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Forced Disappearances?

Bridget Conley-Zilkic

A Challenge to Those Working in the Field of Genocide
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INTRODUCTION



SUR 16 was produced in collaboration with the **Regional Coalition on Citizen Security and Human Rights**.¹ Every day individuals are subjected to countless forms of violations of their security. Entire impoverished communities have been deprived of their right to participate in the decisions about their own security; in some areas, citizens are exposed to violence both from criminals and from police allegedly combating crime; developments in the regional and international levels as well as in the local and national levels have been disparate and unsatisfactory. By discussing those topics and others, the articles in the dossier exemplify both the challenges and the opportunities in the field of citizen security and human rights.

The non-thematic articles published in this issue, some of which also touch upon the issue of security, albeit more tangentially, provide insightful analyses of other pressing matters relating to the field of human rights: violence against women, forced disappearances, genocide, the right to self-determination, and migrations.

Thematic dossier: Citizen Security and Human Rights

Security and human rights hold an intrinsic – and problematic – relationship in regions with high rates of criminal violence. In these contexts, lack of security can be both a consequence and a pretext for human rights violations, as human rights can be presented as impediments to effective policies against crime. It is precisely to conciliate the agendas of security and human rights, particularly in Latin America, that the concept of citizen security has emerged.

Citizen security places the person (rather than the state or a political regime) as the main focus of policies directed at preventing and controlling crime and violence. In Latin America, such paradigm shift took place in the last few decades, as part of the transition from military dictatorships to democratic regimes. The concept of citizen security seeks to reinforce the idea that security goes hand-in-hand with protecting human rights, and therefore clearly departs from the authoritarian idea of security as protection of the State, common in the times of military dictatorships in Latin America and elsewhere.

In its 2009 “Report on Citizen Security and Human Rights”,² the Inter-American Commission on Human Rights (IACHR) defines citizen security in the following terms: “The concept of citizen security involves those rights to which all members of a society are entitled, so that they are able to live their daily lives with as little threat as possible to their personal security, their civic rights and their right to the use and enjoyment of their property” (para. 23). Thus, the concept of citizen security used by the IACHR includes the issues of crime and violence and their impact on the enjoyment of personal freedom, specifically property and civil rights.

The report by the IACHR also intends to inform the design and implementation of public policies in this area. In paragraphs 39-49, the Commission highlights the States’ obligations regarding citizen security: (i) Taking responsibility for the acts of its agents as well as for ensuring the respect of human rights by third parties; (ii) Adopting legal, political, administrative and cultural measures to prevent the violation of rights linked to citizen security, including reparation mechanisms for the victims; (iii) Investigating human rights violations; (iv) Preventing, punishing, and eradicating violence against women, pursuant to the Convention of Belém do Pará.

In order to fulfill such obligations, the States should adopt public policies in the area of citizen security that incorporate human rights principles and that are comprehensive in their rights’ scope; intersectorial; participatory in regards to the population affected; universal, i.e. inclusive without discriminating vulnerable groups; and, finally, intergovernmental, involving different levels of government (para. 52). Even though these guidelines do not serve as a prescription, their focus on the actual impact of security policies on the enjoyment of the rights of individuals, their attention to the multi-sectorial nature and participatory mechanisms of those policies, as well as the obligation of preventing crime and violence by tackling its causes, serve as solid guide for States or for civil society organizations and victims wishing to advocate for security policies that promote human rights.

In other words, the concept of citizen security highlights that security policies must be, at very least, people-oriented, multi-sectorial, comprehen-

1. The Coalition is formed by the following organizations: Center for Legal and Social Studies (CELS) – Argentina, Brazilian Public Security Forum – Brazil, *Instituto Sou da Paz* – Brazil, Center for Development Studies (CED) – Chile, Center for Studies on Citizenship Security (CESC) – Chile, Center for the Study of Law, Justice and Society (Dejusticia) – Colombia, Washington Office on Latin America (WOLA) – United States, Myrna Mack Foundation – Guatemala, Institute for Security and Democracy (INSYDE) – Mexico, Miguel Agustín Pro Juárez Human Rights Center (Prodh Center) – Mexico, Fundar, Center of Analysis and Research – Mexico, *Ciudad Nuestra* – Peru, Legal Defense Institute (IDL) – Peru, Support Network for Justice and Peace – Venezuela. Representatives of the Andean Development Corporation (CAF) and the Open Society Foundations also took part in some of the meetings of the coalition.

2. Inter-American Commission on Human Rights, “Report on Citizen Security and Human Rights”, Doc. OEA/Ser.L/V/II. Doc.57, 31 December 2009, available at: <http://www.cidh.org/countryrep/Seguridad.eng/CitizenSecurity.Toc.htm>. Last Accessed on: May 2012.

sive, context-specific and prevention-oriented,³ as well as participatory and non-discriminatory. The papers in the present dossier reveal how daunting and necessary this task is.

In **Citizen Security and Transnational Organized Crime in the Americas: Challenges in the Inter-American Arena**, Peru's former interior minister Gino Costa examines some of the main challenges and advances in inter-American efforts to combat organized transnational crime using the concept of citizen security. In **The Current Agenda of Security and Human Rights in Argentina**, researchers from Argentina's Center for Legal and Social Studies (CELS) describe the public security agenda in Argentina within the regional context, analyzing the first year of operations of the country's Ministry of Security and its attempt to implement policies incorporating the concept of citizen security. This same department is the subject of an additional article appearing in this issue. In **Civic Participation, Democratic Security and Conflict between Political Cultures - First Notes on an Experiment in the City of Buenos Aires**, Manuel Tufro examines a pilot program recently implemented by the Argentinian ministry with the aim of expanding public participation in the planning of local public safety policies. In the essay, Tufro analyzes the conflicts arising from this attempt to disseminate a practice in line with the ministry's agenda of promoting "democratic security" in places in which mechanisms of participation owe their existence to what he calls a "neighborhood political culture".

In **The March of Folly and Drug Policy**, Pedro Abramovay uses Barbara Tuchman's work to examine drug policies that have been implemented since 1912, arguing that they are example of policies that are not in the interest of the community being served by the policymakers who designed them.

Finally, this issue's dossier includes a double interview about the recent implementation of UPPs (Pacifying Police Units) in poor communities of Rio de Janeiro (Brazil) previously dominated by criminal organizations. The interviewees are José Marcelo Zacchi, who helped design and implement a government program to expand social and urban services in the areas served by the UPPs, and Rafael Dias, a researcher at human rights NGO Justiça Global.

Non-thematic articles

This issue includes five additional articles relating to important human rights issues.

In **Extraordinary Renditions in the Fight against Terrorism – Forced Disappearances?**, Patrício Galella and Carlos Espósito argue that the practice of kidnappings, detentions and transfers of presumed terrorists by United States officials to secret prisons in third-party States where they are presumably tortured – euphemistically called "extraordinary renditions" – guard similarities with the forced disappearance of persons. The distinction is important because

it means that perpetrators of forced disappearances may be prosecuted as having committed crimes against humanity.

Also dealing with crimes against humanity is an article by Bridget Conley-Zilkic in which she examines the field of genocide prevention and response as it furthers its professional development. In her essay, titled **A Challenge to Those Working in the Field of Genocide Prevention and Response** she explores some of the conceptual and practical challenges facing this field, such as how to define genocide, what can organizations do to prevent it, who are the subjects of these organizations' work, and how to measure success.

Another article, **The ACHPR in the Case of Southern Cameroons**, critically analyses decisions by the African Commission on Human and People's Rights concerning the right of self-determination. In it, Simon M. Weldehaimanot proposes that the case of Southern Cameroons has ignored previous jurisprudence and made this right unavailable for "peoples".

Also touching upon challenges to the sovereignty of nation-states is **The Role of the Universalization of Human Rights and Migration in the Formation of a New Global Governance**, in which André Luiz Siciliano reviews the literature on migration to propose that it is an issue which is still mired in anachronistic Westphalian notions that impede the broad and effective protection of fundamental human rights, as opposed to recent concepts such as cosmopolitan citizenship and the responsibility to protect.

In our final article, researchers from Brazilian think-tank Cebrap (Centro Brasileiro de Análise e Planejamento) examine challenges to the constitutionality of recent legislation on domestic violence, the so-called Maria da Penha law. In **Law Enforcement at Issue: Constitutionality of the Maria da Penha Law in Brazilian Courts**, the authors show that most judicial opinions favor positive discrimination of women in order to combat a scenario of chronic inequality. In a context of historical and ongoing oppression of women by men, they argue, treating men who commit domestic violence against women more stringently than women does not hurt the over-arching principle of non-discrimination.

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3. See the report developed by the United Nations Development Programme (UNDP) in partnership with the Inter-American Institute of Human Rights (Costa Rica), available at: http://www.iidh.ed.cr/multic/default_12.aspx?contentid=ea75e2b1-9265-4296-9d8c-3391de83fb42. Last accessed on: May 2012.



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ABSTRACT

After the attacks of September 2001, U.S. President George W. Bush declared a global 'war' against international terrorism and authorized a program of kidnappings, detentions, and transfers of presumed terrorists to secret prisons in third-party States, in which it is suspected that torture was used as a means of interrogation with the goal of obtaining information about future terrorist attacks. This practice, called 'extraordinary rendition,' under certain conditions goes further than arbitrary detention and shows similarities to the forced disappearance of persons. The distinction is relevant, among other reasons, because cases of Extraordinary Renditions that could be classified as forced disappearance may constitute a violation of *ius cogens*, generating international responsibility for States and the possibility of perpetrating crimes against humanity for individuals who commit these illegal acts.

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KEYWORDS

Extraordinary Renditions – Forced disappearances – *Ius cogens* – Crimes against humanity



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EXTRAORDINARY RENDITIONS IN THE FIGHT AGAINST TERRORISM. FORCED DISAPPEARANCES?

Patricio Galella and Carlos Espósito*

If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.¹

1 Introduction

After the attacks of September 2001, U.S. President George W. Bush declared a global ‘war’ against international terrorism (BUSH, 2001) in which, eluding the usual channels of international cooperation, he authorized a program of abductions, detentions, and transfers of presumed terrorists to secret prisons in third-party States. It is suspected that torture was used as a means of interrogation there, with the aim of obtaining information about future terrorist attacks. This practice of secret detentions, abductions on foreign territory, and transfers without respect for the minimum guarantees of due process has been given the name “extraordinary rendition’ (SADAT, 2005; WEISSBRODT; BERQUIST, 2006).²

As Judge Antônio Cançado Trindade indicated in his reasoned opinion in the *Goiburú* case, Extraordinary Renditions is reminiscent of the transnational practices of Operation Cóndor (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, Voto razonado, párra. 55), a program that constitutes a clear case of State terrorism according to the Inter-American Court of Human Rights (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, párra. 66). Operation Cóndor was plotted by military regimes in South America in the 1970s, and included a secret plan for information sharing, illegal detention, torture, forced disappearance and extrajudicial executions of political opponents based on the doctrine of national security. We acknowledge that there are many differences between these two situations

*We are grateful to Alejandro Chehtman and Pietro Sferrazza for their comments on a previous version of this work.

regarding their justifications, their methods, and their ends. Nevertheless, the comparison is useful to demonstrate how the evolution of international law makes it possible for some detentions to be qualified as forced disappearances under the definition of the term ‘extraordinary rendition.’ In fact, the Extraordinary Renditions program includes cases in which the presumed terrorists were secretly detained and sent to ‘black holes’ without any information or record of their fate or whereabouts due to the authorities systematically denying any such detentions.

In this paper, we maintain that, under certain conditions, Extraordinary Renditions goes beyond the concept of arbitrary detention and, as a consequence, shows similarities to the concept of forced disappearance of persons. This distinction is relevant, among other reasons, because cases of Extraordinary Renditions that can be qualified as forced disappearances could constitute a violation of the norms of *ius cogens*, generating an aggravated international responsibility for those States who commit these illegal acts and the possibility of trial for crimes against humanity for individual perpetrators.

2 Forced disappearances in international law

The concept of forced disappearance of persons first appears in Hitler’s “Night and Fog Decree” of December 17, 1941 which stated that any person who, in territories occupied³ by Germany, threatened the security of the German State or of the occupying forces should be transported in secret to Germany where, without further ado, they would disappear. At the same time, it was strictly forbidden to give information on the fate of these people, thereby creating a situation of despair and uncertainty not only for the family of the person who had disappeared but also for the general population. (ESTADOS UNIDOS DE AMÉRICA, 1942).

This phenomenon resurfaced as a policy of systematic state repression in the 1960s, when Guatemalan security forces used forced disappearance as part of its campaign against the insurgency. This strategy was subsequently picked up by other countries on the continent when military regimes were installed in Argentina, Brazil, Chile, and Uruguay (NACIONES UNIDAS, 2002, p. 7). As of this time, forced disappearance acquired international pre-eminence and attention.

The United Nations (UN) first included the subject in its agenda in the 1970s, but it was only in 1980 that it approved the creation of a Working Group designed to act as a link between the victims’ families and the States. This was the first thematic procedure of the Commission on Human Rights.⁴ On February 13, 1975, encouraged by the situation in Cyprus, the UN Commission on Human Rights urged the States to make efforts to locate people whose whereabouts were unknown (NACIONES UNIDAS, 1975). Due to it being an armed conflict ruled by international humanitarian law, the term used was ‘missing persons’ or ‘persons unaccounted for’ (NACIONES UNIDAS, 2002, párra. 12). But in 1977, with regards to Chile, the UN General Assembly expressed its concern over the “disappearance of people for political reasons” (NACIONES UNIDAS, 1977) and on December 20, 1978, with Resolution 33/173, it made reference to the “forced or involuntary disappearance of people due to excesses committed by authorities charged with law enforcement or security, or by analogous organizations.”

These events signified the beginning of a codification process of forced disappearances in international law. Concerned about the phenomenon's persistence, the UN General Assembly took the first step in 1992 by approving the Declaration on the Protection of all Persons from Enforced Disappearance. In 1994, the Organization of American States approved the first legally-binding instrument on the matter: the Inter-American Convention on the Forced Disappearance of Persons. The issue was taken further in 1998 when the Chairperson-Rapporteur of the Working Group on the administration of justice at the UN presented a Preliminary Draft Convention inspired by the 1992 Declaration and the Convention against Torture. The process was concluded in 2006 with the adoption of the Protection of all Persons from Enforced or Involuntary Disappearance by the UN General Assembly of the International Convention (GALELLA, 2011).

According to Article 2 of the International Convention, every forced disappearance contains at least three constitutive elements and a direct consequence. The first element is the privation of freedom, whichever way this is carried out. Although in most disappearance cases the privation of freedom is produced without following legal procedures, detention can also be carried out following a judicial order. In this case, it is only after the authorities take detainees to secret detention centers that they refuse to provide information or make the person available to the judicial authorities. The difference between arbitrary detention and forced disappearance lies precisely in that in the latter, the State refuses to either recognize its participation in the detention or facilitate information on the fate of the detained person (OTT, 2011, p. 32). The second characteristic element is the participation of the State,⁵ whether directly, through its agents, or by its acquiescence in allowing the practice within its borders by people outside of state institutions. The necessary participation of the State in any of these forms is the defining and characteristic element and this has been upheld by civil society organizations that do not recognize the existence of a forced disappearance without State participation. If the State does not participate, we must use the concept of illegitimate privation of freedom, which should be challenged by the State. This difference is reflected in the International Convention, which establishes the obligation of investigation and punishment of cases committed by non-State agents in Article 3. The third element is the refusal by the authorities to provide information on the whereabouts and fate of the missing person. This refusal affects not only the missing person, but also their families, causing anguish and despair. The refusal extends to the actual existence of the detention and to the release of information regarding the whereabouts of the missing person. This refusal leads to the direct consequence mentioned above: the removal of the person from the protection of the law. This is the case because it automatically carries with it the impossibility of the victim and their family questioning the legality of the person's detention before a competent judge and of having access to the guarantees of due process inherent to a State governed by the rule of law. Through forced disappearance, the State not only takes away the freedom, and, in most cases, the life of the detainee, but it is also done secretly, leaving no trace. When the State has no intention of demonstrating that the person is effectively missing, it leaves the victim in a state of total defenselessness (GOMEZ CAMACHO, 2007, p. 28-29).

3 International cooperation in criminal matters and its deviations

Information and intelligence sharing as well as the coordination of strategies in the fight against terrorism has as its ultimate goal the prevention of terrorist threats from becoming a reality. If these materialize and those responsible are outside the jurisdiction of the State affected, cooperation procedures can be used, such as extradition, deportation, or transfer of a person with the aim of proceeding to their judgment or the fulfillment of an existing conviction (EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, 2006).

Extradition is the most important example of international cooperation in judicial terms. It consists of the handing over of a fugitive from justice by one State to another State for their judgment or to comply with the execution of a sentence that has been previously handed down. This is a formal procedure regulated by various international treaties. In the European sphere, there is the European Convention on Extradition, made in Paris on December 13, 1957, the Convention relating to the simplified extradition procedure between member States of the European Union of March 10, 1995, and the Extradition Convention between the member States of the European Union made in Dublin on September 27, 1996. On June 13, 2002, the European Union approved a framework decision adopting the European arrest warrant (CONSEJO EUROPEO, 2002), which is intended to replace the above-mentioned instruments and the purpose of which is to speed up the handing over of persons requested by another State in the European Union for the prosecution of criminal charges or for the execution of a custodial sentence or security measure. In the Americas, extradition is regulated by the Inter-American Convention on Extradition of 1981, made in Caracas on February 25, 1981.

These treaties regulate extradition and establish a series of material requirements for its authorization, such as the existence of events giving cause for extradition and the exclusion of political crimes, among others. But in addition, the States must take into account certain factual circumstances before authorizing an extradition request. One of the most important restrictions consists of the obligation of the requested State to refuse the extradition request when there are legitimate grounds to believe that in the requesting State the life or safety of the person requested will be in endangered. This limitation is known as the principle of *non refoulement* or non-return and was originally included in Article 33(1) of the Convention Relating to the Status of Refugees, drawn up in Geneva on July 28, 1951, to be applied to refugees. Over time, the principle has been extended to other areas of international law and has been recognized in other international instruments as shown in Article 3(1) of the International Convention against Torture, made in New York on December 10, 1984, Article 16(1) of the International Convention for the protection of all persons against enforced disappearance, made in New York on December 20, 2006, Article 22(8) of the American Convention on Human Rights, made in San José on November 22, 1969, and the Inter-American Convention for the prevention and punishment of torture, made in Cartagena, Colombia on September 12, 1985. Although the International Convention on Civil and Political Rights does not contain a specific provision, the Human Rights Committee, in its General Comment No. 20 on Article 7 of the Covenant, pointed out that “States Parties must not expose individuals

to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement” (NACIONES UNIDAS, 1992, p. 35). Therefore, as was affirmed by the European Court of Human Rights in the case of *Soering vs United Kingdom* in 1989 (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 33-36), the requested State must abstain from authorizing an extradition when there are legitimate grounds for believing that the requested person will be the victim of torture or other inhuman treatment or that his or her life will be at real risk.

Extradition is the classic international cooperation procedure in judicial matters, but it is not the only one, nor does it prevent the use of alternate methods of handing over an individual (REMIRO BROTONS et al., 1997, p. 497). One practice used is the requested individual’s deportation or expulsion to speed up transfer or even to avoid the requirements of the extradition process. Deportation consists of the expulsion from a State’s territory of a foreigner whose presence is unwanted or considered prejudicial to the State, in accordance with its laws. In general, this involves civil procedures decided by the executive rather than the judicial power. Although this procedure must be carried out respecting a series of formalities, it is not as demanding as extradition (FINDLAY, 1988, p. 7). One of the most well known cases is that of Klaus Barbie, expelled from Bolivia in 1982 and detained by the French authorities for subsequent trial in France, where there were criminal proceedings open against him for his part in the Second World War. In 1974 France had requested extradition from Bolivia, but this had been denied on the basis of there being no extradition treaty between the two countries. At his trial, Barbie sustained that his deportation had been illegal, but the French court rejected this claim. Barbie took his case to the old European Commission on Human Rights, which determined that Barbie’s deportation to France had been legal, and had not infringed Article 5 of the European Convention on Human Rights regarding a person’s right to liberty and security (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1984, p. 230).

Another practice used for capturing a suspect or a criminal and forcibly transferring them to another State’s territory for trial is international abduction. If a State carrying out the operation on foreign territory does this with the consent of the territorial State, there is no violation of the territorial State’s sovereignty, as it will have negotiated consent for the incursion into its territory; it is, therefore, a form of cooperation between States. This does not, however, present an obstacle to the eventual responsibility of those taking part in the abduction for the violation of the abductee’s human rights. On the other hand, if the incursion has not had the consent of the territorial State, the State undertaking the abduction or capture will have also violated the State’s sovereignty and incurred international responsibility. This is, for example, what happened with the abduction of Adolf Eichmann on Argentine territory and his subsequent transfer and trial in Israel. The action was organized in secret by Israeli forces and without the consent of the Argentine State. The UN Security Council demanded that the Israeli government make suitable amends to Argentina (NACIONES UNIDAS, 1960), which considered the case closed as soon as Israel officially presented its apologies. The illegality of Eichmann’s detention was not, however, considered by the Israeli court an impediment to his trial (ISRAEL, 1962, párra. 4).

The Israeli court applied the principle of *male captus bene detentus* (wrongly captured, properly detained), the most well known precedent of which goes back to the case of *Ker vs. Illinois* in 1886 in the United States. In this case, a racketeer had escaped to Peru and the U.S. government decided to hire a detective agency to detain and transfer him to its territory for trial. Despite the agency having the request and all the documents needed for negotiating the extradition in cooperation with the Peruvian authorities in its possession, Ker was abducted and transferred against his will and without the participation of the Peruvian authorities. The agency justified its actions by saying that as a consequence of the occupation of Lima by Chilean forces at the time, there was no authority with which to negotiate the extradition process. The accused, for his part, sustained that his arrest had been illegal because the extradition treaty in effect between the United States and Peru had been violated. The Supreme Court ruled that the method by which the accused had been brought before it was irrelevant as long as the laws of the United States had not been broken, and convicted Ker (ESTADOS UNIDOS DE AMÉRICA, 1886). This ruling was broadened in the case of *Frisbie v Collins* (1952) to include cases in which the laws of the U.S. had also been broken (ESTADOS UNIDOS DE AMÉRICA, 1952).

Other courts, however, have interpreted the subject differently. In 1991, the South African Court of Appeal decided on a case concerning a member of the African National Congress (ANC) to Swaziland. Once there, he was abducted by South African agents, repatriated, put on trial for treason, and condemned to 20 years in prison by the court. In the appeal, the Court held that the abduction had constituted a serious injustice that violated the right of person not to be detained illegally or abducted. It also affirmed that persons were protected against illegal detentions, that the impartiality of the justice system had to be upheld, and that sovereignty and territorial integrity had to be respected (SUDAFRICA, 1991). As a result, the Court of Appeal annulled the original decision. Another example can be found in the case of *R. v Horseferry Road Magistrates Court, ex parte Bennett*, which was deliberated by the House of Lords in 1994. In this case, the accused had been forcibly abducted and transferred from South Africa to the United Kingdom without going through the corresponding extradition process for trial. The accused was convicted, but appealed the decision before the House of Lords, which in turn decided that it was empowered to analyze the legality of the actions by which a person had been brought before British justice, and finally upheld the appeal (REINO UNIDO, 1994). In accordance with this decision, the court decided it was therefore empowered to refuse trial, which confirmed the ruling of *male captus bene detentus* as long as there was no national or international prohibition on pursuing the trial (CHEHTMAN, 2010).

In the United States, recourse to abductions of persons abroad has been practiced by the Administrations of Presidents Reagan, Bush (senior), Clinton, and Bush (junior). In 1986, for example, Reagan authorized the CIA to abduct suspects of certain crimes abroad for trial in the United States (FINDLAY, 1988, p. 7; DOWNING, 1990, p. 573). In 1989, as part of the American intervention in Panama, President Bush ordered the capture of Noriega⁶ for his subsequent trial in the case brought against him in U.S. courts for drug trafficking. Another relevant case is the abduction on Mexican territory of Humberto Álvarez Machaín for the murder

of a Drug Enforcement Administration (DEA) agent (ESPÓSITO, 1995).⁷ In this case, the U.S. Supreme Court recognized that the forced abduction of a person in another State constituted a violation of international law, but defended its right to try the person responsible for having violated the criminal laws of the United States. President Clinton, in turn, authorized a program for the capture of presumed terrorists (ESTADOS UNIDOS DA AMERICA, 1995) for the purpose of sending them to countries where there were criminal proceedings pending against them, which could be, but not necessarily, in the territory of the United States (FISHER, 2008). In a court appearance before Congress on April 17, 2007, Michael Scheuer, in charge of the program from 1995 to 1999, stated that the purpose was to capture presumed terrorists or participants in an attack against the United States or its allies, obtain documentation, and try them in the country that had started criminal proceedings against them. But he added that the goal of detention was not to submit them to interrogation (ESTADOS UNIDOS DE AMÉRICA, 2007, p. 12). As we will see later, these practices intensified with the ‘war’ on terror declared by the Bush (junior) Administration.

4 Extraordinary rendition

After the attacks of September 11, 2001, the United Nations Security Council approved resolution 1373 of September 28, 2001, which strongly condemned the terrorist acts and imposed a series of obligations on States aimed at strengthening international cooperation in the prevention and fight against terrorism. The States assumed, among other things, the obligation of sharing information with other governments about groups committing acts of terrorism, or planning to commit them, and of cooperating with other governments in the investigation, detection, detention, and prosecution of those taking part in such acts. The Security Council also created a Committee charged with oversight of the application of this resolution and increasing the ability of States in the fight against terrorism.

At the same time, the United States government authorized a national strategy to avoid terrorist attacks on its territory or against American citizens or installations abroad. This strategy included the holding of presumed terrorists in recognized or secret detention centers that were controlled by the U.S. but located outside its territory, and managed by third-party countries “representing” the United States. The detentions did not allow for basic guarantees of due legal process and were in violation of international law (SADAT, 2005; WEISSBRODT; BERQUIST, 2006; AMNESTY INTERNATIONAL et al., 2009).

One of the authorized practices combined the detention, abduction, and international transfer of presumed terrorists – without negotiating an extradition procedure, deportation, or expulsion – to third party countries to be interrogated using techniques equivalent to torture, inhuman or degrading treatment. This combination has received the name of extraordinary rendition, even though such a term does not exist as a concept in international law (SANDS, 2006). We are not dealing here with detaining and abducting criminals for subsequent prosecution (SANTOS VARA, 2007, p. 177-178), as had been used by the Reagan, Bush (senior), and

Clinton administrations, but rather the abduction or arbitrary detention of presumed terrorists in the territory of one State for their interrogation in another and relying on, in some cases, methods prohibited by international law.⁸ The program, known as the ‘High Value Terrorist Detainee Program,’ was designed to detain certain members of Al Qaeda considered to be of high value to the United States secretly and for long periods of time.

In general, the detention or capture was carried out with the consent, knowledge, and cooperation of the secret services of the State where the presumed terrorist was found (FOOT, 2007, p 24-25).⁹ The executing body of the U.S. was a special CIA unit known as the Special Removal Unit (HERBERT, 2005). Once detained, high value prisoners would be transferred, secretly and without respect for minimum guarantees, to third-party countries for interrogation. In 2005, Secretary of State Condoleezza Rice tried to justify and give a pretence of legality to the use of rendition when she stated that, for decades, the United States and other countries had used it for transporting supposed terrorists from the country where they had been found to their country of origin or another country to be interrogated, detained, or brought to justice. She also said that in certain cases, extradition was not effective and that rendition was a valid alternative allowed by international law. As one of the precedents for rendition, Rice pointed to the case of Carlos “The Jackal,” who was abducted by the French authorities with the consent of Sudan (the country in which he was found), and tried for the murder of two French agents (ESTADOS UNIDOS DE AMÉRICA, 2005b). However, the Secretary General of the Council of Europe forcefully refuted this comparison by recalling that the detention of Carlos “The Jackal” had proceeded based on an existing detention order and that once detained, he had been brought before the judge with all the guarantees of due process (DAVIS, 2006), a situation that does not occur in the case of extraordinary rendition. In fact, as a result of the use of extraordinary detentions, some presumed terrorists have spent years without being accused of any crime and, in other cases, they have disappeared.

From the perspective of international human rights law, Extraordinary Renditions presents a series of serious anomalies. First, it is an assault on an individual’s right to liberty and security, including even the life of the detainees, which affects the guarantees of due process. This is not a case of detaining and then extraditing a convicted person or one who is about to be tried. Rather, it is a preventive detention, carried out in secret with no intention of initiating criminal proceedings against the person.

Second, it is believed that presumed terrorists were transferred to third-party countries to be interrogated by methods prohibited by international law. According to news reports and articles, individuals were transferred to countries with a high risk of torture, such as Jordan, Syria, Egypt, and Morocco, and all countries that the U.S. State Department has criticized for their violations of human rights (ESTADOS UNIDOS DE AMÉRICA, 2008). In the case of confirmation that these individuals were submitted to this type of treatment,¹⁰ rendition would also constitute a violation of the prohibition on torture, which is a *ius cogens* and therefore obligatory for all States (BUTTON, 2007) and an infringement of the principle of *non refoulement* recognized in common and conventional international law. This principle is absolute

and unwavering, even in emergency situations.¹¹ In addition, the obligation to non refoulement extends to all types of transfer, that is, whether deriving from a process of extradition, expulsion, or deportation (ARBOUR, 2006) when there are grounds to believe that the person will be tortured or submitted to inhuman or degrading treatment. It is relevant, also, that in the case of Chahal and also that of Saadi, the European Court of Human Rights stated the absolute nature of this prohibition.

Third, the person who is detained arbitrarily and taken to a secret detention center is deprived of the opportunity to question the legality of their detention or to know on what charges they have been detained. In some cases, the detainees have disappeared without a trace (SADAT, 2005, p. 324) and are denied any contact with their families. No records exist of their detention or any acknowledgement by any government (WEISSBRODT; BERQUIST, 2006, p.127). During their entire secret detention, the detainees are victims of the crime of enforced disappearance of persons (SADAT, 2005, p. 322; INTERNATIONAL COMMITTEE OF THE RED CROSS, 2007, p. 24).

5 Extraordinary Renditions as forced disappearance

At the end of 2005, the Center for Human Rights and Global Justice at New York University published a list of persons detained in the war against terrorism whose whereabouts were unknown. The list, based on articles and reports in the press and investigations made by various NGOs, is divided into three categories:

1. Persons confirmed to be or to have been held in secret detention centers in the United States or in installations on foreign territory controlled by the United States.
2. Persons presumably held by the United States and who are probably held in secret detention centers controlled by the United States or in installations on foreign territory but controlled by the United States.
3. Persons who may be held by the United States and who may be held in secret detention centers controlled by the United States or in installations on foreign territory but controlled by the United States.

In category 1, the U.S. has admitted at some point that these persons have been detained by their authorities. Nevertheless, there has been no information on their fate or whereabouts. In categories 2 and 3, the U.S. has not admitted the detention and the difference between these categories lies in the degree of certainty over the detention. Cases in category 2 include substantial evidence of secret detention by the U.S. while in cases of category 3, there is only inconclusive evidence.

However, are the three elements present in these categories? That is: (i) the arrest, detention, abduction, or any other form of deprivation of liberty; (ii) the carrying out by agents of the State or by persons acting with the authorization, support or acquiescence of the State; and (iii) the concealment of the fate or whereabouts of the missing person and the consequent removal of the person from the protection of the law?

5.1 Arrest, detention, abduction, or any other form of deprivation of liberty

The first component of extraordinary detention is the detention or abduction of the presumed terrorist. It is public knowledge today that the United States has developed a strategy of detention for presumed terrorists in officially unacknowledged centers where they can remain for long periods of time. As we mentioned, the executing body of the U.S. government has been a special CIA unit known as the Special Removal Unit (HERBERT, 2005). This unit would be charged with capturing the presumed terrorists and transferring them to a “black site” directed by U.S. authorities or third-party countries, although always with the cooperation of the United States. The organizations Amnesty International and Human Rights Watch have published lists with the names of the persons supposedly detained arbitrarily in Iraq, Afghanistan, Pakistan, Indonesia, Thailand, Uzbekistan, and whose whereabouts are still unknown (AMNESTY INTERNATIONAL et al., 2009). Since these are secret detentions, there are no official records or acknowledgement by the authorities, resulting in the difficulty demonstrating the existence of these detentions and their duration. Nevertheless, it is useful to remember that the Committee on Legal Affairs of the Council of Europe Parliamentary Assembly has proven that, as part of the fight against terrorism, the U.S. government prepared a plan of abductions and transfers of presumed terrorists to various parts of the world. In its opinion, while some detainees were victims of arbitrary detention in the absence of any legal protection, others had simply disappeared for indefinite periods of time and were held in secret locations, including in the territories of member States of the Council of Europe, such as Poland and Romania (CONSEJO DE EUROPA, 2007, p. 7). The Polish authorities have denied any participation in cases of Extraordinary Renditions or the existence of secret detention centers on its territory. Nevertheless, in September of 2008, an ex-intelligence officer of this country confirmed that between 2002 and 2005 the CIA had held presumed terrorists in the Stare Kiejkuty base in northeast Poland (EASTON, 2008). The Romanian authorities have also refuted such accusations and said that their country did not maintain any secret detention centers during the fight against terrorism (EARTH TIMES, 2009).

5.2 The work of agents of the State or by persons acting with the authorization, the support, or the acquiescence of the State

According to Article 4 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, the conduct of any State organ shall be considered an act of the State under international law, whether this organ exercises a legislative, judicial or other function. In the case study, if it is irrefutably proven that Extraordinary Renditions was carried out by a special CIA unit and therefore by an organ of the United States government (BUTTON, 2007, p. 544), the logical consequence shall be to attribute the conduct of this unit to the United States of America.

The clearest acknowledgement of the existence of a plan to secretly detain presumed terrorists was given by the President of the United States, George Bush (junior), in a 2006 speech. On this occasion, he spoke of the need to secretly detain certain terrorists considered of high value to be interrogated by experts, and when appropriate, prosecuted. He, in turn, recognized that, in a limited number of cases, locations outside the territory of the United States had been used (BUSH, 2006). At the same time, some authors affirm that on September 17, 2001, Bush signed a decree – which has not yet been made public – authorizing the use of Extraordinary Renditions of presumed terrorists and their transfer to other States for detention or interrogation (MARGULIES, 2006, p. 189). Lastly, the conclusions presented by the Council of Europe report on the existence of secret detention centers directed by CIA agents in Poland and Romania between 2003 and 2005 confirm the existence of a plan for detentions and interrogations outside the territory of the United States (CONSEJO DE EUROPA, 2007, párra. 7).

It is important to remember that certain European States have also participated in Extraordinary Renditions. The cases of Abu Omar, Khaled El Masri,¹² Al-Rawi, El-Banna, El-Zari and Agiza are the most well-known and reflect the coordination of the secret services of Italy (SISMI), the United Kingdom (MI5) and Sweden (SÄPO) with the CIA in Extraordinary Renditions (NINO, 2007, p. 125 and ss). Furthermore, the European Parliament has opened investigations into the use of European airports for the detention and illegal transfer of presumed terrorists by the CIA (EUROPEAN PARLIAMENT, 2006).

5.3 Concealment of the fate and whereabouts of the missing person

A secret detention may occur not only in an officially unacknowledged location, but also in one that is acknowledged but has secret installations or sections. What determines the secret character of a detention center is whether or not the authorities of the State disclose the place of detention, any information on the fate of the detainee (NACIONES UNIDAS, 2010, p. 12) or deny its actual existence. If the detention centers in Guantánamo Bay and Abu Ghraib prison are very well-known, there are other installations, some of them secret, which have been used in the fight against terrorism. Some media reports even say that for some time, an airplane (BOLLYN, 2004) and a ship (IRUJO, 2008) on the high seas have been used as itinerant secret prisons.

In 2004, the Washington Post newspaper published various articles in which it affirmed that the U.S. government was secretly holding presumed terrorists in Iraq. The articles said that then U.S. Secretary of State, Donald Rumsfeld, had ordered the officials in charge not to include the records of certain detainees considered to be of high value to prevent monitoring by the International Committee of the Red Cross (CIRC) (TAGUBA, 2004, párra. 33) and, at the same time, not to disclose information to the enemy (SCHMIT; SHANKER, 2004). The number of ghost detainees (HUMAN RIGHTS WATCH, 2004, p. 8), that is, those whose detention had not been acknowledged, supposedly held in unofficial centers and without their families' notification, numbered over 30, although it is still very difficult to determine the

exact number as there are no records of these detentions (SCHMIT; JEHL, 2004; LINZER, 2009a) or the records have been modified, as Rumsfeld's order confirms.

For its part, Human Rights Watch has stated that the U.S. government has methodically refused to provide information on the fate or whereabouts of high value detainees (HUMAN RIGHTS WATCH, 2004, p. 8; LINZER, 2009a). The 2006 address of President Bush (junior) here becomes especially relevant because, by acknowledging the existence of a plan for secret detentions, he also acknowledged that the detention centers used could not be disclosed for reasons of security (BUSH, 2006).

An interesting case is that of the Spanish citizen of Syrian origin, Mustafa Setmariam Nassar, detained in 2005 in Pakistan by forces of that country and suspected to have taken part in the September 11 attacks. According to a report from the Council for Human Rights, he was held by the Pakistani authorities for some time before being handed over to the United States. Since, at this time, there has been no official acknowledgement of his fate or whereabouts, it is thought he was detained on the island of Diego García and that currently he is now in a secret detention center in Syria (NACIONES UNIDAS, 2010, p. 67). In response to a request by a Spanish judge (YOLDI, 2009) for information on the fate of Mr. Nassar, the FBI replied in June 2009 that the person mentioned was not in the U.S. at that time, without clarifying whether he was in the custody of the United States or indeed where he was. Furthermore, in response to various requests from NGOs, the CIA has replied that it could neither confirm nor deny the existence of files on the subject (NACIONES UNIDAS, 2010). The whereabouts of Mr. Nassar continue to be a mystery (GUTIÉRREZ, 2011).

6 Consequences in international law

Article 12 on the international responsibility of the State for wrongful acts stipulates that a violation of a State's international obligation occurs when an act of a State is not in compliance with that required of the State by the obligation, no matter what the origin or nature of this obligation. Every violation of an international obligation, therefore, results in international responsibility.

Extraordinary Renditions usually begins with the detention, abduction, or capture of an individual in the territory of a State, continues with the forcible transfer to a third-party State, and is completed with the application of interrogation methods prohibited by international law. In a certain number of cases, the detentions are not officially recorded or acknowledged by any authority, thereby constituting possible cases of forcible disappearance.

Extraordinary Renditions, as internationally wrongful acts, bring with them the international responsibility of the State for the violation of an international obligation. In the first place, if the abduction or the detention occurs without the consent of the territorial State, this State's sovereignty has been violated and it is entitled to suitable redress from the State that committed the violation. In the *Lotus* case, the Permanent Court of International Justice held that carrying out police operations in the territory of another State without its authorization constitutes a basic violation of sovereignty (CORTE PERMANENTE DE JUSTICIA, 1927) and the affected State has the right of redress from the State committing the violation. The

old European Commission of Human Rights said that an arrest by the authorities of one State in the territory of another, without its prior consent, not only results in the responsibility of one State toward the other, but also constitutes a violation of the right to security recognized in article 5 (1) of the Convention on Human Rights (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 26). Recall, however, that the wrongfulness of the detention does not impede the exercise of the jurisdiction of the courts of this State in prosecuting the individual, as the cases of *Ker*, *Eichmann*, and *Álvarez Machaín* have shown.

Second, if it is proven that the territorial State has cooperated actively or passively in the execution of extraordinary rendition, it becomes complicit (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2004, párra. 318). This acquires special relevance in the case of presumed terrorists held in secret detention centers in Thailand (CONSEJO DE EUROPA, 2007, párra. 7; NACIONES UNIDAS, 2010, p. 54), Afghanistan, Iraq, Romania (WHITLOCK, 2006), Poland (GOETZ; SANDBERG, 2009), Macedonia, and Lithuania (COLE, 2009), because it would be extremely difficult to believe that the governments implicated had no knowledge that a detention center had been installed on their territory, that arbitrary detentions and, in some cases, forcible disappearances were taking place. Furthermore, every State has the obligation to act with diligence to prevent its territory from being used to commit wrongful acts. If, for example, as stated by Dick Marty's report to the Council of Europe, Romania and Poland allowed CIA agents to carry out secret arrests in their territories, these States will have violated their obligation to ensure that nobody is detained either arbitrarily or secretly in the territory under their jurisdiction. They should, therefore, be answerable in court for these violations and the victims should be given access to effective justice and obtaining suitable redress that includes restitution, rehabilitation, and fair compensation (CONSEJO DE EUROPA, 2006b). Similar statements would extend to those countries that allowed airplanes carrying presumed terrorists subjected to Extraordinary Renditions to refuel at their airports, if they knew or should have known that this airplane was being used for this purpose.

Article 16 of the CDI draft stipulates that a State providing help or assistance to another State in committing an internationally wrongful act is internationally responsible for providing this help or assistance if was aware of the circumstances of this internationally wrongful act. The act itself shall be internationally wrongful if it is committed by the State that has provided the help or assistance. In the commentary to this Article, the Commission differentiates between the responsibility of the State committing the wrongful act and that of the State helping or assisting the former, and in which case it is only be responsible to the extent that its own behavior caused or contributed to the internationally wrongful act. The Commission adds that if the wrongful act would have occurred anyway, whatever the case, the responsibility of the State giving assistance shall not include the obligation of indemnity for the act itself. The Commission defined providing assistance as facilitating the abduction of a person on foreign territory (NACIONES UNIDAS, 2001, p. 116).

Third, if the presumed terrorists were transferred to countries with a risk of torture and the States knew of this situation, they would also be responsible for having violated the principle of non-refoulement because, despite having sufficient

grounds for believing the person would be tortured once transferred, they did not abstain from doing so. In the case of *Soering*, the European Court of Human Rights declared that the request for extradition of a person to a State not part of the European Convention, and where it was probable that they would suffer inhuman or degrading treatment or punishment, results in a violation of Article 3 of the Convention by the State granting the extradition (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 33-36). If, therefore, responsibility is applied in cases in which there is at least a formal procedure such as extradition, it would also apply to extraordinary rendition, characterized as it is by secrecy and lack of a formal procedure.

Moreover, under the provisions of Articles 21 and 22 of the Convention against Torture, a party State to this Convention may, at any time, declare that it recognizes the competence of the Committee to receive and consider communications from another State alleging violation of the Convention (Article 21) or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of the Convention by a State (Article 22). The United States, as well as Poland, Italy, Spain, Sweden, and the United Kingdom, among others, have accepted the Committee's jurisdiction under Article 21 that there is no legal obstacle to a State presenting a claim against them for violation of the principle of non-refoulement. It is interesting to consider that the United States government itself has recognized that in 28 cases, it has authorized the use of "advanced" interrogation methods against certain detainees and that, in three cases, the technique used has been that of simulated drowning or waterboarding (ESTADOS UNIDOS DE AMÉRICA, 2005b).

Is it possible to appeal to the recently ratified International Convention against Enforced Disappearances? If we abide by the letter of Article 35 and a literal interpretation, the answer would be no, given that the Committee's competence applies only to those cases that began soon after it came into effect. Furthermore, not all States have accepted the jurisdiction under Articles 31 and 32. Nevertheless, enforced disappearance is a permanent crime, that is, one that continues to be committed as long as the fate or whereabouts of the victim remains unknown. As a permanent crime, the Convention may be applicable on certain occasions; for example, not against the United States directly since it has not ratified it, but against those States that have accepted the Committee's competence. In any case, the question has not been settled in case law.

6.1 Aggravated responsibility

Is a regime of aggravated responsibility applicable to extraordinary rendition? Several obligations are owed to the international community as a whole¹³ and when serious, that is systematic and flagrant, violations of these obligations are committed consequences that arise in addition to those deriving from ordinary wrongful acts (GAETA, 2010, p. 421; CRAWFORD, 2010, p. 410-411). These obligations derive from norms prohibiting certain acts threatening the survival of the States, their peoples, and the most basic human values.

A serious violation of an obligation to the international community as a whole results in an obligation of the State responsible to cease committing the wrongful

act, proceed with the fulfillment of its obligation, make amends, and if appropriate, give guarantees and assurances of non-repetition. This also generates obligations for the rest of the States and triggers a regime of aggravated responsibility. Article 41 provides that in the case of serious violation of a peremptory norm, three particular obligations result for all States, whether affected or not: to cooperate in ending it; to abstain from providing help or assistance that upholds the situation; and to abstain from recognizing the situation created by the violation as lawful. The interest of the States does not derive from having suffered harm, but rather from the fact that a peremptory norm has been violated and the collective interest has been seriously affected. Article 48 states that every State has the right to invoke three consequences for the violation of this norm: a) the cessation of the situation of wrongfulness; b) the guarantee of non-repetition; and c) redress. The cessation of the wrongful situation and the guarantee of non-repetition are rights held by every state, even if the violation does not threaten them individually. Article 48(2) (b) provides that every State may also request compliance with the obligation of redress for the State suffering injury or for the beneficiaries of the violated obligation (VAURS-CHAUMETTE, 2010, p. 1027).

The prohibition of torture has acquired the classification of *ius cogens* norm (NACIONES UNIDAS, 2006, p. 17), as confirmed by national and international courts (ESTADOS UNIDOS DE AMERICA, 1992, p. 471; REINO UNIDO, 1996, p. 540-541; REINO UNIDO, 1999, p. 841). The same peremptory nature in international law should be applied to the prohibition of enforced disappearances. This opinion is supported in the jurisprudence of international courts, such as the Inter-American Court of Human Rights,¹⁴ in opinions of national judges at the highest levels (ARGENTINA, 2005)¹⁵ and of regional human rights organizations (CONSEJO DE EUROPA, 2006b, párra. 71). The acceptance of the peremptory categorization of the prohibition of enforced disappearances would make the States responsible for enforced disappearances unable to be excluded from responsibility simply because they are not bound by a treaty and they would be submitted to the above-mentioned regime of aggravated responsibility.¹⁶ This is an important confirmation for international law, even if, in practice, it would be improbable that a State, upon feeling jeopardized by the actions of the United States or its allies in the fight against terrorism, would call for their acknowledgement of responsibility for this serious wrongful conduct.¹⁷

6.2 *Individual responsibility*

The Statute of the International Criminal Court (ICC), the Inter-American Convention against forced disappearances, the draft articles of the International Law Commission on Crimes against the Peace and Security of Humanity, and the International Convention consider forced disappearance to be a crime against humanity. Article 7 of the Statute of the International Criminal Court defines it in a more restrictive way, and includes the need to demonstrate the intention of leaving the victims outside the protection of the law for a prolonged period of time. Moreover, a crime is against humanity when it has been committed as part of a systematic or generalized attack against the civilian population and with knowledge of the aforesaid attack. In the case of *Kumarac and others*, the Court for ex-Yugoslavia described what it considered to be the systematic and

generalized nature of a violation. For the Court, the expression “generalized” refers both to an attack committed on a large scale and to the number of victims, while the phrase “systematic” is related to the planning of the violent acts and the lack of probability of them having occurred by accident (TRIBUNAL INTERNACIONAL PARA LA EX YUGOSLAVIA, 2002; NACIONES UNIDAS, 2001, p. 271).

Are these assumptions present in cases of extraordinary rendition? We are dealing with extremes that are very difficult to prove, especially in the case of forced disappearance, which feeds on secrecy, informality, and denial. Even so, a first approximation to its systematic character could be derived from the ‘high value detainees’ program whereby the detention of presumed terrorists considered to be of high value in secret locations outside the territory of the United States were authorized and clearly recognized by President Bush in 2006 (ESTADOS UNIDOS DE AMERICA, 2006). Likewise, the Bush Administration’s approval decrees authorizing the use of reinforced interrogation techniques (ESTADOS UNIDOS DE AMÉRICA, 2005a) and the memoranda that have been publicly disclosed in which it was stated that the Convention against torture was applicable only inside, and not outside, the territory of the United States. The ex-special United Nations rapporteur against torture, Manfred Nowak, has stated in an interview that Extraordinary Renditions violated the principle of non-refoulement and that, lamentably, it was a systematic practice of the Bush administration (THAROOR, 2007). Regarding its generalized character and according to information from the press, the number of persons detained in secret centers amounted to 100 (SCHMIT; JEHL, 2004); of these, at least 35 (AMNESTY INTERNATIONAL et al., 2009; LINZER, 2009b) are still missing. Another obstacle would be the classification of presumed terrorists as civilians. Civilians are considered to be those that do not participate in hostilities and are therefore protected. Could it be considered that the fact of having contact with terrorists makes a person a combatant?

Even if it is shown that the disappearances really constitute a crime against humanity by proving irrefutably the existence of a systematic and generalized practice against the civilian population, in reality, since the United States is not a party to the Rome Statute (and if we also take into account bilateral agreements it has signed with various States excluding the jurisdiction of the International Criminal Court) it would be very difficult, although not impossible, for its nationals to be tried by the Court. A way out could be if those responsible are found in the territory of a signatory State of the Rome Statute that also has been the host of disappearances or territory through which flights have traveled when there is no bilateral agreement with the United States to exclude the Court’s jurisdiction. It should be remembered, also, that in February 2010, a formal complaint was made to the officer of the International Criminal Court to initiate a prosecution for crimes against humanity against President Bush (junior), Richard Cheney, Donald Rumsfeld, George Tenet, Condoleezza Rice and Alberto Gonzales for their Extraordinary Renditions policy perpetrated to the detriment of 100 individuals. Although the United States is not party to the Rome Statute, the accused authorized Extraordinary Renditions in the territory of the Statute’s party States, some of them in Europe. According to Article 12 of the Rome Statute, it is within the ICC’s jurisdiction to judge nationals of States not party to the Statute when they have committed crimes on the territory of a party State or a State that has

accepted the Court's jurisdiction in this crime. However, the question has not been settled in case law (MORRIS, 2001; AKANDE, 2003; CHEHTMAN, 2010) and it has been noted that the confirmation of the jurisdiction of the Court over nationals of States not party to the Statute results in a violation of the Vienna Convention on the Law of Treaties in the sense that obligations would be imposed on non-party States without the consent of that State (LEIGH, 2001, p. 124). It has also been affirmed that States do not have the power to delegate jurisdiction over non-nationals to an international criminal court unless the State of that nationality has given consent (MORRIS, 2001). Another counter argument is that the International Criminal Court would be acting illegally if it exercised jurisdiction over non-party State nationals that acted in the application of an official policy of the non-party State, converting the case into a dispute between States over the legality of policies used (WEDGWOOD, 2001, p. 193-199; MORRIS, 2001, p. 20-21). Despite the criticism of the Court's jurisdiction, others have noted that once the decision was made to create the Court, it would be intolerable that the court know about crimes committed in the territory of a member State and its citizens but exclude the same crimes committed in the same territory by citizens of a non-member State. Lastly, such a situation would constitute a serious limitation to the right of the territorial State to judge crimes committed on its territory (AKANDE, 2003, p. 649) and would generate a situation of impunity, exactly the opposite of the International Criminal Court's goal.

Lastly, if Extraordinary Renditions – considered as forced disappearances of persons – effectively constitute a crime against humanity, the possibility should not be excluded that a State, in exercising the principle of universal jurisdiction, would exercise its competence to judge those responsible for the crimes. In November 2004, a group of lawyers in Berlin, using the principle of universal jurisdiction acknowledged in its legal system, began prosecuting officials of the Bush administration for the tortures in Abu Ghraib. The cases were dismissed.

