
ILAC Rule of Law Assessment Report:

Guatemala

This report details the findings of a team of experts from member organisations of the International Legal Assistance Consortium (ILAC), based on an assessment of key justice sector institutions in Guatemala.

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**International Legal
Assistance Consortium**

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List of Abbreviations

ABA-ROLI	American Bar Association-Rule of Law Initiative*
AGJI	Guatemalan Association of Judges for Integrity – Asociación Guatemalteca de Jueces por la Integridad
AG	Attorney General – Fiscal General
CACIF	Coordinating Committee of Agricultural, Commerical, Industrial and Financiancial Associations – Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras
CANG	Bar Association of Guatemala - Colegio de Abogados y Notarios de Guatemala
CEH	Historical Clarification Commission - Comisión para el Esclarecimiento Histórico
CICIG	International Commission against Impunity in Guatemala – Comisión Internacional Contra la Impunidad en Guatemala
CONAP	National Counsel for Protected Areas – Consejo Nacional de Áreas Protegidas
CSO	Civil Society Organization
FECI	Special Prosecutorial Unit Against Impunity – Fiscalía Especial Contra La Impunidad
IACA	International Association of Court Administration*
IAP	International Association of Prosecutors*
IAWJ	International Association of Women Judges*
IBA	International Bar Association*
ICC	International Criminal Court
ICG	International Crisis Group
ICJ	International Commission of Jurists*

IDP	Internally displaced person
IDDP	Public Criminal Defender Institute – Instituto de la Defensa Pública Penal
ILAC	International Legal Assistance Consortium
INACIF	National Institute of Forensic Sciences – Instituto Nacional de Ciencias Forenses
INGO	International Non-Governmental Organization
MINUGUA	United Nations Verification Mission in Guatemala – Misión de Verificación de las Naciones Unidas en Guatemala
MP	Public Prosecutor’s Office – Ministerio Público
NCSC	National Center for State Courts*
PDH	Human Rights Ombudsman – Procuraduría de Derechos Humanos
PGN	Solicitor General’s Office – Procuraduría General de la Nación
PNC	National Civilian Police – Policía Nacional Civil
SIDA	Swedish International Development Agency
UDEFEGUA	Unit for the Protection of Human Rights Defenders of Guatemala – Unidad de Protección a Defensoras y Defensores de Derechos Humanos – Guatemala
UNDP	UN Development Programme
UNHCR	UN High Commissioner for Refugees
UNODC	UN Office on Drugs and Crime
URNG	National Revolution Unity of Guatemala – Unidad Revolucionaria Nacional Guatemalteca

* ILAC member organizations

Executive Summary

In October 2017, a team of experts representing six of ILAC's member organisations carried out a needs assessment concerning the rule of law and the justice system in Guatemala. The team assessed the situation of the judiciary and the prosecution services, as well as their role in upholding the rule of law in Guatemala.

In order to provide a more in-depth analysis, The mission also examined the role and response of justice sector actors in response to thematic rule of law challenges in Guatemala, including the legacy of the conflict and impunity, disputes involving development projects on land claimed by indigenous peoples and local communities, criminalization of protests, and violence and discrimination.

Although Guatemala has now been at peace for over twenty years, the centuries of inequality and decades of conflict that preceded the 1996 Peace Accords in Guatemala have left a legacy of impunity, corruption, racism and violence that still present a fundamental threat to stability and equitable development in the country today. In recent years, justice sector actors supported by a UN-backed international Commission against Impunity (CICIG) have achieved some impressive milestones in promoting accountability and transparency that can stand as a precedent for the entire region.

However, beyond these individual cases, the broader commitments to social justice and rule of law made in the Peace Agreement remain largely unfulfilled. As a result, the country has failed in many significant respects to consolidate the benefits of this period of stability through full compliance with its human rights and rule of law undertakings, beginning with those set out in the Peace Agreement itself. This has left many of the root causes of the conflict essentially unaddressed, including pervasive poverty, racism, corruption, inequality, institutional weakness and conflict over land. Moreover, these conflict factors have not simply remained salient during the past two decades but have grown more complicated, intractable and destabilizing.

For instance, the post-conflict failure to take steps to respond to wartime human rights abuses by the intelligence services has fueled an epidemic of impunity, fed by both longstanding endemic issues such as corruption and institutional weakness, and newer factors such as the explosion of illicit funding and violence that has accompanied the expansion of the regional narcotics trade. As a result, the levels of post-war violence have remained among the highest in the world, and the effects continue to fall disproportionately on the weakest in society. Women and girls, in particular, have faced appalling levels of violence, including rising levels of femicide, with virtually no chance of redress before under-resourced courts struggling to cope with their caseloads.

Another example is presented by conflict over land and the rights of indigenous peoples in Guatemala. The Peace Agreement committed the country to a conciliatory approach, based on the adoption of agrarian laws and tribunals that would provide redress to those who lost their land during the conflict and protect the rights of indigenous peoples and small farmers. However, these measures were never implemented and pressures on land have grown dramatically during recent years in light of government policies to encourage large-scale investment in monoculture agriculture, extractive industries and hydroelectric power. Those trying to defend their land are now victimized rather than protected by the justice system, facing criminalization for attempting to remain in their homes and lack of redress for violent evictions.

The undertakings set out in the Peace Agreement can only sustainably be implemented via concerted action of the legislative and executive branches of government. The fact that such measures have not been taken during the subsequent 22 years represents perhaps the central failure in Guatemalan political life. While individual “justice operators” – judges and prosecutors – can and do make a difference, the justice sector as a whole struggles to cope with insufficient resources, gaps in capacity, external efforts to influence its work, and decreasing commitment to ensure the necessary independence to allow fulfilment of its constitutional duty to impart justice.

Reforms to ensure access to justice and the independence of the court system are a matter of urgency. Time and time again, the members of the Mission were informed of the destabilizing effects of the failures of the past and current Governments of Guatemala to secure the rule of law, as a precondition for respect for human rights. In this regard, the fact that 22 years have passed since the conflict is not a cause for satisfaction but rather an alarm bell, as long as the root causes of conflict identified in the Peace Agreement remain largely unaddressed.

In parallel and independently of the need for broader structural reforms, justice operators must be respected and supported, so that they have the independence and capacity to play the outsized role that has been thrust upon them. Although the ILAC expert team makes more detailed recommendations below, it is crucial to note from the outset that justice operators in Guatemala currently work under a combination of circumstances that constrain their independence and effectiveness.

ILAC is neither the first nor the only observer to point out these circumstances. However, we hope this report will provide clear notice to state authorities that failure to address the clearly documented and well-understood obstacles to the independence and effectiveness of the justice sector can only be taken as unwillingness to strengthen the rule of law in Guatemala. Without an effective and independent system of justice, the rule of law and human rights cannot be secured.

I. Introduction

Although Guatemala has now been at peace for over twenty years, the centuries of inequality and decades of conflict that preceded the 1996 Peace Accords in Guatemala have left a legacy of impunity, corruption, racism and violence that still present a fundamental threat to stability and equitable development in the country today.

In recent years, justice sector actors supported by a UN-backed international Commission against Impunity (CICIG) have achieved some impressive milestones in promoting accountability and transparency that can stand as a precedent for the entire region. However, beyond these individual cases, the broader commitments to social justice and rule of law made in the Peace Agreement remain largely unfulfilled, leaving many of the root causes of the conflict in Guatemala unresolved.

As a result, the rule of law remains fragile and contested in Guatemala and recent controversies between the country's President, Jimmy Morales, and the CICIG have highlighted the extent to which limited progress stands against a backdrop of profound rule of law challenges. While individual "justice operators" – judges and prosecutors – can and do make a difference, the justice sector as a whole struggles to cope with insufficient resources, gaps in capacity, external efforts to influence its work, and decreasing commitment to ensure the necessary independence to allow fulfilment of its constitutional duty to impart justice.

In October 2017, the International Legal Assistance Consortium (ILAC) sent a team of eight experts from its member organizations on a mission to assess the justice system in Guatemala. The experts found a country reeling from a series of rule of law crises, in which many interlocutors raised concerns that battle lines had been drawn between segments of society that were no longer capable of dialogue. On one hand, actors in the justice sector and a cross-section of the broader population support accountability and transparency, including high profile investigations assisted by CICIG. However, an opposing spectrum of political, military and business actors resist moving beyond a status quo in which Guatemala risks being drawn deeper into a mire of corruption, impunity and social conflict.

Despite the many achievements Guatemala has made since the conflict, the need to fulfil the neglected promises of the Peace Accords and support the beleaguered justice operators seeking to give them effect has never been more acute. Against this backdrop, the ILAC committee of experts was deeply impressed by the many Guatemalan lawyers and judges we met who work with limited resources and under constant threat to sustain the rule of law. We hope this report and its recommendations will play a part in supporting the struggle to achieve a more just society in Guatemala.

I.a. ILAC in Guatemala

The International Legal Assistance Consortium was established in 2002 as a mechanism to coordinate the work of international and regional actors involved in rebuilding justice systems and establishing the rule of law in countries that had experienced conflict. ILAC consists of 52 member organisations worldwide representing over three million judges, prosecutors, lawyers and legal academics.

During its first ten years, ILAC has carried out assessment missions and/or initiated legal reform programs in over sixteen countries. In making its assessment reports public, ILAC seeks to assist national rule of law actors identify both gaps and opportunities for reform, and to contribute to better coordinated and more effective international support to post-conflict rule of law reconstruction.

Although ILAC has not previously been active in Guatemala, several of its member organizations have significant experience working with Guatemalan partners to promote the rule of law. The International Commission of Jurists (ICJ) has its regional office for Central America in Guatemala City, led by Ramón Cadena, a noted Guatemalan jurist and one of the experts in the ILAC delegation. The ICJ has implemented programs to support the independence of the judiciary and access to justice in Guatemala and the broader region. The National Center for State Courts (NCSC) is also active throughout the region, with an office in Guatemala City and a strong record of support to the justice sector, including a program on juvenile justice. The American Bar Association Rule of Law Initiative (ABA ROLI) includes Guatemala in its Central America Regional Forensics Program, which supports the use of scientific evidence in criminal investigations and prosecutions. In 2011, it published the Prosecutorial Reform Index (PRI) for Guatemala.¹ The Law Society of England and Wales has intervened in cases of attacks against human rights lawyers in Guatemala and is planning capacity building projects in the country.

¹ The PRI is a tool developed by ABA ROLI to assess a cross-section factors important to prosecutorial reform in transitioning states, enabling local governments and international donors to better target prosecutorial reform programs and monitor progress towards establishing accountable, effective, and independent prosecutorial offices. See ABA, "Prosecutorial Reform Index for Guatemala Released" (May 2012), available at: https://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/guatemala/news/news_guatemala_prosecutorial_reform_index_released_0512.html.

I.b. The ILAC assessment

The proposal to conduct an assessment in Guatemala arose from discussions between ILAC and its member organizations beginning in late 2016. During a preparatory mission conducted on 29 May-02 June 2017, ILAC representatives met with high-level representatives of the judiciary, the prosecution services, civil society and the international community, all of whom supported the proposed assessment and provided advice on key issues to address.

In August of 2017, ILAC decided to proceed with a mission aimed at examining the situation of the judiciary and the prosecution services, as well as their role in upholding the rule of law in Guatemala. In order to provide a more in-depth analysis, the mission was also tasked with examining the justice sector response to thematic rule of law challenges in Guatemala, including the legacy of the conflict and impunity, disputes involving development projects on land claimed by indigenous peoples and local communities, criminalization of protests, and violence and discrimination against women and LGBTI persons.

In October 2017, a team of eight experts from six of ILAC's member organisations carried out a needs assessment of the justice system in Guatemala. The assessment team was composed of distinguished legal and human rights professionals with diverse backgrounds and areas of expertise:

- **Nerea Aparicio** (Spain), Director, Latin American and the Caribbean Division, American Bar Association Rule of Law Initiative (ABA-ROLI), previously Human Rights and Justice Officer, UN Verification Mission in Guatemala (MINUGUA) and Principal Specialist, Inter- American Commission on Human Rights (IACHR), nominated by ABA-ROLI.
- **Judge Josselyne Béjar Rivera** (Mexico), Sitting Judge at the 6th Criminal Court of the State of Jalisco, Mexico, Secretary of the Mexican Association of Women Judges and Magistrates, nominated by the International Association of Women Judges (IAWJ).
- **Ramón Cadena Rámila** (Guatemala), Regional Director for Central America, International Commission of Jurists (ICJ), Professor, Human Rights Institute of the San Carlos University, nominated by the ICJ.
- **Mike Enwall** (USA), Lawyer, previously President of the Colorado Criminal Defence Bar, Chief Judge of the 20th Judicial District of the state of Colorado, and ILAC Country Representative to Liberia from 2007 to 2010, lawyer and individual member of ILAC.

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- **Judge Gabriela Knaul** (Brazil), Sitting Judge at the Mato Grosso State Court, previously UN Special Rapporteur on the independence of judges and lawyers (2009-2015), nominated by the International Association of Women Judges (IAWJ).
 - **Luis María Palma** (Argentina), Vice President, Latin America chapter of the International Association for Court Administration (IACA), Director, Center for Judicial Studies of the University of Buenos Aires and Dean, School of Graduate Studies of the University of Belgrano, nominated by the National Center for State Courts (NCSC).
 - **Carolina Valenzuela** (Canada), Crown Prosecutor in the Domestic Violence Unit of the Prosecution Service in the Province of Alberta, nominated by the International Association of Prosecutors (IAP).
 - **Sue Willman** (UK), Member, Human Rights Committee of the Law Society of England and Wales, Equity Partner and Director of Deighton Pierce Glynn Solicitors, and Member of the Colombia Caravana, a UK lawyers group, nominated by the Law Society of England and Wales.
 - **Rhodri Williams** (Sweden), Senior Legal Expert and Team Leader, ILAC.
 - **Leonor Selva Flores** (El Salvador), Expert Consultant.

In preparing the assessment, the team spent two weeks in Guatemala interviewing officials, parliamentarians, civil servants, members of the judiciary, members of the private bar, civil society organisations, business leaders, and key international organisations, donors and NGOs. During the assessment trip, the team met with over 150 Guatemalan interlocutors and numerous international officials and experts. Most meetings were held in the capital, Guatemala City, but the expert team also traveled to Quetzaltenango, Nebaj (Quiché Department), El Estor (Izabal Department), Flores and La Libertad (Petén Department), as well as Rabinal (Baja Verapaz Department).

ILAC wishes to thank the many judges, prosecutors, lawyers, human rights defenders and officials at all levels and in all parts of country that we visited who took the time to speak with us. Particular thanks are due to the Human Rights Ombudsman for arranging for our participation in a 16 October 2017 academic conference on “Legal Education and Human Rights in Guatemala”. During the trips to the interior of the country, experts met with indigenous and *campesino* communities facing the loss of their homes and the prosecution of family members for engaging in peaceful protests. The experts wish to thank every one of the many articulate and engaged Guatemalans they were able to meet, but most of all these communities, for sharing their painful experiences without any immediate prospect that we would be able to help.

Given the sensitive nature of some of the issues discussed in this report, the sources interviewed are frequently identified only in general terms. Their names are known to the authors and to ILAC. The report was assembled by the team of experts, with the assistance of Sebastian Elgueta, an expert consultant and barrister admitted to the Bar Council of England and Wales, an ILAC member organization. It was edited by Rhodri Williams, ILAC Senior Legal Expert.

The Assessment mission and this report were made possible through core funding provided to ILAC by the Swedish International Development Cooperation Agency (Sida).

I.c. Guatemala – Background and context

Located on Mexico's southern border, with coasts on both the Atlantic and Pacific Oceans, the Republic of Guatemala is the most populous country in Central America with 15 million inhabitants, almost half under 19 years of age.²

The vast majority of the population reside in rural areas, mainly in the southern half of the country. Guatemala is a multi-ethnic, multi-cultural and multi-lingual society inhabited by both Indigenous Peoples, the Afro-descendent Garifuna community, and mixed-race Ladinos. Among those of Indigenous descent, the Maya comprise 22 distinct sociolinguistic communities. Between 40 and 60 per cent of the population identifies as Indigenous.³ Twenty-four languages are spoken: Spanish (the official language), 21 Mayan languages⁴, Xinca and Garifuna.

Most pressing among the many challenges facing Guatemala are poverty and crime. While national data indicate about 50% poverty, including 13% extreme poverty,⁵ the United Nations Development Programme (UNDP) reports 62% in medium poverty, 30% in extreme poverty and 4% living in severe poverty.⁶ According to the World Bank, rural poverty rates top 70% in parts of the country, with the department of Alta Verapaz reporting 89% living in poverty, of which 47% live in extreme poverty.⁷

The country's large Indigenous population are overrepresented among those in poverty and extreme poverty.⁸

2 Instituto Nacional de Estadística, "Caracterización Estadística República de Guatemala" (2013), 13.

3 OHCHR, Regional Office for Central America, "Diagnóstico sobre la Situación de los Derechos Humanos de los Pueblos Indígenas de América Central", *Volume I* (2011) 190.

4 Achi, Akateco, Awakateko, Chorti, Chuj, Itza, Ixil, Jakalteco, Kanjobal, Kaqchikel, Kiche, Mam, Mopan, Poqomam, Poqomchi, Q'eqchi, Sakapulteko, Sikapakense, Tectiteco, Tz'utujil and Uspanteco.

5 According to Guatemala's National Statistics Institute (Instituto Nacional de Estadísticas – INE), 53.7% of the population lives in poverty; of this percentage, 13.3% pertains to extreme poverty; Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, "Guiding Principles on Extreme Poverty and Human Rights" Un doc. A/HRC/21/39 (2012).

6 UNDP Guatemala "Guatemala en Breve" [webpage, accessed 18 April 2018]. The UNDP notes those living in poverty rose between 1990 and 2015.

7 World Bank, "Mapas de Pobreza Rural en Guatemala 2011" (2011).

8 UNDP, "Más allá del conflicto, luchas por el bienestar: Informe Nacional de Desarrollo Humano 2015/2016 Resumen ejecutivo" (2016).

Violent crime is also widespread. In 2016, up to 5,459 violent deaths were reported, or 33 deaths per 100,000 inhabitants.⁹ The violence that besets Guatemala occurs within a context of impunity; in 2015, the justice system determined criminal responsibility in only 10% of reported homicides.¹⁰

Although the 36-year internal armed conflict ended over two decades ago, in 1996, recovery from the effects of the conflict remains a challenge, exacerbated by the prevalence of organised crime, corruption, and gang violence.

I.c.i. The Conflict Years (1960 - 1996)

After proclaiming independence from Spain in 1821, Guatemala stagnated for decades as an authoritarian State that “excluded the majority of the population, was racist in its precepts and practices, and served to protect the economic interests of the privileged minority”.¹¹ When decades of political tensions erupted into civil war in 1960, Guatemala entered a tragic and devastating stage of its history.

The Commission for Historical Clarification (*Comision de Esclarecimiento Histórico*, CEH), a UN-sponsored ‘truth commission’, estimated in 1999 that the number of killed or disappeared (and assumed killed) reached over 200,000, with 93% of human rights violations attributed to state forces and paramilitary groups associated with the state, and 3% to guerrilla forces.¹²

The CEH concluded that the military response to the challenge posed by the guerrilla movement had been excessive, and that country’s indigenous population had been particularly hard-hit by violence and repression, including use of sexual violence as a weapon of war. With 83% of all victims of the conflict from among the Maya alone, the CEH concluded that the Guatemalan state had committed genocide against its Indigenous Peoples.

Throughout the conflict, state institutions, and particularly those responsible for the administration of justice and public security, were ineffective and lost credibility as impunity became the norm for generating and maintaining a climate of terror.¹³

The absence of state institutions in rural areas contrasted with ubiquitous military commissioners and Civil Defence Patrols (*Patrullas de AutoDefensa Civil*, PAC).¹⁴ The conflict was marked by the state’s reliance on military intelligence, which operated outside of regular army channels.

9 IACHR, “Situation of Human Rights in Guatemala”, *Doc 43/15* (2017), para 338 to 343.

10 CICIG, “Sistema de Medición de la Impunidad” [webpage, accessed April 2018] (2015).

11 CEH, “Guatemala Memory of Silence: Conclusions and Recommendations” (1999), 17.

12 CEH, “Guatemala Memory of Silence: Conclusions and Recommendations” (1999), 17.

The remaining 4% of human rights violations could not be definitively attributed to any party.

13 CEH, “Guatemala Memory of Silence: Conclusions and Recommendations” (1999), 28.

14 MINUGUA, First report on human rights of the UN Verification Mission in Guatemala, UN Doc. A/49/856 (1995).

Death squads acted as de facto military units, enjoying the tolerance and complicity of state authorities.¹⁵ Meanwhile, powerful private individuals frequently collaborated with state agents to instigate or commit acts of violence in defence of their economic interests or in response to conflicts with rural or urban workers.¹⁶

On 29 December 1996, after years of negotiations under UN auspices, the Guatemalan government and its guerrilla opponent, the National Revolution Unity of Guatemala (*Unidad Revolucionaria Nacional Guatemalteca*, URNG) signed the last in a series of peace agreements collectively referred to as the Peace Accords, ending the conflict.

The Accords consisted of the following agreements:

- Comprehensive Agreement on Human Rights;¹⁷
- Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict;¹⁸
- Agreement on the Establishment of a Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer;¹⁹
- Agreement on Identity and Rights of Indigenous Peoples;²⁰
- Agreement on Social and Economic Aspects and the Agrarian Situation;²¹
- Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society;²²
- Agreement on Constitutional Reforms and the Electoral Regime;²³
- Agreement on the Basis for the Legal Integration of the URNG;²⁴ and the
- Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements (Timetable Agreement).²⁵

15 CEH, "Guatemala Memory of Silence: Conclusions and Recommendations" (1999) 36.

16 CEH, "Guatemala Memory of Silence: Conclusions and Recommendations" (1999) 44.

17 UNSG, United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala, UN Doc. A/48/928-S/1994/448 (1997).

18 The government commits itself to guarantee the conditions necessary for the safe return of the internally displaced to their places of origin or to another place of their choice, to promote the return of land abandoned by uprooted populations, and to involve them in the design and implementation of a comprehensive reintegration plan. UNSG, Letter dated 28 June 1994 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN doc. A/48/954-S/1994/751 (1997).

19 This agreement defines a process for investigating human rights abuses taking place between the beginning of the war and the signing of the final peace agreement, and for producing recommendations that contribute to national reconciliation. UNSG, Letter dated 28 June 1994 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, UN doc. A/48/954-S/1994/751 (1997), annex II.

20 This agreement sets out commitments to fight legal and de facto racism and to construct a multicultural, multi-ethnic and multilingual State. The accord puts a premium on consultation between the State and the indigenous population. UNSG, Letter dated 5 April 1995 from the Secretary-General to the President of the General Assembly and to the President of the Security Council UN Doc. A/49/882-S/1995/256 (1995), annex I.

21 This agreement contains four chapters on broader civic participation in all levels of the Government; economic growth measures; rural development projects; and "increases in the tax base and a range of measures against tax evasion and fraud". UNSG, Letter dated 24 May 1996 from the Secretary-General addressed to the President of the General Assembly, UN Doc. A/50/956 (1996) annex I.

22 This agreement aims to strengthen the three branches of the new democratic government. UNSC, Identical letter dated 30 September 1996 from Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, UN Doc. A/51/410-S/1996/853, (1996) annex I.

23 This agreement sets out a series of proposals for constitutional reforms; "the proposals focus mainly on the recognition of the identity and rights of indigenous peoples and the mandate and structure of the country's security forces". UNSA and Unidad Revolucionaria Nacional Guatemalteca Comandancia General Guatemala, Identical letters dated 97/01/16 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, UN doc. A/51/776-S/1997/51 (1997), annex I.

