
ILAC Discussion Paper:

Judges as Anti-Corruption Actors in Colombia, Guatemala and Mexico

Discussion paper II of the Judges
as Peacebuilders Project



Photo: Shutterstock



International
Legal Assistance
Consortium



CYRUS R. VANCE CENTER
FOR INTERNATIONAL JUSTICE



International Association
of Women Judges

ILAC Discussion Paper:

Judges as Anti-Corruption Actors in Colombia, Guatemala, and Mexico

Discussion Paper II of the Judges as
Peacebuilders Project

Translated from Spanish

This Discussion Paper is a product of the project ***Judges as Peacebuilders*** led by the International Legal Assistance Consortium (ILAC), the Cyrus R. Vance Center for International Justice (Vance Center) and the International Association of Women Judges (IAWJ) and is authored by Jaime Chávez Alor (Vance Center). It is one of a series of three Discussion Papers; the other two deal with judicial diversity and judicial security and independence in Colombia, Guatemala and Mexico. Vanessa Passos Araújo (ILAC), Jaime Chávez Alor (Vance Center) and Audrey Cavaness managed the ***Judges as Peacebuilders*** project.

ILAC, the Vance Center, and the IAWJ thank each of the justice providers who participated in the virtual roundtables held on September 14 and 15, 2021, and February 22, 2022, as well as the conferences organized in Mexico City, Guatemala City and Bogotá in late March and early April 2022.

They are also grateful for the support of other member organizations of ILAC: World Justice Project, the Law Society of England and Wales and the National Centre for State Courts, and especially to those who moderated the roundtable Efforts against Corruption, Alex Rodríguez and Lizzette Robleto de Howarth. They also thank Juan Salgado of the Mexico office of the World Justice Project for their invaluable comments on this discussion paper.

They also thank the Corporation of Judges and Magistrates of Colombia (CORJUSTICIA), the Guatemalan Association of Judges for Integrity (AGJI) and the Mexico Chapter of the International Association of Women Judges (IAWJ) for their participation in the roundtables and for their comments on this document.

They also appreciate the key support of the Swedish government's agency for peace, security and development, *Folke Bernadotteakademin*.

Table of Contents

Summary4

Key Recommendations from the Roundtable Discussions with
Judges in Colombia, Guatemala, and Mexico:.....6

1 Introduction7

2 Efforts of the Judiciary against Corruption9

Administrative and criminal liability of companies and obligations of
honesty9
Parties to the proceedings and redress for acts of corruption 11
Specialization of judges and prosecutors in corruption and tools to
manage complex corruption cases..... 14
Challenges in dealing with complex corruption cases 16

3 Anti-corruption efforts within the Judiciary.....19

Integrity and corruption prevention policies for the legitimacy of
the judiciary.....21

3 Recommendations25

National governments (executive, legislative and judicial powers)25
National and international legal community27
Judicial associations.....27

4 Description of the *Judges as Peacebuilders* Project.....28

Summary

Article 11 of the United Nations Convention Against Corruption (UNCAC) establishes the decisive role of the judiciary in the fight against corruption. Judicial work on corruption can have a direct impact on whether the fight against corruption will succeed or fail. According to the 2021-2022 Anti-Corruption Assessment in Latin America,¹ conducted by the Vance Center for International Justice, the groups most affected by corruption are people living in poverty and traditionally marginalized groups.

This discussion paper summarizes findings from a series of roundtable discussions with over 50 judges from Colombia, Guatemala, and Mexico as part of the **Judges as Peacebuilders** project by the International Legal Assistance Consortium (ILAC), the Cyrus R. Vance Center for International Justice of the New York City Bar Association, and the International Association of Women Judges (IAWJ).

Over the last decade, governments in the region have increasingly become aware of the need to better regulate against corruption, not only corruption by public actors but also private entities. There is a need to establish administrative liability, sanction companies and push them to adopt internal integrity codes. Although there are differences in Colombia, Guatemala and Mexico, judges participating in this project agree that one of the most pressing issues is for private entities to adopt internal integrity and compliance programs to counter corruption. In addition, in Mexico and Guatemala where adequate legislation exists, there are not many cases of private entities being criminally held accountable for acts of corruption.

Regarding the redress and damages for corruption cases, judges in each of the three countries raised concern that the legal test of ‘legal and legitimate interest’ has not been sufficiently developed to guarantee full redress to victims of corruption as well as to allow a greater participation of civil society organizations.

Opinions differ between judges from Colombia, Guatemala and Mexico on whether there should be a specialized anti-corruption judicial corps. Those in favor of specialization said that judges with the necessary knowledge and resources are better placed to hear corruption cases, especially in instances of grand corruption. Yet, other judges said that the individual risks for judges specialized in corruption would be too high, making them potential targets for

¹ Lawyers Council for Civil and Economic Rights, Vance Center for International Justice.

“Evaluación Anticorrupción en Latinoamérica 2021-2022”. March 2022.

<https://bit.ly/LCEAL21>

powerful and corrupt groups. Some judges said that there is no need for a jurisdiction exclusively dedicated to corruption, but that, instead, it is important to improve the general training for judges to hear, often, complex corruption cases. What the participating judges from all three countries do share is the firm understanding that it is essential to guarantee judicial independence to avoid risks that carry with political nominations as well as attacks against judges.

Judges emphasized the importance of strengthening international cooperation mechanisms since many corruption cases transcend borders, and information from national investigations can be fundamental for other country corruption investigations. Also, one of the most difficult challenges of complex corruption cases is how they are often politicized and how sitting judges can face political pressures.

Another major challenge to combating corruption is the instances of corrupt behavior within the judiciary itself. While many anti-corruption measures have been put in place by the executive branch to prevent corruption, the judiciary has only adopted some of these policies.

On a regional level, judiciaries, including in Colombia, Guatemala, and Mexico, have adopted internal policies that reinforce judicial integrity to prevent corruption. Some examples include the adoption of codes of ethics and integrity, justice actors' declarations of wealth, as well as oversight and disciplinary mechanisms that meet international standards. As discussed during the roundtables, even the appearance of a judge's lack of integrity or corruption will affect the standards of a due process. This affects not only the individual judge, but the judiciary overall.

Judges from Colombia, Guatemala and Mexico said that it is essential to also include integrity and ethics policies when considering merits of candidate judges. There is also a common need to reinforce training mechanisms and efforts on judicial integrity and anti-corruption for all judicial staff. In addition, the participation of civil society is key in these efforts to make the anti-corruption work more known to the wider public and changing the view of the judiciary as an all-corrupt entity.

