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PRESENTATION



Sur – International Journal on Human Rights is a biannual publication that presents an analytical and balanced standpoint on human rights in Southern Hemisphere countries. With the aim to strengthen the South-South and the South-North dialogue among human rights activists, scholars and UN officials, this journal promotes a critical debate on several issues related to the theme. It breaks away from a pseudo-consensus and opens up spaces to improve the quality of this discussion. It therefore invites dissent, since we believe that a consistent human rights doctrine will only be put into place after a wide-ranging exchange of ideas.

We firmly believe that the information that is being produced must be widely publicized and, for this reason, this journal is issued in three languages (English, Portuguese and Spanish). Approximately 6,000 copies of the first two issues have been distributed free of charge in over 100 countries and, to ensure an extended readership, we have made an unabridged version available at <www.surjournal.org>, in the three languages.

For this edition, papers have been submitted from thirteen countries (Argentina, Brazil, Cameroon, Chile, India, Ireland, Namibia, Nigeria, Switzerland, Tanzania, Uganda, United Kingdom, and United States). After a selection by an International Editorial Board, whose members are human rights scholars, specialists and UN officials, we are publishing eight contributions, one of which reports on a research project. The subject matters dealt with are: security and human rights; trade and human rights; access to justice on domestic and international levels; and land reform.

Two papers contributed by participants of the Knowledge Development Group, organized by **Sur** in April 2005, focus on the subject of **trade and human rights**. Caroline Dommen discusses mechanisms that, by protecting human rights, actually favor the trade practices in which they are inserted. Carlos Correa depicts the progresses made in the

process to lend more flexibility to the TRIPS Agreement for medical drugs, and shows how the Doha Declaration and the 2003 Decision of the TRIPS Board are insufficient to ensure a reduction in prices and the negotiation of voluntary licenses.

Tracing a bridge between **security and human rights**, the article of Bernardo Sorj deals with the concept of human security applied to Latin American problems.

Four articles – contributed by Alberto Bovino, Nlerum S. Okogbule, Maria José Guembe and José Roberto Cunha – discuss different aspects concerning **access to justice**, on domestic and international planes. From an international perspective, Bovino dwells on the peculiarities of evidence evaluation conducted by the Inter-American Court of Human Rights, underlining the flexibility shown by this jurisdictional body in dealing with grievous infringements of rights. Okogbule weighs the specific obstacles hampering access to justice in the Nigerian context. Guembe discusses the decision of the Supreme Court of Argentina, which deemed unconstitutional the amnesty laws that benefited military personnel involved in violations of human rights during the dictatorship. Cunha presents the results of his survey among magistrates in the state of Rio de Janeiro, Brazil, as to the extent of their familiarity with and their actual use of international law in issues involving human rights.

Land reform in Namibia is the theme of the text by Nico Horn, who considers the implications of the colonizing process and custom-law.

Although very varied in their themes and approaches, all these papers share a common point of departure – the contextualization of human rights – attempting to contribute to the reconstruction of these rights, with a view at their implementation, and to ensure a better coverage of local and regional demands.

We are wrapping up this issue with a summary of the plan of action submitted by the High Commissary for Human Rights, Louise Arbour, who proposes mechanisms to increase the effectiveness of human rights protection in the several UN member countries.

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CAROLINE DOMMEN

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ABSTRACT

This article focuses on ways that human rights advocates can ensure that trade and trade rules promote rather than undermine human rights. The article concludes that an effective way to achieve respect for human rights in international trade policy is through engaging with trade policy-makers of national governments, and show the positive role a human rights contribution can play in ensuring a fair and democratic international trading system. The article points out that human rights defenders share concerns about trade with development groups, women's rights advocates, environmentalists and others already working on trade, and suggests that human rights advocates demonstrate, through applying the relevant human rights accountability mechanisms, how they can make a positive contribution to making trade more equitable and human rights-friendly. [Original article in English.]

KEYWORDS

Trade – Human rights – WTO – Development

TRADE AND HUMAN RIGHTS: TOWARDS COHERENCE*

Caroline Dommen

In the last few years, there have been many claims about whether or not trade liberalization enhances – or undermines – human rights, and about whether trade agreements should do more – or nothing – to promote human rights.

These claims come from various quarters: human rights advocates who want to ensure that trade and trade-related rules do not undermine the enjoyment of human rights (the “coherence” perspective), those who want to see trade sanctions used as tools to ensure respect for minimum standards of human rights (the “conditionality” perspective), believers in free trade and developing countries who fear that human rights standards might be applied in a way that works against free trade and thus undermine economic well-being, and development campaigners who see “human rights” as a useful slogan.

All of these very different actors bring very different perspectives to what they mean by “trade and human rights” and thus much confusion surrounds discussions on these topics.

This article will focus on how human rights advocates can ensure that trade and trade rules are developed in a way that promotes rather than undermines human rights. After looking at the human rights-inconsistent process of trade negotiations, it will consider ways in which application of trade rules risk undermining human rights. This article will then describe some ways to ensure that human rights are protected and promoted in international trade, and caution against some initiatives that could be counterproductive.

* I wish to thank Juana Kweitel for her assistance in preparing this article for publication. Responsibility for opinions expressed and any errors that may remain lies entirely with the author.

The article concludes that an effective way to achieve respect for human rights in international trade policy – especially that policy developed and applied in the World Trade Organization (WTO) – is through raising human rights concerns with the trade policy-makers of national governments, particularly through showing the positive role a human rights contribution can play in ensuring a fair and democratic international trading system.

Lack of transparency, narrow participation: human rights inconsistent

Trade policy is infamous for being untransparent and undemocratic. Lack of transparency and participation do not in themselves necessarily lead to human rights-harmful outcomes. But they often do. They also stand in direct contrast to human rights principles, such as the right of everyone to take part in the government of their country, embodied in Article 21 of the Universal Declaration of Human Rights; the right of access to information, embodied in Article 19 of the International Covenant on Civil and Political Rights (ICCPR); and citizens' rights to participate in the conduct of public affairs set out in Article 25 of the ICCPR.

While within the World Trade Organization there have been improvement in access to documents and meetings, many key documents are still not made public until they cease to be relevant, if they are made public at all. And progress within the World Trade Organization has been offset by the increasing number of bilateral trade negotiations which are so secretive that they make the WTO seem positively translucent in contrast.

Indeed, bilateral trade negotiations are almost invariably negotiated away from the public eye, and often progress so quickly that it is impossible for civil society groups – and sometimes even government ministries other than trade or the high-level political negotiators – to comment on draft texts or bring their expertise on specific issue-areas to the negotiations. An example can be found in Thailand. As the Thai group FTA Watch reports, in the Thai–US negotiations for a bilateral trade agreement, the United States demanded that the Thai government verbally agree to keep the process of negotiations secret.¹ The Thai government signed another trade agreement (with Australia) without the involvement of Parliament and without disclosing the content of the agreement to the public until after the pact was concluded, and then only in English.

In addition to being contrary to the international human rights standards set out above, this is contrary to the Thai Constitution, which encourages public

1. See FTA Watch Thailand, "Thailand's Free Trade Agreements and Human Rights Obligations" (March 2005). Available at <www.ftawatch.org/autopage1/show_page.php?t=21&s_id=8&d_id=8>. Last access on 6 September 2005.

participation in policy decision making and monitoring the state's exercise of power,² and United States trade rules which aim to obtain wider and broader transparency in the negotiating process.³ This situation is replicated across many of the bilateral trade agreements negotiated between industrialized and developing countries.

This lack of transparency facilitates human rights-inconsistent outcomes. In many cases, it gives a stronger role to business than public interest groups, as governments will tend to consult business groups and put forward their interests more than those that civil society is defending.⁴ For instance, the interests of the Pharmaceutical Research and Manufacturers of America (PhRMA) are reflected in almost all the recently-adopted US bilateral trade agreements,⁵ resulting in putting affordable medicines out of reach of many, contrary to the right to health principle of facilitating access to medicines.⁶

In addition, broader transparency of the negotiations could promote the accountability needed to help developing countries achieve trade agreements that are more development-friendly, and that serve the needs of the most vulnerable members of their population, consistent with human rights principles. This is particularly the case in bilateral trade negotiations where power imbalances are significant and developing countries are often pressured into agreements that are not in their own interest.

2. Section 76 of The Constitution of the Kingdom of Thailand says: "The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all".

3. Bipartisan Trade Authority Bill 2002, Section 2102 (b)(5).

4. For a discussion of the representation of business interests in the WTO, see C. Dommen, "The WTO, International Trade, and Human Rights", in M. Windfuhr (ed.), *Beyond the Nation State – Human Rights in Times of Globalization* (Global Publications Foundation, 2005). Available at <www.3dthree.org/en/page.php?IDpage=13&IDcat=5>. Last access on 6 September 2005.

5. See M. Asif Ismail, "Exporting Prices, Drug Makers' Trade Group Makes the Industry's Priorities US Trade Policy", (Center for Public Integrity, Washington DC, July 2005). Available at <www.bilaterals.org/article.php?id_article=2233>. Last access on 6 September 2005.

6. See UN Press Release, "US-Peru Trade Pact Negotiations: Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations" (July 2005). Available at <www.unhchr.ch/hurricane/hurricane.nsf/view01/502C4F87F9FF119BC125703D00396440?opendocument>. Last access on 7 September 2005. For a discussion of the benefits and disadvantages of bilateral trade agreements, with a focus on the impact of Intellectual Property rules on access to medicines, see Hamed El-Said & Mohammed El-Said, "TRIPS, Bilateralism, Multilateralism & Implications for Developing Countries: Jordan's Drug Sector" (*Manchester Journal of International Economic Law*, April 2005). Available at <www.bilaterals.org/article.php?id_article=2192>. Last access on 6 September 2005.

But even in the World Trade Organization, where broad developing country membership does help the economically weaker participants to negotiate together and resist pressures, developing countries have difficulty in having their interests taken into account. The WTO is in theory democratic as each member has an equal vote. But in reality, developing countries have difficulty in participating as equals.⁷ One reason for this is lack of capacity. Many of the poorest countries are not even able to have World Trade Organization representatives in Geneva. Others only have one part-time delegate to cover the whole breadth of WTO issues, and only a handful of trade policy staff in their capital. In contrast, Japan has 23 World Trade Organization delegates in its Geneva mission, and the USA has 14, as well as large and well-resourced trade offices in Tokyo and Washington DC respectively.⁸

Added to this, poor countries are often obliged to make concessions in order to trade with richer countries. So in practice, new trade rules are weighted in favor of the rich, and do not necessarily reflect the long-term interests of the poorest countries and their inhabitants. Even staunch World Trade Organization supporters agree that, during the negotiations creating the WTO, developing countries agreed to substantially more obligations than developed countries did.⁹ Subsequently, developed countries have demonstrated little political will to address issues dear to developing countries. This is exacerbated by the fact that the World Trade Organization Secretariat, supposed to be neutral, often acts in a way supportive of what industrialized countries ask for, against developing countries' wishes. In June 2005, for instance, both the World Trade Organization Secretariat and the Chair of the services negotiations took strong positions against proposals advocated by many developing countries.¹⁰

Although developing countries have improved their collective strength in the World Trade Organization in recent years, and have enjoyed some successes, both in terms of substance and of process, there is a flip side to this success. As developing countries have participated more meaningfully in the WTO's work and succeeded in having their concerns taken into account, there is a move of trade decision-making away from Geneva, such as to WTO "mini-ministerial", unofficial meetings hosted

7. A 1998 study showed that of the 97 developing countries that were then members of the WTO, 56 do not participate effectively in its work. See Constantine Michalopoulos, "The Participation of the Developing Countries in the WTO" (World Bank Policy Research Paper, 1998).

8. See Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO – The Real World of International Trade Negotiations* (London & New York: Zed Books, 2003).

9. Jeffrey Schott, "WTO 2000: Setting the Course for World Trade" (1998).

10. Alexandra Strickner & Carin Smaller, "Formula One Racing: Who's Going to Win the Grand Prix?" (IATP/TIP Geneva Update, June 2005).

by a World Trade Organization member, which play a crucial role in determining the outcome of negotiations. In general, only selected countries' Ministers are invited to these meetings, and powerful economies play a disproportionate role in them.

Just as worryingly, trade decision-making is taking place in bilateral or regional trade agreements. This move away from multilateralism and collective public scrutiny causes the most significant human rights concerns described throughout this article.

