
ILAC Rule of Law Assessment Report:

A Window of Opportunity

Support to the Rule of Law
in Guatemala



International
Legal Assistance
Consortium

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Acronyms and abbreviations

AGJI	Association of Guatemalan Judges for Integrity (acronym in Spanish)
CACIF	Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (acronym in Spanish)
CICIG	International Commission against Impunity in Guatemala (acronym in Spanish)
FECI	Special Prosecutor's office Against Impunity (acronym in Spanish)
IACHR	Inter-American Commission on Human Rights
ILAC	International Legal Assistance Consortium
INL	Bureau of International Narcotics and Law Enforcement Affairs
NGO	non-governmental organisation
UN	United Nations
USD	US dollars
WJP	World Justice Project

Executive summary

“The Window of Opportunity” report was undertaken to enquire into the state of Guatemala’s justice sector since the publication of the International Legal Assistance Consortium’s (ILAC) rule of law assessment report on the Guatemalan justice sector in May 2018. The report was coordinated by ILAC and is a collective effort between ILAC and its member organisations, the Law Society of England and Wales and the Cyrus R Vance Center for International Justice of the New York City Bar Association. In December 2019, the ILAC team travelled to Guatemala City to meet with various organisations and justice sector actors who provided the insight to make this report possible.

A window of opportunity after CICIG’s closure

The report examines the state of Guatemala’s justice sector after the closure of the International Commission against Impunity in Guatemala (CICIG) in September 2019. It discusses how recent threats against the justice sector have reversed much of the progress that was made to strengthen the rule of law during CICIG’s existence. Guatemala cannot combat corruption and strengthen the rule of law without ensuring an independent and impartial judiciary. With a new incoming executive, the report concludes that the international community must seize the window of opportunity to re-engage with Guatemala in combating corruption. This will require finding new and effective models of development cooperation to ensure more sustainable ways of strengthening the rule of law.

Key recommendations to continue strengthening the rule of law in Guatemala

- **Guaranteeing the independence of the judiciary** requires not only that Guatemala’s executive and legislature must adhere to the separation of powers, but that judges are empowered to act independently and impartially without fear of retaliation or personal attacks.
- **Breaking isolation and returning to multilateralism** will require that Guatemala and the international community agree on new long-term cooperation efforts to fight corruption.
- **Continuing efforts to fight corruption** after CICIG’s closure will require that Guatemala develop new and innovative mechanisms to eradicate corruption with support from and in cooperation with the international community.

Timeline of Rule of Law Backsliding in Guatemala



ILAC team and authors

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Introduction

In 2015, just four years before the closing of the International Commission against Impunity in Guatemala (CICIG), the “Guatemalan Spring” united the people of Guatemala in protest as they called for and demanded more concerted efforts and reforms to fight corruption and end impunity. The Guatemalan Spring led to the resignation and arrest of Guatemala’s then-president and vice president after they were implicated in an unprecedented case of corruption. That same year, Jimmy Morales, a TV comedian with no prior political experience, was elected president based upon his anticorruption platform – with his campaign slogan stating, “neither corrupt, nor a thief” and a promise to extend CICIG’s mandate.

During this period, CICIG’s work also intensified under its Commissioner, Iván Velásquez, and Guatemala’s then-Attorney General, Thelma Aldana. Many believed that CICIG, with robust backing from the international community, was leading Guatemala from its past – where corruption and impunity prevailed, to a future with a stronger rule of law. That hope was quashed under President Morales. When CICIG opened an investigation into President Morales himself and his family’s involvement in illegal campaign financing, he began what interviewees described as “a well-plotted strike against the rule of law”. This began with attacking CICIG’s legitimacy and credibility. His offensive was facilitated by the Trump administration’s indifference towards CICIG, reversing the US’s previous position as CICIG’s greatest supporter. President Morales was ultimately successful in his efforts, as CICIG’s doors closed when its mandate expired on 3 September 2019.

Since the release of ILAC’s report on the Guatemalan justice sector in May 2018,¹ the systematic attacks on the rule of law in Guatemala have intensified. President Morales’s decision to not renew CICIG’s mandate was one of the major casualties of this assault. His decision seriously risks damaging the progress made in strengthening the rule of law in Guatemala during CICIG’s 12 years of fighting corruption and strengthening government institutions. Several interviewees indicated that there appeared to be a united movement in Guatemala, known as the “Corrupt Pact” (*el Pacto de Corruptos*), which had joined President Morales’s efforts to discredit the advancements made by CICIG, one that continues to influence the executive, legislature and judiciary to date. This is a worrying trend, especially considering that Guatemala already ranks 96th of the 126 countries included in the World Justice Project’s (WJP) 2019 Rule of Law Index.²

¹ Rhodri Williams, “ILAC Rule of Law Assessment Report: Guatemala” (2018).

² The WJP Rule of Law Index is a leading source for independent data on the rule of law. Using data from household and expert surveys, the WJP measures countries’ rule of law performance across eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice.

In the future, it will be a significant task to review the lessons learned from CICIG's 12 years of existence. At present, with the rule of law in Guatemala at a crossroads, it is more critical to identify how the international community can immediately support the Guatemalan justice system. The rule of law is defined as a principle of good governance where nobody is above the law and there is accountability before the law. It also requires measures to ensure adherence to such principles as the separation of powers. If abided by, these core principles, together with constitutional safeguards, prevent corruption and restrain abuse of power.³ The lack of adherence to these principles in Guatemala has directly endangered the anticorruption efforts initiated by CICIG, threatened the fragile peace that has endured so far and ultimately weakened the rule of law.

This report also finds that Guatemala is failing to comply with international and regional guarantees to ensure an independent and impartial judiciary, including the Basic Principles on the Independence of the Judiciary and the recommendations on guaranteeing the independence of justice sectors actors by the Inter-American Commission on Human Rights (IACHR). Moreover, Guatemala's Constitution provides that its "magistrates and judges are independent in the exercise of their functions and are subjected solely to the Constitution of the Republic and to the laws. Whoever attempts to undermine the independence of the Judicial Organ . . . will be disqualified from exercising any public office".⁴ Furthermore, the Basic Principles on the Role of Lawyers is being breached because Guatemalan lawyers are unable to fulfil their professional functions without intimidation, hindrance, harassment or improper interference.⁵

On 14 January 2020, Guatemala's newly elected president, Dr Alejandro Giammattei, a former prison director who was once investigated by CICIG, took office. During the presidential elections in August 2019, less than 5 million of the 8 million registered Guatemalans voted and only 18 percent of those registered voters elected President Giammattei. As President Giammattei took office with a low level of legitimacy, he was joined by a new Congress with 19 political parties represented. The newly formed Congress will also elect an entirely new judiciary, after the nominations process which was still ongoing at the time of writing and which has been plagued by delays and allegations of corruption. President Giammattei, a conservative from the political party Vamos, did not support the renewal of CICIG's mandate and has claimed that CICIG failed to directly address the root causes of corruption.

Despite these challenges, there is a window of opportunity to support a return to strengthening the rule of law in Guatemala. President Giammattei has shown early signs that he will refrain from directly attacking the justice sector as his predecessor did and he has taken early steps to reinvigorate the fight

³ United Nations and the Rule of Law, "What is the Rule of Law" [webpage, accessed 6 March 2020].

⁴ Guatemala's Constitution of 1985 with Amendments through 1993, art. 203.

against corruption. Reengagement, support and cooperation by the international community is vital to ensure that, in CICIG's absence, Guatemala continues its efforts to combat corruption and to strengthen the rule of law.

A victim of its own success

CICIG was an innovative, hybrid mechanism where international investigators and national prosecutors worked together to investigate and prosecute crimes of corruption carried out by criminal networks. It also aimed to enable Guatemalan prosecutors to investigate and prosecute corruption cases more effectively on their own. Since its creation in 2007, CICIG supported Guatemala's Public Prosecutor's Office in investigating more than 100 cases of corruption and prosecuting over 650 individuals, resulting in 400 convictions. This included the indictment of Guatemala's then-president, Otto Perez Molina, and his vice president, along with the prosecution of several other powerful authorities. By reducing impunity, it was estimated that CICIG contributed to a net decrease of more than 4,500 homicides from 2007 to 2017.⁶ Moreover, CICIG broadly worked to strengthen Guatemala's institutional framework, by proposing and supporting legal reforms such as the creation of the Courts for High Risk Crimes.⁷

Prior to CICIG, Guatemala's Public Prosecutor's Office (*el Ministerio Público*) had difficulties in trying cases of corruption due to a lack of resources and capacity, and for fear of retaliation from the criminal networks it was meant to be investigating. As several interviewees stated, CICIG was the catalyst that changed that trend as it paved the way to bring corruption charges against powerful individuals and build trust in the justice sector. Several interviewees also acknowledged that CICIG was an example of successful multilateralism. One interviewee observed that CICIG was an acknowledgment by Guatemala that it needed, and was willing to accept, international support in combating corruption. It was ultimately a signal from the international community that it was seriously committed to strengthening the rule of law in Guatemala.

