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In all countries, equal respect for everyone's dignity depends upon clear laws, equally applied, with access to justice and rights and a fair trial before independent judges. The Rule of Law includes a number of key components, such as *legality* (a system governed by laws, not tyranny, in which public officials must act within their given legal powers and in which settlements of disputes must follow the law); *legal certainty* (according to which the application of the law must be predictable and must generally not be retrospective; fair warnings must be given about any changes in the law); *equality* (the law must apply equally against all); *access to justice* (disputes are decided in a court or similar body after a fair hearing before an impartial and independent judge) and the *respect of basic rights*. Access to justice therefore requires an independent judiciary, as well as independent prosecutors and lawyers.¹

Corruption is unusual in that it offends all components of the rule of law. If justice is not impartial and independent, it can be bought by the highest bidder, and therefore it does not apply equally against all. Likewise, if the courts are corrupt (e.g. because decisions of the judges can be influenced or bought), then there is a missed opportunity for fair trial and due process. As well, corruption can lead to undermining the predictability of rules, for

example when vested interests attempt to exert influence over how they are applied or to whom.

2015 is synonymous with major corruption scandals in Guatemala and Honduras, two countries connected by history, politics and the economy and which share similar challenges, such as high poverty and criminality levels.² These high-level corruption scandals have rocked the political establishment in both countries. Popular pressure, together with strong investigative and prosecutorial powers eventually led to the impeachment of the former President of Guatemala and his Vice-President (Otto Pérez Molina known as 'OPM', and Roxana Baldetti, respectively). It seems to have effected change in Honduras as well.

The ousting of OPM and Ms Baldetti was done legally. Citizens in Guatemala (and in Honduras) took to the streets in peaceful demonstrations. These are among the most significant events in the transformations the country has undergone since the end of the civil war, which ended in 1996 and during which student leaders and union organisers had been gunned down or disappeared. Nevertheless, a number of challenges remain, including the entrenched influence of organised crime on politics, high levels of violence, the lack of an independent judiciary, and corruption. This paper uses a rule of law lens to analyse both

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¹ Bingham, T, 2010, *The Rule of Law*, Allen Lane, Penguin Press; Jowell, J, *The Rule of Law: A Practical and Universal Concept*, in Jowell, Thomas and van Zyl Smit (Eds), *Rule of Law Symposium 2014 – the Importance of the Rule of Law in Promoting Development*, Bingham Centre for the Rule of Law, Singapore Academy of Law, 2015

² According to the CIA's Factbook, Honduran growth remains dependant on the economy of the US. The country is one of the poorest in Latin America and has the world's highest murder rate. More than half the population lives in poverty. Guatemala is also among the most violent in the world, in part due to impunity, gang violence and the drug war. See CIA, *The World Factbook Honduras*, <http://is.gd/lwKgGV> and OSAC, *Guatemala 2014 Crime and Safety Report*, <http://is.gd/OEcSBL>; D. Renwick, 4 Dec 2015, *Central America's Violent Northern Triangle*, CFR Backgrounders, <http://is.gd/MM8AGX>

these corruption scandals and the challenges lying ahead.

CORRUPTION AND THE BREAKDOWN OF THE PEREZ MOLINA ADMINISTRATION³

Starting in April 2015, tens of thousands of Guatemalan protestors began taking to the streets demanding urgent change, an end to impunity, and the resignation and prosecution of their political elites (they would soon be followed by their Honduran neighbours). These unprecedented marches were sparked – and have subsequently been galvanised by – revelations of graft, bribery and embezzlement in the countries’ public procurement, social security and customs sectors (to name but a few). All these cases involve high-level politicians on both sides of the border, although only in Guatemala were the former President and his Vice-President forced to resign (they currently sit in prison and are facing charges).

These mass protests were formed in response to the uncovering of a corruption scam by a UN-backed Commission Against Impunity in Guatemala (*Comisión Internacional contra la Impunidad en Guatemala*, known by its Spanish acronym as CICIG) together with the Public Prosecutor or Attorney General (called the Public Ministry or *Ministerio Público*) (see Box 1). They reported that senior custom officials had taken bribes from businessmen in return for lower custom duties (this case was dubbed ‘The Line’ or ‘*La Línea*’). Official figures suggest *La Línea* defrauded the state of millions of dollars⁴. Up to

³ The investigative magazine *Contrapoder* has a timeline covering most significant milestones in Guatemala since the scandals broke. See Alvarez, A, 29 Oct 2015, *El Despertar ciudadano y el treozar de los políticos*, *Contrapoder*, <http://is.gd/A90joD>

⁴ The actual amount is subject of discussion. Some figures suggest between 120 to 130 million was syphoned off, whilst the BBC reports that in the course of 2 weeks, one individual alone stole about USD 330,000. See Reynolds,

18 people – including the head of the Customs Department – were arrested. Investigations honed in on the role of Vice-President Baldetti’s Chief of Staff, Mr Monzón Rojas, who stood accused of spearheading this ring. He initially went into hiding and pressure built around Ms Baldetti. Congress lifted her political immunity (which she appealed unsuccessfully), and she was eventually forced to step down on May 7.⁵ Monzón Rojas eventually turned himself in early October and was remanded in custody. He incriminated both Baldetti and OPM as leaders of the crime ring.

Box 1: CICIG – an overview

The United Nations and the Government of Guatemala agreed to set up CICIG in 2006. As an independent entity, its mandate consists in supporting the Attorney General/Public Ministry and other bodies such as the police in the investigation and dismantling of “illegal security bodies and clandestine security organisations” operating in Guatemala. CICIG has broad investigative powers. In addition to providing investigative and prosecutorial support, CICIG is also tasked with fostering capacity of the Judiciary. It can also formulate recommendations on policies and laws to implement in order to tackle organised crime. Its original mandate does not include corruption.

Its mandate was renewed three times, in 2009, 2011, and most recently in early 2015.⁶ The United States funds 40% of the CICIG’s budget, whilst the remaining 60% comes from other countries.⁷

The release of the ‘*La Línea*’ report by CICIG in early April coincided with a period of uncertainty over its future. President Molina initially refused to extend the

L, *In Guatemala, Pérez Molina claims US conspiracy behind corruption prosecution*, Tico Times, <http://is.gd/yC11F4>, Telesur, 27 Apr 2015, *Anti-Corruption Protest Demands Guatemalan President, VP Resign*, <http://is.gd/f49Rqe> and BBC Mundo, “*La Línea*”: el qué, el cómo y el por qué del escándalo de corrupción que tumbó al presidente de Guatemala, <http://is.gd/myV2q9>

⁵ This implied lifting her political immunity first (which she appealed).

⁶ CICIG, *Mandato, Acuerdo de creación de la CICIG*, <http://is.gd/AE3MP5>

⁷ See for example La Hora, 1 Dec 2015, *Alemania dona 1.5 millones de euros a la CICIG*, <http://is.gd/0pUoxd>

Commission's mandate before caving in. From prison, he would say he regretted doing this and claimed he was forced to do so by the US. He also claimed that CICIG operates without checks and balances, which could in itself undermine the rule of law.⁸

As pressure grew on President OPM, Congress began discussing his involvement in *La Línea*. A Congressional Committee recommended fully lifting the President's political immunity, and indicated an investigation into the President could proceed. Although the Constitutional Court⁹ rejected OPM's appeal against the decision (much like his former Vice-President's appeal for leniency was overruled), in the end, Congress voted against lifting his immunity.¹⁰

In mid-August, the head of CICIG publically suggested it was 'probable' that the President had participated in *La Línea* and was in fact one of its leaders. The President began losing support from his closest allies (including business leaders and some in his own party) and different factions of society such as the church called for his resignation. CICIG and the Public Prosecutor pressed the Supreme Court¹¹ to call for Congress to lift the President's immunity, which it eventually did. This opened the door for the President's impeachment during a second vote in Congress which secured a two thirds majority.¹²

⁸ Menchu, S and Pretel, R, 25 Oct 2015, *Guatemala's Perez says Biden forced him to accept anti-corruption purge*, Reuters, <http://is.gd/3x4ryl>; see also, Martínez Ahrens, J. 15 Dec 2015, *Guatemala's jailed ex-leader: I didn't want any deaths just to save my skin*, El País, <http://is.gd/aFENre>

⁹ The Constitutional Court (*Corte de Constitucionalidad de la República de Guatemala*) is the highest court in Guatemala, and is led by a Court president who is elected annually. She/he is supported by five judges (and their respective deputies) who are elected for a five-year term.

