

The right of access to justice in Guatemala

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Executive Summary

- I. If the civil actions filed in Canada in the cases of *Choc vs. HudBay Minerals Inc.*, *Caal vs. HudBay Minerals Inc.* and *Chub vs. HudBay Minerals Inc.* were filed in Guatemalan courts, there would be a very high probability that the plaintiffs would not receive an impartial trial that respects due process.
- II. The three civil actions against HudBay Minerals Inc., HMI Nickel Inc. and Compañía Guatemalteca de Níquel S.A. (Guatemalan Nickel Company, "CGN") cannot be pursued in Guatemala with any assurance of justice and reparations for the victims due to institutional weaknesses and the lack of political will of the Guatemalan Justice System, which results in a system of impunity.¹ In addition there are political, social and gender obstacles, as well as a lack of independence of the judiciary, impunity and corruption. All of these characteristics of the Guatemalan Judicial System would prevent the appropriate application of justice in these cases.
- III. Two of the cases are in regard to incidents that occurred almost three years ago, while the rape of eleven women and the unlawful entry of their homes occurred five years ago. All of these cases are still in the first of the five phases of the Guatemalan criminal process, in the preparatory phase.
- IV. This delay is partially due to the fact that one of the accused, ex Lieutenant Colonel Mynor Padilla, has not yet been detained; he is presumably abroad, although unconfirmed information indicates that he could be in Guatemala again. There has not been significant progress in these cases.
- V. There continue to be numerous incidents of violence in Guatemala related to issues regarding land, mining projects, hydroelectric dams and new bio-fuel agriculture, including those that have led to the death of community leaders and peasants. Most of these incidents have not resulted in adequate or impartial judicial proceedings.
- VI. Law Decree 17-73, Article 38 of the Guatemalan *Criminal Code*, regulates the criminal liability of corporations in the following manner: in the case of crimes committed by a corporation, the following individuals may be held responsible: directors, managers, executives, representatives, administrators, officials or employees who participated in the incident, or whose acts conditioned the occurrence of the event. Such individuals will be punished in accordance with the *Criminal Code's* sentencing guidelines for individuals.
- VII. The above law should be applicable to the acts committed by the security personnel of HudBay Minerals Inc. However, until now, no investigation has been carried out against the respective managers, executives, representatives,

¹ Impunity is considered to be a lack of criminal punishment and lack of civil accountability. The rates of impunity are so high in Guatemala that it was necessary to create the International Commission Against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala "CICIG"), a unique UN body implemented in the country in order to fight this problem and to dismantle parallel criminal structures.

administrators or officials of any corporation. As previously stated, there is only one arrest warrant against the person in charge of HudBay Minerals Inc.'s private security company, retired Lieutenant Colonel of the Guatemalan Army, Mynor Padilla. No arrests have been made in these cases.

- VIII.** The civil liability of private companies is specified in Article 24 of the *Civil Code* which states that a legal entity is civilly liable for the actions of its representatives, who in carrying out their duties, cause damage to others, or when they violate the law or do not abide by it. This liability is without prejudice to the liability of those directly responsible for the damage.
- IX.** In the Guatemalan judicial system, civil liability for criminal acts cannot be claimed independently of the criminal process. Rather, civil liability is related to and depends on the existence of a criminal ruling that establishes the criminal responsibility of the authors or accomplices of crimes. Until the recent reforms to the *Code of Criminal Procedure*, through Decree number 7-2011, the demand for civil liability for criminal acts could only be commenced in civil court after the penal sentence was handed down. This would make it difficult to present a civil action in Guatemala in these cases.
- X.** Further, there may be a lack of accountability in these situations, as by the time a case is resolved, companies may have taken steps to avoid paying damages by not having sufficient assets in Guatemala to cover the damage award. For example, in the present case, HudBay Minerals sold the mining project to a Russian enterprise approximately a year ago. This greatly complicates any legal claim for civil responsibility in Guatemala.
- XI.** Although the ability to claim for civil damages through the criminal process has advanced significantly with the 2011 reforms, there continue to be serious limitations that hamper putting these reforms into practice: a) rural and indigenous populations have been affected by acts of violence perpetrated against them, which has caused them very serious injury or the loss of life; b) these populations do not have sufficient money to pay for legal counsel before courts of justice; c) civil liability continues to be contingent on a criminal conviction; d) the political and economic power of corporations often does interfere with judicial independence, thus creating further impunity.
- XII.** Guatemala clearly faces serious problems with its justice system and the impunity that exists within it. Guatemala is the only country in the world in which the United Nations, in collaboration with the government, has established a commission to fight impunity and organized crime, the International Commission Against Impunity in Guatemala ("CICIG"). Although this entity is doing everything possible to break through the existing wall of impunity, the results have not been entirely satisfactory. The justice system does not respond effectively to crimes committed by punishing those responsible for killings that are related to illicit armed security forces that continue to be present in Guatemala.
- XIII.** This leads us to conclude that in the case of HudBay Minerals Inc. it is very likely that justice will not be obtained, nor will criminal or civil liability be

established in Guatemalan courts. As we have already stated, civil liability can only be considered after criminal responsibility is determined. For all of these reasons there is a very high probability that there would be impunity in these cases in Guatemala. It is recommended that the case against HudBay Mineral Inc. be heard in the jurisdiction of Ontario, Canada in order to achieve justice, since it is highly unlikely that justice would be done in Guatemala.

- XIV.** In the Guatemalan legal system, any kind of legal dispute, whether criminal, civil or labor, is difficult for low income or disadvantaged populations to pursue. This is true for indigenous peoples, the impoverished and women because of the costs of legal actions including legal fees, procedural costs, payment of experts, technicians and so on. In the Civil Law system, which originates in Roman law, it is essential to have the assistance of lawyers, and legal procedures are lengthy and expensive.
- XV.** According to a statistical report on violence in Guatemala written by the United Nations Development Program (UNDP)-Guatemala of December 2007, "the violence and insecurity that has gripped the country represents a serious obstacle to the consolidation and development of democracy and challenges the capabilities of democratic institutions to govern the country.
- XVI.** "Violence represents not only a serious obstacle to the consolidation of democracy but also imposes high costs to the development of the country. The main cost is the human cost, due to the death, injuries, mutilations and disabilities suffered by those who are victims of violence. In addition to the immeasurable human pain that these incidents represent, violence also imposes an economic burden on the country that restricts its prospects of development."
- XVII.** Through the law known as *Law in Defense of the Procedural Rights of Nationals and Residents*, Guatemalan law protects the rights of Guatemalan men and women to present civil actions against transnational companies before foreign courts, that is, in the corporate domicile of those companies. However, the *Law in Defense of the Procedural Rights of Nationals and Residents*, Decree 34-97 of the Congress of the Republic alone does not prevent victims from bringing a civil claim before Guatemalan courts – this depends on whether Canadian courts will exercise jurisdiction to hear the claim.

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Introduction

1. This expert report answers the following question: If the civil actions filed in Canadian courts for the cases *Choc v. HudBay*, *Caal v. HudBay* and *Chub v. HudBay* were brought in Guatemalan courts instead, is there a real and serious risk that the plaintiffs would not receive a fair and impartial trial that respects due process?