CICIG's achievements demonstrated that the revision of norms and laws could change people's attitudes and engender new values.⁸ Interviewees stated that during CICIG's early years, it functioned as a deterrent against corruption by engendering compliance with the law for fear of being investigated and prosecuted. Over time, however, respect for the law increased and confidence in the justice system grew in response to CICIG's successes. Several interviewees noted that CICIG changed the mindsets of many Guatemalans who had previously believed that their country could never rise above a state of widespread corruption. The Guatemalan Spring was evidence of this shift because Guatemalans had become more informed, knowledgeable and active in pursuing an end to corruption and impunity. Interviewees also stated that more Guatemalan judges felt compelled to act with integrity because they knew that CICIG would hold them accountable.

⁶ International Crisis Group, "Saving Guatemala's Fight Against Crime and Impunity", Latin America Report N°70 (24 Oct. 2018), p. i.

⁷ For a further discussion on conflicts over land and natural resources, see Rhodri Williams, "ILAC Rule of Law Assessment Report: Guatemala" (2018), p. 39.

⁸ See generally, Cass R Sunstein, "How Change Happens" (2016).

For other judges, CICIG supported them in assuming control and empowering them to act with integrity, independence and transparency – something that was previously just an ideal. This in turn helped to build public trust in institutions like the Public Prosecutor’s Office and the judiciary. The interviewees stated that this was a momentous step forward for the rule of law in a country like Guatemala with its difficult history and a prevailing mistrust of public institutions.

According to CICIG, its greatest achievement was “the promotion of citizen awareness on the importance of a law-abiding culture. Guatemalans are now well aware that we are all equal before the law and, by abiding by the Rule of Law, the State must guarantee citizens’ wellbeing”.⁹ In April 2019, even when President Morales was attacking CICIG’s legitimacy and credibility, 72 percent of Guatemalans were in favour of CICIG and supported its mandate continuing.¹⁰ Moreover, according to Transparency International’s 2019 Global Corruption Barometer for Latin American & the Caribbean, which was published in September 2019, 76 percent of Guatemalans believed ordinary people could make a difference in the fight against corruption.¹¹ CICIG was likely a catalyst for this belief. By contrast, according to the same Global Corruption Barometer, 90 percent or more of Guatemalans reported having little or no trust in institutions, with the president being the most corrupt authority.¹²

“The enemy within”

After taking office in January 2016, President Morales reneged on his anticorruption campaign platform and his promise to support CICIG after it was revealed that CICIG had opened an investigation into his son and brother for defrauding the government by using false invoices. Then, in August 2017, President Morales and his political party became the subjects of a CICIG-led investigation. The investigation resulted in charges against President Morales and a member of Congress relating to campaign finance violations. Regarding the charges, the Public Prosecutor’s Office made three eventual requests to the Supreme Court to lift President Morales’s immunity.¹³ The first two requests were made by then-Attorney General Thelma Aldana, with the second request being made in August 2017. In an apparent act of retaliation, President Morales declared Commissioner Velásquez *persona non-grata* two days later via a video on social media. In support of his declaration, President Morales stated, “As president of the republic, for the interests of the Guatemalan people, strengthening of the rule of law, and institutionality, I declare Mr Iván Velásquez Gómez *non grata*, in his capacity as commissioner

⁹ CICIG, “Opinion Poll Shows That 72% of Guatemalan People Support CICIG’s Work” (5 April 2019) [webpage, accessed 10 Feb. 2020].

¹⁰ *Id.*

¹¹ Global Corruption Barometer Latin American & the Caribbean: 2019 Citizens’ Views and Experiences of Corruption (2019), pp. 28, 43.

¹² *Id.* at pp. 10, 43.

¹³ All three requests to lift President Morales’s immunity were ultimately denied. The first two requests were denied by the Supreme Court. The third request was granted by the Supreme Court, but denied when it was referred to Congress for approval.

of the International Commission against Impunity in Guatemala, and I order that he immediately leaves the Republic of Guatemala”.¹⁴

The Constitutional Court of Guatemala quickly overruled President Morales after the Ombudsman for Human Rights challenged his declaration before the Court. Dismissing the Constitutional Court’s ruling, President Morales took to social media to declare, “No national court has constitutional powers to overrule decisions taken by the president concerning foreign affairs”.¹⁵ In August 2018, Attorney General María Porrás, who had been recently appointed by President Morales via Twitter, made the third request to lift his immunity. In response to the request, President Morales’s office released a statement that he respected the rule of law and “reiterates his commitment to institutions in the country, to legal order and due process”.¹⁶ In early September 2018, in what could only be interpreted as another act of retaliation, the Guatemalan government issued a statement that Commissioner Velásquez was banned from re-entering Guatemala because he was a threat to order and public security.

In what interviewees unanimously agreed also led to the attacks on Commissioner Velásquez, CICIG began investigating contributions to President Morales’s campaign by Guatemala’s small, yet extremely powerful, economic elite. It was the view of some interviewees that CICIG, and even the Guatemalan Spring, had initially received support from Guatemala’s economic elite, including the powerful Chamber of Commerce (CACIF). Interviewees stated that, up until this point, the economic elite had begun to benefit from an increased environment of legality and stability, which facilitated foreign direct investment. CICIG had previously focused its investigations on political corruption, but now it was directly digging into the financing of elections by the private sector. Interviewees reported that this shift had led these special interest groups to join President Morales’s attacks against CICIG and the justice sector as whole, presenting a unified front which is commonly referred to as the “Corrupt Pact”. How the Corrupt Pact is defined in Guatemala varies depending on who one asks. In general, it is made up of members of Guatemala’s economic elite and politicians who were of the opinion that ending CICIG would preserve their privileges.

As one interviewee noted, paradoxically the formation of the Corrupt Pact was a sign that CICIG was rooting out corruption and threatening impunity – CICIG had become a victim of its own success. According to interviewees, CICIG’s opponents began to refer to it as the “enemy within” because, in their view, it was debilitating Guatemalan institutions and asphyxiating the media by its dominating presence. It was also called a “supranational institution”

¹⁴ YouTube, “¡Non grato! Jimmy Morales echa inmediatamente a Iván Velásquez de Guatemala” (27 Aug. 2017) [webpage, accessed 8 March 2020].

¹⁵ BBC News, “Guatemalan president orders out UN anti-corruption investigator” (28 Aug. 2017) [webpage, accessed 8 March 2020].

¹⁶ AP News, “Prosecutors seek to life Guatemala president’s immunity” (11 Aug. 2018) [webpage, accessed 20 Feb. 2020].

and many believed that Commissioner Velásquez did not understand the delicate balance needed to operate within Guatemala's complex political and social landscape. Other complaints against Commissioner Velásquez included that he was not subject to sufficient oversight, particularly economic oversight. He had become too much of a "hero-like" figure and had taken on the characteristics of the leader of a political party. A few interviewees stated that Commissioner Velásquez had inappropriately involved himself in legislative reforms on matters which conservative sectors of Guatemalan society viewed as "political", including indigenous and women's rights. The most cited example of this by interviewees was CICIG's role in the 2016 constitutional reforms, where it supported a proposal for a plural legal system by recognising indigenous customary justice systems. The proposal was never presented in Congress.

Interviewees stated that CICIG's decision to investigate President Morales and his family resulted in a "duel of egos" – President Morales versus Commissioner Velásquez. Guatemalans themselves were divided over CICIG's decision to investigate the president. Some believed that CICIG should have focused on more sophisticated cases of corruption, involving larger sums of money (the case against President Morales's son and brother involved approximately 12,000 US dollars [USD]); others believed the investigation was an important symbol that no one was above the law. "CICIG Thursdays", a televised press conference led by Commissioner Velásquez where he would announce CICIG's ongoing investigations, was also controversial. Interviewees stated that the press conference caught the imagination of many Guatemalans, raising public awareness about the law and justice sector by showing that public institutions were doing their job and the rule of law was being strengthened. For others, "CICIG Thursdays" was seen as an abuse of power and raised questions of due process violations, as Commissioner Velásquez would sometimes announce the names of potential defendants. Some Guatemalans believed that Commissioner Velásquez positively engaged the world in their country's fight against corruption by increasing CICIG's international profile. Others felt that it was inappropriate for CICIG to play this role and that it should have been left to national institutions like the Special Prosecutor's Office Against Impunity (FECI, acronym in Spanish) or the Courts for High Risk Crimes. Interviewees summarised that as Commissioner Velásquez adopted a more protagonistic role, the fight against corruption became an even more polarised issue than before. This further polarisation was likely to hamper and have long-lasting, negative effects on Guatemala's future anticorruption efforts.

