

sur

international journal  
on human rights

15

v. 8 • n. 15 • dec. 2011  
Biannual  
English Edition

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**SUR - International Journal On Human Rights** is a biannual journal published in English, Portuguese and Spanish by Conectas Human Rights. It is available on the Internet at <<http://www.surjournal.org>>

SUR is covered by the following abstracting and indexing services: IBSS (International Bibliography of the Social Sciences); ISN Zurich (International Relations and Security Network); DOAJ (Directory of Open Access Journals); Scielo and SSRN (Social Science Research Network). In addition, SUR is also available at the following commercial databases: EBSCO and HEInonline. SUR has been rated A1 and B1, in Colombia and in Brazil (Qualis), respectively.

SUR. Revista Internacional de Direitos Humanos / Sur – Rede Universitária de Direitos Humanos – v.1, n.1, jan.2004 – São Paulo, 2004 - .

Semestral

ISSN 1806-6445

Edições em Inglês, Português e Espanhol.

1. Direitos Humanos 2. ONU I. Rede Universitária de Direitos Humanos

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## SPECIAL ISSUE

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# PRESENTATION



SUR issue number 15 is a very special one. For the first time, it encompasses three different sections. One comprises a thematic dossier on the national implementation of regional and international human rights systems. Additionally, this issue brings two non-thematic articles involving relevant contemporary human rights topics (business and human rights and women's rights in Islam), as well as an interview with Denise Dora, from the Ford Foundation (2000-2011).

Finally, celebrating the 10<sup>th</sup> anniversary of Conectas Human Rights, issue No. 15 is published with the same cover color as No. 1, and brings a dossier by Conectas's current and former staff members, who share their experience and lessons learned. This last section is presented in more detail in the letter to the readers, later in this issue.

## Thematic dossier: Implementation at the National Level of the Decisions of the Regional and International Human Rights Systems

Since the adoption of the Universal Declaration of Human Rights in 1948, the international and regional human rights systems have been fundamental in the definition and protection of human rights, and have contributed substantially to the improvement of the Rule of Law in various different regions. These mechanisms, in many cases, have been the final remedy available to victims when local institutions failed or were unwilling to protect their rights. Accordingly, in addition to a protection mechanism, they represent a source of hope in adverse local political contexts.

Many human rights defenders and experts, however, claim that decisions and recommendations issued by these mechanisms are not currently being implemented satisfactorily at the national level. The lack of implementation is a serious threat to the very mechanisms themselves, which lose credibility in the eyes of the victims and the States, and fail to provide remedies to those who need them. *Sur – International Human Rights Journal* issue number 15 brings a thematic dossier to tackle this problem, i.e. to promote a critical debate on the national imple-

mentation of decisions and recommendations derived from regional and international human rights systems. This section encompasses four articles, three on the Inter-American, and one on the European system.

The first article highlights the interplay between the European human rights system and Russia. *Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges*, by Maria Issaeva, Irina Sergeeva, and Maria Suchkova, examines the interaction between the Russian legal system and the Strasbourg Court, exposing the European human rights available mechanisms to enforce its decisions as well as criticizing the obstacles in Russia for the implementation of measures adopted by the European Court, particularly those of a general nature.

The dossier's second article, *The Damião Ximenes Lopes Case: Changes and Challenges Following First Ruling Against Brazil in the Inter-American Court of Human Rights*, written by Cássia Maria Rosato and Ludmila Cerqueira Correia, presents a general overview of the implementation of the recommendations expressed in the first ruling of the Inter-American Court against Brazil, in 2006, dealing with mental health institutions. The authors expose how, by developing international jurisprudence and strengthening the actions of Brazil's *Anti-Asylum Movement*, the Court had a positive impact on the country's public mental health policy and the rights of persons with mental disabilities, although further policy changes are still required.

Thirdly, SUR presents another article discussing implementation in the Inter-American system, this time exploring the Argentinean case. In *The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court*, Damián A. González-Salzburg reviews a series of legal cases involving Argentina before the Inter-American Human Rights system and analyzes the lack of compliance of the State regarding Inter-American Court decisions. Through his case-by-case analysis, the author shows how the Argentinean Supreme Court has been inconsistent

in its recognition of the binding nature of Inter-American Court decisions, despite international and national legal imperatives requiring the Supreme Court to fulfill its obligation to prosecute those responsible for human rights violations.

The final article of this dossier presents a theoretical discussion on how regional human rights systems can contribute to build a transnational public sphere. In *Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions*, Marcia Nina Bernardes argues that the Inter-American system contributes to Brazilian democracy by providing a transnational litigation forum for discussing issues often underrepresented in the domestic public sphere. The author also states that Inter-American system loses its credibility particularly in cases where national authorities and the legal community fails to take into account international human rights norms at the national level. In this case, implementing regional decisions and recommendations is a key element, not only to strengthen the system itself, but also to improve Brazilian democracy.

### **Non-Thematic Articles: Violence against Muslim Women and Corporations and Human Rights**

Apart from the thematic dossier, this issue brings two other articles that present a critical debate on pressing topics. The Journal's opening article, *Criminalising Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, was written by Ziba Mir-Hosseini and discusses how political Islam has rehabilitated *zina* laws and its impact on women's rights. This normative body exists in many Muslim countries and forbids sexual relations outside marriage, sanctioning it with cruel punishments that violate international human rights. It criminalizes consensual sexual activity and authorises violence against women, involving, inter alia, death by stoning. The author argues that this issue should and can be solved within Islamic tradition. She also presents a critical analysis on how activists can be effective in challenging those practices

by engaging their governments through "naming and shaming" strategies as well as a process of dialogue and debate.

Our second non-thematic article features a discussion on business and human rights. Leandro Martins Zanitelli's *Corporations and Human Rights: The Debate between Voluntarists and Obligationists and the Undermining Effect of Sanctions* discusses the contemporary debate on corporate behavior responsive to human rights. The author analyses two sets of competing arguments: the voluntarists and obligationists, the former pushing for voluntary commitments by States to promote corporate social responsibility, while the latter affirm the need of legal sanctions against corporations, as a necessary step to adapt their behavior to norms of social responsibility. The author defends a voluntarist approach, arguing that, despite the fact that the imposition of sanctions on companies can indeed lead to progress in the protection of human rights, it might pose an obstacle to the development of more genuine practices in social corporate responsibility.

### **Interview with Denise Dora**

We have included an *Interview with Denise Dora*, Human Rights Program Officer of the Ford Foundation in Brazil from 2000 to 2011. She analyzes the human rights organizations in Brazil, particularly focusing on the challenges faced by Brazilian society to build a strong civil society needed to guarantee human rights in the country and abroad, arguing that there still is room for capacity building in Southern organizations and for the reduction of global asymmetries.

This is the fourth issue released with the collaboration of the Carlos Chagas Foundation (FCC). We thank FCC for their support to the Sur Journal since 2010.

Finally, we would like to remind our readership that our next issue, edited in partnership with the *Latin American Regional Coalition on Citizen Security and Human Rights*, will discuss citizen security from a human rights perspective.

The editors.



#### ZIBA MIR-HOSSEINI

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#### ABSTRACT

This author offers a feminist and rights-based critique of *zina* laws in Muslim legal tradition, which define any sexual relations outside legal marriage as a crime.

In the early 20<sup>th</sup> century, *zina* laws, which were rarely applied in practice, also became legally obsolete in almost all Muslim countries and communities; but with the resurgence of Islam as a political and spiritual force later in the 20<sup>th</sup> century, in several states and communities *zina* laws were selectively revived, codified and grafted onto the criminal justice system, and applied through the machinery of the modern state.

The author reviews current campaigns to decriminalise consensual sex, and argues that *zina* laws must also be addressed from within the Islamic legal tradition.

Exploring the intersections between religion, culture and law that legitimate violence in the regulation of sexuality, the author proposes a framework that can bring Islamic and human rights principles together.

Original in English.

Received in June 2011. Accepted in October 2011.

#### KEYWORDS

Sexuality – Violence – Gender – Islam – Law – Human rights



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This paper is available in digital format at [www.surjournal.org](http://www.surjournal.org).

# CRIMINALISING SEXUALITY: ZINA LAWS AS VIOLENCE AGAINST WOMEN IN MUSLIM CONTEXTS\*

Ziba Mir-Hosseini

Islamic legal tradition treats any sexual contact outside a legal marriage as a crime. The main category of such crimes is *zina*, defined as any act of illicit sexual intercourse between a man and woman.<sup>1</sup> The punishment for *zina* is the same for men and women: 100 lashes for the unmarried and death by stoning for the married; however, instances of these punishments are rarely documented in history.

In the early 20<sup>th</sup> century, with the emergence of modern legal systems in the Muslim world, the provisions of classical Islamic law were increasingly confined to personal status issues.<sup>2</sup> *Zina* laws, which were rarely applied in practice, also became legally obsolete in almost all Muslim countries and communities. In the late 20<sup>th</sup> century, the resurgence of Islam as a political and spiritual force reversed the process. In several states and communities, once-obsolete penal laws were selectively revived, codified and grafted onto the criminal justice system, and, in varying forms and degrees, applied through the machinery of the modern state. Most controversial among these have been the revival of *zina* laws and the creation of new offences that criminalise consensual sexual activity and authorise violence against women. Activists have campaigned against these new laws on human rights grounds; campaigns in countries as diverse as Nigeria, Pakistan and Iran have revealed the injustice and violence brought by the 'Islamisation' of criminal justice systems. The issues addressed in these campaigns resonate in many other Muslim contexts where traditional and patriarchal interpretations of Islam's sacred texts are invoked to limit women's rights and freedoms.

There is extensive literature on these issues from a human rights perspective.<sup>3</sup> This chapter offers a feminist and rights-based critique of *zina* laws that engages

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\*This paper is a revised version of a chapter of the following book "Control and Sexuality: The Revival of *Zina* Laws in Muslim Contexts", organized by the author of this piece and Vanja Hamzic (WLUM Publications, 2010).

Islamic legal tradition from within. It aims to broaden the scope of the debate over appropriate concepts and strategies for the campaigns to decriminalise consensual sex. It is intended as a contribution to the emerging feminist scholarship on Islam, by showing how *zina* laws can also be challenged from within. Exploring the intersections between religion, culture and law that legitimate violence in the regulation of sexuality, this chapter aims to contribute to the development of a framework that can bring Islamic and human rights principles together. Such a framework can empower activists, at both theoretical and practical levels, to engage in an internal discourse within communities so as to bring about sustainable legal and cultural reform.

*Zina* laws are part of Islamic legal tradition, and must be situated within that tradition's classifications of human behaviour and, especially, sexual relations and gender roles, and the penalties that it prescribes for different categories of offences. Drawing on anthropological insights and feminist scholarship on Islam, this chapter shows how *zina* laws are also embedded in wider institutional structures of inequality that take their legitimacy from patriarchal interpretations of Islam's sacred texts. They are an element in a complex system of norms and laws regulating sexuality, and they are closely linked with two other sets of laws: those concerning marriage (*nikah*) and women's covering (*hijab*). This link is at the root of violence against women, and must be broken from within the tradition.

To do so, this chapter needs to address two blind spots in approaches to the issue. First, scholars who work within an Islamic framework are often gender-blind, being largely unaware of the importance of gender as a category of thought and analysis and often opposed to both feminism, which they understand as arguing for women's dominance over men, and human rights, which they see as alien to Islamic tradition. Secondly, many human rights and women's rights activists and campaigners are not well versed in religious categories of thought and religious-based arguments; they consider it futile and counter-productive to work within a religious framework. These blind spots must be eliminated; approaches from Islamic studies, feminist and human rights perspectives, far from being mutually opposed, can be mutually reinforcing, particularly in mounting an effective campaign against revived *zina* laws.

After outlining the approach and the premises on which the chapter is based, it traces the historical context of shifts in the politics of religion, law and gender that led to the recent revival of *zina* laws and punishments, and the clash between two systems of values and two conceptions of gender rights: those of international human rights law and the Islamic legal tradition. The chapter then examines *zina* laws in the context of classical Islamic legal tradition, exploring the links with the laws of marriage and dress code that regulate women's sexuality, and the theological assumptions and juristic theories that inform them. Finally, the chapter shows how *zina* laws and punishments can be challenged on legal and religious grounds, and how essential elements of Islamic legal tradition are in harmony with human rights law. The conclusion offers suggestions or guidelines for developing a framework that can bring Islamic and human rights principles together. Such a framework can empower activists, at both theoretical and practical levels, to engage in an internal discourse within communities to bring about sustained legal and cultural reforms.



## 1 Approach and Premises

The chapter starts from the premise that ‘human rights’ and ‘Islamic law’ are ‘essentially contested concepts’; that is, they mean different things to different people and in different contexts.<sup>4</sup> However, advocates of both claim universality, that is, they claim that their objective is to ensure justice and proper rights for all humanity.<sup>5</sup> The notion of ‘human rights’ is used in a relatively limited sense, as a framework that began in 1948 with the Universal Declaration of Human Rights, and has been developed by the United Nations in subsequent documents and instruments. As human rights approaches are relatively well-known, more attention is devoted here to Islamic legal traditions and discourses.

Secondly, in this chapter a discomfort with the term ‘Islamic law(s)’ must be noted. ‘Islamic laws’, like other laws, are the product of socio-cultural assumptions and juristic reasoning about the nature of relations between men and women. In other words, they are ‘man-made’ juristic constructs, shaped by the social, cultural and political conditions within which Islam’s sacred texts are understood and turned into law. From the perspective of this chapter, it is more analytically fruitful and productive to speak of ‘Islamic legal tradition.’

This tradition is approached from a critical feminist perspective and from within the tradition, by invoking one of its main distinctions, which underlies the emergence of the various schools in the tradition and the multiplicity of positions and opinions within them; that is, the distinction between *shari’a* and *fiqh*. *Shari’a* in Arabic literally means ‘the path or the road leading to the water’, but, in Muslim belief, it is God’s will as revealed to the Prophet Muhammad. As Fazlur Rahman notes, “in its religious usage, from the earliest period, it has meant ‘the highway of good life’, i.e. religious values, expressed functionally and in concrete terms, to direct man’s life.” (RAHMAN, 1966, p. 100)<sup>6</sup> *Fiqh*, jurisprudence, literally means ‘understanding,’ and denotes the process of human endeavour to discern and extract legal rulings from the sacred texts of Islam – the Qur’an and the Sunnah (the Prophet’s practice, as related in the *hadith*, or traditions).

Thus, the rulings derived from the sacred texts are matters of human interpretation. However, some specialists and politicians today — often with ideological intent — mistakenly equate *shari’a* with *fiqh*, and present *fiqh* rulings as ‘*shari’a* law,’ hence as divine and not open to challenge. Too often statements are heard that begin with “Islam says ...” or “According to *shari’a* law ...”; too rarely do those who speak in the name of Islam admit that theirs is no more than one opinion or interpretation among many. A distinction between *shari’a* and *fiqh* is crucial, from a critical feminist perspective, because it both engages with the past and enables action in the present; it enables the separation of the legal from the sacred, and to reclaim the diversity and pluralism that was part of Islamic legal tradition. It also has epistemological and political ramifications, and allows contestation and change of its rulings from within.<sup>7</sup>

Thirdly, this chapter rejects statements beginning ‘Islam says...’ or ‘Islam allows...’ or ‘Islam forbids...’ Islam does not speak, rather it is people who claim to speak in the name (with the authority) of Islam, selecting sacred texts (usually

out of context) that appear to justify their claims, and repressing other texts that oppose them. Moreover, those who talk of *shari'a*, or indeed religion and law in relation to Islam, often fail to make another distinction now common when talking of religion in other contexts, namely, between faith (and its values and principles) and organised religion (institutions, laws and practices). The result is the pervasive polemical and rhetorical trick of either glorifying a faith without acknowledging the abuses and injustices that are committed in its name, or condemning it by equating it with those abuses. Of course, faith and organised religion are linked, but they are not the same thing, as implied by conflating them in the labels 'Islamic' or 'religious.'

Fourthly, although this chapter may talk about religion, law and culture as distinct arenas of human behaviour, in practice it is hard to separate them. Social reality is far too complex. Religious beliefs and practices are not only shaped by the cultural contexts in which they originate, function and evolve, but they also influence cultural phenomena. Law, too, not only controls behaviour but is also shaped by religious as well as cultural practices; all these beliefs and practices are, in turn, subject to relations of power – rulers, governments, structures of inequality. The meanings of laws and religious practices also change with shifts in the power relations in which they are embedded, and in interaction with other cultures and value systems. In other words, it must be recognised that laws and religious practices are not fixed, unchanging and uniform, but rather they are the products of particular social and cultural circumstances, and of local and wider power relations.<sup>8</sup>

Finally, issues are created through social movements and political debates and struggles. The systematic and institutionalised regulation of female sexuality and behaviour by man-made and man-enforced laws is not confined to Muslim contexts, nor is it recent. It is ancient and found in most human societies, sanctioned by religious texts and cultural tradition, and often enforced by violence. What is new is that the human rights framework and contemporary ideas of gender equality enable the identification of the issue of *zina* laws as a violation of women's human rights.<sup>9</sup>

## 2 Why *Zina* Laws and Why Now?

Current *zina* laws reflect centuries-old, human-made interpretations of Islam's sacred texts, which can be criticised from within the framework of Islamic principles, in accordance with the changing realities of time and place and contemporary notions of justice. As in other religious and legal traditions, notions of justice among Muslims have not until recently included gender equality in its current sense. The idea of gender equality became inherent to conceptions of justice only in the 20<sup>th</sup> century, and has only recently presented Islamic legal tradition with a challenge that it has been trying to meet.<sup>10</sup> Thus, the revival of *zina* laws, and the emergence of a global campaign against them, must be understood in the context of the recent conflict between two systems of values, the one rooted in pre-modern cultural and religious practices that often sanction discrimination among individuals on the

basis of faith, status and gender, and the other shaped by contemporary ideals of human rights, equality and personal freedom.

This conflict of values is not confined to Muslim contexts, rather it is ubiquitous, and shades into the animated and ongoing debate between universalism and cultural relativism. But it acquired a sharper political edge in the Muslim world in the second half of the 20<sup>th</sup> century with the emergence of the question of Palestine, and the rise of Islamist movements that sought to merge religion and politics.<sup>11</sup> In the aftermath of the 11 September 2001 ('9/11') attacks, the politics of the so-called "war on terror" and the invasions of Afghanistan and Iraq – both partially justified as promoting democracy and women's rights – added a new layer of complexity to the situation. Rightly or wrongly, many Muslims perceived the war to be directed against them. This has not only increased their sense of insecurity and the appeal of traditional values, but it has also, in their eyes, eroded the moral high ground of human rights law and delegitimised the voices of dissent and reform from within.

In many ways, 1979 proved to be a turning point in the politics of religion, culture and gender, both globally and locally. It was the year when the United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which gave gender equality a clear international legal mandate. But it was also the year when political Islam had its biggest triumph in the popular revolution that brought clerics to power in Iran, and when the military government in Pakistan extended the ambit of *fiqh* to criminal law, with the introduction of the Hudood Ordinances.

The decades that followed saw the concomitant expansion, globally and locally, of two equally powerful but opposed frames of reference. On the one hand, the human rights framework and instruments such as CEDAW gave women's rights activists what they needed most: a point of reference, a language and the tools to resist and challenge patriarchy. The 1980s saw the expansion of the international women's movement and of women's NGOs all over the world. By the early 1990s, a transnational movement further coalesced around the idea that violence against women was a violation of their human rights, and succeeded in inserting it in the agenda of the international human rights community. In their campaigns, they made visible various forms of gender-based discrimination and violation rooted in cultural traditions and religious practices, and protection from violence became a core demand of women's human rights activists. In 1994, the UN Commission on Human Rights condemned gender-based violence and appointed a special rapporteur on violence against women, its causes and consequences, as requested in the Vienna Declaration at the 1993 UN Conference on Human Rights.<sup>12</sup>

In Muslim contexts, on the other hand, Islamist forces — whether in power or in opposition — started to invoke Islam and *shari'a* as a legitimising device. They presented the 'Islamisation' of law and society as the first step to bring about their vision of a moral and just society, as a remedy for the problems of rising criminality, corruption and 'immorality' that they understood to be the consequence of the mixing of sexes. This spoke to the masses, and played on the

popular belief among Muslims that Islam is the essence of justice, thus no law that is 'Islamic' could be unjust.

Tapping into popular demands for social justice, the Islamist rallying cry of 'return to *shari'a*' led to regressive gender policies, with devastating consequences for women: compulsory dress codes, gender segregation, and the revival of outdated patriarchal and tribal models of social relations. The 'Islamisation' of law and society centred on the criminal justice system, an area of public law that had lost ground to codified law, influenced by European models, both under colonial rule and with the modernisation of legal systems.<sup>13</sup> At the same time, the Islamists criminalised — and thus politicised — areas of sexual and moral behaviour that had previously not been the concern of the state, and thus facilitated the enforcement of their authoritarian and patriarchal interpretations of the law.

*Fiqh*-based penal laws had already been revived in codified form in Libya in 1972.<sup>14</sup> After 1979, the same happened in Pakistan (Enforcement of Hudood Ordinances, 1979), Iran (1979), Sudan (Penal Code, 1983, and Criminal Act, 1991), and Yemen (Penal Code, 1994). The same has occurred at a provincial level in Kalantan state in Malaysia (Syariah Criminal Code Act, 1993), several states in Nigeria (1999–2000), and Aceh Territory in Indonesia (2009). In other cases, such as Afghanistan under the Taliban (mid-1990s to 2001), in Algeria since the rise of the Islamic Salvation Front (FIS), and in Somalia for many years, there are reports of the arbitrary application of Islamic penal laws.<sup>15</sup> Actual instances of stoning as a result of judicial sentences remain rare; currently, they only occur in Iran. But wherever classical penal laws have been revived, and in whatever form, nearly all those sentenced under *zina* laws to lashing, imprisonment or death by stoning have been women. In many instances, women have been brought to court on the basis of false accusations by family members or neighbours, or have been punished by non-state actors and communities.<sup>16</sup>

To understand why women have been the main target of the revival of *zina* laws, two prime questions need to be asked: What is the place of *zina*, both as a concept and as a set of legal rulings, in the Islamic legal tradition? How can it be argued – within that tradition – for the decriminalisation of consensual sexual relations? To explore these questions, the links need to be examined, in *fiqh* (Islamic jurisprudence), between three sets of rulings that regulate sexuality, i.e. those concerning *zina*, marriage and *hijab*. And what are the juristic constructs and legal theories on which they are based?

### 3 *Zina* as defined in Classical *Fiqh* Texts

Classical *fiqh* divides crimes into three categories according to the penalties they incur: *hudud*, *qisas*, and *ta'zir*.<sup>17</sup> *Hudud* (singular *hadd*: limit, restriction, prohibition) are crimes with mandatory and fixed punishments derived from textual sources (Qur'an or Sunnah). *Hudud* crimes comprise five offences. Two are offences against sexual morality: illicit sex (*zina*) and unfounded allegation of *zina* (*qadhaf*). The others are offences against private property and public order: theft (*sariqa*), highway robbery (*qat' al-tariqhiraba*), and drinking wine (*shurb al-khamr*);

some schools also include rebellion (*baghi*); and some include apostasy (*ridda*). The jurists defined these offences as violations of God's limits (*hudud al-Allah*), i.e. violation of public interest. *Hudud* assume the central place in the call for 'return to *shari'a*' by Islamists, who consider them crimes against religion, though not every such crime or punishment has a textual basis.<sup>18</sup> They are the main focus of international criticism, since they entail forms of punishment, such as lashing and cutting off limbs, which were common in the past but have been abandoned by modern justice systems that consider them cruel and inhumane — and are defined in international human rights law as torture.

The second category, *qisas* (retribution), covers offences against another person, such as bodily harm and homicide. The penalty is defined and implemented by the state, but unlike *hudud*, *qisas* offences are a matter for private claims, in the sense that the penalty is applied only if the individual victim – or, in case of homicide, his or her heir – asks for full *qisas*. Alternatively, the victim or heir may forgive the offender, or ask for the lesser penalty of *diya* (compensation, blood money), or waive any claim. In the case of homicide, whether intentional or not, blood money or compensation given for a female victim is half of that of a male. By making homicide a private matter, the revival of *qisas* laws allows so-called 'honour' crimes, whereby families can kill female members for presumed 'sexual transgressions' and the killer can escape with at most a few years imprisonment (WELCHMAN, 2007).

The third category, *ta'zir* (discipline), covers all offences not covered by the first two. Punishments for these crimes are not established by textual sources, and are not fixed but left to the discretion of the judge. As a general rule, *ta'zir* penalties are less than *hadd* punishments. Under the category of *ta'zir*, Islamic states have introduced new punishments with no precedence in classical *fiqh*, in order to impose their notions of 'Islamic' morality and to limit women's freedom, for example by a dress-code. As it sanctions and legitimates the state's power to enforce laws, this is also the area of criminal justice most open to abuse by Islamists.

There are differences between legal schools and among the jurists as to the definition, elements, evidentiary requirements, legal defences, exonerating conditions and penalties applicable to each of these three categories of crime, and to each crime within each category. The boundaries between the sacred and the legal are particularly hazy with respect to *hudud* crimes, which are viewed as having a religious dimension because of their textual basis. This is certainly the case with respect to *zina*, which is treated at times as a sin to be punished in the hereafter, rather than as a crime. There is room for repentance and God's forgiveness. The objective is not punishment but rather self-reformation and the shunning of evil ways (KAMALI, 1998, 2000; RAHMAN, 1965).

Yet there is a consensus in *fiqh* on the definition of *zina*, and the rulings are clear. *Zina* is defined as sexual intercourse between a man and women outside a valid marriage (*nikah*), the semblance (*shubha*) of marriage, or lawful ownership of a slave woman (*milk yamin*). *Zina* can be established by confession or by the testimony of four eyewitnesses, who must have witnessed the actual act of penetration, and must concur in their accounts. The punishment is the same for men and women, but

offenders are divided into two classes: *muhsin*, defined as free men and women, of full age and understanding, who have been in a position to enjoy lawful wedlock; and non-*muhsin*, who do not fulfil these conditions. The penalty for the first class is death by stoning, and for the second, 100 lashes. The lashes have a Qur'anic basis, as will be shown; but stoning does not, being based only on the Sunnah.<sup>19</sup>

The juristic consensus ends here. There are significant differences among the legal schools and among jurists within each school as to the conditions required for a valid confession and for testimonial evidence. These differences, based on arguments supported by reference to sacred texts, have practical and important legal consequences. For instance, while jurists in Hanafi, Hanbali and Shi'a schools require the confession to be uttered four separate times, Maliki and Shafi'i jurists consider one confession sufficient to establish the offence. The majority view among Maliki jurists is unique in allowing an unmarried woman's pregnancy to be used as evidence for *zina*, unless there is evidence of rape or compulsion; in other schools, pregnancy does not automatically constitute proof and *zina* must be established by confession or the testimony of eye-witnesses. Yet again, it is important to stress that, for Maliki jurists, the duration of pregnancy can be as long as seven years, which clearly suggests their humanitarian concern to protect women against the charge of *zina*, and children against the stigma of illegitimacy. That is to say, like their counterparts in other schools, Maliki jurists did their best to make conviction for *zina* impossible.<sup>20</sup>

A closer examination of classical jurists' rulings on *zina* confirms that they did their utmost to prevent conviction, and provided women with protection against accusations by their husbands and the community. In this, they relied on Qur'anic verses and the Prophet's example in condemning the violation of privacy and honour of individuals, in particular those of women, and leaving the door open for repentance. These verses define requirements for valid evidence of *zina* in such a stringent way that, in practice, establishment and conviction of an offence are almost impossible. An uncorroborated accusation (*qadhif*) is itself defined as a *hadd* crime, punishable by 80 lashes (Quran 24. 23).<sup>21</sup> If the wife is pregnant and her husband suspects her of *zina*, but has no proof, all he can do, in order to avoid the *hadd* offence of *qadhif*, is to deny paternity and divorce her by the procedure of *li'an*, mutual cursing by swearing oaths; if the wife swears an oath of denial, she is exonerated from the charge of *zina* (Quran 24. 6-7). Further, a confession of *zina* can be retracted at any time; and the doctrine of *shubha* (doubt, ambiguity)<sup>22</sup> prevents conviction for *zina* in cases where one party presumes the sexual intercourse to be licit, for example when a man sleeps with woman he believes to be his wife or a slave, or when a woman has sex with a man she presumes to be her husband.

Scholars suggest that the Qur'anic penalty – 100 lashes for men and women – was intended to reinforce a single form of marriage and to forbid other forms of union and promiscuity. This is evident in the verse that follows: "Let no man guilty of Adultery or fornication marry any but a woman similarly guilty, or an Unbeliever: Nor let any but such a woman or an unbeliever marry such a man. To the Believers such a thing is forbidden" (Quran 24. 3). Likewise, the penalty for slaves (both male and female) is half of that of a free person, which means that in no way did the Qur'an envisage death as a penalty for *zina*.



In pre-Islamic Arabia several forms of sexual union existed, including temporary ones: female slaves were prostituted by their masters; women as well as men could have multiple partners; and adultery was not considered a sin, but an injury to the property rights of a fellow tribesman – the male partner paid a fine, while the female was punished by being detained in her house for the rest of her life (GIBB; KRAMERS, 1961, p. 658). The Qur'an clearly disapproves of the prevalent sexual and moral codes among the Arabs, and introduces measures to reform them: it forbids the prostitution of female slaves (Quran 24. 33); speaks of sex outside marriage as a sin to be punished in the Hereafter (Quran 17. 32; Quran 25. 68-71); and modifies existing practices to promote chastity and a standardised form of marriage. Eight verses (Quran 24. 2-9) deal with the law-like issue of illicit sexual relations and form the basis of *fiqh* rulings on *zina*. These verses introduce new sanctions to safeguard a new form of marriage, subject men and women to the same punishment for extra-marital relations, and protect women in the face of accusations against their chastity.

Two verses prescribe punishment for illicit sexual relations. The first reads as follows: "If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way" (Quran 4. 15). The verse does not use the term *zina*; instead, *fahisha* (lewdness) is used, which most commentators understood as implying adultery and fornication. However, Yusuf Ali, one of the notable translators of the Qur'an, in a note states that *fahisha* "refers to unnatural crime between women, analogous to unnatural crime between men," (YUSUF ALI, 1997, p. 189),<sup>23</sup> the subject of the next verse, which states: "no punishment is specified for the man, as would be the case when a man was involved in the crime" (Quran 4. 16). It has also been argued that *fahisha* in Quran Surah an-Nisa, (Quran 4. 15) denotes a sexual act in public and prostitution, not private consensual sex, whether it is heterosexual or not. The verse endorses the existing punishment for *fahisha* — of which only women, it appears, could be accused. They should be confined to the home for the rest of their lives, or humiliated by having to appear in public covered in animal dung. The verse, however, while not abolishing this penalty, contains it by requiring the evidence of four witnesses and, perhaps more importantly, promises women a way out. In any case, jurists agree that the punishment was superseded by Quran, Surah an-Nur (Quran 24. 2), which reads: "The woman and the man guilty of adultery or fornication (*al-zaniyahwa al-zani*) – flog each of them with a hundred stripes."

It seems clear that not only the Qur'anic verses but also the jurists, with their intricate rules for proof of *zina*, aimed to reform existing practices in the direction of justice, as understood at the time. But both the spirit of the verses and the rules of the jurists lose their force for justice when classical *fiqh* rulings are codified and grafted onto a unified legal system, and implemented by the coercive machinery of a modern nation state.<sup>24</sup> Hence, it is not enough to take the classical *zina* rulings at face value, as some do. Defenders of current *zina* laws often hide behind the reassurance that they are impossible to enforce in practice; they ignore how they are actually used, and that it is women and the poor who are most often the victims.

#### 4 Marriage (*Nikah*) and Covering (*Hijab*)

What defines *zina* is the absence of a legal marriage (*nikah*); thus, *zina* rulings intersect with and in practice are maintained by other rulings that the classical jurists devised for the regulation of sexuality, namely those concerning marriage and women's covering. These patriarchal rulings sustained the power and sanction of *zina* provisions, and continue to do so today, even if they have been eliminated from modern legal codes. In all Muslim countries – apart from Turkey – the source of family law is classical *fiqh*, which grants men the right to polygamy and unilateral divorce. Thus a closer examination of marriage and *hijab* as defined in classical *fiqh* texts is in order.

Classical jurists defined marriage (*‘aqd al-nikah*, ‘contract of coitus’) as a contract with fixed terms and uniform legal effects. It renders sexual relations between a man and a woman licit; any sexual relation outside this contract is by definition *zina*. The contract is patterned after the contract of sale, and has three essential elements: the offer (*ijab*) by the woman or her guardian (*wali*); the acceptance (*qabul*) by the man; and the payment of dower (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation.<sup>25</sup>

The contract automatically places a wife under her husband's *qiwama*, which is a mixture of dominion and protection. It also defines a default set of fixed rights and obligations for each party, some supported by legal force, others with moral sanction. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in the two concepts *tamkin* (obedience; also *ta‘a*) and *nafaqa* (maintenance). *Tamkin*, defined as sexual submission, is a man's right and thus a woman's duty; whereas *nafaqa*, defined as shelter, food and clothing, is a woman's right and thus a man's duty. In some schools, a woman becomes entitled to *nafaqa* only after consummation of the marriage, in others this comes with the contract itself; but in all schools she loses her claim if she is in a state of *nushuz* (disobedience), which the classical jurists defined only in sexual terms. In other words, all schools share the same logic that links a woman's right to maintenance and protection to her obedience and sexual submission to her husband. Among the default rights of the husband is his power to control his wife's movements and her ‘excess piety.’ She needs his permission to leave the house, to take up employment, or to engage in fasting or forms of worship other than what is obligatory (for example the fast of Ramadan). Such acts may infringe on the husband's right of ‘unhampered sexual access.’ There is no matrimonial regime; the husband is the sole owner of the matrimonial resources, and the wife remains the possessor of her dower and whatever she brings to or earns during the marriage.

In discussing the legal structure and effects of the marriage contract, classical jurists had no qualms in using the analogy of sale. They allude to parallels between the status of wives and female slaves, to whose sexual services husbands/owners were entitled, and who were deprived of freedom of movement. This is not to suggest that classical jurists conceptualised marriage as either a sale or as slavery.<sup>26</sup>



Certainly, there were significant differences and disagreements about this among the schools, and debates within each, with legal and practical implications.<sup>27</sup> They were keen to distinguish between the right of access to the woman's sexual and reproductive faculties (which her husband acquires) and the right over her person (which he does not). Rather, the intention here is to stress is that the notion and legal logic of 'ownership' and sale underlie their conception of marriage and define the parameters of laws and practices, where a woman's sexuality, if not her person, becomes a commodity and an object of exchange.

The logic of women's sexuality as property, and its sale on marriage, which informs the classical *fiqh* texts, is at the root of the unequal construction of marriage and divorce, and sanctions the control over a woman's movements. It is also this logic that justifies polygamy and defines the rules for the termination of marriage. A man can enter up to four marriages at a time,<sup>28</sup> and can terminate each contract at will. Legally speaking, *talaq*, repudiation of the wife, is a unilateral act (*iqā'*), which acquires legal effect by the declaration of the husband. A woman cannot be released without her husband's consent, although she can secure her release through offering him inducements, by means of *khul'*, which is often referred to as 'divorce by mutual consent.' As defined by classical jurists, *khul'* is a separation claimed by the wife as a result of her extreme 'reluctance' (*karahiya*) towards her husband. The essential element is the payment of compensation (*'iwad*) to the husband in return for her release. This can be the return of the dower, or any other form of compensation. Unlike *talaq*, *khul'* is not a unilateral but a bilateral act, as it cannot take legal effect without the consent of the husband. If she fails to secure his consent, then her only recourse is the intervention of the court and the judge's power either to compel the husband to pronounce *talaq* or to pronounce it on his behalf if the wife establishes one of the recognised grounds — which again vary from school to school.<sup>29</sup>

Another set of rulings that are invoked, today, to sanction control over women and to limit their freedom of movement are those on *hijab*.<sup>30</sup> They are used to prescribe and justify the punishment of women for non-observance of the dress code, using *ta'zīr*, the discretionary power of the judge or Islamic state. But this has no basis in Islamic legal tradition. Unlike rulings on marriage and *zina*, classical *fiqh* texts contain little on women's dress-code. The prominence of *hijab* in Islamic discourses is a recent phenomenon, dating to the Muslim encounter with colonial powers in the 19<sup>th</sup> century, when there emerged a new genre of Islamic literature in which the veil becomes both a marker of Muslim identity and an element of faith.

Classical texts — at least those that set out legal rulings — address the issue of dress for both men and women under 'covering' (*satr*). These rulings are found in the Book of Prayer, among the rules for covering the body during prayers, and in the Book of Marriage, among the rules that govern a man's 'gaze' at a woman prior to marriage.<sup>31</sup>

The rules are minimal, but clear-cut: during prayer, both men and women must cover their '*awra*, their pudenda; for men, this is the area between knees and navel, but for women it means all the body apart from hands, feet and face. A man may not look at the uncovered body of an unrelated woman. The ban can be relaxed

when a man wants to contract a marriage; then, in order to inspect a prospective bride, he may be allowed the same privileges as one of her male close relatives.

There are also related rules in classical *fiqh* for segregation (banning any kind of interaction between unrelated men and women) and seclusion (restricting women's access to public space). They are based on two juristic constructs: the first defines all of a woman's body as '*awra*, pudenda, a zone of shame, which must be covered both during prayers (before God) and in public (before men); the second defines women's presence in public as a source of *fitna*, chaos, a threat to the social order.<sup>32</sup>

## 5 A Critique from Within

In their rulings on *zina*, classical jurists sought to safeguard sexual order, personal honour and blood relations, and to ensure legitimate paternity. But these rulings were designed and perceived to protect the sanctity of marriage and to be a deterrent, not to be codified and enforced by the machinery of a modern state. As shown, these rules are, in theory, gender-neutral. They specify the same punishments for men and women, and contain measures to protect women against false accusations, with such strict requirements of evidence that it is almost impossible to prove a case.

The power and sanction of *zina* rulings, it must be stressed, lie not in their implementation, but in how they define the limits of permissible sexual conduct. Their power is exerted and sustained through the other rulings just outlined, those regulating marriage and women's covering. To understand how all these rulings work, it is necessary to examine how classical jurists thought of gender and female sexuality, and identify the underlying legal theories and juristic assumptions. As is evident from the rulings on marriage and *hijab* discussed above, *zina* laws rest on two juristic constructs: woman's sexuality as property acquired by her husband through the marriage contract, and woman's body as a shameful object ('*awra*) that must be covered at all times. Such constructs, in turn, hinge on a patriarchal reading of Islam's sacred texts and an underlying theory of sexuality that sanctions control over female behaviour. All *fiqh* schools share this patriarchal ethos and conception of sexuality and gender; if they differ, it is in the manner and degree to which they translate them into legal rulings.

Islamists and traditional Muslim scholars claim that the classical *fiqh* rulings are immutable and divinely ordained. It is not the intention here to enter a discussion on the theological validity of such a claim, or whether such a patriarchal reading of the Qur'an is justified. The legal logic of classical *fiqh* rulings must, of course, be understood in their own context. They must not be approached anachronistically. Judgement should be suspended when dealing with past tradition. But this does not mean that this tradition has to be accepted blindly or that it can't be dealt with critically. In this time and context it also needs to be asked: How far does such a conception of sexuality and gender rights reflect the principle of justice that is inherent in the very notion of *shari'a* as a path to follow? Why and how did classical jurists define these rulings so that women are under men's authority, and women's sexuality is men's property? What are the ethical and rational foundations for such

notions of gender rights and sexuality? These questions become even more crucial if it is accepted – as it is here – that the classical jurists sincerely believed both that their findings were derived from the sacred sources of Islam and that they reflected the justice that is an indisputable part of the *shari'a*, as they understood it.

There are two sets of related answers. The first set is ideological and political, and has to do with the strong patriarchal ethos that informed the classical jurists' readings of the sacred texts and their exclusion of women from the production of religious knowledge. The further one moves from the era of the Prophet, the more it is found that women are marginalised and lose their political clout: their voice in the production of religious knowledge is silenced; their presence in public space is curtailed; their critical faculties are so far denigrated as to make their concerns irrelevant to law-making processes.<sup>33</sup> Women had been among the main transmitters of the *hadith* traditions, but by the time the *fiqh* schools were consolidated, over a century after the Prophet's death, they had reduced women to sexual beings and placed them under men's authority.<sup>34</sup> This was justified by a certain reading of Islam's sacred texts, and achieved through a set of legal constructs: *zina* as a *hadd* crime, with mandatory and fixed punishments; marriage as a contract by which a man acquires control over a woman's sexuality; and women's bodies as '*awra*, shameful.

The second set of answers is more theoretical, and concerns the ways in which patriarchal social norms, existing marriage practices and gender ideologies were sanctified, and then turned into fixed entities in *fiqh*. In brief, the genesis of gender inequality in Islamic legal tradition lies in an inner contradiction between the ideals of the *shar'ia* and the patriarchal structures in which these ideals unfolded and were translated into legal norms. Islam's call for freedom, justice and equality was submerged in the patriarchal norms and practices of 7<sup>th</sup>-century Arab society and culture and the formative years of Islamic law (MIR-HOSSEINI, 2003, 2007, 2009).

In short, classical jurists' conceptions of justice and gender relations were shaped in interaction with the social, economic, and political realities of the world in which they lived. In this world, patriarchy and slavery were part of the fabric of society; they were seen as the natural order of things, the way to regulate social relations. In their understanding of the sacred texts, these jurists were guided by their outlook, and in discerning the terms of the *shari'a*, they were constrained by a set of gender assumptions and legal theories that reflected the social and political realities of their age. The concepts of gender equality and human rights—as they are meant today – had no place and little relevance to their conceptions of justice.

It is crucial to remember that even if ideas of gender equality belong to the modern world, and were naturally absent in pre-modern legal theories and systems, nevertheless, until the 19<sup>th</sup> century, Islamic legal tradition granted women better rights than did its Western counterparts. For instance, Muslim women have always been able to retain their legal and economic autonomy in marriage, while in England it was not until 1882, with the passage of the Married Women's Property Act, that women acquired the right to retain ownership of property after marriage.

For Muslims, however, the encounter with modernity coincided with their painful and humiliating encounter with Western colonial powers, in which both

women and family law became symbols of cultural authenticity and carriers of religious tradition, the battleground between the forces of traditionalism and modernity in the Muslim world – a situation that has continued ever since. As Leila Ahmed observes, this has confronted many Muslim women with a painful choice, between betrayal and betrayal. They have to choose between their Muslim identity – their faith – and their new gender consciousness (AHMED, 1984, p. 122).

One of the paradoxical and unintended consequences of political Islam has been to help create an arena within which many women can reconcile their faith and identity with their struggle for gender equality and human dignity. This did not happen because the Islamists offered an egalitarian vision of gender relations– they clearly did not. Rather, their very agenda of ‘return to *shari’a*’, and their attempt to translate *fiqh* rulings into policy, have provoked Muslim women to increased activism, which some refer to as ‘Islamic feminism.’<sup>35</sup> The defence of patriarchal rulings as *shari’a*, as ‘God’s Law,’ as the authentic ‘Islamic’ way of life, brought the classical *fiqh* books out of the closet, and unintentionally exposed them to critical scrutiny and public debate. A growing number of women came to question whether there was an inherent or logical link between Islamic ideals and patriarchy. This opened a space for an internal critique of patriarchal readings of the *shari’a* that was unprecedented in Muslim history. By the early 1990s, there emerged a new consciousness, a new way of thinking, a gender discourse that is arguing for equality for women on all fronts within the framework of Islam. This new discourse is nurtured by feminist scholarship in Islam that is showing how gender is constructed in Islamic legal tradition, uncovering a hidden history and rereading textual sources to unveil an egalitarian interpretation of the sacred texts.<sup>36</sup>

The emerging feminist scholarship on Islam is helping to bridge the wide gap that exists between the conceptions of justice that inform and underpin the dominant interpretations of the *shari’a* on the one hand, and human rights legislation on the other. This scholarship is part of a new trend of reformist religious thought that is consolidating notions of Islam and modernity as compatible, not opposed. Following and building on the work of earlier reformers, the new religious thinkers contend that human understanding of Islam’s sacred texts is flexible; the texts can be interpreted as encouraging pluralism, human rights, democracy and gender equality. Revisiting the old theological debates, they aim to revive the rationalist approach that was eclipsed when legalism took over as the dominant mode and gave precedence to the form of the law over its substance and spirit. Where earlier reformers sought an Islamic genealogy for modern concepts, the new thinkers place the emphasis on how religious knowledge is produced and how religion is understood; how interpretations of the *shari’a* and *fiqh* constructs must be evaluated in their historical contexts.<sup>37</sup> This new trend of reformist thought helps to assess how these legal constructs have been reproduced, modified and redefined by those countries and communities that have reintroduced *zina* laws by ‘Islamising’ penal laws.

More importantly, this new religious thinking and its language can open a new and meaningful dialogue between Islamic law and international human

rights law. Such a conversation can help to build an overlapping consensus and give human rights advocates the conceptual tools and the language to engage with Muslim communities. It can enable them to see *zina* laws as neither part of an irredeemably backward and patriarchal religion, nor as divine and immutable, but as an element in the complex web of norms and laws that classical jurists developed for the regulation of sexuality.<sup>38</sup> In other words, this conversation can help human rights advocates to see these laws for what they are: juristic constructions that have their roots in the tribal structures and patriarchal ideology of pre-Islamic Arabia, which continued into the Islamic era, though in a modified form.

For example, it can be shown how death by stoning (*rajm*) takes its textual justification not from the Qur'an but from the Sunnah. Jurists of all schools rely on three *hadith* to build their legal arguments for stoning. This has been contested both by invoking arguments from classical *fiqh* theory, such as the textual primacy of Qur'an over *hadith*, and the fact that the authenticity of these *hadith* has been questioned,<sup>39</sup> as well as on human rights grounds. It can be stressed how the legal rulings in the Qur'an and the Sunnah must be understood in their historical and social contexts. For example, some have argued that stoning was a common form of execution at the time of the Prophet, and that it came into Islamic legal tradition as punishment for *zina* from Jewish tradition.<sup>40</sup>

Moreover, the Qur'an neither mandates stoning as punishment for adultery, nor speaks of any punishment for consensual sexual relations in private. As Asifa Quraishi rightly argues, *zina* as defined by classical jurists must be seen as a crime of public indecency rather than private sexual conduct. In her words, "(w)hile the Qur'an condemns extramarital sex as evil, it authorizes the Muslim legal system to prosecute someone for committing this crime *only* when the act is performed so openly that four people see them without invading their privacy." (QURAISHI, 1997, p. 296).<sup>41</sup>

Defining crimes according to punishment is itself a juristic development. The expression *hudud Allah*, limits prescribed by God, appears 14 times in the Qur'an. Nowhere is it used in the sense of punishment, fixed or otherwise, nor is it stated specifically what these limits are (KAMALI, 1998, p. 219; 2000, p. 45-65). As Fazlur Rahman notes, in two verses (Quran 2. 229-230) the term appears six times in relation to divorce, demanding that men either retain or release their wives *bil-ma'ruf*, i.e in accordance with 'good custom'; each time, the term carries a slightly different meaning, but neither here nor elsewhere is it used in the sense of punishment. In his words:

*These facts should compel us to pause and think how little concerned the Qur'an is about the purely legal side and how much more and primarily with setting the moral tone of the Community. The legal side has undoubtedly to be done justice to and an adequate law has to be developed. But it is left to the Community to formulate this law in the light and moral spirit of the Qur'an which itself shows little tendency to lay down hard and fast laws. And doubly mistaken are those who claim to take the law of God into their own hands and seek to implement it literally.*

(RAHMAN, 1965, p. 240).

## 6 Summary and Conclusions

What are the implications of the analysis offered here for the Violence is Not Our Culture Campaign? This chapter has been mindful of two broad questions: What are the main challenges faced by women's rights activists in their campaign to abolish the *zina* laws? Can Islamic and human rights frameworks coexist, or in other words, how can an overlapping consensus be built? The chapter located *zina* laws in the context of the intersection between religion, culture and law in the regulation of sexuality in the Islamic legal tradition, and the shifting politics of relations between religion, law and gender in recent times. The premise here has been that a campaign against *zina* laws must be fully informed about the legal, social and political justifications of these laws, and the link between them and other laws and customs that sanction men's control over women's sexuality. *Zina* laws should not be treated in isolation; they are part of complex system for regulating women's behaviour, which is informed by a patriarchal reading of Islam's sacred texts and sustained by a set of outdated assumptions and juristic constructs about female sexuality, which are at the root of violence against women.

The reform and secularisation of penal laws and criminal justice systems in the first half of the 20<sup>th</sup> century, and their 'Islamisation' in the second half, has made it clear there can be no sustainable improvements in Muslim women's legal and social position while patriarchal interpretations of Islam's sacred texts remain unchallenged. Twentieth century shifts in the politics of religion, law and gender led to the emergence of two powerful, yet opposing, frames of reference: international human rights law and political Islam. The encounter between them has produced a productive dialogue, and opened a new phase in the politics of gender and the battle between forces of traditionalism and modernism in the Muslim world. The crucial element of this phase has been that women themselves — rather than the abstract notion of 'women's rights in Islam' — are now at the heart of the argument.

International human rights law gives activists a conceptual framework and language in which to criticise these laws as gender-based violence. But such an argument meets powerful opposition in countries and communities where religious discourse is paramount, where religious identity has become politicised, and where the Islamists set the terms of sexual and moral discourses. To be effective in such contexts, human rights norms and values must be articulated in a language that can engage with local cultures, practices, and religious traditions (DEMBOUR, 2001). This is a difficult task, a challenge that all human rights advocates must deal with in one way or another. Each context has its own specificities and dynamics, and presents its own challenges. In Muslim contexts, this challenge is given a particular edge by the domination of traditional *fiqh* and the ways in which its rulings have become embedded in customary cultural practices and sexual codes. The very fact that *zina* laws come under *hudud* — seen as 'God's limits' — gives the Islamists and the fundamentalists a real advantage, a ready-made argument for rejecting and denouncing reform as 'contrary to Islam'; hence the power of the Islamist rallying cry of 'return to *shari'a*'.



One of the main strategies adopted by human rights advocates is to name and shame offending governments into respecting and protecting rights. States that invoke religious misinterpretations to justify discrimination and violence against women have signed up to international human rights conventions; their lack of accountability in enacting the latter must be exposed. But in the eyes of many Muslims, the moral high ground and justice of international human rights law have been undermined by the politics and rhetoric of the so-called “war on terror” in the aftermath of the 9/11 attacks, as well as the West’s unwavering support for Israel despite its escalating violations against the Palestinians and their land.<sup>42</sup> Claiming to be advocates of justice, Islamists thrive on being seen to oppose such outside interventions. In these new 21<sup>st</sup> century conditions, activists must also be able to engage in an internal discourse within Muslim communities (AN-NA’IM, 2005). As Abdullahi An-Na’im points out, “although the apparent dichotomy between the so-called religious and secular discourses about the rights of women in Islamic societies is somewhat false or grossly exaggerated, its implications are too serious to be ignored in practice” (AN-NA’IM, 1995b, p. 51). A campaign that can bring Islamic and human rights perspectives together can be more persuasive and effective.

To reiterate the main points of the argument in this paper:

- Strategies should be diverse and multi-levelled, and must be able to engage in an internal discourse within communities. Given the intimate links between Islamic legal tradition and culture, it is essential to frame arguments for reform and change concurrently within both Islamic and human rights frameworks.
- In a campaign against *zina* laws or stoning, for strategies of confrontation such as ‘naming and shaming’ to be more than political rhetoric and be effective in persuading governments or Islamists to change laws or practices, they must be combined with a process of engagement, dialogue and debate in which all sides have the opportunity to articulate principles and defend practices. This has worked, for example, in Morocco with the reform of Family Law following years of women’s activism and engagement with clerics (BUSKENS, 2003; COLLECTIF 95 MAGHREB-EGALITÉ, 2005); and in Pakistan, with the amendment of *zina* laws following the intervention of the Council of Islamic Ideology (COUNCIL OF ISLAMIC IDEOLOGY, 2006; LAU, 2007).
- As a general principle, if the aim is to persuade some other group to change their practices or laws, it is more effective to argue that they transgress their own principles; that an alternative law or practice might be more in accordance with both their principles and those of others – including international human rights law.
- The principles and ideals of the Qur’an reflect universal norms that have resonance in contemporary human rights standards, and provide the basis for an ethical critique from within an Islamic framework of penal laws based on classical jurisprudence.