2. Answering this question required an analysis of the historical, social and political context as well as the substantive and procedural laws that affect the victims' rights of access to justice, right to due process and right to a remedy regarding the serious human rights violations allegedly suffered by them.

3. The main objective of this report is to identify and analyze the possible obstacles to an appropriate resolution of the cases and to access to justice in the Republic of Guatemala for both civil accountability and criminal punishment. In answering these questions, this report considers:

- a. What degree of impunity² exists for violent acts in Guatemala? That is to say, what percentage of violent acts or crime against life in Guatemala are not punished by civil and criminal law?
- b. What is the level of violence in Guatemala, specifically in terms of the homicide rate?
- c. What impact do the levels of crime have on the Justice System's capacity to carry out impartial and efficient legal proceedings in individual cases?
- d. Factors related to the Rule of Law in Guatemala which affect the right of access to justice, for example: a) the degree of independence and impartiality of judges; b) corruption in the justice system; c) political interference in the judicial process; d) trafficking of influence; e) violence and threats of violence against members of the justice system; f) violence or threats of violence against witnesses; g) violence and threats of violence against victims or their families; h) the issue of institutional strengthening in the justice system, including training courses.

4. In general terms, this expert investigation considers whether these three judicial cases could be resolved by the Guatemalan justice system. The events of these particular legal cases occurred in a complex context impacted by various factors: a system of discrimination, dispossession, lack of access to land, institutionalized violence, alleged abuse on behalf of international companies and impunity. It is important to consider how the Guatemalan Judicial System would respond to a situation where representatives or employees of corporations are accused of committing serious human rights violations. The report analyses to what

² Impunity is considered to be a lack of criminal punishment and lack of civil accountability. The rates of impunity are so high in Guatemala that it was necessary to create the International Commission Against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala "CICIG"), a unique UN body implemented in the country in order to fight this problem and to dismantle parallel criminal structures.

extend it would be possible to establish both civil accountability and criminal punishment in these cases in the Guatemalan courts.

5. Lastly, it is important to analyze two legal questions: a) what is the position of Guatemalan law regarding the right of Guatemalan citizens to bring civil actions before foreign tribunals against transnational companies; and b) how can or could the *Law in Defense of the Procedural Rights of Nationals and Residents* affect a potential civil claim brought by the victims of this case in Guatemalan courts.

6. The general conclusion reached in this study is that the three legal cases against HudBay Minerals Inc, HMI Nickel Inc. and Compañía Guatemalteca de Niquel S.A. cannot be heard in Guatemala with appropriate assurances regarding access to justice and redress for the victims because of institutional weaknesses, a lack of political will within the Guatemala justice system and because of historical, socio-cultural and political factors in Guatemala that result in a system of impunity. In addition there are political, social and gender obstacles to justice, as well as a lack of judicial independence, impunity and corruption. All of these features of the judicial system in Guatemala prevent the appropriate application of justice in these cases.

1. Obstacles to the right of access to justice in legal cases against corporations and in the case of human rights violations

a. Lack of independence, impunity and corruption in the Justice System

7. With regard to the Justice System, the *Political Constitution of the Republic of Guatemala* establishes that the core principle of the judiciary is judicial independence. Article 203 of the *Constitution* establishes the independence of the judiciary and provides the legal authority to judge. That article affirms that "justice is ruled in accordance with the *Constitution* and Laws of the Republic. Courts have the legal authority to judge and promote the execution of court rulings. Other state entities must assist the tribunals so that their resolutions can be carried out. Magistrates and judges are independent in carrying out their functions and they are only subject to the *Constitution of the Republic* and the law."

8. According to law, a person who acts in contrast to the Independence of the Judiciary will be disqualified from holding any public office, in addition to any sanction established by the *Criminal Code*. The judicial function is exercised exclusively by the Supreme Court of Justice and other tribunals as the law establishes. "No authority may intervene in public administration."

9. In reality, however, the most central problem in the administration of justice in Guatemala is the failure to comply with this basic norm; the justice system is weak and subject to external influences, particularly in cases involving organized

crime, ex military, public officials and transnational companies. As international experts have pointed out, the Guatemalan justice system has very high rates of impunity. For example, in the year 2009, the *International Commission Against Impunity in Guatemala (CICIG)* reported that “the impunity rate in Guatemala is ninety eight percent, with just two of every one hundred cases reaching the courts.”

10. Phillip Alston, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions stated in reference to Guatemala that “this is a good place to commit murder, because you almost certainly will get away with it”. The judicial system must respond effectively to crimes, in particular, crimes against life, in a manner that results in the punishment of those responsible for committing crimes through criminal convictions. Mr. Alston’s remarks illustrate the present state of the administration of justice and the reality of the judicial profession. At the moment, Guatemala’s legal system faces serious challenges including high levels of impunity, serious delays, and a failure to conduct legal proceedings in a manner that protects due process without interference, pressure or corruption. The International Commission against Impunity in Guatemala has stated to the press that “the cleansing of the justice system is urgently needed” suggesting that if this extreme measure is not taken, important advances in the struggle against impunity will not occur. The International Commission of Jurists and the Instituto de Estudios Comparados en CIencias Penales [Institute of Comparative Studies in Criminal Sciences] have made similar statements.

11. Recently, the United Nations Deputy High Commissioner for Human Rights, Kyung-Wha Kang addressed this issue in the nineteenth session of the U.N. Human Rights Council in which she discussed reports from several countries. Ms. Kang stated that in some Latin American countries, the justice systems were very slow to resolve cases in which fundamental human rights had been violated. Regarding Guatemala, Ms. Kang expressed concern that 15 years after peace had been reached, the violation of fundamental human rights, which she regards as structural problems, “continued unresolved”. Similarly, the Inter-Diocesan Project for the Recovery of Historical Memory Report (REMHI) and the Report from the Commission for Historical Clarification (CEH) stated that one aspect of the State’s weakness is the ineffectiveness of the Judicial System and its incapacity to process legal cases and punish perpetrators.

12. In other words, the State of Guatemala does not comply with the principle of “the duty to provide a remedy” which obliges the State to investigate, process and punish those who commit serious human rights violations. Several fundamental reforms must be taken to create an efficient and transparent judicial system in Guatemala: a) establish a professional judicial system (“*carrera judicial*”) that includes the Magistrates of the Supreme Court of Justice, since presently the profession only includes Judges of First Instance; b) purge the Judiciary; c) establish a system, implemented by Guatemalan state authorities, that provides security and protection to justice officials, as such a system does not presently exist; d) strengthen the School of Legal Studies of the Judiciary and the Training Unit of the Office of the Prosecution; e) establish systems for the appointment of judges on the basis of judicial professionalism by creating a Judicial Council.

13. The *2005 National Human Development Report by the United Nations Program for Development (UNDP)* contained the following description of justice services in Guatemala: "when one is poor or belongs to an unprotected minority group, the expectations of solving conflicts are low, due to the marginalization, stigmatization and the inequality that rule the daily practices of activities in the judiciary. Economic poverty is dramatically transformed in "legal poverty", which impedes a true solution to the conflict at stake.

