

DEVELOPMENT AND HUMAN RIGHTS

● **César Rodríguez Garavito,
Juana Kweitel and Laura Trajber Waisbich**
Development and Human Rights:
Some Ideas on How to Restart the Debate

● **Irene Biglino, Christophe Golay and Ivona Truscan**
The Contribution of the UN Special Procedures
to the Human Rights and Development Dialogue

● **Luis Carlos Buob Concha**
The Right to Water: Understanding its Economic, Social and Cultural
Components as Development Factors for Indigenous Communities

● **Andrea Schettini**
Toward a New Paradigm of Human Rights Protection for
Indigenous Peoples: A Critical Analysis of the Parameters Established
by the Inter-American Court of Human Rights

● **Serges Alain Djoyou Kanga and Siyambonga Heleba**
Can Economic Growth Translate into Access to Rights?
Challenges Faced by Institutions in South Africa in Ensuring
that Growth Leads to Better Living Standards

● **Interview with Sheldon Leader**
Transnational Corporations and Human Rights

● **Aline Albuquerque and Dabney Evans**
Right to Health in Brazil: A Study of the Treaty-Reporting System

● **Linda Darkwa and Philip Attuquayefio**
Killing to Protect? Land Guards, State Subordination
and Human Rights in Ghana

● **Cristina Rădoi**
The Ineffective Response of International Organisations Concerning
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Protection System



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SHELDON LEADER

Sheldon Leader, a graduate of Yale and Oxford Universities, is the director of the Essex Business and Human Rights Project, where he provides advice and training on issues related to business and human rights in various parts of the world. Leader is also a longstanding member of the Human Rights Centre at the University of Essex and the Advisory Board to the Human Rights Committee of the Law Society of

England and Wales. He teaches and lectures at the University of Essex, the University of Paris-Ouest, and a number of universities in the United States.

Email: leader@essex.ac.uk



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INTERVIEW WITH SHELDON LEADER

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

By Conectas Human Rights

This interview took place in Juiz de Fora,
Minas Gerais, on February 2013.

Original in English

The first United Nations Forum on Business and Human Rights was held in Geneva from the 3rd to the 5th of December, 2012. Over 1000 participants from more than 80 countries attended, making this event the largest global meeting about this issue.

The Forum, which was chaired by John Ruggie, former Special-Representative of the Secretary-General, addressed the issue of human rights and transnational corporations and other business enterprises. The Forum was comprised of more than 20 official sessions, with a number of side sessions also held during the same period. Discussions focused on trends and challenges to the implementation of the “Guiding Principles” (*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*).

The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June, 2011.

Sur – International Journal on Human Rights interviewed Sheldon Leader, a British specialist who has closely followed the discussions on this topic.

Within the broad discussion on business and human rights in the last five years, what would you say are the main steps forward and what are the main shortcomings?

I would say the main steps forward involve investment law’s increasing engagement with human rights issues, including a heightened awareness of the abuses that are taking place via investment contracts that are largely kept secret. This is a positive step because there is now growing pressure to make these contracts public, and generally I think there is growing pressure to make a lot of other elements of investment law more human rights-friendly. We are not at all there yet—there is yet to be an opening up of investment arbitration to human rights—but the terrain is being steadily prepared and I think it will bear fruit. I also think that one of the more encouraging developments

Notes to this text start on page 113.

comes from those cases that are increasing the scope of a parent company's duty of care. The Court of Appeal for England and Wales has made this really important decision, which holds that when parent companies produce guidelines for standards to be observed by their subsidiaries [which many multinationals do] then the parents can be held accountable to victims of accidents caused by those subsidiaries if the parents are negligent in failing to oversee the implementation of these standards.¹ While not all national courts follow this ruling, I think that at the end of the day it is going to carry a lot of weight elsewhere. These steps are quite technical in a way, I suppose, but they are also central. So, I think the legal environment has produced some good things.

There is plenty that needs to be developed and there is plenty that needs to be done. The whole way of trying to understand the balance between commercial interests and human rights interests is still far from being human rights-friendly. The courts and businesses are very far away from giving the right sort of weight to human rights. So, we are entering a dangerous time in which there is a platform of consensus that links human rights and businesses, but there is also a real risk that it is going to be weakened. Rights and protections need to be robust enough when pitted against intense commercial pressures. This has not yet been formulated and implemented, and I would say it is the real problem.