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## NOTES

1. Apart from *zina*, other categories of sexual relations criminalised in classical legal tradition are *liwat*, homosexual relations between men, and *musahaqa*, homosexual relations between women, neither of which are a major focus of this chapter.
2. For instance, many Arab states adopted the penalty for adultery and so-called 'crimes of passion' from European penal codes (Abu-Odeh, 1996, Welchman, 2007). The same happened in Iran.
3. See the websites of Women Living Under Muslim Laws (<http://www.wluml.org>) and the Violence is Not Our Culture Campaign (<http://www.stop-killing.org>). Last accessed on: Jun. 2011.
4. See Gallie (1956, p. 167-172); an essentially contested concept, in Gallie's terms, has 'disagreement at its core,' Terms and concepts like 'work of art' or 'democracy' or 'religion' inevitably involve endless disputes about their proper use on the part of their users. In other words, contestedness is an essential part of such concepts; there cannot be only one definition on which all agree.
5. For discussions of the tension between universalism and relativism in human rights, see: An-Na'im (1990, 1995a), Dembour (2001), Merry (2003), Sen (1988). For debates on the compatibility between Islam and human rights law, see: Baderin (2001, 2007), Bielefeldt (1995, 2000), Hunter and Malik (2005), Jahanpour (2007), Sajoo (1999), Strawson (1997).
6. In Kamali's words (2006, p. 37), "Shari'a demarcates the path which the believer has to tread in order to obtain guidance."
7. For instance, Al-'Ashmawi, the Egyptian reformist and chief judge of the High Court of Appeals, in a book entitled *Usul al-Shari'a*, The Principles of Shari'a (not *Usul al-Fiqh*), contends that *shari'a* is not legal rules but ethical principles and values in the Qur'an, in which justice is primary. For a sample translation of his work, see Kurzman (1998, p. 49-56).
8. See Merry (2003) for an insightful discussion of ways in which culture and, along the way, anthropology as a discipline that studies culture, has been demonised in certain human rights discourses, which do not take into consideration the rethinking of the concept of culture in anthropology in recent decades. This has parallels with the demonisation of religion by those unaware of theoretical developments in religious studies.
9. For excellent accounts of anthropological approaches to violence against women, see Merry (2006, 2009).
10. This challenge has been the subject of many research projects and initiatives; see, for instance, New Directions in Islamic Thought and Practice, initiated in 2003 by the Oslo Coalition for Freedom of Religion and Belief ([www.oslocoalition.org/nd.php](http://www.oslocoalition.org/nd.php)), and Musawah: A Global Movement for Equality and Change in the Muslim Family, launched in 2009 ([www.musawah.org](http://www.musawah.org)). Last accessed on: Jun. 2011.
11. For a definition of Islamists as 'Muslims committed to public action to implement what they regard as an Islamic agenda,' see Mir-Hosseini and Tapper (2009, p. 81-82).
12. For a good account of these developments, see Merry (2006, p. 77-84).
13. For a general discussion of the 'Islamisation' of criminal law, see Peters (1994).
14. They were grafted onto existing Italian-based criminal law; but they did not have stoning as punishment for *zina* (PETERS, 1994). Meanwhile various Gulf states already had *fiqh*-based penal codes: Kuwait (1960, 1970), Oman (1974), Bahrain (1976). Codification came later in United Arab Emirates (1988) and Qatar (2004).
15. For instance, 16 October 2009, Somali hardliners Islamic militia whipped women for wearing bras, as they defined it as 'provocative'. Available at: <[http://www.alarabiya.net/save\\_print.php?print=1&cont\\_id=88238&lang=en](http://www.alarabiya.net/save_print.php?print=1&cont_id=88238&lang=en)>. Last accessed on: Jun. 2011.
16. There is now a substantial literature on this; for instance, for Pakistan, see Jahangir and Jilani (1988); for Iran, Terman (2007); for Sudan, Sidahmed (2001); for Nigeria, Imam (2005) and Peters (2006).
17. For *fiqh*-based accounts, see Safwat (1982) and Bassiouni (1997); for an analytical view, see Peters (2005); for reformist and critical accounts, see El-Awa (1993), Kamali (1998, 2000, 2006, p. 184-189).
18. The inclusion of drinking alcohol and apostasy has no textual basis. Hanbali jurists do not define apostasy as a *hadd* crime (PETERS, 2005, p. 64-65); some jurists do not consider drinking alcohol as a *hadd* crime (EL-AWA, 1993, p. 2).
19. For an outline of *zina* rulings in Sunni schools and differences of opinion among the jurists, see IbnRushd (1996, p. 521-530).
20. A belief in the 'sleeping foetus' (*raqqad*) is still widespread in North and West Africa. According to this belief, the embryo for some unknown reason goes to sleep in the mother's womb, and remains there dormant until it is awakened, for example by a magical potion or intervention by a saint. Malik ibnAnas, founder of the Maliki school of jurists, was reputed to have been a sleeping foetus. See Jansen (2000), Mir-Hosseini (1993, p. 143-46).

21. Translated by Abdullah Yusuf Ali, see Yusuf Ali (1997).
22. The doctrine of *shubha* is based on a saying of the Prophet: "God's sanction will not be applied in cases where there is room for doubt." *Hadd* is suspended in cases where there is any ambiguity as to facts and proofs; for discussion, see Fierro (2007).
23. For a groundbreaking study, see Kugle (2003, 2010).
24. For instance, the Islamic Republic of Iran uses the notion of '*ilm-e qazi*' ('judge's knowledge') which refers to personal information that is not presented or examined by the court. In practice, this allows the judge to decide if an offence has been committed; often women are tricked into confession, see Terman (2007).
25. This discussion is concerned with marriage as defined by classical jurists, not marriage in practice; for more detailed treatment of the subject, see Ali (2006, 2010a), Mir-Hosseini (2003, 2009). *Mahr* is sometimes inaccurately translated as 'dowry,' but this means property or cash that a wife brings her husband on marriage, as occurs in India and used to occur in Europe; the Muslim *mahr*, by contrast, is property that a husband gives his wife, and thus resembles the English 'dower,' a more appropriate translation.
26. For similarities in the juristic conceptions of slavery and marriage, see Marmon (1999) and Willis (1985).
27. For these disagreements, see Ali (2003, 2006) and Maghniyyah (1997); for their impact on rulings related to *mahr* and the ways in which classical jurists discussed them, see Ibn Rushd (1996, p. 31-33).
28. In Shi'a law a man may contract as many temporary marriages (*mut'a*) as he desires or can afford. For this form of marriage, see Haeri (1989).
29. Classical Maliki law grants women the widest grounds (absence of the husband, his mistreatment, failure to provide, and failure to fulfil marital duties), which have been used as the basis for expanding women's grounds for divorce in the process of codification, see Mir-Hosseini (1993, 2003).
30. Many terms commonly used today in different countries for 'the veil,' such as *hijab*, *purdah*, *chador*, *burqa*, are not found in classical *fiqh* texts.
31. For the evolution of *hijab* in Islamic legal tradition, see Mir-Hosseini (2007).
32. For a critical discussion of these two assumptions, see Abou El Fadl (2001, p. 239-247). In some extremist circles today, even a woman's voice is defined as '*awra*'.
33. There is an extensive debate in the literature on this, which will not be entered into here. Some argue that the advent of Islam weakened the patriarchal structures of Arabian society, others that it reinforced them. The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineal to patrilineal descent, that Islam facilitated this by giving patriarchy the seal of approval, and that the Qur'anic injunctions on marriage, divorce, inheritance, and whatever relates to women both reflect and affirm such a transition. For concise accounts of the debate, see Smith (1985) and Spellberg (1991).
34. As Abou-Bakr (2003) shows, women remained active in transmitting religious knowledge, but their activities were limited to the informal arena of homes and mosques and their status as jurists was not officially recognised.
35. There is a growing literature on the politics and development of 'Islamic feminism'; for discussions and references, see Badran (2002, 2006) and Mir-Hosseini (2006, 2011a, 2011b).
36. Feminist studies in Islam are too numerous to list here, but see especially Ahmed (1992), Al-Hibri (1982, 1997), Ali (2003, 2006, 2010a, 2010b), Barlas (2002), Hassan (1987, 1996) Mernissi (1991), Mir-Hosseini (2003, 2006, 2009, 2011a, 2011b), Wadud (1999, 2006).
37. For general introductions and some sample texts, see Kurzman (1998, 2002); Abu Zayd (2006).
38. For a discussion of Muslim feminists' discourse on *zina*, see Serrano (2009).
39. For examples, see Burton (1978, 1993), Engineer (2007), Kamali (2000).
40. For a discussion of debates in classical sources, see Burton (1978, 1993) and for new arguments based on human rights, see Baghi (2007), Engineer (2007), Quraishi (2008).
41. See also Karamah (n.d.).
42. For an incisive discussion of dilemmas encountered by international NGOs working in Muslim contexts, see Modirzadeh (2006).



## RESUMO

A autora oferece uma crítica feminista e baseada em direitos sobre as leis de *zina* na tradição jurídica muçulmana, a qual define como crime todas as relações sexuais fora do casamento civil.

No início do século XX, as leis de *zina*, que raramente eram aplicadas na prática, tornaram-se também juridicamente obsoletas em quase todos os países e comunidades muçulmanas; mas com o ressurgimento do Islã como uma força política e espiritual durante o século XX, em vários estados e comunidades as leis de *zina* foram seletivamente restabelecidas, codificadas e introduzidas no sistema de justiça penal, e aplicadas pela estrutura do Estado moderno.

A autora examina campanhas em curso para descriminalizar o sexo consensual, e argumenta que as leis de *zina* também devem ser abordadas a partir de dentro da tradição jurídica islâmica.

Explorando as interseções entre cultura, religião e direito que legitimam a violência na regulamentação da sexualidade, a autora propõe uma estrutura que pode conciliar os princípios islâmicos e de direitos humanos.

## PALAVRAS-CHAVE

Sexualidade – Violência – Gênero – Islã – Direito – Direitos humanos

## RESUMEN

La autora, desde una perspectiva feminista y basada en los derechos, critica las leyes de *zina* de la tradición jurídica musulmana, que penalizan todas las relaciones sexuales extramatrimoniales.

A principios del siglo XX, las leyes de *zina*, que rara vez se aplicaban en la práctica, se volvieron también obsoletas legalmente en casi todos los países y comunidades de tradición musulmana; sin embargo, con el resurgimiento del islamismo como fuerza política y espiritual a fines de ese mismo siglo, en varios países y comunidades fueron resucitadas, codificadas e implantadas en el sistema penal en forma selectiva, y fueron aplicadas por medio de la maquinaria estatal moderna.

La autora repasa campañas actuales destinadas a despenalizar las relaciones sexuales consentidas y sostiene que las leyes de *zina* también deben ser consideradas desde la tradición jurídica islámica.

Explorando las intersecciones entre la religión, la cultura y el derecho que legitiman la violencia en la reglamentación de la sexualidad, la autora propone un marco que puede unir los principios del derecho islámico y los derechos humanos.

## PALABRAS CLAVE

Sexualidad – Violencia – Género – Islam – Derecho – Derechos humanos



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## ABSTRACT

This article addresses the subjection of corporations to human rights norms, or the so-called “horizontal effect” of these rights. More specifically, it considers the controversy between voluntarists and obligationists on the best way to prevent human rights abuses arising out of corporate activity. Drawing on research on the undermining effect of sanctions, the article discusses the risk of such an effect should the method of promoting respect for human rights advocated by obligationists be applied, i.e. through regulation. It also examines the plausibility of a similar undermining effect on the motivations of actors – such as NGOs, consumers, workers and investors – whose actions impose limitations on modern corporations.

Original in Portuguese. Translated by Barney Whiteoak.

Received in July 2011. Accepted in October 2011

## KEYWORDS

Human rights – Corporations – Voluntarism - Global Compact – Regulation



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# CORPORATIONS AND HUMAN RIGHTS: THE DEBATE BETWEEN VOLUNTARISTS AND OBLIGATIONISTS AND THE UNDERMINING EFFECT OF SANCTIONS

Leandro Martins Zanitelli\*

## 1 Introduction

This article addresses the subjection of corporations to human rights norms, which is known as the “horizontal effect” because it concerns relations between private actors rather than between private actors and the State. (KNOX, 2008, p. 1). More specifically, the article considers the controversy between voluntarists and obligationists, the former being proponents of proposals, like the one exemplified by the United Nations Global Compact, that attempt to prevent human rights violations through the adherence of companies and the spontaneous development (i.e. free from state coercion) of good business practices. Obligationists, meanwhile, tend to distinguish themselves by their mistrust of the aforementioned proposals and their subsequent insistence on the need for punitive measures, both on the national and international level, for any significant progress to be made on the prevention of human rights violations either by businesses or with their complicity.

After presenting a brief account of recent actions of the United Nations involving corporations and human rights (section I) and the voluntarist and obligationist arguments (sections II and III, respectively), the article examines a series of discoveries made in recent years concerning what is called the “undermining effect” of sanctions (section IV). The intention is to consider whether the evidence of an undesirable effect of sanctions on behavior supports the position advocated by voluntarists in the debate on the horizontal application of human rights. This is the question posed in section V, which concludes, in short, that the risk of an undermining effect on corporations should only be taken seriously if their respect for human rights – as well as the other actions nowadays encompassed by “corporate social responsibility” – is not related to the goal to maximize profits. If, on the one

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\*The author thanks UniRitter and Fundação de Amparo à Pesquisa do Estado do Rio Grande do Sul (FAPERGS) for the financial support and Sur Journal for the careful review of the paper.

hand, the imposition of sanctions on companies can indeed lead to progress in the protection of human rights, on the other hand it can pose an obstacle to the development of more genuine (in the sense of unselfish) practices in social corporate responsibility. Finally, the article examines the potential for sanctions to produce an undermining effect on the behavior of actors – such as activists, consumers and workers – thanks to whom businesses currently find themselves compelled to prevent abuses arising out of their activities. The evidence on this point indicates that an undermining effect should only be anticipated if the establishment of sanctions was to raise the confidence, among these actors, that corporations would observe human rights norms, albeit through force.

## 2 The horizontal effect of human rights in the United Nations

In a challenge to conventional thinking that only States are legally bound by international human rights norms, these limits have been considered, in recent years, to extend to at least some, if not all, of the duties emanating from these norms to non-State actors and, in particular, to corporations. Placing this obligation on private organizations is known as the horizontal effect of human rights (KNOX, 2008, p. 1), in contrast to vertical effects, which are the obligations that the same rights establish for States. In Brazilian constitutional doctrine, these expressions are used to designate the binding effects of fundamental rights norms on public and private actors, respectively (SARLET, 2000, p. 109).

Among the reasons why the debate on the horizontal effect of human rights has acquired such prominence is, to begin with, the dominance of some non-State actors, particularly multinational corporations, whose annual revenues can exceed the GDP of many countries (HESSBRUEGGE, 2005, p. 21). Along with this dominance is the fact that the cross-border activities of these companies often place them outside the jurisdiction of their host States (KINLEY; TADAKI, 2004, p. 938). Indeed, the policing of human rights violations based on the legislation of the host State can be compromised by the influence that corporations exert on local authorities, which is particularly predictable when corporate activity is vital to the development of poor regions (KINLEY; TADAKI, 2004, p. 938).

Within the scope of the United Nations, the recent history of discussions on human rights violations by non-State actors includes the creation, advocated in 1999 by the then Secretary-General Kofi Annan, of the Global Compact – a “learning forum” (RUGGIE, 2001) involving business leaders, governments, NGOs and international agencies intended to align corporate activities with universally accepted principles of human rights, labor, environment and anti-corruption (UNITED NATIONS GLOBAL COMPACT, 2011a).

Shortly afterwards, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, an advisory body to the Commission on Human Rights (later replaced by the Human Rights Council), approved the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (commonly referred to as “Norms”) (UNITED NATIONS, 2003). These Norms recognized the horizontal effect of human rights

by declaring that, although the corresponding obligations fall primarily on the States, corporations, “within their spheres of activity and influence”, also have the responsibility to “promote, secure the fulfillment of, respect and ensure respect of” human rights recognized in international law and national legislation, including the rights and interests of indigenous peoples and other vulnerable groups (UNITED NATIONS, 2003, para. 1). They also established that the activities of corporations shall be subject to monitoring by the United Nations and other national and international mechanisms “already in existence or yet to be created” for this purpose (UNITED NATIONS, 2003, para. 16), while compliance with the obligations and reparations for any violations are to be determined by national courts and international tribunals (UNITED NATIONS, 2003, para. 18). However, the proposed Norms encountered resistance from businesses and governments, prompting the Commission to abandon debate on the matter (FEENEY, 2009, p. 180).

In 2005, Kofi Annan appointed, at the behest of the Commission, Professor John Ruggie as Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations. With an initial mandate of two years, later extended for an additional year, the work of the SRSG was characterized, at first, by the rejection of the Norms, which were criticized in an initial report in 2006 for the lack of a principle defining the respective responsibilities of States and corporations on the subject of human rights (UNITED NATIONS, 2006, para. 66). The SRSG also claimed that the controversy engendered by the Norms “obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights” (UNITED NATIONS, 2006, para. 69). Later on, the SRSG suggested adopting a three-part regulatory framework (“Protect, Respect and Remedy”) (UNITED NATIONS, 2008a) consisting of a State duty to protect against human rights abuses by businesses, a corporate responsibility to respect human rights and the need for remedies against potential violations both by States, that should develop ways to investigate, punish and compensate for wrongdoings, and by the corporations responsible for these wrongdoings. Corporations would provide the means for the injured parties to bring to their attention the violations that had occurred in order to obtain compensation.

This regulatory framework was generally well received (JERBI, 2009, p. 312) and was unanimously approved at the June 2008 session of the Human Rights Council, which, at the time, extended the SRSG’s mandate for another three years, urging further development of the principles of “Protect, Respect and Remedy” and the provision of more specific recommendations concerning the duties of the State to protect human rights from abuses by corporations, including a clearer definition of the content and limits of the obligations of these corporations in relation to human rights and suggestions on how to enhance access to effective remedies at the national, regional and international level for victims of abuses (UNITED NATIONS, 2008b, section 8/7, para. 4).

Shortly before the end of his mandate, the SRSG presented, in 2011, a report containing “guiding principles” for implementing the three-part regulatory framework. These principles specify the duties of the State, which are defined as

duties to “prevent, investigate, punish and redress” human rights abuses occurring within their territory or jurisdiction (UNITED NATIONS, 2011, annex, I, para. 1), to which is added the recommendation that measures be adopted to prevent violations committed outside their territorial limits by corporations domiciled inside their jurisdiction (UNITED NATIONS, 2011, annex, para. 2). With respect to companies, the guiding principles establish, regardless of the size of the company (UNITED NATIONS, 2011, annex, II, para. 14), the duty to avoid human rights infringements either through their own activities or directly related to their business relationships (UNITED NATIONS, 2011, annex, para. 13). Moreover, companies are expected to respect all internationally recognized human rights, which include, at minimum, the rights expressed in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work (UNITED NATIONS, 2011, annex, para. 12). Finally, the guiding principles assign to the State the duty to ensure, through legislative, judicial or administrative means, access to effective remedy for the victims of violations (UNITED NATIONS, 2011, annex, para. 25), while also urging them to consider ways to facilitate access to non-State-based grievance mechanisms (UNITED NATIONS, 2011, annex, para. 28). They also recommend that corporations establish or participate in non-State-based grievance mechanisms intended to determine and remedy as early as possible abuses related to corporate activity (UNITED NATIONS, 2011, annex, para. 29).

### 3 The enforceability of horizontal human rights

Although the regulatory framework to “Protect, Respect and Remedy” and the recently proposed guiding principles for their application place a duty on corporations to respect human rights and, therefore, confer on these rights a horizontal effect, they do nothing to make these obligations legally enforceable against non-State actors on the international stage. In other words, although they assert the duty of companies to respect human rights beyond the mere observance of local laws (UNITED NATIONS, 2011, annex, para. 11), it is the State, within its territory or jurisdiction, that is responsible for investigating and punishing non-compliance by businesses with their human rights obligations (UNITED NATIONS, 2011, annex, para. 25). Concerning non-State-based grievance mechanisms, the guiding principles observe that regional and international human rights bodies have dealt “most often” with alleged violations by States of their duties to protect, and they encourage the States, themselves, to raise awareness about the existence of these other mechanisms and to facilitate access to them (UNITED NATIONS, 2011, annex, para. 28).

All this is consistent with the fact that the guiding principles are intended to elaborate on the implications of existing standards and practices for States and companies, not to create new legal obligations (UNITED NATIONS, 2011, para. 14). Currently, human rights observance is legally enforced internationally against States, not individuals (UNITED NATIONS, 2007, para. 33-44). In the Inter-American and European Courts of Human Rights, whose judgments are binding and may determine the payment of compensation, grievances can only be brought against

States (CONSELHO DA EUROPA, 1950, art. 33-34; ORGANIZAÇÃO DOS ESTADOS AMERICANOS, 1969, art. 48, 1, “a”). The same is true of the African Court (UNIÃO AFRICANA, 1981, art. 47), although the African Charter on Human and Peoples’ Rights also places some duties on non-State actors (UNIÃO AFRICANA, 1981, art. 27-29). The exceptions to the principle of unsanctionability of individuals or non-State entities for human rights infringements under international law are confined to international criminal law (UNITED NATIONS, 2007, para. 19-32).

Immunity from the jurisdiction of international courts does not mean, obviously, that human rights violations caused by the activity of a corporation go unpunished but, instead, that the punishment depends on national legislations and also on the scope that national jurisdictions have to address abuses that occur beyond the territorial limits of each country. Examples of this are the cases filed in the U.S. based on the Alien Tort Claims Act, in which reparations have been claimed for human rights offenses committed outside U.S. territory by or in collusion with U.S. corporations or their subsidiaries (JOSEPH, 2004, p. 21-63).

There is a concern, however, that sanctions instituted by national legal systems will be insufficient to prevent violations. It should be noted that poorer countries, precisely those where the risk of abuses occurring is greater, are generally less likely to establish rules capable of curbing the activities of large companies in their territories (OSHIONEBO, 2007, p. 4). Moreover, there is a certain mistrust concerning the effectiveness of measures that are non-binding or unaccompanied by the means apply sanctions, such as the Global Compact, which has been accused of allowing some companies to obtain undue prestige by presenting themselves to the public, simply by signing the Compact, as defenders of human rights (NADER, 2000; DEVA, 2006, p. 147-148). As a result, both NGOs (INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, 2002; BUNN, 2004, p. 1301-1306) and the academic community (OSHIONEBO, 2007; BRATSPIES, 2005) have been calling for corporations to be internationally subject to sanctions for acts that disrespect human rights committed by them or their subsidiaries.

But is the imposition of sanctions on the international level in fact a good strategy for preventing human rights offenses by companies and, in particular, by multinational corporations? The following sections address this question considering not only the debate on the horizontal effect of human rights, but also the results of more comprehensive studies on obedience of legal norms and the behavioral effects of sanctions.

#### **4 The desirability of sanctions (1): voluntarist arguments**

On the topic of the protection of human rights, part of the debate on the appropriateness of imposing sanctions on offending companies has been fuelled by the UN Global Compact, a voluntary initiative to promote human rights and environmental preservation based on the debate between different actors, including corporations, and on the dissemination of information on the measures adopted by participating businesses. The Global Compact is, however, just one prominent example of the strategy to align the activities of corporations with collective



interests and, in particular, with human rights through soft law instruments or business codes of conduct that are non-binding or that carry no sanctions (KINLEY; TADAKI, 2004, p. 949-960).

Together with other similar proposals for enhancing respect for human rights by companies through the voluntary engagement of businesses, the Global Compact has sparked a debate that divides “voluntarists” and “obligationists” (ZERK, 2006, p. 32-36), the former characterized by their enthusiasm for projects to promote human rights voluntarily among corporations and the latter by their mistrust of these projects.

Before examining the arguments put forward by these two positions, it is important to point out that the debate is full of nuances and that the opinions held by each of the opposing groups are by no means homogeneous. Among the voluntarists, for example, there are those who are not opposed to the idea of subjecting corporations to sanctions, even internationally, for human rights violations (RASCHKE, 2009, p. 526-528), but who nevertheless place a higher value on proposals such as the Global Compact and even suggest that they are a means to achieving binding norms. There are others, meanwhile, among those who might label themselves obligationists, who recognize the value of voluntary codes of conduct and other soft law instruments (DEVA, 2006, p. 143-144), while also declaring the insufficiency of these means and stressing the need for a system of legal sanctions (VOGEL, 2010).

One of the reasons to trust in voluntary solutions is the fact that respect for human rights is to some extent aligned with the corporate goal to maximize profits, as companies are likely to avoid violating these rights in their own interests or, in other words, in the selfish interests of their shareholders (KELL, 2005, p. 74; RUGGIE, 2001, p. 376). Much of the literature on human rights and, more broadly, all the activities performed by corporations for the good of society – usually identified by the expression “corporate social responsibility” – is intended to determine whether and to what extent social actions positively influence the performance of companies (MARGOLIS; ELFENBEIN; WALSH, 2007).

The relationship between social responsibility and commercial success suggests that the creation of punitive international norms for cases of human rights infringements by corporations may be less constructive than it would first appear. This relationship, however, does not lead to the conclusion that a regulation accompanied by sanctions should not be pursued or is even undesirable, just as voluntary proposals must be considered not only as part of the solution (to be complemented by the adoption of hard law measures for cases in which non-legally binding incentives prove to be insufficient), but also as a first-step solution or even as the only solution to consider for acts that violate human rights involving corporations. One preference for voluntarism in the sense alluded to here begins to emerge when, given the circumstances, it is recognized that efforts to subject companies to binding international norms would, given the resistance of these same companies and the enormous difficulty for an agreement between countries, be doomed to failure (KELL, 2005, p. 73; RUGGIE, 2001, p. 373). It has been claimed, therefore, that while initiatives such as the Global Compact, which are based on



dialogue and persuasion, may perhaps not be the best solution, they are, under the present circumstances, the only viable alternative for promoting human rights in the corporate world.

The viability argument also shows signs of treating voluntarism as a type of second-class solution, which, although not ideal, has proven under the current circumstances to be the only possible alternative. Are there, besides this, any other arguments to suggest that non-binding measures such as the Global Compact are superior to a system of sanctions? One such argument makes the claim that soft law measures intended to promote the gradual application of social responsibility principles are best suited, given the malleability of their provisions, to the incipient stage of the legal doctrine on the obligations attributed to corporations and to the fast pace at which the circumstances of production change, since these changes require frequent shifts in corporate behavior concerning respect for human rights (RUGGIE, 2001, p. 373-374). In addition to the lack of sanctions, it has been argued that the vagueness or “open-ended” nature of soft law norms like those exemplified in the principles of the Global Compact offers an advantage, given the circumstances, over a regulatory system for which it would be necessary to await more detail and precision.

## 5 The desirability of sanctions (2): obligationist arguments

Part of the criticism leveled at the Global Compact addresses certain characteristics not found in other non-binding codes of conduct, such as the involvement of the United Nations, which some consider undesirable not only because it allows corporations to improve their reputation by merely making a declaration to the cause of human rights (NADER, 2000; DEVA, 2006, p. 147-148), but also because it makes the UN more susceptible to the influence of these same corporations (UTTING, 2005, p. 384). This article, however, shall only consider the arguments that oppose the Global Compact for its non-obligatory nature and that, therefore, apply not only to this initiative but also to other soft law instruments in the field of corporate social responsibility.

Viewed as a voluntary proposal to encourage corporations to adopt the principles of social responsibility, the Global Compact is often criticized for its very nature, i.e. for the fact that it is non-binding. What this implies is that respect for human rights by corporations will not be achieved, beyond a certain degree, without enforceable legal actions, whether nationally or internationally. This, obviously, does not mean to suggest that the Global Compact and other self-regulating instruments are devoid of efficiency, or even that progress in corporate social responsibility cannot be achieved without these codes of conduct (particularly in cases when this responsibility and the goal to maximize profits coincide), but rather that the desirable degree of human rights observance cannot be achieved, or at least has not yet been achieved, with voluntary solutions. In the case of the Global Compact, this lack of success is attested not only by the low number of participating corporations (UTTING, 2008, p. 963; DEVA, 2006, p. 133-143), but also by the fact that observance of the Compact's principles by participants is allegedly poor (VOGEL,

2010, p. 79-80), applied through isolated measures or limited to areas in which respect for the aforementioned principles incurs the lowest cost (NASON, 2008, p. 421). Furthermore, the lack of mechanisms for verifying compliance with the provisions announced by companies in their reports does not even provide any assurance that they are indeed pursuing human rights (NASON, 2008, p. 421; OSHIONEBO, 2007, p. 23-24). Finally, even though membership of the Compact only requires submission of an annual communication reporting on the initiatives applied, a significant portion of the members currently have an “inactive” (“non-communicating”) status, since they have not fulfilled this obligation: 1,550 (UNITED NATIONS GLOBAL COMPACT, 2011c) of a total of 6,195 business participants on May 31, 2011 (UNITED NATIONS GLOBAL COMPACT, 2011b). Another 2,434 corporations were expelled from the Compact, the majority for not submitting a communication for two consecutive years (UNITED NATIONS GLOBAL COMPACT, 2011c). This high percentage of “non-communicating” corporations is a sign that membership of the Global Compact does not always correspond to a serious commitment to the application of its principles (DEVA, 2006, p. 140).

Although they generally emphasize the inefficiency of the Global Compact, its opponents rarely specify the reasons why the Compact is, like other voluntary initiatives, doomed to failure. This mistrust could be caused by an assumption that is so banal that it barely even deserves a mention – namely, that the goal of corporate activity is to maximize profits and, therefore, that without regulation or some other informal incentive (such as the threat of a consumer boycott) through which the observance of human rights can serve to attain this objective, little or no respect for these rights by corporations is to be expected. Added to this is the fact that exposure to competition may lead businesses to violate human rights (for example, by exploiting workers) not only to maximize profits, but also as a means of survival.

## 6 The undermining effect of sanctions

This section will focus on the undermining effect of sanctions, while an analysis of its importance to the debate on respect for human rights by corporations and, more specifically, to the controversy between voluntarists and obligationists, will be left until the next section. One hypothesis for the effectiveness of sanctions, the dissuasion argument, is that the frequency of an offending behavior varies depending on the magnitude and the certainty of the punishment. Accordingly, the more severe the sanction and the more certain its application, the less chance there is that a violation will occur. This theory, which has already been proposed in the classic literature, has recently been tackled more rigorously in economic studies (BECKER, 1968). It is claimed, therefore, that an unlawful act can be predicted whenever its expected benefit (or “utility”) is greater than the cost, which consists of the cost of the act itself to the actor plus the expected cost of the sanction. This expected cost, meanwhile, is determined by the severity of the sanction (i.e. its disutility for the actor) and by the probability (as perceived by the potential offender) that it will be imposed (BECKER, 1968, p. 176-177).

The undermining effect theory contrasts with the dissuasion argument. Whereas the dissuasion hypothesis claims that the threat of sanctions discourages the act against which the sanction is imposed, a discouragement that increases as the severity of the punishment and the certainty that it will be applied rises, the undermining effect to some extent states the opposite: instead of discouraging the violation, the punishment discourages obedience.

A more accurate description of the undermining effect explains it not necessarily as an effect that replaces dissuasion, but rather as one that can exist alongside it and, consequently, weaken it. As an illustration, imagine that actor *A* who, in the absence of a sanctioning norm regulating it, is likely to perform act *x*. After the introduction of a norm making the opposite conduct  $-x$  subject to punishment, the undermining effect corresponds to the reduction – or even elimination – of the previous likelihood of *A* to perform *x*. At the same time, it is possible that, given the fear of punishment, *A* nonetheless still performs *x*, which can be explained by the dissuasion effect. One way of defining the undermining effect, therefore, is by explaining it as a diminishment or suppression of the uncoerced likelihood (more precisely, uncoerced by the sanctioning norm) to behave in a certain way. This effect may be offset by the dissuasion effect, to the extent that the actor ends up behaving in the desired way, but now motivated exclusively (or, at least, to a greater degree) by a reluctance to suffer the consequences of the sanction.

Explanations for the undermining effect vary. According to one of them (DECI, 1971), the undermining effect is an effect on the intrinsic motivation towards a behavior, also known as the over-justification effect (LEPPER; GREENE; NISBETT, 1973). It is claimed, with this assertion, that acts can be extrinsically and intrinsically motivated. When motivation is extrinsic, the act is performed with the expectation of a reward, while, in contrast, actors who are intrinsically motivated choose a certain behavior for the value this behavior holds for them (i.e. for its intrinsic value), not because of any benefit they will receive as a result. Intrinsic motivation for some activities is related to psychological needs of self-determination and competence (DECI; RYAN, 1985, p. 32). Therefore, when a behavior observed by intrinsic motivation begins to be rewarded (which occurs when either this behavior is rewarded or the opposite behavior is subjected to sanction), an alteration can occur in the “locus of control” (DECI, 1971, p. 108) in virtue of which the actor begins to perceive the behavior in question as no longer an exercise of their autonomy – that is, no longer as internal behavior, but instead externally controlled – losing, therefore, the intrinsic motivation to practice it.

Other theories explaining the impact of sanctions are based on evidence of conditional cooperation (also called “strong reciprocity”) (GÄCHTER, 2007; GINTIS, 2000). At least under certain circumstances, it has been found that a significant portion of human beings behave as conditional cooperators, i.e., they are prepared to act for the common good provided that others do the same. This behavioral trait has led to a number of hypotheses on the effects of sanctions. It is claimed, for example, that if a sanction is perceived as being unfair, it can be interpreted as a signal of the perversity or lack of willingness to cooperate on the part of the authority that imposed it and, therefore, has a negative influence on the behavior

of people who are subject to it (FEHR; ROCKENBACH, 2003). Something similar occurs if the need for a sanction is perceived by the population as a signal that their peers are unwilling to cooperate (VAN DER WEELE, 2009). A conditional cooperator may judge that, if a sanctioning norm is necessary, it is because the other members of the community are only willing to cooperate due to an external incentive (in this case, the sanction). By assigning selfishness to others, the conditional cooperator who thinks like this ends up behaving selfishly too. The difference between these two hypotheses is that, in the first case, the undermining effect depends on the content of the sanction (more accurately, that the sanction is considered unfair), while in the second case, it is an effect of the sanction itself.

Conditional cooperation, however, also attributes to sanctions an effect that contrasts with the undermining effect, which is sometimes called the indirect effect (SHINADA; YAMAGISHI, 2008, p. 116) or spill-over effect (EEK et al., 2002). This theory claims that the sanction induces part of the population to cooperate as it makes them believe that, under threat of punishment, other people, even egoists, will cooperate too. It is possible, therefore, to identify two motivational effects of sanctions, both of which promote obedience. On the one hand, there is the dissuasion (or direct) effect, whereby self-interested individuals behave in the desired way due to fear of punishment. On the other hand, there is the spill-over (or indirect) effect, whereby conditional cooperators obey because they believe others will too.

Both hypotheses – the undermining effect and the indirect effect of sanctions – have already been confirmed in experiments, although the evidence supporting the second (EEK et al., 2002; BOHNET; COOTER, 2003; SHINADA; YAMAGISHI, 2008) is more abundant than for the first (MULDER et al., 2006; GALBIATI; SCHLAG; VAN DER WEELE, 2009). The distinction that, at first glance, is apparent between them brings to light an ambiguity inherent in the idea of conditional cooperation, which can be understood either as cooperation conditioned on the cooperation of others in and of itself, or as cooperation conditioned on others being intrinsically motivated to cooperate. In the first case, what matters to the conditional cooperator is what others will do, not why they will do it, so the sanctioning norm can be seen as a signal, when it is observed, that others (even though motivated by a selfish impulse) will cooperate. This, then, is the indirect effect. In the second case, however, belief in the cooperation of others is not enough for the conditional cooperator when it is accompanied by a disillusion about the motives for cooperation, i.e., when it is believed that the cooperation of others will only be achieved through threat of punishment. For this “more demanding” conditional cooperator, the sanction may well be viewed as a signal of the lack of unselfish willingness of others to comply with a norm and, consequently, they may act selfishly themselves (undermining effect).

One way of conciliating the hypotheses of the undermining effect and the indirect effect consists of admitting that the motive of the cooperation of others is irrelevant for conditional cooperation and anticipating the undermining effect only in cases when the sanction, although in place, is unlikely to be applied. Sanctioning systems that are poorly enforced and, consequently, that rarely apply sanctions may

convey the idea that an intrinsic willingness to cooperate is absent (otherwise, the sanction would not be necessary) and, at the same time, given their inefficiency, prove inadequate in leading conditional cooperators to believe in the cooperation of others. This is the conclusion reached by Mulder *et al.* (2006), for whom sanctions can cause a reduction in cooperation when they are removed or when there are flaws in their application. Furthermore, the lack of trust in the intrinsic motivation of other citizens can lead the undermining effect to occur in areas not covered by the sanctioning norm (MULDER *et al.*, 2006, p. 161). For example, if legislation severely punishes tax evasion, a conditional cooperator may be led to believe that his neighbors only pay taxes for a selfish reason, i.e. to avoid the sanction, and, therefore, that they will also act selfishly on other occasions when behavior is not (or is inadequately) sanctioned – for example, voting for a candidate who serves his or her own interest rather than the community's, consuming water in excess, etc.

Another explanation links the undermining effect not to the loss of intrinsic motivation or to the mistrust of the behavior of others that the sanction inspires but, instead, to the potential impact of legal norms on social norms (YAMAGISHI, 1986, 1988a, 1988b; KUBE; TRAXLER, 2010). For example, imagine that actor *B*, in the absence of a legal sanction, engages in behavior *y* in virtue of a social or informal norm. This means that *B* performs *y* because he/she judges it to be correct (i.e. through intrinsic motivation) or, at the very least, to avoid the application of an informal sanction. An “information sanction” can be any number of negative reactions to an offending behavior, from a simple disapproving look to ostracism, which have in common the fact that they are not applied by the State. Countless studies have revealed that, to a certain extent, social norms exist due to altruistic punishment, meaning that some individuals will sacrifice their own well-being to punish transgressors (FEHR; GÄCHTER, 2002; FEHR; FISCHBACHER, 2004). One hypothesis of the undermining effect, therefore, is that the establishment of a legal sanction in favor of a certain behavior weakens the social norm by which this same behavior is prescribed, since it discourages altruistic punishment. The idea, in short, is that actors are less likely to incur the cost of punishing their peers after the offending behavior becomes the target of a formal sanction.

## 7 Corporations, human rights and the undermining effect

One might object, therefore, to the idea of subjecting corporations to sanctions for disrespecting human rights, alleging the possible undermining effect of a national or international legislation created for this purpose. Using terms characteristic to the debate between voluntarists and obligationists, the former would say that the creation of sanctioning norms for the horizontal effect of human rights is not only, to an extent, unnecessary, considering the willingness of companies to adjust their activities to embrace the principles of social responsibility (including the observance of human rights), but also harmful, as the norms could curb this willingness. Furthermore, it should also be considered to what extent this undermining effect could occur as a result of the mere threat of creating a system of sanctions such as the one suggested by the Norms (UNITED NATIONS, 2003, para. 18).

In order to assess the cogency of a voluntarist argument predicated on the undermining effect, it is necessary to determine, based on either empirical data or on speculation, how likely it is for this effect to occur in corporations submitted to sanctions for human rights violations. Recall that the undermining effect was defined in the previous section as the reduction or elimination of the likelihood without the coercion exercised by the sanctioning norms to adopt a certain behavior. Therefore, for the undermining effect to occur, it is essential, first of all, to determine that such a likelihood exists, i.e., that corporations are inclined to respect human rights without the coercion of legal norms. Second, once this inclination has been confirmed, it is also appropriate to consider its magnitude, since the greater the likelihood of uncoerced observance of human rights, the more there would be to lose from the potential undermining effect of legal sanctions. Finally, the plausibility of the undermining effect also needs to be assessed based on the reasons that lead a business to engage in corporate social responsibility and, particularly, in the defense of human rights. Many of the answers to these questions can be found in the literature on corporate social responsibility. The growing commitment of companies to socially worthwhile causes can be observed not only anecdotally – for example, by the number of Fortune 500 companies that mention social responsibility in their annual reports (LEE, 2008, p. 54) – but also empirically, in studies that employ a number of different gauges, such as charitable contributions, environmental performance and the application of administrative or legal sanctions (MARGOLIS; ELFENBEIN; WALSH, 2007, p. 11-13).

Much of the empirical research on corporate social responsibility has been dedicated to investigating the relationship between social responsibility and business success, or “corporate financial performance” (for a meta-analysis, see MARGOLIS; ELFENBEIN; WALSH, 2007). As this relationship has been substantiated, it is reasonable to speculate that the reason why a company is likely to defend human rights without the threat of a legal sanction is merely strategic, i.e., that respect for human rights, like other corporate social activities, is a means to maximize profits.

However, despite the prominence given to the alleged competitive advantage afforded by social responsibility, the pursuit of profit is not the only reason explaining why a company would make a commitment to promoting the common good. Indeed, it has been suggested that a company’s managers to some extent observe their own personal ethics, often at the expense of the goal to maximize profit (LEE, 2008; p. 65; CAMPBELL, 2007, p. 958-959). One area in which a great deal of attention has been paid to the motives of business executives and managers is environmental responsibility. Kagan, Gunningham and Thornton (2003), for example, have shown that some of the differences in the environmental performance of paper manufacturers can be attributed to managerial attitudes. Similarly, the model of ecologically responsible corporate conduct proposed by Bansal and Roth (2000, p. 731) includes the “personal values” of the members of an organization.

These observations aside, it is important to add that the maximization of profit is still considered the primary motive for a corporation to behave in a socially responsible manner (AGUILERA et al., 2007, p. 847). Other branches of literature reach the same conclusion by observing that individuals subject to competition more



rarely behave in an altruistic manner (SCHOTTER; WEISS; ZAPATER, 1996), the same occurring in cases when the decision to be taken is perceived as an “economic” decision (PILLUTLA; CHEN, 1999; BATSON; MORAN, 1999).

Since respect for human rights constitutes a strategy for companies to maximize profit, it seems unlikely that an undermining effect will occur once sanctions are introduced for violating these rights. After all, the motivation to observe human rights is not intrinsic, nor is it related, like the models of conditional cooperation, to a willingness to act altruistically provided that others do the same.

Nevertheless, in cases when the socially-minded behavior of a corporation is not merely strategic, the hypothesis of an undermining effect is indeed worthy of consideration. Therefore, just as it has been accepted that companies make an unselfish commitment to human rights and to other socially worthwhile objectives, there are good reasons to establish a system of sanctions based on a dialogue between the parties, since the outcome of a participatory legislative process has less chance of being viewed as an affront to the autonomy of the parties and, therefore, of undermining the intrinsic motivation to act in the legally prescribed manner (FREY, 1997, p. 1046; TYLER, 1997, p. 232-233). It should be noted, meanwhile, that legislation that is considered unfair could also threaten the likelihood to cooperate (FEHR; ROCKENBACH, 2003).

However, even though there is the possibility of an undermining effect, its occurrence does not prevent the creation of a system of sanctions from benefiting the realization of human rights. In addition to the dissuasion effect of the sanction, the observance of these rights could also be promoted as a result of the aforementioned indirect or spill-over effect in companies that, thanks to the established sanction, would adjust their policies in defense of human rights not only out of self-interest but also out of a belief that others will do the same. One plausible assumption, although it has yet to be confirmed empirically, is that business executives who sympathize with the cause of human rights will start to behave like conditional cooperators when subjected to competition. In other words, as a system of sanctions causes one company to believe that its competitors will respect human rights, a higher level of observance can be achieved than one prompted by the dissuasion effect alone.

Finally, it remains to be considered what the possible consequences are of a system of sanctions for actors such as NGOs, employees, consumers and investors. Nowadays, these actors help combine the goals of social responsibility and profit maximization, for example, by assuring that human rights violations committed by corporations tarnish their reputation and, consequently, result in reduced sales, disinvestment or a decrease in worker performance. As previously mentioned, these actors frequently serve as altruistic punishers, who make a sacrifice – for example consumers who boycott the products of an offending company, purchasing similar, more expensive products elsewhere – in order to punish behavior they consider immoral. The question, as has already been observed, is whether the creation of legal sanctions can undermine the willingness of these actors. One such undermining effect could lead States and the international community to bear part of the cost that is today shouldered privately to punish

corporate violations, the appropriateness of which would have to be carefully examined. From the point of view of human rights, such a change would only be desirable if the dissuasion and indirect effects of the established sanctions were sufficient to offset the negative impact of reducing the social oversight to which companies are subject.

The occurrence of an undermining effect such as this depends firstly on the actual motivations of the actors involved. These motivations, even if they are predominantly intrinsic or altruistic, are not always entirely so (AGUILERA et al., 2007, p. 851-852), meaning that, by establishing a system of sanctions, the actions of groups that favor corporate social responsibility can only alter as fast as the changes in legislation force that these groups to review their strategies.

Now consider the hypothesis that activists, consumers and other actors do indeed behave as altruistic punishers and are likely to penalize companies that violate human rights even at a cost to themselves. This punishment corresponds to what is called a second-order social dilemma (YAMAGISHI, 1986), since, just like with common social dilemmas, cooperation (in this case, the punishment of misconduct) offers the individual a lower reward or payoff than the opposite conduct (defection), even though cooperation is, collectively speaking, the preferable alternative (DAWES, 1980, p. 169). To simplify: a society in which corporations respect human rights may be preferable to one in which this does not happen, but for many citizens the cost of punishing violations of these rights (for example, through protests or boycotts) is lower than the benefit that each citizen obtains, individually, from this same sanction.

If we accept the altruist punishment hypothesis, the question then lies in determining to what extent this punishment, as an example of the cooperation it represents, diminishes when formal sanctions are established. On this matter, there is evidence from an experiment conducted recently by Kube and Traxler (2010), in which levels of altruistic punishment are compared in cooperative games with and without the threat of formal sanction for free-riders (equivalent, in the experiment, to the sanction applied by an external agent). The results indicated a greater willingness of the participants to punish the lack of cooperation by their peers in the second case. Furthermore, a series of studies has been conducted by Yamagishi (1986, 1988a, 1988b) on cooperation in second-order social dilemmas. These studies revealed that behavior in second-order social dilemmas differed from what is observed in common social dilemmas (first-order dilemmas). While confidence in others raises the level of cooperation in first-order dilemmas – i.e., willingness to cooperate is enhanced by the belief that others will cooperate too – the relationship is inverted in second-order dilemmas, when, as we have already seen, cooperating means incurring a certain cost to punish defectors or free-riders. Therefore, a lack of confidence in others results in more, not less, cooperation when, like in the aforementioned experiments, there is a cost to maintaining a system of sanctions through which refusal to cooperate is punished.

This evidence leads to the conclusion that the hypothesis of an undermining effect involving actors other than corporations themselves or their managers cannot be dismissed. In the case of the experiments conducted by Yamagishi (1986,

1988a, 1988b), however, it is clear that this effect would be caused by an increase of confidence in others. This being the case, a system of sanctions for human rights violations committed by corporations or with their complicity would only reduce the willingness of activists and others to altruistically punish offending companies if the system raised their confidence that corporations, even though selfishly motivated, would respect these rights. It can be concluded, therefore, that sanctioning norms that are rarely applied – due to lack of enforcement or any other reason – have no undermining effect whatsoever on these actors, unless the very existence of these norms – even though they are not properly applied – is enough to elude potential punishers about the likelihood of cooperation by business leaders.

## 8 Conclusion

After a brief account of the recent measures of the United Nations on the horizontal effect of human rights and, more specifically, the observance of these rights by corporations, this article presented the differences between voluntarists and obligationists, the former more enthusiastic than the latter about the proposals – such as the Global Compact – to promote respect for human rights and, more generally, corporate social responsibility, without the use of regulatory mechanisms. Finally, it considered whether the studies conducted in recent years on the undermining effect of legal sanctions support the voluntarist position and to what extent they do or do not.

Before bringing things to a close, it is important to point out some of the limits of the conclusions that have been drawn here, starting with one that is all too evident: this article does not contribute in any way to the debate on the content of the horizontal effect of human rights, i.e., on the definition of the obligations to be observed by companies. If anything can be said about this based on the considerations presented here, it is that any future legislation on corporations and human rights should, preferably, in the absence of a consensus, be based on processes with the active participation of businesses. At least, as long as the legislation is intended to be created in concert with the development of social responsibility practices that are unrelated to the self-interest of companies, a development towards which a system of sanctions that is externally imposed and potentially viewed as unfair by businesses will have little to contribute.

Second, it is worth noting that the article makes no distinction between the countless ways in which respect for human rights by companies can be legally required. In addition to straightforward reparations for the victims of violations, human rights observance can be achieved coercively, for example, as a condition for obtaining aid from financing institutions such as the World Bank or by imposing trade restrictions (KINLEY; TADAKI, 2004, p. 999-1015). Although a conviction to make reparations for damages is comparable, monetarily speaking, to a denial of financing, the impact of either on the motivation of companies may differ. It is recommended, therefore, in the future, to consider the implications of research on the consequences of sanctions in relation to each of the various ways in which a horizontal effect of human rights can occur.

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## RESUMO

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O artigo trata da sujeição das corporações às normas de direitos humanos, a chamada “eficácia horizontal” desses direitos. Mais particularmente, tem em vista a controvérsia entre voluntaristas e obrigacionistas sobre a melhor maneira de prevenir abusos a direitos humanos relacionados à atividade empresarial. Baseando-se em trabalhos sobre o efeito solapador (*undermining effect*) de sanções, o texto discorre sobre o risco de verificar-se tal efeito caso se procure promover o respeito aos direitos humanos da maneira defendida pelos obrigacionistas, isto é, pela via regulatória. Considera, também, a plausibilidade de um análogo efeito solapador sobre as motivações de agentes – como ONGs, consumidores, trabalhadores e investidores – graças aos quais a atuação corporativa se vê forçada, hoje em dia, à observância de certos limites.

## PALAVRAS-CHAVE

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Direitos humanos – Corporações – Voluntarismo – Pacto Global – Regulação

## RESUMEN

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El presente artículo trata sobre la sujeción de las corporaciones a las normas de derechos humanos, lo que se denomina como “eficacia horizontal” de esos derechos. Principalmente, analiza la controversia entre voluntaristas y obligacionistas en torno a la mejor forma de prevenir abusos a los derechos humanos, relacionados con la actividad empresarial. Basándose en trabajos sobre el efecto de socavamiento (*undermining effect*) de las sanciones, el texto discurre sobre el riesgo de verificar dicho efecto, cuando se busca promover el respeto de los derechos humanos de la manera defendida por los obligacionistas, o sea, por la vía regulatoria. Considera, también, la plausibilidad de un efecto de socavamiento análogo, sobre las motivaciones de los agentes – como ONG, consumidores, trabajadores e inversores – gracias a los cuales el accionar corporativo se ve forzado, hoy en día, a la observancia de ciertos límites.

## PALABRAS CLAVE

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Derechos Humanos – Corporaciones – Voluntarismo – Pacto Global – Regulación



#### DENISE DORA

Denise Dora is a human rights activist and lawyer. She graduated with a degree in law from the Federal University of Rio Grande do Sul, received a Master's Degree in International Human Rights Law from the University of Essex, England, and another in History, Politics and Cultural Heritage at the Center for Research and Documentation of the Getúlio Vargas Foundation, Rio de Janeiro. She was founder and CEO of Themis - Legal Assistance and Gender

Studies, a feminist organization that works for the democratization of justice and created the program in Brazil Lawyer Advocates for the People. Between 2000 and 2011, she was responsible for the Ford Foundation's Human Rights Program in Brazil.



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## INTERVIEW WITH DENISE DORA

By Conectas Human Rights.  
Interview conducted in July 2011.  
Original in Portuguese. Translated by Eric Lockwood.

*How would you describe the landscape of civil society organizations working on human rights in Brazil today? In your view, what has changed both in its mode of action as well as the results of the last decade? What do you see that is new in the human rights movement? What is changing?*

It is important to recognize that there is a strong human rights movement in Brazil today, which has been growing since the 1970's, and more intensely during the process of democratization since the late 80's. It is a diverse movement with local organizations, volunteer activism, commissions, trade unions, associations, networks, state and local government councils, as well as nongovernmental organizations and institutes that monitor governments at national and international forums. There is a mosaic of actions, ranging from grassroots social movements to international litigation. This is rare, interesting and important. There has been a historic struggle for social rights in Brazil - the struggle for labor rights and immigrant rights are good examples - that created a foundation upon which individuals and organizations began to build the contemporary human rights movement during the post-1964 period. This period saw the prevalence of human rights commissions throughout the country, as well as ownership of the idea of "I am a human rights activist" by many groups.

The new human rights organizations are thus born in this fertile environment. There was a first generation of organizations that came into existence during the 1980's, the pioneer of which was perhaps the Pará Society for Human Rights (created in 1979), and the Movement for Justice and Human Rights in Porto Alegre, followed by the Office of People's Counsel (GAJOP), the Center for the Study of Violence at the University of São Paulo (NEV/USP) and the National Human Rights Movement in the late 1980's. These groups started to meet victims of human rights violations, file complaints, propose public policies and monitor state and federal governments in their actions. Only in 1992 did Brazil finally ratify the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights, committing itself to engage with the international human rights system more effectively. In the 1990s, there was strong legal and institutional development in the country upon the ratification of major international treaties and the

creation of the National Secretariat of Human Rights and various state bodies. It was a rich and interesting moment, but still very focused on the Brazilian domestic scene, and on the problems in Brazil and Brazilian society.

Since 2000, the trend has been the appearance of new human rights organizations such as Global Justice, Conectas Human Rights, the “Terra de Direitos” organization, the International Human Rights Program of GAJOP and the Pará Society for Human Rights (SDDH). These organizations rethink Brazil’s situation in the global context, and how to work on human rights in Brazil, connecting themselves with the new international geopolitical order. It was this organizational trend that I followed closely, saw grow, expand and succeed in the last 10 years. I believe that, in addition to maintaining the rich grassroots human rights movement in Brazil, there was a need that you [Conectas], among other organizations, came to fill, which is precisely the idea of thinking about Brazil in the world in order to show that Brazil has something to offer and also to highlight the ways in which it can improve.

*As human rights organizations face the enormous challenge of measuring and proving the effectiveness of their work, what tools do you think are most useful?*

I believe that outcome indicators depend on what the organization itself proposes to accomplish. The first step is for organizations to discuss this internally, understand clearly what they want to achieve and the possible outcomes of their actions. Having the ambition to eradicate violations of human rights is critical, but it requires knowing with some precision what the process entails and what steps should be taken. I believe that organizations need to be ambitious without being voluntaristic. They must have a strategic objective, and an action plan with concrete indicators. This is the tool to assess your progress and setbacks in your work; often in my experience at the Ford Foundation, I monitored projects with ambitious goals that moved forward, step by step. A good example is the “Arab Spring.” Perhaps organizations in Egypt did not have amongst their goals overthrowing a dictator, which might have seemed too bold; yet they participated in the overthrow, and foresaw this possibility as a result of political mobilization. And they were able to participate as key protagonists in the movement to topple the government. Our challenge is to develop indicators that measure this participation.

I think the debate about the effectiveness of the human rights movement is very important and should be part of the literature on indicators. This debate should not, however, be bureaucratic, but, rather, should be rooted in the fundamental question about the contexts in which these organizations do their work and the possibility of social change. It is only then that you can think of effectiveness and results. I think we should have this debate within the international human rights movement, since it helps us understand our place in the world of politics and transformation. Human rights organizations defend the rights of persons, on an individual or collective scale, which affects the economy, politics and culture. I think, therefore, that we should “embrace” the debate on effectiveness and results, and not avoid it.