14. "Guatemalan citizens are holders of obligations and rights, however, equal opportunities to exercise them do not exist. This has a direct repercussion in the possibility of accessing the same options to enjoy a life in dignity. Since the right of access to the courts of justice is difficult or impossible for the indigenous or other impoverished sectors, this difficulty denies people the right to life without fear, with security and full human development."

15. Guatemala currently faces serious problems with its judicial system and the existing impunity within it. It is the only country in the world in which the United Nations, in collaboration with the government, has established a commission to combat impunity and organized crime, the International Commission Against Impunity In Guatemala ("CICIG"). Although this entity is doing everything possible to break the existing wall of impunity, the results have not been totally satisfactory. The justice system does not respond effectively to the crimes committed in a way that leads to the punishment of those responsible for killings that are related to illicit armed security forces that continue to be present in Guatemala.

16. Since 2005, a series of important laws have been passed (Decree 71-2005, *Creación de la Dirección de Inteligencia Civil del Ministerio de Gobernación* [Creation of the Authority of Civil Intelligence of the Ministry of the Interior; Decree 21-2006, *Ley Contra la delincuencia organizada* [Law Against Organized Crime]; Decree 32-2006, *Ley de Creación del Instituto Nacional de Ciencias Forenses* [Law to Create the Institute of Forensic Sciences] (INACIF); Decree 22-2008, *Ley Contra el Femicidio y otras formas de violencia contra la mujer* [Law against Femicide and other forms of violence against women]; Decree 28-2008, *Ley reguladora del procedimiento de Extradición* [Law to Regulate the Procedures for Extradition]; Decree 9-2009, *Ley contra la Violencia Sexual, Explotación y Trata de Personas* [Law against Rape, Exploitation and Human Trafficking]; Decree 15-2009, *Ley de Armas y Municiones* [Law of Weapons and Ammunitions]; Decree 17-2009, *Ley de fortalecimiento de la persecución penal* [Law to reinforce criminal persecution] Decree 21-2009, *Ley de Competencia Penal en procesos de mayor riesgo* [Law of Criminal Jurisdiction in high risk processes] Decree 23-2009, that contains reforms to the Law against Organized Crime.

17. In addition, institutions have been created to confront organized and common crime, for example Decree 32-2006 that creates the National Institute of Forensic Sciences (INACIF); Decree 71-2005, that created the General Authority of Civil Intelligence of the Ministry of the Interior (DIGICI) and the Installation of the International Commission Against Impunity in Guatemala (CICIG). Unfortunately these efforts have not been sufficient to fight the impunity that continues to be present.

18. In the publication "Impunity and Criminal Investigations in Guatemala"³, the jurist and professor Javier Monterroso Castillo makes the following conclusions:

- a. Impunity is one of Guatemala's most serious problems: more than 90% of the cases that enter the criminal system do not receive an effective response;
- b. Impunity affects the country's governability and citizen's trust of the judiciary, thereby promoting actions on the fringes of law, both on the part of criminals and victims;
- c. The Guatemalan State has made efforts to resolve this problem; for example, the creation of the institutional mechanisms, passing laws and even the installation of the International Commission Against Impunity in Guatemala (CICIG);
- d. These efforts are insufficient to confront the phenomenon of impunity that is directly caused by inefficient of criminal investigations, corruption, and a lack of political will.

19. Sergio Barrios Escalante, in his writing: "la Justicia Guatemalteca en su laberinto" [the Guatemalan Justice System in its labyrinth]⁴, also describes the problem of justice in Guatemala:

"An unquestionable premise is that in the case of Guatemala, it is practically impossible to consolidate the transition to democracy and to truly establish of the Rule of Law without strengthening the Justice System. Without an adequate, real and effective strengthening of the justice system, it is impossible for the Guatemalan State and society to favor and to safeguard the true fulfillment and observance of Human Rights in our country. Without justice and the observance of Human Rights, there is no security, and in particular, it is not possible to attain the security necessary that is defined and implemented in a State categorized as democratic."

20. *The Myrna Mack Foundation*, which has worked on these issues for many years, considers that in order to overcome the lack of effectiveness of the justice system, the following issues are a priority:

- a. The creation of policy of national security and a comprehensive policy to control crime, going beyond particular situations to reduce criminal activity, the use of violence and the generalized perception of insecurity.
- b. The Foundation believes that the policy should be oriented towards preventing the underlying causes of crime, combined with institutional measures to control criminal or violent acts. Efforts also need to be made to strengthen the National Civil Police, which is the institution responsible for public order and citizen security, as well as the organized participation of

³ Javier Monterroso Castillo, *Impunidad e investigación criminal en Guatemala [Impunity and Criminal Investigation in Guatemala]*, 2011, online: <http://www.kas.de/wf/doc/1974-1442-4-30.pdf>

⁴ Sergio Barrios Escalante, *La Justicia Guatemalteca en su laberinto [the Guatemalan Justice System in its labyrinth]* (Albedrío: May 2008), online: <http://www.kas.de/wf/doc/1974-1442-4-30.pdf>

the population in areas that concern it by law, without denying the state's inherent responsibilities.

- c. The security of judges, prosecutors and lawyers continues to be extremely precarious; the Office of the Prosecution has been unable to improve results in the investigation and persecution of these serious acts. The measures taken to improve the situation are isolated and do not represent a global, planned policy.
- d. There have been no serious studies based on official information regarding threats, harassment, intimidation and violence used against justice authorities in order to help identify the most vulnerable groups, to determine the most common forms of intimidation used, to establish the identity of the possible perpetrators or to study in depth the causes of these violent acts.
- e. It is concerning that on one hand, in fulfilling their duties, public officials risk their lives to contribute towards the search for truth and justice in their country; while on the other hand, the State does not implement necessary security mechanisms to guarantee the protection of its officials.
- f. Despite the increase of the problem of violence against judicial authorities, and the judiciary's understanding of the problem, the institutional response on behalf of the State has been weak and insufficient. Undoubtedly, this violence, which causes fear amongst judicial officials, contributes to deficiencies in due process, impunity and to the general ineffectiveness of the judicial system.
- g. It was recently announced that there is an initiative to provide life and medical insurance for judges and magistrates using funds from the *Ley de Extinción de Dominio* [Law of Expiration of Ownership]. While the intentions are good, the Myrna Mack Foundation finds it alarming that the suggested solution to the problem of violence against judicial officials is to provide life insurance instead of providing better protection. It is not an issue of compensation for families in case of death, rather there should be investment in the necessary mechanisms to protect the physical integrity and lives of those who put themselves at risk while administering justice.
- h. To date, there is no plan to protect judicial officials, although according to statements made by the President of the Supreme Court of Justice, Judge Thelma Aldana, a commission has been formed to push forward a Comprehensive Security Plan for the 850 judges across the country. Meanwhile, judicial authorities continue to operate without protection.
- i. The Myrna Mack Foundation believes that immediate attention must be given to the regulations governing the judicial profession, including the defects in the Law of the Judiciary that do not provide sufficient job security and judicial independence.

21. The main areas of regulation of the judiciary include the functions of the organs of the judiciary; security of tenure; the system of selection, appointment and evaluation of judges; evaluation of professional performance; promotions and

transfers; the disciplinary regime; the administrative authority of the Supreme Court of Justice that should correspond to another organ and not the Supreme Court of Justice. All of these areas are related to the independence of the judiciary and the struggle against impunity.