The shift away from one multilateral forum to a plethora of bilateral ones is why it is important to seek accountability from national governments on their trade policy positions, by demanding, for instance, that they make all their trade negotiating positions public, and ensure that they are aware of the human rights implications of the proposals.

WTO rules nationally: limiting policy space

The most common way that rules developed in the World Trade Organization affect human rights is through limiting governments' ability to regulate or to take other measures to promote or protect human rights at the national level. Indeed, in promoting "free trade" the WTO and bilateral agreements seek to do away with possible regulatory interferences with the free flow of goods and services, thus limiting governments' ability to regulate in favor of development, environmental protection, or to defend vulnerable groups. This has given cause for particular concern regarding essential elements of livelihood such as food or health,¹¹ and provision of basic services such as education, health care or water.¹²

The list of cases where World Trade Organization and other trade rules have hindered enjoyment of the rights to food, health, education, housing or others would be long. Also, many of these cases do not come to public light or are linked in complex ways to other aspects of economic policy, making it hard to distinguish the role of trade agreements. This article will look at one issue area where WTO-related rules could limit countries' ability to take measures that favor human rights: WTO rules on trade in services.

11. For a discussion relating to agriculture trade liberalization and human rights, see 3D & IATP, "Planting the Rights Seed – A Human Rights Perspective on Agriculture Trade and the WTO" (2005). Available at <www.3dthree.org/en/page.php?IDpage=38&IDcat=5>. Last access on 7 September 2005.

12. See also Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization – Actors, Processes and Possible Strategies" (*Human Rights Quarterly*, vol. 24, pp. 1-50, 2002); and OHCHR, "Human Rights and Trade" (paper prepared for the 5th WTO Ministerial Conference in Cancún, 2003). Available at <www.unhchr.ch/html/menu2/trade/index.htm>. Last access on 7 September 2005.

*Liberalization of trade in services and governments' duty to regulate*¹³

The realization of human rights requires effective national policies. The policies required will differ from country to country: one-size-fits-all solutions do not exist. Governments will need the regulatory space and flexibility to tailor domestic regulatory policies to the needs and particularities of the country, society and human right in question. International rules and negotiations on liberalization of trade in services risk curtailing governments' policy space and flexibility. Although services are included in most bilateral trade agreements, the global framework remains the World Trade Organization. This section will therefore focus on services trade liberalization through the World Trade Organization.

A service is a result of human activity which is not a tangible good. Liberalization means that foreign and domestic service providers can compete to provide services. The scope of services trade liberalization through the WTO and other trade agreements is vast, ranging from accounting and advertising to telecommunications, tourism or transport. Liberalization can have – and has had – implications for access to basic services and thus for human rights in areas such as education, health care, job security or access to water. Rules on services trade liberalization, however, can reach further within a governments' regulatory space and affect human rights in that way, as the US–Gambling case discussed below shows.

The World Trade Organization requires neither privatization nor deregulation of services, nor does the WTO require any country to open up any particular service sector to international competition. So why is the World Trade Organization held responsible for human rights concerns arising from services liberalization? To help us find the answer, this article will examine some human rights dimensions of these three points – privatization, deregulation, services covered – in turn.

Services were first introduced into the multilateral trading system in the late 1980s, resulting in the adoption of the General Agreement on Trade in Services (GATS) in 1995, as an integral part of the WTO Agreement. World Trade Organization efforts to liberalize trade in services are part of a broader global trend towards increasing private sector participation (and increasingly, participation of large and powerful multinational corporations) in the provision of state-like functions, provoking competition in areas that were once under the responsibility of government as service supplier.

Liberalization does not explicitly require privatization of any particular service sector. In practice, however, allowing competition in a service sector implies the elimination of a monopoly, including public monopolies. This process is frequently

13. For a more detailed discussion of how rules on liberalization of trade in services affect human rights, see 3D & Forum-Asia, "Practical Guide to the WTO for Human Rights Advocates" (2004). Available at <www.3dthree.org/en/complement.php?IDcomplement=36>. Last access on 7 September 2005.

tantamount to privatization. In the real world, therefore, there are clear links between liberalization and privatization, but international trade agreements including the WTO's, shy away from explicitly expressing any preference for private over public provision of services.

In some sectors, such as telecommunications in Asia, services have greatly improved after privatization and liberalization: quality and availability increased and prices dropped. In others, though, a two-tiered system has emerged, with a high-quality segment available to those who can afford it, and an underfinanced government-provided segment for the poor. In some cases, privatization has put services out of reach of poor people altogether: in Ghana for instance, even water prices which the government and the World Bank considered to be below the market rate are beyond the means of most families. Indeed, the private sector being driven by commercial, profit-oriented objectives, private competition in basic service provision is not the most effective means of ensuring universal access to services which are essential but not lucrative.

Human rights law does not oblige States to be the sole provider of essential services. However, it does require States to guarantee essential service supply, especially to the poor, vulnerable and marginalized. The increasing frequency of two-tiered availability of services *de facto* discriminates against the most vulnerable or marginalized sectors of a population, contrary to human rights. Indeed, the non-discrimination principle, central to human rights law, prohibits discrimination on the basis of the ability to pay for basic services.

In addition to making access to essential services harder, privatization and liberalization can make it harder for governments to regulate. In human rights terms regulation is not only a need but also a **duty**. Indeed, human rights law requires States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfill human rights.

Like other trade rules, those on services aim to eliminate obstacles to trade, including possible regulatory interferences. While barriers to trade in goods are usually imposed at national borders (for example through tariffs), barriers to trade in services are more diverse. In addition, barriers to trade in services frequently affect core areas of domestic regulation, such as licensing standards (such as facilities licensing for clinics and laboratories, or waste disposal permits), minimum professional standards, subsidies for providers of essential services, or social objectives that foreign investors and service providers must meet.

There is a practical and a legal aspect to governments' difficulty in regulating in the public interest to fulfill their role as primary duty bearer of human rights. The practical dimension relates to the difficulty of regulate an increasingly large and powerful private sector. In the health sector, for instance, the World Trade Organization has indicated that private companies can subvert health systems through political pressure and "regulatory capture", namely the co-opting of regulators to make regulations more favorable to private companies. When the service provider is foreign, it is even

harder for a government to impose conditions, particularly when the country in question is keen to attract foreign investment.

The legal aspect relates to the regulations that General Agreement on Trade in Services will allow. While GATS does recognize the right of WTO Members “to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives” it sets limits on government regulations, and can thus challenge national regulatory prerogatives.

A recent WTO Appellate Body ruling raised important issues in this regard: the US–Gambling case.¹⁴ Antigua and Barbuda had brought a challenge to the US internet gambling ban to the World Trade Organization dispute settlement system, saying it was a violation of the US’ General Agreement on Trade in Services commitments. The WTO Appellate Body ruled that in the case of internet gambling, the US ban is excused by the “public morals” exception in GATS, which allows countries to derogate from the provisions of the agreement. Human rights advocates can be encouraged that this decision could allow other countries to derogate from General Agreement on Trade in Services obligations in the future, to uphold the public interest objectives that GATS recognizes.¹⁵

Nevertheless, concerns remain. A significant one is that the Appellate Body’s broad interpretation of what restrictions are prohibited under GATS may threaten the validity of many domestic service regulations that were so far considered to be allowable.¹⁶

Another lies in bilateral trade agreements provisions relating to services. CAFTA for instance (the Central American Free Trade Agreement, the recently-concluded agreement between the US on the one hand, and several central American countries on the other) includes provisions that allow foreign investors to challenge government measures that are inconsistent with the Agreement. CAFTA does not contain an exception similar to General Agreement on Trade in Services “public morals” exception, so a Central American-based company might succeed in a legal challenge to strike down public interest measures, such as bans like the United States internet gambling one.¹⁷

14. “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint Brought by Antigua and Barbuda)”. Report of the Appellate Body, WT/DS285/AB/R, issued on 7 April 2005.

15. These include measures necessary to protect public morals or to maintain public order; or necessary to protect human, animal or plant life or health. See GATS, Article XIV: General Exceptions.

16. Joost Pauwelyn, “WTO Softens Earlier Condemnation of US Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation” (April 2005). Available at <www.asil.org/insights/2005/04/insights050412.html>. Last access on 7 September 2005.

17. Peace through Interamerican Community Action (PICA), “CAFTA Jeopardizes Maine’s Gambling Regulations” (July 2005, on file with the author).

A particular aspect of human rights-based concerns about GATS relates to public services. Legitimacy of governmental regulation in this area, which covers basic services, is especially uncertain – and it is unclear whether it comes under the scope of General Agreement on Trade in Services (which would mean that governmental regulations including those designed to promote the realization of human rights such as subsidies to governmental providers would be prohibited) or not. Indeed, national regulations are subject to GATS' general obligations, including the prohibition on discrimination between different countries' service providers.

Suppose that the government of a WTO member (country A), has not made any commitments to liberalize trade in education services and runs most schools, although private education is also available. Faced with a shortage of teachers in the public schools, and the adverse impact of this shortage on the right to education, country A decides to enter into a bilateral agreement with country B to allow teachers from B special derogations from immigration requirements so that they can teach in country A. In spite of the fact that country A has not made commitments in the area of education, the agreement with country B might be found to violate the GATS non-discrimination principle, as it gives preferential treatment to service suppliers from country B over country C. The preference granted to B might have a genuine public policy purpose if the language spoken in country B is the same as in country A, for instance, or if they have more of a shared culture and history than A does with C.

However, in this scenario, if education services do not fall under General Agreement on Trade in Services, there would be no violation. The reason why it is unclear whether education or other public services come under GATS is that the agreement does not apply to services “supplied in the exercise of governmental authority”. The Agreement defines this as “any service which is applied neither on a commercial basis nor in competition with one or more service suppliers” – but the actual scope of this provision is clear to none, even the world's leading GATS experts. Indeed, the increasing supply of government services on a commercial basis has challenged the clear distinctions between governmental and non-governmental service provision.

Another way General Agreement on Trade in Services might reduce a country's flexibility to regulate in the public interest is through limiting a governments' ability to provide economic measures in favor of disadvantaged groups. Human rights law requires governments to take steps to ensure enjoyment by particularly vulnerable groups of their human rights. Some governments protect steps they take to this end in their GATS commitments. New Zealand for instance, exempts from its GATS obligations “current or future measures at the central and sub-central levels according more favorable treatment to any Maori person or organization in relation to the acquisition, establishment or operation of any commercial or industrial undertaking”. Australia and Malaysia do much the same for their indigenous peoples.

Pro-GATS advocates might rely on these examples to argue that General Agreement on Trade in Services does not limit a government's ability to pursue public interest

objectives, since countries have a lot of scope to choose which commercial sectors to commit to GATS and which sectors to exempt. Countries who need social policy exemptions, they argue, can carve out the policy space they need to pursue them. However, a country that has a policy to facilitate access of a disadvantaged group to a particular service, but omitted to exempt it from General Agreement on Trade in Services, may find itself in contravention of GATS, as might a country that introduces such a policy in the future. In addition, the political dynamics, power imbalances or simply the complexity of trade negotiations sometimes lead countries to make commitments in areas in which liberalization or deregulation go against their national interests. And this does not only affect small countries: the US–Gambling case was based on a commitment that US trade negotiators had apparently made erroneously, a mistake that went undetected for nearly 10 years until Antigua and Barbuda’s WTO challenge.

This points to another key concern about General Agreement on Trade in Services, which is its “lock-in” effect. Once a country has made a GATS commitment, it is virtually impossible to change, even if later circumstances require such change. Reversing the Agreement commitments is technically permitted, but governments can only do so by negotiating “compensation” for all affected trading partners, which can be prohibitively costly. This means that if subsequent events reveal negative social or economic effects, it may be too late to take corrective action, and that a government may be curtailed from taking steps to address a social problem that only becomes manifest after the government has made GATS commitments.

In short, it would appear that governments retain their freedom to regulate only to the extent that the regulations they adopt are compatible with GATS. The threat of being brought before a World Trade Organization dispute settlement panel because of a new regulation affecting foreign service providers could have a chilling effect on governments’ inclination to regulate to promote human rights or in the public interest. From a democracy and accountability perspective there is an additional concern: in the final instance the judgment as to whether a domestic regulation is GATS-compatible will be made not by governments but through WTO dispute settlement. And the panels’ mandate is to apply trade law – not to ensure the protection of the public interest in WTO member countries.

