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Statement of the New York City Bar Association on the Attacks on Judge Erika Aifán Davila in Guatemala

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New York, February 8, 2022 – The New York City Bar Association expresses its deep concerns for the increased attacks on the independence of Guatemala's judiciary, in particular the attacks leveled against Judge Erika Aifán.

Judge Aifán is a trial judge presiding over Guatemala's High-Risk Court¹ responsible for high-level corruption and organized crime cases. In March 2021, Judge Aifán, described as an "icon of the struggle against corruption in Guatemala," received the *International Women of Courage Award 2021*² from the U.S. State Department. She is a founding member of the Guatemalan Association of Judges for Integrity (AGJI),³ supported by the New York City Bar Association's Cyrus R. Vance Center for International Justice (Vance Center).⁴ Judge Aifán was also part of the

¹ The Courts for High Risk Crimes were created in 2009 by law, with support from the International Commission against Impunity in Guatemala (CICIG), to hear cases involving serious human rights violations, organized crime and corruption. See more about the Courts for High Risk Crimes in: ILAC Rule of Law Assessment Report: A Window of Opportunity Support to the Rule of Law in Guatemala, ILAC, March 2020, http://ilacnet.org/wp-content/uploads/2020/03/ILAC-Guatemala-report-2020_web.pdf.

² Press Release, U.S. Dep't of State, 2021 International Women of Courage Awards Recipients Announced (March 4, 2021), <https://www.state.gov/2021-international-women-of-courage-award-recipients-announced/>.

³ Asociación Guatemalteca de Jueces por la Integridad Homepage, <https://agji-gt.org/~agjigtor/> (last visited February 2, 2022).

⁴ The Cyrus R. Vance Center for International Justice of the New York City Bar Association ("The Vance Center") advances global justice by engaging lawyers across borders to support civil society and an ethically active legal profession. The Vance Center is a unique collaboration of international lawyers catalyzing public interest innovation that brings together leading law firms and other partners worldwide to pioneer international justice initiatives and provide pro bono legal representation to social justice NGOs. The Vance Center Homepage, www.vancecenter.org (last visited February 2, 2022).

The Vance Center's focus on the Guatemalan judiciary began in 2013 with a delegation examining the rule of law in light of the Guatemalan Constitutional Court's reversal of the conviction of Efraín Ríos Montt and continues today.

Guatemalan judges' delegation that visited the New York City Bar Association in November 2021.⁵

As a result of the sensitive nature of the cases handled by Judge Aifán, including cases against public officials and other magistrates involving corruption, she has been subjected to a pattern of harassment and threats in an effort to impede these cases. In 2019, the Inter-American Commission on Human Rights (IACHR) found that security measures put in place to protect Judge Aifán were insufficient given the level of harassment and threats she suffered. As a result, the IACHR granted precautionary protection measures in favor of Judge Aifán to address the security issues.⁶ As a judge of the High Risk Court, Judge Aifán oversees cases related to corruption, including cases in which former high-level public officials and powerful actors in Guatemala are involved, such as the Odebrecht-related case.⁷ However, despite the IACHR's ruling, the threats to Judge Aifán's personal safety have continued, and most recently have taken the form of targeting her judicial immunity.

In recent weeks, three new requests to lift Judge Aifán's judicial immunity have been filed, in addition to two other such efforts that were initiated in 2020 and 2021. All the requests are related to the 2020 case, "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*). The case was made public in mid-February 2020, when the Specialized Prosecutor Against Impunity announced the arrest of Gustavo Alejos, a politician accused of and previously imprisoned for several corruption cases. The Special Prosecutor accuses Mr. Alejos of corruption related to the selection of judges while Mr. Alejos was alleged to have been hospitalized, as permitted by another judge, for a medical condition. It is alleged that he was seen receiving visits from several individuals involved in the judicial nominations process, including members of Congress, politicians, judges, magistrates and lawyers.⁸ Judge Aifán is currently overseeing the Parallel Commissions case.

The Vance Center has been working for over a year to support the efforts of AGJI to strengthen its institutional capacity and judicial independence in Guatemala.