22. Corruption is another serious problem in the judicial sector. A recent comprehensive study entitled "*Indicadores de Percepción y Experiencias de Corrupción en Guatemala (IPEC)*" [Perception indicators and experiences of corruption in Guatemala] conducted by *Acción Ciudadana* [Citizen Action] in the year 2006, revealed that 54.8% of the Guatemalan population interviewed does not know how to make complaints regarding corruption, while 68.2% of those interviewed experienced corruption but did not denounce it. According to this organization, these indexes have not changed substantially over the last six years.

23. The study also indicates that the most significant reasons for failing to pursue legal action regarding corruption are: fear of reprisals (27.4%), the perception that those guilty would never be persecuted (19.4%), and administrative difficulties (14.5%). According to the annual report of the Office of the Prosecutor, 198 complaints were presented to the Prosecutor's Office regarding corruption, while only 25, or 12.5% of the total, resulted in sanctions.

24. Regarding corruption, the Citizen Action study concludes that: i) there is a lack of understanding of the meaning of corruption; ii) 40% of the cases regarding corruption are related to family or labor issues; iii) 40% of the cases refer to presumed corruption with insufficient information; iv) 20% of the cases refer to situations in which there is information and documentation indicating a presumed act of corruption, but citizens are unaware of the appropriate complaints mechanism. With respect to the characteristics of the denouncing population, it established that of all of the cases presented, 70% come from outside the capital.

25. In another study entitled "*Indicadores de Transparencia en el Sector Justicia en Guatemala*" [Indicators of Transparency in the Justice Sector in Guatemala], published in January 2011 by Citizen Action and Global Integrity⁵ stated that *Transparencia Internacional* [Transparency International], in a report regarding perceptions of corruption, gave Guatemala a rating of 3.1 on a scale from 0 to 10, thus ranking Guatemala as having one of the highest rates of corruption in the region.

26. The report adds that according to ex prosecutor Amilcar Zárata, the level of impunity in the country is approximately 75%, that is, of every ten cases, fewer than 3 would be resolved appropriately. According to this report, several studies have indicated that institutions from the justice sector in Guatemala are infiltrated by criminal organizations and suffer from political interference in decision making. This situation has been repeated in several cases involving transnational private companies that operate in rural areas of the country.

⁵ Citizen Action and Global Integrity, *Indicadores de Transparencia en el Sector Justicia en Guatemala* [Indicators of Transparency in the Justice Sector in Guatemala], January 2011, online: <http://www.transparenciajudicial-gt.org/>

27. The report "Indicators of Transparency in the Justice Sector in Guatemala" conducted by Citizen Action and Global Integrity in January 2011 made the following findings:⁶

- a. There are weak and insufficient regulations to sanction or remove judges.
- b. Only half of the laws regarding the hiring, removal, transfer and evaluation of judges are implemented in practice.
- c. There are often links between Magistrates of the Supreme Court and the judges they appoint.
- d. The evaluations of judges are *ad hoc*.
- e. Measures for the protection and security of judges are very limited.
- f. Lack of clarity in the procedures to hire human resources for support positions, which makes the evaluation of those jobs and performance more difficult.
- g. The study gave transparency regarding access to information a rating of 7.76%.
- h. In terms of accountability, a rating of 43.33% was given. The main mechanisms to promote accountability are legal statements authorities signs declaring what properties they own. These statements must be signed by authorities when first taking on their posts.
- i. There is a lack of mechanisms or regulations to oversee behavior.
- j. There is a "Code of Ethics", but its regulatory mechanisms are insufficient and it does not provide for sanctions. There is no oversight or supervision when judicial officials go into private practice.
- k. The study gave justice administration a rating of 37.5% because of difficulties with adequately dealing with work load.
- l. The process of appointing magistrates and judges is not transparent and a social audit from civil society is needed to make this process more transparent. In this regard, the study gave a rating of 50%. Although the Law of Nominations Commissions was passed to address the lack of transparency, these processes have not yet been implemented effectively.
- m. Regarding the implementation of regulations in the career of magistrates, the study gave a rating of 31.25%. The study noted the ineffectiveness of performance evaluations, which are only carried out in the case of judges, but not for magistrates.
- n. Regarding the issue of transparency in a magistrate's career the study gave a rating of 3.13%.
- o. Regarding the accountability of magistrates, the study gave a rating of 25%. Again the principal mechanism of oversight is the statement of

⁶ *Ibid.*

properties submitted at the beginning of their careers. During the period of their functions, there is no oversight.

- p. Regarding the transparency of the prosecution, the study gave a rating of 25%.
- q. Regarding the accountability of prosecutors, the study gave a rating of 47.5%. Again, the statement of properties is the principle mechanism of control.
- r. Regarding the effectiveness of the administration of the Prosecution's Office, the study gave a rating of 36.6% due to the difficulties in adequately organizing and distributing the work load.
- s. The Prosecution's Office has no mechanisms to govern conflicts of interest and there are complications in coordinating with other entities regarding the obtaining of evidence.
- t. Regarding investigators in the Prosecution's Office, there are rules for hiring however there is a lack of regulations for performance evaluation. The study gave a rating in this area of only 46.15%.

28. The case of ex Minister of the Interior, Carlos Vielmann, regarding the crimes of extrajudicial execution and conspiracy, has had a significant impact on Guatemalan society as it provides a good example of the weaknesses of the Guatemalan justice system. In this case, the Office of the Prosecution requested that efforts to extradite Mr. Vielmann be halted on the grounds that there were insufficient security conditions to try him in the country. This request was granted by the Third Court of Appeals and upheld by Miguel Ángel Gálvez, First Judge of High Risk of the Judiciary.

29. Although it was not directly expressed, the position taken by the Office of the Prosecution provides good reason to believe that the Office of the Prosecution concluded that there was insufficient independence of national courts to prosecute him impartially in Guatemala and that in order to achieve justice in this case, it was best that he be tried in Spain. Accordingly, the ex minister will be tried in Spain by the Spanish Justice and Court system. Francisco Dall'Anese, Commissioner and representative of CICIG commented to the newspaper *Prensa Libre* on November 24, 2011, that while it is the job of Guatemalan authorities to prosecute a person and do justice in Guatemala, if the conditions in the country are such that justice cannot be achieved in Guatemala, then justice must be sought in another country instead.

30. As we can see, the problems of the Judicial System in Guatemala are diverse and deep, and there is a need to strengthen the judiciary, to ensure the security of justice officials, to improve transparency and reduce corruption, and to ensure the effective monitoring of evaluations and standards of professionalism, which has not yet been achieved. Solving these problems requires a broad and comprehensive process focused on these elements, so that Guatemala can ensure judicial independence, with due process that permits rapid and timely justice, adequate compensation for victims and true legal accountability.