As a counterpoint to this obstacle-filled scenario, we should mention the case of Italy, where the judicial system condemned 23 CIA agents in November 2009 for their participation in the kidnapping of the cleric Abu Omar in Milan. The judgment was given in the absence of the accused and with the application of the principle of territorial jurisdiction, since the kidnapping was carried out in Italian territory. The judge Oscar Magi sentenced Robert Seldon Lady to eight years in prison and the rest of the accused to five years, including an Air Force colonel. In March of the same year, the Constitutional Court of Italy said that all evidence that showed coordination between the Italian secret services and the CIA violated the rules of State secrecy and was therefore inadmissible at trial. (ITALIA, 2009). In dealing with a trial based on the principle of territoriality, it would have been more feasible to undertake a real investigation as to what happened. Judge Magi granted Abu Omar damages of 1.45 million dollars and his wife 750,000 dollars for their suffering. (DONADIO, 2009). Lastly, even though the judgment was given in absentia, it set an important precedent because the condemned men, if they should decide to travel to a country of the European Union, run the risk of being served with an order for their detention and surrender, or if they decide to travel to other countries, they must concern themselves with whether the State to which they are going has an extradition treaty with Italy.

7 Conclusion

Extraordinary Renditions constitutes a serious violation of obligations internationally assumed by States and is an assault on the basic human rights of persons, among them the right to life, liberty, and the security of the person. In this paper we have held that Extraordinary Renditions should not be treated as merely arbitrary detention because these acts also violate obligations of *ius cogens* because they cover up the deliberate practice of torture and enforced disappearances of persons, resulting in a regime of aggravated international responsibility for States and the possible determining of individual responsibility for crimes against humanity.

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NOTES

1. Statement by Bob Baer, an ex-undercover agent who worked for the CIA in the Middle East (JAMIESON; MC EVOY, 2005, p. 516).

2. There is even a movie called *Extraordinary Rendition*, screened in 2007 and directed by Jim Threapleton.

3. The decree applied only to the western occupied countries (Belgium, Holland, France, Norway).

4. The function of the Working Group is to help families of missing persons find out about the fate of victims of disappearance. To do this, it receives complaints from family members and acts as an intermediary between them and governments, carrying out exclusively humanitarian work. The Group's function, however, does not include attributing or determining the international responsibility of the accused State or of the persons responsible, but instead tries to bring the parties together to find out what happened and the fate of the missing persons.

5. Or of a political organization, according to the International Criminal Court Statute.

6. In his speech justifying the invasion of Panama, President Bush recognized that one of the motives was the capture of Noriega.

7. Álvarez-Machain was finally absolved due to lack of evidence.

8. As the technique of simulated drowning is known.

9. The Italian agent Luciano Pironi, who took part in the kidnapping of Abu Omar in Milan by CIA agents, stated that this had been carried out with

the total cooperation of the Italian secret services.

10. As appears to be the case with the recent leaking of classified U.S. documents by the Wikileaks website.

11. In the case of *Agiza v Sweden*, the Commission against Torture reaffirmed that the protection given by the Convention against Torture is absolute, including in the context of situations in which national security is at risk (UNITED NATIONS, 2005, para. 13.8).

12. This case is currently being analyzed by the European Court of Human Rights, based on an accusation by El Masri against Macedonia for complicity in his detention and transfer.

13. According to article 53 of the Vienna Convention a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole and from which no derogation is permitted.

14. As has been stated by the Inter-American Court of Human Rights in the *Goiburú* case.

15. Vote by Minister Antonio Boggiano (ARGENTINA, 2005).

16. In an opinion by Cassese, the categories of *erga omnes* and *juscogens* obligations coincide inextricably, stating that every peremptory norm imposes *erga omnes* obligations and vice-versa (CASSESE, 2010, p. 417).

17. The question to be asked here is whether States can commit crimes (PELLET, 1999, p. 433-434).

RESUMO

Depois dos atentados em setembro de 2001, o então presidente dos Estados Unidos, George W. Bush, declarou uma “guerra” global contra o terrorismo internacional e autorizou um programa de sequestros, detenções e traslados de supostos terroristas para prisões secretas em terceiros Estados, nos quais há suspeita de utilização de tortura como método interrogatório, com o objetivo de obter informações sobre futuros atentados terroristas. Essa prática, denominada “entregas extraordinárias”, sob certas condições, extrapola a figura da detenção arbitrária e apresenta semelhança com a figura do desaparecimento forçado de pessoas. A distinção tem relevância, entre outros motivos, porque as entregas extraordinárias passíveis de serem qualificadas como desaparecimentos forçados poderiam constituir uma violação de normas de *ius cogens*, gerar uma responsabilidade internacional agravada para os Estados aos quais se atribuísem a autoria desses atos ilícitos e a possível perpetração de crimes de lesa humanidade para os autores individuais.

PALAVRAS-CHAVE

Entregas extraordinárias – Desaparecimentos forçados – *Ius cogens* – Crimes contra a humanidade

RESUMEN

Tras los atentados de septiembre de 2001, el Presidente de EE.UU. George W. Bush declaró una ‘guerra’ global contra el terrorismo internacional y autorizó un programa de secuestros, detenciones y traslados de presuntos terroristas hacia prisiones secretas en terceros Estados, en los que se sospecha que se utiliza la tortura como método interrogatorio, con el objeto de obtener información sobre futuros atentados terroristas. Esta práctica, denominada ‘entregas extraordinarias’, bajo ciertas condiciones, va más allá de la figura de la detención arbitraria y presenta similitudes con la figura de la desaparición forzada de personas. La distinción tiene relevancia, entre otras razones, porque las entregas extraordinarias que pudieran calificarse como desapariciones forzadas podrían constituir una violación de normas de *ius cogens*, generar una responsabilidad internacional agravada para los Estados a los que se atribuyese la autoría de esos actos ilícitos y la posible comisión de crímenes de lesa humanidad para los autores individuales.

PALABRAS CLAVE

Entregas extraordinarias – Desapariciones forzadas – *Ius cogens* – Crímenes contra la humanidad



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ABSTRACT

United in the belief that civilians should not suffer from intentional infliction of widespread and systematic violence and the assumption that special measures are necessary to prevent and protect groups from such violence, a diverse group of scholars, educators, journalists, activists, advocates, policymakers, diplomats, and military leaders have raised their voices against genocide and mass atrocities. This group has grown exponentially over the last decade and can be understood as an emerging field in its own right. This essay explores some of the conceptual and practical challenges facing this field as it furthers its professional development.

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A CHALLENGE TO THOSE WORKING IN THE FIELD OF GENOCIDE PREVENTION AND RESPONSE*

Bridget Conley-Zilkic

1 A Moment Ripe for Self-Reflection

Today's genocide and atrocity prevention efforts emerge from a long history of mass murder of civilians being accepted or deemed a lesser concern than negotiation processes, political allegiances, or the need to win a conflict. There is no shortage of examples of terrifying assaults against societies' most vulnerable groups. The most recognized cases like the Holocaust, Rwanda and Srebrenica, dominate discussions, but there are also many less known cases like Guatemala.

The civil war in Guatemala (1960-1996) was among the bloodiest of Latin America's Cold War conflicts. An estimated 200,000 people were killed or disappeared. Two specific years in the 1980s stand out as the most lethal. Between 1981-1983, some 100,000- 150,000 Guatemalan Maya were killed by the national armed forces (JONAS, 2009, p. 381). As part of a scorched earth counter-insurgency plan, governmental forces killed, raped, tortured, and forcibly displaced Maya in the rural mountain regions. Beginning in 1983, the army undertook measures to control the survivors, ushering in a second phase of assault marked by a combination of amnesty and intensified militarization of surviving communities. In the worst hit community, Rabinal, 14.6% of the population was killed and 99.8% of the victims were from the Maya population (HIGONNET, 2009, p. 27).

For the Guatemalan government, the offensives were deemed necessary to finally end the long-running civil war (1960-1996) and enable modernization of

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the state. For the key outside countries that supported the government, particularly the U.S., the most salient feature was Marxist insurgency, only one example of the perceived global threat. Human rights activists from Amnesty International and Americas Watch (now Human Rights Watch) were targeted as communist sympathizers for even documenting the atrocities. The U.S. government accused such groups of being part of “a concerted disinformation campaign [...] by groups supporting a left wing insurgency” (SIKKINK, 2004, p. 167).

It was not until the United Nations-sponsored Commission on Historical Clarification in Guatemala published its final report, *Memory of Silence*, in 1999, was the term “genocide” applied to the violence. The Commission’s report describes what happened as “acts of genocide against the Maya people that live in the Ixil region, Zacualpa, northern Huehuetenango and Rabinal” (HIGONNET, 2009, p. 131).

Much has changed since the 1980s – and particularly since the failures of Rwanda and Bosnia-Herzegovina and the exponential growth of the field in response to Sudan. Today, the value of genocide and atrocity prevention work is recognized by global leaders and it is undertaken from a wide range of disciplinary and organizational approaches. While some of the most vocal and visible actors are in the U.S., individuals, organizations, and coalitions from around the globe, including places that have experienced past violence, are tackling atrocity prevention and response issues.

The field of genocide and atrocity prevention work is united in the ethical belief that entire groups of civilians should not be assaulted and the normative assumption that special measures should be created to protect against and respond to this violence. But beyond the ethical and normative consensus, much more discussion is needed. For the field to consolidate its progress and continue to grow, it must strengthen its capacity for self-reflection and criticism.

Today’s genocide prevention movement is marked by four signature characteristics. First, the field is emerging and not understood as coalesced.¹ This is a time of great creativity and experimentation. This means that the basic practices, assumptions, tools, and vocabularies are up for debate. Multiple goals exist, and the differences between them lack clarity. One area where this is particularly noticeable is in the wide range of terminologies used to describe the phenomenon at hand: genocide, mass atrocities, crimes against humanity, ethnic cleansing, and so forth.

Second, in the shift from an emphasis on response to one of prevention, many people and organizations in the field (although certainly not all) have chosen to focus on structural concerns, both in terms of the conditions that enable violence to occur and in the agencies and forums that might respond to occurrences of violence. Both areas are born out of study of patterns across cases, a perceived imperative to engage before lives are lost, and the need to have stronger response measures queued up (within the “toolbox”) and ready to go. The shift can also be seen in the efforts of grassroots activists who are trying to realize a permanent and sustained constituency of engaged citizens, rather than creating new interest with each new individual case.

But crisis still drives the policy discussions and there is no low tide to allow for careful construction of new systems. Hence, the bureaucratic changes are undertaken in an environment where it is easy for longer-term needs to be overshadowed by today's most pressing concerns. Further, improving response necessarily demands understanding case-specific dynamics, which is an entirely different set of skills and knowledge. Finally, introducing normalcy into response mechanisms for extraordinary violence threatens to lower the bar for when extraordinary measures can be undertaken.

Third, there is a shift from a historical human rights posture of opposition to governments to that of working cooperatively with governments and multi-lateral or international organizations to create stronger, more diverse, and attuned response mechanisms. This does not mean that advocates refrain from criticism of governmental policy; even the most cursory glance at recent reports would quickly refute that assertion. It is rather a subtle attitudinal change towards viewing government as a largely positive partner, even if one that needs goading at times, that should further assert its global power. The shift means that non-governmental actors have found allies inside governments and are choosing strategies that aim to result in real policy changes. This positive impact should not be underestimated.

However, such a strategy only works if there is a government that is willing to engage and bend to such pressure, hence it offers a model for action in only certain societies and on certain issues. It may also deepen national biases by prioritizing conversations within pre-established national political communities rather than compelling a search for international coalitions with diverse partners. It means that the field is developing around actions that are perceived as more possible because of their potential appeal to key governments, rather than necessarily being guided by circumstances in places at risk of or experiencing mass violence. And it invites governments to use coercive measures—an invitation that, once issued, may be difficult to control and/or recall.

Today's genocide prevention activists have expanded further than many previous human rights campaigns to engage the general public in applying pressure on their own governments, particularly in the U.S. As a result, the movement has shown considerable creativity and tapped into a passion for its issues among a broader public. The presence of an audience for this work is doubtless and a great accomplishment for the field will be if it continues to grow and professionalize without losing the spark of ingenuity that characterized its most compelling public outreach efforts. Drawing in a larger public contributes to the field's capacity to make its policy recommendations stick and to sustain political focus on the issues.

The first challenge of this trend is that maintaining a strong public outreach effort can consume an organization's resources and promote policies and measures of success that shift the focus more to what people as advocates can do, and away from what will improve conditions for the individuals at risk. Second, members of the general public are not currently well educated enough to be informed actors in the movement. There is very little understanding of the dynamics of foreign policy making, case-specific background, and/or even the most basic concepts at play (i.e., human rights versus humanitarian organizations). While this may be

a broader foreign policy concern, it has specific ramifications for organizations that emphasize the role of a public movement.

Not everyone will agree with this presentation of the challenges facing the field or how the field of genocide and atrocity prevention should respond to its challenges. However, the strength of a field is not measured solely by its points of consensus, but also the vibrancy of its debates. This paper attempts to outline both areas of consensus in the field and the knowledge base that informs it, as well as areas of contention. To this end, it aims to be provocative in highlighting debates that are already underway in the field of genocide and atrocity prevention. The questions raised in this paper do not lend themselves to easy answers nor necessarily to consensus, and this may not be desirable. Instead, it is a hope that they contribute to the field's capacity for self-criticism and reflection, while also challenging it to reach out to other fields to share insights and join forces.

2 What Do You Really Want To Achieve?

Debates over goals are valuable for a field, not because they produce consensus, but because they provoke discussion of the strengths and weaknesses of organizations as they continually grow in relation to evolving circumstances.

One example of this comes from the human rights profession as it debated whether and how to expand to include social and economic rights in addition to political and civil rights. "Poverty is the world's worst human rights crisis," former Amnesty International (AI) Executive Director Irene Khan emphatically states in *The Unheard Truth: Poverty and Human Rights* (KHAN, 2009). In June 2009, Amnesty launched their campaign, "Demand Dignity," which aims "to end the human rights abuses that imprison people in poverty" (AMNESTY INTERNATIONAL, 2011). Mary Robinson, then writing as UN High Commissioner for Human Rights, agreed, noting that during the Cold War western countries tended to argue solely for political and civil rights, whereas Soviet bloc countries emphasized social and economic rights. The result too often was that the two sides spoke past each other. She argued, "The time had finally come to take the two sets of rights equally seriously" (ROBINSON, 2004, p. 866).

Human Rights Watch (HRW) took a different approach. Executive Director Ken Roth argued that "naming and shaming," HRW's hallmark methodology, depended on the organization's ability to document a clear case of violation, violator and remedy. While agreeing that social and economic rights are critical for the well-being of a population and can be addressed in some ways via naming and shaming, he argued promoting them was not the central role for HRW given the organization's strengths and limitations:

Moral capital does not accumulate through our voice alone (why should our opinion count more than others?), but through our investigative and reporting methodology. It is a finite resource that can dissipate rapidly if not grounded in our methodological strength.

(ROTH, 2004, p. 65).²

This discussion offers some guidance for the genocide and atrocity prevention field. How can organizations balance their work between the nature of abuses they focus on and their unique organizational capacity to contribute to improvements? What is the most sustainable and rigorous strategy for an organization? It is a discussion that must assess both organizational strengths and weaknesses and grapple with the evolving external environment. And it is unlikely that the answer will be the same for all actors.

Within the genocide and mass atrocity prevention field, important distinctions in potential goals have not yet been debated. Below are several examples of ways to articulate a core objective. This is not by any means an exhaustive list. There are trade-offs with each, and none provides an obvious or easy option for actors within the field:

- (1) *Protecting vulnerable groups (defined by group identity or simply civilian identity) from the threat of death in moments of extreme crisis.* The goal is defined in relation to a clearly visible threat or on-going violence that marks its victims for death (killing). It is a goal that most makes sense in contexts of fast-moving offensives against civilian groups and focuses on conditions that will stem the death toll. As the most narrowly defined goal on this list, it more readily lends to consistency in application. It also best corresponds to the extreme ethical stakes implicit in the term “genocide” and the various extraordinary response mechanisms in development by the field. However, it is also a rare form of violence, often develops with lightning speed, and can end or shift just as quickly.
- (2) *Decreasing the capacity of armed forces to commit and instances of large-scale violence against civilians.* This goal begins in reference to the moment of crisis, defined either solely by a threat of killing or potentially expanded to what is called indirect death or the intentional creation of “conditions of life” that cause death. However, this goal also extends to engagement on longer-term solutions that alter the balance of power that enabled atrocities to occur. Inevitably, such a goal implies engagement with situations even beyond the moment of extreme crisis; a political vision—often partisan—of the most desirable realignment of power; and a much greater number of cases to potentially address, complicating efforts at consistency in case selection and focus.
- (3) *Increasing the civilian protection capacities of international and national agencies.* The broadest goal introduced in this section, it adapts to a range of circumstances in which civilians suffer from violence. Such a goal is not defined solely in reference to a crisis, but also to how conditions functionally produce different forms of violence. It is less easily defined than either of the two above goals, but it might provide a framework for engaging situations characterized by long-term, low-level violence that appears in spikes, more isolated instances, or with multiple perpetrators who may function more like criminal networks.

This third type of violence, as we will see, may be increasingly common in our world today and over the long-term it can impact a great number of civilians--sometimes even more than episodic violence. In 2010, for example, 3,111 people were murdered in one Mexican city, Juarez, related to the activities of criminal gangs. This figure is more than the estimated 2,421 killed in Afghanistan (MORE, 2011) or the 2,321 violent deaths in Darfur, Sudan (DARFUR death..., 2011). Death tolls are often subject to dispute and should not be the only factor for consideration within the field, but these numbers suggest that a broader civilian protection agenda might significantly alter the standard array of cases the field focuses on.³

2.1 “Genocide” by any other name is not “genocide”

Much ink has already been spilled over the definitional challenges of “genocide.” What began as a scholarly debate over the major elements of the crime of genocide – the need to demonstrate an “intent to destroy,” the question of what constitutes “in whole or in part,” the articulation of the protected groups and the constitutive acts--has proven unhelpful in many ways for those interested in developing response mechanisms or improving policy. Over the past two decades, the courts have provided greater legal guidance for when the term might apply, but its power does not reside in its legal standing, but rather in its ethical and political significance.

Therefore, “genocide” will likely remain a highly contested term whenever applied.

Attempts to create or deploy other labels that retain the sense of significance embedded in “genocide,” but which are not similarly restricted in definition (see Table 1.1 for an overview) run into difficulties that cannot be resolved through terminology. The ethical force of genocide resides in the perception of its uniqueness. Using different language to cover a broader set of acts or using “genocide” in a loose fashion diminishes some of the conceptual clarity of the defined crime, the coherency of arguments for creating exceptional response mechanisms, and the power to mobilize a public.

Thus far, the field has developed largely through identification of extreme international failures in response to episodes of intensive, intentional killing, like the Holocaust, Rwanda, or Srebrenica, which are more readily identified as “genocide.” As such, the starting point of “genocide” is the exception, and it has worked backwards from there to identify rules that govern risk assessment, early warning and response mechanisms. At the moment of crisis--and particularly extreme crisis as witnessed in the examples above--there may well be no meaningful difference between the ideas and vision set out in the various objectives and terminology discussed in this section. However, as we will explore in the remainder of this paper, when one looks at questions surrounding prevention, models for understanding violence, and termination, the complications multiply.

Arriving at a more nuanced discussion of the goals demands an examination of the language developed to name violence. However, while greater clarity and consistent application of terminologies is helpful, debates over language will not resolve the challenge of more clearly articulating goals.

Table 1.1

OVERVIEW OF KEY TERMINOLOGY					
LEGAL DEFINITIONS					
	Status	Intent	Scale	Targeted group	Acts
Crimes against humanity (CHARTER, 1945; UNGA, 1998)	International legal definition; London Charter of the International Military Tribunal & ICC Rome Statute.	Systematic; "war criminals"	Widespread	Civilians	Murder, extermination, enslavement, severe deprivation of physical liberty, deportation, torture, rape, persecution, disappearances, apartheid, other acts
UN Convention on the Prevention and Punishment of the Crime of Genocide (UNGC, 1948)	International legal definition	Intent to destroy; includes rulers, public officials, or private individuals.	In whole or part	Ethnic, national, racial or religious group as such	Killing, serious bodily or mental harm; conditions of life calculated to bring about its physical destruction; prevent births and forcibly transferring children of the group to another group
EMERGENT INTERNATIONAL NORM					
	Status	Intent	Scale	Targeted group	Acts
Responsibility to Protect (ICISS, 2001) <i>Genocide, ethnic cleansing, war crimes and crimes against humanity</i>	Principle accepted at 2005 World Summit	National government's intention, negligence, or incapacity	Large-scale threatened or actual loss of life	Civilians	Loss of life, ethnic cleansing, killing, physical removal, rape, torture
NON-GOVERNMENTAL ORGANIZATIONS					
	Status	Intent	Scale	Targeted group	Acts
Uppsala Conflict Data Project (ECK; SOLLENBERG; WALLENSTEEN, 2003): <i>One-sided violence</i>	Political science term (corresponds to datasets used by UCDP)	Intentional; by a government or organized group.	25 or more deaths in a calendar year	Unarmed civilians	Direct use of armed force to kill civilians. Includes acts associated both with atrocities and terrorism.
Genocide Prevention Task Force (GPTF, 2008): <i>Colloquial usage of genocide & mass atrocities</i>	Bi-partisan task force convened by U.S. Institute of Peace, U.S. Holocaust Memorial Museum, & The American Academy for Diplomacy	Deliberate; by perpetrators or potential perpetrators.	Large-scale	Civilians: "typically be/c of group identity;" group identity not defined	Refer to crimes against humanity and genocide, as defined in international legal documents and customary international law, including definitions of war crimes if committed as part of a plan, policy, or large-scale perpetration.
MARO (SEWELL; RAYMOND; CHIN, 2010): <i>Mass atrocity</i>	NGO-proposed planning handbook for military responses to mass atrocities.	Systematic; by state or non-state armed groups.	Widespread	Non-combatants	Violence occurs in complex multiparty dynamics; difficulty of maintaining impartiality regardless of how the mission is defined; and potential for accelerated escalation of violence.

INDEPENDENT SCHOLARS					
	Status	Intent	Scale	Targeted group	Acts
Raphael Lemkin (LEMKIN, 1944) <i>Genocide</i>	Lawyer; Coined the term "genocide."	Coordinated plan	Policies that target entire groups.	Nation or ethnic group.	Eight "techniques of genocide:" political, social, cultural, economic, biological (related to birthrates & child rearing), physical, (nutrition, health and killing) religious, and moral, designed to destroy patterns of life of the oppressed group and favor those of the oppressor.
Barbara Harff and Ted Gurr (HARFF; GURR, 1988) <i>Genocide and politicide</i>	Political Scientists	Part of state-sponsored policies	Substantial	Genocide: group is defined by communal characteristics. Politicide: group is defined in terms of hierarchical position or political opposition to the regime.	Death, including killing and deliberately creating the conditions of life that would bring about death.
R. J. Rummel (RUMMEL, 1990) <i>Democide</i>	Political Scientist	Intentional	Includes extrajudicial executions of one person up to massacres of large numbers.	Any person and people.	Killing by government or "unofficial" groups receiving government approval, aid, or acceptance through direct action or reckless disregard for life.
David Scheffer (SCHEFFER, 2006) <i>Atrocity crimes</i>	Law professor; policymaker	Systematic and planned. Tied to individual legal responsibility.	Large-scale, "substantial" by terms of the courts.	Range of group identifiers.	Attempt to reference multiple international crimes in a single vocabulary without the burden of legal proof of any: including genocide, crimes against humanity, and war crimes.
Ben Valentino (VALENTINO, 2004): <i>Mass killing</i>	Political Scientist	Intentional	1,000 + civilian deaths	"Discrete group," separating a State perpetrator from civilian victims.	Intentional death of at least 1,000 noncombatants from a discrete group in a period of sustained violence
Jacques Semelin (SEMELIN, 2009) <i>Massacre Genocide</i>	Historian	Deliberate; Actions carried out by both central and local actors. Process, generally by a strong State.	Carried out in proximity to victims. Process aimed at total eradication of group.	Civilian Group as determined by the perpetrator.	Killing

3 Genocide is not inevitable; but is it preventable?

If you were a policymaker focused on Kyrgyzstan in 2009 or 2010, what would have been your most important concern? For U.S. policymakers, high on the list was the threatened eviction from the Manas military base, a critical route for reinforcing and supplying troops in Afghanistan. On February 3, 2009, Kyrgyz President Kurmanbek Bakiyev ordered the US base to close; although he later reversed his position.

That same year, the country ranked at number 42 on the Failed States Index,⁴ it occupied roughly the same positioning in 2010, somewhere in the warning range, at less risk than neighboring Uzbekistan or Tajikistan, but at greater risk than Kazakhstan or Turkmenistan. Kyrgyzstan did not figure among the top 20 countries in Barbara Harff's genocide and politicide warning list 2009 (HARFF, 2009).

Amid increasing government oppression and economic tensions, in early April 2010, popular protests that resulted in at least 75 individuals dead and over 400 individuals wounded in the capital and other northern centers overthrew the president. Analysts at the time speculated that the leadership change could aggravate the country's existing north/south tensions (TRILLING, 2010). The interim government under Roza Otunbayeva immediately began to develop plans to consolidate the new government and institute democratic changes; she also cast new doubt on the agreement allowing the U.S. to continue using the Manas base.

Then, in violence concentrated over four days in June 2010, largely in the southern cities of Osh and Jalalabad, Kyrgyz mobs attacked the minority Uzbek community: setting homes aflame, murdering an estimated 470 people, and displacing (both refugees in Uzbekistan and internal displacement) some 400,000 (KYRGYZSTAN INQUIRY COMMISSION, 2011, p. ii). Journalists reported the grisly details of assaults against women, children, and men, clearly targeted because of their ethnicity.

The example raises critical questions for prevention: What concerns should have claimed priority for analysts and diplomats focused on Kyrgyzstan? Should the atrocity prevention agenda be able to anticipate this level of violence? How could a risk assessment or early warning system be finely tuned enough to pay attention to the multiple risks within a single country? When is a risk of turmoil (and the type of turmoil) realized? When has it only just begun?

Genocide and mass atrocities do not appear spontaneously. Research into past cases supports the view that genocides develop incrementally (VALENTINO, 2004). Activists and policymakers have recognized that the human and financial costs increase exponentially the longer one waits to take action. As the report of the Genocide Prevention Task Force rightly asserted: "In its popular conception, early warning is often equated with an alarm bell sounded just before disaster strikes. This notion is much too limited" (GENOCIDE PREVENTION TASK FORCE, 2008, p. 17). However, translating these observations into finely-tuned, accurate and timely prevention activities is not a straightforward endeavor.

3.1 *Do we know enough to substantiate a unique atrocity prevention agenda?*

To begin this discussion, we must make a distinction between risk assessment and early warning for genocide and mass atrocities and then we will quickly review some of the tools used for both, before we raise questions about the limitations of an atrocity prevention agenda.

Ted Gurr (2000) defines the two areas thus.

Risk assessment “identifies situations in which the conditions for a particular kind of conflict [...] are present [...]. Whether or not risks are realized depends on whether the preconditions remain unchanged and on the occurrence of accelerating or triggering events.”

Early warning is “derived from monitoring the flow of political events, with special attention to actions that are likely to precipitate the onset of conflict in high-risk situations [... these] early warnings are interpretations that the outbreak of conflict in high-risk likely and imminent”

(GURR, 2000).

We will begin with looking at risk assessment. The factors that analysts commonly use to assess the level of risk in a particular country can be broadly grouped into five categories, see Table 1.2. The list below consolidates the work of several researchers—see, for instance, the work of Barbara Harff, Ted Gurr, Montgomery Marshall, Lawrence Wocher, Benjamin Valentino, Jay Ulfelder, and Scott Straus--and highlights some significant differences between variables favored by individual researchers. For example, Benjamin Valentino and Jay Ulfelder (VALENTINO; ULFELDER, 2008) advocate using infant mortality rates as a means to capture “a variety of dynamics in the political economy, including not only the accumulation and production of wealth but also the ways in which governments and citizens use (or misuse) that wealth and the effectiveness of state agencies charged with executing policy” (VALENTINO; ULFELDER, 2008, p. 15). There is disagreement about the relative strength and weakness of the state and how that correlates to violence. Another point of dissension is the centrality of state ideology; for Harff, it is of utmost relevance, not so in Valentino and Ulfelder’s model. An important area of consensus is that armed conflict significantly increases the potential for atrocities. Given the high correlation of atrocity with conflict, we will explore conflict trends in more detail later in this section.

Moving quickly into early warning, there is a range of “triggering” events that could help further focus prevention activities. The Genocide Prevention Task Force outlines several potential triggers: contentious elections; high-profile assassinations; battlefield victories; and environmental conditions (for example, drought); deadlines for significant policy action, legal judgments, and anniversaries of highly traumatic and disputed historical events. In addition, Alex Bellamy argues that a range of shifts in armed conflict – outside intervention, broken agreements, and a surge to “end” a conflict -- can cause escalation in atrocities. Unconstitutional regime changes, state incapacity, and rise of ideologically revolutionary regimes can also significantly increase the potential for

widespread violence (BELLAMY, 2011, p. 12). But even here, the landscape of potential cases remains too broad to effectively define imminent threats.

Monitoring these shifts in circumstance and whether they are likely to produce or increase violence requires a high-degree of case specific knowledge. The work of international monitoring groups like International Crisis Group or Human Rights Watch is crucial here. Experiments in new technologies are also offering models for early warning. SwissPeace and the Alliance for Peacebuilding, for instance, have developed a project called “Before,” that uses a variation of crowd sourcing to gather information about threats in Guinea. Sudan Sentinel uses satellite surveillance as a way to “watch” what is occurring in otherwise difficult to access areas like Sudan’s Nuba Mountains.

It is possible and perhaps even likely that risk assessment and early warning work will improve over time. But across the board in the work of risk assessment and early warning, there are some significant challenges. Both identify significantly more countries at risk than those that result in atrocities. Neither can yet adequately distinguish between different types of risks: instability, which can be either positive or negative; atrocity understood as 1,000 deaths perpetrated by a government; genocide; war, etc. There is insufficient evaluation of both quantitative systems and expert analysis. In short, there is a lot of room to improve the core tools and strategies used to inform the prevention agenda.

3.2 You’ve been forewarned: now what will you do?

Even if researchers were able to identify a place where the risk assessment indicated a threat and where a commonly cited triggering event was imminent, there is the next hurdle: conveying this information to the right policymakers who would then implement appropriate response measures. The process of assessment, warning, communication and implementation are rife with difficulties such as insufficient or contradictory information, competing agendas, resource challenges, access to key decision-makers, and availability of appropriate and feasible response mechanisms.

But perhaps the greater challenge resides in the very logic of a unique atrocity or genocide prevention strategy. In a comparison of the agendas for peacebuilding and atrocity prevention, Alex Bellamy notes few differences between the two. This leads him to conclude that an entirely separate atrocity prevention paradigm is not necessary: “what is needed is an atrocity prevention lens which informs and, where appropriate, leads policy development and decision making across the full spectrum of prevention-related activities” (BELLAMY, 2011, p. 2).

Granting that the prevention agendas, as laid out in and acknowledged by, for instance, Responsibility to Protect or Genocide Prevention Task Force Report, do not offer new approaches to established peacebuilding agendas, it should not be surprising that the reports’ military response components have garnered the most attention. It is arguable that instead of infusing an atrocities-prevention lens into pre-existing development and democratization efforts, these and other efforts to promote early action to prevent atrocities or genocide have unleashed an ill-defined paradigm for military intervention. The paradigm begins with a vaguely defined conceptual

framework (genocide, mass atrocities, civilian protection, etc) and further blurs the lines into a generalized categorization of “prevention”.

How would the work of the field have to change if instead of focusing on building support for preventative military operations, actors in the field opted to prioritize increasing the funds available for development aid and crafting the prevention lens that would accompany such funds, for instance?

3.3 Respond to realities, not projections

Understanding the larger context in which atrocities become possible and how they develop is crucial. However, given the challenges of accuracy, communication and response to predictions, there is a strong argument to be made that response mechanisms have to be undertaken in relation to the distinct features of conflict or violence as they manifest, rather than what might yet occur. Framing engagement with countries around preventing the worst from happening may lead to policies that ignore or misrepresent the very real problems outside atrocities.

For those who do not agree that something worse is on the horizon, it is simple to discount warnings. Or if action is taken, it is similarly easy to discredit strong response mechanisms (particularly the more coercive ones) as politically motivated. And, of course, there is always a measure of politics involved in military deployments, as there should be.

Further, while there are a great number of similarities between peacebuilding and atrocity prevention, one important difference remains. Peacebuilding defines a positive goal (improving a situation) and atrocity prevention implies a negative goal (ensuring something does *not* happen). Engaging countries around a prevention agenda means getting locked into the basic logical trap of trying to prove that something would have happened if action had not been undertaken. This is always going to be a weak argument.

Table 1.2

COMMONLY CITED RISK FACTORS FOR MASS ATROCITIES	
Past Group Violence	<ul style="list-style-type: none"> • Prior genocide or politicide • Legacy of vengeance or group grievance
State ideology	<ul style="list-style-type: none"> • Rise of factionalized elites • Voice and accountability of groups • Exclusionary ideology of ruling elite • Minority character of ruling elite • State-led discrimination
State Structure	<ul style="list-style-type: none"> • Political instability or upheaval • Non-violent protests • Autocratic nature of the state • Leadership instability • Infant mortality
Economic situation	<ul style="list-style-type: none"> • Organization for Economic Cooperation and Development (OECD) Country Risk Classification • Low trade openness • GATT/WTO member
Conflict	<ul style="list-style-type: none"> • Self-determination conflict • Major armed conflict • Conflict where the lines of battle correlate with major social cleavages

4 Conflict patterns are changing: are you ready?

Recognizing that atrocities and genocide frequently occur within armed conflict, the study of conflict trends is central to anticipating how atrocity trends might develop in the future and what new response mechanisms might be necessary. Not all conflicts result in mass atrocity, but given that atrocities frequently occur in the context of armed conflict, it is worth exploring this topic in greater detail.

First, some good news. Since the end of the Cold War era, conflicts are less deadly and there are fewer international conflicts.⁵ This is likely caused by a number of factors: end of the Cold War-fueled proxy conflicts, fewer conflicts involving the major powers, exponential increase in peacemaking and peacebuilding activities, development and expansion of international norms, global economic interdependence, increased number of democracies, overall decreased mortality rates, and rising national incomes. This does not mean conflict has ended.

Today, conflicts tend to occur inside poor countries, geographically clustered together (CENTER FOR SYSTEMIC PEACE, 2011, figure 8) that are neither democracies nor autocracies, but an unstable mix of both, termed “anocracies” (HUMAN SECURITY REPORT PROJECT, 2011, p. 76). Since the end of the Cold War, while there are fewer autocracies and more democracies, there has also been a sharp increase in the number of anocracies. That number has held fairly steady ever since (CENTER FOR SYSTEMIC PEACE, 2011, figure 12). In other words, the number of societies at particular risk seems to have become a stable part of the global horizon. Conflicts today also re-start at higher rates than in the past, although there are differences among various researchers as to the resurgence rate (GENEVA DECLARATION, 2008 p. 58).

The key actors have changed. International and transnational actors play significant roles today, both as agents of conflict, but also in terms of responders and interveners. According to the Human Security Report (HSR), between 2003 and 2008, there was a 119% increase of non-state conflicts, defined as “confrontations between communal groups, rebels, or warlords that do not involve the state as a warring party” (HUMAN SECURITY REPORT PROJECT, 2011, p. 10). Mary Kaldor has argued that global trends towards the de-centralization and privatization have altered who has the finances to enable, communications to organize, and means to enact violence. She describes the old wars as conflicts of state-building, and the new wars as wars of state “un-building” (KALDOR, 2007, p. 16).

These trends culminate in new vulnerabilities for civilians. Notably, there has been an increase in smaller-scale assaults against civilians. Here, the numbers are alarming: between 1989 and 2002, the number of such campaigns increased by 70 percent (HUMAN SECURITY REPORT PROJECT, 2011, p. 177).

The perpetrators of the greatest number of casualties from one-sided violence remain mostly governments, but include non-state actors. They are, in order of ranking: Rwandan government (1994), government of Bosnia Serbs (this government was a breakaway faction, not the legitimate government of Bosnia), Government of Sudan, AFDL (DRC), government of Afghanistan, government of DRC, LRA, government of Burundi, Janjaweed, and the Islamic State of Iraq

(HUMAN SECURITY REPORT PROJECT, 2011, p. 183). It will surprise no one in the atrocities prevention field that Rwanda, Bosnia, Sudan, DRC, Lord's Resistance Army, and Burundi are on this list. The presence of Afghanistan and Iraq (dates not specified), two cases that have not been on the anti-genocide agenda (at least not in the U.S.) raises questions about how the field defines its scope of work.

These factors taken together lead us to question whether the greatest threats to civilians today have changed over time from large-scale offensives against civilians to more geographically and demographically contained cases increasingly involving non-state actors. How these changes impact an atrocity prevention agenda depends on the goal of actors in the field – the broader the mandate, the more today's shifts in armed conflict are relevant. For those who wish to remain tightly focused largely on swift, potentially overwhelming killing offensives, the changes in conflict may be of more limited relevance.

5 What rules govern the exception?

Raphael Lemkin, who coined the term genocide in his 1944 publication, *Axis Rule in Occupied Europe*, is arguably also the first person to systematically study the phenomenon (LEMKIN, 1944). Key to his concept of “genocide” are two insights that would later be significantly altered in the legal definition. First, Lemkin specifically did not limit “genocide” to killing.

While the Nazi assaults against European Jews were the most radical manifestation of the regime's genocidal policies towards occupied populations, but genocide enveloped much more than this extreme form. He described multiple objectives of genocidal plans, including the “disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups” (LEMKIN, 1944, p. 90).

Second, Lemkin identified genocide as composed of two phases: “one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor” (LEMKIN, 1944, p. 79). This two-step process reflects Lemkin's expression that one could document “genocide” against both a population that had been removed (in any number of ways) and also against one that remained subject to colonization by an oppressor.

For decades after Lemkin's pioneering work, there was very little study of genocide. A small group of scholars took up this project beginning in the 1970s. Their work forms the starting point for what became an explosion of interest in the late 1990s and into the new millennium.

The study of genocide was for many years, and still is to some extent, overdetermined by the dominance of one case: the Holocaust. This history has cast a long shadow over the development of explanatory theories and response mechanisms. While the Holocaust remains a logical part of any study of genocide, it is marked by some specific characteristics that must be appreciated in order to make any meaningful comparisons. The international scale of both the armed

conflict and the genocide, the attempt to murder all of the targeted group, and the use of industrialized killing mechanisms combine to create a unique circumstance. Genocide studies has tended towards cases and processes that more closely adhere to a model of the Holocaust.

The research dynamics are now changing, but the field developed with little attention to negative cases, that is instances that demonstrate similar characteristics but did not result in genocide. Further, the dominant theories rely heavily on study of the nation-state during episodes of mass violence, yet rarely connect specific episodes of violence to larger political, economic and social processes, including global processes, which impact the state development (MOSES, 2008). Even within the state model, many theories place particular emphasis on the role of national elites (LEVENE, 2004a, 2004b). The study of genocide, and now mass atrocities, has too often developed without reference to the literature of political violence. Further, only recently have studies in this area included the impact of variations in contexts of mass violence: for example, cases that occur as part of colonial or settler violence, during coups or counter coups, communal violence, revolutionary social transformation, secession, partition, or counter-insurgency.

But many of the assumptions of the early development of research on genocide have found their way into the work of prevention and response. More recent work that expands the array of cases and contexts in which atrocities occur has yet to be integrated into the policy-oriented discussions.

5.1 The importance of studying local dynamics

By 2001, major fighting across front lines had come to a standstill in the Democratic Republic of Congo (DRC). But violence escalated in the east as local groups, known as Mai Mai, took up arms (STEARNS, 2011, p 251-266). The fought for a range of reasons: in opposition to Rwandan and Rwandan-allied forces, notably the RCD; sometimes to protect their own villages and exact revenge for attacks they suffered; their own enrichment, often by “taxing” local populations; settling old disputes over land or power; or punishing civilians associated (however loosely) with an opposing side. With weapons flowing from both the Congolese and Rwandan governments, Mai Mai groups formed quickly and without needing to rely on local populations for support.

It was in this context that some 1,000 people were massacred at Kasika, a small jungle village one hundred miles west of the Rwandan border. The road through Kasika eventually leads to a gold mine, hence its strategic value. The chief of Kasika, Francois Naluindi, was widely popular and respected. But nearby was a more militant leader, known as Nyakilibi, who had begun arming youth declaring he would defend his country against the Tutsi invaders, although locals thought Nyakilibi’s real interest was in expanding his land rights.

When a group of Rwandan and RCD soldiers passed through the town, Naluindi offered them food and welcomed them. As they exited the town, Nyakilibi and his men fired shots at them. Soldiers searched for the Mai Mai and then moved

on. A week later, the RCD and the Rwandan group once again passed through the village. Again, the Mai Mai shot at the party, killing a high-ranking and legendary Rwandan leader, Commander Moise.

This time, the Rwandans and RCD soldiers stayed in the village overnight. The next morning RCD troops attacked a group at the Church, bludgeoning them to death. They succeeded in killing the village priest and several nuns. They also killed the chief, his pregnant wife and most of Naluindi's extended family, who had sought shelter at his house. The victims were not only killed—many were disfigured and torn apart. One survivor commented: “It was like they killed them, and then they killed them again. And again” (STEARNS, 2011, p. 257). A Congolese researcher, Floribert Kazingufu, also notes that the murder of the chief later set off another conflict over succession that further divided the village (KAZINGUFU, 2010).

Among those who committed the massacre at Kasika, were Banyamulenge, Congolese youth of Rwandan background but who had lived in Congo for years—decades for some. They had long suffered discrimination in Congo, and like the Mai Mai, had many motivations for joining militias. Stearns enumerates a few:

The longing to be accepted as Congolese citizens, to obtain land rights, and to be represented in local and provincial administration. Of course, many of the youth also wanted to succeed, to obtain power and fame [...] the careers of many ambitious Banyamulenge had been blocked by the discrimination and favoritism fostered by Mobutu.

(STEARNS, 2011, p. 264).

This story demonstrates that not all patterns of violence can be explained at the national level. Long-standing, unaddressed political and social claims coupled with the means and license to resort to violence, as well as unpopular external actors all contributed to the larger context of armed conflict. From there, each act of violence set in motion new grievances and further legitimized violence as a means to resolve claims.

A small amount of research has been done on the variations of when, where, and how violence occurs inside a single case study, but the work that exists suggests that response mechanisms not currently understood or even visible may be embedded in the knowledge of these patterns (KALYVAS, 2006, p. 14). Other studies, like Scott Straus' work on hate radio in Rwanda (STRAUS, 2007) suggest that some of the response mechanisms considered part of the “toolbox” may be much more limited than often considered.

Critical to extrapolating policy insights from this level of inquiry is a sense of the dynamic evolution of violence. This implies a marriage of rich, case-specific knowledge with understanding of how international response mechanisms function not only to respond to given conditions, but also as productive forces in the complex interplay of the international, national and local dynamics.

Outside of increasing recognition of the need for more work at this level, there is little consensus. For instance, in her work on the local dynamics of violence in the

DRC, Severine Autesserre urges international actors to focus on interventions at the local level to address the political claims of local actors. Only then, she argues, will the international players see real sustainable gains resulting from their peacemaking efforts. Alex de Waal (DE WAAL, 2010), however, has argued that such interventions are unlikely to be successful. Local disputes in conflict-ridden societies often follow a logic of the marketplace, a process of continual renewal of agreements based on the going price – be it actual funds, access to power or resources, or other terms of negotiation. International interventions into this process momentarily inflate the “price” of a settlement, and once the international engagement diminishes, the market will “correct,” often violently.

5.2 *Who does the killing?*

In the last week of February 2007 at the trial of *Vujadin Popovic et al* before the International Criminal Tribunal for the former Yugoslavia, a witness for the prosecution told one of the most astounding stories of the genocide at Srebrenica that has yet come to light. The witness worked as a truck driver with the Bosnian Serb army, on the day in question he delivered drinks and food to soldiers working the execution squads.

The story begins in the days following the fall of Srebrenica, one of the last Bosnian government hold-outs in the eastern territory almost totally controlled by Bosnian Serb forces. In the month of July 1995, Bosnian Serbs launched their final assault on Srebrenica. They took Dutch peacekeepers hostage, and, receiving little international response from NATO or the UN, seized the town. They separated the men from the women and children and hunted down other men who had fled through the woods. All those captured were taken to execution sites where they were systematically murdered. In total, some 8,000 Muslims, mostly men, but including some women and children, were killed.

At one such killing site, Bosnian Serb soldiers had just fired their weapons at a line of blindfolded and bound Muslim men, when the above truck driver arrived. He testified to what he saw there, as the men fell dead:

In that heap, in that pile of dead bodies, who did not resemble people any longer, this was just a pile of flesh in bits, and then a human being emerged. I say a human being, but it was actually a boy of some five to six years. It is unbelievable. Unbelievable. A human being came out and started moving towards the path, the path where men with automatic rifles stood doing their job. And this child was walking towards them. All of those soldiers and policemen there, these people who had no trouble shooting -- I shouldn't judge them because I don't know about their situation. Perhaps they did it because of the order they received and perhaps they did it because of their nature. There are all kinds of people, and some of them may have done it gladly. Some probably did it because they had to. And then all of a sudden they lowered their rifles and all of them, to the last one, just froze.

(INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 2007, p. 7851).

The truck driver explained that the commanding officer demanded that the soldiers shoot the boy, but not one of them would, not even the officer himself. Finally, they turned the boy over to the driver to bring back with the next load of victims. The driver instead took the boy to a hospital and he survived.

What changed in that moment such that men engaged in a killing operation suddenly refuse orders? What do we know about the individuals who kill? Those who stand on the sidelines, not taking sides when innocents are murdered? Those who resist? Many stories of survival from across the cases of genocide include examples of people refusing the logic of genocide – sometimes emphatically, sometimes only fleetingly. But even those cursory seconds provide us insight into the factors that impact individual's decision-making in times of atrocity.

In 1950, Theodor Adorno, a leading intellectual from the Frankfurt School who fled Nazi Germany, together with Else Frenkel-Brunswick, Daniel Levinson and Nevitt Sanford published *The Authoritarian Personality* (ADORNO et al., 1950), an inquiry into the psychological profile of people who support authoritarian governments. Their conclusion was that certain personality characteristics tend toward fascist ideology. An authoritarian personality, they posited, is a form of psychological aberration.

A few years later, in 1963, Hannah Arendt, after watching the Adolf Eichmann trial, came to a very different conclusion. In *Eichmann in Jerusalem: A Report on the Banality of Evil* (ARENDR, 1963), Arendt argues that extraordinary evil is possible because it becomes the norm and regular people carry out its measures. Today, the consensus is much closer to Arendt's position than to Adorno's.

Across the range of cases, one clear insight has become apparent: perpetrators of atrocity are “normal”-- they represent a demographic cross-section of their societies. In his signature exploration of the motivations of perpetrators, James Waller concludes:

As we look at perpetrators of extraordinary evil, we need no longer ask who these people are. We know how they are. They are you and I. There is now a more urgent question to ask: How are ordinary people like you and me, transformed into perpetrators of extraordinary evil?

(WALLER, 2002, p. 133).

This question leads us back to some of the same questions presented in the early warning and risk assessment section about structural factors that impact the likelihood of mass violence.

But micro-level research involves more than perpetrators. Understanding the motivations, options, and strategies of a range of individuals-- survivors, bystanders, rescuers -- helps us better understand the phenomenon of genocide itself. However, motivations and patterns of participation within and across cases vary greatly and often change over time. This high degree of variation renders the wealth of narrative examples an endless and fascinating body of work to explore, but may make it difficult to arrive at broad-reaching conclusions related to prevention.

6 How would you measure success in ending genocide(s)?

On June 17, 2009, U.S. Presidential Envoy for Sudan, General Scott Gration stated that Darfur was experiencing “remnants of genocide,” thereby touching off a bitter disagreement within the Obama Administration, notably with U.S. Ambassador to the United Nations, Susan Rice. Two days earlier, Rice had described the situation as “genocide,” as had President Obama earlier that month (WONG, 2009). Journalists’ accounts of the disagreement used the adjective “furious” to describe Rice’s response to Gration’s comments.

By 2009, the scale of systematic assaults on civilians had significantly decreased and mortality rates in the refugee and displaced persons camps were largely back to normal levels. Yet there remained an enormous, vulnerable population of displaced civilians beset by a range of acts of violence in a context of civil war with a government that retained the capacity and had amply demonstrated the will to conduct organized campaigns of violence against civilian groups. Could this be defined as the end of genocide?

On October 19, 2009, debates within the Obama administration were resolved with the announcement of a new Sudan policy. They retained the Bush Administration’s use of “genocide” to describe the situation, and the policy consisted of three simultaneously--and apparently equally weighted--priorities: a “definitive end to conflict, gross human rights abuses, and genocide in Darfur,” implementation of the 2005 Comprehensive Peace Agreement between Sudan’s North and South, and efforts to ensure that Sudan would not again become a haven for terrorists.

But the debate between Gration and Rice was neither simply semantic nor was it purely a disagreement over policy options. It related to a fundamental question for the field: what constitutes an end to genocide and who determines the definition? How groups choose to answer this question is critical; it constitutes the ultimate measure of their success.

6.1 *The shadow of what ought to be*

The tension in the field today about what constitutes its objectives spills over into the discussion of endings⁶ and therefore what defines success. Is success defined as ending genocide or atrocities, as such, or the ending of discrete occurrences of genocide or mass atrocities? There has been little focused discussion of even what the latter, more contained goal, entails. The “moment of ending” that currently informs work in the field often contains multiple measures of success: an end to dying, an end to the circumstances that enabled the dying to occur (up to and including regime change), and the arrival at some form of justice for the victim group, be it judicial, monetary or symbolic.

However, actual endings rarely live up to this vision: mortality rates may decrease, but perpetrator regimes may remain in power, some form of conflict may continue, and victim’s needs may be unmet. Often, one incident or series of

offensives may end, only for violence to reappear later or elsewhere. Nonetheless, these suboptimal endings may be more realistically achieved; and they may save lives. Disaggregating these components of endings enables a more nuanced understanding as well as a more frank discussion over which ending might constitute a goal for different actors, what actions might most support it, and how one would measure success.

6.2 The historical record

As an illustration, a small selection of past cases is presented in Table 1.3. Of these twelve cases reviewed, we find five cases where the genocidal episode coincided with the end of the armed conflict, in four of those cases the perpetrator regime was completely defeated (Ottoman Turkey, Nazi Germany, Khmer Rouge in Cambodia, and Rwandan government). In the one case, Bosnia-Herzegovina, outside interveners engaged largely on humanitarian rather than political or interested basis and the conflict ended through negotiations that kept much of the perpetrator regime intact in areas it controlled. World War I, World War II, Vietnam's invasion of Cambodia, and the Rwandan Patriotic Front's victory were all fought primarily to win a war, the results of which ended genocide. The capacity of armed forces associated with the victim groups to mount resistance played a role in ending atrocities in the Nuba Mountains, Rwanda and Bosnia. Although it is worth noting that armed rebellion is among the factors cited as a risk factor for atrocities to occur in the first place.

The more frequent ending of the cases on our list is that the perpetrators remained in power, but after defeating an opposing force or subduing them, stopped short of total destruction. The communities suffered terribly, but physical elimination of a targeted group is not a common perpetrator goal. The deployment of violence, as Stathis Kalyvas has argued, can be exceptionally cruel even if its aim is to control a group, not to exterminate it (KALYVAS, 2006, p. 26-27).

