

OBSERVATIONS AND RECOMMENDATIONS OF
NEW YORK CITY BAR ASSOCIATION
DELEGATION OF BUSINESS LAWYERS OF THE AMERICAS TO GUATEMALA

Introduction

On August 12 and 13, 2013, the New York City Bar Association (the “City Bar”) sponsored a delegation of business lawyers from four countries of the Americas to Guatemala (the “Delegation”). The purpose of the delegation was to assess the potential effects on the rule of law and the international business climate in Guatemala of the ongoing prosecution of former President Efraín Ríos Montt and Mauricio Rodríguez Sánchez, his former head of military intelligence, on charges of genocide and crimes against humanity (the “Proceeding”). The delegation was organized by the City Bar’s Cyrus R. Vance Center for International Justice (the “Vance Center”), with logistical support from the Myrna Mack Foundation.

Delegates

The Delegation consisted of ten lawyers, with collectively more than 200 years of experience practicing international business law in the Americas, in most cases in Latin America. The delegates were:

Hunter T. Carter (United States), partner Arent Fox, chair of City Bar Inter-American Affairs Committee

Ciro Colombara (Chile), partner Rivadaneira, Colombara & Zegers

Robert Cusumano (United States), Executive Director of the Legal Horizons Foundation, former general counsel of ACE Group of Insurance Companies, and member of Vance Center Committee

Eric Ordway (United States), partner, Weil Gotshal & Manges, member of Vance Center Committee

Alexander Papachristou (United States), executive director of Vance Center

Lindsay Sykes (Bolivia and United States), partner Ferrere

Amanda Taub (United States), Member of the Human Rights Committee of the City Bar, counsel Buhler, Duggal & Henry

José Ugaz (Peru), partner Benitez, Forno & Ugaz

José Antonio Urrutia (Chile), partner Urrutia & Cia Abogados

Macarena Vasallo (Chile), associate Urrutia & Cia Abogados

The delegates participated in the delegation strictly as individuals, not as representatives of their employers, and on a voluntary, pro bono basis.¹ They did not represent any businesses or individuals as clients and exercised their own, independent judgment. Their interest was only to support the rule of law in Guatemala and other countries influenced by events there.

Participants in Guatemala

¹ Alexander Papachristou participated ex officio on behalf of the City Bar.

The Delegation sought to meet with all interested participants and interested parties in the Proceeding, including officials of the Guatemalan judiciary directly involved at all stages of the Proceeding and other senior officials of the Guatemalan government. The Delegation also approached senior representatives of leading organizations in Guatemala taking an active interest in the Proceeding, as well as attorneys for the defendant Ríos Montt (although not with him). The Delegation succeeded in meeting with individuals holding the following positions:

The President and an Associate Justice (*Magistrado Titular*) of the Guatemalan Constitutional Court

The President of the Guatemalan Supreme Court

The President of the Criminal Chamber of the Guatemalan Supreme Court

The Controlling Judge (*Juez Controlador*) of Guatemala's High Risk Court who conducted part of the preliminary phase of the Proceeding

The Chief Judge and Members of the High-Risk Court who conducted the trial in the Proceeding

The Human Rights Ombudsman of Guatemala

The Country Representative in Guatemala of the United Nations High Commissioner for Human Rights

Board Members and the President of the Center for the Defense of the Constitution (*Centro para la Defensa de la Constitución*) (CEDECON)

The Executive Director of the Center for Legal Action on Human Rights (*Centro para la Acción Legal en Derechos Humanos*)(CALDH)

The Director of the Guatemalan Forensic Anthropology Foundation (*Fundación de Antropología Forense de Guatemala*) (FAFG)

The Regional Director of the International Commission of Jurists – Guatemala

The President and Members of the Executive Board of the Bar Association of Guatemala

The Deputy Chief of Mission and the Political and Economic Counselor of the United States Embassy in Guatemala

One of the attorneys from former President Ríos Montt's trial defense team

The President and a Board Member of the Myrna Mack Foundation (*Fundación Myrna Mack*)

Board Members and the Executive Director of the Coordinating Committee of the Associations of Farmers, Merchants, Industrialists and Financiers (*Comité Coordinador de asociaciones Agrícolas, Comerciales, Industriales y Financieras*) (CACIF)

The Attorney General of Guatemala and her Chief of Staff

Representatives of the Guatemalan media at a press conference on August 13.

