accusatory," the Lund London Guidelines state, "*the language used must be accurate, clear and drafted in a dispassionate tone to reflect the facts objectively and so that the processes of the mission are transparent.*" The members of GAIPE are highly respected and experienced professionals who can gauge whether the language used is appropriate in relation to the degree of certainty conveyed by the evidence they examined.

The assertion that GAIPE did not substantiate its findings is a misrepresentation of the GAIPE report, which contains detailed citations to hundreds of text messages exchanged by the defendants and thousands of pages of court records. The report also notes that the confidentiality of many of its sources was required to protect individual security and the integrity of the ongoing criminal investigation. In that sense, it is relevant to note that the Lund-London Guidelines do not require a fact-finding mission to fully identify the the evidence considered in its report. Indeed, the Guidelines affirm that the "confidentiality of sources should be the basic operating principle."⁷

⁷ The International Human Rights Fact-Finding Guidelines (The Lund-London Guidelines), paragraph 53: https://www.ibanet.org/Fact_Finding_Guidelines.aspx

Missions like GAIPE rely by nature on the established integrity and capacity of its members to generate credibility for its findings. Security conditions in Honduras simply would not allow GAIPE to reveal a detailed description of their sources of information. In this sense, it was entirely appropriate and in conformity with the Lund-London Guidelines that GAIPE did not reveal the sources on which they based their conclusions.

Greenspan further asserts that GAIPE failed to meet standards laid out in the Lund-London Guidelines because it arrived at conclusions without full access to all evidence in the public prosecutor's investigation. The Lund London Guidelines do not require that a fact-finding delegation gather all evidence related to a case, nor would that be a reasonable expectation of a non-governmental initiative such as the GAIPE. Rather, the Guidelines state, *"In applying a standard of proof, the delegation must gather sufficient information from various credible sources to meet this standard and assess the reliability of the information collected."*

Greenspan's review presents misleading and inaccurate assertions, and employs confusing language

Greenspan's document employs language that could confuse the reader. It blurs the distinction between the independent investigation by GAIPE and the investigations of the Honduran police and prosecutors. After discussing the GAIPE investigation, Greenspan refers ambiguously to "the investigation" in contexts that could only refer to the public prosecutor's investigation, such as the section of his review that discusses violations of the Minnesota Protocol. This is done in such a way that it creates the false impression that the prosecution of Amsterdam & Partners' clients is based solely on investigations conducted by GAIPE, and that GAIPE is associated with the problems with the criminal investigation. In fact, GAIPE was not formed until five months after Sergio Rodriguez's arrest and indictment.

Throughout the report, Greenspan continues to present unsubstantiated, inaccurate assertions. On page 10, for example, Greenspan asserts, "The GAIPE Report's conclusions are based almost exclusively on digital information from telephone companies and on messages extracted from several phones." Greenspan continues to make the assertion that GAIPE's conclusions are based solely on telephone data when he cites GAIPE's conclusion that DESA employee Sergio Rodriguez "participated in the design and implementation of strategies intended to stigmatize, criminalize, and attack Berta Isabel Caceres Flores and members of COPINH. This entailed hiring and maintaining a network of informants and contract killers with whom he had direct

communication.” This conclusion, he incorrectly claims, was based solely on two text messages. In reality, GAIPE reviewed thousands of pages of information extracted from Sergio Rodríguez’s phone, and conducted other investigative measures.

While presenting the facts of the case, Greenspan states that DESA president David Castillo was arrested on March 3, 2018, “The symbolic date of this arrest should be noted: it was the second anniversary of Berta Cáceres’.” Though the reference to the significance of the date of the murder would appear to support Greenspan’s assertion that DESA employees’ arrests were the result of “misplaced international pressure,” he fails to note that Castillo was arrested in the airport because he was leaving the Honduras, a circumstance that could have forced authorities to arrest him at that time. The murder occurred March 2, 2016.

Greenspan either misstates or misunderstands the content of a text message cited in the GAIPE report and uses the misinterpretation of the text to wrongly assert that GAIPE’s factual conclusion were based on speculative inferences. He does this when he refers to the text message sent by Sergio Rodríguez that alerted DESA executives that Berta would be in La Esperanza on March 2 and March 3. Greenspan incorrectly stated that the text message asserted that a group from Rio Blanco intended to ask for Berta’s resignation from COPINH leadership, which was not the content of the message.

