

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

# NEW YORK CITY BAR

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Contact: Eric Friedman  
[efriedman@nycbar.org](mailto:efriedman@nycbar.org)

Eli Cohen  
[ecohen@nycbar.org](mailto:ecohen@nycbar.org)

## **STATEMENT CONDEMNING THE CONTINUING HARASSMENT AND CRIMINALIZATION OF JUSTICE OPERATORS IN GUATEMALA**

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The New York City Bar Association (City Bar) is gravely concerned by the Republic of Guatemala’s continued criminal harassment of lawyers, judges, prosecutors, and former prosecutors who have handled corruption cases. On February 8, 2022, the City Bar called on the Guatemalan Government to take action to protect Judge Erika Aifan from harassment and to ensure that any disciplinary action taken against her and other judges of the High Risk Court who handle corruption cases be properly administered and accorded all the protections of due process.<sup>1</sup> Unfortunately, the harassment and arrests have escalated, threatening judicial independence and the rule of law in Guatemala.

### **I. JUDICIAL INSTITUTIONS IN GUATEMALA CONTRAVENE THEIR MANDATE BREACHING DUE PROCESS PRINCIPLES**

As integral components of the country’s justice system, the Public Prosecutor’s Office, the Supreme Court of Justice, and the Constitutional Court are required to abide by the Constitution of the Republic of Guatemala and other laws, ensuring respect for the rule of law.<sup>2</sup> However, in

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<sup>1</sup> *Statement of the New York City Bar Association on the Attacks on Judge Erika Aifán Davila in Guatemala*, New York City Bar Association (February 8, 2022), <https://www.nycbar.org/media-listing/media/detail/attacks-on-judge-erika-aifan-davila-in-guatemala>

<sup>2</sup> The Constitution of the Republic of Guatemala establishes, in Article 203- “*Independence of the Judicial Organ and power to adjudicate*. Justice is administered pursuant to the Constitution and the laws of the Republic. The

#### **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.*

the past few weeks multiple credible media sources have reported that, far from complying with their legal mandate, these institutions persist in actively persecuting, imprisoning, and criminalizing Guatemalan judges, prosecutors, and lawyers solely for fulfilling their professional obligations in pursuing cases against corruption.<sup>3</sup>

These acts by the Guatemalan authorities violate due process principles, including the right to a public hearing, by initiating criminal prosecutions under seal based on allegations made by attorneys who are defending those indicted in corruption cases. As the prosecutions are conducted under seal, the investigations are not made public and the corresponding hearings are often postponed, prolonging the preliminary detention of the accused.

## II. CRIMINALIZATION OF JUSTICE OPERATORS IS RELENTLESS AND REVEALS A SYSTEMATIC PERSECUTION

Some of the distressing cases include that of Siomara Sosa, former prosecutor of the FECCI (Guatemala's Special Prosecution Division combating impunity) and defense attorney, Leily Santizo, former member of the CICIG (the now defunct United Nations supported International Commission against Impunity in Guatemala). They were arrested and placed in preliminary

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*power to adjudicate and enforce judgments belongs to the tribunals of justice. The other state organisms must assist tribunals in their requirements to enforce judgments. Justices and judges are independent in the exercise of their powers and are only subject to the Constitution and the laws. Those who attempt to undermine the independence of the Judicial Organism, in addition to the penalties set by the Penal Code would be barred from exercising public office. The judicial power shall be exercised exclusively by the Supreme Court of Justice and the other tribunals established by law. No other authority will intervene in the adjudication power."*

Moreover, Article 251 of the Constitution provides that: *"The Public Prosecutor's Office is an institution that assists public administration and tribunals and has autonomous powers, with the chief objective of ensuring strict compliance with the laws of the State. Its organization and operation will be governed by organic laws. The head of the Public Prosecutor's Office will be the Attorney General and the exercise of public penal action belongs to them [...]."*

Further, Article 268 sets forth the essential power of the Constitutional Court, stating that *"The Constitutional Court is a permanent tribunal of exclusive jurisdiction, whose essential function is the defense of the constitutional order, as a collegiate tribunal independent of other State organisms and undertakes the specific tasks sets forth by the Constitution and the laws. The economic independence of the Constitutional Court shall be guaranteed through a percentage of the revenues that correspond to the Judicial Organism."*

The Universal Declaration of Human Rights, and the American Convention on Human Rights, to which Guatemala is a party, indicate, in articles 9 and 7 respectively, that no one can be arbitrarily detained, imprisoned or banished.