In all three countries, judges who denounce cases of corruption are subject to reprisals according to the project participants, sometimes coming from within the judiciary itself, which discourages the denunciation of corruption. Judicial associations are an important instrument in the fight against corruption.

Key Recommendations from the Roundtable Discussions with Judges in Colombia, Guatemala, and Mexico:

- 4** Harmonize anti-corruption legislation with international standards to provide adequate legal tools to judges hearing corruption cases, including strengthening mechanisms to guarantee redress for corruption cases.
- 5** Provide sufficient resources to enable judges to independently hear corruption cases, including providing physical and legal protection of judges in charge of high-profile corruption cases. Provide sufficient human and financial resources to complex corruption cases, new models of judicial training on corruption is needed, both for judges as well as other justice operators involved.
- 6** Include integrity principles from the Bangalore Principles of Judicial Conduct as an integral part of basic judicial training and include principles of ethics and integrity in trainings throughout the judicial career.
- 7** Create and strengthen institutional capacity to address cases of corruption within the judiciary, including disciplinary systems, providing sufficient human and financial resources, and taking appropriate measures to prevent the resources from becoming instruments for political use.

1 Introduction

One of the main problems in countries in Latin America, including Colombia, Guatemala, and Mexico, is the high level of corruption and impunity. The justice system plays an important role in combating impunity in corruption cases; success or failure has a direct impact on the role of those who impart justice as peacebuilders. The United Nations Convention Against Corruption (hereinafter UNCAC) provides in its Article 11 the decisive role of the judiciary in the fight against corruption².

A system incapable of administering and imparting justice in corruption cases loses legitimacy before a societal claim due to the harm caused by corruption. In each of the countries, acts of corruption affect the enjoyment of civil and economic rights by the population. According to the 2021-2022 Anti-Corruption Assessment in Latin America³, conducted by the Vance Center for International Justice of the New York City Bar Association, the populations mostly vulnerable to the implementation of public policies, including people living in poverty and traditionally discriminated groups, are greatly affected by acts of corruption in these countries.

Corruption, being a complex phenomenon, is difficult to be traced and proven; therefore, the general capacity of the judiciary to impart justice decreases. Whether through administrative proceedings or through criminal proceedings, judges depend on investigations carried out by other entities, such as investigating or prosecuting agencies. In addition, in highly public corruption cases in which top-level politicians and private sector individuals are investigated, justice operators are often victims of pressure and other reprisals that will inhibit investigations or influence their actions and decisions, which adds a serious impact on the independence of judges in this type of cases.

On the other hand, the judicial branches have not been exempted from acts of corruption and questions regarding the lack of integrity of their members, affecting their legitimacy and the public perception of their ability to fight corruption. In response to this concern, some countries – like in Colombia, Guatemala, and Mexico – have institutionalized reinforced integrity measures such as sworn statements or mechanisms to prevent nepotism.

This discussion paper of the "Judges as Peacebuilders" project is the second in a series of three papers on Colombia, Guatemala and Mexico. This paper brings together key points from the discussions from roundtables on anti-corruption

² United Nations Convention against Corruption, Resolution 58/4 of the United Nations General Assembly, 31 October 2003.

³ Lawyers Council for Civil and Economic Rights, Vance Center for International Justice, Anticorruption Evaluation in Latin America 2021-2022, March 2022. Available at: <https://bit.ly/LCEAL21>

efforts, held on October 14 and 15, 2021, which joined more than 30 justice officials, and members of international organizations and civil society.

This paper is not intended to be exhaustive or representative of the views of all those involved in the administration of justice, but rather to highlight key challenges and areas of anti-corruption efforts, as well as possible solutions put forward by project participants. Reference to judges was made by the persons who participated in the project.

Colombia, Guatemala, and Mexico share common elements, but also have important differences in their anti-corruption legal framework and how they penalize corruption. Understanding the tools and challenges that judges face when adjudicating corruption cases is key to promoting national, regional, and international efforts to strengthen their capacities in this area, and therefore, the rule of law. Additionally, it is necessary to understand anti-corruption efforts that build integrity and legitimacy within the judiciary itself.

The most relevant points on each of the topics are presented below. In addition, there are preliminary recommendations at the regional level which include the role that the international community can play in supporting anti-corruption efforts as discussed with roundtable participants as part of ILAC's Judges as Peacebuilders project.

2 Efforts of the Judiciary against Corruption

Administrative and criminal liability of companies and obligations of honesty

Over the last decade, governments in Latin America, including Colombia, Guatemala and Mexico, have become more or less aware of the need to regulate corruption not official corruption, but also corruption by private entities. Although public officials often commit administrative or corruption offenses, in many cases there is a counterpart in the private sector involved in these acts and not always the corresponding legal attention is provided.

The UNCAC, ratified by the three countries herein analyzed,⁴ in its Article 12 establishes the obligation of the States Parties to adopt measures to prevent corruption and improve accounting and auditing standards in the private sector, as well as, to provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures where appropriate. Parallel to the involvement of the private sector in anti-corruption efforts is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its Good Practices Guide on Controls, Ethics and Compliance,⁵ as well as the 2018 Lima Commitment on Democratic Governance in the Face of Corruption.⁶

In this regard, and in harmony with international commitments, some countries have included in their own legal frameworks legislation to prevent corruption – including measures or honesty measures for the private sector as mechanisms to prevent these conducts.⁷

There are essential differences between Colombia, Guatemala and Mexico with respect to the regulation of administrative responsibility and penalizations for companies and their integrity obligations.

⁴ Colombia ratified on October 27, 2006; Guatemala ratified on November 3, 2006; Mexico ratified on July 20, 2004. Status of signature and ratification of the United Nations Convention against Corruption. Available at:

<https://www.unodc.org/unodc/en/corruption/ratification-status.html>

⁵ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related documents. Available at: <https://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>

⁶ Lima Commitment: democratic governance in the face of corruption: VIII Summit of the Americas: April 13-14, 2018 : Lima, Peru / Prepared and published by the Summits of the Americas Secretariat. p; cm. [sic] (OAS. Official documents ; OAS/Ser.E). Available at: http://www.summit-americas.org/LIMA_COMMITMENT/LimaCommitment_es.pdf

⁷ *Ibíd.* "Evaluación Anticorrupción en Latinoamérica 2021-2022".