¹⁰ The motion to lift OPM's immunity was presented by an opposition lawmaker.

¹¹ The Supreme Court of Justice (*Corte Suprema de Justicia*) is composed of 13 members, appointed for five-year terms. They elect a president for a one-year term.

¹² Menchu, S, 29 Aug 2015, *Bid to Lift Guatemala president's immunity advances in Congress*, Reuters, <http://is.gd/2hdKW5>

Facing imminent investigation and arrest, the President stepped down instead on 2 September and presented himself in Court the next day. In doing so, he declared he would "submit himself to the rule of law" and face legal proceedings against him. Both OPM and his former Vice-President are now imprisoned and are awaiting a full trial (OPM was formally charged in December).¹³ This situation is not without a touch of irony, as the President was elected on a 'mano dura' (or tough stance) mandate against organised crime. A former Judge "from the establishment", Mr Maldonado Aguirre, was originally sworn in as Vice-President in lieu of Ms Baldetti, and then as acting President.¹⁴

The latest indicted politician is Pedro Muadi, former President of the Congress who is accused of embezzling state money through a sophisticated shadow jobs system involving his security guards, whose salaries he over-reported.¹⁵

ANALYSIS

Although corruption tends to have its own idiosyncratic explanations in different countries, it is nevertheless interesting to highlight some of the similarities as well as the differences in Guatemala and Honduras.

Demand for accountability and the importance of social security institutions

In both countries, grass-roots movements have sparked growing numbers of protests starting in April 2015. These marches progressively gained in intensity and momentum, and are driven by citizens' demand for greater justice, integrity and transparency. In Guatemala, and to some

¹³ AFP, 10 Dec, *Guatemala prosecutors formally accuse ex-president of graft*, <http://is.gd/pRwYqw>

¹⁴ Cabria, E, Olmstead, G, 14 May 2015, *El juez del establishment llega a Vicepresidente*, Nómada, <http://is.gd/swDGDV>

¹⁵ Prensa Libre, *Pedro Muadi guardará prisión provisional en Mariscal Zavala*, 29 October 2015 <http://is.gd/bAL3vl>

extent in Honduras, demonstrations have also bridged ethnic, class and urban/rural divides (both indigenous groups as well as the educated elites take active part in the demonstrations). Marches are mainly led by youth groups and students, but include a mix of people from all over the country.¹⁶

Politicians are the target of the public's ire, which is driven by a loss of trust in institutions and a belief that legal and illegal groups as well as vested interests exert significant influence over the Executive, Legislature and Judiciary.¹⁷ The fact that citizens have mobilised against corruption in this manner is remarkable. This is because both countries have been beset by civil wars, rising spikes of violence (mainly between drug gangs), corruption and military rule. Honduras also went through a military coup in 2009 which deposed the country's democratically elected President (Mr Zelaya). These protest movements have organised civil society in a way that it can call politicians to account. However, as will be discussed below, the long-term impact of these protests remains to be seen, notably because other challenges such as the influence of organised crime on politics must be addressed.

The second similarity across both countries relates to the place of the Social Security Institutions in the corruption scandals, which in impoverished countries like Guatemala and Honduras represent a sizeable share of the national budget¹⁸. This is because social security

institutions draw on large procurement packages which offer higher opportunities for graft.

Soon after the Customs scandal erupted in Guatemala, the authorities – drawing once more on investigations by CICIG – arrested the President of the Central Bank (a former chief of staff of Perez Molina) together with the Director of IGSS and about another dozen suspects (including the son of a Supreme Court Justice). This followed new allegations showing they had embezzled approximately USD 15 million by rigging procurement and tendering procedures in favour of a large pharmaceutical company. This scheme is thought to have gone on for years. The Attorney General's office and CICIG also published evidence that a former Presidential Secretary serving in the administration of President Colom (2008-2012), Mr Alejos, together with his acolytes, was one of the masterminds behind what is now dubbed 'the merchants of health' or '*negociantes de la salud*'.¹⁹ Alejos, who funded the campaign of the three previous presidents (including OPM), is still a fugitive to this day.²⁰ The Ministry of Health in November suggested it had uncovered the presence of 'shadow jobs', and declared it would debar a number of companies from its procurement system.²¹ Finally, Congresswoman Montenegro, who has been pushing for the newly introduced reform to the Law on Procurement, provided evidence that some

¹⁶ Internet penetration in Guatemala is reported to be of 25%, which is significant. Social Media played an important role in the protests.

¹⁷ In a recent interview, Iván Velázquez stated: "It is definitely true – and this is not a Guatemalan problem but an international one, although it is much more visible in Latin America – that certain factors – state powers and non-state powers – pressure judicial bodies so that they don't affect their interests". See Labrador, G, 17 Nov 2015, *Head of Guatemala's CICIG reflects on Past victories, Challenges ahead*, Insight Crime, <http://is.gd/BhKKyD>

¹⁸ Guatemala's administration is known as the *Instituto Guatemalteco de Seguridad Social*, or IGSS. On average, social protection spending represents 15.7% of GDP in developing countries such as Honduras and Guatemala.

See, Van Stolk, C and D Tesliuc, E, 2010, *Toolkit on tackling error, fraud and corruption in social protection programs*, RAND Corporation

¹⁹ Gamazo, C, 28 Oct 2015, *Jaque a Gustavo Alejos y los negociantes de la salud*, Plaza Pública, <http://is.gd/EmjFQO>

²⁰ Prensa Libre, 27 Oct 2015, *Gustavo Alejos tiene arraigo y orden de captura, según MP*, <http://is.gd/oXLSOr> and López, G, 10 Nov 2015, *Los casos de corrupción que marcaron el declive en el Seguro Social*, Prensa Libre, <http://is.gd/UbxBr1>

²¹ Méndez Villa, C, 11 Nov 2015, *Ministerio de Salud deja de comprar medicamentos a Agefinsa*, El Periódico <http://is.gd/WKQaeZ> See also, El Periódico, 28 Oct 2015, *Así operaban los negociantes de la salud*, <http://is.gd/8UT0ti>

goods and medicine for the social security institution cost 8 times as much as normal.²²

Similarly, in Honduras, the former director of the Social Security Institute (*Instituto Hondureño de Seguro Social*) is also accused of embezzling around USD 300 to 350 million, while some of his colleagues stand accused of accepting bribes from medical companies. Under this scheme, some services bought ambulances thousands of dollars above price, with the surplus laundered through to front companies.²³ The National Party and President Hernández are also alleged to have pocketed up to USD 90 million in order to fund the 2013 election campaign. Hernández has admitted to taking “only a fraction” of this money, and pledged he would return the amount.²⁴

Shortly after these revelations, the Honduran Supreme Court issued arrest warrants for the Vice President of the Congress (Ms Gutierrez) and some of her relatives on the suspicion that a firm they own (*AstoPharma Laboratory*) sold drugs of dubious quality to government at an inflated price. A multi-party Commission was also established to investigate this case in the Congress. After reviewing witness testimony and prosecutorial evidence, the President of the Supreme Court agreed in late September to press charges and started proceedings against Ms Gutierrez and her relatives.²⁵ Mr Zelaya, the head of the Social Security Institute who is said to have led a lavish lifestyle, was remanded in custody and is now awaiting trial.