Perspective of Delegation

The delegates consider the rule of law to be fundamental to successful business and thus to a prosperous national economy. Indeed, businesses exist only as a result of laws permitting their establishment and providing them with powers and responsibilities. Their activities flourish when the legal system in which they operate provides clear, coherent, and consistent rules, enabling them to predict reasonably how their business decisions will conform to the laws and

their enforcement. The judicial system plays an essential role in providing businesses with legal guidance and practical reliability.

The rule of law is particularly important when businesses consider whether to invest internationally. They rely on their lawyers to advise them whether the legal systems in another country, including the judicial systems, offer sufficient mitigation of so-called political risks, such as official corruption, excessive delay or unpredictability in regulatory and judicial decision-making, and other divergences from the rule of law.² Political risks of this kind raise the perceived cost of doing business in another country and thus require businesses to invest only in more profitable ventures and to forgo investing if higher returns, matching the higher risks, are not available.

How the judiciary considers charges of serious violations of international law by a former leader of the country inevitably represents a bellwether for the rule of law in that country. On the one hand, the matter demonstrates that the institutions of government, including the executive and the judiciary, are willing and able to exercise authority over an inevitably politically and legally complex case – a sign of great strength in the country’s rule of law. On the other hand, the matter challenges those institutions to act independently of political considerations and to conclude the matter based on applicable law and the specific facts of the case – essential elements of the rule of law.

Accordingly, the Delegation views the Proceeding as an important indication of whether Guatemala is adhering to the rule of law. To demonstrate commitment to the rule of law, the delegates expected the Proceeding to be reasonably accessible, comprehensible, and consistent with generally-recognized international standards for independent, orderly, and fair judicial process.

Summary of the Proceeding

For a summary of the Proceeding, please see: <http://www.riosmontt-trial.org/category/summary/>.

Observations of Delegation

1. All of the participants with whom the Delegation met were generally open, engaged, and constructive. They generously shared their time, information, and opinions with the Delegation and welcomed its interest and involvement.

² The fundamental importance of the rule of law to international business is well-recognized by the World Bank and other international agencies and associations. See: United Nations Conference on Trade and Development, 1–3 November 2004 *Good Governance In Investment Promotion*, U.N. Doc. TD/B/COM.2/EM.15/2 (August 25, 2004). Available at http://unctad.org/en/Docs/c2em15d2_en.pdf (last accessed August 21, 2013); *Rule of Law and Development*, World Bank Group, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0..contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited August 21, 2013).

2. All of the participants expressed basic acceptance of the importance of the Guatemalan legal system, and specifically viewed the judiciary in Guatemala as the appropriate institution to consider the charges in the Proceeding, even as many voiced concerns and criticisms about specific institutions and practices.
 - a. There was widespread concern that the upcoming appointments (*postulaciones*) process will suffer from politicization and corruption.³ Certain participants described first-hand experiences with attempted influence and manipulation in the recent past. Many people expect that the process will lead to appointment of judges and officials who will be less favorably disposed to the continuation of the Proceeding and other potential prosecutions like it.
 - b. There were frequent and specific reports of political interference with the judiciary during the Proceeding, including alleged bribes and threats to individual judges.
 - c. There was general criticism of the constitutional challenge (*amparo*) process as being too frequently used and too easily susceptible to manipulation, which causes harmful confusion and delay.⁴
 - d. There was frequent concern that judges do not receive sufficient respect and resources to manage judicial proceedings effectively and independently.
 - e. There was similar concern that the management of the judicial system does not sufficiently encourage attorneys to prepare and present cases efficiently and to conduct themselves constructively, or sufficiently discourage them from engaging in behavior and tactics that are destructive to the functioning of the judicial system.
 - f. However, the participants generally discussed the procedures and rulings in the Proceeding in ways that indicated that the trial was conducted with a clarity, coherence, and consistency compatible with a reasonably reliable rule of law.
 - g. Although often with trepidation or skepticism, the participants envisioned the potential for the Proceeding to resume in an orderly and fair manner.
3. All of the participants expressed the desire to see the Proceeding resume and reach a conclusion on the merits, even as some doubted that this is possible and others showed a lower level of urgency. The Delegation notes that, while the CACIF representatives with whom it