As part of the peace process, the United Nations Verification in Guatemala (*Misión de Verificación de las Naciones Unidas en Guatemala*, MINUGUA) was established in 1994 in order to verify the implementation of the Accords.²⁶

The Peace Accords represented a long-term agenda for the country's development that was supported by many sectors of society. The aims of the Accords were to overcome the social, political, economic, ethnic and cultural root causes of the armed conflict as well as its many consequences. The nine agreements include more than 300 specific commitments and constitute a broad and detailed blueprint for reform and change. Some of the issues were particularly difficult to resolve. For example, in promoting an end to discrimination against indigenous persons, the Peace Accords touched on a sensitive fault lines dating back to colonial times, making their implementation a difficult litmus test for the extent to which Guatemalan society is capable of transcending its divisions.²⁷

The Accords were structured so that some parts were applicable immediately, whereas others required changes to the Constitution to be approved in a nation-wide referendum focused on four questions – definition of the nation and social rights, and reform of the Congress, executive, and judiciary, respectively. The referendum, held on 16 May 1999 failed to approve the reforms. Amidst heavy campaigning against the referendum by a small and powerful minority, only 18% of the electorate turned out. MINUGUA reported that the defeat represented the greatest political setback in the peace process and attributed it to the scant commitment of Guatemala's economic and political elites to implementing the Peace Accords and the “the lack of strong national constituencies supportive of the accords” capable of pressuring the authorities:

Although the negotiating process broadly involved organized civil society groups, the idea that the agreements represented a full national consensus was later questioned by some sectors of Guatemalan society – the private sector and some political parties included – that either opposed the Accords or claimed not to have been sufficiently represented or consulted in the negotiating process.²⁸

The referendum results revealed a serious division in the country. Municipalities with indigenous majorities voted for it, whereas other municipalities voted against, indicating that much of the urban and non-indigenous population did not feel that the proposals regarding multiculturalism or the reform of the armed forces affected them.

24 This agreement provides a comprehensive program for the integration of URNG members into Guatemalan society. MINUGUA, Agreement on Constitutional Reforms and the Electoral Regime, UN Doc. A/51/776-S/1997/51 (1998), annex I.

25 This agreement is a detailed guide for the implementation of all the commitments undertaken by the parties in the peace agreements signed since 1994. It sets out a calendar for the phased implementation of those commitments and for the establishment of the Follow-up Commission. The agreement also requests the Secretary General to establish a mission to verify all the agreements, into which MINUGUA was absorbed.

26 MINUGUA was established by A/RES/48/267 of 19 Sept. 1994.

27 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para. 18. The accords were more wide-ranging and complex than those that ended the conflict in neighbouring El Salvador four years earlier which had served as an important reference point for the Guatemalan negotiations.

28 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004).

The failure to ratify the referendum also undermined the central strategy for achieving necessary reforms related to the mandate of the armed forces, independence of the judiciary and recognition of indigenous languages.²⁹ The loss was a major disappointment for indigenous leaders and organisations that had participated enthusiastically in the implementation process until that point, including in the many joint commissions set up to develop policies and legislation on issues such as land, education reform, indigenous religion and political participation.³⁰

I.c.ii. The Transition to a Post-Conflict Society

After the signing of the Peace Accords, Guatemala faced an escalating spiral of violence. Alongside the spread of street gangs (known as ‘maras’), there was increasing acknowledgement that illegal and clandestine groups linked directly to wartime intelligence and military structures continued to operate in peacetime.³¹ Formed by former or current members of the military, intelligence and police forces, these groups used their positions and connections within state institutions to enrich themselves through illicit activities, manipulating the justice and security systems to guarantee their impunity.

Amnesty International described Guatemala as “a corporate mafia state” in which the traditional oligarchy is ruling together with other sectors, such as businessmen, police, military officers and judicial officials.³²

From 2000 to 2014, the anti-corruption unit at the Public Prosecutor’s Office (*Ministerio Público*, MP) accumulated 4,900 complaints; by 2015 only 7% had been tried and 69% were still being processed. High profile cases revealed illegal networks of high-ranking members of the military, prosecutors, lawyers, accountants and other professionals. The inability of the justice system to cope with these networks inspired a 2003 agreement with the UN to create a “Commission for the Investigation of Illegal Groups and Clandestine Security Organizations” (CICIACS).

However, in 2004 the Constitutional Court declared several articles of the agreement unconstitutional, and the Government proposed to hold national consultations before proposing a modified version of the agreement to the UN.³³ At the end of 2006, the government and the UN agreed to establish the International Commission Against Impunity in Guatemala (*Comisión Internacional Contra la Impunidad en Guatemala*, CICIG).

29 UNSC, Fourth report of the United Nations Verification Mission in Guatemala, UN Doc. A/54/526 (1999), para 80-82.

30 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004) para 40.

31 WOLA, “Hidden Powers in Post-Conflict Guatemala Illegal Armed Groups and The Forces Behind Them” (2003).

32 Amnesty International “Guatemala’s lethal legacy: past impunity and renewed human rights violations” (2002).

33 The government of President Alfonso Portillo reached the original CICIACS agreement in the final few days of its mandate, and the new Government of President Oscar Berger, who took office on 14 January 2004, sent the document for consultation to the Constitutional Court. MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004). 32.

The CICIG was set up to act, in effect, as a co-prosecutor alongside the designated prosecutor of the Public Prosecutor's Office, which would in turn set up a 'mirror' prosecutorial unit – the Special Unit Against Impunity (*Fiscalía Especial Contra la Impunidad*, FECI) – to work alongside CICIG. Before this arrangement could come into effect, the agreement had to be approved by Congress and the Constitutional Court.

However, a February 2007 incident in which high ranking government officials and police officers engineered the killing of three Salvadoran members of the Central American Parliament (PARLACEN) led to national and international outrage that ensured the rapid approval of CICIG by the Parliament after a Constitutional Court advisory opinion had ruled the agreement constitutional.

From 2015 to 2017, a period referred to as the “Guatemalan Spring”, significant progress was made in rooting out corruption due to a combination of popular protests, courageous work by judges, and the combined efforts of the Public Prosecutor's Office and CICIG. In April 2015, The Public Prosecutor's Office and CICIG charged several members of then-President Otto Perez Molina's administration with setting up a corruption ring with the help of high-ranking officials in the tax and customs administration. The case, denominated “La Linea”, came to involve officials from the highest levels of government, including then-Vice President Roxana Baldetti, and eventually President Molina Perez himself. In September 2015, the President resigned, and the “La Linea” trial continues as of the date of this report.

On 25 October 2015, Jimmy Morales – a comedian turned politician – won the presidency after running on an anti-establishment and anti-corruption platform.³⁴ By August 2017, as the ILAC assessment was in its final planning stages, a conflict between President Morales and CICIG broke into the open as the President sought to expel the CICIG Commissioner, Iván Velásquez, from the country. The CICIG and the Attorney General had previously sought to have the President's immunity lifted over alleged campaign finance irregularities. As the ILAC assessment went forward, the Constitutional Court quashed the President's order to expel Velásquez and the Congress and Supreme Court rejected CICIG and the Attorney General's request to lift President Morales' immunity. Since then an uneasy deadlock has prevailed, culminating in intense attention to the selection process for a new Attorney General, which is ongoing at the time of this writing.

The ILAC assessment took place in the midst of this crisis, with many of the justice operators that the ILAC experts spoke with deeply concerned about its implications for the future of rule of law, democracy and even the stability of the country. Many interlocutors expressed gratitude for the efforts of the ILAC mission to concentrate international attention and support to Guatemala at this particularly challenging moment in the country's history.

34 IACHR, “Situation of Human Rights in Guatemala” (2015), 33-35

At the time of the writing of this report, Guatemala finds itself at a crossroads. The question of whether the country consolidates its democratic system and the rule of law, or whether structural corruption remains the norm and ‘politics as usual’ continues to dominate will turn to a large degree on the fate – and the efforts – of its justice operators. In the words of one judge ILAC spoke with, “at this moment, either side can lose”, with corrupt, vested interests afraid to lose power and reform supporters afraid to lose the opportunity for change.³⁵

35 Interview, 09 October 2017.

II. Guatemala Justice System and Institutions

The Guatemalan judiciary is defined in the Constitution as a branch of Government alongside the executive and legislative branches. The system of government is democratic and republican with considerable power centralized in the office of the President, who serves four-year terms of office.³⁶ The Congress is unicameral, consisting of 158 representatives who serve four-year terms with the possibility of re-election.³⁷

The Judicial Branch is headed by the Supreme Court of Justice, which hears all ordinary appeals from lower courts and is also responsible for the administration of the judicial system. The Supreme Court consists of 13 Justices, appointed by Congress from a list of candidates selected by a Nomination Committee (*Comisión de Postulación*) comprised of lawyers, law faculty deans and electoral judges.³⁸ Guatemala also has a Constitutional Court, which is independent from the Supreme Court and has exclusive jurisdiction over constitutional questions.

Significant justice sector reforms began in the 1990s in Guatemala. A new Criminal Procedure Code adopted in 1994 substituted adversarial proceedings for the old paper-based inquisitorial model of prosecution, in which pre-trial detention was the norm and investigative and adjudicatory functions were assumed by a single Judge.³⁹ During the same year, the Public Prosecutor's Office, headed by the Attorney General and charged with criminal prosecution, was established as a separate entity from the Solicitor General's Office (*Procuraduría General de la Nación*, PGN), which focuses solely on representing the state.⁴⁰ The Public Criminal Defender Institute (*Instituto de la Defensa Pública Penal*, IDPP) was also established during this period, providing representation to indigent defendants (and replacing the law students who had previously performed this service). The IDPP began under the supervision of the Supreme Court but became an independent institution in 1998.⁴¹

36 Organización de Estados Americanos, "Reporte sobre el estado de los sistemas judiciales en las Americas 2002-2003", Guatemala.

37 See website of the Congress of the Republic of Guatemala, www.congreso.gob.gt.

38 Article 214 and 215 of the Constitution.

39 The new criminal procedure was approved by Congress on 28 September 1992, coming into force on 14 December 1992. Congreso De La República, "Consulta Legislativa" [webpage, accessed 2 May 2018]. The procedure was structured in three phases: preparatory or investigative; intermediate, to determine whether there is sufficient evidence to go to trial; and the oral and public debate for producing evidence and determining the criminal liability of the accused.

40 After the 'self-coup' (dissolution of the Congress and the Supreme Court) by President Jorge Serrano Elías and the appointment as president of Ramiro De León Carpio, constitutional reforms were adopted aimed primarily at cleaning up the Congress of the Republic and the Supreme Court of Justice. Midori Papadópulo "Análisis jurídico-constitucional del Golpe de Estado del 25 de mayo de 1993 hasta las reformas a la Constitución", *Jurídica series Jurídica series* (1995).

41 The IDPP became independent from the Supreme Court on 13 July 1998. IDPP, "Breve Historia del Derecho de Defensa en Guatemala" [webpage, accessed 2 May 2018].

II.a. Investigative Institutions

The Attorney General (*Fiscal General*) of Guatemala heads the Public Prosecutor's Office (*Ministerio Público*) and has overall responsibility for criminal investigations and prosecution.

The Public Prosecutor's Office directs the National Civilian Police (*Policía Nacional Civil*, PNC) in criminal investigations. The National Institute of Forensic Science of Guatemala (*Instituto Nacional de Ciencias Forenses* – INACIF) provides forensic services to the prosecutors and police, as well courts and defence attorneys.

II.a.i. The Public Prosecutor's Office

The Public Prosecutor's Office (*Ministerio Público*) in its current form was created through a 1994 organic law (*Ley Orgánica del Ministerio Público*) that separated this institution from the Solicitor General's Office and gave it overall responsibility for criminal investigations and prosecutions.

The new Criminal Procedure Code adopted the same year removed the investigative role previously held by judges and placed the National Civilian Police (*Policía Nacional Civil*, PNC) under the supervision of the Prosecutor's Office in criminal investigations. Under the terms of the organic law, the Public Prosecutor's Office is divided into subject matter-based sub-offices (*fiscalías*) for various types of complex criminal phenomena (for instance, organized crime, drug trafficking, and crimes against women), and regional offices covering specific districts (*fiscalías distritales*).⁴²

Early implementation of this reformed system was beset by problems.⁴³ Most notable was a failure to prepare for the transition that some commentators viewed as a wilful effort to obstruct justice.⁴⁴ A decision to implement the transition by summarily assigning all cases under investigation at the time to the new Public Prosecutor's Office led to the immediate creation of a daunting backlog.⁴⁵

42 Article 24 of the Organic Law on the Public Prosecutor's Office.

43 One headline of the time read 'Caos en la Justicia' (Chaos in the Justice System) *Prensa Libre* (02 July 1994).

44 "The lack of political will by the state agencies to implement the new criminal procedure, with the backing of conservative sectors tied to traditional practices of criminal justice, was the main reason implementation was marked by so much improvisation." Luis Ramirez and Miguel Angel Urbina, "Informe nacional, Guatemala", in Julio Maier, *Las Reformas Procesal Penales en America Latina*, Buenos Aires (2000), 443.

45 According to César Barrientos Pellecer, one of the mistakes made at that time was that "the case of the transitory provision of the 1992 Code of Criminal Procedure of Guatemala that provided that proceedings under way in the investigative phase would be passed on to the new procedure, and that those in the trial phase (*etapa de plenario*) would continue in the previous system. This provision resulted in the historical backlog asphyxiating the new procedure." Cesar Barrientos Pellecer, "Evaluacion de la Reforma Procesal Penal en Guatemala. Revista de Ciencias Penales de Costa Rica" (2003), 45.

Despite the new rules, investigations continued as a formal, bureaucratic process of accumulating papers and in the absence of a prosecutorial management system, no distinction was drawn among the thousands of cases coming into the criminal justice system.⁴⁶ International technical assistance initially channelled via MINUGUA and later via UNDP was unable to move the Prosecutor's Office beyond its tendency to improvise rather than strategize.⁴⁷ Former Attorney General Claudia Paz y Paz has noted that:

[...], while the creation of the [MP] could have been a great opportunity to reduce impunity and strengthen citizen trust in the justice system, the old practices of the inquisitorial system seeped into the new institution. In addition, due to the inadequate profile of the [prosecutors], or their successive replacements, the [MP] suffered from a lack of independence, a failure to define goals and policies, an organization that favored bureaucracy, and a formalistic method of investigation that contributed to its ineffectiveness.⁴⁸

As studies indicated that up to 95% of criminal complaints went unaddressed, a new model of prosecutorial management was implemented in 2011 to distinguish between less serious crimes that could quickly be resolved, and more serious complex investigations, and to devote specific resources to addressing each category.⁴⁹ This strategy was complemented with better coordination and follow-up on cases, meetings with local organisations, and adaptation of the performance evaluation system to reflect the new roles of prosecutors working in specialized teams.⁵⁰ Case-by-case investigative measures were dropped in favour of a strategic prosecution model based on proactive prosecution aimed at tackling emerging patterns of crime and dismantling illicit groups.⁵¹

46 The test for evaluating a good investigation was the number of official notes sent to other government offices, not the inquiry into an incident or the eventual determination of criminal responsibility. The UNDP described it in the following terms: "Albeit with some exceptions, the investigations are routine, without concrete lines of investigation or the formulation of hypotheses as the starting point for the work. In many cases, the investigation is limited to performing three or four 'boilerplate' investigative steps and continuing to shelve the case, formally or informally." UNDP, "Technical Assistance Unit of the Attorney General's Office, Lineas de Accion para el Diseno de Politicas de Persecucion Penal en el Ministerio Publico, Informe de Monitoreo y Acompañamiento" (2002), 57, as cited in Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 34.

47 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 34.

48 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 36.

49 See 2011-2014 MP Strategic Plan.

50 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 89.

51 Ministerio Publico, *Memoria de Labores* (2011).

The Criminal Investigations Division of the Public Prosecutor's Office (*Dirección de Investigaciones Criminalísticas*, DICRI) is responsible for planning, supervising and carrying out investigations and collecting evidence.⁵² The Prosecutor's Office is the only institution in Guatemala's criminal justice system that has developed a computerized case management system. Processing begins with the intake of complaints and continues via analysis of each case and its referral to early decision or investigative units. The system serves both to document the various steps within each investigation and to generate statistical information on the overall processing of cases.⁵³ Nevertheless, problems with the coordination of investigations have persisted, reportedly due to gaps in the capacity of assistant prosecutors and the lack of adequate training and continuing education.⁵⁴

The Public Prosecutor's Office issues public reports including statistical information on work performed, objectives achieved, and the implementation of criminal justice policies.⁵⁵ Two units in the Office coordinate accountability-related activities. The first one is the Secretariat for Criminal Policy, which defines policies on criminal prosecution and establishes goals for each unit or office, as well as for each individual prosecutor, based on the work plan. The second is the Unit for Performance Evaluation, which is responsible for measuring and improving personal and institutional performance, and applying technical, administrative and computer tools to facilitate the evaluation of information concerning staff performance.⁵⁶

In 2006, Guatemala adopted the Law against Organized Crime (Decree 21-2006), to implement its obligations under the UN Convention against Transnational Organized Crime. This law provides for three special methods of investigation: undercover agents, deliveries under surveillance, and the use of wiretaps.⁵⁷

52 The DICRI provides technical support for investigations, compiles and processes information in support of the investigation, proposes expert witnesses and research to assist in the investigation, carries out relevant and useful actions to clarify the facts of the case; assists in jurisdictional proceedings, and carries out other functions as assigned, all under the supervision of the prosecutor in charge of the case. Organic Law on the Public Prosecutor's Office, Article 40.

53 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 136.

54 Assistant prosecutors were not skilled at directing investigations, and often made irrelevant requests of investigations, which took up the DICRI's, limited resources or made complicated last-minute requests because of a failure to plan ahead properly. Additionally, some reports indicate that DICRI staff did not receive continuous education and many staff needed review of and training on topics such as tracking, surveillance, and operating methods. ABA ROLI, "Prosecutorial Reform Index: Guatemala" (2011), 86.

55 Guatemala Attorney General's Office, "Memoria Administración Mayo 2016 – 2017" (2017).

56 ABA ROLI, "Prosecutorial Reform Index: Guatemala" (2011), 74-75.

57 Through an agreement with the Public Prosecutor's Office, the National Civilian Police, and the Ministry of the Interior, the CICIG developed the legal design of a system for the wiretapping of phones and other means of communication and created a Wiretapping Unit (*Unidad de Métodos Especiales de Investigación*, UME) within the Public Prosecutor's Office, which began its work in June 2009. With the support of the international community, particularly investigative agencies from the United States and Canada, the Commission equipped, selected, and trained the unit's personnel. WOLA, *The International Commission Against Impunity: An Innovative Instrument for Fighting Criminal Organizations and Strengthening the Rule of Law, Report 6/2015* (2015), 13.

Former Attorney General Claudia Paz y Paz, and Commissioner for the Commission Against Impunity Ivan Velásquez, have highlighted the undeniable probative value of wiretaps for proving a criminal act as well as for avoiding the complications that could arise with other forms of evidence, for example witnesses, who may be intimidated or bribed.⁵⁸

II.a.ii. The National Civilian Police

The Peace Accords and the criminal procedure reforms established a new national police force in 1997, the National Civilian Police (*Policía Nacional Civil*, PNC) to replace the previous National Police force, blamed for gross human rights violations during the war.

The PNC was placed under the jurisdiction of the Ministry of the Interior, and contrary to international expert advice, was composed primarily of the personnel of the old National Police with only three months training for their new role. MINUGUA raised emphatic objections in 1998 to the inclusion of 40 former members of the armed forces, including 22 former sergeants of the notorious Presidential General Staff (*Estado Mayor Presidencial*, EMP).⁵⁹ The consequences of this failure to vet the new force included the employment for over a decade of two policemen given forty-year prison sentences in 2010 for the 1984 forced disappearance of union leader Fernando García.⁶⁰

In criminal investigations, the PNC works under the supervision of the Criminal Investigations Division of the Public Prosecutor's Office (*Dirección de Investigaciones Criminalísticas*, DICRI), including as members of joint investigative teams with the prosecutorial units specialized on issues such as crimes against women, organized crime, and drug trafficking. However the contribution of the police to these tasks has reportedly been limited by the poor quality of their training, and few efforts were made during the early years to create a professional and independent corps of detectives.⁶¹

58 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 133. Interview with Iván Velásquez, October 17, 2017.

59 MINUGUA who described the action as "a flagrant breach of the Government's commitments". MINUGUA, Third report on the verification of compliance with the agreements signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), UN Doc. A/53/421 (1998), para 79.

60 On 28 October 2010 PNC officers Héctor Roderico Ramírez Ríos and Abraham Lancero Gómez Calix were given 40-year prison sentences for disappearing Fernando García on 18 February 1984. Despite their direct involvement in this gross human rights violation they had worked in the National Civilian Police for more than 10 years, attaining the ranks of commissioner and deputy commissioner respectively. When arrested in March 2009, Ramírez Ríos was still on active duty and was commander of the police in Quetzaltenango. Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014".

61 UNSG, Third report of the United Nations Verification Mission in Guatemala, UN Doc. A/53/421 (1998), para 78.

In the early 2000s, MINUGUA and the Inter-American Commission on Human Rights (IACHR) documented how investigation-related activities continued to be carried out by military intelligence units.⁶² This undermined coordination between the prosecutors and civilian police formally charged with criminal investigations, exacerbating the ongoing lack of coordination and trust between them, and leading to duplication of functions. According to MINUGUA, “conflicts with the [Prosecutor’s Office] with respect to the jurisdiction and responsibility of the criminal investigations have contributed to the poor quality and prolonged delays in the presentation of evidence for prosecutions, and, accordingly, have favoured the persistence of impunity.”⁶³

II.a.iii. The National Institute of Forensic Science

The National Institute of Forensic Science of Guatemala (*Instituto Nacional de Ciencias Forenses* – INACIF) was established in 2006, centralizing a system previously dispersed among the police, the prosecution and the judiciary.⁶⁴ INACIF provides its services at the request of the courts, prosecutors, defence attorneys and the PNC.⁶⁵

However, it is meant to be autonomous from both the Public Prosecutor’s Office and the PNC, and initial misinterpretations of this autonomy led to a near breakdown of communications in the early years.⁶⁶ Despite the subsequent establishment of better coordination, INACIF still does not have the resources to generate enough evidence to offset the near-total reliance on witness testimony in criminal investigations, with all the risks this entails to eyewitnesses in the absence of an effective witness protection program.⁶⁷

62 MINUGUA reiterated the seriousness of the activities of illegal structures which conduct parallel investigations, in some cases affecting the judicial process. Faced with the high crime rate, and especially the impact of kidnappings, which serve to heighten the perception of a climate of insecurity, the State has allowed persons or groups outside the competent institutions to become involved in police investigations, on the pretense of supporting prosecutors, judges and victims, and to utilize State resources. An example of this parallel system is the group known to the public as “La Oficinita”, which is allegedly composed of agents and former agents of the State, professionals and individuals linked to powerful economic groups. Verification has established that, in many cases, this group conducts illegal activities either to obtain a conviction of accused criminals or even to have them eliminated MINUGUA, United Nations Verification Mission in Guatemala, UN Doc. A/55/174 (2000), para 83. The IACHR, in its 2003 country report, also documented the “improper influence from the military in matters unrelated to their specific functions, especially through the use of military intelligence in criminal investigations. IACHR, “Report on the Situation of Human Rights in Guatemala” (2003).

63 MINUGUA, Fourteenth Report of United Nations Verification Mission in Guatemala on the verification of the Comprehensive Agreement on Human Rights, UN. Doc A/58/566 (2003).

64 This dispersion of laboratories resulted in a series of shortcomings, such as lack of consistency amongst the services, inefficiency, and qualitative shortcomings. Fanuel Garcia, Reorganizacion del Servicio de Ciencias Forenses para la Administracion de Justicia en Guatemala, Guatemala City, Instituto Comparado de Ciencias Penales de Guatemala, 97.

65 Art. 29 of Decree 32-2006.

66 Even though its governing body included, among others, the Attorney General and the Minister of Interior, the first Director of INACIF broke off all communication with prosecutors and PNC investigators. As one assessment of INACIF described it: “The doors of the institution are closed...thus there can be no direct coordination between the forensics experts and the prosecutors. Everything must be requested in writing.” This translated into unnecessary, reiterative, and onerous requests from prosecutors. In addition, the experts produced incomplete reports that were incomprehensible for the prosecutors. Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”, 44-45.

67 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”, 45.

Regional accessibility is a particular issue. Budgetary constraints initially limited INACIF's services to Guatemala City and some departmental capitals, with no services in the interior. Expert examinations needed in crimes of violence against women were only performed in Guatemala City during working hours, resulting often in the re-victimization of complainants.⁶⁸ Currently, INACIF staff perform examinations 24 hours a day in the capital and from 7am to 7pm, with night-time availability, in the limited areas of the interior where there is an accessible District Prosecutor's Office (*fiscalía distrital*).

Crime victims in areas without accessible INACIF staff must submit to a forensic medical exam in a local hospital, typically carried out by staff with no training in criminal forensics and victim handling and little interest in undertaking such examinations for fear of being called to give testimony in a trial. Such hospitals frequently lose or mishandle evidence gathered during an exam.

Even if evidence is properly gathered, its quality at trial is unreliable. All samples are currently sent to a lab in Guatemala City, causing delays. Moreover, forensics labs routinely fail to secure the chain of custody, resulting in the exclusion of the evidence at trial. Until recently, INACIF lacked equipment to process DNA testing, so all samples had to be sent abroad, delaying the process by as much as a year.⁶⁹ As of today, the INACIF laboratory is still not accredited for DNA testing, meaning that its DNA test results cannot be admissible in court.⁷⁰

68 ICCPG, "Instituto Nacional de Ciencias Forenses de Guatemala: Estado de Situación 2012", *Revista El Observador Judicial* (2012), 84.