In **Colombia** there is currently no legal norm to classify the criminal acts of corruption committed by legal entities; this is, only natural persons can be liable. The participants in the roundtables said that it is difficult for the inclusion of criminal liability with respect to the former to be approved by Congress, since there is a legal definition of corporate organized crime.

Participants point out the lack of willingness of the public prosecutor's office to monitor the processes, since the institution is eminently political. They also point out the lack of unified and standardized criteria to manage corruption cases, in addition to the constant rotation and/or transfers of investigators and prosecutors, which has a negative impact on the development of investigations.

In Colombia there are administrative penalties for acts of corruption committed by private entities, and there are penalties for their actions as a contracting entity with the government. In addition, civil liability is considered to be indirect, because in the commission of a crime by a natural person, the legal person to which he/she belongs may be linked. Furthermore, there exist measures to prevent or dissuade corruption in private entities, although they are not generally mandatory.⁸

Participant judges commented upon how useful it would be to mandate training and work-related activities among the different authorities working on anti-corruption matters to unify good practices and strategies.

In **Guatemala**, legal entities can be held criminally and civilly liable, and only those considered as "obligated parties" in money laundering legislation can be administratively penalized⁹. Judges reported that the criminal legislation is sufficient to charge directors and representatives of legal entities with criminal liability, in addition to their cancellation. However, in its practical application, there are hardly any precedents in this regard and no penalties for private entities have been registered. There have been convictions against representatives of private entities as natural persons, but they have not gone beyond that level.

Guatemala does not have an anti-corruption legal framework for private sector companies; this means that there are no legislative obligations or mechanisms to encourage the implementation of honesty or compliance programs to inhibit acts of corruption.¹⁰ Some companies follow internal compliance structures as good practice or due to obligations from international operations, but not because of any national requirement.

Judges highlight that it is incredibly damaging to public perceptions of the government's willingness to prosecute corruption when there are public

⁸ Ibid. "Evaluación Anticorrupción en Latinoamérica 2021-2022".

⁹ Ibid. "Evaluación Anticorrupción en Latinoamérica 2021-2022".

¹⁰ Ibid. "Evaluación Anticorrupción en Latinoamérica 2021-2022".

reports of a company involved in acts of corruption and then that company continues to contract with the State.¹¹

In **Mexico**, the anti-corruption legal framework includes criminal and administrative penalties for private entities, and it is possible to take civil action to claim damages for acts of corruption. Additionally, the national legislation (administrative and criminal) establishes that a corporate integrity program can be taken into account to mitigate any penalties.

In spite of this, participant judges have identified these integrity or compliance programs as an area of opportunity to determine whether a legal entity had adequate measures in place to combat corruption. Existence of training programs in this regard was reported; however, they were deemed insufficient.

Similarly to Guatemala, there are no existing precedents of criminal liability related to legal entities, although there are precedents of administrative liability in which companies are disqualified by the Office of the Comptroller from contracting with the government. For this same reason, the participating judges remarked that the legislation has not completely regulated fully administrative and criminal penalties, since private entities, once penalized at the administrative level, claim that a criminal investigation violates the *non bis in idem* principle.¹²

Parties to the proceedings and redress for acts of corruption

Project participants reported that in **Colombia** the legislation to identify individual victims and grant compensation is sufficient. However, obstacles arise at the enforcement level. Although there are rules for seizing assets that can be used to pay compensation, the delay of the judicial apparatus is an obstacle to execute the judgment.¹³

Although the victim is a procedural party (intervener), other types of persons filing complaints cannot be parties thereto. For the stage before the prosecutor intervenes a complainant is not considered a procedural party and,

¹¹ La Prensa “Cuatro empresas señaladas de pagar sobornos a Giammattei aumentaron sus contratos entre 2018 y 2021” February 16, 2022. Available at: <https://www.prensalibre.com/guatemala/justicia/cuatro-empresas-senaladas-de-pagar-sobornos-a-giammattei-aumentaron-sus-contratos-entre-2018-y-2021/>

¹² The non bis in idem principle consists of not punishing the same person more than once for the commission of the same punishable act.

¹³ Razón Pública, “Los retos del sistema judicial en Colombia” August 17, 2020. Available at: <https://razonpublica.com/los-retos-del-sistema-judicial-colombia/>; El Heraldo “El costoso atraso digital de la justicia” June 12, 2020. Available at: <https://www.elheraldo.co/columnas-de-opinion/humberto-mendieta/el-costoso-atraso-digital-de-la-justicia-733765> .

consequently, their procedural rights are limited. That is to say, they can only file a complaint and appeal the rejection of the case, but it is not possible to carry out any other procedural action, which those which participant judges reported as a concrete obstacle for them to be able to follow-up the case. In this sense, according to the Colombian legislation, the public prosecutor's office should act as the victims' representatives; participating judges reported that it is relevant evaluating the prosecutor's performance in respect to the results obtained in corruption cases.

For this same reason, the designation of a civil society organization as a victim in a corruption case where society in general is the affected party is not contemplated in Colombia.

In respect to redressing of damages, if the State is ordered to pay damages for an act of official corruption, the State may go after the offending official to make restitution to the government. There is a project to amend the Constitution and eliminate the action of repetition.¹⁴ The project participants consider that impunity would be generated if this legal definition is eliminated.

In **Guatemala**, procedural legislation considers the determination of the offended party or direct victim as an adhesive complainant, which allows him/her to participate directly in the criminal proceeding.

When society is the offended party, it is incumbent upon the public prosecutor's office, in compliance with the law, to bring action on behalf of society and claim the corresponding redress for restitution and compensation. However, there is no prosecution policy in this regard. When the State is the offended party, the Office of the Attorney General, in its role as the State's attorney, is the entity that shall bring actions for redress. Frequently, this action is exercised in the redress hearing, once criminal liability has been established, and for this purpose a hearing is held on the third day after the ruling has been issued. In some cases, redress sentences have been obtained, but in many other cases, training and preparation are required to prove the damages caused to the State by the sentenced person.

One of the great challenges in Guatemala is that victims are threatened, and it is difficult to get them to testify before the courts out of fear of reprisals. Due to the publicity surrounding of corruption cases that involve powerful individuals or accused entities that seek to obtain impunity through different means. One of these means is to remove independent judges from cases through malicious attacks that include the filing of unfounded complaints and actions to pressure the judges. This was analyzed in depth in discussion paper number 1 of this series.