Even several months after its closure, CICIG remains a polarising factor in Guatemala. One interviewee stated that this was not surprising, considering that CICIG had been dismantling decades of social violence and disassembling powerful social and economic forces that had thrived on impunity. Several interviewees explained the polarised camps as follows: one was either on the left and labelled as a "communist", in favour of CICIG, and a defender of human rights and indigenous peoples, women's and LGBTQI rights; or, one was on the right, business oriented, against CICIG and in

favour of preserving “traditional Guatemala” and conservative ideologies. Those on the “left” believed those on the “right” were corrupt and those on the “right” believed those on the “left” were sabotaging Guatemala’s economic development. Interviewees observed that judges and lawyers had also been unwillingly cast into these ideological camps, threatening their ability to be seen by the public as independent and impartial.

Several interviewees stated that the polarisation within Guatemala’s society had caused a breakdown in dialogue across political lines to the point where members of civil society and the private sector refused to collaborate, regardless of the topic. Such extreme polarisation is particularly dangerous in Guatemala, which already suffers from extreme inequality – nearly 60 percent of Guatemalans live below the poverty line¹⁷ – and where there is an ongoing history of marginalisation, discrimination and racism against the indigenous majority.

CICIG’S demise

CICIG had a history of receiving bipartisan support in Washington, DC. The Obama administration was a great supporter of CICIG and successfully pressured President Morales’s predecessor to extend CICIG’s mandate.¹⁸ Upon CICIG’s closure, the US was its largest funder, having contributed over 40 million USD, investing in the training of judges, prosecutors, investigators and police, in addition to infrastructure and technical assistance. Sweden was CICIG’s second largest donor, contributing over 25 million USD. As several interviewees observed, the Trump administration adopted an indifferent attitude towards CICIG. It shifted from supporting Guatemala in its fight against corruption to focusing its policymaking on stopping narco-trafficking and migration, as exemplified by the “safe third-country agreement”¹⁹. As interviewees noted, this policy shift overlooks the fact that organised crime and impunity are two of the primary causes of migration.²⁰

Moreover, interviewees agreed that the indifference of the Trump administration towards CICIG and its foreign policy shift emboldened CICIG’s opponents. In 2017, CICIG’s foes set about lobbying in Washington, DC and eventually convinced some US Congress members that Russia had

¹⁷ International Monetary Fund, IMF Country Report No. 18/154 (June 2018), p. 4.

¹⁸ The Washington Post, “How U.S. apathy helped kill a pioneering anti-corruption campaign in Guatemala” (14 June 2019) [webpage, accessed 10 Feb. 2020].

¹⁹ In July 2019, the US and Guatemala signed a “safe third-country agreement” which allows the US to send asylum seekers to Guatemala. The agreement is primarily aimed at preventing migrants from El Salvador and Honduras from reaching the US.

²⁰ See Human Rights Watch, “Guatemala: Events of 2019” (2020) [webpage, accessed 16 Feb. 2020].

infiltrated CICIG.²¹ The lobbying efforts resulted in Congress suspending 6 million USD in funding in 2018, a third of CICIG's annual budget. By this point, President Morales had already made Guatemala the first country to follow the US in moving its embassy in Israel to Jerusalem, despite international condemnation. The Trump administration's indifference towards CICIG was clear in late August 2018, when President Morales sent US-donated armoured vehicles to patrol around CICIG's office building. Later that same day, President Morales declared he would not renew CICIG's mandate, as he stood flanked by military and police officials. The only response from Washington, DC was a Tweet by then-Secretary of State Mike Pompeo that "Our relationship with Guatemala is important. We greatly appreciate Guatemala's efforts in counter-narcotics and security".²²

Interviewees reported that the Morales administration had also begun to systematically isolate Guatemala from others in the international community that still supported CICIG. In May 2018, President Morales requested that Sweden remove its ambassador, Anders Kompass, within 30 days and threatened to declare him *persona non grata* if he failed to leave. The threat came directly after Sweden contributed an additional 9 million USD to CICIG in response to Washington, DC withholding promised funds. The Guatemalan government based its request on the fact that Ambassador Kompass had said that Guatemala was a "corrupt society" during his announcement that Sweden would contribute additional funds to CICIG.²³ Either way, as interviewees reported, the request had a chilling effect on other embassies in Guatemala as they feared similar treatment for openly supporting CICIG.

The slow-motion coup by the Morales administration rolled on with the ban on Commissioner Velásquez in September 2018. Despite an order by the Constitutional Court that Commissioner Velásquez be permitted to re-enter the country, he never returned to Guatemala and led CICIG from afar until its closure. The coup reached a highpoint on 7 January 2019, when President Morales unilaterally declared he was terminating the agreement establishing CICIG within 24 hours. He also demanded that all CICIG officials and staff

²¹ The allegations that Russia had infiltrated CICIG relate to the case of the Bitkov family, a Russian family of Putin critics who had migrated to Guatemala to avoid persecution. In January 2015, the Bitkovs were arrested for alleged financial crimes, but those charges were dismissed. CICIG then supported the conviction of the Bitkovs for passport violations and documentary irregularities. The family received extreme prison sentences – 19 years for the father and 14 years for the mother and daughter. Regarding the Bitkov case, US Senator Marco Rubio stated, "I am concerned that CICIG, a commission mostly funded by the United States, has been manipulated and used by radical elements and Russia's campaign against the Bitkov family in Guatemala". In mid-2018, the US State Department debunked these allegations, but some Republican Congress members continued to support the accusation that Russia had infiltrated CICIG and influenced the investigation and prosecution of the Bitkovs. NY Times, "Guatemala Corruption Panel Has New Foe: U.S. Senator Marco Rubio" (6 May 2018) [webpage, accessed 10 March 2020].

²² Twitter, Secretary Pompeo @SecPompeo (1 Sept. 2018) [webpage, accessed 10 Feb. 2020].

²³ Reuters, "Guatemala asks Sweden, Venezuela to remove ambassadors over 'interference'" (11 May 2018) [webpage, accessed 10 March 2020].

leave the country within that timeframe. His reasoning was that CICIG violated Guatemala's sovereignty and the rights of suspects. Pushing back, two days later, the Constitutional Court ruled that President Morales's decision was unconstitutional because he did not have the unilateral authority to terminate the rights and obligations of a bilateral agreement with the UN. The UN Secretary General also "strongly rejected" the declaration and stated that CICIG should complete its mandate in compliance with the international agreement between Guatemala and the UN.²⁴ Although he failed in his attempts to prematurely close CICIG, President Morales ultimately let its mandate expire. CICIG's doors closed on 3 September 2019.

A legislature failing to check the executive

The makeup of Guatemala's Congress is typically fragmented – there were 13 political parties represented during President Morales's term and 19 political parties are represented in the new Congress at the time of writing. Despite such fragmentation, interviewees reported that President Morales had built the necessary political alliances to secure support for his stance. They also reported that Congress members were often "bought off" by special interest groups, the old military guard and the economic elite.

Over the last two years, Guatemala's Congress on multiple occasions has attempted to pass an amendment to the National Reconciliation Law.²⁵ The proposed bill would grant an amnesty to those convicted of grave human rights violations committed during Guatemala's internal armed conflict, along with allowing for the release of those awaiting trial and ending future investigations of those crimes. Pressure from the international community, including the US Department of State, the UN High Commissioner for Human Rights, the UN Special Adviser on the Prevention of Genocide, the Inter-American Commission on Human Rights (IACHR), Human Rights Watch, the Washington Office on Latin America (WOLA) and other human rights organisations, has helped prevent the bill from passing to a vote. In March 2019, the Inter-American Court for Human Rights also ordered Guatemala to shelve the amnesty bill, as it was incompatible with Guatemala's international human rights obligations.²⁶

Pressure from the international community, including the UN High Commissioner for Human Rights, had previously thwarted Congress's attempts to pass a bill amending the Non-Governmental Organisation (NGO) Act. The amendment is aimed at development NGOs and includes new

²⁴ UN News, "UN Chief 'strongly rejects' Guatemala decision to expel anti-corruption body" (8 Jan. 2019) [webpage, accessed 10 Feb. 2020].

²⁵ The National Reconciliation Law was signed as part of the 1996 peace agreement that ended Guatemala's 36-year internal armed conflict. The National Reconciliation Law currently prohibits granting amnesty for grave human rights violations such as genocide, torture and crimes against humanity committed during the internal armed conflict.