69 Samples were sent to Sevilla University in Spain (which funded a pilot forensics program) or Costa Rica for testing. ABA ROLI, "Prosecutorial Reform Index: Guatemala" (2011), 86.

70 To gain accreditation, a DNA lab must pass a rigorous inspection and review of their laboratory and DNA testing processes to ensure that all DNA tests are performed thoroughly and accurately. Once accredited, a DNA laboratory must also participate in proficiency DNA testing and allow an annual inspection. For DNA test results to be admissible in court, the DNA testing must be carried out by an accredited laboratory.

II.b. Institutions involved in the Adjudication Process

The Supreme Court of Guatemala hears appeals from the ordinary court system and manages its administration. The Constitutional Court is independent from the Supreme Court and has exclusive jurisdiction over constitutionality matters.

II.b.i. The Judiciary

Under the reformed 1994 Criminal Procedure Code, judges continued to be responsible for ruling in cases and overseeing enforcement of judges, but were given the additional duty of upholding the rights of citizens in the preparatory and investigative stage of cases, including authorization of arrest warrants, pretrial detention, review of communications, attachment of assets, and searches. Thus as the former investigative judges (*jueces de instrucción*) surrendered their investigatory function to the newly created Public Prosecutor's Office, they became instead judges responsible for upholding guaranteed rights (*jueces de garantías*).

In practice, judges were unprepared to take on their new responsibility for external oversight of prosecutorial decisions, just as prosecutors struggled with new investigative procedures. As a result, judges initially simply continued investigating cases, which continued to be conducted primarily based on written pleadings assembled by judges and other subaltern officials delegated judicial functions. These practises perpetuated the lengthy proceedings and incapacity to resolve cases that constituted the most pressing problems in the criminal justice system.⁷¹

The Guatemalan Constitution establishes the economic and functional independence of the judiciary and a complex system for appointing judges through nominations committees meant to ensure their selection on strict criteria of competence and integrity.⁷² However, the manifest and persistent problems with judicial independence and effectiveness were taken up in the Peace Accords, resulting in the 1999 passage of a new Law on Judicial Career Services.⁷³ One of the new features of this law was the rule in Article 32 that judges' performance evaluations should be taken into account in their re-appointment or promotion.

71 Mauricio Duce, "La oralización de las etapas previas al debate: la experiencia de la Ciudad de Quetzaltenango en Guatemala," *CEJA* (2007), 2.

72 The nomination committee system replaced a criticized practice of direct appointment by Congress. Article 241 of the 1965 Constitution.

73 Decree 41-99.

However, the Constitutional Court invalidated this provision in a subsequent decision,⁷⁴ meaning that this provision could only apply to the appointment of first instance judges, while performance evaluations could not be treated as a criterion for the promotion and appointment of appellate judges (*magistrados de sala*) and members of the Supreme Court of Justice.⁷⁵

This decision had the effect of downgrading merit as a selection and promotion criteria for higher court judges, facilitating the co-optation and politicisation of selection processes.⁷⁶ To this were added persistent internal and external interference in the work of judges. As described by the IACHR: “the external influences denounced consist of pressure being brought by the media, the military, the political parties, the economic sectors, and all branches of the Government, with the objective of protecting private interests or certain groups through the administration of justice.”⁷⁷

Finally, the institutional design of the Supreme Court has fueled persistent problems.⁷⁸ On one hand, Supreme Court justices have both dual functions and are often forced to sacrifice their role as an adjudicator in order to fulfil their administrative role. Meanwhile, the President of the Court is elected by the plenary of the members on a rotating basis for a one-year term, without any possibility of re-election.⁷⁹ As a result, the policies adopted by each president are rarely followed up on by the successor, who invariably barely settles into the role before making way for the next. The lack of clear rules for succession has led to internal divisions in the Court that can delay the election process for months.⁸⁰

74 Constitutional Court, judgment of January 31, 2007, (cases 1903-2003, 2183-2003, and 2261-2003). The Court found that Article 32 of the Law on the Judicial Career Services to be at odds with Articles 207 and 208 of the Constitution.

75 The Constitutional Court decision also abolished a requirement to include judges that received positive evaluations in the lists sent to Congress during the appointment process. Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”, 45.

76 According to the UN Special Rapporteur on the Independence of Judges and Lawyers, the participation of Congress resulted in “serious meddling in the independence of the highest-level judicial body.” Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009), para 38.

77 IACHR, “Report on the Situation of Human Rights in Guatemala” (2003), para 32.

78 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”.

79 This system was introduced by constitutional amendment in 1993.

80 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add.3 (2009) para 38.

II.b.ii. Structure of the Judiciary

The Supreme Court of Justice

The Supreme Court of Justice is made up of 13 Justices and has both appellate jurisdiction and administrative authority over all tribunals with the exception of the Constitutional Court.⁸¹ Justices are selected for concurrent, renewable five-year terms by Congress from a list of candidates proposed by the Nominations Committee (*Comisión de Postulación*), an independent body consisting of law faculty deans, lawyers, and Court of Appeals judges.⁸²

In its appellate role, the Supreme Court consists of three Chambers. The Civil Chamber deals with *casaciones* (a form of civil appeal), disputes over jurisdiction, administrative law matters, accounts, and civil responsibility, while the Criminal Chamber supervises appeals and jurisdictional disputes related to criminal and penitentiary law. The third chamber deals with *amparo*, or complaints seeking relief for alleged violations of constitutional rights, as well as *antejuicio*, or requests to lift immunity from individuals who enjoy immunity by virtue of their position, allowing criminal charges to be brought.

The Constitutional Court

The Constitutional Court of Guatemala was created along with the current Guatemalan Constitution in 1985.⁸³ The Constitution stipulates that the Court is independent from the Supreme Court, enjoys economic independence, and has exclusive jurisdiction over the defence of the constitutional order, with jurisdiction over general constitutional challenges (*recursos de inconstitucionalidad*), *amparo* actions brought against the Supreme Court, the President or the Vice-President, and appellate jurisdiction over all constitutional challenges brought in lower tribunals. It may issue opinions regarding the constitutionality of treaties, agreements, draft laws and laws vetoed by the President, resolve jurisdictional issues in matters of constitutionality, and compile doctrine and constitutional principles gleaned from constitutional challenges.⁸⁴

81 Article 214 of the Constitution.

82 Article 215 of the Constitution.

83 In the various attempts to make Guatemala a democracy, the idea of a Constitutional Court became one of the goals. The initiative for its creation began in 1965, when Guatemala voted for a civilian government. Three successive military governments followed, and it was not until 1985 that the Constitutional Court was created. Maria Luisa Beltranena de Padilla "Guatemalan Constitutional Court", *Florida Journal of International Law*, 2000-2001, 26.

84 The Court may be expanded by two members (*vocales*) when hearing *amparo* actions against the Supreme Court, the President or the Vice President. Article 272 of the Constitution.

Courts of Appeal

The Courts of Appeal (*Cortes de Apelaciones*), Collegiate Tribunals (*Tribunales Colegiados*) and other courts in the same category review the decisions of lower courts. The Courts of Appeals are composed of Chambers determined by the Supreme Court.⁸⁵ The members of the Courts of Appeals are selected by Congress from a list of candidates proposed by a Nomination Committee representing universities, law faculties, the Bar Association and the Supreme Court.⁸⁶

There are currently 42 Courts of Appeal nationwide: eight mixed regional courts, six criminal law courts, five administrative law courts, four civil law, four labour law, one family law, one special court for children and adolescents and one second instance court of accounts and jurisdictional conflicts. The jurisdiction of these courts depends on both subject matter and geographical criteria.

Courts of First Instance (Ordinary Jurisdiction)

Courts of First Instance are the lower courts, and thus, the first to hear cases based on subject matter and geographical criteria.⁸⁷ They are organised into the following subject-matter jurisdictions: Criminal Law, Drugs & Environmental Crimes; Civil Law; Civil and Commercial Affairs; Labour Law; Family Law; Children and Adolescents; Child and Adolescence (Criminal).

High Risk Courts

High Risk Courts were created in 2009 – following a proposal by CICIG – to hear high profile criminal cases while providing greater security measures for judges, lawyers and witnesses. They are currently only active in Guatemala City, but at the time of the assessment, new chambers were in the process of being opened in Quetzaltenango.

85 Article 218 of the Constitution.

86 The Committee is presided over by a representative of the rectors of the universities of the country and includes the Deans of the Law Faculty of each University of the country, an equivalent number of members elected by the General Assembly of the Bar Association and by the magistrates of the Supreme Court of Justice, respectively. Article 217 of the Constitution.

87 Judicial Branch Law, Decree 2-89 of Congress.

Administrative Law Tribunal

The Administrative Law Tribunal hears challenges to acts of the public administration, including matters relating to contracts and tenders.⁸⁸

Peace Courts and Municipal Courts

Municipal Courts hear matters related to municipal ordinances.⁸⁹ Peace Courts *inter alia* try minor matters of criminal and civil jurisdiction and have the power to impose fines.⁹⁰

School of Judicial Studies

The School of Judicial Studies is responsible for the training of judges, magistrates, and employees of the judicial branch.

The Judicial Career Council

The Judicial Career Council is responsible for disciplinary and administrative sanctions and complaints against judges.⁹¹ The Council is made up of representatives of the Supreme Court and Courts of Appeal, as well as Peace Judges, Ordinary Judges and support staff.⁹² The Council is also responsible for organising the appointment of new judges, including carrying out performance evaluations of judges, magistrates and judiciary staff. The Council prepares reports regarding candidates who are being considered by the Nomination Committee for election to the Supreme Court and Courts of Appeal.⁹³

88 Article 221 of the Constitution.

89 Article 259 of the Constitution.

90 Ana Cristina Rodríguez Pineda, "Guide to Legal Research in Guatemala" (2015) [webpage, accessed 19 April 2018].

91 Decree 2-89 of Congress 32-2016.

92 Webpage of the Supreme Court of Justice, "Consejo de la Carrera Judicial" (accessed 16 May 2018), available at: http://ww2.oj.gob.gt/csj/index.php?option=com_content&view=article&id=126&Itemid=114.

93 Jessica Gramajo, 'Aprueban nuevas normas para jueces y magistrados', *Prensa Libre* (29 June 2016).

II.c. Other Rule of Law Institutions and Organizations

II.c.i. The Human Rights Ombudsman Office

The Office of the Human Rights Ombudsman (*Procuraduría de Derechos Humanos*, PDH) was set up in 1986 on the basis of the current Constitution adopted a year prior. It is tasked with monitoring respect for human rights by investigating individual complaints, as well as through policy advocacy and public education.⁹⁴ Each Ombudsman is appointed for a five-year period as a member of a National Human Rights Commission composed of representatives of the political parties represented in Congress during the corresponding period.

The Ombudsman presents an annual report on human rights to the Commission.⁹⁵ The PDH has proven to be a valuable defender of indigenous rights in Guatemala, recognized both regionally and internationally for its efforts.⁹⁶ It is acclaimed by the IACHR, the UN Special Rapporteur on indigenous rights, the UNDP⁹⁷ and the ABA⁹⁸. Due to threats against the current Ombudsman, Mr. Jordán Rodas Andrade, the Inter-American Commission on Human Rights has issued a precautionary measure in favor of him and his immediate family.⁹⁹

II.c.ii. Guatemalan Bar Association

The Guatemalan Bar Association (Colegio de Abogados y Notarios de Guatemala, CANG) was formed in 2001 with a mission to ensure that “law professionals exercise their trade in strict compliance with the Constitution, justice, equity, responsibility and ethics, for which purposes it will promote continuing education and social projection.”¹⁰⁰ The Bar Association is composed of four different organs: the General Assembly, the Board, the Electoral Tribunal and the Honour Tribunal, which adjudicates in complaints against individual lawyers.¹⁰¹

94 Website of the Human Rights Ombudsman of Guatemala, “Misión, visión y objetivos” (accessed 16 May 2018), available at: <https://www.pdh.org.gt/biblioteca/category/31-mision-vision-y-objetivos.html>.

95 Article 273 of the Constitution.

96 UNDP, “Más allá del conflicto, luchas por el bienestar: Informe Nacional de Desarrollo Humano 2015/2016 Resumen ejecutivo” (2016), 125. UNSG, Victoria Tauli-Corpuz and UN Human Rights Council, Special Rapporteur on Rights of Indigenous Peoples, Rights of indigenous peoples, Un doc. A/72/186 (2017), 14.

97 UNDP, “Más allá del conflicto, luchas por el bienestar: Informe Nacional de Desarrollo Humano 2015/2016 Resumen ejecutivo” (2016), 125.

98 American Bar Association, “Tilted Scales: Social Conflict and Criminal Justice in Guatemala” (2014), 8.

99 Inter-American Commission on Human Rights, “IACHR Grants Precautionary Measure for Human Rights Ombudsman of Guatemala” (press release, 03 November 2017).

100 “Colegio de Abogados y Notarios de Guatemala” [webpage, accessed 19 April 2018].

101 Decree 72-2001.

II.c.iii. The Public Institute for Criminal Defence

The Institute for Public Criminal Defence (*Instituto de Defensa Pública Penal*, IDPP) is responsible for providing criminal defence services to those without the means to afford legal representation. It also has administrative and supervisory responsibilities over lawyers practising in criminal defence. The IDPP is an autonomous and independent institution.¹⁰²

II.c.iv. Directorate of Alternative Conflict Resolution Methods

The Directorate of Alternative Conflict Resolution Methods (*Directorio de Métodos Alternativos para la Solución de Conflictos*), is tasked with alternative dispute resolution, including establishing contact with local community leaders and the establishment of early warning systems to identify social conflict hotspots. It also coordinates and promotes the use of alternative conflict resolution methods through Mediation Centers at the local level.¹⁰³

II.c.v. Supreme Electoral Tribunal

The Supreme Electoral Tribunal is the body responsible for all matters relating to political elections.¹⁰⁴

II.c.vi. Coordinating Commission for the Modernization of the Justice Sector

The Coordinating Commission for the Modernization of the Justice Sector was created in 1997 to support compliance with the provisions of the Peace Accords affecting the justice sector. It seeks to perform joint actions for the comprehensive modernization of the justice sector and coordinates the efforts of the criminal justice sector, as it promotes the modernization of the institutions redirecting financial resources to achieve this goal. It is composed of the President of the Judiciary and the Supreme Court of Justice, the Attorney General, the Interior Minister and the Director of the IDPP.

102 Article 1 of Decree 129-97.

103 Website of the Judicial Organ of Guatemala, "Dirección de Métodos Alternativos de Solución de Conflictos" (accessed 16 May 2018), available at: <http://www.oj.gob.gt/index.php/nosotros-dmasc>.

104 Article 223 of the Constitution.

II.c.vii. Law Faculties

There are law faculties in 12 private universities in Guatemala.¹⁰⁵ The San Carlos University of Guatemala (USAC) is the only public university offering law as a course of study.

II.d. The International Commission against Impunity in Guatemala

The Peace Accords promised an end to decades of State-sponsored political repression and the establishment of legal and institutional guarantees for the respect of human rights, including through the dismantling of repressive structures and a comprehensive reform of the security and justice sectors. Under the terms of the Peace Accords the state pledged to respect civil and political rights, to strengthen the justice system and human rights institutions, to combat impunity and to develop compensation programs for the victims of State-sponsored gross human rights violations committed during the conflict.¹⁰⁶

Despite the failure of the 1999 constitutional referendum on implementation of the Peace Accords, there have been significant advances, including the emergence of an independent Public Prosecutor's Office, the creation of the National Civilian Police (PNC) and the Public Institute for Criminal Defence, and the adoption of a judicial career law which improved the selection, training and evaluation of judges.

These developments have been accompanied by improved technology and expanded court infrastructure, improved access for indigenous persons through the hiring of bilingual staff and interpreters, and the creation of five Justice Administration Centres in predominantly indigenous areas of the country.¹⁰⁷

However, many problems persist. Most perpetrators of wartime crimes failed to be held to account, and impunity has subsequently remained the norm, fuelling widespread lack of public confidence in the justice system. To varying degrees, Guatemalan justice institutions still suffer from the same deficiencies that inhibited their effectiveness at the time of the Peace Accords – lack of resources, insufficient presence in rural areas, inadequate training and career development for officials, corruption and lack of coordination.

105 These are Universidad de San Carlos de Guatemala, Universidad Francisco Marroquín, Universidad Rafael Landívar, Universidad del Istmo, Universidad Mariano Gálvez, Universidad Mesoamericana, Universidad Panamericana, Universidad Rural, Universidad San Pablo de Guatemala, Centro Universitario de Oriente, Universidad de Occidente, Universidad Da Vinci.

106 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 25.

107 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 29.

II.d.i. Illegal Security Forces and Organized Crime

The Peace Accords' Comprehensive Agreement on Human Rights expressly called for the dissolution of "illegal security forces and clandestine security machinery".¹⁰⁸ Such illegal forces were created during the conflict, within the state security apparatus, particularly military intelligence, to carry out counterinsurgency operations. After the Peace Accords they continued to operate and generate profits through organized crime, within state institutions and in the private security sector.¹⁰⁹ MINUGUA consistently reported on the existence of these groups, and their negative effect on the consolidation of the rule of law, accountability and the effective enjoyment of human rights:¹¹⁰

... the operational capacity of these groups, their links with public officials at the local and national level and the impunity which prevails for most of their actions are all factors that contribute to the people's growing perception of insecurity. ... clandestine State structures similar to those that existed during the internal armed conflict continue to exist, as do other structures which seem to be related to organized crime and which have corrupt ties with State apparatus, including the judicial system...; they appear to be motivated by economic, political or even personal interests.¹¹¹

Commitments in the Peace Accords that would give the state mechanisms to control these groups such as strengthening police and judicial investigative capacities, civilian intelligence and congressional controls over intelligence agencies, were not implemented. Indeed, conflict era intelligence networks were frequently kept intact, supposedly to fight crime.¹¹² Shielded by impunity, these structures regrouped to pursue illegal business interests and seek political influence. Because the State no longer committed human rights abuses as a matter of policy, these groups remained in the shadows, but some members held key positions within the state and maintained informal links to police, justice officials and military intelligence.¹¹³

108 "In order to maintain unlimited respect for human rights, there must be no illegal security forces or any clandestine security machinery. The Government of Guatemala recognizes that it has an obligation to combat any manifestation thereof". Guatemalan Peace Accords, Comprehensive Agreement on Human Rights, Commitment IV.

109 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", para 49.

110 MINUGUA, United Nations Verification Mission in Guatemala, UN Doc. A/55/174 (2000), para 73.

111 MINUGUA, United Nations Verification Mission in Guatemala, UN Doc. A/55/174 (2000), para 74 and 75.

112 As former Attorney General Claudia Paz y Paz stated: "the best example is the enrichment of successive administrations from fraud in the payment of import duties, which facilitated the survival of the networks engaged in contraband through the appointment of known intelligence officers to control customs." Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 52-53.

113 MINUGUA, United Nations Verification Mission in Guatemala, UN Doc A/57/336 (2002), para 52.

During the post-war period, the illegal structures frequently conducted parallel criminal investigations that were tolerated by state actors on the pretext that they supported prosecutors, judges and victims, and allowed efficient use of state resources.

One example of this parallel system was the '*oficinista*' ('small office'), allegedly composed of current and former state agents and individuals linked to powerful economic groups. Prosecutors allowed such investigations to be relied on for evidence at trial, despite the lack of authority or competence by those carrying them out. Many of these 'investigations' affected the outcomes of trials, leading to acquittals or protecting the real perpetrators of crimes.¹¹⁴ MINUGUA alleged that such illegal investigations served "either to obtain a conviction of accused criminals or even to have them eliminated."¹¹⁵

By 2003, a clear post-war pattern of violence and impunity had emerged, leaving Guatemala with one of the highest homicide rates in Latin America.¹¹⁶ Human rights defenders were targeted in particular by the illegal groups and clandestine security mechanisms.¹¹⁷ Death threats against human rights defenders investigated by MINUGUA doubled between 1998 and 2002.¹¹⁸ Judges, prosecutors and lawyers also faced increased threats and intimidation in cases involving human rights, corruption and drug trafficking.

The Government failed to provide resources for adequate protection, forcing the Supreme Court to set up its own security unit, but this force did not have the personnel, equipment or funds to all judges who received threats.¹¹⁹

International concern over this climate of intimidation led to visits from the Special Rapporteur of the Commission on Human Rights on the independence of judges in 1998 and 2001, the Special Representative of the Secretary-General on human rights defenders in 2002, and the Inter-American Commission on Human Rights in 2003.

114 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, "Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014", 51.

115 MINUGUA, United Nations Verification Mission in Guatemala, UN Doc. A/55/174 (2000), para 83.

116 The number of violent deaths since the end of the conflict increased from 3,200 in 1995 to 3,999 in 1997, declined to 2,655 in 1999, and then shot up again to 3,600 in 2002. MINUGUA, United Nations Mission in Guatemala, UN. Doc A/58/566 (2003), para. 16.

117 Amnesty International, "Guatemala: Guatemala's Lethal Legacy: Past Impunity and Renewed Human Rights Violations" (2002).

118 MINUGUA investigated 43 cases of threats against human rights defenders in 1998 (26 death threats), 57 in 1999 (35 death threats) and 77 in 2000 (34 death threats). In the 2001-2002 period, the number of cases jumped significantly, rising to 140 (63 death threats) in 2001 and 82 in 2002 (38 death threats). MINUGUA, United Nations Mission in Guatemala, UN. Doc A/58/566 (2003), para 18.

119 The Special Prosecutor for Crimes against the Judicial Sector received 212 complaints in 2001-2002, of which 43 involved threats against judges, 30 against lawyers and 19 against prosecutors. In 2002, a justice of the peace was murdered by a mob; in 2003 a member of the appellate court for administrative issues was killed in an apparent hold-up and, a few days later, a judge working on high-profile narcotics cases was the victim of an assassination attempt. Two prosecutors (including the Special Prosecutor for Human Rights Defenders) were also attacked. MINUGUA, United Nations Mission in Guatemala, UN. Doc A/58/566 (2003), para 38.

In 2007 Philip Alston, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions, summarised the situation in country, stating that “Guatemala is a good place to commit a murder because you will almost certainly get away with it”.¹²⁰ Emblematic cases included the 2006 murder by elite policemen of six prisoners allegedly organizing criminal operations from inside the *El Pavón* prison.

The official report on the incident cleared the officers on the finding that there had been a confrontation with the killed inmates.¹²¹ Although the Human Rights Ombudsman deemed the deaths to be extrajudicial executions,¹²² the prosecutor in the case was later promoted.¹²³

Sustained links between illegal groups and justice sector actors helps to explain the high level of impunity for violent crime in Guatemala. High level government officials and MINUGUA were quick to identify their existence and influence but could do little to stop them.¹²⁴ While the origins of these groups lay in the conflict, they soon became associated with transnational organized crime, giving rise to new sources of corruption and violence. New fortunes were amassed and clandestine groups taking advantage of the prevailing institutional weakness soon opened the way for new groups more clearly associated with organized crime that competed directly with the political and economic elites for power.¹²⁵

Many in Guatemala saw the need for an outside actor with sufficient backing to effectively investigate and prosecute illegal groups.¹²⁶

120 Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston, Mission to Guatemala, UN Doc. A/HRC/4/20/Add.2 (2007), para 18.

121 *Prensa Libre* (September 26, 2006).

122 Resolution of the Ombudsman (December 27, 2006).

123 Four years later he was prosecuted for tampering with the crime scene in the assassination of Victor Rivera, a Ministry of the Interior advisor who had been involved in the Pavón case. CICIG, “Arrest against Rivera Case”, *Press release 004* (April 8, 2010).

124 In November 2001, the President of the Republic declared that clandestine networks and mafias were embedded in the Ministry of Interior and other parts of the State. During the Consultative Group meeting, the President acknowledged the penetration of the State by corrupt interests. In May 2002, the presidency’s Strategic Analysis Secretariat made public its working documents for establishing a Government policy to combat those structures. The Attorney General at that time complained of organized crime structures within his office. MINUGUA, United Nations Verification Mission in Guatemala, UN Doc A/57/336 (2002), para 53.

125 The assassination of three Salvadoran members of the Central American Parliament and their driver in February 2007 led to a decisive change in favour of congressional and judicial approval of CICIG. The main suspects of this crime were four members PNC officers who were arrested and a few days later themselves executed by a group of armed men while in custody at a maximum-security prison. The crime scene was tampered with and the bodies mutilated post-mortem in an apparent effort to make them appear to be victims of ‘regular’ prison violence. Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”, 50.