³ In 2014, Guatemala is scheduled to hold selection commissions ("*comisiones de postulacion*,") to select the country's magistrates and attorney general. The *comisiones* consist of a multi-step process in which candidates are first nominated to a short-list by various legal and governmental institutions. The short lists for the magistrate positions are presented to the legislature, which then makes the final selections. Selection of the attorney general works in the same way, except that the executive makes the final decision.

⁴ Indeed, in its brief to the Inter-American Court of Human Rights in the 2009 *Dos Erres* case, the Guatemalan state itself noted that "[...] in practice, the constant and frivolous use of the appeal for legal protection has merited that different Bodies of the State discuss the implementation of measures that allow attacking the inadequate use of this constitutional action." The Court agreed, finding that the structure of the *amparo* process rendered it vulnerable to exploitation by unscrupulous parties and their attorneys. Case of the "Las Dos Erres Massacre" v. Guatemala, Judgment of November 24, 2009, page 33, para. 107-109.

met joined in expressing this desire, CACIF publicly has opposed the Proceeding and called for a reversal of the conviction of Ríos Montt.⁵

- a. Some participants considered the apparent April 2014 date for the Proceeding to resume as too far off, in light of the upcoming appointments process, which they fear will lead to appointment of judges and an attorney general who will not pursue the Proceeding and thus leave the victims, defendants, and other trial participants in limbo.
- b. Some participants considered this date to be appropriate in light of the regular scheduling of judicial proceedings in Guatemala.

Based on these observations and information that it reviewed before and after the visit to Guatemala, the Delegation formed the following views:

1. The Proceeding represents a historic and crucial experience in Guatemala's establishment of the rule of law. That the Proceeding is taking place is a significant, if not conclusive, indication of a national commitment towards the establishment of firm foundation for the rule of law, and a positive signal for international business opportunity.
2. While the Delegation takes no view regarding the veracity of the charges in the Proceeding, it notes that some interested parties in Guatemala have raised concern that a finding of genocide, or even a trial on such charges, against a former leader of the country inevitably will harm Guatemala's image and business climate internationally. The Delegation is firmly of the view that the contrary is the case. Indeed, several members of the Delegation come from countries that have accounted for their own pasts in this way, and then transformed into vibrant economies and political systems. The fact that any country, large or small, at any stage of its political and economic development, makes use of its legal system to account for tragic events in its past only redounds to its credit, strengthens its image and its business climate, and reflects favorably on its adherence to the rule of law.
3. Even as the Proceeding engendered confusion and controversy in Guatemala and internationally, it showed certain key indicators of the rule of law: it took place in the courts, before trial and appellate judges who employed official procedures and made oral and written rulings; the parties participated actively and had legal representation; a detailed judgment on the merits was issued, and the Constitutional Court ruled on certain issues (albeit in a bitterly-divided split decision). Disregarding worrisome evidence of political manipulation, these indicators contrast notably with how Guatemalans handled issues of controversy in the past, especially during the period under scrutiny in the Proceeding.
4. The frequency and specificity of reports of political interference with the judiciary during the Proceeding, including alleged bribes and threats to individual judges, raise grave concern for adherence to the rule of law in the Proceeding. Such reports undermine the credibility of claims that the

⁵ See http://www.cacif.org.gt/index.php?option=com_content&view=article&id=1072%3Aimc-21-05-2012&catid=36%3Anoticias&Itemid=887&lang=es

procedures and rulings in the Proceeding are consistent with the rule of law. The rule of law is not limited to, even as it depends on, the mere objective plausibility or rationality of decisions, but also requires institutional good faith, respect and resources, including the maintenance of order and physical safety for decision makers. Good faith, independent judgment based rationally and exclusively on evidence presented and the applicable law is a cornerstone of the rule of law.