When referring to GAIPE’s discussion of the text conversations between DESA employees seeking to obtain the release from detention of a man locally renowned to be an assassin hired by DESA after he was detained for murder, Greenspan attempts to discredit that finding claiming that the text messages cited in reference to events that took place in 2015 were from 2012 and 2013. If Greenspan had consulted the original Spanish language citation he would have discovered that the faulty citation is a mistake of the translator, and the actual citation was not Appendix I, notes 10-29 but rather Appendix II, notes 10-29.

In another inaccurate assertion, Greenspan states, “From the earliest moments of the investigation, there was only one focus: DESA.” Initially, a former member of COPINH, who was a close friend of Berta Cáceres’s, Aureliano Molina, was the focus of the investigation⁸. In fact, Aureliano Molina was arrested the day after the murder, but released without an indictment for lack of evidence. COPINH’s general coordinator,

⁸ La Hora Honduras: Interrogan a tres personas tras la muerte de Berta Cáceres.
<http://www.laprensa.hn/honduras/936395-410/interrogan-a-tres-personas-tras-la-muerte-de-berta-c%C3%A1ceres>

Tomas Gomez, was also a focus of investigation, though he was never arrested. The persecution of these two men was an extension of a pattern of the harassment that they had both suffered together with Berta before her murder. Text communications recovered during the police investigation showed that DESA executives and employees were in communication with police and even the Minister of Security in the early stages of the investigation, when the COPINH members were the focus of investigations.⁹

Greenspan refers to initial lines of investigation that stigmatized the victim, her friends and colleagues

Greenspan picks up on DESA's practice of stigmatization of COPINH, "Further, testimony has been provided in the criminal proceedings to indicate that the first persons to arrive on the scene following the murder were not police officers or law enforcement authorities: they were members of COPINH. Indeed, investigators observed that the COPINH members had altered the crime scene before any photographs or evidence could be taken." As word spread that Berta had been murdered, those that cared about her rushed to her home to see if it was true, and to assist the surviving victim, Gustavo Castro. Since police did not initially secure a perimeter, many of her family members and colleagues from COPINH entered the home. The assertion that COPINH altered the crime scene implies the motive of tampering with evidence, rather than mourning and providing aid to loved ones. It also would lead readers to believe that it was only COPINH members who entered the unsecured crime scene, though many others also did.

Greenspan also encourages examination of Berta Caceres' personal life. This was the first line of inquiry in the police investigation,¹⁰ but one which was eliminated by police investigators and public prosecutors as evidence implicating those currently accused grew. In so doing, Greenspan was again deceptive in his presentation of international standards for best practices, this time referring to the Minnesota Protocol. Greenspan claims, "This profile should include sensitive information such as findings of marital infidelity or other stigmatized sexual behavior." However, the Minnesota Protocol in fact

⁹ GAIPE Report, pages 16-18. <https://www.gaipe.net/english/>

¹⁰ Page 17, GAIPE Report. "According to an exchange of messages between DESA employees and executives, the murder was being reported as a crime of passion. For example, a message from March 8, 2016 states that the "Minister of security told [...] today that it was a 'skirt problem' [a problem related to an affair][.]" Referring to the criminal motive, they asserted: [...] what the major reported and what is the strongest hypothesis. A crime of passion." <https://www.gaipe.net/english/>

states, “Appropriate sensitivity should be used with respect to, for example, findings of marital infidelity or other stigmatized sexual behavior.”¹¹

Conclusions

In the months leading up to the trial of current and former DESA employees, the DESA corporation is attempting to use a weakly supported review commissioned by its defense and public relations team to defend DESA executives implicated in the murder of Berta Caceres.

Though DESA employees are under prosecution and investigation by the Honduran public prosecutor’s office and police investigators, DESA’s defense and public relations efforts are focused on discrediting the GAIPE investigation. Berta Caceres’ family and organization, COPINH, have frequently expressed concern that by withholding information from the investigation, the public prosecutor’s office is protecting the intellectual authors of the murder. GAIPE’s report drew attention to evidence in possession of prosecutors since at least May of 2016 but not acted upon, which implicated top-level DESA executives, and also conducted its own investigations that implicated DESA in a range of criminal activities.