126 Claudia Paz y Paz Bailey, Georgetown University Law Centre, Open Society Foundations, “Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014”, 52-53.

II.d.ii. Founding and role of CICIG

In late 2006, the UN and the Government of Guatemala signed an agreement to establish the International Commission against Impunity in Guatemala (*Comisión Internacional Contra la Impunidad en Guatemala*, CICIG). The Commission represented a compromise, lacking independent powers to initiate prosecutions that had been discussed for previous versions. A scandal involving the deaths of three Salvadoran members of the Central American Parliament and their driver caused national and international uproar, shifting election year sentiment in the Congress in favour of approving the establishment of CICIG.¹²⁷ Following a favourable Constitutional Court advisory opinion in May, Congressional ratification came in August 2007.

The CICIG was established as an independent, international body designed to support the Public Prosecutor's Office, the police and other relevant bodies in investigating crimes committed by members of illegal groups.¹²⁸ The UN Secretary-General designates the head of CICIG (the Commissioner). In contrast to other international mechanisms, CICIG is an independent investigative entity that operates under Guatemalan law and works alongside national counterparts building their capacities to investigate and prosecute illegal groups.¹²⁹ CICIG is the first hybrid mechanism with a subject-matter jurisdiction related not to human rights violations in the context of conflict but rather to dismantling organized crime (the Hariri tribunal in Lebanon perhaps being the closest comparison). In prosecutions CICIG joins the Prosecutor's Office as a complementary prosecutor (*querellante adhesivo*) to help bring high-profile cases to trial. It also has a broader mandate to recommend law and policy reform.¹³⁰

CICIG operates on a two-year mandate basis, which has been extended by the Guatemalan government on four occasions since 2009. Since its creation CICIG has played a prominent role in the consolidation of Guatemala's democratic system and rule of law. In 2009, CICIG was credited with avoiding a national political crisis when it was able to clear the then-President of Guatemala for the murder of the lawyer Rodrigo Rosenberg.¹³¹ In 2011, the "Portillo Case" revealed a high-level embezzlement network involving former President Alfonso Portillo Cabrera, which appropriated over 15 million dollars from the Ministry of Defence.

Most notably, the 2015 investigation of the "La Linea" customs fraud case fuelled the massive anti-corruption protests of the "Guatemalan Spring" and ultimately forced the resignation of then-President Otto Pérez Molina and Vice President Roxana Baldeón.

127 ODHAG, "Deudas de la Transición; Ejecuciones Extrajudiciales de personas Estigmatizadas" (2007).

128 CICIG, "Agreement to establish CICIG" [webpage, accessed 19 April 2018].

129 WOLA, "The International Commission Against Impunity in Guatemala: A WOLA Report on the CICIG EXPERIENCE" (2015).

130 CICIG, "Agreement to establish CICIG" [webpage, accessed 19 April 2018].

131 Rosenberg made a video days before his death blaming the then President Álvaro Colom if anything were to happen to him. CICIG investigated his death and eventually ruled out the involvement of the President and prosecuted two groups of former PNC officers.

CICIG's contribution has also been made via support for institutional changes, new legislation and building institutional capacity. It boosted the public prosecution's investigative capacity through the creation and training of the Special Unit Against Impunity (*Fiscalía Especial Contra la Impunidad*, FECI), created a Wiretapping Unit in the Public Prosecutors Office (*Unidad de Métodos de Investigación Especial*, UME) through an agreement including the Police and Ministry of Interior, it pushed for reforms to the Law Against Organized Crime allowing the use of confidential informants, it introduced new regulations, protocols and manuals to improve the existing Witness Protection Program while also securing international cooperation for the relocation of protected witnesses, and it proposed the creation of the High Risk Courts.

Most recently, CICIG contributed with state institutions and civil society organisations to promoting a draft proposal of about sixty constitutional reforms, with a focus on reforms of the justice sector. In April 2016, a technical secretariat composed of CICIG, the Office of the United Nations High Commissioner for Human Rights, the Human Rights Ombudsman, and the Office of the Public Prosecutor developed a bill of reforms to the Constitution, and submitted them to a public consultation entitled the "national dialogue for the reform of the justice sector". In October 2016 the proposed reforms were presented as an effort to reinforce judicial independence through constitutional anchoring of the judicial career and the replacement of Nomination Committees with a more meritocratic selection process. Another key goal of the proposed "Initiative 5179" was the introduction of legal pluralism through constitutional recognition of indigenous customary justice systems.

In Congressional debates, more ambitious proposals such as the abolition of the Nomination Committees and legal pluralism were rejected. However, Constitutional amendments were adopted that require judicial selection processes to be non-discriminatory, introduce incompatibility between judicial functions and outside associations or employment other than academia, and reinforce merits and professional criteria in evaluations and selection processes.¹³² Despite these successes, CICIG has faced significant setbacks and limitations.¹³³

Some high-profile cases have ended in acquittal, and key law reforms, such as a judicial career law, have stalled in Congress. While CICIG has helped strengthen certain specialized prosecutorial units, the Public Prosecutor's Office remains overstretched and without presence in much of the country. Other institutions that are essential for combatting impunity – notably the civilian police and judiciary – still remain weak, vulnerable to corruption and frequently unaccountable in the case of abuses.

132 Amendments to Article 205 introduce "public contests that guarantee equality and non-discrimination" as a principle of the administration of justice. Article 207 was amended, inter alia, to introduce an incompatibility between exercising judicial functions and holding any other form of employment or position in political or religious organisations, trade unions, or any other profession except academia. Article 208 was amended to state that all judges and magistrates are subject to the principles of independence, impartiality, objectivity, transparency, publicity, merits, stability and specialization, reinforce the irremovability of judges pending performance evaluations, to introduce mandatory retirement at age 75, and to state that three quarters of candidates for the position of magistrates in the Appellate Courts must be judges, while the remainder should be practicing lawyers.

133 International Crisis Group, "Crutch or Catalyst: The International Commission Against Impunity in Guatemala", *Latin America Report* N°56, (2016).

In August 2017 the President of Guatemala, Jimmie Morales clashed with the current head of CICIG, Iván Velásquez, starting a new political crisis over in what was widely perceived to be an attempt to obstruct CICIG efforts to fight corruption and impunity. After CICIG and the Attorney General announced they would be seeking to strip the President of his immunity to face charges that he had avoided reporting campaign contributions while Secretary General of his political party in 2015, the President declared Velásquez “persona non-grata” and ordered him to leave the country immediately. Morales argued the move was “an act of loyalty towards the nation” and accused Velásquez of pressuring members of Congress into reforming the Constitution.

There was a national and international outcry leading to massive protests in Guatemala at the obvious self-interest in the proposed expulsion. Within a few days the Constitutional Court declared the expulsion unconstitutional.

A smear campaign against CICIG followed. As Velásquez explained to the ILAC Expert Team: “In 2015, when the fight against corruption was exclusively focused on government corruption, the support for CICIG was absolute. Then, when investigations started targeting other sectors, then support became fractured”. Those other sectors included cases in which private funding flowed from businessmen, bankers, media moguls and others into former President Otto Perez Molina’s party as means of controlling institutions.¹³⁴ Even though the President’s attempt to expel the head of CICIG failed, the Commission’s work continues to be affected by an ongoing campaign aimed at discrediting both the entity and its leadership, through accusations of political persecution, interventionism and claims that the actions of CICIG hamper Guatemala’s economic prosperity.¹³⁵

134 Interview, 18 October 2017.

135 Luis Alejandro Amaya, “La CICIG se defiende ante campaña de acusaciones en Guatemala”, CNN (9 February 2017).

III. Independence of the Justice Sector

The principle of the independence of the Judiciary has been recognized as “international custom and general principle of law”,¹³⁶ and has been established in numerous international treaties.¹³⁷

The independence of persons or organs performing judicial functions is considered to be a *condition sine qua non* for the observance of standards of due process as a human right in the Inter-American system.¹³⁸ The lack of such independence inhibits the right of access to justice and fosters mistrust of the courts.¹³⁹ In Guatemala, for instance, where the judiciary has never enjoyed the conditions to be considered fully independent, only 35% of the population trust the Judiciary.¹⁴⁰

III.a. Independence of the Judiciary

The principle of judicial independence is reflected in the Guatemalan Constitution. Articles 154 and 203 set out the independence of the judicial branch from the executive and legislative branches, and define political and legal sanctions for interference with the courts.¹⁴¹ Articles 12 and 207 of the Constitution address judicial independence as a guarantee for individuals’ right to due process, stating that only a competent judge, in application of the legally established procedure, can limit an individual’s fundamental rights.

136 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009), para 14.

137 The importance of an independent judiciary has been recognized in the following international and regional instruments: Universal Declaration of Human Rights (Article 10); the International Covenant on Civil and Political Rights (Article 14); the 1993 Vienna Declaration and Programme of Action (Para. 27); American Convention on Human Rights (Article 8(1)); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.1); and the African Charter on Human and Peoples’ Rights (Article 7.1). Some more specific international treaties also contain provisions on the independence and impartiality of the courts, such as: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 18.1); the International Convention for the Protection of All Persons from Enforced Disappearance (Article 11.3); the Additional Protocol to the Geneva Conventions (Article 75.4) and the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Article 6.2).

138 I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 71. The Inter-American Court has held that a judge hearing a case must be not only competent, but independent and impartial as well. I/A Court H.R. *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 273; see also, *Case of Ivcher Bronstein v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 112; and the *Case of the 19 Tradesmen v. Colombia*. Judgment of July 5, 2004. Series C No. 109, para. 167.

139 Leandro Despouy, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, UN doc. A/HRC/8/4 (2008), para. 34.

140 UNDP, “Informe Regional de Desarrollo Humano. (2013-2014) Seguridad democrática con Rostro Humano. Diagnóstico y propuestas para América Latina” (2013).

141 Likewise, the Constitution prevents judges and members of the Judiciary from exceeding their jurisdictional limits, in compliance with the principle of separation of powers.

Article 205 breaks down judicial independence into four components:

- a. Functional independence;
- b. Economic Independence.;
- c. Irremovability of judges, except in the cases and procedures of destitution expressly conveyed in the law; and the
- d. Exclusive right to select staff.

The Inter-American Commission on Human Rights (IACHR) has insisted that the independence of the Judiciary and its clear separation from the other branches of government must be respected and ensured both by the executive and by the legislature, based on the recognition, in law, of the judiciary's independence, including from interference by other branches of government.¹⁴² This guarantee is established in law through recognition of the principle of separation of powers. In practice, guarantees of the judiciary's independence must be assured in a variety of ways, including securing the judiciary's financial independence, secure tenured appointment, an appropriate and transparent process of selection and appointment of judges, respect for the independence of judges in their deliberations, decisions and the general functioning of the Judiciary; and disciplinary proceedings that offer due process guarantees.¹⁴³ In 2009, the United Nations Special Rapporteur on the independence of judges and lawyers, noted that:

...Guatemala has maintained a generalized institutional weakness, reflected in the absence of norms, policies and sufficient measures to materialize public service. Some sectors of society have tried to create conditions that allow them to coopt institutions in order to serve their own interests. The justice system is no exception and is currently at risk of falling under the control of spurious interests, such as drug trafficking and organized crime.¹⁴⁴

The challenge seems to remain as fundamental as ever, as is evidenced by the fact that throughout its visit to Guatemala, the ILAC expert team consistently recorded concerns from members of international organizations, civil society organizations, and even public institutions who claim that the judicial system is – in the words of one interviewee – “coopted by corrupt structures of power that have historically never been dismantled”.

In this regard, despite institutional efforts to modernize the judicial system, there remain a series of challenges that threaten or diminish judicial independence in Guatemala.

142 IACHR, “Annual Report 2012”, *Doc. 34* (2013), para 111. See also, Council of Europe, Committee of Ministers. Recommendation No. R (94) 12 on the independence, efficiency and role of judges. Adopted by the Committee of Ministers on 13 October 1994, at the 518th meeting of the Ministers’ Deputies, principle I. 2.b).

143 IACHR, “Guarantees for the Independence of Justice Operators, Towards Strengthening Access to Justice and the Rule of Law in the Americas” *Doc. 44*, (2013), para. 34.. See also Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009).

144 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009).

III.a.i. Functional Independence

It is crucial to examine whether justice operators have the guarantees of independence that will enable them to freely discharge their functions within the system of justice. This dimension involves more than just the procedures and qualifications for the appointment of judges, but also the guarantees of their security of tenure until the mandatory retirement age or the expiration of their term of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.¹⁴⁵

Functional independence is the guarantee that judges' decisions are only subject to the rule of law and not any other influence, with reference primarily to the executive and legislative branch. Involvement of the executive and legislative in the selection and appointment of justice operators, is not in itself a violation of judicial independence, but it does represent a risk to the independence of members of the Judiciary, due to the inherently higher levels of politicisation in these more political branches.¹⁴⁶

Selection Process for members of the Judiciary

A proper selection and appointment process is a condition *sine qua non* for guaranteeing the independence of justice operators.¹⁴⁷ International law has established minimum criteria to guarantee that the procedures followed in the appointment of justice operators ensure that they have the qualifications that will make for a truly independent system that affords access to justice.¹⁴⁸ The UN Special Rapporteur and the IACHR have pointed out that one of the main problems in some countries is that selection systems are politicized, a problem that frequently begins with the process for selecting the highest-ranking members of the justice system and spreads to lower appointments until the entire judicial apparatus is affected.¹⁴⁹

145 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009), para 52.

146 CIDH, "Garantías para la Independencia de las y los operadores de justicia. Hacia el fortalecimiento del acceso a la justicia y el estado de derecho en las Américas, Doc. 44, (2013).

147 I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para 156; *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, para 75. See also, *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para 98; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para 138.

148 If basic parameters for selecting and appointing justice sector operators are not observed, the authorities participating in the process are given an overly broad margin of discretion, with the result that the persons selected might not be suitable. I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para 74.

149 Gabriela Knaut, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Un doc. A/HRC/23/43/Add.4 (2013), para 79.

Guatemala's legal system, as construed in a 2007 Constitutional Court ruling, defines separate processes for the selection of Judges and Magistrates: one for ordinary judges in lower courts and another, at the higher end of the judicial hierarchy, for Magistrates in the Supreme Court and the Courts of Appeal.¹⁵⁰ In practice, the ruling has meant the process for the selection of lower judges is more meritocratic, while the selection for the highest authorities of the Judiciary is not strictly bound by the requirement to take evaluations and merit into account in the Judicial Career Law, and therefore more susceptible to political influences.

Following 1993 constitutional reforms, magistrates of the Supreme Court and Courts of Appeal are selected by Congress from a short-list of candidates provided by a Nomination Commission. After controversial selection processes for the Attorney General in 1999 and 2005, the Congress adopted a 2009 Law on Nomination Committees extending this process to also regulate the selection of the Attorney General and the Human Rights Ombudsman. The composition for the Nomination Committees responsible for the election of Supreme Court magistrates and Courts of Appeal magistrates, respectively, vary slightly, but both are composed of members drawn primarily from the Guatemalan Bar Association (*Colegio de Abogados y Notarios de Guatemala, CANG*), the deans of the law faculties and members of the Judiciary.

The Nomination Committee for the Supreme Court consists of 34 members, comprising:

- one representative elected as the presiding member by the presidents of Guatemala's universities;
- 11 deans of law faculties;
- 11 representatives from the Bar Association; and
- 11 Appellate Judges designated by the Association of Magistrates of the Courts of Appeal.

The Nomination Committee for Appeals Court Judges consists of 34 members, comprising:

- one representative elected as the presiding member by the presidents of Guatemala's universities;
- 11 deans of law faculties;
- 11 representatives of the Bar Association; and
- 11 Supreme Court Magistrates designated by the Supreme Court of Justice.

¹⁵⁰ A 2007 ruling by the Constitutional Court stated that only the promotions and appointments of ordinary judges would be subject to performance evaluations, while these wouldn't be considered as requirements for the appointment of Supreme Court Justices and members of the Courts of Appeal. Constitutional Court of Guatemala, Case No. 1903-2003, 2183-2003 and 2261-2003 (2007).

In both cases, the selection process consists of 13 steps:

1. A call for candidates for the composition of the Nomination Committee is issued at least four months before the term of the incumbent public official ends;
2. The Committee is constituted, in that members are selected by their collegiate institutions (except the law school deans) and sworn in by Congress;
3. The Committee adopts of a work plan, including a timeline of activities, rules of procedure, qualifications of the person to be selected, and evaluation criteria, including a ranking table;
4. An initial selection is made by eliminating candidates who do not comply with the basic legal requirements;
5. The Committee runs background checks on remaining candidates via public records, including those of disciplinary boards such as the Council of the Judicial Career and the Honour Tribunal of the Bar Association;
6. The Committee publicizes a short-list of candidates;
7. During a five-day period, anyone can challenge the capacity, honourability or desirability of any remaining candidate;
8. The Committee responds to any challenges with a final decision on each;
9. The Committee enjoys discretion to schedule public interviews with the candidates with the highest results;
10. The Committee performs an evaluation, ranking candidates based on their professional background and the rating criteria determined by the Committee;
11. The Committee votes by voice and with mandatory motivation to produce a final list, consisting of all candidates that receive the support of two-thirds of the Committee;
12. The Committee sends the final list to Congress;
13. Congress elects the Magistrates to the Supreme Court or the Courts of Appeal by a two-thirds vote.

Criticism of this process has focused on the balance struck between political and meritocratic elements and the risk of it being captured by clientelism, or a *quid pro quo* approach that compromises the integrity of the outcome. For instance, the 2014 election of Supreme Court Magistrates was criticised by national and international observers for failures including the adoption of evaluation criteria favouring professional longevity over merit, the conduct of peremptory interviews that lasted less than five minutes, the failure by Committee members to explain their votes, and the lack of meaningful opportunities to challenge candidates.¹⁵¹

The UN Special Rapporteur for Judicial Independence urged authorities to consider

151 WOLA, CEJIL, DPLF, GHRC, DPLF, PI, Open Society Justice Initiative, “Organizaciones internacionales se pronuncian frente a la suspensión del proceso por genocidio en Guatemala no respetaron estándares internacionales” (2015).

repeating the selection process as they were deemed “not carried out in accordance to international standards, especially with regards to their objectivity and transparency, thus affecting the judicial independence in the country”¹⁵². Impunity Watch argued that successful candidates in 2014 engaged in openly political campaigning and relied on “political godfathers” to get elected.¹⁵³ During the ILAC mission, judges confirmed that such politicization of candidacies still applies.

As a result, the ILAC experts frequently heard that Nomination Committee members are often perceived as acting as representatives of group interests or engaging in generalized clientelism, rather than being objective evaluators.¹⁵⁴ There is some evidence that a process meant to distance politics from judicial selection by relying on justice sector actors such as the Bar Association and law faculties has only served to politicize these actors.¹⁵⁵

While the Bar Association is a private entity, it exercises several public functions, including its role in the judicial selection process. Consequently, its internal election processes have allegedly become battlegrounds for different interests.¹⁵⁶ Unfortunately, the ILAC team arrived to a scheduled meeting with the Bar Association only to be informed that it had been cancelled and was unable to schedule another meeting. The experts were therefore unable to hear the views of the Bar Association regarding concerns expressed by many other actors about their role.

The ILAC Expert Team also heard complaints from numerous interlocutors that the role of law faculties in the Nomination Committees had become so politicized that some law faculties allegedly only exist to influence judicial selection processes. Since the introduction of the Nomination Committee process, the number of law faculties has gone from four to over ten, with some accused of being “phantom faculties” without evident students, graduates or scholarship. Outside interests reportedly fund these institutions for the sole purpose of occupying a seat in these Commissions.

The existence of such heavy questions hanging over the process for selecting Magistrates for the Supreme Court and Appellate Courts also complicates the perceived neutrality of the Magistrates who have been selected by these means, and who are themselves expected to serve an objective role in the Nominations Committees going forward. The ILAC experts were told by numerous interlocutors that the Judiciary is widely perceived to be corrupt and politicized.

152 Gabriela Knaul, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Un doc. A/ HRC/23/43/Add.4 (2013).

153 Impunity watch, “Policy Brief: Comisiones de Postulación e Independencia Judicial en Guatemala” (2014).

154 In the words of one observer, the process has been the process has been “perverted from the inside.” Bill Baretto, “El sistema de comisiones es bueno, pero en la práctica se ha pervertido” *Plaza Publica* (7 October 2014).

155 Steven Dudley, “The War for Guatemala’s Courts. How political, corporate and criminal interests seek to influence Guatemala’s justice system”, *Insight Crime*, (2014).

156 The Bar Association’s internal election processes have been described as “obscure” with little clear accountability. The Bar Association receives public funding, but claims it is not subject to scrutiny from the General Comptroller’s Office or via the Access to Public Information Law. It does not issue a public report on its elections or regarding campaign funding. About 7,000 out of the 20,000 affiliates participate in elections. Gabriel Woltke, “La pelea por el MP (y el Estado) comienza en esta elección olvidada”, *Nómada* (2 January 2017).

Several judges informed the experts that they were routinely offered (and turned down) bribes, reinforcing the sense that corruption in the judiciary is more the norm than the exception.¹⁵⁷

Internal Threats to Judicial Independence

The ILAC Expert Team also received information regarding potential threats to judicial independence from within the Judiciary itself. There are also documented cases that suggest that functional independence is also weakened by excessive concentration of administrative functions within the Judiciary and, more importantly, by the co-optation of the judiciary at the highest levels by illegal groups. The ILAC team heard from some in the judiciary that in 2014 a movement of around 50 judges emerged that called for the improvement of the integrity of the Guatemalan bench. This group faced reprisals in the form of threats of transfer, denial of staff and supplies, and other similar measures apparently intended to have a chilling effect. At present there is little support in the Supreme Court for this movement.

The Blanca Stalling Case: One of the most revealing examples of threats to judicial independence emanating from within the Judiciary is the case of Supreme Court Magistrate Blanca Aida Stalling Dávila, which was made public on February 2017, when the police detained Ms. Stalling on charges of trading in influence. Judge Carlos Giovanni Ruano Pineda had filed a complaint against Stalling stating that on 16 September 2016, he was summoned into the Supreme Court of Justice's Office where she proceeded to demand that he assist her son, who was then a defendant in a fraud case being heard in Judge Pineda's court. Judge Pineda had recorded the conversation.¹⁵⁸ On February 2017, Congress lifted Stalling's immunity and on May 2017, she was removed from her position as Supreme Court of Justice by the Council of the Judicial Career. She remains in preventive detention while her trial continues.

Stalling was already a controversial figure linked to several criminal investigations: she allegedly attempted to block the impeachment process against former President Otto Pérez Molina and was linked to a separate attempt to influence the 2015 "La Linea" case.¹⁵⁹ Ms. Stalling was also rumoured to have built a powerful structure within the judiciary; she had been Director of the Institute for Public Criminal Defence from 2004 to 2014, as well as a prosecutor and an advisor to former President Álvaro Arzú.

157 Helen Mack, director of the Myrna Mack Foundation and member of the National Commission to Support and Assess the Modernization of the Justice System (*Comisión Nacional de Apoyo y Seguimiento a la Modernización del Sector Justicia*) explained that: "What we are seeing in this distortion is that the most corrupt judges are the ones that remain, those with contacts, those who are part of the structure. The good judges, because there are good judges, not all are corrupt, are signalled out, stigmatized and expelled from the Judicial Career. Carlos Arrazola, 'Estas son las Comisiones de Postulación más deslegitimadas,' *Plaza Pública* (15 September 2014).

158 CICIG, "Capturan a la Magistrada Blanca Stalling Dávila" *Comunicado de Prensa 014* (2017).

159 Soy592, "¿Quién es la magistrada Blanca Stalling?" (8 February 2017).

The Stalling case revealed the pressures lower level judges can be exposed to, in a context in which administrative power and appeals jurisdiction is concentrated in a single Supreme Court and appointments at all higher levels are made via a process without sufficient guarantees to ensure that merit trumps inappropriate influence.

In such a context, the combination of the failure of the political system to provide sufficient resources to allow the judiciary to operate effectively and the failure of the judicial leadership to establish professional routines and procedures can create a situation in which judges that act independently can be punished by measures that, if challenged, can be written off to lack of resources or bureaucratic capriciousness.

For instance, the ILAC experts spoke with judges in the recently-created High Risk Courts who have observed an arbitrary distribution of workload that affects both the type and number of cases handled by each judge, and can be used to reward or punish. Some judges who had ruled against figures associated with the military and security forces in controversial cases related to wartime crimes now found themselves with virtually no cases, exposing them to bad performance evaluations for not clearing enough cases. Meanwhile, another judge currently working on a complex, high-profile and controversial case, has been given an excessive additional caseload, exposing him to the risk of bad evaluations for not being able to cope.