Negotiations to further liberalize services are currently under way in the WTO as well as in bilateral agreements, and many countries are coming under considerable pressure to liberalize more service sectors, or to eliminate limitations on their existing commitments. Moreover, developing countries are being asked to make GATS liberalization commitments across such a broad range of service sectors that they are unable to analyze what the potential losses of benefits of such liberalization would be, let alone request access to industrialized countries’ service markets.¹⁸

18. See for instance “Statement by Jamaica to the WTO Trade Negotiations Committee” (28 July 2005, on file with the author).

From a human rights perspective, it is important that countries not commit new sectors under GATS until their human rights effect has been evaluated. GATS itself provided that a comprehensive assessment of the impacts of services trade liberalization should have been undertaken before 2000, but this obligation remains unfulfilled, much to the dissatisfaction of developing countries. African trade ministers, for instance, noted in June 2003 that the “Services Council has not satisfactorily met the requirement of carrying out the assessment of trade in services as stipulated in the GATS”. Representatives of Latin American countries, and NGOs around the world have voiced similar concerns.

Human rights advocates have constructively added their voices to calls for assessment of the potential and actual impact of services policies, on the grounds that these are fundamental to ensure the most appropriate policies and regulations for development, and for human rights. The High Commissioner for Human Rights has for instance recognized that States have the responsibility to ensure that commitments they make in other areas, including trade, does not reduce their capacity to set and implement national development policy. In a detailed study of services trade liberalization and human rights, the High Commissioner has concluded that human rights require a constant examination of trade law and policy as it affects the enjoyment of human rights, and that assessment is a major means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights.¹⁹

Rights in: upholding human rights in trade

Human rights advocates have an important task ahead of them to ensure that trade and trade rules respect promote and fulfill human rights. This section will indicate some points worth bearing in mind to ensure that efforts to mainstream human rights into trade agreements are successful.

First, it is essential to be clear about what we really want when we talk of human rights mainstreaming. This article assumes that what human rights advocates want is that international trade and trade rules, including those developed and applied through the WTO, support rather than threaten human rights. How best then to achieve this?

Some human rights advocates call to abolish the World Trade Organization as the solution to human rights-inconsistent trade policies. Others call for adding the words “human rights” in WTO texts or other trade agreements. This section will argue that these calls are misguided, and that the best way to ensure that trade and trade rules promote human rights is to broaden the focus of the human rights lens from the World Trade Organization, to integrate the human rights concerns of

19. Report of the High Commissioner, “Liberalization of Trade in Services and Human Rights” (UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/9, 25 June 2002). Available at <[www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.9.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.9.En?Opendocument)>. Last access on 7 September 2005.

non-discrimination, monitoring, democratic participation and accountability at each step of the process of making and applying trade policy. This section will point out some effective ways in which human rights advocates can bring their experience to support efforts to promote a fairer and more human rights consistent international trading regime.

The World Trade Organization is often accused of being the cause of economic injustices; there no shortage of examples of unfair WTO rules and processes. But even amongst critics, views differ sharply as to whether abolishing the WTO would be the solution to the problem. Some argue that the WTO is so deeply flawed that it is beyond reform and should therefore be abolished. Others however point out the importance of a multilateral framework for international trade, as only a multilateral framework can help insulate the small economies from the strong.

Indeed, the process and content of regional and bilateral trade agreements have provided a glimpse of how trade rules developed outside the multilateral framework are a far worse threat to global economic equity and enjoyment of human rights than the World Trade Organization system. The way these agreements are negotiated is not only more secretive than the WTO, but imbalances of power are more extreme and the outcomes even less balanced and harmful to the public interest than what comes out of the World Trade Organization. As George Monbiot, a vocal critic of liberalization has recently said, the “only thing worse than a world with the wrong international trade rules is a world with no trade rules at all”.²⁰ He thus makes a plea not to scrap the World Trade Organization, “but to transform it into a Fair Trade Organization, whose purpose is to restrain the rich while emancipating the poor”.

Some human rights advocates have called for inclusion of the words “human rights” in World Trade Organization texts. This is a dangerous route for human rights, for three main reasons. First, the “no explicit reference” starting point in the WTO/human rights debate has been used to support fundamentally opposing views. Those who do not want to see human rights discussed in the World Trade Organization declare that since the legal texts are silent on the issue, the WTO has no human rights-related mandate or obligations. Those who want to see the WTO held accountable to human rights standards say that explicit rights language should be brought into its text. Both seem to assume that the only way that the World Trade Organization could be held accountable to human rights standards would be if human rights were explicitly mentioned. The implication is that until the words “human rights” are explicitly included in WTO texts, the World Trade Organization will have no human rights mandate.

20. George Monbiot, “I Was Wrong about Trade”, (*The Guardian*, UK, 24 June 2003). Available at <www.monbiot.com>. Last access on 7 September 2005.

Given the difficulty that World Trade Organization members have of agreeing on even the simplest matters, changing the WTO legal texts might take a long time, and be extremely time-consuming. This is particularly the case given that many World Trade Organization professionals still equate the term “human rights” with “labor standards” and strongly resist expanding the WTO’s mandate to either. The time involved is the second reason why seeking to insert the words “human rights” into WTO texts would be a perilous undertaking. Because the ultimate – and real – objective of work on human rights in the World Trade Organization is to ensure that economic actors go beyond lip service to human rights, and effectively promote and protect these rights in their trade dealings, a change in WTO wording is unlikely to be the best use of human rights advocates’ time.

A third reason why including human rights wording in World Trade Organization texts may not be a satisfactory outcome can be drawn from the experience of the environmental movement. Environmental issues began being discussed in earnest by the international trade community since the early 1990s; so environmental activists have a ten-year trade policy head start on their human rights advocates. References to the environment were already present, if somewhat timid in the 1995 Marrakesh Agreement that established the World Trade Organization. By the time of the Doha Ministerial Conference such references were frequent: the Doha Ministerial Declaration contains many references to the environment.

Yet almost no environmentalists are happy with the mandate crafted by trade officials, nor with the way that negotiations on the environment have been going in the World Trade Organization. Importantly, many environmentalists are now lamenting that bringing environmental issues formally into the WTO’s ambit has given the World Trade Organization a large role in developing the issues. Based on this experience, experts on trade and the environment advise human rights advocates to ensure that any recognition of human rights and related values in the World Trade Organization insulates those values from the trade regime, in order to avoid giving the WTO too much competence on human rights-related issues.²¹ In a similar vein, other public interest groups are seeking to reduce the WTO’s reach, and limit its activities strictly to regulating the technical aspects of trade.²²

21. 3D → Trade – Human Rights – Equitable Economy and Rights & Democracy, “Towards Development: Human Rights and the WTO Agenda” (report of a panel discussion held during the WTO Ministerial Conference in Cancún, September 2003). Available at <www.3dthree.org/en/page.php?IDpage=21&IDcat=5>. Last access on 7 September 2005.

22. See International Gender and Trade Network, “IGTN at Cancún”, calling for reduction of the scope of the WTO to specific trade issues (2003). Available at <www.igtn.org/page/404>. Last access on 7 September 2005.

Assuming that when asking that human rights be mainstreamed in trade, human rights advocates want international trade and trade rules, including those developed and applied through the WTO, to support rather than threaten human rights, the discussion in this section so far points to the fact that mainstreaming would best be achieved by applying human rights tools to trade policy at the points at which it is made and applied, rather than bringing human rights into the World Trade Organization.

As the previous sections have shown, the processes through which policy space for public interest regulation is reduced take place not just in the World Trade Organization but also through bilateral agreements, and the way in which trade agreements are implemented at the national level. We have also seen that when the economic powers – whether countries or private business – are unable to attain their aims through the WTO, they move away from the multilateral forum to bilateral or regional trade negotiations, where they can exert more pressure, and often do so more privately. This pleads in favor of maintaining the spotlight on the national level, as this is where trade policy is formulated and applied, whether the rules are established in the World Trade Organization or elsewhere.

Also, while devoting their attention to the WTO, human rights advocates concerns about trade have tended to let the human rights machinery languish in the background. Yet human rights rules and implementation mechanisms are a forceful basis for ensuring that trade and trade rules are equitable, work in the public interest and support rather than threaten human rights.

Paul Hunt, UN Special Rapporteur on the Right to Health, has for instance pointed to ways that human rights can play a positive role in defining national trade policies that are equitable, attentive to the particular needs of the most vulnerable, and respectful of human rights. He has demonstrated how a right to health-based analysis can, in relation to essential drugs, help to identify practical and precise policy interventions to ensure enjoyment of the medicines element of the right to health. This includes ensuring that an essential drug is **available** in a particular country. To this end, a developing country should use available TRIPS flexibilities to ensure availability of low-cost versions of the drug. The drug must be **accessible** to all within the country, especially those living in poverty. This might call for creative thinking about delivery mechanisms such as mopeds for nurses, and could also require a country to avoid imposing import duties that make that drug inaccessible to the poor. Finally, an essential drug should be of **good quality**, which also implies that a country must have a system for monitoring and checking essential drug quality.²³

23. For a more detailed analysis, see 3D → Trade – Human Rights – Equitable Economy and Rights & Democracy (op. cit., note 21).

The High Commissioner for Human Rights has also drawn attention to ways human rights can be applied in the trade context. The 2002 report on trade in services, for example, says that the human rights approach to assessment of services trade liberalization introduces a methodology for assessments that promotes popular participation and consultation of those affected by liberalization – the poor, people dependent on public services, small businesses, industry groups, as well as social, trade and finance Ministries. The report adds that a human rights approach to assessments emphasizes transparency and accountability so that the outcomes of assessments and negotiation processes in trade fora are open to public scrutiny.²⁴

Human rights advocates can further demonstrate the positive role they can play by participating in the development and formulation of trade policy at the domestic level. In some countries, coalitions of civil society groups already intervene in the formulation of trade policies, but – not counting trade unions – human rights groups rarely participate. Participation of human rights groups in these processes would not only broaden the range of stakeholders represented, but would improve understanding amongst human rights advocates of trade policy issues.

Even when the trade issues at hand are complex, an approach based on human rights can make a significant contribution through very simple steps. One such step would involve asking the trade ministry what steps it is taking, in its trade negotiations, to ensure that it is not reducing its policy space and flexibility to adopt measures for the protection of human rights. In the area of health, for instance, human rights advocates could ask the government trade officials whether they have ensured that proposals in areas such as intellectual property or services do not threaten enjoyment of the right to health.

If the information is not public, or if the response from government officials is that they do not know, human rights advocates can remind them of the human rights obligation to permit people to participate in decision-making on issues that concern them, and of the human rights obligation to monitor the human rights situation in their country in order to ensure that policies adopted promote human rights. Human rights advocates should also remind those responsible for governmental trade policy of the duty to ensure non-discrimination in the enjoyment of human rights. This implies that if a particular trade liberalization

24. OHCHR (op. cit., note 12). The Human Rights Commission Working Group on the Right to Development has also emphasized the necessity of introducing and strengthening human rights standards and principles in undertaking impact assessments of trade and development rules and policies. See "Right to Development", Report of the Working Group on its sixth session (2005). Available at <www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.25.pdf>. Last access on 7 September 2005.

policy discriminates against a particular sector of the population – and there is considerable evidence demonstrating that trade liberalization frequently has adverse effects on women²⁵ – it will be inconsistent with human rights law. As the High Commissioner for Human Rights has pointed out, respecting the human rights requirement to avoid discrimination means not only protecting individuals and groups against overt discrimination, but also not leaving certain individuals and groups out of the trade picture.²⁶

Reminding trade policy-makers of the obligation to refrain from discrimination is also a way of making trade-offs explicit. Public acknowledgment of who is being favored by a particular trade policy choice is an essential prerequisite for holding economic actors, including actors from the private sector, accountable for their actions and for possible adverse social effects of the private benefits they might derive from a particular trade policy.