Similarly, the United Nations Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985, and confirmed by the UN General Assembly) gave rise to the Universal Charter of the Judge which specifies that a judge's independence is a prerequisite for the administration of impartial justice, respecting the law. Judicial independence is indivisible. All institutions and authorities, domestic and international, must respect, protect, and defend such independence. It is further stated that members of the Public Prosecutor's Office are to be treated as judges, and therefore said principles apply with equal force to them.

<sup>3</sup> *La guerra contra los jueces y fiscales independientes que luchan contra la corrupción en Guatemala*, El País (February 21, 2022), <https://elpais.com/internacional/2022-02-21/la-guerra-contra-los-jueces-y-fiscales-independientes-que-luchan-contra-la-corrupcion-en-guatemala.html> (All websites last visited May 18, 2022.) See also EU, US caution Guatemala over persecution of lawyers, judges, ABC News (February 11, 2022), <https://abcnews.go.com/International/wireStory/eu-us-caution-guatemala-persecution-lawyers-judges-82836714>

detention after the Public Prosecutor's Office charged them with alleged conspiracy and obstruction of justice crimes.<sup>4</sup> Both lawyers had been involved in high-profile landmark corruption cases that resulted in the imprisonment of multiple politicians, businessmen and drug traffickers.<sup>5</sup>

In addition, Virginia Laparra Rivas, former head of the FECCI in Quetzaltenango, was arrested on February 23, 2022 and on March 3 charged with abuse of power and usurpation of functions. The allegations against Laparra arise from her filing of claims with the Judicial Disciplinary Board against judges in 2019. Laparra was detained amidst authorities' harassment of numerous former FECCI prosecutors, leading a number of them to resign and flee. Ms. Laparra has been denied due process, as her hearing has been postponed at least six times for various reasons. In the meantime, she is languishing in preliminary detention.<sup>6</sup>

Likewise, FECCI assistant prosecutors Willy Racanac López and Paola Mishelle Escobar Quiñónez were detained February 16, 2022, for the alleged crime of abuse of power in the case *Comisiones Paralelas 2020*.<sup>7</sup> In that case, the FECCI submitted multiple requests to revoke the immunity of certain judges in the Supreme Court of Justice, the Electoral Tribunal, and the Constitutional Court, based on evidence of a plot involving corruption in the election of judges.<sup>8</sup> The prosecutor's office attempts to justify its actions using groundless claims asserting that the requests to revoke judicial immunity were filed for the purpose of coercing false confessions.

These cases along with the intimidation and subsequent exile of former FECCI head Juan Francisco Sandoval; former prosecutor Carlos Antonio Videz; former Supreme Court justice and Attorney General Thelma Aldana; former Court of Appeals judge Claudia Escobar, and former prosecutor Andrei González, as well as justice Gloria Porrás who was reelected as a justice of the Constitutional Court, but then disqualified from office in apparent retaliation for some of her rulings, threaten the strength of the rule of law and underscore the absence of measures to safeguard sound governance in Guatemala.<sup>9</sup> Additionally, assistant prosecutor Eduardo Pantaleón, who worked on high-profile corruption cases including *Libramiento de Chimaltenango* and those

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<sup>4</sup> *EU, US caution Guatemala over persecution of lawyers, judges*, ABC News (February 11, 2022), <https://abcnews.go.com/International/wireStory/eu-us-caution-guatemala-persecution-lawyers-judges-82836714>

<sup>5</sup> *Ligan a proceso a las abogadas anticorrupción Leily Santizo y Siomara Sosa por colusión*, Prensa Libre (March 7, 2022), <https://www.prensalibre.com/guatemala/justicia/ligan-a-proceso-a-las-abogadas-anticorrupcion-leily-santizo-y-siomara-sosa-por-colusion/>

<sup>6</sup> *Ligan a proceso a Virginia Laparra, exjefa de la FECCI de Quetzaltenango*, Prensa Libre (March 3, 2022), <https://www.prensalibre.com/guatemala/justicia/ligan-a-proceso-a-virginia-laparra-exjefa-de-la-feci-de-quetzaltenango-breaking/>

<sup>7</sup> *FECCI: Capturan a dos auxiliares fiscales por abuso de autoridad*, Perspectiva (February 16, 2022), <https://www.perspectiva.gt/noticias/feci-capturan-a-dos-auxiliares-fiscales-por-abuso-de-autoridad/>