These cases have had real consequences across both sides of the border. The plundering of the Social Security Institute’s budget in Guatemala

²²Medinilla, A, 26 Nov 2015, *Verdadero. Montenegro: “El Estado ha comprador productos con una sobrevaloración de hasta el 800%”*, Plaza Pública, <http://is.gd/J5pPBo>

²³ Cuevas, F, 9 Sept 2015, *Honduras detains ex-official suspected of fraud*, Associated Press <http://is.gd/b0cZQU>

²⁴ Tico Times, 30 May 2015, *Anti-corruption protests spread to Honduras with demands that President Hernández resign*, <http://is.gd/OekDfw>

²⁵ Cuevas, F, 2015, *Honduran judge begins formal trial for congress VP*, Associated Press <http://is.gd/kvtTnO>

takes place at a time when the education and health budgets are running dry. The funds that were syphoned off were actually destined to treat patients with kidney trouble (36 of whom reportedly died in hospital as a result of their lack of treatment). The ‘merchants of health’ are alleged to have syphoned off up to USD 2.5 million of a 15 million contract.²⁶

CICIG and the prosecution of corruption crimes

While there are similarities, there are also a number of differences between the two countries. First is the preeminent role of CICIG, whose pivotal work is now hailed across the region as an example of good practice. Working together with the Office of the Attorney General/Public Ministry and drawing on investigatory techniques such as phone tapping, the Commission has been vital in providing robust, objective and impartial evidence of wholesale corruption.²⁷ In that sense, Guatemala is a step ahead of Honduras which lacks an independent investigative body (the scandal there was broken by a journalist, who has been sent to prison for defamation.²⁸)

One of the claims of protestors in Honduras is precisely that an independent investigative body be set up to look into government sleaze and prosecute corrupt officials. Although he initially resisted the idea, President Hernández bowed to pressure and agreed to set it up. He announced the creation of a framework to combat impunity and corruption (*Sistema Integral de Combate contra la Impunidad y la Corrupción, SICCIC* in

²⁶ García, J, 23 Sept 2015, *El personaje clave de la corrupción tiene el peor nombre*, Nómada <http://is.gd/Tzb0qV>

²⁷ The investigatory and prosecutorial techniques have come a long way under CICIG’s leadership. In the past, there was no legal procedure allowing to wire-tap suspects, nor was there a possibility for prosecutors to bargain with low-level defendants. The asset forfeiture framework was also poorly developed, meaning prosecutors could seldom use it. See Speck, M, 16 Dec 2015, *A civic awakening in Guatemala*, Miami Herald, <http://is.gd/a4eGkq>

²⁸ Reuters, 13 Nov 2015, *Condenan a periodista que denunció corrupción que salpicó a presidente de Honduras*, <http://is.gd/aZOH67>

Spanish). This framework includes a national dialogue with leading social and political actors. In late September, the Organisation of American States (OAS) issued a statement according to which it would contribute to the SICCIC by setting up the 'Mission to Support the Fight Against Corruption and Impunity in Honduras' (*Misión de Apoyo contra la Corrupción y la Impunidad en Honduras*, MACCIH). Using the Inter-American Convention against Corruption as framework, it is originally foreseen for the Mission to be led by a legal expert together with a panel of judges and prosecutors who will be tasked with supervising, monitoring and supporting anti-corruption institutions.²⁹ MACCIH will also establish a diagnostic study on the situation of the Judiciary in Honduras and make sweeping recommendations to foster the Judiciary.³⁰ A 'Justice Observatory' will be set-up as well to evaluate progress towards reforms.

Civil society, however, has voiced concerns about MACCIH's relative lack of teeth and independence, arguing that it should be independent and have the power to investigate and prosecute sleaze.³¹ The Honduras Anti-Corruption Party (which holds 13 out of 128 seats in Congress) presented a law formalising the creation of MACCIH.³² The full scope of the Mission (including the powers eventually bestowed onto it) should be published late 2015 or early 2016. The Mission will start operating in January, when an agreement with the OAS will

be signed (this will require approval from Congress).

In the absence of a strong prosecution, the role of the United States in policing the region is very apparent, particularly in Honduras.³³ In early October, the patriarch of one of the country's richest families – the Rosenthals – along with his son and nephew were indicted in the United States for laundering money for drug traffickers.³⁴ Yankel (the nephew), who had been a minister for investment promotion until the summer of 2015, was arrested in Miami. Patriarch Jaimie heads one of the biggest business groups in the country, *Grupo Continental*. He is a former vice-president of Honduras and was presidential candidate on four occasions.³⁵ Under the *Foreign Narcotics Kingpin Designation Act*, the US froze assets of *Grupo Continental* and Honduras' banking commission ordered the liquidation of their flagship asset – a local bank – urging that deposits be returned to its 220,000 clients.³⁶ Again, this shows the real costs of corruption, since shutting down the Rosenthal's businesses could leave up to eleven thousands unemployed and could end up costing Honduras up to three percent of GDP, according to a recent report by a fiscal think

²⁹ See OEA, *Misión de Apoyo contra la Corrupción y la Impunidad en Honduras* (MACCIH), <http://is.gd/l3cllj> and OAS, 9 No 2015, *What is the MACCIH?*, <http://is.gd/3sT8OK>

³⁰ This work is to be undertaken by the Justice Studies Center of the Americas in Chile

³¹ *La Prensa*, 2 Nov 2015, *Indignados hondureños viajan a Estados Unidos*, 2 Nov 2015, <http://is.gd/tk9sA0>; Graham, D, 28 Sept 2015, *OAS to establish anti-corruption body in Honduras*, Reuters, <http://is.gd/ReoApa>; *La Tribuna*, 9 Dec 2015, *MACCIH debe tener autonomía en el combate a la corrupción*, <http://is.gd/7q74Ab>

³² *La Prensa*, 24 Sept 2015, *Diputados del PAC presentan ley para la Cicih*, <http://is.gd/fd7Nw4>

³³ As Historian Greg Grandin noted, it would appear the United States' support for anti-corruption movements and institutions in the 'Northern Triangle' is less than altruistic, however. In addition to the need for strong institutions as a way to favour a stable business environment, this could also be a way to curb mass migration towards the north, which has increased of late as a result of increasing violence levels. See Grandin, G, 2 Sept 2015, *What's Happening in Guatemala?*, *The Nation*, <http://is.gd/u72W7C>

³⁴ A political analyst who would be subsequently assassinated, claimed that most entrepreneurs in Northern Honduras laundered drug money. See Avila, J, 7 Nov 15 *La captura del megaempresario hondureño empieza un terremoto*, *Nómada*, <http://is.gd/0mLnd1>

³⁵ Cuevas, F, Sherman, C, 7 Oct 2015, *Powerful Honduran businessman accused of money laundering*, *Associated Press*, <http://is.gd/vllrsh>

³⁶ *BBC Mundo*, 14 Oct 2015, *La caída de los Rosenthal, el poderoso clan hondureño acusado de lavado de dinero y narcotráfico*, <http://is.gd/9xy7GT>

tank.³⁷ In addition to poverty and insecurity, corruption is said to be an increasing push factor for migration to the United States (including of unaccompanied minors), so this could have important social and demographic implications as well.

Recently, the US has been planning for a USD 1 billion package for Central America in an initiative known as the *Alliance for Prosperity of the Northern Triangle*.³⁸ Some of this money is expected to be used to fight corruption, foster good governance and beef up security, although it will also support infrastructure and industry, tax breaks and so on. El Salvador, which could benefit from the *Alliance for Prosperity*, is allegedly staunchly opposed to letting in any outside influence on its domestic politics and has resisted setting-up a Commission (Box 2).

Box 2 – El Salvador’s fledgling anti-corruption movement

El Salvador is different in that the political left (under President Sánchez Cerén) has been in power since 2009. Critics suggest that parties and movements on the right of the political spectrum – under whose watch different corruption scandals erupted – are trying to “hoist the banner of anti-corruption politics”, if cynically and clumsily.³⁹ There appears to be some disagreement over the extent to which government and the opposition have fostered or on the contrary aim to scupper transparency and anti-corruption, however.⁴⁰

Whilst street mobilisation is not nearly as significant as in neighbouring countries, the governing party of President Sánchez Cerén – who had just years ago vigorously opposed the idea – proposed in October the creation of an anti-corruption commission called

the *International Commission against Impunity in El Salvador* (CICIES, for its Spanish acronym), admittedly at the suggestion of the United States. So far, support for CICIES seems to be feeble at best. However: “*The bourgeoisie is asking for [CICIES], not the people [...] What our people want is justice, and for the judicial system to work*”⁴¹, with other civil society organisations also calling CICIES a smokescreen and urging the reinforcement of judicial institutions as a priority.