*One of the issues raised by the topic of evaluation is how to measure over time social change or the “influence” of certain actions in public policy. In cases where several actors influence public policy, how can an organization claim authorship of some particular outcome, including, if possible, a quantification of the degree of influence over time?*



I believe again that this depends on the authorship – in other words, on what the organization thinks it can accomplish. When you aim to influence Brazilian foreign policy, the organization must work with what we call, using the jargon, the “theory of change.” In other words, the organization must have in mind how to exert such influence. How do you influence Brazilian foreign policy? It is not only by editing newsletters, or talking to the relevant authorities, nor by criticizing foreign policy in international forums. It is, rather, through a small set of levers, in which all of these actions are interconnected. I thus think the question of how we assign responsibility for change depends, again, on how we design our plan of action. To influence foreign policy, one must first understand what the foreign policy is and its problems, criticize it, speak with the competent authorities, denounce the country in international forums, produce and disseminate studies on the subject, engage other partners in the debate, propose a committee in Congress – in other words, there must be coordinated action. And then, yes, the organization can assert its influence in a given result; I argue that this measurement and affirmation of its influence depends on the goals organizations set for themselves, what they think they are capable of and how they envision carrying out their plan of action. I also think that an institution rarely effects the necessary changes by itself; being modest and recognizing the work of others is part of building a theory of change that renders visible what each political actor has to contribute.

*In dealing with funders, how should human rights organizations deal with the difficulty of measuring their influence on results?*

The world of funders is diverse, made up of people of different ideologies and political affiliations, different systems of work. Some funders may be more restricted, however. Those who work with human rights tend to understand the difficulty of measurement, and are more aware of the long-term perspective that reveals structural changes. On the other hand, an organization cannot work with the idea of the “immeasurable” in reports to funders, since for donors it is critical to understand the processes of change, and the organization’s share of responsibility in this change. Many funders build their funding strategies around the idea of coordinated action amongst a set of institutions to achieve certain strategic objectives. In the case of Conectas and Brazil’s changed voting position regarding Iran, for example, one can say that you [Conectas] worked in a context that was initially unfavorable, in light of the fact that President Lula greatly expanded his support of Iran - causing a strong national and international impact - and due to the arrival of President Dilma - who has a different perspective of human rights, you then found yourselves working in a more favorable context. This is an example of how Conectas implemented its strategy in such a context. With this information, it may not be possible to accurately measure Conectas’s share of the responsibility, for example, in changing Brazil’s vote in the Human Rights Council in relation to Iran, but it is sufficient to indicate that it played a role. Finally, I think we have to take on the challenge of trying to evaluate our actions, not simply avoid it by arguing about the difficulties of measuring the effectiveness of human rights initiatives. Organizations need to know how to evaluate their actions, and beyond that, whether they actually have an impact. Again, we must participate and contribute to initiatives concerning impact assessment.

*You are directly involved in strengthening the infrastructure of human rights in the Global South. What are your comments about this effort?*

The current system of human rights protection in the world was constructed after the Second World War and as a result of its outcome. From that context emerged the Universal Declaration of Human Rights (UDHR), the whole institutional architecture of the United Nations (UN), and then the Conference on Human Rights in Vienna in 1993, and the creation of the High Commissioner for Human Rights. The dynamics of this process was dictated by the Allies who won World War II in 1945, and while the UDHR was being developed, England and France, for example, had colonies in Africa. Therefore, there is an inherent contradiction in the system. It was designed mainly by the Europe-US alliance, and the institutional architecture follows this logic. It is no coincidence that the UN human rights institutions are located in New York and Geneva – in other words, the inclusion of the Global South was not considered at the System's inception. The 1950's and 1960's witnessed the anti-colonial revolts in African countries, which had some impact on human rights institutions, but the reality was that the colonizers were the ones who designed the institutional architecture of human rights protection. African civil society had to struggle against powerful players in the international system of human rights protection, such as France and England.

In the 1970's, in response to the Latin American dictatorships, there were some changes. The dictatorships were composed of national military elites and, although the U.S. government had a role in collaborating with some dictatorial governments (as has already been demonstrated by the research of esteemed academic institutions in the U.S.), the dictatorships were an issue amongst Latin American citizens regarding their respective governments – in other words, there was no direct confrontation with international powers, as there had been in Africa. It was possible to start building concrete international solidarity, and the dictatorships in Argentina, Brazil, and Chile slightly modified the logic of the system. I think, therefore, that it was in the 1970's and 1980's that the UN system of human rights protection truly began to be asked questions that required its engagement with citizens neither from Europe or the U.S. In Latin America, organizations began to play a major role in the system of human rights protection starting in the 1980's – free from the dictatorships, the region's countries began forming a new civil society, which began to engage international human rights mechanisms.

The creation of the UN - and the systems of human rights protection – occurred at a moment in history when there were no human rights organizations in the Southern Hemisphere, and very few groups in the Northern Hemisphere. Thus we come to the year 2000 without a solid human rights infrastructure in countries of the Southern Hemisphere. And what do I mean when I talk about infrastructure? The essential conditions for human rights protection. What are these conditions? I suggest that, in democratic regimes, there are five: (1) a legal framework of protection, (2) responsible government institutions, (3) strong human rights organizations (4) and academic and technical human rights expertise, and (5) sustainability and communication. It's as if you are building a bridge. To cross a river, you must have a good technical understanding, a construction plan, appropriate materials, beams, cement, and laborers. A bridge is a piece of infrastructure that enables the movement of persons,

which opens paths. Infrastructural conditions are, to me, those that allow a certain discourse or activity to take place. In Brazil, we didn't have solid organizations. We had no working legal framework before the 1990's. We had no education, research and knowledge about human rights. We did not have recurring funding, only that of international donors. Did we overcome this obstacle? Not entirely, I would say, but we are building the infrastructure.

*What have the advances been in recent years in creating a human rights infrastructure in Brazil?*

First, we accomplished almost all of our goals regarding the legal framework. Brazil has ratified all of the international treaties, the Constitution of 1988 affirms human rights, the country has its National Plan for Human Rights -as the Vienna Conference recommended- and a National Secretariat for Human Rights. I think, regarding the legal and institutional dimension, one can say that Brazil is meeting the challenge, which is very important, because having a legal basis to act brings great stability to human rights organizations. Consider the countries where international conventions were not ratified, nor were treaties, and in which human rights are not protected in the constitutions: the challenges to action are far greater. In Brazil, in contrast, the terrain is solid, which provides confidence for organizations to carry out their work.

Second, I believe that progress has been made on the issue of the information and knowledge available. In the last decade, several undergraduate and graduate programs have incorporated human rights courses. Today there are at least five good Masters and PhD programs in human rights in Brazil. There is a wide range of trainings, workshops, seminars, publications on human rights, books, and booklets (produced by the government as well as within civil society and academia). Is it enough? I think not. We are living through the first wave, which is about disseminating information rather than knowledge creation, but that's how it is – it's a process. Libraries have begun to have books on the subject. There are scholars of the subject. Today there is a national association, the National Association of Human Rights, Research and Graduate Studies (ANDHEP). This is infrastructure. You go to a library and find a book on human rights. This is fundamental.

Third, I believe that there is a very important development amongst organizations, as I mentioned earlier. There is a new generation of organizations that were established or reshaped in the last decade that will deal with violations of human rights, not only participating in the internal debate in the country, but also in the institutional architecture of the United Nations, through complaints, actions and international litigation. There has been the creation of national funds and foundations for human rights, such as the Brazil Human Rights Fund, which could contribute to long-term sustainability. Internationally, organizations have begun to act in a non-compliant fashion, challenging the existing geopolitical UN policies, influencing the debate of the Human Rights Commission, and interacting with organizations in other countries and continents. New networks of collaboration were created between countries of the South, which also requires more skilled communication. There is a clear development of infrastructure and of operational capacity to defend and promote human rights in Brazil.

*What are the remaining challenges in the field?*

There are several. Speaking specifically about Brazil, I believe we have a challenge with regard to sustainability. Brazilian democracy is approaching its 30<sup>th</sup> anniversary and we still do not have a support base for human rights organizations in Brazilian society. Organizations still depend on international funding. The funds are new, and they are just now beginning to define their agendas. And the Brazilian government, in turn, is still learning to deal with civil society, and needs to better define its procedures. I think, for example, that the Human Rights Secretariat should establish a public mechanism to regularly fund the activities of civil society. This is a great challenge. The government is responsible for public policy in this area but cannot address the issue of human rights alone. It has to rely on an autonomous civil society, which is critical, and it should create some independent financing instrument to support groups and organizations. A public fund, which enables organizations to receive long-term institutional funding. This is an essential component of democratic regimes that has not yet been done in Brazil and definitely needs to be done.

It is also unclear in Brazil, and in many countries around the world, what constitutes a public policy on human rights. What is a public policy? How do you build it? What are your goals? Again, what are the results? If an organization should think about its goals and results, the government has to do so to an even greater extent. Often, governments engage in solving problems that arise on a day-to-day basis, and lose sight of the structural policies that, in the long term, can create better conditions for the country. Finally, there are many obstacles still to be overcome to become a country that fully protects human rights. However, as I said earlier, I believe we have moved a bit forward in terms of infrastructure – that is, we already have some elements to “bridge the gap,” although there is still much work to be done.

In the international sphere, we are confronted with the reality that the human rights system operates mainly in the Northern Hemisphere. There are objective questions, such as how to attend a meeting of the Human Rights Council in Geneva, or a hearing of the Commission on Human Rights of Organization of American States (OAS) in Washington; one must have a visa, be able to catch a plane, have enough money; it is far easier to travel within Europe or the U.S. than from São Paulo or Johannesburg or New Delhi. There is also the issue of access to the languages of the United Nations. In sum, there are many structural challenges to the participation of activists from the South in international forums. It is important to have periodic international forums in the Global South, and to bring the UN to where a large percentage of the population lives. There are also issues of culture, diversity and differences. But this is a good challenge to face.

*Why have human rights organizations in Brazil made little use of strategic litigation and delegated some of this work to the Public Prosecutor? What are the consequences of this attitude?*

First, because there is the Public Prosecutor (MP), whereas in most other countries it does not exist. We must take advantage of the fact that we have an institution that has the constitutional authority to defend public interests with a highly skilled staff. I think it's wise of organizations to make good use of this. However, we would be naïve to think that making use of the Public Prosecutor would be sufficient. Over

the years, it has been confirmed that the institution is endowed with a heterogeneous dynamic, and it is not appropriate to submit all the public interest, human and social rights cases to the Public Prosecutor. We need to have some level of autonomy, and ability to dialogue with the MP and monitor its actions. It's in that moment that we find ourselves. We built this perception that we can on the one hand, rely on the Public Prosecutor, and also on the Public Defender, but on the other, we must not lose autonomy. Finally, we learned that we have to bring our own lawsuits as well, which require a lot of legal and political resources. In the last 20 years, both at the federal and state levels of the MP, we have seen some very interesting situations. The debate and litigation surrounding the construction of the Belo Monte plant is an example. The performance of the MP in Altamira is crucial to sustain the lawsuits. However, the engagement of local organizations, grassroots organizations and indigenous groups with the Pará Society for Human Rights, Global Justice and the Public Prosecution is what brings the case to OAS, which has a large national impact. But there is permanence in the local legal work undertaken by the MP, which has a constitutionally defined role and is a strong institution.

Second, reformulating a stand alone litigation strategy involves having human and financial resources and therefore should be a priority for the organization. Litigation, to succeed, cannot be sporadic, but must take place on a regular basis, in an organized fashion and with long-term goals. To build a reputation in this field you need to know how to litigate, have technical knowledge, win cases, regularly go to court, and be recognized in the legal community. In this way, a petition with the letterhead of the organization has some impact immediately. For this, I think it's necessary to have a very focused agenda, because it is not possible to accumulate knowledge and recognition in several areas. Organizations should define a subject or an institution, such as prisons or hospitals, and understand everything about the issue: administrative procedures, specific laws, hierarchies, decision makers, etc. and strategies to build their cases considering this expertise. I think that in Brazil, the Brazilian Institute for Consumer Defense (IDEC) is a good example of strategic and efficient advocacy. I actually harbor an intellectual suspicion about this idea of filing lawsuits occasionally. I think it does not build organizational capacity, enter into an organic dialogue with the judiciary or create a consistent body of work. The mantra of strategic litigation becomes strategic to the extent that it thinks ahead – in other words, it does not refer to sporadic action. Conectas developed an interesting strategy when it tried working on a specific topic - the Juvenile Detention Centers in São Paulo; its geographic focus and limited scope made possible a series of lawsuits. The frequency of the lawsuits shows that the organization has a strategy and will not give up easily, and can bring about institutional changes and reduce violations.

I also think that working with the judiciary in Brazil is one of the challenges of this decade. During this process of democratic consolidation we should think about the different powers, in this case, the judiciary, and reflect on what constitutes the niche of human rights organizations in this field. There is a debate about the democratization of the judiciary, which requires a type of intervention, and there is debate about the demand for human rights in the judiciary, which calls for a different type of intervention. And in both situations, there is a set of state and nonstate institutions working in this arena, with the Brazilian Bar Association (OAB), the Public Prosecutor,

Public Defenders, associations of judges, prosecutors, defense attorneys, professors, law schools, with all of whom we must act, sometimes in a complementary manner, sometimes in an alternate manner.

*Why do you think that Brazilian human rights organizations have worked little on the issue of racial equality?*

Why? I ask that question of Brazilian human rights organizations!

*How was it transitioning from going to work in a human rights organization to working for a foundation? What are the challenges of working in an international funding organization such as the Ford Foundation?*

Initially there was no problem, because I saw the Ford Foundation (FF) in Brazil as part of the field of human rights, and I thought my role would be backstage: I could contribute to other organizations in the implementation of their projects. So I tried to establish two criteria for funding, (1) to support the construction of human rights infrastructure in Brazil and (2) combating lingering discrimination in Brazil - especially racial discrimination. Along the way, I also tried to increase the network of people and organizations supported by FF, and not restrict it to the set of more traditional human rights actors in Brazil. Over time, it was evident how important the internal debates at the FF were at the international level, both to increase resources for Brazil as well as to dialogue about the various lines of funding and priorities in the area of human rights.

There are also challenges of working in an organization of international funding, in fact, a North American funding organization. The Ford Foundation, like other foundations, was created in the 1930's, in the United States, at a time of the expansion of industrialization, as part of a strategy by the economic elites to reduce poverty and inequality. These foundations also ended up supporting the agenda of international cooperation by the United States. In this way, for example, during the Carter administration, the FF played a significant role in the fight against dictatorships in Latin America; under Bush, the FF had to deal with the issues involving the Durban Conference. However, the Ford Foundation is the only philanthropic organization that has had offices around the world since the 1950's, rounding out local teams, hiring people to manage donations and offices, which internally creates a strong cross-cultural dialogue. During these years I had the opportunity to learn from my colleagues in various parts of the world about their local challenges, and how they went about constructing more just societies. This is a unique lesson, and for this reason as well I support the global dimension of our human rights actions.

## About Conectas

*How do you evaluate the course of these first ten years at Conectas?*

I think it has been a journey of successes. It was an organization founded with a great ambition, which was to shake up the logic of South-South and North-South, at a time when this was not an obvious question and, fundamentally, the "how-to" was not apparent. I think Conectas combines great ambition with the political capacity of its



founders, directors and staff in a truly impressive way. I understand political capacity as how to think, develop strategies step by step, develop activities, etc. Another important point is that Conectas is a cosmopolitan organization, and not provincial. It has always counted on people of different nationalities, different faiths, such as Malak Poppovic, Juana Kweitel, Scott Dupree, Nathalie Nunes, and foreign interns. This is also part of the organization's strategy. I believe that Conectas is an organization that has had and continues to enjoy much success, as it has elements of renewal and innovation. The current transition process is exemplary in this regard. It has been mature, generous and professional. You worked with an outside consultant and engaged members of the Advisory Board, which is a lesson to be shared with other organizations.

Returning to the theme of effectiveness and indicators, I think Conectas can objectively assess its trajectory, based on what was proposed: to create a network of South-South activists and academics. I think this was accomplished: the International Human Rights Colloquium since 2001, the Sur Journal in its 15th edition, the project of Foreign Policy and Human Rights; there is an increase in the ability of many organizations in the Global South to work with the UN system. In short, there are many concrete data. There is also dialogue with human rights organizations like Amnesty International and Human Rights Watch, which redefines the role of organizations in the Global South in the international sphere. I think that there is also work of local and national relevance, and the relationships formed with Brazilian organizations. It is important to value local partnerships, listen to other organizations, and not be self-involved. The new generation taking the reins of Conectas has inherited an important lesson; it is open and interested in learning. This is very important to understanding the success of Conectas.

*Conectas was founded with the goal of strengthening the human rights movement in the Global South. Do you still think this perspective is relevant?*

I'm thinking about these new global movements, and have not yet fully formed opinions, just impressions. In terms of South-South, North-South and "global" logics, I tend to think that ten years is little time to effect change, and that we should continue working with South-South logic. Why? Because the words and concepts have meaning and "global" does not necessarily include the "South." The concept of global can dilute the concept of South, and until we change the concept of what really is global, I think it is important to invest in South-South logic. The organizations of the North have a very important role in designing the system of human rights protection, in international denunciations, in the capacity to reach authoritarian countries, in situations of war. These organizations are essential, but are part of the system of human rights established in the North; in other words, they are linked to this narrative, story and context. Ultimately, they are important and have great value, but simply were not founded and developed in the countries of the Global South, with all the problems that plague them. I don't think there is a dispute here; there is the obvious issue that to produce the necessary changes in Latin America, Africa and Asia require strong organizations in their respective countries. Therefore, rethinking the global infrastructure of human rights means making sure that there is institutional capacity and resources in the countries of the Global South, in light of its great challenges. I think there is still a long road to travel before the inequality between human rights organizations in the world can be reduced, and I continue to defend "affirmative action."



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#### ABSTRACT

Over the last few years, the issue of the execution of judgments from the European Court of Human Rights by Russia has gained pivotal importance, not only for Russia itself, but also for the whole European human rights system more generally. In this article, the authors analyse various challenges that Russia faces with regard to the execution of the Court's judgments as they concern both individual and general measures, as well as the country's achievements in this respect. In particular, the authors examine what has been described in the press as a skirmish between the Strasbourg Court and the Constitutional Court of Russia.

Original in English.

Received in August 2011. Accepted in October 2011.

#### KEYWORDS

European Court of Human Rights – Enforcement of ECtHR judgments – Russia



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# ENFORCEMENT OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RUSSIA: RECENT DEVELOPMENTS AND CURRENT CHALLENGES

Maria Issaeva, Irina Sergeeva and Maria Suchkova\*

## 1 Introduction

Over the last few years, the issue of Russia's execution of judgments from the European Court of Human Rights (the "Court" or the "ECtHR") has gained pivotal importance not only for Russia itself but also, more generally, for the whole system of human rights protection under the auspices of the Council of Europe. Applications submitted to the Court against Russia make up a large share of the Court's caseload. The survival of the European human rights system, which is already facing a grave crisis due to the overload of the Court, to a great degree, depends on a decrease in the number of applications coming to the Court. This can be most efficiently achieved through the prompt and full execution of judgments that point at systemic domestic problems.

At the same time, a debate on the interplay of the Russian national legal order and the Convention (ECHR) system has recently arisen in the Russian public and legal domain. A legislative bill was proposed granting the Russian Constitutional Court powers to hold that any law the application of which was found by the ECtHR to violate the Convention in a case against Russia, is nevertheless compliant with the Russian Constitution. The bill envisages (so appears to be the perception of the bill's authors) that the State is not therefore bound to change the impugned law. This debate, based to a large extent on the apparent strengthening of the sovereignty principle in the political discourse, is similar to processes taking place in some other European countries. For example, the United Kingdom's parliament

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\*The views expressed by the authors in this article are their own, and do not reflect the opinion of Thre-fold Legal Advisors, its clients or the European Court of Human Rights.

has for several years been reluctant to implement the ECtRH judgment in the case of *Hirst v. the United Kingdom* (EUROPEAN COURT OF HUMAN RIGHTS, 2005) in which the Court found that a blanket ban on prisoners' voting rights was in violation of the Convention.

The Court is due to deliver judgments in several politically sensitive cases, like the judgment on compensation in recently decided *Yukos v. Russia* (EUROPEAN COURT OF HUMAN RIGHTS, 2009c), and two interstate cases, *Georgia v. Russia (nos. 1 and 2)* (EUROPEAN COURT OF HUMAN RIGHTS, 2009d; 2010b). This only adds to concerns about the future of Russia's execution of the Court's judgments.

Finally, from a standpoint of studying the effects of international law on domestic legal systems, it is crucial to examine how international human rights norms are being implemented in countries with a relatively recent history of democracy and a fragile concept of the rule of law, such as Russia.

The authors will give a brief overview of the approach of the ECtHR to remedies and the framework of supervision of enforcement of its judgments by Member States of the Council of Europe. They will subsequently examine the particular problems that Russia faces with regard to the execution of ECtHR judgments, both as concerns individual and general measures as well as the country's achievements in this respect.

## 2 General remarks on the enforcement of ECtHR judgments in Russia

Before discussing issues specific to the Russian context, several general remarks regarding the system of execution of ECtHR judgments should be made.

According to Article 46(1) of the Convention, Member States of the Council of Europe undertake to "abide by the final judgments of the Court in any case to which they are parties." The legally binding nature of the Court's judgments and the developed machinery of enforcement supervision is a unique feature of European human rights. The Member States of the Council of Europe have, in principle, three obligations following an adverse ruling from the Court: (1) to make payment of compensation, if awarded; (2) if necessary, to take further individual measures in favour of the applicant, that is to put a stop to the violation found by the Court and to place the applicant, as far as possible, into the situation existing before the breach (*restitutio in integrum*), (EUROPEAN COURT OF HUMAN RIGHTS, *Akdivar v. Turkey* (Article 50), 1998, para. 47); and (3) to take measures of a general character in order to ensure non-repetition of similar violations in the future (EUROPEAN COURT OF HUMAN RIGHTS, *Broniowski v. Poland*, 2004, para. 193).

As discussed in more detail below, individual measures may entail, for example, a re-examination of the applicant's case by domestic courts, lifting restrictive measures imposed in violation of the Convention, taking positive administrative steps to enable the full enjoyment of rights by the applicant, releasing the applicant from custody, etc. General measures may not be required in cases where a violation found by the Court is of an isolated or exceptional nature (LAMBERT-ABDELGAWAD, 2008, p. 27). However, where a violation is rooted in deficiencies within the domestic legal order which have the potential of affecting

a large number of persons, the State is required to engage in legislative or policy reform or take other measures to eliminate such a problem and its effects.

The ECtHR system's approach to determining the scope and content of the remedial measures required, following a Convention violation finding, is different to that adopted by another major regional human rights system: namely the Inter-American Court of Human Rights.<sup>1</sup> Relying on the principle of subsidiarity, under which the ECHR is subsidiary to domestic legal orders, the Court has traditionally been reluctant to specify necessary remedial measures other than compensation, in its judgments.<sup>2</sup> This shifts the determination of the particular content of enforcement measures to the Member States, supervised and assisted by the Committee of Ministers (CoM) and, thus, to the political arena.

From an effective execution of judgments standpoint, the Court has often been criticised by other Council of Europe bodies and by academics for this reluctance to specify the remedial measures necessitated by a violation (COUNCIL OF EUROPE, 2000b, para. 5). For example, Steven Greer indicates that it is greatly important that the Court identifies precisely what steps need to be undertaken to comply with its judgments. This is because, if it were to do so, (a) enforcement would be less open to political negotiation within the CoM; (b) it would be easier to monitor execution objectively; and (c) a failure to comply effectively is easier to enforce through the national legal process as an authoritatively confirmed violation (GREER, 2006, p. 160-161).

However, several arguments can be made in support of a different standpoint. The approach to the question of whether remedial measures should be identified in a judgment may differ between individual and general measures. While, as indicated above, the individual measures required to remedy a violation are in many cases straightforward, the remedial measures ensuring non-repetition of violations may require comprehensive reforms. At times, such reforms may not be limited to legislative change, but may also involve, for example, changes in administrative practice, public opinion or the attitudes of State officials to a particular practice. Defining such measures is a lengthy and difficult task that may only be accomplished through a dialogue between various stakeholders (governmental and non-governmental) on both national and international levels. It appears that international judicial proceedings are not a proper forum for such a dialogue. As to the pilot judgment procedure,<sup>3</sup> concern has been expressed that dealing with a complex systemic problem on the basis of a single case may not, in certain situations, allow for an analysis of all aspects of that problem. This runs the risk of inadequate guidance provision on remedial measures to Member States. Moreover, a proper analysis of the factors influencing the underlying problem, and an assessment of how best to eliminate the negative ones, is a lengthy and costly process. This may be difficult for the Court (already limited in resources and struggling to maintain the consistency and coherence of its case-law) to execute in every case.

A final argument for determining the content of general measures through political, rather than judicial, means is that the political process may be instrumental in creating (through dialogue and cooperation with the Committee

of Ministers) a sense of ownership of the measures needed to comply with the judgment at the domestic level. Conversely, imposing measures specified in the Court's judgment on domestic authorities may produce the opposite effect, leading to a rejection of such measures and provoking arguments about the Court's failure to understand the country's politico-legal context. The latter scenario may prejudice the Court's authority.

Turning to the enforcement framework existing in the Council of Europe, Article 46(2) of the Convention provides the Committee of Ministers with powers to supervise the execution of the Court's judgments by States. Generally, for each case (or group of similar cases) the Committee examines the remedial measures suggested by the State, discusses the issue during special human rights meetings of delegates from all Member States, and adopts a final resolution once it is satisfied that the judgment in question is complied with. The Committee has recently decided to engage in more intensive enforcement supervision for particularly important judgments, such as those revealing a complex and systemic problem within the legal system of a Member State, or those requiring urgent individual measures to prevent further harms to the applicant (COUNCIL OF EUROPE, 2011b). This enhanced supervision implies a more proactive approach on the part of the Committee in assisting States to identify the content of remedial measures required and, where necessary, putting more pressure on the State concerned to comply with an adverse judgment swiftly.

Russia ratified the Convention and accepted jurisdiction of the Court on 5 May 1998. Since then the Court has delivered over a thousand judgments finding at least one violation of the Convention by the Russian State (COUNCIL OF EUROPE, 2011a). For the past several years Russia remains one of the principal contributors to the caseload of the Court,<sup>4</sup> along with Turkey, Ukraine and Romania (COUNCIL OF EUROPE, 2010a). Importantly, many applications to the Court stem from unresolved systemic or structural problems existing in Russian law and/or policy. These include, *inter alia*, violations of the principle of legal certainty through the supervisory review of civil and criminal cases; delayed enforcement of domestic judgments on social security payments to be made from the budget; harsh conditions of detention amounting to inhuman or degrading treatment; and lack of effective investigation into cases of police brutality. Russia's full and swift compliance with the Court's judgments is of pivotal importance not only to ensuring the enjoyment of the rights guaranteed under the Convention to anyone within the jurisdiction of this State, but also to alleviating the crisis currently facing the Convention system and to securing its effective functioning in the future.

While Russia has a decent record of making compensation payments within the deadlines set by the Court, and also complies with the requirement to pay default interest where delay has occurred (COUNCIL OF EUROPE, 2011b), its implementation of individual and, especially, general measures has been subject to criticism. For example, in the most recent report on implementation from the special rapporteur of the Parliamentary Assembly of the Council of Europe, Russia is listed among those States facing substantial implementation problems (COUNCIL OF EUROPE, 2010f).



The following two sections of this article examine the challenges to and achievements of the enforcement of ECtHR judgments by the Russian authorities as concerns individual and general measures, respectively.

### 3 The implementation of individual measures: the re-opening of domestic proceedings

One of the challenges to the implementation of individual measures in Russia can be found in the process of re-examination of national court cases.

As outlined above, the purpose of individual measures is to achieve *restitutio in integrum* (HARRIS; O'BOYLE; WARBRICK, 2009, p. 875). The re-examination or re-opening of court proceedings is an important means "to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention," (COUNCIL OF EUROPE, 2006b). According to Recommendation Rec(2000)2 of the Committee of Ministers, the re-opening of court proceedings "has proved the most efficient, if not the only, means of achieving *restitutio in integrum*," in particular, where:

- (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and*
  - (ii) the judgment of the Court leads to the conclusion that*
    - (a) the impugned domestic decision is on the merits contrary to the Convention, or*
    - (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.*
- (COUNCIL OF EUROPE, 2000a).

It is clear that the enforcement mechanism under the Convention can work effectively only where the Member States' laws provide for the re-examination of individual cases in order to remedy the violations found by the ECtHR.

In Russia, the re-opening of court proceedings is governed by three different codes of procedure. Generally speaking, the Russian system of courts includes constitutional courts, courts of general jurisdiction and commercial courts.<sup>5</sup> Constitutional courts (or charter courts, as they are named in some of the constituent entities, or regions, of Russia) decide whether various laws and regulations comply with the Constitution of the Russian Federation or, depending on jurisdiction of a specific court, the Constitution (Charter) of Russia's constituent entity. Courts of general jurisdiction hear all criminal disputes and civil disputes in which at least one of the parties is a natural person, unless a dispute is specifically referred to the jurisdiction of a commercial court. Commercial courts hear commercial cases, specifically economic disputes between parties that are legal entities or individual entrepreneurs. The procedure in courts of general jurisdiction is governed by the Civil Procedure Code and the Criminal Procedure Code, whereas the procedure in commercial courts is governed by the Commercial Procedure Code.

Although the re-opening of different types of court proceedings has certain

common features, re-opening further to an ECtHR judgment is not regulated in a uniform manner. Most importantly, unlike the Commercial Procedure Code and the Criminal Procedure Code, the Civil Procedure Code does not expressly provide a ground for the re-opening a case on the basis of an ECtHR judgment. As a result, the Russian courts had been dismissing requests to re-open court proceedings, until the matter was raised by three applicants in the Constitutional Court.

In the cases of two of the applicants, the ECtHR found *inter alia* violations of Article 6(1) of the Convention in connection with a lack of legal certainty in quashing judgments relating to the applicants before domestic courts by way of supervisory review (*nadzor*) (EUROPEAN COURT OF HUMAN RIGHTS, *Kot v. Russia*, 2007; EUROPEAN COURT OF HUMAN RIGHTS, *Kulkov and others v. Russia*, 2009a). Supervisory review is a procedure exercised by higher courts for quashing or altering judicial decisions that have become legally binding. It should be noted that the Russian supervisory review procedure in civil proceedings has long been a matter of concern for the ECtHR and the Committee of Ministers. Russia has been recommended “to give priority to the reform of civil procedure” to restrict the use of the supervisory review procedure “through stricter time-limits for *nadzor* applications and limitation of permissible grounds for this procedure so as to encompass only the most serious violations of the law,” as well as limitation of “the number of successive applications for supervisory review that may be lodged in the same case” amongst others (COUNCIL OF EUROPE, 2006a).

In the third applicant’s case, the lay judges who, along with a professional judge, heard the applicant’s case in the national court, were appointed in violation of applicable law. As a result, the ECtHR found a violation of Article 6(1) of the Convention in light of the fact that the composition of the bench could not have been regarded as a “tribunal established by law” (EUROPEAN COURT OF HUMAN RIGHTS, *Fedotova v. Russia*, 2006).

In view of the shortcomings found in national proceedings by the ECtHR in these cases, they appear to fall in the category of court proceedings where a re-examination would be justified. However, the Russian courts dismissed the applicants’ requests by reference to a lack of express provision in the Civil Procedure Code to allow for a re-opening to remedy ECHR violations.

On 26 February 2010, the Constitutional Court issued a judgment finding that Russia’s obligations to enforce ECtHR judgments under the Convention include the adoption of individual and general measures, where required (RUSSIA, 2010c). A person whose rights were found by the ECtHR to be breached should have an opportunity to have his or her case re-examined by the national courts. Therefore, the lack of a provision in the Civil Procedure Code could not justify the refusal to re-open proceedings, especially considering that the Commercial Procedure Code did provide for the possibility of such a re-opening in commercial proceedings. There is no objective reason for the discrepancies between the Commercial Procedure Code and the Civil Procedure Code in this respect. The courts of general jurisdiction should have applied relevant provisions of the Commercial Procedure Code by analogy when deciding on the issue of re-opening proceedings.

Furthermore, the Constitutional Court stated that the implementation of national procedures ensuring that national judicial decisions were re-examined in view of violations of the Convention would be an appropriate general measure in this situation. Therefore, the Civil Procedure Code should be amended accordingly. A bill amending the Civil Procedure Code was submitted to the State Duma shortly after this ruling (RUSSIA, 2010b). Regrettably, this bill has not yet been adopted.

However, there is yet another concern connected to the somewhat restrictive wording of the suggested amendment in the bill (RUSSIA, 2010b). The wording of the amendment is based on the similar wording used in the Commercial Procedure Code. According to this provision, the re-opening of court proceedings is allowed when the application to the ECtHR and the Convention violation directly arises out of the domestic case that is to be re-examined.

It follows from the clarifications of the Supreme Commercial Court, that an application for review of a court decision based on an ECtHR judgment may be filed with a competent commercial court by a person who participated in the relevant domestic proceedings or any other person whose rights and/or obligations were affected by the relevant court decision (RUSSIA, 2007).

On its face, the existing legislative formulation appears to be sufficient to remedy violations of the Convention identified by the ECtHR. However, there is a risk that only rather straightforward situations would be covered. For example, some major disputes can be complex involving various interrelated court proceedings. An attempt to re-open any of those proceedings further to the delivery of an ECtHR judgment might prove to be problematic in light of the requirement for a strict connection between the ECtHR judgment and national proceedings. This concern is supported by court practice. There are not many reported cases of commercial courts that address the issue of the re-opening of proceedings further to an ECtHR judgment. However, available court practice shows that Russian commercial courts are somewhat reluctant to re-open the proceedings on that ground (RUSSIA, 2008b, 2009c). Nevertheless, the Constitutional Court's judgment and the Russian authorities' willingness to follow the recommendations of the Committee of Ministers is generally a very welcome development.

#### **4 The implementation of general measures**

As noted above, the aim of a general measure is to ensure non-repetition of similar violations by a Member State in the future. Thus, any general measure required from a State is most likely to entail the need to amend its domestic legislation or adopt a complex of other measures of a general character in order to eliminate a particular problem. Overall, the Russian authorities have made genuine attempts to comply with most ECtHR judgments relating to general measures as well as with recommendations from the Committee of Ministers. However, a recent disagreement between the ECtHR and the Russian Constitutional Court has posed one of the biggest challenges to the whole system of enforcement of ECtHR judgments with respect to Russia. Furthermore, as the Russian example vividly

shows, elimination of legislative deficiencies in many instances does not mean elimination of a systemic problem, as such problems are often rooted in entrenched day-to-day practices of Russian state authorities.

In this section of the article, the authors first assess the mechanisms and procedures that exist in Russia to ensure the execution of judgments as concerns general measures. Examples of cases in which general measures have been successfully implemented will then be analysed. Finally, the recent tensions between the Constitutional Court and the ECtHR are examined and more problematic instances of implementation are discussed.

#### *4.1 Procedures and mechanisms for the implementation of general measures*

One area of concern, regarding the enforcement of general measures in Russia, are the procedures and mechanisms within the executive branch and the parliament for the effective and swift implementation of reforms necessary to comply with adverse judgments of the Court.

In 2008, the Committee of Ministers recommended that Member States set up bodies (or appoint officials) that would coordinate enforcement processes; create appropriate mechanisms for establishing dialogue and transmission of information between the Committee and domestic authorities; and develop effective synergies between various authorities at the national level to ensure enforcement of the Court's judgments (COUNCIL OF EUROPE, 2008a). Similarly, the Parliamentary Assembly has on numerous occasions indicated that national parliaments have great potential to ensure that the judgments of the Court are implemented. They may do so by exercising parliamentary scrutiny over the actions of the executive in this respect and putting pressure on government where it fails to act. Moreover, they can initiate legislative reform where it is necessary to comply with judgments, and systematically verify the compatibility of draft and existing legislation with Convention norms. To that end, the Assembly recommends that parliaments establish "structures that would permit the mainstreaming and rigorous supervision of their international human rights obligations" (COUNCIL OF EUROPE, 2011c, para.6.6).

In Russia, a coordinating role is entrusted to the Office of the Agent of the Government before the Court, which is a division of the Ministry of Justice (MoJ). Its functions include making recommendations for the improvement of Russian legislation and practice, and drafting legislative bills where necessary, as well as ensuring cooperation between various State authorities for the enforcement of the Court's judgments (RUSSIA, 1998). However, in practice this office, which is also tasked with representing Russia in all cases before the Court and ensuring that just satisfaction is paid in good time, lacks the resources and political weight to engage in a comprehensive coordination of the execution of judgments as concerns general measures. It also appears to lack enforceable powers to ensure meaningful cooperation between all the relevant State authorities and to put pressure on those offices or officials unwilling to cooperate.

As for parliamentary involvement in the enforcement process, according to a recent report issued by the Parliamentary Assembly, Russia belongs to a group of countries that have adopted a horizontal approach to the way its parliament deals with human rights problems. Thus, there is no special committee with a specific human rights mandate within the parliament, and human rights are implied to be a cross-cutting issue that should be taken into account by every committee (COUNCIL OF EUROPE, 2011c, para. 28). However, the role of the Russian parliament in the execution of the Court's judgments remains underdeveloped. It appears to be limited to the adoption of legislation intended to remedy violations of the Convention when such legislation is proposed. Although there is a special centre within the Council of the Federation (the upper chamber of the parliament) tasked with monitoring legislation and its application with a focus on human rights issues, it has no specific mandate to take into account the judgments of the Court while performing its functions (RUSSIAN, 2008a). Furthermore, Russia's compliance with its international human rights obligations rarely becomes a subject of discussion during the annual reporting sessions of the Government before the parliament.<sup>6</sup> During the most recent such session, held in April 2011, the issue of enforcement of the Court's judgments was not raised at all (PUTIN, 2011).

This paper is not intended to provide a detailed analysis of the root-causes for the lack of parliamentary involvement in the execution process. Nevertheless, two factors contributing to this situation should be highlighted. These are namely, the lack of a procedure whereby the parliament would regularly be informed of adverse ECtHR judgments and the enforcement requirements of the Committee of Ministers; and the lack of a specific obligation on the Government to report to the parliament about its compliance with its international human rights obligations.

Finally, a recent development concerning procedures for the enforcement of judgments deserves attention. In May 2011, a Russian presidential decree, *On the monitoring of the application of law in the Russian Federation*, was adopted (RUSSIA, 2011c). It provides that one of the goals of such monitoring is to ensure the enforcement of those judgments of the ECtHR which require legislative change. Although the methodology for conducting such monitoring activities is yet to be developed, some features of the monitoring framework are already determined. The Decree provides that the MoJ will assume a coordinating role in the monitoring process: input will be sought from various State authorities (including the judiciary) as well as civil society; deadlines for the completion of monitoring should be set yearly; the MoJ will accumulate all proposals and information submitted to it and report to the President, making suggestions as to legislative or other changes required; the results of monitoring will be published.

In the authors' opinion, the Decree should be regarded as a positive development in meeting the recommendations of the Committee of Ministers discussed above as well as remedying the shortcomings of the previous system. It remains to be seen, however, what particular steps will be taken in order to implement this Decree and how effective the monitoring process will be in delivering practical results.

#### 4.2 *Speedy enforcement of domestic courts' judgments: Burdov v. Russia (no. 2)*

An issue that arose soon after Russia joined the Council of Europe is the mass non-enforcement of final domestic judgments delivered against the State and its entities due to lack of budgetary funds and the proper coordination of activities between various State bodies. This has proven to be a systemic problem, not only for Russia, but also for some other Eastern European/post-Soviet countries. Before 2009, there were sometimes hundreds of non-enforcement applications pending before the ECtHR with respect to Russia. These consistently gave rise to the finding of a violation of the right to a trial within a reasonable time (Article 6, ECHR) and the right of peaceful enjoyment of one's possessions (Article 1, Protocol No. 1 to the ECHR) (COUNCIL OF EUROPE, 2009a). While the amounts awarded under such unenforced domestic judgments could be as small as EUR 100, it took domestic authorities several years to complete their enforcement, with no compensation for such delays being guaranteed at the domestic level. As a result, the ECtHR applied the pilot judgment procedure in the case of *Burdov v. Russia (no. 2)* (EUROPEAN COURT OF HUMAN RIGHTS, 2009b). This case addressed Russia's ongoing failure to honour judgments in respect of which no effective domestic remedies were available to the parties concerned.

In its judgment of 2009, the ECtHR explicitly ordered that Russia set up such a remedy within six months from the date on which the judgment became final (by 4 November 2009) and grant "adequate and sufficient redress" by 4 May 2010 to all persons in the applicant's position in the cases lodged with the Court before the delivery of the pilot judgment (EUROPEAN COURT OF HUMAN RIGHTS, *Burdov v. Russia (no. 2)*, 2009b, para. 141, 145).

Although the deadline of 4 November 2009 indicated by the Court was eventually missed by the Russian State, at the end of 2009 the Committee of Ministers noted, with satisfaction, the "efforts deployed within the special inter-ministerial commission set up with the participation of the Presidential Administration, which resulted in the preparation of draft laws setting up a domestic remedy" and that "these draft laws were subject to consultations with the Council of Europe's Department for the execution of the judgments of the European Court" (COUNCIL OF EUROPE, 2009b).

The new Russian law on compensation, the "Law on Compensation," went into effect on 4 May 2010. This law enables claims for compensation based on a violation of the right to a fair trial, and to enforcement, within a reasonable time. It is applicable to domestic judgments, awarding any amount to be recovered from national budgets at various levels. Such claims may be brought at any time prior to the end of the enforcement proceedings but not earlier than six months after the statutory time-limit for enforcement expires, and no later than six months after the enforcement proceedings have been terminated. The compensation awarded is not dependent on the establishment of fault of any competent authorities responsible for delayed enforcement (RUSSIA, 2010a).



Those applicants who lodged their applications with the Court prior to the delivery of the judgment in *Burdov (no. 2)* obtained the right to bring proceedings under the new law within six months of its entry into force. Within the past year, the ECtHR has declared a number of cases of the same nature lodged by Russian individuals inadmissible with reference to the remedy provided for by the new Law on Compensation. The Court indicated its satisfaction with this remedy, in particular, in respect of the amounts to be awarded under the new law. However, it expressed its concern about the hypothetical situation in which the Russian State might fail to honour the new judgments:

*The Court is mindful that an issue may subsequently arise whether the new compensatory remedy would still be effective in a situation in which the defendant State authority persistently failed to honour the judgment debt notwithstanding a compensation award or even repeated awards made by domestic courts under the Compensation Act. That was indeed a hypothesis suggested by the applicants (see paragraph 14 above), but the Court does not find it appropriate to anticipate such an event, nor to decide this issue in abstracto at the present stage.*

(EUROPEAN COURT OF HUMAN RIGHTS, *Nagovitsyn and Nalgiyev v. Russia*, 2010c, para. 35)

In June 2010 the Committee of Ministers “welcomed the Russian authorities’ adoption of the reform to introduce the remedy for non-enforcement or delayed enforcement of domestic judicial decisions” and “strongly encouraged the Russian authorities, particularly the higher judicial bodies, to take any necessary steps to ensure the coherent application of the reform in accordance with the requirements of the Convention” (COUNCIL OF EUROPE, 2010b). Monitoring of the implementation of the new law is ongoing. Overall, the adoption of the Law on Compensation and the case of *Burdov (no. 2)* as a whole are an example of successful cooperation between Russia and the Convention institutions on the reform of Russian domestic legislation.

#### 4.3 Another story of success: *Shtukaturv v. Russia*

Another example of successful cooperation that is worth mentioning under the head of general measures, took place in connection with the case *Shtukaturv v. Russia* (EUROPEAN COURT OF HUMAN RIGHTS, 2008). The judgment, which became final in June 2008, concerned issues of judicial deprivation of legal capacity in the absence of the person concerned and involuntary admission to a psychiatric hospital. In finding a violation of the applicant’s right to respect for his private life (Article 8, ECtHR), the Court indicated that the standards existing in Russia in regard to this particular matter differed from those adopted at the European level:

*The Russian Civil Code distinguishes between full capacity and full incapacity, but it does not provide for any “borderline” situation other than for drug or alcohol addicts. The Court refers in this respect to the principles formulated by Recommendation*

*No. R (99) 4 of the Committee of Ministers of the Council of Europe, cited above in paragraph 59. Although these principles have no force of law for this Court, they may define a common European standard in this area. Contrary to these principles, Russian legislation did not provide for a “tailor-made response.*

(EUROPEAN COURT OF HUMAN RIGHTS, 2008).

Although there were no general measures indicated by the Court in its judgment, at the end of 2008 the Committee of Ministers noted that the relevant provisions of Russian law on the incapacity of adults had not been modified. It has requested that Russian authorities initiate reform of those provisions criticised by the Court and accelerate the process of reform concerning the placement of persons of unsound mind into psychiatric institutions (COUNCIL OF EUROPE, 2008b).

In just a few months, the Russian Constitutional Court considered an application lodged by Mr. Shtukaturov and others to challenge the compliance of the relevant provisions of Russian law with the Russian Constitution and agreed with the applicant (RUSSIA, 2009b). The said provisions were declared to be incompatible with the Russian Constitution and discontinued with immediate effect. Soon after the judgment was delivered by the Constitutional Court, relevant amendments to the legislation had been initiated by the Russian Parliament. These were finalized, and entered into force in 2011 (RUSSIA, 2011b).

The case of Shtukaturov is particularly illuminating to the role of the Russian Constitutional Court. In this case, the Constitutional Court essentially agreed with the position of the ECtRH and the Committee of Ministers. However, as we will show below, this is not always the case.

#### ***4.4 Perceived systemic clash between the European human rights system and the Russian Constitution***

The first ever case in which the European Court of Human Rights disagreed with the position of the Russian Constitutional Court is relatively recent (ZORKIN, 2010).

The ECtHR adopted its judgment in *Kostantin Markin v. Russia* on 7 October 2010 (EUROPEAN COURT OF HUMAN RIGHTS, 2010d). This judgement is still not in force as the case was referred to the Grand Chamber, which is still to deliver its judgment.<sup>7</sup>

In this case, the Court found a provision of Russian law prohibiting the granting of parental leave to military servicemen, unlike their female counterparts, to be discriminatory under Article 14 of the Convention (in combination with Article 8) (EUROPEAN COURT OF HUMAN RIGHTS, *Konstantin Markin v. Russia*, 2010d).

In this specific case, the applicant brought concurrent proceedings before the Russian Constitutional Court to challenge the compatibility of the relevant domestic provisions with the Russian Constitution, which also prohibits discrimination. However, the Constitutional Court found the existing provisions to be compatible with the Russian Constitution. In reaching its conclusion, the Constitutional Court referred to the essence of military service as:

*A special type of public service which ensures the defence of the country and the security of the State, it is therefore performed in the public interest. Persons engaged in military service exercise constitutionally important functions and therefore possess a special legal status which is based on the necessity for a citizen of the Russian Federation to perform his duty and obligation in order to protect the Fatherland.*

[...]

*Under section 11 § 13 of [the Military Service Act] parental leave is granted to female military personnel in accordance with the procedure specified in federal laws and regulations of the Russian Federation. A similar provision is contained in section 32 § 2 of the Regulations on military service, which also provides that during parental leave a servicewoman retains her position and military rank.*

[...]

*The law in force does not give a serviceman the right to three years' parental leave. Accordingly, servicemen under contract are prohibited from combining the performance of their military duties with parental leave. This prohibition is based, firstly, on the special legal status of the military, and, secondly, on the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty to defend the Fatherland.*

(RUSSIA, 2009a)

In addressing the issue of general measures in the case of Markin, the ECtHR stated as follows:

*67. It has been the Court's practice, when discovering a shortcoming in the national legal system, to identify its source in order to assist the Contracting States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments [...]. Having regard to the problem disclosed in the present case, the Court is of the opinion that general measures at national level would be desirable to ensure effective protection against discrimination in accordance with the guarantees of Article 14 of the Convention in conjunction with Article 8. In this connection, the Court would recommend that the respondent Government take measures, under the supervision of the Committee of Ministers, with a view to amending section 11 § 13 of the Military Service Act and the Regulations on military service, enacted by Presidential Decree No. 1237 on 16 September 1999, to take account of the principles enunciated in the present judgment with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned.*

(EUROPEAN COURT OF HUMAN RIGHTS, *Konstantin Markin v. Russia*, 2010d).

While, notably, the case before the ECtHR has not yet resulted in a final judgment of the Grand Chamber, the Chamber judgment of the Court has had a

significant impact on the position of Russian legislative and judicial authorities, particularly with regard to the role of the ECtHR vis-à-vis the role of the Russian Constitutional Court. This has, most recently, resulted in an ambiguous draft law whose consequences are not easy to predict.

#### **4.4.1 Reaction of Russian and Council of Europe officials to the ECtHR Chamber judgment in the case of Konstantin Markin**

The Chairman of the Russian Constitutional Court, Judge Zorkin, initiated a general discussion where he formulated “the limits to flexibility” of Russia on the international arena. He spoke widely of the primacy of the Russian Constitution (and consequently, the judgments of the Constitutional Court) over any international court’s judgments (ZORKIN, 2010). He stated: “The Strasbourg Court is competent to indicate errors in legislation to countries, but in the event where judgments of the ECtHR are directly contradictory to the Russian Constitution, the country must follow its national interests.” (ZORKIN, 2010).

Zorkin referred to the argument often adduced by the ECtHR itself to the effect that domestic authorities are better placed to understand the needs of their society. He concluded that, unlike international courts, Russia should have priority in assessing what constitutes the public interest (ZORKIN, 2010). According to the position posited by the Russian President, and discussed since October 2010 to the present (August 2011), Russia has never delegated such a portion of its sovereignty that would allow any international court to adopt decisions amending Russian law<sup>8</sup> (MEDVEDEV, 2010).

Such a position has attracted serious criticism from the Council of Europe: the Secretary General has responded to the effect that human rights enjoy priority over national law, and that any judgment of the ECtHR which identifies an incompatibility of national law with the European Convention must be modified (JAGLAND, 2011). At the same time, the Russian President has recently promised that Russia will comply even with judgments of international courts that are excessively political (MEDVEDEV, Dmitry, 2011).

#### **4.4.2 Most recent Russian legislative proposal purporting to extend the powers of the Constitutional Court**

In June 2011, the Acting Chairman of the upper house of the Russian Parliament introduced a bill that has been the subject of the most active debate in June and July 2011 (RUSSIA, 2011e).

In essence, the proposed bill imposes on all Russian courts an obligation to refer any case to the Constitutional Court if the court concludes that a law to be applied in the particular case is incompatible with the Russian Constitution. Such referrals are to be made particularly where an international human rights body has adopted a judgment stipulating the violation of an international treaty by the Russian Federation, stemming from the application of a law that does not correspond to that international treaty. Similarly, in examining any issue

on remedying a human rights violation in accordance with a judgment of an international human rights body, any Russian court must refer the case to the Constitutional Court if it concludes that such a judgment of an international body hinders the application of a law that does not contradict the Russian Constitution. Such a referral should request the Constitutional Court to confirm the compatibility of the law with the Constitution. In addition, an individual obtains the right to request the Constitutional Court to verify the compatibility of a certain legislative act with the Constitution following the adoption of a judgment by an international human rights body. This right is held by an individual who believes that such a legislative act should not be applied due to the adoption of such a judgment by an international human rights body, or conversely, should remain applicable, such a judgment notwithstanding (RUSSIA, 2011e). The bill thus implies that, hypothetically, a situation may arise whereby the Constitutional Court could declare a Russian law to be compatible with the Constitution notwithstanding an ECtHR judgment identifying it as being in violation of the Convention.

Following heated discussion on this bill in June and July 2011, the hearing of this legislative proposal was rescheduled for the autumn. There are good chances that the wording of the bill will be significantly revised; it therefore is too early to give any detailed analysis of the proposed bill. However, a number of comments may be made.

Russia has been, and remains a party to the Vienna Convention on the Law of Treaties. As such it is bound by Article 27.<sup>9</sup> No action undertaken domestically can change this provision of the Vienna Convention, which essentially means that the clash between the ECtHR and the Russian Constitutional Court is not really a clash. The two bodies function in two “parallel worlds” with the ECtHR adjudging on matters of compatibility with the Convention, and the Constitutional Court adjudging on matters of compatibility with the Russian Constitution. Furthermore, as international law has a direct application in Russia pursuant to that same Constitution (Article 15(4)), a judgment of the Constitutional Court cannot affect the binding nature of ECtHR judgments.

Certain confusion in Russian academic circles stems from the fact that the ECtHR issues judgments, that is case law, while Russia has predominantly been a civil law jurisdiction, with precedents having no significant force within its boundaries until recently. The arguments adduced by the proponents of that position would be as follows: if there is a conflict between an international treaty and domestic law (excluding the Constitution), it is indeed an international treaty that takes priority. However, if it is an inter-state judicial body that adopts a decision indicating the incompatibility of a domestic provision with an international agreement, it is necessary to additionally analyse such a decision, taking into account the priority of the Russian Constitution in the domestic legal order. This need may eventually lead to the application of domestic law rather than international law (RUSSIA, 2011d).

There is an obvious error in this reasoning. This stems from Article 19 of the European Convention, which entrusts the European Court with the function “[t]

o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto” (COUNCIL OF EUROPE, 1950). What raises concern, is that such arguments are now adduced by the State Duma, the lower house of the Russian Parliament; that is, the country’s principal legislator (RUSSIA, 2011d).

#### *4.5 Day-to-day practices: impossible solution?*

The reason that finding a proper legislative solution does not necessarily ensure compliance with Convention standards can best be illustrated by the situation within the domain of Russian criminal proceedings connected to the issue of police brutality. This is a very common problem in the Russian Federation. This area is also one of the better examples of the cooperation of the Russian authorities with the Council of Europe: the State is willing, but, unfortunately, it is not very successful.

The current Russian Criminal Procedure Code is reported to contain only one major deficiency: it does not secure access of claimants to investigations. In every other respect, the Code stands up quite well to the expectations of the European human rights institutions. However, the procedure for investigation of brutality complaints is still as badly ineffective as it was several years ago (COUNCIL OF EUROPE, 2010c). The problem thus lies within the practical domain of the day-to-day functioning of law enforcement bodies rather than within the Russian legislative set-up. In a report to the Committee of Ministers, a group of Russian NGOs has offered the following reasons for the inefficacy of investigation procedures in this regard:

- a) lack of institutional and personal independence of the investigators;*
- b) existing professional evaluation system pushing investigators to work to secure high quantitative indices at the expense of the quality of investigation;*
- c) lack of resources needed for investigators;*
- d) inefficiency of control over investigators*

(COUNCIL OF EUROPE, 2010c).