²⁶ I/A Court HR, *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal, Case of Molina Theissen and 12 other Guatemalan's Cases v Guatemala*. Provisional Measures and Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of March 12, 2019.

limitations, controls and oversight on their registration and operation, which many international organisations have reported are inconsistent with the right of association and freedom of expression.²⁷ Even more concerning is the sweeping, broad and vague power given to the executive branch to annul an NGO's legal status if the NGO has engaged in activities that disturb "public order" or when an NGO has committed "any violation of the regulations".

Regardless, the newly formed Congress passed the amendment in mid-February 2020, and President Giammattei signed the amendment into law shortly thereafter. Some interviewees expressed serious concern that this amendment would weaken or close down NGOs that were critical of the government. Just prior to this report going to publication, the Constitutional Court provisionally suspended the amendment from entering into effect. Relying on international human rights standards, the Constitutional Court found in a 4-1 decision that the amendment threatened to violate human rights, particularly the right of association and freedom of expression which are fundamental to a democratic society. Despite the Constitutional Court's recent ruling, it is worrying how quickly the new legislature and executive approved the amendment. It could also be an ominous sign for the pending amendment to the National Reconciliation Law.

The previous Congress approved reforms to Guatemala's Criminal Code, which came into effect in December 2019, and may weaken efforts to combat corruption and end impunity.²⁸ The new reforms allow for those accused of corruption and organised crime, including money laundering and bribery, to receive significantly reduced penalties if they partially or fully admit guilt and cooperate with the authorities. The reforms aim to dismantle corruption networks by encouraging cooperation from those charged with such crimes in complex investigations. Some interviewees have reported that these reforms could potentially increase impunity, as the accused may simply pay a fine instead of serving a prison sentence. Interviewees also believed that the reforms would undermine deterrence.

The "truth" commission

In late 2019, members of Guatemala's previous Congress, some the subject of CICIG investigations themselves, created a five-person commission to investigate CICIG's work. The commission's purpose was to call on those accused or convicted of corruption to air their grievances and allegations of illegalities and abuses. After the Constitutional Court ruled that only the Public Prosecutor's Office had the power to investigate such matters, Congress simply repurposed the commission to a "truth" commission, but it continued with the same aim. Many interviewees feared that this so-called "truth" commission was a step towards prosecuting the Guatemalan judges and lawyers who had worked with CICIG or supported its cause. It appears

²⁷ Transparency International, "Constitutional Court in Guatemala Should Reject Oppressive NGO Law" (5 March 2020) [webpage, accessed 8 March 2020].

²⁸ Although CICIG had previously proposed similar reforms, that version included additional safeguards and guarantees to prevent impunity.

that those fears are not unfounded. On 10 January 2020, just a few days before the end of the previous Congress's term, the commission recommended the arrest of judges and prosecutors who had allegedly committed abuses while working with CICIG. In its findings, the commission stated that "the prosecutors, judges and magistrates involved should be investigated . . . they should remember that they are not immune or above the law".²⁹ The commission went as far as recommending that the Attorney General issue arrest warrants for the judges and lawyers identified.

Several interviewees have observed that the commission was a retaliation exercise by the political and economic elites who had never been held accountable until CICIG. Before the commission had released its findings, it was already having a chilling effect on the judges and lawyers that fell within its purview. In December 2019, judge interviewees expressed concern that if the commission resulted in their prosecution and conviction, they could end up in the same prison cells controlled by the gangs and criminal networks which they themselves had convicted.

After the commission issued its findings, the UN Secretary-General called on the Guatemalan government to protect the rights and ensure the safety and security of former CICIG staff, as well as justice sector actors and human rights defenders who worked in support of the rule of law in Guatemala.³⁰ At the time this report was published, it was unclear how Attorney General Porras would proceed with the findings and recommendations.

Building the justice system's capacity

CICIG was never meant to be a permanent fixture within the Guatemalan justice sector but it brought much-needed technical and legal expertise, including investigators, criminal analysts and researchers. Many interviewees criticised CICIG for never properly transferring its technical capacities and expertise to national institutions during its 12 years of existence. For example, one interviewee stated that CICIG's expertise in investigating cases of bribery, fraud and money laundering assisted Guatemalan prosecutors in bringing and presenting these cases, but the investigatory, case management and presentational skills were never transferred. Interviewees agreed that this led to national institutions relying too heavily on CICIG when investigating and prosecuting high-profile and complicated corruption cases.

Only one year remained to transfer CICIG's capacities and withdraw from the time Commissioner Velásquez was banned from re-entering the country to CICIG's mandate expiring. Interviewees stated that Commissioner Velásquez made the decision to continue investigating until the day CICIG closed, rather than dedicating the remainder of its mandate to administratively closing down the Commission. Some interviewees agreed with this decision as

²⁹ Congreso de la República, Acuerdo No. 3-2019, Comisión de la Verdad, p. 12.

³⁰ United Nations Secretary-General, "Statement by the Spokesman for the Secretary-General on efforts to support the fight against impunity in Guatemala" (10 Jan. 2020) [webpage, accessed 10 Feb. 2020].

CICIG's mandate was to investigate corruption, not to administratively shut down the Commission, but others believed it was more important to spend the remainder of CICIG's existence strengthening national institutions.

It was originally thought that, upon CICIG's closure, many of CICIG's experienced lawyers, investigators and experts would transfer to national institutions, bringing their expertise to the national system. This did not happen, because CICIG was under such heavy attack at the time of its closure that its staff was tainted by association. As of December 2019, it was reported by an interviewee that all but one of the 12 Guatemalan lawyers working for CICIG remained unemployed. Several of those lawyers had even fled to neighbouring countries as part of a short-term protection programme. The CICIG staff members who remained in Guatemala were receiving some psychological support and legal assistance at the time of writing, but there was no long-term commitment to their support. Although CICIG did finalise its legislative reform projects before its closure, the failure to integrate the legal experts working on those projects into the national system was a lost opportunity to improve future legislative reform processes.

While all of CICIG's open investigations were handed over to the Public Prosecutor's Office upon its closure, several interviewees expressed concern that not all of those investigations were properly transferred. There were also concerns about how the Public Prosecutor's Office would proceed with the approximately 60 open corruption cases in CICIG's absence. Moreover, many of the high-profile corruption cases opened in 2015 during the Guatemalan Spring have yet to reach trial, due to delays caused by defendants using motions as a stalling tactic and judges and prosecutors facing intimidation. For example, the *La Linea* case,³¹ which is a high-profile corruption case pending before the Courts for High Risk Crimes, was opened in April 2015. At the time of the publication of this report, the case was set for trial in March 2020. It is a legitimate concern and a possibility that many of the open corruption cases will go unprosecuted. This may be partially due to a loss of funding and capacity after CICIG's closure or, as interviewees have stated, also due to pressures upon and influence from within the Public Prosecutor's Office to end to such cases.

CICIG's failure to transfer capacity to national institutions raises questions about the veracity of the goals and sustainability of international development cooperation implemented in Guatemala. It is essential that careful analysis is made on what models of cooperation are appropriate and sustainable for the future.

³¹ The *La Linea* case is the symbol of Guatemala's progress in eradicating corruption. The case implicates Guatemala's then-incumbent president, Otto Perez Molina, and his vice president, in a corruption scandal which involved custom agents giving importers reduced tax rates in exchange for millions of US dollars in bribes. The trial has been pending since October 2017 and the presiding judge is under pressure to discharge the defendants.

Lawfare tactics

Vulnerable institutions

CICIG and other justice sector institutions and actors have all suffered at the hands of a common strategy – the use of the law to attack the justice system and undermine the rule of law. As interviewees stated, the use of such tactics to end CICIG’s mandate represents a larger, targeted dismantling of the recent progress made in justice sector reform in Guatemala. This abuse of power, combined with threats made against the personal safety of justice sector actors, has left several justice sector institutions in a vulnerable state. It is also worrying that the Guatemalan Bar Association has remained silent in response to the threats being made against Guatemala’s justice institutions, judges and lawyers. The Guatemalan Bar Association never responded to ILAC’s requests to meet regarding this report.