Meanwhile, three former anti-mafia judges are being prosecuted for taking bribes from organised crime in return for a more favourable judgment. Prosecutors also brought charges against a group of corrupt judges, lawyers and a prosecutor who took bribes in return for lowering sentences.⁴² A congressman is currently under investigation for illicit enrichment as well.

These different arrests and investigations are spearheaded by an Attorney General (Mr Martínez) who is seeking re-election. Congress is divided over his candidacy.⁴³

Timing of the protests and elections– out with the old, in with the new?

The timing and potential fall-out of these scandals merits some attention. Events in Guatemala started unfolding as the country went into election fever. The first round of presidential and legislative elections took place on 6 September 2015, with the second round taking place on 25 October (elections in Honduras are not due until late 2016).⁴⁴ The severity of the allegations released by CICIG in April had led protestors to call for delaying the elections and to ask for important electoral reforms to be ushered in before polling day.

³⁷ ICEFI, quoted in Insight Crime, 11 Nov 2015, *CentAm Elites Afraid of Prosecution? Don’t Bet on It*, <http://is.gd/ljLeYU>; see also Avila, reference number 34

³⁸ See official statement here: <http://is.gd/mg3hdu>

³⁹ Goodfriend, H, 16 Nov 2015, *El Salvador’s New Anti-Corruption Crusaders*, NACLA, <http://is.gd/UMmHxx>

⁴⁰ See for example Goodfriend, H (Note 39), and Rubio-Fabián, R, 9 Nov 2015, *Combate a la corrupción e impunidad en el Triángulo Norte*, <http://is.gd/g2jibp>

⁴¹ Margarita Posada, quoted in Goodfriend, H (Note 39)

⁴² Associated Press, 26 Nov 2015, *El Salvador breaks up corruption ring of judges, lawyers*, <http://is.gd/uvwNz9>; Prensa Libre, 26 Nov 2015, *El Salvador desarticula red de corrupción judicial*, <http://is.gd/S68M8H>

⁴³ Labrador, G, 2 Dec 15, *Arena, dividida, debate si Luis Martínez merece tres años más en la Fiscalía General*, El Faro, <http://is.gd/HQjTrY>

⁴⁴ There was a high voter turnout for the first round (about 70%), with null votes accounting for approximately 9%. The Public Ministry was flooded with reports of irregularities.

Although this did not happen, it would have allowed Guatemala to shift from a politics of protests to a politics of reform and deliberative democracy, as Professor Anita Isaacs remarked.⁴⁵ One is inevitably led to consider whether events in Guatemala would have unfolded in the same way (especially the rapid loss of support within the political elite towards Baldetti and Perez Molina) had 2015 not been election year.

The electorate's distaste for 'politics as usual' seems to have been the driving factor behind Jimmy Morales' election to the Presidency. Morales – a comedian⁴⁶, devout evangelical and relative political neophyte – was from the onset seen as an 'anti-system' candidate (which he identified with even though this moniker is hotly contested) (Box 3).

Box 3: President-Elect Jimmy Morales – some facts⁴⁷

- He has never held a seat in office. He ran – unsuccessfully as mayor of a major city in Guatemala.
- His manifest was 6 pages long. Some of his main action points include promoting health, education and free-enterprise. He ran on the slogan 'neither corrupt or a thief' and claimed to be an 'outsider'. His campaign budget was low compared to other frontrunners. Admittedly, this provided him with the advantage of not having to give in to particular agendas or demands from funders, as investigative newspaper *Nómada* remarked.
- He was elected with 70% of the vote (53% turnout, down from 72 in the first round), winning over former first lady Sandra Morales (who faced corruption allegations in the past).
- Morales has a wafer-thin majority in Congress (11/158 seats), and will therefore need to build

⁴⁵ In Al Jazeera, 29 Aug 2015, *Inside Story – can corruption be wiped out in Guatemala?* <http://is.gd/zDvEth>

⁴⁶ The election of Morales to the Presidency drew unexpected attention to a TV character he played in a movie entitled *A President in a Sombrero*. His character, Neto, nearly gets elected president by making vague promises before he drops out of the race.

⁴⁷ BBC, *Guatemalan election: Jimmy Morales elected president*, 26 October 2015, <http://is.gd/ryoN0n>

alliances. Almost half the amount of incumbent congressmen got re-elected, and the three leading parties won the majority of seats (political parties are known for having a short life span, though).⁴⁸

- He has pledged to extend CICIG's mandate until 2023 (the current mandate expires in 2017). In addition to promising efforts to root out corruption, he has also pledged to retain the serving attorney general (Ms Aldana), boost funding for the Justice system and make government more meritocratic and transparent. He asked CICIG to vet all candidates for top government positions.
- His party – the National Convergence Front (NCF) – was set up by former military officers who have publically stated their objective of preventing any prosecution of former army officers for human rights violations.⁴⁹ Morales' ties to the military establishment raise questions concerning his approach to the prosecution of former army officers for war crimes during the civil war. Some therefore suggest Morales is a new face for an old guard which supported OPM, and it is unsure whether he will really reform the status quo.⁵⁰
- Although his ties to the military establishment could be one of his biggest weaknesses, Morales has pledged not to name any army official to his cabinet, except for Defence.
- The question now is whether Morales can channel votes into support for his political agenda.

CICIG and the Public Prosecution played an important role in the elections. In July, they released a damning report showing that most parties receive illicit funding.⁵¹ The report stated that up to half of donations to parties come from corruption and another quarter from organised crime. The report further contended

⁴⁸ See Isaacs, A, 5 Nov 2015, *A wrong turn for Guatemalan Democracy*, New York Times, <http://is.gd/M6V7FL>

⁴⁹ Abott, J, 30 Oct 2015, *Jimmy Morales, the New Face of Guatemala's Military Old Guard*, NACLA, <http://is.gd/435JiV>

⁵⁰ Some analysts, mainly in academia and civil society think both current president Maldonado and oncoming president Morales will not. See La Hora, 25 Nov 2015, *Critican falta de acción de Maldonado y Morales ante reformas del Estado*, <http://is.gd/BqPtUd>

⁵¹ CICIG, 16 Jul, 2015, *'El financiamiento de la politica en Guatemala'*, <http://is.gd/QKy8cl>

that there is little transparency in party financing, as they fail to disclose the source of funding (political contributor anonymity facilitates links to organised crime).

In the run-up to the elections, one of the leading contenders who lost in the first round (Mr Baldizón from the 'Lider' party), was instructed by the Supreme Electoral Tribunal to stop his campaign as he had spent above the authorised threshold. He ignored this. CICIG also reported that Mr Baldizón's Vice-Presidential candidate was involved in a money-laundering scheme when he was head of the Central Bank. The Supreme Court followed-up on this revelation by lifting the political immunity of Mr Baldizón's running mate, which is thought to have dealt his campaign a severe blow (he was the leading contender, but eventually came in third place in the first round).

RULE OF LAW ASSESSMENT

The impact of the scandals currently besetting both countries – particularly the investigation and prosecution of serving Guatemalan politicians – is significant. This is the first time a sitting president's political immunity has been lifted by Congress in Guatemala. That said, there is a precedent for prosecuting former presidents for corruption. Arnoldo Alemán of Nicaragua (1998-2002) was prosecuted for money laundering and former president of El Salvador, Francisco Flores (1999-2004) is under house arrest and faces prosecution for embezzling up to USD 15 million from Taiwanese donations to earthquake victims.⁵² In Panama, former President Martinelli is also facing investigations for similar corruption charges. There is also former President Alfonso Portillo of Guatemala, who served a jail sentence in the United States for money laundering before returning to his home country. Statistics suggests that of the 32 heads

⁵² BBC, *Former El Salvador leader Francisco Flores in police custody*, <http://is.gd/Ck0UmC>

of states in the region ruling between 1990 and 2010, 13 are behind bars in exile or under investigation^{53 54}.