¹⁴ Razón Pública "Un espectáculo de veras bochornoso: los otros "micos" de la ley anticorrupción" December 12, 2021. Available at: <https://razonpublica.com/espectaculo-veras-bochornoso-los-otros-micos-la-ley-anticorrupcion/>

Mexico participants reported on the efforts by civil society organizations to prove that they are victims in criminal corruption cases, using their mission to demonstrate a standing in specific cases¹⁵. However, this has not been a successful approach for reasons that are explained below.

In April 2021, the Supreme Court of Justice of Mexico ruled that the standing of complainants in acts of administrative corruption must be recognized in order to resort to protection proceedings against irregularities committed by the Ministry of Public Oversight in its investigation¹⁶. This is an important step to give civil society organizations the opportunity to participate in cases where impunity may exist.

In Colombia, Guatemala and Mexico, judge participants reported that an area ripe for legislation is to review how high corruption affects society and societal representation given the level of politicization of the cases. The concepts of legal and legitimate interest have not been sufficiently developed to allow civil society organizations to have greater participation, and there is a particular concern about the effects that proving a civil society organization as a victim may have in terms of redress. Judge participants raised the impractical implications of allowing civil society to claim standing, including proving a large number of organizations as victims.

Additionally, there are cases of corruption that can be difficult to quantify, which is added to the already practical complications. According to the judge participants, these obstacles raise concern because of the deterrent effect that civil society organizations may have in doing this type of work in corruption cases.

The participants of this project are also aware that high-corruption cases cause important and transcendental damages that are very difficult to compensate via a ruling, when damage has already been done. Part of this transcendence has to do with the serious damage caused to human rights.

¹⁵ Animal Político “Inteligencia Financiera pide a jueza reconocer a ONG como víctima en caso Lozoya y darle acceso al proceso” April 17, 2021. Available at: <https://www.animalpolitico.com/2021/04/lozoya-uif-ong-corrupcion-victima/>

¹⁶ Mexicanos Contra la Corrupción y la Impunidad “Suprema Corte resuelve en favor del combate a la Corrupción desde la Ciudadanía” April 29, 2021. Available at: <https://contralacorrupcion.mx/suprema-corte-resuelve-en-favor-del-combate-a-la-corrupcion-desde-la-ciudadania/>

Specialization of judges and prosecutors in corruption and tools to manage complex corruption cases

As part of this project's discussion, there were differing opinions between the judges from Colombia, Guatemala and Mexico on whether there should be specialized jurisdictions and judges for corruption cases.

Those in favor said that specialization is required given the complexity of high-corruption cases. However, those opposed said that the risk of attacks against specialized judges and prosecutors is too great as they would become direct targets.

Others said that while an exclusive jurisdiction is unnecessary, that it is important to strengthen training opportunities to hear complex corruption cases. In this way, possible pressures in these cases are not focused all the time on a small group of judges. In this case, it is considered necessary to improve resources, both for judges and their assistants, and to strengthen the mechanisms for clearing up backlogs in the judicial system.

For context, according to data from the World Justice Project's Rule of Law Index, judicial congestion is one of the most serious problems identified by legal experts in the criminal justice system in all three countries.¹⁷

Colombia does not have specialized anti-corruption judges despite the fact that the administration of Juan Manuel Santos announced in 2017 the creation of an anti-corruption judicial corps. According to participants, those who impart justice understand of the need to create judges with national jurisdiction for corruption cases, since most corruption cases overflow local jurisdiction. However, a particular emphasis was placed on the need to decongest the judicial system so that they can better manage cases since the high workloads prevent any in-depth study of complex cases.

The Attorney General's Office does have a specialized anti-corruption unit that falls under the organized crime division.

In **Guatemala** there are high-risk courts and tribunals that hear certain cases at the request of the Public Prosecutor and by decision of the Supreme Court. The High-Risk Courts and Tribunals were legislatively created in 2009 to hear cases of serious human rights violations, organized crime and corruption.¹⁸

In Guatemala, judge participants reported that judges in these bodies have been attacked by various power groups seeking impunity in corruption cases.

¹⁷ Disaggregated information from the Rule of Law Index provided by the World Justice Project. "Judicial congestion and insufficient number of judges": Colombia, 9; Guatemala, 9.4; Mexico, 7.6 (Numbers out of 10 where 1 is "not a serious problem" and 10 is a "very serious problem").

¹⁸ Impunity Watch, Office for Guatemala "Jueces en Mayor Riesgo: Amenazas a la independencia judicial en Guatemala" February 2019.

Even so, the specialized tribunals are considered necessary, and the importance of strengthening training was raised.

In Guatemala many of the corruption cases are investigated by the Office of the Specialized Prosecutor Against Impunity (FECI). This office has been the target of many attacks to hamper its performance and undermine its independence. Former prosecutor Juan Francisco Sandoval Alfaro was dismissed in July 2021 by the Attorney General of the Republic without a previous dismissal process. As a result of his dismissal, the former prosecutor reported that he was subject to pressure because his office was investigating a corruption case involving the President of the Republic¹⁹. After his dismissal and departure from Guatemala for security reasons, there have been a series of transfers of prosecutors assigned to the FECI and subsequent criminalization against them²⁰.

An emblematic episode of the types of attacks that individual judges face for hearing corruption cases is that of Judge Erika Lorena Aifán Dávila, from the High-Risk Trial Court Group "D" that is presiding over the "Parallel Commissions 2020" case. As a result of this, several individuals seeking impunity filed preliminary proceedings to pierce her judicial immunity, remove her from office and subject her to criminal proceedings. The case became public in mid-February 2020, when the FECI announced the arrest of Gustavo Alejos, a politician previously imprisoned for several corruption cases. The Office of the Specialized Prosecutor charged Mr. Alejos with corruption related to the selection of judges. As Mr. Alejos was hospitalized, as allowed by another judge, due to an alleged medical condition, he was allegedly seen receiving visits from various people involved in the judicial appointment process, including congress members, politicians, judges, chief justices and lawyers.²¹

In **Mexico** there is specialization in corruption matters for administrative judges, but not for criminal judges. Some participant judges from Mexico are

¹⁹ CNN "Remueven al fiscal anticorrupción de Guatemala Juan Francisco Sandoval" July 23, 2021. Available at: <https://cnnespanol.cnn.com/2021/07/23/remueven-fiscal-anticorrupcion-juan-francisco-sandoval-guatemala-orix/>