Under the Law on Criminal Jurisdiction in High Risk Proceedings (*Ley de Competencia Penal en Procesos de Mayor Riesgo*) the Criminal Law Chamber of the Supreme Court assigns cases to High Risk Court chambers upon the request of the Public Prosecutor's Office. However, the law does not regulate this process more closely and the Criminal Law Chamber has yet to define an objective, predetermined and impartial system to assign these cases. The resulting, unfair allocation of cases is clearly arbitrary at best and incompatible with international standards. The UN Special Rapporteur on the independence of judges and lawyers has stated that "the method for assigning cases within the judiciary is paramount for guaranteeing the independent decision-making of judges" and recommended development of "a mechanism to allocate court cases in an objective manner."¹⁶⁰

In the present case, there are strong grounds to believe that the discretion to assign cases at will is not only arbitrary but actively being abused in order to punish judges who have acted independently. Given that a single authority – the Supreme Court – has plenary control not only over allocation of cases but also the evaluation system and the possibility to deny promotions or transfer judges, the Guatemalan judiciary is, by any standard, far from having created guarantees for the independent decision-making of judges.

160 Leandro Despouy, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41/Add (2009), paras. 46-47.

III.a.ii. Economic Independence

For the judges to enjoy economic independence, the judiciary must be independent from other state powers and judges must be free of internal pressure, applied with a view to interfering with their work. The Constitution establishes a yearly minimum budgetary allocation to the judiciary of no less than 2% of the state's ordinary national income, while also reserving any income resulting from activities pertaining to the administration of justice for the sole use of the Judiciary. The Supreme Court is constitutionally responsible for the approval of the budget of the judicial branch, while the Treasury is obliged to transfer budgetary funds to the judiciary every month automatically, e.g. without any input from the legislative or executive branches. While the Constitution clearly safeguards the financial independence of the judicial branch in principle, reported delays in delivery of the monthly transfers from Treasury can be perceived as a threat to judicial independence.¹⁶¹

Economic independence implies not only that judges are autonomous in the use of their resources, but also that these resources be sufficient to guarantee an adequate administration of justice. However, many of the judges and judicial employees consulted by the ILAC expert team raised concerns about insufficient resources, including lack of qualified staff, inadequate office space, weak safety and security measures and arbitrary allocation of resources. The Supreme Court is responsible for the design and approval of the judicial budget but has neither developed objective criteria and procedures for the allocation of resources within the judicial branch, nor transparent decision-making processes, rendering it difficult to understand the rationale for the apparent misallocations identified by many judges.

An objective lack of resources appears to affect judges of all instances throughout the country, as observed by the ILAC team during its multiple visits to courtrooms in both the capital and the provinces. ILAC experts witnessed the absence of security guards in court facilities outside of Guatemala City, inadequate storage spaces for case files, overcrowded offices, and other significant deficiencies. Surprisingly, the evidence of lack of resources was most striking in the recently created High Risk Courts, which are meant to play central role in Guatemala's struggle against impunity. Given the existential importance of this issue for the country, as well as the security risks involved and the need to efficiently process highly complex cases, denial of resources to these courts appeared as a glaring and hardly justifiable deficiency.

Nevertheless, judges from the High Risk Courts claimed that resource deficiencies hamper their ability to process cases, cause unnecessary procedural delays and even imply a threat to their own security. Judges that spoke with ILAC's experts reported shortage of auxiliary staff and office supplies such as paper and copy machines, diminishing their capacity to process the heavy paperwork related to complex cases. Judges in the newly created High Risk Court "D" also reported that the lack of an assigned room for hearings frequently resulted in their suspension, leading to unnecessary delays in urgent cases.

161 ICJ, "La Independencia Judicial en Guatemala" (2016).

The ILAC team visiting the High Risk Courts were struck by the failure to ensure safe and reliable access to courtrooms and office spaces. Upon arrival, the team found half of the elevators in the multi-story tower housing the courts non-operational. Those that were working were already full of people who had entered from the garage under the building by the time they reached the main lobby, meaning that the only way of accessing upper floors was to take the stairs down to the sub-basement, wait in a mixed crowd of court personnel, visitors, lawyers, handcuffed suspects, and policemen, before squeezing into elevators filled well beyond their capacity on the way up. From the points of view of effectiveness, security and accessibility of the courts, the situation could only be described as far from ideal.

Of no less concern, the lack of resources devoted to providing adequate security measures for judges – and particularly High Risk Judges – poses a serious threat to their personal integrity. Despite repeated written and verbal requests to the Supreme Court for better security, the response has been entirely inadequate.¹⁶² For instance, Judge Erika Aifán cited being assigned non-working vehicles and security personnel without training or supervision. In one case, an agent was assigned a non-working firearm. Some security agents did not work full hours, departing without leave during court sessions when they were meant to be present. Negligent agents suffer no consequences beyond transfer to a different post. The judges reported asking the president of the Court for a general risk assessment, only to see the process bog down entirely into a defence of one particular security agent.

The risks involved are not theoretical. Judges of the High-Risk Tribunals reported numerous threats, as well as instances of being followed and harassed.¹⁶³ Some of the judges suggest that cases involving particularly dangerous litigants may be assigned as a means of control or punishment. Judge Yassmín Barrios Aguilar, for example, was assigned a case involving gang members and received death threats. Judge Pablo Xitumul reported that he received threats from gang members and that during one difficult criminal trial he was handling, his son was attacked and shot three times. Judges have also been subject to defamation campaigns, including allegations of homosexuality or children out of wedlock with court staff that are calculated to stigmatise the judges in the context of Guatemala's socially conservative society.

Finally, some of the judges suggested that they may be subject to espionage or illegal supervision. At one point Judge Erika Aifán noticed a surveillance camera placed to record what she said and did at and near her desk; she later found out that this had happened in other judges' chambers as well.

162 The Supreme Court of Justice is responsible for the personal safety of judges, with resources belonging to the Judicial Organ. The Judicial Branch has its own Security Department, in charge of -among other things- assessing security risks of judges.

163 The IACHR made similar findings in its recent report: "The report also confirms the worrying situation of justice operators in the country, who face accusations, harassment, smear campaigns, assault and threats to their life and integrity, especially when they are involved in high impact cases of corruption, serious human rights violations or cases with significant economic interests at stake." IACHR, *The Situation of Human Rights in Guatemala*, (OEA/Ser.L/V/II. Doc. 208/17), 31 December 2017.

When she reported the matter to the Supreme Court, the cameras were removed but without an explanation or identification of the responsible party. At another point, Justice Aifán discovered a chain of paper clips hanging outside her office window, and was informed that the device could be used as an antenna. As with the cameras, this device was also removed without explanation.

III.a.iii. Professional Evaluations, Disciplinary Regimes and Tenure of Judges

The importance of judicial irremovability in connection with the principle of judicial independence has been recognized in international guidelines such as the UN Basic Principles on the Independence of the Judiciary, adopted in 1985.¹⁶⁴ Tenure in office helps shield judges from external influences that could compromise their independence. The Guatemalan Constitution establishes the irremovability of ordinary judges, with exceptions only as prescribed by law, but also stipulates that: “magistrates of any category and ordinary judges will be appointed to their positions for a duration of five years, with the possibility of reelection and reappointment, respectively. During this period of time, they cannot be removed or suspended, except in those cases and through the formalities established in the law”. The Constitution also stipulates that judges and magistrates “shall not be separated, suspended, transferred or forcefully retired, if not by virtue of a legal justification and with observance of all legal guarantees”.¹⁶⁵

While these constitutional provisions are robust, the legal tenure of judges in Guatemala can only be assessed in light of the effect of secondary legislation and the implementation of procedures related to the disciplinary regime, sanctions, transfers, and professional evaluations of members of the judiciary.

164 European Network of Councils for the Judiciary Project Team, “Development of Minimum Judicial Standards III. Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary. Report 2012-2013” (2016).

165 Constitutional Chamber, Case No. 657-94, 70.

Disciplinary Regime

Judicial independence also requires accountability and judicial disciplinary regimes constitute a mechanism to achieve this aim.¹⁶⁶ However, it is also acknowledged that such regimes can threaten judicial independence and become mechanisms of intimidation if misused, manipulated or poorly designed.

In June 2016, the Congress approved the Law of the Judicial Career, which established a new disciplinary regime for members of the Judiciary. The law introduced categories of prohibited behaviours (minor, grave and very grave misconduct) created Boards of Judicial Discipline, with the power to apply all disciplinary sanctions to judges short of dismissal (*destitución*), which requires a decision of the Supreme Court. The Boards are constituted by two magistrates of the Courts of Appeal and an ordinary judge, with investigative activities carried out by the General Supervision of Tribunals (*Supervisión General de Tribunales*) of the Supreme Court. The Law sets out pre-established sanctions and guarantees for key principles, including the right of judges to only be investigated and sanctioned by an authority with jurisdictional powers.¹⁶⁷

Many observers praised this reform.¹⁶⁸ However, judges expressed concerns about aspects of the new disciplinary regime, including overly vague descriptions of prohibited behaviours and the potential duplication of criminal and administrative sanctions for the same misconduct, with some fearing the possibility of a “witch-hunt” against judges. In January 2016, two judges’ associations, the Institute of Magistrates (*Instituto de Magistrados*) and the Association of Judges and Magistrates (*Asociación de Jueces y Magistrados*) filed challenges to the law that the Constitutional Court has yet to decide.

Observers have stressed the importance of international support and scrutiny of the judicial discipline process. While abuse of the disciplinary process to sanction competent and honest judges is a major concern, the risk of failure to sanction dishonest or corrupt judges is no less pressing. Helen Mack, of the *Fundación Myrna Mack* told ILAC of her concern that up to 90 or even 95 per cent of judges may be corrupt. She has filed complaints against some of them, but none succeeded. She said that when CICIG proposed reforms in investigation and sanctions for misconduct, the judges uniformly rejected them. Ms. Mack stressed the importance of institutional changes and her strong belief that judicial oversight should be conducted by an agency independent of the Supreme Court. She claimed that a fund provided for judicial evaluation have been diverted to other purposes by the Supreme Court.¹⁶⁹

166 ICJ, “Judicial Accountability: A Practitioner’s Guide” (2016).

167 ICJ, “La Independencia Judicial en Guatemala” (2016).

168 Jessica Gramajo, ‘Aprueban nuevas normas para jueces y magistrados,’ *Prensa Libre* (29 June 2016).

169 Interview, 16 October 2017.

Exclusive competence over disciplinary proceedings against judges and magistrates

An important characteristic of judicial disciplinary regimes is that supervisory powers should be exercised by an autonomous authority composed of peers of impugned judges, in order to guarantee independence from external influences. In this regard, one of the most serious violations of judicial independence identified by ILAC is in respect of the Honour Tribunal of the Bar Association. This Tribunal has attributed to itself the competence to sanction judges for alleged misconduct committed in the course of exercising judicial powers. This practice is reportedly becoming a mechanism for private lawyers to intimidate or “punish” judges.

The Honour Tribunal justifies its competency arguing the Law of Mandatory Collegiate Affiliation (*Ley de Colegiación Profesional Obligatoria*) states that all professional associations are responsible for supervising the ethical and legal performance of their affiliates. Furthermore, they claim that there is no violation of the principle that legal action cannot be instituted twice for the same cause of action (*non bis in idem*) since the nature of the processes carried out by professional associations do not imply an exercise of the penal law (*ius puniendi*) of the State, but is rather a separate process of a different nature.¹⁷⁰

Although Guatemala’s high courts have ruled on the practice, they have left a degree of ambiguity. While the Supreme Court has argued that this practice violates the independence of judges, the Constitutional Court has stated that the Bar Association has limited competence to impose its disciplinary regime on sitting judges, within the framework of the principle that the legality of actual judicial decisions can only be determined by a tribunal with appellate jurisdiction and not a disciplinary entity: “The Honour Tribunal of the Guatemalan Bar and Notary Association is not competent to hear complaints for ethical misconduct against judges or magistrates for actions derived from the exercise of their judicial powers, if the conduct that they are accused of is already established as a punishable misconduct in the Law of the Judicial Career”.

Judges claim that in practice, private attorneys are using their disciplinary regime as a mechanism for intimidating and harassing judges. Defending a case in the Bar Association’s Honour Tribunal is by all accounts costly, time-consuming and stressful, constituting even in the best case a significant distraction from the judicial duties of impugned judges.

170 This argument is based on the criteria for *non bis in idem* set out by the Inter-American Court of Human Rights, decision CO-5/85.

Transfers

The Law on the Judicial Career sets out the circumstances under which judges and magistrates may be transferred. Requests for voluntary transfers are submitted to the Council for the Judicial Career, which must evaluate the motivation of the request and the merits of the requesting judge to determine whether the transfer is appropriate. Alternate judges and magistrates are given priority for transfers when a position is vacant. Involuntary transfers may be ordered by the Council, based on “service needs”, but the transferee is entitled to a hearing and must be adequately compensated for expenses related to the transfer.

The Constitutional Court of Guatemala has confirmed that “the irremovability of judges is not an absolute guarantee, but any decision against it must be duly motivated and come as the result of a procedure in which the incumbent judge can exercise his or her defence”.¹⁷¹ However, judges expressed concerns to ILAC that involuntary transfer remained a less drastic and overt means than dismissal for the Supreme Court to control or punish judges, diminishing their independence.

Performance Evaluations, Promotions, Re-election and Reappointments

Performance evaluation is central to judicial careers in Guatemala, constituting a fundamental aspect of the motivation behind promotions, re-elections and reappointments of members of the Judiciary. The ILAC team was repeatedly told that performance evaluations are routinely used as means of political control over judges.

The Law of the Judicial Career states that “promotions ought to be carried out with strict compliance to the scale of satisfactory performance developed by the Council of the Judicial Career.”¹⁷² The Constitutional Court has ruled that renewal of judge’s appointment at the end of their terms constitutes “a legal obligation (not a discretionary attribution) which the Supreme Court of Justice must comply with, thus observing the performance rate obtained, because the doctrine held by the Constitutional Court indicates that only when such rating is unfavourable will it be viable not to renew the appointment of a judge.”¹⁷³ According to the law, judges and magistrates are subject to annual evaluations by the Council for the Judicial Career, which makes recommendations subsequently reviewed by the Supreme Court.¹⁷⁴

171 Constitutional Chamber, Case No. 657-94, 70.

172 Law on the Judicial Career, Article 32.

173 *Jueza Sonia Toledo Castañeda v. Corte Suprema de Justicia*. Constitutional Chamber of Guatemala, Case No. 829-2007.

174 Article 32 of the Law of the Judicial Career.

An early concern regarding the Council of the Judicial Career was its composition, which was seen as insufficiently broad and liable to allowing decisions to be taken by a small circle of high judicial officials.¹⁷⁵ In September 2017, the Congress amended the Law on the Judicial Career, introducing a more balanced and independent composition for the Council on the Judicial Career.¹⁷⁶ The aim of the reform was to secure a higher level of independence and objectivity within the Council. However, many interlocutors ILAC spoke with underscored the need to monitor the impact of this reform in practice.

The Council on the Judicial Career delegates the design and implementation of evaluation systems to the Performance Evaluation Unit. While the law calls for annual evaluations, the Performance Evaluation Unit has developed a system based on five-year reviews, four-year reviews and second-term reviews; in 2015, a total of 132 judges were evaluated with over 80% of them having been good or outstanding results.¹⁷⁷ According to the Performance Evaluation Unit, assessments are carried out according to the Bylaw on the Judicial Career and the Manual for the Evaluation of Judges. The Manual is not publicly available, nor are its contents generally known to members of the Judiciary. Many judges complained that evaluations are arbitrary and lacking in objectivity, allowing political manipulation and clientelism.

175 The Council was then composed of: The President of the Supreme Court, the Head of the Human Resources Division of the Supreme Court (hierarchically answerable to the President of the Supreme Court), the Head of the Judicial Organ's Institutional Capacity Unit, and one representative each of the Assembly of Judges and the Assembly of Magistrates. Given that the Council only required three members to be validly constituted and decisions were taken by a simple majority, it was considered that such composition granted the President of the Supreme Court an advantageous position that "opened the possibility that the criteria of the President of the Judicial Organ and the Supreme Court become predominant." ICJ, "La Independencia Judicial en Guatemala" (2016).

176 According to this reform, the new Council is constituted by a representative of the Supreme Court of Justice, one delegate each from the Assembly of Magistrates, the Assembly of Appellate Judges, the Assembly of Ordinary Judges, and the Assembly of Peace Judges, a professional in psychology, another in public administration and a specialist in human resources.

177 Consejo de la Carrera Judicial de Guatemala, "Memoria de Labores, 2015-2016".

III.b. Independence of Prosecutors

The International Commission against Impunity in Guatemala (*Comisión Internacional Contra la Impunidad en Guatemala* – CICIG) has captured much of the national and international attention in relation to Guatemala's recent struggle against corruption. However, even though the CICIG has undeniably played a crucial role, it is the Public Prosecutor's Office (*Ministerio Público*) that is fundamentally responsible for investigating crimes, prosecuting them, and upholding the rule of law.

Prosecution relies heavily in the principle of managed discretion, meaning in practice that prosecutors should exercise independence within the framework of policies that clearly define their powers, obligations and objectives. In the Guatemalan context, such a framework must provide prosecutors with tools to match the ever-growing complexity of the crimes they seek to eradicate. Consistent with international and regional standards, prosecution offices are increasingly developing areas of substantive specialization in respect of corruption, organized crime, and other serious offenses.

As is the case for judges, the independence of prosecutors demands above all that the prosecutor's decisions and activities are free from undue pressures. This requires political authorities to refrain from interfering in decisions on handling individual cases. It also implies that procedures for the hiring, retention, promotion, and mobility of prosecutors must be fair and impartial.

The Public Prosecutor's Office has made significant progress in many of these areas over the last few years, and its work has been acknowledged by both the international community and civil society.¹⁷⁸ Nevertheless, it continues to face many challenges, including the pursuit of complex and resource intensive prosecutions against organized crimes and corruption, and the associated security risks to victims, witnesses, judges and prosecutors themselves. Maintenance of public trust is crucial to the effectiveness of prosecutorial work in order to encourage citizens to report crimes and cooperate with law enforcement officials. Successful prosecution also requires political commitment at the highest levels.

178 Tulio Juárez, 'Doce países más y Unión Europea reconocen y aplauden avances de la CICIG y el liderazgo de Iván Velásquez', *el Periódico* (27 April 2018).

III.b.i. The Process for Selecting the Attorney General

At the time of the ILAC mission, Guatemalan interlocutors were virtually unanimous on the crucial importance of the selection process for a new Attorney General set for early 2018.¹⁷⁹ At the time of writing of this report, the process was still ongoing, and closely followed by national civil society and many international observers.

The Constitution specifies that the Public Prosecutor's Office is headed by the Attorney General (AG).¹⁸⁰ Candidates for Attorney General must be members of the Bar and undergo a similar selection process to that for Supreme Court Magistrates: they are appointed by the President from a list of six candidates selected by a Nominations Committee comprising the President of the Supreme Court, the deans of the law schools, and two representatives of the Bar Association, namely the President of the Board and the President of the Honour Tribunals. The selection process takes place every four years.

Because the AG selection process relies on the mechanism of nomination committees, it is liable to the same non-transparent negotiations and clientelist practices that have been identified in the election process for judges and magistrates. The key difference is that the final decision rests with the President and not Congress, meaning in practice that the ruling party tends to have a more dominant role in the obscure negotiations that allegedly underpin these processes. This lack of transparency was highlighted in the election of sitting Attorney General Thelma Aldana. Conservative actors allegedly set out to replace former Attorney General Claudia Paz y Paz in light of her role in promoting accountability for conflict-era crimes;¹⁸¹ indeed some of the actors involved subsequently went on the record about their roles.¹⁸² Ms. Aldana herself acknowledges that her selection was the product of obscure negotiations by corrupt actors, as pointed out by CICIG Commissioner Iván Velásquez during his meeting with the ILAC Expert Team.¹⁸³ Even though Aldana has proven herself independent, her selection process is exemplary of the flaws plaguing the system.

With the process to replace Thelma Aldana currently underway – and Guatemala's ability to free itself from corruption and impunity at stake – the credibility of the process will rest on the extent to which it is, and is perceived to be, based on the application of objective and clear criteria that accentuate the aptitude, probity and academic and professional backgrounds of the candidates. These concerns should also shape the outcome of discussions in Congress on proposed constitutional reforms meant to modify the process of selecting the Attorney General.¹⁸⁴

179 October 17, 2017.

180 Constitution of Guatemala, Article 251.

181 Carlos Arrazola, 'La favorita según muchos, la mas preparada según ella', Plaza Pública (2014).

182 Jose Luis Santz, 'Guatemala: The Fall of Paz y Paz, the End of a Judicial Awakening', InSight crime (August 15 2014).

183 October 17, 2017.

184 According to the proposal under discussion, the AG would be appointed by the President from a list of four candidates made up of equal number of candidates selected by the Supreme Court and Congress. Propuesta de Reforma Constitucional, Iniciativa 5179. "Exposición de Motivos Reforma Constitucional en Materia de Justicia" (2016).

III.b.ii. Strengthening the Public Prosecutor's Office

The Public Prosecutor's Office has taken significant steps to improve its effectiveness and reach during the last decade. It has, for example, expanded access to the justice system by creating victims' support offices across the country and increased the number of indigenous language interpreters. Between 2008 and 2013, the number of cases lodged with MP soared by more than a third (from 216,111 to more than 300,000); however, the number of cases resolved without going to court increased almost four times (from 5,800 to 27,950) and convictions more than doubled (from 3,280 to 7,122).¹⁸⁵

In 2016, Congress approved reforms to the Organic Law on the Public Prosecutor's Office, introducing key changes that contributed to its effectiveness and independence, including by:

- stipulating that the Attorney General can only be removed if it is determined that she or he knowingly and wilfully committed a crime;
- introducing a merit based system of advancement for prosecutors; and
- creating a new disciplinary system with a Supervisory Authority to investigate complaints against prosecutors and Disciplinary Boards to apply sanctions.¹⁸⁶

Significant challenges and capacity gaps remain. Under the Constitution, the autonomy of the Public Prosecutor's Office extends to financial and budgetary independence. According to prosecutors the ILAC team spoke with, the budget of the Prosecutor's Office fully covers current payroll and services, as well as some resources for improving and expanding the organization to the extent necessary to make it more effective and accessible throughout the country. Of the 340 municipalities in Guatemala, the Prosecutor's Office is now present in 39. Nevertheless, the Prosecutor's Office has expanded significantly; from 2014 to 2017, the institution opened a series of offices and specialized agencies all over the country, including 66 new prosecutorial departments, representing institutional growth of 61 per cent.¹⁸⁷

For 2018, the Prosecutor's Office has asked the Congressional Finance Commission for a further budgetary increase for projects to further reduce the gap between the institution and citizens. The Office is also implementing a new system to improve the coordination between headquarters and regional offices by creating Regional Prosecutors to act as a liaison.

¹⁸⁵ Open Society Justice Initiative, "Effective Prosecution: Guatemala's Public Ministry in an International Context" (2014).

¹⁸⁶ Decreto Legislativo 18-2016, Reformas a la Ley del Ministerio Público.

¹⁸⁷ Ministerio Público, "Presupuesto 2018: MP solicita ampliación para fortalecimiento Institucional" (27 October 2017).

III.b.iii. Litigation in Bad Faith

Guatemalan defence lawyers, like their colleagues worldwide, are required to represent their clients to the best of their ability and within the confines of applicable rules and procedures. However, many legal experts ILAC spoke with alleged that defence attorneys in recent cases involving corruption and serious human rights violations had abused the exercise of legal defence and even undertaken illegal actions on behalf of their clients in order to cause maximum delay in proceedings.

One oft-cited example such “malicious litigation” or “litigation in bad faith” involves the use of repetitive *amparo* complaints – alleging violations of fundamental rights – in order to delay judicial processes.¹⁸⁸ In the case of the Dos Erres trial, in which army officers were accused of a massacre of villagers in the department of Petén, over 40 *amparos* were filed to stop the detention of the 17 accused. In a corruption prosecution (known as the “Mi Familia Progresá”), three defence attorneys filed 70 *amparos*, all of which failed.