Where do you think the formulation and implementation of this balance would happen?

I think ultimately it has got to be in litigation. I mean, to give rights their right weight. Ultimately, there is a lot of work that can be done by way of trying to get acceptance outside of the courtroom. Maybe I can link that up with another possibly positive development, which is the rising interest in non-judicial methods of dealing with allegations of human rights abuses by business. In the United Kingdom, this could ideally result in a Commission on Business and Human Rights. It's been some years in the discussion phase, and it is still not there yet, but it is a really promising way of getting arguments about human rights in a quasi-judicial forum to be given the kind of weight they need to be given. If that kind of Commission could be established, it would be a tremendous step forward.

And in this context, how would you analyze the impact of the Guiding Principles (GPs)?

They are a step forward. It is, I do believe, something like what John Ruggie, formerly the United Nations Secretary-General's Special Representative for Business and Human Rights, calls a "constitutional moment". We have very general statements that are nevertheless clear enough to render certain kinds of arguments no longer viable. For example, the argument that "my suppliers are simply arms-length contractors, and I have no further obligations to check them out and deal with them" can no longer be held *if* these principles are even minimally accepted. The requirement in the Guiding Principles that there be this vertical responsibility—that parent companies take more responsibility for their role—is a clear statement that goes beyond the increases in types of parent company responsibility that we are seeing in some courts. So the Guiding Principles are saying something quite definite, but nevertheless very general. And that is the dangerous part: there are going to be attempts to fill in the blanks in a way that is not really going to satisfy human rights requirements. So I think the Guiding Principles are a sign of progress, but they also open up a new terrain for potential regression.

What do you think should be the role of the UN Working Group on Business and Human Rights?²

Several possibilities. Definitely it is there to take the principles further in one sense. That is to say, to make the principles fuller and more concrete, to provide more furnished details about how to conduct, for example, a due diligence investigation or how to understand supply-chain obligations. The Working Group serves that function. But should it be seen as an authoritative interpreter in an area where there is ongoing and often intense debate in civil society? I, on the whole, do not think so because at this stage, with the balance of forces between interests being what they are, I could not say that I have enough faith in any single body to give an authoritative interpretation of certain principles. I think we are going to have to live with competing interpretations for some time, and we will have piece-meal steps to begin to see them resolved. But that is going to take a lot of work by human rights advocates to prepare the terrain and push for certain things. It is wrong, at this stage of development of the Guiding Principles to expect the Working Group to come up with this quasi-judicial capacity on its own.

But can the Working Group give more concrete meaning to the General Principles?

Yes, but that is a different thing. Fleshing out what some of these principles mean is something you can do without necessarily making these value judgments about the weight of the rights at stake as they compete with commercial interests. These judgments about the weights to assign to the competing interests are judgments that have to be made in the various settings of negotiation and dialogue between business and human rights advocates, but it would be premature to create a single body to do it as a supra-national Court of Appeal. If we push too fast on trying to create such a body, the Working Group risks alienating parties to such an extent that it could damage the progress that has been made with the Guiding Principles so far.

What is your view of the proposals to enlarge the jurisdiction of the International Criminal Court (ICC) to be able to deal with cases of corporate misconduct?

I think it would be good. I cannot claim to be a complete expert on the opposing positions in that debate, but on the whole I very much like breaking the log jam about the status of the obligations of companies in international law.

A lot of the discussion has been about access to a remedy, and we have seen several reports of how it is difficult to bring companies to justice, especially in the Global South. Have you seen any innovations or changes in legislation that make it possible to hold companies accountable at the national level?

