

**OBSERVATIONS AND RECOMMENDATIONS OF**  
**NEW YORK CITY BAR ASSOCIATION**  
**FOLLOW-UP DELEGATION OF LAWYERS OF THE AMERICAS TO GUATEMALA**

Introduction

On July 16 to 18, 2014, the New York City Bar Association (the “City Bar”) sponsored a delegation of lawyers from five countries of the Americas to Guatemala (the “Delegation”). The purpose of the Delegation was to assess various developments since the City Bar’s 2013 delegation to Guatemala (the “2013 Delegation”), which focused on the prosecution of former President Efraín Ríos-Montt (the “Ríos-Montt Case”)<sup>1</sup>. The Delegation, in the context of the current state of the rule of law in Guatemala, specifically assessed certain subsequent legal actions, as well as the ongoing appointment of judges to the Guatemalan courts. Like the 2013 Delegation, 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 (\*denotes member of 2013 Delegation)

**Hunter T. Carter\*** (United States), partner Arent Fox, member of Vance Center Committee, and former chair of City Bar Inter-American Affairs Committee

**Francisco Cox** (Chile), partner Balmaceda & Cox

**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

**Mirna Goransky** (Argentina), Deputy General Prosecutor of the Office of the National Attorney General in Argentina (on leave) and Vance Center consultant for the Delegation

**Clara Elena Reales**, (Colombia), Chief Legal Officer of the Colombian Association of Pension and Severance Funds Administrators

**Carlos Rosenkrantz**, (Argentina) partner Bouzat, Rosenkrantz & Cia and president of the Universidad de San Andrés

**José Ugaz\*** (Perú), partner Benites, Forno & Ugaz

The delegates participated in the Delegation strictly as individuals, not as representatives of their employers, and on a voluntary, pro bono basis. 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

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<sup>1</sup> See <http://www2.nycbar.org/pdf/report/uploads/20072558-GuatemalaDelegationReport.pdf> (the “2013 Report”)

The Delegation sought to meet with a broad range of interested participants in the development of the rule of law in Guatemala, including many of the individuals or their successors in office whom the 2013 Delegation met. The Delegation was largely successful in meeting those whom it approached and found all participants in its meetings to be open and informative. The participants were:

The President (*Magistrado Titular*) of the Guatemalan Constitutional Court  
The Chief Judge and Members of the High-Risk Court who conducted the trial in the Rios-Montt Case  
The Human Rights Ombudsman of Guatemala  
The Country Representative in Guatemala of the United Nations High Commissioner for Human Rights  
The Commissioner of the International Commission Against Impunity in Guatemala  
The Regional Director of the International Commission of Jurists – Guatemala  
The President and Members of the Executive Board of the Collegium of Lawyers of Guatemala  
The Dean of the San Carlos University (Universidad de San Carlos)  
The Deputy Chief of Mission and the Political and Economic Counselor of the United States Embassy in Guatemala  
The President 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 Chief of Staff and other members of office of the Attorney General of Guatemala  
The Coordinator and members of Plaza Pública (on line journal)  
The President of the Foundation for the Development of Guatemala (*Fundación para el Desarrollo de Guatemala*)

### Perspective of the Delegation

The delegates brought the same perspective as the 2013 Delegation, informed by the experience that that delegation had.<sup>2</sup> The Delegation specifically focused on several issues that the 2013 Delegation had identified as significant to the status and future development of the rule of law in Guatemala:

1. The process of appointing judges, which was ongoing during the visit of the Delegation<sup>3</sup>, appeared threatened with politicization and corruption, as the 2013 Delegation had found

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<sup>2</sup> 2013 Report at 2-3.

<sup>3</sup> As of the date of this report, the Guatemalan Congress had appointed new judges to the Supreme Court and was scheduled to appoint new judges to the appellate courts on October 12. Controversy over the conduct of the appointments process grew as it came to a close, leading to resignation in protest by one appointee and international statements of concern.

many feared would occur.<sup>4</sup> The Delegation determined to assess whether this process was consistent with the strengthening of the rule of law in Guatemala.