5. Widely-expressed fear of the politicization and corruption of the upcoming appointments process raises further grave concern for adherence to the rule of law in the Proceeding and generally in Guatemala. A process originally designed to shelter appointments from politics appears to lack necessary transparency, consistency, and organization. The resumption of the Proceeding should not depend on the outcome of the appointments process if the rule of law is to prevail. In light of the current status of the Proceeding, if newly-appointed judges or other officials decide not to resume the Proceeding, they will undermine confidence and respect for the rule of law in Guatemala, along with the conditions for international business opportunity.

Recommendations of the Delegation

1. The Delegation recommends the resumption of the Proceeding at the earliest possible date, with the expectation that the Proceeding will result in a fair and final decision on the merits of the charges one way or the other.
 - a. The Delegation recognizes that such resumption will require extraordinary measures in scheduling the Proceeding, but considers that this is appropriate, even necessary, in light of the significance of the Proceeding for the rule of law and international business opportunity in Guatemala.
 - b. The Delegation recognizes that such resumption potentially will burden the parties, as well as the witnesses, in the Proceeding and further recommends that the Government of Guatemala provide needed and appropriate resources and support to the parties, judges, and witnesses to alleviate this burden. The Delegation also recommends that the judiciary consider appropriate measures to facilitate prompt merits-based disposition of this matter.
 - c. The Delegation recommends and urges that all participants and interested parties in the resumed Proceeding, as well as the Government of Guatemala, exercise and publicly express full and constant respect for the law and procedures, including internationally-recognized standards, and specifically for the status, safety, and independence of the judges, attorneys, and witnesses.
2. The Delegation recommends that the Government of Guatemala and all participants in the appointments process commit themselves publicly to exercise their respective roles in the process honestly and transparently, with the substantive qualifications of those considered for appointment as the sole basis for their selection.

- a. The process should take place openly with appropriate safeguards, so that all participants and the public can be confident in its integrity. The Government of Guatemala should encourage independent experts from Guatemala and other countries to observe and report on the appointments process.
 - b. To the extent that amendments in the process are feasible in the time available, amendments that enhance the transparency and merit basis of selection should be implemented.
 - c. The responsible authorities should announce and effect special measures to prevent as much as possible and otherwise detect and punish any corruption of the process.
3. The Delegation recommends that the Guatemalan Congress and judiciary promptly consider appropriate reforms of the constitutional challenge (amparo) process, so that it secures the rights of parties and other participants in judicial proceedings, but does not unnecessarily delay or complicate these proceedings.
 4. The Delegation recommends that the Guatemalan Congress, the judiciary, and the Bar Association promptly consider appropriate reforms of the rules and procedures of professional responsibility for attorneys, including judges, public officials, and private attorneys, to ensure respect for their respective status, rights, and authority. In particular, trial judges require adequate means to manage courtroom conduct and ensure the security of witnesses, attorneys and courtroom personnel, including themselves, and reviewing courts require powers to sanction inappropriate conduct.

Conclusion

The Delegation will continue to monitor the Proceeding and seek ways to support it and other efforts in Guatemala to strengthen the rule of law. The Delegation thanks all those with whom it met and expresses its fervent wish that Guatemala continue to rely and build on the rule of law, for the benefit of its investment climate and the well-being of its citizens.

About the Association

The New York City Bar Association, since its founding in 1870, has been dedicated to maintaining the high ethical standards of the legal profession, promoting reform of the law and access to justice, and providing service to the profession and the public. The Association, through its 24,000 members, continues to work for political, legal and social reform, while implementing innovative means to help the disadvantaged. Protecting the public's welfare remains one of the Association's highest priorities. www.nycbar.org.

The Association is grateful to the attorneys from other jurisdictions who participated pro bono in the Delegation and to Marie-Claude Jean-Baptiste and Ildiko Egry of the Vance Center.