31. There continue to be numerous incidents of violence related to issues regarding land, mining projects, hydroelectric dams and new bio-fuel associated crops, including those that have led to the death of community leaders and peasants. Most of these incidents have not been legally pursued in an adequate or impartial manner. To date, no act of violence against social leaders (including murders, threats or criminalization of social protest) has been appropriately resolved in court. In general the phenomenon of impunity in Guatemala is extremely high. Precisely for that reason the International Commission against Impunity (CICIG) was formed. CICIG has noted in various reports that Guatemala continues to be affected by high rates of impunity. In cases regarding threats and killings of social leaders related to mineral extraction carried out by national or international private companies, there has been no legal accountability, and impunity has been 100%.

32. All of the above leads us to conclude that in the case of HudBay Minerals Inc. it is very likely that justice will not be obtained, nor will criminal or civil liability be established in Guatemalan courts. As we have already stated, civil liability can only be considered after criminal responsibility is determined. For all of these reasons there is a very high probability that there would impunity in these cases in Guatemala. It is recommended that the case against HudBay Mineral Inc. be heard in the jurisdiction of Ontario, Canada in order to achieve justice, since it is highly unlikely that justice would be done in Guatemala.

b. Political, social and cultural factors as obstacles to effective access to justice

33. A historical problem that dates to the Spanish colonization of Guatemala is deep and latent racism against indigenous peoples that cuts through all levels of Guatemalan society and is practiced by large segments of the non-indigenous population.

34. During the internal armed conflict, racism contributed to a context in which indigenous populations were massacred, women raped, and entire populations dispossessed of their lands. "Guatemala: Linaje y racismo" [Guatemala: lineage and racism] by Marta Elena Casaús Arzú, describes Guatemala's social and intellectual evolution and a continuing colonial attitude in contemporary Guatemalan society which has allowed systemic racism to persist.

35. Elsewhere, Casaús, picking up on the work of lawyer and sociologist Carlos Guzmán-Böckler, notes that racial and institutional discrimination is a central aspect of colonial society that survives to this day, but is continually denied as a present problem. Racism is understood as a social product, variable in form and content, which depends on the social structure that determines it.

36. Another contribution to this concept by Casaús was to link Guatemalan racism to racist acts and attitudes, both in terms of prejudices, jokes and stereotypes, and in discrimination in employment, housing, land and legal relationships. This is a logical result of the ideological structure of the ruling class: school, family, identity, academy, and so on, which has allowed racism to become a central aspect of Guatemalan society, from colonial times to now, and to be a common theme in the

history and power structure of Guatemala. The concept is tied to a global system of domination and is directly linked to the "State racism".

37. Demetrio Cojtí in *Racismo contra los Pueblos Indígenas de Guatemala* [Racism Against the Indigenous Peoples of Guatemala] points out that "racial discrimination can be unconscious, that is, Guatemalans can be racist without making a conscious decision to do so, and it is naturally expressed in different aspects of social life. This institutionalized racism is not intentional; it is rooted in routine practices, in the functioning of organizations and institutions, in interpersonal relations, and so on. Its practice may not be perceived as racism but as the 'natural order of things'".

38. In the same publication, this author points out that the Commission for Historical Clarification (United Nations' Sponsored Truth Commission 1999, pages 23-24) concluded that genocide was committed against Indigenous Peoples of Guatemala during the Guatemalan internal war. "The undeniable reality of racism as a doctrine of superiority, permanently expressed by the State, represented a fundamental factor that explains the particular brutality and discrimination with which military operations against hundreds of Mayan communities were carried out in the western and northwestern part of the country, particularly between 1981 and 1983, when more than half of the massacres and scorched earth actions took place."

39. The Human Development Reports of the United Nations System in Guatemala, from 1999 to 2005 have established that in comparison with the non-indigenous population, the indigenous population is in a state of vulnerability and exclusion. However, we should add that during judicial processes carried out in different branches of the courts, there are additional obstacles that originate from the fact that Guatemala is an intercultural and multi-lingual country. The official justice system lacks the resources to bring translators to all judicial proceedings, which can make languages a significant obstacle to justice. Additionally, different concepts of law between cultures is an obstacle to effective access to justice.

40. Finally, due to the high levels of corruption that exist in the administration of justice in Guatemala, it is common for justice officials to ask for money from the parties, in exchange for favorable judicial decisions. Generally, such requests are made by the more powerful party, who has access to financial resources. As a practical matter, then, those who do not have resources are excluded from the justice system.

41. Another obstacle to the access to justice is the status of women in Guatemala, which is manifested in the legal and practical exclusion of women from influencing the political and legislative agenda of the country.

42. A significant factor regarding the status of women in Guatemala is the prevalence of violence against women. As a result of efforts of women's organizations, there are legislation and institutions to combat violence against women; nonetheless, violence against women remains a serious problem. For example, in January and February 2009, 104 women were murdered; in 2010, 640 women were murdered.

43. Although there is greater awareness of the problem of violence and reporting of violent incidents has increased (for example statistics from the judiciary in 2006 indicate that 153 cases of femicide were reported, of which 35 led to guilty verdicts; 15,373 cases of violence against women were reported, of which there 218 led to guilty verdicts; and 278 cases of "economic violence" were reported, of which 2 led to guilty verdicts), systemic impunity continues to be a very common and serious problem, since it affects all citizens economically, psychologically and socially, particularly the victims.

44. On a general scale in Guatemala, compared to men, women are the least educated, the most impoverished, the most affected by physical and psychological violence, and therefore face serious difficulties accessing justice and safeguarding their rights. One of the main problems faced is lack of access to justice, and the often degrading treatment that indigenous women receive in the courts. The right of access to justice in the case of indigenous women who live in poverty or extreme poverty is greatly affected by serious obstacles (it is more difficult for them to travel from their homes to the courts due to their objective conditions, the trip is dangerous and their multiple domestic activities such as the caring for their children is seriously affected.)

45. Other reports on human development carried out by the United Nations system in Guatemala from 1999 to 2005 highlighted that: "compared with the non-indigenous population, the indigenous population lives in a state of vulnerability and exclusion". Although the recommendations of the Comisión de Fortalecimiento de la Justicia [Commission to Strengthen Justice] includes recommendations that refer to mechanisms or reforms to facilitate access to justice for the Mayan population, they have not been fully implemented, there is resistance to them by some judicial authorities. As a result the use of Mayan languages and the inclusion of mechanisms of traditional justice are not yet a reality in the Guatemalan Justice System.

46. Sexual violence committed against indigenous women, is a sensitive issue in Guatemala that is constantly denied. Until quite recently, it was very common that Ladina women from the middle or upper classes would hire indigenous domestic workers, and among their obligations they would have to let themselves be used by her sons, who would have their first sexual experience with them. It was common to hear jokes about this custom. Only recently have domestic workers started to organize and struggle for their rights regarding this issue and other abuses suffered by them.

47. Thus we note that sexual violence against indigenous women has been practiced, tolerated and even encouraged by State institutions, especially by the armed forces. Only relatively recently has there been an institutional effort to reduce this serious abuse. However, as with racism and sexism, this pattern of conduct is deeply rooted in Guatemalan culture.

48. In our country, one of the consequences of sexism, as well as the lack of professionalism of the army (which had institutionalized violence and saw it as a means to resolve all kinds of problems), was that during the 36 years of internal

armed conflict, rape was a generalized, massive and systematic practice carried out by State agents as part of a policy of counterinsurgency and creating terror.