2. The Rios-Montt Case resulted in disciplinary actions against the trial tribunal, which proved to be controversial.<sup>5</sup> The Delegation determined to assess whether these disciplinary actions complied with generally recognized standards for managing judicial conduct.
3. The 2013 Delegation had identified several features of the Rios-Montt Case, which Guatemalan observers characterized as exaggerated, but not unusual, which raised concerns for the integrity of the judicial process, including
  - “frequent and specific reports of political interference with the judiciary”,
  - use of the constitutional challenge (*amparo*) “too frequently and too easily susceptible to manipulation”,
  - insufficient respect and resources for judges to manage judicial Rios-Montt Cases effectively and independently, and
  - inadequate or inappropriate management of attorneys in their behavior and tactics before the courts.<sup>6</sup>

The Delegation determined to assess whether the management of the judiciary in Guatemala corresponded with a strengthening rule of law.

### Background to Observations and Recommendations

The participants provided candid and wide-ranging views. The Delegation did not investigate independently the facts presented. In the main, however, the descriptions and opinions were consistent with each other, as was the general view supporting the need for systemic reform. It is clear that Guatemala faces serious challenges to the full and fair enforcement of its laws, and that these challenges are becoming acute in 2014 as the country goes through the constitutionally-mandated process of judicial selection that will affect — and indeed select — most of the judicial officers in the country.

The Guatemalan constitution mandates a complex process of judicial selection, apparently intended to enable diverse participation, reasonable transparency, and merit-based

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<sup>4</sup> 2013 Report at 4

<sup>5</sup> See <http://www.opensocietyfoundations.org/voices/guatemalan-judge-faces-retaliation-over-role-genocide-trial>;

[http://internacional.elpais.com/internacional/2014/04/05/actualidad/1396653444\\_524435.html](http://internacional.elpais.com/internacional/2014/04/05/actualidad/1396653444_524435.html)

<sup>6</sup> 2013 Report at 4

selection. It provides that all judges on the Courts of Appeal and the Supreme Court are selected over the same year<sup>7</sup>, and therefore calls for the simultaneous roll-over of all senior judgeships in the country. Commissions, comprised in equal portions of law school deans, sitting appellate judges, and Collegium of Lawyers delegates, select applicants for public interview and recommend candidates for appointment by the Congress. Recently, the Constitutional Court ruled that the individual members of the commissions must explain orally during the hearing the basis for their ratings of each applicant. We are informed that there are over one thousand applicants for the judicial positions<sup>8</sup>.

Nearly all of the participants bemoaned the absence of a “judicial profession” in Guatemala that, as they used the phrase, would train and develop judges along professional, merit-based career paths, fostering appropriately balanced aspects of judicial culture: independence, practicality, knowledge of the law, fairness, and wisdom. A professional judiciary, commanding respect from other branches of government and the legal profession generally, is a key component of the rule of law throughout the world, and this respect arises from the commitment of time, expertise, and economic and social resources that the judiciary receives.

Participants explained that there are formal and informal conditions and constraints affecting judges in Guatemala. The Delegation heard often that judges regularly operate under threat of physical violence and enjoy little or no real protection. Corruption continues to be a major problem. In addition, Guatemalan judges face disciplinary proceedings initiated by the judiciary itself and separate disciplinary proceedings initiated by the “Honor Court” of the Collegium of Lawyers. They also are subject to regular performance evaluations, under a system that does not have a viable set of criteria for such evaluations.

The aftermath of the Rios-Montt Case offers an example of these features. At an early stage of the trial, the presiding judge, with the concurrence of her associate judges, removed defense counsel from the courtroom because of apparent disruptive conduct and ordered the defendants’ pre-existing counsel to resume the defense. After the ensuing conviction was reversed, both the judiciary and the Collegium of Lawyers commenced intricate disciplinary proceedings against her, with little or no deference to the trial judge’s need to manage the courtroom. Participants described that the judicial disciplinary proceedings were dismissed, but that the Honor Court sanctioned the judge, in what participants said was an extraordinary action.

