

PRESENTATION

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## IACHR/International Justice Project

### Working Session on Implementing International Human Rights Protections

Transcript of the Presentation by Ambassador Jorge Taiana

#### Panel on Legislative and Related Mechanisms for Implementing International Human Rights Protection

First of all I would like to highlight the importance of the issue and the importance of the international human rights system for a specific country, that is to say Argentina. I don't think it is abstract, I think it relates to the history of our countries. Particularly in Argentina it is connected to the experience of the dictatorship that ruled Argentina from 1976 until 1983. The existence of that period, the existence of massive human rights violations at that time, left a profound mark on Argentine society and defined two or three very important things: first, the importance attributed in society to the promotion and protection of human rights (which means human rights are accorded a very high status); second, the importance of international mechanisms and specifically of the regional system. Why? Because the regional system contributed decisively to revealing the genocidal nature of Argentina's dictatorship; third, the active vanguard and decisive role of the nongovernmental human rights organizations in putting forth an agenda, putting forth priorities, and clearly expanding the space for seeking liberty and justice. At that time, the third actor, not the international mechanisms, not the NGO but the State, was obviously a State that was resistant to all of this.

The change began with the return to democracy. Since then, the State has become an active player making important efforts in seeking out creative approaches - one thing we can say about the 20 years of democracy, in which no doubt we have had many problems, but where some State policies have been adopted, such as a broad defense of human rights domestically and substantial support and an effort to participate in the regional system, which Argentina considers its own. So this is the framework and this has taken various forms. The first and perhaps the most obvious are the Constitutional amendments of 1994 where a set of international human rights instruments were given Constitutional rank. In those amendments there is a specific article that lists certain treaties and this brought an end to the debate over the relationship between treaties and domestic law in principle; it also ended the debate about the relationship between human rights treaties and all other treaties because the only treaties that have been given constitutional rank are human rights treaties and I can't say any more about it because Judge Schiffrin is here and he knows much more about this than I and he will be addressing this later today. But this is a crystallizing of the issue of the rank or the importance that society has attributed to human rights. This has had a great many implications. Judge Schiffrin will be addressing the judicial implications of which there are a great many. But it has had a set of effects in the importance of human rights treaties and their dissemination because if you receive a copy of the Constitution, copies of all of those treaties are attached thereto.

It has also had an impact on the use of the system by Argentines. Argentina has a special characteristic in that it has a great many cases before the Commission and it is a country where most of the cases are not brought at this time by human rights organizations but by private attorneys who consider that one of the rights under the Convention has been violated in the domestic system and so they have recourse to the regional system. I should also note that the

Argentine State is a State in which at least two of the structures, the Ombudsman and the Public Defender, have brought cases to the system against the State itself, because they consider, in particular the Office of the Public Defender, that they consider that it is their obligation that their advocacy role not end in the domestic realm but rather that it extends to the regional system if there are violations of the Convention.

Another important consequence of this has been the development of a series of institutions that tend to internalize, up-date, and render compatible or coherent domestic legislation and procedures with international human rights treaties. Recall that Argentina is a federal State. The substantive criminal laws in particular are almost exclusively federal but the codes of criminal procedure are provincial, that is to say they depend on each province, and this introduces a number of complex factors when it comes to seeing how things play out. At the federal level, we also developed a complex architecture. There is an Ombudsman at the national level and there are several ombudsmen in various provinces and cities. There is a secretariat structure for human rights in the Executive. What I would like to go into more depth on, because human rights legislation in Argentina is wide-ranging, are those measures dealing with actions of the inter-American system and some specifically with cases before the Commission.

Let's begin with one of these that I think is important to note. The Argentine State has seen significant developments and original initiatives with respect to friendly settlements. The first time the Commission and the State signed a friendly settlement was the *Birt Case* from Argentina. This had to do with the possibility of bringing a civil claim against the State with respect to persons who were arbitrarily deprived of their liberty during the dictatorship. The domestic courts had rendered an opinion according to which the right to present a civil claim against the State had proscribed. By having the statute of limitations for a period of two years, it would mean that most people would have had to present their claims during the dictatorship itself, which would not have been very prudent. The case ended up in a friendly settlement and what this friendly settlement proposed was a mechanism for reparations for the victims of these arbitrary detentions. First, it was proposed through an executive decree exclusively for the benefit of the persons who had brought the case. It was then extended in the interests of justice and it took the form of a law that the legislature adopted and it established reparations for all people who had stepped forward and a mechanism for coming forward was created, before the Secretariat for human rights. More than 8,000 who had been detained came forward to claim this right. But you know that in Argentina the main human right problem were the missing people the "desaparecidos", and so after this case another law was adopted for the victims of forced disappearance, and once again a mechanism was created. More than 9,000 victims came forward to seek reparations and the Argentina State had paid out more than \$1 billion to victims of the dictatorship. It was a major effort and the interesting thing about this massive reparation mechanism was that it arose from a case before the Commission and it was born of an effort to reach a friendly settlement, and domestically it happened and then it was made more wide-spread. So here we have a good example of how legislation, in this case legislation for reparations, came out of the friendly settlement of a case that was brought before the Commission.