As Mary Robinson, former High Commissioner for Human Rights has pointed out, increased participation by those affected contributes to trade policy that is more transparent, accountable and responsive to the needs of the people it is said to serve, as well as being more sustainable and more legitimate.²⁷ Experience in many countries confirms this. Uganda, for instance, has a process for civil society participation in national trade policy formulation, and an official from the government Trade Ministry recently said that “disadvantaged groups in this country like small farmers are ultimately affected by the economic and trade policies that are formulated. It is through the continuous engagement of civil society in this process, through shaping national positions and backing government officials that go to the negotiations, that the voice of these groups will be heard”.²⁸

Several countries also acknowledge that broader stakeholder participation at the national level strengthens developing countries’ voices in international trade negotiations and can improve their capacity to resist pressures from larger economies to make commitments in the area of trade that go against development or public interests. Experience in Kenya, for instance, demonstrated that civil society input to the Ministry of Trade resulted in Kenya being able to submit timely negotiating proposals to the WTO and thus participate in those negotiations in a meaningful way.

The human rights framework can provide an additional tool for resisting

25. Mariama Williams, *Gender Mainstreaming in the Multilateral Trading System – A Handbook for Policy-Makers and Other Stakeholders* (London: Commonwealth Secretariat, 2003).

26. OHCHR (op. cit., note 12).

27. 3D → Trade – Human Rights – Equitable Economy & Rights & Democracy (op. cit., note 21).

28. Quoted in David Ddamilura & Halima Noor Abdi, *Civil Society and the WTO: Participation in National Trade Policy Design in Uganda and Kenya* (London: Cafod Trade Justice Campaign, 2003).

pressures to agree to trade rules that would reduce flexibility and policy space to protect the public interest and human rights. Indeed, developing countries could, in trade negotiations, use their human rights obligations as a shield to protect them from engaging in liberalization commitments that would reduce their ability to protect human rights. Brazil did this from 2001, through introducing a series of resolutions on access to medicines in the UN Commission on Human Rights. These resolutions were part of a successful global strategy that Brazil spearheaded to achieve recognition of access to medicines as a human right, and which supported developing countries' efforts in the WTO to ensure recognition of their right to make low-cost generic drugs available to their populations.²⁹

Human rights advocates could make better use of international human rights mechanisms such as the UN human rights treaty bodies in support of national work to ensure that countries' policies on international trade support human rights. Treaty body members occasionally raise trade-related issues³⁰ but not in a concerted way, and rarely as part of a strategy to address a specific trade-related human rights concern.

Human rights concerns about lack of transparency and participation in trade policy are shared by development groups such as Focus on the Global South and Oxfam, with environmental groups such as the Center for International Environmental Law (CIEL) and with women's groups such as the International Gender and Trade Network (IGTN). Yet, although these groups occasionally refer to human rights, few actually apply the human rights framework in support of their work on trade. Human rights advocates could significantly move the public interest agenda in trade forwards by demonstrating the unique usefulness of international human rights monitoring and accountability mechanisms to other public interest advocates.

Indeed, given that human rights advocates share many concerns with other public interest advocates, the best way to ensure human rights are truly mainstreamed in international trade policy is for human rights groups to make their energy and expertise known to other public interest advocates and join forces with them to achieve international trade and trade rules, including those developed and applied through the World Trade Organization, that support rather than threaten human rights.

29. See C. Dommen, "WTO and Human Rights Bodies Reach Out to Each Other", in *Between Trade and Sustainable Development (Bridges)*, year 7, n. 3, April 2003). Available at <www.ictsd.org/monthly/archive.htm>. Last access on 7 September 2005.

30. See <www.3dthree.org> for a list of trade-related issues considered by UN human rights treaty bodies.

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ABSTRACT

The TRIPS Agreement brought about very important changes in international standards relating to intellectual property rights. Because of its far-reaching implications it is one of the most controversial components of the WTO system. On the initiative of developing countries, the concerns raised regarding the implications of the TRIPS Agreement on public health were reflected in the adoption of the Doha Declaration on the TRIPS Agreement and Public Health, in 2001. The Declaration was followed by a Council for TRIPS Decision in 2003 on the implementation of its paragraph 6. In this article, the author states that as adopted, the implementation of paragraph 6 is unlikely to put strong pressure on patent owners to lower their prices or negotiate voluntary licenses. The author highlights that controversies are likely to continue, especially as developed countries seek TRIPS-plus protection via interpretation or negotiation of bilateral and regional agreements, and as patents over trivial developments are granted and used to block or delay generic competition. [Original article in English.*]

KEYWORDS

Trade – Intellectual property – WTO – Doha Declaration – Health

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TRIPS AGREEMENT AND ACCESS TO DRUGS IN DEVELOPING COUNTRIES

Carlos M. Correa

The Doha Declaration on TRIPS and public health

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹ brought about very important changes in international standards relating to intellectual property rights. Because of its far-reaching implications, particularly with respect to developing countries, the agreement has been one of the most controversial components of the WTO System. Strong disagreements on the scope and content of the Agreement emerged during the Uruguay Round negotiations, both between developed and developing countries and among developed countries themselves. Implementation of the Agreement and its review under the “built-in agenda” have also been contentious.²

This has notably been the case in relation to pharmaceuticals. By their very essence, patents enable pharmaceutical manufacturers to charge prices above marginal costs, recover research and development expenditures and make a profit. The AIDS crisis in Africa, and growing evidence on the negative implications of patents for access to medicines by the poor, have brought the relationship between TRIPS and health to the forefront. With more than 30 million people

1. The TRIPS Agreement provides for minimum standards for the protection of patents, trademarks, copyrights and other intellectual property rights. See the text of the agreement in <www.wto.org>.

2. See, e.g. various contributions in Brigitte Granville (ed.), *The Economics of Essential Medicines* (London: The Royal Institute of International Affairs, 2002); and Peter Drahos & Ruth Mayne (ed.), *Global Intellectual Property Rights. Knowledge, Access and Development* (New York: Palgrave Macmillan-Oxfam, 2002).

living with HIV, most of them in the poorest regions of the world, the need to address the problem of access to patented medicines has emerged as a global priority. While it is true, as argued by the pharmaceutical industry, that other factors such as infrastructure and professional support play an important role in determining access to drugs,³ it is also true that the prices resulting from the existence of patents ultimately determine how many will die from AIDS and other diseases in the years to come.

The concerns raised about the implications of the TRIPS Agreement on public health were reflected in the adoption of the Doha Declaration on the TRIPS Agreement and Public Health⁴ upon the initiative of developing countries, at the Fourth WTO Ministerial Conference (9-14 November 2001). The Doha Declaration recognizes the “gravity” of the public health problems afflicting many developing and least developed countries, especially – but not limited to – those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics. However, the Declaration reflects the concerns of developing and least developed countries regarding the implications of the TRIPS Agreement on public health in general, without limitation to certain diseases.

While acknowledging the role of intellectual property protection “for the development of new medicines”, the Declaration specifically recognizes concerns about resulting effects on prices. The Declaration affirms (paragraph 4) that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health, and that it should be interpreted accordingly:

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' rights to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

The Doha Declaration clarifies members' rights to adopt an international principle of exhaustion of rights (under which parallel imports may be accepted).⁵ It states that “the effect of the provisions in the TRIPS Agreement ... is to leave each member free to establish its own regime for such exhaustion without challenge” (paragraph 5d). Similarly, the Declaration confirms the

3. International Intellectual Property Institute, “Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa” (Washington DC, 2001), p. 23.

4. WT/MIN(01)/DEC/W/2, 14 November 2001, hereinafter the Doha Declaration.

members' rights to grant compulsory licenses on grounds determined by each member. It also allowed least developed countries to delay the introduction of pharmaceutical patents until 2016. The Declaration also makes clear that "public health crises" can represent "a national emergency or other circumstance of extreme urgency". "Emergency" in this context may be either a short-term problem, or a long-lasting situation.

Confirmation that the TRIPS Agreement leaves room for flexibility at the national level has important political and legal implications. It indicates that the pressures to impede the use of available flexibilities run counter to the spirit and purpose of the TRIPS Agreement. In legal terms, it means that panels and the Appellate Body must interpret the TRIPS Agreement and laws and regulations adopted to implement it in light of the public health needs of the individual members.

In paragraph 6 the Doha Declaration instructed the Council for TRIPS to address this delicate issue: how can members lacking or having insufficient manufacturing capacities make effective use of compulsory licensing.⁶ The basic problem underlying paragraph 6 is that many developing countries lack or have an insufficient capacity to manufacture medicines on their own. Manufacturing capacities of pharmaceuticals are distributed very unevenly in the world. Not many countries have the capacity to produce both active ingredients and formulations, and very few countries maintain significant research and development capabilities.

When the TRIPS Agreement becomes fully operative (after 2005), many countries may face difficulties in acquiring medicines at affordable prices. Today, for example, some countries, such as India, do not provide patent protections for pharmaceutical products, and produce generic versions at a fraction of the price of the patented products. A member country where the price of patented products is high has the option of issuing a compulsory license to permit import from such countries. The problem is that, as countries fully comply with the TRIPS Agreement by 2005 at the latest, they will no longer be able to produce and export cheap generic copies of patented medicines. Consequently, the sources of affordable new medicines will dry up and countries without sufficient

5. According to the principle of international exhaustion of rights, a patent holder "exhausts" his rights after the first legitimate sale of patented products in a foreign country. Hence, he cannot prevent the subsequent transborder movement of such products.

6. A "compulsory license" is the authorization given by a judicial or administrative authority to a third party for the use of a patented invention, without the consent of the patentee, on various grounds of general interest (e.g., absence of working, public health, anticompetitive practices, emergency, national defense).

manufacturing capacity and market demand will not be able to grant a compulsory license either for the local production or for the importation of such medicines: they will become entirely dependent upon expensive patented versions.

The Doha Declaration requested the Council for TRIPS “to find an expeditious solution to this problem and to report to the General Council before the end of 2002” by the end of 2002. An agreement was only reached on August 30, 2003,⁷ after a diplomatic battle, when the United States finally accepted a text covering all diseases, as mandated by the Declaration.⁸ The agreed “solution” is based on a compromise developed by the Chair of the TRIPS Council⁹ and on a “Statement by the Chair” proposed by the US as a condition to accept the deal and satisfy the American pharmaceutical industry.

For the purposes of the Decision, “eligible importing member” means any least developed country member, as well as any other member that has made a notification to the Council for TRIPS of its intention, to use the system as an importer. Some countries have notified the Council that they will only use the system in cases of national emergencies or in other circumstances of extreme urgency or in cases of public non-commercial use, and in others that they will not use the system. The eligible importing country must make a notification to the Council for TRIPS, that:

- specifies the names and expected quantities of the product(s) needed;
- confirms that the eligible importing member in question, other than a least developed country member, has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question; and
- confirms that, where a pharmaceutical product is patented in its territory, it has granted or intends to grant a compulsory license in accordance with Article 31 of the TRIPS Agreement and the provisions of this Decision.

In addition, the compulsory license issued by the exporting member shall contain the following conditions:

- Only the amount necessary to meet the needs of the eligible importing member(s) may be manufactured under the license and the entirety of this production shall be exported to the member(s) which has notified the Council for TRIPS of its needs.

7. See IP/C/W/405, available at <www.wto.org> (hereinafter “the Decision”).

8. The US initial position aimed at limiting the possible solution to HIV/AIDS, malaria and tuberculosis.

9. See the text of the Chairman of the Council for TRIPS of 16 December 2002 (JOB(02)/217). Available at <www.wto.org>.

- Products produced under the license shall be clearly identified as being produced under the system set out in this Decision through specific labeling or marking. Suppliers should distinguish such products through special packaging and/or special coloring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price.
- Before shipment begins, the licensee shall post on a website the following: (1) the quantities being supplied to each destination; and (2) the distinguishing features of the product(s).

Further, the exporting member shall notify the Council for TRIPS of the granting of the license, including the conditions attached to it. Where a compulsory license is granted by an exporting member, adequate remuneration pursuant to Article 31.h of the TRIPS Agreement¹⁰ shall be paid to that member taking into account the economic value to the importing member of the use that has been authorized by the exporting member. This means that, although the remuneration would be paid by the exporter, the “economic value” taken into account to determine the amount of remuneration is that of the importing country. Where a compulsory license is granted for the same products to the eligible importing member, the obligation of that member under Article 31.h shall be waived in respect of those products for which remuneration is paid by the exporting member.