Constitutional Court

During President Morales’s term, the Constitutional Court³² found in several instances that his actions had been unconstitutional, including: his declaration of Commissioner Velásquez as *persona non grata* (3-2 ruling); his decision to unilaterally and prematurely end CICIG’s mandate (4-1 ruling); and his signing of a “safe third-country agreement” with the US (4-1 ruling). The Constitutional Court also granted injunctions against congressional decisions, such as preventing Congress from deliberating on the amendments to the National Reconciliation Law and blocking its first attempt to create a commission to investigate the judges and lawyers working with CICIG. President Morales and the legislature have side-stepped and even ignored Constitutional Court rulings in some instances. A poignant example is from July 2019, when the Constitutional Court ordered that Congress must approve the “safe third-country agreement” before its ratification. Later that same month, President Morales disregarded the Constitutional Court and signed the agreement into law without it ever being presented to Congress. Under President Morales, the government was not held to account by the judiciary, a sign of a weakened state of the rule of law in Guatemala.³³

³² The Constitutional Court of Guatemala is made up of five titular judges, with one judge appointed by each of the following bodies: Congress, the Superior University Council of the University of San Carlos de Guatemala, the Guatemalan Bar Association, the Supreme Court of Justice and the President and Council of Ministers. The Constitutional Court issues opinions regarding the constitutionality of treaties, agreements, draft laws and laws vetoed by the president, resolves jurisdictional issues in matters of constitutionality and compiles doctrine and constitutional principles arising from constitutional challenges.

³³ One of the WJP’s rule of law factors is “limited government powers”, and within that factor is the subfactor, “government powers limited by the judiciary”. According to the WJP’s 2019 Rule of Law Index, Guatemala scores 0.53 out of 1 in that subfactor, which is below the average in Latin America.

In response to rulings by the Constitutional Court that limit his power, President Morales has publicly stated that the Constitutional Court judges should refrain from politics and that the Court has exceeded its jurisdiction.³⁴ Similarly, on more than one occasion there were requests by an organisation that was allegedly under the government's control to lift the immunity of the Constitutional Court judges who had ruled against President Morales. The basis for the requests was that the judges had unconstitutionally ruled on matters of foreign affairs, which were exclusively within the competence of the executive powers. In one instance, Guatemala's Supreme Court went so far as to accept Congress's request to lift the immunity of the three Constitutional Court judges. That attempt was thwarted when the Constitutional Court itself granted an injunction against the Supreme Court.

The Constitutional Court judges have also had their physical safety put at risk. One interviewee observed that during a recent protest at the Constitutional Court, all police officers were removed, and the judges were left without adequate protection. In October 2019, the IACHR issued a resolution to grant precautionary protection measures to four of the five Constitutional Court judges. The precautionary measures were issued in response to personal and professional threats made against them for ruling against President Morales's attempt to deny CICIG employees from re-entering Guatemala and to prematurely shutdown CICIG. The IACHR asked the state of Guatemala to ensure that the four named Constitutional Court judges could continue to perform their judicial functions without being subject to threats, harassment or fear for performing their duties.³⁵

To date, despite a lack of respect for the separation of powers and ongoing threats, the Constitutional Court remains a pocket of resistance in a closing space for the judiciary and is one of the few institutions upholding the rule of law.

Courts for High Risk Crimes

The Courts for High Risk Crimes were created in 2009 by law, with support from CICIG, to hear cases involving serious human rights violations, organised crime and corruption. In a country like Guatemala with high levels of corruption – Guatemala ranks 100th out of the 126 countries ranked for absence of corruption by the WJP³⁶ – anyone involved in these types of cases, including judges, prosecutors, defence attorneys, defendants and witnesses, may be at serious risk. The Courts for High Risk Crimes were created out of these concerns. In theory, the judges sitting on the benches of the Courts for High Risk Crimes should receive additional resources and security to enable them to fulfil the difficult task of presiding over high-profile cases. In

³⁴ Prensa Libre, "Congreso conocerá antejuicio de tres magistrados de la Corte de Constitucionalidad" (9 Jan. 2019) [webpage, accessed 10 Feb. 2020].

³⁵ IACHR Resolution 56/2019, José Francisco de Mata Vela y otros respecto de Guatemala (25 Oct. 2019).

³⁶ WJP, "World Justice Project Rule of Law Index 2019", p. 23.

practice, interviewees have observed that this has not been the case, particularly since the closure of CICIG.

The Association of Guatemalan Judges for Integrity (AGJI, acronym in Spanish), a group of judges who stand for an independent judiciary in Guatemala, has been a strong advocate for a proper support mechanism for the judges from the Courts for High Risk Crimes. Several of the judges who are members of AGJI and sit on the Courts for High Risk Crimes expressed grave concerns about a well-plotted attack from within the system to stifle their work at a time when, with CICIG gone, it is vital to consolidate trust in public institutions. These judges have stated that they feel isolated without CICIG, as it has become more difficult to make independent and impartial rulings.

Interviewees reported that the number of threats and acts of intimidation tactics against judges performing their duties independently and impartially, especially against those presiding over corruption cases in the Courts for High Risk Crimes, have recently increased in quantity and severity. Judge Erika Aifán is a glaring example of the difficult situation the judges from the Courts for High Risk Crimes are facing. Judge Aifán is currently presiding over high-profile corruption cases, such as the *Phoenix*³⁷ and *Illicit electoral finance*³⁸ cases. She has been and continues to be subject to threats against her personal safety and attacks on her professional career. The threats against her personal safety have even included receiving death threats via text message. She also recently found that two court employees assigned to her chambers had shared confidential information on the *Phoenix* case with lawyers and had also removed pages from the file, which could result in the release of defendants.

Judge Aifán's difficult position resulted in the IACHR intervening on her behalf in October 2019 and finding that she had been provided with inadequate safety measures. She, and other judges from the Courts for High Risk Crimes, are accompanied by several armed security guards and often travel in bullet-proof vehicles. Yet, the IACHR stated that although the judicial system provides Judge Aifán with security measures, the threats against her have "their origins precisely in certain people in state institutions, without an appreciation . . . for implementing more concrete measures to

³⁷ The *Phoenix* case involves Gustavo Herrera, who allegedly coordinated a network to embezzle 50 million USD of public funds from the Guatemala Social Security Institute. Herrera is also known for using his political and economic powers to influence the selection of high-level judges and prosecutors over the past decade.

³⁸ The *Illicit electoral finance* case involves the National Convergence Front, a conservative political party, and those implicated include several members of Guatemala's powerful economic elite, who allegedly contributed funds to President Morales's campaign without reporting their donations. President Morales could be implicated in this case, but he joined the Central American Parliament (PARLACEN), a multilateral body for regional cooperation resulting from the 1980s peace processes, to allegedly maintain immunity after his presidential term ended.

reduce the climate of hostility against her, such as publicly reaffirming the legitimacy of her work and demanding respect for her integrity at all times”.³⁹

Another member of AGJI reported that he was recently followed in his car from his home to a meeting, which is an intimidation tactic reminiscent of those used in Guatemala during the 1980s. Several members of AGJI were also left for almost three months without safe transport. Until recently, the chief of security for the entire court system was allegedly linked to the military and a close ally of President Morales. There were concerns expressed by interviewees over his appointment to this position and several judges requested that the chief justice of the Supreme Court remove him from the position. He remained in that post until an arrest warrant for domestic violence was issued against him. One interviewee also noted that the judges from the municipalities are in an even more precarious situation because they are isolated, more exposed to gang violence and receive less visibility than the judges at risk in the capital.

Several judge interviewees stated that the system for filing criminal complaints against judges was being used to “criminalise” the judges overseeing high-profile corruption cases. Such criminal complaints are treated as administrative crimes and are investigated by the Public Prosecutor’s Office. In a healthy, functioning justice system, an appropriate number of meritorious complaints filed against judges is to be expected. However, Judge Aifán, for example, is the subject of more than 40 complaints filed before the judiciary’s disciplinary body, the Public Prosecutor’s Office and the Ombudsman for Human Rights.

Judges who are members of AGJI stated that the use of these different tactics was working, at least in part, as they were experiencing anxiety and lower morale. They could choose to leave the country on self-imposed exile but believed such a decision would only worsen the situation and negatively impact Guatemalan society as a whole. They also believed that without CICIG, there was less oversight of the judges sitting on the benches of the Courts for High Risk Crimes and less of a guarantee that the judges would act independently and impartially. Those same interviewees, however, expressed hope that the new executive and legislature would have a more respectful attitude towards the justice system and the separation of powers than the ones that had come before.

Judicial nominations

In contrast to most other countries in the region, only magistrates and trial judges are given tenure in Guatemala. Appellate judges and the 13 judges on Guatemala’s Supreme Court are elected every five years by Congress. As the last judicial elections took place in 2014, Guatemala began the process of nominating and electing entirely new benches for the Supreme Court and Court of Appeals in the summer of 2019. Congress should have elected the

³⁹ IACHR Resolution 55/2019, Érika Lorena Aifán respecto de Guatemala (23 Oct. 2019).

new judiciary by mid-October 2019 but as in the past, the nominations process was plagued by technical delays and allegations of corruption.⁴⁰

Many interviewees stated that the judicial nominations process was being used as a tool to control the judiciary and fill its benches with judges willing to preserve the impunity of the political and economic elite. Those same interviewees observed that the Nominations Committees – formed to nominate the judicial candidates – were known for their lack of objectivity and transparency. During the current election cycle, the Nominations Commissions have used technicalities as a pretext to exclude candidates from the Supreme Court and Court of Appeals. The most striking examples are the exclusion of Judges Miguel Angel Galvez and Erika Aifán, both judges presiding over high-profile corruption cases. Judge Galvez was excluded for failing to present a certified copy of his national identification because he submitted the copy and the certification in two separate documents. Judge Aifán had apparently failed to, as a formality, include the phrase “trade union” (*sindical*) in one of her affidavits relating to any possible impediments to sitting on the Supreme Court. Although she corrected the error and claimed it was not relevant to her candidacy, not a single commission member permitted her to remain eligible.