At the same time, according to the Russian authorities, who submitted a publicly available communication on this issue to the Committee of Ministers in November 2010, a number of steps were undertaken by the State in 2009/10 to ensure a higher level of professional training for members of the police, including specific steps in the area of professional ethics and discipline (COUNCIL OF EUROPE, 2010e).

Recently, the Russian government engaged in a major reform of the police service and adopted a new law, “On the Police” (RUSSIA, 2011a). However, this is once again a legislative reform, which will not necessarily entail the effective changes on the ground. Hopefully, the measures undertaken by the Russian Government in this area will be successful.



## 5 Conclusion

What can definitely be foreseen is that the Convention system will serve as a “litmus test” to the outcome of any pending reform touching upon human rights issues in Russia. If the volume of analogous cases lodged with the Court on a given matter decreases, the reform is ultimately a success. If the volume of cases does not decrease, then the reform is a failure and will require further efforts.

Considering the Convention system as a whole, one must conclude that it is the perfect tool for a country like Russia exactly for this reason: it allows any unresolved issue to bounce back and reveal itself in the practice of the ECtHR; any reform that purports to remain solely on paper therefore has no long term prospect of success. Again, for exactly this reason, the ECtHR together with the Committee of Ministers is an extremely powerful instrument. It appears to be of utmost importance that this instrument, both in its judicial and political dimension, is based on the defence and promotion of human rights and the rule of law.

Focusing specifically on Russia within the Convention system, one shall remember its long history, spanning centuries, throughout which the inherent problem of the enforcement of law domestically has always existed.<sup>10</sup>

In our view, if used wisely, the Convention mechanisms will enable Russia to do the “impossible”: to bring its legal system to the level of international standards, a feat which it has not yet been able to accomplish. However, this aim will always need to be balanced against the anxiety shown by the Russian authorities regarding the possible misuse of these powerful instruments to exert excessive political pressure.

We would like to conclude by citing one of the most recent judgments of the ECtHR in which it explicitly outlines how and to what extent the Court upholds this position and understands the need for such a balance:

*It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. (...) The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.*

(EUROPEAN COURT OF HUMAN RIGHTS,  
*Demopoulos and Others v. Turkey*, 2010a)

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## NOTES

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1. Judgments of the Inter-American Court of Human Rights provide detailed specification of the State actions required to repair harms occasioned by violations of the American Convention on Human Rights. Apart from monetary compensation, this may include, *inter alia*, symbolic measures, conducting an effective investigation into the abuses at issue and bringing the perpetrators to justice, altering existing legislation, and positive measures to ensure the non-repetition of similar violations. (CAVALLARO; BREWER, 2008, p.785).

2. However, a trend towards the Court giving indications of remedial measures required has more recently been observed, particularly since the introduction of the pilot judgment procedure.

3. According to Rule 61 of the Rules of the Court, a pilot judgment procedure may be initiated by the Court when «the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications». A judgment delivered as a result of such a procedure shall identify the nature of the problem or dysfunction at hand and indicate the remedial measures that need to be undertaken by the State concerned (EUROPEAN COURT OF HUMAN RIGHTS, 2012).

4. It should be noted, however, that most of the applications submitted against Russia (about 98%) are found by the Court to be inadmissible (EUROPEAN COURT OF HUMAN RIGHTS, 2010a, 2010b, 2010c, 2010d).

5. State commercial courts are often referred to as “arbitrazh” courts. However, it is important to distinguish State “arbitrazh” courts from arbitration and arbitral tribunals.

6. According to Article 117(1.a) of the Russian Constitution the Government shall annually present the State Duma with a report on the results of its activities. The State Duma has powers to put questions to the Government which should be addressed in such report.

7. According to Article 43 of the Convention,» [w]ithin a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber». In the rare case when such a request is accepted, the Grand Chamber decides the case afresh and delivers a new judgment. If such request is rejected, the judgment of the Chamber enters into force.

8. Article 15 of the Russian Constitution reads as follows:

“Article 15 (1) The Constitution has supreme legal force and direct effect, and is applicable throughout the entire territory of the Russian Federation. Laws and other legal acts adopted by the Russian Federation may not contravene the Constitution.

(2) Organs of state power and local self-government, officials, citizens and their associations must comply with the laws and the Constitution.

[...]

(4) The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply”. (Unofficial translation by International Constitutional Law. Available at <[http://www.servat.unibe.ch/icl/rs00000\\_.html](http://www.servat.unibe.ch/icl/rs00000_.html)>. Last accessed: 10 Aug. 2011).

9. “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (UNITED NATIONS, 1969)

10. “Of all the Eastern European nations attempting to change the structure of their societies through law, Russia faces the greatest challenges. The absence of an independent legal culture, the temptation to fall back on a system of decrees promulgated from the top, is centuries old. The legal reforms of 1864 onward attempted to initiate a counter-trend. That trend proved to be too insecurely established to survive into the brutalities, lawlessness and summary “justice” of the Civil War, of the temporary military governments of various regions and even of self-proclaimed republics during that war. The Red and White Terror led to [...] ruthless imposition of discipline in the Party, the Soviets and the Armed Forces as a necessary foundation for the exercise of power, allegedly in the interests of direct popular democracy. The tradition of perceiving law as synonymous with power and as an autocratic command or set of commands from above remained too strong. The idea that many take for granted in developed legal systems, that governments are bound by law, is only now beginning to be articulated” (ULITSKY, 1993, p. 70).



## RESUMO

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Nos últimos anos, a questão da execução das decisões da Corte Europeia de Direitos Humanos pela Rússia ganhou destaque não apenas na própria Rússia, mas também em todo o sistema de direitos humanos europeu. Neste artigo, as autoras analisam diversos desafios que a Rússia enfrenta com relação à execução das decisões judiciais da Corte, já que estas se referem tanto a medidas individuais quanto gerais, e também às conquistas do país nessa área. Em particular, as autoras examinam o que foi apresentado pela imprensa como um conflito entre a Corte de Estrasburgo e a Corte Constitucional da Rússia.

## PALAVRAS-CHAVE

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Corte Europeia de Direitos Humanos – Execução das decisões da Corte EDH – Rússia

## RESUMEN

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En los últimos años, el tema de la ejecución de las sentencias del Tribunal Europeo de Derechos Humanos por parte de Rusia adquirió una importancia central no sólo para Rusia misma sino para todo el sistema europeo de derechos humanos en general. En el presente artículo, las autoras analizan los diversos desafíos que enfrenta Rusia respecto de la ejecución de las sentencias del Tribunal en lo atinente a medidas tanto individuales como generales, y los logros del país en este sentido. En particular, las autoras examinan lo que en la prensa se ha descrito como una riña entre el Tribunal de Estrasburgo y la Corte Constitucional de Rusia.

## PALABRAS CLAVE

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Tribunal Europeo de Derechos Humanos – Ejecución de sentencias del TEDH – Rusia



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#### ABSTRACT

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The purpose of this article is to present a general overview of the implementation of the measures expressed in the 2006 judgment against Brazil in the *Damião Ximenes Lopes* case, the first Brazilian case heard by the Inter-American Court of Human Rights, and to discuss international responsibility for human rights violations. Drawing on official documents, articles and opinion pieces, this article reviews the background of the case, traces the steps taken by Brazil to comply with the judgment, and examines the consequences for the country's public mental health policy.

Original in Portuguese. Translated by Barney Whiteoak.

Received in August 2011. Approved in October 2011.

#### KEYWORDS

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Inter-American Human Rights System - Inter-American Court - Reparations – Degree of compliance – Monitoring of international recommendations.



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# THE *DAMIÃO XIMENES LOPES* CASE: CHANGES AND CHALLENGES FOLLOWING THE FIRST RULING AGAINST BRAZIL IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Cássia Maria Rosato and Ludmila Cerqueira Correia

## 1 Introduction

The subject of responsibility in international human rights law dates back to the movement for the internationalization of human rights, which emerged in the Post-War period in response to the atrocities committed during the Second World War.

Following the Universal Declaration of Human Rights in 1948, what is now known as international human rights law began to be drafted through the adoption of important human rights protection treaties of both global scope (United Nations - UN) and regional scope (European, Inter-American and African systems). The global and regional systems, inspired by the values and principles of the Universal Declaration, comprise a range of instruments for protecting human rights on the international level. It is worth noting that these systems complement each other, supplementing national protection systems in order to assure the greatest possible effectiveness in the protection and promotion of human rights.

Brazil only ratified the main human rights protection treaties once the country's democratization process had begun, in 1985. And it was with the Constitution of 1988 – which enshrines the principles of human rights and human dignity – that Brazil began to take its place on the international stage of human rights protection.

In this context, it should be pointed out that the growing internationalization of human rights evoked the designs of a universal citizenry, from which internationally assured rights and guarantees emanate. And, in this sense, it is important to emphasize that the study of international human rights protection is closely connected to the study of the international responsibility of the State.

It should be noted that international responsibility for human rights violations is important for reasserting the legality of the set of rules intended to protect individuals and assert human dignity. It should also be pointed out that the rules

for holding offending States responsible are preventative in nature, since they can avert other human rights violations from occurring, as we shall see below.

The Inter-American Human Rights System is notable in this context, given its role in the process of internationalizing the legal systems of various Latin American countries. The Inter-American Court of Human Rights has heard several cases of human rights violations that have led to important institutional changes in national justice systems. On this point, one issue that has gained prominence is the monitoring of the implementation, on the national level, of the decisions and recommendations that emanate from the international and regional human rights systems and mechanisms.

This being the case, the purpose of this article is to a) present a general overview of the implementation of the recommendations expressed in the 2006 judgment against Brazil in the *Damião Ximenes Lopes* case, the first Brazilian case heard by the Inter-American Court of Human Rights, and b) to demonstrate its repercussions on the country's public mental health policy.

## 2 Brazil and international responsibility for human rights violations

According to André de Carvalho Ramos (2004), international human rights law consists of a set of rights and abilities that guarantee the dignity of the human being and that benefit from institutionalized international guarantees.

As Flávia Piovesan points out:

*In response to the atrocities committed during the Second World War, the international community began to recognize that the protection of human rights constituted a legitimate international interest and concern. By becoming the subject of legitimate international interest, human rights have transcended and surpassed the preserve of the State or the exclusive national authority.*

(PIOVESAN, 2006, p. 4-5).

As a result of international action, human rights violations have acquired more visibility, exposing the offending State to the risk of political and moral embarrassment, which has spurred some progress in the protection of human rights. When confronted with the publicity given human rights violations, the State is practically obligated to justify its actions, and this has helped change and improve specific government policies where human rights are concerned, providing support or incentives for domestic reforms.

When a State recognizes the legitimacy of international interventions in the field of human rights and when it alters its policy on the matter in response to international pressure, the relationship between the State, its citizens, and international actors is strengthened. The international system establishes a standard of conduct for States, making it legitimate for complaints to be lodged if international obligations are disregarded. In this vein, the international framework establishes judicial safeguards, supervision, and monitoring so that States can guarantee internationally assured human rights.

By setting minimum standards to be respected by States, the international instruments for the protection of human rights have a dual impact because they are actionable in both national and international jurisdictions. On the national level, the international instruments merge with domestic law, thereby broadening, strengthening, and streamlining the human rights protection system based on the principle of the supremacy of the human being. On the international level, the international instruments establish international safeguards by holding the State responsible when internationally assured human rights are violated.

Originally, the system of international responsibility of the State used to refer only to disputes between States. However, with the evolution of international relations, a new type of dispute in international law emerged in which the injured party was no longer the State directly, but instead a citizen of the State. Therefore, according to Patrícia Galvão Ferreira (2001), the system was broadened to protect the citizens of one State against the actions of a foreign State, starting from a 1924 jurisprudence of the Permanent Court of International Justice (the predecessor of the UN International Court of Justice), which granted permission to states to champion the cause of its nationals in international courts when they could demonstrate that the injury was caused by the breach of an international norm. Still according to the author, this understanding has preceded the current international human rights protection regime:

*With the creation and ratification of international human rights treaties after the Second World War, governments radically overhauled the system of international responsibility. From this point on, international responsibility did not just protect the interests and remedy damage and injury caused by international disputes involving two States or one State against a citizen of another. Now, for the first time, international responsibility includes the State that violates an international provision that protects the rights of its own citizens.*

(FERREIRA, 2001, p. 24).

Note that the objective nature of the obligations to protect human rights makes the individual the primary concern of the State's international responsibility for human rights violations. Furthermore, André de Carvalho Ramos explains that when human rights treaties refer to the duty of the State to guarantee declared rights, they do not mention the element of "blame" to characterize the international responsibility of the State. The author states:

*The jurisprudence of international human rights protection bodies is thorough in specifying the predominance of the objective theory of the international responsibility of the State. The reason for this is the need to interpret the international human rights provisions in favor of the individual, as a result of the objective nature of these rules.*

(RAMOS, 2004, p. 92).

Blame, therefore, is immaterial. What matters is that a human rights violation is the result of the failure either by a State directly to comply with its obligations or

by persons acting with the support of the State. The basis of responsibility lies in the substantiation, pure and simple, of an action that is in breach of international law. In this vein, the same author concludes:

*The international responsibility of the State for human rights violations is, undeniably, an objective responsibility. At the heart of this institution is the duty to redress that arises each time an international rule is breached. All that is needed is proof of the causal link, the conduct and the harm itself.*

(RAMOS, 2004, p. 410).

Under international human rights law, the State has the primary responsibility for the protection of rights, while the international community bears the subsidiary responsibility, when national institutions present failures or omissions in the protection of rights. The main objective of the international safeguards, therefore, is to provoke advances in the national human rights protection systems.

It is important to point out that the Inter-American Court of Human Rights has developed consistent jurisprudence on the legal consequences of international responsibility for the violation of rights guaranteed by the American Convention on Human Rights. For example, article 63.1 of the convention contains a provision on the international responsibility of the State and the subsequent reparation for the harm caused.

Therefore, according to Patrícia Galvão Ferreira (2001), by ratifying the American Convention on Human Rights, States Parties to the Organization of American States (OAS) codified the principle of international law whereby a declaration of international responsibility generates the duty to restore the situation prior to the violation of the right, when possible, and redress the harm caused by the violation.

Finally, it is worth repeating the point made by André de Carvalho Ramos:

*The international responsibility of the State is based on the harmful consequences and the causal link between the conduct of the State and the violation of the international obligation, with no room to investigate blame or wrongdoing by the agent or agency of the State, thereby facilitating the confirmation of State responsibility and the subsequent reparations to the individual victims of the human rights violations.*

(RAMOS, 2004, p. 410).

The jurist Cançado Trindade asserts that:

*As a result of the coexistence of international protection instruments based on different legal foundations [...], all States (including those that have not ratified the general human rights treaties) are now subject to international supervision of the treatment of people under their jurisdiction.*

(CANÇADO TRINDADE, 1998, p. 83).

This renowned author also highlights that no State today is exempt from responding to allegations of human rights violations, through their acts and



omissions, before international supervisory bodies, and Brazil is no exception to this rule (CANÇADO TRINDADE, 1998).

Since the promulgation of the Federal Constitution of 1988, Brazil has ratified key international human rights treaties: the Inter-American Convention to Prevent and Punish Torture, on July 20, 1989; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, on September 28, 1989; the Convention on Children's Rights, on September 24, 1990; the International Covenant on Civil and Political Rights, on January 24, 1992; the International Covenant on Economic, Social and Cultural Rights, on January 24, 1992; the American Convention on Human Rights, on September 25, 1992; the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, on November 27, 1995; the Protocol to the American Convention regarding the Abolition of the Death Penalty, on August 13, 1996; the Protocol to the American Convention in the area of Economic, Social and Cultural Rights (San Salvador Protocol), on August 21, 1996; the Rome Statute, which created the International Criminal Court, on June 20, 2002; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, on June 28, 2002; the Optional Protocol to the Convention on Children's Rights on the Involvement of Children in Armed Conflicts, on January 27, 2004; and the Optional Protocol to the Convention on Children's Rights on the Sale of Children, Child Prostitution and Child Pornography, also on January 27, 2004.

In addition to these, on December 3, 1998, the Brazilian State finally recognized the jurisdiction of the Inter-American Court of Human Rights, through Legislative Decree No. 89/98. This enlarged and strengthened the jurisdictions protecting internationally assured human rights. Brazil's alignment with the international human rights protection system is, therefore, quite recent.

Throughout this process, one key issue has been the need to combine the national and international protection systems based on the principle of human dignity, because, when this is done, the human rights assured in the national and international instruments acquire a greater importance, thereby strengthening the mechanisms for holding the State responsible.

An examination of the human rights cases in Brazil that have been referred to the Inter-American Commission (PIOVESAN, 2006) reveals that they all want international oversight, requesting an international response due to non-compliance with obligations entered into on the international level.

The same author writes: "According to international law, the responsibility for human rights violations always rests with the State, which has the legal personality on the international stage." (PIOVESAN, 2006, p. 279). Therefore, the Brazilian State cannot invoke the federal principles or the separation of powers to absolve the federal government from responsibility for breaches of internationally agreed obligations.

Accordingly, in the case that shall be presented here, it is the Brazilian State that was judged by the Inter-American Court of Human Rights, since it is the State that is held internationally responsible whenever an international human rights obligation it agreed to observe is violated (PIOVESAN, 2006).

It is important to point out, too, that the future of international human rights protection in Brazil depends in large part on national implementation measures. In

addition to bringing the internal legal framework in line with international protection standards, it is also necessary to prioritize the development of public policies to guarantee and protect human rights, and also to streamline internal mechanisms for monitoring the implementation of these human rights. This underscores the subsidiary nature of international responsibility, i.e. that international action is always a supplementary action, constituting an additional guarantee of human rights protection.

It is also worth mentioning the important role of social actors in the defense and protection of human rights in Brazil, not only domestically, but also internationally, by proposing international actions before the bodies of the global and regional human rights protection systems. With the active involvement of civil society, the international instruments constitute a powerful mechanism for reinforcing the protection of human rights and the democratic regime in the country, through the designs of an engaged citizenry that is capable of uniting behind nationally and internationally assured rights and guarantees.

Maia Gelman explains Brazilian human rights activism from the standpoint of the ability to lodge complaints internationally, based on the “power to embarrass” in the realm of international relations (GELMAN, 2007). Muller, as cited by Gelman, points out that “this power to embarrass is the main weapon of pressure groups that advocate for human rights. The activities of these groups are intended to influence public policy (...) and pressure the State on the international stage” (GELMAN, 2007, p. 67-68). The consequences of this international influence have been called the “boomerang effect” (GELMAN, 2007, p. 67-68). According to Keck, as cited by Gelman, “this effect is triggered when a national group reaches out to foreign allies to put pressure on the government, so that it changes its domestic policies.” The author goes on to say that local governments, by ignoring the demands of these groups, can broaden the scope of their claims, causing them to echo with more resonance domestically. (GELMAN, 2007, p. 68).

On this point, Flávia Piovesan adds:

*The Brazilian experience illustrates how international action can help publicize human rights violations, raising the risk of political and moral embarrassment for the offending State and, as such, causing it to emerge as a significant factor in the protection of human rights. Furthermore, when confronted with publicity on human rights violations, together with international pressure, the State is practically “compelled” to justify its actions.*

(PIOVESAN, 2006, p. 313).

This is what we shall see in the case presented here, in which a complaint was lodged against Brazil with the Inter-American Commission on Human Rights by the family of the victim of human rights violations.

### 3 The Case of *Damião Ximenes sv. Brazil*

This is the first Brazilian case to be judged by the Inter-American Court of Human Rights, of the Organization of American States (OAS). Damião Ximenes Lopes, Brazilian, was 30 years old in October, 1999 when he was admitted by his mother to the only psychiatric clinic in the municipality

of Sobral, in the state of Ceará. Damião was suffering from a severe mental condition, which is why his mother, Albertina Viana Lopes, took him to the aforementioned institute to receive medical attention. The clinic, called Casa de Repouso Guararapes (Guararapes Rest Home), was accredited by Brazil's public health care service, known as the Unified Health System (SUS). Four days later, his mother returned to visit her son at the clinic and the guard refused her entrance. Despite the guard's efforts, she managed to make her way into the institute and immediately began to call out Damião's name. This is the report of the events that followed:

*He [Damião] came to her [his mother] staggering, with his hands tied behind his back, bleeding from his nose, his head swollen and his eyes practically shut, collapsing at her feet, filthy, hurt and smelling of feces and urine. He fell at her feet crying out for her to call the police. She did not know what to do and asked that he be untied. His body was covered in bruises and his face was so swollen that he was barely recognizable.*

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2004, p. 599).

Albertina then sought the help of the employees to take care of her son, and the nursing staff bathed Damião while she spoke to the only doctor who was present at the institute. Without performing any kind of examination, he prescribed Damião medication and then left the Rest Home. Albertina left the institute in a state of shock and when she arrived home, in the municipality of Varjota, she received a message that the Rest Home had telephoned. A few hours later, she returned to the institute and was informed that her son had died. The family requested an autopsy, as the doctor at the Rest Home, Francisco Ivo de Vasconcelos, had not ordered any such examination. On the same day, Damião's body was transferred to the Dr. Walter Porto Medical Examiner's Office, where the autopsy was performed by the same doctor from the Rest Home, who concluded that the death was from "indeterminate causes" (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2006, p. 33). However, André de Carvalho Ramos claims the autopsy report identified marks on his body that indicate torture:

*Damião was subjected to physical restraint, his hands tied behind his back, and the autopsy revealed that his body had been beaten, presenting injuries located in the nasal region, right shoulder, lower portion of the knees and the left foot, ecchymosis around the left eye, homolateral shoulder and fist. On the day of his death, the doctor of the Rest Home, without physically examining Damião, prescribed him some drugs and immediately left the hospital, where there was now no doctor. Two hours later, Damião was dead.*

(RAMOS, 2006, p. 1).

In response to this serious situation, Damião's family filed a criminal case and a civil case for damages against the owner of the psychiatric clinic, and also filed

a petition against the Brazilian State before the Inter-American Commission on Human Rights (IACHR), via Damião's sister, Irene Ximenes Lopes. Later, a Brazilian non-governmental organization that works to expose human rights violations, called *Justiça Global*, joined the case as co-petitioner.

The IACHR received the petition with the allegations concerning Damião before the end of 1999 and the Brazilian State was promptly urged to present its considerations on the case. In 2000, additional information was received from Damião's family and a new deadline was extended to Brazil to respond to the allegations. The Brazilian State once again failed to present information. The IACHR then gave the Brazilian State one final opportunity, warning that failure to respond would lead the Commission to apply the provision of article 42 of its regulations (which states that, when a government fails to respond, the facts presented in the petition will be presumed to be true).

In 2002, considering the position of the petitioner and the lack of response from Brazil, the IACHR approved the Admissibility Report, concluding that the petition met the admissibility requirements. In 2003, Brazil presented, for the first time, information on the case. In accordance with IACHR regulations, a friendly settlement procedure was made available to the parties involved. This was welcomed by the petitioner, who expected a proposal from the Brazilian State. However, no such expression was forthcoming. After additional communications and analyses of the standards of medical treatment that should be provided to people with mental illnesses, the IACHR concluded in 2003 that the Brazilian State was responsible in the *Damião Ximenes Lopes* case:

*For violating the right to humane treatment, to life, to judicial protection and to a fair trial enshrined in articles 5, 4, 25 and 8, respectively, of the American Convention, due to the hospitalization of Damião Ximenes Lopes in inhuman and degrading conditions, the violation of his right to humane treatment and his murder, the violation of the duty to investigate and the violation of the right to effective remedies and judicial guarantees associated with the investigation of the events. The Commission also concluded that, in relation to the violation of these articles, the State also violated its generic duty to respect and guarantee the rights enshrined in the American Convention in relation to article 1(1) thereof.*

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2004, p. 587).

At the same time, the IACHR recommended that the Brazilian State conduct “a full impartial and effective investigation into the events leading to the death of Damião Ximenes Lopes and make suitable reparations to his family for the violations (...) including the payment of compensation” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2004, p. 587).

In 2004, the first meeting was held between the parties involved, in which Brazil presented only partial progress in its compliance with the recommendations made by the IACHR. As a result of this, the petitioners indicated the need to refer the case to the Inter-American Court, since Brazil had not fully complied with the

recommendations. The Brazilian State requested an extension, more than once, of the deadlines set by the IACHR. Considering the lack of suitable implementation of the recommendations by Brazil, the Commission decided to submit the case to the Inter-American Court.

Also in 2004, the IACHR presented an application for the Court to determine whether the Brazilian State was responsible, as previously mentioned, for violating the rights embodied in Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention in relation to the obligation established in Article 1.1 (obligation to respect rights) thereof, to the detriment of Damião Ximenes, for the inhuman and degrading conditions of his hospitalization in a psychiatric clinic that operated within the legal framework of Brazil's Unified Health System (SUS).

The Brazilian State, in response to the notification issued by the Inter-American Court, filed a preliminary objection, claiming that not all domestic remedies had been exhausted. After reading all the written arguments on the preliminary objection (from the petitioner and from Brazil), the Court convened a hearing for November 2005. In its oral argument at this hearing, the Brazilian State acknowledged its partial responsibility for the violation of Articles 4 and 5 (right to life and a fair trial) of the American Convention, and expressed agreement with the poor treatment conditions that resulted in the death of Damião Ximenes. However, the Brazilian State did not acknowledge violation of Articles 8 and 25 of the Convention.

The Court did not accept the preliminary objection filed by Brazil, judging it to be untimely, as it should have been made earlier during the admissibility stage to the IACHR. Following the decision to dismiss the preliminary objection, the Court decided to proceed with the judgment of the case. Accordingly, the parties involved and also the IACHR submitted their final written arguments.

In 2006, the final trial on the case was held. After hearing the parties and expert witnesses, and analyzing all the documentation on the proceeding, the Court presented its judgment, sentencing Brazil for the first time in a case of merit.

According to André de Carvalhos Ramos (2006), the main points of the judgment, in addition to Brazil acknowledging the violations of articles 4 and 5 of the American Convention, were related to the fact that Damião had a mental illness and the slow pace of Brazilian justice in the criminal and civil cases brought by the family. This means that in cases of people with some form of disability, the State must not only prevent violations, but it should also take additional positive protection measures that consider the specifics of each case. On the sluggishness of the Brazilian justice system, the Court judged that the slow pace of legal proceedings encourages impunity and may be considered a violation of the right of access to justice. In the *Damião Ximenes Lopes* case, the lack of a trial court ruling six years after the start of the criminal case was considered a violation of the right to trial within reasonable time.

Finally, the Court determined that Brazil should make moral and material reparations to the Ximenes family, through the payment of compensation and

other non-monetary measures. For example, Brazil was urged to investigate and identify those responsible for Damião's death within reasonable time and also to implement training programs for health professionals, particularly psychiatric doctors, psychologists, nurses and nursing assistants, as well as all people working in the field of mental health.

#### 4 Analysis of the case and the measures of the Court in the *Damião Ximenes Lopes* judgment

The petition of the Ximenes Lopes family was not only the first case to be admitted and judged by the Court, as previously mentioned; it also led to the first ruling against the Brazilian State by the Inter-American system. Unlike other countries in Latin America, Brazil does not usually have many complaints filed before the Court, which likely indicates a poor knowledge of regional system in the country.

Another important point is that the judgment of the Inter-American Court of Human Rights in the *Damião Ximenes Lopes* case is the first to address cruel and discriminatory treatment of people with mental illnesses. By recognizing the vulnerability of these people, the Court broadened international jurisprudence and, on the national level, strengthened the actions of Brazil's Anti-Asylum Movement, which is formed by organizations that are intent on exposing human rights violations in psychiatric institutes.

According to Fabiana Gorenstein (2002), until 2002 there were only 70 Brazilian cases (either pending or shelved) in the IACHR, while neighboring Argentina had 4,000 and the Commission overall had received approximately 12,000 petitions. More recent data indicate that the number of Brazilian cases has increased. This can be seen in the research conducted by Fernando Basch *et al.*, which measured the degree of compliance with the decisions of the Inter-American system between 2001 and 2006 (BASCH *et al.*, 2011). In other words, the representativeness of Brazil in the Court is still small compared to the other countries that typically access the Inter-American system. This can be observed by the total number of Brazilian cases that have been heard (6), while Peru and Ecuador, over the same period (2001-2006), had 17 cases each (BASCH *et al.*, 2011). Another factor that should be taken into consideration is the size of the Brazilian population, which – even though comparatively far higher than all the other Latin American countries – does not translate into a larger number of filings with the Inter-American system. In fact, Brazil has fewer filings than countries that have significantly smaller populations.

Therefore, the judgment against Brazil in the *Damião Ximenes Lopes* case serves as an example to be followed, since it demonstrates that efficient international mechanisms exist that protect rights and adequately redress the victims of human rights violations. The case can also be considered a success because the complaint filed by the family was heard and Brazil was sentenced for serious human rights violations. In other words, this case serves as a model in a culture unaccustomed to claiming rights on the international level.

Even before the final ruling of the Court, significant progress was already



underway in Brazil, reflecting the positive repercussions of the case. Foremost among these advances: the Guararapes Rest Home, where Damião died, not only had its accreditation as a psychiatric institute that provides services to Brazil's Unified Health System (SUS) revoked in July 2000, but it was also shut down nearly a year after the incident. Furthermore, a lifelong annuity was granted to Damião's mother by the state of Ceará in 2004 and a new health center was opened, called Damião Ximenes Lopes, as part of the new mental health policy established by Law No. 10216/2001 (BRASIL, 2001).

According to Ludmila Correia, the municipality of Sobral is now considered a reference in mental health, because it prioritizes residential therapy and/or outpatient care, abandoning treatment that involves confinement. Indeed, the municipality has received an award for the successes it has achieved with its new policy (CORREIA, 2005).

Following the ruling against Brazil, the federal government was urged to pay compensation to Damião's family, given that moral and material damage had been proven, and also to pay the court costs incurred in the case. As a result, on August 14, 2007, the Brazilian State made the payment of the amounts set by the ruling to Damião's family in accordance with Decree No 6185 of August 13, 2007 (BRASIL, 2007).

Concerning the investigations into those responsible for Damião's death, only in 2009 were the owner of the Guararapes Rest Home and six members of staff sentenced to serve six years in a semi-open prison (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2009).

In 2010, in a civil case for moral damages brought by the Ximenes Lopes family, the Ceará State Court of Appeals upheld the trial court ruling that sentenced the owner of the psychiatric clinic and also the clinical director and the administrative director to pay compensation in the amount of R\$150,000 to Damião's mother. It is interesting to note that, in the proceedings of this case, there is a copy of the IACHR Report that led to the judgment against Brazil. This demonstrates the repercussions of the international ruling on domestic law, according to information obtained from the Ceará State Court of Appeals website. On this point, it is worth noting the reflections of Víctor Abramovich on how international law impacts a country's domestic legal affairs in a dynamic way and in line with local characteristics:

*At the same time, these international norms are incorporated into national legislation by the respective Congresses, governments and judicial systems, and also with the active participation of social organizations that promote, demand and coordinate the domestic application of international norms before various state organs. The application of international norms on the national level is not a mechanical act, but rather a process that involves different kinds of democratic participation and deliberation and provides ample room for a rereading or reinterpretation of the principles and international norms in accordance with each national context.*

(ABRAMOVICH, 2009, p. 25).

The table below shows each of the individual reparation measures applied by the Court, the beneficiaries, the amounts (for monetary reparations) and the status of compliance with the measure, for the current year [2011].

REPARATIONS SET BY THE COURT IN THE <i>DAMIÃO XIMENES</i> CASE (2006)			
Reparation	Beneficiaries	Amount	Status of reparation
Material damage (loss of income)	Albertina Viana Lopes	US\$ 41,850.00	Complete
Material damage (loss of income)	Irene Ximenes Lopes	US\$ 10,000.00	Complete
Immaterial damage	Damião Ximenes Lopes (to be transferred to his mother)	US\$ 40,000.00	Complete
Immaterial damage	Damião Ximenes Lopes (to be transferred to his mother)	US\$ 10,000.00	Complete
Immaterial damage	Albertina Viana Lopes	US\$ 30,000.00	Complete
Immaterial damage	Irene Ximenes Lopes	US\$ 25,000.00	Complete
Immaterial damage	Francisco Leopoldino Lopes	US\$ 10,000.00	Complete
Immaterial damage	Cosme Ximenes Lopes	US\$ 10,000.00	Complete
Court costs and legal expenses	Albertina Viana Lopes	US\$ 10,000.00	Complete
Investigate events in reasonable time	Ximenes Lopes family	-----	Partial
Publish sentence in Federal Gazette	Ximenes Lopes family	-----	Complete
Establish training programs for mental health professionals	Brazilian Population	-----	Partial

Finally, it is clear that the solution of the case was slow in terms of domestic law. Both in the criminal and civil case, the family had to wait more than 10 years for a trial court verdict sentencing the perpetrators in the criminal case and to receive the reparation for moral damages due to the death of Damião Ximenes. At the same time, the Court, in its Order on the Monitoring of Compliance with the Judgment, asserted that due to “the possibility that motions may be filed against the aforementioned decision, Brazil should submit, in its next brief, thorough and updated information on the status of the criminal proceedings” (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2009, p. 4-5). For this reason, compliance with this measure is considered to have been partial, not only because the family had to wait 10 years for a trial court verdict, but also, and primarily, because it was not a final judgment, meaning that the defendants can appeal.

This situation confirms the thesis of Víctor Abramovich, when analyzing the Inter-American system, that the implementation of international decisions, on the domestic level, encounters the following difficulties:

*Complying with the reparation measures issued by an international organ requires a high level of coordination between governmental agencies, which is often not achieved. This significantly hampers the processing of the case, the work of the ISHR's organs, and the enforcement of decisions. Effectively coordinating between agencies even within the*

*same government is complex, and even more so when the government must coordinate its activities with Parliament or the judicial system, when the measures involved in a case require legal reforms or the filing of lawsuits.*

(ABRAMOVICH, 2009, p. 26-27).

However, it can be said that the investment made by the family in its claim before the IACHR yielded several positive results. First, the Brazilian State was held responsible internationally for violating human rights, which was unprecedented in the country. Additionally, compensation for material and immaterial damages was paid to the family for Damião's death. Finally, the Brazilian State was urged to review its policy, coming under pressure to make important changes to its mental health policy on the legislative and administrative levels, and also in the overall provision of services, which will be examined next.

## 5 Repercussions of the *Damião Ximenes Lopes* Case on Brazil's Mental Health Policy

The National Mental Health Policy has been the subject of reform recently in Brazil: a new perspective in the country's legal framework in relation to people with mental illness led to the approval of Law No. 10216, on April 6, 2001 (BRASIL, 2001). This special legislation provides for "the protection and the rights of people with mental illness and redirects the model of mental health care," making the State and society responsible for shifting away from the previous model of care that was based exclusively on traditional confinement. The introduction of this new policy establishes the paradigm of co-responsibility of society and the State, based on intersectoral actions that are not limited to the health sector.

The new law was finally approved after 12 years of stalemate in the National Congress, indicating that the *Damião Ximenes* case contributed to speeding up the passage of the law, as Brazil responded to the international pressure exerted by the IACHR in 1999. This can be observed from the arguments made in defense of the Brazilian State before the Court, by the National Mental Health Coordinator at the time, Pedro Gabriel Godinho:

*In 2001, Law No. 10216 was passed, intended to defend the rights of mental patients, change the model of care at facilities such as the Guararapes Rest Home into a community-based care network and establish an external oversight of involuntary psychiatric admissions, under the terms of the UN Principles for the Protection of Persons with Mental Illness of 1991.*

(CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2006, p. 16).

The new mental health model established after the approval of the law consists of a network of daily treatment services in Brazil formed primarily by Psychosocial Treatment Centers (CAPS), which are intended to integrate the users of these services with their families and the community. The CAPS facilities constitute the cornerstone

of the strategy pursued by the Ministry of Health to reform public mental health care in Brazil. The reform actually began with the very first Psychosocial Treatment Units and Centers in the 1980s, but was propelled by the approval of the new law and the implementation of the new mental health policy by the Brazilian State.

The standards and guidelines for the functioning of the CAPS are contained in Decree No. 336/GM of February 19, 2002, and they are classified by the size of the facility and the type of patient, and given the denominations CAPS I, CAPS II, CAPS III, CAPSi and CAPSad. Moreover, Decree No. 189 of March 20, 2002, established a new funding system for the procedures that can be charged by the CAPS facilities that are registered with the Unified Health System (SUS). In addition to the CAPS, the mental health care network consists of other services, such as outpatient facilities and extended care clinics, day hospitals, Residential Therapeutic Services (SRT), the Return Home Program, Communal Centers, beds reserved in general hospitals, and beds in psychiatric hospitals.

In 2003, in the area of Basic Care, the Ministry of Health released the document “Mental Health and Basic Care: the connection and the dialogue necessary,” which stresses the importance of prioritizing training in the development of the new policy and including mental health indicators in the Basic Care Data System (SIAB) in order to evaluate and plan actions in this area (BRASIL, 2003). Additionally, the Ministry of Health also issued Decree No. 154 in 2008 that created the Family Health Support Centers (NASF). Among the provisions contained in this Decree is the recommendation for each NASF to have at least one mental health professional, given the “epidemiological magnitude of mental illnesses” (BRASIL, 2008, p. 3). Concerning mental health actions, this document stipulates that the NASFs should be integrated with the mental health care network (that includes the Basic Care/Family Health network, CAPS, Residential Therapeutic Services, outpatient facilities, communal centers and leisure clubs, among others), “organizing their activities based on the demands identified together with the Family Health staff, helping create the right conditions for the social reintegration of the users and maximizing the potential of the community resources (...)” (BRASIL, 2008, p. 10-11).

In the face of these new provisions, the need arises to examine how they have been implemented in Brazil and whether they assure mental health patients the right to treatment and universality of access, which are guaranteed by the Federal Constitution and the SUS. The decentralization of the treatment is another principle of the new model, as the services are organized closer to the social environment of their users, with the care networks paying more attention to existing inequalities and tailoring their actions to the needs of the population in an equitable and democratic manner.

In a number of publications and information systems, the Ministry of Health releases data on the implementation of the mental health network in Brazil. For the purposes of this article, data was taken in July of this year from the Ministry of Health’s electronic report *Mental Health in Data – 7*, which is an important source of national data.

The number of CAPS installed across the country, in June 2010, had reached a 63% coverage rate (considering the recommended minimum of one CAPS for every 100,000 inhabitants). It is worth noting that coverage in the Northeast of

Brazil has improved from “critical” in 2002 to “very good” in 2009. Other regions, however, particularly the North of the country, require special attention because of their specific characteristics (BRASIL, 2010).

The coverage of residential therapeutic facilities is still considered low. According to the aforementioned electronic report, the factors holding back the expansion of these services are:

*Insufficient funding mechanisms, political difficulties with deinstitutionalization, poor liaisons between the SRT program and the federal and state housing programs, local resistance to the process of social and family reintegration for long-time patients and the fragility of continued training programs for the residential services staff. (...)*

(BRASIL, 2010, p. 11).

This being the case, the Brazilian government needs to develop an appropriate system of funding that involves different sectors of public policy besides just health, and also establish the criteria and guidelines to cater to the needs of people with mental illness who are either homeless, who are still inpatients, or who have been released from psychiatric hospitals. Furthermore, it is necessary to rethink the structure of the residential therapeutic facilities, taking into consideration the characteristics and needs of the public that will be treated, accounting for matters such as age and length of internment, among other things.

Another provision that has proven difficult to implement and consolidate is the Return Home Program, as can be observed from the number of people who have benefited in Brazil. According to the Ministry of Health’s report (BRASIL, 2010, p. 12), “only one third of the estimated number of people held in hospitals for long periods receive the benefits,” which demonstrates the failure of some sectors to realize a genuine process of deinstitutionalization, to ensure the necessary documentation for mental health patients, to effectively reduce the number of psychiatric beds and to streamline the lawsuits in which this social group figures as a party.

Also relevant is the low number of Communal Centers in place in Brazil, since these centers play a significant role in the current model of mental health care (BRASIL, 2010).

In the case of mental health outpatient facilities, the situation is also problematic, considering that, in general, these services produce poor results and their work is not well integrated with the wider mental health care network, and so a more in-depth discussion is required about their role in Brazil’s current mental health policy (BRASIL, 2010).

On the matter of psychiatric hospitals, there has been a progressive reduction in the number of beds between 2002 and 2009, with 16,000 beds being eliminated by the psychiatric division of the National Hospital Services Assessment Program (PNASH) and the Program for the Restructuring of Psychiatric Care (PRH). However, despite the changing profile of these hospitals (they have grown smaller: 44% of the beds are now in small hospitals), Brazil still has 35,426 psychiatric beds (BRASIL, 2010). In this case, it is vital to reflect on the hospital-based model that still persists in the country, despite the implementation of regional and community services.

The number of beds reserved in general hospitals in Brazil, meanwhile, totaled just 2,568 in July 2008 (BRASIL, 2010). This number represents a major setback in the implementation of psychiatric reform in Brazil, which is intended to focus mental health care on a regional level, gradually closing down psychiatric hospitals and placing psychiatric beds in general hospitals in order to provide more complex care in this area.

Concerning the role of mental health professionals at the NASFs opened in Brazil, the Ministry of Health's report reveals that in April 2010, these professionals represented 2,213 of the 6,895 employees at these centers, which corresponds to approximately 30% of the total (BRASIL, 2010).

It should be added that, although there have been a series of advances in mental health policies in the country, the Brazilian State has still not adopted specific training programs for mental health professionals, particularly in psychiatric hospitals (which was determined by the Court), indicating the fragility of the country's mental health care network. Therefore, the Brazilian State needs to be urged by the IACHR to resolve this matter, which is still pending, that has been monitored by the NGO *Justiça Global*.

Furthermore, there are still cases of deaths at some psychiatric hospitals in Brazil as a result of mistreatment and violence perpetrated against patients there, reaffirming that these facilities continue to violate human rights, according to information from the website of the Mental Health and Human Rights Monitoring Center and the Anti-Asylum Movement. These organizations also confirm that there is no national system of oversight, while communication and the exchange of information within the network on all these issues is still flawed.

Finally, it is worth noting that the Ministry of Health and the Special Ministry of Human Rights issued Interministerial Decree No. 3347 of September 29, 2006, that established the Brazilian Center for Human Rights and Mental Health, which was formulated by a Working Group created especially for this purpose by the two ministries. The Decree sets the guidelines and courses of action for the Center, in accordance with the proposals made in the Final Report of the Working Group, for it to be:

*An initiative that is intended to broaden the channels of communication between the public authorities and society, through the formulation of a mechanism for lodging complaints and externally monitoring the institutions that treat people with mental illnesses, including children and adolescents, people with alcohol and other drug abuse related illnesses, and also people in confinement.*

(BRASIL, 2006).

However, despite the fact that it has been open for almost five years, there is only one official record of activity by the Center since its creation. In April this year [2011], a group of institutions led by the Federal Psychology Council staged an inspection of psychiatric hospitals in the city of Sorocaba, in the state of São Paulo, after receiving complaints of human rights violations. The Brazilian Center for Human Rights and Mental Health was involved in this inspection, sending one member of its executive committee, according to information obtained on the website of the Federal Psychology Council.



Even considering the aforementioned progress in the country's mental health policy, the Inter-American Court of Human Rights determined, in its Order on the Monitoring of Compliance with the Judgment, that the training of mental health professionals constitutes a measure with which Brazil has still not complied (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2009). Accordingly, the Court requested that the Brazilian State, on the subject of training mental health professionals, specifically address the following matters:

*It is necessary for the State to refer in its next brief solely and exclusively to: i) the training activities carried out after the decision, whose content refers to "the principles that must govern the treatment given to individuals with mental disabilities pursuant to international standards on the subject and those set forth in the [...] Judgment", ii) the duration, periodicity and number of participants in those activities, and iii) whether they are mandatory.*

(CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Caso Ximenes Lopes vs. Brasil*, 2009, p. 7).

The monitoring conducted by the Court on the compliance with the judgment, in the case in hand, demonstrated that, in spite of the improvements identified in Brazil's mental health policy, there is still a great deal of progress to be made. Not only are deaths continuing to occur in psychiatric hospitals similar to the one that held Damião Ximenes, but the numbers presented on the replacement services (CAPS, Residential Therapeutic Facilities, Communal Centers, etc.) are still insufficient to meet the demands of the population. This situation confirms that a hospital-based model of mental health care still remains in place in Brazil and this cannot be left unaddressed.

## 6 Final considerations

By adhering to the international human rights protection system, together with the obligations that come with it, the State also accepts international monitoring of how fundamental rights are respected in its territory. It is, therefore, reaffirming the general principle of international law, according to which the violation of international rules applicable to States generates international responsibility for the offending State.

It could be said that the need to provide an effective guarantee of human rights leads to a broadening and a deepening of the dual responsibility of prevention and punishment that the State has over all individuals in its jurisdiction. The obligation of a "guarantee" finally makes the State face its responsibilities both in relation to its agents or employees who are "outside the law," and also in relation to private individuals.

An important observation can be made about the verdicts issued by the Inter-American Court of Human Rights in the cases it hears. It can be said that the Court has contributed actively and consistently to the improvement of the system of international responsibility, encouraging States to increasingly pursue the international protection of human rights. Although the jurisprudence of the Court is still quite recent, the Inter-

American system is turning into a relevant and effective strategy for the protection of human rights when national institutions are currently failing.

On this point, we should highlight the importance of the monitoring – by the Inter-American Commission and by States Parties to the American Convention – of compliance with the Commission's recommendations to States that are being held internationally accountable and with the rulings of the Court. The effective oversight of compliance with the recommendations of the Commission and the decisions of the Court by the States Parties to the Convention is consistent with the overarching goal of international human rights law, which is to achieve the effective protection of human rights. Note that the monitoring of State conduct has a preventative effect.

It should be pointed out that the progress in the field of international human rights law is due largely to the growing awareness and mobilization of civil society, together with the sensitivity of public institutions towards the prevalence of human rights. Furthermore, the international protection instruments constitute powerful mechanisms to effectively strengthen the protection of human rights on the national level by reasserting the importance of the domestic protection mechanisms.

The compliance of the Brazilian State with the ruling in the *Damião Ximenes* case raises a number of considerations about the monitoring of the implementation, on the national level, of the decisions and recommendations that emanate from the Inter-American Human Rights System.

While Brazil may have complied almost in full with the judgment and, more specifically, while progress has been made in the new model of mental health care in the country, it is important to adopt measures and mechanisms for receiving and investigating complaints on mistreatment and violence committed against people with mental illnesses, with an emphasis on the participation of organized civil society (as provided for in the Brazilian Center for Human Rights and Mental Health), the Public Prosecutor's Office, and organizations representing health sector professionals, to create a channel of communication between users of mental health services and their families and to restrict conduct that violates the rights of people with mental illnesses.

According to Brazil's Anti-Asylum Movement, the replacement network of mental health services should offer quality treatment that caters to the demands of the Brazilian population, thereby demonstrating comprehensive psychiatric reform. Moreover, the underlying principles of these services should be very clear in order to strengthen the significance of the social environment of the users, taking into account that many CAPS facilities end up reproducing the atmosphere of an asylum in their daily treatment.

Therefore, one of the major challenges in the area of mental health affecting public policy on the rights of this social group is the socio-cultural dimension, in the sense that it is only possible to talk about changes to the model if effective actions are in place to transform society's attitude towards people with mental illness.

Given everything that has been expressed here, there is no doubt that the formulation of rules to guarantee the quality of mental health treatment in Brazil gained momentum with the Psychiatric Reform Law in 2001, together with the other rights protection mechanisms that derived from it, as a result of the mobilization of the Brazilian State in the wake of the *Damião Ximenes* case.

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## RESUMO

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O objetivo deste artigo é apresentar um panorama geral acerca da implementação das medidas expressas na sentença que condenou o Brasil, em 2006, no caso *Damião Ximenes Lopes*, primeiro caso brasileiro julgado pela Corte Interamericana de Direitos Humanos, discutindo-se a responsabilidade internacional por violação de direitos humanos. Através de documentos oficiais, artigos e textos opinativos, este artigo retoma o histórico do caso, além de traçar o percurso do Brasil no cumprimento da sentença e as consequências para as políticas públicas de saúde mental no país.

## PALAVRAS-CHAVE

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Sistema Interamericano de Direitos Humanos – Corte Interamericana – Reparações – Grau de cumprimento – Monitoramento das recomendações internacionais.

## RESUMEN

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El objetivo de este artículo es presentar un panorama general acerca de la implementación de las medidas expresadas en la sentencia que condenó a Brasil, en 2006, en el caso *Damião Ximenes Lopes*, primer caso brasileño juzgado por la Corte Interamericana de Derechos Humanos, que discute la responsabilidad internacional por violación de derechos humanos. A través de documentos oficiales, artículos y opiniones, este artículo retoma el historial del caso, además de trazar el recorrido de Brasil en el cumplimiento de la sentencia y sus consecuencias para las políticas públicas de salud mental en el país.

## PALABRAS CLAVE

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Sistema Interamericano de Derechos Humanos – Corte Interamericana – Reparaciones – Nivel de cumplimiento – Monitoreo de las recomendaciones internacionales



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ABSTRACT

This study aims to analyze the lack of effective compliance in Argentina with the decisions of the Inter-American Human Rights System (IAHRS). Through a case analysis, it evaluates the Supreme Court's role in applying international law in general, and the decisions of the Inter-American Court of Human Rights in particular. Based on this analysis, advances and setbacks are identified in the different positions adopted by the Supreme Court, which then allows for the identification of problems. Finally, the study proposes a way by which to overcome the challenges and thereby improve the level of compliance with IAHRS decisions.

Original in Spanish. Translated by Nora Ferm.

Received in July 2011. Accepted in October 2011.

KEYWORDS

Inter-American Court (IAHCR Court) – Supreme Court of Justice – Compliance with legal decisions



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# THE IMPLEMENTATION OF DECISIONS FROM THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN ARGENTINA: AN ANALYSIS OF THE JURISPRUDENTIAL SWINGS OF THE SUPREME COURT

Damián A. González-Salzberg

## 1 Introduction

The effectiveness of the Inter-American Human Rights System (IAHRS) is a topic that attracts increasing attention, given concerns about a lack of compliance with its decisions by different bodies. In particular, one could highlight the publication in 2010 of two quantitative studies that examined the degree to which the decisions adopted by the bodies of the IAHRS were effectively applied (BASCH et al., 2010; GONZÁLEZ-SALZBERG, 2010).

The two publications are far from identical; for one thing, they each analyzed different sets of data. While the analysis done by the Association for Civil Rights (ADC) included decisions from both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IAHRS Court), our work focused solely on the decisions issued by the Court. Likewise, the ADC study was limited to evaluating the decisions taken within a five year period, whereas our study looked at all sentences issued by the Court since it began in 1987 until the end of 2006 – decisions the Court would have monitored for compliance as of late 2008. Similarly, another important difference is in the conflicting conclusions drawn about the effectiveness of the IAHRS; this can be attributed to differences in indicators, rather than substantial differences in data measurement.

On the other hand, the studies agree on the urgent need to improve compliance with IAHRS decisions. However, our analysis exposed strong reasons to believe that the measures necessary to achieve this objective should come from within States themselves, and here we diverge from some of the proposals in the ADC study.

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*Notes to this text start on page 128.*

Meanwhile, the ADC's point on the importance of focusing on strengthening national implementation mechanisms could be very wise. In particular, attention should be placed on the need for States to recognize that compliance with IACHR Court decisions is mandatory. Above all, the judicial powers of the States must accept the binding nature of the decisions of the judicial body of the IAHRs, given that – as will be explained shortly – this is where the greatest obstacles to effective compliance can be found. We therefore believe that this is the necessary starting point for any analysis of compliance with IAHRs decisions within national contexts.

Against this backdrop we present our work, limiting ourselves to the case of Argentina in order to analyze the role played by the country's highest court regarding recognition of the binding nature of the IACHR Court's decisions. First, we describe the present situation with respect to Argentina's compliance with IACHR Court decisions, exposing current problems. Next, we analyze the evolutionary development of the implementation of international law in the jurisprudence of the Supreme Court of Justice of Argentina (CSJN), in general terms, in order to understand the origins of the current situation. Special attention will be given to the last constitutional reform, because it generated a paradigmatic shift with regard to how IAHRs decisions were treated in the courts. Finally, we evaluate how the CSJN has treated the decisions of the IAHRs and in particular the decisions of the IACHR Court. The goal will be to identify both the shortcomings and the strengths of the CSJN in order to determine how best to improve compliance with IAHRs decisions.

## 2 Argentina's (non) Compliance with IACHR Court Decisions

As of 2010, the Argentine State had been convicted by the IACHR Court six times (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Garrido y Baigorria v. Argentina*, 1996; *Caso Cantos v. Argentina*, 2002; *Caso Bulacio v. Argentina*, 2003; *Caso Bueno Alves v. Argentina*, 2007a; *Caso Kimel v. Argentina*, 2008a; *Caso Bayarri v. Argentina*, 2008b). In addition, the State had not fully carried out all of the reparations ordered in any of the verdicts. That does not mean that the State has ignored these decisions; according to the monitoring done by the IACHR Court itself, the State has adopted measures aimed at complying with all of these decisions, with the exception of the “*Buenos Alves*” verdict (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Buenos Alves v. Argentina*, 2007a), which the IACHR Court had not yet commented on as of mid 2011.

Applying the methodology used in the study published last year, we can classify the measures demanded of the State into six categories: compensation; payment of costs and expenses; publicizing the court sentence; public acknowledgement of responsibility; prosecution and punishment of those responsible; and modification of national legislation. Based on this classification system, we can observe that the State was ordered to pay compensation five times; to pay expenses in all six cases; to publicize the verdict in four cases; to publically recognize its responsibility in one instance; to modify its internal legislation twice –one of those times with more specificity than the other; and to investigate human rights violations and prosecute those responsible on four occasions.

This data can be seen graphically in the following table that we developed. It shows whether the actions demanded by the IACHR Court have been fully complied with (FC), partially complied with (PC) or not complied with (NC).