The 2013 trial for genocide of late former president Efraín Ríos Montt is also considered by many a textbook example of malicious litigation and its effect in obstructing justice. The start of the trial was delayed nearly a year due to repeated procedural objections filed by the defence, following which all four defence lawyers resigned on the first day of trial and appointed a new lawyer in their place, in an effort to force some of the judges who were friends with that lawyer to recuse themselves.¹⁸⁹

The Constitutional Court exercised its exclusive power to regulate the jurisdiction of constitutional matters by introducing reforms to the Law of Amparos in 2013 and 2014. Its aim was to clarify the competences of different categories of judges in relation to *amparo* appeals and to reduce unnecessary procedural delays as a result of their use in ongoing judicial processes.¹⁹⁰ Nevertheless, abuse of the practice prevails, according to many observers and efforts continue to identify ways to preserve the legitimate protective function of *amparo* appeals while preventing their abuse to delay proceedings through repetitive invocations where there is no significant prospect of success.

188 Rachel Sieder notes that the *amparo* motion compares unfavorably with similar *tutela* actions in Colombia that can be filed without the assistance of a lawyer. Accordingly, she argues that the monopoly of lawyers over *amparo* actions makes them less accessible to marginalized communities and more liable to abusive invocation by defense attorneys in order to delay proceedings. Rachel Sieder, “The judiciary and indigenous rights in Guatemala”, *International Journal of Constitutional Law*, vol. 5, no. 2 (2007) 238-9.

189 Consejo Editorial de Plaza Pública, ‘La CC favorece el litigio malicioso’, *Plaza Pública* (22 May 2013).

190 Byron Rolando Vásquez, ‘Corte de Constitucionalidad intenta evitar el abuso de amparos’, *Prensa Libre* (13 December 2013).

III.b.iv. Lifting of Immunity

Judicial immunity and protections against the lifting of immunity (*antejuicio*) is a measure designed to protect public officials in the exercise of their constitutional powers from unfounded criminal actions that could be politically motivated. Immunity currently extends to a wide swathe of public actors including the President and Vice-President, ministers and deputy ministers, congresspersons, the Human Rights Ombudsman, the Attorney General and all judges and magistrates.¹⁹¹ The aim of the *antejuicio* process is to ensure that neither the complaint underpinning the prosecution of a public official nor the prosecution itself is politically motivated. However, many observers raised concerns that the impeachment process is liable to abuse as a means of achieving impunity by preventing well-grounded prosecutions that are not politically motivated.

The Guatemalan *antejuicio* process contains checks and balances. For instance, requests to lift the immunity of members of congress must be approved by the Supreme Court, guaranteeing that such questions are handled by another branch of government instead of being decided exclusively within legislative branch. Similarly, Congress rules on lifting the immunity of magistrates of the Supreme Court and Courts of Appeals. However, in the context of weak judicial independence and the existence of networks of corruption within state institutions, this process of checks and balances is at risk of being reduced to a mechanism of quid pro quo, allowing the branches to shield each other from prosecution.

An apparent example of this risk materialized during the timeframe of the ILAC assessment. In September 2017, the Supreme Court approved a request to lift the immunity of the President, Jimmy Morales, in relation to charges of illegal campaign funding brought by CICIG. However, Congress rejected the request. In October 2017, the Supreme Court rejected three more requests to lift President Morales' immunity, as well as similar requests against 107 members of Congress accused of passing legal reforms that would benefit themselves.¹⁹² These proceedings were criticized for lacking transparency and clear indications that the decisions were taken based solely on the merits of the accusations.

191 A complete list of those accorded immunity as a result of their office includes the President of the Republic, Vice President of the Republic, President of the Supreme Court of Justice, Magistrates of the Supreme Court of Justice, Magistrates of the Supreme Electoral Tribunal, Magistrates of the Constitutional Court, Magistrates of the Courts of Appeal, Ministers, Legislators, Vice-ministers, Presidential Secretaries, Deputy Secretaries, the Human Rights Ombudsman, the Attorney General, the Solicitor General, Judges, Governors, Comptrollers, Mayors, and Constituent Assembly members. The number of officials has increased over the years. In the view of one observer elites have "increased unnecessarily the number of high-ranking public officials that are credited with this protection. Aguirre, V; Fuertes, M. y Sánchez, A., *El antejuicio en Guatemala: aportes para su estudio* (Guatemala: Instituto de Problemas Nacionales de la Universidad de San Carlos, 2017).

192 Julio e Santons, 'CSJ rechaza antejuicios en contra de Jimmy Morales y 107 diputados', *el Periódico* (27 April 2018).

IV. Transitional Justice

Transitional justice has been understood as contributing to the rebuilding of rule of law since at least 2004, when then-UN Secretary General Kofi Annan reported on the links between these fields of activity.¹⁹³ The four mechanisms for achieving transitional justice, as set out by the Secretary-General, are truth-seeking, prosecution of those responsible for abuses, reparations to victims, and institutional reforms to address structural factors that allowed abuses to happen, preventing their recurrence.¹⁹⁴

The previous UN Special Rapporteur on transitional justice, Pablo de Greiff, related institutional reforms very clearly to prevention, in the sense of measures to shield the population as a whole in transitional societies from the resumption of gross violations of human rights.¹⁹⁵ He noted that reform of the judiciary is a relatively overlooked but crucial form of institutional reform:

Given the importance of an independent and effective judiciary in securing rights — but also of acknowledging the dubious role some judiciaries have played in pre-transitional periods in some countries — it is somewhat surprising that judicial reform has not played a more prominent role in discussions about guarantees of non-recurrence. This is in spite of recommendations made by many truth commissions in relation to judicial reform and the fact that many transitional countries have reformed their justice systems.¹⁹⁶

In a more recent report, however, de Greiff acknowledged the particular challenges of transferring the transitional justice model from the negotiated post-authoritarian transitions where it was born to the complex and weakly institutionalized post-conflict settings where it is most frequently applied today.¹⁹⁷ He points out that the very institutions necessary for the realization of human rights and transitional justice are typically destroyed in conflict, raising the question of “how post-conflict societies should be assisted ... to effectively bridge institutional gaps”¹⁹⁸

193 UN Security Council, “The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General”, UN Doc. S/2004/616 (23 August 2004).

194 Under ideal circumstances, transitional justice programs should be ‘comprehensive’, making full use of all four mechanisms to rebuild trust in institutions and contribute to long-term reconciliation. Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff”, UN Doc. A/HRC/21/46 (09 August 2012).

195 UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff”, UN Doc A/HRC/30/42 (04 September 2015), para. 22.

196 De Greiff Prevention Report, para. 52 (citation omitted).

197 UN Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, UN Doc A/HRC/36/50 (21 August 2017).

198 Id, paras. 55-6.

Guatemala is mentioned as one of the first countries historically to raise this dilemma:

...once the transitional justice model took shape, it was transferred, with little modification, to contexts in which the background conditions that made it effective were absent. Transitional justice has often – and in the recent past, predominantly – been implemented in weakly institutionalized post-conflict contexts. ... Not surprisingly, the outcome of its implementation has been uneven. This is true of two early cases, namely, El Salvador and Guatemala...¹⁹⁹

ILAC and its member organizations have engaged with the question of how reform of the justice sector can contribute to transitional justice and prevention in conflict-affected settings.²⁰⁰ As indicated in this report, much remains to be done in terms of reforming Guatemala's justice system in order to ensure the broadest possible access to justice in the country. The extent to which these reform efforts succeed will determine the ability of the judiciary to play a preventive role in a society that has yet to transition to positive peace and stability.

However, the sense that justice has been done for the overwhelmingly indigenous victims of the conflict will also depend on complete fulfilment of the Peace Accords, including commitments to recognize the “jurisdictional autonomy” of indigenous communities wishing to apply their own customary laws.²⁰¹ In addition, justice operators in Guatemala also continue to play a direct and central role in efforts to secure accountability for crimes committed during the conflict through the investigation and prosecution of perpetrators. Although Guatemala has made important strides in prosecuting wartime violations, much remains to be done and many obstacles to accountability remain over 20 years after the end of the conflict.

¹⁹⁹ Id, para. 40.

²⁰⁰ Rhodri Williams, “Judges as Peacebuilders: How Justice Sector Reform Can Support Prevention in Transitional Settings” *ILAC Discussion Paper* (March 2018).

²⁰¹ Rachel Sieder, “The judiciary and indigenous rights in Guatemala”, *International Journal of Constitutional Law*, vol. 5, no. 2 (2007).

IV.a. Incorporation of the Peace Agreements

Despite the failure of the 1999 referendum to incorporate the Peace Accords in Guatemala's Constitution, some notable steps have occurred to combat discrimination and to make the State more reflective of Guatemala's diversity. One of the most important changes was the passage of 2002 legislation mandating decentralization, with reserved seats for representatives of indigenous communities in the Departmental Development Councils that decide and plan development policy at the local level. Guatemala also criminalized racial and other forms of discrimination for the first time in the country's history.²⁰²

In 2016, 20 years after the Peace Accords, and one year after the "Guatemalan Spring" brought mass protests against impunity and corruption, the country embarked on an unprecedented effort to reform the justice system meant to include not only institutional reforms such as changes to the selection process for higher court magistrates, but also recognition of indigenous jurisdiction. This proposed reform would allow indigenous authorities to adjudicate local matters in accordance with customary rules and proceedings, in accordance with the Constitution, international human rights instruments, and the Peace Accords. These proposed changes were seen as particularly important in light of the difficulties Guatemala's indigenous majority has experienced accessing the formal justice system.²⁰³ Representatives of indigenous communities that spoke with the ILAC team in Quetzaltenango indicated that they did not believe in the formal justice system, which did correspond to their social and cultural reality, and only wanted to be submitted to their own adjudicatory institutions.²⁰⁴

For some of the judges who spoke with the ILAC team, recognition of legal pluralism was not only one of the most important issues facing Guatemala, but also one of the most difficult. Although indigenous customary systems in Guatemala are based largely on a restorative rather than a punitive model, and are not applicable to outsiders, interests opposed to recognition have fanned fears of draconian punishments and human rights violations. According to one judge, economic interests view recognition as "extremely threatening, because it would allow communities to organize, facilitating resistance to megaprojects."²⁰⁵ The level of controversy over this issue is reflected in the fact that the Constitutional Reform package failed in early 2017 over lack of agreement over procedures for considering the various proposals for recognition of customary law. Another indication of persistent tensions is the failure of all subsequent governments, including the current one, to acknowledge the 1999 finding of the Commission for Historical Clarification (*Comision de Esclarecimiento Histórico*, CEH) that wartime crimes against Guatemalan Indigenous Peoples amounted to genocide.

202 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 41.

203 Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN. Doc. E/CN.4/2003/90/Add.2 (2003).

204 Interview, 12 October 2017.

205 Interview, 09 October 2017.

IV.b. Transitional Justice Prosecutions

In its final report in 2004, MINUGUA stressed the lack of Government commitment to ending impunity for human rights violations, and particularly the crimes committed during the conflict described in the report of the Commission for Historical Clarification:

Many of the cases stem from massacres, such as those committed in Dos Erres (178 civilians tortured and killed over three days by the army in 1982); Rio Negro (70 females and 107 children killed by army soldiers and PACs in 1982); El Aguacate (21 peasants killed by a guerrilla patrol in 1988); and Cuarto Pueblo (400 residents of a village executed by the army in 1982). Others involve the assassination or forced disappearance of human rights activists and political figures, such as Myrna Mack (1990); Epaminondas González Dubón (1994); Jorge Carpio, a presidential candidate killed during the 1995 campaign; Manuel Saquic, a pastor and human rights coordinator (1995); and Monsignor Juan José Gerardi (1998). Other, more recent cases, such as the 2001 disappearance of university professor and former member of URNG, Mayra Gutiérrez and the killing of Barbara Ann Ford, a member of a religious order working on mental health projects in indigenous communities, remain unsolved.²⁰⁶

Prosecutions registered advances in two important cases, the murders of Monsignor Gerardi and Myrna Mack, resulting in convictions in 2001 and 2002, respectively, against members of the Presidential General Staff (*Estado Mayor Presidencial*). The verdicts represented the culmination of 12 years of extraordinary efforts on the part of the Mack family and four years by the Office of Human Rights of the Archdiocese of Guatemala, as well as a handful of committed prosecutors, judges and witnesses, all of whom had to overcome relentless efforts to undermine the proceedings.²⁰⁷

In subsequent years, gains were achieved in the investigation of the gross violations of human rights committed during the internal armed conflict. For instance, the Criminal Chamber of the Supreme Court declared the self-executing nature of judgments in cases referred by the Inter-American Commission on Human Rights (IACHR) to the Inter-American Court.²⁰⁸ It also ordered the Public Prosecutor's Office to conduct new investigations to determine the direct perpetrators and masterminds responsible for the violations of human rights established by the Inter-American Court in its judgments.²⁰⁹

206 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 49.

207 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 49.

208 These included "Street Children (Villagrán Morales et al.); "Panel Blanca (Paniagua Morales et al.); "Bámaca Velásquez"; "Carpio Nicolle et al."; and "The Dos Erres Massacre".

209 IACHR, "Report on the Situation of Human Rights in Guatemala", Doc. 43/15 (2015), para 423.

In 2011, four soldiers were sentenced to 6,060 years each in the Dos Erres Massacre.²¹⁰ Subsequently, five persons were convicted for their participation in the 1982 Plan de Sánchez massacre; and one former police chief was convicted for his participation in the 1981 forced disappearance of the student Edgar Sáenz Calito.

In 2013, a criminal complaint against former President Efraín Ríos Montt, as well as other high-level military commanders for the crimes of genocide and crimes against humanity committed in the Ixil region in 1982 and 1983. Ríos Montt was accused of the assassination and torture of 1,771 Ixil Maya indigenous people and for the forced displacement of thousands of other victims when he was president and commander of the Guatemala Army (1982-1983). The trial began on March 19, 2013 in the First High Risk Court “A”, presenting the first time in Guatemalan history that a former Head of State was accused of such crimes in national proceedings. During the course of the proceedings, the IACHR received information about death threats against the presiding judges and granted precautionary measures on their behalf.²¹¹ On May 10, 2013, the First High Risk Court “A” convicted Ríos Montt, sentencing him to 50 years in prison for genocide and 30 years more for crimes against humanity. In this judgment, for the first time, the racial nature of the violence suffered during the armed conflict was acknowledged. Nonetheless, on May 20, 2013, under intense pressure from conservative business elites and retired military officers, the Constitutional Court, the highest judicial body, annulled the judgment and ordered a retrial.

The trial was to be resumed in January 2015, but was suspended after the High Risk Court “B” accepted the recusal brought by counsel for Ríos Montt against the chief judge of the Court.²¹² In August 2015, the trial resumed under Judge María Eugenia Castellanos, who ordered special provisions for the trial in light of the aging Ríos Montt’s state of health. Accordingly, Ríos Montt was not compelled to be present at the proceedings and would be represented in court by a guardian, the hearings would be closed to the public and the press, and no sanction would apply in the case of a conviction.²¹³

In December 2015, the Constitutional Court turned down an *amparo* appeal requesting an end to criminal proceedings against the Ríos Montt, holding that amnesty for the former general was not admissible and that he had to be investigated and tried, with the trial scheduled for the beginning of 2016.

210 One further soldier was sentenced in 2012. According to CEH, the Dos Erres massacre took place over three days in early December 1982 and was carried out by a counterinsurgency unit known as the Kaibiles. At the time, Ríos Montt was de facto president and commander-in-chief of the army. Over 200 residents of Las Dos Erres, a newly settled community in Petén, were killed in the massacre. Soldiers raped girls and women before killing them. They bludgeoned villagers, including children, to death and tossed many into a community well. Forensic investigators exhumed 162 bodies from Las Dos Erres. Of these, 67 were children under the age of 12.

211 IACHR, “Report on the Situation of Human Rights in Guatemala”, *Doc. 43/15* (2015), para 428.

212 According to civil society, this motion was filed after the time period established in the law had elapsed. WOLA, ICTJ, GHRC, CEJIL, DPLE, Impunity Watch, “International Organizations Applauds the Initiation of the First trial for Sexual slavery and Violence During the Armed Conflict in Guatemala: The Sepur Zarco case”.

213 *Redacción BBC Mundo*, “Guatemala: Ríos Montt enfrentará juicio pero no habrá condena”, *BBC* (25 August 2015).

On March 31, 2017, a pre-trial hearing was held in a new case against Ríos Montt and others in the army High Command at the time of the “Dos Erres” massacre.²¹⁴ However, the presiding judge assigned the case to High Risk Tribunal “B”, which also presided over the stalled Maya Ixil genocide case against Ríos Montt.²¹⁵ Because of Ríos Montt’s death on April 1, 2018, neither the retrial nor the new trial will take place.

More recent investigations resulted in the January 2016 arrest of 14 former military officers, including a former head of military intelligence, on charges of crimes against humanity and enforced disappearance in the CREOMPAZ case (named in reference to the Spanish acronym for a peacekeeper training base in Cobán, Alta Verapaz). Eight officials are currently being prosecuted for crimes carried out between 1981 and 1984 at the base, where the remains of over 500 people, mainly of indigenous Achi, Q’eqchi, Poqomchi, Ixil and K’iche descent, were exhumed from 83 mass graves.²¹⁶

In February 2016, two ex-military officers were sentenced to 120 years and 240 years in prison, respectively, in the “Sepur Zarco” case by Judge Yassmín Barrios Aguilar, President of the High-Risk Court “A”, for crimes against humanity in the form of sexual violence, murder and enforced disappearance against Q’eqchi women.²¹⁷ In its path-breaking judgment, the court found that sexual violence against indigenous Maya Q’eqchi’ women was part of a deliberate strategy by the Guatemalan army, turning the victims into objects of war in order to disable and defeat people considered enemies. The Court ordered reparations to be granted to the Sepur Zarco Grandmothers and to their communities as a whole.

214 The case against Ríos Montt in the Las Dos Erres massacre case had remained dormant until August 2016, when the United States deported Santos López Alonzo, a former Kaibil agent, to Guatemala, where he was charged with homicide and crimes against humanity. At the time of the massacre, the members of the army High Command were Ríos Montt, Minister of Defense Oscar Humberto Mejía Víctores, and Chief of the High Command, Héctor Mario López Fuentes. Mejía Víctores and López Fuentes both died before they could be prosecuted for this or other alleged crimes.

215 Jo-Marie Burt and Paula Estrada, ‘Ríos Montt to Face Second Genocide Trial for the Dos Erres Massacre’ *International Justice Monitor* (April 3 2017)

216 OHCHR, Annual report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, UN Doc. A/HRC/34/3/Add.1 (2017), para 6.

217 The bucolic village of Sepur Zarco (located between Izabal and Alta Verapaz Departments) was the scene of systematic rape and exploitation of indigenous Q’eqchi’ women, from 1982 until 1988. The women of Sepur Zarco were used as domestic servants, raped and made to live in slave-like conditions by the Guatemalan military. This is the first case at the national level involving sexual violence and domestic slavery against indigenous women during the internal armed conflict. Their husbands, who were claiming land, had been forcibly disappeared, detained or killed. The defendants were Esteelmer Francisco Reyes Girón and Heriberto Valdez Asij.

IV.c. Current Challenges

There is little doubt that the prosecutions achieved to date in Guatemala for wartime crimes have set regional and even globally relevant precedents for fighting impunity.²¹⁸ However, the judgments to date have come long after the conflict and addressed only a fraction of the caseload of wartime crimes so widespread, systematic and calculated that they were deemed by the Commission for Historical Clarification to have constituted genocide against Guatemala's indigenous communities. The ILAC expert team also observed that too much of the burden and risks entailed by these politically sensitive cases continues to be borne by the victims, witnesses, prosecutors and judges that have decided, often at great personal risk, to seek accountability.

The Guatemalan state not only provides insufficient support and protection to these actors, but does little to discourage or sanction apparent miscarriages of justice. In the abovementioned CREOMPAZ case, for instance, a number of interlocutors raised concerns related to the conduct of the presiding judge, who was seen to manipulate procedural and evidentiary rules in order to drop charges against some defendants and minimize the criminal liability of others.²¹⁹ As a result, one human rights lawyer interviewed said he no longer believed in transitional justice: "Despite working on successful transitional justice cases, I don't see the judgments provoking a change to society".²²⁰

218 Marta Martínez, "Impunity's Eclipse: The Long Journey to the Historic Genocide Trial in Guatemala", *International Center for Transitional Justice Report* (2017)

219 Interviews with civil society organization, 31 May 2017, and lawyers, 10 October 2017.

220 Interview with lawyers, 10 October 2017.

V. Rule Of Law Thematic Issues in Guatemala

Due to factors such as the failure to incorporate the commitments made in the Guatemalan Peace Accords into national law and policy, justice operators have an outsized role in guaranteeing transparency, accountability and respect for human rights. However, in order to live up to this potential, justice operators need to enjoy sufficient guarantees of independence and resources to be effective.

As described above in this report, the ILAC expert team observed numerous obstacles to the independence and effectiveness of both judges and prosecutors.

In the case of judges, the credibility of the judiciary is at stake in light of widespread perceptions of corruption and politicization. Representatives of a key human rights organization in Guatemala stated that the role of judges is crucial in combatting impunity and corruption, and that the question of whether Guatemala can change hinges on issues as basic as meaningful reform of the process for selection and promotion of judges.²²¹

While individual judges that choose to act independently can and do have a great positive impact, they do so in the face of risks and threats, while the judiciary as a whole fails to live up to its constitutional role.

In the case of the Public Prosecutor's Office, the situation is complicated by the perceived dual nature of the office's current role. Virtually all interlocutors the ILAC team spoke with praised the efforts of the Prosecutor's Office, in coordination with CICIG, to tackle corruption and organized crime, as well as their prosecution of crimes related to the armed conflict. At the same time, many concerns were raised about the role that the prosecution service has played in facilitating the criminalization of peaceful protesters and the eviction of communities from their lands in the countryside. For instance, indigenous community leaders in Quetzaltenango told the ILAC team that the same office that fought corruption criminalized them, noting that the sole response to protests against rising energy costs had been to create a new prosecutor's office against electricity theft.²²²

221 Interview with the Unit for the Protection of Human Rights Defenders of Guatemala (*Unidad de Protección a Defensoras y Defensores de Derechos Humanos – Guatemala – UDEFEGUA*), 31 May 2017.

222 Interview, 12 October 2017.

Indeed, for both the judiciary and the prosecution, serious questions were raised both in relation to accessibility and in relation to their role in addressing the social conflicts over land and natural resources that have come to dominate Guatemala's political debate. This chapter of the report sets out the findings of the ILAC expert team in relation to how obstacles to the independence of Guatemalan justice operators impacts their effectiveness in dealing with these two key issues.

V.a. Access to Justice

One of the most important tests of any justice sector is the extent to which it is accessible and responsive to the needs of marginalized communities that have historically faced obstacles to accessing justice. In light of the inequality and discrimination that have characterized Guatemalan society throughout its history, there are many groups that have continue to face such barriers.²²³ In order to illustrate the severity of these issues, the ILAC team focused on two of the most severely impacted groups, women and LGBTI persons.

V.a.i. Women

The Peace Accords include numerous obligations to promote gender equality and combat discrimination against women, most notably in the *Agreement on Socio-economic Issues and the Agrarian Situation*. As with the struggle against racism, the Government response has tended to focus on a proliferation of new institutions and norms that have yet to affect the structural causes of violence and discrimination against women. For instance, the Government approved a National Policy for the Promotion and Development of Guatemalan Women as well as an Equal Opportunities Plan in 2001. New institutions have included the National Women's Forum, the Presidential Secretariat for Women and the Office for the Defence of Indigenous Women, all of which have experienced funding shortfalls that limited their reach and impact. Gender discrimination has been penalized in the Guatemalan Penal Code.²²⁴

However, violence against women and gender inequality are entrenched historical problems in Guatemala. In the context of a patriarchal system, women have been "made invisible and subordinated systematically, which in turn, has obstructed their possibility to access economic, political and social spheres under equal conditions and opportunities."²²⁵

223 See, e.g. Inter-American Commission on Human Rights (IACHR), *Situation of Human Rights in Guatemala* (2017), Chapter 2.

224 MINUGUA, *Ninth report of the United Nations Verification Mission in Guatemala*, UN Doc. A/59/307 (2004), para 58.

225 ONU Mujeres, "Evaluación Regional de Acceso a la Justicia como mecanismo de prevención para acabar con las violencias contra las mujeres 2011-2015. Estudio de caso de Guatemala: Avances y Retos de la justicia especializada", (2016).