One of the main concerns voiced by developed countries during the negotiation of the Decision, was the possible diversion of the exported products to rich countries.¹¹ The Decision establishes that eligible importing members shall take all reasonable measures within their means, proportionate to their administrative capacities and to the risk of trade diversion to prevent re-exportation of products that have actually been imported into their territories under the system. In the event that an eligible importing member that is also a developing country member or a least-developed country member experience difficulty in implementing this provision, developed country members shall

10. Article 31.h: “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”.

11. The risk of diversion has probably been overstated. Trade in medicines is subject to stringent national regulations that erect effective barriers to market access. The European Commission has noted that “the industry acknowledges that to date there is no re-importation of medicines from the poorest developing countries into the European Union, i.e. the problem of re-importation is still largely theoretical”, in European Commission (DGTrade, 2002). “Tiered Pricing for Medicines Exported to Developing Countries, Measures to Prevent their Re-Importation into the EC Market and Tariffs in Developing Countries” (Brussels: Working Document, 22 April), p. 10.

provide, on request, and on mutually agreed terms and conditions, technical and financial cooperation in order to facilitate its implementation. Additionally, members shall ensure the availability of effective legal means to prevent the importation into, and sale of, within their territories, products produced under the system set out in this Decision and diverted to their markets inconsistently with its provisions, using the means already required to be available under the TRIPS Agreement. If any member considers that such measures are proving insufficient for this purpose, the matter may be reviewed in the Council for TRIPS at the request of that member.

The Chair's Statement added that the special conditions (as set out in paragraph 2b(ii) of the Decision)¹² apply not only to formulated pharmaceuticals but also to active ingredients produced and supplied under the system as well as to finished products that have been produced using such active ingredients. The Statement also adds (though there is no evidence to support this statement), that it "is the understanding of members that in general special packaging and/or special coloring or shaping should not have a significant impact on the price of pharmaceuticals". In addition the Statement introduces a monitoring system, including verification of how the member in question has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector.¹³

The Statement also indicates that members recognize that the system "should be used in good faith to protect public health and, without prejudice to paragraph 6 of the Decision, not be an instrument to pursue industrial or commercial policy objectives". The only reasonable reading of this statement is that the **importing** country should use the system for public health reasons, but it certainly does not exclude the supply of the required medicines which have a profit objective by commercial entities. Without the possibility of making a profit, potential suppliers will lack the incentive to make the investments (including the covering of legal costs) necessary to satisfy the requirements of countries without manufacturing capacity.

12. Article 2(b)(ii): "The products produced under the license shall be clearly identified as being produced under the system set out in this Decision through specific labelling or marking. Suppliers should distinguish such products through special packaging and/or special coloring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price".

13. One of the noticeable ambiguities in the Decision is the concept of "manufacturing capacity". It is unclear, in particular, whether such capacity should be determined on technical grounds only, or taken into account the economic feasibility of manufacturing. This latter interpretation seems the most reasonable on efficiency grounds, and given that economic feasibility may be as an important barrier for local manufacturing as the lack of technical capacity.

Changing national laws

The Decision takes the form of an interim waiver, which allows countries producing patented products under compulsory licenses to export the products to eligible importing countries, provided that a compulsory license has also been granted in the importing country and that various other conditions, as discussed above, are met. The waiver would last until the TRIPS Agreement is amended.¹⁴

It is important to note that the system under paragraph 6 of the Doha Declaration will operate in a scenario in which there is only one world supplier of a patented drug and, therefore, there will be no available source of generic products. The use of such a system will be necessary when the patent owner **refuses to supply** a patented drug in a country (with insufficient or no manufacturing capacity in pharmaceuticals) at a price or under other conditions acceptable to the interested country. The basic assumption for the application of the system is, therefore, a situation where (a) a drug is available and **could** be sold to the country in need by the patent owner, and (b) the patent owner refuses to do so.

This means that whatever humanitarian reasons underlie the country's demand for a given drug, nothing in the adopted system will compel the patent owner to supply the needed drugs. He may just passively watch how the country in need strives to fulfill the conditions imposed by the Decision, while people remain without treatment. He may also facilitate the process by conferring a voluntary license to a potential exporter. It may also occur that the patent owner exploits the intricacies and complexities of the system, and exercises his rights under the relevant national laws to block the unauthorized use of his patent. The system under paragraph 6 may, in fact, be applied **in a context of conflict** between the demanding country and the patent owner unwilling to supply.

A WTO waiver means that a member shall not initiate a complaint against another member if the latter acts under the terms of the adopted waiver. But to the extent that the national law is not aligned with the waiver, it will not prevent the patent owner from invoking provisions in the national laws to prevent the acquisition of the patented drug from other sources. Therefore the actual

14. According to paragraph 11, "... This Decision, including the waivers granted in it, shall terminate for each member on the date on which an amendment to the TRIPS Agreement replacing its provisions takes effect for that member. The TRIPS Council shall initiate by the end of 2003 work on the preparation of such an amendment with a view to its adoption within six months, on the understanding that the amendment will be based, where appropriate, on this Decision and on the further understanding that it will not be part of the negotiations referred to in paragraph 45 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1)".

implementation of the Decision will depend on the extent to which national laws allow the waived acts.

Under the adopted system, for instance, is recognized the possibility (fully consistent with the TRIPS Agreement) of granting a compulsory license to **import** a patented drug. The problem, however, is that many developing countries provide for the granting of compulsory licenses for the **manufacture** of patented subject matter, and not for importation. Hence, in order to make operative any solution under paragraph 6, those developing countries would need to amend their national patent laws accordingly. This may be unnecessary if the national laws included provisions for non commercial government use of patented inventions, allowing for either local manufacturing or importation.¹⁵

Similarly, amendments to national laws will be necessary in the potential exporting countries. Compulsory licenses are granted under grounds specified by national laws. The supply of export markets is not an accepted ground in most national laws.¹⁶ Moreover, in implementing Article 31.f of the TRIPS Agreement,¹⁷ WTO members have established compulsory licenses to supply “predominantly” the domestic market. If a company receives a request under paragraph 6 to supply a foreign country, it would not be able to obtain a compulsory license exclusively to export, unless the national law has been amended accordingly. The extent to which governments will be willing to start the complex process of amending the patent law – especially on the basis of an interim waiver – is open to question. Nothing in the Decision precludes developed countries from acting as exporters of generic drugs under the system, but it is uncertain how their governments would react if requested to amend their laws and grant compulsory licenses for supplying under paragraph 6. In

15. It is to be noted that the Decision only refers to “compulsory licenses” and not to government use for non-commercial purposes. However, the waiver is adopted with regard to Article 31, paragraphs (f) and (h) of the TRIPS Agreement, which equally covers both forms of uses without authorization of the patent holder. Any good faith interpretation of the Decision, therefore, should admit such government uses.

16. However, Article 168 of the Australian Patent Act and Article 55(2) of the Patent Act of New Zealand, permits exports under an agreement with a foreign country to supply products required for the defense of that country. Article 48B(d) and (i) of the UK Patent Act provides for a compulsory license in respect of a patent whose proprietor is not a WTO proprietor when the owner’s failure to license the patent on reasonable grounds means that a market for the export a patented product made in the UK is not being supplied. Article 45.g of the Argentine patent law permits the granting of a compulsory license not predominantly for the domestic markets when necessary to remedy anticompetitive practices or in cases of health emergencies or national security.

17. Article 31.f: “any such use shall be authorized predominantly for the supply of the domestic market of the member authorizing such use”.

fact, most observers expect the large generic producers in the developing world (such as India, China, Brazil, Thailand and South Africa) to undertake this production and export.¹⁸

The effective use of a compulsory license in both the importing and exporting country will also depend on procedures. In some countries (e.g. Argentina) an appeal by the patent owner against the grant of a compulsory license does not suspend its immediate execution (e.g. Article 49, Argentine Patent Law n. 24481, as amended). In other countries, this may not be the case. The patent owner may file an appeal or obtain an injunction and thereby stop exports under a compulsory license until a final administrative or judicial decision is taken, perhaps a few years later. National patent laws, hence, will have to be amended, as necessary, in order to make the use of compulsory licenses for export an effective mechanism to address public health needs.

Conditions for use of the waiver

Numerous conditions are established in the text of the Decision, as interpreted by the Chair's Statement, for allowing exports of patented medicines. In order to get the supply of drugs under this mechanism the following steps must be followed:¹⁹

1. Unless the prior request of a voluntary license does not apply,²⁰ an entity in the importing country must seek a voluntary license from the patent owner.²¹

18. K. Maskus, "TRIPS, Drug Patents and Access to Medicines-Balancing Incentives for R&D with Public Health Concerns", in *Knowledge Economy, Development Gateway* (2003), at <www.developmentgateway.org/download/206719Maskus_on_TRIPS,_Drug_Patents,_Medicines.pdf>. Last access on 12 September 2005.

19. See Brook K. Baker, "Vows of Poverty, Shrunken Markets, Burdensome Manufacturing and other Nonsense at the WTO" (*Health GAP*, 27 August 2003). Available at IP-Health website: <www.healthgap.org/press_releases/03/092703_HGAP_BP_WTO_Cancun.html>. Last access on 7 September 2005.

20. This would generally be the case – depending, however, on national law – when an authorization is given on grounds of extreme urgency, anti-competitive practices or non-commercial public use (Article 31 (f) and (k) of the TRIPS Agreement).

21. In requesting a compulsory license both in the importing and the exporting country, it will be necessary to identify and include all the patents that may affect the supply of a drug, since normally there are patents covering the active ingredient, acceptable formulations, polymorphs, manufacturing processes etc. of the same drug. On patenting practices in pharmaceuticals, see Correa, *Trends in Drug Patenting* (Buenos Aires: Corregidor, 2001).

2. Failing this, an application for a compulsory license must be submitted to the government of the importing country and the license be obtained there (unless there is no applicable patent in that country).
3. The importing country must assess the capacity of its generic industry to produce the required medicine locally.
4. If capacity is insufficient, it must notify the WTO of its decision to use the paragraph 6 system.
5. The interested importing party must identify a potential exporter.
6. That exporter must in turn seek a voluntary license from the patent owner on commercially reasonable terms for a commercially reasonable period of time.
7. If the voluntary license is refused, the potential exporter must seek a compulsory license (to be granted on a single-supply basis) from its own government.
8. The exporter will need to seek product registration and prove bio-equivalence and bioavailability, as required by national law.
9. If exclusive rights (as promoted by the US) are granted²² in the importing country with regard to data submitted for registration of a medicine, the supplier will have to obtain authorization by the possessor of the data to use them, or to develop its own studies about toxicity and efficacy (unless the use of such data is authorized under the compulsory license).
10. Before shipment begins, the licensee shall post on website information about the quantities being supplied and the distinguishing features of the product.
11. The exporting member must notify the Council for TRIPS of the granting of the license, including the conditions attached to it.

This process must be fulfilled over and over, since only the amount necessary to meet the needs of one particular eligible importing member may be manufactured under the license, and the entirety of this production shall be exported to the member that has notified its needs to the Council for TRIPS.

Economic feasibility

As discussed elsewhere,²³ in order to be effective, a solution to the problem described in paragraph 6 should be economically viable, and not only

22. See Correa, "Protection of Data Submitted for the Registration of Pharmaceutical Products. Implementing the Standards of the Trips Agreement" (Geneva: South Centre, 2002).

diplomatically acceptable. Does the Decision provide the incentives to encourage potential suppliers to make the necessary investment and take the associated risks? In addition to complying with the legal procedures involved in the application of a compulsory license and the marketing approval of the product, the potential exporter will have to develop (when produced for the first time) the chemistry and formulate the drug, and then produce the active ingredients and/or formulations with shape, color, label and packaging different from of the patent owner's product, and at a low price affordable to the acquiring party. Pharmaceutical firms are unlikely to make the required investment if there is no reasonable profit expectation.

The Decision recognizes that the viability of the "solution" largely depends on the existence of economies of scale that justify production. According to paragraph 6 of the Decision, however, the realization of economies of such scale is only envisaged in cases where the importing country is a party to a regional trade agreement with at least half of its current membership made up of least developed countries. In this case the obligation of that member under Article 31.f of the TRIPS Agreement shall be waived to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory license in that member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. Given the requirement about participation of least developed countries, this exception will only apply to some regional agreements in Africa but not in other regions,²⁴ thereby limiting the effect on economies of scale that could have been obtained.

As noted by Maskus (2003, op. cit.), though overall needs in the poor nations are immense, "even if some poor countries in a trade agreement covered by this exception pooled their demands for a particular medicine, the scale may be still too low to become attractive for potential suppliers ... because the eligible import markets in really small countries will not be large, generic producers may not be interested in producing such small volumes and foregoing chances for economies of scale".