Very little is known about the internal processes in perpetrator regimes across the historical record of atrocities. Some measure of internal dissent about the scale of killing appears to make a difference in the path of violence. But the decision-making process in many cases has not been sufficiently probed. Are there clues in such study that could inform efforts to alter perpetrators choices?

In cases where either the conflict continued or the regime remained in power, often the capacity and will to commit widespread abuses was unchanged, and violence began again against the same or new groups. This implies that even where instances of genocide or atrocities end, that further analysis is needed to see where additional internal threats might appear.

Finally, negotiations are not well suited to ending atrocity, even if they remain the only option for ending a conflict. Negotiation implies a measure of equality between sides and the ability of said sides to assert their interests; atrocities and genocide occur as asymmetrical assaults against civilian groups.

While resistance, as noted above, can ultimately turn the tide of a conflict, it is, by definition, not an option for the civilians as the victims of the mass violence campaigns.

6.3 Who defines the end?

Even in 2004, some Rwandan women were still dying directly from the perpetrator's actions during the period of genocide. Women who had been raped by HIV positive men were marked for death because the perpetrators knew that even if their victims survived the killing campaigns, that AIDS would curtail their lives. In the case of many women rape survivors for whom antiretroviral drugs were simply too expensive, they were correct.

Minority returns have been a problem that has plagued post-conflict Bosnia. Displaced people and refugees returned in significant numbers to areas where their ethnicity was a majority, but for individuals whose pre-war homes were in areas where they would now be an ethnic minority, the rates of return were significantly lower. The end result is a country where the effects of wartime ethnic cleansing have permanently altered the society.

Among the millions of displaced Darfuris living in camps--some for what will soon be a decade--at the edge of towns, blurring the line between camps and slums, are farmers. For them, the loss of a connection to the land is a vital blow to their identities and communities. Calculating an end that would somehow right these wrongs, or at least provide an acceptable address, is a worthy undertaking. However, it demands a long-term commitment to particular societies well beyond the end of killing or even the conflicts that enabled killing.

It is also unlikely to form the basis of an ending for policy discussions that focus on the techniques of a "toolbox" for response mechanisms. For organizations and individuals committed to ending genocide and mass atrocity, there needs to be a serious discussion based on what they can deliver--not necessarily all the time or according to a perfect agenda--but in realistic scenarios. What constitutes success for the field? How could said success be measured?

The crime dubbed an "odious scourge on humanity" by the drafters of the UN Genocide Convention is much easier to condemn than it is to transform. Efforts to do so will likely fall short of their ideal goal and the populations at risk suffer unimaginable pain; it is the nature of the problem. And many more civilians will suffer from targeted violence in ways that are difficult for the field to address in any coherent way. To some extent, none of these assaults has ever ended: in terms of the permanent scars communities and individuals pass on to subsequent generations, the land and other goods stolen, and the grossly unjust violence perpetrated. But it does not withstand the test of humility, sustainability or honesty to imagine that the "field" however constituted could deliver on all these promises.

Today, it is up to the field of genocide prevention and response to examine what, precisely and realistically it defines as success and what is necessary to achieve it.

Table 1.3

GENOCIDE ENDINGS		
Case	Context	Ending
Herero Namibia, 1904-1905	German colonial forces campaign of starvation and killing of Herero ended when the generals believed they had accomplished their task. Outcry in Germany impacted the shift in tactics from extermination to internment.	Goal of accomplished. Regime intact.
Armenians Ottoman Empire, 1915-1918	The Ottoman leadership ended the killing, starvation and mass deportations when they believed their goals had been met. They were then defeated at the end of World War I.	Goals accomplished. Regime ultimately defeated, as part of wider conflict.
Campaigns against ethnic minorities Soviet Union, 1937-9	Killing, starvation and mass deportation were targeted against a number of groups, for instance, the Ukrainians, Chechens, and others in addition to targeting individuals for political reasons. These campaigns ended with the death of Stalin.	Goals accomplished. Regime intact.
European Jews, Roma, Poles. Nazi Germany, 1939-1945	The Nazis deployed a wide range of measure to target entire ethnic groups, the most extreme of which was the plan to rid Europe of its Jewish population by killing them all. Military defeat by the Allied forces ended the genocide, regime and the war.	International coalition with vested interests defeats perpetrators.
Massacre of communists Indonesia, 1965-6	Power struggle between President Sukarno and Gen. Suharto involved widespread violence and systematic murder of communists. This violence ended when communist were eliminated and the power struggle was decided in favor of Suharto.	Goals accomplished. Regime intact.
Cultural Revolution China, 1966-1976	Includes repression of Tibet, Inner Mongolia, the Uyghurs, and other minorities in addition to politically defined opponents. These were started and stopped by Mao who maintain the capacity to re-start violence.	Goals accomplished. Regime intact.
Biafran War Nigeria, 1967-70	The Nigerian armed forces defeated the Biafran secessionist effort. Despite ruthless compoment of some armed forces, when the war ended, violence rapidly de-escalated.	Goals accomplished. Regime intact.
Khmer Rouge regime Cambodia, 1975-1979	The Khmer Rouge regime was overthrown by an invasion by neighboring Vietnam.	Perpetrators defeated by a neighboring country with vested interests.
Mayan communities Guatemala, 1981-1983	A 36-year long civil war peaked when the government launched a concentrated counter-insurgency that targeted entire Mayan communities. This high level of violence subsided when the government felt it had gained adequate control over the countryside. The civil war ended with negotiations in 1996.	Goal accomplished. Regime intact. Conflict continued. Goal accomplished. Regime intact.
Nuba Mountains Sudan, 1992	Government led counter-insurgency was brutally escalated with issuance of a jihad against the Nuba in 1992. It ended because of internal dissent within the ruling regime and the Nuba resistance.	Internal dissent. Resistance. Regime intact. Conflict continued.
Rwanda, 1994	The genocidal regime was overthrown by a Tutsi-led rebellion, the Rwandan Patriotic Front.	Perpetrators defeated by rebellion with vested interests. Violence displaced unto DRC.
Bosnia, 1992-1995	The Bosnian government, weak and isolated compared to Bosnian Serb secessionists, who were armed by neighboring Serbia. International bombing and a newly armed government army on the ground pushed Bosnian Serbs to make concessions at the negotiating table.	Combined international intervention and national resistance. Negotiations ended conflict.

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NOTES

1. Jill Savitt's research and insights on the nature of the field today greatly influenced the development of this section of the paper.
2. Since 2004, HRW has increased the amount of work they do on economic, social, and cultural rights. See, for example: <<http://www.hrw.org/health>>. Last accessed on: May. 2012
3. The cases most often cited, even a slightly expanded list, entail the deaths of close to 100,000 people, sometimes exponentially more. For example: assaults against the Herero, Armenian genocide, Holocaust, Nigerian Civil War, Bangladesh, East Timor, Cambodia, Guatemala, Burundi, Bosnia-Herzegovina, Rwanda, Sudan. Dropping this number to 5,000, as Alex Bellamy has done in a report for the Stanley Foundation significantly expands the list to 103 examples in just the post-WWII era. Dropping it further to 1,000, for instance, alters the nature of the phenomenon at hand. Different metrics make sense for different goals, inclusion of a broad number of cases is important for research but may not be a practical for dictating policy response under the banner of "mass atrocity" or "genocide" prevention.
4. The Failed States Index is an attempt to quantitatively measure state instability and is

produced annually by the Fund for Peace. For more information, see <http://www.fundforpeace.org/global/?q=fsi2012>. Last accessed on: May. 2012.

5. See, for instance, *Human Security Report 2009/2010* (HUMAN SECURITY REPORT PROJECT, 2011), produced annually by the Simon Fraser University, Canada's Human Security Report Project. The authors write that from 1984 to 2008, high intensity conflicts that result in 1,000 or more deaths a year, which tend to be between states and involving major powers -- have decreased by 79% (157). Other researchers have argued that this decline reversed slightly between 2005 and 2007, largely due to the impact of armed conflict in five countries: Afghanistan, Iraq, Pakistan, Somalia, and Sri Lanka. See "Global Burden of Armed Violence" (GENEVA DECLARATION, 2008, p. 9).

6. This section draws on the work from a series of seminars held with Alex de Waal and Jens Meierhenrich. The seminars examined a number of cases, as well as disciplinary approaches to endings. More about the research project can be found here: <<http://fletcher.tufts.edu/World-Peace-Foundation/Activities/How-Mass-Atrocities-End>>. Last accessed on: May 2012.

RESUMO

Reunidos em torno da convicção de que civis não deveriam ser submetidos de maneira intencional à violência generalizada e sistemática, e com base no pressuposto de que medidas especiais são necessárias para prevenir a ocorrência dessa violência e proteger grupos contra tais abusos, um conjunto diverso de acadêmicos, educadores, defensores, formuladores de políticas públicas, diplomatas e líderes militares têm protestado contra genocídios e atrocidades em massa. Em crescimento exponencial desde a última década, este grupo pode ser qualificado como um campo independente em plena ascensão. O presente ensaio explora alguns dos desafios conceituais e práticos enfrentados nesta área na medida em que esta se profissionaliza.

PALAVRAS-CHAVE

Genocídio – Ativismo – Atrocidades – Prevenção

RESUMEN

Unidos en la creencia de que los civiles no deben sufrir la imposición intencional de violencia sistemática y generalizada, y en la comprensión de que son necesarias medidas especiales para prevenir y proteger a los grupos de tal tipo de violencia, un grupo diverso de investigadores, educadores, periodistas, activistas, abogados, políticos, diplomáticos y líderes militares hicieron oír sus voces contra el genocidio y las atrocidades en masa. Este grupo creció exponencialmente a lo largo de la última década y hoy puede ser visto como un campo de trabajo emergente. Este ensayo explora algunos de los desafíos conceptuales y prácticos que este sector enfrenta, en el devenir de su desarrollo profesional

PALABRAS CLAVE

Genocidio – Activismo – Atrocidades – Prevención



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ABSTRACT

The objective of this study was to identify the main positions regarding the constitutionality of the Maria da Penha law (Law 11340/2006) in the Brazilian judicial system. As a result of political demands of the Brazilian feminist movement, the law has been at issue in the public sphere, and its constitutionality before the Supreme Federal Court has been pursued. The following issues were identified: i) a questioning of the law as a whole, considering its distinguished treatment of women, ii) a questioning of the law in that it precludes the enforcement of Law 9099/95; iii) the legislative competence to define petty crimes, iv) the support for subjection of the Judicial Branch and v) the constitutionality of law without background reasoning. By examining the arguments used in Courts of Justice, we intend to demonstrate how the establishment of the law is not limited to the legislative act, and the Judiciary can be the stage for disputes.

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KEYWORDS

Maria da Penha law – Constitutionality – Judiciary – Public sphere – Theory of law



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LAW ENFORCEMENT AT ISSUE: CONSTITUTIONALITY OF THE MARIA DA PENHA LAW IN BRAZILIAN COURTS*

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1 Introduction

Approved by the President of the Republic more than five years ago, the Maria da Penha law is the first Brazilian law providing comprehensive measures to inhibit domestic violence against women. As of September 22, 2006, Law 11340/2006 was named Maria da Penha law after an episode of domestic violence suffered by Mrs. Maria da Penha Maia Fernandes¹ that had wide repercussion in Brazil. The legislation was a result of decades of advocacy by Brazilian feminists for the regulation of Article 226, 8 of the Federal Constitution. This article demands that the State “ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family” (BRASIL, 1988). The bill has also been influenced by the demands of international treaties that Brazil has signed, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention of Belém do Pará (1994) and the Beijing Women’s Conference (1995). Needless to say, it stands as a milestone for the fight against gender-based violence as a social problem in Brazil.

The Maria da Penha law has established new measures and made significant changes to the way the Brazilian legal system addressed the issue. For instance,

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it has introduced conceptual innovations, such as recognizing different forms of violence — physical, psychological, sexual, property-related and moral —, as well as defining domestic violence against women regardless of the actor's or victim's sexual orientation. It has also introduced emergency protective measures for victims (such as the suspension of weapon possession, removal from home and limitation on the perpetrator's nearness to victims) and the preventive arrest of offenders in case they are found to pose a risk to the victims' physical or mental integrity. The bill has given special attention to the way victims should be treated in police stations specialized in domestic violence cases; has provided that victims should be assisted by multidisciplinary teams and has improved their access to justice by creating rules such as the need for legal assistance at all procedural stages (Article 27 of the Maria da Penha law). Furthermore, it has introduced new mechanisms of assistance to women experiencing domestic violence, as well as conferred them the right to keep their employment when it is deemed necessary that they temporarily leave their workplace. Additionally, it has created Small Claims Courts for Family and Domestic Violence against Women with civil and criminal competence (Articles 14 and 33), given that the judges in these courts are able to examine both crime and family law issues.

Notwithstanding the complexity and reach of these measures, the Maria da Penha law focuses on a more stringent criminal treatment for this type of violence. It precludes the jurisdiction of Special Criminal Courts to try crimes of domestic violence against women (Article 41 of the Maria da Penha law). Lastly, it has expressly prohibited penalties such as the mere provision of food or other financial aid to victims, as well as strictly pecuniary compensating penalties (Article 17 of the Maria da Penha law).

The preclusion of the jurisdiction of the Special Criminal Courts, which were created and regulated by Law 9099/95, was one of the most controversial issues discussed before the law was enacted. It has also been one of the most sensitive issues with regard to its enforcement.

Law 9099/95 has regulated Article 98 of the Federal Constitution, which provides for the Special Criminal Courts' jurisdiction to try petty crimes. Currently, Law 9099/95 establishes that Special Courts can try crimes of minor offensive potential, i.e., those leading to sentences not exceeding two years (Article 61 of Law 9099/95). It establishes a special and faster prosecution, introducing so-called "depenalizing" measures.

According to Law 9.099/1995, before the prosecution begins, the dispute may be settled between the parties, leading to termination of culpability. Otherwise, there may be plea bargain, where the Prosecutor's Office proposes a noncustodial sentence to be enacted immediately, offering, in exchange, to not initiate prosecution (Article 76 of Law 9099/95). In addition to this, the law introduces the possibility that, after the prosecution begins, the procedure can be conditionally reprieved, entailing conditions to be imposed on the defendant, which, if fulfilled timely, should lead to stay of execution.

Law 9099/95 has also introduced a change that is not directly connected to the procedure, but that impacts the issued addressed herein: Article 88 establishes that the prosecution of minor bodily injuries and unintentional injuries depends on

the victim's complaint, which repeals the provision in the Criminal Code that any crime is the object of unconditional public prosecution.

Thus, the provision of Article 41 of the Maria da Penha law implied not only the preclusion of alternatives to punishment and the criminal proceeding established by Law 9099/95 to cases of domestic violence against women, but also included minor injuries again in unqualified public prosecution processes, i.e., as a crime that does not need the victim's consent to be prosecuted.

Since it has become effective, the Maria da Penha law has been controversial among law enforcers. Some judges have questioned its constitutionality or the applicability of its legal provisions — especially those relating to the preclusion of Law 9099/95 and the minor injury prosecution system — and these discussions have led to heated debates in the public sphere.

Given this scenario, in December 2007, the President of the Republic presented the Declaratory Action of Constitutionality 19 (ADC 19) to the Supreme Federal Court (STF) with the purpose of solving judicial controversies and debarring the legal uncertainty over the constitutionality of the Maria da Penha law, especially articles 1, 33 and 41.

Yet due to the overall uncertainty surrounding the enforcement of the Maria da Penha law, in 2010 the Office of the Attorney General filed a Direct Action of Unconstitutionality claiming a Provisional Remedy (BRASIL, *ADI 4424*, 2010e) that would standardize its interpretation. According to the complaint filed with the Supreme Federal Court, the legislation would allow two different interpretations for enforcement: the assumption that the crime of domestic violence gives rise to (i) public prosecution according to the victim's complaint or (ii) unconditional public prosecution.² As we will address in this article, the only interpretation consistent with the Constitution, from the Attorney General's standpoint, is an unconditional public prosecution.

Resistance to the enforcement of the Maria da Penha Law, especially regarding its constitutionality, and the filing of judicial reviews of constitutionality with the Supreme Federal Court,³ have evoked a feeling of mistrust of the law's enforcement by the Judiciary in the public sphere, especially among social movement actors.

Thus, we may advocate that the conflicts that have arisen add even more importance to researching the enforcement of the Maria da Penha law by Brazilian courts.

The argument of unconstitutionality may hinder the application of the Maria da Penha law. In Brazil, the process of judicial review enables any judge or Court, by means of diffuse judicial review, to argue unconstitutionality to prevent the enforcement of a law. According to this model, the Federal Supreme Court (STF) may choose to adopt a system of diffuse judicial review to argue the constitutionality of a legal rule in its application to a particular case. In this case, the effects of the decision are limited to the case concerned, but the court may also challenge the constitutionality at an abstract level (concentrated judicial review).

At an abstract level, the court's decision should apply to all cases. The decision definitively removes legal rules from the legal system, rendering unconstitutional a particular legal rule or making the constitutionality of such rule contingent upon a

particular interpretation, thereby standardizing the interpretation of the law in order to bring it into compliance with a particular provision of the Constitution.⁴ As can be seen, this model makes the Brazilian Judicial Branch extremely susceptible to the debate on constitutionality of laws, which may ultimately result in non-enforcement by judges of appellate courts or courts of appeals of a law approved by the legislative.

Given the traits of the Brazilian judicial review, the objective of this paper is to respond to the concern over the application of the Maria da Penha law based on data from courts of appeal. Below we present a partial assessment of the enforcement of this law in Brazil, concentrating on some Brazilian Courts of Justice to do so.

Given the context underlying our research, we will present results from our database from the enactment of the Maria da Penha law until December 2010 to enrich the discussion on constitutionality in nine Brazilian Courts of Justice.

We will review the arguments and positions assumed by justices of the Courts of Justice, the contents of the Direct Action of Constitutionality 19, Direct Action of Unconstitutionality 4424 and the issues of the resulting hearing in the Supreme Federal Court.

Last, we will consider whether there are precedents contrary to the enforcement of the Maria da Penha law owing to its alleged unconstitutionality before the trial of actions by the Supreme Federal Court. The analysis, grounded on the data gathered, will also ascertain if there is connection between the discussions in Courts of Justice and that in the Supreme Federal Court.

2 Result of the Empirical Research in the Courts of Justice

This study analyzes 1822 judicial decisions regarding the enforcement of the Maria da Penha law accessed in the digital collections from the Courts of Justice of the following locations: Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Roraima, Rio Grande do Sul and São Paulo.⁵ Different aspects involved in the enforcement of the Maria da Penha law were considered in the research's scenario (including the issue of constitutionality) in order to provide an overview of the law's enforcement in different Brazilian regions.

In this paper, these decisions allow us to outline the general picture of the resistance to the Maria da Penha law that questions its constitutionality. Out of the decisions analyzed, 272 discussed the constitutionality of the Maria da Penha law (approximately 15%). The data below concentrate only on how the justices of different Brazilian States' Courts of Justice discuss and render their decisions on constitutionality.

The results allow us to make the following assessment: although it is possible that the argument of unconstitutionality works as a strategy to preclude the enforcement of the Maria da Penha law, the data shows that it has failed to establish precedent in the courts. In fact, empirical data is not enough to indicate generalized resistance in courts, even if there are indications that the Maria da Penha law is questioned either because the debate impacts courts' decisions or influences the public sphere. In other words, if there is resistance to the application of legal provisions of the Maria da Penha law or if it happens to a greater extent in trial courts (which

this research does not find), the said resistance does not affect the discussion on the precedents of the law's constitutionality.

According to our data, the arguments above were dispelled by the courts in the overwhelming majority of cases challenging the constitutionality of Maria da Penha Law. In only six cases did the courts entertain it as an unconstitutional provision. In 14 decisions, the Court did not entertain the argument of unconstitutionality, but ordered an "interpretation according to the Constitution".

Furthermore, there were 17 decisions where the justices stated their personal positions on the issue of constitutionality, but decided in favor of the constitutionality of the Maria da Penha law. In 15 of these cases, the justices stated that the reason for the said decisions was the hierarchy of courts. In one case, the justice has defended the unconstitutionality of the Maria da Penha law, but decided to enforce the law to ensure the best outcome for the defendant. In another case, the justice acting as rapporteur stated that he believed the Maria da Penha law was unconstitutional, but decided to make an "interpretation according to the Constitution." The positions that consider the Maria da Penha law unconstitutional seem to be few and are advocated by justices especially in certain states. By analyzing each State's profile of reasoning over constitutionality per justice, we can deepen our understanding of the issue. However, this task will not be carried out in this text.

Besides the trials' results, we felt it important to heed the Courts' arguments to discuss the constitutionality of the Maria da Penha law. Questions about the law's constitutionality are connected to three subjects: i) the law's questioning as a whole, considering its distinguished treatment of women; ii) the law's questioning as it precludes the enforcement of Law 9099/95; and iii) questioning over the jurisdiction to legislate.

The justices' positions on these subjects may be grouped the following way: a) positions in favor of the constitutionality of the Maria da Penha law founded on elements relevant to each of the issues raised above (often involving more than one), b) positions contrary to the constitutionality of the Maria da Penha law, which are similarly grounded on elements relevant to the said issues (often involving more than one); c) positions advocating an interpretation of the Maria da Penha law according to the Constitution (in general, the Maria da Penha law is constitutional, except for some provisions); d) positions that defend the unconstitutionality of the Maria da Penha law, even if they subsequently recommend its enforcement because of the hierarchy of courts; e) positions of justices defending the constitutionality of the Maria da Penha law who fail to ground their position.

The arguments for or against the constitutionality of Maria da Penha law will be systematized and exposed in the next section. Section 3.2 addresses the position of the justices who enforced an interpretation according to the Constitution. This type of decision happened principally in the cases discussing the validity of precluding Law 9099/95. Lastly, there were decisions where justices only enforce the Maria da Penha law for the party's claims without stating their position on its constitutionality.

Many of the arguments on the constitutionality of the Maria da Penha law (ADC 19 and ADI 4424) raised by this research are stated in the actions undergoing trial in the Supreme Federal Court.

2.1 Questioning of the Maria da Penha law as a whole, considering its distinguished treatment of women

The argument most frequently raised against the constitutionality of the Maria da Penha law in the cases analyzed is that the idea that the differential treatment of women who experienced violence at home is unconstitutional because it violates the principle of gender equality established in Article 5, item I of the Federal Constitution.

This position has little support among justices. They generally justify the differentiation introduced by the Maria da Penha law given the history of men abusing women, which is currently still significant.

It is common for justices to refer to statistics and surveys which “show that women are the main victim of domestic violence” in order to justify “special protection by the Criminal Law” in order to reduce inequalities. As stated by Justice Lais Rogéria Alves Barbosa, “the rules grounded on experience have shown that the number of women suffering all sorts of injuries by their partners is significant and growing, especially in the poorest layers of society.” (BRASIL, *Apelação Criminal 70029413929*, 2009a).

Thus, the reasoning is that, given that domestic violence is a social problem, the Maria da Penha law is constitutional precisely because it promotes substantive equality between men and women. The justices who have maintained this position point out that the formal equality ensured by the Constitution is not enough and that equality should be factual and enforced through laws providing for concrete measures.

They have advocated that women’s weakness and inequality should be analyzed case-by-case. Some justices even claim that the case is “an affirmative action in favor of women experiencing domestic violence who desperately needed appropriate protections in order to inhibit this type of violence and restore the substantive equality between men and women.” (BRASIL, *Apelação Criminal 200905003254*, 2010a).

The frequency of this reasoning varies quite a deal in the courts we analyze. It is recurring in the Court of Justice of São Paulo, where the argument of substantive equality is the basis for around 40% of the decisions discussing the constitutionality of the Maria da Penha law. In turn, the Court of Justice of Mato Grosso do Sul has used the same argument in only about 12% of the decisions discussing it.

A variation of this argument is used in decisions that have not employed the term “substantive equality,” but claim that the Maria da Penha law was constitutional given the Brazilian reality and history, where thousands of women experience domestic violence. This is the reasoning used in approximately 15% of decisions on the constitutionality of the Maria da Penha law in the Court of Justice of Rio Grande do Sul and in less than 5% of the decisions dealing with the issue in the Court of Justice of Mato Grosso do Sul.

In many decisions, the Maria da Penha law is deemed constitutional due to the State’s ability to “establish laws to protect vulnerable individuals on the grounds of gender.” (BRASIL, *Apelação Criminal 70030827380*, 2009b). The protection to the elderly conferred by Law 7716/89, to children and adolescents by the Child and Adolescent Law (ECA — Law 8069/90), and the prohibition of discrimination on the basis of race, color, ethnicity or religion under Law 7716/89, are cited as

constitutional examples of the “State’s power to make laws establishing different treatment to minority groups” (BRASIL, *Habeas Corpus 70031748676*, 2009c). According to Justice Barbosa, when protecting women, the State would be considering their “gender condition”, and assisting families by creating mechanisms to inhibit violence within their relationships, as provided for in Article 226, Paragraph 8 of the Federal Constitution.

Therefore, the Maria da Penha Law is alleged to be constitutional for giving effectiveness to the Constitution itself by making the protection of families concrete, since “the practice of domestic violence typically entails harmful consequences to every family as an entity,” representing a direct violation of human dignity, under the terms of articles 2 and 3, Paragraph 1 of the said law, and particularly under the provision established in Article 1, III of the Federal Constitution. Therefore, the Maria da Penha law would be a way to protect each individual within a family (BRASIL, *Apelação Criminal 2009.025378-7*, 2009d).

This argument is often used in the Court of Justice of Rio Grande do Sul, where it grounds about 20% of the decisions on constitutionality of the Maria da Penha law. In other courts, such as in São Paulo and Mato Grosso do Sul, this argument is not as frequent: it is used in only 5% of cases.

Some decisions refer explicitly to international treaties signed by Brazil, stating, for instance, that “the Maria da Penha law has ultimately been created to fulfill an International Convention signed by the very federal government” and “is founded on historical, empirical and statistical facts which justify that women, because of this differentiation, must have a tool to safeguard the balance of the men-women equation.” (BRASIL, *Apelação Criminal 70028874113*, 2010b). According to this line of reasoning, the Maria da Penha law, as a means of protection, has incorporated into domestic legislation international standards issued in favor of women to prevent and punish violence against them.

The most common argument is that the ordinary legislator may enact laws that establish differentiation, since Article 5 of the Federal Constitution aims to ensure substantive equality between men and women, but not all justices agree on this. For instance, Justice Romero Osme Dias Lopes has rendered decisions stating that statutory law cannot be contrary to the Federal Constitution and that the Constitution precludes several forms of discrimination, including on the basis of gender, and prohibits the legislator from differentiating men and women. This justice claimed that men could also be the victims of domestic violence and, thus, differentiation by gender would be completely inappropriate. Mr. Lopes also mentions theoretical positions implying that affirmative measures are incentives to discrimination (BRASIL, *Recurso em Sentido Estrito 2007.023422-4*, 2007a).

Although numerically insignificant, these decisions may create immeasurable and unpredictable effects by influencing other decisions or rousing debates in the public sphere. Such consequences are not discussed in this paper, but may be the object of future studies. Moreover, the decision referenced above is illustrative as it uses arguments raised in the early enactment of the Maria da Penha law.

The panel of the justice referenced above (the Second Criminal Panel of the Court of Justice of Mato Grosso do Sul) raised the Argument of Unconstitutionality

in Strict Appeal 2007.023422-4/0002, which has undergone trial in the Competent Court of Justice in January 2009. The argument claimed unconstitutionality of the Maria da Penha law, stating, “that the said law is ineffective, disseminating injustice, in addition to being antisocial, outdated and disguised as social revenge” (BRASIL, *Arguição de Inconstitucionalidade em Recurso em Sentido Estrito 2007.023422-4/0002*, 2009g). Nonetheless, the Full Court of Appeals’ decision in the Court of Justice of Mato Grosso do Sul advocated the constitutionality of the Maria da Penha law on the grounds that it is based on constitutional rights and that it has been enacted to deal with empirical inequality, given the alarming increase in violent situations, and “weighing the easiness of perpetration and psychological vulnerability of the victims, who could not previously resort to a specific measure to regulate and effectively inhibit the criminal situation.”

With respect to the formal aspects of these issues, to be discussed below, the decision has held that the Constitution grants the ordinary legislator the power to legally define “crimes of minor offensive potential.” By enacting the Maria da Penha law, the intention of the legislator was to treat more severely women’s offenders in the family environment, precisely because the “decriminalizing” parts of Law 9099/95 have not proven effective to fight crimes of this nature.

2.2 Questioning of the Maria da Penha law for precluding the enforcement of Law 9099/95

The main questioning relating to the Maria da Penha law used in State Appellate Courts references Article 41 of the law, which precludes the enforcement of law 9099/95 in domestic violence against women. This questioning has influenced actions presented to the Supreme Federal Court.

For instance, this is the position of Justice Adilson Vieira Macabu, who has declared Article 41 of the Maria da Penha law unconstitutional in some decisions, since it “violates the constitutional principles of equality and equal protection of people of different genders and spouses, as well as threatens the principles of reasonableness and proportionality.” According to this argument, when the Constitution states that “everyone is equal before the law, without distinction of any nature,” in Article 5, it precludes the establishment of “normative distinctions” in laws below it. According to the justice, this is a protection against discrimination. He avers that it is not reasonable that, if for a crime committed against the elderly, the perpetrator benefits from the decriminalizing measures of Law 9099/95, the same cannot occur when the victim is a woman. The justice then wonders if women are always going to be at an inferior level. (BRASIL, *Apelação Criminal 6208/2008*, 2008, *Apelação Criminal 3144/2009*, 2009e).

However, most of the decisions consider that the said provision is constitutional. The majority of arguments refer to the legislator’s intention to actually refute the “decriminalizing” measures of Law 9099/95 in cases of domestic violence against women, such as a plea bargains and conditional stays of execution.

In order to justify that there is no violation of the proportionality principle because of the preclusion established in Article 41, regardless of the sentence rendered, justices often refer to the legislator’s intent to change the scenario of domestic violence by proposing “changes which can actually contribute to stop or

reduce it drastically” (BRASIL, *Apelação Criminal 20100178957*, 2010c). The Courts of Justice of Rio de Janeiro and São Paulo frequently use this argument in around 25% and 15% of the decisions, respectively, but infrequently used in Rio Grande do Sul and Mato Grosso do Sul (about 5% of the decisions).

An argument about the severity of the crime also seems to ground the decisions purporting the provision’s constitutionality. Thus, dismissing the effect of Law 9099/95, the Maria da Penha law aimed to more severely punish crimes of violence against women committed within the family. Some justices argue that such preclusion is fundamental to effectively protect women, stating that the Maria da Penha law would become ineffective otherwise, precisely because what distinguishes it from other legislation is the preclusion of the “decriminalizing” measures of Law 9099/95.

Some justices have developed a sort of intermediate position about the preclusion of the enforcement of Law 9099/95: they think the Maria da Penha law is constitutional, but consider that some provisions of Law 9099/95 are applicable to cases of domestic violence and create exceptions to Article 41. They understand that the constitutionality of the Maria da Penha law does not entail the preclusion of all provisions of Law 9099/95 in cases of violence against women. Arguments following this position were used in decisions of the Court of Justice of Mato Grosso do Sul, as well as in other courts, such as those in Rio de Janeiro and Rio Grande do Sul.

Justice Carlos Eduardo Count of the Court of Justice of Mato Grosso do Sul avers: “As a matter of fact, what remains to be done is to analyze whether all the procedural mechanisms under Law 9099/95 are substantively contrary to the protection of Article 226, Paragraph 8 of the Constitution” (BRASIL, *Apelação Criminal 2008.022719-8*, 2009f). Afterwards, the justice argued that the constitutionality of the Maria da Penha law lies in the fact that it acknowledges that some provisions of Law 9099/95 are not sufficient to protect victims of domestic violence. Thus, only these provisions should not be enforced, and not Law 9099/95 as a whole. He believes that only measures which substantially violate the protection given to victims of domestic violence should be precluded. He argues that the conditional stay of execution of the process does not violate this protection, as it requires the fulfillment of certain requirements and conditions (BRASIL, *Apelação Criminal 2008.022719-8*, 2009f).

Thus, the Court applies the Maria da Penha law and the provisions of Law 9099/95 through the so-called “interpretation according to the Constitution.” Justices of the Court of Justice of Mato Grosso do Sul adopted this position even after the decision of the Full Court (BRASIL, *Arguição de Inconstitucionalidade em Recurso em Sentido Estrito 2007.023422-4/0002*, 2009g), which affirmed the constitutionality of the Maria da Penha law.

We also found cases where justices claim to have interpreted the law according to the Constitution because, according to them, in order to recognize the unconstitutionality, the process would have to be referred to the respective Full Court, and this would delay the process. This occurs because the Courts of Justice are divided into panels and chambers, which are made up of smaller groups of justices who are responsible for ordinary proceedings. However, Article 97 of the Federal Constitution establishes that only the Full Court, i.e., composed of all justices, could hear arguments for unconstitutionality.

2.3 Questioning the Maria da Penha law and the jurisdiction to define petty crimes

We also found arguments for unconstitutionality which defended that only constitutional legislators could define petty crimes, or “crimes of minor offensive potential”. Justice Adilson Vieira Macabu contends that the Maria da Penha law violates Article 98, I of the Constitution because the jurisdiction of Special Criminal Courts is determined by the nature of the crime and, therefore, it cannot be precluded on the grounds of who the victim was (BRASIL, *Apelação Criminal 6208/2008*, 2008).

Most Courts of Justice do not use this argument, but it is widely used in decisions of the Courts of Justice of Rio de Janeiro, Mato Grosso do Sul and São Paulo. In the vast majority of the decisions, justices have decided that such jurisdiction belongs to the ordinary legislator, contrary to that alleged by the party.

The prevailing understanding is that the Constitution has delegated to the ordinary legislator the authority to define petty crimes, as determined by Article 98, item I. Thus, if the Maria da Penha law expressly precludes the enforcement of Law 9099/95, these violations cannot be considered petty crimes. Laws that are inferior to the Constitution can, therefore, define which criminal offenses are subject to the “decriminalizing” provisions of Law 9099/95.

2.4 Positions of submission to the hierarchy of the Judicial Branch and decisions that do not found their positions

In some decisions, the justices do not state their opinions about the constitutionality of the Maria da Penha law, claiming subjection to the hierarchy of the Courts, although they are bound to sentences issued by higher trial courts only when the Supreme Federal Court has ruled through concentrated judicial review or when there is decision of the respective Full Court. We understand that this as the meaning of the decisions where justices raise the following arguments: i) the fact that the constitutionality has already been tried by the Supreme Federal Court ii) the fact that the Maria da Penha law has not been ruled unconstitutional by the Supreme Federal Court or iii) the fact that it has been tried by the respective Full Court.

The position of some justices who followed these arguments is noteworthy: considering that the Maria da Penha law, although “controversial,” has not been declared unconstitutional by the Supreme Federal Court and the “the guardian of the Constitution” until now (the actions were still pending judgment at that time), its provisions were still in force and should be enforced by justices and courts (BRASIL, *Apelação Criminal 70036402121*, 2010d, *Apelação Criminal 70029410172*, 2009h).

Some justices have agreed with the opinion of trial court judges or else with the defense’s arguments about the unconstitutionality of the Maria da Penha law, but ultimately decided for its constitutionality, since this position keeps with most of the precedents. However, in several cases, justices do express their personal position against the Maria da Penha law and its alleged inconsistency with the constitutional text.

In the Court of Justice of Mato Grosso do Sul, Justice Romero Osme Dias

Lopes stresses five scenarios under which he considers that the law is unconstitutional. However, for him, the debate is irrelevant given the decision of the Supreme Federal Court and the very Court of Justice of Mato Grosso do Sul, which fully recognized the constitutionality of the Maria da Penha law.

This justice, who had already favored the unconstitutionality of the Maria da Penha law as explained in item 3.1, was forced to change his opinion after the Argument of Unconstitutionality issued in January 2009 by the Court of Justice of Mato Grosso do Sul.

Thus, he supported the constitutionality of some articles of the law, including the preclusion in its Article 41, in keeping with the provisions of Article 97 of the Constitution. Nonetheless, the justice reproduced the trial of the 2nd Chamber of the Court of Justice of Mato Grosso do Sul (BRASIL, *Recurso em Sentido Estrito 2007.023422-4*, 2007a), where he appealed for the unconstitutionality of the Maria da Penha law, stating it “disrespected one of the objectives of the Federative Republic of Brazil (Article 3, item IV), violated the principle of equality and the principle of proportionality.”

Except for cases where there is sexual violence or serious injury, this justice believes that “the woman experiencing domestic violence does not want her partner or husband to be arrested, or criminally convicted.” Therefore, the solution is not to rest on Criminal Law, “but in the creation of public policies committed to recover the mutual respect that must prevail within the families.” According to him, the perpetrator’s conviction “only worsens relationships within the family” and women want the State to intervene to “relieve the family’s problem” and stop the assaults without leading to the partner’s arrest.

Similarly, Mr. Carlos Eduardo Contar, of the 2nd Criminal Chamber’s Justice of the Court of Justice of Mato Grosso do Sul, grounds the constitutionality of the Maria da Penha law on the fact that it had been the object of Argument of Unconstitutionality in the same court despite the opinion that it is now unconstitutional.

Thus, the two justices of the 2nd Criminal Chamber of the Court of Justice of Mato Grosso do Sul who openly advocated the unconstitutionality of the Maria da Penha law have eventually enforced it, because they believe that the understanding established in the Argument of Unconstitutionality tried by the Full Court cannot be challenged further.

In the Court of Justice of Rio Grande do Sul, Justice Manuel José Martinez Lucas justifies his decision in favor of the constitutionality of the Maria da Penha law only because, “strangely,” this is the position of the overwhelming majority. According to him, this is the provision which confronts the “fundamental right of equality between men and women” when he considers that the “very constitutional provision determines that only the Constitution may regulate this equality and men and women should be treated unequally only when the Constitution so allows it.” (BRASIL, *Apelação Criminal 70029189206*, 2009i). He has stated that he was “forced” to change his position when he recognized that he was “virtually alone,” and justified the change “owing to the judicial scenario and to avoid a fruitless discussion.” He has also raised the argument that judges and courts in Brazil should apply the Maria da

Penha law because the Supreme Federal Court, “the guardian of the Constitution,” had not declared it unconstitutional.

Among the cases analyzed, we also found decisions where justices, given the issues raised by the party, have enforced the Maria da Penha law, but have not expressed their opinions on the constitutionality. Or, they have taken its constitutionality for granted, even when the party has raised this question, or accepted the Maria da Penha law as constitutional without providing any reasoning for that position.

3 The Maria da Penha law and the Supreme Federal Court

Since its enactment in 2006, the Maria da Penha law has been the subject of debate in the Supreme Federal Court on several occasions. *Habeas Corpus* 106212 (BRASIL, 2011), tried in March 2011 by the Supreme Federal Court, exposed an important divergence relating to the law: the constitutionality of Article 41 of the Maria da Penha law (which precludes the enforcement of Law 9099/95). The Supreme Federal Court’s decision in this trial was unanimous to deny HC 106212, maintaining that Article 41 of the Maria da Penha law was constitutional.

Nevertheless, the matter has been examined as incidental and has not affected the prosecution of concentrated judicial review, which had already been proposed. In December 2007, the President of the Republic proposed the Declaratory Action of Constitutionality 19 (BRASIL, *ADC 19*, 2007b) and, in 2010, the Office of the Attorney General filed the Direct Action of Unconstitutionality 424 (BRASIL, *ADI 4424*, 2010e).

ADC 19 and *ADI 4424* were filed within the span of three years and were tried concomitantly by the Supreme Federal Court in February 2012. Both actions have been considered admissible, *ADC 19* by unanimous vote and *ADI 4424* by a majority vote (against the vote by presiding appellate judge, Cezar Peluso). Although different, the claims are strongly related. Both actions were filed to settle legal disputes and end the legal uncertainty concerning the constitutionality of the Maria da Penha law. *ADC 19* addressed particularly the constitutionality of Articles 1, 33 and 41 and *ADI 4424* claimed that an “interpretation according to the Constitution be given to Articles 12, I, 16 and 41 of Law 11340/2006.” The difference between the claim of *ADC 19* and *ADI 4424* suggests that new controversies aroused from the enforcement of the Maria da Penha law. Accordingly, the claim of *ADI 4424* includes the understanding that there is controversy within the Judiciary about the nature of the action for minor bodily injuries tried under the Maria da Penha law.

3.1 Declaratory Action of Constitutionality 19 (*ADC 19*)

When addressing its admissibility, the plaintiff described a negative scenario of the enforcement of the Maria da Penha law, presenting decisions of different courts questioning its constitutionality in view of an alleged threat: “(i) to the principle of equality (Article 5, I, Constitution); (ii) to the competence of special criminal courts (Article 98, I, Constitution) and (iii) to the competence attributed to the States to establish the local judicial organization (Article 125, Paragraph 1 and Article 96, II, “d”, Constitution).” Decisions made by the Court of Justice of Mato Grosso do Sul,

Rio de Janeiro and Minas Gerais about this issue, as well as others reaffirming the constitutionality of the Maria da Penha law, were presented as evidence of the judicial controversy that ADC 19 required the Supreme Federal Court to settle.

The main arguments used to support the constitutionality of the articles under review were as follows: a) the distinctive treatment of women in the Maria da Penha law is justified by historical reasons, as women stand as a social group which has been discriminated against, and equality cannot be understood exclusively from a formal point of view; b) given the unequal and patriarchal situation of Brazilian society, affirmative actions to protect women are of crucial importance; c) only the Federal Government may legislate; and d) the country is bound by international treaties.

3.2 Direct Action of Unconstitutionality (ADI 4424)

In order to level interpretation of the Maria da Penha law, the plaintiff claimed: i) the preclusion of the enforcement of Law 9099/95 and any of its provisions relating to crimes under the Maria da Penha law; ii) the nature of unconditional public action determined for minor bodily injury crimes under the said law; iii) the application of Articles 12, I, and 16 of the Maria da Penha law (about the need for withdrawal of complaint to be made before court) exclusively to crimes prosecuted on victim's complaint (such as the crime of intimidation, provided for in Article 147 of the Brazilian Criminal Code). Thus, the three objectives of the action refer to the consequences of precluding Law 9099/95 in cases of domestic violence against women, especially in relation to the change the said law establishes for crimes that produce minor physical injuries.

In this action, the prosecution of domestic violence by Law 9099/95 was said to imply impunity for actors, and not to hinder the logic of the cycle of violence that occurs against women. They maintained that making the action conditional to the victim's complaint disregarded the special situation of domestic violence and the problems brought about by the enforcement of Law 9099/95; namely, unsatisfactory settlements, women's discouragement from seeking the Judiciary, and cases treated as mere "domestic disagreements." They believed all of this resulted in impunity, strengthening violence against women. The need for a complaint was treated as an obstacle to the protection of health, life and non-discrimination of women. The action also points to researches showing that, at that time, 70 percent of the cases pending before the special criminal court involved events of domestic violence against women and, as a rule, the outcome was settlement, which discouraged women to file action against actors and strengthens impunity within patriarchal cultures.

To demonstrate the legal controversy about the subject, the claim described the arguments supporting the contrary position, i.e. that bodily injury crimes committed against women in domestic environments should be prosecuted by public action based on a victim's complaint like the other personal injury cases. Such a position is grounded on the following aspects: a need for preserving the family entity and for respecting the victim's wishes, the fact that many couples reconcile after moments of crisis and the possibility of unwanted conviction of the defendant.

Two positions have been outlined in this debate: 1) the action is public and should be unconditional and 2) the action is public and should be conditioned to the victim's claim. The action identifies the latter as the opinion of the majority, especially given a decision made by the Superior Court of Justice in February 2010 in line with that assumption. According to the claim:

The judicial opinions according to which the crime of minor bodily injury should no longer depend on the filing of a complaint by the victim – ‘whose wishes are almost always disguised by the threats and the oppression [exerted by] the perpetrator in order not to be sued’ -, given the preclusion in Article 41 of the Maria da Penha law, and taking into account the historical setting of legislative intervention in domestic violence, have lost.

(BRAZIL, ADI 4424, 2010e).

The plaintiffs also made reference to the role of the complaint made to the Inter-American Commission on Human Rights by Maria da Penha Maia Fernandes. The Commission identified a pattern of discrimination in the tolerance of domestic violence against women in Brazil and recommended legislative reforms. This reasoning is justified largely by international conventions (American Convention on Human Rights and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention of Belém do Pará, which was the first to recognize violence against women as a general phenomenon), in addition to precedents of the Supreme Federal Court.

The claim states that considering minor bodily injury crime as a conditional public action, as well as enforcing Law 9099/95 for crimes committed under the Maria da Penha law: i) harms human dignity and violates the American Convention on Human Rights, which establishes the respect to physical, mental and moral integrity; ii) violates the principle of equality, and iii) represents an inadequate protection of constitutional rights.

According to the authors, making a criminal action conditional to the victim's complaint ignores the implications of this particular form of violence and perpetuates violence against women due to the lack of adequate criminal response.

The authors also claim that the harmful consequences that women may face after filing a complaint amount to gender inequality. In other words, they violate the principle of equality, giving rise to a situation of impunity, which strengthens violence against women. The claim also follows the position in the report of the Inter-American Commission on Human Rights, which asserts that one of the major shortcomings of laws aimed at combating violence against women is establishing its primordial objective as the preservation of the family, instead of the protection of its members from violence and discrimination. Lastly, it refutes the notion that it is in the individual interest of women, since there has been a constitutional option for defending human rights, including those of women, and cites research indicating that withdrawal of complaints leads courts to shelve 90 percent of criminal cases. Referring to the preclusion to deficient protection of constitutional rights, the action argues that the need for complaint would hinder the protection of health, life and the principle of non-discrimination against women.

3.3 Trial of Actions in the Supreme Federal Court

In February 2012, the Supreme Federal Court found ADI 4424 and ADC 19 admissible simultaneously.⁶ Justice Marco Aurélio de Melo was the rapporteur and defended hearing both of the actions.

The first set of arguments Justice Aurélio de Melo analyzed refers to the constitutionality of Article 1 of the Maria da Penha law. According to him, the constitutionality of this article is not a concern since differentiating victims based on their gender in order to inhibit domestic violence is not disproportionate or unlawful, and women are more vulnerable to violence that occurs within the family. Women experience a significantly higher number of assaults than men, according to the justice, and those suffered by men tend not to be a consequence of cultural and social values or of the usual difference in physical strength between men and women. He also considers the Maria da Penha law to be consistent with international treaties signed by Brazil.

The justice points out that, according to the Constitution, fundamental rights cannot be not insufficiently protected. In this vein, Melo avers that the Maria da Penha law was enacted in light of the invisibility of victims of violence in the home. He believes that the rule mitigates social and cultural discrimination in the country and would be necessary as long as the situation continued. He also points out that other laws were enacted to protect weaker parties, such as the Child and Adolescent Law (ECA) and the Elderly Law.

Justice Aurélio de Melo contends that Article 33 of the Maria da Penha law – which determines that cases under this law be tried by ordinary courts until special domestic violence courts are established - is constitutional. According to the justice, this would not violate Articles 96, I, and 125, Paragraph 1 of the Constitution, which confer the authority to establish judicial organization to the states, since Article 14 of the Maria da Penha law would have offers an option, not an obligation, to the states.

In his final point on ADC 19, the justice asserts that Article 22 of the Constitution establishes that the Federal Government needs to regulate procedural law. Thus, the states' assignment to manage their respective judicial organization would not compromise the Federal Government's prerogative to establish rules about processes and, consequently, enact rules that eventually influence local courts.

As for ADI 4424, Justice Aurélio de Melo believes that the debate should take into account empirical data. According to him, in most cases victims withdraw the complaints against the actors of assaults in the hope that violence will not recur. He cites "Violência Doméstica na Lei Maria da Penha" by Estela Cavalcanti, which points out that the rate of withdrawal reaches 90% of cases. Justice Aurélio de Melo argues that the withdrawal of a claim is not an expression of the victim's free will, but rather indicates the hope that the perpetrator will not continue the abuse. Nonetheless, states the justice, in most cases violence worsens, since the constraints that could lead the perpetrator not to become violent are absent.

He advocates that making the action unconditional does not lead to the violation of a women's will and autonomy by the State, since this would not be legal

tutelage but a simple safeguard. Leaving the women in charge of filing a criminal prosecution means to ignore the fear, the psychological and economic pressure, and the threats that they suffer, as well as the asymmetry in power, resulting from historical and cultural conditions. According to the justice, this contributes to decreasing the protection of the victim and prolonging the scenario of violence, discrimination and harm to human dignity.

The justice reaffirms that the Maria da Penha law cannot be considered apart from the Constitution and international treaties, which allow positive discriminations aimed to benefit groups that are more vulnerable and compensate for inequalities based on culturally ingrained prejudice.

Thus, the justice voted for the hearing of ADI 4424, considering that Articles 12, I, 16 and 41 of the Maria da Penha law are in conformity with the Constitution, i.e. that the non-application of Act 9099/95) to the crimes in which the former is applicable is constitutional.

While discussing ADC 19, the other justices followed the opinion of the rapporteur, contributing brief comments similar to his argument. One argument used repeatedly is that of substantive equality, which amounts to treating unequal individuals differently. Several justices (Rosa Weber, Carmen Lúcia, Ricardo Lewandowski, and Ayres Britto) stated that the Maria da Penha law is an affirmative action or policy in favor of women, which is justified by a scenario of social inequality. The fact that some justices defended the constitutionality of the Maria da Penha law or its provisions by referencing constitutional protection of the family (Justices Fux and Lewandowski) is also significant. Reference was also made to international treaties and conferences.

In her opinion, Justice Carmen Lucia affirmed the need to deal with the problem of domestic violence seriously, stressing that the existence of action on trial signals that the fight for equality and dignity for women is far from complete. According to her, “an average white Western man can never write or think of equality and inequality as one of us — because prejudice affects the way he sees.” The justice stated that women, even herself, who holds a distinguished official position, are treated differently because they are seen as usurping the place of men. She asserts that the fact there are still women experiencing violence is a concern for all women, and is not an individual matter. This point was made in disagreement with Justice Fux, who said that women who suffer domestic violence are not be equal to those who “have an ordinary life.”

The justice said that the Maria da Penha law is important to ensure the dynamics of equality and that, although many believe a Supreme Federal Court justice is free from prejudice, this is not true. Even though she may not suffer like other women, there are those who still think that the Supreme Federal Court is no place for women. Currently, discrimination is not conspicuous, but this does not mean that it does not exist. She considers that, historically, physical violence in the home has annihilated generations of women and the Maria da Penha law is a sign that the fight for equality must continue. She concludes her opinion by stating that women have been put in an unequal position by historical social processes and, thus, should receive differential protection.

Justice Cezar Peluso has also defended the constitutionality of the Maria da Penha law, advocating that they hear ADC 19 since, “actually, the Maria da Penha law represented a normative strategy of the Brazilian legal system to, instead of violating, put into practice the principle of equality.”

However, he was the only justice to advocate against hearing ADI 4424. According to him, his position should not be understood as “a mere opposition to the vast majority, but as a warning to the legislator that, in this case, had good reasons for giving conditional character to the criminal action.” According to him, one could not assume that the legislator was unreasonable in his choices when drafting the Maria da Penha law, as he was informed by elements that arose in public hearings, put forth by experts in sociology and humanities, who contributed with data justifying the need for victim’s complaints in the criminal process.

By expressly rejecting the argument used by Justice Lewandowski on the possible existence of a defect of the will of the assaulted woman at the time of a complaint, Justice Peluso said that this is not a rule and emphasized the importance of “exercising the nucleus of human dignity, that is, taking responsibility for one’s own destiny.” According to the justice, many women choose to not report the perpetrators of violence. Thus, the legislator has considered the need for complaint on the assumption that “the human being is characterized precisely for being the subject of its own history, for his ability to decide which way to go.”