As recently as last year, Guatemala was reported to have the world's third highest rate of femicide.²²⁶ According to the Judicial Statistics Center of the Guatemalan Judiciary Organ, there were 8,153 cases related to violence against women in 2016, of which some 3,356 (42%) received a ruling.²²⁷ The Public Prosecutor's Office has reported that it receives the highest number of criminal complaints in relation to violence against women.²²⁸

The scale of the problem in Guatemala has been recognized at the regional level. In a 2014 ruling in the case of *Véliz Franco and others vs. Guatemala*, the Inter-American Court of Human Rights found a lack of due diligence in the investigation of the murder of 15-year-old Maria Isabel Véliz Franco, and ruled that Guatemala had failed to protect the life and integrity of the victim, while also failing to take adequate steps to prevent violence against women. More recently, the March 2017 deaths of 37 girls in a state-run foster home for victims of abuse or abandonment (the 'Safe Home of the Virgin of the Assumption' – *Hogar Seguro Virgen de la Asunción*) brought home the extent to which the state not only fails to protect women and girls but is implicated in violations of their rights.²²⁹

The Judiciary coordinates its efforts to address these issues with the Public Prosecutors Office and the Institute of Public Criminal Defence via the National Commission for Monitoring and Support for the Strengthening of Justice (*Comisión Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia* – CNSAFJ), which focuses on improving the justice system, and specifically lists access to justice for women as one of their target areas. Both the Public Prosecutor's Office and the Judiciary have developed specialized systems within their structure to handle cases pertaining to women and their rights.

Following the 2008 passage of the *Law against Femicide and other forms of violence against women*, the Judiciary began developing specialized criminal chambers for cases classified as femicide or physical, psychological or economic violence against women. Nevertheless, challenges remain not only in terms of ensuring that such chambers are accessible in all parts of the country, but also in terms of how they operate.

226 Mimi Yagoub, "Why Does Latin America Have the World's Highest Female Murder Rates?", InsightCrime (11 February 2016).

227 Julio E Santos, 'Mujeres son las principales víctimas de violencia a nivel nacional', *el Periódico* (22 April 2017).

228 Glenda Sánchez, 'Los diez delitos más denunciados ante el Ministerio Público', *el Periódico* (8 July 2017).

229 The *Hogar Seguro Virgen de la Asunción* was a state-run Foster home for victims of abuse or abandonment that hosted girls who had served time for criminal activities but had no one to care for them after their release. Consistent allegations of bad conditions including overcrowding and malnutrition led the Human Rights Ombudsman to successfully seek precautionary measures before the IACHR in 2013. However, the Guatemalan State failed to comply and allegations of sexual, physical and psychological abuse and human trafficking continued. In March 2017, a group of girls protested the alleged violations happening inside the foster home and were locked in a room as punishment. A fire broke out inside the room, which resulted in the death of 37 girls. Firefighters and relatives of the girls testified that they were unable to control the fire because they could not access the premises. Although even the President was aware of the events taking place, state authorities failed to take adequate actions to prevent the tragedy. Only three public servants were arrested for negligence in the case. Esteban Biba Efe, 'El Hogar Seguro de Guatemala que se convirtió en un infierno: vejaciones, comida con gusanos...', *El Mundo* (3 October 2017).

The expert team heard from judges outside the Capital who say they struggle with determining whether these specialized courts have jurisdiction in specific cases due to difficulties in distinguishing cases of femicide from ordinary murder. Representatives of the Criminal Policy Department of the Public Prosecutor's Office stated that one of the institution's strategic objectives is to enhance the prosecution of crimes against victims with 'special characteristics', e.g. vulnerable populations such as women and children.

To this end, the Prosecutor's Office has created special prosecution offices for women and children, respectively, that consolidate a range of services, including, psychological and medical assistance, establish positions for specially trained auxiliary prosecutors and incorporate new evidence gathering techniques. A key aim of these offices is to avoid re-victimization and offer adequate attention to victims. Although the Public Prosecutor's Office plans to offer these services in all regional offices by 2018, this will still leave significant gaps in coverage in rural and peripheral areas.

In the small town of Salama in Baja Verapaz, the expert team encountered a positive model of prosecuting crimes of violence against women and children in the form of the *Modulo de Atencion Integral* (MAI) supported by USAID.²³⁰ The project involved setting up specialist offices around an accessible courtyard area, in which prosecutors worked alongside social workers, psychologists, and some interpreters (more were needed in order to cover all the local indigenous languages). The project had received some 350 complaints in the previous period of less than 3 months, demonstrating the overwhelming levels of violence against women in proportion to the small local population.

Providing protection and equal access to justice to women from indigenous communities poses a particular challenge. The expert team was advised of a feeling of "double marginalization" on the part of indigenous women – they reported feeling marginalized for being poor and indigenous, and doubly marginalized for being women. Mayan community leaders who met with the team expressed their concern that indigenous women were less likely than non-indigenous women to report domestic crimes due to a variety of factors, including fear or distrust of the authorities.

Indigenous heritage is often the exploited by public and private entities, from art to commerce and tourism, yet profits from these activities are rarely shared with indigenous Guatemalans. This phenomenon particularly affects women, whose image and traditional products frequently lack sufficient legal protection. In 2015, indigenous women formed the National Movement of Mayan Weavers to reclaim property rights over their weaving techniques and patterns. They have engaged in advocacy, and initiated legal actions for recognition of their collective property rights, and filed a 2016 law initiative to the same end.²³¹ The Movement seeks not only fair economic returns for their work, but also protection of their cultural heritage. In their own words, "our weavings are the books that the colonizers could not burn."

230 The initiative began in August 2007, and involved a team of six prosecutors by Prosecutor Claudia Gomez. The team was informed that other similar projects were underway in a number of Guatemalan cities and towns, including Guatemala City, Quetzaltenango, Mixtco, Villanueva, Chiquimula, Coban, and Izabal.

231 Manuela Picq, "Maya Weavers propose a collective intellectual property law" (2017).

V.a.ii. LGBTI Persons

Despite overwhelming stigmatisation, discrimination and violence against lesbian, gay, bisexual, transsexual and intersex (LGBTI) persons in Guatemala, there has been some progress in recent years. The most important development may be the increased visibility of this community, as represented by Congresswoman Sandra Morán, who organized the first Pride parade in Guatemala in 1988 (200 people attended, as compared with 25,000 in 2017) and became the first openly non-heterosexual person elected to Congress in 2015. The NGO 'OASIS' (Organisation to Support Integral Sexuality in the face of AIDS), was permitted to form as an NGO in 1993 to work on HIV issues and subsequently extended their work to LGBTI issues, including participation in TV debates about homophobia and raising awareness among judges. Trans-women have also created an organization, *Trans Mujeres en Tacones*. Although only some 25% of the population is now in favour of gay marriage, both male and female same-sex sexual activity is legal in Guatemala

This progress has been achieved in the face of the overwhelming discrimination, stigmatisation and violence against the LGBTI community in Guatemala. Against the backdrop of one of the highest general murder rates in the world, LGBTI persons and particularly trans-women face extreme violence, including reported extrajudicial killings by the state. Mr. Jorge López, the director of OASIS, recounted for the ILAC team how he received death threats in 2014 along with a trans-woman, Chantal Quiñones; while Mr. López left the country for a time, Ms. Quiñones did not do so and was murdered. In 2016 alone, 40 trans women were reportedly murdered.²³²

The situation is exacerbated by the prevalence of organised crime and corruption. As in neighbouring Honduras and El Salvador, the result is a flow of refugees leaving the country to seek asylum elsewhere.²³³

In contrast to crimes against women, which are systematically recorded under the law against femicide, no statistics are kept on anti-LGBTI hate crimes (nor are trans-women counted as victims of femicide). OASIS reported that it is aware of as many as 94 hate crimes including murder that have not been adequately investigated; on average 15 to 20 members of the LGBTI community are murdered each year with complete impunity. While this situation stems in part from the failure of the Department of Attention to Victims of the Public Prosecutor's Office to live up to its responsibility for dealing with such cases, many victims fail to report crimes, either due to lack of awareness of their rights or fear of the perpetrators of the crimes, who are frequently involved in organized criminal gangs that are sometimes themselves composed of LGBTI persons.

232 Transgender Europe, Trans-murder Monitoring Project, available at: <https://tgeu.org/tmm/>.

233 Amnesty International, No Safe Place: Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity (November 2017)

Trans-women are currently the most vulnerable members of Guatemala's LGBTI community. Access to education and economic opportunities are scarce, so they often fall into situations of poverty where they can easily be exploited.²³⁴ Trans-women often turn to prostitution, which also makes them highly vulnerable to both arrests and police harassment, and human trafficking networks. Trans-women offenders are routinely held in male prisons during lengthy periods of preventive pre-trial detention and experience sexual assault and rape. A trans-woman activist who met the team described having been infected with HIV after being gang raped in a male prison.

At present, members of the trans community are effectively undocumented; although they can register their name, there is no legal means for them to register their gender. This leaves them unable to receive identity documents, denying them the status of legal persons, causing numerous practical problems, and presenting a risk to public health given that an estimated 24% of transwomen are living with HIV. Those that have sought healthcare have frequently been ridiculed for taking new names, and avoid hospitals or health centres, preferring not to risk the humiliation. Rates of HIV are high in Guatemala, with 22,000 people receiving retroviral treatment, and have been rising, particularly among trans-women. OASIS expressed concern that many members of the community are not accessing adequate medical treatment for a variety of reasons, including identity discrimination against trans-people. Similar problems arise in relation to the identification of bodies in the morgue and their release to relatives. In 2017, LGBTI organizations worked with Congresswoman Sandra Morán to file a Gender Identity Law Initiative to allow members of the trans community to change their gender in official documents, improving access to public services. However, a bill to this effect introduced in 2012 remains under discussion.

Gay marriage is not legal in Guatemala and alternative family structures are not recognized in law. A bill on civil unions was introduced in 2016 by Congresswoman Sandra Morán but has made little progress. Current anti-discrimination legislation does not refer to sexual orientation or gender identity, which is a significant gap. OASIS cited frequent employment discrimination in employment, with individuals passed over for hiring despite good qualifications or fired once their sexual orientation came to light.

234 According to the Latin American and Caribbean Network of Trans People, 58% of trans women in Guatemala did not finish primary school and 76% of them work in the informal sector as their only option for survival.

V.b. Social Conflict: Land and Natural Resources

V.b.i. Underlying socio-economic issues

The root causes of the conflict in Guatemala included extreme poverty and inequality, skewed land distribution, abandonment of rural areas by the state and the political and economic exclusion of the rural population. In the *Agreement on Socio-economic Issues and the Agrarian Situation* signed as part of the Peace Accords, the government pledged a wide range of remedies, including increased social spending to expand and improve education, health care and other basic services; improved access for rural peasants to market-based land programs as well as housing and agricultural credits; the establishment of a national rural development policy; and mechanisms for resolving widespread land and property disputes. These measures were to be financed by tax reforms to raise government revenues at least 12% of GDP, complemented by steps towards decentralization to give local populations a greater voice in development policy.²³⁵

Twenty-two years later, fragmented efforts have produced only limited results in the area of socio-economic reform. Despite increases in social spending and the creation of new institutions to address land issues, public services remain vastly inadequate, rural development opportunities scarce and land conflicts ubiquitous. One of the main limitations has been the chronic lack of government funds, linked to the refusal by economic elites to pay higher taxes to finance an expansion in State services that would primarily benefit the poor. The result is that Guatemala has failed to increase its tax base to even the modest target of 12% of GDP established in the Peace Accords.

Hopes for a breakthrough came with the 2000 “Fiscal Pact” between the three branches of Government, business leaders and civil society, which set out a balanced plan for progressively increasing revenues and ensuring transparent use of State resources. To date, progress toward increasing fiscal revenue, fighting tax evasion, and enhancing the transparency of government spending has been modest, and Guatemala maintains the lowest revenue mobilization rates in the region.²³⁶

In discussions with the ILAC team, Guatemalan business leaders acknowledged the need for further social reforms and advocated reforming the country’s educational curriculum to adapt to societal and economic changes, but were opposed to a revival of the Fiscal Pact or other measures to increase tax revenues.²³⁷

235 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 50.

236 USAID, PFM LAC, RSD “Strengthening Public Financial Management in LAC” (2014).

237 Meeting with business leaders, 16 October 2017; meeting with representatives of the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations – (*Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras* – CACIF), 17 October 2017.

Efforts to improve access to land and resolve land conflicts have also been insufficient. Many key land-related legal reforms have not been carried out, most notably the commitment to create a national land registry, which is considered essential for giving rural landholders legal security. International donors provided major assistance for pilot projects in this area but official promises to enact enabling legislation have repeatedly proven hollow. Nor have commitments under the Peace Accords to deal with other aspects of the land question been honoured. Other outstanding pledges include passage of an agrarian law, review of the status of idle lands and lands illegally acquired during the armed conflict, and establishment of legal security for land held communally by indigenous communities. As a result, nearly 1,500 land conflicts remain unresolved, while the institutions responsible for addressing these conflicts, such as the Secretariat of Agrarian Affairs and the Land Fund (FONTIERRAS), continued to lack sufficient resources in 2016.²³⁸

V.b.ii. Rights of Indigenous Peoples

Guatemala acknowledged in the Peace Accords that it could not advance and prosper as a nation without reversing a deep legacy of discrimination against the Mayan, Xinka and Garifuna peoples that compose roughly half of the population, but have been systematically excluded from economic opportunities and political decision-making. In addition to a history of oppression dating back to colonial times, the indigenous population bore the brunt of the armed conflict, as confirmed by the CEH, which determined that 83% of those killed were members of Mayan communities and that the army committed acts of genocide against indigenous groups. At the signing of the peace agreements, Guatemala's racial and cultural diversity was largely unacknowledged in the country's political debate, educational curriculum, or legal framework. Rural areas predominantly inhabited by indigenous populations resided presented the worst social indicators and received the lowest levels of public investment. Indigenous women were doubly victimized, suffering both racial and gender discrimination.²³⁹

The main vehicle created in the Peace Accords for changing this situation was the *Agreement on Identity and Rights of Indigenous Peoples*, which promised a multifaceted effort to fight legal and de facto discrimination and development of a genuinely multicultural, multi-ethnic and multilingual State. The Agreement required consultation, creating unprecedented opportunities for indigenous communities to participate in the design of policies that affected them. The signing of the agreement in March 1995 was a watershed moment. Never before had the Guatemalan State so fully and openly acknowledged the extent of the nation's racial, cultural and linguistic division nor so clearly committed itself to bridging this chasm.²⁴⁰

238 OHCHR, Annual report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, UN Doc. A/HRC/34/3/Add.1 (2017), 63.

239 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para 38.

240 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004) para 39.

Seven years later, the UN Special Rapporteur on the human rights of indigenous people, Rodolfo Stavenhagen, indicated after his visit to Guatemala in 2002 that some progress had been made.²⁴¹ However, despite a proliferation of new commissions and institutions, actual progress in dismantling ethnic and racial discrimination was found to be slow due to the persistence of structural discrimination.²⁴² Stavenhagen concluded that:

...as long as there is no modification of the very foundation of the concentration and appropriation of the principal economic, political and symbolic resources of the country by the governing elites, which have succeeded in systematically excluding the indigenous people from nation-building, the latter will be unable to play a role as free and equal citizens. The Agreement on Identity and Rights points to a modification of this structure as the means of guaranteeing peace and human rights in a framework of democracy, but, as MINUGUA has underlined, this path is strewn with pitfalls and the goal is not yet in sight.²⁴³

In its final report, MINUGUA indicated that eight years into the implementation process, progress was more formal than substantive. Significant legal and institutional reforms and the breaking of taboos against discussing racism and discrimination had done little to change the everyday reality experienced by most indigenous persons. Lack of representation in politics and public life and unseen barriers to advancement continued to be the norm, with indigenous rural areas still lacking basic infrastructure or decent public services.

In retrospect, the failure of the 1999 constitutional referendum to incorporate the Peace Accords was a major disappointment for indigenous leaders and organizations that had participated enthusiastically in the implementation process until that point on the supposition that it would lead to transformative change.²⁴⁴

241 Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN. Doc. E/CN.4/2003/90/Add.2 (2003), para 19: "The number of justices of the peace in the indigenous areas has been increased, and a Commission on Indigenous Affairs has been formed within the Supreme Court. Other bodies set up include the Guatemalan Fund for Indigenous Development and the Office for to grant official status to the indigenous languages, on the basis of the work which has been carried out by the Academy of Mayan Languages of Guatemala. A joint commission has also been created to oversee the conservation and administration of Mayan sacred places, and a law on sacred sites has been adopted. More recently a Presidential Commission to Combat Discrimination and Racism against the Indigenous Peoples in Guatemala was established."

242 Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN. Doc. E/CN.4/2003/90/Add.2 (2003), para 20.

243 Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN. Doc. E/CN.4/2003/90/Add.2 (2003), para 20.

244 MINUGUA, Ninth report of the United Nations Verification Mission in Guatemala, UN Doc. A/59/307 (2004), para. 39.

Although Guatemala ratified the International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples in 1996, it has largely failed to implement the protective rules of this treaty.²⁴⁵ The ILO Convention requires ratifying states to protect the rights of indigenous peoples, including through the adoption of special measures “as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”²⁴⁶ Part II of the Convention is devoted to land, including an obligation to recognize “rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy” as well as rights to “participate in the use, management and conservation” of natural resources pertaining to such lands.²⁴⁷ The Convention also stipulates that indigenous peoples should not be removed from their lands except where necessary as an exceptional measure, and in such cases with the right to return as soon as feasible, or receive alternative land and compensation.²⁴⁸

Perhaps most important, ratifying states are required to respect indigenous peoples’ own procedures for transferring land and consult them “whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.”²⁴⁹ This right of consultation as established by ILO Convention 169, has not been implemented into Guatemalan domestic law, even though the Convention was ratified in 1996 as a commitment to guarantee the rights of Guatemala’s Mayan and Garifuna populations. For the past 21 years, Congress has refused to legislate on this issue, despite all than 20 requests from the Constitutional Court. The ILAC team heard repeated examples of permits the mining and hydroelectric projects being granted without appropriate consultation.²⁵⁰

245 International Labor Organization Convention on Indigenous and Tribal Peoples Convention, 1989 (No. 169), Geneva, 76th ILC session (27 Jun 1989).

246 ILO Convention 169, Articles 2 and 4.

247 ILO Convention 169, Articles 14 and 15.

248 ILO Convention 169, Article 16.

249 ILO Convention 169, Articles 17 (1) and (2). The state is expected to protect indigenous communities from incursions by outsiders, an obligation made clear by rules requiring prevention of outsiders from “taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them” as well as requiring penalization of unauthorized intrusion or use of such lands. ILO Convention 169, Articles 17(3) and 18.

250 See, e.g. Peace Brigades International, “Regulation of consultation, a highly questioned process”, Bulletin No. 37 (2017).

V.b.iii. Threats and criminalization

The ILAC team found that lawyers, human rights defenders and community leaders representing communities threatened by development projects in Guatemala face unrelenting threats, stigmatization, intimidation and attacks.²⁵¹ By providing legal representation to parties to cases, lawyers carry out a crucial role in facilitating access to justice and ensuring the proper functioning of the justice system. This role is particularly important in cases involving human rights abuses and natural resource disputes, given the vulnerability and unfamiliarity with the working of the justice system on the part of victims and affected communities. International standards such as the UN *Basic Principles on the Role of Lawyers* seek to ensure that lawyers can carry out their function without fear of inappropriate pressures or threats. The Basic Principles, for instance, advise governments to prevent intimidation or improper interference with lawyer's work, as well as unfounded sanctions or prosecution.²⁵²

The ILAC team heard from numerous sources that lawyers and defenders working on conflicts related to land, territory and the environment faced particularly frequent and severe attacks.²⁵³ In addition, human rights defenders were constantly subjected to smear campaigns to stigmatize and discredit them and their work, in an attempt to force them to stop their legitimate activities. For instance, members of the Centre for Environmental, Social and Legal Action reported being targeted with smear campaigns after they challenged the licence given to the Minera San Rafael mining company in San Rafael Las Flores in June 2017. The justice system is regularly misused to target and harass human rights defenders in an attempt to break up movements and organizations, and silence human rights defenders.

A General Instruction by the Public Prosecutor's Office containing guidelines for effective investigation of attacks against human rights defenders has been under review for several months. There is a clear need for a program or public policy for the comprehensive protection of human rights defenders, to comply with the judgment of the Inter-American Court of Human Rights in the case of *Human Rights Defender et al. v. Guatemala*. This process, which should be based on full consultations with civil society organizations had not been concluded at the time of writing this report.²⁵⁴

251 The IACHR made similar findings in its recent report: "The IACHR further highlights in its report the serious situation faced by human rights defenders in Guatemala and the importance of preventing and punishing attacks and intimidation against human rights defenders, in light of the valuable work they perform and given the multiplying impact that such attacks have on the protection of human rights in the country." IACHR, *The Situation of Human Rights in Guatemala*, (OEA/Ser.L/V/II. Doc. 208/17), 31 December 2017.

252 UN *Basic Principles on the Role of Lawyers* (1990), paragraphs 16-18: "16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities. 18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

253 See also UDEFEGUA, *Informe Criminalización en Guatemala: Análisis de Situación 2012 – 2017* (2017).

254 Amnesty International, "Guatemala 2017/2018" (website, accessed 16 May 2018), available at: <https://www.amnesty.org/en/countries/americas/guatemala/report-guatemala/>.

This situation has led the IACHR to request that the Guatemalan State adopt precautionary measures for the benefit of human rights defenders and justice operators, including the recently appointed Human Rights Ombudsman, Jordán Rodas. In discussions with the ILAC experts, Mr. Rodas was determined to continue his work despite threats and slander. It was clear to the team that such threats were made not only against attorneys in criminal or human rights cases, but also prosecutors and lawyers working for the Office of the Public Prosecutor, and in particular judges hearing controversial cases such as those in the High Risk tribunals.

In addition to external pressures such as threats and stigmatization, lawyers – like judges – also face unfounded complaints entertained by the “Honour Tribunal” that rules on disciplinary sanctions for the Guatemalan Bar Association. As described by lawyers the ILAC experts spoke with, the apparent motive for such complaints was to punish or discourage lawyers and judges who were involved in controversial cases. The effect was to place a considerable financial and psychological burden on individuals affected and to delay the processing of cases.

Throughout the visit, the ILAC team also heard accounts of the criminalisation of human rights defenders as well as families or communities engaged in defending their land rights. Such complaints were expressed in relation to agribusiness, megaprojects, mining projects and hydroelectric projects throughout the departments outside the Capital that the ILAC team visited. While virtually all interlocutors ILAC spoke with expressed support for the Office of the Public Prosecutor in its work against corruption and impunity, the main complaint voiced was in relation to the failure to rein in the practice of criminalizing human rights defenders.

According to observers in Guatemala, efforts to silence protest typically begin with defamation of protesters in the press and social media in which they are portrayed as terrorists or the ‘internal enemy’ and rumours meant to discredit them are spread.²⁵⁵ A subsequent step is criminalization through arrests or the issuance of arrest orders (*ordenes de captura*) and prosecution on unfounded charges. The issuance of arrest orders, even in the absence of actual efforts to make arrests, was seen as a means of putting psychological pressure on embattled communities.²⁵⁶ In some cases, arrest orders were issued in the immediate wake of dialogue meetings, against the community leaders who had voluntarily revealed themselves as such by attending them in good faith.²⁵⁷ In many cases, slander and criminalization has quickly been followed by violent attacks, including by the security guards hired by companies granted concessions for megaprojects.²⁵⁸

255 Interview with representatives of UDEFEGUA, 31 May 2018.

256 Interview with Fundación Guillermo Toriello, 09 October 2017.

257 Interview with representatives of UDEFEGUA, 31 May 2018.

258 For instance, in January 2017, 72 year old Sebastián Alonso Juan was killed during a peaceful protest against hydroelectric projects being built in the Ixquis region of San Mateo Ixtatán. The indigenous communities affected by the hydroelectric projects PDSA (Promoción y Desarrollos Hídricos S.A.) have struggled for several years for the right to consultation regarding two hydroelectric plants seen as inconsistent with their way of life. In 2014, an army unit was settled on company lands without the agreement of the local population and has effectively controlled the area since then. The community complains of daily physical attacks and damage to property and natural resources. During a 17 January 2017 protest, security guards and local police allegedly fired on protesters, hitting Mr. Alonso Juan, who was reportedly also slashed with a machete and died the same evening.

V.b.iv Land and natural resource conflicts

Although the 1996 Peace Accords explicitly referred to agrarian land reforms, and the creation of agrarian courts to resolve disputes over land in a reasoned manner, these commitments have never been implemented. Instead, even longstanding, good faith occupation of land can be challenged as the criminal offence of ‘usurpation’ (*usurpación*). This results in land disputes being processed by criminal courts under rules that condemn communities and their leaders to criminalization for seeking to uphold the right to remain in their homes. Against a background of contested and unresolved property rights, private companies have initiated extractive activities that not only take place on contested land but have adverse local consequences, such as pressure on the water supply, flooding, and pollution. The benefits of such activities to local communities in terms of employment, profit-sharing or compensation tend to be minimal, even as extractive firms rarely contribute significant tax revenues.