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<sup>7</sup> In addition to judicial appointments, the Constitution provides for appointment of the *fiscal general* and the *contralor general de cuentas* during the same year and for the same four-year term.

<sup>8</sup> The process was to include the commissions interviewing the applicants, but the number of applicants has made this impractical.

The Rios-Montt Case also supplied examples of several other features of the Guatemalan judicial process that participants frequently criticized. These include: the qualifications, training, and support of judges; the assignment of cases to judges; the reported efforts to influence judges with bribes or threats; and the use of the *amparo*<sup>9</sup>. The Delegation observed a general view that the judiciary lacks appropriate respect, authority, and organization.

## Observations of the Delegation

### *1. The Judicial Selection Process*

Participants unanimously asserted that the judicial selection process set forth in the Guatemala Constitution is not working. First, they say that the formal qualifications for judges are rudimentary and inadequate, leading many people to apply without due regard to their merit and challenging the commissions in evaluating those who do. The delegation heard that the commissions are unable to consider appropriately the objections to candidates that it receives and may credit unjustified objections and neglect well-based concerns. Moreover, the criteria by which the commissions are to make numerical ratings of candidates are not consistent, practical or meaningful. Whether for this reason or due to generally suspected ulterior and secret assessments, participants report a general disregard for the numerical ratings.

The constitutionally-mandated composition of the commissions also has devolved into dysfunction. The provision, by which delegates from law schools, sitting judges, and the Collegium of Lawyers are to be equally represented, established commissions of 12 delegates originally, but with the advent of many more law schools, the provision now triggers 33-member commissions. The delegation heard repeatedly that this size is unwieldy, and this seems undeniable. There is widespread suspicion that the multiplying of law schools, many of which have no students, represents an explicit exploitation of the Constitution's provisions.<sup>10</sup>

The task of the commissions seems daunting by any measure. Thousands apply, and the commissions must evaluate and rate each one, explaining their ratings orally at commission sessions. The process also would appear to discourage well-qualified candidates from wading into the sea of applicants.

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<sup>9</sup> *Amparo* is a Constitutionally-provided remedy for an alleged violation of rights, which is threatened or has occurred, enabling an individual to seek relief in any court of law.

<sup>10</sup> To qualify to serve on commissions, law school deans apparently need have only that title, but not faculty or students. It bears noting as well that the Collegium of Lawyers also seems to have no formal policy by which it selects its representatives on the commissions, just as the judges on the commissions gain selection in an opaque manner.

These features of the formal process make understandable the widespread suspicion of a shadow system of selection, exactly what the Constitution sought to avoid. Most of the participants asserted that various vaguely-defined interest groups circulate “lists” of their judicial candidates which determine selection. When the Delegation sought to confirm this phenomenon, participants denied their own involvement, even as they asserted such activity by others; all asserted that a shadow selection system effectively governs the process. Various participants described their growing disenchantment with the fairness of the process and in the good faith of other participants in it. For this reason, what might seem positive developments, such as the introduction of cameras in the commission sessions, do not seem to foster optimism for enhanced transparency.

## *2. Management of the Judiciary*

The Delegation observed an active debate in Guatemala regarding the role and importance of the judiciary. There is concern that an unchecked judiciary could pose a threat to social order of the kind that Guatemala experienced before democratic reforms. On the other hand, there is recognition that the judicial system handles society’s toughest problems, including narco-trafficking, black marketeering, organized crime, and corruption, and that criminal elements have the means and incentives to undermine the judiciary, including by manipulating the selection process. Participants generally emphasized the constant challenge to judicial independence and integrity and a vulnerability to inadequate training and support, influence-peddling and corruption.