Justice Peluso also asserts that a legislator should consider the risks that could arise from the Supreme Federal Court’s decision to make the action unconditional on the victim’s complaint. The first risk would be the possibility of women suffering intimidation, as they would no longer be able to influence the progress of the prosecution or to prevent it. The second risk would be the conviction of the perpetrator, with unpredictable consequences for the family, in cases where peaceful coexistence between a woman and her partner is subsequently established.

The justice maintained that making the action unconditional and public could trigger more violence. The public nature of criminal action would not stand as a deterrent to such violence, according to his opinion. On the contrary, it could increase the likelihood of its occurrence, since the perpetrator knows that he is subject to a condition that is out of his control, i.e., that will not change even if he changes the way he treats the victim. According to the justice, the Judiciary could not take on the risks of this decision, which would imply losing sight of “the family situation.” He points out that the legislator sought to reconcile values: the protection of women and the need for maintaining the family situation in which she is involved, which is not only limited to the condition of the woman or her partner, but also includes children and other relatives.

With the dissenting opinion of Justice Peluso, the Supreme Federal Court officially supported the constitutionality of the Maria da Penha law with a majority vote.

In this decision, many of the arguments used by the justices in the Courts of Justice in several of the Brazilian states studied were repeated in the opinions of this Court’s justices, especially those who have advocated the constitutionality of the Maria da Penha law.

4 Conclusion

The debate about the Maria da Penha law's constitutionality is not reflected in the establishment of precedents contrary to its enforcement in courts of appeal. Out of the 1822 decisions analyzed by this research, only 272 (15%) have discussed this issue. Out of these, in 14 decisions, the justices have enforced the Maria da Penha law partially, according to what they call an interpretation according to the Constitution, and, in only six of them has unconstitutionality been declared.

We realized that the resistance to the enforcement of the Maria da Penha law rests especially on the issue of the enforcement of Law 9099/95 (this is what is in debate in all the 14 cases of interpretation according to the Constitution and in three of the cases of unconstitutionality). This means that, in the cases where the Court somehow resists to the enforcement of Maria Penha Law, the focus of discussion is the stricter criminalization of the actor, and not the existence of different mechanisms of protection to women. Furthermore, only a few justices from some Brazilian states express these positions.

Out of the six unconstitutionality sentences mentioned above, three were rendered by Mr. Adilson Vieira de Macabu of the Court of Justice of Rio de Janeiro, who has advocated that the preclusion of Article 41, preventing the enforcement of Law 9099/95, violates the principle of equality. The other three decisions were rendered by Romero Osme Lopes Dias of the Court of Justice of Mato Grosso do Sul, who resorted to the same argument. However, this justice has ultimately changed his decisions due to the positions of higher courts. We found some decisions that were based on similar grounds, which points to the influence that mechanisms of standardization of precedents exert somehow.

Although decisions in favor of the legislation's constitutionality prevail, there were dissenting opinions that defended the unconstitutionality of the Maria da Penha law in all courts. Therefore, one may say that, even though we have not found generalized resistance to the Maria da Penha law, one may not assume that the debate about its constitutionality had been settled before the Supreme Federal Court tried ADC 19 and ADI 4424. Furthermore, this study only addresses the discussions taking place in the higher courts and does not cover trial courts, about which there are rumors of cases of domestic violence being tried by Special Criminal Courts. This may well be happening, without the dissatisfied party resorting to the courts of appeal.

In terms of the positions and arguments used, there is some specificity regarding states and justices in the Courts of Justice. In other words, some arguments appear only in some courts and do not appear – or appear only incidentally - in others.

It is worth noting that we address only justices of Courts of Justice and, thus, are not able to confirm whether or not this variation is triggered by the claims made before the Court or by the manner that each justice grounds his positions on the constitutionality of the Maria da Penha law. It is probable that these two factors are simultaneously valid.

In any case, it is interesting to observe how some issues are raised in some courts but not in other ones, or how different is the frequency in which they appear. For instance, the most common argument made by the Court of Justice in Rio Grande do Sul to support the constitutionality of the Maria da Penha law considers how this law lawfully promotes substantive equality between men and women. This

argument was used in about 30 percent of the decisions of the Court concerning the constitutionality of the Maria da Penha law. The same occurs in the Court of Justice of São Paulo, which uses the argument of substantive equality in around 40 percent of its decisions on the issue. Other courts grant less importance to this argument. For instance, in the decisions made by the Court of Justice of Mato Grosso do Sul, the argument appears in approximately 18% of the decisions, a lower proportion than the two other Courts. The argument most used by this Court in about 50 percent of its decisions is that the Maria da Penha law may be considered constitutional because its constitutionality has already been affirmed the Full Court.

In the State of Rio de Janeiro, 30 percent of the decisions apply the argument of substantive equality. In these decisions, the reasoning most often offered (in about 45 percent of decisions) is that the competence to define petty crimes belongs with the ordinary legislator. The frequency of this same argument is quite different in other states; for instance, the Court of Justice of São Paulo has resorted to it in only 15 percent of its decisions, the Court of Justice of Mato Grosso do Sul in 10%, and the Court of Justice of Rio Grande do Sul in 10%.

The variation between the arguments commonly used by each Court generally follows this pattern: the argument that contends that the Maria da Penha law is constitutional because it aims to fulfill Article 226, Paragraph 8 of the Constitution is used in approximately 20 percent of the decisions of the Court of Justice of Rio Grande do Sul whereas the Courts of Justice in São Paulo, Rio de Janeiro and Mato Grosso do Sul base constitutionality on this argument in only 5 percent of their decisions.

In 25 percent of the decisions of the Court of Justice of Rio de Janeiro which discuss the constitutionality of the Maria da Penha law, we found they used the argument that the legislator intended to more severely punish the perpetrators of assaults against women, preventing alleged misuse of decriminalizing provisions of Law 9099/95. This would be valid given that this crime poses a serious threat to human rights, and is recurrent in nature.

A similar argument is often used in decisions by the Court of Justice of São Paulo (about 15 percent), while it is not frequently used in the Courts of Justice in Mato Grosso do Sul (7 percent) or Rio Grande do Sul (4 percent).

In the Courts studied, we do not find generalized resistance to the enforcement of the Maria da Penha law in courts of appeal owing to its alleged unconstitutionality. Furthermore, we did not detect the development of a line of precedents supporting this thesis. Nevertheless, as we have said, we do not want to overlook or minimize this discussion, since this research does not include trial courts, the existence of positions contrary to the Maria da Penha law and the possibility that these decisions influence the precedents.

The recent decision by the Supreme Federal Court in February 2012 has confronted and neutralized the interpretative disputes reviewed in this study when it declared the constitutionality of the law and of some of its provisions (such as Article 41).

Nevertheless, this does not imply the complete eradication of controversies over the Maria da Penha law in the Brazilian courts. There is no solution to the doctrinal legal debate and it is important to keep track of disputes that may rise at the new stages of debate following the Supreme Federal Court's decision.

Importantly, this study focused on resistance to the enforcement of the Maria da Penha law connected to the disagreements over its constitutionality. Other disputes that are also relevant to delimit the scope of the application of the law, such as the one regarding the conditions for application of protective measures, are legally substantiated at another stage of doctrinal discussion and should be considered in assessments of the Maria da Penha law in Brazilian courts.

Moreover, study on this issue should be extended in order to improve one's understanding of resistances that may linger in other instances or brought about by other arguments. Our findings only consider the courts of appeal, which represent one aspect connected to the enforcement of the Maria da Penha law. A more comprehensive diagnosis of the problem should be undertaken by considering other issues and examining the filters that are at play that occur before cases reach the courts.

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NOTES

1. The complaint made by Maria da Penha Maia Fernandes to the Inter-American Commission on Human Rights (OAS) states that there was governmental tolerance of domestic violence. Maria da Penha is a Brazilian biopharmaceutical professional who was victim of a double attempted murder by her husband in 1983, and appealed to the commission in 1998 given the irregularities and undue delay of the Brazilian judicial system.
2. As we will discuss below, the Maria da Penha Law, in its Article 41, expressly prevents the application of the Law 9.099/95. Consequently, it also precludes the application of the Article 88 of the Law 9.099/95 to cases of domestic violence against women, which means that minor bodily injuries practiced in this context would not depend on the victim's complaint as the other crimes of this nature do. Article 41 of the Maria da Penha Law, also often subjected to judicial review, as we will describe in more detail later on, has raised doubt about the waiving of the requirement of victim's complaint. This is because Article 16 of the Maria da Penha Law states that if the victim of the crimes established by this law wants to withdraw the complaint, the victim must appear before the judge at a hearing specifically designated for this purpose. Taking into consideration these two mechanisms, they pose the question of what type of legal procedure the crime of intentional minor bodily injury against women is subjected to – either unqualified public prosecution process (noting the prohibition of application of Article 88 of Law 9.099/95 in cases under the Maria da Penha law) or qualified, i.e. requiring the consent of the victim, according to interpretation based on the Article 16 of Maria da Penha law. Another interpretation, however, states that it is not the case of inconsistency of the proceedings established by the Maria da Penha Law, since the victim's complaint under Article 16 would apply to other crimes, other than the minor bodily injuries, such as the crime of intimidation (which also requires victim's complaint).
3. Brazil is a country that has 27 federal units. Each of them has a Court of Justice (TJ) with the jurisdiction to try cases, especially those that appeal decisions of trial courts. The judges working in the Courts of Justice are called justices. The highest level of the Judicial Branch is made up of the Superior Court of Justice (STJ) and the Supreme Federal Court (STF). The first is mainly responsible for trying, among other things, the appeals coming from the Court of Justice. The Supreme Federal Court is responsible for trying cases involving constitutional issues.
4. For the purposes of this text, some forms that promote the centralized control of constitutionality are the Direct Action of Unconstitutionality (ADI) and the Declaratory Action of Constitutionality (ADC). The objective of ADI is to abstractly declare the unconstitutionality of a federal or state law or normative act, while the ADC aims to abstractly declare the constitutionality of a federal or state law or normative act (Article 102, I, of the Federal Constitution of Brazil). ADI is also used to give the federal or state law or normative act a specific interpretation "according to the Constitution," a hermeneutical mechanism used by justices in Brazil, which interprets the rule in question in a way that is consistent with constitutional provisions. The capacity to bring such actions is limited. In the case of ADI and ADC, the following parties may propose an action: a) the President of the Republic; b) the chair of the Federal Senate; c) the chair of the House of Representatives; d) the chair of the State Legislatures or the chairs of the Federal District Legislative Chamber; e) the State and Federal District Governors; f) the Attorney General; g) the Federal Council of the Brazilian Bar Association; h) the political party represented before the Brazilian Congress; and i) unions and class entities of national nature.
5. The selection of precedents via digital collection has some limitations, and the main one is the uncertainty about the availability of all decisions regarding the terms sought. Although one cannot draw conclusions about the universe of the cases actually tried, we have analysed all the cases made public by the courts.
6. The trial decision by the Supreme Federal Court was not published when this text was finished. The description of the trial in this paper is based on the declaration and public reading of the opinions of the justices during the session, which was broadcasted on TV Justiça and available at: <http://www.youtube.com/playlist?list=PL18BEF1AC0B1D43A&feature=plcp>. Last accessed: 2 Nov. 2011.

RESUMO

Este estudo teve como objetivo mapear as principais posições sobre a constitucionalidade da Lei Maria da Penha (Lei 11.340/2006) no sistema judiciário brasileiro. A lei, fruto de lutas políticas do movimento feminista brasileiro, tem sido objeto de discussões na esfera pública e de ações que visam consolidar sua constitucionalidade perante o Supremo Tribunal Federal. As posições identificadas foram as seguintes: i) o questionamento da lei *in totum*, por conferir tratamento diferenciado à mulher; ii) o questionamento da lei por vedar a aplicação da Lei 9.099/95; iii) posições que discutem a competência legislativa para definir crimes de menor potencial ofensivo; iv) posições de submissão à hierarquia do Poder Judiciário; e v) posições que assumem a constitucionalidade da lei sem fundamentação. Ao analisar os argumentos utilizados nos Tribunais de Justiça, pretendemos mostrar que a criação do direito não se resume ao momento legislativo, sendo também o Judiciário palco de disputas.

PALAVRAS-CHAVE

Lei Maria da Penha – Constitucionalidade – Judiciário – Esfera pública – Teoria do direito

RESUMEN

Este estudio tuvo como objetivo mapear las principales posiciones sobre la constitucionalidad de la Ley Maria da Penha (Ley 11.340/2006) en el sistema judicial brasileño. La Ley, fruto de las luchas políticas del movimiento feminista brasileño, ha sido objeto de discusiones en la esfera pública y de acciones que buscan consolidar su constitucionalidad frente al Supremo Tribunal Federal (STF). Las posiciones identificadas son las siguientes: i) el cuestionamiento de la ley *in totum*, debido a atribuir un trato diferenciado a la mujer; ii) el cuestionamiento de la ley por impedir la aplicación de la ley 9099/95; iii) posiciones que discuten la competencia legislativa para definir crímenes de menor potencial ofensivo; iv) posiciones de subordinación a la jerarquía del Poder Judicial y v) posiciones que asumen la constitucionalidad de la ley sin ofrecer fundamentación para ello. Al analizar los argumentos utilizados en los Tribunales de Justicia, pretendemos demostrar que la creación del derecho no se resume al momento legislativo y que el Poder Judicial también es un palco de esas disputas.

PALABRAS CLAVE

Ley Maria da Penha – Constitucionalidad – Judicial – Esfera pública – Teoría del derecho



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ABSTRACT

Human rights treaty monitoring bodies have contributed to the process of norm specification beyond human rights treaties. Yet in some instances, these bodies have avoided complex principles that desperately need elaboration. On the right of self-determination, vital in Africa, the ACHPR had two relevant cases: *Katanga* (disposed in less than one page) and *Southern Cameroons*, which has obscured the important contribution of *Katanga* by failing to distinguish internal from external self-determination. Consequently, the ACHPR has made the right of internal self-determination almost unavailable for "peoples". This article critically examines the ACHPR's reasoning.

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KEYWORDS

Self-determination – Constitutional law – Autonomy – Secession – *Southern Cameroons*



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THE ACHPR IN THE CASE OF SOUTHERN CAMEROONS

Simon M. Weldehaimanot

1 Introduction

International Human Rights Law (IHRL) is known for indeterminacy. There is a common problem with international law: complex rules are formulated in the absence of proper dispute settlement procedures (CRAWFORD, 1994, p. 23). For example, Robert Lansing famously described the right of self-determination as “loaded with dynamite” (CASSESE, 1996, p. 22). For this reason, the “need for a principled stance on self-determination has never been greater. Most large-scale violent conflicts now occur within states rather than between them, and in many cases of large-scale intrastate conflict, self-determination is an issue – sometimes *the* issue” (BUCHANAN, 2003, p. 332). “In recent years, people have been slaughtering each other over the proper application of national self-determination in Ethiopia, Afghanistan, Bosnia, Iraq, Sri Lanka, Azerbaijan, Vietnam, and many other parts of the world” (TILLY, 1993, p. 31). The problem cannot be exaggerated:

At present, there are about 26 ongoing armed self-determination conflicts. Some are simmering at a lower level of irregular or terrorist violence; others amount to more regular internal armed conflicts, with secessionist groups maintaining control over significant swathes of territory to the exclusion of the central government. In addition to these active conflicts, it is estimated that there are another 55 or so campaigns for self-determination which may turn violent if left unaddressed, with another 15 conflicts considered provisionally settled but at risk of reignition. Self-determination conflicts, therefore, remain highly relevant, as the most recent episode involving Georgia has demonstrated.

(WELLER, 2009, p. 112).

Even though the dynamite right of self-determination is about 90 years old, still, “international law [...] fails to provide coherent conceptual and institutional support for forms of self-determination short of full independence and for a principled way of ascertaining when more limited modes of self-determination are appropriate” (BUCHANAN, 2003, p. 331). Indeed, “It remains today for the world to decide the validity of secession, and international law must provide the mechanism to evaluate that decision” (WASTON, 2008, p. 292-293). It is arguable that “a law of secession that strikes the proper balance between self-determination and territorial integrity will promote the greatest stability by providing peaceful means to address ethnic disputes and bringing de facto independent pseudo-states into the light” (WASTON, 2008, p. 292-293). In fact, going further, some hold that “Creating and implementing default rules in international law for partition and secession has significant potential to reduce the risk of conflict at relatively low cost” (RICHARDSON, 2009, p. 716).

However, while noting the indeterminacy of IHRL, it is important to admit that, regardless of the intensity of codification, law cannot be free of ambiguity to the extent that courts and judges are unnecessary. It is for this reason that international law--specifically, Article 38 of the Statute of the International Court of Justice (ICJ)--recognizes “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. When indeterminacy is unavoidable, the solution has been sought from procedures and adjudicative tribunals. IHRL has many judicial and semi-judicial institutions that have contributed to the process of norm specification beyond human rights treaties “both through the application of the standards to specific cases and through the general interpretation of treaty provisions” (CAROZZA, 2003, p. 59). In fact, norm specification seems one of the most important contributions of the largely toothless human rights protection apparatus.

Unfortunately, this important task of interpreting IHRL is not well-used. Not only are rulings given after a long time, but the reasoning is also not always profound, for which reason alone it fails to command respect. In addition, aggrieved sides that deserve encouragement for seeking solution to their grievances from tribunals of reason, as opposed to from the force of the gun, are sometimes unconvincingly told that they have no remedy in the international plane.

The main reason appears to be that the quasi-judicial institutions mandated to consider human rights violations and interpret rights are inadequately equipped. They are often confronted with complex problems that they tend to prefer to avoid. The African Commission on Human and Peoples’ Rights (ACHPR), which is one of the monitoring institutions of the African Charter on Human and Peoples’ Rights (African Charter) is a good example. In the past, the blame was directed to the African Union for not adequately funding the ACHPR. However, even with resources, the “creativity, and wisdom of those who run the system,” sometimes disappointingly missing, “are absolutely crucial” (HEYNS, 2004, p. 701). For example, the procedure of litigation before the ACHPR has been convincingly criticized not only as unduly time-consuming but also as not conducive for the advancement of jurisprudence (WELDEHAIMANOT, 2010, p. 14-38).

In 1995, the ACHPR had an opportunity to articulate the right of self-determination in the post-colonial context in an important case, *Katanga*. In *Katanga*, the ACHPR was asked to recognize the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga, a region in Zaire (AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS – ACHPR, *Katangese Peoples' Congress v Zaire*, 1995, para. 1). In addition, the ACHPR was asked to recognize the independence of Katanga and then “help secure the evacuation of Zaire from Katanga”. The ACHPR disposed *Katanga* in less than half a page and it has been deservedly criticized for not developing the jurisprudence of the right of self-determination.

In 2003, the ACHPR was presented with a substantially similar case, *Southern Cameroons*. Fourteen Cameroonians from an area they called Southern Cameroons petitioned the ACHPR alleging violations of many rights of Anglophone Cameroonians, one of which is the right of self-determination. The violation is allegedly caused by the abrogation of a federal constitution and replacement by a unitary state in which Anglophone Cameroonians have allegedly been dominated. In this case, not only did the ACHPR fail to elaborate *Katanga*, but it confused the one important point that *Katanga* contributed to the jurisprudence of the right of self-determination.

Part II of this article alludes to the indeterminate but most feared right of self-determination. Part III critiques the unsound reasoning of the ACHPR by comparing it to the convincing jurisprudence that was available before *Southern Cameroons* that the ACHPR should have consulted. In addition, Part III discusses the sound jurisprudence established before the ACHPR's ruling and updates it further by reflecting on a recent advisory opinion from the ICJ. Considering the specificity the right of self-determination has acquired as a result of scholarly and judicial discourses, Part IV concludes by noting that the remedies the ACHPR eventually gave could have been more specific. Norm-specification or jurisprudence building, rather than proving actual relief for victims of human rights violations, has been the most notable achievement of the quasi-judicial human rights monitoring institutions. However, more elaboration is still needed.

2 The Indeterminate Right of Self-Determination

From its origin until now, the right of self-determination is, of course, controversial. Almost every writer has lamented the indeterminate nature of the right. The most prophetic has been Robert Lansing, who warned that “an application of this principle is dangerous to peace and stability [...] The phrase is loaded with dynamite. It will raise hopes that can never be realized. It will,” so Lansing shared his fear, “cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late, to check those who attempt to put the principle in force. What calamity that the phrase was ever uttered! What misery it will cause!” (CASSESE, 1996, p. 22) To Klabbbers, the “right of self-determination easily qualifies as one of the more controversial norms of international law” (KLABBERS, 2006, p. 186). To Jennings, the doctrine of self-

determination of peoples “was in fact ridiculous, because the people cannot decide until someone decides who are the people” (JENNINGS, 1956, p. 55-56). To Grant, “self-determination has notoriously lacked concrete legal content. In particular, it has lacked a procedural framework for its realization” (GRANT, 1999, p. 11). “Self-determination,” so it seemed to Fox, “has become either everything or nothing” (FOX, 1995, p. 733). To Castellino, “within international law, self-determination has become all things to all men” (CASTELLINO, 2000, p. 1).

The people in a state do not have homogeneous aspirations, preferences and demands; and the right of self-determination does not explain how conflicting desires should be reconciled or arbitrated. In addition, the indeterminacy is related to the “self or people” which is entitled to the right, the content of the right and the circumstances under which the right can be exercised. Furthermore, almost every writer on the area has noted conflict between the right of self-determination and the principle of territorial integrity of states.

The right of self-determination is stated in many treaties and different soft laws. Even though a word-for-word reading of all the pronouncements of self-determination appears useless, a brief restatement is important. In an unclear manner, article 1(2) of the United Nations (UN) Charter states that one of the purposes of the UN is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” article 55(c) of the Charter further required the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Paragraph 2 of the 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples states that “All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 1960). But, paragraph 6 of the same declaration adds a qualification which subsequent pronouncements of the right of self-determination almost consistently follow: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”. Furthermore, paragraph 7 adds that all States are required to “observe faithfully and strictly the provisions of the Charter of the United Nations [...] on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity” (UNITED NATIONS, 1960). Common article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reads, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 1966a, 1966b).

However, the wording of the Declaration on Friendly Relations and Cooperation among States is specifically important as it hinted that in some cases, the right of self-determination can override territorial integrity of a state and warrant secession. For their territorial integrity to be maintained, the Declaration indicates that states must be “conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour” (UNITED NATIONS, 1970). Therefore, the Declaration Resolution gives an indication of the fact that there is self-determination that can be realized without affecting the territory of the state (*internal self-determination*), and there is another one, which affects the territory (*remedial secession or external self-determination*).

Article 20(1) of the African Charter on Human and Peoples’ Rights gives to “all peoples” “the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen” (AFRICAN UNION, 1981). Article 3 of the Declaration on the Rights of Indigenous Peoples states that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 2007). These are not the only documents in which the right of self-determination is provided.

3 Determining the Indeterminate

It is not, however, helpful to indefinitely lament the indeterminate nature of the right of self-determination and do nothing about it. International law (article 38 of the ICJ Statute) recognizes “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. In reality, judicial decisions flesh-out indeterminate rules in a more reasonable and coherent manner. Therefore, the following sections try to fill the indeterminacy based on sound judicial decisions.

3.1 *Jurisprudence before Southern Cameroons*

As of 1920, some aspects of the right of self-determination were detailed. As norms have evolved, the interpretation of the right has evolved. However, there is no need to chronicle the contradictory history here. The ICJ had six opportunities to touch on the right of self-determination. In the *Frontier Dispute Case* (INTERNATIONAL COURT OF JUSTICE – ICJ, *Burkina Faso v. Mali*, 1986, p. 567), the ICJ argued that “the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice” (ICJ, *Burkina Faso v. Mali*, 1986, p. 567).

In *Katanga*, the ACHPR was also confronted with the issue of secession based on the right of self-determination vis-à-vis territorial integrity of an African state. In this case, the ACHPR offered one significant point. It realized that self-

determination may be exercised in different approaches to autonomy systems such as self-government, local government, federalism, confederation or any other form of relations which have to be fully cognizant of other recognized principles such as sovereignty and territorial integrity. Establishing the basis for what is later called remedial secession, the ACHPR noted that:

In the absence of concrete evidence of violations of human rights to the point the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government [...] Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

(ACHPR, *Katangese Peoples' Congress v Zaire*, 1995, para. 6).

Afterwards, the Human Rights Committee of the ICCPR reflected on the right and contributed one significant point. Many states and some scholars hold that after decolonization is completed, the right of self-determination expires. In this context, the Human Rights Committee clarified that the scope of self-determination is not restricted to colonized peoples but continues to regulate the constitutional and political processes within states (UNITED NATIONS, 1994, para. 296). Later on, in its opinion on Quebec's claim to secede unilaterally from Canada, the Supreme Court of Canada stated "international law expects that the right of self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstance [...] a right of secession may arise" (CANADA, *Reference re Secession of Quebec*, 1998, para. 130, 311).

The Court further noted that a "state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity" (CANADA, *Reference re Secession of Quebec*, 1998, para. 130, 311).

When it comes to the "people" who are entitled to the right, in one respect, there is consensus: people under colonial rule or alien domination. At present, there are no such right-holders. However, given that self-determination has post-decolonization application, it has become important to define the self who is entitled to the right. The most helpful question to define the self is to consider who has been asking for the right of self-determination. Permanent identification marks are helpful but even with these marks, such as sex, group autonomy is not always demanded. Women, for example, even though oppressed in many states, have never asked for a separate state or autonomous province where men become aliens with a different passport. The same is certainly true with workers, gays or lesbians.

However, race, ethnicity, culture, economic lifestyle and historical separateness are essential factors for seeking a separate state. There is a growing consensus in defining "people". In *Southern Cameroons*, the ACHPR, relying on experts, concluded that where a group of people manifest common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious

and ideological affinities, territorial connection, and a common economic life, it may be considered to be a “people” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 170). In the ICJ’s *Kosovo Case*, a separate opinion employed a “conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people”. To these factors “a significant one” was added – “*common suffering*” – common suffering creates a strong sense of identity (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 228).

There has been some doubt as to whether different peoples who experienced a common colonial experience for decades can indeed be considered “people”. But even this issue is well-settled. The case of the Eritreans is similar to the situation in Southern Cameroons. Eritreans belong to nine different ethnic groups with different languages, culture, religion and economic and political history but they spent more than 60 years under one colonial roof. The colonial experience forged a common identity. In regard to Eritreans, the Permanent Peoples’ Tribunal ruled:

Eritrean people do not constitute a national minority within a state. They have the characteristics of a people [...] In their quality as a people they have the right to live freely, and without prejudice to its national identity and culture, within the boundaries of their own territory as delimited during the colonial period up to 1950.

(ROAPE, 1982, p. 39-52).

Therefore, in *Southern Cameroons*, the ACHPR is right in finding that the people of Southern Cameroon qualify to be referred to as a people (ACHPR, *Katangese Peoples’ Congress v Zaire*, 2009, para. 179).

It is true that in *Kosovo*, the ICJ noted that many aspects of self-determination are “subjects on which radically different views were expressed” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 82). The lack of consensus may justify disqualification of publicists as subsidiary means for the determination of international law. Yet the wealth of the debate should have enriched the reasoning of the ACHPR in *Southern Cameroons*.

3.2 Southern Cameroons: jurisprudential disruption and regression

The root cause of the matter in *Southern Cameroons* is typical of the crisis linked to Africa’s colonial history and the inherited identity. The present day Cameroon became a German colony in the late 19th Century (KONINGS, 2005, p. 278). As part of the developments of First World War, the defeated Germany was obliged to renounce its over-sea colonies. Thus, the present day Cameroon was divided into French and British administrations under the mandate system of the League of Nations and, later on, the Trusteeship System of the United Nations (MCPHEETERS, 1960, p. 367-375). French Cameroon constituted the larger part and Northern and Southern Cameroons territories administered by Britain consisted of “two narrow non-contiguous regions bordering Nigeria and stretching from

the Atlantic coast to Lake Chad” (KONINGS; NYAMNJOH, 2003, p. 23). Later on, Northern Cameroons became part of Nigeria while Southern Cameroons later on joined French Cameroon.

The French-Cameroon gained independence on 1 January 1960 as the Republic of Cameroon or *La République du Cameroun*. Under the auspices of the United Nations, a plebiscite was conducted in Southern Cameroons on 1 October 1961 to determine the decolonization fate of the territory and the people of Southern Cameroons decided to join the independent Republic of Cameroon (EBAI, 2009, p. 632). It needs to be noted that the reunification of Southern Cameroons with the Republic of Cameroon took place despite the Anglophone-Francophone divide (KONINGS; NYAMNJOH, 1997, p. 207-229). Up to now, as the complainants stressed:

Southern Cameroons was [...] under British rule from 1858 to 1887, and then from 1915 to 1961, a total period of nearly 80 years. That long British connection left an indelible mark on the territory, bequeathing to it an Anglo-Saxon heritage. The territory's official language is English. Its educational, legal, administrative, political, governance and institutional culture and value systems are all English-derived.

(GUNME et al., 2004 apud ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 11).

For this reason, the initial association of the two territories took the form of a federal republic consisting of the two parts. From the outset, the political leadership of the French-speaking Republic of Cameroon preferred a unitary instead of federal structure: federalism was taken “as an unavoidable stage in the establishment of a strong unitary state” (KONINGS; NYAMNJOH, 1997, p. 210). Therefore, the federal constitutional and administrative structures adopted at the time of the reunification of Southern Cameroons with the Republic of Cameroon as a result of the 1 October 1961 plebiscite were progressively altered (STARK, 1976, p. xx). In the end, the federal structure of the state was abolished on 20 May 1972 in violation of the constitutional clauses establishing the federation. In short, this move has disappointed the people of Southern Cameroons, pushing them from demanding the restoration of the federal constitution to complete separation from Cameroon.

On 9 January 2003, *Kevin Mgwanga Gunme* and 13 others filed a complaint before the ACHPR against the Republic of Cameroon giving rise to a case already referred to in this article as *Southern Cameroons*. They alleged, among other violations, that for decades, the inhabitants of Southern Cameroons were victims of the denial of the right of self-determination. Two important points here are the relief that was sought and the remedy that should have been given. The complainants were not clear on the relief they sought. Among other things, they asked the ACHPR “to reaffirm the inherent, unquestionable and inalienable right of the people of the Southern Cameroons to self-determination” (GUNME et al., 2004 apud ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 11). The declaration issued on 3 April 1993 by elites of Southern Cameroons, the Buea Declaration, elaborates the relief further. It was declared that “the only redress adequate to right the wrongs done to Anglophone Cameroon and its people since the imposition of

the Unitary state is a return to the original form of government of the Reunified Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 14). A declaration issued a year later in May 1994, the Bamenda Proclamation, laments that the constitutional proposals were not reacted upon. “Should the Government either persists in its refusal to engage in meaningful constitutional talks or fail to engage in such talks within a reasonable time,” the Proclamation hinted that there will follow a declaration of independence of the “Anglophone territory of Southern Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 15). The said declaration of independence was made on 30 December 1999. In fact, there is a government in exile. It is, therefore, apparent that endorsement of this declaration was impliedly sought as a relief.

For a case or communication to be considered by the ACHPR, there are about seven admissibility requirements to be met but not all of them are relevant to this article. According to article 56(2) of the African Charter, Communications shall be considered by the ACHPR if they are “compatible” with the Charter of the Organization of African Unity or with the African Charter. The Charter of the Organization of African Unity is now replaced by the Constitutive Act of the African Union. The literal interpretation of this provision is that the complained violation should be compatible with one but not necessarily with both. This seems to be the position of the ACHPR because it stated only the “condition relating to compatibility with the African Charter” which the ACHPR found to have been met in *Southern Cameroons* (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 71-72).

However, it seems that compatibility has been interpreted in such a manner that the main objectives and principles in the Constitutive Act are taken as the limits within which the rights in the African Charter shall be established. One of the main objectives of the African Union, as stated in article 3(b) of the Constitutive Act, is to “defend the sovereignty, territorial integrity and independence of its Member States”. One main principle stated in article 4(b) is “respect of borders existing on achievement of independence”. Indeed, in affirmation of *Katanga*, in *Southern Cameroons* too, the ACHPR felt “obliged to uphold the territorial integrity of the Respondent State. As a consequence, the ACHPR cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons that will jeopardise the territorial integrity of the Republic of Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 190). Very clearly, the ACHPR went to the extent of stating that the “African Charter cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 191).

For a case to be considered by the ACHPR, local (national) remedies must have been exhausted, or their non-availability or ineffectiveness convincingly argued. Another interesting point in *Southern Cameroons* is that the complainants submitted that “there are no local remedies to exhaust in respect of the claim for self-determination because this is a matter for international forum and not a domestic one” further asserting that “the right of self-determination is a matter that cannot be determined by a domestic court” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 81). This claim is rather true. The fundamental problems that

societal heterogeneity posed for newly emerging African states when they began their political existence have not abated even more than forty years after the first African country achieved independence from colonial rule (SELASSIE, 2003, p. 52). In the face of this reality, the solution many African states adopted to this problem is forced national unity. Fearing that official recognition of diversity would foster divided loyalties and separatism, virtually all African states have avoided coming to terms with their heterogeneity and until the 1990s, it was highly uncommon for any state to reflect its diversity in its constitution or laws (SELASSIE, 2003, p. 53).

In fact, in *Southern Cameroons*, the respondent state agreed that “no local remedies exist with respect to the claim for self-determination” and it seemed to justify its position by arguing that the right of self-determination for the people of Southern Cameroon was solved when the latter, in the context of decolonization, used that right in favor of becoming part of the present day Cameroon (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 82). There is some truth in this position in the sense that external self-determination in the context of former colonies is assumed to be a one-time choice and, once used, it is irreversible at will. The case of Somaliland and Eritrea are good examples. Because Somaliland voluntarily joined the other Somaliland to form what is now Somalia, it is argued that the right is irreversibly used (WELLER, 2008, p. 39-40). The case of Eritrea, a former Italian colony, was denied much sympathy from international law because in the 1950 Eritreans were considered to have chosen to be part of Ethiopia – a fact contested by Eritreans.

Yet, the fact that external self-determination in the colonial context is waived does not mean that there is no internal self-determination or remedial secession. In this sense, the respondent state erred gravely. As the ICCPR’s Human Rights Committee noted, the scope of self-determination is not restricted to colonized peoples but within states continues to regulate the constitutional and political processes (UNITED NATIONS, 1994, para. 296). The complainants’, as well as the main demand of the Anglophone part of Cameroon, has been for internal self-determination. It was only when this demand for a constitutional reform was not heeded that remedial secession was demanded. Self-determination is a peoples’ right and the ACHPR found that “the people of Southern Cameroon can legitimately claim to be a ‘people’” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 178).

Having found that Southern Cameroonians are “peoples”, the ACHPR then continued to address whether they are entitled to the right of self-determination (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 182). This was a wrongly framed question as the right is explicitly provided in the African Charter. Rather, the ACHPR should have asked whether internal or external self-determination is justified. The ACHPR’s failure to separate internal from external self-determination (remedial secession) is fatal, and it explains the ACHPR’s confusion. The ACHPR seemed to deny remedial secession as part of the right of self-determination when it held that the “African Charter cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party”. However, *Katanga* established that a high scale of perpetual human rights violations can justify calling the territorial integrity of a state (ACHPR, *Katangese Peoples’ Congress v Zaire*, 1995, para. 6).

Again, the ACHPR set the cost of internal self-determination too high by using the standard for external self-determination (secession). The ACHPR resolved to investigate if the demand for constitutional reform (towards a federal constitutional order) is within the right of self-determination (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 182). Rightly so, the ACHPR was convinced that the matter merits its determination and it “accepted that autonomy within a sovereign state, in the context of self-government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 184-191). The respondent state wrongly asserted that internal self-determination “may be exercisable by the Complainants on condition that they establish cases of massive violations of human rights, or denial of participation in public affairs” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 191). The ACHPR wrongly agreed with the position of the State “that in order for such violations to constitute the basis for the exercise of the right of self-determination under the African Charter, they must meet the test set out in the Katanga case” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 194). The standard in *Katanga* is that there must be “concrete evidence of violations of human rights [...] coupled with the denial of the people, their right to participate in the government” (ACHPR, *Katangese Peoples’ Congress v Zaire*, 1995, para. 6). “Going by the Katanga decision,” the ACHPR thought that “the right of self-determination cannot be exercised, in the absence of proof of massive violation of human rights under the Charter” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 194).

However, this standard is for calling into question the territorial integrity of the state party. It is the standard that justifies external self-determination (remedial secession), not a federal order or any system of autonomy. The various autonomy systems must be exercised without affecting territorial integrity but to say that massive violations of human rights is the price of federalism or some sort of autonomy deprives the right of self-determination any meaningful content. The ACHPR would have been sound in concluding that the scale of violation that justifies remedial secession is not present in the respondent state. The ACHPR also turned internal self-determination almost unavailable to peoples who are minorities in a state by requiring that any form of internal self-determination “must take into account the popular will of the entire population, exercised through democratic means, such as by way of a referendum, or other means of creating national consensus. Such forms of governance cannot be imposed on a State Party or a people by the ACHPR” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 199).

It is apparent that there are majorities and minorities in almost every country. While the majorities, as in Cameroon, prefer a highly centralized form of government, minorities prefer autonomy and self-government. If the nature of government is left to a majoritarian democracy, minorities will be denied the autonomy they want. The case of Sri Lanka is a good example. It is for this reason that the Complainants argued that there is no domestic remedy and the respondent State agreed.

Given that the cost for internal self-determination is set too high, in the end, the ACHPR “is not convinced that the Respondent State violated Article 20 of the Charter”. Even though, in giving recommendations, the ACHPR tried to mitigate the error in not finding a violation of the right of self-determination by asking the state to “abolish all discriminatory practices against” the targeted people, the recommendations remain weak. Rather than ordering restoration of the federal constitutional order of 1961, which seems to satisfy the demand for internal self-determination, the ACHPR recommended the state enter “into constructive dialogue with the Complainants [...] to resolve the constitutional issues” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 215). The ACHPR should have been more specific and bolder with its recommendations.

3.3 *Kosovo: jurisprudence corrected*

The most serious consideration the right of self-determination has had is in the recent *Kosovo Advisory Opinion* of the ICJ, given two years later than *Southern Cameroons*. The reasoning of the ICJ clearly demonstrates the limitations of the ACHPR.

The *Kosovo Advisory Opinion* arose because the General Assembly asked the ICJ to decide if the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law (UNITED NATIONS, 2008). The ICJ pondered “[w]hether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 82). The majority opinion dodged many pertinent questions. However three judges were aware of the important task of norm-specification of international judicial institutions. They held that “Many of the legal issues involved in the present case require the guidance of the Court” and thus they offered separate opinions (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Sepúlveda-Amor, 2010, para. 35).

3.3.1 On secession and territorial integrity

Surprisingly, against the fairly established jurisprudence, the *Kosovo* majority opinion came with a disruptive stand. It held that “the scope of the principle of territorial integrity is confined to the sphere of relations between States” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 81). Hence, “the Court considers that general international law contains no applicable prohibition of declarations of independence” by forces leading a province (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 84). Nevertheless, the seemingly disruptive ruling had support from some scholarship. According to article 2(4) of the UN Charter, “All members shall refrain in their international relations from the threat

or use of force against the territorial integrity [...] of any state". Some scholars take article 2(4) as prohibiting "external military attacks, but not necessarily against subversion by Self-Determination" (SZASZ, 2000, p. 2). Article 2(4) does not imply that a state's subjects are not bound to rebel. Indeed, in some of the hearings of the *Kosovo Advisory Opinion*, some states argued that the international legal norm of respecting the territorial integrity of States does not apply to peoples. The position of the ICJ has placed the ruling of the ACHPR in *Southern Cameroons* at the other extreme. In fairness, however, the majority opinion in *Kosovo* is not without criticism.

While taking the principle of territorial integrity as a matter of inter-state relation appears true to the early development of the principle among European states, in other parts of the world, and in Africa in particular, where the principle has taken other factors of legitimatization. Previously, the ICJ endorsed this line of argument stating famously that "the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice" (ICJ, *Burkina Faso v. Mali*, 1986, p. 554). In *Katanga* the ACHPR hinted that only higher proportion violations of human rights can bring territorial integrity of an African state into question. In the absence of such level of violations, Katanga, the province of Zaire that demanded endorsement of its desire to secede by the ACHPR, "is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire". Thus, the ACHPR felt "obligated to uphold the sovereignty and territorial integrity of Zaire" (ACHPR, *Katangeses Peoples' Congress v Zaire*, 1995, para. 5-6).

Indeed, "international law has developed a powerful reverence for the finality of national borders" (GEORGE, 2007, p. 188). Many scholars "assume some support for regarding *utipossidetis** as a norm of regional customary law in Latin America and Africa, if not a general norm as well, in the context of decolonization" (RATNER, 1996, para. 599). Some tried to determine if self-determination or territorial integrity is more powerful and "on whose side is International Law". Admitting that such a decision is "a close call", they note, "that important round appears to have gone to Territorial Integrity" (SZASZ, 2000, p. 3-4). Even though there have been a few situations where the international community has ignored the *utipossidetis* principle, "the preemption of the 'UtiPossidetis' principle by the international community is definitely the exception rather than the norm" (SHAH, 2007, p. 35). However, the ICJ has refused to regard *utipossidetis* as a peremptory norm (RATNER, 1996, p. 615). In addition, *utipossidetis* does not bar post-independence changes in borders carried out by agreement (RATNER, 1996, p. 600).

Therefore, the argument that territorial integrity is not a conflicting norm to the exercise of the right of self-determination by way of secession is not sound. To the contrary, the "people (population) of a territory, incarnated after

* *Uti possidetis*, "as you possess" in Latin, is a principle in international law that territory and other property remains with its possessor. The principle was used to require that former colonies develop into states following colonial boundaries.

independence as the State, has a right to territorial integrity. It holds this right, post-independence, against the international community, and also against its own citizens and component ethnic groups, who are generally under a duty to respect it” (WHELAN, 1994, p. 114). In addition, state practice is clearly in favor of territorial integrity and self-determination is widely understood as meaning some sort of autonomy within the boundaries of the state.

One of the separate opinions in *Kosovo*, though countered by a dissenting opinion, is the most sound and most agreeable with the majority of scholarship. In this separate opinion, and taking the issue of self-determination in relation to territorial integrity, Judge Yusuf observed that “the right of self-determination has neither become a legal notion of mere historical interest nor has it exhausted its role in international law following the end of colonialism”. However, he added that “international law disfavors the fragmentation of existing States and seeks to protect their boundaries from foreign aggression and intervention. It also promotes stability within the borders of States”. Thus, post-colonial self-determination “is a right which is exercisable continuously, particularly within the framework of a relationship between peoples and their own State”. “In this post-colonial conception,” reasoned Judge Yusuf, “the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises [...] in which the population or the ethnic group live, and thus constitute internal rights of self-determination” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 7-9).

Judge Yusuf further noted that claims to external self-determination by such ethnically or racially distinct groups pose a challenge to international law as well as to their own State, and most often to the wider community of States. To him, “there is no general positive right under international law which entitles all ethnically or racially distinct groups within existing States to claim separate statehood, as opposed to the specific right of external self-determination which is recognized by international law in favor of the peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation”. “Thus,” he continued, “a racially or ethnically distinct group within a State, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State, though this might be the wish of the entire group”. The reason, according to Judge Yusuf, is that the “availability of such a general right in international law would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 10).

However, in view of its growing emphasis on human rights and the welfare of peoples within state borders, Judge Yusuf also noted that international law “pays close attention to acts involving atrocities, persecution, discrimination and crimes against humanity committed inside a State”. Judge Yusuf also recognizes that international law does not turn a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their right of

internal self-determination but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. “Under such exceptional circumstances,” wrote Judge Yusuf, “the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 7, 11).

Judge Yusuf added that:

If a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State’s territorial unity and sovereignty.

(ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 12).

He then offered helpful examples, which may legitimize a claim to external self-determination:

Such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government [...] Nevertheless, even where such exceptional circumstances exist, it does not necessarily follow that the concerned people has an automatic right to separate statehood. All possible remedies for the realization of internal self-determination must be exhausted

(ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 16).

3.3.2 Majorities v. minorities on self-determination

As noted above, the people in a state are not homogeneous in their aspirations. For this reason, no state can devise a system of governance that satisfies every citizen or resident. This makes the search for a formula that maximizes the level of satisfaction of a state’s population on a given policy relevant but such a formula has not been simple.

The existence of groups of people with the same desires seems a fortunate situation – smaller group of people can be permitted to be governed based on their desires and preferences. This postulation, however, assumes that one population group’s desire is not a source of disappointment to others – an assumption which would allow dividing the population of a state into smaller population groups with similar desires. However, this assumption is not always true. For example, federalism pleases one segment of Sri Lankans and deeply disappoints others. Union with Greece pleases Greek Cypriots and annoys Turkish Cypriots. Religious

fundamentalists of one state are not pleased when same-sex marriage is permitted in the state next door, and those wishing an end to capital punishment are not happy when the neighboring state allows it.

In addition, for a state to allow groups to be governed in accordance with their desire and will, for practical purposes the group should be defined on more permanent bases and there should be many areas of agreement such as regarding language, culture, livelihood and geography. It is this communality with a higher level of permanency that makes the argument of dividing the “peoples” to further smaller “peoples” with common desires attractive. Ethnic minorities and indigenous peoples, as defined below, satisfy the permanency of the communality requirement. If the two requirements are not met, a state cannot continue to form and reform smaller groups in order to maximize the will of the people. In addition, endlessly dividing peoples to smaller and smaller groups would eventually end into leaving individuals live their life as they wish. In such a situation, group affairs, as public governance is, becomes irrelevant. There is no need for administration if every individual can live freely as he or she desires.

There is little literature on the will of the people as the basis of the authority of government – a concept set out in article 21 of the Universal Declaration of Human Rights (UDHR). Works on the drafting history of the UDHR do not tell anything about who the people are and whether the people are divisible (MORSINK, 1999, p. 66). Even in the most detailed attention to article 21 where the UDHR is treated article by article, it evaded the mind of the participants that the “people” needs a definition and more rules are needed to regulate a situation of divided will. Thus, “there is a more immediate challenge relating to article 21: how to ensure that the right of individuals, groups and peoples to a minimum of ‘internal’ self-determination” (ROSAS, 1999, p. 451).

Regarding mutually exclusive desires, a state has to have a formula by which a certain desire overrides others. For a long time, this formula has been majoritarian democracy. However, majoritarian democracy has injustices, especially in situations when segments of a state’s population *continuously* find themselves losing to the majority. To avoid the harshness of this formula, democracies protect minorities through entrenched rights and the use of dispassionate judges. Of course, this comes in the context of the majorities willfully putting a limit to their might. “Although one may believe that majority rule needs to be limited and constrained in various ways,” some scholars convincingly argue that in a creation *ex nihilo* (creating for the first time), “these limits and constraints can ultimately have no other normative foundation than a simple majority decision”. Any legal limitation on the will of the majority is a result of “a simple majority deciding that a simple majority may not be the best way to decide some issues” (ELSTER, 1994, p. 179-180).

Before the advent of IHRL, a constitution-making may have been creation *ex nihilo*. At present, however, to some extent IHRL regulates the constitutional order of states. This means that not everything is at the mercy of the simple majority. It is not fair, nor does it serve the purpose of international law, to tell complainants to go back home and accept the result of a referendum. In this context, the ACHPR should have been more specific and bolder with its recommendations.

It is helpful to recall that the Human Rights Committee of the ICCPR has convincingly held that the right of self-determination has not expired with the end of colonialism but within states continues to regulate the constitutional and political processes (UNITED NATIONS, 1994, para. 296). A constitution-making or revision process is not a one-time event relegated to history. Rather, “We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been written or re-written in the last quarter century” (HART, 2003, p. 1). Indeed, there is an increase in revision of constitutions. Especially as the Arab Spring has led to the fall of many dictatorships and autocratic regimes, there is a proliferation of demands for new constitutions.

In writing a new constitution or revising the old one, grievances of minorities are likely to arise. For this reason, the role of IHRL in framing or revising a constitution for a state is getting serious attention. Recently, two scholars took the ICCPR as the principal source of universal procedural norms that all states contemplating the drafting or revision of their constitutions are well advised to consider (FRANCK; THIRUVENGADAM, 2010, p. 3). A notable book on a constitution-making or revising process notes a recent and growing role of IHRL as a body of guiding principles for the process of writing and content of a constitution (BRANDT et al., 2011, p. 62). Indeed, throughout the twentieth century, IHRL has grown from a narrow set of norms to governing detailed issues concerning the way in which governments ought to be structured. Therefore, IHRL is now an embryo of an emerging *world constitution* (EVANS, 2005, p. 1048).

The ruling of the ACHPR appears even weaker when examined in the light of its previous ruling that “international human rights standards must always prevail over contradictory national law,” including a constitution, because to “allow national law to have precedence over the international law” “would defeat the purpose of” international law (ACHPR, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 1999, para. 66). In this context, *erga omnes* obligations, ratified (by the state about to write or revise a constitution) or un-ratified treaties of almost universal ratification, customary international law and soft-laws have different levels of authority ranging from being binding to merely persuasive.

So far, a constitution-making or revision process and the content of a constitution have been explained by terminologies and concepts of political science and constitutional law. However, these concepts and terminologies are closely related to provisions of IHRL. For example, the right of self-determination (as a component of IHRL) and federalism (as a concept of government, thus the area of political science and constitutional law) are related, but one must note that the latter carries a binding legal element. For this reason, numeric minorities are likely to use international law as a supreme law with which the national constitution must comply and they are more likely to petition treaty monitoring bodies for enforcement. Such cases, complex as they are, should be welcomed as the alternative is that minorities will rise with arms to realize their claim.

Even after identifying the “people/s”, the content of the right of self-determination needs fleshing out. There is no reason why “peoples” who have

the right of self-determination should not get the protection accorded to ethnic minorities who are regarded as not having a right to territorial autonomy. The rights of ethnic minorities are the most proximate provisions to define the content of internal self-determination within a state that must be respectful of territorial integrity.

4 Conclusion

Many provisions of IHRL are indeterminate. However, legislation alone does not make the law so specific that judges are unnecessary: the specific part of the law is provided by those institutions authorized to interpret or apply the law to facts. It must be for this reason that international law explicitly recognizes judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. Judicial and quasi-judicial human rights treaty monitoring bodies have contributed to the process of norm specification beyond human rights treaties through general comments, resolutions and case law, perhaps to the extent that it looks too much like law-making from the bench. On the other hand, in many instances, these bodies have avoided complex principles that desperately need elaboration or they have disposed of them by inferior reasoning that further obscures the principles. In fairness, these bodies suffer from a severe lack of resources that has clearly affected the quality of their products.

On the right of self-determination, which so vital in Africa, the ACHPR had two relevant cases. In the first one, *Katanga*, the ACHPR offered less than one page of reasoning though, significantly, the existence of remedial secession as part of the right of self-determination is indirectly acknowledged. More than ten years later, the ACHPR was confronted with *Southern Cameroons*. Unfortunately, not only did the ACHPR fail to elaborate *Katanga*, but it also obscured the important contribution of *Katanga* by failing to distinguish internal from external rights of self-determination. Consequently, the ACHPR set the standard for internal self-determination too high by using the standard for secession. Furthermore, the ACHPR has made the right of internal self-determination almost unavailable for “peoples” (the main claimants) who could be numeric ethnic minorities. The ACHPR did so by subjecting the nature of self-determination to majoritarian democracy. As a result, the ACHPR gave soft recommendations that lack specificity.