Yes, small things, but important things. Not just access to justice but generally legislation that is strengthening the extra-territorial obligations of companies. An example is the United Kingdom's Bribery Act of 2010.³ It is potentially very powerful, is now in force, and it places a due diligence requirement on United Kingdom companies for actions their overseas agents and employees take. So, if I now pay a bribe in the Congo in order to obtain business for a company domiciled or otherwise active in the UK, criminal liability immediately arises for the company that permitted this and did not do its best to prevent it. That is a step forward. It is not access to justice for victims, true, but it is a potentially very powerful deterrent. Have I seen analogous things elsewhere in the area that do take, as

you put it, innovative steps toward more adequate remedies? No, I can't say that I have. To me, the problem areas that I am familiar with arise from the need for a more robust attitude toward preventative remedies, injunctions, or a variety of other orders that slow down or stop projects until an abuse has been remedied, as has happened in Brazil quite recently. We need more of that; criteria for making them easier to obtain and more available are very necessary. It is true, unfortunately, that most of the time when you get these injunctions, particularly rapid injunctions, it is a delaying mechanism. You are saying, "Look, you are going to have imminent and irreversible damage if you don't stop." But the full order to stop something permanently is rare, despite the fact that such an order would be clearly merited in certain situations. We also need to include the problems of standing for investment contract disputes that are basically between companies and host governments, where the real victims are third parties—local populations—who are often injured when the terms of a contract negotiated between the company and a State are violated. The real victims are not able to complain because they are not formally parties to the contract. That is the big gap. In fact, I would say that arbitration of disputes over these contracts is still too narrow; it does not allow victims enough recourse.

How does the North/South divide work when you talk about businesses and human rights?

In my limited experience, the North/South divide is really a function of the kind of resource that is being exploited and the way in which populations are being treated while that is happening, especially when one looks to the extractive industries. It seems to me that the damage done in the South to local populations is so much clearer and stronger than it is elsewhere. I am basing this only on two examples from my personal experience: Uganda and Senegal. In both cases, there really is a much greater awareness of the social impact of the extractive industries than occurs elsewhere; you read about it in the papers a lot and you see a lot of debates among local NGOs in the countries. Civil society involvement in the South is greater than in the North because so much more is at stake for societies in places like Uganda or Senegal.

In Latin America, some left-wing countries are very much directly involved in promoting the extractive industries. To your knowledge, is that the case elsewhere?

How that shift is happening elsewhere is a good question. Take Uganda. I think there is a clear split politically. The executive [branch] definitely sees this kind of connection that you are describing; but, civil society, to which parliament pays some attention, takes a more conditional view of the merits of developing the industry. They want to *build in more guarantees for local populations*. This has produced different views between certain members of Parliament and the Executive Branch. Overall, you cannot say countries in the South are strongly aligned with one another; it depends on the national context, and the domestic forces that are operating within them to compete with one another for inward investment.

What role do universities and NGOs play in this discussion?

For us, the most successful relationships have been where there is mutual interaction. First of all, we are at a frontier area in quite a few areas of law. Human rights are pushing into the business agenda in a way that reconfigures certain elements of

investment law, trade law, and corporate law; and universities are very well placed to provide new solutions to these problems. You will not find that in consultancies or in the law firms; they do not have time to get into that kind of work. For us, the most successful things have been where we have been able to draw on what we find out from commissions to do projects by getting out into the field with those asking for the work to be done and seeing what is happening and then going back and working at solutions at the level of basic principles. So, I think there is a tremendous role for universities, particularly at this time where classical legal doctrines run out, and it is impossible to rely on a string of established leading court decisions in this area. It is not like classic commercial law where you really do have a very rich field of jurisprudence. Universities are not advocacy bodies. The terrain for each must be clear. Universities are not set up, indeed, to exert pressure via campaigning. They *are* set up to do field work, and there we can work well and have worked well with NGOs out in the field. Universities have the access, they know what they are looking for, and each group can complement one another quite well. And the NGOs themselves are not passive in this. They often make use of legal arguments, not to litigate, but to frame the arguments to the state or to the employer. So, there is a good two-way movement because when they do that, it feeds back on us being better able to frame what we are after and what we are trying to find. This is also a time, politically, where governments—in Europe, at least—are interested in the impact of their research on wider society. The United Kingdom has become very interested in having each academic show the real-world impact of his or her work. That, I think, can be explained by the fact that the crises—financial, social, and political—are leading governments to think that the university has to do its share in trying to help with some of these problems. So, it is a good time to be doing this work in the university.

What do you think are the main cases regarding this debate?