		Compensation	Costs And Expenses	Publicity	Acknowledgement	Prosecution	Legislative Change
ARGENTINA	Garrido - Baigorria	FC	FC			NC	
	Cantos		FC				
	Bulacio <sup>1</sup>	FC	FC	FC		PC	PC
	Bueno Alves <sup>2</sup>	NC	NC	NC		NC	
	Kimel	FC	FC	FC	FC		FC
	Bayarri	FC	FC	FC		PC	

The degree to which the State complies with the sentences can be determined based on this data. However, the reparations ordered in the “*Bueno Alves*” decision (payment of compensation and expenses as well as publicizing the decision) should not be considered because, as mentioned earlier, the data is not yet available.

It can be observed that the State has begun to comply in some respects. It has paid compensation in four of the remaining cases; it has paid costs and expenses in five cases; it has publicized the court decision in three cases; it has publically acknowledged its responsibility the one time that it was ordered to do so; it has modified its internal laws according to the verdict that ordered specific changes; and it has partially complied with the generic changes ordered by the other decision (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Garrido y Baigorria v. Argentina*, 2007b; *Caso Bulacio v. Argentina*, 2008c; *Caso Cantos v. Argentina*, 2010a; *Caso Kimel v. Argentina*, 2010b; *Caso Bayarri v. Argentina*, 2010c).

On the other hand, the State has not complied with its obligation to prosecute those responsible for human rights violations in any of the cases in which this was ordered. The same outcome can be expected for the “*Bueno Alves*” case, since—as we will explain later—the CSJN decided to ignore that sentence from the IACHR Court.

However, non-compliance with the obligation to conduct a judicial investigation is hardly surprising, given that it is the common denominator amongst all IAHRS member states that refuse to comply with IACHR Court decisions. As we explained in a previous publication (GONZÁLEZ-SALZBERG, 2010, p. 128-130), the obligation to prosecute the responsible individuals was imposed in 42 cases (of the 70 verdicts that were analyzed), and as of the end of 2008, none of these sentences had been satisfactorily fulfilled. Of all of the measures imposed, this

clearly represents the one that has the highest percentage of non-compliance, at 73.8% of cases. The first instance of compliance by a State was only recorded in 2009 (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Castillo Páez v. Perú*, 2009) and as of mid 2011 this continues to be the only exception to the general rule of non-compliance.

This brings us to reinforce the hypothesis presented in the previous section: that to guarantee compliance with the decisions issued by the IACHR Court, it is indispensable for the judicial powers of the IAHRs member states to recognize the binding nature of the Inter-American Court decisions. In this context, this study will proceed to analyze the ups and downs of the CSJN with regard to the implementation of international law in general, and then analyze the position of the CSJN with regard to the IACHR Court in particular.

### 3 The implementation of international law by the CSJN

Since its establishment in 1863, the CSJN has been able to directly apply international law to the cases that it has heard. The 1853 Constitution empowered the CSJN and the lower courts to address cases governed by treaties with foreign nations (Article 97 in the original 1853 text) while establishing the original jurisdiction of the highest court over issues concerning foreign ambassadors, ministers, and consuls (Article 98 in the 1853 text). This constitutional authority, coupled with the statement made on the prosecution of crimes committed against the *law of nations* (Article 99 in the original), can be understood to provide express constitutional authorization for the CSJN to apply general international law (MONCAYO et al., 1990, p. 69). Furthermore, Law 48, approved in 1863, specifically recognized the applicability of international law in general, when it established that the CSJN should proceed according to the *law of nations* when hearing cases related to foreign diplomats, and when it included in Article 21 the obligation of all national judges to apply international treaties and the *principles of the law of nations*.

As a result, the CSJN has applied the customary rules of international law numerous times since the 19th century without encountering problems (ARGENTINA, *Gómez, Avelino c/ Baudrix, Mariano*, 1869). With regard to the implementation of international treaties in particular, it is clear that—in addition to the aforementioned references—Article 31 of the Constitution recognized them as an integral part of the supreme law of the land.

The difficulty is found in the questionable hierarchy given to international law by Law 48. In the aforementioned Article 21, this law established that national judges were obliged to apply norms in the following order of priority: the Constitution, national laws, international treaties, provincial laws, the laws that previously governed the nation, and principles regarding the rights of persons.

However, issues could not always be easily resolved when the Argentine legislation came into conflict with the international obligations assumed by the State. In 1963, the CSJN created a doctrine to deal with such situations. That year, the CSJN issued the “*Martín and Cía.*” verdict, in which it decided that there was no legal basis for determining the relative rank of laws and treaties, and therefore any

conflicts between them should be resolved by applying the hermeneutic principle, which states that later norms supersede previous ones (ARGENTINA, *Martín y Cía. Ltda. S.A. c/ Administración General de Puertos*, 1953, párr. 6, 8).

It is worth highlighting that the basis for this decision was questionable, given the court's fallacious assertion that there was no legal basis to resolve the hierarchical conflict between treaties and laws. The CSJN should have acknowledged the existence of contradictory normative foundations that prioritized both kinds of norms. On the one hand, Law 48 placed national laws above treaties. At the same time, when the verdict was issued, there was an indisputable customary rule of international law that affirmed the hierarchical superiority of treaties over national laws. The Permanent Court of International Justice had ruled along these lines (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1930, p. 32), stating that the primacy of international law over the national laws of the States included primacy over the national Constitution (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1932, p. 24).

The doctrine established through "*Martín and Cía.*" was not modified until 1992, when the "*Ekmekdjian c/ Sofovich*" decision was issued. By then, the CSJN understood that the inexistence of a normative basis for determining the hierarchy between treaties and laws was false – although that had also been the case in 1963. The court noted that in early 1980, the Vienna Convention on the Law of Treaties had entered into effect, and it required Member States to give preference to international law over national law. As a result, the CSJN decided that it was within its jurisdiction to prevent a violation of this Convention, given that the State might otherwise be held accountable internationally (ARGENTINA, *Ekmekdjian, Miguel Ángel c/ Sofovich, Gerardo y otros*, 1992, párr. 18-19).<sup>3</sup>

After the aforementioned doctrine had been established, it remained unclear what position the court would take in a future conflict between an international treaty and the National Constitution. While it has already been mentioned that from the perspective of international law, the imposed solution is the primacy of a treaty (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1930, 1932), the CSJN did not concur with that interpretation. That became clear in 1993, when the CSJN issued its decision in the "*Fibraca*" case. In that decision the CSJN maintained that international law could only prevail over national law once the constitutional principles of public rights had been assured (ARGENTINA, *Fibraca Constructora SCA c/ Comisión Técnica Mixta de Salto Grande*, 1993, párr. 3). This conclusion drew on Article 27 of the Constitution, which establishes the obligation to secure relationships with foreign States through the signing of treaties so as long as they conform to the principles of public rights enshrined in the Constitution.

Still, the CSJN has not issued a categorical statement about the way in which a hypothetical conflict between national law and customary international law should be resolved. Given the principle of legal equivalency that generally governs international law (BROWNLIE, 1998, p. 3-4), one might expect that the court would give international customary law the same rank as that given to international treaties.

Thus, the doctrine of constitutional supremacy has been clearly established throughout the history of CSJN jurisprudence. It is worth recalling the extraordinary exception of the 1948 decision in the "*Merk*" case, where the court ruled that the

Constitution only prevails over international laws in times of peace, whereas the opposite would be true in times of war (ARGENTINA, *Merk Química Argentina S.A. c/ Nación*, 1948). However, this ruling is only an isolated case within CSJN jurisprudence.

Perhaps the most relevant instance where a treaty was said to outrank the National Constitution can be found in 1860. In that year, the Constitution was reformed for the first time, as a result of the annexation of the state of Buenos Aires into the Argentine Confederation (ESCUDE; CISNEROS, 1998). The reform arose from a treaty signed between the Parties in 1859. Known as the “Pact of San José de Flores”, the treaty provided a political basis for modifying a constitution that otherwise could not be reformed for ten years (so, until 1863) due to the provisions of Article 30. However, this case is also atypical, and it occurred before the existence of a CSJN that could evaluate its validity.

By way of conclusion, it can be stated that, despite the existence of these two exceptions, it is clear that up until the 1994 constitutional reform, the CSJN gave higher status to the Constitution relative to any international law. A logical consequence of this doctrine of constitutional supremacy was the recognition of the CSJN as the ultimate arbiter, in accordance with the Constitution. The CSJN’s use of the doctrine of constitutional supremacy sets a clear limit on the possibility of the CSJN recognizing the binding nature of a decision issued by an international court, especially a decision that imposes a standard not accepted by the CSJN. However, the 1994 constitutional reform may have weakened this seemingly rigid doctrine.

#### 4 The constitutional hierarchy of certain international instruments

The constitutional reform of 1994 not only provided a constitutional basis for the supremacy of treaties over national laws, in the new Article 75 subpoint 22; it also established that 11 international human rights instruments, listed in the Constitution itself, take precedence over the Constitution.<sup>4</sup> Similarly, the constitutional clause established that other human rights agreements could also have precedence, with the vote of two thirds of the members of both chambers of Congress.<sup>5</sup>

This reform is extremely important for the topic at hand, because the American Convention on Human Rights (ACHR) is one of the international instruments that were given constitutional hierarchy, and this had an impact on the jurisprudence of the CSJN when it came to applying the ACHR. Notably, the ACHR is the only international instrument that establishes the jurisdiction of an international court with the power to issue binding rulings on States. Therefore, we will proceed to analyze in detail the implications of the constitutional hierarchy given to the ACHR.

In this context, it should be noted that the Constitution maintains that the listed instruments “... under the conditions of their validity, do not repeal any article from the first part of this Constitution, and should be understood as complementary to the rights and guarantees recognized herein.” (ARGENTINA, 1994, art. 75, inc. 22). This wording used by the Constituent Assembly has been the subject of various CSJN’s rulings, and should therefore be examined.

First, the article in question establishes that the international instruments



have constitutional hierarchy *under the conditions of their validity*. As presented in the Constituent Assembly debates, this expression refers to the fact that the treaties acquire this status in accordance with the reservations and interpretative declarations that the Argentine state made at the time of ratifying or approving them (ARGENTINA, 1994, p. 2836).

However, since 1995 the CSJN has attributed a different meaning to this expression; a meaning that is quite relevant and does not contradict the intentions of the Constituent Assembly. When the court resolved the “*Giroldi*” case, it ruled that the conditions of validity of the ACHR should be understood to include how that treaty actually applies in the international context, particularly its implementation by international courts (ARGENTINA, *Giroldi, Horacio David y otros*, 1995a, párr. 11). Similarly, in the “*Bramajo*” case the following year, the court ruled that the reports of the IACHR Court also determined the conditions of validity of the ACHR (ARGENTINA, *Bramajo, Hernán Javier*, 1996a, párr. 8). Nevertheless, two years later the CSJN ruled that this did not mean that the recommendations issued by the IACHR Court were binding for the judicial powers of the State (ARGENTINA, *Acosta, Claudia Beatriz y otros*, 1998a, párr. 13).

This legal interpretation should be considered wise, in so far as it considers the declarations of treaties’ regulatory bodies to be relevant to the conditions of the treaties’ validity.<sup>6</sup> Specifically, it is the only interpretation that explains why the First Optional Protocol to the International Covenant on Civil and Political Rights was granted constitutional status, even though its only function is to recognize the competence of the Human Rights Committee to receive individual complaints regarding violations of human rights listed in the Covenant. A different interpretation—one that concluded that the declarations of the regulatory bodies do not determine the conditions of validity of the treaties—would make the concession of constitutional status to the aforementioned Covenant nonsensical.

The second characteristic established by Article 75, subpoint 22, is that the listed instruments *have constitutional hierarchy*. Surprisingly, the interpretation of this phrase presented some legal discrepancies, even though the intentions of the Constituent Assembly had been clear. According to the Constituent Assembly, the listed treaties were not being incorporated into the Constitution itself; rather, they were given equal status (ARGENTINA, 1994, p. 2851). However, the CSJN has, in some case, interpreted Article 75, subpoint 22, as effectively incorporating the listed international instruments into the Constitution (ARGENTINA, *García Méndez, Emilio y Musa, María Laura*, 2008, párr. 7, 13), and in other cases as simply providing equal rank of these instruments, outside of the Constitution itself (ARGENTINA, *Quaranta, José Carlos*, 2010a, párr. 16, 24).

The next clause under consideration establishes that the international instruments *do not repeal* any article from the first part of the Constitution. This is undoubtedly the clause that has generated the most divergent views in doctrine and jurisprudence, since it has been understood to determine the hierarchical relationship between international instruments that have constitutional status and the Constitution itself. Within the CSJN, conflicting criteria persist today with regard to how this phrase should be interpreted when resolving cases where the Constitution appears at odds with an international instrument that technically has the same hierarchical status, such as the ACHR.

After the constitutional reform, member Elisa Carrió stated that *do not repeal* was an affirmation by the Constituent Assembly, which, having reviewed the different international instruments, concluded that there was no conflict between them and the first part of the Constitution. Therefore, the compatibility of both normative bodies would not be subject to judicial review (CARRIÓ, 1995, p. 71-72). This opinion was initially taken up by CSJN in 1996 when hearing the “*Monges*” case (ARGENTINA, *Monges, Analía M. c/ U.B.A.*, 1996b, párr. 20-21), and it appeared to gain traction as the majority opinion in 1998 (ARGENTINA, *Cancela, Omar Jesús c/ Artear SAI y otros*, 1998b, párr. 10).<sup>7</sup>

Furthermore, the 1996 decision maintained that while the Constituent Assembly’s language on *do not repeal* referred only to the dogmatic part of the Constitution, the same concept should be applied to the organic part (ARGENTINA, *Monges, Analía M. c/ U.B.A.*, 1996b, párr. 22).<sup>8</sup> While the judges did not offer a clear basis for this, it may have emerged from the simple fact that the Constituent Assembly lacked the power to alter the hierarchy of different clauses within the Constitution, in accordance with Law 24.309, which identified the need for the reform and provided the authorization to carry it out. In particular, this law had restricted which articles of the Constitution could be reformed, noting that any unauthorized changes would be nullified. As a result, an interpretation other than the one made by the CSJN would lead one to think that treaties with constitutional hierarchy could “repeal” the organic part of the Constitution, thereby creating three different levels of hierarchy covering the first part of the Constitution, treaties with constitutional status, and the second part of the Constitution – an alternative that was closed to the Constituent Assembly.<sup>9</sup>

On the other hand, the dissenting opinion by Judge Belluscio in the “*Petric, Domagoj*” case (ARGENTINA, *Petric, Domagoj Antonio c/ diario Página 12*, 1998c, párr. 7) used a different interpretation of the *do not repeal* criteria. According to this opinion, treaties that had constitutional hierarchy would be constitutional norms of second rank, valid only when they did not contradict norms contained in the first part of the Constitution.<sup>10</sup>

Without losing sight of these two contradictory positions adopted within the CSJN, we find it necessary to examine the minutes of the Constituent Assembly. These minutes demonstrate that the expression *do not repeal* was included only near the end of the final discussion that preceded the vote. The minutes do not indicate that claims were made as to the absolute compatibility between the constitutional clauses and all of the contents of the international treaties. On the contrary, it appears that the “*do not repeal*” text arose from the aforementioned prohibition found in the law that initiated the constitutional reform, which prevented, under threat of nullification, any modification to the first part of the Constitution (ARGENTINA, 1994, p. 2836-2837, 3013). We believe that this is the basis for the inclusion of the words in question and that it is intimately tied to the characteristic of *complementarity* that is given to international treaties.

Article 75, subsection 22 of the Constitution affirms that the instruments should be understood as *complementary* to other constitutional rights. As the Constituent Assembly argued, this could be considered the key to resolving any conflict that emerges between a treaty that has constitutional hierarchy and the Constitution itself. The term

“*complementary*” was used to ensure that the correct interpretation was made clear: in case of any normative conflict, the decision that was most favorable to the rights of the person should prevail. In other words, the interpretive guideline established by the Constituent Assembly was the *pro homine* principle, which is used as a hermeneutic rule in various instruments that were given constitutional hierarchy (CONVENCIÓN NACIONAL CONSTITUYENTE, 1994, p. 2837-2838, 2857). This interpretation appears to be accepted today by the CSJN (ARGENTINA, *Gottschau, Evelyn Patrizia c/ Consejo de la Magistratura de la Ciudad Autónoma de Buenos Aires*, 2006a, párr. 10).

In light of this, the affirmation of the existence of hierarchical relationships between the Constitution and constitutionally-ranked treaties starts to lose importance, given that the constitutionally-established rule is that the norm that offers the greatest protection to the rights of the people is the one that should be applied. Judge Zaffaroni seems to have interpreted it the same way; in recent years he has maintained that any constitutional clause that causes injury—according to a *pro homine* interpretation—to human rights recognized in treaties that have constitutional hierarchy should be considered inapplicable (ARGENTINA, *Maza, Ángel E.*, 2009b, párr. 8).

It can be said that various international human rights instruments, including the ACHR, became recognized as norms of the highest rank in the Argentine legal system following the 1994 constitutional reform. Similarly, this reform gave the IACHR Court special status, as it is the only international court whose decisions are acknowledged to be binding under a rule of constitutional standing.

## 5 The value given to IACHR Court decisions after the reform

As mentioned earlier, the CSJN has understood since 1995 that the case law of the IACHR Court should serve as a guide for the correct interpretation of the ACHR (ARGENTINA, *Giroldi, Horacio David y otros*, 1995a). This doctrine is clearly established through multiple CSJN decisions, which have stressed the inescapability of IACHR Court jurisprudence when interpreting the compatibility of national law and the ACHR (ARGENTINA, *Videla, Jorge Rafael y Massera, Emilio Eduardo*, 2010b, párr. 8).

The CSJN’s stance has also evolved to the point where today it understands that the criteria laid out by the IACHR Court in cases involving other States are not only relevant for interpretive purposes, but could also be seen as binding on the State. Various judges have therefore invoked the jurisprudence of the IACHR Court, with the understanding that they were doing it to fulfill an international obligation. This trend can be observed in way in which various ministers voted during the resolution of the “*Simón*” case (ARGENTINA, *Simón, Julio Héctor y otros*, 2005);<sup>11</sup> as well as in the majority vote for the “*Mazzeo*” decision (ARGENTINA, *Mazzeo, Julio Lilo y otros*, 2007a, párr. 36).<sup>12</sup>

On the other hand, there is clearly criticism within the CSJN regarding the way in which it has applied the case law of the IACHR Court, and international law in general, in cases related to the punishment of crimes against humanity. This conclusion can be drawn by looking at the dissenting opinion of Judge Fayt in the aforementioned “*Mazzeo*” case (ARGENTINA, *Mazzeo, Julio Lilo y otros*, 2007a, párr. 22, 37). In this respect, one may share the judge’s concern that the statements of

certain judges could indicate some degree of ambiguity with regard to the difference between international custom and the rules of *jus cogens*<sup>13</sup> and also with regard to the precise moment in which international treaties enter into force.<sup>14</sup>

However, this should not be seen as an obstacle to considering these CSJN decisions to be legally sound, given that the obligation to prosecute the crimes of the State is obviously mandatory (GONZÁLEZ-SALZBERG, 2008, p. 460-461). Similarly, the position of the CSJN should not be questioned, in light of the binding nature of IACHR Court decisions.

On the contrary, concerns should arise when contradictions are observed between the CSJN's assertions of the binding nature of IACHR Court decisions and its failure to comply with the judgments against the Argentine State. It is therefore worthwhile to analyze how the CSJN has behaved in particular cases where it has become involved after a sentence was imposed by the IACHR Court.

## 6 The position of the CSJN as regards the Argentine sentences issued by the IACHR Court

The CSJN has intervened, through its decisions, following convictions by the IACHR Court in the “*Cantos*”, “*Bulacio*” and “*Bueno Alves*” cases. The CSJN was also involved by virtue of provisional measures issued in the “*Mendoza Prisons*” matter. However, its conduct is far from showing the adoption of uniform criteria; rather, its conduct is characterized by contradiction: sometimes recognizing the binding nature of the IACHR Court and other times refusing to carry them out.

In the “*Cantos*” case (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Cantos v. Argentina*, 2002), the IACHR Court had ruled against the State, determining that the plaintiff had been denied the right of access to justice given the amount of money he owed after he lost a legal complaint against the State. As a result, the IACHR Court ruled that the State should adopt different measures such as waiving the legal expenses and fines, covering the fees paid to the professionals involved, and setting “reasonable amounts” for these fees, lower than the rates established by the CSJN.

After the ruling, the Attorney General for the National Treasury appeared before the CSJN so that the court would proceed with its implementation. However, the CSJN argued that its involvement was unnecessary for fulfilling some of the provisions, and that it would not comply with the demand to reduce the fees paid to professionals because that would violate the rights of the professionals who were involved during the trial at the national level (ARGENTINA, *Cantos, José María*, 2003). Thus, the CSJN expressly refused to comply with the orders of the IACHR Court. Nevertheless, we note that there were two dissenting opinions, although only Judge Maqueda explicitly stated that the entire IACHR Court decision should be complied with (ARGENTINA, *Cantos, José María*, 2003, párr. 16).

The CSJN's stance was very different after the verdict in the “*Bulacio*” case (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Bulacio v. Argentina*, 2003). In that case, the IACHR Court had ordered the State to undertake various measures, including an investigation of the events surrounding the death of a

juvenile, Walter Bulacio, after his illegal detention by the police. The Court had emphasized that, for this purpose, the statute of limitations that had been issued by the national courts were impermissible.

At the end of 2004, the complaint filed against one of those accused of the Bulacio crime came before the CSJN so that it could rule on the statute of limitations that was issued by the lower courts. The CSJN issued a ruling of great significance, maintaining that, as the IACHR Court had decided, the statute of limitations could not be considered to have expired. The ruling was especially relevant because the members of the Court did not fully agree with the judicial criteria employed by the IACHR Court, and they listed several critiques of the procedure that was undertaken in that international forum. Nonetheless, the CSJN decided that it was necessary, in principle, to subordinate their decisions to the rulings of the IACHR Court given the binding nature of the decisions issued by that Court (ARGENTINA, *Espósito, Miguel Ángel*, 2004b).

The real importance of this decision lies in the existence of the aforementioned tension between the judicial opinion of the CSJN and the ruling of the IACHR Court. This represents an important difference compared to previous decisions, where the binding nature of the jurisprudence of the IACHR Court had not implied any need to go against the legal criteria employed by the CSJN itself. Therefore, it can be said that the “*Espósito*” case is the one that shows the unquestionable recognition of the binding nature of the IACHR Court decisions and mandatory compliance by the CSJN.

However, the CSJN behaved in a completely contradictory way shortly thereafter. In the “*Bueno Alves*” case, (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Buenos Alves v. Argentina*, 2007a) the IACHR Court established the obligation of the Argentine State to investigate the alleged torturing of a plaintiff in police headquarters and to punish those responsible. However, barely two months after the IACHR Court’s ruling, the CSJN decided to rule that the statute of limitations had run for the primary defendant in the case (ARGENTINA, *Derecho, René Jesús*, 2007b). This adhered to the opinion of the Attorney General, which was issued prior to the decision of the IACHR Court. This opinion had stated that the statute of limitations should be upheld since that the allegations did not constitute a crime against humanity. The Attorney General felt that his opinion was compatible with the jurisprudence of the IACHR Court, which would only inhibit statutory limitations for crimes against humanity, understanding that crimes using this typology were equivalent to serious human rights violations (ARGENTINA, *Derecho, René Jesús*, 2006b).

Thus, in 2007, the CSJN ignored the IACHR Court decision, failing even to make reference to it in its own ruling. This was a drastic departure from the position adopted during the resolution of the “*Espósito*” case in 2004, and it deserved, at the very least, a clear explanation.

Finally, although the issue of the “*Mendoza Prisons*” was not the subject of a judgment on the merits by the IACHR Court, the CSJN intervened in the case. This happened after three provisional measures were issued, which required the adoption of urgent measures to protect the lives and physical integrity of the individuals detained in prisons in the Mendoza province (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Asunto de las Penitenciarías de Mendoza respecto Argentina*, 2004, 2005, 2006).

In its first intervention, the CSJN required that the national and provincial



governments submit information on the provisions adopted in order to comply with the IACHR Court's instructions (ARGENTINA, *Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otros*, 2006c). Subsequently, the CSJN decided to require that the Executive Branch adopt adequate measures to protect the lives, health, and physical integrity of all of the prisoners, within twenty days. It also required that the provincial court block any order that was issued that could imply a violation of the human rights of the detainees (ARGENTINA, *Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otros*, 2007c).

This final intervention by the CSJN represents a clear step in the direction of the case law set out in "*Espósito*". However, the significance of this decision, in terms of the recognition of the binding nature of the IACHR Court's judgments, is very different from the previous case. That is because in this instance there was no tension between the measures called for by the IACHR Court and the criteria of the CSJN; the CSJN understood the need for action given the gravity of the situation (ARGENTINA, *Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otros*, 2006c; *Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otros*, 2007c).

## 7 Conclusion

This study provided a concise analysis of the evolution of CSJN case law with regard to the implementation of international laws. The goal was to examine the changes in doctrine undergone by the court, in order to understand its position with respect to the obligations emerging from the IAHRs. The jurisprudential history showed a marked tendency toward the protection of the principle of constitutional hierarchy, followed by the self-recognition of the CSJN as the highest court.

An important change in this legal paradigm occurred with the 1994 constitutional reform. The concession of superior status to several international human rights instruments, including the ACHR, created an important opening for the fulfillment of international obligations—particularly those emerging from the IAHRs. However, the CSJN has been inconsistent in its recognition of the binding nature of IACHR Court decisions, even though this obligation comes both from the authority of an international treaty and from a clause of the utmost rank within the Argentine legal system.

Given the fluctuations in the case law, it is hard to predict if the CSJN will end up sticking to the position that recognizes that when it comes to human rights, the ultimate legal interpreter is not the CSJN but rather the IACHR Court. This possibility can be glimpsed in the "*Espósito*" precedent and the position held by Judge Zaffaroni in the "*Maza*" case (ARGENTINA, *Maza, Ángel E.*, 2009b, párr. 8), when he prioritized the implementation of the ACHR over the Constitution because of an interpretation *pro homine* of the rights in question.

As expressed at the beginning of this article, the greatest weakness of the IAHRs today is the failure of national courts to fulfill their obligation to prosecute those responsible for human rights violations, and the Argentine state is hardly the exception. The only conceivable way to overcome this situation would be for the CSJN itself to abandon positions like the one taken in response to the verdict in the "*Bueno Alves*" case and instead revert to the doctrine set out in the "*Espósito*" decision in response to the "*Bulacio*" verdict.



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## NOTES

1. It can be debated as to whether the obligation imposed by the IACHR Court in this case was strictly to undertake legislative reform. Certainly it did not create an obligation to change a specific norm; instead, the Court accepted the parties' agreement to set up a consultative group to evaluate possible changes to the law (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Caso Bulacio v. Argentina*, 2003, par. 144).
2. By mid-2011, the IACHR Court still had not issued any statement on its oversight of the status of compliance with this decision.
3. Another argument used by the Court in this case was that international treaties could be considered complex federal acts, given that both the Executive Branch and the Legislative Branch are involved in concluding them. The Court therefore maintained that the repeal of a treaty by only one of these branches of government would violate constitutionally conferred powers.
4. These instruments are: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; the First Optional Protocol to the International Covenant on Civil and Political Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment; and the Convention on the Rights of the Child.
5. This occurred in 1997, with the Inter-American Convention on the Forced Disappearance of Persons, and in 2003 with the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.
6. In this sense, Judges Petracchi and Fayt have stated that similar treatment should be given to the doctrine established by the Human Rights Committee and the Committee Against Torture, given that these are the regulatory bodies for the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, respectively (ARGENTINA, *Trejo, Jorge Elías c/ Stema S.A. y otros*, 2009a, párr. 5).
7. This happened in 1996 when Judge Vázquez – who had been the first to uphold the primacy of the Constitution over treaties with equal status (ARGENTINA, *Méndez Valles, Fernando c/ A. M. Pescio S.C.A.*, 1995b) – adopted the opinion already held by four other judges. This created a five-judge majority that shared the same understanding of Article 75 subpoint 22. However, Judge Vázquez reverted to supporting the primacy of the Constitution in 2004, with the “*Arancibia Clavel*” decision (ARGENTINA, *Arancibia Clavel, Enrique Lautaro y otros*, 2004a).
8. A hint of a contrary view can be seen in the CSJN's ruling in the “*Felicetti*” case (ARGENTINA, *Felicetti, Roberto y otros*, 2000, párr. 10), which indicates that the first part of the Constitution is hierarchically above both constitutionally-ranked treaties and the second part of the Constitution, giving the latter two the same hierarchical status.
9. The possibility that a clause modified by the Constituent Assembly could be declared null and void is far from being a mere hypothetical exercise. It occurred in 1999, when the CSJN determined that the Constituent Assembly had overstepped their role (ARGENTINA, *Fayt, Carlos Santiago c/ Estado Nacional*, 1999).
10. This dissenting opinion by Judge Belluscio would later be echoed by Judge Fayt in his dissenting opinion in the “*Arancibia Clavel*” case (ARGENTINA, *Arancibia Clavel, Enrique Lautaro y otros*, 2004a, párr. 15, 24, 32). Judges Zaffaroni and Highton seem to have applied similar criteria to their votes in the same case, when they found a conflict between the Constitution and a treaty with constitutional status and opted not to apply the latter (ARGENTINA, *Arancibia Clavel, Enrique Lautaro y otros*, 2004a, párr. 22, 33).
11. In particular, it emerges from the opinions of judges Petracchi (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 24), Zaffaroni (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 26), and Highton (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 29).
12. The binding nature of IACHR Court jurisprudence has also been used by Judge Petracchi to justify changes in previously-held opinions, particularly his refusal to extradite a Nazi war criminal (ARGENTINA, *Arancibia Clavel, Enrique Lautaro y otros*, 2004a, párr. 22- 23) and the validation of the law of due obedience (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 13-14, 30).
13. This can be seen in the votes of Judge Zaffaroni and Judge Highton in the “*Arancibia Clavel*” case (ARGENTINA, *Arancibia Clavel, Enrique Lautaro y otros*, 2004a, párr. 28); in Judge Zaffaroni's vote in the “*Simón*” case (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 27); and in Judge Lorenzetti's vote in the same case (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 19).
14. In particular, with Judge Highton's vote in the “*Simón*” case (ARGENTINA, *Simón, Julio Héctor y otros*, 2005, párr. 22).

## RESUMO

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O presente trabalho tem por finalidade analisar a falta de cumprimento efetivo das decisões do Sistema Interamericano de Direitos Humanos no caso da Argentina. Por meio de uma análise jurisprudencial, avalia-se o papel que a Corte Suprema de Justiça tem desempenhado quanto à implementação do direito internacional, em geral, e das sentenças da Corte Interamericana de Direitos Humanos, em particular. Em função da análise desenvolvida, identificam-se avanços e retrocessos em diferentes posturas adotadas pela Corte Suprema, o que permite identificar os problemas existentes. Em consequência, o trabalho propõe qual deve ser o caminho a seguir para superar os obstáculos identificados e assim melhorar o grau de cumprimento das decisões do SIDH.

## PALAVRAS-CHAVE

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Corte Interamericana (Corte IDH) – Corte Suprema de Justiça – Cumprimento de sentenças

## RESUMEN

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El presente trabajo tiene por finalidad analizar la falta de cumplimiento efectivo de las decisiones del Sistema Interamericano de Derechos Humanos (SIDH) en el caso de Argentina. A través de un análisis jurisprudencial, se evalúa el rol que la Corte Suprema de Justicia ha tenido respecto de la implementación del derecho internacional, en general, y de las sentencias de la Corte Interamericana de Derechos Humanos, en particular. En función del análisis desarrollado, se identifican marchas y retrocesos en las distintas posturas adoptadas por la Corte Suprema, lo cual permite identificar los problemas existentes. En consecuencia, el trabajo propone cuál debería ser el camino que debe seguirse a fin de superar los obstáculos identificados y así mejorar el grado de cumplimiento de las decisiones del SIDH.

## PALABRAS CLAVES

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Corte Interamericana (Corte IDH) – Corte Suprema de Justicia – Cumplimiento de sentencias



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ABSTRACT

This article discusses two main arguments. The first is that the Inter-American System of Human Rights (ISHR) provides the institutional basis for the construction of a transnational public sphere that can contribute to democracy in Brazil. Issues that are not recognized on the national political agenda can thrive in these transnational spaces. However, for the ISHR to function as a transnational public sphere, it needs to have credibility and its orders must be respected by the states. The second argument of this paper is that one of the challenges to the credibility of the ISHR is the reluctance of the national legal community to implement international human rights law in practice. We refer here to both the implementation of international decisions against Brazil and to so-called “conventionality control.” We have a legal duty to conform our conduct to international human rights standards, which have thus far been neglected.

Original in Portuguese. Translated by Eric Lockwood.

Received in August 2011. Accepted in October 2011.

KEYWORDS

Inter-American Human Rights System – Transnational public sphere – Due diligence – Conventionality control



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# INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A TRANSNATIONAL PUBLIC SPHERE: LEGAL AND POLITICAL ASPECTS OF THE IMPLEMENTATION OF INTERNATIONAL DECISIONS

Marcia Nina Bernardes\*

## 1 Introduction

Among the many achievements made by Brazil since the democratic transition, we can highlight the country's increasing participation in the international regime of human rights, ratifying and adhering to treaties, both in the context of the United Nations (UN) and in the context of the Organization of American States (OAS). Regionally, the country ratified the American Convention on Human Rights (ACHR) in 1992 and recognized the compulsory jurisdiction of the Inter-American Court of Human Rights (IACHR) in 1998. Since 1989, Brazil has ratified or adhered to many other regional instruments of human rights protection, such as the Inter-American Convention to Prevent and Punish Torture (in 1989), the Convention on the Prevention, Punishment and Eradication of Violence against Women (in 1995), the Protocol of San Salvador and the Protocol of the American Convention on Human Rights to Abolish the Death Penalty (in 1996) and the Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (in 2001).

At the same time that the process of ratification of and adherence to international treaties on human rights is a foreign policy decision, implementing the principle of the primacy of human rights in international relations as established by Article 4, Section II of the Constitution of 1988, a deeper understanding of what these international commitments mean domestically is still a challenge. On the one

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\*I thank Carolina de Campos Melo, Daniela Vargas, Renata Pelizzon, Bartira Nagado, Viviana Krsticevic Beatriz Affonso for their many lessons on the Inter-American Human Rights System. I also thank Isabella Maioli, Natalia Frickmann and Luiza Athayde, for their collaboration in preparing the text for publication and to other students in the group Research, Simulations and Reality at the Center for Human Rights at PUC-Rio who, over the last ten years, have taught me many things about international human rights law.

hand, there is a formal consensus in Brazil around the idea of human rights, made evident by the enactment of our constitution and the ratification of international treaties. On the other hand, routine practices of state agents and private individuals, both domestically and internationally, contradict this consensus.

This article will discuss progress and obstacles in Brazil regarding the implementation of our international human rights obligations, focusing mainly on the Inter-American System of Human Rights (ISHR). Such obstacles are political-legal and are rooted in a vision of a nationalist and parochial state, associated with privatist non-inclusive political practices that remain in both the state and civil society. The advances, in turn, concern the efficient use of the Inter-American system by democratic sectors of the state and civil society as a space for the deconstruction of these practices and strengthening of a democratic and inclusive culture.

We make, therefore, two main arguments, one primarily political in nature and another primarily legal. The first argument is that the ISHR provides the institutional basis for the construction of a transnational public sphere that can contribute to the expansion of Brazilian democracy. We preliminarily understand the concept of the public sphere as non-state *loci* of deliberation, where it is possible to attain the formation of collective will, the justification of previously agreed-upon decisions, and the forging of new identities. This discursively formed political will may influence the formal processes of state decision making, contributing to public policies that are beneficial to vulnerable social groups. However, sometimes national structures do not allow certain items to reach the public sphere, or if they do, they are not transformed into official public policies, because they reach out to invisible social groups, challenge powerful economic interests, among other reasons. In these moments, transnational public spheres can be decisive. Issues that gain no traction on the national political agenda can be addressed in these transnational spaces and, later, be included on the domestic political agenda in a more powerful position. However, for the ISHR as a transnational public sphere to produce the aforementioned political effects, it is necessary that its organs have credibility and that its orders be followed by the states.

The second argument we intend to advance is that a major challenge to the effectiveness of the decisions of the organs of the ISHR in Brazil is the opposition of the national legal community to incorporating international human rights law in its practices. We refer here to both the implementation of the decisions against Brazil issued by international bodies and, especially, so-called “conventionality control” that must be exercised by the Brazilian authorities, along with the known safeguards ensuring legality and constitutionality, avoiding the violation of international human rights conventions. There is a legal duty to conform domestic conduct to international standards of human rights protection, which has been neglected by national legal actors. This reality threatens the legitimacy of Inter-American system.

In section 2 of this article, we discuss some relevant issues in Brazil that have arisen after its transition to democracy and also recent international developments that are essential for understanding the institutional basis for the ISHR as a transnational public sphere. Unfortunately, within the narrow scope of this article, we cannot have a conceptual discussion about the transnational public sphere, and we focus on processes that encourage the formation of transnational public spheres, as well

as the inclusion of Brazil in these processes. In section 3, we continue to develop this argument through an analysis of the increasingly intense participation of Brazil in the ISHR, highlighting the major obstacles that still need to be overcome. The concept of reparation in international human rights law is broad and international decisions, as we will see, provide for measures for compensatory damages, symbolic measures and measures of non-repetition of the violation found. Among these last measures, we highlight the obligation to diligently investigate the alleged crime, prosecute, and possibly punish those responsible for rights violations. In section 4, we will affirm that complying with a sentence is an international legal obligation of the Brazilian authorities. In section 5, we will focus on the analysis of the obligation of due diligence, which deals directly with the jurisdiction of traditional legal actors, and where we address Brazil's non-compliance with most judgments against it.

## 2 The inclusion of Brazil in the international human rights regime and the formation of transnational public spheres

Brazil today is a party to the main human rights treaties. However, there is much skepticism regarding the effectiveness of these legal instruments. Indeed, the question about the power of law to shape conduct, invoked at every turn by those who are interested in law as an instrument of social change, is even more acute in the case of international law than in other areas of law. What is the relevance of an international standard that creates obligations for the state since, ultimately, the capacity to honor international obligations depends on the state itself, given that there is no superior body to enforce its mandates? How can the gradual process of Brazil's inclusion in international human rights regime be understood within the international and Brazilian context during the end of the 20th century and the beginning of the present century?

According to the realist hegemonic school in international relations theory, associated with the Hobbesian model of Westphalia,<sup>1</sup> states conform to international standards when they realize, through a strategic calculation, that it would be consistent with national interests. The motive of a state's action is always to maximize its interest and to struggle for power. Likewise, they violate international standards for strategic reasons, under a guise of legal reasoning to justify their actions. National sovereignty would be the legal concept that would explain this political vision focused on the state's interests.

As a matter concerning the *raison d'État*, the Brazilian foreign policy organs recognized that adherence to international human rights law was connected to multilateralism and the expansion of Brazilian international autonomy, which were Brazilian foreign policy priorities during the 1990s.<sup>2</sup> Indeed, the government wanted Brazil to have credibility, showing the international community that Brazil had completed the transition from dictatorship to democracy and that it had entered a new stage in its economic, social and political history. Ratification of human rights treaties was considered an eloquent sign of this new phase.<sup>3</sup> Similarly, in the post-Cold War world, multilateralism was seen as giving a more active role, which otherwise would have been out of reach, to countries on the periphery of global relevance. It was thought that Brazilian participation in international regulatory structures would

preserve and increase its autonomy. Again, stronger international systems of human rights protections were an important step in this direction (PINHEIRO, 2004, p. 58-62).

But this realist explanation can explain neither the entire international scene of the post-Cold War era nor that of the national context of democratic transition. According to Anne-Marie Slaughter, the realist “challenge” to international law and the coercive capacity of international legal norms can be met if we change the lens of absolute sovereignty, which has been used for two hundred years to understand international relations, to a different lens, of the liberal-constructive perspective, which sees new relevant international actors, in addition to the state (SLAUGHTER, 1993).

According to this view, state sovereignty, which was absolute and unitary in the Westphalian view, was disrupted due to the forces of globalization and multiculturalism. “Above” and “below,” such processes have imploded the principle of territoriality as a defining criterion of domestic affairs, the exclusive domain of sovereign states, and international affairs, the subject of negotiation between states (GOMEZ, 1998). The breakdown of sovereignty gives insight into the role of new actors in international relations that are articulated in transnational networks around different issues, superseding the old dichotomy mentioned above. In fact, the most relevant contemporary issues such as the environment, health, human rights, security and the economy compel structures that underlie different levels of governance, from local to global.<sup>4</sup> Thus, sovereignty in the context of the contemporary world is neither absolute nor flexible, but broken.

Slaughter argues that networks of civil society organizations and social movements, as well as networks of state agents (international associations of mayors, judges, and legislators, among others), brought about a dynamic in international relations that cannot be explained exclusively from the realist perspective of the balance of power between nations (SLAUGHTER, 1993). Margaret Keck and Kathryn Sikkink point out networks involving international human rights organizations, from grassroots organizations to bureaucratic branches of international organizations (such as the Inter-American Commission on Human Rights, for example) and states (such as the Special Secretariat for Human Rights of the Presidency of the Republic), to international NGOs (KECK, SIKKINK, 1998). These networks have been effective in creating soft law, such as reports, codes of conduct, guidelines, and declarations of principles. They also have been effective in pressuring states and international organizations to adopt practices and standards closer to the codes they create.

The liberal-constructivist perspective emphasizes the importance of international organizations that were formed after the Second World War, such as the United Nations, the Organization of American States, the European Union and, more recently, the World Trade Organization. Such organizations, as well as subjects of international law with their own legal personality, are also spaces for deliberation and negotiation. In this sense, they are certainly arenas of struggle for power, as the realist school would say, but are also *loci* where values are constructed and disseminated, rooted traditional practices are challenged and given new meaning and repertoires of action are built and expanded. These institutions provide the basis for deliberative forums where interests and viewpoints are presented and perhaps changed during the course of negotiation: “States may not know what they want when they begin to

negotiate complex issues within a complex institutional framework, or may change their ideas during the process leading to changes in how they understand their national interests.” (HURRELL, 2001, p. 37).

According to Andrew Hurrell, to illustrate this point, “international institutions can be the place where state officials in Brazil and Argentina, for example, are exposed to new standards” (HURRELL, 2001).

These organizations constitute international regimes that can impact the balance of power between nations and between the state and groups of individuals as they create a kind of international law. International actors considered weaker can increase their chances of participation, in accordance with their “ability to use international platforms and to take advantage of established arguments to promote new and more inclusive rules and institutions” (HURRELL, 2001, p.38).

These new lenses of weakened sovereignty and of thematic networks allow us a more adequate assessment of the dynamics of the international human rights regime. Returning to the example of Brazil, in fact, the “prevalence of human rights” in international relations, as mentioned in the Constitution, was a policy that was gradually implemented over a long period of time, involving not only the state but also civil society. Such involvement has intensified since 1993 when the then Ministry of Foreign Affairs sponsored a national meeting on human rights to produce an assessment of Brazil’s record, to be presented at the United Nations Conference of Human Rights in Vienna. After the conference, a series of meetings was held in Brazilian state capitals, where the push for the ratification of human rights treaties was consistent and decisive. From these meetings, the first National Plan for Human Rights in 1996 was developed, setting forth the top human rights goals to be prioritized by the Executive in all its areas of activity.<sup>5</sup>

The affirmation of the domestic commitment to human rights and adherence to international treaties allowed for appeals to international monitoring bodies as an additional tool for strengthening the culture of respect for rights. As we shall see, different organizations of civil society and different social networks gradually formed around the Inter-American System of Human Rights (ISHR) and other supranational forums and, therefore, on several occasions managed to make the Brazilian government give a more appropriate response to allegations of human rights violations, which previously would have been ignored.

Indeed, the involvement of Brazilian actors with the Inter-American System Human Rights created an interesting dynamic involving the State, civil society organizations and organs of the system. The relationship between these entities is not generally peaceful and harmonious, but it can still spur advances in the promotion of human rights, depending on how power is configured at that moment. Cavallaro and Schaffer explain the dialectical character of this relationship:

*Civil society can seek the enforcement of individual rights through the use of human rights protection mechanisms at the Inter-American System of Human Rights; in turn, the System needs the support of civil society to bolster its legitimacy. Governments provide the resources necessary to keep the Inter-American System functioning and elect individuals who will serve as commissioners or judges in their monitoring bodies, but these institutions also*

*depend on the voluntary acceptance of their authority and good-faith participation in the established rules of engagement to be effective. And those institutions that constitute the system have the authority to settle claims and issue decisions requiring the action of both governments and civil society actors, but that authority depends on the perception of the latter group that the authority is exercised in a reasonable and appropriate.*

(CAVALLARO, SCHAFFER 2004, p. 220-221).

There is no doubt among those who defend the ISHR that it has already established itself as an important tool for promoting human rights. So much so that several civil society organizations are incorporating litigation at the ISHR as part of their strategy and others specialize in bringing cases to supranational bodies. The input of these actors, in turn, affects how these international organs work and force states to negotiate with those to whom they did not previously want to listen. Throughout the litigation and the many international exchanges between state actors and civil society from different countries, certain practices are criticized, new repertoires of action are acquired and the asymmetry of power between state and individual can be mitigated. Such effects may result from genuine learning processes and democratic consolidation, which we call processes of developing consciousness (*raising awareness*) or strategies of political pressure, creating awkward situations for states that call themselves democratic (*embarrassment power*).

However, much progress is still needed in order to give effect to the determinations of the legal organs of the system, whether regarding compliance with the decisions of international bodies like the Inter-American Commission on Human Rights (IACHR) and, especially, the Inter-American Court of Human Rights (ICHR), or through the direct use of these parameters by the national judiciary. Indeed, national authorities do not comply fully and willingly with international obligations and repeated failure to comply can cause a loss of legitimacy and credibility of the ISHR with respect to the victims of human violations and the civil society organizations that represent them. The positive effects of the processes described above for the construction of a democratic culture could be lost. Let us consider the case of Brazil before the ISHR.

### **3 Brazil at the Inter-American System of Human Rights: advances and obstacles**

The Brazilian state, subsequent to the ratification of major international human rights treaties, was slow to incorporate the international human rights regime, giving little importance to supranational litigation. Especially in the first decade after the transition to democracy, the state failed to adequately respond to the requests of the IACHR, ignored deadlines and responded to petitions that described in detail serious human rights violations with a few generic paragraphs (CAVALLARO, 2002, p. 482). Recommendations of the ISHR organs were often disregarded by authorities, especially at the state level, who considered the judgments to be infringements upon national sovereignty. Even today, the Brazilian government appears to be resistant to the scrutiny of its public policies by international bodies, as seen from the recent



reaction of the Brazilian State to the IACHR decision ordering provisional measures to suspend the construction of the hydroelectric plant of Belo Monte, due to alleged deficiencies in the licensing process that would result in the violation of the rights of indigenous peoples of that region.<sup>6</sup>

The Brazilian civil society organizations, in turn, were also initially reluctant to make use of international organs. Perhaps because of the delay in Brazil's full participation in the international human rights regime, supranational litigation was not part of the repertoire of actions of Brazilian human rights activists over the past decade. International NGOs have adopted as part of its mission the dissemination of the ISHR as a resource for domestic promotion of human rights. They knew that:

*Introducing civil society to the system would undermine the attempts of the Brazilian state to classify the dispute as a kind of imperialist intervention against the system. Finally, expanding the range of litigants necessarily expanded the requirement for greater state involvement in the Inter-American system.*

(CAVALLARO, 2002, p. 484).

The task of involving Brazilian organizations in this strategy was difficult. In fact, until May 1994, among the hundreds of cases pending in the IACHR and the thousands of petitions forwarded by activists in South America, only ten referred to Brazil (CAVALLARO, 2002, p. 483). This is partly explained by the Brazilian delay in ratifying the American Convention of Human Rights, in 1992, and in recognizing the jurisdiction of the ICHR, in 1998, finally implementing Article 7 of the Temporary Constitutional Provisions Act. In 1998, moreover, only about 3% of the pending cases before the IACHR were against Brazil (CAVALLARO, 2002, p. 483).

However, and despite some difficulty, the efforts of a few pioneer international and national NGOs in Brazil using the mechanism of individual petitioning began to bear fruit. In 2005, the number of cases against Brazil in the IACHR reached 90, and in the IACHR 2004 report, Brazil ranked third amongst countries in number of complaints against it and cases pending (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2004, cap. III, seção A).<sup>7</sup> Today, according to the 2010 report of the IACHR, 97 cases are pending against Brazil, which ranked fifth in the number of cases, after Peru (349 cases), Argentina (209 cases), Colombia (183 cases) and Ecuador (133 cases).<sup>8</sup>

The number of prosecuted cases against Brazil by the IACHR remains low compared to other Latin American countries such as Peru, Mexico or Honduras. To date, five cases have been judged against Brazil, in which four sentences have held the country liable and established recommendations whose implementation are still being monitored (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Ximenes Lopes v. Brasil*, 2006; *Escher e outros v. Brasil*, 2009a; *Garibaldi v. Brasil*, 2009b; *Julia Gomes Lund e outros v. Brasil*, 2011b), and in which one has been closed (*CORTE INTERAMERICANA DE DIREITOS HUMANOS*, *Nogueira de Carvalho e outro v. Brasil*, 2006c). In addition to the sentences, various provisional measures were issued against Brazil in five cases (*CORTE INTERAMERICANA DE DIREITOS HUMANOS*, *Penitenciária Urso Branco*, 2002; *Unidade de Internação Sócio-Educativa*, 2011a; *Penitenciária Dr. Sebastião Martins*,

2006b; *Complexo do Tatuapé da Febem*, 2005) and in one case there was the rejection of a provisional measure (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Julia Gomes Lund e outros v. Brasil*, 2011b). There is no case against Brazil set to go to trial on the Court's docket at the moment.

In response to the growing number of petitions sent to the IACHR, the Brazilian state has also demonstrated a greater commitment to human rights during the litigation. In 1995, it established a Human Rights Secretariat in the Ministry of Foreign Affairs, specializing in systems of the United Nations and Organization of American States, which is the body that formally represents Brazil regarding human rights issues, receiving all communications originating from those international organizations. The Department of Human Rights, which in 2003 achieved the status of Ministry and had direct ties to the presidency, is also part of the delegation responsible for the communications of the Brazilian state before the IACHR and the Court. Although it was established in 1977, it was only in the 1990s that the Secretariat assumed a more active role in international human rights litigation, both in regard to the litigation itself, and to the negotiations with the other domestic organs with jurisdiction to deal with the topics being discussed internationally. Recently, the Attorney General's Office has also played a role in representing Brazil, being responsible for responding to the arguments concerning the admissibility of cases, specifically questions relating to the exhaustion of domestic remedies.

We can thus see an evolution in the federal executive branch with respect to the Brazilian response to international human rights demands. We went from a stage of great ignorance about the ISHR, to the creation of a specialized team that has begun to respond more adequately to requests. Since 2000, the state has adopted a more proactive stance and instead of merely reacting to requests for legal and political action, has sought to create conditions to apply Article 48 (b) of the ACHR to close the case when the grounds for pursuing it cease to exist. This movement, however, is not linear. The example mentioned above, regarding the rejected precautionary measures prescribed by the IACHR in the *Belo Monte* case, seems to be a return to Brazil's prior dynamic with the ISHR.

For this strategy to succeed, the organs responsible for representing Brazil must negotiate with the Brazilian state and municipal authorities, which are generally those that have constitutional authority to examine and resolve most of the alleged human rights violations. In fact, our federative pact, when confronted with Articles 2 (the duty to adopt domestic legislation consistent with the treaty), 28 (federal clause) and 681 (requiring the State party to comply with the ruling of the court in any case to which it is a party) of the ACHR, creates a paradoxical situation: the federal government responds internationally for acts over which it has limited control and cannot argue this fact to exempt itself from international liability.

Besides dealing with the state and local authorities, these agencies of the federal executive branch face the challenge of engaging the legislative and judicial branches with the ISHR. Many of the recommendations of the IACHR and the Court's judgments require legislative changes whose approval encounters resistance. Likewise, the Brazilian judiciary has not exercised the forementioned "control of conventionality" and does not tailor their decisions to the standards developed by

the ISHR, although the ACHR has been formally incorporated in domestic law through Decree No. 678 of November 6, 1992.

There has been no resolution regarding the need for a special internal procedure to ensure the execution of the Court's judgments, especially with respect to the payment of damages. Article 63.1 of the American Convention authorizes the court to determine "reparatory measures that tend to nullify the effects of violations. This article guarantees the right, and if applicable, provides the necessary reparations as well as establishing the compensatory damages to the injured party" (KRSTICEVIC, 2007, p. 24). With respect to compensation, Article 68.2 of the ACHR sets forth that the payment must be made in accordance with internal procedures in force. In Brazil, the issue is still pending and the need for ratification of the Court's ruling and the compulsory system requiring writs for such payments is being discussed, in light of the system's slowness, and the fact that the victim has gone through a long domestic and international ordeal until the Court's decision is handed down and deadlines for compliance with the judgment are set. According to bill No. 4.667/2004, presented by then Deputy José Eduardo Cardozo, the payment of compensation mandated by decisions of international bodies is the responsibility of the Union - except for the right to seek compensation from the person or entity, in the public or private sphere, who caused the human rights violation - and the sentence is enforceable without any further action, unlike the foreign judgments that need to be ratified. The project has been amended to substantially alter the system of payment proposed in the original version (AFFONSO, LAMY, 2005).

With respect to compliance with the measures of non-repetition and the obligation to investigate, the situation is also serious. Part of the problem stems from the fact that the majority of the judges, ministers, prosecutors and lawyers have little familiarity with international law, and in particular international human rights law. Using this branch of law has not been part of their repertoire of actions and needs to be developed, as was the case with human rights activists in the 1990s.