The ACHPR erred in holding that that the current political regime (unitary state) and constitution of Cameroon do not violate the right to self-determination of the people of Southern Cameroons. Facts before the ACHPR show that the English-speaking Cameroon opted to be part of the French-speaking Cameroon with great hesitation and on the condition that when the two became one state, the form of government would be federal. Shortly after, the federal constitution was dismantled without the consent of the people in Southern Cameroons. The move from a federal to a unitary form of government entails a violation of the right to self-determination of Southern Cameroons. This is exactly the case between Eritrea and Ethiopia – a case on which the complainants relied in part. In 1952,

the UN federated Eritrea and Ethiopia, giving the first broad autonomy. In less than ten years, Ethiopia abrogated and replaced the federal constitution with a unitary one. Eritreans were outraged. The Permanent Peoples' Tribunal found this to be a violation of the right of self-determination of Eritreans. Eventually, a lengthy (30 years) war brought settlement to the case, as a victorious Eritrea went beyond internal self-determination to "secession".

The ACHPR would have been right in inviting Cameroon, the respondent state, to return to the federal constitutional order of 1961 under which the complainants and the people they represent had meaningful levels of internal self-determination. By failing to do so, the ACHPR may as well have contributed to the belief that the right of self-determination is realized not in a court of reason or diplomatic quarters but when claimants go to the bush and amass power.

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RESUMO

Os órgãos de monitoramento dos tratados de direitos humanos têm contribuído para o processo de especificação de normas além dos próprios tratados. No entanto, em alguns casos, esses órgãos têm evitado princípios complexos que precisam urgentemente de elaboração. Em relação ao direito à autodeterminação, vital na África, a Comissão Africana dos Direitos Humanos e dos Povos (CADHP) teve dois casos relevantes: *Katanga* (disposto em menos de uma página) e *Southern Cameroons*, que, em vez de aperfeiçoar, obscureceu a importante contribuição do caso *Katanga* ao não distinguir os aspectos interno e externo do direito à autodeterminação. Consequentemente, a CADHP fez com que o direito à autodeterminação interna quase não esteja disponível aos “povos”. Este artigo examina criticamente o raciocínio da CADHP.

PALAVRAS-CHAVE

Autodeterminação – Direito Constitucional – Autonomia – Secessão – *Southern Cameroons*

RESUMEN

Los órganos de vigilancia de los tratados de derechos humanos han contribuido con el proceso de especificación de las normas más allá de los tratados de derechos humanos. Sin embargo, en algunos casos, dichos órganos no se han ocupado de principios complejos que necesitan desesperadamente ser elaborados. Sobre el derecho a la autodeterminación, un derecho esencial para África, la Comisión Africana de Derechos Humanos y de los Pueblos (CADHP) tuvo dos casos relevantes: *Katanga* (cuya decisión tiene menos de una página de largo) y *Southern Cameroons*, el cual, en lugar de ampliar *Katanga*, ocultó el importante aporte de este último caso al no distinguir el derecho a la autodeterminación interna y externa. En consecuencia, la CADHP ha hecho que el derecho a la autodeterminación interna prácticamente deje de estar disponible para los “pueblos”. El presente artículo examina en forma crítica el razonamiento de la CADHP.

PALABRAS CLAVE

Autodeterminación – Derecho constitucional – Autonomía – Secesión – *Southern Cameroon*



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ABSTRACT

This article briefly reviews a variety of literature on the political and social characteristics of our contemporary times, through which it paints a picture of the relative decline of the nation-state in the international system. This is particularly clear when addressing the issues of the universalization of human rights and the resistance to this process in the context of migration. These two issues are opposite sides of the same reality, since it is through the universalization of human rights that significant changes have occurred, such as the rise of social movements and the emergence of the concept of *cosmopolitan citizenship*, or even the *responsibility to protect*. The universalization of human rights, therefore, has been responsible for the relativization of State sovereignty vis-a-vis the international system. The issue of migration, meanwhile, based on ideas from the 17th century that invoke a nationalism – anachronistic in this day and age – that confines human beings to the territories where they “belong”, performs a dual function: on one hand, it preserves some fundamental characteristics of the Westphalian nation-state, such as the principles of sovereignty and self-determination; on the other, it impedes the broad and effective protection of fundamental human rights.

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Human rights – Nation-state – Migration – Global governance



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THE ROLE OF THE UNIVERSALIZATION OF HUMAN RIGHTS AND MIGRATION IN THE FORMATION OF A NEW GLOBAL GOVERNANCE

André Luiz Siciliano

When the products of labor are not material goods, but social relationships, communication networks and forms of life, then it becomes clear that economic production immediately implies a form of political production, or the production of society itself. We are thus no longer bound by the old blackmail: the choice is not between sovereignty and anarchy.

(HARDT; NEGRI, 2005)

1 Introduction

The powerful ideas that shaped human societies up until the past three hundred years were almost all religious, with the notable exception of Chinese Confucianism. Since the Peace of Westphalia,¹ Liberalism was the main secular ideology to produce a worldwide effect, a doctrine associated with the rise of the middle class, first commercial and then industrial, in parts of Europe in the 17th century (FUKUYAMA, 2012). As enunciated by classical thinkers such as Locke, Montesquieu and Mill, Liberalism preaches that the legitimacy of State authority derives from the State's ability to protect the individual rights of its citizens and that the power of the State needs to be limited by law.

The technological advances of the 20th century, however, have led to the configuration of a new reality, in which individuals establish social relations independent of the territory they inhabit. The widespread use of the Internet and the expansion of television broadcasting means that anything can become news and that any news can circle the globe in a fraction of a second. New global concerns have become part and parcel of the daily life of individuals, such as concerns about global warming, human rights and the shortage of drinking water. The perception that the individual belongs to the world has grown increasingly strong, especially when solidarity or opportunity can be found across national borders. Similarly, as

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more companies become international and transnational, the ability to buy and sell products anywhere in the world, or even the simple fact of sharing information on online social networks, all reinforce the awareness of belonging to a global society.

The 21st century has begun under this new perspective, with other powerful ideas dealing blows to the political and social structures that predominated in past centuries. New possibilities present themselves as people realize that, instead of belonging to different States, they all inhabit the same planet, almost all of which is accessible to them. The basic units of politics themselves, the territorial, sovereign and independent nation-states, including the oldest and most stable, are being pulled apart by the forces of a supranational or transnational economy and by the intranational forces of secessionist regions and ethnic groups (HOBSBAWM, 1994). By enabling the political articulation of individuals on a global scale, international or transnational social movements have formed new power structures in the international system that are independent of the nation-states to which they belong.

Therefore, although no institutionalized unitary supranational government exists and States are not the only agents, outlines are being drawn for new global governance in which universal values are shared. The new agents exert a certain diffuse control over the responsibilities of States to their respective citizens, requiring each State to assure the fundamental human rights of their nationals under penalty of foreign humanitarian intervention. The concepts of *Cosmopolitan Democracy*, *Cosmopolitan Citizenship*, *Responsibility to Protect* and *Fragmentation* have emerged, illustrating the internationalization of values and the irrelevance of national territorial borders in the configuration of the new order.

Thus, the objective of this paper is to demonstrate that the issues of migration and the universalization of human rights are important constituent elements of globalization and the new system of global governance, and to show that they challenge the existing structure of the nation-state. The first priority is to adopt a mode of analysis that is not contaminated by the idea that the nation-state is the natural form of political organization for humanity. Next, some specific developments shall be analyzed, namely the roles of immigration and citizenship in light of universal of human rights and the relative power of the State. Finally, it will demonstrate that the emerging form of global governance is likely to maintain the trend of weakening the nation-state and strengthening individual rights in the international system.

2 The State

The nation-state is not the natural form of political and social organization, nor can it be said to be the best possible form of organization. It is merely the form that best adapted to the social and political values following the Treaties of Münster and Osnabrück (1644-1648), which formally put an end to the dominance of religion in international politics. Similarly, it should not be assumed that human nature is to settle in one's place of birth since on the contrary, human beings are natural migrants. Since biblical times, there have been numerous records of human migrations, whether triggered by wars, basic needs or environmental catastrophes, among other reasons.

With the passage of centuries, human evolution led people to create forms of social and political organization that better permitted the exploitation of natural resources and improved conditions for survival, particularly in terms of competition with their peers. Territories were enclosed in order to allow for exclusive and more efficient use of natural resources by the people who possessed them.

The fact is that in the 21st century, practically everything is appropriated and traded, and different people agree to coexist with each other² peacefully. The flow of capital, products, ideas and information is all global. Wealth can be created both from cheaper resources and raw materials, and also in more valuable markets. In 2012, society is global, the challenges we face are global and nation-states have been stripped of many of their original functions. Marx, Durkheim, Weber and Parsons all argued that the growing differentiation, rationalization and modernization of society gradually reduced the importance of national sentiments. The senselessness of modern times, however, lies in the fact that while there are still good reasons for people to migrate such as wars, natural catastrophes, other insecurities, the search for a better life or the mere curiosity to visit other places, people are confined to the place where they were born.

2.1 The Nation-State

The world is still organized into nation-states, sovereign in their territories and reciprocally exclusive. For this reason alone, the immigrant is perceived and received either as a trespasser or as a promoter of development, depending on the interests of the State at any given time (WIMMER; GLICK SCHILLER, 2002). The assumption that nation, State and society are natural social and political expressions of the modern world has been called “methodological nationalism” by Wimmer and Glick Schiller. They argue that there are three modes of methodological nationalism.

The first is the result of ignorance, which has produced a systematic blindness towards the paradox that modernization has led to the creation of national communities amidst a modern society supposedly dominated by the principles of achievement. Wimmer and Glick Schiller mention that neither Parsons and Merton nor Bourdieu, Habermas or Luhman discuss the national framing of States and societies in the modern age. Moreover, these nation-blind theories were created in an environment of rapidly nationalizing States and societies and, in the case of Weber and Durkheim, at the conclusion of nationalist wars.

The second is taking national discourse, agendas, loyalties and histories for granted without questioning them or making them the object of analysis. Economists, political scientists, anthropologists and historians all assumed the State is the unit of reference for their studies, forging a unit that had not previously existed. Economists since Adam Smith and Friedrich List have taken the so-called internal economy and external relations as their primary references. Political scientists assumed that the nation-state was the ideal unit of reference in the international system, but they did not question why the system was *international*. Anthropologists, by abandoning diffusion and adopting the functionalist theory, practically assumed that the cultures to be studied were unitary and organically

related to (and fixed within) a territory. Even history became a study of the history of nations³ and not of men. Only during the last decade has it been possible to overcome this blindness of methodological nationalism by moving beyond the dichotomy between State and nation without falling into the trap of the nation-state (WIMMER, 1996, 2002).

The third is social science's use of territorial imagery and reducing the analytical focus to nation-states. It is worth pointing out that the social sciences have become obsessed with describing processes that occur within the boundaries of each nation-state in contrast to those outside them, thereby losing sight completely of the connection between these processes and the nationally defined territories (WIMMER; GLICK SCHILLER, 2002).

These three variants intersect and mutually reinforce each other, forming a coherent epistemic structure and a self-reinforcing way of looking at and describing the social world.

3 Migrations

With this in mind, it is necessary to understand the historical evolution of the perception of migrations in order to recognize the changing discourse of the States over a brief and recent time span, particularly in the period following the formation of the nation-states. The first period is the prewar era (1870-1918),⁴ marked by strong economic growth and demand for labor, but also brief financial crises. During this period, many European countries abolished the passport and visa system following the example of France, which eliminated the barriers to the free movement of labor in 1861 (WIMMER; GLICK SCHILLER, 2002). In this period, migration was strongly encouraged by States.

The second period spanning from the First World War to the Cold War brought an end to the free movement of workers. The conflict itself, followed by the reconstruction of the devastated countries and the establishment of other newly independent States, had both made labor more valuable and become a serious threat. Part of the national defense strategy of these new countries involved the closure of the borders. Moreover, the models of social analysis developed over the period considered that each territory had its own, stable population, ignoring migration. An arbitrary assimilation was advocated. Immigrants began to be viewed not only as a security risk but as endangering the isomorphism between nation and people and, therefore, a major obstacle to the nation-state building that was underway. This was a period of closing borders and keeping counts.

The third stage occurred during the Cold War when the blind spot became blindness, since almost all historical memories of the transnational and global processes there had once been were erased. Modernization theory made it look as though Western Europe and the United States of America had developed national identities and modern States within their territorial confines rather than in close relationship with a global economy and flow of ideas. One notable example of this period was West Germany, which, in competition with East Germany, forged a national consensus by developing a generous welfare State for its citizens,

making the concept of citizenship assume a decisive role in the social structure, and guaranteeing rights to some workers and not to others (namely those who were not considered German and who were used to rebuild the country in the postwar period). The idea crystallized that the immigrant is not a citizen and few modern institutions are as emblematic of rights as citizenship. In a strict definition, citizenship describes the legal, incomplete, relationship between the individual and the polity (SASSEN, 2006).

Similarly, Zolberg argues that the political organization of the world's territories is one of mutual exclusion of sovereignties (ZOLBERG, 1994). It is worth pointing out that each territory is the sovereignty of a particular State, which excludes it from all the others and, from this perspective, immigration is no longer seen as natural movement (something intrinsic to human nature), but as transference from one jurisdiction to another. The immigrant, therefore, begins to be viewed as deviating from the norm of the new, politically organized world. Zolberg claims that the free flow of people and the right to leave one country and travel across borders would significantly reduce the sovereign authority over that territory, which leads to the conclusion that, rather than a matter of security or the economic viability of managing a territory, open migration implies the loss of power of a sovereign government over its territory and its people. In the words of Catherine Dauvergne (2008), "in contemporary globalizing times, migration laws and their enforcement are increasingly understood as the last bastion of sovereignty" (DAUVERGNE, 2008, p. 2).

A sovereign government, however, is not restricted to the negative aspect of coercive authority over the people in a given territory; it has, primarily, another extremely important duty to protect and defend the individual. Thus, the main problem lies in the fact that in this modern structure, the only entity with the legitimacy to protect the individual is the nation-state. The international community protects, to an extent, only refugees, those who are persecuted and, as far as everybody else is concerned, "the international community, as presently constituted, appears unable or unwilling to meet their needs" (ZOLBERG, 1994, p. 170).

3.1 Resistance of States to immigration

The migration issue is ultimately about maintaining power and preserving the *status quo*. To prevent the free flow of people is, to a large extent, to preserve the remaining power of States and of small interest groups with considerable political influence in developed States (FACCHINI; MAYDA, 2008, p. 695). From the time of the Cold War, national rhetoric has portrayed the immigrant as a foreigner with limited rights (SASSEN, 2006) and as responsible for falling salaries and rising unemployment, which is unfounded, as shall be demonstrated below.

However, restricting immigration does impede the protection of human rights, since the immigrant, who is thus not a citizen, has limited rights. An alarming, and paradoxical situation occurred in Europe in 2011 when developed nations demanded the ousting of dictators from countries in northern Africa, alleging that they were violating the human rights of the populations of these

countries. However, these same populations, when seeking asylum and refugee status in Europe, were turned away in equally inhumane conditions when they reached the European continent. By classifying people with a status that sets them apart from national citizens, restrictions on migration flows exempt States from the duty of assuring their human rights.

In an article titled “People flows in globalization”, Richard Freeman deconstructs the supposedly economic and developmentalist arguments to examine the causes and consequences of migration and argue that people flows are fundamental for the global economy and that the interplay among immigration, capital and trade is essential to understanding how globalization affects the economy. According to the United Nations (INTERNATIONAL ORGANIZATION FOR MIGRATION, 2009), while the number of immigrants more than doubled between 1970 and 2005, rising from 82.5 million to nearly 190 million, the number of immigrants in the United States during the 1990s was practically the same as in the first decade of the 1900s, although both the U.S. and the world populations were significantly larger in the 1990s (FREEMAN, 2006, p. 148).

One telling statistic on the restricted movement of people in our globalized times is the fact that immigrants represent just 3% of the global workforce, while world exports represent 13% of world GDP (2004) and direct foreign investment corresponds to 20% of global gross capital formation (FREEMAN, 2006). Another significant reality is that globalization has not diminished the difference between the cost of labor in different places; thus, wages paid in developed countries are 4 to 12 times higher than wages paid in developing countries for the same occupation (FREEMAN, 2006). These data largely explain why migration flows are directed from developing countries to developed countries: even though working conditions in developed countries are bad by local standards, the wage received by immigrants will be far higher than it would be in their country of origin, thereby enabling them to send money to their families.

The protectionist argument that barriers exist to protect the jobs and wages of citizens is entirely unfounded. First, unskilled immigrants (the majority of whom come from poor countries) do not compete with local labor, but complement it; second, the destination country is generally capital-intensive while the source country is labor-intensive; third, the vast majority of migrants are young working-age people; and, finally, the flow of immigrants drives the flow of investments (FREEMAN, 2006, p. 157).

Therefore, increased immigration flows do not depreciate the salaries of local workers,⁵ meaning that any justifications to restrict immigration are primarily political and ideological, and have nothing to do with economic or developmentalist reasons. Indeed, if developed countries allowed more immigration, world GDP would rise and the inequality of wages among countries would decline. As Dani Rodrik points out, “If international policy makers were really interested in maximizing worldwide efficiency, [...] they would all be busy at work liberalizing immigration restrictions” (RODRIK, 2001). Nevertheless, liberating migration flows and ultimately permitting the free movement of people across territories would severely diminish the power of nation-states (ZOLBERG, 1994).

4 Human rights, citizenship and the nation-state

The primary function of the nation-state and also the source of its legitimacy is the protection of its citizens. Therefore, the origin of the State's duty to protect referred only to citizens recognized as such, i.e. those vested with citizenship. However, the nature of citizenship has been challenged by changes such as the erosion of privacy rights and also by the proliferation of old issues that have gained new attention, such as the status of indigenous communities, expatriates and refugees, etc. (SASSEN, 2006). The international consciousness of the need to protect the basic rights of all peoples by means of some universally acceptable parameter partially influenced the United Nations Charter of 1945, which affirmed a "faith in fundamental human rights, in the equal rights of men and women and of nations large and small" (IBHAWOH, 2007).

The commitment to uphold the human rights expressed in the UN Charter of 1945 was followed by the Universal Declaration of Human Rights (UDHR) of 1948. These conventions, which were later replicated on regional levels in Europe, the Americas and Africa, currently constitute the foundation of contemporary international human rights standards. The universalization of human rights is intended to assure the individual rights and guarantees of any person in any territory safeguarded by the international community. However, this distinction between person and citizen created a significant problem for international political theory: the problem of how to reconcile the actual diversity and division of political communities with the newly discovered belief in the universality of human nature (LINKLATER, 1981).

The individual, now the holder of universal rights⁶ independent of the nation-state where they are located,⁷ became the object of concern of the international community, overriding the international principles of sovereignty and non-intervention. This could bring about a possible structural shift in the system, which would permit individual or collective self-determination independent of States (LINKLATER, 1981). On this point, while not in any way radical, there is a school of theorists (Cosmopolitans) that envisage the rise of global democratization, both of institutions and of political participation, by individuals on the global stage. However, while the prevailing system is one of nation-states, the protection of the rights of individuals, in addition to citizenship and its guarantee of rights and duties, will continue to primarily be the responsibility of States (CHANDLER, 2003).

Cosmopolitans claim that globalization has produced a juxtaposition of jurisdictions, meaning that sovereign power in the same location may be divided between international, national and local authorities, as is the case in the European Union. They believe a reconfiguration of political power is taking place, a shift to one no longer underpinned by traditional internal/external and territorial/non-territorial distinctions (HELD, 2004). From this theory, two others have emerged: cosmopolitan democracy, which explores the possibility of new structures of representative power; and cosmopolitan citizenship, which recognizes individual rights and guarantees independent of the submission of the individual to any nation-state.

The Cosmopolitans assert that democracy as a system of government was considerably strengthened following the Cold War and the victory of the West over the Soviet system (ARCHIBUGI, 2004). Indeed, as a result of people's movements, many countries in Eastern and Southern Europe embraced democratic constitutions and, in spite of countless contradictions, autonomous governments have gradually expanded and consolidated. In this respect, the recent events in the Middle East, known as the Arab Spring, reinforce Archibugi's thesis, since although new democracies have not yet emerged, the process of reviewing and discussing the current political systems in the region has been profound, complex and undeniable.⁸

However, this same school of thought also argues that a democratic deficit exists within nation-states, emphasizing the fact that a national decision may not be truly democratic if it affects the rights of citizens that do not belong to the community in question. Moreover, they bemoan that another, equally important development that should have followed the victory of the liberal States has not occurred: the expansion of democracy as a model of global governance (ARCHIBUGI, 2004). Although there are signs of change – with discussions on the representativeness of countries in the IMF, the emergence of the G-20 as a decisive group in the economic sphere, or the reform of the UN Security Council that is always under consideration – there are no real prospects for the democratization of world governance. This presents serious distortions in the exercise of power, whether in the WTO, NATO, the Security Council itself or even in terms of the representativeness of decisions taken by the UN General Assembly.⁹

Nevertheless, Danielle Archibugi emphasizes that the principles of the Rule of Law and Shared Participation have been progressively applied to international relations, which was the basic idea behind the concept of Cosmopolitan Democracy. Archibugi's intention is to reassert the basic concepts that underpin Cosmopolitan Democracy and suggest that there could be a widening and deepening of the participation of citizens and groups of people at the global level, as well as a weakening of the nation-state as the legitimate and unitary representative of the interests of people.

In cosmopolitan citizenship, there is an opposing argument at work. It claims that the proposed framework of cosmopolitan regulation, which is based on the fictitious rights of global citizenship, does not recognize the democratic rights of citizens, or the collective expression of these rights in State sovereignty that could result in the loss of the guarantee of protection by a nation-state (CHANDLER, 2003). On the other hand, the framework of regulation of the modern democratic system is historically and logically derived from the formal assumption of equal self-governing individuals (CHANDLER, 2003, p. 341).

Although there is some divergence over the resulting benefits, universal rights of global citizens could lead to new forms of managing the international public order and individual guarantees. Besides focusing on citizenship rights that are territorially limited by national States, attention needs to be paid to the spillover of democracy and human rights globally. In this respect, the strengthening of the international human rights system could lead to the transfer of citizenship rights

to the individual, inasmuch as citizenship may cease to be the condition that guarantees rights. In other words, rights would be conferred based on the inherent dignity of the human person, not by nationality (REIS, 2004). A real step in this direction would be to gradually extend some of the rights inherent to citizens to immigrants, such as the right to vote in local elections.

5 A New global governance

Archibugi's framework is, to an extent, the same as the one addressed by Rosenau when he identified the process of *fraggementation*, which consists of the fragmentation of the State coupled with the integration of social groups. Fragmentation occurs when groups and individuals no longer consider the nation-state to be the legitimate expression of their interests, insofar as they start to act by themselves in defense of their interests that are no longer served by the State. For example, this can be seen in the case of Belo Monte¹⁰ in which local indigenous groups demonstrated against the policies and actions of the Brazilian government on the use of resources in the region of Volta Grande do Xingu, in Pará. These groups identified with other groups that were equally isolated in other areas, joining forces through social integration with their peers in different regions or nations. They also joined other indigenous groups from the region of Rondônia in Brazil and also from Peru to protest the use of their lands by their respective national governments and demonstrate more effectively on the international stage.¹¹ Furthermore, they sought backing from the Inter-American Commission on Human Rights of the OAS for their demands that were being ignored by the Brazilian State (SICILIANO, 2011). In this case, we can see the fragmentation of the State (vertical) and the social integration (horizontal) (ROSENAU, 1997).

National borders have become increasingly permeable and new issues transcend current jurisdictions. The governance that exists on a local and national level no longer serves the demands of a global world and there is no legitimate supranational governance to resolve these new issues. In this context, four challenges are particularly relevant to the process of building global governance (ROSENAU, 1997): i) the speed with which normative issues have to be addressed, since the telecommunications revolution imposes a new speed on decision-making processes in the field of international relations; ii) the possibility that the tensions inherent in the process of *fraggementation* may have rendered the traditional precepts of Western civilization unreliable as guides to individual or group conduct, since *fraggementation* means that society, at the same time that it fragments in relation to an old model (statist hierarchical structure), integrates in relation to a new one (social, networked and horizontal); iii) that some worldwide norms (values) can be identified both in the sphere of the State and in a multi-centric world; and iv) arenas in which the cleavages may be so deep as to prevent the evolution of widely shared norms.

The case of Belo Monte, or even that of the Arab Spring, clearly demonstrates the diminishing relative importance of nation-states and the growing significance of social movements, whose interests very often transcend borders and diverge

from the official position of national governments. In these two examples, the “international community” was called upon to take a stand and to interfere and assist those most vulnerable, potentially violating the sovereignty of the States involved. And what will be the reaction of the “international community”? What precedents will be set? What values based on concrete cases such as these will be established or reinforced?

These situations have a tendency to repeat themselves more frequently and the questions they raise point to the configuration of a new paradigm in international relations.

5.1 *New Structures*

In the early 1980s, Robert W. Cox claimed that “social forces” were capable of breaking down statist political structures. He predicted three possible outcomes resulting from these forces: i) the emergence of a new hegemony based upon the global structure of social power generated by the internationalization of production; ii) the emergence of a non-hegemonic world structure of conflicting power centers; or iii) the emergence of a counter-hegemony based on a third-world coalition against core-country dominance. Regardless of the accuracy of any of the predicted outcomes, “social forces” have been responsible for driving a paradigm shift in the power relations of nation-states for more than thirty years (COX, 1981).

Towards the end of the last century, the phenomenon that Rosenau named “fragementation” was derived from the observance of the same force that Della Porta, with some variation, called “social movements” – which are typified by a segmented organizational structure, with groups arising, mobilizing and declining continually; *polycephalous*, with a plural leadership structure; and networked, with groups and individuals connected through multiple links (DELLA PORTA, 2007, p. 125). This definition means that social movements can be groups of landless farmers lobbying for land reform or indigenous groups demanding the inviolability of their land, or even a large portion of the population of a territory that no longer accepts submission to its government.

These forms of social organization which gained prominence in the 1990s were the subject of a recent analysis by former Brazilian president Fernando Henrique Cardoso,¹² who asserted that social movements were driven by the evident inability of the State to fulfill social demands, but also, to some extent, by society’s distrust in the politics practiced by representative democracy, i.e. by their elected members of Congress. Cardoso summed up his arguments by stating that social movements are extremely efficient when it comes to staging resistance, but they face major difficulties implementing policies; he cited the example of the Arab Spring, in which the population managed to organize itself to topple dictators from power, but not to form a new government.

Similarly, Della Porta points out that the non-governmental organizations that flocked to Seattle¹³ for the WTO Ministerial Conference in 1999 were an example of everything the trade negotiators were not. They were not only well organized, but they also had built unusual coalitions (for example, environmentalists

and trade unionists overcame old divisions in order to act together against the WTO). And they had a clear agenda: to obstruct the negotiations (DELLA PORTA, 2007, p. 141). Whatever the shortfalls of social movements, their social and political power is notable and all indications point to them growing stronger.

The emergence of social movements has only been possible thanks to the reductions in time and space brought about by globalization (CARDOSO, 2011). This argument is corroborated by David S. Grewal, who asserts that globalization may be defined as the intensification of worldwide social relations that link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa (GREWAL, 2008).

Globalization is the name commonly attributed to the recent ability of people to interrelate with one another while they are anywhere on the globe and it is, among other things, the unparalleled process through which conventions are determined (GREWAL, 2008, p. 2). For Milton Santos:

Globalization is not just the existence of a new system of techniques, but also the result of actions that assure the emergence of a global market responsible for the currently effective political processes. Therefore, the factors that contribute to explain the architecture of modern-day globalization are the uniqueness of the technique, the convergence of the moments, the awareness of the planet and the existence of a single motor in history, represented by a globalized surplus-value.

(SANTOS, 2007, p. 24).

With globalization, what we are experiencing now is the creation of an international group that covers the entire globe within established parameters: a new world order in which we clamor for connection to one another via standards that are offered for universal use (GREWAL, 2008, p. 3). And the standards that permit such global coordination are a reflection of “network power”. The concept of network power, as conceived by Grewal, assumes two things: i) the standards that permit coordination gain in value as more people use them; and ii) this dynamic can lead to the gradual elimination of competing standards. For example, that globalized surplus-value has an enormous network power, just like the international financial system does, or Facebook or the metric system. The network is the group of interconnected people linked to one another so they can benefit from cooperation. These benefits can assume different forms, including the exchange of goods and ideas (GREWAL, 2008).

Thus, social movements such as the environmental, human rights and humanitarian aid movements are largely transnational. However, even though there may be a global network of social relations, there is no sovereign global governance to give it order as we know it on the national level. This is why the term *globalization of sociability* is used to distinguish relations of sociability from those of sovereignty and to emphasize the core tension in contemporary globalization: that everything is being globalized except politics (GREWAL, 2008, p. 50). The same author points out that even Cosmopolitan Democracy theorists argue that democracy should be strengthened at the national levels, thus reproducing the current system on a larger scale.

An example of the political globalization referred to by Grewal is the organization of international environmentalists, rubber-tappers and indigenous groups, who received the support of the United States Congress and the Treasury Department for their local demands (HOCHSTETLER; KECK, 2007, p. 155). However, these movements have not emerged from a process of cumulative development of institutions and organizations that have responded to issues and problems, both internal and external to their countries. Instead, there are clear discontinuities, contingencies and also sudden surges of opportunity (HOCHSTETLER; KECK, 2007, p. 223).

Transnational social movements play a democratizing role in globalization in that they enable some direct participation by individuals in political matters by enhancing representation in international institutions and providing voices and ideas that were not previously heard (KHAGRAM; RIKER; SIKKINK, 2002, p. 301). Transnational networks and non-governmental organizations, when analyzed from the perspective of representativeness, internal democracy, transparency and deliberation, are quite flawed and imperfect; in fact, they are informal, asymmetrical institutions that function as ad hoc antidotes for domestic and international representative imperfections (KHAGRAM; RIKER; SIKKINK, 2002). However, this specific role of correcting representative imperfections is of extreme importance and must not be suppressed, since from it comes the capacity to raise local demand to the sphere of international interest.

It can be concluded that social movements not only use the standards and networks provided by globalization, but they also fuel them, creating new networks and developing new standards so as to establish a path dependence which, at first, does not conflict with the dominant structures. However, Della Porta warns that substantial changes may be driven by the growing power of multinational corporations and international governmental organizations, not to mention a weakening of the representative model of democracy, meaning there may be room for reflection on new forms of democracy (participative, direct, deliberative etc.). Milton Santos asserts that another globalization is possible, since current globalization is much less a product of ideas that are actually possible and much more the result of a restrictive ideology that was purposefully established.

6 Conclusion

Globalization allows the world to be seen as the new unit of reference, whether economic, political, anthropological or historical. Financial and trade relations do not respect the territorial borders of nation-states; political organizations in many ways transcend and impose obligations on States; man is once again viewed as an inhabitant of the planet and history is one of humanity.

The individual and groups of individuals have begun to organize in networks and have managed to create social movements with enough political clout to interfere directly in the decision making of national governments. In the international system, decision-makers also cannot ignore the influence of or repercussions for social movements. There is a growing distance between

the individual and the State that allows various issues (environmental, cultural, labor and trade, among others) to be handled internationally without any State involvement. In spite of the strength of this movement, it has not been capable of breaking down the structures of the power relations created following the Peace of Westphalia. Indeed, it coexists with them in relative harmony.

The universalization of human rights and the restriction of large-scale international migration are the only two issues capable of bringing about a comprehensive restructuring of the current statist, hierarchical power structure. From a human rights perspective, this is because individuals, whether in the international system or inside States themselves, are rights holders independent of States. Moreover, considering that the legitimacy of State power derives basically from the ability to protect its citizens, international recognition of individual human rights supersedes the principle of self-determination and, more importantly, in the event of individual rights violations by the State, legitimizes external intervention to override the sovereignty of the State.

The issue of migration represents another aspect of the same dilemma. Preventing the free movement of people by attaching a given population to a given territory precludes the universalization of human rights. On one hand, this occurs by not recognizing the rights of those humans who are not national citizens and, on the other, by not guaranteeing the rights of citizens outside of their territory. Citizenship, the political and legal link to the State, guarantees the existence of the State's power over its nationals.

Thus, while social movements are altering the relations between forces in domestic and international politics by the strengthening power of networks, the new global governance continues to coexist with the Westphalian system of nation-states. Despite numerous changes, there are no prospects for any radical restructuring of the system for the following reasons: first, because the universalization of human rights is still modest and, second, because migration is not on the agenda of social movements.

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NOTES

1. Signed in the towns of Münster and Osnabrück, the Westphalia Treaties sealed the Peace after the Thirty Years' War in Europe (1618-1648). These treaties introduced a new normative logic both to the relations between and those within countries, as sovereign states purposefully ignored the Church in their decision-making. The influence of the Holy See on European political issues was annulled by the sovereign states. (Romano, 2008).
2. The main exception is the dispute between Israelis and Palestinians, which is probably the only one that could impact the international system. There are other hostile episodes of intolerance in Africa, the Middle East, Eastern Europe and West Asia, although these conflicts involve a relatively small contingent of people or limited resources, and are not capable of influencing the international system.
3. The history of Brazil is one of the few examples in the Western world, since Brazilians consider their country more than 500 years old, i.e. that its origin precedes the emergence of the Brazilian nation. As a rule, countries consider as the starting point of their existence the respective unifications or proclamations of independence, i.e. the emergence of a unit of exclusive national identity.
4. Wimmer and Glick-Schiller propose a division in three "moments" (i – the pre-War era; ii – the period comprising two Great Wars until the start of the Cold War; iii – the Cold War era) in which patterns of behavior and normative trends can be identified in public policies in various countries. There is no precise date in which each of this "moments" can be said to have started and ended, as there are no single facts that can be pinpointed as milestones. Therefore, even though they are imprecise, the dates suggested by Wimmer e Glick-Schiller are used here.
5. "In fact, studies find the opposite. For the United States, Freidberg and Hunt (1995) report that a 10% increase in the fraction of immigrants in the population reduces native wages by at most 1%". Cited in Freeman (2006, p. 157).
6. Consolidated primarily in the UN Universal Declaration of Human Rights.
7. Conventions on refugees and stateless persons recognized for the first time the existence of the individual on the international level (REIS, 2004, p. 151). The principle of the Responsibility to Protect (UNITED NATIONS, 2006) was approved by the UN General Assembly, in New York in 2005 (A/RES/60/161), by more than 170 states and it has been invoked to permit the occupation by the international community of states that violate human rights.
8. The so-called "Arab Spring" has been the subject of numerous studies, with various interpretations of its causes and consequences, as can be seen by the debate between Salem Nasser, Arlene Clemesha and Gunther Rudzit, and moderated by William Waack, which can be viewed at: <<http://globoTV.globo.com/globo-news/globo-news-painel/todos-os-videos/v/segundo-turno-da-eleicao-no-egito-traz-expectativas-diversas-para-toda-a-regiao/1986106/>>. Last accessed on: 14 Jan. 2012.
9. "In the UN General Assembly, those member states whose total number of inhabitants represents just 5% of the world's population have a majority in the Assembly. Would it then be a more democratic system were the weight of each state's vote proportional to its population? In such a case, six states (China, India, the United States, Indonesia, Brazil and Russia) that represent more than half of the world's population would have a stable majority." (ARCHIBUGI, 2004).
10. A hydroelectric dam being built by the Brazilian government on the Xingu river in the state of Pará that is facing strong resistance from indigenous communities, environmental groups and part of the international community, particularly non-governmental organizations involved in the defense of minorities and the environment.
11. Three Amazon Indians protested in London against the hydroelectric dams that threaten to destroy the land and the lives of thousands of indigenous people. Ruth Buendia Mestoquiari, an Ashaninka Indian from Peru, Sheyla Juruna, a Juruna Indian from the Xingu region of Brazil, and Almir Suruí, of the Suruí tribe in Brazil, are calling for three controversial hydroelectric dam projects in the Amazon to be halted. The three indigenous representatives protested, with supporters from Survival International, outside the office of the Brazilian Development Bank – BNDES, which is providing much of the funding for the dams (SURVIVAL INTERNATIONAL, 2011).
12. At a conference staged by the International Conjuncture Analysis Group (Gacint) of the University of São Paulo's International Relations Institute (IRI-USP), on November 23, 2011, the former president Cardoso addressed the issue "The economic crisis and the changing global order: the role of Brazil" (CARDOSO, 2011).
13. In 1999, in Seattle, during the WTO Ministerial Conference, many civil society groups united to demonstrate their grievances. Organizations ranged from environmental and human rights associations to small, 20-year persons groups, and protests were organized online.

RESUMO

O presente artigo trata de tecer breve revisão de literatura diversificada acerca das características políticas e sociais dos tempos atuais, na qual se pretende apresentar um retrato da situação de relativo enfraquecimento do Estado-nação no Sistema Internacional, especialmente quando enfrentadas as questões da universalização dos direitos humanos e da resistência a esse processo manifestada na questão das migrações. Ambas questões são aspectos opostos de uma mesma realidade, pois significativas evoluções tem ocorrido através da universalização dos direitos humanos, como o fortalecimento dos movimentos sociais, o surgimento do conceito de *cidadania cosmopolita*, ou mesmo o da *responsabilidade de proteger*, e, assim, a questão da universalização dos direitos humanos tem sido responsável pela relativização das soberanias estatais face ao sistema internacional. A questão migratória, por outro lado, sustentada sobre os ideais do século XVII, invocando um nacionalismo, hoje anacrônico, que confina os seres humanos aos territórios aos quais “pertencem”, exerce uma dupla função: por um lado, a de preservar algumas características fundamentais do Estado-nação westfaliano, como os princípios da soberania e da autodeterminação; por outro, a de obstar a proteção ampla e efetiva dos direitos humanos fundamentais.

PALAVRAS-CHAVE

Direitos humanos – Estado-nação – Migração – Governança global

RESUMEN

El presente artículo intenta presentar una breve revisión de la diversificada literatura sobre las características políticas y sociales de los nuevos tiempos, en los que se pretende presentar un retrato de la situación de relativo debilitamiento del Estado-nación en el Sistema Internacional, especialmente cuando se trata de cuestiones referentes a la universalización de los derechos humanos y de la resistencia en este proceso, que se manifiesta en la temática de las migraciones. Estas dos cuestiones son aspectos opuestos de una misma realidad, pues a través de la universalización de los derechos humanos han ocurrido avances significativos, como el fortalecimiento de los movimientos sociales, el surgimiento del concepto de *ciudadanía cosmopolita*, o incluso el de *responsabilidad de proteger*, y de esta forma, la cuestión de la universalización de los derechos humanos ha sido responsable por la relativización de las soberanías estatales frente al sistema internacional. La cuestión migratoria, por un lado, sustentada sobre los ideales del siglo XVII, invocando un nacionalismo, actualmente anacrónico, que confina a los seres humanos a los territorios a los cuales “pertenecen”, ejerce una doble función: por un lado, la de preservar algunas características fundamentales del Estado-nacional westfaliano, como los principios de la soberanía y de la autodeterminación; y por otro, la de obstaculizar la protección amplia y efectiva de los derechos humanos fundamentales.

PALABRAS CLAVE

Derechos humanos – Estado-nación – Migración – Governança global



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ABSTRACT

The Western Hemisphere, particularly the countries in Latin America and the Caribbean, are faced with a serious security problem, which is the primary concern of citizens in the region. There are a range of important factors that contribute to this problem, such as those caused by drug trafficking, drug consumption and debilitated security and judicial institutions. However, within limited times and spaces, there have been positive institutional developments at the national and inter-American (international) levels that are not insignificant. It will be critical to build on these advances in order to overcome these challenges.

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KEYWORDS

Citizen Security – Transnational organized crime – Homicides – Victimization – The Perception of Insecurity – Confidence in the police – Penitentiary system – Organization of American States



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CITIZEN SECURITY AND TRANSNATIONAL ORGANIZED CRIME IN THE AMERICAS: CURRENT SITUATION AND CHALLENGES IN THE INTER-AMERICAN ARENA*

Gino Costa**

1 Executive Summary

Insecurity and crime are now considered the main problem facing Latin American countries. This perception is substantiated by the high homicide rates in the hemisphere, second only to the ones in Africa. (UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2011, p. 19-21) Drug trafficking is the main factor associated with high murder rates; another factor is the extensive use of firearms. Public opinion surveys also show high levels of perceived insecurity and victimization, particularly in terms of crimes against property.

This situation is partially explained by institutional weaknesses, which are expressed in the extremely high rates of distrust of police forces and judicial institutions, and the failure of the populist penal policies implemented in recent years. The continuation of human rights violations, the chronic neglect of prison systems, the privatization of security services, and the recurring use of the Army for citizen security work also are reasons for concern.

However, there have been some positive institutional developments, albeit limited, which can serve as a foundation for a response to this situation. Developments worth highlighting include police reform and modernization, the implementation of comprehensive public policies, increasing municipal involvement, and reforms of the criminal justice system.

The inter-American system has been strengthened in the past 25 years to favor

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cooperation in the fight against transnational organized crime. The current challenge is to strengthen national capacities through inter-American cooperation to reverse the negative trend. Doing so will require, among other things, an inter-American action plan for citizen security with an adequate tracking mechanism; strengthening and consolidating the Hemispheric Security Observatory;¹ creating an annual course on Security Management for senior personnel; and establishing a permanent special rapporteur for citizen security at the Inter-American Commission on Human Rights.

Meanwhile, the Member States of the Organization of American States (OAS) should design and implement comprehensive, long-term policies to prevent of all kinds of insecurity, violence, and crime. Moreover, they should support the application of the law, rehabilitation and social reintegration, attention to victims, and institutional strengthening. Finally, Member States should equip themselves with security observatories that provide high-quality information and analysis to better understand the problems of citizen security and transnational organized crime; and strengthen inter-American cooperation.

2 Citizen insecurity and transnational organized crime in America

The serious issues of crime, violence and insecurity in the hemisphere have become more evident since 2008 and were identified as the most important problems in Latin America. Before then, citizens' primary concern was unemployment. In 2010, two thirds of the countries in Latin America rated crime as their primary problem (CORPORACIÓN LATINOBARÓMETRO, 2010). This demonstrates the magnitude of the challenges found in the security arena and places it high on the regional agenda. However, as will be shown later, poor security is not the direct result of a sudden increase in violence and crime. Rather, it is the result of a sustained accumulation of serious, unresolved problems. It is also associated with a decrease in the relative importance of other concerns - such as unemployment, the economy, and poverty-, whose indicators have significantly improved in recent years (COSTA, 2011, p. 33).



This perception is supported by available data on homicides in the hemisphere. In 2010, the Americas as a continent had the second highest number of homicides in the world (144,000) compared to Africa (170,000), Asia (128,000), Europe (25,000) and Oceania (1,200). If population is taken into account, the Americas still stand in second place, with 15.6 murders for every 100,000 inhabitants, compared to 17.4 in Africa and a world average of 6.9 (UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2011, p. 19-21). This hemispheric average hides significant differences among subregions. For example, the countries in North America and the Southern Cone have rates that are lower than the global average, whereas Central America and the Caribbean have rates that are several times higher. These aggregate figures also obscure the differences between countries in the same subregion. The differences within countries are also important and generally show that homicides are concentrated in certain cities, municipalities, and towns.

Most of the murder victims in the Americas are men (90%), which is higher than the global figure (82%) (UNITED NATIONS OFFICE ON DRUGS AND CRIME,

2011, p. 63-64). Young men are especially vulnerable. For example, in Latin America, the murder rate for boys, girls, and young adults between the ages of 15 and 29 is more than double the regional average. Middle-income and low-income youth are even more vulnerable with a homicide rate four times that of high-income youth (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, p. 10). In some countries, homicides impact some racial groups much more than others.

According to the United Nations Office on Drugs and Crime (UNODC) (2011), murders are primarily associated with four factors. First, they are correlated with levels of human development, including economic growth, and inequality. Countries with high levels of development tend to have lower homicide rates, and vice versa. Latin America is a paradox, because it has relatively high human development indices; its high murder rates are better explained by the persistence of high levels of income inequality and the activities of organized crime. Second, countries with a strong rule of law tend to have lower homicide rates, and vice versa. Instead, several countries in the Caribbean, Central America, and South America have recently experienced a rapid increase in homicides at the same time that their rule of law indices dropped. Third, the availability of firearms is a particularly serious problem in the hemisphere, as indicated by the high percentage of murders carried out with firearms (74%) compared to the global average (42%). This indicator is high in all subregions. Lastly, illegal drug trafficking and other forms of transnational organized crime play a major role in violence. The actions of organized crime, however, do not always translate into violence. Those involved would like to be able to continue their illicit actions without resorting to violence, but they frequently utilize it to manage disputes between organizations over the control of illegal routes and markets, to discipline their own members, and to respond to actions taken by public agents who are trying to suppress their activities. There are five times more murders associated with the activities of organized crime in the Americas than in Asia, and ten times more than in Europe, indicating the importance of this phenomenon in the context of homicides in the hemisphere.

A recent World Bank study on violence in seven Central American countries identifies three primary causes: drug trafficking, youth violence, and the availability of firearms (BANCO MUNDIAL, 2011, p. 11-23). Of those, drug trafficking ranks are the highest quantitatively. A ranking of the 50 world cities with the highest murder rates supports the argument that drug trafficking is the most important cause of crime and violence. In 2010, 35 of these 50 cities were in Latin America and most of these were located along the primary drug routes that lead to the North American market (SEGURIDAD, JUSTICIA Y PAZ, 2011, p. 3-4).

Homicides linked to drug trafficking are, in turn, associated with four phenomena: a) confrontations between drug cartels, the military and police; b) power struggles within the cartels, which are fueled by arrests, extraditions, and deaths; c) confrontations between cartels to secure control over drug routes or consumer markets; and d) intimidation of officials or private citizens who do not give in to them.

Of the risk factors for violence analyzed by the United Nations Development Program (UNDP) in seven Central American countries, the one most correlated with homicide is the number of legal or illegal firearms in the hands of civilians. Indeed, the countries in the northern triangle have many more firearms per person

than those of the southern triangle, as well as higher murder rates. The former also score lower on basic social indicators (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2009-2010, p. 153-ss).

Another World Bank study (WORLD BANK, 2011) based on in-depth research conducted in violent communities in five developing countries concludes that the different forms of violence are more interrelated than frequently believed. In violent communities, the responses to crime are mostly undertaken by individuals and result in negative repercussions for social capital because these responses include, on one hand, silence and resignation, and on the other, the decision to arm oneself or depend on illegal groups. Deficiencies in urban infrastructure—a lack of public meeting spaces, narrow and dark streets, and limited services—also affect patterns of violence. Although the literature is inconclusive when it comes to the relationship between unemployment and violence, it is a widely held belief among the public that unemployment—and especially youth unemployment—drives up violence.



Between 1995 and 2010, Latinobarómetro measured Latin American households' experiences with victimization using the question "Have you or any of your relatives been assaulted, attacked, or a victim of violence in the past twelve months?". The positive response rate increased from 29% in 1995 to 43% in 2001, and then fell to 32% in 2006. Since 2007, it has gone up and down slightly, twice, and reached 31% in 2010. A comparison of the three five-year periods (1995-1998, 2001-2005 and 2006-2010) shows that the figure was stable during the first two periods (37% and 38%) and then dropped during the third (34%) (CORPORACIÓN LATINOBARÓMETRO, 2010). In contrast to homicides, which went up during the last decade, victimization went down, a trend that is probably related to economic growth in the hemisphere and to decreases in unemployment, poverty, and, in some countries (albeit slightly), inequality. Nevertheless, this victimization rate is high in comparison with the average of 16% found in the 2004-2005 International Crime and Victimization Survey (Enicriv/Enicris), which was carried out in 30 developed countries in North America, Western Europe, and Japan. For example, the rates in North America are between 17% and 18%.

With the exception of North America, victimization rates are very similar across the American subregions, a pattern different from that of homicides, where rates are much lower in the Southern Cone. There are also important differences between countries.

The most recent Barómetro de las Américas survey, carried out in countries in Latin America, the Caribbean, and North America, provides valuable information on the victims of crime, particularly for crimes against property. Men are much more likely than women to be the victims of such crimes. People with a university education are twice as likely to be crime victims as those with elementary or no education. Victimization rates increase in line with levels of wealth; for instance, the rate at the lowest level is 17% whereas at the highest levels it is 24%. However, in absolute terms, the majority of victims are found in the lowest social strata. Those who live in large urban centers are more vulnerable than those who live in medium-sized or small cities, or in rural areas; approximately 25% of the inhabitants of large cities were victims of crime, compared to 14% of those who lived in small cities or rural areas (SELIGSON; SMITH, 2010, p. 68-69).



Confidence in police in Latin America is also relatively low. According to Latinobarómetro, confidence in police forces in Latin America has increased somewhat in recent years, from 32% between 1996 and 2000, to 36% between 2006 and 2010. This could be related to the slight drop in victimization rates, particularly after 2004, and to the increased professionalism of the police forces in some countries. Still, about two thirds of the Latin American population has little to no confidence in the police. To get a sense of how much still needs to be done to strengthen the police, in Europe confidence levels provide a telling comparison: there, levels of confidence in the police stand at about 65% (DAMMERT; ALDA; RUZ, 2008, p. 33).

The 2011-2012 World Economic Forum ranking (WORLD ECONOMIC FORUM, 2011, p. 405) backs up these results, putting most of the Latin American and Caribbean police forces in the bottom quarter of the table. Only one Latin American country is found in the top quarter, together with the countries of North America.

According to Latinobarómetro 2010, the main problem facing the police is corruption (31%); other problems cited include lack of personnel (22%), inadequate training (17%), scarcity of resources (13%), limited cooperation from the public (8%) and outdated equipment (6%). Despite this distrust, Latin Americans believe that the best answer to insecurity is to have more police on the streets.

Confidence in Latin American judicial systems is even lower, scoring on average 31% in the past fifteen years. In Europe, confidence in the judiciary is up at almost 50% (DAMMERT; ALDA; RUZ, 2008, p. 33).



In 2010, Barómetro de las Américas assessed perceptions of insecurity in 26 countries in the Americas using the following question: “In the place where you live, thinking about the possibility that you might be the victim of an assault or robbery, do you feel very safe, somewhat safe, somewhat unsafe, or very unsafe?” The index counts those who said they felt somewhat or very unsafe. The aggregate result for Latin America was 43%, a high figure compared to 23% for North America. The countries in this subregion have the lowest levels of perceived insecurity, followed by most of the countries in the Caribbean (SELIGSON; SMITH, 2010, p. 60-61). The differences between subregions and countries in Latin America are not insignificant.

There seems to be a correlation between perceived insecurity and victimization: the former expresses the feeling of vulnerability to crimes against property, which are in turn measured in terms of victimization rates. This is substantiated by the fact that the most victimized countries are the ones with the highest levels of fear, and vice versa. Meanwhile, there does not seem to be such a close relationship between perceived insecurity and homicides. Low levels of confidence also affect perceived insecurity in security and justice organizations, particularly the police. Indeed, if confidence in their capacities for prevention and investigation is low, the feeling of danger is high. To the extent that fear depends both on victimization and confidence in institutions, it will vary in line with both indicators (COSTA, 2011, p. 34).

Despite major differences between sub-regions and countries, considering all of the main security indicators results in a picture of the hemisphere that is generally characterized by high homicide rates, high victimization rates, and high perceptions of

insecurity, on the one hand, and by low confidence in security and justice institutions on the other (COSTA, 2011, p. 32-34). Reversing the negative indicators will only be possible with more efficient institutions that can gain the trust of the public and achieving this goal will require a persistent effort to professionalize, modernize, and democratize these institutions.

3 The impact of citizen insecurity and transnational organized crime

Insecurity and organized crime are problems with multiple dimensions and implications for the economic, political, public health, and human rights arenas.