There is no doubt that both Honduras and Guatemala benefit from well-developed legal frameworks. Guatemala emerged from a military-run dictatorship in 1985, when it signed a new Constitution enshrining the separation of powers (it was revised in 1993). Separations of powers are also protected by Article 4 of the Constitution of Honduras. Therefore, one could argue that both countries are governed by laws and meet the basic principle of *legality*. Nevertheless, there is a high level of politicisation and discretion in how these laws are enacted, meaning that politicians and judges tend to interpret and implement the law in a way that benefits them, or find loopholes in the legislation. A case in point is Mr Baldizón's flaunting of electoral laws to continue campaigning.

Human Rights

In 2013, Mr Rios Montt (a former military dictator) was convicted of genocide and crimes against humanity and sentenced to eighty years in prison. Shortly after, the Guatemalan Constitutional Court annulled the verdict (in a 3 to 2 ruling) and sent the proceedings into chaos.⁵⁵ The Court's decision annulled the final days of the trial (when prosecution and defence witness were all heard, together with closing

⁵³ Irish Times, 27 Dec 2014, *Two decades of corruption at the highest level in Central America*, <http://is.gd/Goaskk>; Moreno León, J, I, nodate, *La Respuesta de Guatemala*, Elmundo.com.ve, <http://is.gd/6bZ2oh>

⁵⁴ Most recently, former Honduran president Rafael Callejas was arrested as part of the FIFA investigations into corruption, and now sits in a US prison. A Guatemalan Judge was also arrested as part of the FIFA investigations whilst holidaying in the US.

⁵⁵ This was the first time a dictator was tried locally, rather than by an international court. The Judge who ordered Rios Montt's detention (Miguel Angel Galvez) is the same that has heard cases involving drug trafficking, murder, corruption, and who ordered former President Perez Molina to stand trial. See Perez, S, D, 16 Dec 15, *Guatemala Judge Renowned for Ex-President's Graft Case*, Associated Press, <http://is.gd/QHDMIV>

arguments, the verdict and sentence). It instructed the trial court to resume the trial, and threatened to sack the Judges if they failed to comply.⁵⁶ In the wake of the annulment, the Constitutional Court was branded as obstructionist (including by one of the Judges on the trial court), and its actions damaging to legal and judicial certainty in Guatemala. According to the Open Society Justice Initiatives, the decision of the Court “raises serious concerns about Guatemala’s willingness and capacity to prosecute grave crimes, judicial certainty in the country, and the protection of the rights of the defendants and the victims [...] Issued in the shadows of explicit threats, this unclear and irregular judgment further raises questions about judicial independence in Guatemala”⁵⁷ A Guatemalan Court recently ruled that, despite Ríos Montt being diagnosed with dementia, the retrial would be allowed. His old age and condition, however, means he is unlikely to serve his time in jail if he is convicted.⁵⁸

Many human right abuses remain unresolved in Guatemala. As the different corruption scandals unfolded and captured public attention, two leading land and human right activists were attacked, and one killed.⁵⁹ CICIG, however, seems to acknowledge the scale of the problem, and has set-up a special unit that will consider land grabs and corruption at the municipal level, perhaps a first sign that corruption investigations could also start focusing on the role of the private sector (both domestic and

international), rather than ‘grand corruption’ cases only⁶⁰.

There is also some suspicion that the same political elite which is now coming under the spotlight may be complicit with some large-scale mining projects. Attention has focused on Tahoe Resources, whose licence to operate *El Escobal* silver mine was recently judged as a violation of due process by a court because it failed to consult local communities. The matter is now with the Guatemalan Constitutional Court⁶¹, which recently ordered the suspension of licenses for two hydroelectric projects supported by a Spanish corporation on the same basis it did not sufficiently consult with local populations.⁶²

In Honduras as well, corruption is also a problem that indigenous people face, since they have also been evicted from their land by miners, loggers and agribusiness complicit with the authorities.⁶³ According to Global Witness, 111 people died in Honduras between 2002 and 2014 defending their land. In 2014, the death count in Honduras was of 12 victims (4 indigenous) and in Guatemala 6 (of which 4 were indigenous).⁶⁴

⁵⁶ For a detailed account, see Open Society Justice Initiative, Nov 2013, *Judging a Dictator - The Trial of Guatemala’s Ríos Montt*, New York, <http://is.gd/qvb6yq>; see also MacLean, Emi, 21 May 2013, *Guatemala’s Constitutional Court Overturns Ríos Montt Conviction and Sends Trial Back to April 19*, International Justice Monitor, <http://is.gd/D7sZf>.

⁵⁷ Open Society Justice Initiatives, (Note 56, pp 18)

⁵⁸ Lara, J, Sánchez, G, 20 Aug 2015, *Ríos Montt será procesado en juicio especial*, Prensa Libre, <http://is.gd/gDoHZo>

⁵⁹ *Tico Times*, 18 Sep 2015, *Indigenous activist who helped close polluting Guatemala palm oil factory shot dead*, <http://is.gd/rz8SK1>

⁶⁰ Hernández, M, 14 Nov 2015, *CICIG reitera prioridades: Corrupción en comunas, despojo de tierras y contrabando*, La Hora, <http://is.gd/jCCp2A> As the CICIG commissioner himself recognised, however, issues affecting the indigenous population are not likely to garner as much public support as grand corruption, which could be a significant challenge for the future of human rights investigations. Labrador, G, 17 Nov 2015, *Head of Guatemala’s CICIG reflects on Past victories, Challenges ahead*, Insight Crime, <http://is.gd/BhKKyd>

⁶¹ Hufstader, C, 3 Nov 2015, *Violence, and bogus charges against human rights defenders in Guatemala continue*, Oxfam America, <http://is.gd/4ML8hZ>

⁶² J. Abbott, 18 Nov 2015, *The Power to defend Our Territory: Indigenous Communities Win Consultation Law in Guatemala*, Upside Down World, <http://is.gd/VKfmfH>

⁶³ Fraser, B, 18 Nov 2015, *Corruption, Land takeovers threaten Indigenous Honduran*, Indian Country Today, <http://is.gd/iNe7Y1>

⁶⁴ Global Witness, *How many more? 2014’s deadly environment: the killing and intimidation of environmental and land activists, with a spotlight on Honduras*,

Organised crime, access to justice and equality before the law

Organised crime in the Northern Triangle of Guatemala, Honduras and El Salvador represents a significant challenge for democracy and the rule of law, and tackling it will be the touchstone against which to measure progress. Organised crime rings – which include among others former members of the military and active members of the police – battle each other for territory, ramping up violence levels in both countries. Their mainstay includes drug trafficking, as well as human trafficking, assassinations, kidnapping, extortion and money laundering.⁶⁵ According to Miller a lot of Honduras' ills stem from the trans-national nature of organised crime.⁶⁶ The country has become a veritable staging post for illicit drugs traveling northbound. High levels of violence and corruption have forced many people into mass migration, and the government has responded with a heavy hand, mainly by militarising law enforcement (which has contributed to undermining an already fragile human rights situation).⁶⁷ Impunity levels in Guatemala and Honduras still run high, since around 97 to 98 percent of crimes go unpunished.⁶⁸

Organised crime groups work closely with different government entities at the central or local level that facilitate their business, “*but [they are] not interested in controlling or overthrowing the state apparatus, which serves them by being*

weak and beholden to their interest”.⁶⁹ Illicit networks sometimes provide public services to conceal their business dealings and have become adept at co-opting the Guatemalan and Honduran States from within and without. They have set-up their own shell companies to bid for public contracts, co-opt politicians and launder money.⁷⁰ Investigative reporter Michael Deibert also shows the deep links between crime and politics as he describes how laundered money from drug traffickers was also used to fund political campaigns.⁷¹

The impeachment and subsequent prosecution of Ms Baldetti and OPM shows that nobody is above the law, and that the long arm of justice can eventually reach those who were historically deemed untouchable. However, the extent to which organised crime has infiltrated politics also accounts for the difficulties in establishing a fair and objective judiciary, and undermines the principles of equality before the law and access to justice. In 2012, CICIG uncovered a network of corrupt judges who colluded with vested interests (including organised crime).⁷² The fact that Vice President's Baldetti Chief of Staff was able to flee the country several days before the CICIG report was published suggests he was tipped off in some way, and also shows the level of political cover most high level officials benefit from. Another, perhaps more telling example, is that lawyers acting on behalf of defendants in relation to *La Línea* were allegedly bribing Supreme Court Justice Ms Blanca Stalling, and

⁶⁵ High criminality levels are compounded by a long-seeded record of inequalities between rich and poor, the inadequacy of Government's response to these challenges, and important poverty levels.