Jose Ricardo Cunha conducted an interesting study at the Rio de Janeiro State Court regarding the level of education and interest in human rights of magistrate judges responsible for 225 of the 244 judgments of the Judicial District. Some of their responses corroborate the argument made above: 84% of judges surveyed had no formal education in human rights, 40% had never studied anything about human rights, even informally, 93% had never engaged in any type of social service or public service. With regard to the mechanisms of international human rights protection, 59% had only a superficial knowledge of the systems of the UN and OAS, 20% admitted having no knowledge about these systems, and only 13% said they read the decisions of international courts with regularity (CUNHA, 2011, p. 27-40). Meanwhile, the courts of other countries, such as Argentina and Colombia, have routinely applied the decisions of the organs of the system, in cases that dealt with violations in other countries, and have recognized the constitutional hierarchy of these decisions (DI CORLETO, 2007; UPRIMNY, 2007).

Ignorance at different levels of government about the obligations arising from membership in the ISHR presents two problems: it increases the chances that there is a violation of the ACHR, generating new reports sent to the IACHR, and also

greatly complicates the implementation of the judgments and recommendations issued in the cases that have reached the System.

Given this reality, civil society organizations, the Secretariat for Human Rights and academia have been trying, and succeeding to a great extent, to change the current situation by promoting seminars and workshops on this issue and by including international human rights law in the curricula of law schools. Since 2004, international law came to be part of the minimum curriculum guidelines in law schools (BRAZIL, 2004), and international law issues have appeared on the bar examination.

Despite real progress, the translation of this growing awareness of the legitimacy of the ISHR in effecting social change and universal rights is still sporadic and the question of compliance with judgments remains a challenge. This problem is not exclusive to Brazil, according to research by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Barbara Schreiber. Among the 462 protective measures issued by both the IACHR and the Inter-American Court between 2001 and 2006, 50% were complied with, 14% were partially complied with and 36% were not complied with at all. The measures determined by the ISHR organs were classified into four broad categories: compensation to victims, measures of non-repetition, duty to investigate and punish violations of rights and measures protecting victims and witnesses. Of these, the measures with the highest degree of compliance are those involving compensation (economic or symbolic) and those with the lowest degree are those involving non-repetition and the requirement to investigate and punish. Also according to the study, during this period the IACHR issued 42 measures against Brazil in 6 cases, with a 41% compliance rate, 24% partial compliance rate, and 36% non-compliance rate (BASCH et al., 2010).

Complying with the System's recommendations depends on a number of factors and is "significantly increased when the cases are accompanied by social pressure on the domestic authorities through several channels" (CAVALLARO, SCHAFFER, 2004, p. 235) capable of mobilizing the public. Organizations that specialize in litigating cases before supranational courts must take into account the domestic political agenda when selecting their cases, if indeed they desire social change:

*Potential litigants at the international level should be careful not to set their own agenda, based solely on legal criteria. Experience shows that international disputes that are not accompanied by campaigns organized by social movements and/or the media rarely produce useful results. As a result, we emphasize the need for supranational litigants to avoid taking the lead in strategic decision-making on how best to use the Inter-American System.*

(CAVALLARO, SCHAFFER, 2004, p. 235).

Indeed, civil society organizations specializing in this type of litigation do not merely refer any case to the IACHR and have developed a kind of strategy that has been called impact advocacy. In general, petitions sent to the IACHR are based on three main criteria: (a) cases that fully reflect systematic patterns of domestic human rights violations, (b) cases that raise issues on which the IACHR has not spoken clearly, aimed at building new international standards of human rights protection, and (c) humanitarian cases, in which the extreme vulnerability of the victim justifies the

litigation, even though they produce none of the other aforementioned effects. Thus, before sending the petition to the IACHR, there is a strategic assessment in light of the legal and political context of that country and of the ISHR with respect to the objectives of the litigation and the chances of success in attaining, more or less, those objectives. “Success,” in this context, does not mean a purely procedural victory. It means, above all, improving the landscape of human rights violations, which sometimes can be even partially achieved, in the proceedings, in the negotiations, in lobbying for human rights in the context of international litigation, independently of the final result of the litigation.

In addition to these obstacles, there are the internal deficiencies of the ISHR, which are vulnerable to the actions of states dissatisfied with the criticisms made by both the IACHR and the Court. These two bodies constantly undergo political pressure when countries withhold funding, attempt to prevent publication of the IACHR’s reports with findings that the ACHR has been violated, and attempt to intervene in the appointment of Commissioners to the IACHR and judges to the Court. These deficiencies eventually cause the ISHR to replicate problems in the domestic sphere, which itself is a reason to seek a remedy at the supranational level, namely for the undue delay in issuing decisions (THEREIN; GOSSELIN, 1997, p.213).

In the next section, we examine to what extent the legal duty to investigate, prosecute and punish is being properly implemented by the Brazilian authorities.

#### **4 The legal obligation to wholly comply with international decisions**

With regard to Brazilian legal actors, ignorance about our international obligations discussed above is responsible for most of the convictions against Brazil and the difficulties in fulfilling the decisions of the organs of the Inter-American System. This is due to the fact that the main cause of the international declarations of Brazil’s liability are violations of Article 1.1 (general duty to guarantee) combined with Article 8 (procedural safeguards) and Article 25 (judicial protection) of the ACHR. This situation could be reversed or mitigated if our legal actors routinely applied international standards of human rights protection.

Before considering the Articles mentioned above, some legal and policy points should be clarified. First, although the Commission and the Court are organs of the OAS, which, in turn, is an international organization subject to foreign policy pressures on State-members, the operating logic of the ISHR is supranational, not intergovernmental or “inter-national.” Unlike those individuals who work in other organs of the OAS, such as the General Assembly, judges and commissioners act in their own names, as human rights experts with all the guarantees of exercising their functions with independence, and do not represent the interest of any State, although by necessity they are nominated for the position necessarily by a member state. Of course, this feature does not immunize the ISHR from political pressures, as mentioned above, but significantly reduces the potential for this kind of embarrassment.

Secondly, in accordance with Article 62.1 of the ACHR, the so-called optional clause of compulsory jurisdiction, states in the region decide independently whether or



not they recognize the jurisdiction of the Court. This decision is a state act of sovereignty. However, once the jurisdiction of the Court has been recognized, it becomes binding and irrevocable, except in cases provided for in the Pact of San José. Pursuant to Article 68.1 and Article 2 of the American Convention, States agree to fully comply with the decision issued by the Inter-American Court, and no argument based on domestic law, such as the statute of limitations, can be used to remove this obligation. Failure to comply with the court decision, *per se*, gives rise to international liability. Even if a State decides to denounce the American Convention to avoid the obligation to implement a given sentence, the possible violations that have come before the ICHR before the State's denunciation will be examined and the international liability of the State could be declared.<sup>9</sup>

With respect to decisions of the IACHR, controversy exists as to its mandatory nature.<sup>10</sup> As mere recommendations, the reports of noncompliance do not give rise to international liability, even if they are issued after a procedure that follows the minimum requirements of due process, such as the right to confront hostile witnesses and present a full defense, and they are similar to a judgment, with a statement of facts, legal reasoning and the order (NAGADO; SEIXAS, 2009, p. 295-299). Nevertheless, the Court declared in the *Loyaza Tamayo* case that states should make every effort to comply with the decisions of the IACHR as a requirement of the rule of good faith in the interpretation of treaties, codified in the Vienna Convention on the Law of Treaties, in 1969:

*Under the principle of good faith, enshrined in Article 31.1 of the Vienna Convention, if a State signs or ratifies an international treaty, especially one dealing with human rights, such as the American Convention, it has the obligation to make its best effort to implement the recommendations of an organ whose mandate is to protect, such as the Inter-American Commission, which is, moreover, one of the major organs of the Organization of American States, and whose function is to "promote the observance and defense of human rights" in the hemisphere*

(Letter OAS, articles 52 and 111)  
(CORTE INTERAMERICANA DE DIREITOS HUMANOS,  
*Loayza Tamayo v. Perú*, 1997a, para. 80).<sup>11</sup>

We must note that the obligation to comply with the provisions of the ACHR stems from ratification of or accession to the treaty, and not through recognition of the compulsory jurisdiction of the Inter-American Court. The IACHR is the body authorized by the relevant treaties to interpret the ACHR. Moreover, the ACHR, in Article 2, establishes the duty to adopt domestic laws necessary to honor the obligations set out in that instrument, and the Vienna Convention on the Law of Treaties, Article 27 provides that a State "may not invoke the provisions of national law to justify its failure to execute its obligations under a treaty."

There are plans for a system to ensure compliance with the collective decisions of the organs of the ISHR. According to the IACHR, the Inter-American Court must submit annual reports to the OAS General Assembly stating, among other things, breach of its decisions by State-parties. The IACHR proceeds in the same way, even without express authority under the ACHR. The goal is to shame the state in violation in a strategy known as "naming and shaming," to facilitate diplomatic initiatives encouraging the state to comply with the decision in question. Among the powers



of the General Assembly, although this feature has not yet been used, it is possible to issue resolution (as such, not binding) recommending to the other State-parties of the OAS to impose economic sanctions on the violating state until the decision from the ISHR organ in question is implemented (KRSTICEVIC, 2007, p. 34-37).

Thirdly, the concept of reparations in international law is broader than in domestic law. In addition to the obligation to monetarily compensate victims and their relatives, these international judgments imposing liability include symbolic reparations, a finding that domestic authorities are responsible for the violations and the so-called “measures of non-repetition,” which could involve changes in public policy, domestic legislation and the jurisprudence of that country’s highest court. The Court imposed measures of non-repetition in the recent case of *Julia Gomes Lund et al vs. Brazil* (Araguaia Guerrilla case), requiring that the state eliminate all legal and political obstacles to investigate and prosecute the perpetrators of the crime of forced disappearance and other crimes against humanity (including torture) (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Julia Gomes Lund e outros v. Brasil*, 2011, para. 65). Thus, although there are doubts about the execution of the economic aspects of an international sentence, as noted above, several aspects of the measures of non-repetition usually imposed against Brazil could be implemented without the need for a law establishing special procedures.

Fourth, specifically with regard to Brazil, there is the position taken by the Brazilian Supreme Court in the case of RE 466.343 on December 3, 2008, which looked specifically at the ACHR and consecrated the supra-legal character in the Brazilian legal system of human rights treaties that were ratified before Constitutional Amendment No. 45, denying, as a consequence, the applicability of domestic laws in conflict with the treaty’s provisions. The result of the decision was the issuance of binding precedent No. 25 of the Brazilian Supreme Court in 2009, deeming illegal the imprisonment of a trustee in breach of trust, in any form, despite the constitutional provision of Article 5, LXVII of the Federal Constitution. We conclude that any other constitutional provisions that conflict with the ACHR, in addition to those regulating the imprisonment of a trustee in breach of trust, also lose their applicability.

Also with respect to Brazil, in addition to the provisions in Article 4, Section 2, and Article 5, paragraphs 2 and 3, Article 7 of the Temporary Constitutional Provisions Act announces that the Brazilian State shall strive for the formation of an international court of human rights. The systematic interpretation of the Constitution supports the view that international human rights treaties will have constitutional status, or at least supra-legal status, and the international bodies, whose contentious jurisdiction is recognized by Brazil through a specific act, shall have authority domestically as interpreters of the Constitution. The thesis that the decisions that such bodies have generated are of a political nature and that therefore would not be subject to mandatory compliance is not consistent with this interpretation.

Thus, it is clear that the ACHR imposes legal obligations upon the Brazilian state authorities, as it is not merely a political document which sets forth aspirations to be pursued in the long term. This Convention, as well as international human rights treaties ratified by Brazil, creates legal obligations for the country. As a legal instrument that becomes part of the domestic legal system, the monitoring of compliance with these obligations should not be performed only by supranational bodies, but also by those

who carry out the essential functions of domestic justice, in addition to the Judiciary. In fact, next to the control of legality and constitutionality, it is imperative to achieving conventionality control.<sup>12</sup> Understanding how articles of the ACHR are interpreted by the Inter-American Court and also by the IACHR is included in this obligation.

Achieving this control is even more indispensable to the extent that a significant part of the international recommendations made to Brazil refer directly to actions that impact the jurisdiction of executive branch agencies responsible for public safety and the prison system, as well as organs of the judiciary, prosecutors, attorneys and the public defender. These actions relate to the duty of due diligence and the obligation to prevent, investigate and punish, as discussed below.

## 5 Challenges for legal actors in Brazil: the duty of due diligence and the need of achieving control of conventionality

In accordance with the stipulations provided by the IACHR in the sentence of *Velásquez Rodríguez v. Honduras*, the first case to be decided by that body, the interpretation of Article 1.1, which brings the so-called general guarantee clause, combined with the other articles that spell out individual rights, leads to the conclusion that the state's duty to promote human rights is not confined to mere abstention from violations of human rights. According to the Court, the State is internationally liable for violation of the Articles of the ACHR, even if perpetrated by individuals, and not by agents of the State, if the latter did not act with "due diligence" to prevent such violations. The duty of due diligence, in turn, was interpreted by the Court as including the obligation to "prevent, investigate and punish" the relevant human rights crimes (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Velazquez Rodriguez v. Honduras*, 1988, para. 162, 172-174). Thus, even if there has been a violation of rights as codified in the American Convention, if the State acted with due diligence in the investigation of crime, preventing impunity, no international liability will be imposed.

Noteworthy within this triple obligation of the States is the duty to "investigate" that results from the settled interpretation of Article 1.1, in relation to other rights listed in the ACHR, as stated above, and which also ends up involving the analysis of possible violation of Articles 8 (fair trial) and 25 (judicial protection) of the ACHR. Regarding the State's liability on acts and omissions that are linked to human rights violations, the Inter-American Court emphasizes in the first sentence in which it holds Brazilian liable:

*The Court considers it appropriate to remember that it is a basic principle of the law of international liability of the state, supported by International Human Rights Law, that every state is internationally liable for acts or omissions of any of its powers or organs in violation of internationally recognized rights, under Article 1.1 of the American Convention.*

*Articles 8 and 25 specify, regarding the acts and omissions of domestic judicial organs, the scope of the forementioned principle of the imposition of any liability for the acts of State organs.*

(CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Ximenes Lopes v. Brazil*, 2006, para. 172-173).

To meet these obligations, the investigation must be “performed by all legal means available and geared towards uncovering the truth and to the investigation, prosecution and punishment of those responsible for the violations, especially when state agents are, or could be, involved” (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Ximenes Lopes v. Brazil*, 2006 to. 148). The obligation to investigate, prosecute and punish, the Court points out, is an obligation of the means, not of the end result, but to be fully satisfied, even if punishment is not feasible, the process should be serious, impartial and effective.

According to a survey conducted by Bartira Nagado, in all cases in which Brazil was declared internationally liable for violations of the ACHR, whether in the reports of the IACHR, or in the judgments of the Inter-American Court, the country failed to adequately comply with its obligations to investigate, prosecute and punish those responsible for human rights violations. According to her:

*Breach of the duty to investigate, prosecute and punish could have as its factual cause: (1) the lack of a police investigation to investigate the alleged crime, (2) failures in the investigative procedures, intentional or not, that end up harming the result of the investigations, (3) undue delay in the carrying out the investigations, (4) defects in the judicial proceedings, intentional or not, (5) undue delay in prosecuting the crime, at all levels, (6) lack of diligence in locating the at-large defendant, prejudicing the progress of the case or the execution of the sentence, (7) flawed judicial decision. These assumptions do not necessarily exhaust the possible problems that can be measured in relation to criminal prosecution, but covers most of the problems in Brazil's cases.*

(NAGADO, 2010).

With respect to these violations, Nagado (2010) asserts that “State agents are responsible, whether police, prosecutors or the judiciary, since these agents have the power to move the criminal prosecution along, at its various stages.”

Not even the lawyers and public defenders are immune. In the case *Roberto Moreno Ramos v. United States*, where the petitioner had been sentenced to death, the IACHR stated that the State failed to comply with its duty to ensure a fair trial and due process with respect to the victim, under Articles XVIII and XXVI, respectively, of the American Declaration of Human Rights, to the extent that the lawyer appointed by the American court did not exhaust the defense possibilities nor argue the mitigating circumstances that could have prevented the application of the death penalty. The IACHR also stated that the mere absence of a public defender who could act in any U.S. state in death penalty cases violated the above provisions (COMISSÃO INTERAMERICANA SOBRE DIREITOS HUMANOS, *Roberto Moreno Ramos (Estados Unidos)* 2005, para. 52-59).<sup>13</sup>

We arrive at a conclusion that contradicts the self-perception of the group: legal actors, who carry out the functions essential to justice, can be perpetrators of violations of internationally recognized human rights. The arguments commonly put forward to justify the unintentional breach of the duty to investigate, prosecute and punish those responsible for human rights violations, such as overcrowded court dockets, lack of adequate infrastructure, or lack of sufficient personnel, cannot be

used to prevent the country's being held internationally liable; if this were the case, the commitment to safeguarding and promoting human rights would become very fragile, as set forth in the aforementioned Article 27 of the Vienna Convention on the Law of Treaties.

## 6 Final thoughts

We argue in this article that international human rights litigation has the potential to strengthen, through political means, the culture of rights in Brazil and we specifically examine the example of the ISHR. Such potential emerges from an understanding of the political dynamics underlying the dispute as typical of a transnational public sphere. In these arenas, practices and interests can (or not) be transformed through strategies of enlightenment and education, as well as through strategies exposing systematic routine violations, shaming and pressuring states that present themselves before the international community as guarantors of human rights. As the public sphere, use of the ISHR allows for the reconfiguration of power, empowering groups that previously were invisible, although this is not always the case.

However, such political potential only exists if the political organs of the ISHR are considered legitimate by the state, and especially by civil society organizations. Accordingly, the full implementation of the provisions of these bodies is critical. Among the types of measures issued from international organs, the most routinely disregarded by Brazil concern the duty of due diligence, which includes the obligation to investigate, prosecute and punish perpetrators of human rights violations. Such obligations directly speak to the work of legal actors who, although they perform functions essential to justice, themselves become human rights violators.

This article aims to draw attention to the importance of conventionality control by national authorities, in particular the judiciary. As a precaution, use of international standards of protection by prosecutors, politicians, lawyers, advocates, and especially judges would decrease the number of cases sent to the IACHR, preventing a case backlog, increasing its agility and promoting human rights more effectively. Ideally, only very emblematic cases would be sent to the ISHR, enhancing the impact of its decisions.

With regard to cases that led to decisions against Brazil, the measures that have been disregarded are again those related to the duty of due diligence. Therefore, the full implementation of these decisions will also require that legal actors recognize the obligation imposed by international human rights laws.

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## NOTES

1. The so-called Peace of Westphalia, signed in 1648, after the end of the Thirty-Years' War in Europe, is considered the starting point for the modern international system, based, on the one hand, on the affirmation of the sovereign territorial state, which emerged as an important political unit, and, secondly, the horizontality of international relations. According to this paradigm, sovereign states coordinate their actions without recognizing any supranational authority that can exercise any kind of vertical coercion.
2. For a defense of a democratic world order and multilateralism as a principle of international relations, see the article by Fernando Henrique Cardoso, *Política Externa: fatos e perspectivas* (CARDOSO, 1993, p. 8-9).
3. Regarding Brazil's policies relating to human rights treaties, see Cançado-Trindade (2002).
4. Regarding weakend sovereignty, see: Anne-Marie Slaughter (2004). Sovereignty and Power in a Networked World Order. Regarding levels of governance, see: David Held (1995).
5. Regarding the preparations for the Vienna Conference on Human Rights and the legacy of this conference, see the book by José Augusto Lindgren Alves, *Human Rights as a Global Theme* (2004) and the article by the same author, *The present retrospective of the Vienna Conference on Human Rights* (1993).
6. In an official note No. 142, April 2011, the Foreign Ministry condemns the decision of the IACHR, claiming to have been taken aback by it and not have had sufficient time to defend against the allegations made against it (BRAZIL, 2011). Rather than defend itself using the procedural mechanisms provided for in the system itself, the state threatens the IACHR, withdrawing the candidacy of Paul Vanucchi to the IACHR, suspending the transfer of funds to the organ and calling back to Brazil its ambassador to the OAS. Such a reaction internally was applauded by many as an act of sovereignty, showing ignorance about international commitments taken on by Brazil when it ratified the Pact of San Jose in 1992. In this regard, see Eco Centre: Environmental Law (2011).
7. Flavia Piovesan provides an interesting analysis of the evolution of the cases against Brazil in the Inter-American System of Human Rights in relation to the number of cases, the rights violated and victims' profiles (PIOVESAN, 2011).
8. In 2010, 1,598 petitions were sent to the IACHR, of which 76 were against Brazil, 32 of these were evaluated by the IACHR and 9 were accepted for processing. The IACHR monitors the implementation of the recommendations in 12 cases that had its report on the merits published in the annual report of the IACHR, thus becoming public, pursuant to Article 51 of the ACHR. Many of the 97 pending cases will not go to the Inter-American Court, since they refer to events before the recognition of the jurisdiction of the court in 1998 (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2010, ch. III, section B). Information is available on the website of the Inter-American Court: <<http://www.corteidh.or.cr/casos.cfm>>. Accessed on: July 14, 2011.
9. Regarding the irrevocable nature of voluntary recognition of the compulsory jurisdiction, the Court pronounced its position in the judgment of the case *Constitutional Court vs. Peru*, on September 24, 1999.
10. Remember that the IACHR is an organ of the OAS pursuant to Article 103 of the Charter, unlike the Inter-American Court, which was created by the ACHR. As an organ of the OAS, the IACHR may consider allegations of violations of the OAS Charter and the American Declaration of Human Rights by any member state of the OAS. With respect to State-parties to the ACHR, the Court's mandate is broader and it can examine the possible violation of the long list of rights contained in it, even though the State in question has not recognized screen the jurisdiction of the Court.
11. And yet, Judge Máximo Pacheco Gomez, the IACHR, in his dissenting opinion in Advisory Opinion 15 (OC-15/97) states that "the nature and object of a judgment of the Court differ from those of a resolution or report of the Commission. It goes without saying that the decision of the Court, although final and not subject to appeal is, pursuant to the American Convention, subject to interpretation (Article 67). The judgment of the Court is also binding and may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state (Article 68(2) of the Convention). At the same time, the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation." (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1997b, para. 27-28).
12. The expression "conventionality control" appeared in a vote by Judge Sergio Garcia Ramirez in the case *Miriam Mack Cheng v. Guatemala*, decided in 2003. Regarding the development of the concept of conventionality control in the jurisprudence of the Court, see the monograph by Fernanda Ferreira Pradal "The judiciary and the American Convention on Human Rights: the duty to control conventionality" (2008).
13. Importantly, the U.S. has not ratified the ACHR and, therefore, the IACHR has only the power to examine possible violations of the American Declaration of Human Rights.

## RESUMO

Este artigo pretende discutir dois argumentos principais. O primeiro é o de que o Sistema Interamericano de Direitos Humanos (SIDH) proporciona as bases institucionais para a construção de uma esfera pública transnacional que pode contribuir para a democracia brasileira. Assuntos que não encontram espaço na agenda política nacional podem ser tematizados nesses espaços transnacionais. No entanto, para que o SIDH funcione como esfera pública transnacional, é preciso que seus órgãos gozem de credibilidade e que suas determinações sejam atendidas pelos Estados. O segundo argumento deste artigo é o de que um dos desafios à credibilidade do SIDH é a resistência da comunidade jurídica nacional a incorporar o Direito Internacional dos Direitos Humanos em sua prática. Referimo-nos aqui tanto à implementação das decisões internacionais contra o Brasil quanto ao chamado controle de convencionalidade. Existe um dever jurídico de nos conformarmos internamente aos padrões internacionais de proteção aos direitos humanos que vem sendo negligenciado.

## PALAVRAS-CHAVE

Sistema Interamericano de Direitos Humanos – Esfera pública transnacional – Devida diligência – Controle de convencionalidade

## RESUMEN

Este artículo pretende discutir dos argumentos principales. El primero es que el Sistema Interamericano de Derechos Humanos (SIDH) proporciona las bases institucionales para la construcción de una esfera pública transnacional que puede contribuir a la democracia brasileña. Aquellos temas que no encuentran lugar en la agenda política nacional se pueden plantear en estos espacios transnacionales. Sin embargo, para que el SIDH funcione como una esfera pública transnacional, es necesario que sus organismos tengan credibilidad y que los Estados se avengan a sus determinaciones. El segundo argumento de este artículo es un aspecto que afecta la credibilidad del SIDH, la resistencia de la comunidad jurídica nacional para incorporar el Derecho Internacional de los Derechos Humanos a su práctica. Nos referimos aquí tanto a la implementación de las decisiones internacionales contra Brasil, como al llamado control de convencionalidad. Existe el deber jurídico interno de considerar los patrones internacionales de protección a los derechos humanos que no se respeta.

## PALABRAS CLAVE

Sistema Interamericano de Derechos Humanos – Esfera pública transnacional – Devida diligencia – Control de convencionalidad



## CONECTAS 10 YEARS

HUMAN RIGHTS

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## LETTER TO OUR READERS

It is with great joy that we present the special dossier “Conectas Human Rights - 10 years”, in this 15th edition of SUR.

This commemorative dossier contains articles written by individuals involved in the founding of Conectas, to reminisce and take stock of the first decade. We saw in this initiative an opportunity to share lessons learned, and even if briefly, to examine some of our mistakes and successes. Thus, the articles have the tone of a personal statement and convey the institutional history from the experiences of each of the authors.

In making this assessment, it is certain that the support and partnerships with a wide range of persons and institutions were instrumental in this journey. None of the initiatives discussed in the articles would have been possible without the participants who come annually to the International Colloquium on Human Rights, the authors of the articles in SUR, the exchange students in the Fellowship Program for Lusophone Africa, and the staff of the Foreign Policy Project and Justice Program. Nothing would have been accomplished without the support of various donors who, since 2001, have believed in and supported the work of an organization with ambitious and innovative causes. To all, our most heartfelt gratitude.

By publishing this dossier, another certainty is re-affirmed: it was the strength and conviction of a seasoned group of activists and academics that brought Conectas into existence. By revisiting the assumptions that led to its creation, the vision of its founders - Malak Poppovic and Oscar Vilhena Vieira – is underscored and presently reflected in each of the organization’s projects. Their attitudes questioning the status quo and their ability to develop strategies for effective action are - and always will be - the DNA of the organization. To the two of them, we offer all our gratitude, affection and admiration.

As Conectas’s directors since April 2011, we feel deeply grateful and honored to continue building the dream that we share as much with those who are mentioned in the articles of this dossier as with our readers: a fairer world, with respect for human rights.

Happy reading!

Lucia Nader, Juana Kweitel and Marcos Fuchs\*

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\* These individuals are, respectively, the Executive Director, Program Director and Associate Director of Conectas Human Rights.





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## ABSTRACT

This article aims at recalling the making-of of Conectas Human Rights, a human rights international organization in/from the Global South, created by a group of practitioners and academics in São Paulo, Brazil. Based on the authors' experience as former and current executive directors of Conectas, this article covers the main aspects of Conectas's Global South Program, concentrating its analysis on the International Human Rights Colloquium and the Foreign Policy Project, as part of Conectas's efforts to reach out to organizations and networks outside Brazil, to bridge the gap between human rights and other disciplines and to facilitate their access to the United Nations.

Original in English.

## KEYWORDS

Conectas Human Rights – International Human Rights Colloquium – Global South – Foreign policy project



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## CONECTAS HUMAN RIGHTS: THE MAKING OF AN INTERNATIONAL ORGANIZATION FROM/IN THE SOUTH

Malak El-Chichini Poppovic and Lucia Nader\*

### 1 Introduction

This article aims at recalling the making of a human rights international organization in/from the South, Conectas Human Rights, created by a group of practitioners and academics based in São Paulo, Brazil.

For its 10<sup>th</sup> anniversary, the purpose is to share our experiences, lessons learned and common achievements with friends and partners. This is particularly important because Conectas was from the start a collective endeavor that involved not only a dedicated team but also members of a network that has been built throughout the years.

The task of telling the story is complex, as it has to reflect the personal involvement and the daily work of staff who fought for their ideals, as well as concerted efforts of collaborators, donors and partners who have helped make this dream come true with their knowledge and support.

Another important challenge for the authors, who have been an active part in the conception of the organization's mission and objectives and its day-to-day work, is to revive the spirit that has moved the team. Unfortunately, reports and institutional documents often limit themselves to facts, figures, objectives and outcomes. This is not a fully documented case study but an attempt to reconstruct the memory of an experience and share what we learned with those who may be interested in strengthening Southern human rights infrastructures.

*Conectas Human Rights is an international non-governmental, not-for-profit organization, founded in Sao Paulo/Brazil in October 2001. Its mission is to promote the realization of human rights and consolidation of the Rule of Law, especially in the Global South (Africa, Asia and Latin America) (...) Conectas develops its activities through two programs that interact and encompass national, regional and international activities (...)*

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\*The authors would like to thank Oscar Vilhena Vieira for his contribution to the last section of this article.

*THE GLOBAL SOUTH PROGRAM aims to increase the impact of the work of human rights defenders, academics and organizations from the Global South (Africa, Asia and Latin America). It therefore develops education, research, networking and advocacy activities. The program also aims to facilitate access by Global South activists to the mechanisms of the United Nations (UN) and regional human rights systems.*

*THE JUSTICE PROGRAM works nationally, regionally and internationally to protect human rights and to promote access to justice for vulnerable groups who are victims of human rights violations in Brazil. It therefore develops strategic litigation and participates in the constitutional debate, particularly in the Supreme Federal Court. In doing so, it aims to destabilize human rights violations and hold the perpetrators accountable, in addition to causing political embarrassment and fostering public debate.*  
(CONECTAS, 2011, p. 1).

This article covers the main aspects of the Global South Program. It concentrates its analysis on its central project, the International Human Rights Colloquium, considered the point of departure for other activities – the most important of which is the development of collaborative activities and experiences among Southern activists and scholars. Special emphasis is also given to Conectas's efforts to reach out to organizations and networks outside Brazil, to bridge the gap between human rights and other disciplines and to build bridges with the UN. Moreover, the story would be incomplete without taking into consideration the creation of Conectas's Foreign Policy and Human Rights project, in 2005, that has reshaped the outcome and impact of our collaborative work with the regional and international human rights systems.

To complement the description of Conectas's Global South Program, there is an article by the editors of the *Sur- International Journal on Human Rights* describing its functioning and goals: "A Journal From the South with a Global Reach" (KWEITEL; POPPOVIC, 2011). Also in this same number, you will find an article entitled "Strategic Advocacy in Human Rights: Conectas' Experience", which shows the main achievements and challenges of Conectas's Justice Program in Brazil by the former Director of the Justice Program, Oscar Vilhena Vieira and the former Coordinator of its main project, Artigo 1º (MACHADO; VIEIRA, 2011).

## 2 Democratization Process and the Human Rights Movement

A quick look at the situation of Brazil and of many other Latin American countries at the time of the creation of Conectas shows a relatively successful democratization process taking place, accompanied with a burgeoning of civil society organizations (CSOs) dealing with multiple aspects of human and social development –women, children, landless peasants, prisoners, etc. The expansion of the "Third Sector" composed of vibrant and diversified organizations and actors was seen as a source of hope and social progress to consolidate the democratic process.

However, despite the adoption of new normative frameworks and the signing of international human rights instruments, most new democracies were still

confronting various forms of institutional violence, disrespect of minority rights and unequal access to justice. Violations were no longer the consequence of arbitrary rule but in most cases occurred as a result of the ill-functioning of law-enforcing institutions; persistent social inequity and lack of accountability of public policies.

Human rights organizations that had gained momentum and visibility in the struggle against authoritarian regimes had to change their tactics to fight endemic violence against a more diffuse enemy. In this new conjuncture, practitioners had to go beyond denunciation of abuses to engage public authorities in translating rights into realities. Although apparently less heroic, the new battles for rights protection of vulnerable groups required long-term strategies and joint action to create pressure for social changes.

The multiplication of rights groups working on a variety of themes and causes has undoubtedly enriched the human rights framework of new democracies. However, factors that represent the main NGO strengths –diversity, flexibility and outreach– are also some of its main weaknesses. The fragmentation of the movement created competition for scarce resources, space and visibility at the cost of shared strategies in the fight for common causes (VIEIRA; DUPREE, 2004, p. 60). The main challenge posed to Southern organizations was to overcome their isolation and create alliances to become stronger proponents not only at home, but also on the international scene.

The new political conjuncture was also the opportunity to revisit relations between Northern and Southern NGOs. In most of the emerging democracies, large international organizations, such as Amnesty International and Human Rights Watch, played a vital role in supporting local activities and in advocating their causes in the international forums during authoritarian rule. The challenge ahead was to bridge the divide between NGOs in the North –with international visibility and sustainability– and those in the South –acting locally and with difficult access to resources. In other words, how is it possible to give voice and visibility to those organizations that are striving to sustain the democratization process and build a truly global human rights movement?

Unfortunately, the relatively successful democratization process was accompanied by diminishing international support for human rights causes. This was especially true in emerging economies, as funding for rights protection migrated to poorer countries. At the same time, national philanthropy was still incipient; and unlike other more consensual topics like children's education, human rights groups were less successful in their attempts to create a constituency of local donors for their causes.

### **3 Conectas Human Rights: South-South cooperation in a globalized world**

Created in the globalized world of the beginning of 21<sup>st</sup> century, Conectas Human Rights was conceived at a moment when civil society organizations were rethinking their goals in the face of the changing political and social realities. In the human rights field, there was an urgent need to consolidate the infrastructures of Southern organizations, to replace competitive fragmentation by cooperation, and to foster constructive engagement with regional and international systems.

Conectas's name was chosen to transmit the idea of creating links, of getting together people and organizations; and as a logo, a compass pointing to the South was selected. The decision taken by the founders to foster South-South cooperation in its programs was a political option that shaped all future actions.<sup>1</sup> It did at no point exclude the North, and especially not the close collaboration with allies fighting for the same ideals of rights protection and equity. It did however point to the need 'to democratize globalization,' the main challenge of the 21<sup>st</sup> century, according to former U.N. Secretary-General Boutros Boutros-Ghali (BOUTROS-GHALI, 2004, p. 3).

We were aware that there are many 'Souths' and many roads to democracy. We also knew that we had no readymade answers or model to impose in a multi-polar world. We were trying to bring new voices to the international debate, while respecting cultural and language diversities. This meant working together to explore our mutual potentials, getting to know neighbors and distant partners, exchanging knowledge and experiences and building new 'horizontal' alliances.

Conectas's Global South Program aimed to create an enabling environment to strengthen a **new generation of human rights defenders**. The rationale for Conectas was that people and groups could transcend their limitations and increase their impact by joining efforts. For this reason, **scholars, thinkers and social leaders** were included in this dialogue from the outset.

Likewise, Conectas felt that it was vital to bring Southern organizations to **the UN and other international forums** to make their voices heard and influence decision-makers. This was particularly important at a time when the post-September 11<sup>th</sup> environment had given rise to security-driven policies that overlooked rights issues and de-legitimized multilateral mechanisms for the resolution of conflicts, thus dismissing the role of the United Nations.

Strengthen the individual and collective impact of human rights activists and scholars working throughout Latin America, Africa and Asia by forging connections among them and increasing their interactions with the UN's international human rights system [and other multilateral human rights systems] (CONECTAS, 2006, p.1).

To develop strategies adapted to Southern realities, Conectas has put education, research, networking and advocacy activities at the center of the Program.<sup>2</sup>

In order to achieve our goals, we had to find answers to a number of important questions:

- How can we create a new type of international organization based in the South, with a Southern agenda of partnerships and networking?
- How can we foster experience sharing and develop a cross-regional dialogue on values and culture?
- How can we generate innovative critical thinking focused on a human rights agenda for the Global South?
- How can we give voice and visibility to Southern protagonists in the international human rights system?

## 4 Building partnerships: Education, Networking and Advocacy

### 4.1 *The International Human Rights Colloquium*

The International Human Rights Colloquium has been, since its creation, the point of departure and the central project of the Global South Program. The Colloquium is a capacity-building and peer-learning conference for activists from countries in Africa, Asia and Latin America that takes place annually over the period of a week in São Paulo and is conducted in three languages: English, Portuguese and Spanish.

By bringing together a wide range of activists, scholars, lawyers and other interested parties, the Colloquium offers ‘a one-of-a-kind forum’ to help them: transcend their isolation and fragmentation; infuse their activities with information about the latest developments in the field; take away vital lessons from each other’s experiences; extend their reach and increase their influence within the UN system; and develop alliances to move forward shared advocacy agendas (CONECTAS, 2006, p. 2-3).

From 2001 to 2010, close to 600 activists from countries in the Global South have participated in it; in addition, some 300 scholars, panelists, observers and monitors took part in the process in different capacities. With the annual colloquium and other related projects, Conectas has gradually built a network of Southern-based human rights activists. It is noteworthy that a large number of former participants continue their dialogue and joint activities through an informal alumni network, **HR Dialogue**. They shared until recently a common portal coordinated by Conectas that has been replaced by new devices (Facebook, Twitter, etc).

An important development linked to the II Colloquium in 2002 was the formation by the lecturers and resource persons of a group that called itself “**Sur–Human Rights University Network**.” The founders were 27 multi-disciplinary scholars and two UN officials from 14 countries (Argentina, Brazil, Chile, Ecuador, Egypt, India, Ivory Coast, Mozambique, Nigeria, South Africa, UK, US, Uruguay and Zimbabwe) who chose the name Sur (South in Spanish) and adopted the same logo as Conectas. At the end of this first meeting, participants decided to form a network whose main goals would be to strengthen human rights education, research and advocacy in Southern universities, and seek to develop strategies to bring them closer to the UN system on subjects of common interest.

#### 4.1.1 Evolution and main features

The first International Human Rights Colloquium that took place in May 2001, actually pre-dated the formal launch of Conectas.<sup>3</sup> The participants were young human rights practitioners from countries in Latin America and Portuguese-speaking Africa. All lectures and working groups were done in Spanish and Portuguese with no simultaneous translation.

In subsequent years, Conectas took full responsibility for the organization of the event, the features of which evolved over time. The themes and contents are chosen in collaboration with partners and former participants. With the



voluntary contribution of panelists from around the world, an extensive program of lectures, workshops, working groups and peer-learning activities is designed for each of its editions.

The above description of the colloquium does not give a full picture of the “participatory, democratic and inclusive” process that built over the years a unique space for Southern human rights defenders to learn, share and work together (COLUMBIA, 2002, p. 4). The organization of the colloquium requires a year-round program that involves the whole Conectas team, starting with a meticulously planned preparatory phase followed by networking and advocacy activities. As in capacity building programs, the process is often as important as outcomes; its main features are described below.

**The profile of selected participants** and the **size of the group** changed over time. For the first couple of years, the original idea was to offer junior practitioners (18-25 years), with little travel experience outside their country or region, the opportunity to get in touch with other cultures and values. Activists working in different rights fields – women, children, prisons, sexual rights, etc. – were brought together to share experiences and help overcome the fragmentation of the human rights movement; members of minority groups were included in all selection processes, and a balance between genders was respected. For the first two editions in 2001 and 2002, participants came from 10 to 13 countries in Latin America and Portuguese-speaking Africa; working languages were Portuguese and Spanish (without translation). The size of the encounter was much larger than subsequent ones, and the duration was two weeks.

Starting from the 3<sup>rd</sup> edition of the Colloquium, English was introduced as a third language, and English-speakers from Africa and Asia were included. The selection continued to follow former criteria; however the requirements for applications were more rigorous with a series of new specifications –such as a minimum of two-years of previous experience, solid recommendations from reliable partners or institutions, submission of a dissertation. This meant that chosen candidates were more qualified to be pro-active participants: learning and exchanging experiences and making good use of knowledge acquired to benefit their organizations upon return. The duration of the encounter has been gradually reduced both temporally, to one week, as well as with regard to the size of the group. This was due partly to budget constraints, but mainly to respond to demands made by participants in their evaluation process.

One of the most complicated exercises is to arrive at the ‘**ideal**’ **number with and composition of the group** for each event. The selection has to take into account gender, geographical distribution and languages, and to be accommodated within a given budget, while at the same time not overlooking logistic considerations, such as ticket prices, Brazilian Consulates in the country to issue entry visas, and transit visas in western countries for those arriving from Africa or Asia. In other words, a complex process of selection involving multiple factors and variables is undertaken several months before the colloquium.

The selection process for the 2011 Colloquium that took place from 5 to 12 November was particularly complicated as for the first year a fourth language,

French, was introduced. Conectas received 314 applications from 85 countries in response to the call for candidates sent to partners and advertised on its site and in its newsletter. A first selection was made in-house, and valid applications fulfilling all requirements were submitted to an independent Selection Committee composed of partners, donors and experts. The Committee selected 50 participants from 30 countries (29 women to 21 men) with the following geographical distribution: 23 Latin America (12 Brazil and 11 other countries), 21 Africa (8 English-speaking; 5 French-speaking and 8 Portuguese-speaking), 4 Asia and 2 Eastern Europe.

#### 4.1.2 Lectures, working groups and other activities:

The curriculum of the Colloquium includes, every year, lectures on the main regional and international human rights instruments, as well as panels on current issues of the international agenda. The teaching of skills useful to their every day work – such as fund-raising or documentation of violations – is also part of the program. Scholars and experts from all continents, as well as officials from the UN and regional human rights systems, contribute voluntarily to the capacity building program.

The colloquium is an event in constant transformation. Every year the results of the evaluation allow us to rethink many of its features. From the topics chosen to the format of the debates, every activity is planned taking into consideration, among other factors, how to facilitate the dialogue between participants who speak three different languages. This has led to the adoption of a balance between formal lectures in plenary with simultaneous translation and activities divided in groups by languages. The whole process is accompanied by multi-lingual staff members and volunteers.

In this respect, it should be mentioned that every year about 15 university students offer their voluntary services as **monitors** to the event. A month before, they receive training on the main topics of the colloquium, as well as on their duties upon the arrival of the participants. They help with the logistics and translation during their whole stay. Thanks to them, the Colloquium offers a welcoming and warm environment for all.

Several activities were introduced to facilitate exchanges over the years. An example of successful innovation was the introduction in 2005 of the **Open Space Forum**,<sup>4</sup> a self-managed activity by participants who have the opportunity to choose issues of their interest for discussion. A year later, **preparatory readings** on topics of the Program were sent to participants on a weekly basis one month before, so as to stimulate them to research the subject and send questions to the lecturers. This latest innovation has greatly improved the quality of student's participation and allowed panelists to adapt their talk to the interests of the audience. Introduced in 2007, **the simulation of a UN Human Rights Council Session** was the most popular new item among participants, as it is a concrete way to understand the working dynamic of the UN. Besides, some features were included in all programs because of their appeal, such as visits to other NGOs or social movements as a way of providing a vision of the diversity of social experiences in São Paulo.

With less formal teacher-student presentations, the colloquium's structure has become more interactive, giving wider space for participants to express their views, fostering intense collaborative advocacy work and increasing its receptivity to innovations.

"The colloquium today is a more democratic and horizontal meeting where differences between capacity-building and peer-learning activities have practically disappeared," says Conectas's Program Director, Juana Kweitel.

**Evaluation processes** carried out with participants and panelists for each colloquium have permitted to adapt changes to the demands of the beneficiaries. Criticisms and suggestions were incorporated in the planning of future programs. Participants are asked to fill in a daily questionnaire covering all aspects of the event –from logistic matters to rating lectures on content– and on the last day they are asked to give a general assessment of overall objectives. Carried out by external consulting firms, the oscillations in the results allow the organizers to test innovations and introduce improvements in its format and content. Since 2006, Conectas has used a complementary in-house tool: an online questionnaire sent to former participants six months after the colloquium to assess how they used their newly acquired knowledge in their daily work (CONECTAS, 2009, p. 188).

To obtain an overall assessment of past colloquia and prepare for the future, in the 9<sup>th</sup> edition, Conectas brought together 34 participants who had participated in the 8 previous events to contribute to a more in-depth evaluation of its format and content. For a detailed description of the methodology and the results, see Conectas's article: Report on the IX International Human Rights Colloquium (CONECTAS, 2009, p. 182-190).

**Unfulfilled goals:** All colloquia took place in São Paulo, although the initial plan was to try other locations. In 2003, discussions were held with members of the Sur network in South Africa to move the venue to Johannesburg or Cape Town. However, the cost and time involved in setting up an infrastructure to carry out the complex organization process exceeded our capacities and resources. Instead Conectas/Sur reached out to partners in other regions to learn from their experiences and discuss possible joint agendas (see below).

Among other unfulfilled goals in the colloquium were: the failure to use the Internet for the online transmission of the colloquium for those who were not chosen or could not attend; and the non-inclusion of French as a working language because of human and financial constraints until 2011.

**Networking and the Use of New Technologies:** At the time of the launch there was much excitement at the development of new Information Communication Technologies (ICT) which some felt would remove the need for 'old-fashioned meetings.' Throughout these years, Conectas made wide use of technology to reach its audiences, but it also had to adapt to the limitations imposed by Southern conditions. As few organizations outside the big cities in Latin America, Africa or Asia had access to ICT, fax and telephones were mainly used for the organization of the first years. This is why courses on the use of the Internet were provided, thanks to an agreement with the Brazilian Ministry of Education, for those participants who did not have previous access to it during the first colloquia. Likewise, Conectas launched its own

interactive portal where participants of the colloquia could post news about their work on an ongoing basis, but discovered that its server was inaccessible to many people in Asia so it had to contract a new host company outside Brazil.

Many of our difficulties have been superseded as communication technologies have become more reliable over the last five years. They have been essential working tools for our daily exchanges with partners, online courses and campaigning activities. Nevertheless, it should be pointed out that the strength of the South-South network, formed during its ten-year existence, was that it brought together protagonists working on the same issues but who, otherwise, would not have had the opportunity to dialogue and work together. Building this type of partnerships requires, besides virtual communication, personal contacts to establish trust and an outreach strategy to follow up on outcomes.

**Joint advocacy:** The Colloquium also aims to have a multiplier effect, which benefits participants and their organizations, through joint actions. With the setting up of its Foreign Policy and Human Rights Project in 2005, Conectas established mechanisms of collaboration with the UN and regional systems that enlarged its advocacy work with Southern partners, as explained below.

## *4.2 Expanding Horizons*

South-South cooperation was a relatively new experience at the beginning of the 2000 decade. To have a better understanding of the problems at stake, Conectas felt the need to involve more closely scholars and researchers in its work. It also made special efforts to diversify its activities by reaching out to partners in their countries and regions.

### **4.2.1 Knowledge Production**

The **Sur –Human Rights University Network**, mentioned above, created during the 2<sup>nd</sup> Colloquium and facilitated by Conectas, became a sister organization run by the same team and practically the same board. Most activities related to knowledge production and to human rights, security and peace matters at the UN and regional systems, were carried out jointly by SUR and Conectas.

The SUR initial group attracted new members through various initiatives. Strictly speaking, it was never a network linked to universities but took the form of a loose gathering of academics and specialists who felt the need to discuss among themselves and with others human rights theories, to go beyond the existing dogmas and to propose Southern approaches to current issues.

Thanks to the generous support of the United Nations Foundation (UNF) and the Ford Foundation, the Sur - Human Rights University Network, in collaboration with Conectas, organized regular meetings. Most of them took place at the time of the colloquia to take advantage of the presence of lecturers and UN officials.

One of the first Conectas/SUR activities was to co-organize with the Center for Human Rights of the Columbia Law School a “Symposium on the

10<sup>th</sup> Anniversary of the Office of the High Commissioner for Human Rights (OHCHR),” to examine its achievements and challenges ahead. The Symposium took place at Columbia University in New York on February 17-18, 2003 with the support of UNF. It featured discussions with the Office’s High Commissioners: José Ayala Lasso (1994-1997); Mary Robinson (1998-2002) and the newly appointed HC, Sergio Vieira de Mello (2003- killed in Iraq later that year), as well as leading human rights activists, scholars and experts.

On the eve of this event, SUR convened a meeting with those members who were present at the Symposium to define its agenda. One of the conclusions was that an independent publication would provide a good communication channel for academics and activists. *Sur—International Journal on Human Rights*<sup>5</sup> was created in 2004 to respond to this demand. Published in three languages, the journal aimed at allowing a more ‘accessible’ internationalization of Southern voices and at providing an intellectual arena for Northern and Southern perspectives to be analyzed and debated. For more information, see article by Kweitel and Poppovic (2011) in the same issue.

SUR members also voiced their concern that the expertise of Southern universities was underutilized by the UN, either due to lack of access or knowledge. The attempts made by Conectas at the time to create a complete database of Southern scholars were not very successful. However, the Sur network became known, and many of its members collaborated with the UN human rights system, as researchers, rapporteurs and/or experts.

Between 2003 and 2006, SUR/Conectas organized several Knowledge Development Groups (KDG) composed of experts and practitioners to study linkages with other disciplines and exchange information with partners.

- **Human Rights and Access to Justice**, several meetings between 2003 and 2005 to discuss public interest law and legal clinics
- **Human Rights and Security**, co-organized with the Washington Office for Latin America (WOLA) and Viva Rio, in October 2004.
- **Human Rights and Trade**, co-organized with the International Trade Law and Development Institute (April 2005).

Another long-term project was a three-year collaborative research (2006-2009) on the constitutional jurisprudence of the Apex courts from the three Southern countries entitled: “**The Justiciability of Human Rights - a comparative analysis: India, Brazil and South Africa**,” also known as **IBSA Project**. The research involving scholars and practitioners was coordinated by Prof. Oscar Vilhena Vieira in Brazil, Prof. Frans Viljoen in South Africa and Prof. Upendra Baxi in India. Its main objectives were: one, to understand the role of the Constitutional Courts in India, Brazil and South Africa in the promotion and protection of human rights; two, to provide a comparative array of legal decisions and strategies to the legal professions and public interest centers. The IBSA Project helped Conectas rethink its constitutional litigation projects, providing it with new strategies available in South Africa and India to change society via courts as well as to expose the limits of Apex courts in achieving real impact on concrete human rights situations.

#### 4.2.2 Geographical outreach

To learn about its partners' projects and plans, to present its own and win the adherence of practitioners, scholars and researchers, the Conectas team traveled extensively to countries in Latin America and Africa and, to a lesser extent, Asia. During the first five years, these outreach activities were essential for the international development of the organization, as can be seen from the few examples below.

Shortly after its creation, Conectas was accepted to take part in an informal group of 'flagship' human rights organizations in **Latin America** in 2003. In its annual meetings sponsored by Ford Foundation, the group composed of about 10 organizations discusses priorities of the current agenda and decide on possible collaborative actions. Over the years, the group has established special relations among its members who consider it a reference for the assessment of their work and impact. Also in Latin America, Emilio Garcia Mendez, a founding member of Sur and close collaborator of our Justice Program, created an organization called '*Fundación Sur*' for the promotion and defense of children and youth rights in Argentina.<sup>6</sup>

**In Africa**, the All-Africa Moot Court annual event organized by the Centre for Human Rights of the University of Pretoria presented a unique opportunity for cooperation with law professors from African universities. Conectas, in collaboration with the Centre and other partners, organized a one-day Sur meeting during three consecutive years, namely in Yaoundé in 2003, in Dar Es Salaam in 2004 and Johannesburg in 2005. Many former participants of these encounters became members of the Sur network and have been partners in various educational activities.

Joint activities undertaken with **Arabic-speaking countries** were one of the most rewarding experiences. After many months of preparation, Conectas/Sur in collaboration with Professor Enid Hill from the American University in Cairo (AUC), Professor Mustapha Kamel Al-Sayyed<sup>7</sup> from Cairo University and UNESCO Human Rights Chairs in the region, organized a meeting with some 30 activists and scholars from the region in April 2004. The main outcome of the meeting was the creation of an "Arab Network on Education and Capacity Building" that has been active in promoting human rights education in the region. Five years later, in 2009, Al-Sayyed's organization Partners for Development, invited Sur members to participate in another meeting in Cairo: "Human Rights Debates: Perspectives from the South" with many of the members of the Arab network. The outcome of the encounter was published as a Special Number of the Sur Journal in the form of a book in Arabic in 2011.

For the first meeting in 2004, the then Conectas Director Oscar V. Vieira and Malak Poppovic<sup>8</sup> took part in the encounter. On the first day in the beautiful old building of AUC, the atmosphere was tense. Our presence and intentions were questioned by participants: Why this encounter? Were we the ones determining who joined the network? Did we have a given model in mind? Who paid for the encounter? Did Brazil have a special interest in the Arab world? However, at the end of the two-day meetings, not only were we able to explain our ideas and dissipate



the distrust but we also formed what was to become long term partnerships with several of its participants. This anecdote is a good illustration of how Conectas established, through dialogue and cooperation, relations of mutual trust and credibility with Southern partners.

Conectas has also invested in long term exchange programs, such as the **Fellowship Program for Lusophone Africa**, sponsored by Open Society Foundations. Since 2004, Conectas has received each year fellows from Angola, Cape Verde, Guinea-Bissau and Mozambique for a non-degree university course and an internship in a Brazilian NGO for a five to eight-months stay. During these years, Conectas has been host to 38 fellows and has kept in close touch with most of them upon their return. In many cases, they pioneered new experiences in their home countries upon return. For example, during his fellowship with Conectas in 2008, Augusto Mario da Silva prepared a project on the prohibition of female genital mutilation which he implemented with his organization, *Liga Guineense de Direitos Humanos*, in Guinea-Bissau. They carried out, together with other NGOs and with the help of UN agencies, an awareness-raising campaign addressed to religious leaders, opinion-makers and victims; as well as advocacy with public authorities. They obtained an unprecedented victory in June 2011 when Congress passed a law prohibiting the practice and punishing it with a five-year prison sentence. Another 2008 Fellow, Salvador Nkamate from *Liga Moçambicana de Direitos Humanos*, became the coordinator of the NGO platform that participated to the Universal Periodic Review (UPR) of Mozambique at the UN Human Rights Council.

## 5 Foreign Policy and Human Rights Project

Created in 2005, the Foreign Policy and Human Rights Project has developed new synergies within the Global South Program. It has added focus and content to Conectas's work with regional and international human rights systems and introduced innovative ways for NGOs to participate in their mechanisms.

The decision to create this project was triggered by a study on Brazil's votes at the former UN Commission for Human Rights. As Brazil had abstained on a resolution about human rights violations in China at the former Human Rights Commission, Conectas wanted to have a better understanding of Brazil's position and role at the UN and other multilateral forums.