It is an economic problem because they require States, companies, and families to increase their spending on security. The economic costs of insecurity are multifaceted. First, there are the institutional costs: what States spend on the institutions responsible for security and justice. Second, there are the investments that companies and families make in private security services. Third, there are the material costs, including the loss of assets. Fourth, there are the resources that the health system uses to attend to the victims, as well as losses associated with emotional harm and to what is not produced as a result of death or temporary or permanent disability. Fifth and more difficult to estimate, though no less important, there is an effect on productive investments resulting from a shake-up in the calculations that shape opportunities and incentives for businesses to invest, create jobs, and expand operations (BANCO MUNDIAL, 2011, p. 4-9).

There are numerous estimates of the economic cost of violence and crime. The Inter-American Development Bank estimates that it is as high as 5% of the gross domestic product of Latin America and this percentage varies by country with some reaching 15% (BANCO INTERAMERICANO DE DESARROLLO, 2009, p. 6). The regional average for Central America is 8%, which includes institutional, private, material, and health costs. The percentages fluctuate between 11% and 4%. Health-related costs, especially the “intangible” ones related to emotional damage and lost production, make up more than half of the total costs (BANCO MUNDIAL, 2011, p. 6-7).

Other studies show how violence and crime affect economic growth, investment, and productivity. A 10% drop in the murder rate can increase annual per capita income by as much as 1% in some countries (BANCO MUNDIAL, 2011, p. 9). A significant drop in high murder rates could increase per capita economic growth in some Caribbean countries by more than 5% per year, while significant advances in the fight against impunity and violence in Latin American countries could increase per capita investment by 3% per year (BANCO INTERAMERICANO DE DESARROLLO, 2009, p. 6). The World Bank (2011, p. 8) also found that crime is one of the five main factors limiting productivity and growth in most Central American countries, and they consider addressing crime to be one of the top three priorities to increase productivity.

Insecurity also hinders economic competitiveness. The World Economic Forum’s 2011-2012 Global Competitiveness Report (WORLD ECONOMIC

FORUM, 2011, p. 402-405) ranks countries using various indicators, including the costs imposed on private companies by crime and violence, organized crime, and terrorism. None of the countries in the hemisphere are included in those where businesses can invest relatively small amounts to protect themselves from crime and violence. Rather, most countries are ranked among those with the highest expenditures and, of the ten lowest-ranked countries in the world, six are in Latin America and three are in the Caribbean. The costs imposed on businesses by organized crime follow a similar trend. In fact, only one Latin American country is on the list of those who spend the least to protect themselves from organized crime; most are ranked in the quartile with the highest expenditure and of the ten lowest-ranked countries in the world, seven are in Latin America and two are in the Caribbean.

A 2004 study of multinational companies conducted by the Council of the Americas found that security expenditures as a proportion of total expenditures were 3% in Asia and 7% in Latin America (BANCO INTERAMERICANO DE DESARROLLO, 2009, p. 5). According to the 2006 Enterprise Survey, company expenditures on security in Latin America and the Caribbean are as high as 2.8% of total sales; in Central America, the figure is 3.7% (BANCO MUNDIAL, 2011, p. 5). The World Bank (2011, p. 8) believes that a 1% increase in corporate losses due to violence could reduce productivity by 5% to 10%.

Just as costs for States and businesses increase as a result of violence and crime, families and individuals are similarly affected. In addition, they incur direct property losses and expenses as a result of physical damages and some of their resources must go towards protecting themselves and their assets, which limits the resources available for satisfying other basic needs (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2006, p. 52). Insecurity also affects interpersonal relationships, because it takes a toll on trust and on people's ability to relate to each other and work together. This is what economists call social capital. In general, high rates of victimization in Latin American countries lead to greater interpersonal distrust (DAMMERT; ALDA; RUZ, 2008, p. 32). The damage to social infrastructure is even more serious in the poorest communities, because violence reduces opportunities and perpetuates income inequality.



Insecurity and organized crime also contribute to a drop in public confidence in democratic political systems.

Perceived vulnerability to violent acts and theft undermines values that are essential for democratic life, especially tolerance for differences and adherence to human rights. Among other things, it contributes to the adoption of highly repressive criminal justice systems that are detrimental to individuals' rights; to demands placed on the authorities to get results at any cost, even if it means restricting rights; increasing police powers; and even violating human rights. It also results in public pressure to imprison as many offenders as possible, the stigmatization of minorities, support for policies that reduce or stop immigration and even the acceptance of inhumane punishments like lynching and the death penalty (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2006, p. 53-54).

In 2010, Barómetro de las Américas assessed public support for rule of law using the following question: “To stop criminals, do you think the authorities should always respect the law, or can they occasionally act outside the law?” It is worrisome that a third of the survey respondents (39%) believe that it is acceptable to violate the law in order to make arrests. In the same survey, victims expressed less support for the rule of law (52%) than those who had not been victims (63%) (SELIGSON; SMITH, 2010, p. 81-86).

Insecurity also erodes confidence in democratic institutions, particularly those responsible for security and justice, although it often goes further and can even affect public loyalty to the democratic system (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2006, p. 53). That is backed up by the 2010 Barómetro de las Américas, which reports that the citizens who are most victimized and who feel most unsafe express less support for the democratic political system than those who have not been victimized or who do not feel as unsafe. Indeed, 49.5% of those who had been victims expressed support for democratic institutions, compared to 54.1% of others. At the same time, 57% of those who feel their neighborhoods are very safe expressed support, compared to 48% of those who feel very unsafe (SELIGSON; SMITH, 2010, p. 78-81).



The high violence and crime rates in the hemisphere themselves constitute a serious human rights problem, not because these acts are necessarily committed by public officials, but because the State has failed to fulfill its responsibility to guarantee that all citizens can exercise and enjoy their rights and freedoms. It is, therefore, an indirect responsibility of the State. There are also many instances of direct responsibility; for instance, the excessive and disproportionate use of force, police brutality, and inhumane prison conditions.

Successful public policies regarding citizen security will reduce the levels of insecurity and organized crime. However, when these rates are very high—as in some countries and some cities in the Americas—States must assume responsibility, taking ownership over the problem and adopting corrective measures that enable them to succeed where they have failed. This is a task that arises from various international commitments to guarantee human rights.

The most serious rights violations are those against life and personal integrity. When violent acts do not take the victim’s life, they often cause physical and psychological damage and sometimes sexual harm. The right to freedom is also violated, particularly in the context of kidnappings, including the traditional “express” kidnappings used for extortion. Because of their severity, the impacts limit the victim’s chances of having a long and healthy life. The right to the peaceful enjoyment of property is also extensively violated, as evidenced by the high rates of property crime.

After crimes occur, it is up to public authorities to investigate them, identify and punish those responsible, and guarantee assistance and protection to the victims. When such State intervention is absent—as happens too frequently in our hemisphere—it constitutes a serious breach of duty as crimes go unpunished and the victims’ rights and particularly the right to justice are violated.

When these fundamental rights are affected, an atmosphere of fear also emerges, which impacts other human rights. Insecurity can change people’s behavior to the point

that they accept fear as a daily norm. In turn, this restricts the exercise of individual rights and freedoms and limits people's actions and opportunities in multiple arenas (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2006, p. 52-53).

Among the most critical restrictions are those placed on movement, enjoyment of property, and recreation. All of us need to move from place to place to satisfy our basic needs. The ability to do so is necessary to enjoy all other rights. It is therefore of central importance. Enjoyment of property constitutes a basic right, and is a precondition to exercising other rights that require material support. One's home is particularly important, because it represents a private space where people can display their affection towards their loved ones in a safe and dignified manner. Freedom of recreation includes the basic human need to enjoy life and engage in leisure activities that bring pleasure. Converting this into reality requires safe and freely accessible public spaces (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2006, p. 361-362).

4 Policies to address citizen insecurity and transnational organized crime in the Americas

Insecurity and organized crime affect the countries of the hemisphere to different degrees. Security policies and their depth and degrees of success also vary significantly. However, it is possible to identify some institutional developments—both positive and negative—that are common across the hemisphere. The positive ones include police reform and modernization, the development of comprehensive public policies, the increasing involvement of municipal governments, and reforms to the criminal justice system. The most notable negative developments include penal populism, which is associated with the crisis in the prison system and sometimes to the use of the armed forces for tasks related to citizen security; persistent institutional weakness and corruption; the privatization of security services; and ongoing human rights violations.



The following are some common elements in the police reform and modernization processes undertaken in the hemisphere:

First, there is an affirmation of civilian control over the police. Civilians lead almost all of the ministries or secretariats in charge of security today (FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES, 2007, p. 72-ss). However, much is lacking to enable these institutions to have solid professional teams that can ensure policy continuity, coordinate actions with other institutions, and exercise effective leadership, supervision, and control of the police. High levels of political volatility, a lack of qualified civil servants, and the continued survival of police forces that operate with significant autonomy and influence hinder full consolidation of civilian control over the police.

Second, is the police are decentralized. There are increasing efforts to give police organizations a more local focus so they can better understand that problems of insecurity and crime manifest themselves differently in different places and result from a range of social, demographic, economic and cultural factors. In contrast to militarized police forces that are centralized and organized vertically, this new kind of organization is more flexible in its decision making and has closer ties to other

public institutions, including municipal governments and communities. Police decentralization processes are often accompanied by new prevention strategies, such as community and an orientation towards problem solving approaches (RICO; CHINCHILLA, 2006, p. 123-201).

Third, new prevention models view the citizen as the object of protection, foster public participation and require the police to be more transparent. The public thereby becomes the main source of information for the police, and often organizes to collaborate with and even monitor them.

Fourth, institutional management systems are modernizing to include strategic planning, budgeting for results, and accountability to the public. To make this possible, criminal information systems have also been enhanced, along with training and specialization of personnel; the latter has benefited from the opening of police education systems to civilian candidates and increased enrollment of police officers in university training centers. Still, serious management deficiencies persist and many of the police forces lag behind in their technological capacities.

Fifth, mechanisms to confront police brutality and corruption have been strengthened, although not without difficulty. These mechanisms include purging bad elements and internal and external controls over police work. Freedom of the press has enabled the media to play an increasingly important monitoring function. The same can be said of the legislative and judicial powers and of human rights organizations, which have been expanding rapidly throughout the hemisphere.

Sixth, police working conditions have improved. There is increasing awareness that it is impossible to have an effective police force if they are not given high-quality, modern training, opportunities for personal, professional, and family development, the basic tools needed to do their job well and fair treatment. If we expect the police to respect citizens' rights, we must pay attention to their own rights.



The transformation of citizen security was initially limited to changes within police forces, yet subsequent efforts have included additional components. One these is the still-nascent development of comprehensive public policies on citizen security, which not only involved controlling and punishing crimes, but also a focus on prevention, rehabilitation, social reintegration, and attention to victims. To be successful, policies should have strategies and plans with clear goals, which assign institutional responsibilities and budgetary resources and include have process and result indicators that facilitate their evaluation.

Whereas security policies previously considered the police to be the only relevant actor, there is now an increasingly comprehensive vision of the efforts required to address a complex problem with multiple causes. This requires the involvement of other institutions, from those in the criminal justice system to those that play an important role in prevention. The multiplicity of actors has also necessitated the design of systems that involve actors at different levels of government, sometimes using national or federal funding for local initiatives.

The growing professionalization of security policies has necessitated the development of increasingly sophisticated information systems that facilitate improved design of interventions as well as self-assessment.



With different degrees of intensity throughout the hemisphere, local governments are increasingly involved in security policies, particularly prevention initiatives. This arises from the increased legitimacy placed on local security efforts, which give an important role to municipalities responsible for a set of policies that directly impact insecurity and crime, such as youth policies, sports, recreation and culture, and employment and job training. Many municipalities also play an active role in the prevention of domestic and gender-based violence and drug use, the rehabilitation and reintegration of young gang members, the care and protection of vulnerable groups, conflict resolution, the promotion of civic culture, urban renewal and the recovery of public spaces, and even neighborhood watch organizations. Furthermore, municipalities with more resources can help equip and train security and justice organizations and process and analyze information about crime. Finally, the municipal authorities are best placed to coordinate the efforts of the police and other institutions acting within their jurisdiction.



Criminal procedure reform represents the most important change in the Latin American judicial system in recent decades as it entails redefining the role of the police so that they are clearly subordinate to the public prosecutor in the execution of criminal investigations. Even more important, it involves a new procedural model where the court is both accuser and guarantor: a model that favors speed, immediacy, oral arguments, and transparency and replaces the old model of inquisition, formalism, and written arguments. Although the consequences of the new model on citizen security have not been fully evaluated, the transition appears to be an irreversible process, at least in the places where it is being implemented.

Other changes in the judicial system are related to the development of alternative dispute resolution mechanisms and the strengthening of systems that uses punishments other than imprisonment, such as community service. Many Latin American criminal codes allow for these kinds of punishment, but they are not always applied because of a lack of organized systems that allow them to occur. A new paradigm known as “restorative juvenile justice” has emerged in recent years for dealing with adolescent offenders; this is particularly relevant given the increasing problem of juvenile crime and to display the commitment to seeking solutions outside the prison system, which could eventually become an example for dealing with adult offenders as well.



In the context of persistently weak civilian management of security policies and police forces with high levels of institutional autonomy--both of which help explain the limited progress made with the aforementioned developments--the following negative trends emerge:

Penal populism is primarily a tough and emotive discourse against crime, which is reflected in legislative initiatives aimed at resolving problems with heavier punishment, criminalizing certain behaviors, reducing in the minimum age for criminal responsibility, increasing police budgets, and increasing prison populations (DAMMERT; SALAZAR, 2009, p. 28). It is frequently accompanied by measures that aim to expand the powers of the police and the military at the expense of individual freedoms and guarantees.

The populist discourse has great political weight and pays off in elections because it speaks to people's anxieties and worries, especially those of victims and those related to particularly despicable violent acts. It also creates an illusion of a quick, definitive solution. It is characterized by portraying victims, who are not always well informed, as protagonists in security decisions and almost exclusively ignoring the views of experts (DAMMERT; SALAZAR, 2009, p. 20). Victims tend to demand measures that are not necessarily the most effective; for example, ones that, instead of resolving the problem, could actually exacerbate it.

Given that penal populism views punishment to be the primary goal of security policies, it is normally accompanied by disdain for efforts at preventing violence and crime and rehabilitating and reintegrating offenders, as well as by the indefinite postponement of police, judicial, and prison reforms. They also disregard the impacts of their initiatives on the prison system as a whole.

Prison systems in the Americas vary greatly, although they are all oriented towards punishment rather than rehabilitation and social integration. In general, they are characterized by poor conditions, high rates of illegal drug use among inmates, inadequate prisoner classification policies, and incidents of violence. If we also factor in the instability and corruption of the prison services, we find a dangerous situation of mismanagement that enables the free exercise of criminal activities and even the creation of large criminal organizations within prison. There are many prisons in the hemisphere where order is maintained through a precarious balance between prison authorities and inmates. These problems have been aggravated by the increase in the number of inmates, overcrowding in the prisons, and, in some cases, by an increase in the number of unsentenced prisoners (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011, p. 118-122).

All of the subregions in the hemisphere saw a significant increase in their prison populations in recent years, both in absolute terms and as a proportion of their total population. In 2009, the prison population of the hemisphere reached almost 3,500,000; excluding Mexico, 66.7% were in North America, 32.8% were in Latin America, and 0.6% were in the Caribbean.² The countries with the highest number of prisoners per 100,000 inhabitants are found in North America and the Caribbean (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011, p. 123-138). However, the subregion with the greatest overcrowding problem in prisons is Latin America (56%) (DAMMERT; ZUÑIGA, 2008, p. 49-50).

Populist policies on crime frequently go hand-in-hand with the deployment of the armed forces for citizen security tasks. This is a widespread phenomenon in the region. To some degree, it is a legacy of military regimes and internal armed conflicts, which blurred the lines between national defense and citizen security, and between the military and the police. Today, the armed forces are still active in the context of internal armed conflicts, but they have also become involved in the fight against drug trafficking and other crises that threaten public order.

Democratic constitutional doctrine makes a distinction between the role of the military in national defense and that of the police in citizen security, explicitly stating that the armed forces can only be used for citizen security in exceptional circumstances, temporarily, and under strict parliamentary and judicial control. The

exceptional nature of this recourse to the armed forces stems from the fact that the mission, training, doctrine, organization, and equipment of the military are very different from those of the police. While the military exists for wars, the police are responsible for protecting and guaranteeing citizen rights and freedoms by preventing and investigating criminal acts.

Using the military to do police work is very risky because their intervention can involve serious human rights violations.³ For example, the military have their own courts, which often cover up violations instead of investigating and punishing them, thus undermining the foundation of a democratic State (HUMAN RIGHTS WATCH, 2009). Nevertheless, there are some situations where criminal groups acquire such firepower and territorial control that the police alone--whether due to their weakness or criminal infiltration--are unable to stop them. In these cases, military interventions must be rare, bounded, and temporary; they must also be subject to broad civil, judicial, and legislative control and come with a quick exit strategy that guarantees that the armed forces will be replaced by the police and others in the public system, such as judicial, educational, and health services.



Another negative trend is the persistent weakness of institutions within the criminal justice system, despite the aforementioned efforts to reform the police and judicial system. Nevertheless, such weakness is not unique to these institutions. Poor economic and social conditions affecting children and youth are at the root of many of the problems with violence. A State that is absent, especially in the social arena, hinders the resolution of these problems and their causes. The State's inability to generate effective social policies—from universal policies that promote social cohesion and guarantee access to health, education, and work, to polices targeted at particularly vulnerable and at-risk populations—is another manifestation of the same problem. This is compounded by the failure of the State to adequately budget for social services and other forms of prevention.

Just as an increase in the number of prisoners has not significantly reduced violence or crime, increases in the budgets for security and justice institutions have also failed to achieve this result (CARRIÓN, 2009, p. 21-22). A budget increase alone does not improve institutional performance, unless it is part of a strategy that includes new organizational models, improved resource management, increased transparency, accountability, and public participation, as well as open combat against corruption and abuse. In the absence of such a strategy, budget increases can feed the administrative corruption associated with the mismanagement of public resources, which is one of three kinds of corruption that, together with operational and police corruption, affects these institutions. Any kind of corruption negatively affects measures of citizen security because it contributes to an increase in criminal activity and in perceptions of insecurity by weakening, undermining, neutralizing or penetrating security institutions.

According to the 2010 Global Corruption Barometer (TRANSPARENCY INTERNATIONAL, 2010, p. 7), the percentage of Latin Americans who acknowledged having paid a bribe in the previous year to the judiciary or the police was 23% and 19%, respectively, whereas in North America the percentages were 6% and 4%.



There has been a rapid increase in the number of private security companies in the hemisphere in recent years, a trend that has paralleled the deterioration of citizen security in the context of persistent institutional weakness. This is a global phenomenon that is not limited to this hemisphere. In many countries, the number of private security guards exceeds the number of police officers. For example, in Central America the ratio is almost three to one. This trend is not problematic in and of itself, nor should it pose a challenge to the State monopoly on the use of force insofar as private security guards carry out their functions in the private sphere. However, these guards do require regulation and supervision, which has not kept pace with their rapid growth. This is compounded by the involvement of retired military personnel and police officers who sometimes use their influence to evade the few controls that do exist. This is particularly worrisome in countries where not long ago, human rights were systematically violated on a massive scale (PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO, 2009-2010, p. 240).

While private security guards need not compete with or substitute public security service, people often turn to them to fill the gaps and shortcomings of the public service. In those situations, the poorest social sectors lose out because they have fewer resources with which to obtain the minimal security conditions that the State cannot provide. Therefore, it is essential that governments guarantee adequate, equitable, and universal public security services.

There are four problems associated with private security operations that require special attention. First, when extractive industries have sensitive operations in zones with a weak State presence, they can end up fulfilling police functions and abusing their power.⁴ Second, firearms that are diverted from private security guards can fall into the hands of criminals. Third, there is the possibility of espionage through the interception of communications by companies that analyze strategic information or provide electronic security. Fourth, some of these companies employ active police officers.



The fourth negative trend—employing active police officers—is the violation of human rights by State agents in the context of citizen security. These violations are a legacy of the authoritarian past and the result of penal populism and institutional weakness. While they take many forms, extrajudicial executions, police brutality, and inhumane prison conditions are three particularly important issues that deserve special attention from governments.

Extrajudicial executions are not only illegal and ethically repugnant, but they are also impractical, because they do not effectively reduce violence or crime. On the contrary, they ultimately contribute to an increase in violence and weaken the legitimacy of public institutions.

Based on data from the 2008 Barómetro de las Américas 2008, a study by José Miguel Cruz (2009) finds that women (2.9%) are less likely to be physically or verbally abused by the police than men (7.2%), and youth are more exposed than adults to abuse because they are the target of most crime-fighting efforts. Indeed, those under age 25 are abused four times more than those over 65. Police misconduct

is also more prevalent in large cities (6.4%) than in rural areas (3.5%). It is four times more likely to affect those who have been the victims of corruption and crime than those who have not and twice as likely to affect people with political leanings, particularly to the left.

The third form taken by persistent human rights violations are the deplorable prison conditions. This has many causes. First, the infrastructure is inadequate and unsafe, which makes it difficult to separate inmates (between those who have been processed or sentenced, primary or repeat offenders, etc.) and impossible to exercise authority. Second, there are high rates of drug use and drug trafficking and extortion networks often involve prison staff. Third, there is disorder, violence, and criminal organizations that operate from within the prisons. Fourth, prison personnel have inadequate working conditions and low salaries. Fifth, insufficient funding and administrative corruption lead to appalling health conditions, food, and nutrition. Sixth, there is a general lack of work and study programs that would be key to efforts at rehabilitation and social reintegration. In sum, these conditions lead to riots and fights with alarming regularity and result in the loss of numerous lives.

5 Inter-American initiatives

Until relatively recently, the security threats, concerns and challenges discussed in the inter-American arena were the traditional ones related to collective security, the defense of States against outside aggression, and internal armed conflicts. Over the past twenty-five years, attention to security issues has broadened to include new and related threats, such as transnational criminal activities that endanger the security of the State and its inhabitants as well as democratic governance and economic and social development. These activities include trafficking illegal drugs, firearms, and persons; terrorism; money laundering; corruption; criminal games; and cybercrime.

The first of these new threats to be addressed under the inter-American system was illegal drug trafficking through the creation of the Inter-American Drug Abuse Control Commission (CICAD) in 1986. The Commission meets twice yearly, and had its fiftieth session in November 2011. It aims to strengthen institutional capacity and channel the collective efforts of Member States in order to reduce the production, trafficking, use and abuse of drugs in the hemisphere in line with international conventions.⁵ It also serves as the most important political forum for tackling the issue; in addition, it promotes research, the exchange of information, specialized training, and technical assistance in the development and management of drug-related public policies. It also develops minimum legislative standards and conducts periodic multilateral assessments. The latter may be the most sophisticated tool the Commission has developed to promote inter-American cooperation on this topic, which was established at the Second Summit of the Americas in Santiago, Chile in 1998. Five rounds have already been done, with the last one covering the period from 2007 to 2009 and the sixth round of assessments is currently taking place. The assessments consider institutional frameworks, reductions in supply and demand, and the success of control measures adopted by States.

Corruption was the second new threat addressed through an inter-American convention adopted in 1996, which is the first international legal instrument to address it.⁶ The Convention establishes a set of preventive measures, defines crimes of corruption, including transnational bribery and illicit enrichment, and has a series of provisions to strengthen international cooperation in the areas of legal assistance, extradition and identification, tracing, freezing, seizing and confiscating property obtained or derived from acts of corruption, and so on. It is linked to an inter-American cooperation program and to a mechanism created in 2001 to follow up on implementation of the Convention, which is in its fourth round of assessments. The Technical Secretariat of this mechanism offers legal support in various areas, namely standards of conduct, model laws, national action plans, training, and the recovery of assets.

In 1997, another inter-American convention was adopted to control the manufacture and illicit trafficking of firearms, ammunition, and explosives, and to facilitate international cooperation on this issue.⁷ The Convention has a consultative committee that aims to guarantee implementation of the convention and promote information exchange, cooperation, and training between countries. The Consultative Committee met for the first time in 2000 and since then, it has continued to meet twice annually. Today, the Organization of American States (OAS) has a marking team and advises countries to help ensure that imported, exported, and confiscated firearms include a serial number, the name and place of manufacture or importation, model, and caliber. All this information makes them easier to trace and link to criminal activities; it also facilitates the identification of arms traffickers and trafficking routes. Moreover, the OAS has a program to manage and destroy stockpiles, which is particularly focused in Central America.

The First Summit of the Americas, which was held in Miami in 1994, resulted in a commitment to prevent, combat, and eliminate terrorism. Following the Summit, two special conferences were held in 1996 and 1998. A plan of action was adopted at the Second Summit of the Americas in 1998 and a year later, the Inter-American Committee Against Terrorism (CICTE) was formed. The Inter-American Convention against Terrorism was adopted less than a year after the tragic events of September 11, 2001.⁸ Since then, the Committee has carried out a wide range of technical assistance and institutional strengthening activities. Today, the Committee has ten programs in six areas: policy development and international coordination, border and financial controls, critical infrastructure protection, legislative assistance, and crisis management. The Committee met annually from 2003 to 2010.

In 1999, a Group of Government Experts on Cyber Crime was formed as result of the Second Meeting of Ministers of Justice or other Ministers or Attorneys General of the Americas (REMJA). In total, the Group has since met on six occasions. The Comprehensive Inter-American Cyber Security Strategy, developed by the Group of Experts, CICTE, and the Inter-American Telecommunication Commission (CITEL), was adopted in 2004.

The Third Summit of the Americas was held in Quebec in 2001 to facilitate the implementation of the United Nations Convention against Transnational Organized Crime and its three accompanying protocols, which was approved in 2000. At this Summit, State adopted an Action Plan, which included a commitment to implement

collective strategies to combat new forms of transnational crime, including cybercrime. The Hemispheric Action Plan against Transnational Organized Crime was approved in 2006, and a Technical Group was created to ensure its implementation. This Group held its third meeting in October 2011. In parallel, the national authorities charged with combating human trafficking met twice between 2006 and 2009 and adopted a hemispheric work plan for 2010 to 2012.

Another threat stems from the activities of criminal gangs. A regional strategy to confront this challenge was adopted in 2010, produced by a working group formed one year earlier.



The policy and institutional changes undertaken by the inter-American system over the last twenty-five years to confront, one-by-one, the new threats to security arising from transnational organized crime, have been accompanied by the adoption of a new conceptual approach, the involvement of new actors, and changes to the structure of the OAS General Secretariat. The Summits of the Americas, which were held in Santiago and Quebec, were instrumental to making these changes, as they promoted reframing the traditional concepts of international security and identifying ways to revitalize and strengthen institutions in anticipation of the Special Conference on Security held in October 2003.

The Declaration on Security in the Americas, which was adopted at the Special Conference, reinforced the idea that the basis and purpose of security is the protection of human beings, and that traditional approaches should be broadened to encompass new threats that have political, economic, social, health, and environmental components. The new threats are multidimensional problems that require multifaceted responses by different national organizations and, in some cases, partnerships between governments, the private sector, and civil society. Many of the threats are transnational in nature and may require hemispheric cooperation. The Declaration also recommended that the Hemispheric Security Commission encourage cooperation among the different bodies of the OAS General Secretariat that have relevant areas of competence. It also suggested the development of strategies and integrated action plans related to the new threats based on the recommendations of CICAD, CICTE, and the CIFTA Consultative Committee.

The 2011 Declaration of San Salvador on Citizen Security in the Americas takes several steps towards the conceptual reframing of security that began in 2003. In effect, it recognizes that crime, violence, and insecurity negatively impact the social, economic and political development of our societies, and violate individual human rights that are central to citizen security. Thus, States should implement long-term policies aimed at prevention, the application of the law, rehabilitation, and social reintegration in order to guarantee a comprehensive approach that emphasizes the causes of crime and attends to the needs of vulnerable groups within a framework that protects and promotes human rights. Given the multi-causal nature of violence, these policies should involve multiple actors, including individuals, all levels of government, civil society, communities, the media, the private sector, and academia. Finally, the Declaration charges the Permanent Council of the OAS in coordination with national authorities and the Secretary General with drafting a hemispheric action plan to follow up on its provisions.

The Report on Citizen Security and Human Rights issued by the Inter-American Commission on Human Rights (IACHR) in 2009 is another important milestone in the conceptual reframing process. Besides reiterating States' negative obligations with regard to security policy, the Commission also recognizes their positive obligation to have comprehensive long-term policies that are focused on the individual, and that effectively protect and promote human rights in the face of crime and violence. This requires that policies place special importance on prevention by addressing their causes.

The development of standards to confront transnational organized crime in the inter-American context has been undertaken at the Meetings of Ministers of Justice or other Ministers or Attorneys General of the Americas (REMJA), which began in 1997 and had met eight times as of 2010. The OAS Secretariat for Legal Affairs has assisted in this valuable work. REMJA is the most important political and technical forum at the hemispheric level for addressing topics related to international legal cooperation for mutual assistance in criminal matters, extradition, prison policies, cybercrime and forensic science.

Improving policies on citizen security and stepping up the fight against transnational organized crime have become top priorities on the national and hemispheric agendas and their success will require stronger institutional capacities. With this in mind, the inter-American system is building an institutional structure centered on the Meeting of Ministers Responsible for Public Security in the Americas (MISPA). MISPA aims to strengthen dialogue with a view to effective cooperation and technical assistance, and to facilitate the transfer of knowledge and the exchange of promising practices. At the first meeting held in 2008, the Commitment to Public Security in the Americas was adopted and one year later, the Santo Domingo Consensus was adopted. The MISPA's third meeting was held in Trinidad and Tobago in November 2011.

The OAS Secretariat for Multidimensional Security supports MISPA through the Department of Public Security. The Secretariat was created in 2005 to assist the different inter-American bodies involved with security issues. In addition to the Department of Security, it also includes the CICAD and CICTE secretariats and the Department of Defense and Hemispheric Security. While the first three focus on new threats, the latter focuses on traditional ones. The Secretariat also has the Hemispheric Security Observatory (Alertamerica), which is associated with its Executive Office.



The American Police Community (AMERIPOL) was created in 2007 to promote cooperation between police organizations to confront transnational organized crime in scientific-technical matters, intelligence information, criminal investigation, judicial assistance, and training. It is comprised of twenty-one police forces from twenty countries in the hemisphere, and it has fifteen observer organizations.

6 Conclusions

- a) Although there are important differences between subregions and countries, the hemisphere has high rates of homicide, victimization, and perceived insecurity, and low levels of confidence in security and justice institutions. Turning these indicators around will require better public policies, a better understanding of the causes and dynamics of citizen insecurity and transnational organized crime, and institutions that are more professional, modern, and democratic.

- b) The available data show that drug trafficking is the main factor associated with high rates of homicidal violence. Another factor is the widespread use of firearms. Both of these merit special attention in public policies.
- c) Citizen insecurity and transnational organized crime are problems with multiple dimensions and negative implications for the economy, politics, public health, and human rights.
- d) Citizen insecurity and transnational organized crime affect countries in very different ways. At the same time, public policies have differing levels of effectiveness. Positive developments include police reform and modernization, the implementation of comprehensive public policies, increasing municipal involvement, and reforms of the criminal justice system. Negative trends include the high incidence of penal populism, the crisis in the prison system, the use of the armed forces to deal with citizen security tasks, institutional weakness and corruption, the privatization of security services, and the continuation of human rights violations.
- e) The inter-American system has been strengthened in the past 25 years to support cooperation to fight against transnational organized crime. This important development must be consolidated because it still has not stopped security from deteriorating in most of the countries in the hemisphere. The current challenge is to strengthen national capacities through inter-American cooperation in order to develop comprehensive, long-term policies that can reverse this negative trend. Doing so will require, among other things, an inter-American action plan for citizen security that includes adequate tracking mechanism, the strengthening and consolidation of the Hemispheric Security Observatory, the creation of an annual course on Security Management for senior personnel and the establishment of a permanent special rapporteur for citizen security at the Inter-American Commission on Human Rights.

7 Recommendations

a) Recommendations for the OAS

- **A Hemispheric Action Plan for Citizen Security.** Approve a Hemispheric Action Plan for Citizen Security that builds on the 2011 Declaration of San Salvador on Citizen Security in the Americas. This will serve as a reference guide for the development of long-term, comprehensive national policies on citizen security. The Action Plan will have objectives and activities that will be implemented over the next five years in the following areas: institutional strengthening; the prevention of insecurity, violence, and crime; application of the law; rehabilitation and social reintegration; attention to victims; and international cooperation. The Plan will be developed in consultation and coordination with the national authorities of the MISPA and the REMJA and will have a monitoring mechanism to facilitate its implementation.

- **Hemispheric Security Observatory.** Broaden and deepen the information provided by the Hemispheric Security Observatory to facilitate a better understanding of the problems and the public policies that could effectively address them. The Observatory should encourage new research and the exchange of experiences related to preventing and combating different forms of insecurity, crime and violence. It should also offer technical assistance to States to create and develop organizations charged with collecting, systematizing, and analyzing country-level information on citizen security and transnational organized crime.
- **Security Management Course for Senior Personnel.** Design and implement an annual course on security management for senior personnel targeted at high-level public officials with relevant responsibilities in order to share experiences and academic research on topics like institutional strengthening, the prevention of all forms of insecurity, crime and violence, the application of the law, rehabilitation and social reintegration, attention to victims, and international cooperation.
- **IACHR Permanent Special Rapporteur for Citizen Security.** Create a permanent special rapporteurship at the Inter-American Commission on Human Rights to monitor and follow up on the recommendations of the 2009 Report on Citizen Security and Human Rights and to implement the Inter-American Court's decisions and recommendations in this field.

b) Recommendations for States

- **Comprehensive Policies on Citizen Security.** Design, implement, and evaluate long-term, comprehensive policies, strategies and plans on the prevention of all forms of insecurity, including crime and violence, application of the law, rehabilitation and social reintegration, attention to victims, and institutional strengthening. These policies should focus on addressing the causes of citizen insecurity and organized crime within a framework that protects and promotes human rights. They should involve a wide range of public, private, and non-governmental actors at all levels of government, including citizens.
- **Security Observatories.** Create and develop, or strengthen organizations in charge of collecting, systematizing, and analyzing country-level information on citizen security and organized crime using the OAS Observatories Manual as a reference in order to better understand the problems and most effective public policies. These organizations will conduct research, systematize and disseminate best practices. They will also serve as national counterparts to the Hemispheric Security Observatory and provide it with regular, timely, and accurate information.
- **International Cooperation.** Strengthen bilateral, subregional, hemispheric and international coordination in order to improve security policies and combat transnational organized crime while fully respecting human rights and the rule of law.

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NOTES

1. The Observatory was created by the Department of Public Security of the Secretariat for Multidimensional Security of the OAS with the aim of gathering and analyzing information about crime produced by member States. More recently, the Observatory has been linked to the Executive Office of the Secretariat, so as to be able to articulate with the observatories on drugs and terrorism. See <http://www.oas.org/dsp/english/cpo_observatorio.asp> Last accessed on: Jan. 2012.
2. The figures for Argentina, Canada, Chile, Nicaragua, Saint Lucia and Venezuela are from 2008, those for Ecuador are from 2007, and those for Suriname are from 2005. In total, data is drawn from 34 countries in the hemisphere and include two countries in North America, 14 in the Caribbean, and 18 in Latin America. Cuba, Haiti, and Honduras did not submit information on their prison populations for any year in the past decade.
3. The Inter-American Court of Human Rights warned of this risk in *Montero Aranguren et al (Catia Detention Center) vs. Venezuela* (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, p. 43).
4. The basic standards used to regulate the operations of private security companies in the extractive industries can be found in the Voluntary Principles on Security and Human Rights, which was signed in December 2000.
5. The United Nations Single Convention on Narcotic Drugs (1961) modified by the 1972 Protocol; the United Nations Convention on Psychotropic Substances (1971); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).
6. The United Nations Convention against Corruption was approved in December 2003.
7. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, which complements the United Nations Convention against Transnational Organized Crime, was approved in May 2001.
8. Between 1963 and 2010, the United Nations approved fourteen international instruments against terrorism. A general convention against international terrorism, which would complement the existing legal framework on this topic, is currently under negotiation.

RESUMO

O Hemisfério Ocidental, em especial os países da América Latina e do Caribe, enfrentam problemas muito sérios de segurança, que são, hoje, a principal preocupação dos cidadãos em toda a região. Contribuem para tanto uma série de fatores, dentre os quais se destacam, devido à sua importância, o efeito pernicioso do tráfico e do consumo de drogas e a fragilidade das instituições responsáveis pela segurança e pela Justiça. No entanto, também houve, embora limitados no tempo e no espaço, desenvolvimentos institucionais positivos, tanto nacionais como interamericanos, que não são nada desprezíveis. É necessário construir com base neles para superar os desafios.

PALAVRAS-CHAVE

Segurança pública – Crime organizado transnacional – Homicídios – Vitimização – Percepção de insegurança – Confiança nas polícias – Sistema penitenciário – Organização dos Estados Americanos

RESUMEN

El Hemisferio Occidental, en especial los países de América Latina y el Caribe, enfrentan muy serios problemas de seguridad, que constituyen, hoy, primera preocupación ciudadana en toda la región. Contribuyen a ello un conjunto de factores, entre los que destacan, por su importancia, el pernicioso efecto del tráfico y del consumo de drogas, y la debilidad de las instituciones encargadas de la seguridad y la justicia. No obstante, también se han experimentado, aunque limitados en el tiempo y en el espacio, desarrollos institucionales positivos, tanto nacionales como interamericanos, que no son desdeñables. Es preciso construir sobre ellos para superar los desafíos.

PALABRAS CLAVE

Seguridad ciudadana – Delincuencia organizada transnacional – Homicidios – Victimización – Percepción de inseguridad – Confianza en las Policías – Sistema penitenciario – Organización de los Estados Americanos



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ABSTRACT

This article presents a specific experiment in public safety policy being carried out in the city of Buenos Aires (Argentina): the National Plan for Community Participation in Safety (PNPCS), which was launched in April 2011 by the brand-new federal Ministry of Public Security. One of the plan's main goals is the dissemination of a new paradigm of "democratic security." My aim is to analyze some of the conflicts that arose during its implementation, focusing on two questions: a) the resistance to change in the relationship between the police and the community; and b) the resistance resulting from the confrontation between the Ministry's agenda and those of civil society organizations. My argument is that both questions go back to the conflictive intersection of the new paradigm of "democratic security" and what I call the "community-based political culture" of participation in safety.

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Citizen participation – Public safety policies – Community assemblies – Democratic security – Community political culture



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CIVIC PARTICIPATION, DEMOCRATIC SECURITY, AND CONFLICT BETWEEN POLITICAL CULTURES. FIRST NOTES ON AN EXPERIMENT IN THE CITY OF BUENOS AIRES.

Manuel Tufro

1 Introduction

The goal of this article is to present a specific experiment in public safety policy being carried out in the city of Buenos Aires (Argentina). This experiment enables us to reflect on the role of civic participation and the State in the dissemination of a new concept of “democratic security.” The National Ministry for Security was created in December 2010 at a time of crisis when a land occupation was violently repressed¹ in the city of Buenos Aires. From the time of the first announcement and steps taken to break the stalemate and peacefully resolve the land occupations, the new ministry expressed a wish to propose goals and tools based on an idea of “democratic security.” One of the elements of change was the systematic implementation of civic participation² by means of the National Plan for Community Participation in Safety (hereinafter PNPCS), which was launched in April 2011. This plan was designed to apply information management and deploy preventive action to disseminate the new paradigm of “democratic security” that was intended to replace other, more repressive ideas centered on penal solutions and the criminalization of poverty. The implementation of the PNPCS achieved some notable successes, but not without the conflicts, obstacles, and challenges typical at the beginning of a process seen as part of a cultural change.

The method chosen for the analysis and the description of this experiment assumes that the goal of working with public policies can be found not only in their enunciation but also in the description of the context and an analysis of their implementation. The data for working on this latter aspect were obtained from the fieldwork and relationships I have built with the players while working on my doctoral

Notes to this text start on page 170.

thesis.³ The structure of the article is as follows: first, I show data necessary for understanding the complexity of the context in which the public policy under analysis is being implemented. I then examine the definition of the idea of “democratic security” as used by the National Ministry of Security, the description of the participation tools designed to disseminate it, and some of the changes and results that can be seen within the first six months of the PNPCS’s implementation. Finally, I analyze some of the conflicts that have arisen during its implementation, with an emphasis on two areas: a) the resistance to change and the relationship between the police and the public; and b) resistance deriving from the confrontation between the Ministry’s agenda and the agendas of civil society organizations. I argue that both issues go back to the conflictive meeting between the new paradigm of “democratic security” and what I call a “neighborhood political culture” of participating in public safety.

2 Context of the implementation

The context in which this new policy is being implemented is complex because it is based on a territorial strategy of participation and cultural change. In Argentina over the last fifteen years, the rhetoric of “punitive demagoguery” was the order of the day in politics, in mass communication media, and in the recommendations of some “experts” (CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 2004; KESSLER, 2009; SOZZO, 2005). At the same time, the erratic and inconsistent nature of the policies implemented by various levels of government (national, provincial, municipal) regarding citizen participation has produced frustration and, in the most promising cases, participatory experiments have supported self-organization and autonomy. These two factors (wide circulation of punitive demagoguery rhetoric and scarce and frustrating presence of the authorities) have contributed to the emergence of what I call a “neighborhood political culture” in relation to safety, which I will describe later, but which is strongly inflected with a repressive approach to public safety. Moreover, the activities of the Democratic Security Agreement, constituted in 2009 and to which I will refer later, constituted a counterweight to the repressive rhetoric in the public sphere and initiated the founding of the new paradigm of “democratic security” adopted by the Ministry. The arrival of this new paradigm on the ground has inevitably produced a conflict between political cultures. This conflict reflects an interesting dynamic when examined in light of the real challenges that the dissemination of a “democratic security” model may face.

Another fundamental contextual fact pertains to the legal and political status of the Autonomous City of Buenos Aires. Since 1880, the city has been the capital of the Argentine Republic. During almost the entire 20th century, it was subject to a system of “federalization” whereby the executive authorities were not elected by its inhabitants but rather appointed by the President of the Republic. Among the various consequences resulting from this lack of autonomy, one in particular is worth mentioning here: the impossibility of having its own specific police force. Instead, the Argentine Federal Police were appointed. In 1996 the city finally won its autonomy, and its authorities were elected by its citizens for the first time. The city’s constitution was passed in the same year, and states in article 34 that “Public

security is an irrefutable duty of the State and is provided equally to all inhabitants”. It also placed citizen participation at the center of its crime prevention strategies, holding that “The city government should contribute to public safety by developing multidisciplinary policies for the prevention of crime and violence, setting up and facilitating channels for community participation.” Despite these declarations of good intentions, the security policies in the city were marked by the impossibility of reaching an agreement with the national government on how to transfer control from the Federal Police to the city government. The fact that the city lacked its own police force, together with the absence of a political decision from all levels of government authority to sustain the participatory experiments, caused cyclical phenomena in which various disconnected citizen participation safety initiatives co-existed in the same area at various times (“Neighborhood Security Councils” organized by the City Government in 1998, “Community Participation Councils” organized by the Federal Police force itself and the National Government in 1998, “Pilot Plan” organized by the National Crime Policy Directorate, a dependency of the National Government Justice Ministry, in the Saavedra neighborhood from 1997 to 2000); these alternated with other periods of total absence of participatory safety initiatives. From 2003 to 2006 local and national governments reached an agreement and, during this period, the neighborhood associations of the National Crime Prevention Plan (PNPD) functioned with certain regularity (CIAFARDINI, 2006; LANDAU, 2008). Within this framework, the city legislature passed law 1689 in 2005 to organize and regulate the Security and Crime Prevention Council, enshrining community participation in safety as a right of the city’s inhabitants and a duty of the State, according to article 11 of that law. Despite achieving this legal recognition, community participation entered a new period of limbo in 2006 when the National Crime Prevention Plan was abandoned. The arrival of a new ideologically conservative administration in 2008 resulted in the creation of a new police force (the Metropolitan Police), without the transfer of power from the federal police. This explains why two police forces have co-existed in the city since 2009, one answering to the National Government and a new force answering to the City Government.

When the National Ministry for Security began implementing the new National Community Participation in Safety Plan in Buenos Aires, the city was governed by an administration ideologically opposed to that of the National Government. The City Government adheres to a concept of security that is dispersed and contradictory in its rhetoric, and is guided by an increase in vigilance and repression in its specific practices. It therefore vetoed initiatives to organize citizen involvement,⁴ while it publicly advocated toughening the laws and the Criminal Code as a way of addressing the “lack of security” (MINISTERIO DE SEGURIDAD DE LA CIUDAD DE BUENOS AIRES, 2010). The city government’s biggest efforts were focused on increasing security cameras in public spaces, and organizing a police force (the Metropolitan Police), supposedly as “neighborhood police.” However, the Metropolitan Police has already been the subject of scandals such as spying, and is not subject to civil authority or external oversight (CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 2008). The context therefore consists of a civic participation policy aimed at boosting a democratic security concept in a territory

where security must be managed jointly with another government authority, which prefers a punitive demagoguery and has thus done all it can to create obstacles to prevent the implementation of any mechanisms for participation.

3 The idea of “democratic security” and the planning of civic participation mechanisms

In 2009, a significant number of specialists, researchers, activists, and politicians in Argentina signed a Democratic Security Agreement (ASD). This founding document systematizes what is understood by “democratic security” as a new paradigm. The agreement was to insist that the State assume responsibility for building security institutions “committed to democratic values and the rejection of demagogic and improvised policies,” of “heavy-handedness,” and the delegation of security to the police forces. Among the guidelines to be followed in a democratic security policy was the configuration of:

A highly professional police force with commensurate remuneration to carry out effective prevention; a criminal justice system to investigate and judge at the opportune time those who infringe the law, guaranteeing full observance of the rules of due process and the right to defense during trial, and a penitentiary system ensuring humane conditions of imprisonment and sentences carried out with an aim of social rehabilitation.

(ACUERDO DE SEGURIDAD DEMOCRÁTICA, 2009, p. 2).

It also calls for a political decision to embrace the democratic administration of security institutions, the dismantling of criminal networks, the use of non-violent methods in police operations in public areas, and humane conditions for serving sentences aimed at social rehabilitation. It is important here to discuss the relationship proposed between “democratic security,” understood as a broad and integral concept of security that seeks to reduce “violence in all its forms,” and civic involvement. The question of civic involvement is not explicitly specified, although it is alluded to when it is suggested that “the planning and implementation of democratic policies should result from diagnoses based on information that is reliable and accessible to the public” and that the police forces should, on the one hand, be integrated with the “community and the local governments in the social prevention of violence and crime” and, on the other, controlled by external, civilian authorities.

The integrants of the ASD presented their guidelines to the country’s President in June 2010. Six months later, when the crisis of the Parque Indoamericano once more underlined the exhaustion of a security model based on self-governing police forces, the creation of a new National Ministry for Security was again put forward based on the ASD’s recommendations. Various specialists selected to be part of this new ministry came from organizations subscribing to views similar to those of the ASD. In terms of public involvement, a National Community Participation Office was created within the Secretariat of Preventive Policies and Community Relations, and Dr. Martha Arriola, a specialist with a long career in questions of

public participation in security⁵ and one of the driving forces behind the ASD, was nominated as its chief. The PNPCS was officially launched on April 4th, 2011 with a mission to “promot[e] the development of a new paradigm of public security in the community,” a paradigm that is described as “conflict management,” as opposed to an already exhausted “paradigm of order,” which “always reduces conflict to negative expressions and translates into responses that are merely repressive... given its manifest incompatibility with constitutional and democratic order”(MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011a).

The Ministry’s resolution 296/11, creating the community assembly as a place for participation, states that: “the National Ministry for Security promotes the development of a democratic security model that implies deploying actions that affect society’s cultural dimension for which reason public participation constitutes one of the central strategies” (MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011e).

In the same resolution, participation is also approached from a human rights perspective, making reference to a number of international rulings and declarations on the subject.⁶ In this way, public participation and the new paradigm of “democratic security” are irrevocably associated. But if public participation can be conceived as a right, it can also be seen as a government policy that can be articulated in mechanisms directed toward various objectives. Thus, one must go further when creating mechanisms in order to ensure that participation is effectively conceived, from a medium- to long-term perspective, as an experience of cultural change that is fundamental to disseminating and sustaining a new understanding of “democratic security.” But participation also appears, when planned in a specific way, as a government tool directed at fulfilling the goal of recovering civilian control of security. The crucial fact in this latter sense is, obviously, the new administration’s expressed wish to end years of police self-government, which resulted not only from corporate resistance to outside control, but also from the disinclination of the State, and of society in general, to become involved (SAÍN, 2008). This recovery of security by civilian government is one of the tenets of the concept of “democratic security.”

The new paradigm is translated into a series of specific dimensions in the PNPCS. First, the scope of the concept of “security” is expanded from simple crime prevention to “community prevention of violence.” This implies the inclusion of other forms of conflict beyond crime, the emphasis on multi-agency strategies and integration by means of not only economic but also symbolic resources and those defining identity such as culture, art, and sports. Second, the practice of prevention and the relationships of the police forces are altered. Situational prevention, which has been one of the fundamental axes of civic participation experiments until now in Buenos Aires, is a further component of the community prevention program. Although it also includes the possibility of putting into practice actions to reduce opportunity and increase risk for potential offenders, it also emphasizes the appropriation and use of public spaces by the community. For this reason the name of the community prevention and control program is “Taking over the street.” The police, on the other hand, must become the object of control and continuous evaluation by those who participate. Third, cultural

change necessitates the training of participants not only in questions of safety and prevention, but also in participation, socio-political analysis, etc. These aspects involve the two participation mechanisms designed to put the plan into action: the neighborhood assemblies and the participation schools. Both have immediate antecedents in the Neighborhood Security Forums and participation schools in the previously mentioned mandates of León Carlos Arslanian while he was head of the Buenos Aires Provincial Security Ministry.

Neighborhood assemblies are the mechanism designed for the territorial approach of community participation. They are spaces set up mainly by non-governmental organizations or entities carrying out their projects in a particular neighborhood, brought together and coordinated by Ministry employees to undertake diagnoses, prepare local security plans, and further attempts at crime prevention and community integration. The work of these assemblies implies the use of some of the methodological tools already used in the Buenos Aires Province Neighborhood Security Forums (such as the “neighborhood maps for the prevention of violence”), which generate information from non-police sources and make it available for the political management of security. It also affirms the presence of this administration’s representatives in the territory, interrupting or mediating the circuit of information established between the police and certain community sectors that may collude with police self-government practices. However, in terms of the Neighborhood Forums, there are some noteworthy changes in the preparation of this new mechanism of neighborhood assemblies, including modifications that seem to have originated in a critical evaluation of some of the previous experiments at the provincial level. The main differences lie in the following points:

- a) Broader participation. Only organizations with a formal structure and legal status could participate in the Neighborhood Forums, which left out a range of organizations arising after the 2001-2002 crisis. The neighborhood assemblies have made this more flexible by requiring that organizations only need “recognized performance” in the community sphere to participate. Moreover, for the first time, the participation of political parties, which was explicitly excluded from the Forums, is permissible. In practice, the flexibility is even greater, given that “individuals of the community” who are not associated with organizations can be accepted, although they are recommended to mobilize as organizations.⁷
- b) The Neighborhood Forums sphere of action coincided with precincts of the Provincial Police. In this new experiment, the sphere of action is not the precinct but the “neighborhood,” a concept that takes into account “the social and cultural characteristics that make people feel part of a common space, with shared identities, horizons and problems” (MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011c). The various neighborhood assemblies should therefore organize themselves according to zones, which in this case coincide with the jurisdiction of Buenos Aires City police precincts. This alteration adapts the mechanism to the institutional geography of the City rather than that of the Province.