²⁰ Prensa Libre. "Renuncian otras dos fiscales de la Feci en medio de señalamientos de persecución penal del MP" February 21, 2022. Available at: <https://www.prensalibre.com/guatemala/justicia/renuncian-otras-dos-fiscales-de-la-feci-en-medio-de-senalamientos-de-persecucion-penal-del-mp-breaking/>; Soy 502 "El recuento de salidas de los fiscales de la FECI: cuatro en el exilio" February 21, 2022. Available at: <https://www.soy502.com/articulo/recuento-salidas-fiscales-feci-5313>

²¹ La Hora "FECI detalla manipulación de las Comisiones Paralelas 2020" February 26, 2021. Available at: <https://lahora.gt/feci-detalla-manipulacion-de-las-comisiones-paralelas-2020/>; New York City Bar Association "Declaración del Colegio de Abogados de la Ciudad de Nueva York sobre los ataques a la jueza Erika Aifán Dávila en Guatemala" February 8, 2022. Available at: http://documents.nycbar.org/files/Aifan_Statement_Spanish_22.2.8.pdf; and ILAC "Una Ventana de Oportunidad: Apoyo al Estado de Derecho en Guatemala" March 2020.

of the opinion that specialization in technical issues is necessary, since it is not possible to preside over corruption cases acting as a criminal judge. One of the problems in Mexico is the differences between federal and local jurisdictions. For this reason, the judges who participated in the project reported the need for a more harmonized system to legislatively integrate the federal and state systems as it pertains to corruption.

In Mexico, a federal office of a specialized prosecutor was created for anti-corruption cases; however, neither at the federal level in criminal matters nor at the local level is there a court that exclusively hears these corruption cases, so there is not the same degree of specialization or speed. Most of the Mexican states have also created anti-corruption prosecutorial units with varying degrees of autonomy and jurisdictions.

Regarding administrative anti-corruption judges, they are not part of the judiciary and are not subject to judicial career rules. The appointment ends up being political through a proposal by the President and ratification by the Senate, which does not guarantee independence and impartiality. For the same reason, the appointments of administrative anti-corruption judges have been pending from 2017 to 2021.²² The same has been reported by judge participants at the state and local levels.

Judge participants from all three countries say that, regardless of specialization, it is essential to guarantee judicial independence. Without this, a special anti-corruption jurisdiction generates even more risks of co-optation and attacks. The importance of providing specific physical and legal protections when complex high-profile corruption cases are being presided over, and the need to provide human resources and training for these cases, was emphasized.

There is also agreement among the judge participants that, if the existence of specialized anti-corruption judicial corps is determined, then there should be a broad discussion on the profiles and qualifications regarding knowledge, specialization, experience, and overall integrity.

Challenges in dealing with complex corruption cases

Judge participants from each of the three countries - Colombia, Guatemala, and Mexico, - reported that one of the most important challenges in dealing with complex corruption cases is the politicization generated around them. Due to weak investigations, judges report little margin for action, since those who impart justice also have the obligation to ensure the rights of the accused.

²² Reporte Índigo “Magistrados anticorrupción, el eslabón olvidado” July 7, 2021. Available at: <https://www.reporteindigo.com/reportes/magistrados-anticorrupcion-el-eslabon-olvidado/>

Complex cases take time and a great deal of attention and the concern, according to the judge participants, is that it may affect public perceptions of the judiciary's capacity and overall legitimacy.

In this sense, one of the challenges identified by the judge participants is the deficiency in the actual investigations of corruption cases. Judge participants said that it is necessary to provide more financial and human resources to prosecutors and comptrollers, including professionalization and training to manage investigations in corruption cases. In particular, they report that it is important to strengthen international cooperation mechanisms such as international legal assistance, since many corruption cases transcend borders, and information from investigations in other countries can be fundamental to an investigation.

Another common challenge between the three countries and identified by the judge participants is the overall lack of training and professionalization of judicial staff (including assisting personnel) to hear complex corruption cases that involve a large amount of technical information presented by prosecutors and controllers, and the defense.

In the specific case of Colombia, the aforementioned challenge of high workloads was emphasized by the participants, which further complicates in-depth analysis needed for complex corruption cases.

Another particular challenge is the evaluation of evidence in complex cases, as it requires highly technical knowledge and support, especially in cases of corruption crimes involving financial elements. For this, judge participants from Colombia highlighted the importance of having training and the support of specialized bodies which can provide this support.

Judge participants also raised concerns over the evasion of liability of private entities through strategies such as creating a new legal entity or changing a corporate name. Another obstacle is the delay of the State to pursue the assets of corporations. Although there is formally the definition of criminal forfeiture or other classifications with similar effects, a long delay has been present throughout its implementation, and this in turn increases the chances of impunity in cases of corruption.

An additional challenge identified by judge participants from Colombia are the difficulties to process a case if the accusation of corruption does not come from a person who is directly involved in the act. This reinforces the importance of cooperation mechanisms with informants or protected witnesses.

In **Guatemala**, one of the challenges is the independence and capacity to have well-integrated investigations, and the lack of support from the judicial system for judges who hear complex corruption cases.

In **Mexico**, one of the challenges identified by participants is the use of procedural mechanisms to obtain cooperation from the accused that, in turn, prevents holding them to account for their corruption offenses.

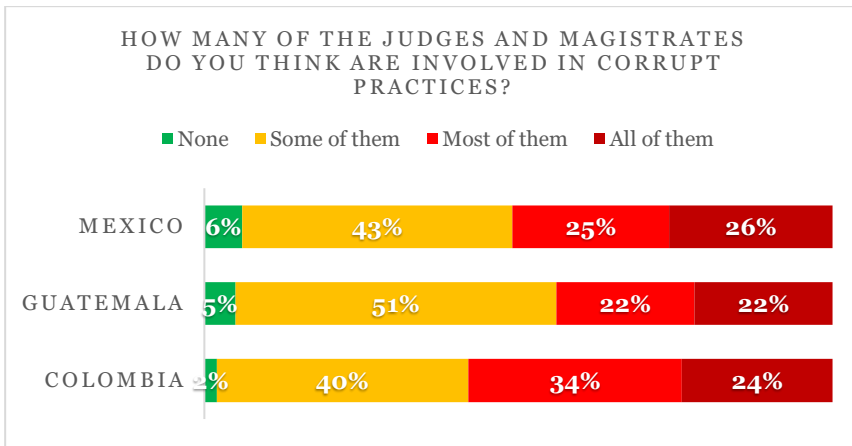
In addition, judges identified the lack of capacity in prosecutor offices amid the complexity of evidence in criminal corruption cases due to the high standard of proof.