The results of this study showed that in Brazil, as in many new democracies, foreign policy decisions are often taken by the executive branch, through the Ministry of Foreign Affairs, without checks and balances from the judiciary and the legislative branches and virtually no participation from civil society organizations. There was a need to find replies to a number of questions, as these decisions have an impact on the human rights situation both nationally and internationally. Which principles guide Brazil's foreign policy? How are decisions taken? Are there accountability mechanisms for positions adopted at the UN? How could social participation and democratic controls be used to contribute to rights protection?

The newly created project was able to intensify and expand the scope of its work with the creation in 2006 of the United Nations Human Rights Council (UN

HRC) by the UN General Assembly to replace the sexagenarian UN Commission on Human Rights that had lost credibility. The new body made of 47 member States, elected by the General Assembly for a three-year period, comprised a large majority of countries from the Global South – a total of 34 countries from Africa, Asia and Latin America. Among other mechanisms, the UN HRC introduced the Universal Periodic Review (UPR) according to which all UN member states are submitted to a review of their human rights situation every four years.

With this new geographic composition, it was clear that the effectiveness of the UN HRC would require a commitment to human rights causes by States as well as an active participation of CSOs from the Global South. As is well known, this was not always the case as many countries not only refused to comply with their obligations, but also refused to condemn other countries' violations. This brought about an unprecedented opportunity for NGOs from the South to play a critical role in making their respective governments accountable and in breaking the "South-South complicity" of mutual protection.

Yet human rights NGOs in Latin America, Asia and Africa continued to face a number of obstacles in expanding their activities to the international spheres, such as lack of access to information and of familiarity with international procedures, language barriers, lack of financial resources to attend the UN meetings *in loco*. In 2007, NGOs from the Global South represented only 33% of the 3050 organizations with consultative status with ECOSOC that could participate fully to the UN HRC (NADER, 2007, p. 10).

During the first five years of its existence, Conectas's Global South projects in education, research and advocacy were geared towards collaboration and interaction with various aspects of the UN system and agencies – such as OHCHR, UNESCO, and UNDP. In 2006, Conectas opted to concentrate its efforts primarily on participation in the UN Human Rights Council, as the principal international body responsible for "promoting universal respect for the protection of all human rights and fundamental freedoms for all". This did not exclude its engagement with regional systems that offered possibilities of strengthening its advocacy work.

Two findings directed many of its future actions: 1) some countries of the Global South, among them Brazil, are strategic international actors, and therefore their foreign policies must be respectful of rights, transparent, and participatory, especially in multilateral spheres such as the UN; and 2) Southern NGOs can make better use of regional and international systems to improve the rights situation in their countries.

*As emerging powers become more important players on the international stage and look to remake a fairer world order, much of the success of that project will depend on their ability to protect and promote human rights. Coordinated civil society efforts within the Global South, such as those initiated by Conectas, are vital to ensuring that a fairer, more humane world order isn't only realized as between states but that actual tangible benefits in terms of quality of life and protection of human rights are delivered to citizens in the Global South.* Nicole Fritz, Executive Director, Southern Africa Litigation Centre.

As it obtained consultative status with UN-ECOSOC that same year, Conectas devised a multi-faceted strategy to make governments accountable for their foreign policies on human rights at home and in the international forums.

### *5.1 Making Brazil accountable at home for its foreign policy on human rights*

Brazil has a favorable legal framework with a Constitution adopted in 1988 which stipulates that one of the ten principles guiding foreign policy is 'the prevalence of human rights' (Article 4, II); it is also party to a large number of international human rights treaties. Nevertheless, in the absence of formal mechanisms of participation in foreign policy decisions – including positions adopted in multilateral human rights bodies – the Brazilian government did not always comply with its constitutional obligations.

One of the first lessons learned was that, to be effective, citizen participation in foreign policy needs to be carried out primarily at the national level in the country's capital, where decisions are made, preferably through formal channels and mechanisms of consultation and monitoring of foreign policy.

In this respect, it is worth mentioning that, in 2006, Conectas persuaded the House of Representatives to establish a Brazilian Committee on Human Rights and Foreign Policy, a coalition composed of members of the executive and legislative branches, the Federal Prosecutor's Office for the Rights of the Citizen and of civil society organizations, to monitor the degree to which Brazilian foreign policy decisions comply with international human rights. Once a year, the Committee invites the Ministry of Foreign Affairs to present its human rights agenda in the Organization of American States (OAS), *MERCOSUR* and UN to the House of Representatives. In addition, on an ongoing basis, the coalition requires information on Brazil's international positions and develops strategies, including media, to foster civil society engagement in the country's foreign policy.

Since 2007, Conectas also increased the public scrutiny of foreign policy by publishing a Yearbook entitled "Human Rights: Brazil at the UN," showing the Brazilian voting record at the UN and its positions regarding human rights crises in specific countries, such as Burma, Iran, North Korea, Sri Lanka and Sudan. In the absence of any official documentation on the subject, the yearbook is considered a source of quality information for NGOs, journalists, scholars and even government authorities.

Another initiative to enhance public scrutiny and accountability of Brazilian foreign policy is the organization of visits by human rights defenders from countries with flagrant rights violations to Brazil. As an example visits from Zimbabwe (2007), Burma (in 2008 and 2011) and Iran (in 2011) came to Brazil, and Conectas coordinated their meetings with Government officials, CSOs, trade unions and the media. During their meetings, they asked for more pro-active foreign policy positions of the Brazilian government in relation to rights abuses in their countries.

"The way in which Brazil positions itself is critical in order that the violations in Iran be, at least, the subject of discussion, as Brazil's stance in the international

area will influence the foreign policy of other Latin American countries.” Says Hadi Ghaemi, International Campaign for Human Rights in Iran, who came to Brazil in 2011.

By fostering access to information, checks and balances mechanisms and building advocacy coalitions, Conectas has gained experience in promoting civil society participation in Brazilian foreign policy to make it more accountable and respectful of human rights.

In the coming years, Conectas intends to encourage the participation of human rights NGOs from key emerging democratic powers to work on their countries’ foreign policies— such as Argentina, Brazil, India, Indonesia, Mexico, Nigeria and South Africa, by sharing its national experience and promoting a collaborative environment.

## ***5.2 Building capacity of Southern NGOs to make use the multilateral bodies***

Since its creation, the Foreign Policy and Human Rights Project aimed at using regional and international human rights protection systems to contribute to the improvement of the human rights situation in Brazil and Global South countries.

It realized the importance of sharing lessons learned with its partners, as a more robust participation of Southern NGOs was indispensable to strengthen regional and international human rights bodies. Although many Southern NGOs were not totally prepared, there was an enormous untapped potential for incorporating an international perspective in their work.

### **5.2.1 UN HRC and the UPR**

The project benefited from its synergy with other of Conectas’ initiatives, such as the International Human Rights Colloquium, the *Sur - International Journal on Human Rights* and the Fellowship Program for Portuguese-speaking Africa to set up an extensive program that included training courses, technical support, production of action-oriented materials, as well as networking advocacy and cross-regional campaigns. For instance in 2007 and 2008, ‘Strategic Meetings on NGO Participation in the UN HRC’ were organized, in collaboration with the International Service for Human Rights, with interested organizations on the eve of the colloquia in São Paulo. Likewise the main themes of the last four colloquia were related to the regional and international human rights systems, and the criteria for the selection of participants now include prior familiarity or work with these systems.

Conectas participated in all the main UN HRC sessions in Geneva to give visibility to national human rights situations, both in Brazil and in the countries of partner organizations that have no easy access to the UN system. In addition, Conectas is a member of HRCNet – Human Rights Council Network, a coalition composed by civil society organizations from several countries working together to improve the effectiveness of the UN HRC.

In Brazil, Conectas, together with national partners, denounced at the UN several abuses occurring in the country. In March 2009, for instance, a side-event was organized during the UN HRC session to give visibility to severe and systematic violations occurring in the prisons of the state of Espírito Santo. As a result of the repercussion of the UN side-event in the local and international media, combined with interventions at the Organization of American States (OAS) and national level, Brazilian authorities took measures to improve conditions and diminish overpopulation in pre-trial detention centers.

In the case of other Southern countries, this was done by convincing partners to attend personally the sessions and facilitate their participation, by finding funds for their travel, helping them set up meeting, designing joint strategies, delivering oral statements and organizing side-events. Human rights defenders from Angola, Burma, Iran, Lesotho, Mozambique, among other Southern countries, were thus able to make their voices heard directly in the UN system. In cases where they cannot attend personally, Conectas reads on their behalf a text prepared by them.

Conectas also accompanied the **UPR process** of several countries from the South – either by training civil society organizations to engage with it, or by attending review working groups in Geneva. As Brazil was one of the first countries to undergo the UPR in 2008, Conectas was able to develop first-hand strategies to engage in the review and to develop a road map for civil society engagement with this process.<sup>9</sup>

Based on this experience, Conectas was able to reach more than 550 human rights defenders from 25 countries through courses and collaborative activities. As an example, Conectas, in partnership with the African Women Millennium Initiative on Poverty (AWOMI), organized in Zambia the “I Strategic Meeting on Southern African Civil Society Participation in the UN Human Rights Council: How to work with Universal Periodic Review,” which gathered, in September 2009, organizations from seven sub-Saharan African countries (Botswana, Lesotho, Malawi, Namibia, Swaziland, Zambia and Zimbabwe). That same year, Conectas was also invited as resource organization to contribute to training courses in Angola, Cape Verde, Kenya and Panama. In 2010, Conectas explored new technology tools by offering an e-learning course for NGOs in Bolivia, Nicaragua and El Salvador on how to participate in their countries’ UPR.

In addition, Conectas has been involved in Brazil’s upcoming review in the UN Treaty bodies, such as the Committee against Torture (CAT) and the Committee on the Rights of Persons with Disabilities (CRPD). In the latter case, Conectas contributed to the creation of a coalition of 20 Brazilian organizations and is coordinating the drafting of a joint shadow report to be submitted to the UN to pressure the Brazilian government to implement the Committee’s recommendations.

To ensure the continuity of its activities at the UNHRC, Conectas, in partnership with two Latin American NGOs – Centro de Estudios Legales y Sociales (Argentina) and Corporación Humanas (Chile), established, since June 2010, a more permanent presence in Geneva by appointing a representative. This was done to facilitate and strengthen the participation of Latin American organizations in the HRC and in the UN system in general.

### 5.2.2 African Commission on Human and Peoples' Rights

Finally, in May 2009, Conectas was accorded Observer Status with the African Commission on Human and Peoples' Rights (ACHPR).

This was a great opportunity to strengthen our collaborative work with African NGOs, to share experiences and introduce innovative cross-regional cooperation among countries from the Global South.

*The decision to expand our participation in the African system arose from the demands of our partners in Africa, especially in Portuguese-speaking countries, as well as from a strategic evaluation of its importance in protecting human rights in the continent and strengthening the international system itself.*

Camila Asano, Coordinator of Conectas's Foreign Policy and Human Rights Project.

In 2010, Conectas participated in the session of the ACHPR and organized, with partners, a two-day seminar on "Women Human Rights Defenders" in Banjul, The Gambia. The main theme of the meeting was the safety of women human rights defenders and the challenges they face in their work. A total of 35 activists attended the meeting, most of them African women, but also participants from Latin America and Asia who shared lessons learned in the use of regional and multilateral human rights systems. In a common Declaration, the participants defined an eleven-point strategy to overcome barriers faced by human rights defenders, which include awareness-raising activities on gender issues and a request to the African Union to include the protection of defenders in the continent's human rights policy.

The Foreign Policy and Human Rights project that started timidly in 2005 as a pilot research became in less than six years a central component of the Global South Program. It infused a new life in the educational and research projects, by combining innovative methods to monitor foreign policy at home and in international forums with a professional technical approach for rights advocacy.

Conectas's work to promote civil society participation in Southern countries' foreign policy, particularly in Brazil, has been shown to be viable, strategic and potentially crucial to the democratic functioning of multilateral human rights protection systems. Southern countries, and South-South cooperation, became more relevant and gradually changed the *status quo* of international affairs. In addition, Conectas was able to consolidate itself as a reference in promoting civil society engagement with international mechanisms, such as the UPR.

There are still many challenges ahead but these preliminary results are most encouraging. Further developments will demand continuing growth and innovation to democratize globalization.

## 6 Dialogue with Institutional Partners

### 6.1 *Partnership with the UN*

If we look at our relations with the UN system, they too have evolved over the years.

The international conferences on major global themes organized by the



United Nations during the decade of the 1990's with their parallel worldwide NGO Forums (e.g. Rio de Janeiro, 1992; Vienna, 1993; Cairo, 1994; Beijing, 1995; Istanbul, 1996 and Durban, 2001) had opened the door to the participation of Southern NGOs. The international media covering the event gave visibility to their existence and work. Conectas was created at a time when it was able to benefit from this opening. Yet, it strived to go beyond occasional participation to reach some form of more permanent relations. It has been an interesting apprenticeship to find our way through the UN system and agencies and build bridges with UN officials. When Conectas obtained consultative status with UN-ECOSOC in 2006 and made frequent trips to attend the UN Human Rights Council sessions in Geneva, it gained a better grasp of the system, and set up projects to share its experience with partner organizations.

We could not fail to acknowledge the moral and logistical support received from the then UNDP Administrator, Mark Malloch Brown, himself a mentor of South-South cooperation. During the first five years, the UNF grants were channeled through UNDP projects –both UNFIP and UNDP Brazil helped administrate these funds and gave support to our international activities through their field offices (e.g. by offering training and access to Internet to colloquium participants in certain African countries). We received video messages for the opening ceremony of the Colloquia from the head of UNDP and from the High Commissioners for Human Rights as they could not attend personally (namely from Mark Malloch Brown, Mary Robinson, the late Sergio Vieira de Mello, Louise Arbour, and Navanethem Pillay) which gave prestige and legitimacy to the newly created organization. Besides, practically all colloquia and events received UN experts as speakers from main agencies or bodies. Conectas, for its part, has maintained its advocacy work on behalf of the UN by organizing encounters with CSOs for UN Rapporteurs visiting Brazil to discuss with them national issues and an agenda of work.

## *6.2 Dialogue and Partnerships with Donors*

At a time when philanthropies did not see Brazil as a priority, Conectas had the privilege to be sponsored by two exceptional donors, **United Nations Foundation (UNF)** and **Ford Foundation** that gave full support to its somewhat ambitious' proposals.

UNF was the major contributor during the first five years. It allowed us to become a multi-lingual organization by introducing English, besides our initial working languages –Portuguese and Spanish. It sponsored the inclusion of Southern academics in our networks, and brought us closer to the UN. Most important of all UNF embraced the South-South strategy to strengthen human rights protagonists in the Global South.

**The Ford Foundation** has a long history of backing human rights organizations in Brazil and of support to educational and academic activities through its field office. Since its creation, Conectas has counted on Ford's support for its Global South Program, although the scope of many of its activities was global. However, it is interesting to note that until recently no 'protocol' existed

for giving international funds to a Southern organization. It is only in 2008/2009 that, besides the donation from the Brazilian office, Conectas also received funds from the international programming undertaken by its New York Office for its Foreign Policy and Human Rights project. Ford adopted a policy of strengthening Southern infrastructure as recognition of the need for strong international NGOs located in the Global South. See Interview of Denise Dora in this issue.

This generous initial support and trust from the two foundations was fundamental for Conectas's growth and progress. It has allowed it to persist in striving towards its goals and to be ready for a more diversified basis of support.

In 2005, UNF changed its funding policy to concentrate on UN advocacy in the field of human rights, peace and security. However, before ending its support, UNF helped Conectas plan its future sustainability by providing the expertise of development strategists who helped Conectas re-define its priorities and approach new donors.

We realized that we had an arduous road ahead before reaching sustainability. Despite the adverse economic conjuncture that obliged us at times to reduce our budget and staff and to keep salaries below competitive market levels, we have managed to fund our major projects thanks to contributions from diversified donors.

Our main donors for the last five years have been: the European Commission, Ford (Brazil and US), Fundação Carlos Chagas, Open Society Foundations, John D. & Catherine T. MacArthur Foundation, Oak Foundation, The Overbrook Foundation/ Better World Fund, The Sigrid Rausing Trust, and United Nations Democracy Fund (UNDEF).

They have put their trust in our work and we have put the best of our efforts to meet their expectations. Most of them have become partners and friends of the organization. Unfortunately, we have failed to build a local constituency in Brazil. With the exception of the Fundação Carlos Chagas that has generously funded the *Sur-International Journal on Human Rights* for two years, like many other human rights NGOs, we have not yet been able to convince the business sector in Brazil and in the region to contribute to our cause. As for Brazilian government funds, the by-laws of the organization specify that they can only be used to fund educational activities, so as to ensure non-interference and autonomy of its activities (CONECTAS, 2010, p. 96).

## 7 What's next?

### Message from former co-directors, Malak Poppovic and Oscar Vieira: *Ce n'est qu'un au revoir*

Ten years on, looking back at our dream for a more egalitarian and democratic globalized world, we feel that we chose the right 'niche' to make a difference in the international human rights scenario. Our South-South cooperation projects were able to: participate in the formation of a new generation of human rights defenders from the Global South with an international perspective; develop cross-regional initiatives bringing together practitioners, scholars and international experts; foster peer-learning and experience-sharing and stimulate academic debate with a Southern perspective.

Conectas Human Rights, created by a group of activists and academics from the South and based in the South, is seen today as an international organization with a strong network of partners composed of members of organizations and academic centers from the South and the North, and from the UN. It has gained visibility by extending its work to international forums, especially the UN; and more important, it has given visibility to other NGOs from the South.

However, Conectas knew from the beginning that for its work to make a difference in the human rights movement, it was essential to form alliances and coalitions with other organizations. It did it in its own way, gradually and cautiously, to make sure that it was building horizontal relations of equality and mutual respect. It has been a rewarding experience to have established good working relations with individuals and organizations worldwide.

It sounds banal to say that all these achievements would have been impossible without the dedication and the hard work of the Conectas's staff members. However, this is a fact recognized by all those who accompanied our evolution. Having our dream come true meant finding the means to realize it, sustain it and convince others to join as partners and multipliers. We were able to do it thanks to a combination of factors. We could start by saying that Conectas's Director, Oscar Vilhena Vieira, who was at the time teaching human rights at the PUC-São Paulo, motivated many of his young students to join him in this endeavor. Some were still studying for their degrees, others were already doing their post-graduation work but all chose to engage in an NGO where they knew that they would have less perspective for a career than in a well-established firm. Their enthusiasm and dedication often made up for their lack of experience; they embraced the cause and assumed responsibilities. Another factor may have been staff members' freedom to introduce innovative ideas and to implement them. We were well aware that our successes were linked to our capacity to deal with diverse situations and to bring novelties into well-established practices. Unfortunately, it is impossible to name all those who worked at Conectas. What can be affirmed is that along the years, the team has kept its international character with staff and interns from various countries and continents, and that, despite its growth, it has kept its capacity for innovation and auto-critical evaluation.

Ten years on, there is a need to review our premises and to carry on our fight taking into consideration the new world situation: the Arab Spring; the increased influence of emerging democratic powers on the global stage; the economic crisis in Western countries; and the growing recognition of the UN role in world politics.

To tackle these new challenges, a younger generation is taking over. The former co-directors, Malak Poppovic and Oscar Vieira, left their posts in April 2011 after a smooth transition. But they will remain close to Conectas: Vieira joined its Board of Directors and Poppovic continues for a few more months as Senior Advisor for Special Projects.

It is with great pride and optimism that the former co-directors recommend their successors: the Executive Director, Lucia Nader and the Program Director,

Juana Kweitel, who have led the major Conectas projects for many years. There is also Conectas's Associate Director and Instituto Pro Bono's Director, Marcos Fuchs, a founding member of both organizations who ensures continuity in the organization. Their leadership is unanimously accepted by the rest of the organization and will undoubtedly bring the needed new energy and outlooks for a changing human rights perspective.

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## NOTES

1. The term 'south' came to substitute what had been designated in the 20<sup>th</sup> century as 'underdeveloped' and later 'developing' countries.
2. Conectas's Global South Program consists of the following projects: International Human Rights Colloquium; the Human Rights Fellowship for Lusophone Africa; *Sur – International Journal on Human Rights*; and Foreign Policy and Human Rights Project.
3. The University Consortium on Human Rights, which consisted of a cooperative agreement among Columbia University in New York represented by Paul Martin, the Pontifical Catholic University (PUC-SP) represented by Oscar Vilhena Vieira and the University of São Paulo represented by Paulo Sergio Pinheiro, organized the 1<sup>st</sup> Colloquium.

4. This activity was introduced by Conectas staff who had participated in the Annual International Human Rights Training Program in Canada.
5. All editions are available at <[www.surjournal.org](http://www.surjournal.org)>. Last accessed on: Nov. 2011.
6. For more information about *Fundación Sur* contact <[info@surargentina.org.ar](mailto:info@surargentina.org.ar)>
7. Al-Sayyed, a founding member of *Sur*, has been a panelist in two colloquia and a close partner in our activities.
8. In the capacity of Senior Advisor to UNF.
9. Available at: <[http://www.conectas.org/PDFs/RoadMap\\_en\\_13.01.11.pdf](http://www.conectas.org/PDFs/RoadMap_en_13.01.11.pdf)>. Last accessed on: Nov. 2011.

## RESUMO

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Este artigo visa recordar a construção da Conectas Direitos Humanos, uma organização internacional de direitos humanos no/do Sul, criada por um grupo de ativistas e acadêmicos com sede em São Paulo, Brasil. A partir da experiência das autoras, que também são a ex-diretora e diretora executivas da Conectas, este artigo aborda os principais aspectos do Programa Sul Global, concentrando sua análise no Colóquio Internacional de Direitos Humanos e no Programa de Política Externa, como parte dos esforços da Conectas em apoiar organizações e redes fora do Brasil, aproximar direitos humanos e outras disciplinas, e criar pontes entre estas com a Organização das Nações Unidas (ONU).

## PALAVRAS-CHAVE

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Conectas direitos humanos – Colóquio Internacional de Direitos Humanos – Sul Global – Programa de política externa

## RESUMEN

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Este artículo busca remodelar la construcción de Conectas Derechos Humanos, una organización internacional de derechos humanos desde/en el Sur Global, creada por un grupo de profesionales y académicos con sede en San Pablo, Brasil. Con base en la experiencia de las autoras, que son a su vez ex Directora y Directora ejecutivas de Conectas, este artículo cubre los principales aspectos del Programa Sur Global, concentrando el análisis en el Coloquio Internacional de Derechos Humanos y el Programa de Política Exterior, como parte de los esfuerzos de Conectas para acercarse a otras organizaciones y redes fuera de Brasil, para superar la brecha entre los derechos humanos y otras disciplinas y para facilita el acceso de estas a la ONU.

## PALABRAS CLAVE

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Conectas Derechos Humanos – Coloquio Internacional de Derechos Humanos – Sur Global – Programa de política exterior





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#### ABSTRACT

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This article seeks to analyze Conectas' experience in human rights advocacy, carried out between 2003 and 2011. Beginning with the historical influences of public interest advocacy in Brazil, of the adoption of the bill of rights of the 1988 Federal Constitution and the internationalization of human rights, this article describes Conectas' main lines of operation, strategies, challenges and successes in overcoming systemic violence and unjustified exclusions in the context of its human rights advocacy experience.

#### KEYWORDS

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Litigation – Human rights – Violence – Constitutionality



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## STRATEGIC ADVOCACY IN HUMAN RIGHTS: CONECTAS' EXPERIENCE

Oscar Vilhena Vieira and Eloísa Machado de Almeida

### 1 Introduction

Conectas Human Rights was conceived at the beginning of the previous decade in São Paulo as an international organization with the goal of contributing to the strengthening of the human rights movement in the southern hemisphere. We started from the determination that it was necessary to strengthen and integrate a new generation of human rights militants who emerged after the fall of the authoritarian regimes in Latin America and the end of racial or colonial segregation in Africa. The emerging democracies in the southern hemisphere did not necessarily bring with them an immediate solution for the longstanding practices of human rights violations, such as institutional violence, racial and gender discrimination and the lack of access to basic rights such as health and education.

On the other hand, new issues such as access to knowledge, intellectual property and the violation of human rights by corporations, seemed more distant from the agendas of traditional rights organizations. For this reason, it was necessary for us to create new work methods in our platforms, including new modes of organization for the human rights movement. Among the core challenges were: How can we foster the formation of new solidarity between organizations around the world? How can we facilitate the sharing of experiences and inspiration associated with combating human rights violations in one country with militants in other countries with similar problems? And, in what way can we increase the autonomy of organizations so that they can contribute to an effectively cosmopolitan human rights discourse?

The emergence of new communication technologies left us optimistic with respect to the possibility of creating an extensive network of partners, through which knowledge and solidarity would naturally flow. We soon perceived that in addition to merely having communication channels, it would also be necessary

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*Notes to this text start on page 204.*

to build trust between people and organizations as well as to identify platforms that would actually awaken the interest of such people and organizations in acting collectively. The International Human Rights Colloquium and soon thereafter the *Sur – International Journal on Human Rights* proved to be extremely efficient instruments for the construction of inter-subjective trust, in part by allowing for a more cosmopolitan dialogue surrounding human rights.

Located in Brazil, however, Conectas Human Rights could not persist without responding to local and national tragic human rights issues. In spite of Brazil's reliance on a network of vibrant human rights organizations, few of such organizations were using the legal instruments created by our new constitutionalism or those established by the International Bill of Human Rights, in order to advance their causes. Having emerged in an environment of widespread distrust of law enforcement institutions, most Brazilian human rights organizations were opting, and still opt, for political interventionist methods, ranging from mobilization and public denouncement of violations, to community empowerment. Even though throughout the course of our history many groups have used legal strategies to enlarge the force of political actions in favor of excluded or persecuted groups, at the beginning of the current decade it seemed to us that the use of public interest litigation could be more deeply explored. In this way, joining arms with the then-recently created Pro Bono Institute, we decided to organize an office for strategic human rights advocacy. The primary goal of this initiative was to challenge law enforcement agencies in Brazil to implement the broad array of rights that were recognized by the 1988 Constitution and its complementary legislation, as well as those rights that are set forth by international treaties to which Brazil became a party when it underwent democratization.

This article seeks to analyze Conectas' initiatives throughout the past decade in the field of justice. Conectas' actions, nonetheless, only make sense if we first understand the institutional framework in which they were applied, as well as the tradition of public interest advocacy that inspired them.

## 2 The context of human rights advocacy in Brazil

The current stage of development of human rights advocacy in Brazil is strongly influenced by at least three fundamental factors: 1) the legacy of cutting edge advocacy sectors (liberals/Catholics/the political left), which began to form during the fight for abolitionism and operated in a remarkable manner in the protection of civil and political rights during past authoritarian regimes (1937-1945; 1964-1985), in addition to being prominent in the struggles for workers rights throughout the past century; 2) the second essential factor for understanding the operation of Conectas is related to the building process that occurred at the end of the transition to democracy, which culminated in the adoption of the 1988 Constitution, as characterized by a generous bill of rights; and 3) finally, the process of globalization and internationalization that occurred with the expansion of a more cosmopolitan discourse surrounding rights and sustainability, cannot be overlooked.

## 2.1 *The Brazilian tradition of human rights advocacy*

With respect to the first of these factors, the actions of progressive advocacy sectors were mobilized in three waves up until 1988, in which lawyers used the justice system as an instrument of rights protection and social change.

Initially, between 1850 and 1950, there was intense advocacy of a predominantly liberal nature. The campaign for the abolition of slavery and the actions of lawyers such as Luiz Gama were responsible for inaugurating public interest advocacy in Brazil (MALHEIRO, 1944). By using an adversarial legal structure, Luiz Gama created a solidarity network of lawyers and organizations, in addition to forging innovative advocacy strategies, in order to free African slaves who either: were transported illegally to Brazil during or after 1831, were born of slave parents during or after 1871 or had attempted to purchase their own freedom in accordance with the 1871 decree.

Ruy Barbosa, who also participated intensely in the abolitionist campaign, side by side with individuals such as Joaquim Nabuco, represents the second step toward the construction of our liberal tradition in the fight for rights. As a Senator and journalist, Ruy promoted the rights of political dissidents, including those who opposed Ruy himself. Furthermore, in the capacity of a lawyer, Ruy Barbosa worked intensely with the Supreme Court, defining a role for himself in the Brazilian institutional arrangement at the time, particularly through the filing of innumerable habeas corpus, in the defense of political dissidents, of victims of the will of successive states of emergency and even of commoners who fell into the meshes of the precarious justice system of the First Republic (RODRIGUES, 1965). Within this same tradition, Sobral Pinto and Evandro Lins e Silva distinguished themselves in the new state, in the fight for civil and political rights of those who opposed the Vargas regime (DULLES, 2007).

A third moment of this liberal progressive wave, which prevailed during the military regime (between 1964 and 1985), was comprised of lawyers who were predominantly connected to the leftist sectors of the Catholic Church and its large network of human rights centers throughout the country. In 1973, the Justice and Peace Commission of São Paulo was founded, under the auspices of Don Paulo Evaristo Arns, archbishop of São Paulo. During those years, the Justice and Peace Commission formed a network of lawyers to defend the rights of political prisoners and their family members (CANCIAN, 2005). These lawyers worked specifically with Military Justice, which is where the cases involving those persecuted by the regime were concentrated.

During this period, there also emerged a stream of lawyers with a more radical direction, whose actions were connected to the unions and to movements of rural landless workers. Many of these lawyers were also linked to the Catholic Church, but under the influence of liberation theology – as they also cooperated with leftist political parties. MST (the Landless Workers' Movement), for instance, which is now even more active in the Brazilian political arena, was founded by religious progressive groups (STÉDILE, 1997). This movement emerged in response to the rigid restrictions imposed on social movements by the military regime. MST created its own legal department with the objective of supporting its activities and protecting its leaders who were systematically involved in confrontations with the police and landowners.<sup>1</sup> During this process, RENAP was also established, which continues to operate today

and is comprised of lawyers, whose work is based on and who are responsible for building legal strategies and providing legal assistance to MST throughout Brazil (CAMPILONGO, 1991).

Finally, another important part of the advocacy movement as well as of the public interest law movement, which was highlighted before the 1988 Constitution, is represented by the urban workers' movement. An early element of this consisted of the National Labor Pool, established by more than sixty young labor lawyers, who were of the most diverse political backgrounds but were predominantly leftist Catholic, and who provided legal assistance to independent unions throughout Brazil (JESUS, 1967). Many of these lawyers, together with lawyers from the leftist party, contributed to the organization of a legal department within the Union of São Bernardo and, thereafter, within the CUT.

Not only did these trends influence the imagination and establishment of our public interest advocacy tradition, but they also influenced the very restoration of our constitutional fabric in 1988. Under the new text, there was a reconfiguration of both normative expectations, in the field of rights, and new institutional actors, who began to operate in the field of public interest advocacy.

## *2.2 The impact of the Constitution on human rights advocacy*

The 1988 Constitution is characterized by the adoption of an extensive bill of rights, the provision of innovative procedural instruments, a close proximity to international human rights law and the reconfiguration of some institutions connected to law enforcement, such as the Public Prosecutor's Office and the Public Defender's Offices. These factors significantly altered the trajectory of public interest advocacy in Brazil. Accomplishing much more than filling in the gaps of the law and fighting for changes in the legislative framework, public interest advocacy began to focus on the effectiveness and implementation of the rights protected by the 1988 Constitution.

It is important to mention that the 1988 Constitution was challenged by a recent history characterized by an authoritarian government and a long history of social injustice and inequality in Brazil. Furthermore, the 1988 Constitution adopted a clear, principal bias toward the goal of guiding social, economic and political change. In this regard, the Constitution gave the State a central role in the promotion of social welfare and economic development (BONAVIDES; ANDRADE, 1991).

The most important innovation of the 1988 Constitution, in terms of the goals set forth by this article, is its extremely generous and comprehensive bill of rights, which includes civil and political rights, as well as economic, social and cultural rights, aside from conceding rights to vulnerable groups such as indigenous people, the elderly and children. The Constitution also recognized a new set of rights relating to the environment and consumer relations, and it followed the guidelines of the International Bill of Human Rights, of 1948. The Constitution's language and scope, however, maintain the strong tradition of social intervention by the state, dating back to the *Vargas Era*.<sup>2</sup>

There are a few important characteristics of the Brazilian fundamental rights regime that should be mentioned here. According to Article 5, paragraph 1, all fundamental rights have immediate application, thus improving upon a traditional constitutional

doctrine and finding support in international human rights law, according to which economic and social rights ought to be viewed as programmatic and complementary devices. When combined with Article 5, XXXV, which sets forth that the law may not exclude any injury or threat to a fundamental right from review by the judicial branch, it becomes clear why the judicial branch began to play such an important political role after the 1988 Constitution was adopted. Both the positive actions by the legislative and executive branches, and the absence of any implementation or regulation of these rights, came to be objects of review by the judicial branch. An important aspect of the architecture of our fundamental rights consisted of the special protection imparted by Article 60, paragraph 4 IV, which is now threaten by constitutional amendments.

In spite of these advances, it is necessary to recognize that an important array of rights failed to be addressed by the 1988 Federal Constitution, particularly those relating to a more contemporary agenda that is connected to the question of gender. Topics such as reproductive rights, civil homosexual union and abortion were not addressed by the Constitution because of the influence of religious sectors in the constitutional process.

Furthermore, constitutional engineering by Brazilian federalism has proven to be, in many circumstances, an obstacle to the full implementation of human rights, particularly with respect to civil rights. As originally intended by the 1988 Constitution, the jurisdiction for investigating crimes against civil rights – homicides and tortures, for example – remained concentrated in the states. For a human rights crime that is committed by a state police officer, for example, the police officer who is “investigated” is the same person in charge of the investigation. Aside from the confusion existing between the perpetrating institutions and the institutions responsible for investigating and sentencing these crimes, this close proximity has been one of the factors contributing to impunity for human rights violations.

Only in 2004 did the 45<sup>th</sup> Constitutional Amendment, entitled Judicial Branch Reform, implement a constitutional provision that allowed for the federalization of cases involving grave human rights violations, or, in other words, a shift of jurisdiction over sentencing to the federal judiciary. In spite of this provision constituting an instrument that is absolutely central to the protection of human rights and being a significant advancement in the institutional arrangement intended for such a protection, the Federal Supreme Court has jurisdiction to authorize any such shift, and, therefore, only the Attorney General may issue such a request. The consequences of this limitation on the provision’s use are evident: since 2004, only two cases have given rise to the use of federalization by the Attorney General, of which only one was accepted by the court.<sup>3</sup>

The 1988 Constitution also set forth new legal instruments capable of allowing for the implementation of such rights, including the writ of injunction and habeas data, in addition to establishing new contexts for the use of other already-consecrated legal instruments, such as the writ of mandamus and class actions. It furthermore recognized equally traditional instruments such as the habeas corpus.

In addition to these specific constitutional instruments for rights protection, the Constitution redefined the mission and jurisdiction of both the Public Prosecutor’s Office and the Public Defender’s Office. Such changes caused these institutions to become central actors in the promotion of public interest law in Brazil.

In accordance with what is affirmed by Article 127 of the 1988 Federal



Constitution, the Public Prosecutor's Office became a "permanent institution, essential to the judicial function of the State, delegated with the defense of the legal order, the democratic regime and social interests and unavailable individuals," or, in other words, the defense of the public interest and fundamental rights (MACEDO JR., 1999). In the past two decades, which followed the adoption of the 1988 Federal Constitution, members of the Public Prosecutor's Office participated in various networks involved in public interest cases, mainly with respect to environmental rights, consumer rights and the rights of children and indigenous people. The majority of the public interest cases that reached the Brazilian judiciary passed through this channel (ARANTES, 1999). With the passage of time, however, the high expectations surrounding the role of the Public Prosecutor's Office, as the quintessential defender of the public interest, diminished among civil society organizations. In fact, there is no effective mechanism through which civil society organizations can pressure agents of the Public Prosecutor's Office to act in any given circumstance. For this reason, the Public Prosecutor's Office cannot be viewed as the sole option for resolving public interest cases.

On the other hand, the Public Defender's Offices, established after the 1988 Constitution, constitute the second set of public agencies directly charged with promoting public interest law in Brazil. Article 5, LXXIV of the 1988 Constitution sets forth that the "State shall provide full and free legal assistance to those who prove they have insufficient resources," and, in order to ensure fulfillment of this law, the Constitution sets forth that the state and federal governments must establish Public Defender's Offices. Such institution is considered "essential to the judicial function of the State, delegated with the legal direction and defense, in all degrees, of the needy, in accordance with Art. 5, LXXIV."

Precisely because of their constitutional character of providing legal assistance to the needy, the Public Defender's Offices act in various areas of the law, such as in family, property, criminal and civil law, with an exorbitant volume of cases in the face of few and scarce physical and human resources (CUNHA, 2001). This scarcity has frequently prevented the Public Defender's Offices from concentrating on activities of strategic human rights advocacy, which tend to significantly alter the institutional practices that violate human rights. Nonetheless, even in the face of these difficulties, it is necessary to recognize both the importance of the Public Defender's Offices and the advances that have been achieved through their operations including, for example, their emblematic action against forced evictions in Rio de Janeiro.<sup>4</sup>

The Constitution, moreover, expressly incorporates the international language of human rights. Article 4 sets forth that the Brazilian government must take human rights into consideration in its foreign policy; Article 5, § 2 requires that the rights expressed in the constitutional text not preclude others resulting from the principles and rules adopted thereby, nor those listed in international treaties to which Brazil is a party, thus opening up the possibility of incorporation of international human rights law into the Brazilian legal order.

In fact, only after the end of the military regime in 1985 and the indirect election of the first civil president did the Brazilian government become party to the main human rights treaties. Ratification of these treaties, however, was only achieved subsequent to the adoption of the new Constitution.

With Brazil's ratification of the American Convention on Human Rights in 1992, as well as the acceptance of the jurisdiction of the Inter-American Court of Human Rights in 1995, many nationally and internationally-based organizations began to use international mechanisms – as a means to overcome the inertia of the Brazilian justice system in dealing with systematic violations of human rights committed by the new democratic government – a fact which helped change the landscape of public interest advocacy in Brazil.

In the path to the new constitutional moment and with the inspiration of normative advances in the international arena, movements for the defense of rights pressured Congress to produce a series of legislative changes in the field of human rights. These infra-constitutional standards address important issues such as, for instance, the rights of children and adolescents (1989), the rights of disabled persons (1989), crimes of racism (1989), the health system (1990), social security (1991), the right to education (1990), unrestricted access to medication for the treatment of HIV (1996), torture (1997) and agrarian reform (1993), among other equally relevant subjects.

Notwithstanding the existence of this significantly protective normative framework in the constitutional, international and infra-constitutional arenas, human rights violations continue to be a part of the country's reality.

In the field of social rights, using education as merely an example, figures from 2009 show that 52% of the students from first to fourth grade are functionally illiterate or, in other words, are either illiterate or possess a rudimentary level of literacy<sup>5</sup> (INSTITUTO PAULO MONTENEGRO, 2011). Of the students from fifth to eighth grade, 24% are functionally illiterate. With respect to health, diseases such as malaria, for instance, affect five hundred thousand people per year in the Amazon's endemic region; almost one million people contracted dengue in 2010; and tuberculosis causes approximately five thousand deaths per year (BRASIL, 2010).

With respect to civil rights, police violence and summary or arbitrary executions are still “widely practiced” (UNITED NATIONS, 2010). Meanwhile, torture and degrading detention conditions are present in a large part of the adult and youth prisons in Brazil. Recent visits by the National Justice Council to the youth prisons throughout the country confirmed that overcrowding and the practice of torture are still a sad reality (BRASIL, 2011a).<sup>6</sup>

Incidents of violence and human rights violations, furthermore, affected certain societal groups that are considered to be vulnerable in Brazil. Blacks, women, children, indigenous people, ex-slave community members, persons with disabilities and the LGBT community are most likely to be victims of human rights violations.

As an example, the black population in Brazil is the poorest and has the least amount of access to essential services and to education. In order for one to have an idea of the force with which racism exacerbates inequality, a white Brazil would have a high Human Development Index (HDI) of 0.814, while a black Brazil, including the population of all people of color, would have an HDI of 0.703. If these were two distinct countries, they would be separated by 61 places in the human development ranking (CICONELLO, 2008). Aside from receiving lower salaries for equivalent work, black women have been shown to receive medical care of the lowest quality, being given minimal anesthesia and gynecological attention, for example (LEAL; GAMA; CUNHA, 2005).

The constitutional process of expansion of rights, intended to contribute to overcoming the arbitrary and various forms of creation of social hierarchies, directly impacted litigation in Brazil. This does not, however, mean that there was a proportional expansion of access to justice: the national average for the relation between persons in need of services of free legal assistance and their defenders is of one Public Defender to every thirty-two thousand people (1:32,044) (BRASIL, 2009). Pro bono advocacy, which could be shown as an alternative to the grave problem of access to justice, is greatly restricted by the Brazilian Bar Association, whose current regulations permit free advocacy merely for disadvantaged civil society organizations of public interest.<sup>7</sup>

The rise in litigation that has been seen in recent years in Brazilian society, increasing from 5.1 million new cases in the state, federal and labor courts in 1990 to 24.5 million new cases in 2010, does not represent a full democratization of access to the judiciary. Research recently revealed that the biggest litigants in the Brazilian courts consist of state and federal public agencies and private banks (BRASIL, 2011b),<sup>8</sup> in spite of the fact that a significant portion of these cases arise from consumer demands.

The fact is that the normative advance for human rights, which began in 1988, has not generated a significant movement for litigation in its defense. With the exception of the relevant but not systemic operations carried out by the Public Defender's Offices and the Public Prosecutor's Offices, very few civil society organizations have dedicated themselves to litigating for human rights.

### *2.3 Impact of the International Agenda on Human Rights Advocacy*

It is difficult to comprehend the recent trajectory of human rights advocacy in Brazil without first taking into consideration the debates, movements and treaties that have developed in the international arena during the past two decades. Even though public institutions had already acquired great prominence in the field of human rights litigation, beginning in 1988 various organizations began to dialogue intensely with the international human rights movement.

Although the human rights movement gained strength after the end of the Second World War with the creation of the United Nations (UN) in 1945, it was the adoption of the Universal Declaration of Human Rights in 1948 and several other international human rights treaties that caused the objectives already expressed in the Universal Declaration to become legally binding; in Brazil, the international language of human rights began to be used only after the military regime ended. This is due as much to the isolation generated by the authoritarian regime, as to the impact of the Cold War. In the context of the United Nations, the logic of the Cold War contributed to the weakening of the operations of most human rights movements. The Inter-American Commission on Human Rights, established by the Organization of American States, was the sole international mechanism that was active in the American continent. It is important to underscore that, up until that time, Brazil had not yet ratified any of the principal international human rights agreements, not even the American Convention on Human Rights of 1969.

Only at the end of the military regime in 1985 and the indirect election of the first civil president did the Brazilian government finally sign the principal human

rights treaties. Ratification of these treaties, however, only took place after the adoption of the new Constitution. The entire movement for the Brazilian government to ratify the principal international human rights treaties, and the partnerships between international human rights organizations that began to operate in the country following the end of the military era, inspired the creation of new organizations with missions that were more clearly geared toward the promotion of human rights.

With Brazil's ratification of the American Convention on Human Rights in 1992 and the acceptance of the jurisdiction of the Inter-American Court of Human Rights in 1995, many nationally and internationally-based organizations began to use international mechanisms as a way to overcome the inertia of the Brazilian justice system in dealing with the systematic violations of human rights committed by the new democratic government (SANTOS, 2007).

Several United Nations conferences occurring in the 1990s stimulated, in the global context, a new flow of ideas that influenced both social movements and the practice of human rights organizations in Brazil. The 1992 Earth Summit, the 1993 World Conference on Human Rights, the 1995 World Summit for Social Development, the 1995 World Conference on Women, the 1996 Conference on Human Settlements and the 2001 World Conference Against Racism – each fomented distinct ways for ideas to be exchanged and flow internationally, among social movements, organizations and even state agents throughout the world. These international conferences, which were distinct from those that had been previously carried out, mobilized thousands of civil society groups and human rights defenders from all around the world, each with the goal of not only participating in such meetings, but also articulating civil society proposals and demanding that the States position themselves around such issues. During preparatory meetings for the conferences, human rights organizations and defenders, which had operations in their own country's domestic spheres, began to interact with organizations and defenders of other countries and regions, thus opening up new opportunities for international dialogue, in addition to allowing for new forms of engagement in international politics to emerge – forms of engagement which were not monopolized by the States or controlled, in the civil society context, by large transnational organizations of the northern hemisphere (NADER, 2007).

Starting from the exposure of Brazilian organizations to this new stage of human rights internationalization, which was not limited to State agents, many Brazilian organizations, including Conectas, began taking into consideration international institutions and even the strategies of similar organizations in the formulation of their own lines of action.

### 3 Conectas' Justice Program: Artigo 1º

It was in this political institutional context and under the influence of these different traditions that Conectas decided to organize a program of strategic advocacy<sup>9</sup> in June 2003, called Artigo 1º ("Artigo 1º – Conectas"), which refers to Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."<sup>10</sup>

Since the beginning of Artigo 1º – Conectas, two main operational focuses

were chosen: i) intensive strategic advocacy, with the goal of destabilizing institutional systemic practices of human rights violations; and ii) constitutional strategic advocacy, geared toward protecting legislative advances surrounding threats of setbacks in the Federal Supreme Court, as well as litigation aimed at enlarging the scope of rights for groups that have been unjustifiably excluded from the constitutional text itself.

### *3.1 Systemic litigation and persistent human rights violations*

Systematic human rights violations, entrenched in longstanding institutional practices, present enormous challenges to alteration, as much for social actors engaged in their change as for the authorities themselves who do not agree with such violations.

The decision to use a large number of different kinds of actions, although directed at attacking a specific question also aimed to destabilize the consolidated practices of systematic violations, in order to confront persistent human rights violations. This decision furthermore aimed at changing the practices that are imbedded in Brazilian institutions, thus seeking, by means of lawsuits, to require these institutions to perfect their procedures for control, transparency and participation. The systematic practice of these institutions in violating human rights presupposes the poor functioning of control mechanisms, such that impunity becomes a central element in the perpetuation of violations.

For this, a double strategy was designed, involving: actions geared toward directly testing and questioning institutional control and transparency procedures; and actions geared toward ordering high damages verdicts against such institutions, including victim reparations, thus exploring the pedagogical nature of indemnifications.

The thematic area initially selected among the persistent human rights violations was that of institutional violence against adolescents in the youth prison system in the state of São Paulo.<sup>11</sup> There were several motivations for choosing this issue: institutional violence related to an area with notorious and deep human rights violations, recognized nationally and internationally through the reports of organizations and the public sector; the centralized management of these prisons would favor systemic action by Conectas; and partnerships had already been established in the middle of 2003, with organizations of victims and family members of victims,<sup>12</sup> most notably with Amar – Association of Mothers and Friends of Children and Adolescents at Risk, which was built into projects then managed by Ilanud.<sup>13</sup>

Working closely with organizations acting in the defense of the rights of children and adolescents, Conectas began to conduct periodical visits to and inspections of the youth prisons, obtaining, directly from the adolescents, information and findings surrounding the human rights violations occurring therein. Between 2003 and 2008, these visits covered approximately 70% of the youth prisons in the state of São Paulo.

Based on its visits to and inspections of the youth prisons, Conectas began to file lawsuits against the official bodies responsible for investigating human rights violations, thereby seeking to coax the existing control instruments into working properly, so as to allow for institutional restructuring. By observing the precariousness and inefficiency of the institutional control mechanisms – as originally expected – in specific cases of human rights violations monitored by Conectas, it was possible to design lawsuits aimed at perfecting these mechanisms.

In this respect, we highlight three sets of legal actions, which, through litigation and court rulings, successfully improved and established mechanisms for control, transparency and participation in youth prisons in the state of São Paulo.

The first set of legal actions refers to the writs of mandamus that were filed by the family members of victims of human rights violations, with regard to the administrative rulings that had denied them access to the internal investigation procedures, which were being retained by the Internal Affairs Division of Febem (currently the Central Foundation for Adolescent Socio-educational Care – CASA Foundation),<sup>14</sup> surrounding the liability of public agents who perpetrated the human rights violations.

These writs of mandamus aimed to affirm the right of adolescent victims of human rights violations, as well as their family members, to have access to and to participate in such investigation procedures.

In its ruling, the Brazilian Court affirmed:

*Clear legal right fully supported by writ of mandamus. Moreover, the existence of a constitutional guarantee of access to information that was also damaged. State failed, it seems, to preserve the life of the adolescent held in its custody and put forth undue obstacles to his family members, preventing them from accessing information surrounding the investigation of the death in question. Unacceptable obstacle that cannot be perpetuated by reason of excessive formalism or adherence to legal filigree. Aside from the right of the appellant to access information pertaining to the death of her son, there is a true obligation of the state to provide necessary clarifications. Ruling that must be reformed so that the mandamus may be conceded, thus giving the appellant access, the extraction of copies and the obtainment of certificates of inquiry pertaining to the death of her son. Appeal provided so that the order is granted.*

(SÃO PAULO, 2005).

After the repetition of similar such lawsuits and court rulings, both the CASA Foundation and the Judge of the São Paulo Children's Court reformulated their understanding and began to guarantee, to victims and their family members, access to and participation in administrative procedures. The use of this pathway by victims may yet cause other effects in the institutional practices of the CASA Foundation, particularly with respect to a rupture in the cycle of impunity. Another set of legal actions refers to the authorization and prerogatives of human rights organizations with respect to their prison visits and inspections. With the passage of years and the intensification of complaints of human rights violations, the CASA Foundation began to make it more and more difficult for organizations to enter the prisons until, in 2005, it issued a general ban on the entry of organizations that did not have cooperation agreements with the prisons.

This explicit ban and the lack of a defined policy on inspections caused Conectas, in partnership with other organizations working in the defense of children and adolescent rights, to file a civil class action, with the goal of requiring the CASA Foundation to create a policy for inspection and transparency, which would be in line with international procedures for human rights protections, particularly the Optional



Protocol to the Convention against Torture. The lawsuit succeeded on appeal, and the ruling of the Court of Justice stressed the importance of the work of NGOs in the defense of human rights:

*(...) There is no doubt that it is the duty of all, and not merely the state, to guarantee the birthrights of children and adolescents, such as the right to life, to health, to physical integrity, etc. The Federal Constitution itself makes this very clear in its Articles 1, III, 204 and 227. Therefore, when the state applies socio-educational measures to juvenile offenders, which are aimed at maturation, an awareness of errors and rehabilitation, there is, in a way, not only a participative duty of the entire population, included herein, which obviously comprises non-governmental entities, but also a right of all persons to verify if such goals are being reached or if, at the very least, efforts for such are being made. (...) Although it is owed to the defendant-respondent to have freedom in the planning and execution of its protection programs, the defendant does not have the right to prohibit non-governmental associations, which act in the protection of children and adolescents, from accessing the youth and the facilities where they are held. When the CASA Foundation acts in this way, it is in violation of the principle of transparency that ought to guide its operation; the CASA Foundation should be the first to make it clear that there are no violations in its detention centers, of the rights established by Art. 124 of the Statute for Children and Adolescents. (...) I grant the appeal, allowing for the plaintiff-petitioners, as well as other non-governmental associations with the same goals, to enter the detention centers of the CASA Foundation, in conformity with any other provisions that now exist or that may be enacted in the future.*

(SÃO PAULO, 2008).

This may perhaps be the most relevant sentence obtained during this period and for various reasons: a collective procedure was adopted, which enlarges the impact and scope of the lawsuit and imposes upon the CASA Foundation a clear obligation of creating strategies for control, transparency and participation.

Finally, a third set of legal actions sought to question poor prison confinement conditions, beginning with violations of general building and care provisions. In this regard, several prisons were questioned, for example for having no fire safety equipment, thus supporting a court injunction for unsafe prisons. This suit fostered an official condemnation of the Brazilian state by the Inter-American Court of Human Rights in December 2005, in a case that was filed in partnership with a group of NGOs.<sup>15</sup> This lawsuit was originally filed before the Inter-American system, on behalf of 4,000 adolescents in the CASA Foundation's detention center in Tatuapé, which was known for subjecting its adolescent inmates to inhumane conditions and treatment. After the failure of the Brazilian government to implement the measures that had been ordered by the Inter-American Commission on Human Rights (among them, providing reparation to victims, closing the detention center and holding the perpetrators accountable for their violations), the case was forwarded to the Inter-American Court of Human Rights. The Court affirmed the same measures that had been ordered by the Commission and required the de-activation of the Tatuapé Complex, which finally took place in December 2006.

The second strategy used by Conectas was to seek, by means of litigation, to extend compensation to victims of human rights violations, so as to revert the process of trivialization of the violations perpetrated by the state. The application of high damages verdicts points to the seriousness of an offense, as well as the need to combat such practice.

There were many victories with respect to requests for compensation for moral damages, arising due to extrajudicial killings and incidents of torture in the CASA Foundation's detention centers. Artigo 1º – Conectas succeeded in transforming the standard of the São Paulo Court of Justice with regard to the value of compensation ordered for loss of life and torture. Initially, judges ordered sentences for the payment of pitiful amounts, of around R\$ 30,000 to families of victims of deadly state actions. Due to the intense work of Conectas, judges began to change their perspectives with respect to the obligation of the state to guarantee the life of those who are in its custody. The values paid in the name of compensation amounts increased to R\$ 300,000 (US\$ 150,000), on average. The goal of awarding such compensation is to send a clear message to the general public that the lives of these adolescents could not be forgotten in the face of such abuses.

Almost one hundred legal actions, in the name of adolescents of Febem's detention centers, were filed with the goal of: guaranteeing compensation for victims of abuse, punishing the perpetrators of these violations and changing the Foundation's institutional practices. Each of these cases demanded and still demands that the civil, administrative and sometimes criminal aspects of the problem be addressed.

Generally speaking, Artigo 1º – Conectas seeks to use the justice system to increase the political cost associated with practices that violate rights, thus contributing to the pressure for reforms in our youth prison system, which is currently in conflict with the law in São Paulo.