23. See Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (Geneva: World Health Organization, 2002), p. 33. Available at <www.who.int/medicines/library/par/who-edm-par-2002-3/doha-implications.doc>. Last access on 7 September 2005. See also "Integrating Intellectual Property Rights and Development Policy" (London: Commission on Intellectual Property Rights, 2002). Available at <www.iprcommission.org>. Last access on 7 September 2005.

24. For instance, Mercosur and the Andean Community do not qualify under the Decision as a single market for the purposes of the Decision.

Conclusions

The implementation of the Decision on paragraph 6 of the Doha Declaration will require adaptations in national laws and entail, in particular cases, significant transaction costs. As adopted, it is unlikely to put strong pressure on patent owners to lower their prices or to negotiate voluntary licenses, nor is it likely to provide incentives to potential suppliers to make the investments necessary to develop and produce the needed drugs. Subventions from the international organizations and donor governments made be necessary to make this “solution” workable.²⁵

Despite the quite obvious limitations of and many constraints imposed by the examined Decision, countries in need of acquiring patented drugs should test the viability of the system. The Decision should be interpreted, in line with the Doha Declaration on the TRIPS Agreement and Public Health, in a manner that facilitates an increase in the supply of medicines to poor countries. It is also necessary to elaborate a **permanent** solution to the problem affecting countries with limited or without manufacturing capacities in this field, based on an amendment to the TRIPS Agreement. Such an amendment should be based on a simpler and more straightforward approach,²⁶ which provides the economic incentives for the solution to be effective.

It is also important to note that the system under paragraph 6 seems to be built upon the assumption that a patent owner is legitimized to prevent access to products under his control, even in the presence of compelling humanitarian reasons. This is certainly not consistent with the Doha Declaration on the TRIPS Agreement and Public Health (particularly paragraph 4), nor with States’ commitments under the International Covenant on Economic, Social and Cultural Rights, especially its Article 12 (recognizing the human “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and obliging the taking of steps to fully realize this right, including “those necessary for ... the prevention, treatment and control of epidemic, endemic, ... and other diseases”). The adoption of the Decision, hence, cannot prevent the use of

25. See K. Maskus, 2003, *op. cit.*

26. For instance, on 3 October 2002, the European Parliament adopted Amendment 196 to the European Medicines Directive, which provides that “manufacturing shall be allowed if the medicinal product is intended for export to a third country that has issued a compulsory license for that product, or where a patent is not in force and if there is a request to that effect of the competent public health authorities of that third country”.

other means when the owner of the relevant patent or patents refuses to supply a needed drug. Countries should be encouraged to develop disciplines to deal with such refusals in the context of the “essential facilities” doctrine,²⁷ or other concepts under competition and public health law.

Finally, it should be recalled that **paragraph 6 only describes one of the problems** arising in the context of the TRIPS Agreement with regard to public health. The intellectual property protection of pharmaceuticals will continue to pose significant challenges to public health policies in developing countries, even if the agreed “solution” were proven to be viable and effective. The agreement on paragraph 6 does not mean an end to the controversies around intellectual property and public health. They are likely to continue, especially as developed countries seek TRIPS-plus protection via interpretation²⁸ or negotiation of bilateral and regional agreements,²⁹ and as patents on marginal or trivial developments (sometimes called “ever-greening” patents) are granted and used to block or delay generic competition.³⁰

27. See John Taladay & James Carlin Jr., “Compulsory Licensing of Intellectual Property under the Competition Laws of the United States and European Community” (*George Mason Law Review* 10, n. 3, Spring 2002), p. 443.

28. The United States Trade Representative (USTR), for instance, interprets that Article 39.3 of the Agreement requires the granting of an exclusive period of protection for data submitted for the marketing approval of pharmaceuticals and agrochemicals.

29. See, e.g., the recent US–Chile and US–Singapore bilateral agreements.

30. “Ever-greening” refers to the acquisition of patent rights over minor or trivial modifications or formulations of existing drugs, with the aim of delaying the entry of generic competition. See Correa, 2001, *op. cit.*

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ABSTRACT

This paper aims to advance the discussion on how to deal with new internal and external security problems in Latin America, both old and new. Part I examines the concept of human security, particularly in Latin America, and considers criticisms in international literature. We argue that human security is more than a normative framework and must be reformulated into an operational and analytical tool. Human security-oriented analysis needs to have a clearer focus on armed violence; the institutional dimensions must also be taken in consideration, within a perspective of variable geometry of international security problems. Part II begins with a short review of the current security problems in Latin America – and the new situation produced by United States anti-terrorism policies. Here we also discuss some of the difficulties in consolidating a common Latin American international agenda. The final section lays out some of the main issues that could be taken on by researchers, civil society and policy makers in Latin America. [Original article in English.]

KEYWORDS

Human security – Violence – Latin America – Human rights

SECURITY, HUMAN SECURITY AND LATIN AMERICA

Bernardo Sorj*

Part I: The human security concept and agenda

The concept of human security

The concept of human security was first introduced in a 1994 UNDP report,¹ though the basis for this formulation has long been present within the United Nations. The founding charter of the UN and several subsequent documents mention national sovereignty as an organizing axis of the international system, as well as the defense of human rights regardless of frontiers. In other words, since its origin the United Nations system recognizes two lines of “absolute” values that the international system should aim to protect: national sovereignty and the human rights of individuals.

Currently, support for the concept of human security lies mainly in the new constellation of post-cold war international actors. This support stems from the fact that much of today’s physical insecurity derives from internal armed conflicts rather than wars between states. These may be civil wars or less clearly-defined conflicts between armed gangs or terrorist groups, sometimes supported directly or indirectly by states with a weak commitment to human rights.

* Opinions expressed in this piece are the sole responsibility of the author. However, the author would like to thank Rubem Cesar Fernandes and José Marcelo Zacchi for discussions on human security issues that helped shape the ideas presented here.

1. On the history of the concept of human security, see Charles-Philippe David & Jean-François Rioux, “Le concept de sécurité humaine”, in Jean-François Rioux (ed.), *La Sécurité Humaine* (Paris: L’Harmattan, 2001).

The concept of human security is innovative in its emphasis on enforcement of individual human rights. This is considered as the principal task of international order, even against the will of the states, which are mentioned as one of the main sources of individual insecurity. However, as we will see, in spite of its focus on individuals, human security can not be separated from institutional frameworks, particularly nation-states under which human rights are (or are not) implemented.

The emphasis on a vision that is no longer centered exclusively on sovereign nation-states promotes new forms of multilateralism, in which non-governmental actors, particularly NGOs, play a central role.²

Today there are several different views of human security circulating in the international sphere. The version proposed by the Human Security Commission – presided over by Sadako Ogasa and Amartya Sen³ and supported by the Japanese government – is particularly broad and conceptually diffuse. Seeking to add risks and threats to physical and environmental security to the UNDP concept of human development (such as epidemics, availability of medicine, poverty, provision of water, development and economic crises, use of firearms and physical violence, ecological disasters) this notion of human security suggests a holistic but not very precise vision of what a national or international policy of security/insecurity should be.

More focused visions, particularly those put forward by the Canadian government and researchers from Canada, hold that human security has five characteristics:⁴

1. It is a holistic concept comprising all the diverse sources of individual insecurity, including those related to poverty as well as physical violence.
2. It is centered on the human rights of individuals. In fact, it emphasizes the role of government as a source of insecurity for its citizens.
3. It values civil society as a privileged actor, implicitly diminishing the role of government.
4. It aims to have a global perspective.
5. It justifies external intervention by the international community in countries going through humanitarian crises.

2. On new forms of multilateralism, see the excellent review by Shepard Forman, *New Coalitions for Global Governance: The Changing Dynamics of Multilateralism* (Center on International Cooperation, 2004).

3. Available at: <www.humansecurity-chs.org/finalreport/index.html>. Last access on 15 September 2005.

4. For an updated presentation of the Canadian concept of human security and its role in foreign relations see: Ernie Regehr & Peter Whelan, *Reshaping the Security Envelope: Defense Policy in a Human Security Context* (Ploughshares Working Papers, 4-4, 2004). For more information on human security in general and the Canadian view in particular see: <www.humansecuritygateway.com>. Last access on 15 September 2005.

A report entitled “A Human Security Doctrine for Europe”, presented recently to the EU High Representative for Common Policy and Security Policy, presents a more precise strategic focus.⁵ The report highlights regional conflicts and failed states, advocating “... preventive engagement and effective multilateralism” (p. 6). In the current context, this approach is considered better than containment in terms of facilitating democratic transition. This is based on the diagnosis that interstate conflicts have decreased while new dangers related to “... lawlessness, impoverishment, exclusivist ideologies and the daily use of violence” (p. 7) have gained prominence. Hence, the five key threats to Europe are: “... terrorism, the proliferation of weapons of mass destruction, regional conflicts, failing states, and organized crime” (p. 8). The main sources of the threats are authoritarian states with repressive policies or state and non-state armed groups in failed states. It proposes to advance a clear legal framework for justified interventions. It also calls for operations on the ground that are based on the principles of human rights, clear political authority, multilateralism, a bottom-up approach, regional focus, the use of legal instruments, and the appropriate use of force.

The actors behind the concept

The concept of human security grew out of efforts to delimit a new doctrine for the international system in which human rights and development issues have a central role. It is a direct product of the end of the Cold War and of the structuring role that the human rights discourse came to play in international forums. The United Nations and small as well as medium-sized developed countries involved in international cooperation (such as Canada and Norway) pushed this new agenda beginning in the mid-1990s. Later, other European countries and Japan also came on board.⁶

There have been different actors and objectives behind the human security agenda. For the United Nations, particularly under Secretary General Kofi Annan, the aim was to create a discourse that would free the United Nations from submission to national sovereignty as the only source of legitimacy for international action. For

5. “A Human Security Doctrine for Europe”, the Barcelona Report of the Study Group on Europe’s Security Capabilities, presented to EU High Representative for Common Policy and Security Policy Javier Solana, Barcelona, 15 September 2004. Although the report has a more clear focus, it is unclear in its definition of what should be included within the notion of insecurity. In page 8 they refer to food, housing and health as possible candidates to be included in their definition of human security, although they indicate that “... their legal status is less elevated”.

6. A heterogeneous group of countries – Austria, Canada, Norway, Chile, Greece, Ireland, Jordan, Mali, Holland, Slovenia, Thailand and Switzerland (with South Africa as an observer member) – formed the Human Security Network in 2000, so far without much impact on the international scene.

medium-sized developed countries not aiming to project their military power, this was a doctrine that would orient international relations and, in particular, international cooperation. Latin American countries support, as we will see, a specific formulation of human security (multidimensional security) as a way to confront the United States' securitizing agenda. African countries, on the other hand, see human security as a concept that will allow them to increase their capacity to negotiate international support. Recently, as we have mentioned, the European Union has been using the concept to baptize their new foreign policy. Finally, over the past few years, a human security approach has been adopted by several NGOs and, in Latin America, even by some institutions of public order. For international NGOs, the human security perspective reinforces their self-image as beyond-border guardians of human rights, while national NGOs and government institutions tend to reduce/reorient the concept to internal security/public order issues.⁷

Criticisms of the human security concept

As a conceptual framework, the idea of security/insecurity is so general that it can be argued – and many do – that it is the nature of modern capitalist society to foment perceived insecurities (even to the point of being defined as a “risk society”). The international relations bibliography has the following main criticisms of the concept of human security:⁸

- It does not have a vision of power or the political institutions necessary for ensuring the effective implementation of human rights, including repression when necessary.
- It dilutes the specific problems of the struggle against physical violence within an agenda that, in the end, includes every possible source of insecurity, confusing different causal factors.
- It loses operational capacity by fusing very different social problems. In complex societies, the diverse areas included within the human security agenda are distributed among different sub-systems with relative operational autonomy and varied responsibilities (the armed forces, public health, social policies, and environmental policies). As a holistic concept that is not translated in analytical operational terms, this notion of human security is incapable of defining priorities and distributing responsibilities.
- It has a narrow and reductionist view of the state (in fact, individual security

7. For instance, the Brazilian National Public Security Secretariat website: <www.seguranchumana.org.br/home.htm>. Last access on 15 September 2005.

8. See various contributions in Jean-François Rioux (ed.), *op. cit.*

has always been present in the modern state) and an exaggerated emphasis on the role of civil society. It loses sight of the fact that public security and the protection of citizens cannot occur without solid institutions to guarantee public order and provision of justice.