The Delegation noted a general commitment to the established processes of adjudication as a key component of the rule of law, but not a fully formed consensus defining and supporting the mission of the judiciary to effectuate fair and balanced judicial resolution of complex disputes. There is widespread resignation that change is impossible, despite recent advances in the rule of law, exemplified however inconclusively by the Rios Montt Case. All participants endorsed the idea of a professional judiciary based on the fostering of a “judicial career”. Although meaning different things to different people, this concept reflects a common, apparently universal, interest in improving the judiciary, with training and other resources, and protecting judges from the formal and informal influences that undermine fairness and promote corruption<sup>11</sup>.

In this context, participants provided a variety of specific observations and opinions about the shortcomings of the judiciary in Guatemala and ways in which it might improve:

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<sup>11</sup> An example of the complexity of views of the judiciary’s role and condition lies in the context of business disputes. Some participants complained that companies can influence the courts improperly, while business representatives explained that they often try to avoid the courts in favor of arbitration, because it is more reliable.

- enhanced explanation of the qualifications to serve as a judge would improve the pool of candidates for appointment
- disclosure of business or other interests of commission members would make judicial selection more transparent and fair
- better training and support of judges would encourage independence and effectiveness
- more formalized and organized assignment of cases would enhance public confidence and judicial ability
- regulation against abuse of *amparo* would strengthen judicial decision making and efficiency
- focus on building judicial culture, both among judges and with society, to develop a shared commitment to fair decisions based on objective criteria, would raise judges' role in democratic process and the rule of law

The Delegation identified one feature of the Guatemalan judiciary that warrants special concern. The disciplining of judges for their conduct in the courtroom represents a particularly challenging element in the rule of law, similar to the sanctioning of legislators based on their actions within the legislature. These settings require protection, so that officials may operate based on independent professional judgment. Only in cases of impropriety demonstrably outside the bounds of reasonable conduct, including with evidence of inappropriate influence, is discipline for judicial decision making generally considered justified.

The disciplining of the presiding judge in the Rios-Montt Case did not appear to meet this rigorous standard. The Delegation heard that this was an extraordinary event and took some solace from that fact; however, it is in the extreme or unusual situations that the rule of law is weakened or strengthened most. The role of the Honor Court of the Collegium of Lawyers in sanctioning the judge raises heightened concern. The Delegation considers the very possibility that judges face discipline by lawyers who appear before the courts to be problematic at best, especially when the judiciary has exercised its own self-regulation (and as in the Rios Montt Case declined to impose discipline).

### Recommendations of the Delegation

The Delegation is wary of venturing too deeply into the particulars of the Guatemalan judiciary and legal system, based on its own limitations, as well as its proper role. However, its observations lead to a sense of crisis in the judiciary that strongly challenges the rule of law in Guatemala and compels engagement by neighbors and colleagues.

Accordingly, the Delegation offers the following recommendations to create a more firm foundation for progress toward the shared ideal of a competent and appropriately independent and empowered judiciary over the course of years. There is no pretense to quick fixes or sure solutions. The complexity of making changes rivals the intricacy of the problems themselves, and success will depend on social consensus and common political will, which are rare anywhere in the world.

#### *A. Reforming judicial selection*

*1. Revising term and timing.* Many participants considered that the five-year term for judges is too short and thus burdens the appointment mechanism too frequently and reduces judges' sense of independence from what inevitably is a political process. In addition, appointment of all high-level judges at the same time appears to challenge the feasibility and efficiency of any selection process. The use of longer and staggered terms offers a commonly-applied means of enhancing efficiency, both in appointments and in the expertise of the judiciary.<sup>12</sup>

*2. Re-constituting the commissions.* The size and composition of the commissions charged with appointing judges seems unwieldy and no longer consistent with the purpose of broad representation. Reform also seems essential and inevitable.

*3. Setting criteria and rationales.* There seems to be consensus that qualifications for serving in the judiciary need to be better known to attract appropriate applicants in feasible numbers. These qualifications might reflect higher expectations for experience and professionalism. It may also prove useful for the commissions to rely on background checks by staff or independent law enforcement officials according to specific quantified criteria.