49. Rape became an instrument of war and a tool used to create terror, violating human rights and international humanitarian law. Rape was a generalized practice during massacres, where in most cases, it was a precursor to death. Rape was massively perpetrated against indigenous women.

50. The Commission of Historical Clarification (CEH), emphasized this horrific truth of the internal armed conflict: "the statistics of rape are under-registered in comparison with other human rights violations...", registering 1465 acts of rape, of which 285 cases were documented. This type of violence was aimed at women 99% of the time, and most of the victims were indigenous women (80%).

51. The Court of Conscience for Women Survivors of Rape during the Armed Conflict: "Mujeres Rompiendo el Silencio" [Women Breaking their Silence], concludes that "the impact of rape cut across the lives of women and the effects are diverse and in many cases, de-structuring, because the act goes against their intimacy, dignity and liberty. For 20 or 25 years, women survivors of this type of violence have faced the physical, psychological and social consequences of it. It is the only crime in which the victim is blamed first."

52. They added that "the past is not dissociated from the present and femicide in Guatemala illustrates that truth. The brutality and cruelty with which women are currently raped and assassinated, is the result of an ancient system of oppression against women, as well as the impunity and the silence that envelops the violence committed against them during the war. This is in addition the continuance of serious socio-economic problems and the growing personal insecurity that exists in the country."

53. The investigation, "Monitoreo sobre violencia sexual en conflictos armados" [Monitoring sexual violence in armed conflict] in Peru, Colombia, El Salvador, Honduras, Nicaragua and Guatemala, carried out by the Latin America and Caribbean Committee for the defense of Women's Rights "CLADEM", documents how sexual violence against women was used as a weapon of war in those six countries. It emphasized that Guatemala was the country where these serious violations were carried out mostly in indigenous populations, taking different forms and manifestations. It also notes that in our country, sexual violence was committed against 12 year old girls and women over sixty alike. The Dos Erres massacre is a paradigmatic example of cruelty and inhumane practices.

2. Violence and Impunity in Guatemala: a problem that plagues Guatemalan Society

54. According to the United Nations Development Program (UNDP), in Guatemala, the homicide rate has increased by 120 percent over the last 10 years. According to the Office of the Prosecution, in 2009, 324,424 crimes were committed, including robbery, threats, theft, violence against women and assaults. However, according to

UNDP, these official statistics are only a fraction of the crimes and misdemeanors that occurred in fact. According to the United Nations Office on Drugs and Crime (UNODC), Guatemala's murder rate for 2009 is 46.3 per 100,000 persons, while Canada's murder rate was 1.8 per 100,000 persons.

55. According to the December 2007 statistical report on violence in Guatemala by the United Nations Development Program, "the country's situation of violence and insecurity is a serious obstacle to the consolidation and development of democracy and questions the country's capacity to govern through democratic institutions.

56. "Violence presents not only a serious obstacle to the consolidation of democracy but it also raises the cost of the development of the country. The main costs of violence are human costs, produced by death, wounds, mutilations and incapacities suffered by the victims of violence. In addition to the immeasurable human pain caused by violence, there is also an economic burden to the country that restricts its prospects of development."⁷

57. According to this report, in general terms, Guatemala's high rates of violence and insecurity are rooted in two factors: social exclusion and the lack of implementation of the law. These factors are related and reinforced by one another. The benefits of a reasonable level of growth of the Guatemalan economy are not equally distributed among the different social stratum. Guatemala is one of the most unequal countries in Latin America and combined with the very high levels of poverty, this creates a serious situation of social tension.⁸

58. Antonio María Costa, Executive Director of the Office of the United Nations against Drugs and Crime (ONUDD) in the preface of the report "Crimen y Desarrollo en Centroamérica" [Crime y Development in Central America] states what while "crime and corruption reign, and drug money perverts the economy, the State (referring to Central America) has lost the monopoly over the use of force and thus its citizens do not trust their leaders or public institutions. As a result, the social contract crumbles and people take the law into their own hands, to protect themselves and to commit crimes." (page 9)

59. According to Mr. Costa, the States "should strengthen their judicial systems to eradicate corruption and reinstate the public trust in the Rule of Law." However, the case of HudBay Minerals Inc. demonstrates how difficult this objective is to attain.

60. The report "Crime and Development in Central America" states that in addition to "undermining the public trust in democracy, corruption causes very concrete reduction of the existing funds that could be used to promote development. In Latin America, each year, at least 10% of the gross domestic product of the region is consumed in bribes, according to a 2004 study carried out by the Inter American Development Bank. Fraud in public contracts also distorts the

⁷ United Nations Development Programme, *Informe Estadístico de la violencia en Guatemala [Statistical Report on Violence in Guatemala]*, (UNDP Guatemala, December 2007) at 13.

⁸ *Ibid.* at 12.

public expenditure, since corrupt officials push forward many projects with possibilities of generating wrongful commissions, such as large public works and contracts of acquisitions in defense, at the expense of social programs. In that manner, corruption can mean greater costs for the development of a country, because dishonest officials seek immediate benefits in detriment to the interests of the public.”⁹

61. The existing violence in Guatemala affects development and democracy, while it also affects daily life, mental health and security of the Guatemalan population. According to UNDP statistics on violence in Guatemala “the situation of insecurity and violence affects the lives of people on a daily basis. The seriousness and high incidence of crimes like homicide, kidnapping and rape are reflected in media coverage and affect the population’s sense of security.

62. A high rate of other types of criminal activity including robbery, theft, threats, fraud and assault affects a greater percentage of the population. The risk possibly becoming a victim of violent crime act causes fear in the population which does not allow people to carry out their daily activities with peace of mind. This situation creates nervous tension that impacts the mental and physical health of the population.”¹⁰

63. In addition, violence in Guatemala affects democratic governance, human rights, judicial independence, the judicial system in general, and the security of citizens. The ability to peacefully coexist is impacted on a daily basis, as the phenomenon of violence and extreme violence continues uncontrolled.

64. Impunity in Guatemala is one of the central problems facing the justice system. International experts have pointed out that Guatemala’s justice system is weak and subject to external influences. In the 2009 report, CICIG pointed out that “the impunity rate in Guatemala is ninety-eight percent, with just two out of one hundred cases actually reaching the courts.” Phillip Alston, United Nations Rapporteur for Arbitrary and Illegal Executions, during his visit to Guatemala on August 20 to 25, 2006, said that Guatemala “is a good place to commit murder, because you almost certainly will get away with it.” The Justice System does not effectively respond to serious crimes committed in a way that would lead to the punishment of those responsible.

3. Criminal liability of private companies, in particular, as applied to the case of HudBay Minerals Inc.

65. Law Decree 17-73, Article 38 of the Guatemalan *Criminal Code*, regulates the criminal liability of corporations in the following manner: in the case of crimes committed by a corporation, the following individuals may be held responsible: directors, managers, executives, representatives, administrators, officials or employees who participated in the incident, or whose acts conditioned the occurrence

⁹ *Ibid.* at 73.

¹⁰ *Ibid.* at 15.

of the event. Such individuals will be punished in accordance with the *Criminal Code's* sentencing guidelines for individuals.