In Mexico, judge participants commented on the lack of harmony between the federal and state provisions, since substantive criminal procedures are different in each the states, adding that some legal definitions have been established, but there are no mechanisms to make these actions effective.

Judge participants from all three countries said that corruption cases involving high-level current or former public officials have become highly politicize and prosecutor offices are building cases to investigate and prosecute people from past administrations or are taking advantage of cooperation mechanisms to generate impunity.

3 Anti-corruption efforts within the Judiciary

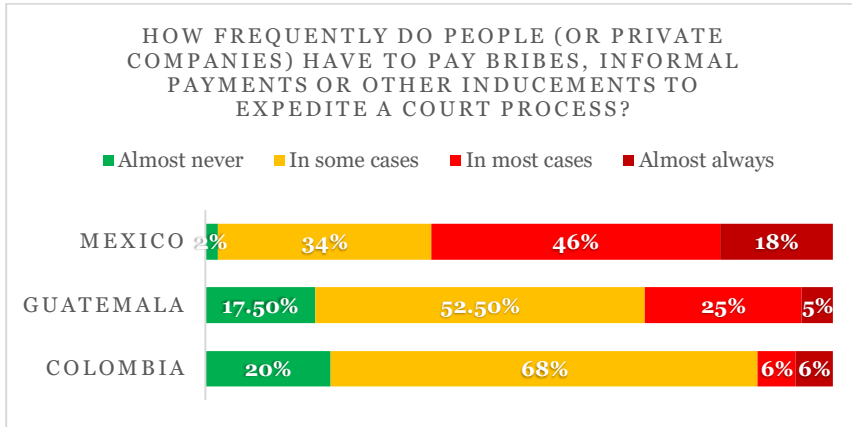
Judicial branches are not exempt from acts of corruption. According to data from the World Justice Project Rule of Law Index, in Colombia, Guatemala and Mexico, respectively, only 2, 5 and 6 percent of the general population believe that judges are free from corruption.²³



Legal experts consider that just in few cases it is not necessary to incur in acts of corruption to speed up the judicial process.²⁴

²³ World Justice Project, General Population Poll, question q2g. The data derive from the General Population Poll from the Rule of Law Index, published by The World Justice Project, Colombia N=977, Guatemala N=953, México N=961. The information related to this question was obtained in 2017 for México and in 2018 for Guatemala and Colombia.

²⁴ World Justice Project, Rule of Law Index 2021, Qualified Respondents' Questionnaire on Civil and Commercial Law question 28e, Colombia N=35, Guatemala N=40, México N=41.



In **Colombia**, a corruption network known as the "toga cartel" that included members of the judiciary was uncovered in 2017, which showed that corruption crept into the judicial system of that country by helping political elites manipulate investigations against them in exchange for bribes of hundreds of thousands of dollars.²⁵

In **Guatemala**, the "Parallel Commissions" case²⁶ in 2018 disclosed a corruption network involving judicial officials who interfered in appointments to the country's high courts. This facts of the case were repeated in 2020, identifying several persons on duty in the judiciary.²⁷

In **Mexico** there are cases, both at the federal and local levels, of judges who took bribes to provide a certain resolution, as well as instances of corruption in court administration.²⁸ In this regard, efforts to counteract judicial corruption are discussed below.

²⁵ Insightcrime "El 'Cartel de la Toga' revela alto nivel de corrupción en las cortes de Colombia" March 15, 2021. Available at: <https://es.insightcrime.org/noticias/cartel-toga-revela-corrupcion-colombia/>

²⁶ International Commission against Impunity in Guatemala (CICIG), Statement CICIG, Caso Comisiones Paralelas, 17 February 2018. Available at: https://www.cicig.org/comunicados-2018-c/com_023_20180227/

²⁷ See section "Especialización de jueces y fiscales en temas de corrupción y herramientas para atender casos complejos de corrupción".

²⁸ El Economista "Reconoce Zaldivar que persiste corrupción en tribunales" July 8, 2021. Available at: <https://www.eleconomista.com.mx/politica/Reconoce-Zaldivar-que-persiste-corrupcion-en-tribunales-20210708-0010.html>; El Sol de México "Denuncian a 25 jueces y magistrados y solo uno pisa la cárcel" August 3, 2021. Available at: <https://www.elsoldemexico.com.mx/mexico/justicia/denuncian-a-25-jueces-y-magistrados-y-solo-uno-pisa-la-carcel-7038486.html>; Los Angeles Times "Jueces y magistrados mexicanos coludidos con préstamos leoninos en la Ciudad de México" July 2, 2021. Available at: <https://www.latimes.com/espanol/mexico/articulo/2021-07-02/opinion-jueces-y-magistrados-mexicanos-coludidos-con-prestamos-leoninos-en-la-ciudad-de-mexico>

Integrity and corruption prevention policies for the legitimacy of the judiciary

One of the efforts of judiciaries reported by participants at the regional level in Colombia, Guatemala, and Mexico, are establishing policies within the judiciary itself that encourage integrity and prevent corruption.

When judges settle disputes there is always a party that is not satisfied with the ruling. The challenge for the judiciary, according to participants, is that even when a final decision may not be favorable to all parties, there should be a sense of conformity that the decision was fair and adjudicated by an impartial institution. When there are suspicions of a lack of integrity or corruption by a judge then the overall legitimacy of the decision and proceeding is put into question. This affects not only the judge in particular, but the judiciary overall.

While these efforts have been carried out to a greater extent in the executive branches, the judiciary has adapted and adopted some of policies to deter judicial corruption.

In **Colombia** there are several preventive and repressive mechanisms including internal judicial integrity policies and a section that carries out surveillance of judges and applies corrective measures in all jurisdictions as reported by participant judges. Additionally, there is the Office of the Public Prosecutor, which acts as an investigative mechanism to protect against arbitrary decisions in criminal trials. There is also the tutela action when one of the parties does not agree with the resolution of a case. And, at the corrective level, there are disciplinary and criminal procedures that are available for forceful application when a judge is accused of corruption.

The judiciary in Colombia does not have its own Code of Ethics and uses the Ibero-American Code of Ethics. However, there is a legal disciplinary code for judges that regulates their conduct. Participant judges said that although there are a variety of penalties, the most severe penalties are generally applied, and the principle of proportionality is not followed. These penalties can loom large over judges; in addition to the fact that investigations are often announced without waiting for their results, which has a negative impact on the public perception of the Judicial Branch.