Moreover, it should be pointed out that the reparation policies implemented in Argentina under legislative norms have included reparation in a wide sense. Thus, other norms should be mentioned, such as Law 23.040, which derogated and declared void the so called "auto-amnesty" law of the last de facto government, Law 23.852, which ruled that the relatives of the disappeared would not be drafted (now null), Law 23.511, which created the Banco Nacional de Datos Genéticos (national genetic data bank), which facilitated the work of identification and restitution of minors carried out by the Grandmothers of Plaza de Mayo, Law 23.421, which creates the legal figure of the absent for the forced disappearance (a norm claimed intensively by human

rights organizations).

Now we will speak not of the adoption of a law but rather the derogation of a law. This also arose out of the friendly settlement of a case, it is the *Verbitsky Case*, it is the name of a very well-known journalist in Argentina, who had been tried and convicted of “desacato”, or contempt. This is a criminal law that tends to give special protection to the honor of those who are endowed with authority. It makes it more difficult to criticize them. The Commission has considerable case law on this and has considered that “desacato” laws are contrary to the Convention, and particularly violative of Article 13, as public figures should have less protection, as they have to be subjected to greater scrutiny. Now that case, and it was a very sensitive case, because the person who had accused the journalist was a member of the Supreme Court of the country. Nonetheless, a friendly settlement was reached and that friendly settlement basically involved derogating the law on “desacato” and that was done.

I would like to cite another example that does not involve legislation but which was a very complex matter, namely some of the difficulties posed by there being a federal State involved in a friendly settlement. This was a very interesting friendly settlement involving a case before the Commission, the *Guardatti Case* and the *Garrido and Baigorria Case* before the Inter-American Court. They both involved the province of Mendoza and they both involved forced disappearances that occurred under the democratic government, something which is obviously unacceptable for all, and it involved a complex institutional construction that included the participation of the Commission, the government of Argentina, and the government of Mendoza, and not just the government of Mendoza but specifically the judiciary of Mendoza because it had been claimed that it had not been capable of prosecuting and punishing the persons responsible for those deeds. This entailed the creation of the commission of ad-hoc commissions and arbitral panels, it was very complex. In general, the problems with respect to compliance with specific recommendations in cases where reports have been adopted by the Commission have to do with two things. First, the federal nature, it is not easy for the national government which represents the State before an organ such as the Commission to have the same position as a provincial government particularly where monetary issues are involved, but not only monetary issues. Sometimes the national government wants a solution but the provincial government does not. Now there is a solution, which is that the national government could agree to pay and then seek indemnification from the provincial governments. Now this was also pointed out by the panelist from Colombia, but there is also a question of *res judicata*. What does one do when either an innocent person has been convicted through violations of due process or where impunity is guaranteed through a trial in which not all of the rights of those seeking the truth have been respected. Now we do not have a solution to this. There have been several legislative proposals. Basically what has been proposed is introducing a firm judgment, a final decision of the organs, the Commission or the Court. Now this proposal was not adopted but it was put forth as a means of resolving that problem.

And where there was a major effort, and this is the novelty of recent days, is the creation of an inter-ministerial structure that provides for the participation of the provincial governments to create an effective mechanism for processing the cases before the Commission and the Court and also to deal with the friendly settlements. This is an important step that is being taken at this time. I would like to mention two or three more things about our experience in human rights and it is a combination of things, for example, when I was saying that it was a task where the national and provincial governments had moved forward, I said so in a general sense but also in a specific sense. In Argentina, we have some unusual State institutions that provide for the participation of NGO's, I am referring for example to the National Commission on Identity, there is a law that created it and it operates within the Secretariat for Human Rights and it has institutional