66. This article is applicable to the acts committed by HudBay Mineral's security personnel. However, to date, no investigation has been carried out against managers, executives, representatives, administrators or officials of any corporation. As stated earlier, there is only an arrest warrant against the person in charge of private security, the retired Lieutenant Colonel of the Guatemalan Army, Mynor Padilla. No arrests have yet been made.

67. Furthermore, Article 38 of the *Criminal Code* establishes that in Guatemala, corporations cannot be criminally prosecuted. In a context where there are increasing numbers of allegations of human rights abuses and violations being committed by powerful national companies and international corporations related to large-scale transnational projects, laws are required to hold them accountable.

4. Civil liability of corporations under Guatemalan law, in particular, as applied to the case of HudBay Minerals Inc.

68. Civil liability is established when the person that has caused damage is required to repair it, either through specific performance or through damages (normally through the payment of reparations). "The primary purpose of civil liability is to repair damage, which is to restore the balance that existed between the property of the tortfeasor and the property of the victim before suffering the damage. Civil responsibility has a preventive aspect, leading citizens to exercise caution act prudently to avoid infringing their responsibilities; and a punitive aspect, consisting of private penalties."¹¹

69. As a legal entity, HudBay Minerals Inc. is responsible for the damages caused by individuals engaging in functions for the company; as is established in Title VII of the *Civil Code*, (Obligations that originate in wrongful acts and deeds), Article 1663 (All damage should be repaired) states: "the employers and owners of workshops, hotels, commercial or industrial establishments and in general, those persons who have others that depend on them, are responsible for the damages caused by their employees and other workers in acts of service."

70. The foundation of this responsibility is vicarious liability, and the presumption that the employer is obligated to control the activities of its subordinates so that the rights of others are not harmed; in order to apply, this type of liability requires a relationship of dependence. This would be the type of liability that is applicable in these cases. However, after three years, there has been no progress in the criminal case.

¹¹ Luis Díez-Picazo and Antonio Gullón, *Sistema de derecho civil* [The Civil Law System], vol. II, (Tecnos Editorial, 1989), at 591.

a. Civil liability for the commission of a crime cannot be claimed independently

71. In the Guatemalan Judicial System, civil liability for a crime cannot be claimed independently. Rather, civil liability is related to and is dependent on a criminal conviction that establishes the criminal responsibility of the perpetrators or accomplices of the crime. Until the recent reform of the *Code of Criminal Procedure*, discussed below, a claim for civil liability based on a crime could only be submitted in civil court once there had been a criminal conviction. This makes it difficult to commence a claim for civil responsibility in these cases.

72. According to the *Civil Code*, Law Decree 106, chapter II, of the legal persons, article 15, legal persons are 4. corporations, consortiums and any other entity with profit making objectives that laws allow. Article 16 establishes that a corporation is a different civil entity than the individual members that compose it; corporations can exercise all rights and can assume the necessary obligations to carry out their objectives and will be represented by the person or unit designated by the law, corporate rules, corporate Statutes or bylaws, or the legal instruments of the company.

73. The civil liability for private companies is clearly defined by article 24 of the *Civil Code*, which states that legal persons are civilly liable for the actions of its representatives committed while carrying out their duties when these actions cause damage to others. Legal persons are also civilly responsible when its representatives violate the law or do not abide by it. The civil liability of legal persons does not affect the ability to bring legal actions against those directly responsible for the damage.

74. According to Guatemala's legal tradition, any person who causes damage to another should repair it. This obligation of reparation is translated into both criminal and civil liability for the individual who caused the damage. When the act that causes damage consists in conduct that the State defines as a crime, the state is responsible for pursuing criminal liability, including imposing punishment against the person responsible in order to repair the social damage caused by their wrongful behavior.

75. At the same time, civil responsibility is interpreted as the obligation by the person who causes harm to repair the damage in the person concretely harmed, and not society in general as represented by the State. One particular action can therefore lead to criminal and civil liability. However, it should be taken into account that according to current Guatemalan legislation, as we already mentioned above, criminal responsibility is personal in nature and is only applicable to the natural person who committed the wrongful act.

76. According to Decree 17-73, which is article 112 of the *Criminal Code*, any person who is criminally responsible for a crime or offense, is also civilly liable. Article 113 states that in the case of two or more persons who are jointly civilly responsible for a crime or offense, the court will determine the damages that each person should pay. However, tortfeasors and accomplices will be jointly and severally liable, not only for their own damages, but also to the damages of other tortfeasors.

This is without prejudice to the right of one tortfeasor to claim the damages from other tortfeasors.

77. According to this article, damages are only imposed in the context of a final criminal conviction; in effect, the Guatemalan system does not contemplate the filing of a civil action before there has been a criminal conviction. In other words, it is only possible to assign civil responsibility in the case of a criminal act when there is a final criminal ruling. This makes a civil action even more difficult in the case under analysis, since after three years, the criminal case has not progressed and it remains, as we already mentioned, in the first of five phases (investigative phase). A civil claim for damages could only begin in the event that there is a criminal conviction.

78. According to article 119 of the *Criminal Code* (Extension of civil liability), civil liability entails:

- a. Restitution;
- b. Reparation of material and moral damage;
- c. Indemnity for damages.

79. Article 122 (*Reference to civil laws*) states that in regard to issues that are not defined by this article, the matter will be governed by provisions contained in the *Civil Code* and the *Code of Civil and Commercial Procedure*. Before the reforms to the *Code of Criminal Procedure*, Decree Number 7-2011, the claim for civil liability in the commission of a crime was even more difficult, since the civil action could only be filed in civil courts once the criminal case was over. This unnecessarily dragged out the civil liability for criminal acts.

b. Reforms to the *Code of Criminal Procedure*, DECREE NUMBER 7-2011

80. A recent reform to the *Code of Criminal Procedure*, through Decree Number 7-2011 changes when damages can be claimed. According to article 7 of that decree, article 124 was reformed in the following manner: Article 124 (Right of reparation of dignity). The right of reparation includes the restoration of the rights affected by the crime, starting from recognizing the victim as a person and rights holder in all the circumstances, in order to repair them as much as possible, and to allow for full social reincorporation, and, where relevant, indemnity for damages caused due to the commission of a crime. To exercise this right, the following rules should be observed:

- a. The claim for reparations may be heard as part of the same process as the criminal conviction. When there is an individual victim, the Court or Judge that entered the criminal conviction will order the parties to a reparation hearing, which should be carried out on the third day.
- b. In the reparations hearing, the amount of the indemnity, restitution, and if relevant, damages, should be set in accordance with the rules of evidence; the decision is pronounced immediately during the hearing.

- c. The decision regarding reparations is included in the judge's written decision regarding criminal responsibility and sentencing.
- d. Notwithstanding the previous provisions, at any stage of the criminal proceedings, the victim or aggrieved party can request that the competent judge or court adopt precautionary measures that would ensure that the accused has sufficient assets exist to cover the reparations owed.
- e. The declaration of civil liability shall become enforceable when the criminal conviction becomes final.

If the reparations hearing was not conducted in this way, the victim or aggrieved parties can safeguard their rights in civil proceedings.