In addition to the issue of incarcerated youth, beginning in 2005, Artigo 1º – Conectas began to work with the question of police violence, particularly in cases of summary executions, with the same strategy of, on the one hand, strengthening mechanisms of control, transparency and participation and, on the other hand, aiming to achieve instructive impact by awarding generous compensation to victims.

On this issue, we highlight the actions carried out during the so-called bloody week of May 2006. In the time between May 12<sup>th</sup> and 21<sup>st</sup>, 2006, there were a series of attacks on the police and rebellions in the prisons of the state of São Paulo, which were orchestrated by the criminal gang First Command of the Capital – PCC, followed by a violent response by the police. In this week, 492 people were shot to death, with clear indications of summary executions practiced by the police (CANO, 2009). The actions of Artigo 1º – Conectas sought to federalize the case, given the high commitment of the institutions of the justice system to conduct factual investigations. In the international context, Artigo 1º – Conectas sought to: abolish the use of the expression “resistance followed by death” in police reports, a factor that is responsible for both covering up the number of incidents of police violence and fostering impunity; and effect the adoption of standards of police conduct surrounding the use of excessive lethal force.

Starting in 2007, Artigo 1º – Conectas began to apply its acquired experience to other areas, in order to operate in the adult prison system, with a focus on the issues of overcrowding, excessive use of provisional imprisonment and poor confinement conditions.

The first case Conectas worked on was of the Public Prison of Guarujá, in which overcrowding and the very poor conditions of confinement characterized a situation analogous to torture. From intense correspondence with local actors,<sup>16</sup> Artigo 1º – Conectas succeeded in starting a large debate on the indiscriminate use of presentence prison and the precarious nature of incarceration in public prisons,<sup>17</sup> which was responsible for shutting down the prison and effecting the adoption of precautionary measures from the Inter-American Commission on Human Rights.<sup>18</sup>

The same strategy was adopted in 2009 in order to operate in the prison system of Espírito Santo, which is notorious for being a great violator of human rights. Artigo 1º – Conectas and its partners<sup>19</sup> worked with a combined strategy of media, local mobilization efforts and international actions, which generated a widespread impact. Absolutely inadequate prison facilities, such as the Vila Velha Judicial Police Department and metallic cells that operated in crates were deactivated and banned (respectively) following both the adoption of the precautionary measures by the IACHR and the debate on the issue that took place at a parallel event in the UN Human Rights Council.

This operational model, because of the intensity of its actions, which were coordinated with other organizations, and its use of the media seems to have contributed to destabilizing systematic violative practices.

### 3.1.1 Litigation to enlarge the spectrum of rights

The decision to enlarge the spectrum of rights was based on the fact that, in spite of the 1988 Federal Constitution representing a great advancement, there are rights that failed to be recognized, leading to the unjustified exclusion of groups in need of an effective system for protection.

In order to attack these unjustified exclusions, two strategies were outlined: first, to defend normative advances obtained in the National Congress; and second, to defend a constitutional interpretation supporting the amplification of human rights.

For the development of these strategies, instead of selecting an issue, we first decided on a privileged location: the Federal Supreme Court (STF). Such a choice was supported by the irrefutable centrality that STF has achieved in the human rights debate (VIEIRA, 2008). In fact, over the past 18 years, the Federal Supreme Court has become one of the primary national forums for defining fundamental rights.

Nevertheless, there exist very restrictive rules that remove a large part of civil society from the constitutional debate: while it is possible to have access to STF, either by means of an appeal filed in a single case or by means of a direct unconstitutionality action, only some social and political actors can work with the Federal Supreme Court directly. In order to democratize this arena, Congress passed a law in 1999 that allows third parties to file briefs of *amicus curiae* with STF. In some countries, such as the United States, this device has considerably influenced Supreme Court decisions, even though it is still used very little in Brazil.

Artigo 1º – Conectas has focused its actions on the use of briefs of *amicus curiae* in its strategy to enlarge the spectrum of human rights in the country. Conectas is currently the organization that files the greatest number of briefs of *amicus curiae*

with the Federal Supreme Court (ALMEIDA, 2006) – 38 so far – on a wide range of issues, and it constantly seeks to form partnerships with relevant actors in each of the areas addressed. Conectas is also the only organization that participated in each of the five public hearings that have been carried out by STF up until now.<sup>20</sup>

Brazil adopted a progressive Constitution in 1988. After the enactment of such, Congress passed several laws intended to implement the expectations that were brought about by the new constitutional order. These new laws are constantly questioned by conservative sectors that were defeated by the political process which culminated in the adoption of the Constitution; these sectors have used the Supreme Court to question the acts of the National Congress. On the other hand, vulnerable minority groups, which are unable to get laws passed before the National Congress, turn to the judiciary in order to obtain some protections. For this reason, the current challenge for civil society organizations committed to the promotion of human rights is to defend both the progressive legislation that was passed after the enactment of the 1988 Constitution and minority groups in cases before the judicial branch.

With the strategy of enlarging the spectrum of rights, beginning from the normative advances created by the National Congress, Artigo 1º – Conectas has expressed itself through actions of great public relevance by defending the new laws. In this regard, we consider as emblematic manifestations, the briefs of *amicus curiae* of Artigo 1º – Conectas, which defended gun control and embryonic stem cell research, in addition to supporting affirmative actions for blacks in universities, on which STF has already taken a stance. The first substantive victory came about in the case on gun control (ADI 3112) (BRASIL, s.d. a), a subject of extreme importance in Brazil due to the impact of such control on homicide rates. Brazil has an extremely high homicide rate, in which small guns are responsible for the majority of these deaths. Following a drawn-out parliamentary debate, the National Congress passed the Disarmament Statute, a law for gun control, setting forth several restrictions on personal gun possession. Although this law contained a provision that would completely prohibit the sale of guns in Brazil, such provision would only come into effect upon approval by national referendum. The results of this referendum were negative. For this reason, the sale of guns today is legal in Brazil, even though several restrictions on the possession thereof are still in effect. In opposition to these restrictions, a direct unconstitutionality act was filed by the PTB (Brazilian Labor Party), a right-wing party, with respect to several provisions of the new law. The Supreme Court ruled on the case in May 2006, upholding the law, implementing a few adjustments pertaining to procedural questions and drawing on the arguments provided by the briefs of *amicus curiae* of Artigo 1º – Conectas, Sou da Paz and Viva Rio.

The second case of normative advancement that was defended by Artigo 1º – Conectas, related to the law on embryonic stem cell research (ADI 3150) (BRASIL, s.d. b). This law suffered from several attacks, particularly from the religious sectors that sought the constitutional protection of the sanctity of life of the embryo, which is discarded in the process of artificial fertilization. In this case, in addition to obtaining a favorable pronouncement on the law from STF, Artigo 1º – Conectas collaborated with STF to carry out the court's first public hearing.

Finally, Conectas defended the affirmative action law (ADI 3330) (BRASIL, s.d. c), which allows for racial criteria in the context of ProUni – a comprehensive program of the federal government for the concession of scholarships for access to university education. In this case, Artigo 1º – Conectas acted in the defense of affirmative action, and, when STF was faced with a request for suspension of judgment, it obtained a favorable vote of the reporting Justice. Artigo 1º – Conectas also acted in the public hearing carried out by STF on this subject.

In addition to these positive substantive results, we must also underscore the result obtained by Artigo 1º – Conectas with respect to the determination of the ability of human rights organizations to file briefs of *amicus curiae* with the Court. Upon the request of Artigo 1º – Conectas, the Federal Supreme Court justices debated which criteria the Court ought to use in order to admit briefs of *amicus curiae* filed by civil society organizations, and they decided that any human rights organization such as Conectas, with an overall mission to promote human rights, would be competent to express itself in all cases in which questions relating to fundamental rights were presented.

Furthermore, Conectas acts in the defense of the constitutional interpretation for the enlargement of rights. As mentioned above, the text of the 1988 Federal Constitution failed to expressly recognize the rights of some groups, thereby necessitating the operation of STF in seeking a comprehensive and expanding interpretation of these rights.

The most emblematic case in this line of actions is the recent case on the constitutionality of civil unions of persons of the same sex (ADPF 132) (BRASIL, s.d. d). The 1988 Federal Constitution established a regime for stable unions and their conversion into marriages, and it explicitly mentions the union between a man and a woman. This mention has served as a justification for the refusal to recognize civil unions between persons of the same sex. Precisely for this reason, the suit filed in STF sought an interpretation of the stable union rules that would remove this unjustifiable exclusion. The manifestation of Artigo 1º – Conectas and its partners was accepted,<sup>21</sup> as was that of other organizations, and STF unanimously recognized the right of the union of persons of the same sex as a family unit.

Although not yet ruled upon, there also exist other pending lawsuits, such as in the case of religious teaching, which seek an interpretation of the law that is more consistent with respect for human rights, in areas where the Constitution has failed to be as consistent.

Finally, and still with the objective of enlarging the spectrum of rights, Artigo 1º – Conectas began to participate in the GTPI/ Rebrip – Working Group on Intellectual Property of the Brazilian Network for People's Integration, with the objective of formulating strategies and legal actions that are geared toward revising the current system of intellectual property protections, in order to foster greater access to medicine. One of the most exemplary lawsuits, which is currently awaiting final judgment by STF, specifically questions pipeline patents and, more generally, the entire system of intellectual property protections in a country where pharmacological assistance constitutes part of the fundamental right to health and the obligations of the state.

From this initiative, paradigmatic and innovative actions were also formulated, including a civil class action that aims to use flexibilities in the protection system

to decrease the price of medicine, which would then be freely distributed by the government. Aside from this lawsuit, which continues to await final judgment, GTPI acts: in the formulation of efforts that oppose the concession of medicine patents; and in the realization of debates that expose the inefficiency of the current system for intellectual property protections – in guaranteeing the creation and development of medication for neglected diseases or access to medication that already exists.

## 4 Conclusion

Following this short and intense strategic advocacy experience in the field of human rights, we can summarize, in the following manner, our greatest challenges and achievements. We will divide the challenges among external obstacles, which relate to the institutional framework and social structure, and internal difficulties, which relate to the limits of the organization itself and its sustainability. In the context of achievements, we mostly aim to emphasize the strategies and methods behind the results described above.

There are many external obstacles to human rights advocacy in Brazil. The first of these obstacles has to do with the systematic nature and breadth of human rights violations in Brazil. Given our social structure, which is highly hierarchical, as characterized by a deep and persistent inequality between several segments of society, violations are widespread and oftentimes nationalized by public opinion. The brutality, arbitrariness and, in most cases, the simple disregard for and neglect of the fringes of our society are not capable of provoking political and legal reactions that are expressed in order to overcome the status quo. Thus, to advocate for human rights causes is, in many cases, something unpopular, and it therefore places the organizations and people involved at risk.

A second difficulty is directly related to the lack of *responsiveness* of the justice system, especially with respect to causes that seek to defend the interests of vulnerable groups in Brazilian society. As illustrated by innumerable studies, such as the Justice Confidence Index of Direito GV (2011) or even the Latinobarómetro studies (2005), there is a strong perception among Brazilians that our justice system does not apply the law in an impartial way. Oftentimes, our legal claims simply receive no institutional response. The most glaring examples of this may be those that relate to torture or death in adult and youth prisons. The requests for federal intervention that were filed with the Office of the Attorney General due to the acute crises of the prison system of Espírito Santo in 2009, never received any kind of response from that institution. Similarly, the request for an investigation of a case involving the suspected collective torture of an adolescent in the Tupi penitentiary not only lacked follow-up but also resulted in several complaints, which were issued by the Public Prosecutor's Office and later attacked by the state court, imputing to the adolescent the practice of self-flogging, as well as of making slanderous accusations.

Also in the realm of legal institutions, a third obstacle can be detected, which relates to the difficulty faced by judges in granting sentences in situations of greater complexity, such as those involving a prison's lack of sanitary conditions or its overcrowding. In the few circumstances where the courts have ordered the



closure of prisons, as occurred in the public prison of Guarujá, it is not rare for the individuals being held to simply be reallocated to other prisons, thus maintaining the underlying violating circumstances. The reach of court decisions is still very narrow in Brazilian legal culture. Complex situations demand a new kind of managerial decision, whereby judges would impose deadlines, criteria and more transparent mechanisms for confronting such problems. Favorable judgments, seen as silver bullets, have frequently been shown to be insufficient in solving the problem. In the first place, these decisions leave judges fearful of their consequences, thus creating a disincentive for the concession of favorable judgments. Furthermore, when such decisions are conceded, they tend to be systematically suspended by the courts. Lawyers and judges need to be more daring in terms of formulating a remedy necessary to confront problems of systematic human rights violations.

A fourth, very challenging obstacle refers to the frailty of the culture of precedents in Brazil. Efforts to obtain a good decision in the field of human rights do not signify that a given violative practice will be suspended in a generalized way. In a system where legal decisions represent, in many cases, mere fragments of legal history rather than interpretive change, the costs for "cause lawyers" are increased. The lack of authority of precedent favors individuals and lawyers who are well positioned to achieve their unique objectives, without altering the logic of the system. In this sense, victories in the field of human rights do not necessarily become dominant jurisprudence, and it is much less likely that they will reverse violative practices.

Finally, a fifth obstacle refers to the sluggishness of the Brazilian courts. Given the accumulation of procedures and the succession of proceedings that ought arrive at judgment, human rights litigation creates disincentives for disadvantaged sectors that favor strong state advocacy structures. There are very few human rights organizations that have the conditions necessary to maintain a team that accompanies numerous cases, each of which may take more than a decade to be resolved. Such delays therefore contribute to the perpetuation of violative practices.

There are also many internal challenges. The first of these relates to the formation of an efficient team of lawyers. Questions of human rights are normally complex, requiring well-trained and experienced professionals. Considering that human rights questions occupy a merely marginal position in the academic curriculum of law schools, when they occupy any space at all, it is very difficult to find young people with the necessary educational background. The question is still more complex, as a combative lawyer ought to be familiar with not only the area of human rights itself, but also civil and criminal procedure, as well as administrative and constitutional law. This dominion of multiple areas is normally only found in more experienced professionals. In most cases, these professionals have salary requirements that are far greater than what is viable for a human rights organization to pay. The problem relates not only to salary, but also to profile. In our recruiting experience, we have found that there are very few young people who not only are engaged in human rights but also dominate its practice and are available to play an advocacy role in a methodical way. Worse yet, when these young people become good lawyers, the market attractions for them are enormous.

Related to the question of forming a good team is the question of its maintenance. Here there are two elements: one of a financial order and the other of

a psychological nature. In the financial field, non-governmental organizations hardly ever receive long-term funding that is compatible with the time that is necessary for lawsuits to be concluded in Brazil. Donations invariably stick to the logic of projects, lasting one or two years before they must be renewed. Even the most stable foundations require a constant renewal of projects, which, in the legal field, is not necessarily possible or necessary. Foundations that understand the nature of strategic litigation and invest over the long term are quite rare. In litigation, it is necessary to continue doing the same thing for many years. And, the sluggishness of the courts does not help contribute to the self-sustainability of human rights advocacy projects. Any procedural victories which could hypothetically generate money for lawyers, take many years to be executed, and even more so when the defendant of the case is the state. The challenges in good team maintenance, nonetheless, are not limited to a merely financial question. Human rights advocacy, however morally gratifying, is extremely taxing from a psychological perspective. Daily contact with violence, arbitrariness and the suffering of others ends up jeopardizing the psychological health of young lawyers (as well as of other professionals). Furthermore, future harm may destabilize teams that, most of the time, lack the necessary support of outside (psychological and security) organizations.

A third internal problem that we detect along this path and that is common to other organizations that have full teams of lawyers, is the relationship between the legal body and the political body of the organization. Lawyers tend to concentrate on cases, which have urgent deadlines and that require a certain amount of reclusion. Militancy requires constant availability for dialogue with other spokespersons, presence in multiples forums of debate and coordinated actions with different spheres of society, possibly even including the state. In an organization that has two such bodies, it is not uncommon to find that different work logics generate friction. Sometimes there are lawyers who do not understand the political imperatives of operational actions, and sometimes there are militants who do not value reclusion and the temporal imperatives of cases. Mediation and integration of the organization's teams must be a constant.

One way of seeking to overcome the problems of scarce resources, sustainability and even professional experience, is to seek partnerships, whether in the context of the state agencies of public interest advocacy, or in the practice of pro bono advocacy, or even with other non-governmental organizations. These partnerships are essential, but making them work is a constant challenge. Public institutions have their own mechanisms for decision-making, and they form their own agendas, not always being available to attend to the needs of non-governmental organizations. Nonetheless, fostering this dialogue is fundamental. The weight of institutions such as the Public Prosecutor's Office and even the defender's offices is so significant in Brazil that one cannot think of a strategic human rights advocacy project that did not take these institutions into consideration. Pro bono advocacy also has an enormous potential. In all of these years, various strategic partnerships were built, but oftentimes the high political tensions involved in a case do not facilitate the entry of pro bono lawyers in human rights litigations. This is exacerbated by the restrictions put in place by the Brazilian Bar Association on the practice of pro bono advocacy.

Greater advantage must also be taken of university partnerships. In the experience of Artigo 1º – Conectas, the greatest difficulty in counting on the collaboration of law professors and law schools has to do with time; the academy invariably works more slowly than necessary for a case.

In spite of these obstacles, there were innumerable achievements in this period that deserve to be highlighted on a balance such as this. This does not deal with narrating future legal victories but rather with reflecting on the way in which these achievements were made and, above all, the way in which litigation had some impact on the field of human rights.

If we use as an example our advocacy geared toward curbing bad practices in the youth prison environment, some positive lines of action can be seized upon. There were three guidelines that we sought to take into consideration. When duly articulated, these guidelines increased our chances of success.

The first element that warrants distinction is the intimate relation that any human rights advocacy project should have with the direct parties of interest (victims or their representatives). It is only from this relationship of trust and respect for victims that lawyers will be able to formulate lawsuits that may be relevant to vulnerable groups. This closeness is essential for ensuring that any victories will also be appropriate for these groups. This relationship is what will provide political meaning and social backing to the practice of strategic human rights advocacy. Confronting the tragic problems in the now-extinct Febem of São Paulo was only possible thanks to an alliance of mothers, intermediated by Amar, with the lawyers of Conectas.

A second key element is the relationship with the media. Although the media in Brazil is repeatedly against human rights, the most relevant part of print media and even some of the most relevant television channels devote a large amount of attention to, and coverage of, issues relating to human rights. Systematically informing these media sectors, producing trustworthy material and offering real and representative cases of violative practices, are all essential for obtaining the attention of communication channels. In the case of the crisis of the prison system of Espírito Santo, narrated above, media coverage was fundamental for destabilizing the violative practices in question.

A third factor that seemed relevant to us in our winning cases was that our actions were carried out systematically, intensely and persistently. Rarely does one succeed in destabilizing a violative practice merely by means of a single lawsuit or court decision. It is necessary to encircle the problems, attack them from many different angles, reduce the spheres of arbitrariness and create channels for participation and intervention so that groups that are willing to improve upon the situation can participate in the process. Approaching the problem systemically requires a deep understanding of that fact. Whether with regard to the issue of prisons, police violence or discrimination of youth with disabilities from the educational system, before acting it is necessary to comprehend the main bottlenecks, which are the points of perpetuation of the problems, and then attack them from multiple directions. Strategic advocacy ought to seek to offer alternatives for judges to confront problems. As mentioned above, it is not enough to serve a pleading; rather, it is necessary to create mechanisms that prevent the perpetuation

of violative practices. In this same sense, strategic advocacy ought to be perfected, and greatly, with respect to the formulation of claims. If lawyers are not creative in what they ask of judges, what judges grant will not be “original.” Finally, we learned that persistence is indispensable to the achievement of advances, as there are many defeats for every victory.

In addition to these three elements that we constantly seek to consider, we also detected institutional opportunities, which, if not well explored, are generally lost. When, in 1999, there emerged a legal opportunity for civil society organizations to participate in the public interest cases in the Federal Supreme Court by filing briefs of *amicus curiae*, few organizations realized that a new road to an important arena of decision-making was being opened. Conectas’ operation in the Federal Supreme Court has been very positive, not only for introducing a human rights bias into the lawsuits pending before the Court, but also for having been capable of inspiring innumerable other organizations to also seek to present their perspectives before the Court. This increase in social participation in the Court certainly impressed upon justices the need to take human rights principles more seriously.

The last lesson that we took away from our own small but intense experience with strategic human rights advocacy pertains to the very expectations that we ought to foster when we engage in complicated tasks. Advocacy cannot be seen as a means to resolve problems but rather as a means to expose human rights violations through a different lens, which is frequently neglected in Brazil: the law. This may seem to be a contradiction; nonetheless, we believe that questions of human rights, when presented merely from a moral, political or even economic perspective, become the object of greater argumentative elasticity, as if certain abusive practices can constantly be the subject of deliberation by the social body. By affirming the perspective of rights and calling upon enforcement institutions to face questions of human rights violations, we can call attention to the imperative nature of the rights that were already the subject of deliberations. Thus, there is no space to discuss whether torture is legitimate or whether discrimination is part of our culture. By incorporating the principles of human rights, by means of the Constitution and innumerable laws and treaties, society and the Brazilian authorities took on a legal responsibility which may not be systematically relaxed. Human rights are, in this way, understood in their imperative dimension. This does not negate the complexity of the situation surrounding the systematic violation of human rights, which would require multiple efforts to overcome. The function of litigation is to expose the inadmissibility of violative conduct, aiming to hold perpetrators accountable and, in particular, seeking to open up institutional channels for these practices to be defeated. Over the course of its journey, with great difficulty and the sense of limitation, Artigo 1º – Conectas sought to attract the weight of the judicial branch in order to destabilize systemic practices of human rights violations. Although it is not possible to trace direct causal relationships in this field of knowledge, we have found innumerable indications that the same actions by a small office of strategic advocacy, such as that of Conectas, can indeed contribute to a reduction in the invisibility of violations and the impunity of violators and the perfection of the institutional mechanisms that are geared toward the question of human rights.

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## NOTES

1. RENAP, primarily comprised of lawyers, under the leadership of Jacques Alfonsin, Luiz Eduardo Greenhalg and Plínio de Arruda Sampaio. This network is still operating today and is responsible for building legal strategies and providing legal assistance to MST throughout Brazil.
2. *Note from the Editors: Era Vargas* is the common appellation for the period Getúlio Vargas ruled Brazil (1930-1945).
3. Under deliberation in the Federal Senate is the Proposed Constitutional Amendment PEC 61/2011, which intends to enlarge both the list of those with standing to file an Incident of Transfer of Jurisdiction (IDC) and the list of those with standing to file lawsuits for the judicial review of constitutionality, as set forth in Article 103 of the 1988 Federal Constitution.
4. The Land and Housing Nucleus (NUTH) of the Public Defender's Office worked strongly on the denunciation of forced evictions in Rio de Janeiro and the defense of the communities. In the face of great political pressure directed against the Defenders, which included the firing and transfer of NUTH employees, the Defenders withdrew from the activities because they disagreed with the courses of action suggested by the current management.
5. Definition of INAF: Illiteracy – Corresponds to the condition of those who are unable to carry out simple tasks that involve reading words and phrases, even though a portion of such individuals may be able to read familiar numbers (telephone numbers, prices, etc.). Rudimentary illiteracy – Corresponds to the capacity to locate an explicit piece of information in short or familiar texts (such as a single announcement or a short letter), read and write typical numbers and carry out simple operations, such as handling money for the payment of small amounts or carrying out length measurements using a tape measure.
6. For example, in the state of Piauí the following situation was found to have occurred: "the adolescents complained consistently of assaults and bad treatment by the police officers (...). The adolescents described (...) that they are tied with their hands behind their backs in holding crates, in such a way that they remain on their tippy toes, for long periods of time." In Rio Grande do Norte: "As one can see (...) there is human feces thrown at the walls and ceiling, in addition to accumulated trash; it was reported that the odor is repugnant. The adolescents narrate assaults by the military police who are responsible for the prison's security" (BRASIL, 2011a).
7. Only the states of São Paulo and Alagoas have a Pro Bono Resolution issued by the Brazilian Bar Association.
8. Report of the National Justice Council indicates that "in the public sector (Federal, State and City), banks and telephone companies represent 95% of the total number of cases of the 100 biggest national litigants" (BRASIL, 2011b). It is estimated that these 100 biggest litigants represent 20% of the total number of cases in Brazil.
9. Conectas' Justice Program received its first push from the financing of the AVINA Foundation (2003-2005), to support the activities of fellow Oscar Vilhena Vieira. Following the AVINA Foundation's support, Conectas' Justice Program was funded by the OAK Foundation (2006-2008 and 2008-2010), of the Open Society Institute (2008-2009). Currently, the Justice Program is funded by the European Union, the OAK Foundation and the Open Society Institute.
10. The following individuals comprised the team of Artigo 1º – Conectas: Lawyers: Oscar Vilhena Vieira (2003-2010); Eloísa Machado de Almeida (2003-2009 and 2011); Beatriz Carvalho dos Santos (2004); Marcela Fogaça Vieira (2004-2011); Humberto Polcaro Negrão (2005-2008); Irineu João Simonetti Filho (2008); Samuel Friedman (2008-2010); Julia Mello Neiva (2009-2010), Vivian Calderoni (2011) and Flávia Annenberg (2011); and Interns: Thiago Amparo (2004); Cecília Oliveira (2004); Vivian Sampaio Gonçalves (2005-2009); Valcrécio Paganele (2008-2009); Riccardo Silva (2009-2011); Rosa de Santana Santos (2010); Fernanda Sacilotto (2010); and Fabiane Oliveira (2010).
11. The state of São Paulo held, from 2003 to 2010, half of the total number of adolescents incarcerated in Brazil, thus characterizing a microcosm of the problem.
12. Other partner organizations in this area were: CTV; Cedeca; CRP; Abrinq; Travessia; CDH; and CDH ES.
13. Conectas' Justice Program was greatly influenced by projects developed by Ianud – United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders, an organization in which Oscar Vilhena Vieira and Eloísa Machado de Almeida developed projects, from the ground up, for the legal technical defense of adolescents who are in conflict with the law, from 2000 to 2003, then under the coordination of Karyna Sposato.
14. The Internal Affairs Offices are bodies of internal control of public institutions, aimed at investigating failures to act and violations of the law and internal regulations. Febem – State Foundation for the Well-Being of Minors is the public institution responsible for the execution and management of youth prisons. It is now called the CASA Foundation – Central Foundation for Adolescent Socio-educational Care.
15. Provisional Measures to the adolescents of the Tatuapé Complex, filed by the Center for Justice and International Law – Cejil; the Teotônio Vilela Commission – CTV; the Association of Mothers

and Friends of Children and Adolescents at Risk – AMAR; the Inter-American Foundation for the Defense of Human Rights – FIDDH; Conectas Human Rights; and the Travessia Project Foundation.

16. Partners in these legal actions included: the Pro Bono Institute, the Community Council on Prisons of Guarujá and the county Public Prosecutor's Office.

17. The case is still pending before the IACHR. Case 12.654 (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2008).

18. Precautionary Measures in favor of the Prisoners in the Public Prison of Guarujá/ IACHR PM 63/2007 (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2007).

19. Partners in these legal actions included: Centro de Apoio aos Direitos Humanos "Valdício

Barbosa dos Santos"; Centro de Defesa dos Direitos Humanos da Serra; the State Human Rights Council of the State of Espírito Santo CEDH-ES; Global Justice; and Pastoral do Menor do Espírito Santo.

20. Artigo 1º – Conectas has participated in all of the public hearings that have so far been carried out by STF on: embryonic stem cell research (ADI 3510) (BRASIL, s.d. b); abortion due to fetal malformation (ADPF 54) (BRASIL, s.d. e); prohibition on the importation of used tires (ADPF 101) (BRASIL, s.d. f); affirmative action for blacks in universities (ADPF 186) (BRASIL, s.d. g); and the role of the Court in the realization of the right to health (BRASIL, s.d. h).

21. Partners of Artigo 1º – Conectas in this legal action included: ABGLT; CORSA; the Gay Group of Bahia; and Escritório de Direitos Humanos de Minas Gerais.

## RESUMO

Este artigo pretende analisar a experiência da advocacia em direitos humanos realizada pela Conectas entre 2003 e 2011. A partir das influências do histórico da advocacia de interesse público no Brasil, da adoção da carta de direitos da Constituição Federal de 1988 e do processo de internacionalização dos direitos humanos, o artigo descreve as principais linhas de atuação, as estratégias, as dificuldades e os sucessos da Conectas na superação de violências sistemáticas e exclusões injustificadas a partir da experiência de advocacia em direitos humanos.

## PALAVRAS-CHAVE

Litígio – Direitos Humanos – Violência – Constitucional

## RESUMEN

Este artículo pretende analizar la experiencia de la abogacía en derechos humanos realizada por Conectas entre los años 2003 y 2011. A partir de la influencia de la evolución histórica de la abogacía de interés público en Brasil, de la adopción de la carta de derechos de la Constitución Federal de 1988 y del proceso de internacionalización de los derechos humanos, el artículo describe las principales líneas de actuación, las estrategias, dificultades y las conquistas de Conectas en la superación de las violencias sistemáticas y de las exclusiones injustificadas, a partir de la experiencia de la abogacía en derechos humanos.

## PALABRAS CLAVE

Litigio – Derechos humanos – Violencia – Constitucional



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Social Studies) and as coordinator of the same organization's Economic, Social and Cultural Rights Program.

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#### ABSTRACT

On the occasion of the 10<sup>th</sup> anniversary of Conectas Human Rights, we remember with pride that our journal is also nearly eight years old, during which time we have edited and published fifteen biannual issues. Looking back over these eight years, it occurred to us that it might be useful to human rights activist groups – always eager to disseminate and discuss their points of view in a publication – for us to relate some of the successes, problems and difficulties we have encountered throughout our history.

Original in Portuguese. Translated by Barney Whiteoak.

#### KEYWORDS

Conectas Human Rights – Sur International Journal on Human Rights – Global South – Academic writing



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## A JOURNAL FROM THE SOUTH WITH A GLOBAL REACH

Pedro Paulo Poppovic and Juana Kweitel

### 1 Why, what for and for who?

*Sur –International Journal on Human Rights* was launched in 2004 to provide a channel of communication between academics and activists committed to the promotion and defense of human rights, with a particular emphasis on problems specific to the “Global South.” The journal was created to give a voice to authors from the South and to provide an intellectual arena where the perspectives of North and South could be critically analyzed and debated.

The concept of South, or Global South, is broad and not easily defined. After all, what is distinctive about the points of view of activists and academics from the South? What do so many countries with such diverse cultures and histories have in common?

To answer these questions, it is necessary to recall the political circumstances, in 2004, in which the journal was created. Most of the countries from the South had recently emerged from long years of totalitarian rule, when governments were characterized by, among other deleterious practices, disrespect for the human rights of their populations. The period when the journal was created was, for many countries in the South, one of transition to democracy in which the gap between laws and reality was still wide. The distribution of wealth continued to benefit small minorities. In most countries, civil society movements were pursuing the truth about the so-called “years of lead” and seeking punishment for crimes committed during the regimes. And – worse – in spite of redemocratization, many human rights were still being disrespected, particularly those of the poor. We were, therefore, in the South, a long way from the Rule of Law that existed in some countries in the North where the majority of academic journals dedicated to the discussion of human rights were published. These and other factors were distinctive to the struggle for human rights in the Global South and justified the creation of our journal.

Numerous meetings with academics and activists from Sur – Human Rights University Network, as well as research about the available journals, revealed

that there was indeed an unfilled niche for an academic journal to provide this voice to the South. And, from the outset, we knew that to have a broad reach, the journal needed to be published in more than one language. We started with Portuguese and English, based on the assumption that Spanish language readers would be able to read Portuguese. However, we realized early on that a Spanish edition was necessary, and so the journal was published in three languages from its very first issue.

Another decisive factor in the creation of the journal was the need to establish a link between activists and academics, building a bridge between theory and practice in the field of human rights.

The results appear to confirm that our journal has filled a gap that was unoccupied and has met the needs of our readers. Currently, more than 2,000 copies (in the three languages) are distributed in over 100 countries, and we also publish an online version in all three languages.

A survey conducted with readers in 2007 revealed a broad acceptance and positive assessment by all readership categories (66% of readers considered the journal “excellent” and 34% considered it “good.” No negative responses were given.) (SUR, 2007, p. A5-A7).

## **2 Preparation process**

As stated on the credits page of the journal, we have three boards for editing the Sur Journal:

- The Executive Board, which, together with the editors, is responsible for handling the editing process;
- The Editorial Board, formed by specialists closest to the journal who help select the topics and the reviewers;
- The Advisory Board, formed by specialists who may help select articles and who, in some cases, participate in the planning of the journal.

All the articles published in the journal come under the scrutiny of the Executive Board, which makes a pre-selection of the contributions to be submitted to the reviewers. Any suggestions or corrections, discussed with the authors, are incorporated into the final articles. This “blind peer review” process lends significant credibility to the publication.

## **3 Definition of the content: Importance of partnerships**

It is important to note that all the contributions published by the journal are voluntary and non-remunerated. In order to expand the scope of our journal, from the seventh issue onwards, each new issue was edited in partnership with other institutions. As a result, the journal is now divided into two parts, one dossier dedicated to a topic specified in the call for papers and one general section consisting of contributions on other topics.

The choice of articles to be submitted to the reviewers and eventually published is made relative to the total number of contributions received for each issue. Therefore, the judgment is not absolute and depends on the quality of the other articles received for the same issue. Rejected articles will only be reserved for publication in subsequent issues in exceptional cases involving contributions that are highly original, politically relevant or that have other qualities that set them apart.

In addition to the essential criterion of editorial quality, our choice takes into account geographic and gender criteria, favoring an equitable distribution and giving preference to authors from minority or vulnerable groups. Another important criterion for selecting articles is an approach from different disciplines, in an attempt to overcome the supremacy of law in the discussion of human rights.

Annex N°1, a study by Laura Baron entitled “Voices of the South: Authors, Nationalities and Topics,” gives a good idea of the consequences of our selection criteria on the distribution of authors, nationalities and topics in our journal (from issue No. 1 to No. 12)

#### 4 Who are our readers?

In addition to the geographic distribution of the authors that is tabulated by the research in Annex 1, the research published in the seventh issue of SUR presents the results of a survey conducted in 2007 that, although not recent, gives a fairly accurate description of the composition of our readership. Just as we proposed, SUR is read equally by academics and activists (36.8% are university professors and 31.2% work for NGOs) (SUR, 2007, p. A5).

To attract new readers, the indexing of the journal in academic and commercial databases has grown increasingly important, since it is through these databases that the journal has become more widely known. SUR is covered by the following indexing services: IBSS (International Bibliography of Social Sciences); DOAJ (Directory of Open Access Journals); Scielo and SSRN (Social Science Research Network). The journal is also available at the following commercial databases: EBSCO and HeinOnline. Only scientific journals with a good reputation and high intellectual standard are accepted by these databases and SUR’s “A” rating in Colombia and “A2” rating in Brazil (Qualis) have almost certainly contributed to inclusion of the journal in such venues.

#### 5 Scope and diversity

Achieving a print run of 2,700 copies and a distribution in more than 100 countries should be considered a good result. Our numbers would no doubt be worse if we had been forced, due to financial pressures, to charge readers either for individual issues or subscriptions. By protecting our mission to promote the voice of the South, we have managed – thanks to the understanding of our sponsors – to distribute the journal free of charge to interested readers.

Meanwhile, another important decision related to how the journal reaches our readers has concerned print versus online publishing. There were strong currents of opinion claiming that our readership has access to the internet and, therefore, that a



printed publication was unnecessary – an online publication would suffice, resulting in substantial savings in printing and mail expenses (approximately 50% of total costs). To guide our decision, we surveyed our readers of both the printed journal (inserting a questionnaire) and the online version. The results were conclusive: more than 77% of the readers expressed a preference for the printed format. Accordingly, our distribution policy is based on two pillars: the journal being free of charge, and published in both printed and online format. We feel sure that the abandonment of either of these two pillars would result in a significant loss of readership.

Another important factor that would impact the scope of our readership is the addition of French to the three languages in which the journal is already published. The lack of a French language publication practically precludes our access to half of Africa, in addition to barring us from one of the leading centers of cultural and political production in the Western world. The inclusion of French, therefore, would immediately increase our scope and give an important boost to the quality and variety of our focus. The only thing preventing us from taking this step are financial considerations.

Obviously, the problem of costs is an essential part of any enterprise. The challenge consists of not abandoning essential objectives in the pursuit of savings. This is not easy. The following are some of the approaches that have worked well for us:

- Partnership with organizations that are committed to the same cause in order to produce individual issues of the journal. As such, we have co-produced issues with the ICTJ (International Center for Transitional Justice), ABIA (Brazilian Interdisciplinary AIDS Association), UNHCR (Office of the United Nations High Commissioner for Refugees), ESCR Net (International Network for Economic, Social and Cultural Rights) and Amnesty International. The following organizations have also contributed to the promotion and selection of articles: ISHR (International Service for Human Rights), the Federal University of Rio Grande do Sul, CELS (Center for Legal and Social Studies) and the Center of Human Rights of the University of Pretoria;
- Longer partnerships like those we have sealed with the Carlos Chagas Foundation, which will fund four issues of the journal, as well as serve on the Executive Board and participate in the coaching program, which will be described further in what follows;
- Gather expressions of recognition from various institutions demonstrating the importance and penetration of the journal;
- Promote special issues in other languages. For example, the Egyptian university organization Partners in Development, in cooperation with SUR, published a special issue in Arabic containing articles translated from the journal and also original contributions from a joint seminar held in Cairo. A similar issue in Chinese is currently being considered, in collaboration with Wuhan University;
- Partnership with universities to check and correct translations, like the one with the University of Texas, in Austin, to proofread translations into English.

## 6 Program to Encourage Academic Production in Human Rights

For each issue of the journal, we receive an average of 80 submissions, but due to space limitations we can choose only 8 or, at the very most, 9 articles. Obviously, many of the rejected articles are of good quality and were only refused because they were submitted to us together with others that we deemed better. However, many of the contributions we receive are uneven: they have qualities (such as originality and political relevance) but also shortcomings (such as disorganization, lack of a logical order, incomplete bibliography, etc.). To address this matter, we have developed, together with the Carlos Chagas Foundation, the Program to Encourage Academic Production in Human Rights (that we informally call “coaching”). The idea of this program is for experienced authors to provide support to young authors from the South, helping them improve and in some cases rewrite the articles they submit.

The first selection of articles for the program was made in the second half of 2011 and, in light of the results, a second selection may occur in 2012 (see Annex 2, Notice of the Program to Encourage Academic Production in Human Rights).

## 7 Conclusion

How can a small, practically unknown organization like Conectas was in 2004, when the journal was founded, have achieved this success? SUR has grown and consolidated, has a loyal readership, enjoys the support of numerous reputable organizations and is frequently cited in scientific papers.

The most obvious explanation is that, when it was launched, the definition of the niche to be filled was correct: there was indeed a need to give a voice to the South and this voice did not have the right vehicle to express itself.

This was in 2004. Today, seven years later, the political and economic world has changed. The South is increasingly an “emerging” force. The North, meanwhile, is losing its clout, including its soft power, and its visions of the world no longer predominate. New visions are surfacing that will undoubtedly affect the conceptualization and the struggle for human rights. The future of Sur Journal depends on us being able to understand and interact with this new reality.

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## RESUMO

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Por ocasião da comemoração do aniversário de 10 anos da Conectas Direitos Humanos lembramos com orgulho que a nossa revista, também, já se aproxima dos oito anos de idade, período no qual editamos e publicamos quinze números semestrais. Ao rememorar esses oito anos de atividade, ocorreu-nos que talvez seja útil para grupos de ativistas, desejosos de divulgar e discutir seus pontos de vista numa publicação, expor alguns dos sucessos, problemas e dificuldades que tivemos ao longo da nossa trajetória.

## PALAVRAS-CHAVE

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Conectas Direitos Humanos – Sur Revista Internacional de Direitos Humanos – Sul Global – Redação acadêmica

## RESUMEN

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Con motivo de la conmemoración del 10º aniversario de Conectas Derechos Humanos recordamos con orgullo que también nuestra revista, ya se aproxima a los ocho años de edad, período en el cual editamos y publicamos quince números semestrales. Al rememorar esos ocho años de actividad, se nos ocurrió que tal vez sería útil para aquellos grupos de activistas, deseosos de divulgar y debatir sus puntos de vista en una publicación, exponer algunos de los logros, problemas y dificultades que tuvimos a lo largo de nuestra trayectoria.

## PALABRAS CLAVE

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Conectas Derechos Humanos – Sur Revista Internacional de Derechos Humanos – Sur Global – Redacción académica

## ANNEX 1

# RETROSPECTIVE STUDY ON SUR AUTHORS

*This annex is a reduced version of a study prepared by Laura Baron, a student at Barnard College in New York who worked as a volunteer at Conectas Human Rights during June and July 2011.*

## 1 Introduction

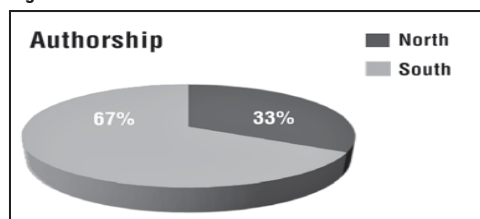
This study looks at the first 12 published issues of SUR. Since its launch in 2003, the journal has published over 160 articles, written by 117 authors from over 30 countries around the globe. In the following pages, the study examines the breakdown of authorship in regards to nationality and gender.

Sur Journal aims to expand and strengthen the international network of human rights communication, with an emphasis on the voices of authors from the Global South. In looking at the demographics of the published authorship, this study analyzes the efficacy of efforts to compile varied voices towards the publication of an insightful and comprehensive journal. The following information shows the extent of Sur Journal's networks, as well as the scope of nationalities that SUR has not yet published.

## 2 Nationalities of the Authors

The graph below (Figure 1.) shows the ratio of authors from the Global North and South. In Issues 1 through 12, 67% of authors published in Sur hold nationalities from Southern countries,

**Figure 1.** Authors from the North and South



while 33% hold Northern ones. These figures do not include the issue in Arabic released in collaboration with the Egyptian organization Partners in Development which comprises 12 articles from authors from the Arab world.

Figure 2 shows the distribution of Sur authors

by nationality, displaying the gradient of author nationalities by percentage. The highest grouping of nations is that to which 20-25% of Sur authors hold citizenship, shown in the darkest shade. The groups are shown in descending order and coded on the map, with the nations represented in lighter shades indicating lower amounts of authorship. Countries shown in the lightest shade are those from which Sur has not yet published authors.

The map in Figure 2 provides a visualization of some of the strengths and weaknesses of Sur's networks. The journal has published extensively articles written by authors holding nationalities of several countries of Latin America, primarily from Brazil and Argentina. However, many nations in Asia and Africa have been published with little or no frequency.

**Figure 2.** Author Nationalities by Percentage of Total

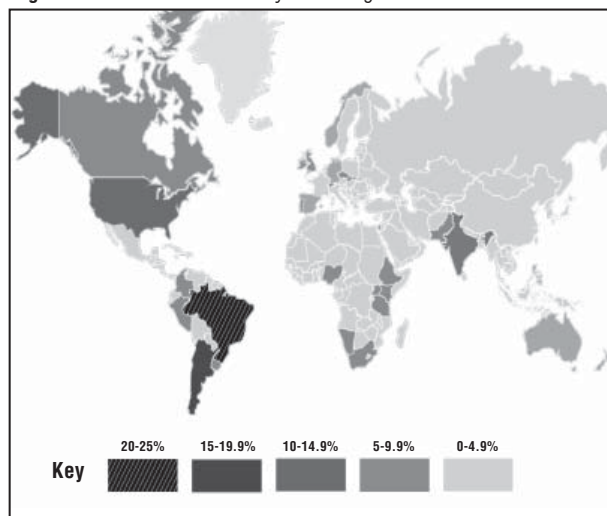


Table 1 provides a numerical summary of the information shown graphically in Figure 2. The countries in which authors who have contributed to SUR hold nationality are shown alongside the number of contributors from that country and the percent of total SUR authors that they represent.

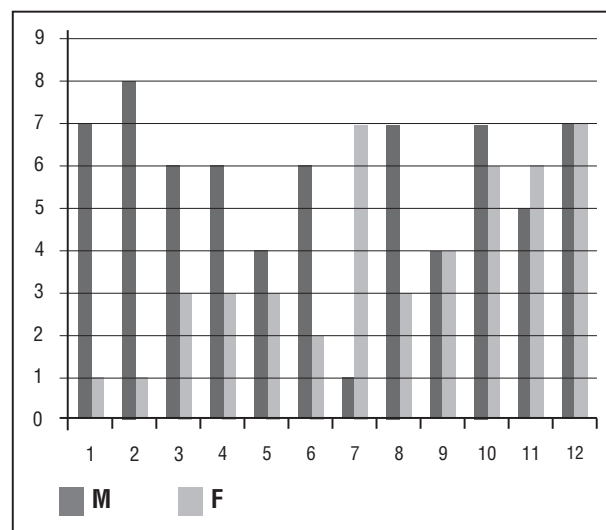
**Table 1**

NUMBER AND PERCENT OF SUR AUTHORS PER COUNTRY					
Nationality	Authors	Percent of Total	Nationality	Authors	Percent of Total
Brazil	23	20.7%	Czech Republic	1	.9%
Argentina	17	15.3%	Ethiopia	1	.9%
USA	16	14.4%	Israel	1	.9%
India	7	6.3%	Kenya	1	.9%
Britain	7	6.3%	Namibia	1	.9%
S. Africa	5	4.5%	New Zealand	1	.9%
Colombia	4	3.6%	Norway	1	.9%
Nigeria	3	2.7%	Pakistan	1	.9%
Chile	2	1.8%	Palestine	1	.9%
Australia	2	1.8%	Peru	1	.9%
Canada	2	1.8%	Philippines	1	.9%
Uruguay	2	1.8%	Portugal	1	.9%
Spain	2	1.8%	Slovakia	1	.9%
Germany	2	1.8%	Switzerland	1	.9%
Belgium	1	.9%	Uganda	1	.9%
Costa Rica	1	.9%			

### 3 Gender of the Authors

Figure 3 displays the distribution of male and female authors who have been published in the first 12 issues of Sur. Over the eight years since the launch of SUR, the journal has moved towards a more equitable gender ratio in its authorship. While the first issue published a 7:1 ratio of male to female authors, the issues 8 through 12 have published an equal average of male and female authors.

**Figure 3.** Distribution of male and female authors published in Sur, Issues 1-12



### 4 Final Comments

- Sur Journal aims to disseminate the voices of authors with an emphasis on those from the Global South, while including articles contributed by authors from the North as well. SUR upholds this aim by publishing a 2:1 ratio of Southern and Northern authors.

- Sur Journal aims to build strong networks of human rights communication among nations of the Global South. SUR has published the work of authors from 31 countries of the world, bringing voices from South America, Asia, Africa, Europe, Australia, and North America into the publication. However, over 50% hold nationalities of Brazil, Argentina, the United States, India, and Britain. Looking at Latin America, Africa, and Asia, authorship nationalities are 44%, 10.8%, and 9.9% of total Sur contributors, respectively. The analysis shows areas of the Global South from which SUR has not published authors, especially in large regions of Africa and Asia.

- Since its commencement, SUR has narrowed a gender gap that held a 7:1 ratio in its first issue and has reached far more balanced proportions of male and female authors. In Issues 8-12, SUR has published an equal average of male and female authors.

## ANNEX 2

# CALL FOR PROPOSALS OF THE PROGRAM TO ENCOURAGE ACADEMIC PRODUCTION IN HUMAN RIGHTS\*

*Conectas Human Rights and the Carlos Chagas Foundation announce the Program to Encourage Academic Production in Human Rights for young Brazilian human rights researchers and advocates. By providing training in academic writing and argumentation, the program supports innovative and consistent article proposals that contribute to the field of human rights.*

## 1 Objectives

The purpose of the program is to give young authors the opportunity to write an original academic article (on the topic "human rights") under the individual supervision of a tutor (specialist). Another intention of the program is for the completed article to be submitted to the Editorial Board of *Sur – International Journal on Human Rights* – published by Conectas – and, if approved, published in the following issue.

The objective of this program, therefore, is to permit rich empirical experiences and theoretical findings relevant to the field of human rights to be published and publicized, in order to contribute to the democratization and diversification of the production of knowledge in Brazil.

The selected authors may participate in the 12<sup>th</sup> International Human Rights Colloquium (organized annually by Conectas), to be held in the second half of 2012.

## 2 Proposal

The program is aimed at young human rights researchers and advocates in Brazil. Candidates must have a higher education diploma.

The competition is open to all disciplines, provided the article proposal addresses the topic of human rights.

The article proposals must be original and individual, so co-authored proposals are not eligible to compete for tutorship.

Only one proposal per candidate may be submitted.

## 3 Thematic Areas

The program will consider various topics within the field of human rights, such as:

- Human Rights and the Environment
- Human Rights of Women
- Rights of Persons with Disabilities
- Rights of Migrants and Refugees
- Development and Human Rights
- Responsibility of Companies
- Economic, Social and Cultural Rights
- Democracy and Human Rights
- Public Security and Human Rights
- Implementation on the National Level of International Human Rights Parameters
- Torture Prevention
- Strategic Human Rights Litigation
- Accountability of Human Rights Organizations
- Regional Human Rights Systems
- UN Human Rights Protection Mechanisms
- Sexual and Reproductive Rights
- Human Rights and Racial Discrimination

It is worth pointing out that the topics listed above are only suggestions. In other words, proposals may address other issues, provided they belong to the broad field of human rights.

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\*This Notice refers to the first edition of the program. In 2012, a second edition will be announced on the website of *Sur – International Journal on Human Rights*.



## 4 Application

Anyone residing in Brazil with a higher education diploma may submit article proposals. There is no specific application form, but each proposal must contain:

1. Extended abstract: a brief presentation of the topic and a summary of the primary arguments and hypotheses to be developed in the article. The extended abstract should contain a title and be no longer than two pages, in Times New Roman, 12 point font size and 1.5 line spacing;
2. Structure of the article to be written: an outline of the organization of the sections that will make up the article, summarizing very briefly what is to be addressed in each one. This should be no longer than one page, in Times New Roman, 12 point font size and 1.5 line spacing;
3. Bibliographical references: a list of the works used to prepare the extended abstract and the main works that will be used to write the article. This list (in alphabetical order) should be no longer than one page, in Times New Roman, 12 point font size and 1.5 line spacing;
4. Short resume: resume of education, professional activities and any published writings. The resume should be no longer than one page.

Applications should be sent by email to [tutoria.sur@conectas.org](mailto:tutoria.sur@conectas.org) by 30/10/2011.

## 5 Languages

Only article proposals in Portuguese will be accepted.

## 6 Selection of Article Proposals

The selection of the proposals will be made by a Selection Commission formed by specialists. The selected applicants (6 at most) must submit the preliminary version of their article within 3 months and the final version a month later.

## 7 Tutors

The tutors will be specialists in human rights selected based on the topics addressed in the selected proposals. The program requires tutors

to keep close track of the construction and development of the candidate's article.

The tutor has the authority to decide whether the final version of the article should be submitted to the Editorial Board of *Sur – International Journal on Human Rights*.

## 8 Publication of the Final Versions

One of the primary objectives of the program is to publish the articles written under the supervision of the tutors in *Sur – International Journal on Human Rights*. Nevertheless, the final version of the article will only be published if it is approved by the Editorial Board of the journal.

It is important to emphasize that the article written by the candidate, if it is approved by the tutor, will be submitted with precedence to the Editorial Board of *Sur Journal*. Therefore, the article may only be published in another journal with the express consent of the Editorial Board of *Sur Journal*.

## 9 Dates and Deadlines

<b>09/15/2011</b>
OPENING OF CALL FOR PROPOSALS
<b>10/30/2011</b>
CLOSURE OF CALL FOR PROPOSALS
<b>11/30/2011</b>
ANNOUNCEMENT OF SELECTED PROPOSALS
<b>02/29/2012</b>
SUBMISSION OF PRELIMINARY VERSION OF THE ARTICLE
<b>03/30/2012</b>
SUBMISSION OF FINAL VERSION OF THE ARTICLE
<b>04/30/2012</b>
DELIVERY OF FINAL REVISED VERSION (COPY DESK)
<b>05/15/2012</b>
SUBMISSION TO EDITORIAL BOARD OF SUR

## 10 Contact

To express any concerns, please contact *Sur Journal* by email at [tutoria.sur@conectas.org](mailto:tutoria.sur@conectas.org). For more information on *Sur Journal*, access the website: <[www.revistasur.org](http://www.revistasur.org)>. For more information on the Carlos Chagas Foundation, access the website: <[www.fcc.org.br](http://www.fcc.org.br)> Last accessed on: Nov. 2011.

## PREVIOUS NUMBERS

Previous numbers are available at <[www.surjournal.org](http://www.surjournal.org)>.

### **SUR 1**, v. 1, n. 1, Jun. 2004

EMILIO GARCÍA MÉNDEZ  
Origin, Concept and Future of Human Rights: Reflections for a New Agenda

FLAVIA PIOVESAN  
Social, Economic and Cultural Rights and Civil and Political Rights

OSCAR VILHENA VIEIRA AND A. SCOTT DUPREE  
Reflections on Civil Society and Human Rights

JEREMY SARKIN  
The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South

VINODH JAICHAND  
Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law

PAUL CHEVIGNY  
Repression in the United States after the September 11 Attack

SERGIO VIEIRA DE MELLO  
Only Member States Can Make the UN Work Five Questions for the Human Rights Field

### **SUR 2**, v. 2, n. 2, Jun. 2005

SALIL SHETTY  
Millennium Declaration and Development Goals: Opportunities for Human Rights

FATEH AZZAM  
Reflections on Human Rights Approaches to Implementing the Millennium Development Goals

RICHARD PIERRE CLAUDE  
The Right to Education and Human Rights Education

JOSÉ REINALDO DE LIMA LOPES  
The Right to Recognition for Gays and Lesbians

E.S. NWAUCHE AND J.C. NWOBIKE  
Implementing the Right to Development

STEVEN FREELAND  
Human Rights, the Environment and Conflict: Addressing Crimes against the Environment

FIONA MACAULAY  
Civil Society-State Partnerships for the Promotion of Citizen Security in Brazil

EDWIN REKOSH  
Who Defines the Public Interest?

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