CICIG supported reforming the system of electing judges as part of the 2016 constitutional reform process to reinforce judicial independence by introducing a more meritocratic selection process, but there were never sufficient votes in Congress to pass the reforms. However, in 2016, Congress passed the Judicial Career Law which includes certain mechanisms that, if properly applied, could contribute to a more transparent selection process. Nevertheless, during the ongoing nominations process, the Constitutional Court found that the Nominations Commissions had failed to comply with the Judicial Career Law and ordered both Commissions to repeat the process accordingly. Complying with the Constitutional Court’s order, the Judicial Career Council conducted evaluations of the judges who had expressed a desire to continue with their candidacy and the Nominations Commissions received and integrated those evaluations into the nominations process. In mid-February 2020, the Nominations Commission for the Court of Appeals provided Congress with a list of 270 nominees and the Nominations Commission for the Supreme Court provided Congress with a list of 26 nominees. By the time Congress received the nominations, more than 120 days had passed since the newly elected Supreme Court and Court of Appeals judges should have taken the bench.

In a recent report, CICIG stated that the judicial nominations process was being used to seize those spaces of power instead of promoting judicial independence.⁴¹ This is exemplified by CICIG and the Public Prosecutor’s

⁴⁰ For a further discussion of Guatemala’s judicial nominations process, see Jaime Chávez Alor and Lauren McIntosh, ILAC Policy Brief, “Judicial Nominations in Guatemala Pockets of Resistance in a Closing Space” (Oct. 2019)

⁴¹ CICIG, “Comisiones de Postulación: Desafíos para asegurar la independencia judicial” (2019), p. 21.

Office uncovering the case of the “Tennis Shoe King” during the 2014 judicial nominations. The case implicated Roberto Lopez Villatoro, a businessman and lawyer, who used his clout and wealth to gain control over the Guatemalan Bar Association and ensured those loyal to him were elected to the Supreme Court and Court of Appeals.⁴² As interviewees have stated, without CICIG’s presence during the ongoing nominations process, there are fewer independent investigators to deter those attempting to influence the bench.

The ongoing nominations process has also been upset by a new corruption scandal. In mid-February 2020, FECCI announced the arrest of Gustavo Alejos, a politician accused in several corruption cases. His implication in a new corruption case relates to the selection of judges called “Parallel Commissions 2020: political and judicial control in the hands of a prisoner” (*Comisiones paralelas 2020: control político y judicial en manos de un privado de libertad*).⁴³ While Mr Alejos was alleged to be hospitalised for a medical condition, he was seen receiving visits from several individuals involved in the judicial nominations process, including members of Congress, politicians, judges and lawyers. Several judges included in the nomination lists presented to Congress in February were observed meeting with Mr Alejos.

In response to the unveiling of this case of corruption, the UN Special Rapporteur on the Independence of Judges and Lawyers expressed concern about the process, stating “The election procedure through the Nominating Commissions seems once again to seriously hamper the independent, transparent and objective judicial process. These weaknesses could have facilitated undue interference”.⁴⁴ Guatemalan civil society organisations and the Public Prosecutor’s Office have also requested that the Constitutional Court suspend the judicial nominations, given the alleged undue influence in the nominations process. In late February, the Constitutional Court granted their request and provisionally suspended the process, finding that candidates nominated to the Supreme Court and Court of Appeals did not comply with the constitutional requirements to be a judge.⁴⁵

Prosecutors

FECCI was established in 2008, as a new division within the Public Prosecutor’s Office out of the need for a specialised division to prosecute high-profile and complex corruption cases. FECCI was supported by CICIG in its investigations and prosecutions and the institutions partnered in

⁴² The case was named the “Tennis Shoe King” because the Mr Villatoro was the owner of a successful tennis shoe store.

⁴³ Prensa Libre, “Gustavo Alejos se reunió con jueces, aspirantes a magistrados y dos diputadas” (18 Feb. 2020) [webpage, accessed 6 March 2020].

⁴⁴ UN Human Rights Office of the High Commissioner, “Guatemala: UN expert concerned by process to appoint judges” (18 Feb. 2020) [webpage, accessed 23 Feb. 2020].

⁴⁵ At the time this report was published, the Constitutional Court had not yet issued its final order in the matter.

prosecuting over 90 corruption cases. Led by its Head Prosecutor, Juan Francisco Sandoval, FECCI is one of the institutions most threatened since CICIG's closure. One interviewee observed that a tactic effectively being employed to suffocate FECCI was the filing of bogus lawsuits against its staff. As of July 2019, 80 criminal complaints had been filed against FECCI staff members, with Prosecutor Sandoval alone the subject of 20 complaints.⁴⁶ Another interviewee stated that this strategy was used to paint the targeted investigator or prosecutor as a "criminal". The tactic further distracts FECCI's staff from their work and lowers morale, as they have to spend time and effort defending each complaint.

FECCI staff are also subject to threats against their personal safety. For example, upon CICIG's closure, the bullet-proof car assigned to Prosecutor Sandoval was removed from his use because it allegedly needed repairs. One interviewee stated that no alternative bullet-proof vehicle was provided until the Ombudsman for Human Rights made a recommendation to the Attorney General. Another interviewee reported that several of FECCI's investigators and prosecutors had resigned in recent months out of fear for their safety. Moreover, several interviewees stated that FECCI had also suffered from CICIG's closure because it relied heavily on CICIG's experts and investigators to support its prosecution of complex corruption cases. FECCI's current staff does not have enough resources or specialised expertise to investigate and prosecute these corruption cases alone.

The division of the Public Prosecutor's Office for Human Rights Crimes (*Fiscalía de Derechos Humanos*) has undergone recent reorganisation and there are differing opinions as to the reasoning behind such reorganisation. The division previously investigated and prosecuted crimes against journalists, justice sector actors, trade union members and human rights defenders, along with crimes committed during the armed conflict, crimes of forced disappearance, torture, extrajudicial killings and discrimination. After the recent reorganisation, crimes committed against journalists, justice sector actors and trade union members no longer fall under the human rights division, but now each belong to a separate specialised division. Time will tell whether the reorganisation improves investigations and the protection of the victims of those crimes or not.

At the time this report went to publication, prosecutors who worked closely with CICIG were continuing to be victimised. Former Attorney General Thelma Aldana, who along with CICIG spearheaded the investigation into President Morales and his family, had a pending arrest warrant against her for an alleged claim of embezzlement related to the purchase of a building at an inflated price during her tenure as Attorney General. These charges were brought against her while she was campaigning for president in 2019 with the political party Movimiento Semilla, which was formed out of the Guatemalan Spring. Thelma Aldana was ultimately disqualified from running for

⁴⁶ Nómada, "Fiscal Sandoval: Temo que el personal de la FECCI se desespere por tanta criminalización" (21 June 2019) [webpage, accessed 8 March 2020].

president due to the corruption charges and, in March 2019, a warrant for her arrest was issued while she was out of the country. After Attorney General Porras requested Thelma Aldana's extradition in February 2020, she was granted asylum by the US a few days later. These actions taken against Thelma Aldana are widely considered to be acts of retaliation for the stand she took in independently and impartially pursuing corruption cases at the highest level.