<sup>8</sup> *Caso Comisiones Paralelas 2020, FECCI solicita retiro de inmunidad de 10 magistrados de CSJ, TSE y CC*, Prensa Libre (June 8, 2021), <https://www.prensalibre.com/guatemala/justicia/caso-comisiones-paralelas-2020-feci-solicita-retiro-de-inmunidad-de-10-magistrados-de-csj-tse-y-cc-breaking/>

<sup>9</sup> *La guerra contra los jueces y fiscales independientes que luchan contra la corrupción en Guatemala*, El País (February 21, 2022), <https://elpais.com/internacional/2022-02-21/la-guerra-contra-los-jueces-y-fiscales-independientes-que-luchan-contra-la-corrupcion-en-guatemala.html>; *Whether on the Court or Not, I Swore to Protect the Constitution*, El Faro (April 20, 2022), <https://elfaro.net/en/202104/centroamerica/25423/Whether-on-the-Court-or-Not-I-Swore-to-Protect-the-Constitution-.htm>

involving acts of bribery committed by members of the judiciary, was arrested for alleged acts of obstruction of justice and breach of duties. Furthermore, over the past few days, Judge Miguel Ángel Gálvez has received multiple threats after he issued an order to commence trial in criminal judicial proceedings against nine former members of the military and police in the case *Diario Militar*.

Moreover, the threats against Judge Aifan continued to escalate, forcing her to resign from her position as head of the High Risk Court, *Juzgado de Mayor Riesgo D* and to flee to the United States. Judge Aifan feared for her life after several years of harassment and repeated attempts by the Public Prosecutor's Office to revoke her immunity.<sup>10</sup> It is alarming that judicial actors like Judge Aifan and the others outlined above have been forced to leave the country due to the threats, intimidation, and persecution they face, along with their arbitrary prosecution and detention by institutions of the State. The common denominator among those targeted for persecution is their role in prosecuting and fighting against corruption. All these individuals worked on high-profile cases that resulted in criminal charges and the imprisonment of State officials,<sup>11</sup> and most belong to the Courts of High-Risk Crimes, the FECCI, or the now defunct CICIG, all of which helped to dismantle criminal networks through effective prosecutions.

### III. ACTS UNDERTAKEN BY GUATEMALAN STATE ENTITIES BREACH INTERNATIONAL LAW

These acts of persecution by State institutions, including the Office of the Public Prosecutor, clearly contravene a number of fundamental principles and standards of international law<sup>12</sup>, including the United Nations Basic Principles on the Independence of the Judiciary. First, UN Basic Principle 1 provides that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. By persecuting judicial actors for their participation in major corruption cases, making use of criminal justice tools and procedures, the State fails to ensure judicial independence pursuant to the UN Basic Principles.<sup>13</sup> Additionally,

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<sup>10</sup> *La Jueza Erika Aifán deja Guatemala debido a las amenazas de redes políticas y criminales*, El País (March 21, 2022), <https://elpais.com/internacional/2022-03-21/la-jueza-erika-aifan-deja-guatemala-debido-a-las-amenazas-de-redes-politicas-y-criminales.html>; See also: *This judge is one of the last U.S. allies in the Guatemala corruption fight. Politicians keep trying to sideline her*, Washington Post (February 19, 2022), <https://www.washingtonpost.com/world/2022/02/19/guatemala-corruption-erika-aifan/>; *Aifán desde el exilio: "En Guatemala estaba en riesgo mi vida"*, El Faro (March 21 2022), [Aifán, desde el exilio: "En Guatemala estaba en riesgo mi vida" - ElFaro.net](https://elfaro.net)

<sup>11</sup> One such case is 'Corrupción y construcción', in which the embezzlement of more than 16 million dollars was exposed and a corruption and money laundering network involving State officials was uncovered. *La guerra contra los jueces y fiscales independientes que luchan contra la corrupción en Guatemala*, El País (February 21, 2022), <https://elpais.com/internacional/2022-02-21/la-guerra-contra-los-jueces-y-fiscales-independientes-que-luchan-contra-la-corrupcion-en-guatemala.html>

<sup>12</sup> Judicial Independence has been recognized both as a general principle of law and as customary international law, United Nations General Assembly/Human Rights Council. Report, Promotion and Protection of All Human Rights – Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41, March 24, 2009, paragraph 14.