⁶⁶ Miller, A, 1 Oct 2015, *Why is Honduras so violent?* Brookings Institute, <http://is.gd/SRvJfV>

⁶⁷ Pretel, E.A, Stargardter, G, 9 Jul 2015, *Military helps cut murder rate, but abuses spike*, Reuters, <http://is.gd/4hTill>

⁶⁸ See UNODC, *UNODC enters partnership to address organized crime in Guatemala*, <http://is.gd/Nu6uKl> ; Refworld, *Guatemala: Violence perpetrated by criminal gang and cases of popular justice; protection offered by the state (2008-March 2012)*, <http://is.gd/XY2Ep1> ; La Prensa, 12 Jun 2015, *Preocupa a sociedad civil impunidad del 96% en homicidios*, <http://is.gd/qrXdFK>

⁶⁹ Insight Crime, *Country Profile: Guatemala*. <http://is.gd/Z05Tw1>

⁷⁰ El Periódico, 27 July 2015, *Empresas de miembro de la red Moreno lavaron dinero con 'Chico Dolar'* <http://is.gd/VKQIPO>. For a case study of how organised crime co-opts politicians and uses corrupt business dealings, see Dardón, J and Calderón, C, *Case study on the network of López Villatoro, the 'tennis show king'*, in Briscoe, I et al (Eds), 2014, *Illicit Networks and Politics in Latin America*, International IDEA, Netherlands Institute of Multiparty Democracy, Clingendael

⁷¹ Diebert, M, 9 Dec 13, *Has Guatemala's Long-Awaited Spring Finally Arrived ?* <http://is.gd/9016U4>

⁷² CICIG, 29 Nov 2012, *Comunicado de Prensa 093, Entregan Informe Jueces de la Impunidad*, <http://is.gd/XdJnJQ>

her sister in law, Ms Sierra de Stalling (also a high-court Judge), in return for reducing sentences.⁷³ Investigative journal *Nómada* suggests Blanca Stalling is one of the most influential judges of the Supreme Court, and was the judge of choice for both former Vice-President Baldetti and former President OPM. Her son and sister in law are being investigated by CICIG (the former due to his role in ‘*the merchants of health*’). She also heads the Penal Court, which means she yields significant power.⁷⁴ Some members of the judiciary and civil society asked for her resignation, claiming her proximity to the defendants and her role in the judiciary would bias the proceedings. She took leave of absence for three months instead, and was recently confirmed as President of the Penal Chamber of the Supreme Court.⁷⁵

Sierra de Stalling and two other judges were arrested on corruption charges in September. This followed the Supreme Court’s lifting of her political immunity after authorities accused her of extorting money in return for freeing *La Línea* defendants. The other judges were arrested in connection with other cases, including kickbacks from companies in return for favourable judgments to them.⁷⁶ Sierra de Stalling was released under house arrest early October but the authorities have now gathered enough evidence to charge her for malfeasance and corruption.⁷⁷

A 2011 study by Guatemala’s *Acción Ciudadana* (Transparency International’s local

chapter) and Global Integrity raised a number of corruption red flags in the judiciary, including the lack of asset disclosure mechanisms and the absence of effective mechanisms to detect and sanction conflicts of interests.⁷⁸ The appointment and independence of judges is another high-risk area, which also succumbs to the influence of organised crime.

Even though CICIG and Public Prosecutors have pursued organised crime, in the words of the International Crisis Group: “*much remains to be done to sever politics from crime. Prosecutors must still work to dismantle illegal structures. Trials must be open, with full respect for defendants’ rights. Those demanding justice in the streets need to be ready to accept both guilty and not-guilty verdicts. The elections must be free and fair, so that the results are widely respected. While it is remarkable that the business community and civil organisations are working side by side, they will need to incorporate internal reforms to prove that their intentions are for the greater good of Guatemalan society*”.⁷⁹

Appointment of Judges

In Guatemala, judges are appointed to the Supreme Courts and Court of Appeals (or appellate courts) for five years. This process is managed by two Judicial Appointment Committees (*Comisión de Postulación*), one each for the Supreme Court and the Court of Appeals, each comprising 34 commissioners. The Appointment Committees shortlist candidates before submitting them to the Congress for approval. In principle, there are strong laws meant to ensure independence of Committee members. Deans of Law Schools and University Directors are represented in the Committee, as well as the Country’s Law

⁷³ Both the Stallings were elected to the Supreme Court by the ruling party of OPM, in an alliance with its arch enemy, the *Lider* party.

⁷⁴ *Nómada*, *Los 30 que Cuentan*, <http://is.gd/ClSNDX>

⁷⁵ Palacios, C, 20 Aug 2015, *CSJ confirma a Stalling como presidenta de la Cámara Penal*, *La Hora* <http://is.gd/MDFxK3>

⁷⁶ Gámez, D, 22 Sep 2015, *#LoQueSabemos: Capturan a juezas Marta Sierra de Stalling, Jisela Reinoso y al magistrado Erick Santiago de León*, *DiarioDigital* <http://is.gd/1auRWY>

⁷⁷ Ramos, J, Lara, J, 27 Oct 2015, *Juez deja en libertad a Marta Sierra*, *Prensa Libre*, <http://is.gd/zp28XG> ; *Insight Crime*, 9 Dec 15, *Judge in Guatemala Corruption Case Charged with Taking Bribes*, <http://is.gd/yXZLTN>

⁷⁸ *Acción Ciudadana and Global Integrity, 2011, Indicadores de transparencia en el sector Judicial en Guatemala*, Enero

⁷⁹ *International Crisis Group, 31 Aug 2015, Political Turmoil in Guatemala: Opportunities and Risks*, <http://is.gd/HIWvLN>

Society. Together, Deans of Law Schools and the Law Society hold a significant number of seats in both Committees and therefore yield significant influence. Each have 12 seats (out of 34), whereas representatives of the Supreme Court have 11 seats, and the University Director, who acts as president in both Committees, holds one seat.⁸⁰ For these reasons, appointments to the Committee have become subject to political in-fighting, which blatantly undermines the initial objective of using committees to ensure a de-politicised process⁸¹.

In 2014, Judge Claudia Escobar resigned just days after being appointed for a second term to the Appellate Court, blaming a nomination process fraught with problems that undermines judicial independence. Among other things, she complained about the lack of transparency and meritocracy.⁸² She also presented a video to the authority demonstrating attempts by a parliamentarian of Perez Molina's party to bribe her.⁸³ The UN called for the nomination process to run again.⁸⁴ The Constitutional Court of Guatemala initially suspended the two selection processes after civil society groups lodged appeals for nullification on the basis that the selection process contained irregularities. Some commission members were found to be candidates in one of the selection processes,

⁸⁰ Judge Escobar, who would later resign from the Appellate Court, claimed that phony universities with no students were set-up for the single purpose of influencing the nomination procedure. Escobar, 7 Oct 2014, Interview with *Especiales de Canal Antigua*

⁸¹ Dudley, S, 18 Sept 2014, *La Justicia y la creación de un Estado Mafioso en Guatemala*, Insight Crime, <http://is.gd/TVWgv8>; For a discussion of how illicit crime aims to influence appointments, see also Jorge Dardón and Christian Calderón, (Note 70)

⁸² Escobar, 7 Oct 2014, Interview with *Especiales de Canal Antigua*. By her reckoning, only a handful of judges who were appointed had the appropriate background for the job.