Well, I am probably prejudiced, but I think the major legal issue at the moment concerns the duty of care which parent companies must exercise in regulating the affairs of their subsidiaries. The Court of Appeal in England and Wales⁴ has made it clear that these parent companies must, when they issue guidelines for companies in the corporate group over which they have control, take responsibility towards victims if they fail to oversee the implementation of these standards adequately. This could have a very large impact on tightening the impact of human rights standards on multinational companies. Not all countries have followed suit so far. The judiciary in the Netherlands, for example, has recently taken a restrictive approach to the scope of a parent company's duty of care when the parent fails to oversee implementation of standards set for the subsidiary when the latter is operating abroad.⁵ I expect over time that countries will converge on the English solution, but this outcome would be helped by pressure from civil society in the various relevant countries that are home to the major multinationals.

The Kiobel case⁶ is also important, but I suspect, and I could be totally wrong, that it is going to allow the statute to stay but narrow its scope. At the moment, one radical interpretation of the Alien Tort Statute⁷ is that it would be possible for an alien to take a non-American company to court in the US for violations committed abroad. If

an alien is suing an alien in a US court, that is bad news for any judiciary in America and the volume of litigation that this promises. So that is going to be chopped down. I am not even certain how realistic it was to begin with anyways. Will the Court totally get rid of Act? They might. It is not the end of the world as other legal developments may well fill the gap.

In the United Nations Forum, John Ruggie said there is a need for an inter-governmental conversation regarding a multinational treaty addressing these issues. What do you think should be the scope of that? Are there any possibilities to get a treaty? Do we need it?

It would be very useful to have a treaty because at the moment you don't have a general international obligation to protect. That is to say, a country can watch one of its nationals commit wrongs that s/he would not be able to commit in the home country, and not be, in and of itself, in a position to regulate that wrong beyond its borders. Piece-meal legislation that directly fixes such an extraterritorial power can do this. For example, the United Kingdom's Bribery Act really is interesting because it provides criminal liability at home for acts [committed] overseas on behalf of the company or indeed by the company itself. The missing piece is the power to regulate overseas activity across a wide range of areas rather than having to wait for legislation to be adopted country-by-country. It would be very helpful. Is it likely? I do not think so. And I do not think so because it is actually creating the possibility that countries will see themselves obliged to regulate their nationals' activities across a very wide range of activities, and, politically, companies are going to do their best to stop that. I just do not know what is in it politically for a self-interested politician to push for this, but I could be wrong. I would like to see it, but am I optimistic I will see it? No.

I think everybody was quite surprised that Ruggie raised that point of the need for inter-government conversation.

Yes, I think what is driving it is that, like he said, there is no general obligation for countries now to regulate what their companies do overseas. It would be good, but you are not going to get it unilaterally because a unilateral move like that would frighten states as well as businessmen about being caught out by acting unilaterally – a worry currently expressed by critics of the UK Bribery Act, for example. So it makes sense to have that multilateral discussion.

NOTES

1. The case is *Chandler vs. Cape Industries Chandler vs. Cape Plc* [2012] EWCA Civ 525 (25 April 2012).

2. At its seventeenth session, in resolution A/HRC/17/4, the United Nations Human Rights Council decided on 17 June, 2011 to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years.

3. UK Bribery Act 2010 c. 23.

4. *Chandler vs. Cape Plc* [2012] EWCA Civ 525 (25 April 2012)

5. A.F. Akpan & anor -v- Royal Dutch Shell plc & anor C/09/337050/HAZA 09-1580

6. "The *Kiobel* case was filed in the United States by Nigerian plaintiffs and brings claims for extrajudicial killings, torture, crimes against humanity, and prolonged arbitrary arrest and detention. The plaintiffs allege that the company (Royal Dutch Shell) collaborated with the Nigerian government to commit these violations to suppress their lawful protests against oil exploration.

The petition for certiorari was granted by the U.S. Supreme Court on October 17, 2011. Oral argument took place on February 28, 2012. One week later, on March 6, the Court requested supplemental briefing on the question of whether the statute encompasses violations committed outside the territory of the United States. Supplemental briefs were filed with the Court in the summer of 2012, and re-argument took place on Oct. 1, 2012. A decision is expected during the first half of 2013. See International Human Rights Clinic, Human Rights Program at Harvard Law School at: <http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co>. Last accessed on: Dec. 2012.

