



Latin American judges address challenges and opportunities in addressing human rights impact of businesses

Judges from six Latin American countries revealed that there were serious obstacles, but also possibilities for justice, facing regional judiciaries as they try to protect the human rights of those who have been adversely affected by the activity of business entities.

The judges gathered as part of the Regional Judicial Dialogue on Business and Human Rights organized by the International Commission of Jurists on September 7.

The Dialogue, moderated by ICJ Commissioner Professor Monica Pinto, brought together 17 judges from Central and South America to consider the role of judges in guaranteeing the right of access to justice and remedy and reparation. The judges also considered the need to guarantee the independence of the judiciary and the security of individual judges, lawyers, and human rights defenders in the context of business activities in the region.

The session featured presentations from a member of the UN Working Group on Business and Human Rights and the Office of the UN High Commissioner for Human Rights. The Dialogue took place in the context of the 5th Regional Forum on Business and Human Rights for Latin America and the Caribbean.

Discussing access to justice and remedy and reparation, the judges shared experiences and jurisprudence in cases related to serious crimes, including against humanity committed during the Argentine military regime, as well as cases of serious corruption and embezzlement in Guatemala.

In Argentina, in a case concerning the 1976 kidnapping and torture of 24 workers employed by the local Ford Motor company at their factory in Buenos Aires during the 1976-83 military dictatorship, a Federal Trial Tribunal sentenced three persons, a former military officer and two former Ford executives to prison of between 10 and 12 years, for their complicit involvement in the crimes. Former Ford executives were accused of providing detailed information and logistical support to security agents that led to the abduction and torture of the victims, and also allowed a detention centre to be set up inside the premises of that factory. The three judges of the Tribunal in this case attended the meeting to share the lessons learned and the significance of the criminal proceedings in the context of efforts to bring justice and reparations for the crimes of the past.

The process and the final sentence is a landmark in the fight against impunity in Argentina and an important message to all so that these crimes are not committed again. The case clarified the ways in which private individuals (the former company executives) participated in the commission of the crimes by State agents (military and security agents), elaborating upon modalities of attribution of

the acts to the accessory perpetrators. It is also an innovation in the ways it gathered and assessed the probatory value of the available evidence of crimes committed more than 30 years ago so that the crimes could still be attributed to the perpetrators.

The reparation ordered by the Tribunal in this case was “symbolic and historical”, consisting on an acknowledgment of the facts by the State and the private actors. The victims may demand now other forms of reparation from the State, but not from individuals. The company as such was not part of the criminal proceedings nor was it sanctioned in the final sentence, since Argentinian law does not accept the criminal responsibility of legal entities such as corporations.

A participant judge from Guatemala shared a case concerning economic crimes of corruption, fraud, illicit association and assets laundering in a provincial town in Guatemala. Here, the experience and outcomes were somewhat different. The case involved the town major and several of his relatives as well as some 20 companies out of which nearly 20 individuals and seven companies received penalties in the final sentence.

The case is of special significance in Guatemala as one of the few, large scale, corruption cases that has reached its final stage with convictions. In the investigation and collection of evidence considered during the trial, participated several public offices and the then International Commission Against Impunity in Guatemala (CICIG), which is no longer in operation. Thanks to recent laws on corruption and money laundering, it is possible to impose sanctions on the company, as a legal entity. In the instant case, those sanctions consisted of monetary fines but not suspension or dissolution of the legal entity to allow other administrative proceedings against the same companies to continue. In accordance with national laws and international standards, the judges ordered full reparation, including for damages, measures of satisfaction such as public statements of apologies and publications to be made by the convicted.

Citing a graphic statement contained in the final sentence, the judge Pablo Xitumul who presided the Tribunal said “corruption and impunity are even more lethal than a cancer or a pandemic, and should be combated without delay or excuses!”

A series of obstacles to access to justice were also identified. One of them is the conclusion and implementation of Free Trade Agreements in the region that often affect human rights such as the right to health and social principles enshrined in the Constitutions of the region, for instance, by committing to very high levels of protection of intellectual property over medicines and promoting private investment in the health sector. In addition, the settlement of disputes via compulsory international arbitration would violate fundamental principles of law and access to justice.

The judges also stressed the need to guarantee judicial independence as a necessary premise for the guarantee of human rights and justice. This requires that judges are not subject to retaliation for the decisions they make in the exercise of their judicial powers and that the selection processes of judges be participatory and public. As Monica Pinto concluded in this part: “the independence of the judiciary and its effectiveness in protecting human rights requires that judges work in an environment of security and stability, without fear of reprisals of any kind due to the content of their decisions, which can often be adverse to the States or certain companies involved. Unfortunately, this is not the case in Latin America.”

With regard to human rights defenders and the right to social protest against economic projects that face popular opposition participants indicated that their protection is generally precarious and many measures have been used in the region that violate the rights and freedoms of defenders of human rights. Defenders are also often stigmatized as advocates of criminals. The COVID-19 pandemic has

only exacerbated that problem with the expansive use of emergency powers by the executive that further limit rights of freedom of assembly, association, and expression. The meeting evoked the jurisprudence of the Inter-American Court of Human Rights that defined human rights “defenders” by their function and not by their denomination. In the application of restrictive measures of rights, principles of proportionality and rationality must be applied, and the measures taken must be for a legitimate purpose.

It was also noted that, in Peru, the Constitutional Court recently ruled that social protest is a right guaranteed by the Constitution as a legitimate expression of popular demands that cannot be equated to a criminal conduct such as extortion. Peru’s criminal law defines the crime of “extortion” in a very vague and ambiguous way that allows the interpretation of the public expression of social demands to claim rights in public spaces as the violent pursuance of an economic benefit or any other “advantage”.

Regarding the rights of indigenous peoples to prior consultation, it was recalled that 15 countries in the region are party to ILO Convention 169 in addition to the jurisprudence of the Inter-American Court of Human Rights in this regard. Legal action in the region has been highly effective in relation to this right through constitutional remedies such as tutela or amparo. The same judicial remedies have been used effectively in relation to other human rights.

As part of the meeting summary, Monica Pinto remarked that “serious human rights violations in which companies are involved occur more frequently in non-democratic contexts, where the rule of law does not prevail and the judiciary is not independent. That is why it is crucial to also promote the Rule of Law and democracy in our countries where there is a large deficit in this regard.”