DESA’s legal defense and public relations team’s campaign to discredit the GAIPE report in the run up to the trial should be understood precisely as a defense strategy. Its review by Brian Greenspan does briefly raise concerns regarding the public prosecutor’s obstruction of access to evidence by the defense and victim’s lawyers, and problems in the handling of the crime scene. Both issues are amply addressed in the GAIPE report, which Greenspan’s review cited. However, the central focus of Greenspan’s review – that is, criticisms of the GAIPE report – fail to stand up to close scrutiny as they are almost entirely based on the presentation of incorrect or misleading information.

Furthermore, references to lines of investigation that stigmatize the victim and her friends and colleagues raises the concern that DESA’s defense team may continue DESA’s pattern of attacks on COPINH in the forum of the trial.

¹¹ Minnesota Protocol. Section 4 “Understanding the Victim” Point 68. Page 15.
<https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>



The International Commission of Jurists (CIJ for its acronym in Spanish) is composed of 60 eminent judges and lawyers from all regions of the world who promote and protect human rights through the rule of law, using their particular legal experiences to develop and strengthen national and international justice systems. The CIJ was established in 1952 and is active on all five continents.



The International Observatory for Advocacy at Risk (OIA for its acronym in French) was created on the initiative of the National Bar Council (France), Paris Bar Association (France), General Council of Spanish Law (Spain), the National Forensic Council (Italy) and 24 Bar Associations of France, Italy, Spain, Switzerland and Turkey. The Observatory monitors cases and situations that limit or impede the ability to freely exercise law in any part of the world and its objective is to provide effective support to threatened or persecuted lawyers for reasons associated with the exercise of the profession.



Due Process of Law Foundation DPLF is an organization based in Washington, DC, dedicated to promoting the rule of law and human rights in Latin America through a regional organization composed of professionals of various nationalities, whose mandate is to promote the rule of law in Latin America through of the analysis and proposal, the cooperation with organizations and public and private institutions, the exchange of experiences and the actions of lobbying and incidence.



The National Lawyers Guild (NLG) is the oldest and largest legal association dedicated to the defense of human rights and public interest within the United States, with chapters in each state. Since its foundation, the NLG has maintained an internationalist perspective promoting the adaptation and compliance of international law in all nations.



The Promise Institute for Human Rights at UCLA brings together professors with experience in international human rights, immigration, national and international security, civil rights, constitution matters, laws of armed conflict, transnational and international criminal justice, environmental law and public interest law.

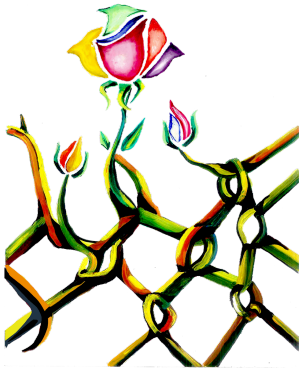


The Center for Research and Promotion of Human Rights (CIPRODEH) is a Honduran organization that works for the defense and promotion of human rights and research that generates changes towards the construction of a democratic and just State that respects human rights and freedom, in a manner consistent with the needs and the inclusion of the population.



GUATEMALA HUMAN RIGHTS COMMISSION

The Guatemala Human Rights Commission - USA is an organization dedicated to the promotion of human rights in Guatemala and Central America and to the support of communities and activists who face threats and violence. GHRC-USA documents and denounces abuses, raises awareness in the international community and promotes policies that promote peace and justice.



Colectivo de Abogados José Alvear Restrepo

The "José Alvear Restrepo" Lawyer's Collective is a non-profit, non-governmental organization, which defends human rights in Colombia whose mission is to defend and promote human rights from an integral perspective, based on their indivisibility and interdependence of all rights and freedoms, to contribute to overcoming impunity, the consolidation of a democratic and participatory Social State of Law, with a just and equitable society, in the perspective of political, economic, social and cultural inclusion, and achieve a stable and lasting peace.



The International Platform Against Impunity is an alliance of European non-governmental organizations that promotes attention and actions of international mechanisms towards structural causes and effects of impunity in different areas of Central America, in support of the most vulnerable actors based on work and the proposals of our members in the field.



EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions against perpetrators of earth rights abuses and we seek to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.



CEJIL defends people whose rights have been infringed in order to change and better the pressing realities of those who live it, prioritizing those who are most at risk – such as human rights defenders, children, and women.