⁸³ The day before her resignation, the Appellate Court in which Escobar served overturned a verdict from the electoral authority according to which Vice-President Baldetti could not be leader of her political party and Vice-President at the same time.

⁸⁴ Emisoras Unidas, 7 Oct 2014, *ONU exhorta a Guatemala a que considere repetir elección de jueces*, <http://is.gd/TQaHlv>

and although a Constitutional Court judgment ruled that commissions should rigorously interview candidates, apply objective criteria and explain their votes, the commission only partially adhered to this requirement. Eventually, the Constitutional Court rejected all appeals in November 2014, and the newly elected judges were cleared to take their seats.⁸⁵

The appointment process in Honduras – where elections to the Supreme Court are scheduled for January 2016 – is very similar. Congress elects 15 judges for a duration of 7 years (renewable once), based on a list of a minimum of 45 candidates put forward by an Nomination Committee. As in Guatemala, the Committee is meant to be representative of society, and includes members of the Supreme Court, unions, the private sector, civil society, the Human Rights Commissioner (*Comisionado Nacional de Derechos Humanos*), the local bar association, and representatives from the leading law faculties. Each organisation presents a maximum of 20 candidates who are submitted to the Nomination Committee.⁸⁶ Intelligence agencies also screen the final candidates, who have to take a polygraph test and answer questions regarding past activities and clients.

The nomination process faces a number of challenges, however. Forty of the 197 candidates allegedly have links with organised crime, according to newspaper *El Heraldo*, and the United States is investigating candidates as well.⁸⁷ A mission of the International Commission of Jurists recently criticised Honduras for the lack of transparency surrounding the nomination and elections of candidates. Just as in Guatemala, the

⁸⁵ The same Constitutional Court also played a role in ruling that the term of former Attorney General Claudia Paz y Paz should come to a premature end. Some suggest this was retribution for her role in leading the prosecution for genocide against the former general, Mr Rios Montt

⁸⁶ Due process of Law Foundation et al, *Organizaciones internacionales observarán elección judicial en Honduras*, <http://is.gd/cYDlse>

⁸⁷ *El Heraldo*, 19 Nov 2015, *En EE UU indagan a 40 aspirantes a magistrados*, <http://is.gd/uatCYU>

International Commission identified the risk of capture of the election process by criminal structures and political parties. Further criticisms were raised. Not least among them were concerns about the short time span associated with the process and the limited oversight role of Congress, especially given that the Nomination Committee is set to present its shortlist to Congress on 23 January 2016, for a vote on the final candidates two days later.⁸⁸ A cousin of President Hernández, Reinaldo Antonio Hernández Soto, was apparently put forward as one of the twenty nominees by academic organisations.⁸⁹

Examples of interference with judicial independence can also be found in Honduras. In 2012, Mr Hernández, who supported the 2009 coup and was president of the Congress at that time, convened Congress in the middle of the night to depose three members of the Supreme Court. Their successors (more loyal to him) were appointed the next day.⁹⁰ Congress also passed legislation making it easier for it to remove justices and the attorney general.⁹¹ In April of 2015, the same Supreme Court lifted a constitutional ban on one-term presidential mandates, paving the way for Mr Hernández to run in 2017 (only one Judge from the opposition voted against it).⁹² In November of 2015, the Inter-American Court of Human Rights – to which the three laid-off judges appealed – ruled in favour of the judges. It

⁸⁸ La Prensa, 30 Oct 2015, *Juristas critican falta de voluntad en elección de magistrados de Honduras*, <http://is.gd/3N8Ony> ; La Prensa, 5 Aug 2015, *Así se eligen los magistrados de la Corte Suprema de Justicia*, <http://is.gd/vc4Oqf>

⁸⁹ Honduprensa, 26 Aug 2015, *Primo del Presidente de Honduras nominado a magistrado de Corte Suprema*, <http://is.gd/5z0DG5>

⁹⁰ Some analysts argued that Hernandez supported this overthrow because the Supreme Court Justices had previously put on hold projects to create autonomous Social Economic Investment Zones.

⁹¹ Human Rights Watch, *World Report 2014: Honduras, Events of 2013*, <http://is.gd/VovMwD>

⁹² Allegedly, the 2009 coup against Mr Zelaya was masterminded as the latter was said to be preparing a referendum that would allow Presidential re-election.

argued that the individuals acted “*in defence of democracy*” and noted that “*members of the Judiciary, who are citizens of a society, may have a moral duty to take a stance*”. In challenging democratic conditions, the Court claimed, the norms that normally restrict a Judge’s right to political participation may not hold. The Court also remarked that due process was not followed (among other things, it highlighted the lack of impartiality of the Supreme Court in the sacking of the Judges).⁹³

Challenges for the Judiciary

Be it in Guatemala or Honduras, a career as a judge, lawyer and/or official who attempt to undertake their jobs professionally is not for the fainthearted. Threats, harassments, attacks and even lynching are regular occurrences. The Honduran Prosecutor in charge of the social security case received 36 threats and was forced in exile in Paris, where he was eventually given a diplomatic post. The lawyer acting on behalf of the Vice-President of the Honduran Congress (Ms Gutierrez) and her family was murdered in September (he allegedly aspired to a position in the Supreme Court). Claiming he was acting for the greater good of the people, his assailant also justified his attack on the basis that the lawyer was defending people that were running the country to the ground (this is a blatant violation of the right to a fair trial).⁹⁴ Data suggests that 64 legal professionals – including judges – have lost their lives from 2010 to 2013 in Honduras.⁹⁵

Even when Judges are conscientious, they face a number of technical constraints. Honduran prosecutors are in short supply and have poor training, according to the Association for a More

⁹³ Corte InterAmericana de Derechos Humanos, *Caso López Lone y Otros vs. Honduras, Sentencia de 5 de Octubre 2015*, paragraphs 171-174, pp 58-60, <http://is.gd/mMfiEK>

⁹⁴ La Prensa, 17 Sep 2015, *Confesión de Rigoberto Paredes sobre crimen de abogado Montes*, <http://is.gd/lGuT76>

⁹⁵ OAS, 30 Jul 2013, *IACHR Condemns Murder of Judge in Honduras*, <http://is.gd/awLNX9>

Just Society. Illustrating the hardship some judges face, the Association is said to have donated hard drives to the public prosecutor's office investigating corruption in the social security institution.⁹⁶ In Guatemala, CICIG has played a key role in raising capacity of key organisations, such as the Attorney's General Office, which now knows how to draw on forensic evidence rather than testimonies to build a case, and has a large team at its disposal.⁹⁷

The key role of other institutions

Looking back, most international reviews welcome developments in Guatemala as a positive sign, and paint it as an example for the region to follow. Civil society throughout the continent has called for many similar bodies to CICIG to investigate graft and crimes. Although one should guard against early celebrations, there may be some glimmers of hope among the many challenges. Even though corruption in the Judiciary is engrained, judges and prosecutors in Guatemala have shown some willingness to follow-up on CICIG investigations and prosecute graft. For example, although the current Attorney General (Ms Thelma Aldana) was appointed by OPM, this does not seem to have stopped her from prosecuting him.⁹⁸ Another example is Judge Galvez who oversaw the Rios Montt case and is currently presiding over the Perez Molina one. In a recent interview, Judge Galvez, who some now label as the 'honorable judge', declared that "*Justice (in Guatemala) has advanced. Today there is more prestige, better investigation [and reiterated his faith] that with all these cases the institutions are going to improve because society is finally getting involved*".⁹⁹

⁹⁶ The New York Times, 10 Dec 2015, *In Honduras Chaos, a Man's Killing Tells a Nation's Story*, <http://is.gd/4hDZut>

⁹⁷ New laws also allow witnesses to be rewarded for collaborating.