The second mechanism designed for the implementation of the PNPCS includes the participation in community security schools. These were proposed as elements in a transversal, rather than territorial approach, and thought of as spaces for debating the general model of security to be designed, rather than about specific local problems. The content of the study programs is comprised of a familiarization course in the concept of “democratic security” as proposed by the Ministry. Its modules include the description and explanation of the founding principles of the PNPCS, the “socio-political analysis of the current reality”, the various models of public security, community integration and prevention of violence, and the links between security, habitat, gender, prevention of drug addiction etc.

The concrete implementation of these mechanisms began, in experimental manner, at the beginning of 2011 in the neighborhoods of Fátima and Ramón Carrillo in Villa Soldati, located in the southwest of the city. This zone was chosen to carry out this pilot project because it contains vulnerable communities. However, this was also the zone in which the conflicts caused by the occupation of the Parque Indoamericano and its subsequent suppression took place. The extremely fractious relationship between the inhabitants and the Federal Police revealed in this pilot assembly was one of the fundamental factors in the formation of the Unidad Cinturón Sur Plan, launched at the end of June 2011, which deployed 2,500 officers of the National Gendarmerie and Naval Prefecture to the south of the city. According to a survey carried out by the Ministry itself, in the Ramón Carrillo neighborhood, 89% of those interviewed said that the number of police and the quality of emergency response had improved (MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011b). Soon after this first pilot program, the Plan was officially launched in April 2011. In the first six months of its implementation, some thirty neighborhood assemblies were formed, which included around 450 organizations. These assemblies are currently at various stages of progress. The coordinators of the assemblies usually recognize two stages: one of “structuring” and the other of “opening up” the assembly. This difference is not insignificant because, as will be seen later, it is related to the homogeneity or heterogeneity of each of the assemblies. The information that arose from these spaces for participation was used in the planning of large-scale deployment of security forces, informing not only the implementation of the above-mentioned Unidad Cinturón Sur Plan, but also of other plans such as the Urban Security Plan and the Access Points to the Autonomous City of Buenos Aires Control Plan.

Another important step forward in terms of the Plan’s goals was to open up participation to those who were not previously involved in participatory security experiments: political groupings, grassroots organizations, human rights organizations, etc. This decision can be interpreted in two ways. On the one hand, it is a pragmatic decision that enables the construction of a series of neighborhood assemblies with the presence of a majority of political and social organizations favoring the Ministry’s plan. In this sense, it facilitates committed support from the majority of players (a central question for beginning any participatory process) but it could also make the assemblies be seen by certain sectors as “politicized” sectarian spaces. On the other hand, the presence of these new players allowed

the introduction of new issues related to human rights, to cultural initiatives to promote community integration and to the social prevention of violence, topics usually absent from the citizen security agenda. These changes include symbolic issues, which are valuable to the extent that they favor dialogue between the citizen security and human rights agendas (which, in Argentina, have been historically separate). For example, the assembly linking organizations from the Floresta Sur and Parque Avellaneda neighborhoods has its headquarters in the same building where a secret detention and extermination center called “El Olimpo” functioned during the military dictatorship (1976-1983). The fact that several assembly headquarters are situated in locations linked to political groups shows that the proposal to open up to new players is working. Other initiatives have a direct impact on urban space and quality of life. The participants in the Flores and Parque Chacabuco neighborhoods, for example, identified an abandoned and dangerous space at the entrance to a subway station, intervened, and transformed it into an amphitheater (called “La Negra Sosa”, a tribute to singer Mercedes Sosa, who died in October 2009), which was inaugurated on October 17, 2011. This broadening of the citizen security agenda was evident in many of the assemblies, and above all, in the five participation school programs launched since June 2011, where there were also interesting exchanges between social organizations, specialists, and academic researchers. In September, the first 83 participants received their diplomas from these participation schools.

However, as will be seen in the following section, the dissemination of a new paradigm of “democratic security” also faced resistance, obstacles, and challenges during the first six months of the Plan’s implementation that derive, in large part, from the various players in the field of participatory public safety, many of whom can be described as being part of a “neighborhood political culture” of participation in security, strongly anchored in ideas owing their origin to a common authoritarian meaning.

4 The conflict with the “neighborhood political culture” of participation in security

To speak of a “field of participation in security” means recognizing that the public policy driving civic participation was not implemented in a vacuum or in virgin territory. On the contrary, fifteen years of debate about public safety as one of the central topics in the public, political and media agendas has left a trail of experiments, of methods of mobilizing, organizing, and making claims, as well as of interpretive frameworks to give meaning to the cyclical crises in managing security. The various levels of government play a central role in this phenomenon, having implemented and abandoned many successive participatory processes since 1997. When the State abandons these processes, many members of the public who participated in them consider the experiment to have ended, and with great frustration, retreat again to the private sphere. But others persist, and thus autonomous forms of organization emerge. Many of those, having no channels through which to communicate with the authorities, adopt their own separate agendas and goals. In this field, the phrase “their own” does not equate

to “spontaneous” or “authentic”. Instead, it almost always refer to goals that are strongly influenced by conventional wisdom and by the discourses that circulate in the mass media, fanned by lobbyists and moral entrepreneurs of all kinds. The “field of participation in security” is formed, therefore, by individuals, associations, and organizations of varied stripes, governmental or not, many of which can be considered as a “residue” of the abandoned participatory experiments once sponsored by the State. These organizations compete for various material and symbolic resources.

It is in this “field” that what I call the “neighborhood political culture” of participation in security emerges. It is comprised of webs of meaning, interpretive frameworks, discursive resources, and practical knowledge that a variety of social players who call themselves “neighbors” use and adopt with certain regularity. The term here does not only denote their condition as “inhabitants” of a particular area, but also activates a historically consolidated political meaning that is used to denote a distancing from “an other:” “the politicians”, “the militants”, “the civil servants,” etc.⁸ A fairly stable set of features defines this “neighborhood culture.” The first, as mentioned previously, is a constant rejection of “the politicians” and civil servants, as well as the invocation of the supposedly apolitical nature of the demands and new organizations, both of which are epitomized in the conventional wisdom notion that the “lack of security is not a matter of the left or the right: it has no ideology.” The second feature is the spasmodic nature of these organizations’ claims. Mobilizations that, fanned by highly visible cases, attract a high number of citizens are alternated with very low levels of participation when participation means a constant commitment, and with the ephemeral nature of many of the organizations. The third feature is the circulation and adoption of certain diagnoses to explain the “lack of security” (based on the criminalization of poverty, of immigrants, of addicts, or of youth), which slide almost naturally toward repressive options as the only imaginable solutions. The fourth feature is the demand for immediate solutions for their complaints, a demand whose virulence increases in inverse proportion to the concrete results (none, or meager at best) that have been achieved by public safety policies until now. This demand is accompanied by an insistence on “greater police presence” as the main solution to the “lack of security.” Some more formalized experiences formed neighborhood networks that deployed situational prevention practices, running the risk of producing socio-spatial segregation as a result. The fifth feature is the notion that participation is not linked to a citizen’s right or duty. Rather, it fits into a tradition that associates participation with denunciation or complaint, and sees it as a transitory solution for a specific situation in which, faced with the inability or ineffectiveness of the State, citizens must do what the State does not do, in line with some of the postulations of neoliberalism. The neighborhood associations usually hold beliefs such as “we should not have to exist,” which is paradoxically – or, perhaps, not so much – accompanied by a petitioning habit that puts the solution to all problems in the hands of the State. (SOZZO, 2000; PEGORARO, 2001; CROCCIA, 2003; TUFRÓ, 2007). In short, the repudiation of politics, the demand for immediate solutions, the ephemeral nature of any commitment and the supposition that the State alone is

responsible for safety are factors that feed a resistance to the construction of more or less formal spaces of participation guided by the State and capable of surviving over time. For many, “institutionalization” is equivalent to “politicization. The implementation of the PNPCS in the city of Buenos Aires has meant a conflict between the idea of “democratic security” and the “neighborhood political culture” of participation, which is managed according to the criteria explained above.

This said, it is unsurprising that the opening up of community assemblies to political players by the Ministry has been perceived by other sectors as an original sin of “politicization”. On the other hand, as has already been said, if various neighborhood assemblies have shaped themselves into heterogeneous spaces, many others, and especially the participation schools, have basically been constituted by organizations that are politically sympathetic to the national government, favoring a perception of a certain sectarianism which, from the point of view of the “neighborhood political culture” of many sectors of the community, is characterized simply as “politicization.” This conflict may serve thus as a trigger to analyze the challenges to the dissemination of the concept of “democratic security” by the State. I turn now to this analysis, addressing two issues that highlight resistance to the new paradigm: the ways of perceiving the public/police relationship and conflicts in defining the priorities, goals, and methods of local public safety agendas.

4.1 The conflict over a new role for the police

Some of the abandoned participatory experiences have left more or less active “trails,” as I have previously mentioned. Among them are the so-called Community Prevention Councils (CPC), which have functioned since the end of the 1990s in several Buenos Aires city precincts. Since they began, these Councils have channeled, under a new framework of “citizen participation,” more traditional links forged by the police force with enclosed and specific sectors of the community, selected according to “the principles of renown and social recognition which the police wisdom classifies as ‘decent people,’” which means having a “previous and personal relationship with the commissioner” (EILBAUM, 2004, p. 190). The logic of the CPCs seems to proceed as follows: a group of “decent people” from the neighborhood forms around a commissioner, who serves as an amplifier of the police discourse, reproducing its smallest issues (such as the dissemination of practical advice on crime prevention, precinct and patrol telephone numbers, etc.) and its more important claims, that is, demands for increased economic, logistic, and human resources, dissemination of repressive ideological stances in relation to public safety policies, etc. The concrete relationship between the police functionaries and the members of the CPCs can be summed up by the “small bed sheet” metaphor, an argumentative procedure that I witnessed firsthand at almost all the CPC meetings I attended. The metaphor refers to a supposed scarcity of resources that prevents the fulfillment of all demands, because “if we cover one side, the other is left uncovered.” The “small sheet” is complemented by complaints over the supposed softness of the laws against delinquents, and from this combination arises the most often heard diagnosis: “the hands of the police are tied.” The members

of the CPC are the ones in charge of disseminating the police discourse to the community. The metaphor of the “short sheet” produces three main effects: a) it portrays the police force as a “scarce commodity” over which one has to dispute, thereby producing “petitioning neighbors” whose idea of participation consists of making one’s own voice heard louder than the other groups so as to ensure one’s share of police protection, without bothering with a vision of the whole; b) it places all the responsibility for inadequate policing and the “lack of safety” on the government of the moment, and above all on the “politicians;” c) it confirms that a “greater police presence” is the solution for “lack of safety,” a mantra that is used in almost all the neighborhood movements created around the subject. As a result of all these issues, experts consider the CPCs examples of “bad practice in participation” (CIAFARDINI, 2006), given that they are organized and coordinated by those that should be controlled, that is, the police force.

In the city of Buenos Aires, the CPCs coexist with the new neighborhood assemblies. Until now, the National Ministry for Security has not required the CPCs to close. There have been negotiations with some of them, and in some cases, attempts to merge them with the newly formed neighborhood assemblies. However, the philosophy of this new participatory program is fundamentally incompatible with the working methods of the CPCs. The Ministry’s new idea is to break the circuit that enables certain representatives from the local community to communicate directly and without mediation with the police management and to set up a new circuit instead: organized community - political management of the police (that is, the Ministry). This circuit allows the police to be called whenever is necessary, but always through the political mediation of Ministry representatives. “Breaking” this pre-existing circuit means not only opening up new spaces for exchange, but literally interrupting certain patterns of interaction and conversation to prevent these new spaces from establishing and reproducing the old patterns of exchange between “notable” community representatives and a self-governing police force. I witnessed one of these interruptions at a neighborhood assembly: someone made a particular public complaint and the commissioner, as he jotted this down in his notebook, said to the man, “Come see me tomorrow at the precinct and we can discuss this in greater detail.” A high functionary at the Ministry who was present that day immediately interrupted the conversation to request that both the citizen’s complaint, the response, and the commissioner’s commitment be made public within the assembly and be recorded in the assembly’s public minutes.

This new way of viewing the relationship between neighbors and police officers, with the mediation of the political administration, creates resistance among the CPC members for various reasons. First, as broadcasters of the police discourse, these sectors uphold the view that the police cannot be controlled by or held accountable to the public (which is one of the central tenets of the neighborhood assembly proposal). They, therefore, seem to become spokespersons for police malcontents unhappy with what they consider interference into the Federal Police’s powers (deployment of the forces) and rights (evaluation of performance and decisions over promotions and raises). Moreover, if information is no longer managed on a personal basis between the commissioner and the member

of the neighborhood, but rather has to be made public within the framework of the assembly, many of these organizations lose their symbolic capital, since it is precisely their privileged position in relation to police information that legitimizes them in the eyes of other sectors of the community, and information on security is a highly valued merchandise in local spheres.

In her speech at the launch of the National Community Participation in Safety Plan, the minister Nilda Garré spoke of the goal of fighting “against the fundamentalism of keeping alive an institutional culture that cultivates secrets” (MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011d). The goal of making information public is mainly to guarantee control of police performance by the community, but it has the secondary effect of diluting these players’ capital. This explains the resistance and obstacles to the generation of new spaces and the implementation of new organizational methodologies that postulate a very different idea of participation than that held by the CPCs or other similar organizations, such as “Friends of the Precincts Associations,” which are charged with collecting funds for the police from among the area’s storekeepers. These organizations resisted joining the neighborhood assemblies, arguing against the assemblies’ “politicization”. But they carry on with their activities, parallel to the assemblies. The following dialogue, taking place in one of the community participation schools, is an example of a grievance of a member of the neighborhood assembly of Parque Patricios in relation to this issue:

Neighbor: Some organizations [like ours] want to know the details, the resources that each precinct has, and when we don’t get this information, participation is discouraged. I’ll tell you what the neighbors say: [*The neighborhood assemblies project*] is great, but the people from the ministry come here to get the information that they don’t get from the precinct, but when we ask, there’s a limit to what we’re told. The CPC works in Parque Patricios. Nowadays there’s more unofficial information coming from the CPC than from the commissioner.

Ministry employee: The commissioner should go to the assembly to provide information. It’s the only way for this to work. The resources are public. It’s important, when one designs a local plan, to know what resources are available.

Neighbor: Because these groups - the CPCs, the Friends of the Precinct - cooperate, getting together unofficially, and this takes the place of what’s official.

In this complaint, we can see various symptoms of the conflict I have described. First, the participant in the assembly senses a degree of impotence on the Ministry’s part, expressed in the idea that the Ministry seeks information from the neighborhood assemblies that it cannot obtain from the precincts. This is not far from reality: although I do not know the degree to which the police gives information to the Ministry, it’s clear that it seeks in the neighborhood assemblies information to complement, act as a counterweight and work as a control for the “official” information produced by the precincts. But, at the same time, the police also refuse to give information to the neighborhood assemblies. And the

organizations that are “friends” of the police continue functioning, but now unofficially (since the neighborhood assembly is supposed to be the official one). Given that “unofficial” agencies continue to receive information that the official ones do not get, the “unofficial” replaces the official, and, in the eyes of the participants, the neighborhood assemblies lose much of their content. Therefore, if the Ministry is not able to make this information circulate publicly, those who possess it are able to reproduce, despite the existence of these new participatory spaces, asymmetries regarding the circulation of information which create a caste of “neighborhood” representatives that often clashes with the state’s representatives (LANDAU, 2008). In this case, the dispute is not only over the legitimacy of the organizations in the eyes of the local community, but also between two models of relationship between the community and the police, one of which reproduces the practices of police self-government, while the other dictates civilian control as a part of the political management of safety. The place of the “petitioning neighbor” who limits himself to demanding greater police presence on his block, who accepts police explanations based on a lack of resources and concludes that that “the politicians” are to blame (the typical stance of the “neighborhood political culture”), is to be taken by a citizen who is active in controlling the police and connected with the political administration of the force, a position coherent with a paradigm of “democratic security.” This is the point that creates resistance.

4.2 The conflict over the “security” agenda

The conflicts over defining what constitutes “security” are not merely conceptual or semantic, but rather bring into play interpretive frameworks and argumentative resources that guide the selection of priorities, signaling of intervention targets, action, etc. In this sense, another one of the important resistances that the concept of “democratic security” upheld by the Ministry has faced in its territorial implementation has been the accusation of “politicization” from various sectors. It is worth noting which characteristics of the participatory process these kinds of accusations address. The National Ministry for Security holds that the “heterogeneity” (which presumably refers to the heterogeneity of the participants) is simultaneously a value, an achievement and a characteristic of the neighborhood assemblies (MINISTERIO DE SEGURIDAD DE LA NACIÓN, 2011b). Nevertheless, certain complexities must be recognized in this “heterogeneity.” First, the implementation process in many of the neighborhood assemblies seems to consist of two stages, which assembly coordinators define as an assembly’s “moment of configuration” and “moment of opening up.” In the first stage, for reasons of pragmatism, priority is given to the convocation of social and political organizations sympathetic to the Ministry’s project. The majority of active assemblies are still in this first stage, but will soon progress to the stage of “opening up” to other types of organizations. The decision to begin in this way was a response to pragmatic issues: levels of conflict needed to be minimal in order to initiate and consolidate a participatory space. Nevertheless, the price of this decision is that other sectors (especially those enrolled in the “neighborhood political culture” of participation

in security) perceive the nascent assemblies as “politicized” or “pro-government” spaces. This assessment leads to a decision not to take part in the assemblies. Even more reactionary strategies are based on these same arguments, such as that of an employee of the Buenos Aires City Government who interrupted an assembly in the Versailles district and accused the National Government of wanting to create, through the assemblies, “committees to defend the revolution” to control the police, and of seeking to make “this like Cuba in ’61.” These extreme positions are fortunately marginal, but they form part of the discourse about the neighborhood assemblies that is aimed at discrediting them.

The assemblies set up according to the logic of these two phases (“configuration” and “opening up”) are those with the most ideologically homogenous participants. They are also more effective at translating the proposals of the new paradigm of “democratic security” into specific initiatives. The Ministry’s official version says that in other areas of the city of Buenos Aires, the assemblies were formed by “spontaneous demand” because there were serious problems in these neighborhoods that created the demand. In cases of this kind that I observed, it was more than just a “spontaneous demand” from the local players; the neighborhood assembly was also a response to an offer by the Ministry to organize situations of protest and agitation. Finally, there are other “mixed” cases, such as Liniers that I will analyze later where a call to convoke politically sympathetic organizations coexisted with the presence of “neighbor” previously mobilized to demand “greater safety.” The latter of these two kinds of cases are those in which the assembly participants were less politically homogenous, and there was a greater distance between the ideas of safety held by the participants (or some of them) and the Ministry’s proposal of “democratic security,” which created conflict over defining the group’s goals and methodologies, with specific resistance and protestation about the working tools and logic proposed by the Ministry. These conflictive situations are not in themselves negative. The problem lies in the fact that, if conflict is a desirable phenomenon in every participatory democratic process, then it must be given a framework and be channeled for the process to be productive and enriching. This constitutes a challenge for both the State and social organizations. When conflict is not channeled in the participatory environment, withdrawals and schisms appear and expose the impossibility of different views coexisting in the same space. Thus the participatory process is impoverished.

I was able to witness an example of this logic in the Liniers neighborhood assembly, on the western side of Buenos Aires. At the time of the launch of the PNPCS, there was a conflict in this neighborhood regarding criminal episodes that had mobilized various groups of inhabitants. At the beginning of 2011, the murder of a taxi driver in Liniers sparked a series of street demonstrations to demand “greater safety.” These demonstrations mobilized pre-existing organizations in the area to work together with others that had formed during the heat of the protests, forming a committee called the “Liniers Self-Convended Neighbors.” This space took upon itself the task of collecting stories from the press and complaints made by those affected by various kinds of crime in the neighborhood over the previous two years. They called this report the “Crime Map” and presented it to the federal and city security ministries. They hoped to get an official answer from ministry officials, and hoped

that the report would result in concrete action on the ground. They received no answer and the actions carried out were seen as slow and insufficient. The contact had, however, served to raise the group's profile and as a result, they were invited to take part in the launch of the Liniers neighborhood assembly on June 2, 2011. This assembly was composed of heterogeneous organizations, and during the first meeting, I was among the many members that clearly saw a dividing line between the participants. A member of the "self-convened neighbors" described it as follows: "What one notices is that there were many Kirchnerist militants,¹⁰ from various groups but ideologically united under this banner, and then the neighbors. It was a clear division, even in the seating arrangement..." (L., member of the Liniers Self-Convened Neighbors).

This dividing line between "neighbors" and "militants," which follows the categories of the "neighborhood political culture," led to some minor tensions at the first meeting. For example, when one of the "self-convened neighbors" suggested that there was a relationship between the degree of danger in a particular neighborhood street and the presence of the Bolivian community in the area. At this point, other assembly participants ("militants" according to the categories of the "neighbors") immediately intervened, repudiating the "neighbors" discriminatory allusions. Nevertheless, the main conflict at that first meeting was over a different issue. While the "self-convened neighbors" group wanted immediate answers to the complaints in the report they had compiled two months prior, Ministry officials proposed to follow a specific working methodology that would include the collective configuration of a "violence prevention map." The neighborhood groups mentioned above interpreted this as a lack of recognition of their work, saying that the "crime map had already been drawn by them." The Ministry representatives insisted that the information collected had been "valuable," but that technically, it did not constitute a "crime map." However, they did not clearly explain why the community report could not form the basis for the diagnosis and management control programs proposed by the neighborhood assemblies,¹¹ nor did they show the need for a methodology standardized with that of the other assemblies. Caught in the middle of these discussions between Ministry representatives and the "self-convened neighbors," and without the power to take part in them, was a group of members of political and human rights organizations sympathetic to the National Government project, but which had never worked on citizen safety issues before.

Two weeks later at the second neighborhood assembly, the evident tension between the two clearly differentiated groups exploded again over an apparently minor and anecdotal issue. Some of the participants belonging to the group I have already mentioned, of political and social militants inexperienced in safety issues, suggested the need for the "self-convened neighbors," with greater experience in the area, to somehow bring themselves to the same level of knowledge on the subject as the other participants, so as to be able to begin the process on an equal footing. "As I am a political militant, you are security militants," held one woman. The "self-convened neighbors" thought it absurd to have to "lower their level;" and said that, rather, the others should raise theirs to meet them. However, it was above all

the categorization of “security militants” that was perceived as an insult by those who constantly defend the “non-political” nature of their activities. They also said that they had been accused of being “de-stabilizers” by the pro-government militants present at the assembly.¹² Offended by this, the “self-convened neighbors” stopped attending the neighborhood assembly and only one of them continued to participate. As this shows, short circuits in communication and difficulties reconciling their agendas contributed to a conflict, which resulted in the defection of one of the groups interested in the community’s safety. As another member of the “self-convened neighbors” organization said:

The neighbors were attacked by the same Kirchnerist militants, with provocations, provocations like “you are security militants, you want to destabilize the government,” and you have to put up with it and move on. But beyond this, what the neighbors see is no progress. The real neighbors, that is, who had been here for four months, neighbors that have been working for many months, were made to draw a red circle, when we had handed over a map on April 6, in other words, two months before they arrived, the neighbors said, “We want answers to what we have given you”.

(M, member of Liniers Self-convened Community Members).

The conflict, therefore, runs through two levels that are constantly confused with each other. On the one hand, the wound to the “apolitical” sensibilities of the “self-convened neighbors” is a result of the tension that appeared in the meetings between those who, without prior experience in issues connected to urban safety, had experienced political militancy and supported the “democratic security” project proposed by the national Ministry of Security, and those, on the contrary, who defend their lack of political ideology and have a long history with neighborhood demands for “greater safety.” Nevertheless, this tension was able to emerge due to another dispute in the assembly. This other dispute was not connected to questions of categorization and political (or “apolitical”) sensibilities, but rather an issue between the Ministry representatives and the “self-convened neighbors” over how to define the structure of the participatory space, the methodologies to apply, and the assembly’s agenda. What constitutes a “crime map,” and what does not? Why adopt a methodology proposed by the Ministry, when the “self-convened neighbors” group has already carried out work showing the community’s problems? Why, instead of starting another diagnosis, are solutions not being found immediately and implemented to solve the problems already diagnosed? These are the questions that were at play from the viewpoint of the “self-convened neighbors.” The idea put forward by the Ministry to use a participatory methodology in order to warrant the sustainability of the participatory space in the long term was not congruent with the goals, the working methods and, ultimately, if I may say so, with the “political culture” of the “self-convened neighbors.” In practice, the Liniers neighborhood assembly has not yet been successful in creating a space that could house and connect the three experiences: that of the “self-convened neighbors,” that of the political and social militants, and that of the Ministry representatives, with their proposed methodology.

5 Conclusions

The experiment launched by the National Ministry for Security in April 2011 is, in many ways, a move encouraged by sectors committed to the dissemination of a democratic concept of public safety. Public participation appears in this context as not only a government technique aimed at regaining civilian control over the security forces, but also as the start of a process of cultural change over the medium and long terms, which will obviously require the permanent renewal of political support to sustain participatory processes until they can be instituted as State policy.

I have tried to show that the decision to implement a territorial strategy to disseminate the new paradigm of “democratic security” meant intervening in a complex situation, in which, in addition to the resistance expected from some police forces accustomed to self-government, other important political players arose who are hostile or indifferent to the new paradigm (the Buenos Aires city government), and also sectors of the organized communities who have their own ideas on public security, often colored by repressive axioms incompatible with the safeguard of human rights. It is on this point that the scuffles and open conflicts described in the second half of this article are produced. It is clear that participation refers not only to government technique or a rhetorical appeal, but also to an environment of conflict and negotiation between particular levels of government (national, provincial, or municipal government agencies; police departments, etc.) and a sector to which all this is directed (“the community,” “the neighborhood”) that does not exist as a unit but as an open set of conflictive groups and interests, with very different political cultures and local issues. The “self-convened” organizations, the residual sediment of other participatory experiments and the police forces (Federal and Metropolitan) constitute the players in what we could describe as participation in security “field,” in which, without a doubt, there are various capitals at play (BOURDIEU, 1995). New players then enter this field: the National Ministry for Security and political and social groupings which, until now, were at the margins of these discussions. This entry provokes a conflictive dynamic, which is still ongoing. The conflicts described in this article represent a temporal cross-section, a “photograph” of a process which in fact is dynamic, where the modes of linkage between the players change, partly also as a consequence of the participatory process itself. The PNPCS has only been running for some months, and these notes are therefore provisional, but I believe they serve to reflect on some of the practical problems that the processes of cultural change promoted by the State can expect to face.

The new experiment in participation proposed by the National Ministry for Security begins with some very promising axioms, but also with the need to articulate with preexisting players in the complex local fields of participation. Two lines of tension appear to be drawn in this scenario. The State faces the challenge of being both articulator and player. It must be the guarantor of a space where enriching conflicts can emerge and be sustained, and at the same time be a disseminator of ideas, of its own and of society’s participation project. This means working in a delicate balancing act and conceiving of possibilities to address the problem that take into account the perceptions and sensibilities of those who for years have been cultivating a systematic

lack of trust in the State in general and as guarantor of public safety in particular, at the same time as considering it to be the only authority capable of solving all problems.

On the other hand, for all those players interested in committing to participation understood as democratizing cultural change, come they from the State or from organizations, a tension emerges between participation as a government dynamic requiring time and perseverance; the urgency to show results (“efficiency”); and the conflicts that emerge every time that spaces are built which, to a greater or lesser degree, presuppose a relinquishing of power by government authorities which they subsequently cannot control (CIAFARDINI,2006). It is no accident that the most “efficient” assemblies at adopting and disseminating the new paradigm appear to be, up till now, those that have greater homogeneity among their participants. In this sense, the achievement of participation as part of a change in political culture and as a condition of disseminating the new paradigm of “democratic security” could come into conflict with the practical need to deactivate a particular potentially explosive situation, as has already happened in previous experiments. The challenge of sustaining the spaces despite these urgencies constitutes the specific content of what is called “political decision-making.”

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NOTES

1. The Parque Indoamericano, located in the far southwest of the City of Buenos Aires, was occupied at the beginning of December 2010. This occupation was first dislodged (by the Federal Police and the Metropolitan Police) and subsequent armed conflict left three dead and various wounded. The complex web of economic, political and criminal interests behind these episodes needs to be exhaustively studied. For an initial understanding see Centro de Estudios Legales y Sociales – CELS (2011).
2. The classification used by the National Ministry for Security is “community participation”. The appeal to the “community” in matters of safety has been criticized as vague, controversial and even risky when one is slipping toward moral authoritarianism (CRAWFORD, 2002) or when one refers to a supposedly “natural” environment in opposition to the constructed and artificial environment of the political spaces (ROSE, 2001). In this case, the notion of “community” refers more properly to the concept of “organized community”, as in the political ideology of Peronism: this does not refer to “natural” links, but to politically constructed social organizations.
3. Research financed by the Consejo Nacional de Investigaciones Científicas y Técnicas [National Council of Scientific and Technical Research] (CONICET) and undertaken within the sphere of Doctorate in Social Sciences at the University of Buenos Aires. Its provisional title is “Lack of Security, culture and the production of subjectivity. The construct of *vecino* (neighbor) in the public communication of public safety. Metropolitan Buenos Aires, 1997-2011”
4. In November 2008 a new public safety law for the City was passed. This law created the Metropolitan Police and established, in tune with the previous law of 2005 that “community participation” is a citizens’ right and a duty of the State. But it also indicated what would be the specific authorities to channel this participation: the Public Safety Forums. These forums were created by law 3267 passed in November 2009. Two articles of the law (3 and 7) included in the attributes of the Forums that of taking part in the “design and preparation of the Public Security Plan”. The Head of the City Government, engineer Mauricio Macri, vetoed this law in January 2010, considering that the design and preparation of the Plan were the exclusive prerogatives of the Executive Branch. In this way the Forums were deprived of a large part of their content. Moreover, almost two years later, they have yet to be constituted.
5. Licentiate Martha Arriola participated in the two mandates of León Carlos Arslanian as the head of the Security Ministry of Buenos Aires Province (1998-1999 and 2004-2007) and was the creator and principal promoter of the Safety Forums, until now one of the few serious and systematic experiments in citizen participation in public safety in Argentina. In 1999 and in 2008, in each of Arslanian’s mandates, the Forums stopped receiving state aid and political support and left to their own devices, so that today only a few still function in an isolated and autonomous fashion. Many of the tools developed for the Forums were taken up for use in the current experiment of Community Assemblies in the City of Buenos Aires, which I have described in this article.
6. As regards citizen participation as a right that must be guaranteed by the State, resolution 296 refers to article 2 of the American Convention on Human Rights, article 20 of the American Declaration of the Rights and Duties of Man, article 2 of the Universal Declaration of Human Rights, article 25 of the International Covenant of Civil and Political Rights, the Universal Declaration of the Rights of the Child and article 4 of the Convention of Belém do Para.
7. In this emphasis on pre-existing organizations and on the recommendation to organize those who have not yet done so, the previously mentioned question of the “organized community” is given visibility. On the other hand, this ideological option has a very clearly pragmatic dimension: it is very difficult to sustain participatory processes over time if they are not involved in the same organized nuclei guaranteeing participant stability. Regarding this, see Landau (2008).
8. The political tradition that sees the figure of the “community member” as supposedly apolitical and non-participatory in any factional interest goes back at least to the Community Organizations arising during the uncontrolled growth of Buenos Aires’ city fabric in the 1920s and 1930s (DE PRIVITELLIO, 2003). At that time, the “community member” was seen as a subject only interested in achieving material improvement for his own community, and supposedly uninterested in questions of political or ideological partisanship.
9. In reference, obviously, to the Revolutionary Defense Committees created in 1960s by the Fidel Castro regime, a capillary structure combining the functions of the dissemination of doctrine with practices of social action, civil vigilance and political control.
10. That is, supporters of the National Government headed by Cristina Fernández de Kirchner.
11. Among other questions, the almost 160-page report prepared by the “self-convened community members” did not provide precise territorial references at the time of the recorded criminal episodes, neither did it prepare time and space patterns of the crimes committed, patterns of avoidance behaviors, etc., features of the “prevention mapping” technique. Nor did it include other questions in the definition of “violence prevention” as part of the “democratic security” paradigm put forward by the National Ministry of Security, such as the problems of public spaces, social conflicts, etc. Its sources were mainly news articles. It nevertheless provided precise information on the location and functioning of various brothels, data used to carry out certain police operations, although not all of those demanded by the “community members” who had authored the report.
12. I was present on this day (June 16, 2011) at the community assembly meeting, and although I heard perfectly well the name “security militants” muttered by a woman taking part in the assembly, at no time did I hear the “self-convened community members” accused of being de-stabilizers. They affirm, however, that they were indeed so accused.

RESUMO

O objetivo deste artigo é apresentar uma experiência concreta de política pública de segurança que está sendo implementada na Cidade Autônoma de Buenos Aires (Argentina): o Plano Nacional de Participação Comunitária em Segurança (PNPCS), lançado em abril de 2011 pelo Ministério de Segurança da Nação. O plano tem como um de seus objetivos principais a difusão de um novo paradigma de “segurança democrática”. Proponho-me a analisar alguns dos conflitos que surgiram na implementação desse plano, focalizando duas questões: a) as resistências à mudança na relação entre a polícia e a comunidade; e b) as resistências derivadas do confronto entre a agenda do Ministério e as agendas de organizações da sociedade civil. Argumento que ambas as questões remetem ao encontro conflitante entre o novo paradigma de “segurança democrática” e o que denominarei de “cultura política vicinal” de participação em segurança.

PALAVRAS-CHAVE

Participação cidadã – Políticas públicas de segurança – Mesas de bairro – Segurança democrática – Cultura política vicinal

RESUMEN

El objetivo de este artículo es presentar una experiencia concreta de política pública de seguridad que se está llevando adelante en la Ciudad Autónoma de Buenos Aires (Argentina): el Plan Nacional de Participación Comunitaria en Seguridad (PNPCS), lanzado en abril de 2011 desde el flamante Ministerio de Seguridad de la Nación. El plan tiene como uno de sus objetivos principales la difusión de un nuevo paradigma de “seguridad democrática”. Me propongo analizar algunos de los conflictos que emergieron en la implementación del mismo, focalizando dos cuestiones: a) las resistencias al cambio en la relación entre la policía y la comunidad; y b) las resistencias derivadas de la confrontación entre la agenda del Ministerio y las agendas de organizaciones de la sociedad civil. Argumento que ambas cuestiones remiten al encuentro conflictivo entre el nuevo paradigma de “seguridad democrática” y lo que denominaré una “cultura política vecinal” de participación en seguridad.

PALABRAS CLAVE

Participación ciudadana – Políticas públicas de seguridad – Mesas barriales – Seguridad democrática – Cultura política vecinal

CELS

The Center for Legal and Social Studies (CELS)* is an organization that works to protect and promote human rights. Since it was created in 1979 in the midst of the military dictatorship, CELS has fought against systematic human rights violations in Argentina by investigating, documenting, reporting, and litigating in favor of fundamental rights. With the return to democracy in 1983, CELS started to work to consolidate the role of the state in the protection of human rights, influencing the design and implementation of public policies. CELS is dedicated to the fight against impunity for serious human rights violations committed during the dictatorship and structural violations of human rights committed under democracy, in order to strengthen rule of law. Today, CELS works on critical issues such as citizen security, police violence, detention conditions, including torture; economic, social, and cultural rights; the strengthening of judicial institutions; expanded access to justice for vulnerable groups; and the democratization of the armed forces. The intervention strategies that CELS uses include research, advocacy, strategic litigation of key cases to denounce the structural patterns of human rights violations, questioning the content, orientation and implementation of public policies, and suing for the legal protection of vulnerable groups and persons.

ABSTRACT

This article takes stock of the public security agenda in Argentina within the regional context. In this sense, it analyzes the Ministry of Security's first year of operations (it was created in December 2010) and provides some specific experiences with an overview of variety of regional security and human rights approaches. While the current changes to security policy in Argentina have their own characteristics and adaptations, they are framed by and interact with some regional trends. This paper explores progress towards gaining political control over security matters, as well as the effects of the international "new threat" agenda. Some of the enacted measures should serve as warning signs, showing how less democratic trends in security can permeate local political decisions if internationally accepted.

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KEYWORDS

Security – Human rights – Police – Civilian government – New threats – Anti-terrorism – Argentina

* More information at: <http://www.cels.org.ar>. Last accessed on: May 2012.



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THE CURRENT AGENDA OF SECURITY AND HUMAN RIGHTS IN ARGENTINA. AN ANALYSIS BY THE CENTER FOR LEGAL AND SOCIAL STUDIES (CELS)*

Issues linked to citizen security and human rights have gained a renewed focus in Argentina. Two recent experiences are milestones that highlight the current state of the local debate.

First, human rights organizations like the Center for Legal and Social Studies (CELS) have been increasingly involved in the debate around security policies, broadening and enriching the traditional agenda of police violence. One strategy has been to promote the Democratic Security Agreement (ASD),¹ which was created in December 2009 and brings together different social and political actors who promote efficient political solutions to the problem of crime from a perspective that respects citizens' rights and freedoms.

Another is the creation of the Ministry of National Security in December 2010,² which began a new phase of civilian government and indicates a shift away from the historical decision to delegate security to the police institutions by Argentine administrations.³

In this article,⁴ we analyze some of the things promoted by the Ministry in its first year, which point to a strategy to recover political control over security forces and to intervene where autonomous centers of power exist, such as in the Argentine Federal Police Force (PFA). We frame the analysis in the context of certain regional trends related to citizen security and explain some of the tensions that arise between security and human rights in regional discussions, and how they manifest themselves in the national arena. Finally, we describe the ASD as a space for advocacy and dialogue around public policies on security that respects human rights.

As an introduction, we raise the importance of differentiating between

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governance of security and governance of security institutions. It is an analytical differentiation that enriches the evaluation of a governance agenda that, while addressing institutional control over security forces, also implies returning control of operational security decisions to the political sphere.

1 Governance of security and governance of security institutions

The disinclination of political authorities to govern security in Argentina was extensive both over time and across jurisdictions, even though standards and hierarchy had officially placed police forces under elected authorities since the return to democracy in 1983. This implies that what is usually called “self-governance” emerged from the decision of political authorities not to get involved with managing security matters, either due to a belief that the police had the right knowledge, or because the necessary steps of relinquishing control could bring about destabilizing power that the police forces have exercised in the past.

This “delegative model” supposes a double abdication: both of the exercise of governance of security matters and of the exercise of governance of police institutions. While in practice both issues are intimately related, for the purposes of this analysis, it is helpful to differentiate between the two. On one hand, every government is responsible for exercising strategic civilian leadership of the police, which requires maintaining full control over the institution. Meanwhile, preventing and punishing crime and violence in an efficient and legal manner must be done through criminal policy priorities and strategies—among other things—that are established and led by government authorities that take into account social problems and conflicts.

The relationship between the two dimensions is found, first, in that relinquishing control over the police forces implies, in practice, a refusal to establish criteria for recruitment, training, control, resource allocation, and many other matters, without which it is impossible to follow a security agenda that does not arise from the police organization itself. Second, this kind of delegation of power favors police collusion and participation in illegal networks, which constitute the most serious problems with crime.

Although the civilian and political governance of security matters is a key demand of human rights organizations and those who work for the democratization of security in Argentina, the fact that political authorities take on the role that corresponds to them is just one point of departure for promoting democratic security policies. It is important to analyze the policies that have been sustained as well as police actions and their effects in order to substantively assess these efforts in terms of what linkages are being made between security and human rights in practice, not just in speech.

2 The Ministry of National Security’s first year: exercising governance of security

The Ministry of National Security has completed its first year during which the key issue was the decision to return control of security to the political authorities before reforming the legal framework that applies to the police. It is worth noting

that the new Ministry has implemented a series of actions that demonstrate its commitment to exercise civilian control over security matters and the federal police forces, thereby discontinuing the historical pattern of delegating governance of security matters and police institutions to the police themselves—particularly the PFA. The set of operations and plans promoted by the Ministry constitutes a new pattern of security policies that advances their control over territory, population, and security forces.

In terms of governance over the security forces, the first thing that stands out is the change made to the PFA's centers of power. This has been carried out primarily through four measures that had significant symbolic and operational impacts. First, there was the transfer of passport administration from the PFA, which had historically been responsible for managing this important documentation, to the Ministry of the Interior. Second, the PFA was moved out of the neighborhoods in the south of Buenos Aires where its involvement in local illegal networks was a major component of the crime in the area and was replaced by two other federal security forces: the Gendarmerie and the Naval Command. Third and fourth, there were interventions into two areas where the PFA had self-defined the distribution of security services, frequently based on legal or illegal agreements between the police and individuals or businesses in the area: the discretionary handling of “additional services”⁵ and the political centralization of decisions about how to distribute police services on the street. In turn, these measures allowed security resources to be reallocated to strengthen services provided in the city of Buenos Aires and together, they show an intervention into key spaces where the PFA had traditionally exercised arbitrary, illegal, and highly lucrative authority.

Second, the Ministry intervened at critical points in the profession and performance of the police in order to shape the profile of police officers and institutions, including through efforts to recognize the rights of the police themselves. This merging of control and “police wellbeing” within the Ministry's operational areas is a unique characteristic of the current government's management style, which is recognized as such on the regional level. It could serve as the basis for a new consensus within the security forces around something other than a delegative model.⁶

In terms of measures undertaken in areas critical to the human rights agenda, there are draft protocols to regulate police action, an unprecedented recognition of the role of the federal security forces in the state terrorism that emerged in Argentina during the last military dictatorship between 1976 and 1983, as well as the inclusion of a gender perspective in different aspects of management.

However, the changes driven by the Ministry have been institutionalized to varying degrees, and it is too soon to measure their impact on security and human rights. For example, the legal framework that applies to the security forces has not been reformed, even though their internal regulations are starting to be changed through ministerial resolutions. During its first year, and in the context of the 2011 election campaign, the Ministry did not seek to reform the foundational and personnel laws of the federal security institutions, changes that are necessary

to begin a new phase of the federal security system. The intervention strategy has focused more on recovering control over the operational decisions and institutional management of the police, rather than reforming the outdated laws under which they operate. However, at the level of the internal standards, a series of ministerial resolutions has reformed and increased the transparency of various regulations that the institutions had previously managed with great discretion and obscurity.

3 Local tensions surrounding democratic security and human rights

The Ministry has promoted an unprecedented, massive deployment of police officers and prefects into the streets of the capital and the province of Buenos Aires. For example, just a few days after it was created, the Ministry launched Operation Sentinel, which deployed 6,000 police officers across 24 districts of greater Buenos Aires. Meanwhile, Operation Southern Belt intensified security and surveillance in the southern parts of Buenos Aires by deploying the National Gendarmerie and the Naval Command, which, as mentioned earlier, had the immediate effect of displacing the territorial power of the PFA from the places where they had a long history of complicity with crime and violence.

Both operations, as well as the recent announcement of the creation of the Neighborhood Prevention Police, were interventions targeted at poor areas where violations of rights occur more often. The positive aspects of these measures include first the decision by the security authorities to prioritize these places. Second, the inclusion of the residents of the towns and settlements as partners of the political authorities and beneficiaries of security policies, not just—as historically has been the case—as threats that must be controlled.⁷ Third, different indicators affirm that these operations have been well received by the target population.⁸

However, using different mechanisms in these territories than those used in the rest of the city raises sensitive human rights concerns, implying a relationship between poverty and crime. This is an issue that has not been clearly addressed in the local debate, even by those who support democratic security policies.⁹ The relationship between crime and poverty is difficult terrain for the human rights discourse, in part because the poor are the primary victims of the repressive tools of the penal system, and simply exposing them to these agencies puts their fundamental rights at risk.

During the 2011 election campaign, the need to implement “comprehensive prevention policies” that tackle the causes of insecurity was a common theme across the whole political spectrum. Candidates who had different perspectives on security matters—even those who had defended the most authoritarian programs in the past—agreed on this point. Thus, arguments related to the link between inequality and insecurity and, in the absence of a deeper analysis, supported both programs that protect the rights of impoverished sectors, and criminalizing interventions that bring more violence to the sectors they claim to protect. Frequently, however, politically correct rhetoric on “the social” leads to new ways of criminalizing poverty.

Considering the policies that are under development and the homogeneity of the dominant rhetoric in both democratic and authoritarian debates around security, it becomes necessary to make analytical and empirical contributions that identify criteria for evaluating such policies, where otherwise the diagnosis remains implicit. These criteria allow one to evaluate how these territorial deployment policies affect the rights of the people who live in those zones, who are mostly poor.

Here we seek to call attention to the need to strengthen all types of controls over the territorial approach to security, including political, judicial, legislative, and other controls by outside bodies that monitor and defend rights. Territorially differentiated interventions require special controls aimed at the critical elements of the relationship between the security forces and the local residents. For example, some abusive practices—such as informal and unrecorded detentions on public roads—elude traditional controls, and therefore necessitate the design of special control mechanisms.

4 The Argentine case within the regional context

The reforms that have taken place off and on in Argentina in recent years have intensified since early 2011 and form part of a regional trend that values and prioritizes, at least in the discourse, a focus on prevention and accountability.¹⁰ Certainly the implementation of these concepts is dissimilar and sporadic across the different countries in the region. In general, the political rhetoric and the academic advances have not been consistently accompanied by security strategies that apply and sustain these values in the medium and long term.

However, as different authors have noted (UNGAR, 2011, p. 4-6; DAMMERT; BAILEY, 2005), several countries in the region have incorporated “problem-oriented policing” into their policies over the last decade; this approach centers on resolving conflicts in a specific context, prioritizing the prevention of crime, and investigating its causes. Under this kind of security policy, the police play a proactive role focused on analysis and prevention, rather than acting in a purely reactive and frequently repressive way. The impact of this type of policy on human rights has not been sufficiently discussed or evaluated.

While the current changes to security policy in Argentina have their own characteristics and adaptations, they are framed by and interact with these regional trends. As mentioned in the previous section, however, these changes lead to certain tensions around human rights that should be managed by the political authorities and monitored by civil society.¹¹

5 Regional tensions surrounding democratic security and human rights

The security debates taking place at the regional level in different multilateral forums have also permeated the discourse and policies at the national level in another way. In recent decades, tension has arisen between different security paradigms in Latin America. On the one hand, there is a view that confronting

crime and violence requires policies that build capacity for civilian and political management of security institutions without militarization. This view was reflected in the *Report on Citizen Security and Human Rights* published by the Inter-American Commission on Human Rights (2009).¹² On the other hand, the situation of insecurity and violence can be attributed to the “new threats”,¹³ which leads to defining social groups or actors that must be controlled by the police, the armed forces, or both. Fundamentally, this view operates within a friend-enemy logic, which allows for heavy-handed interventions based on the idea that internal security problems threaten institutionalism and even regional stability. This view also posits a need to professionalize the police forces, but in practice, this is frequently done with an eye towards militarization as a key tool to “fight insecurity”.

In recent years, these analytical frameworks have appeared in regional negotiation processes and dialogues.¹⁴ In general, the concept of “new threats” remains central to the definition of security policies and explanations of crime and violence in the region. The police and military are often turned to for responses to political, economic, social, public health or environmental problems or concerns (CHILLIER; FREEMAN, 2005). Making reference to the “new threats” such as terrorism, drug trafficking, or trafficking in persons or assets, broadens the traditional definition of national defense to the point of superimposing internal security issues that are perceived to be threatened by these supposedly new and nonconventional conflicts. This perspective has guided the regional debate in recent years, and has made security a key focus of States’ political and social agendas.

In Argentina, the line between security and defense has been an institutional hinge of the democratic transition.¹⁵ Except for some political conjectures and isolated remarks made during electoral campaigns, there has generally been a strong political consensus around the need to maintain that separation (CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 2011, cap. II).¹⁶ However, regional discussions around the new threats question the delineation between the two, since many countries have a history with the heavy militarization of internal security efforts (particularly Mexico and Central America, but also, in different ways, in Brazil, Venezuela and Colombia) (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, p. 42-44).¹⁷

The Argentine government’s position on this is contradictory. On the one hand, in 2011 the government stated in different regional meetings that it does not endorse the tendency towards militarization nor the application of regressive human rights standards in security policies. On the other hand, this year it internally promoted two worrisome initiatives that contradict its previous positions to varying extents.

The measure that most strained the principles of the government’s program was the approval of the so-called “anti-terrorism law”.¹⁸ This law reforms the penal code and doubles sentences for all crimes where it is determined that there was “the aim of terrorizing the population or forcing national public authorities, foreign governments, or agents of an international organization to take an action or to abstain from doing so” (ARGENTINA, 2011b).¹⁹

There are various criticisms of this initiative. The reform introduces an aggravating factor for all crimes in the penal code using very poor legislative technique that creates a loose formulation that leaves the interpretation of possible “terrorist aims” or acts of extortion open to judicial discretion.²⁰ The reform also creates internal inconsistencies within the penal code. For example, it modifies the range of punishments by allowing lesser crimes, if committed with “terrorist aims”, to be punished more severely than the most serious crimes. While these may appear to be mere technicalities, they show that the consequences of thoughtless penal reforms, which feed the “voracity” of the penal system, are not seriously considered.

Even more importantly, this law brought Argentina in line with the regional trend of hardening penal legislation as a response to terrorism. From an international policy perspective, Argentina seems to have responded to a threat of being excluded from the G20 by the Financial Action Task Force (FATF),²¹ an inter-governmental organization created at the behest of the G7 and comprised of the world’s largest economies. In doing so, Argentina missed an opportunity to discuss the best way of complying with international obligations without weakening constitutional guarantees.

The second worrisome issue is the use of military resources to improve surveillance and control of the country’s border regions. In mid 2011, the national government launched Operation Northern Shield (ARGENTINA, 2011a)²² to respond to the transnational security problems related to drug trafficking, trafficking in persons, and the smuggling of goods the use of radars and military resources, and together with the police and security forces. It was presented as a measure aimed at building capacity in some provinces to control land, river, and air space.²³

The operation involves joint work and coordination between the Ministry of National Security and the Ministry of Defense, although the regulation that applies to these operations explicitly states that the national government will control a policy so that the armed forces do not intervene in internal security matters. It also states that internal security forces will carry out the operations that emerge from the identification of illegal acts. However, this kind of intervention strains these principles and raises several questions. A first issue is the linking of regional security problems to “new threats” and the resulting tendency to incorporate the armed forces in security operations that fall into this category (even if only instrumentally, through technological support). This creates concern about the blurring of the line between national defense and internal security, particularly in a regional context where, as previously mentioned, the armed forces are increasingly involved in internal conflicts.

A second relevant question is the need to establish how to guarantee political governance and civilian control over Operation Northern Shield when it includes so many joint actions carried out by both the military and the police. Along the same lines, we can ask how the intelligence information produced through such control and surveillance operations will be managed; in addition to the collection of information, in many cases this implies the self-generation of tasks, which is contrary to National Intelligence Law 25.520.²⁴ In 2008 it was established that information collected by the Armed Forces during “Irregular Aerial Transits

(IATs)²⁵ should be passed on to the civilian authorities of the domestic security system. In other words, military radar operators cannot carry out intelligence activities using the information they collect because they do not have the mandate to systematize or analyze the information. Although a joint resolution issued later by the Ministries of Security and Defense established limitations consistent with the national intelligence law, it is still troubling that it is not expressly stated that conducting and controlling the transfer of this information to the security forces should be done exclusively in the civilian sphere.

Now we will try to reflect critically on the influence of regional and international security agendas on local policy. The “new threat” agenda is permeating governments’ security agendas, with the added complexity promotion in countries with progressive governments. The approval of the Anti-Terrorism Law, one of the high priority measures promoted by the FATF, serves as a warning of how the local political class accepts the less democratic, but internationally accepted trends in security.