81. Through this recent reform, it was legislated broadly that in a specific hearing, in a specific timeframe, a claim for reparations can be made which includes the following provisions: the victim will receive restitution for the harm caused by the criminal act, this restitution will acknowledge the circumstances of the victim, and recognize them as rights holders, and will repair them as much as possible, and allow for full social integration, in addition to reparations for the damages caused due to the commission of a crime.

82. Secondly, the reform allows reparations to be dealt with in the same criminal process once a criminal conviction had been entered, at a hearing on the third day after the ruling is made. Additionally, it allows for the victim to request precautionary measures to ensure the availability of sufficient resources to cover potential reparations. Nonetheless, it must be noted that companies have access to specialized and experience legal counsel, while generally the victims in these cases live in rural areas, with subsistence-level incomes, thus limiting their capacity to hire lawyers. The asymmetry between the two parties is profound. A company involved would likely challenge the conviction, thereby suspending the payment of reparations, as the Article states: the declaration of civil liability will be carried out when the conviction is final.

83. Finally, a lack of accountability may occur in such situations as by the time a case is resolved, companies may have taken steps to avoid paying damages by not having sufficient assets in Guatemala to cover the damage award. For example, in the present case, the corporation HudBay Minerals Inc. sold the mining project to a Russian enterprise approximately a year ago. This greatly complicates any legal claim for civil responsibility in Guatemala.

84. Furthermore, the *Code of Civil Procedure* regulates the manner in which judgments are executed in Guatemala, including the reparations explained above, in accordance with the reforms introduced by Decree 7-2011 (articles 294, 295, 340, 341, 342, 343). In this regard, once the criminal trial is resolved, the victims must begin the process of enforcement, which will further delay the process of receiving reparations. Hopefully, however, the reforms of the *Code of Criminal Procedure* will improve the situation substantially.

85. We can conclude that although the ability to claim for civil damages through the criminal process has advanced significantly with the 2011 reforms, there continue to be serious limitations that hamper putting these reforms into practice: a) rural and indigenous populations have been affected by acts of violence perpetrated against them, which has caused them very serious injury or the loss of life; b) these populations do not have sufficient money to pay for legal counsel before courts of justice; and c) civil liability continues to be contingent on a criminal conviction; d) the political and economic power of corporations often does interfere with judicial independence, thus creating further impunity.

5. Theory of “Forum Non-Conveniens” and the *Law of Defense of the Procedural Rights of Nationals and Residents, Decree 34-97 of the Congress of the Republic*

86. The theory of “*forum non conveniens*” refers to a Common Law doctrine that has been regarded as an essential tool for implementing justice in Common Law countries, but does not have a direct equivalent in the Civil Law tradition. According to the doctrine of “*forum non conveniens*” a court can decline their jurisdictional authority over a case if they deem it impractical and if an alternative, adequate forum exists.

87. This doctrine is founded in the discretionary authority of a court to decline jurisdictional authority to hear a particular case, on the grounds that even though it has jurisdictional authority to hear the case, the court finds that another court has jurisdiction; and feels that the other court, as a result of practical considerations, would be a better forum to deal with the specific case. The eventual application of this doctrine assumes that there are at least two tribunals that share complete jurisdictional authority over a particular case.

88. On May 14, 1997, the Congress of the Republic issued the Decree 34-97, *Law of Defense of the Procedural Rights of Nationals and Residents*. The main purpose of this law is to state that the theory of “*forum non conveniens*” violates the rights of Guatemalans that are guaranteed by the Political Constitution of the Republic and the Guatemalan legal system. This law correctly states that the theory is foreign to the Guatemalan judicial system and, in general, to all Latin American judicial systems. The theory of “*forum non conveniens*” is considered to be contrary to the Charter of the Organization of American States (OAS) and specifically against the right of access to justice.

89. Decree 34-97 of the Congress of the Republic states the following premise: the *Code of Civil and Commercial Procedure* of Guatemala in article 17 establishes that the plaintiff in any personal action has the right to exercise their action before a court in the corporate domicile of the defendant; theories such as “*forum non conveniens*” violate public order in Guatemala since it requires Guatemalan citizens to file lawsuits in Guatemala, even when the original choice would be to file the lawsuits in a foreign country.

90. The above decree notes that the theory of *forum non conveniens* has already been applied in some cases to negate the right of Guatemalans to file, pursue and finalize civil actions before foreign tribunals against companies that produce and commercialize products that are harmful for human health, even in cases where the victims have voluntarily chosen to have their cases regarding damages caused by these companies heard in foreign courts. For this reason, the decree notes that a law is needed to regulate the application of legal theories that are foreign to our legal system in a way that guarantees the right to access to justice, which is a universal human right.

91. Lastly, this decree notes that the law was specifically passed in response to attempts by transnational companies to use the defense of "*forum non conveniens*" when they are sued in their corporate domiciles for the damages caused to foreigners or residents. Foreign judges have not acknowledged the fact that Guatemalan citizens voluntarily submitted themselves to the jurisdictional authority of that court, and accordingly have relied on the doctrine of "*forum non conveniens*" to require plaintiffs to litigate in forum they have not chosen, which creates an unwelcome precedent for Guatemalan citizens who may suffer from harms caused by foreign companies.¹²

92. My opinion is that through this decree, Guatemalan legislation protects the right of Guatemalans to present judicial claims before foreign tribunals against transnational corporations in the corporate domicile of the companies. However, the *Law in Defense of the Procedural Rights of Nationals and Residents*, Decree 34-97 of the Congress of the Republic alone does not prevent victims from bringing a civil claim before Guatemalan courts – this depends on whether Canadian courts have the jurisdiction to hear the claim. If the lawsuit is first filed in Canadian courts, it will terminate the jurisdiction of Guatemalan courts over the case. In any event, it is to be remembered that in Guatemala, the criminal case needs to be finally resolved before bringing a lawsuit claiming civil liability.

¹² See articles 3, 4 and 5 of the above law.

Final Conclusions:

- I. In my opinion, if the civil action before Canadian courts in the cases *Choc vs. HudBay*, *Caal vs. HudBay* and *Chub vs. HudBay* are presented before Guatemalan Courts, there is a very high probability that the plaintiffs would not receive an impartial trial that respects due process.
- II. The three civil actions against HudBay Minerals Inc., HMI Nickel Inc. and Compañía Guatemalteca de Níquel S.A. (Guatemalan Nickel Company, "CGN") cannot be pursued in Guatemala, with any assurance of justice and reparations for the victims due to institutional weaknesses and the lack of political will of the Guatemalan Justice System, which results in a system of impunity. In addition there are political, social and gender obstacles, as well as a lack of independence of the judiciary, impunity and corruption. All of these characteristics of the Guatemalan Judicial System would prevent the appropriate application of justice in these cases.
- III. Through Decree 7-2011, Reforms to the Code of Criminal Procedure, Guatemalan law protects the rights of Guatemalans to present legal demands before foreign tribunals against international companies, in the corporate domicile of those companies. However, the *Law in Defense of the Procedural Rights of Nationals and Residents*, Decree 34-97 of the Congress of the Republic alone does not prevent victims from bringing a civil claim before Guatemalan courts. Whether a claim could be brought in Guatemala depends on whether Canadian courts will claim jurisdiction over the civil actions.

Guatemala, August 20, 2012