7. The Alien Tort Statute, 28 U.S.C. § 1350, reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This statute affords United States courts jurisdiction over cases involving violations of international law brought by foreign citizens for abuses committed outside the United States.

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Access to medical treatment for people living with HIV/AIDS: success without victory in Chile

GABRIELA COSTA CHAVES, MARCELA FOGAÇA VIEIRA AND RENATA REIS

Access to medicines and intellectual property in Brazil: reflections and strategies of civil society

SUR 9, v. 5, n. 9, Dec. 2008

BARBORA BUKOVSKÁ

Perpetrating good: unintended consequences of international human rights advocacy

JEREMY SARKIN

Prisons in Africa: an evaluation from a human rights perspective

REBECCA SAUNDERS

Lost in translation: expressions of human suffering, the language of human rights, and the South African Truth and Reconciliation Commission

SIXTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

PAULO SÉRGIO PINHEIRO

Sixty years after the Universal Declaration: navigating the contradictions

FERNANDA DOZ COSTA

Poverty and human rights from rhetoric to legal obligations: a critical account of conceptual frameworks

EITAN FELNER

A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability

KATHERINE SHORT

From Commission to Council: has the United Nations succeeded in creating a credible human rights body?

ANTHONY ROMERO

Interview with Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU)

SUR 10, v. 6, n. 10, Jun. 2009

ANUJ BHUWANIA

“Very wicked children”: “Indian torture” and the Madras Torture Commission Report of 1855

DANIELA DE VITO, AISHA GILL AND DAMIEN SH-ORT

Rape characterised as genocide

CHRISTIAN COURTIS

Notes on the implementation by Latin American courts of the ILO Convention 169 on indigenous peoples

BENYAM D. MEZMUR

Intercountry adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child

HUMAN RIGHTS OF PEOPLE ON THE MOVE: MIGRANTS AND REFUGEES

KATHARINE DERDERIAN AND

LIESBETH SCHOCKAERT

Responding to “mixed” migration flows: A humanitarian perspective

JUAN CARLOS MURILLO

The legitimate security interests of the State and international refugee protection

MANUELA TRINDADE VIANA

International cooperation and internal displacement in Colombia: Facing the challenges of the largest humanitarian crisis in South America

JOSEPH AMON AND KATHERINE

TODRYS

Access to antiretroviral treatment for migrant populations in the Global South

PABLO CERIANI CERNADAS

European migration control in the African territory: The omission of the extraterritorial character of human rights obligations

SUR 11, v. 6, n. 11, Dec. 2009

VÍCTOR ABRAMOVICH

From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System

VIVIANA BOHÓRQUEZ MONSALVE

AND JAVIER AGUIRRE ROMÁN

Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law

DEBORA DINIZ, LÍVIA BARBOSA

AND WEDERSON RUFINO DOS

SANTOS

Disability, Human Rights and Justice

JULIETA LEMAITRE RIPOLL

Love in the Time of Cholera: LGBT Rights in Colombia

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MALCOLM LANGFORD

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Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda

INTERNATIONAL HUMAN RIGHTS COLLOQUIUM

Interview with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN) Report on the IX International Human Rights Colloquium

SUR 12, v. 7, n. 12, Jun. 2010

SALIL SHETTY

Foreword

FERNANDO BASCH ET AL.

The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions

RICHARD BOURNE

The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association

MILLENNIUM DEVELOPMENT GOALS

AMNESTY INTERNATIONAL

Combating Exclusion: Why Human Rights Are Essential for the MDGs

VICTORIA TAULI-CORPUZ

Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in relation to the Millennium Development Goals

ALICIA ELY YAMIN

Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations

SARAH ZAIDI

Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?

MARCOS A. ORELLANA

Climate Change and the Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism

CORPORATE ACCOUNTABILITY

LINDIWE KNUTSON

Aliens, Apartheid and US Courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?

PREVIOUS NUMBERS

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The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?