In Colombia, declarations of assets and income, as well as the registration of conflicts of interest, are public and mandatory for magistrates, judges and administrative staff.

Judge participants noted that an area of opportunity could be that the efforts to discipline justice operators do not correspond to the size of the profession. There is a judicial discipline commission within the judicial branch which is responsible for the discipline of prosecutors, attorneys and lawyers, meaning, about 50 thousand people. Therefore, it is impossible to monitor and deal with corruption cases appropriately.

In terms of prevention, judge participants said that there is a need for guidance on the management of conflicts of interest and ethical dilemmas, not just written codes. Although there are written rules, there is a need for instances that can resolve doubts and carry out a more accurate prevention function.

Colombian judges participating in the project found that one of several areas of risk for the judiciary through the role of the court clerk. Ensuring that acts of corruption are not committed by the clerk ends up being the responsibility of the judges. This implies not only more work but also the need for training to be able to carry out this task. In addition, there is a need for training in integrity matters for these staff members.

In **Guatemala** there are two institutions that control discipline matters for the judiciary: the Supreme Court of Justice and the Judicial Career Council. The judicial branch does have a Code of Ethics.

As part of the internal integrity policies, judges are subject to Court Supervision which is under the Supreme Court. When there is a complaint against a judge, it is the Court Supervision that recommends whether an action should be opened. If an action is not opened, the process is concluded. If they do open one, there is a hearing before the Judicial Disciplinary Board and the ruling of the Board may be appealed.

One of the problems raised by judge participants is that these disciplinary mechanisms are used to question sentences, affecting judicial independence. On the other hand, there have been cases of misconduct and corruption that have been denounced, and even though they are serious, no penalties are imposed, light penalties are imposed for serious conduct, or the Supreme Court improperly leaves the penalties null and void.²⁹

There is a training program on integrity that is taught to all Judicial Branch staff members. The training covers several topics including the values of the judiciary and performance of outreach activities, but it is felt by the judge participants that more specific monitoring mechanisms are lacking. The judge participants insist that an integrity policy should be applied from the process for appointment of judges and other judicial staff members. The competitive examinations should include ethical tests.

The sworn asset position statement is mandatory by law in Guatemala. It is made upon taking office and is subsequently updated every January.

The efforts of the Guatemalan Association of Judges for Integrity (AGJI) in corruption prevention mechanisms that are not applied by the judiciary in general have been identified by the judge participants as good practice. The

²⁹ See, as an example: La Hora “Archivan denuncias hechas por Aifán contra auxiliar de Tribunales” September 9, 2021. Available at: <https://lahora.gt/archivan-denuncias-hechas-por-aifan-contra-auxiliar-de-tribunales/>

AGJI is of the view that a judicial function of integrity legitimizes the actions performed by the judiciary. For the same reason, in addition to the asset position statement that judges must submit, members of the AGJI have published on its website, without any legal obligation whatsoever, asset position statements that were created in accordance with international best practices.³⁰ This exercise is particularly important because it is the first official entity in Guatemala to make public asset statements.

In **Mexico**, the problem of legitimacy is particularly important at the national level, as citizens in general do not distinguish between federal and state judges.

Mexico has a Decalogue and a Code of Ethics whereby the basic principles of integrity are established. Ethics, as a result of the concept of the judiciary in constitutional matters, has become a generator of the modernization and professionalization of the administration of justice according to the judge participants. At the federal level, the current Chief Justice of the Supreme Court of Justice of the Nation and of the Judiciary Council has taken efforts to strengthen the mechanisms for sanctioning corrupt judicial personnel as a banner cause. Although this is a positive initiative, judge participants said that it is important to carry out these processes in compliance with all procedural rights and international standards. Similarly, in administrative matters, efforts have been doubled to prevent and sanction corruption in the administrative actions of the judiciary.

In the Federal Judicial Branch, the creation of a special commission presided over by the Comptroller of the Federal Judiciary Branch to hear cases of nepotism has been identified by the judge participants as a good practice, since nepotism is one of the problems that most affects the legitimacy of the judiciary.

In Mexico, judge participants also identified public deliberation as a good practice to prevent corruption at the regional level. The Supreme Court of Justice meets publicly, and the sessions are broadcasted in the Judicial Channel on the web page. This has been difficult to replicate at the national level with other courts because of the cost.

Lastly, in Mexico there is an obligation for all public officials to file asset and interest position statements. The important thing in this point, according to the judge participants, is that the verification of the information be an effective mechanism for the prevention of acts of corruption.

Justice enforcement officials in all three countries said that the first integrity policy should be to evaluate ethical merit for entry into the judicial career and to strengthen the judicial career. A person trained to be a judge is more likely

³⁰ Guatemalan Association of Judges for Integrity “Comunicado 08-21 AGJI. La Asociación Guatemalteca de Jueces por la Integridad presenta declaraciones de intereses de sus integrantes.” August 25, 2021. Available at: <https://bit.ly/declaracionesAGJI>

to behave according to high standards of integrity than a political appointee. Judge participants said that they believe this is because someone who dedicates his or her life to the judiciary has much more to lose from an act of corruption than someone who sees judicial office as a temporary position.

In the same line of reasoning, the need to strengthen mechanisms for ongoing training and capacity building for the integrity of judicial staff is commonly identified by the judge participants. In addition, the participation of civil society may be key to bringing these efforts to a wider societal level and changing the public view of the judiciary as a corrupt entity.

In all three countries, the existence of reprisals for judges who denounce cases of corruption, sometimes within the judiciary itself, has been mentioned by the participants, to have a deterrent effect.

3 Recommendations

National governments (executive, legislative and judicial powers)

- 1 Strengthen judicial capacity for corruption cases and depoliticize investigation entities such as police and prosecutors so that cases can be prosecuted with sufficient resources and in accordance with the law.
- 2 Promote judicial cooperation in terms of the UNCAC and the Report of the Special Rapporteur on the Independence of Judges and Lawyers.³¹
- 3 Harmonize anti-corruption legislation with international standards to provide adequate legal tools to judges hearing corruption cases:
 - Colombia should legislate for the responsibility of legal entities and clearly determine integrity obligations for legal entities.
 - Guatemala should legislate on integrity obligations for private entities, establishing it as a requirement for their registration, and create incentives for compliance of the integrity obligations.
 - Mexico must consolidate the implementation of the National Anticorruption System.
 - The countries analyzed should organize debates on the role of civil society organizations in promoting corruption cases, they play important roles to counter impunity as there is a serious lack of follow-up by political entities of corruption cases, including considering:
 - Accepting *amicus curiae* briefs
 - Including civil society as parts that can provide formal support in corruption cases
 - Strengthen mechanisms to guarantee full compensation and redress for corruption cases. Judges should develop formal criteria for full compensation and redress for corruption cases, including the right to the truth.