⁵ Press Release, The Vance Center, Guatemalan Judges Visit the Vance Center (November 2021), <https://www.vancecenter.org/guatemalan-judges-visit-the-vance-center/>.

⁶ Press Release, Organization of American States, IACHR Grants Precautionary Measures to Protect Justice Operators in Guatemala (October 28, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/276.asp (referring to precautionary measures resolution granted in favor of Judge Aifán and a similar resolution on behalf of three Constitutional Court magistrates, IACHR stated: "[i]n keeping with Article 25 of its Rules of Procedure, the Commission asked the State of Guatemala to adopt any measures necessary to protect beneficiaries' rights to life and personal integrity; to take any measures necessary to ensure that beneficiaries can do their work as a judge and as magistrates without being subjected to threats, harassment, or fear for doing that work; to come to an agreement with beneficiaries and their representatives regarding any measures that need to be taken; and to report on any actions taken to investigate the alleged events that gave rise to the adoption of this resolution, to prevent such events from happening again in the future"); see also Erika Lorena Aifán v. Guatemala, Precautionary Measures, Resolution 55/2019, Inter-Am. Comm'n, Precautionary Measure No. 682-18 (October 23, 2019), <https://www.oas.org/es/cidh/decisiones/pdf/2019/55-19MC682-18-GU.pdf>.

⁷ Adriana Beltran, Behind the Fight to Hijack Guatemala's Justice System, WOLA, July 10, 2021, <https://www.wola.org/analysis/behind-the-fight-to-hijack-guatemalas-justice-system/>

⁸ ILAC, *supra* note 1 at pg. 31.

The Prosecutor General's Office, headed by Prosecutor General Maria Consuelo Porras Argueta De Porres, filed two requests to lift Judge Aifán's judicial immunity on January 13th⁹ and 18th¹⁰, 2022. A third request was presented by Raúl Amilcar Falla Ovalle on behalf of the Foundation Against Terrorism (*Fundación Contra el Terrorismo*) on January 24, 2022. These requests refer to alleged crimes committed by Judge Aifán including abuse of authority, breach of duties, and perverting the course of justice. If the requests to remove Judge Aifán's judicial immunity are granted, this would allow her to be criminally prosecuted for alleged abuses in her adjudication of cases brought by the Special Prosecutor Against Corruption.

Prominent members of civil society in Guatemala and abroad have expressed concerns over the validity of these requests, noting that, in seeking to lift Judge Aifán's immunity, the Prosecutor General appears to be attempting to secure impunity for those accused in the Parallel Commissions case, including Mr. Alejos, by facilitating the removal of Judge Aifán, an independent judge, from overseeing the case.¹¹ Further, the Prosecutor General's mandate ends in May 2022 and she is seeking reelection but is facing pushback and has been accused of facilitating corruption.¹² Many in civil society fear that the requests to lift Judge Aifán's immunity are a further attempt to help the Prosecutor General's reelection campaign and appoint a friendlier judge to the High-Risk Court.¹³

It is also worth noting that in September 2021, the U.S. State Department included Prosecutor General Porras Argueta De Porres in the United States' Undemocratic and Corrupt Actors list, under section 353 of the United States–Northern Triangle Enhanced Engagement Act, for obstructing investigations into acts of corruption by interfering with criminal investigations.¹⁴ Additionally, the lawyer who filed the most recent request to lift Judge Aifán's immunity, Mr. Ovalle, was included in the U.S. Embassy in Guatemala's July 2021 "Report to Congress on Foreign Persons who have Knowingly Engaged in Actions that Undermine Democratic Processes

⁹ @MPguatemala, Twitter (January 13, 2022, 1:01 PM), <https://twitter.com/MPguatemala/status/1481687873606885376?s=20>.

¹⁰ @MPguatemala, Twitter (January 18, 2022, 12:23 PM), <https://twitter.com/MPguatemala/status/1483490139691225089?s=20>

¹¹ Oscar Canel, *Antejuicio Aifán genera dudas sobre intencion del MP de Consuelo Porras*, La Hora, January 16, 2022, <https://lahora.gt/antejuicio-Aifán-genera-dudas-sobre-intencion-del-mp-de-consuelo-porras/>; *Advierten que antejuicio contra Aifán busca la toma completa del poder*, La Hora, January 15, 2022, <https://lahora.gt/advierten-que-antejuicio-contra-Aifán-busca-la-toma-completa-del-poder/>.