SUR 13, v. 7, n. 13, Dec. 2010

GLENDA MEZAROBBA
Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil

GERARDO ARCE ARCE
Armed Forces, Truth Commission and Transitional Justice in Peru

REGIONAL HUMAN RIGHTS MECHANISMS

FELIPE GONZÁLEZ
Urgent Measures in the Inter-American Human Rights System

JUAN CARLOS GUTIÉRREZ AND SILVANO CANTÚ
The Restriction of Military Jurisdiction in International Human Rights Protection Systems

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The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?

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The Role of Sub-Regional Courts in the African Human Rights System

MAGNUS KILLANDER
Interpreting Regional Human Rights Treaties

ANTONIO M. CISNEROS DE ALENÇAR
Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism

IN MEMORIAM

Kevin Boyle – Strong Link in the Chain
By Borislav Petranov

SUR 14, v. 8, n. 14, Jun. 2011

MAURICIO ALBARRACÍN CABALLERO
Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia

DANIEL VÁZQUEZ AND DOMITILLE DELAPLACE
Public Policies from a Human Rights Perspective: A Developing Field

J. PAUL MARTIN
Human Rights Education in Communities Recovering from Major Social Crisis: Lessons for Haiti

THE RIGHTS OF PERSONS WITH DISABILITIES

LUIS FERNANDO ASTORGA GATJENS
Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring

LETÍCIA DE CAMPOS VELHO MARTEL
Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective

MARTA SCHAAF
Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities

TOBIAS PIETER VAN REENEN AND HELENE COMBRINCK
The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years

STELLA C. REICHER
Human Diversity and Asymmetries: A Reinterpretation of the Social Contract under the Capabilities Approach

PETER LUCAS
The Open Door: Five Foundational Films That Seeded the Representation of Human Rights for Persons with Disabilities

LUIS GALLEGOS CHIRIBOGA
Interview with Luis Gallegos Chiriboga, President (2002-2005) of the Ad Hoc Committee that Drew Up the Convention on the Rights of Persons with Disabilities

SUR 15, v. 8, n. 15, Dec. 2011

ZIBA MIR-HOSSEINI
Criminalising Sexuality: *Zina* Laws as Violence Against Women in Muslim Contexts

LEANDRO MARTINS ZANITELLI
Corporations and Human Rights: The Debate Between Voluntarists and Obligationists and the Undermining Effect of Sanctions

INTERVIEW WITH DENISE DORA
Former Ford Foundation's Human Rights Officer in Brazil (2000-2011)

IMPLEMENTATION AT THE NATIONAL LEVEL OF THE DECISIONS OF THE REGIONAL AND INTERNATIONAL HUMAN RIGHTS SYSTEMS

MARIA ISSAEVA, IRINA SERGEEVA AND MARIA SUCHKOVA
Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges

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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

DAMIÁN A. GONZÁLEZ-SALZBERG
The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court

MARCIA NINA BERNARDES
Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions

SPECIAL ISSUE: CONECTAS HUMAN RIGHTS - 10 YEARS

The Making of an International Organization from/in the South

SUR 16, v. 9, n. 16, Jun. 2012

PATRICIO GALELLA AND CARLOS ESPÓSITO
Extraordinary Renditions in the Fight Against Terrorism. Forced Disappearances?

BRIDGET CONLEY-ZILKIC
A Challenge to Those Working in the Field of Genocide Prevention and Response

MARTA RODRIGUEZ DE ASSIS MACHADO, JOSÉ RODRIGO RODRIGUEZ, FLAVIO MARQUES PROL, GABRIELA JUSTINO DA SILVA, MARINA ZANATA GANZAROLLI AND RENATA DO VALE ELIAS

Law Enforcement at Issue: Constitutionality of Maria da Penha Law in Brazilian Courts

SIMON M. WELDEHAIMANOT
The ACHPR in the Case of *Southern Cameroons*

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The Role of the Universalization of Human Rights and Migration in the Formation of a New Global Governance

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GINO COSTA
Citizen Security and Transnational Organized Crime in the Americas: Current Situation and Challenges in the Inter-American Arena

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Civic Participation, Democratic Security and Conflict Between Political Cultures. First Notes on an Experiment in the City of Buenos Aires

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The Current Agenda of Security and Human Rights in Argentina. An Analysis by the Center for Legal and Social Studies (CELS)

PEDRO ABRAMOVAY
Drug policy and *The March of Folly*

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