⁹⁸ Perez Molina himself appeared surprised that she 'turned' against him. See Martínez Ahrens, J. (Note 8)

⁹⁹ Quoted in Associated Press. See Perez D, S (Note 55)

The Constitutional Court has also played an important role in how events are unfolding. For example, as Ms Baldetti became embroiled in *La Línea*, she appealed to the Constitutional Court against the lifting of her political immunity, though her appeal was rejected. This is significant, because a majority of the Court's appointees were nominated by Congress, itself dominated by the two leading parties, including that of the former Presidential duo. But although events suggest the Court is willing to step up and act independently from politics, a more cynical analysis cannot be excluded, as it could be said that the Court was pushed to refuse Baldetti's appeal and used her as a sacrificial lamb to diffuse the situation at the time.

CONCLUSIONS

The people of Guatemala and Honduras have played a key role in demanding justice, and they should be careful in letting their guard down – demanding accountability the way the Guatemalan people has been doing over the past few months must be sustained.¹⁰⁰ Pressure should also be maintained to modify the electoral system and introduce measures that foster transparency, including tougher money laundering laws. The current scandals – the most important of Guatemala's history – sparked a real 'social awakening', set a precedent and provide a small window of opportunity to achieve change. In addition, there is a chance to build on this to more seriously eliminate the influence of organised crime and other types of corruption. As already alluded to above, a key issue for the coming Morales administration will be how it

¹⁰⁰ The main civil society movement, #JusticiaYa or #JusticeNow has already called for a mass movement early January 2016 (when Jimmy Morales is to be sworn in), admittedly to demonstrate the citizenry will remain vigilant.

deals with trials and investigations into human rights violations as well.¹⁰¹

Recently, the Guatemalan Congress has been debating and voting amendments to different laws, although this is expected to be a drawn out process as some have been stalled and/or face significant hurdles. Among the more important ones are a Procurement Law which was approved in late November¹⁰²; a Public Sector Reform Law¹⁰³, the Law on the Judicial Profession ("*Ley de la Carrera Judicial*")¹⁰⁴ and a 1985 Law on Elections and funding of Political Parties ("*Ley Electoral y de Partidos Políticos*")¹⁰⁵. Reform to the latter would limit re-election of congressmen and mayors to two terms only, and would limit opportunities for candidates to defect from one party to another, a practice that is common in Guatemala and which encourages pork, personalised politics, and corruption.¹⁰⁶ It would also bring more transparency to party funding. The Law is currently stalled in the Constitutional Court, however.

But to a large extent, the success of these reforms will also depend on Jimmy Morales, and for reasons outlined in this paper, the path ahead still hides many unknowns. Morales will inherit a feeble political majority and take the helm of a heavily indebted country. Improving security and justice will require vast amounts of money, though fiscal pressure on the State is significant in a number of ways, not least because Guatemala has one of the world's

lowest levels of tax collection¹⁰⁷. For example, improving the police, overcrowded prisons¹⁰⁸ and the court systems would cost an estimated USD 1.38 billion by 2023, according to a recently released report, when in fact insecurity is estimated to have cost Guatemala USD 6.7 billion in 2012 alone.¹⁰⁹ In 2013, Guatemala spent 1.6 percent of its GDP on security and public order, among the lowest figures in Central America. Meanwhile, the Attorney's General Office is said to have received only 95 of the 143 million dollars approved by Congress for 2015.¹¹⁰ The recently approved budget for 2016 earmarks less funds for health compared to 2015, and does not provide enough funds to fight corruption.¹¹¹ CICIG, supported by the United Nations, has therefore suggested levying a new anti-crime tax to try and beef up budget for security and justice and thus maintain the anti-corruption momentum.¹¹²

It is clear also that these reforms and changes will take time. For this to happen, respect and belief in democratic institutions, as well as upholding the laws, is required. As Iván Velásquez, the CICIG Commissioner recently declared: "*What began as a crusade against corruption must not only affect organised crime, but it must also seek to establish a culture of*

¹⁰¹ As a former general, OPM has also been incriminated for human rights violations during the civil war.

¹⁰² Barreto, B, 15 Nov 2015, *Ley de Contrataciones, una reforma parcial*, Plaza Pública, <http://is.gd/3CM4vy>

¹⁰³ See the Draft Law here <http://bit.ly/1kZ1w3P>

¹⁰⁴ See the Draft Law here <http://bit.ly/1QGwxWS>

¹⁰⁵ See for example, Ortiz, G, 31 Oct 2015, *Mijangos: "Tenemos un débil Sistema de partidos políticos"*, La Hora <http://is.gd/bNoAJw>. The Law can be accessed here: <http://is.gd/iUlvKg>

¹⁰⁶ For a thorough analysis of Guatemala's party system, see Hernández, O.J, 25 Oct 2015, *Guatemala o la herencia de un Sistema colapsado*, Confidencial <http://is.gd/CHibpn>

¹⁰⁷ Hyde, D, 13 May 2015, *In Guatemala, better tax collection means better education and better jobs*, MCC, <http://is.gd/6dvB5o>

¹⁰⁸ Prison population in Guatemala is said to be of 191%, and pre-trial detentions are high, at 48%. See Hernández, M, 7 Dec 15, *48% de presos aún está sin juicio*, Prensa Libre, <http://is.gd/wNNwHX>

¹⁰⁹ Yagoub, M, 12 Nov 2015 *Where's the Money for Guatemala's Proposed Security Reforms*, Insight Crime <http://is.gd/IOH163>; Pachico, E, 11 Jul 2013, *Insecurity Cost Guatemala \$6.7 Billion Last Year*, Insight Crime, <http://is.gd/FjSVZQ>

¹¹⁰ Yagoub, M (Note 109)

¹¹¹ Olmstead, G, 4 Dec 2015, *Cinco razones por las que el primer año de Jimmy será de crisis (por el presupuesto)*, Nómada, <http://is.gd/cuUP0b>

¹¹² Associated Press, 10 Nov 2015, *Proposal for anti-crime tax sparks debate in Guatemala*, <http://is.gd/plnKnC>; Rodríguez, M, 18 Nov 2015, *ONU apoya debate de impuesto para la justicia*, La Hora, <http://is.gd/4un0Nz>

legality in society".¹¹³ Anticipating the challenges ahead, Morales, who appears intent on tackling corruption and reforming the country, has not ruled out calling for a Constituent Assembly in case he does not find the appropriate support in Congress to push them through.¹¹⁴

In Honduras, in addition to the role the OAS-backed anti-corruption mission (MACCIH) will eventually play and the significance of the Rosenthal case for the future of the anti-corruption movement, the 2014 'Law of Secrets' has been at the centre of some controversies. Anti-corruption advocates claim it limits the opportunity for and scope of anti-corruption investigations.¹¹⁵ On the one hand, authorities claim the law can be helpful in uncovering corrupt networks, as was recently the case when tapped telephone conversations lifted the lid on two corrupt judges in Honduras.¹¹⁶ Regardless, civil society there also seems intent on bringing in change.

Whether this will lead to removing the ruling political elite remains to be seen, as does the overall impact of these anti-corruption movements on the 'northern triangle' and Central America as a whole.

¹¹³ Quoted in Ortiz, G, 24 Oct 2015, *Los 10 aspectos que definen un Nuevo rumbo para Guatemala*, La Hora, <http://is.gd/guAhty>

¹¹⁴ Mitchell, R, Cameron, M, Oct 8 2015, *Oligarchy in Retreat: Guatemala's Election*, Council on Hemispheric Affairs, <http://is.gd/HsRJds>

¹¹⁵ Elheraldo, 8 Nov 2015, *Honduras : Ley de secretos es un obstáculo para la investigación*, <http://bit.ly/1PkNMxv>

¹¹⁶ La Prensa, 14 Nov 2015, *JOH: Ley de Escuchas es beneficio para Honduras*, <http://is.gd/9Cleio>

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