In Quetzaltenango, members of the expert team spoke with an indigenous community that faced criminalization when they protested against a hydroelectric project in the region in 2014. As a result of their protests, eleven members of the community were subject to preventive detention and one of them was separated from his family for over two years. The team visited and met four inmates in a semi-open prison facility who remained under preventive detention in basic conditions with no means of supporting their family. Community members described a pattern in which concessions were first awarded without consultation of affected communities, and subsequent protests were met with threats and criminal charges, including drug trafficking, terrorism and corruption.

Other human rights defenders described being physically threatened because of their work to support agricultural communities in Izabal Department seeking to uphold their land rights and defend themselves from evictions.²⁵⁹ During a visit to Izabal Department, the ILAC team was told of a peaceful protest on 27 May 2017 against the pollution of Lake Izabal that led to the issuance of 16 arrest warrants, including against four journalists who covered the demonstration and a fisherman who took part in it. ILAC was told that an estimated 500 arrest warrants had been issued against protesters in the Departments of Izabal and Alta Verapaz, along with the southern Petén.

259 Communities in Izabal Department are involved in a long running land dispute that arose in the 1980s, when the army allocated land to companies it had formed itself. As palm oil and mining companies sought to make good on these land allocations, they came into conflict with local farmers who had farmed the land for generations. In the absence of the agrarian courts and land legislation promised in the Peace Accords, the rules governing such conflicts are ambiguous and community leaders seeking to protest the loss of their homes and lands find themselves prosecuted for crimes on the basis of unfounded allegations. Interview with Fundación Guillermo Toriello, 09 October 2017.

The case of Abelino Chub Caal is emblematic of how criminalization is used to try to break down community resistance to surrendering their homes and land. The ILAC expert team met with Mr. Chub Caal in prison in Guatemala City, and also discussed his case with members of his community in El Estor, Izabal Department. Mr. Chub Caal became involved in protests against an eviction because he was asked, as one of the only members of his community who speaks Spanish, to mediate with the police at the scene. When he sought to intervene in the eviction, he was arrested and, despite a lack of any evidence against him, accused of being part of a group of armed persons who entered a farm and burned down a house. The team heard from several sources that community leaders who attempt mediation are frequently targeted for criminalization in order to discourage others from playing similar roles.

Mr. Chub Caal was formally charged with five offences, namely: unlawful association, illegal association of armed people, coercion, aggravated usurpation and arson. Due to the lack of evidence against him, the first three of these offences were dismissed by the judge, but his release has been refused to date. At the time of the visit Mr. Chub Caal had been jailed in Guatemala City for nearly a year. Because of the distance to Izabal, his family has been unable to visit him, and he fears for his life in prison. Although he has been held in cellblocks for nonviolent offenders, his first cellblock was taken over by violent criminal gangs who, at the time of the interview, were threatening to take over other cell blocks and kill the prisoners inside.

The expert team found another example of criminalization outside Guatemala City in relation to a US-owned gold mine, *el Tambor*, which is known locally as *la Puya*. The mine is situated in a fertile agricultural area where small farmers have traditionally grown fruits and vegetables, a livelihood dependent on a clean and safe water supply. As the mine has been exploited, local water sources have been found to contain high levels of arsenic, leading to protests that have now gone on for six years, including a constant presence outside the mining area since 2012.

In 2015, the Supreme Court upheld a ruling that the mine had violated the community's right to prior consultation and had failed to conduct an adequate environmental impact assessment and ordered operations suspended. However, the community reported that this decision has not been enforced and that, on the contrary, they have been exposed to both attacks and criminalization. Women leaders in particular have faced both violent assaults and defamatory attacks on social media, without adequate state protection. Moreover, three community members were sentenced to nine years in prison and substantial fines in 2014 on charges of threats and assaults of mine employees that the community rejects.

The ILAC team found a final example involving forced evictions in Petén, the northern province of Guatemala. Until the 1970s, Petén was entirely forested and isolated from the rest of the country except by air. When roads were built in the late 1970s, the population increased dramatically due to migration from the rest of the country. During the 1980s, many families and communities displaced by the internal armed conflict spontaneously resettled in Petén, forming new communities there that received considerable official recognition, including the opening of schools, inclusion

in local birth registries and assignment of mayors. However, these communities were once again threatened in 1989 with the adoption of new legislation setting out extensive protected natural areas (*zonas protegidas*), placed under the administration of the National Counsel for Protected Areas, or CONAP (*Consejo Nacional de Áreas Protegidas*).

In 2004, an effective amnesty was announced for residents of communities already established in protected areas at that point and practicing sustainable forms of agriculture. These communities were expected to sign an agreement with CONAP giving them conditional rights to remain. However, a survey of community land use was not completed until 2010 and agreements were signed haphazardly, with many communities left out.²⁶⁰ In the meantime, rumors circulated that oil exploitation had begun in protected areas and that communities would be forced out. These rumors began to materialize by the late 2000s. By late 2017, violent evictions of families from the Laguna Larga area led to the issuance of precautionary measures in favour of the affected communities by the Inter-American Commission on Human Rights.²⁶¹

Nevertheless, the threat of evictions remained with troubling involvement by local justice operators. According to sources in Petén, CONAP considered any community that had not signed an agreement to be illegal and subject to eviction. Moreover, unfounded accusations that these communities are engaged in narco-trafficking provided a pretext for carrying out evictions without any notice to with affected communities, some of which were still in dialogue with CONAP at the time regarding signing an agreement. In seeking evictions, CONAP has allegedly proceeded by identifying communities through aerial oversight and presenting technical evidence on their location to the Public Prosecutor's Office, which initiates proceedings based solely on the CONAP complaint, and without approaching the communities affected in order to verify CONAP's claims. Judges are also alleged to issue eviction decisions based solely on hearing CONAP's evidence. Decisions ordering evictions are forwarded to a justice of the peace, who assembles the police and begins the eviction, frequently with so little notice that farmers do not have time to return from their fields to assist their families.

In an interview, an official with the local prosecutor's office recognized that usurpation complaints by CONAP were processed summarily by his office but claimed that it was the responsibility of the presiding judge to verify the allegations in each case.²⁶² ILAC requested an interview with the competent court but was told no judges were available to speak to the team. A representative of the local Institute of Public Criminal Defense office confirmed that a longstanding instruction to the IDPP not to get involved in evictions had been revoked by a 2017 order to attend evictions and verify the procedural rights of those affected, albeit at the time of the enforcement of the eviction rather than in advance.²⁶³

260 Interview with Human Rights Ombudsman office, Flores, Petén, 12 October 2017.

261 IACHR, Resolution 36/2017, Precautionary measure No. 412-17 (08 September 2017).

262 Interview, 12 October 2017.

263 Interview, 12 October 2017.

The IDPP representative pointed out that the office had no capacity or relevant expertise, and had not been given any opportunity to approach the issue strategically. As a result, the order had yet to be implemented; the staff was aware at the time of the interview of two evictions that were being processed, but had not contacted or notified the affected communities.

The ILAC team was able to meet with communities that had been evicted or were facing eviction under these circumstances.²⁶⁴ The communities considered themselves to be representative microcosms of Guatemala, and were proud of the efforts by their parents to overcome the wartime destruction of their old communities and build new homes without state assistance. Under these circumstances, accusations of narco-trafficking were particularly painful. They saw the negotiations over agreements as a trick and complained that they had been given no notice of evictions in the past, in which entire villages had been burnt to the ground. One community member described having been criminalized; arrested five days before an arrest warrant was issued in his case, he was initially charged with usurpation, then political provocation and finally released for lack of evidence. In his view, the charges were a pretext for holding him to try to force an admission. While he was held in preventive detention, he was threatened and forced to pay protection money (*talacha*) in jail and pressured to admit guilt in exchange for being allowed to go home with no more problems.

Far from guarantors of legal certainty, the justice sector was seen by these farmers as oppressing them in order to do the bidding of large oil concerns. They maintained that they were nevertheless determined to struggle for their homes by peaceful, legal means, but one community member expressed his frustration: “It’s as if they are trying to provoke us into a new conflict.”

264 Meetings on 13 October 2017.

VI. Conclusions and Recommendations

Although Guatemala has been at peace for 22 years since the Peace Accords were signed, the country has failed in many significant respects to consolidate the benefits of this period of stability through full compliance with its human rights and rule of law undertakings, beginning with those set out in the Peace Agreement itself.

This has left many of the root causes of the conflict essentially unaddressed, including pervasive poverty, racism, corruption, inequality, institutional weakness and conflict over land. Moreover, these conflict factors have not simply remained salient during the past two decades but have grown more complicated, intractable and destabilizing.

For instance, the post-conflict failure to take steps to respond to wartime human rights abuses by the intelligence services has fueled an epidemic of impunity, fed by both longstanding endemic issues such as corruption and institutional weakness, and newer factors such as the explosion of illicit funding and violence that has accompanied the expansion of the regional narcotics trade. As a result, the levels of post-war violence have remained among the highest in the world, and the effects continue to fall disproportionately on the weakest in society. Women and girls, in particular, have faced appalling levels of violence, including rising levels of femicide, with virtually no chance of redress before under-resourced courts struggling to cope with their caseloads.

Another example is presented by conflict over land and the rights of indigenous peoples in Guatemala. The Peace Agreement committed the country to a conciliatory approach, based on the adoption of agrarian laws and tribunals that would provide redress to those who lost their land during the conflict and protect the rights of indigenous peoples and small farmers. However, these measures were never implemented and pressures on land have grown dramatically during recent years in light of government policies to encourage large-scale investment in monoculture agriculture, extractive industries and hydroelectric power. Those trying to defend their land are now victimized rather than protected by the justice system, facing criminalization for attempting to remain in their homes and lack of redress for violent evictions.

A full description of the reforms that Guatemala would need to undertake in order to satisfy the requirements of the Peace Agreement, as well as its obligations under the Inter-American and applicable international human rights instruments are beyond the scope of this report. However, a key outset observation is that these are legal undertakings that can only sustainably be implemented via political means. The Peace Agreement set out numerous commitments to amend or pass laws and create institutions that could only be fulfilled by concerted action of the legislative and executive branches of government. The fact that such measures have not been taken during the subsequent 22 years represents perhaps the central failure in Guatemalan political life.

Although Courts should be guided by the spirit of the Peace Agreement, their primary responsibility is to uphold the Constitution and apply the national law of the country as it is. Thus, until the political branches in Guatemala ensure that the Peace Agreement commitments have been fully incorporated into domestic law, the Courts cannot guarantee compliance on their own. Similarly, although Guatemala's international obligations are directly applicable,²⁶⁵ those arising from the Inter-American system tend to be policed by national courts primarily when they are clearly violated. Active prevention of violations would, once again, require the type of legal, public policy and institutional change that can only come about through the action of the executive and legislative branches.

ILAC is an organization of international rule of law practitioners that work with national partners in fragile and conflict-affected countries to identify priority justice sector issues and support reforms, and the main concern of this report is the role and situation of justice operators in Guatemala. As a result, it would go beyond the scope of this report to attempt to detail the entire array of legislative and institutional reforms necessary to ensure full compliance with the Peace Agreement and international human rights obligations. In this area, ILAC defers to actors with a clearer mandate to undertake such an analysis, such as the Inter-American Commission on Human Rights (IACHR).

However, ILAC not only endorses the conclusions of the latest IACHR report on the situation of human rights in Guatemala, but also underscores the urgency of reform.²⁶⁶ Time and time again, the members of the Mission were informed of the destabilizing effects of the failures of the past and current Governments of Guatemala to secure the rule of law, as a precondition for respect for human rights. In this regard, the fact that 22 years have passed since the conflict is not a cause for satisfaction but rather an alarm bell, as long as the root causes of conflict identified in the Peace Agreement remain largely unaddressed. For instance, despite judgements from the Inter-American Court, indigenous survivors of 1980s massacres that ILAC interviewed in Baja Verapaz Department are still waiting for their relatives' cases to be fully investigated and remedies to be provided.

In parallel and independently of the need for broader structural reforms, justice operators must be respected and supported, so that they have the independence and capacity to play the outsized role that has been thrust upon them. Although the ILAC expert team makes more detailed recommendations below, it is crucial to note from the outset that justice operators in Guatemala currently work under a combination of circumstances that constrain their independence and effectiveness.

ILAC is neither the first nor the only observer to point out these circumstances. However, we hope this report will provide clear notice to state authorities that failure to address the clearly documented and well-understood obstacles to the independence and effectiveness of the justice sector can only be taken as unwillingness to strengthen the rule of law in Guatemala. Without an effective and independent system of justice, the rule of law and human rights cannot be secured.

²⁶⁵ Constitution of Guatemala, Article 46.

²⁶⁶ IACHR, Situation of Human Rights in Guatemala (2017).

Recommendations in relation to the Government of Guatemala

The President of the Republic of Guatemala, Jimmy Morales, has frequently reaffirmed the country's Constitutional commitment to guaranteeing the rule of law for all persons on its territory. It is crucial that the executive branch in Guatemala continue to uphold this commitment to transparency and accountability. Specific measures that should be taken to this end include the following:

- Work with the Judiciary and Congress to replace the current selection process for higher judicial positions with one based on the application of objective and clear criteria, based on aptitude, probity and the academic and professional background that prove the capacity of candidates, in accordance to international standards of human rights. Guarantee that all current and future processes for the selection of high judicial and prosecutorial officials are based on the objective and transparent application of criteria that guarantee that the most qualified candidate be selected, as established in each case by a full written and motivated decision.
- Respect the mandate of the CICIG, and take all necessary steps to support its work. Cooperate actively with CICIG in combatting corruption, and abstain from any action that could obstruct the CICIG's work in the country
- Request a four-year extension of CICIG's mandate, allowing for CICIG to plan its activities under a midterm perspective while also maximizing the opportunity for state institutions to increase their own capacities in cooperation with CICIG.
- Take all necessary steps to support the independence of justice operators, including ensuring adequate resources are made available to the justice sector to ensure that it can perform its vital function, and guaranteeing the safety of justice operators, in particular judges in jurisdictions such as the High Risk Courts. Confirm state support for the rule of law and the independence of the judiciary
- Ensure that the state complies with court judgements and provides adequate resources for the enforcement of judgements, such as those by the Constitutional Court.
- Develop a strategic plan for ensuring that key justice sector actors are present and accessible in the interior of the country. Consult with all relevant justice sector actors, and in particular the Judiciary, the Public Prosecutor's Office, the Institute for Public Criminal Defense, the INACIF and the Human Rights Ombudsman.
- Take all necessary steps to guarantee the full integration of the 1996 Peace Accords into national constitutional and statutory law. In doing so, give particular urgency to the provisions on indigenous people's rights and agrarian reform.

- Take all necessary steps to guarantee full compliance with the rulings, precautionary measures, and recommendations issued in relation to Guatemala by the Inter-American Court and Commission on Human Rights. In doing so, take into particular account the need for public policies in Guatemala to reflect the rulings of the Court on the rights of indigenous peoples, as well as the rights of marginalized groups, such as women and LGBTI persons, to access to justice and equality.
- Take all necessary steps to guarantee compliance with the recommendations of UN treaty supervisory bodies and human rights special mechanisms. Invite human rights mechanisms such as the Special Rapporteur for the independence of judges and lawyers and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Give full legal effect to ILO Convention 169 on Indigenous and Tribal Peoples.
- Develop credible, fair and symmetric mechanisms for consultation with communities impacted by development projects, including environmental impact studies and alternative dispute resolution for social conflicts. Consider the involvement of impartial observers such as international organizations and civil society.
- Consider reporting on national and sub-national progress in the implementation of Sustainable Development Goal 16 on peace, justice and strong institutions as part of Guatemala's Voluntary National Review process for 2018 and beyond, in the context of the UN Agenda 2030.
- Consider adopting the United Nations' Guiding Principles on Business and Human Rights, and developing a national action plan for its implementation.

Recommendations in relation to the Congress of Guatemala

The Congress of Guatemala should take steps to affirm its commitment to the rule of law, beginning with bringing to a successful close the overdue constitutional reforms necessary to implement the Peace Accords. The Congress should also fully respect the separation of powers in respect to the Judiciary and the Public Ministry, and take all appropriate steps to ensure that the budgetary needs of these institutions are fully and promptly met. Congress should also undertake legal reform efforts in the following areas:

- Strengthen the independence of the Human Rights Ombudsman.
- Adopt land laws and create agrarian tribunals as foreseen in the Peace Accords and amend the Penal Code to remove the crimes of usurpation and aggravated usurpation or ensure that they cannot be applied in any cases involving adjudication of competing claims based on law and customary attribution.
- Amend the right of amparo to discourage its abuse in cases where it is invoked without any prospect of success.
- Reform the freedom of information rules in order to ensure respect for the right to truth, as well as the right to access to personal data and information in accordance with international standards.
- Amend the Penal Code to ensure that hate crimes on the basis of gender identity can be prosecuted. Adopt legislation to implement the recommendations of the UN Universal Periodic Review process, and in particular to end discrimination and hate crimes against women and members of the LGBTI community and to protect human rights defenders.
- Adopt legislation fully implementing ILO Convention No. 169 into the domestic legal framework, including a meaningful right to consultation for communities affected by development and protection of the cultural heritage and intellectual property rights of indigenous communities.
- Support the increased budget requested by the Office of the Public Prosecutor in accordance with its Strategic Plan for 2015-2019, in order to fund measures to make the institution more accessible to citizens.

Recommendations in relation to the Judiciary

The Judiciary as a whole should orient itself toward greater independence and take active measures to combat corruption. Although the Judiciary must be provided with adequate resources to function at full capacity by the State, it should also identify and take all possible steps to make justice more accessible to marginalized groups, reduce backlogs and inefficiencies, and support effective judges. Specific measures that should be taken to this end include the following:

- Ensure public access to all judicial decisions and improve outreach in order to ensure that marginalized groups understand their legal rights and promote a better understanding of the working of the judiciary among citizens and journalists in order to improve public trust and access to justice. Provide factual information to counter misrepresentation of the law or slander of judicial personnel in the media.
- Conduct realistic, updated risk assessments in consultation with the judges and personnel in all Guatemalan court facilities, including High Risk Courts, develop a strategic plan for security, and follow up with all necessary steps to ensure the security of judicial personnel, as well as the safety of all persons present in all court facilities.
- Provide adequate staffing and resources for judges, including clerks and secretarial staff as well as office space and equipment, and a fair and sufficient allocation of human, physical and infrastructure resources for all courts.
- Undertake an assessment of the need for interpretation across Guatemala's courts and seek resources to ensure sufficient interpreters to cover needs.
- Develop a system of allocation of cases in compliance with international standards that guarantees the assignment of competent, independent, impartial judges, according to predetermined laws. Ensure that cases are distributed to judges in an objective, non-arbitrary manner that ensures an equitable allocation of cases and a manageable workload.
- Review current ethics framework considering best practices and international standards in order to guarantee a strong and enforceable system of ethics that contributes to public trust in the Judiciary.
- Ensure that all disciplinary proceedings involving judicial officials are handled exclusively by the judiciary, and that they are initiated only based on evidence of a breach of specific rules of conduct. Guarantee that disciplinary procedures provide an impartial supervision and exclude the possibility of arbitrary reward and punishment of judges in violation of the principle of judicial independence.
- Ensure that evaluations and career decisions, including transfers, are undertaken based on objective criteria and in accordance with due process. Ensure that evaluations are undertaken transparently, with full motivation and in accordance with law, and that all criteria for evaluation, including those in the Manual for the Evaluation of Judges, are widely disseminated.
- Develop capacity building and continuing education programs for judges that guarantee that they fully understand the implications of Guatemala's international human rights commitments and are capable of actively applying human rights in their daily functions.

Recommendations in relation to the Public Prosecutor's Office

The role of the Public Prosecutor will be particularly crucial – and especially scrutinized – in the wake of the ongoing selection process for a new Attorney General. It will be essential to maintain continuity in the Public Ministry's efforts, in cooperation with the CICIG, to combat impunity and corruption. Specific measures that should be taken to this end include the following:

- Development, dissemination and implementation of policies for the protection of groups targeted because of their support for human rights in Guatemala, such as journalists, community leaders and trade unionists, as well as for marginalized groups such as LGBTI persons.
- Suspend evictions in all cases involving adjudication of competing claims based on law and customary attribution pending legislative efforts to provide mechanisms for adjudication of land disputes in accordance with the provisions of the Peace Accords.
- Ensure that the Department of Attention to Victims of the Public Prosecutor's Office effectively deals with hate crimes against LGBTI persons. Review policies and consider a similar coordinated approach to that taken in the case of violence against women and femicide.
- Conduct realistic, updated risk assessments in consultation with the prosecutors and personnel in all facilities, develop a strategic plan for security, and follow up with all necessary steps to ensure the security of prosecutorial personnel, as well as the safety of all persons present in prosecutorial facilities.
- Guarantee adequate staffing and resources for prosecutors, including clerks and secretarial staff as well as office space and equipment. Ensure that the regional offices of the Public Ministry, in particular, have sufficient staff and equipment to be able to carry out their duties throughout the territories they are responsible for.
- Further develop the capacity of prosecutors to effectively manage their caseloads.
- Expand cooperation with CICIG to focus on transfer of capacities to specialized prosecutors working on complex cases, such as those involving organized crime, money laundering and human trafficking. Develop mechanisms to ensure that this knowledge is disseminated to the entire corps of prosecutors.
- Develop further projects to combat violence against women along the lines of the Modulo de Atención Integral (MAI), with resources for interpretation in all locally relevant languages and preventative work.
- Ensure that the public ministry takes all necessary steps to ensure the protection of lawyers and human rights defenders.

Recommendations in relation to the Universities

The role of Law Faculties is fundamental to the entire legal system, both concretely and symbolically. The allegation that “phantom” law schools that do not engage in significant teaching or scholarship have been set up for the sole purpose of influencing high judicial and prosecutorial appointments is incalculably damaging for the reputation of the Guatemalan legal system. Such law faculties must immediately be identified and shut down. For Law Faculties operating in good faith to educate students and contribute to legal knowledge, the following recommendations are made:

- Ensure that legal instruction is undertaken in accordance with international standards, and that it systematically incorporates precedent cases handed down by the Constitutional Court as well as binding judgments from the Inter-American System.
- Work with faculty to ensure the curriculum not only includes awareness of applicable human rights standards but a concrete understanding of how they are to be invoked and applied in the day-to-day work of lawyers and justice operators.
- Expand clinics providing legal services, in coordination with the Institute of Public Criminal Defense and the Guatemalan Bar Association, in particular, to communities that would otherwise be excluded from access to legal advice.
- Review the role of Law Faculties in postulation commissions and ensure that they are upholding the highest standards of integrity in the exercise of their work.
- Develop programs to increase access to universities and the legal profession by students from non-traditional and disadvantaged backgrounds, in particular the indigenous community.

Recommendations in relation to the Guatemalan Bar Association

The Guatemalan Bar Association plays a crucial role in making justice accessible to ordinary people. Specific measures that should be considered in order to increase the Bar Association's effectiveness include the following:

- Renounce efforts to sanction judges and issue a binding clarification that the jurisdiction of the Honor Tribunal is limited to infractions by lawyers and notaries.
- Take steps to ensure that the Bar Associations' own election and decision-making processes are fully transparent.
- Demonstrate leadership in guaranteeing that selection processes for high judicial and prosecutorial officials in which the Bar Association has a formal role, are conducted in strict accordance with international standards.
- Promote a dialogue with other justice sector actors to identify how the protective function of the right of *amparo* can be preserved while preventing its abuse to delay proceedings through repetitive invocation without significant prospects of success.
- Develop the capacity of the private bar in Guatemala to assist in the provision of free legal assistance to the indigent, as well as incentives for lawyers to provide such legal aid. Coordinate with the Institute of Public Criminal Defense in order to identify priority categories of cases not currently covered by their services, in which indigent parties are often involved, in order to ensure complementarity.
- Consider developing programmes, with the support of the international community aimed at increasing the representation in the Guatemalan legal profession of underrepresented groups such as women, LGBTI persons, disabled persons, and members of indigenous and Garifuna communities.

Recommendations in relation to the Institute of Public Criminal Defense

The Institute of Public Criminal Defense should seek sufficient resources to be able to cover its core caseload of criminal cases, and, contingent on resources, consider expanding services beyond criminal defense issues where a manifest need exists.

Recommendations in relation to the Human Rights Ombudsman

The Human Rights Ombudsman should seek resources to reinforce its auxiliary departments in underserved, rural areas, and consult the LGBTI community in order to build trust and develop effective responses to barriers they face in accessing justice.

ILAC is a global rule of law consortium providing technical assistance to justice sector actors in fragile and conflict-affected countries.

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