6 The experience with the Democratic Security Agreement

As already mentioned, the security and human rights agenda in Argentina gained new momentum with the creation of the Democratic Security Agreement (ASD) in late 2009. Different social and political actors in Argentina have come together to identify and promote basic agreements on these issues. In this sense, the ASD emerged as a multi-sectoral alliance aimed at designing and implementing actions to promote efficient policies that respect human rights given public demand for increased security. Signed by more than 200 politicians, cultural icons, academics, representatives of social and non-governmental organizations, and experts from different sectors and political orientations, the foundational document has ten principles that relate to three areas: the security forces, judicial powers, and the prison system.

6.1 *State response to crime*

In Argentina, state action to address the increase in violence and crime has mostly been limited to simplistic authoritarian responses that have further entrenched the ineffectiveness of the police, judiciary, and prison system. In recent years, some security institution reform processes had favorable results, but they were interrupted in order to return to policies that had been proven to fail.

6.2 *The deceit of the iron fist*

Iron fist policies have not reduced crime. Rather, they have increased violence and, in some cases, they have even posed a threat to democratic governability. Recurring themes in these iron fist policies include the delegation of security to the police, increases in sentencing, the weakening of guarantees, and policies centered on mass imprisonment and preventive detention. The repeated failures of these policies have

been used to insist on continuing with the same formulas, creating a reckless spiral that has never accounted for its results. This series of misguided interventions has not only been an impediment to the professionalization of the police, but it has also boosted the action of illegal networks that enjoy the participation of public officials.

6.3 The responsibility of the State

The state is responsible for ensuring that the public can freely exercise and enjoy their rights. Building a citizenry that respects the law is the ideal, but if the law is broken, the state should provide the means necessary to identify and punish those who are responsible.

Suitable policy to address crime and security requires police who are effective at prevention, who are highly professional and properly compensated. It also requires a criminal justice system that investigates and tries those who break the law in a timely manner, that guarantees full compliance with the rules of due process and the defense at trial. Finally, it needs a prison system that provides decent conditions and executes sentences with a vision of social rehabilitation.

6.4 A comprehensive view of security

Solving this problem requires addressing the causes of crime and criminal networks in order to reduce all forms of violence. A comprehensive view of security implies both preventing physical violence and guaranteeing decent living conditions for the whole population. This requires an integrated approach with strategies that connect security policies with other public policies, and that complements the actions of the penal system with interventions in all other areas under the state's purview. These state resources should be distributed in an egalitarian fashion and should increase protection for traditionally excluded sectors so as to avoid exacerbating inequality.

To advance a comprehensive and effective approach to the security problem, the design and implementation of democratic policies should be based on studies that are based on accurate and publically accessible information. Producing such information is also a non-transferable duty of the State.

6.5 The democratic management of security institutions

All governments are responsible for exercising strategic civilian leadership over the police and this assumes that they have full control over the institution. Preventing and punishing crime in an efficient and legal manner requires a police system that is strictly subordinated to the public security directives issued by government authorities. Recent history shows that delegating this responsibility facilitated the formation of police divisions that operated autonomously, organized vast corruption networks and even threatened democratic governability.

The basic guidelines for the modernization and democratic administration of security institutions are: the integration of police efforts on preventive security

and criminal investigation; the institutional decentralization of the police force to the district and community levels; the cooperation of the police with communities and local governments for the social prevention of violence and crime; internal civilian control and external control of performance and legality; a non-militarized training system for the police that is rooted in democratic values; and a training regimen based on ranks and police specializations.

6.6 The deactivation of criminal networks to reduce violence

The purely repressive measures promoted during security crises are aimed at prosecuting petty crimes and the youngest offenders under the false belief that this will stop increases in crime. The reality indicates that a large percentage of common crimes are associated with major criminal networks and an illegal arms market that puts people's lives and integrity at risk.

Therefore, reducing the violence that has our society in a state of alarm will require redirecting criminal investigation and prevention resources towards the deactivation of these criminal networks and illegal markets. The Public Prosecutor's Office plays a fundamental role in this task, together with other government authorities. A judicial police force under the auspices of the Public Prosecutor's Office will bring transparency to the preparation of criminal investigations.

6.7 Non-violent police action in the public arena

Democratic management of security should guarantee control over police actions carried out during operations in public spaces, such as sporting events, recitals, social protests, and evictions. This requires establishing standards with regulatory status to cover action in public spaces so as to ensure that the use of force is proportional, rational, and secondary to other alternatives, and to eradicate police practices that violate these criteria.

6.8 The role of the judicial system

The judicial branch and the Public Ministry are both responsible for promoting democratic security policies, for quickly and effectively investigating crimes, and for controlling prison conditions. They are also in charge of the use of preventive detention and institutional violence.

6.9 The enforcement of sentences under the rule of law

There are approximately 60,000 people in prison in Argentina. The detention centers are characterized by inhumane conditions. Prisons, police stations and juvenile detention centers have high rates of overcrowding and a large majority of unsentenced detainees. They also lack social rehabilitation measures and are the sites of systematic violence and torture. A democratic security policy should ensure that prison sentences and preventive detention take place under decent conditions

that foster the rehabilitation of the convicted individuals, and that they do not contribute—as they do now—to the continuation and exacerbation of violence, injustice and crime they are trying to resolve.

6.10 The need for a new agreement to promote security in a democracy

To comply with the state's obligation to provide public security in the context of these democratic principles, it is essential to reach a broad political and social agreement that facilitates progress in the design and implementation of short-term, medium-term, and long-term policies to find immediate, lasting solutions to societal demands for security.

In sum, we believe that the ASD is an initiative that creates opportunities and spaces for dialogue that were nonexistent a few years ago. It aims to create a basic foundation on which to build concrete public policies on security that are efficient and consistent with human rights, democratic principles, and the rule of law.²⁶ The ASD helps to coordinate the work and perspectives of different political sectors, issue experts, and civil society organizations, while contributing an alternative discourse to the punitive demagoguery that dominates both in normative principles and policymaking.

Certainly the ASD faces a number of future challenges. One of them is related to the need to move from high-level agreement and discourse down to concrete security proposals and eventually to a structural reform of the security system.²⁷ Another challenge relates to the need to broaden the agreements that have been achieved, translate them to different levels in the country (provinces, local governments / municipalities, etc.) and make them known among different relevant state institutions. Likewise, based on this article's assessment, there is a need to continue strengthening and coordinating with the Ministry of Security to recognize and support promising actions, incentivize the development of a public policy strategy, and monitor and question aspects that are troubling for the human rights agenda.

In all of these areas, they must strengthen the substance and maintain a discourse that respects human rights, while also being proactive and concrete in terms of citizen security. Given the political complexities of this topic, it is essential for political and social actors to maintain a minimum, agreed-upon foundation that can make progress on concrete alternatives to the regressive, iron fist approaches that can otherwise lead to reversals of basic rights.

7 Notes on the new political period and priorities for democratic security

Argentina began 2012 with the renewed and strengthened efforts towards legitimacy at all levels of government, and with a medium-term horizon for free of elections. The experience of the Ministry of Security has shown that it is possible to intervene in centers of autonomous police power—even including

the PFA—without generating major reactions that threaten governability. The Federal Police had degraded so far that not only were they not stopped from engaging in illegal activities, but any demands for training, evaluation or professionalism had been abandoned. This is no small matter, given that it challenges the claims that local politics must bargain with police as a precondition to their ability to govern.

In this sense, analyzing and evaluating security policies from the perspective of the exercise of political rule requires a perspective that can connect regulatory dimensions (institutional designs, mechanisms, laws and regulations) with an institutional culture whereby political authorities influence the daily operations and practices of the police. The literature on police reform makes note of these different levels. Analytically, it is typically said that a reform process starts at the regulatory level because it is harder to change police practices; this is what is often referred to as the gap between standards and practice. However, this descending linearity from regulatory reforms to changes in practice does not necessarily hold true in the Argentine case.

The first year of the Ministry of National Security presents unknowns with regard to the arrangement of regulatory levels, institutional culture, and practices. It has carried out its strategy of recovering political control over security and the security forces within the context of existing legislation. A number of important ministerial resolutions have provided a new regulatory framework for issues that were considered to be critical. The analysis shows that the main commitment was made at the intermediate level, creating the conditions to change institutional culture. All of the decisions and measures showed the security forces and the public that the traditional self-governance of the federal forces was undergoing significant change. However, far-reaching reforms of the federal security system will necessitate a solution to the current coexistence of this style with the anachronistic rules that govern the security forces, ultimately leading to a regulatory arrangement that is consistent with democracy. This would entail a strategy to affirm authority over security matters, starting with culture and practices and then undertaking the necessary reform of the legal frameworks.

Likewise, in order to make progress in this area, it is important that the new context include commitments by legislators in different political coalitions to engage with the proposals of the ASD. However, the multi-party political consensus achieved within the ASD framework at the national level have not yet taken root within the parties, which are weaker or non-existent at the provincial and local levels. Thus, there is a need for actions that will strengthen the foundation of basic agreements on security in a democracy, particularly to prevent the manipulation and trivialization of the issue in the media by representatives of the same parties that forged agreements like the ASD at the national level. Nevertheless, the new context has made favorable conditions for reforming the laws that have governed the security forces since the dictatorship, and for approving regulations to create a new framework for institutional performance and practices of the federal security forces.

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1. For more information, see <www.asd.org.ar>. Last accessed on: 15 Jan. 2012.

2. Although various factors contributed to the creation of the Ministry, its formation was also one of the ASD's main recommendations.

3. In Argentina, the main exceptions to the delegative model were the cycles of reforms to the security system in the province of Buenos Aires (1998-2001 and 2004-2007), followed by the transfer of the National Aeronautic Police (PAN) from the military to the civilian sphere, which led to the creation of the Airport Security Police (PSA) in 2005. In both cases, the context of institutional reform, which involved rethinking the regulations and design structures for these security forces, was the driving force for the political government.

4. The analysis used in this article is based on a chapter on security published in May 2012 (CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 2012).

5. "Additional services" include hiring the police to provide security services for a given store and this constitutes a major source of self-generated income for the PFA.

6. These policies are consistent with a regional trend towards police accountability, professionalization, and recognition of police rights. For an example, see the discussion on the Police Ombudsman in Peru in the chapter "Medidas para Enfrentar la Corrupción en la Policía Nacional del Perú: Logros, Dificultades y Lecciones" (COSTA;

ROMERO, 2008).

7. In the capital, these deployments have been combined with community roundtables on security. The information that came out of these roundtables has influenced operational decisions, which indicates that territorial deployment is not only aimed at holding back the crime that occurs in more privileged parts of town, but also at strengthening security in the neighborhoods that are affected by the operations.

8. This conclusion comes from the community roundtables, request from residents of nearby neighborhoods to be included in the plan, comments made by officials who work at the territorial level, and the differential outcome achieved by the national government's political party in the municipalities impacted by Southern Belt—a fact that specialists have interpreted as relating directly to the territorial security operations.

9. There are several statistical studies at the regional and global level that evaluate and analyze the relationship between socioeconomic factors and criminality. But in general, these studies do not consider impacts and tensions related to human rights. See, for example, Mark Ungar (2011, p. 95-99).

10. These trends have been studied in great detail. See, for example, Hugo Frühling (2006, 2007, 2011).

11. "A warning light should go on regarding the simplistic readings of the experience of the Police

Pacification Units (UPP) in the shantytowns of Rio de Janeiro and the way in which this model is being promoted for export to other states in Brazil and also to Argentina. The involvement of the UPP—a security force created specifically for the Rio shantytowns in the context of the next world soccer championship and the Olympic Games—is complex and designed for situations of crime and violence that are of greater magnitude than those in Argentina, both in quantitative terms (deaths, casualties, weapons) and in qualitative terms. Human rights defenders in Rio have criticized the resulting social control that the peacekeeping police have had in the affected shantytowns. Nevertheless, this experience is permeating the local political discourse with little nuance.” (CENTRO DE ESTUDIOS LEGALES Y SOCIALES, 2012, p. 127-128).

12. The Report gathers previous declarations and jurisprudence from the Inter-American Human Rights System and proposes standards for states to follow in developing public policies related to security. One of the most important aspects is that it does not limit itself to highlighting states’ negative obligations, but also explores positive obligations around issues like attention to victims of violence and crime, prevention, judicial investigation (the right to procedural safeguards and judicial protection), the democratic governability of security, the professionalization and modernization of police forces, principles of action and protocols for the use of force, the development of internal and external controls, and the separation of national defense and internal security, among other things.

13. As Marcelo Saín (2001) explains, “The label ‘new threats’ was given to the collection of nontraditional risks and conflictive situations—in other words, things that do not arise from interstate conflicts over territory or borders or from competition over strategic domain, which are particularly subject to military solutions through the use of or threat of using the armed forces of the warring countries. These “new threats” have generated questions and issues that make up the so-called ‘new security agenda’, which emphasizes drug trafficking, guerrillas, terrorism, conflicts of an ethnic, racial, nationalist or religious nature, etc.—that is to say, problems that, under the Argentine institutional framework, would clearly fall under the domestic security arena”.

14. In Latin America, 2011 was characterized by important discussions on regional security; two hemispheric events stood out in particular. In June 2011, the General Assembly of the Organization of American States (OAS) celebrated its 41st session in El Salvador focused on the topic of “Citizen Security in the Americas”. And in November 2011 in Trinidad and Tobago, the OAS held the Third Meeting of Ministers Responsible for Public Security in the Americas (MISPA III), which addressed topics related to police management. Other spaces where regional security issues have

been discussed include the XIX Meeting of High Authorities on Human Rights and Foreign Ministries of MERCOSUR Member and Associated States (RAADDH), held in the city of Asunción, Paraguay from April 25 to 27, 2011, where a seminar was organized on Citizen Security and Human Rights. There, the MERCOSUR Institute of Public Policies and Human Rights (IPPDH) and UNHCHR suggested that the next RAADDH meeting should discuss issues related to citizen security and human rights that could be taken forward in a joint dialogue with the Ministries of the Interior and the Ministries of Justice of the different member states, in order to make progress on regional policies.

Meanwhile, there was also the XXI Ibero-American Summit of Heads of State and Governments, held in Asunción, Paraguay on October 28 and 29, 2011, which focused on “Transformation of the State and Development”. The Heads of State and Governments issued a special joint public statement on public and citizen security, highlighting, among other things, the importance of applying public policies on citizen security within each of their respective territories in order to advance a process of regional integration and security. They also emphasized that efforts to “build the capacity of states to prevent and address crime and violence should be accompanied by their institutions’ unconditional respect for human rights, in the context of national and international frameworks” (CUMBRE IBEROAMERICANA, 2011).

15. Every so often in local debates, a candidate tries to take up this position again and propose to solve crime problems by involving the Armed Forces in internal security matters. In their crudest form, these proposals involve putting the army on the streets, but they can also include militarized approaches to police work.

16. See also Marcelo Saín (2001), which recounts the existing political consensus for maintaining this separation and the attempts in the 1990s to get the armed forces to intervene in drug trafficking cases.

17. The IACHR Report makes special reference to this point in Articles 100-105. There, it says: “One of the Commission’s central concerns with respect to the actions that the member states have taken as part of their policy on citizen security is the following: the involvement of the armed forces in professional tasks that, given their nature, fall strictly within the purview of the police force. The Commission has repeatedly observed that the armed forces are not properly trained to deal with citizen security; hence the need for an efficient civilian police force, respectful of human rights and able to combat citizen insecurity, crime and violence on the domestic front” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 100, p. 42). “Within the region, it is sometimes suggested—or even carried out directly—that military troops take over internal security based on the argument that violence or criminal acts are on the rise. The Commission has also

addressed this point, stating that arguments of this type 'confuse the concepts of public security and national security, when there is no doubt that the level of ordinary crime, however high this may be, does not constitute a military threat to the sovereignty of the state'" (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 103, p. 43). And in its recommendations, the IACHR suggests: "In the domestic legal system, draw a clear distinction between national defense as the function of the armed forces, and citizen security as a function of the police. Make it very clear that because of the nature of the situations they must deal with, the instruction and specialized training they receive, and the region's unfortunate history of military intervention into internal security affairs, the police have sole responsible for the functions associated with prevention, deterrence and lawful suppression of violence, under the oversight of the legitimate authorities of a democratic government." (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, p. 106).

18. The draft legislation was sent to the House of Representatives by the executive branch in October 2011; it was included on the agenda for the special session, and therefore only underwent a brief parliamentary debate.

19. Law 26.734 was approved on December 22, 2011, enacted on December 27, 2011, and published in the official bulletin on December 28, 2011: Article 3: "When any of the crimes included in this Code is committed with the aim of terrorizing the population or forcing national public authorities, foreign governments, or agents of an international organization to take an action or to abstain from doing so, it will double the minimums and maximums of the scale" (ARGENTINA, 2011b).

20. This type of formulation violates the constitutional principle of legality, which requires that criminal classifications be as precise as possible in order to minimize the degree of discretion and arbitrariness with which the penal laws are applied.

21. See the FATF's 40 recommendations at <<http://www.fatf-gafi.org/dataoecd/38/53/34030987.pdf>>. Last accessed on: 15. Jan. 2012.

22. Decree PEN 1091/11 (ARGENTINA, 2011a), extended for one year by Decree 296/2011 on December 30, 2011 (ARGENTINA, 2011c).

23. According to decree PEN 1091/11 "the northeastern and northwestern borders of Argentina have mountainous characteristics that facilitate the incursion into national territory of criminal organizations dedicated to illegal drug trafficking, trafficking in persons, and the smuggling of goods" (ARGENTINA, 2011a, cons. 4). The operation was established with the goal of "increasing surveillance and control over land, river and air space that falls under national jurisdiction along the northeastern and northwestern borders of Argentina, and to apprehend illegal entrants and turn them over to the legal authorities" (ARGENTINA, 2011a).

24. Article 2, subparagraph 4 of Law 25.520 establishes the scope of intelligence produced by the Armed Forces: "Strategic Military Intelligence – the intelligence part refers to knowledge of the military capacities and weaknesses of countries that are of interest from a national defense perspective, and of the geographic environment of the operational strategic areas identified in military strategic planning." (ARGENTINA, 2001).

25. Joint resolution MD 1517 and MJSy DH 3806, from December 16, 2008.

26. Many of them also contain the standards and the spirit of the IACHR report mentioned earlier.

27. An example is the pressing need to modify the foundational and personnel laws of the federal security institutions, as well as the associated regulations, in order to establish and accompany the public security reform and modernization processes according to constitutional principles and human rights. In turn, this would imply putting effective political leadership over the police system, in order to drive deep changes in its organizational structures and traditional ways of operating See Center for Legal and Social Studies (2011, p. 84 and ss).

RESUMO

O artigo propõe um balanço da agenda de segurança pública na Argentina no contexto regional. Neste sentido, a análise do primeiro ano da gestão do Ministério de Segurança (criado em dezembro de 2010) e a reflexão sobre algumas experiências específicas dialogam com a definição de um panorama regional em matéria de segurança e direitos humanos, com aspectos contrastantes. Embora as mudanças atuais no âmbito da política de segurança na Argentina possuam suas próprias características e ajustes, elas são marcadas por e estão ligadas a algumas tendências regionais. Esta avaliação leva em consideração tanto os avanços positivos referentes ao exercício do controle político em questões de segurança, quanto o impacto da agenda internacional de “novas ameaças” à segurança. Algumas dessas medidas aprovadas alertam para a maneira pela qual tendências menos democráticas em matéria de segurança aceitas internacionalmente permeiam decisões políticas locais.

PALAVRAS-CHAVE

Segurança – Direitos humanos – Polícia – Controle civil – Novas ameaças – Antiterrorismo – Argentina

RESUMEN

El artículo propone un balance de la agenda de seguridad pública en Argentina en el contexto regional. En este sentido, el análisis del primer año de gestión del Ministerio de Seguridad (creado en diciembre de 2010) y de algunas experiencias específicas, entra en diálogo con la caracterización de un panorama regional en materia de seguridad y derechos humanos con claroscuros. Si bien los cambios actuales en materia de política de seguridad en Argentina tienen sus propias características y adaptaciones, se enmarcan y dialogan con algunas tendencias regionales. El balance da cuenta tanto de avances positivos hacia el ejercicio del gobierno político de la seguridad, como de la incidencia de la agenda internacional de “las nuevas amenazas”. Algunas de las medidas sancionadas constituyen señales de alerta acerca de cómo las corrientes menos democráticas de la seguridad aceptadas internacionalmente permean las decisiones políticas locales.

PALABRAS CLAVE

Seguridad – Derechos humanos – Policía – Gobierno civil – Nuevas amenazas – Antiterrorismo – Argentina



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ABSTRACT

The article takes into account the concept of foolishness, used by Barbara Tuchman, to raise a debate on the global drug policy that has been implemented since 1912. From this concept it is evaluated how this foolishness has negative effects on the efficiency of public policy on democracy and fundamental rights. At the end, some alternatives to break this policy are presented.

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KEYWORDS

Drugs – War on drugs – Democracy – Fundamental rights – Public policies



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DRUG POLICY AND *THE MARCH OF FOLLY*

Pedro Abramovay

The March of Folly is the title of the classic book by Barbara Tuchman, in which the author traces the true history of human folly “from Troy to Vietnam”. Tuchman tries to explain why “those with political decision-making power so frequently act in a manner contrary to that dictated by reason and their own interests” (TUCHMAN, 1996, p.4). This refers to situations where, in retrospect, the chosen solution seems to have no concrete relationship with the interests of those who select the policy. Drug policies developed globally since 1912 through the International Opium Convention signed at the Hague, including the 1961 United Nations Single Convention on Narcotic Drugs, the war on drugs declared by former U.S. President Richard Nixon in 1971, the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the increasing militarization of the conflict in many Latin American countries, seems to be a strong candidate for inclusion in an updated volume of Tuchman’s book.

This article seeks to show that the folly of current global policies on drugs has adverse effects in three areas: (i) the possibility of crafting an efficient public policy, (ii) the development of democracy and (iii) the guarantee of fundamental rights.

1 Folly and public policies

The literature on public policies has evolved dramatically, particularly in the second half of the 20th century. A major contribution that this literature has provided to public managers is the clear idea that “the process of solving a political problem consists of a series of steps” (FREY, 1999, p. 14). This process has been given the name “policy cycle.”

Notes to this text start on page 198.

There are several definitions of each of the various stages that make up this cycle. As Klaus Frey (1999, p. 13) explains, all of these definitions presuppose the existence of three basic phases: formulation, implementation and monitoring results.

Formulation includes the diagnosis of the problem, the objectives to be achieved and the choice of means to achieve those objectives.

Implementation refers to the phase where the actions outlined in the formulation are executed and must be accompanied by process indicators and assessment tools to determine whether the actions proposed are indeed being followed and whether the objectives are being achieved.

The monitoring of results, based on the implementation indicators, allows us to evaluate whether the goals were achieved and whether the implementation costs (direct costs and negative externalities) exceeded the policy's benefits, producing an inefficient policy.

These elements have two basic functions. First, we seek to formulate a method for the production of efficient public policies. Second, public policies are an important instrument in holding public managers accountable. How can one publicly debate the merits of a policy if one does not have a clear diagnosis of the problem and know the objectives to be achieved, the means of its implementation and the results?

In the case of global drug policy this cycle is completely corrupted by ideological views that, as discussed above, confound public debate on this issue. What is the purpose of current drug policy? The 1961 Convention highlighted that the goal of creating an international system to monitor internationally banned substances was the increase in the "health and welfare of all." If this is the policy objective, there should be a diagnosis showing what actually damages one's health and, from these findings, solutions should be formulated to reduce this damage. Finally, indicators should be designed to enable the global community to assess whether the policies are actually being implemented and, once implemented, are producing the desired effects.

Fifty years after the 1961 Convention, the outlook is quite another one. The report by the Commission on Global Drug Policy¹ states that:

In practice, the result attained was the opposite of the desired result: the global growth of the illicit drug market, largely controlled by organized crime on a transnational scale. Although there are no precise estimates on the overall consumption of drugs over the past 50 years, an analysis focused on the past 10 years shows a market for illicit drugs that is increasingly widespread and that continues to grow.

(GLOBAL COMMISSION ON DRUG POLICY, 2011, p. 4).

The report noted that between 1998 and 2008 there was a 34.5% increase in the consumption of opiates, 27% in cocaine and 8.5% in marijuana.

In the case of Brazil, statistics about consumption are scarce and do not allow for a proper assessment of the relevant policies. The absence of studies relating to a subject that arouses great interest in the national political debate is also an indicator of an unwillingness to formulate efficient public policies.

With respect to repressive drug policies, it is natural that the policy objective

is, in addition to improved public health, the reduction of violence related to the use and trafficking of drugs. Nevertheless, there are few studies on the relationship between drugs and violence.² In addition, the relevant indicators are not directly related to these objectives. The Global Commission's report explains that:

Today we continue evaluating the success in the war on drugs based on parameters [...] that deal with the judicial process such as the number of arrests, quantities seized or the severity of sentences. The indicators are able to prove the rigor with which a given policy is being implemented but are not able to measure the extent to which this policy is successful in meeting its goal.

(GLOBAL COMMISSION ON DRUG POLICY, 2011, p. 5).

What is noticeable is that the folly that hinders the debate, as discussed in the next section, is extended to the planning and execution of public policies, distorting the very notion of public policy. It is no longer a "sequence of steps" to achieve a certain goal but a political necessity to provide answers to address a widespread fear of the population. Answers that are beyond the logic of public policy use the logic of war.

It is important to note that this approach to the subject, outside the logic of public policy, has detrimental effects on the population. There are some sectors of the population that suffer from these effects far more severely than others. Any policy that uses criminal law as its main instrument, as stated by Zaffaroni, Batista, Slokar and Alagia (2003), will have a more severe effect on vulnerable populations.

In the case of drugs, this phenomenon can manifest itself in many different ways. Domestically in each country, the most vulnerable populations suffer far more severely the effects of incarceration. In the United States, this is clear. A recent survey in California, for instance, shows that the rate of incarceration among blacks for possession of marijuana is 300% higher than that among whites (MALES, 2011).

In Brazil there are no consistent data on this topic, but research conducted in São Paulo showed that 80.28% of those arrested for drug trafficking have only a first-grade education (JESUS, 2011, p. 68).

In the international sphere, the effects are also not felt equally across groups. Although consumption is highly concentrated in developed countries like the United States and European countries, the deaths produced by the war on drugs occur primarily in Latin America, and more recently, in West Africa. And these inequalities are increasingly documented. In 2011, a bipartisan group of U.S. senators produced a report that explicitly links the increase in violence in Mexico and Central America to drug use in the U.S. (UNITED STATES, 2011).

2 Folly and democracy

It would not be appropriate in this article to parse through different definitions of democracy, but freedom of expression, an open space for public debate and the possibility that an idea espoused by a minority can become a widely held idea are common to all definitions.

Folly, therefore, finds it difficult to co-exist with democracy. The development and implementation of current drug policies does serious damage to the workings of democracy. This is the case not only for the reasons that were described in the previous section—a lack of accountability in a public policy that is built on the logic of war and not in pursuit of the desired goals—but, as we shall see, this damage is also inflicted by suppressing the possibility of public debate on the issue.

As Moises Naim (2009) stated, “banning everything related to drugs has created a climate where it is also prohibited to think freely about alternatives to prohibition.”

Some examples corroborate this idea. Among them, the Bolivian case is quite impressive.

The 1961 United Nations Single Convention stated in Article 49.2, “the chewing of the coca leaf should be abolished within 25 years.” In 2009, the Bolivian state, which has an ex-user of coca leaf as president and a Constitution that protects the coca leaf as part of its cultural heritage, filed with the United Nations a request to revoke the article.

The proposal was an act of respect towards the Convention. A country that protects the coca leaf in its Constitution could not continue to be a signatory. To avoid acting like other countries such as Peru and Argentina, who admit the leaf is chewed in their countries and simply ignore the Convention, Bolivia decided to tackle the issue head-on and tried to use regular procedures to modify the agreement. It was proposed that if no country opposed the Convention’s modification within 18 months, the change would be accepted.

Eighteen countries, led by the United States, opposed Bolivia’s petition. Their opposition was manifested in a half-page document with nearly identical wording among the countries that opposed the initiative, without any consistent rationale.³

The Bolivian example shows the resistance of the international community in accepting any debate on a modification to the present legal framework of prohibition, even if it is a *fait accompli* and a cultural practice protected by other UN conventions, such as the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Another example of the difficulty in engaging in a public debate about drugs that does not meet the interests of prohibitionists was the resignation of the renowned scientist David Nutt. Professor Nutt, of King’s College in London, occupied the chair of the Advisory Council on Drug Abuse of the British government. Nutt published a study in *The Lancet*, one of the most prestigious medical journals in the world, claiming that LSD and marijuana were less dangerous than alcohol. The British government said that with the research Nutt had undermined efforts to communicate a clear message about the harm caused by drugs (TRAN, 2009). How can scientific data hinder the communication of a clear message? Only by the logic of Orwell’s Ministry of Truth from his famous work *1984* can one accept such reasoning.

The last example of a failure of public debate is the Brazilian case of the *Marijuana March*.⁴ In 2011, the Supreme Court (STF) recognized that it was

unconstitutional to ban the Marijuana March in Brazil. This was without a doubt a praiseworthy decision. However, one cannot forget that if the issue did reach the Brazilian Supreme Court, it was only because for several years, judges in São Paulo had banned the march. There could be no clearer example of how the subject of drugs suppresses democratic freedoms than the suspension of the right of public expression that has endured for so long in the state of Sao Paulo.

3 Folly and fundamental rights

The last section of this article seeks to show how unwise drug policy directly affects the guarantee of fundamental rights.

International examples are numerous. From countries that impose the death penalty for drug trafficking to countries that implement some of the drug policies mentioned above, one could make a huge list of complaints.

However, I will not go down that path. I will instead address an important aspect of drug policy in Brazil as an example of the violation of fundamental rights.

In Brazil, the implementation of the Drug Law is executed with complete disregard to constitutional requirements. The Brazilian Supreme Court in September 2010 held unconstitutional a provision of Brazilian law concerning drugs that prohibited the substitution of a penalty of imprisonment for a penalty restricting rights in cases where the judge applied a reduced sentence because the defendant was not part of a criminal organization or had no prior criminal record. In such cases the minimum penalty is one year and eight months. According to Brazilian criminal law, someone who has been sentenced to a term of up to four years in prison can instead be given by a lesser penalty restricting rights. The Brazilian Drug Law expressly nullifies this right. The Brazilian Supreme Court found this unacceptable and declared the Drug Law unconstitutional (BRAZIL, 2010).

Although the Brazilian Supreme Court recognized the unconstitutionality of the Drug Law, the judges at the trial and appellate level are still applying the law. In research carried out in São Paulo, it was shown that in 58% of cases the penalties for drug trafficking are less than four years (JESUS, 2011, p 82). Therefore, the defendant would be entitled to the substitution of an alternative sentence in lieu of imprisonment. However, in 95% of cases, the judges did not award an alternative, lesser sentence (JESUS, 2011, p. 85).

The provision of law that denies bail to those accused of drug trafficking has also been attacked on constitutional grounds. The right to the presumption of innocence is constitutionally enshrined in Brazil. But according to the same survey, 93% of defendants fighting drug trafficking charges were unable to secure a provisional release from detention (JESUS, 2011, p. 89).

Finally, data from the same survey reveals another practice that disregards the Constitution when it comes to drug policy. In 17.5% of cases resulting in imprisonment in São Paulo during the specified period, there was seizure of drugs by the police in people's homes obtained without a warrant (JESUS, 2011, p. 41). Such a practice expressly violates the Constitution and the drugs seized in

these circumstances should be considered illegal evidence, nullifying the process. However, once again, the Constitution's provisions are not respected.

These examples show us how the application of the Drug Law in Brazil also operates under the logic of war, trampling constitutional rights and guarantees.

The Brazilian case is an example of a problem that is present in several countries.

4 New possibilities

Despite this scenario, there are glimpses of new possibilities in the global debate. Since the three previous presidents of Brazil, Colombia and Mexico, Fernando Henrique Cardoso, Cesar Gaviria and Ernesto Zedillo, respectively, met at the Latin American Commission on Drugs and Democracy, denouncing the failure of the drug war and lobbying for more intelligent policies,^[5] Latin America has produced some very interesting discussions far removed from folly.

Colombian President Juan Manuel Santos said in an interview with the British newspaper *The Observer* that a new approach was needed to “take away the violent profit that comes with drug trafficking: [...] If that means legalising, and the world thinks that's the solution, I will welcome it. I'm not against it.”(DOWARD, 2011).

This comment was followed by the Joint Statement on Organized Crime and Drug Trafficking, signed by the presidents of Chile and the member-countries of the Mechanism of Tuxtla Dialogue and Consultation (including Mexico, Colombia and several countries in Central America and the Caribbean). In item 7 of the Declaration, the Heads of State:

Noted that it would be desirable to achieve a significant reduction in the demand for illegal drugs. However if this is not possible, as evidenced by recent experience, the authorities in consumer countries should then explore all possible alternatives to eliminate the exorbitant profits of criminals, including regulatory or market options. This would prevent the transfer of these substances from continuing to cause high levels of crime and violence in Latin American and Caribbean countries.

(MEXICO, 2011).

For the first time, a group of leaders has begun to recognize the failure of current policies. Barbara Tuchman insists upon not judging former leaders by contemporary ideas, as one can only consider an idea foolish if it was perceived that way at the time it was presented (TUCHMAN, 1996, p 5). The question is whether the Latin American presidents who are beginning to denounce the folly of drug policy will be the vanguard of a new approach or will serve only to endorse, in voicing their concerns during this time, the inclusion of drug policy in the updated volume of *The March of Folly*.

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NOTES

1. The Commission on Global Drug Policy, composed of influential international players, was created to spur a lively debate on the subject by calling attention to the failure of current policies.

2. The existing ones demonstrate, often, that the relationship is not driven by use, but by illicit traffic, as suggested by João Manoel Pinho de Mello in *Assessing the crack hypothesis using data from a crime wave: the case of São Paulo* (MELLO, 2010).

3. The texts objecting to the petition are available at: <<http://www.druglawreform.info/>

issues/unscheduling-the-coca-leaf/item/1184-objections-and-support-for-bolivias-coca-amendment>. Last accessed on: 18 Mar. 2012.

4. The Marijuana March, a public demonstration advocating the legalization of marijuana, was held in various cities around the world and was banned by decisions of trial and appellate courts in the State of São Paulo on the grounds that the event would be condoning drug use. However, in 2011, those decisions were reversed by the Brazilian Supreme Court.

5. Available at: <www.drogasydemocracia.org>. Last accessed on: 18 Mar. 2012.

RESUMO

O artigo parte do conceito de insensatez, usado por Barbara Tuchman, para fazer um debate sobre a política global de drogas que vem sendo implementada desde 1912. A partir deste conceito se avalia como essa insensatez produz efeitos negativos sobre a eficiência da política pública, sobre a democracia e sobre os direitos fundamentais. Ao final são apresentadas algumas alternativas para o rompimento dessa política.

PALAVRAS-CHAVE

Drogas – Guerra às drogas – Democracia – Direitos fundamentais – Políticas públicas

RESUMEN

El artículo parte del concepto de insensatez, utilizado por Barbara Tuchman, para realizar un debate sobre la política global de drogas que viene siendo implementada desde implementada desde 1912. A partir de este concepto es evaluado como esta insensatez produce efectos negativos sobre la eficiencia de la política pública, sobre la democracia y sobre los derechos fundamentales. Al final se presentan algunas alternativas para romper con esta política.

PALABRAS CLAVE

Drogas – Guerra a las drogas – Democracia – Derechos fundamentales – Políticas públicas



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INTERVIEW – VIEWS ON THE SPECIAL POLICE UNITS FOR NEIGHBORHOOD PACIFICATION (UPPs) IN RIO DE JANEIRO, BRAZIL

By Conectas Human Rights.
Interview conducted in March 2012.
Original in Portuguese. Translated by Thalia Cerqueira.

In 2008, the Department of Security of the state of Rio de Janeiro (RJ) set up its first Special Police Unit for Neighborhood Pacification (UPP) in the community Dona Marta in the city of Rio de Janeiro. To date (March 2012), about 20 units are in operation and by 2014 it is expected that up to 40 units will be active. These figures show the extent of this policy and, thus, the importance of studying and discussing UPPs by activists, government officials and experts from Brazil and from other countries in the Global South.

According to the Department of Security of the state of Rio de Janeiro, the UPPs represent a new model of public policy in the field of security. Their stated goal is “to regain territories previously dominated by criminal gangs and establish a democratic rule of law”* through community law enforcement, in conjunction with social and urban projects.

Considering the magnitude of social issues it seeks to address, this policy has received widespread media attention both nationally and internationally, as well as the heavy criticism of many experts. For example, after a visit to Brazil, Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, welcomed the UPP project, although he noted that there are increasing reports of abuses by police officers against residents of the communities assisted and pointed to a failure to provide the social services assigned to these units.**

With this discussion in mind, *Sur – International Journal on Human Rights*, released an issue on Citizen Security and Human Rights and interviewed two UPP experts to contribute to public debate on effective policies to ensure the right to security.

*State Government of Rio de Janeiro. More information is available at: <http://www.rj.gov.br/web/mapa/exibeconteudo?article-id=566038>. Last accessed on: 29 Mar. 2012.

**ACNUDH, *UN Special Rapporteur finds that killings by Brazilian police continue at alarming rates, Government has failed to take all necessary action*, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10089&LangID=E>. Last accessed on: 29 Mar. 2012.

INTERVIEW 1

Rafael Dias — Global Justice Researcher

How do you view the Special Police Units for Neighborhood Pacification policy (UPPs) in Rio de Janeiro? To what extent do the UPPs represent a progress or a setback in relation to other policies in place in Rio de Janeiro?

From a conceptual standpoint, the Special Police Units for Neighborhood Pacification (UPPs) cannot be regarded as public policy because we believe that the “public” aspect of policy depends on social participation in all stages of implementation (i.e. planning, performance and implementation). An effective public policy is delivered with the massive participation of society. This is not the case of the UPPs, which were designed and executed by the government without any participation from society, without any mechanisms for external control or any real dialogue with the communities where they were established. Moreover, there is no law or rule governing the UPPs and their operating model, operating limits, and institutional objectives. Therefore, we consider the UPPs to be, at best, a governmental policy, since they express a particular project of the state government of Rio de Janeiro. The UPPs are subject to government strategies and their specific interests, which cannot be confused with the interests of society as a whole or human rights in general. On the whole, the UPPs add value to the communities in which they are implemented by stopping, if momentarily, the conflicts between the police and armed groups. This produces an immediate relief in the daily life of residents who were in the crossfire. The criminalizing, random and violent character of police actions have not only resulted in serious human rights violations, but also demand the constant attention of those living in the slums, even though they face a permanent barrier built by the government and the media that prevents them from filing their complaints and making political demands to end this type of action.

Before the UPPs, the much touted “politics of confrontation” was responsible for the exponential growth of “resistance killings” — a way of covering up the summary executions carried out by the police. In 2007, the first year of Sérgio Cabral Filho’s administration, these executions reached 1,330 cases (an average of 3 events per day). By the end of 2008, criticism of this type of policy caused the state government to change its discourse and present UPPs as “new” in the realm of public security policy, setting up one unit in the community of Santa Marta. However, this law enforcement model cannot be considered something new. The development of GPAE (Policing Group for Special Areas) in the community of Cavalão in Niterói and Cantagalo/Pavão-Pavãozinho in Copacabana in the early 2000s operated much like a community policing group and demonstrate the existence of a public security project similar to the UPPs, although the project was subsequently weakened and dismantled. The difference between the two projects is the massive investment in assigning legitimacy to the UPPs, often uncritically. UPPs are elevated as a magical solution to public security issues, while overlooking some elements that remain unchanged in this security policy. Moreover, the principles of community policing are not applied in the UPPs,

who conduct routine patrols in the slums and impose their organizational culture coercively instead of mediating conflicts.

A breakthrough would be to address the issue of drug trafficking without resorting to the logic of war, which stimulates the production of a violent society.

Do the consequences of the UPPs include the militarization of the communities where they are set up?

The overt and permanent presence of the armed police implies the militarization of everyday life in these communities. While we cannot deny the power exercised by armed groups in the favelas, either by the drug trafficking activities or by the militia, the State is expected to refrain from following the same logic of armed occupation of urban spaces.

UPP commanders operate at their own discretion as a kind of “general administrator” of the community they are in charge of and instill the culture of barracks into the minds of those living around the UPPs. Moreover, the commander is the one who authorizes funk parties and other events in favelas with a UPP. Another indication of militarization is that the political mediation of the community, which could be coordinated by neighborhood associations or local groups and organizations, are conducted by the police force. The political mediation exercised by the military police undermines residents’ capacity to coordinate their own territory. The criminalization of residents remains unchanged, as there are an increasing number of arrests due to contempt toward military officers in areas controlled by the UPPs. Furthermore, the UPP design is conceptually tied to the military occupation of territories in order to allegedly regain state sovereignty through their “pacification.” In Complexo do Alemão and Penha, the army fulfilled this role before the UPP was fully deployed. The truth is that the state has always been present in the favelas, either with its armed wing, or by providing some essential services, albeit poorly.

To what extent do the UPPs contribute to ensuring citizens’ right to security?

The right to security should be understood broadly, as a result of a set of social policies in which public security is one but not the only way to ensure its effectiveness. We should not confuse public security with police intervention, because viewing public security merely as a police duty is a very simplistic way of addressing the issue. With the UPPs, the state can no longer escape its public duties and accountability to the society, since it has regained control over the territory allegedly relinquished to drug trafficking. What we see is that the situation of inequality and the poor quality of public services remains unchanged after the entry of UPPs. If we can no longer blame the drug dealers, the ineffective pursuit of public policies can only be ascribed to the State, even though police intervention was expected to guarantee the successful implementation of these policies for the whole population. What other explanation do we have for the fact that public services do not reach the community of Santa Marta, located in Botafogo, with the same quality and quantity as others living in the same neighborhood?

The way the UPPs are deployed and their territorial intervention seems to

imply that the favela is a place of crime, but we know that violent crime has much more complex dynamics, which cannot be directly associated to the favela itself. Therefore, government action reinforces this view by monitoring and controlling those who are seen as potentially dangerous ones instead of promoting the welfare of the residents.

Besides the security aspect, do the UPPs contribute to ensuring other rights of those living in the communities served?

The UPPs cannot be analyzed apart from the current model of “business management of the city” that has been put into place in Rio de Janeiro. The staging of major sports events (2014 World Cup and Olympic Games 2016) has sped up the authoritarian and militarized management of urban spaces. Most UPPs have been deployed in the southern region of Rio, close to hotels and to the games venues (like Tijuca to the north and Cidade de Deus to the west) — the only exception is the Batan, the only militia-controlled area that was “pacified,” where journalists from the newspaper *O Dia* were tortured in 2007. Other areas of the state were not assisted by this public investment. Law enforcement authorities conveniently forgot the area called “Baixada Fluminense,” which has the highest crime rates in Rio de Janeiro.

The business management of urban spaces is conducive to the “harmless displacement” of those living in areas controlled by UPPs, who have seen the cost of living increase considerably, although the state has failed to establish consistent public policies in these spaces. What we see is the prohibition and criminalization of cultural traits of the favelas expressed in funk parties. So far, the belief that the “pacification” promoted by the police would be the gateway to the development of welfare policies has not manifested. The blatant inequality among the favelas’ residents and those living elsewhere in the city remains unchanged. Also, it sounds a bit strange to attribute the fulfillment of human rights to police action.

Should the UPP model apply to other areas outside of Rio de Janeiro?

The UPP is a model that came from Medellín in Colombia. There, crime rates initially declined and are now rising again. Rio de Janeiro’s security and law enforcement managers traveled to Medellín many times and brought this security package back with them. If we acknowledge that the context in Medellín is different from the context in Rio and that models cannot be simply transplanted from one city to another, we should also acknowledge that the model implemented in Rio, inspired by the Colombian experience, does not necessarily serve as a paradigm for other Brazilian cities. The UPP experiment is very recent and should be evaluated and even criticized. The conservative consensus around the UPPs does not add any value to the debate on public security. Public security should be demilitarized. The military occupation of certain urban areas does not contribute to building a democratic society. Instead, it encourages government strategies to control of a stratum of the population (i.e. the poor). This political strategy seeks to maintain social inequalities through ongoing monitoring and spiteful surveillance of those living in the favelas and peripheral areas

INTERVIEW 2

José Marcelo Zacchi — Research Associate, Institute for Studies
on Labor and Society — IETS

How do you view the Pacifying Police Units policy (UPPs) in Rio de Janeiro? To what extent do the UPPs represent a progress or setback in relation to other policies in place in Rio de Janeiro?

From the perspective of which results the UPPs have produced, one can say that they have extended regular law enforcement services to historically excluded areas in order to recover the government's capacity to promote public actions in these areas. This has had immediate positive effects in ensuring basic civil rights — rights to come and go, freedom of association, demonstration, physical and moral integrity, and security.

From the perspective of Rio de Janeiro's history of public security in the favelas, these results represent the practical expression of some key changes in the views and habits of the city.

The first change has been to amend the primary task of the police in the favelas and poor areas to provide security to citizens, instead of protecting the city from the alleged threat posed by these communities. The second change lies in defining the protection of life, physical integrity and basic freedoms as a top priority rather than fighting drug trafficking at any expense. The third change has been the recognition that this mission is better accomplished through regular presence and preventive efficiency combined with society and other public services rather than through willful military incursions.

These far-reaching changes were brought about gradually by the actions of various sectors of society and previous governmental experiences over the past two decades of democracy in the city. Not long ago, these experiences would not have been supported as they are today. The UPPs represent the institutional and programmatic breakdown of the renewal of assumptions combined with good news: since 2008 when the first unit was deployed, Rio de Janeiro's chiefs of police have demonstrated the commitment and competence required to transform these assumptions into new institutional practices.

One should not ignore the limits of such a policy: the UPPs are neither the solution to the problems found in the territories where they are present, nor a solution to public security in Rio de Janeiro. Nor should we overlook the challenges that lie ahead. However, we cannot take for granted the innovative character and the impressive results the UPPs have achieved thus far.

Do the consequences of the UPPs include the militarization of the communities where they are set up?

I do not see this happening in the practical experience of communities. To a large extent, it seems to be the opposite. The peculiar phenomenon of urban violence in Rio de Janeiro emerged in the 1980s due to high levels of crime and insecurity

and the overt control of armed criminal groups and the daily recurrence of armed conflicts among these groups, their opponents and the police.

Over the years, the presence of “soldiers” from these groups created terror: they had rifles and other powerful weapons at the entrance and within these communities, they built bunkers and barriers to vehicles and people, they restricted the movement of residents to other areas of the city and the adopted “martial laws,” prohibiting people from wearing clothes with the colors of rival gangs or from carrying cameras, as well as organizing trials and executions. Besides this, the communities were repeatedly exposed to shootings and explicit combat situations.

Only the profound naturalization of this reality or the deep-seated distrust of police activity can make one classify the context described above as less militarized than one in which armed violence is close to zero, civil liberties are exercised, democratic law and due process are the guiding principles of relationships and any violations are subject to public criticism and sanctions by the law. If we believe in the democratic rule of law as a desirable framework for collective organization, we must acknowledge the notable advances made in this direction.

It is clear that a shift towards democratic rule requires far more than the initial step of setting up the UPPs. The permanent presence of police forces, to begin, must be quickly combined with new means of conflict resolution and social participation. Everyday policing efforts should be adequately limited in terms of, for example, the routine practices of enforcement and patrolling, carrying weapons, and the ratio of police officers to inhabitant — and it is of pivotal importance to prevent any of these correct measures from being publicly confused with policy weakening. The regulation by public authorities of dimensions of daily life it has so far neglected — from neighborhood disputes to urban organization rules, from the use of public spaces to the legal provision of urban services — must resort to well-balanced channels of dialogue and transition rules, engaging more public officials than just the police.

The positive fact is that this is all part of the agenda spelled out by state and local governments in Rio today and it has been reflected in actions and strategies following the pacification. Nevertheless, there is no doubt that much remains to be done at all these levels.

To what extent do the UPPs contribute to ensuring citizens’ right to security?

The first contribution of the UPP is to ensure liberties. This is, indeed, the central purpose of the UPPs. It means the freedom to move freely or to receive visits regardless of where in the city people come from. It means the freedom to organize associations and express oneself publicly without being intimidated by local “bosses.” It means to be able to experience public spaces without being exposed to armed conflicts. And all these prerogatives are advocated by a democratic sovereign state, which justifies the presence of the government and the police forces in other areas of the city and the country.

The change in the indicators of crime and violence in the communities served speaks for itself. Besides making firearm shootings infrequent episodes,

the 22 areas and 400,000 residents served by the program in 2008 experienced reductions of up to 80% in the rate of homicides and 30 to 70% in the rates of other violent crimes, while the levels of police lethality were close to zero. This trend has contributed to a decline in the city's overall crime rates during the same period, expressed in a 26% reduction in homicides and 60% reduction of deaths in clashes with the police.

Finally, these achievements gave rise to other agendas previously hidden by the prominence of armed conflicts. Issues such as domestic violence against women and reintegration programs for former members of criminal gangs or former convicts, the provision of health policies for drug addicts, the resolution of everyday conflicts, proper and daily regulation of police action, among others, are able to gain visibility and prominence in the local aspirations of the city. Most of these themes are increasingly present in public debate but not in actual policies, and we can draw an agenda for new steps forward to enhance security in these communities.

Besides the security aspect, do the UPPs contribute to ensuring other rights of those living in the communities served?

An interesting finding of the recent experience of Rio involves the interdependence between security and other social, economic and urban rights. In context of the establishment of armed boundaries within the city, such as the one in Rio, it is not just inequality and the restriction of opportunities that fuels conflicts, but also violence that undermines the possibility of other processes of social inclusion.

Urban policies designed to improve accessibility bump into armed patrols or physical barriers on roads and streets. Schools and health care centers find it difficult to attract professionals and operate within an area of risk and conflict. Companies avoid investing in these areas or hiring professionals who live there. Local associations are constrained or directly coopted, which makes the provision of basic services such as garbage collection and street lighting difficult or unfeasible.

The advent of security — or peace, if we want to call it that — thus implies breaking down these barriers. It brings with it both the opportunity and the challenge of fostering the so-called pacification intended to reintegrate underprivileged areas into the city.

Fortunately, the need for change is now clearly stated in Rio's governmental agenda. At the municipal level, the UPP Social program, whose creation and implementation I was pleased to participate in, coordinates the expansion of social and urban services into pacified areas and engages its residents in this process. Other state and federal programs play the same role at their respective levels. The private sector has also stepped into these areas and support for local entrepreneurship is gaining strength amidst a favorable economic setting.

There is clearly a long path ahead to pay off the burden of debt that mounted during the history of neglect. The extent of the progress achieved to date varies widely according to dimensions and territories, but security has played a starring role in efforts to trigger the movements of reintegration into the city.

Should the UPP model apply to other areas lying out of Rio de Janeiro?

Yes, if we view the UPPs as a benchmark for police work based on informed planning, minimized use of force and community-centered activities, and a commitment to ensuring rights and controlling misconduct. In this case, it was not exactly a “role-model UPP,” but a model of good police action anywhere in the world, which inspired the very design of the UPPs.

On the other hand, if we view the UPPs as an acronym for the process of restoring democratic sovereignty to urban areas dominated by gangs, then the model may make sense to other major cities exposed to similar phenomena. There are not many of these cities in the world: as it has been said here, the core issue in Rio is not the rate of crime and violence generally, but overstepping these boundaries and averting urban conflicts, which are very particular to Rio and not common in other places.

Rio is struggling to be a success case for plans of public security and social and urban inclusion, with a potentially exciting combination of these two initiatives. The only task we have now is to hope and work hard to make things happen.

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