Latin Americans and human security

The majority of human rights NGOs and the academic community in Latin America have so far tended to be critical of the concept of human security. To understand this criticism, one must think back to the continent's recent past, when military dictatorships used the all-inclusive doctrine of National Security to subsume various aspects of social life to the fight against communism and "national defense". Within this doctrine, public security forces including the police were under control of the armed forces. A major goal of democratization, then, was to reign in the armed forces. New constitutions restricted the armed forces' mandate to defending the national territory against external enemies, taking them out of functions related to internal security.

In this context, a human security perspective is seen as an attempt to "resecuritize" social life, placing social problems within the scope of security. (Paradoxically, when the concept of human security was introduced, the intent was just the opposite: to broaden considerations of security problems in order to bring interrelationships with broader social problems into focus.)

Further, the concept of human security generates certain unease in intellectual circles as well as in the armed forces insofar as it was developed in opposition to a vision of international relations based on national sovereignty. The foreign policies of Latin American countries in the 20th century were centered on the value of national sovereignty, which is comprehensible given the latent fear of an invasion by the United States. In spite of these criticisms we believe that it is possible and perhaps even advisable to continue working with the concept of human security in the region. After all, it is the only existing conceptual framework in which to develop a multilateral vision and respect for human rights and social development in international relations. However, we also believe it is necessary to define a more precise focus for analysis.

Human security as an analytical tool

The concept of human security can be viewed as embodying different, albeit not contradictory, meanings. Different social actors also put it into practice in different ways. One way in which the concept is defined is fundamentally normative, defining a moral horizon for international relations and societies in which all human rights are guaranteed. Another way sees human security

as a semantic field, rather than as a defined set of normative principles or conceptual tool. In this view, human security is understood as a loose conceptual framework that creates a common ground for dialogue among different actors in search of an international security agenda that prioritizes the problems of development and enforcement of human rights. A third reading of the concept, which will be explored in some detail in this paper, seeks to transform human security into an operationally relevant and analytically useful concept for social scientists.

An operational and analytically relevant concept of human security should:

- Produce a more narrow focus of “insecurity”. At the crux of the concept of human security is protection from organized or uncontrolled armed violence that is capable of threatening: (1) the stability of local democratic institutions; and/or (2) the physical safety of the population; and/or (3) produce an international community’s reaction (for instance, in the case of a genocide or training terrorists). Hence, humanitarian crises related to famine, health epidemics, or natural or ecological disasters are not included within a more focused concept of human security. We believe it would not be difficult, although it is beyond the scope of this paper, to argue the moral and political importance of differentiating between these types of humanitarian (or ecological or health epidemic) crises and destruction produced by intentional human violence.
- Include an analysis of the institutional and social framework under which human security is, or is not, assured. In fact the institutional framework is at the center of the different policies oriented by a human security analysis. Most of the cases of humanitarian or international intervention refer either to failing states or countries that are going through humanitarian crises. In both cases the basic problems are related to failing institutions. Undue emphasis on the capacity of NGOs and civil society in general to solve security problems is unrealistic, inefficient and escapist, not confronting the issues of strengthening the democratic state institutions. **There is no individual human security outside a state with political and administrative structures capable of assuring it.**
- Relate security and development issues without submitting one to the other. A security agenda that is insensitive to issues of global and national inequality, epidemics, environment deterioration, disillusionment and relative deprivation will be condemned to fighting a war against symptoms. A developmental economics agenda that reduces security issues to an epiphenomenon that doesn’t need specific treatment, investments and institutional build-up will find itself with a mounting problem that could eventually lead to authoritarian regimes and even state collapse.

A Latin American perspective on human security

From a Latin American perspective, human security should:

- Not conflate diverse social problems. While social problems are inter-related, each one possesses specific dynamics and requires specific policies and institutions. Recognizing the inter-relationships between problems, such as violence and poverty, should not imply a reductionist view of social problems. Sociological research has shown that it is not necessarily the poorest sectors of the urban population that get involved in crime and that armed violence, once consolidated, has a dynamic that is autonomous up to a certain point. In the same way, many of the problems placed on the multidimensional agenda refer to problems fundamentally associated with internal politics. We cannot forget, for example, that poverty in Latin America is sustained, above all, by social inequalities, corruption, and by the inefficiency of social policies.
- Develop an operational vision with a special focus on state institution building, which includes the participation of civil society but which ultimate goal is to assure the functioning of a state based on the rule of law. Human security-oriented research and action should focus on the insecurity resulting from armed violence, within a perspective that considers respect for human rights and comprehends the social context that generates such violence. Thus the prevention and repression of violence should act on the immediate causes as well as social contexts – in particular on the social groups most at-risk to be victimized by or involved in armed violence and crime.
- Advance not only an international but also a **national** multilateral approach to security problems, in which different stakeholders (*inter alia*, public institutions, NGOs, entrepreneurial and community associations) discuss and advance new approaches and policies.
- Recognize that in concrete situations there can be tensions between a universalistic view of human rights (or the defense of ecology) and the recognition of sovereignty as one of the pillars of the international system. While extreme cases can be handled by international courts many situations bear a level of ambiguity which requires open spirit and dialogue. At a local level it is important to increase the interaction between institutions responsible for the national defense and NGOs struggling for human rights. Otherwise mistrust and mutual recrimination will only hamper the advance of a more democratic agenda.
- Relate to the global debate on security within a variable geometry perspective. This means emphasizing that global concepts and agendas are only meaningful if they recognize the specificities of local conditions, and that they are only relevant insofar as they are useful for comparative analysis. Further, they should include different variations and typologies and not

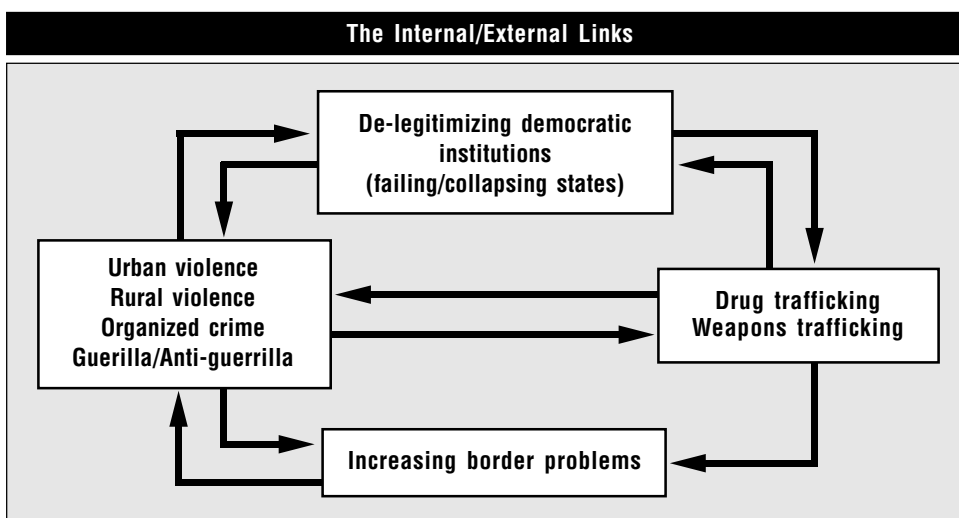
seek to be all-embracing simplifications of the style advanced by international agencies and the US government. More specifically, in Latin America – where countries are not major players in terms of military or humanitarian aid, nor are they rogue or collapsed states – the focus of human security should be on internal problems of public order that may have international consequences. The same variable geometry approach should be applied internally to Latin America, where seeking a common denominator has tended to generate very general and non-operational proposals. Sub-regional and bilateral agreements provide more realistic bases from which to advance a common security agenda. A human security agenda should be built from the local toward the global instead of the current tendency to produce global concepts and apply to national situations.

Part II: Towards a Latin American human security perspective

Latin American security problems: the internal/external links

Urban violence has increasingly taken hold of larger cities in Latin America and is becoming more and more associated with international drug trafficking, arms dealing and money laundering; these activities do not respect national borders and combating them depends on a multilateral effort by states in the region. Guerrilla warfare, previously in Central America and now in Colombia, has generated refugee problems and created tensions at the borders. Although international terrorist groups are not important overall, they do have (or had) certain significance around the triple border region between Brazil, Argentina and Paraguay.

Although inter-state armed conflict is not a relevant issue in Latin America



today, the impact of violence and politics under the influence of drug production and organized crime (and guerilla warfare in Colombia) have the potential to inflame inter-state conflicts and produce problematic regions, such as the triple border region and particularly the Amazon region. Perhaps even more importantly, they may result in a democratically elected government that could fall within the Bush doctrine of failing or terrorist-sympathizer states. Thus, the links between internal and external security problems can produce failing states as much as they can destroy state-building efforts in the region.

The Bush doctrine and Latin American security

Latin America constitutes the region of the world with the lowest levels of armed conflicts between states and the lowest military expenditures in relation to GNP. The region has consolidated borders, and is for the most part absent of intra-religious conflicts and strong ethnic hatred. Latin America is the only region in the world where all the countries adhered to an anti-nuclear weapons treaty.

The decade of the 1990s, which we could call a period of “blue globalization”, was a period of democratic consolidation on the continent. The agenda of the international system in general, and of United States/Latin America relations in particular, were dominated by economic themes and by the expectation that globalization, as well as new forms of economic regulation, would generate a system of international political governance founded in multilateralism. With the new millennium, analysts saw that the tides were quickly turning. Economic globalization did not produce expressive gains for a good part of the population of Latin American countries in this new era of “gray globalization”.

The Bush administration adopted a more self-contained posture in US international foreign policy with regard to institutional arrangements and supranational treaties. Following the events of September 11th, the United States redefined its strategic position as strongly unilateralist, and its foreign policy became focused almost exclusively around the fight against terrorism. Indeed, the term “terrorism” has come to be applied to practically all the organizations considered to be enemies of the US government, in many cases without any tie to international terrorism.⁹ The fight against terrorism and resulting American interventions were made under the guise of protecting human rights. This caused some doubts about the right of justifying external intervention in the name of human security.

The Bush government reproduced the same polarization and consequent

9. In a recent exhibit in New York organized by the DEA Museum, entitled *Drug Traffickers, Terrorists and You*, the concept of terrorism is broad enough to include a guerilla who killed an American officer in 1969 as an act of terrorism. The same exhibit on terrorism also included anti-smoking advertisements...

automatic alignment to US foreign policy as had been experienced in the period of communism. It has mainly failed and some changes are likely to be introduced in its second administration. In any case, the new international scenario can not be simplistically fit into the Bush doctrine. One can not ignore transformations in the international order brought by the events of September 11th and the ways that the fight against terrorism is changing international security strategies. The issue is not to deny the problem but to participate actively in defining the threats and different ways to confront them.

In the new context of militarization of international relations, all these factors have led the United States to marginalize Latin America in its system of priorities. This marginalization has deepened because the fight against terrorism is not seen as a priority security issue within the region, despite US efforts to polarize the world around this subject. In Latin America the fight against terrorism does not fill the space left by the fight against communism, which had the support of most of the dominant groups, the middle classes, and the local armed forces.

The region presents its own weaknesses in the international arena. In past decades, Latin American countries were not able to develop a shared vision of their security problems, nor a concrete agenda for action. Even more than Europe or Japan, Latin American countries are free riders in the international scene. While they enjoy the strategic umbrella of the United States, Latin American countries often feel they are victimized by the hegemonic power of their overbearing neighbor from the north. After the anti-communist struggle, different countries presented perspectives and priorities that varied considerably in terms of reorganizing the inter-American institutional system and defining security priorities in the region. The United States is the only country on the continent that presents a proposal for hemispheric security, while Latin American countries tend to favor local perspectives/interests and a defensive posture.

Without a doubt, the 1990s brought certain novelties and advances in the region, such as setting democratic order as a central factor for maintaining peace. Another new element was subregional agreements (Mercosur, Andean Area and Central America) with positive political-institutional implications for democratic consolidation. Even so, the common element of foreign policy in Latin America continues to hinge on the principle of non-intervention and on efforts to undermine or limit the capacity of the United States to impose its agenda on countries in the region.¹⁰ Faced with the United States' tendency to securitize the international agenda, Latin American countries have emphasized the pluridimensionality of the hemispheric security agenda, prioritizing problems associated with poverty, health, the environment and economic development.