³¹ Report of the Special Rapporteur on the independence of judges and lawyers. A/72/140. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/216/41/PDF/N1721641.pdf?OpenElement>

- 4 Provide sufficient resources to judges hearing corruption cases, to ensure their independence:
 - Providing enhanced physical and legal protection to judges hearing high-profile corruption cases.
 - Providing sufficient human and financial resources to judges presiding over complex corruption cases, developing new models of judicial training in terms of anti-corruption.
 - Create and implement an anti-corruption training program for judges and assisting judicial staff.
- 5 Develop mechanisms to professionalize the appointment of specialized anti-corruption judges based on merit and high standards of integrity, avoiding the use of political appointments.
- 6 Include the principles of integrity in the Bangalore Principles of Judicial Conduct as an integral part of basic judicial training and include principles of ethics and integrity in trainings throughout the judicial career.
 - Include the principles of integrity in the Bangalore Principles of Judicial Conduct as an integral part of basic judicial training:
 - Require training and examination in ethics and integrity for people entering the judiciary.
 - Include training on integrity issues for staff supporting judges.
 - Create and review codes of ethics and conduct in the judiciary.
- 7 Develop and strengthen institutional capacity to address cases of corruption within the judiciary:
 - Strengthen disciplinary systems, including providing sufficient human and financial resources.
 - Ensure that disciplinary systems are not used for political ends by, increasing transparency of the disciplinary processes and their outcomes. In Mexico, carry out a constitutional reform of the Federal Judiciary Council, to incorporate an effective remedy for the administrative liability of judges.
 - Consult judicial personnel in how to orient the judiciary's work on integrity.

- 8 Develop and strengthen protection mechanisms for persons, including judicial staff who report acts of corruption, involving guarantees to avoid reprisals or forced transfers of judges.
- 9 Include civil society organizations and other actors in the legal community in anti-corruption efforts within the judiciary.

National and international legal community

- 10 Conduct and support efforts to train judges in anti-corruption cases, including reviewing integrity programs of corporations.
- 11 Conduct and support training programs on how to judge cases involving complex investigations.
- 12 Organize dialogue between prosecutors and judges on corruption issues, as well as other justice actors and the civil society.
- 13 Conduct training programs on ethics, integrity and the prevention of conflicts of interest that include not only all levels of judicial operators, but also other actors from the national and international legal community.
- 14 Organize international dialogue on judicial cooperation in corruption cases.
- 15 Support efforts by independent judges, judicial associations and civil society to promote integrity in the judiciary.

Judicial associations

- 16 Adopt specific integrity mechanisms, starting with membership in the associations³².
- 17 Build a sense of citizenship around anti-corruption efforts through training and dissemination activities on the importance of anti-corruption efforts by the judiciary.

³² An example of concrete mechanism is the effort conducted by the Guatemalan Association of Judges for Integrity to publish interest declarations. See section 5A.

4 Description of the *Judges as Peacebuilders* Project

This discussion paper is the second in a series of three documents, published as part of the **Judges as Peacebuilders** project. The aim of the project is to promote peace and societal stability by supporting and empowering judges and justice sector actors in Colombia, Guatemala, and Mexico in their fight against corruption and impunity, while upholding judicial independence. The project is framed according to the 2030 Agenda, especially the Sustainable Development Goal (SDG) 16: Promote fair, peaceful, and inclusive societies and SDG 5: Achieve gender equality and empower all women and girls.

The **Judges as Peacebuilders** is an initiative of the International Legal Assistance Consortium (ILAC), funded by the Swedish government agency for peace, security and development, Folke Bernadotteakademin. The project was implemented in collaboration with ILAC members, the Cyrus R. Vance Center for International Justice of the New York City Bar Association (Vance Center) and the International Association of Women Judges (IAWJ).

As part of this project, roundtables were held with a group of judges from Colombia, Guatemala, and Mexico. Through the roundtables, participants came together to first, review the situation at both national and regional levels, and develop recommendations and possible solutions to improve anti-corruption efforts, judicial diversity and to strengthen the independence of the judiciary; second, to shed light on these causes and contribute to policy dialogue at both national, regional, and international levels.

These papers aim to serve as a tool for national partners to elevate their arguments and recommendations at the policy level, and for the promotion of judicial independence and the rule of law.

The other papers that are part of this series are Discussion Papers I and III, are respectively on judicial security and independence and diversity in the judiciary.

ILAC is a global rule of law consortium providing technical assistance to justice sector actors in fragile and conflict-affected countries. ILAC's mission is to rapidly respond to and assess the needs of the justice sector in conflict-affected and fragile countries, and help strengthen the independence and resilience of justice sector institutions and the legal profession. Today, ILAC has more than 80 members including individual legal experts as well as organizations that represent judges, prosecutors, lawyers and academics worldwide.



**International
Legal Assistance
Consortium**

ILAC Secretariat

Stockholmsvägen 21,
SE-122 62 Enskede, Stockholm
Sweden

Phone: +46 (0)8-545 714 20
info@ilac.se

www.ilacnet.org



CYRUS R. VANCE CENTER
FOR INTERNATIONAL JUSTICE

The Cyrus R. Vance Center for International Justice of the New York City Bar Association advances global justice by engaging lawyers across borders to support civil society and an ethically active legal profession. The Vance Center is a unique collaboration of international lawyers catalyzing public interest innovation that brings together leading law firms and other partners worldwide to pioneer international justice initiatives and provide pro bono legal representation to social justice Non-Governmental Organizations.



International Association
of Women Judges

Read the report online:



As the only global network of women judges, the International Association of Women Judges (IAWJ) envisions a world where gender equality, respect for human rights, and inclusive systems are the norm. The IAWJ was founded nearly 30 years ago with a vision of increasing the number of women judges and promoting equal justice for women and girls throughout the world. Today, the IAWJ has grown into a highly respected organization with over 6,100 judges in more than 100 countries and territories.