¹² Maria Guarchaj, *Rechazan reeleccion de Consuelo Porras*, Federacion Guatemalteca de Escuela Radiofonicas, January 26, 2022, <https://www.fger.org/rechazan-reeleccion-de-consuelo-porras/>.

¹³ Maria Cruz Chajon Ramirez, *Crece rechazo por antejuicios planteados por el MP contra la jueza Erika Aifán*, Epicentro, January 18, 2022, <https://www.epicentro.gt/crece-rechazo-por-antejuicios-planteados-por-el-mp-contra-la-jueza-erika-Aifán/>.

¹⁴ U.S. Dep't of State, Update on Report to Congress Pursuant to Section 353(d)(1)(A) of the U.S-Northern Triangle Enhanced Engagement Act (September 27, 2021) <https://www.federalregister.gov/documents/2021/09/27/2021-20821/update-on-report-to-congress-pursuant-to-section-353d1a-of-the-united-states-northern-triangle>.

or Institutions, Significant Corruption, or Obstruction of Such Corruption in El Salvador, Guatemala, and Honduras."¹⁵

In response to these requests to remove Judge Aifán's judicial immunity, Mr. Diego Garcia Sayan, the United Nations Special Rapporteur for Independence of Judges and Lawyers, published an opinion piece in the El Pais newspaper detailing the harassment suffered by Judge Aifán. Among the various issues highlighted in his piece, Mr. Sayan stated that:

By invoking an alleged "abuse of authority" by Judge Aifán, she has been the subject of an extravagant number of criminal complaints and disciplinary actions effectuated by people who have been affected by her decisions....

Various analysts believe that these unusual steps by the Guatemalan Prosecutor's Office are for the purpose of cutting off [Judge Aifán's] investigations and nullifying important investigations into serious acts of corruption.¹⁶

The U.S Department of State also issued a statement declaring that the January 13th announcement of the filing of a formal request to lift Judge Erika Aifán's immunity was a blatant effort to obstruct investigations into corruption and an affront to the integrity of Guatemala's highest courts.¹⁷ And United States Agency for International Development (USAID) administrator Samantha Power described the request as a "transparent reprisal for her independence and courage in defense of accountability and the rule of law."¹⁸ Other national and international organizations have also come to Judge Aifán's defense, including the Guatemalan Association of Judges for Integrity (AGJI)¹⁹ and the Centroamerican Federation of Judges for Democracy (FECAJUD),²⁰ among others.²¹

¹⁵ "Raul Amilcar Falla Ovalle, a lawyer for the NGO Fundacion Contra el Terrorismo (Foundation Against Terrorism – FCT), attempted to delay or obstruct criminal proceedings against former military officials who had committed acts of violence, harassment, or intimidation against governmental and nongovernmental corruption investigators." Press Release, U.S. Embassy in Guatemala, 353 Corrupt and Undemocratic Actors Report (July 1, 2021), <https://gt.usembassy.gov/353-corrupt-and-undemocratic-actors-report/>.

¹⁶ Diego Garcia Sayan, *La jueza Aifán y los ataques a la justicia*, El Pais, January 20, 2022, <https://elpais.com/opinion/2022-01-21/la-jueza-Aifán-y-los-ataques-a-la-justicia.html>

¹⁷ Press Release, U.S. Dep't of State, U.S. Concern for Integrity of Guatemalan Judicial System (January 16, 2022), <https://www.state.gov/u-s-concern-for-integrity-of-guatemalan-judicial-system/>.

¹⁸ @PowerUSAID, Twitter (January 18, 2022, 4:44PM), <https://twitter.com/PowerUSAID/status/1483555912367415301?s=20>.