Threats against human rights defenders, civil society and journalists

In 2018, there were 26 murders of human rights defenders in Guatemala, and 15 murders in 2019.⁴⁷ One interviewee noted that the number of attacks against human rights defenders had been on the rise within the last two years, with most of the attacks occurring in rural areas against indigenous leaders who were working to protect their land, prevent further environmental degradation and for the right to be consulted.⁴⁸

Guatemala's Ombudsman for Human Rights, Jordan Rodas, was also a central target in these attacks. In November 2017, the IACHR granted Ombudsman Rodas and his family precautionary measures "as their rights to life and personal integrity [were] at risk" and because he was "subjected to additional harassment intended to restrict his work, such as potential budget cuts to his agency or else removal from his position" for his support of CICIG.⁴⁹ Notwithstanding, the attacks against the Ombudsman have continued. President Morales openly criticised the Ombudsman in the media and Congress has attempted to remove him from his position on more than one occasion. One interviewee observed that the Ombudsman's personal safety had been recently threatened when his flight information was released on social media before a scheduled trip. The IACHR expressed concern again in November 2019, over new attempts to remove the Ombudsman after episodes of harassment that impacted his ability to carry out his institutional role. The IACHR reiterated its call for the Guatemalan government to adopt and implement measures to ensure that the Ombudsman could carry out his duties "without being subjected to acts of intimidation or fear of reprisals for performing his duties".⁵⁰

President Morales financially squeezed the Ombudsman in 2019, by withholding 20 million Quetzales (approximately 2.6 million USD) of the Ombudsman's total budget of 120 million Quetzales (approximately 15.5 million USD). According to the Ombudsman, this was in retaliation for his support of CICIG and for appealing President Morales's attempt to

⁴⁷ Front Line Defenders, "Front Line Defenders Global Analysis 2018" (2019), p. 4; Front Line Defenders, "Front Line Defenders Global Analysis 2019" (2020), p. 4.

⁴⁸ For a further discussion on conflicts over land and natural resources, see Rhodri Williams, "ILAC Rule of Law Assessment Report: Guatemala" (2018), p. 77.

⁴⁹ IACHR, Press Release, IACHR Grants Precautionary Measure for Human Rights Ombudsman of Guatemala (3 Nov. 2017).

⁵⁰ IACHR, Press Release, IACHR Expresses Its Concern over a New Attempt to Dismiss the Guatemalan Human Rights Ombudsperson (9 Nov. 2019).

unilaterally and prematurely shut down CICIG before the Constitutional Court. After the Constitutional Court found President Morales's attempt was unconstitutional, the Ombudsman publicly stated that, "the government is under obligation to comply . . . If it doesn't obey, that is a whole other matter, and would constitute a coup, because the cornerstone of the rule of law is respect for the judicial branch".⁵¹ As for the funds withheld from the Ombudsman, the Constitutional Court ordered for their allocation and release. The new Congress was complying with the Constitutional Court order at the time this report was published.

In December 2019, Ombudsman Rodas was elected as the president of the Iberoamerican Federation of Ombudsmen at its annual conference in Rio de Janeiro, Brazil. One interviewee stated that such an appointment would help to shield the Ombudsman from attacks and threats because it has raised his international profile. As several interviewees have observed, the more the cases and faces of the independent and impartial judges, prosecutors and lawyers fighting corruption are known, the better. Those attacking and threatening these actors will be less likely to do so if they know that the international community is watching and ready to react.

Interviewees reported that the media was similarly under attack, as newspapers critical of the government had recently been excluded from official advertising. The former president of Guatemala's Congress also awarded "prizes" to certain newspapers for allegedly "misinforming" Guatemalans.⁵² The recipients of these "prizes" were newspapers known for being critical of the government.

Other interviewees representing civil society organisations also reported being subject to retaliatory actions for supporting anticorruption efforts and defending human rights. For example, Acción Ciudadana openly spoke out against President Morales's attack on CICIG and was targeted for that reason. Limiting the freedoms of civil society goes hand in hand with a broader undermining of the rule of law. As UN High Commissioner for Human Rights Michelle Bachelet recently stated, "Protecting civic space and protecting the rule of law are two sides of the same coin. This equal and impartial rule of law is fundamental to democracy – and vice versa. The weakening of one immediately threatens the existence of the other".⁵³ It remains to be seen how the recent passage of the amendment to the NGO Act will impact Guatemala's civil society, which had become more robust and active since the Guatemalan Spring.

⁵¹ AP News, "Guatemala court blocks president's expulsion of UN team" (10 Jan. 2019) [webpage, accessed 10 Feb. 2020].

⁵² El Diario, "El presidente del Congreso de Guatemala da un Pinocho a un medio por desinformar" (3 Dec. 2019) [webpage, accessed 10 Feb. 2020].

⁵³ Keynote speech by Michelle Bachelet, UN High Commissioner for Human Rights, "Finland, Sweden and Norway in multilateral cooperation. How can we secure the legitimacy of multilateral cooperation? What are the tendencies in Europe and globally?" (6 Feb. 2020).

The executive and legislature's use of lawfare tactics and disregard for the separation of powers threaten the independence and impartiality of justice sector institutions and actors and inhibit an active, robust civil society. This strategy could also have deep and long-lasting consequences on Guatemalan society, especially in terms of rebuilding trust in public institutions. In order to support a reversal of this undermining of the rule of law, the international community must devote more time and resources to closely and carefully follow the situation. It must also respond more assertively and proportionally when these tactics are employed against the justice sector and other stakeholders.

Conclusion

The rule of law is at a crossroads in Guatemala, but with a new government in place there is space to once again establish ways forward and forms of cooperation to strengthen the rule of law. The ushering in of a new administration is occurring at a critical moment and brings challenges, including extreme polarisation, loss of hope and a lack of trust in the government and institutions. Yet, President Giammattei is taking initial steps to fulfil the promise he made in his inaugural speech to put “a full stop on corrupt practices so they disappear from the face of this country”.⁵⁴ The day after he took office, President Giammattei signed an inter-institutional cooperation agreement against corruption. The agreement calls for the implementation of mechanisms to prevent corruption and impunity, the strengthening of public spending to fight corruption and for oversight to be given to the Public Prosecutor’s Office to ensure that the involved institutions properly comply.

Most notably, as one of his first acts, President Giammattei created a presidential commission against corruption under which he will develop new policies to fight corruption, create mechanisms to identify acts of corruption and propose new laws and regulations.⁵⁵ The commission’s mandate calls on the government to fully execute Guatemala’s commitments to comply with international and national anticorruption standards. Shortly after the establishment of the new commission, President Giammattei announced that Guatemala’s former vice minister of counter-narcotics, a former prosecutor who also worked with international agencies on anticorruption, would lead the commission. This appointment was positively received by those with a proven record of combating corruption in Guatemala, including former Attorney General Aldana.⁵⁶

The fact that Guatemala’s new foreign affairs minister met with Ambassador Kompass in January 2020, and affirmed future cooperation between Guatemala and Sweden, is hopefully an indication of President Giammattei’s willingness to re-engage in multilateralism.⁵⁷ Returning to multilateralism also presents a new opportunity for Guatemala to engage with international human rights organisations and to include Guatemala’s civil society in the new government’s dialogue and policies on international development cooperation.

In December 2019, the director of the US Bureau of International Narcotics and Law Enforcement Affairs (INL) stated that the fight against corruption in

⁵⁴ Reuters, “Turbulent inauguration day in Guatemala, outgoing president hit by eggs” (14 Jan. 2020) [webpage, accessed 10 Feb. 2020].

⁵⁵ Prensa Libre, “Estas son las atribuciones de la recién creada comisión presidencial contra la corrupción y su director” (21 Jan. 2020) [webpage, accessed 10 Feb. 2020].

⁵⁶ Twitter, Thelma Aldana @Thelma Aldana (4 Feb. 2020) [webpage, accessed 10 Feb. 2020].

⁵⁷ Ministerio de Relaciones Exteriores, “Canciller Pedro Brolo recibió la visita del Embajador de Suecia Anders Kompass” (17 Jan. 2020) [webpage, accessed 10 Feb. 2020].

Guatemala was a US priority.⁵⁸ That same month, the US State Department blacklisted Guatemala's ex-infrastructure minister for his involvement in "significant corruption".⁵⁹ The United States Agency for International Development (USAID) and INL will also support the new presidential commission against corruption by providing computer equipment and office infrastructure.⁶⁰ Welcome as this is, there is no indication that the Trump administration will change its policies and go beyond mildly supporting eradicating corruption in Guatemala. Other international actors who are defenders of the rule of law cannot wait and hope for renewed US engagement before they act and will need to step in and fill this void.

CICIG showed that it is possible to change mindsets and attitudes about combating corruption and the rule of law in Guatemala. As one interviewee stated, this was a remarkable achievement given the complexities of Guatemala's history and the diversity in its people's ways of living and thinking. At the same time, several interviewees observed that the Guatemalans continuing the fight against corruption in the absence of CICIG felt abandoned by the international community in those efforts. Guatemalans understood the geopolitics and how much influence Washington, DC had in the region. Nevertheless, they were disillusioned after other international actors rapidly followed Washington, DC's foreign policy position and withdrew from openly and robustly supporting the fight against corruption and strengthening the rule of law. They were also frustrated and disappointed to witness how quickly Guatemala had fallen back into its old ways and at the lack of commitment by national and international actors to preserve CICIG's salvageable achievements. One interviewee stated that many Guatemalans were now more sceptical than ever of international interventions, after the smear campaign against CICIG as an overarching international body.