<sup>13</sup> UN Basic Principles on the Independence of the Judiciary: "*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*"

the State's acts of persecution violate Articles 203, 251 and 268 of the Guatemalan Constitution.<sup>14</sup> Moreover, the State has failed to adhere to UN Basic Principle 17, which requires that complaints made against a judge in his/her professional capacity be processed expeditiously and fairly under an appropriate procedure.<sup>15</sup> The allegations of judicial and prosecutorial misconduct against the judicial operators prosecuting and adjudicating corruption cases made by defense counsel representing individuals indicted in those cases are not resolved via expeditious and fair proceedings. To the contrary, the allegations are the subject of sealed proceedings that suffer from numerous irregularities.

Moreover, the State's persecution of judges and prosecutors breach multiple standards set forth by the American Convention on Human Rights. Specifically, Articles 8 and 25 of that treaty encompass due process principles, including that of the independence of the judiciary. The Inter-American Commission on Human Rights has issued recommendations to States that are parties to the Convention, providing that States shall pledge the necessary and adequate resources to ensure the protection of judicial operators' lives, and their overall safety and security, and, further, that States must thoroughly investigate any attacks on them.<sup>16</sup> The State of Guatemala, which is a party to the treaty, has failed to adhere to the American Convention on Human Rights.

#### **IV. GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS REACT IN CRITICISM**

Numerous governments, organizations and individuals have expressed concern over the pattern of attacks on the independence of judges and prosecutors handling corruption cases in Guatemala. The Inter-American Commission on Human Rights assessed the judicial tools used by Guatemalan judicial authorities to prosecute the above-mentioned judges and prosecutors for misconduct and concluded that the tools are being used for purposes of intimidation, harassment, and removal. Further, the IACHR has warned that the State's failure to ensure the security of judicial operators against external influences has a significant negative effect on judicial activity and obstructs justice.<sup>17</sup> It is also worth noting that the IACHR previously issued precautionary protection measures to Judge Aifan,<sup>18</sup> as well as other judges including Judge Yassmin Barrios, Judge Patricia Isabel Bustamante García, and Judge Pablo Xitumul de Paz. Similarly, the European

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<sup>14</sup> Constitution of the Republic of Guatemala, *Supra n.2*.

<sup>15</sup> UN Basic Principles on the Independence of the Judiciary, Principle 17: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure."

<sup>16</sup> *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>

<sup>17</sup> Comunicado de Prensa de la Comisión Interamericana de Derechos Humanos, CIDH expresa preocupación por nuevas afectaciones a la independencia judicial en Guatemala (February 22, 2022), <http://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2022/037.asp>

<sup>18</sup> 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](https://www.oas.org/en/iachr/media_center/PReleases/2019/276.asp);

*see also* Erika Lorena Aifan 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>

Union has reported that the prosecutions of judges and prosecutors in Guatemala are preceded by “lengthy social media campaign[s], including intimidation and threats”.<sup>19</sup> Additionally, the United States government has also issued several statements condemning the State of Guatemala’s actions against Judge Aifan and others.<sup>20</sup>

## **V. CITY BAR CALLS UPON GUATEMALAN INSTITUTIONS TO CEASE INTIMIDATION AND ACT ON LEGAL BASIS**

The New York City Bar Association calls on the Attorney General and Head of the Public Prosecutor’s Office, the Justices of the Supreme Court of Justice, and the Judges of the Constitutional Court, as guardians of the rule of law in Guatemala, to undertake all necessary measures and:

- a. Act in accordance with the law and their constitutional mandates and focus their efforts to fight corruption, disregarding private interests.
- b. Cease the criminalization of and the attacks on lawyers, judges, prosecutors, and former prosecutors who have fought corruption in Guatemala, thereby defending the rule of law.

To safeguard the rule of law, Guatemala must combat corruption and end impunity.

Task Force for the Independence of Lawyers and Judges

Christopher Pioch, Co-Chair

Jessenia Vazcones-Yagual, Co-Chair

Vance Center for International Justice

Alexander Papachristou, Executive Director

Jaime Chavez Alor, Latin America Policy Director / Member, Inter-American Affairs Committee and Task Force for the Independence of Lawyers and Judges

Inter-American Affairs Committee

Michael A. Fernandez, Chair

International Human Rights Committee

Ramya Kudekallu, Chair

May 2022

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<sup>19</sup> Guatemala: Statement by the Spokesperson on the rule of law situation (February 11, 2022), [https://www.eeas.europa.eu/eeas/guatemala-statement-spokesperson-rule-law-situation\\_en](https://www.eeas.europa.eu/eeas/guatemala-statement-spokesperson-rule-law-situation_en)

<sup>20</sup> 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/>