¹⁹ Press Release, AGJI, Con Relacion A Las Diligencias De Antejudio Presentadas Por El Ministerio Publico en Contra de la Jueza Erika Aifán (January 18, 2022), <https://agji-gt.org/~agjigtorg/comunicado-agji-01-2021-con-relacion-a-las-diligencias-de-antejuicio-presentadas-por-el-ministerio-publico-en-contra-de-la-jueza-erika-Aifán/>.

²⁰ @FECAJUD, Twitter (January 18, 2022, 9:31 AM), <https://twitter.com/FECAJUD/status/1483446928218202117?s=20>.

²¹ @PIRegional, Twitter (January 14, 2022, 8:50PM), <https://twitter.com/PIRegional/status/1482168159415193602?s=20>; @NorwayMFA, Twitter (January 21, 2022, 10:02 AM) <https://twitter.com/NorwayMFA/status/1484541992638025740?s=20>; @JordanRodas, Twitter (January 13, 2022, 4:57 PM), <https://twitter.com/JordanRodas/status/1481747164862767112?s=20>;

Additionally, the Vance Center filed a merits petition before the IACHR on behalf of Judge Aifán, identifying violations of her judicial independence, including threats to her physical safety and efforts to criminalize her official conduct.²²

The requests to lift Judge Aifán's judicial immunity are a direct attack on her judicial independence and pose a grave risk to the rule of law in Guatemala. According to the United Nations' *Basic Principles on the Independence of the Judiciary*, the State shall guarantee the independence of the judiciary and the judiciary "shall decide matters before them impartially...without any restrictions, improper influences inducements, pressures, threats or interference...."²³ As detailed above, Guatemalan Judge Erika Aifán oversees high-profile and complex cases against high-level government officials and organized crime organizations. These requests to lift her immunity plainly constitute an attempt to retaliate against her and intimidate her for performing her judicial duties in accordance with the law.

In 2013, the IACHR published recommendations for guaranteeing the independence of operators of justice which provide that the states have an obligation to safeguard the independence of the judiciary in order to ensure that victims' rights are protected as required by Articles 8 and 25 of the American Convention on Human Rights, which was signed by Guatemala in 1969.²⁴ IACHR has also noted that the Inter-American Court of Human Rights has previously referred to the need for an independent judiciary to guarantee the administration of justice. Furthermore, IACHR specifies that another component of guaranteeing due process for citizens is to ensure that judges exercising their functions are protected from intimidation, threats, or other attacks. The IACHR additionally highlights that States must guarantee that any disciplinary actions initiated against judges be properly and legally administered.²⁵ Similarly, the UN Basic Principles advise that a charge or complaint made against a judge in their professional capacity shall be handled expediently, fairly, and in accordance with "established standards of judicial conduct."²⁶

The New York City Bar Association respectfully calls upon the Guatemalan Government to take the measures necessary to respect and protect Judge Aifán's judicial independence, including implementing IACHR's precautionary measures. In addition, we call on the Guatemalan

@ASIES_GT, Twitter (January 18, 2022, 6:14 PM),

https://twitter.com/ASIES_GT/status/1483578484748345347?s=20; @AifánErika, Twitter (January 16, 2022, 2:04 PM), <https://twitter.com/AifánErika/status/1482790914380935168?s=20>.

²² Press Release, The Vance Center, Vance Center's Support of Guatemalan Judge Erika Aifán Receives Widespread Coverage (September 2021), <https://www.vancecenter.org/vance-centers-support-of-guatemalan-judge-erika-aifán-receives-widespread-coverage/>.

²³ Basic Principles on the Independence of the Judiciary (1985), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

²⁴ Garantías Para Independencia De Las Y Los Operadores de Justicia, Inter-Am. Comm'n H.R. (December 5, 2013), <https://www.oas.org/es/cidh/defensores/docs/pdf/Operadores-de-Justicia-2013.pdf>.

²⁵ *Id*; Reveron Tujillo v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment (June 30, 2009) Inter-Am.Ct. H.R., https://www.corteidh.or.cr/docs/casos/articulos/seriec_197_ing.pdf.

²⁶ See Basic Principles, *supra* note 23.

government to ensure that any disciplinary actions taken against the judges of the High Risk Court, including Judge Aifán, be properly administered to ensure due process.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org