What CICIG has shown is that a balance needs to be struck where Guatemala has autonomy over its own institutions and policies, but in cooperation with the international community providing technical assistance and supporting capacity development. Time and real long-term commitment will help rebuild the trust of the Guatemalan people in the international community.

Rule of law reform takes time and, as Guatemala has shown, it is not a straightforward path. The near future will reveal whether Guatemala's new administration has chosen to return to the path of strengthening the rule of law. It is imperative to seize this window of opportunity, presented as the new executive takes initial steps to reinvigorate Guatemala's efforts to combat corruption. One thing is certain, it is more likely that Guatemala will return to

⁵⁸ Prensa Libre, "Estados Unidos apuesta a fortalecer a la Feci para combatir la corrupción en Guatemala" (5 Dec. 2019) [webpage, accessed 10 Feb. 2020].

⁵⁹ US Embassy in Guatemala, "Public Designation, Due to Involvement in Significant Corruption, of former Guatemalan Minister Alejandro Sinibaldi" (3 Dec. 2019) [webpage, accessed 10 Feb. 2020].

⁶⁰ Prensa Libre, "Exviceministro antinarcóticos dirigirá la Comisión Presidencial contra la Corrupción" (4 Feb. 2020) [webpage, accessed 10 Feb. 2020].

the path of strengthening the rule of law with support from the international community and immediate, well-planned international development cooperation.

Recommendations

Guaranteeing the independence of the judiciary. Guatemalan judges must be empowered to fulfil their judicial duty independently and impartially without fear of retaliation, intimidation, threat and attacks. Steps should be immediately taken to respect and enhance their independence and impartiality to strengthen the rule of law.

The international community should support:

- Taking steps towards establishing a cross-sector dialogue on reforming the judicial nominations process so that it is transparent and based on merit. Support can be shown through active peer-to-peer exchanges with other countries in the region that have implemented successful reforms, such as Colombia, Costa Rica, Mexico, Argentina and Brazil.

At the executive level, urgent attention needs to be given to the following recommendations:

- Guarantee judicial independence by:
 - o Consistently supporting the integrity of the justice system by refraining from criticising and politicising judges and undermining their independence with tactics such as requesting that their immunity be lifted for legitimately finding against the government.
 - o Implementing the security measures provided for in the precautionary measures granted by the IACHR for judges and the ombudsman for human rights. If judges are targeted, the overall justice system is vulnerable. There must be clear and robust safeguards implemented for deterrence.

Concerning the legislature, there needs to be an enhanced focus on the following measures:

- Allocating sufficient funds to the judiciary so it can perform its functions, including funds for technical, administrative and security resources. This is relevant for national authorities, but also for international donors that used to invest in CICIG. It is not too late to integrate lessons learned and expertise from CICIG into national justice system institutions by recruiting former CICIG national staff and building on their technical expertise.
- Respecting the separation of powers by leaving investigations, such as those undertaken by the recent congressional commission, to the proper authorities and ensuring there are proper grounds when requesting that a judge's immunity be lifted.

The judiciary's administration should:

- Guarantee the personal safety of judges, particularly the judges from the Courts for High Risk Crimes, by providing adequate protection and safety measures to prevent attacks, intimidation, threats and harassment. Such support, which is low cost but high yield, should be provided to those most in need. Without adequate security, there is little incentive for judges to risk their own personal safety to uphold the rule of law.

Break isolation and return to multilateralism. CICIG was once an example of how multilateralism could be used to strengthen the rule of law. The multilateralism once enjoyed in Guatemala can return with support from the international community.

The international community should consider the following measures:

- Engaging with the new government to restore bilateral and multilateral relations, re-establish trust and develop new cooperation plans. Without immediate action, momentum with the new government could be lost.
- Supporting the creation of “safe spaces” for dialogue on strengthening the rule of law, including working with national counterparts and facilitating regional peer-to-peer exchanges to support judges, prosecutors and lawyers working to eradicate corruption.
- If the amendment to the NGO Act is reinstated, monitoring whether the amendment is used to limit civic space and preparing measures to support NGOs limited by the amendment.
- Supporting national efforts to reframe the rule of law discussion from an ideological to a technical discussion, focusing on how the rule of law benefits economic advancement.

At the executive level, urgent attention needs to be given to the following recommendations:

- Allowing new civil society organisations to register with the Ministry of the Interior and ensuring low registration costs and non-restrictive registration criteria.

Continue efforts to fight corruption. Guatemalan justice actors are in need of strategic, forward-thinking technical legal expertise to combat corruption. There is currently no evidence of a unified popular call among Guatemalans for another international or regional-backed mechanism with a similar mandate, particularly as other mechanisms in the region are faltering. In light of these considerations, new mechanisms and forms of cooperation need to be considered for how best to continue anticorruption efforts in Guatemala.

The Guatemalan government should realign its priorities to encompass the following measures:

- Allocating sufficient resources to fight corruption to the relevant institutions, including the Ministry of the Interior (*el Ministerio de Gobernación*), the Attorney General, the Public Prosecutor's Office and the judiciary.
- Continuing investigating and prosecuting the open cases transferred from CICIG to the Public Prosecutor's Office.
- Dismissing the recommendations of the recent congressional commission and showing support for the judges and lawyers who worked with CICIG to incentivise them to fulfil their professional mandate to combat corruption.
- Consider incorporating the expertise of CICIG staff into the new presidential commission against corruption. This would be a concrete first step in addressing a perceived failure by CICIG to integrate valuable expertise and experience into national institutions.

International donors, international NGOs, governments and intergovernmental organisations have a crucial role to play and should initially focus their attention on the following:

- Continuously monitoring the situation in Guatemala and raising the international profile of judges, prosecutors and lawyers fighting corruption, including by monitoring high-profile corruption cases and reporting on instances where their independence is threatened.
- Working with national counterparts to identify the technical and financial support and capacity building needed to support the institutions in charge of fighting corruption, including FECCI and the new presidential commission against corruption in executing its mandate.

Methodology

This report intends to be qualitative in nature and resulted from direct interviews with 44 individuals from 25 different organisations and institutions undertaken in Guatemala City during the period of 1 to 8 December 2019. Desk research was also carried out to ensure that information was up to date and that the chronological events, following the launch of ILAC's rule of law assessment report on the Guatemalan justice sector in May 2018, were properly updated and reflected with accuracy. Meetings were held in Spanish.

A comprehensive set of Terms of Reference (ToR) was drafted and agreed by the authors prior to their visit to ensure that there was coherence, coordination and consistency throughout the mission, including interview questions and identification of key stakeholders. Three external experts, including a former ILAC delegate of the first Guatemala visit of October 2017, were consulted to verify the ToR included the correct criteria and pathway. Throughout the month of November 2019, the authors contacted all relevant stakeholders to schedule meetings and interviews; unfortunately, some key stakeholders contacted did not respond to this call, including the Guatemalan Bar Association.

The draft of the report was shared with two external experts and their comments were integrated into the report at the discretion of the authors. All three ILAC delegates agreed upon the final document for publication and the content of this report is intended to inform a range of significant stakeholders to support justice sector actors in Guatemala, who are operating under extremely difficult circumstances.

Research questions

- a. What is the impact of the withdrawal of CIGIG on Guatemala's justice sector?
- b. In what ways, if any, did CICIG transfer capacity, as stated in its mandate?
- c. Since the end of CICIG's mandate, what steps, if any, have been taken to support justice sector actors to ensure that adequate resources are available to them to perform their duties in safety?
 - i. In particular, what steps have been taken to support judges such as those from the Courts for High Risk Crime?
- d. How can the international community support Guatemala's justice sector after CICIG's closure and with an incoming new government?

“The Window of Opportunity” report examines the state of Guatemala’s justice sector after the closure of the International Commission against Impunity in Guatemala (CICIG) in September 2019. The report was undertaken to look deeper into the continued threats against Guatemala’s justice system since the publication of the International Legal Assistance Consortium’s (ILAC) rule of law assessment report on the Guatemalan justice sector of May 2018. The report was coordinated by ILAC and is a collective effort between ILAC and its member organisations, the Law Society of England and Wales and the Cyrus R Vance Center for International Justice of the New York City Bar Association. In December 2019, the ILAC team travelled to Guatemala City to meet with a wide range of stakeholders, who provided the insight to make this report possible.

The report highlights how recent threats against the justice sector have reversed the progress made to strengthen the rule of law during CICIG’s existence. With a new incoming executive, the report concludes that the international community must seize the window of opportunity to re-engage with Guatemala and recommends how support can be provided to the justice system to continue the fight against corruption and strengthen the rule of law. This will require finding new and effective models of development cooperation to ensure more sustainable strategies and long-term strengthening of the rule of law.

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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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