participation of the Grandmothers of the Plaza de Mayo because the task of this commission is to identify those children who were abducted during the military dictatorship and deprived of their identity. This is an institution that is working very well and it has a very original characteristic. Moreover, it is an example of how a national experience, a very tragic development, has international repercussions, for in the Convention on the Rights of the Child, the article on the right to identity is known as the article of the Grandmothers of the Plaza de Mayo because it came out of that experience, and there is clear and effective collaboration on the part of the State, non governmental organizations and the international community. Now in the case of the Province of Buenos Aires, this was a very interesting case as well, there is an organization created by the State, but it is run by private persons and representatives of nongovernmental organizations, and this is the Provincial Commission on Memory, which is aimed at carrying out the general recommendations having to do with the right to the truth. The Commission for the Protection of Memory has a major archive on the history of the violations and the idea is to take stock of the experience of the clandestine detention centers.

In the Province (of Buenos Aires), there is an institution that is like the Secretariat for Human Rights that is part of the Executive Cabinet and there are several institutions that have been created, depending on the law that created them, to promote and harmonize legislation and practices relating to human rights to make sure they are compatible with international standards. These institutions have been developed, they have their activities, and they are supposed to set standards and also to process complaints. In the case of the Province of Buenos Aires, following a series of observations by local NGO's and international organizations, the Human Rights Committee under the International Covenant on Civil and Political Rights and the Committee Against Torture, a pact has been adopted against torture aimed at eliminating torture as the perverse practice that it is.

One important thing is that in 1992, the Commission established that the Amnesty Laws that had been adopted, the Full Stop Law and Due Obedience Law, were incompatible with the American Convention on Human Rights. Several years later, the legislature derogated those laws and, at this time, actions are underway (they were initiated by nongovernmental organizations) aimed at declaring those laws null and void. Said nullity has been declared by two judges and by the Chamber of Deputies and is now awaiting a decision that might be coming soon from the Supreme Court. We hold out great hope that after the Inter-American Court's judgment in the *Barrios Altos Case* that the Supreme Court of Argentina will ratify what has already been decided and would thereby close out that space for impunity that has caused so much harm to Argentine society.

A final thought in the system, and not just on Argentina. The system is useful and has been useful for several things. First of all it saves lives. There are people who are alive thanks to the system and it might be good in this context to think of the usefulness of the system of precautionary measures, even though its legal basis is in the Rules of Procedure of the Commission, and it has been considerably effective. The system saves lives, the system establishes the truth, and it achieves justice in some individual cases, necessarily very few in view of its nature. The system is useful for standard setting in terms of how to move forward. The system is a clear early warning mechanism - generally when there are several decisions referring to a given problem in the system, it is because that problem exists, it is an early warning system that helps avoid deterioration in the human rights situation in the region and it is also useful for expanding space for setting forth and reaffirming rights. This contribution that has been made by the system in conjunction with the States and the decisive actions of nongovernmental organizations should obviously continue. We all need to continue to make efforts, we from the States need to try to overcome the limitations when it comes to complying with decisions and to

ensure full observance of human rights.

I would also like to offer a thought having to do with the current times in the Americas. These are not the moments of the greatest optimism, these are not the moments of some years back when, with the return of democracy, we thought that the consolidation of the rule of law and freedoms and human rights was on an ascending path without any backsliding. But now we are living in difficult times, the States are facing many difficulties, and this is a time when, in many places, security is placed above human rights. We are living in a time when the levels of impunity tolerated by the judicial systems are high. So I would simply like to conclude thanking the system and its contributions to my country, I would like to thank the people from the nongovernmental organizations for their struggle because they are the ones who made this system possible. This system would not have existed had they not endeavored to make it work. And I would like to thank the States for their efforts and I offer my best wishes so that the defense and protection of human rights will always be accorded priority and that it not be subordinated to any other interests.

I would not want to finish this presentation without mentioning one of the fundamental actors with regards to the protection of human rights in our countries: the Judiciary. In my country, as it is in many countries throughout the region, the international human rights tools (and thus the standards approved by them) enjoy supra-legal hierarchy. Therefore, it is the judges, at different levels, the ones primarily responsible of responding to human rights violations and thus are the ones fundamentally responsible in one of the most difficult struggles: the struggle against impunity. The challenge lies in strengthening not only the internal mechanisms in each country, so that human rights become real as the DUDH alludes in its preamble: the becoming of a world in which human beings can be freed from fear and misery and in which they can enjoy freedom of speech and religion. Thank you very much.