The practice of soliciting written comments from professional organizations, civil society representatives, and the public during a set period of time, along with an opportunity for candidates to respond, is particularly useful towards the goals of legitimacy and accuracy in selection. As reconstituted, the commissions could make much better use of this practice, just as they could improve the public interviews of candidates if there are fewer of them.

With fewer and better vetted applicants, the commissions would be able better to explain their ratings of candidates. Publication of the criteria used by the commissions, which presumably include additional considerations to the stated qualifications for appointment, such as the need for diversity in appointments, also would enhance credibility.

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<sup>12</sup> The Delegation recognizes that these reforms will require amendment to the Constitution of Guatemala and will not be possible during the current appointments process.



## *B. Reforming judicial management*

As described, the Delegation identified a consensus in Guatemala to seek to enhance the professionalism of the judiciary, often described as establishing a “judicial career”. This goal seems appropriate, even urgent, based on the observations of the Delegation, as well as the 2013 Delegation. The Rios-Montt Case and its aftermath drew worldwide attention to the Guatemalan judicial system, and observers generally expressed puzzlement and concern over certain aspects of that case and subsequent events, notably reversal of a substantive decision on procedural grounds leaving no apparent likelihood of resumption. The Delegation did not observe that this international concern about the Guatemalan judiciary and more broadly the rule of law has forged a consensus for significant reform among Guatemalan elected officials, the legal profession, or the business community.. Such reform seems timely, even urgent, and essential if Guatemala is to present itself as seeking to strengthen the rule of law and engage more successfully with international business.

In the view of the Delegation, this reform effort should include the following issues:

1. *Judicial qualification.* As stated, what it is to be a judge needs formal, specific definition that affirms the important role of the judiciary and the authority and prestige of the judge.
2. *Judicial appointment.* The Delegation has provided recommendations above.
3. *Judicial training and resources.* Most participants agreed that judges need and deserve better preparation and resources to do their jobs.
4. *Judicial protection.* Independence requires that judges be safe from threats and inducements. They also need adequate compensation, accommodations, and other services.
5. *Judicial discipline.* Oversight of judicial conduct in the courtroom generally is a matter of monitoring by the judiciary itself, through appellate review and sanctioning in accordance with due process when required. A role for a lawyers’ association or other outside bodies, especially with members interacting regularly with judges, raises serious concerns of infringement on judicial independence.
6. *Case assignment.* Many participants observed that the system by which cases get assigned to various judicial bodies is not well understood or explained. It is a standard element of transparency and integrity that cases be assigned randomly or according to an objective, principled mechanism that is formally and clearly explained.

7. *Judicial Review.* Similarly considerations apply to review of judicial rulings and decisions. The 2013 Delegation supported calls for reform of the *amparo* in Guatemala, and this Delegation re-affirms that support.

The Delegation acknowledges that these features of reform are not exhaustive or entirely consistent. The concerted reform effort that seems necessary now should encompass additional issues and considerations, as well as the participation of representatives of all elements of Guatemalan society. Such an undertaking may well lead to significant revision of the Constitution and the organs of government.<sup>13</sup> The Delegation urges that Guatemala not shrink from the magnitude of the challenge, given the seriousness of the situation.

The members of the Delegation individually and on behalf of their colleagues in the legal professions of their countries wish to express willingness to participate appropriately with this reform effort in Guatemala. While the results inevitably will rely on and reflect the particular circumstances in the country, experience and ideas from outside likely will be useful. Since the objective is a reformed judiciary that attracts respect and business partnership from other countries, such participation seems sensible.

### Conclusion

The Delegation will continue to monitor the ongoing processes and debates in Guatemala and seek ways to support the strengthening of the rule of law. The Delegation thanks all of the participants and re-affirms the fervent wish, expressed by the 2013 Delegation, 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.

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<sup>13</sup> The Delegation suggests that this reform effort might include establishing a new, or revising an existing, agency to act as a dedicated administrator of the judiciary.