10. The Resolution of the Special Conference on Security (27-28 October 2003) in Mexico clearly reflects these impasses.

During the anti-communist struggle, security apparatuses became more autonomous, particularly the armed forces. They developed doctrines of defense and public order centered in the notion of National Security and called for stronger armed forces, presenting themselves as representatives or defenders of the national interest in the struggle against the internal enemy – communism – and the external enemy – bordering countries. However, with the end of communism the main historical enemy evaporated and the processes of democratization (with civil governments focusing on internal national and social problems) reduced intra-national tensions.¹¹

In recent years important advances were made in building trust and collaboration between armed forces that had traditionally been rivals (particularly between Chile and Argentina or Brazil and Argentina). However, the armed forces in Latin America continue to be largely immune to democratization processes (in the sense of being open to public debate and to redefining their doctrine, which continues to be anchored in the notion of National Security). Thus, there is a dissonance between the military doctrine and the dominant political discourse, which emphasizes democracy and human rights. This is reflected even in the limited number of academic research centers and civil society organizations in Latin American countries that focus on monitoring the armed forces and police.

The way reality is perceived and conceptualized plays a fundamental role in the social realm. The Bush doctrine of war against terror may have a major impact on Latin American security systems and has the capacity to galvanize and polarize Latin American politics around a love/hate axis. Possibly one of the worst consequences of the current US anti-terror doctrine is that many Latin American politicians and intellectuals are able to gain recognition and popularity only by criticizing the United States government position. This allows them to avoid analyzing and confronting the continent's genuine security problems, including the development of an effective security doctrine capable of facing up to the US anti-terror agenda.

During the fight against communism, United States foreign policy found important support in different social and political sectors in Latin America, where communism was seen as a common enemy. However, the fight against terrorism does not mobilize local support as none of the Latin American social groups consider this struggle a priority. Furthermore, for the armed forces, particularly in Brazil, the US has become a main source of concern, especially due to its presence in neighboring Colombia and worries about a conspiracy to internationalize the Amazonian region. In this context, the use of anti-American slogans can be an easy way to gain public support, and can become a source of international strain.

11. Today these are reduced to certain cases of historic "bad feelings", for example between Chile and Bolivia, but the hypothesis of war has become practically excluded.

Towards a Latin American security research agenda

Easy anti-USA rhetoric is one of the obstacles to advancing a Latin American security agenda. In some cases like Colombia – seen by many in Latin America as “contaminated” by the strong US presence there – it affects the capacity to analyze and to advance an alternative, non-reactive, agenda. However, more specific issues are at stake.

Traditionally, the area of international relations was not a central field of inquiry among most of the leading Latin American social scientists. Although there are some relevant groups of researchers in the area, their approach is generally mostly traditional – that is, focused on foreign relations and international trade. At the same time, in recent decades, Latin American social scientists and NGOs have advanced research and practical proposals in the area of internal violence/security problems, focusing mainly on violence as an internal problem. There is a clear need for more research and discussions among practitioners on the **internal/external** links of violence and security and international relations issues. From the 1980s on, Latin American social scientists tended to focus on their own countries, abandoning comparative Latin American studies. This was a product of the defeat of the left, which had a regional perspective. It also reflects the specificity of the new democratic realities and their internationalization, which created closer ties with academic centers in developed countries. Most of the NGOs with a generally stronger Latin American focus do not have solid research capabilities.

Latin American countries’ foreign policies have so far tried to confront the US anti-terror doctrine with a concept of “multidimensional security”, which is quite close to that of human security, except that it does not include the idea of humanitarian intervention. The concept of multidimensional security identifies problems related to drug and arms trafficking, terrorism, health, poverty, economic crises and the environment as sources of insecurity, among others. Clearly this is not a proposal for an effective foreign policy doctrine, and does not confront possible scenarios for intervention. It does, however, counterbalance US foreign policy by relativizing and diluting its emphasis on defense.

Although in recent years an increasing number of Latin American NGOs have begun to focus on security issues, an important number of those focused on human rights have some difficulties advancing an affirmative agenda on security problems. This is partly due to the fact that any operational proposal needs to deal with the effective use of repressive tactics. A false dichotomy has been created between efficiency and transparency. Practical experience shows that efficiency is linked to transparency, but also that the emphasis on transparency should not be separated from a clear understanding of the operational specificities and needs of the security system.

Faced with this reality, the following question arises: In the current context, is it necessary or even possible to try to advance a pro-active Latin American

agenda that seeks to confront regional security problems and increase the region's autonomy on the international playing field? I believe that the answer to both parts of this question is yes. But the principles of non-intervention and opposition to the United States' agenda are not enough to confront the challenges underway. In the first place, while the United States' agenda could be reigned in to some extent, it can not be completely controlled. Due to the political, military and economic weight that it wields, the United States can only be confronted with another agenda that permits effective negotiations. That is, multilateralism at the regional level can only be constructed from an agenda that takes into consideration the problems (but not necessarily the diagnosis nor the solutions) raised by United States foreign policy. For the majority of the countries in the region, the relevant problems are: the reality of new forms of organized crime and terror that explode the distinction between internal and external policies; the emergence of problematic border regions associated with drugs, criminals, guerrillas and terrorism; and finally the constitution of territorial spaces, including urban spaces, where the state has lost effective control. Such issues demand new bilateral, sub-regional and regional arrangements, plus a renewed role/strategy for the armed forces and the collective security system in the region.

A **pro-active research and practical agenda** should confront the following questions:

The redefinition of the current vision of Latin American foreign policy centered on the principles of non-intervention and a pluri-dimensional agenda

Latin America needs to confront new internal and external threats with a strategy that reinforces democratic institutions in general and the law enforcement system in particular. We need to advance the discussion on national sovereignty, recognizing that the traditional position based on a closed perspective of sovereignty is no longer viable (and probably never was, but during a certain period it was possible to enjoy the illusion). There is a certain consensus that security problems in today's world go beyond the limits of national borders and the individual capacity of states to cope with security threats. In fact, in recent years Latin American countries have developed an "interventionist" posture in cases of maintaining democratic institutions. The general tendency for countries in the region to assume "sovereignist" positions is a legitimate attitude, grounded in the desire to create mechanisms that can repel unwanted interventions from the United States. However today's challenge is to advance an agenda of collective security that develops mechanisms that share decision making and inter-state operational systems, particularly – but not only – in border areas, while maintaining respect for national sovereignty.

New relationships between internal and external policies, between security forces and the constitution of problem regions

New forms of organized violence diluting divisions between national defense and internal public security demand a redefinition of the roles of the armed forces and the police, and increasing cooperation between them. This necessity comes up against various difficulties. Among the political elite of the region, particularly in southern cone countries, there is the recent memory of military interventions. This generates reasonable concern around the autonomy of the armed forces and a tendency to want to delimit their field to external issues and maintain them at the margin of internal questions. Historical experience from the period of the fight against communism also indicates that when they are closely involved with questions of internal security, the armed forces tend to subordinate political forces and their chain of command. (Even today, Brazil's main police force – the military police – is hierarchically organized in military terms with the highest post being that of colonel, making it dependent on the armed forces). A legitimate concern also exists that the armed forces are contaminated and corrupted by the considerable financial resources of organized crime.

Even so, integration of the armed forces and police is an increasingly present demand. This is because internal and external problems in the region are interlinked, because the borders are key areas in actions against organized crime, and because certain regions of the borders are “colonized” by groups outside the law. What changes are needed in the doctrine and governance of the armed forces in order to integrate them in efforts to quell new forms of violence? At the same time, how can public control be increased so that they do not overstep political boundaries? How can we integrate the police and their intelligence services with those of the armed forces while ensuring that each remains autonomous? How can sub-regional and regional cooperation efforts be developed between police and the armed forces? How can we guarantee shared inter-state mechanisms to control our borders? How can we treat “problematic” regions while preserving national sovereignty? How can we adapt and multiply the region's achievements and best practices, such as post-conflict reconstruction of the security forces in Central America, police reform experiences in Latin American cities like Bogotá and Mexico City, and projects with risk groups in slums like those developed by Viva Rio in Brazilian favelas? These pressing questions will require concerted efforts and coordinated responses from Latin American countries in light of the new security developments described above.

Facing the issues of violence, drugs and terrorism

Since the Latin American research agenda on international relations and security problems and policies is mostly defensive, different stakeholders (including social scientists, NGOs, and governments) tend to avoid discussing the concepts that

currently inform the international debate held not only by the United States but also by European and international organizations.

A local debate is needed to advance the regional view(s) of the phenomenon of drugs and terrorism. The current US security doctrine – which equates terrorism with any “anti-American” act, including drug production and trafficking, money laundering, guerrilla and violent political groups – confuses and fuses diverse problems that actually require differentiated solutions. Different types of violence have different social backgrounds and require different solutions. Even if we recognize that some criminal and violent political groups can become interconnected to international terrorist networks, this does not mean that they can be confronted with a common operational framework.

Most violence problems in Latin America with the capacity of destabilizing state institutions are related to drug dealing that produces the economic resources for crime and guerilla recruitment. Drug trafficking is at the center of internal/external security links with the potential to disestablish continental security. Solutions should be related to social contexts and should be based both on security arrangements that respect human rights so as not to alienate the poor sectors of the population, and on the advancement of an active agenda for social inclusion. Thus we need to substitute the US government’s concept of terrorism with a more precise and useful typology of the different forms of violence and their sources – without denying, when applicable, the potential linkages with international terrorism.

The study of different forms of violence itself needs further research. The idea that violence (and even terrorism) is related to extreme poverty is both morally and empirically wrong. Many well-meaning people and organizations associate violence and poverty as a way to justify more social investment. But it stigmatizes the poor and is not based on empirical facts: a recent nationwide study by Viva Rio¹² on armed violence indicates that the poorest sectors of society are not those most involved in violent criminal activities. Of course, contexts of social deprivation and exclusion produce the frustration and social basis for recruitment into and involvement in crime. However, more empirical research is needed to identify the specific groups most at-risk to engaging in armed violence (generally male youth) and policies to improve their chances in life, changing their malehood values and assuring inter-generational mobility

Redefining the concepts of collapsing/failing states

The same goes for the issues of “failing states” – a concept that has become common currency in the international arena, but is not widely discussed in the region. Latin Americans tend to (over)react to the concept of failing states, as they believe it may

12. See <www.vivario.org.br>. Last access on 21 September 2005.

pave the way for foreign intervention. Their main argument is that history shows that most Latin American states, in spite of political crises and social upheavals, are solidly grounded. This argument is well-founded. However, it neither assures future results nor does it confront the issue that deterioration of the institutional system in some countries can generate political realities that may cause the United States itself to (over)react, destabilizing countries and creating failing states.

The problems of failing and collapsing states can not be dissociated from development issues and economic policies.¹³ At the same time, they are the product of more complex consequences of globalization: democratization of expectations, new identities which may become secessionist, and the breakdown of traditional local powers and hierarchies. One of the sources of Latin American states' stability is their strong national identities and lack of open religious or ethnic conflicts. However, the latter may not continue to be the rule in some Andean countries where ethnic demands are mixed, although not reduced, to the economy. The last decades of political and cultural democratization – with the breakdown of clientelistic ties, individualization and the advancement of egalitarian values – have decreased tolerance toward government corruption especially in contexts where social inequality is increasingly unacceptable. This has paradoxically increased mistrust toward democratic institutions.

Latin American researchers could contribute with a more nuanced notion of “failing states” by highlighting processes through which states can begin to fail, but also how and where they find resources to maintain their stability. At the social research level, Latin America has a solid tradition of analyzing the complexities of state-building and violence. These analyses take institutional and social contexts into consideration, thus avoiding the oversimplification so common in the literature on international relations.

Advance comparative studies on police and judiciary reform to assure the rule of law

There was a period some years ago when international agencies actively supported reform of Latin American judiciary systems. During this period, much important research in this area was made available. The “fashion” seems to have passed and progress in this field has begun to lose momentum. Still, many of these studies did not incorporate functional analyses of security forces and small and light weapons use and control. Periodical reviews of the diverse Latin American experiences with police and judiciary reform would be fundamental to assure an effective and human rights-oriented system of law enforcement.

13. On this issue, see Susan L. Woodward, “The State Failure Agenda: From Sovereignty to Development”, MS 2004.

Conflict prevention and resolution

Latin American diplomacy in the last decade has made important gains, particularly in Central America. Yet research centers and NGOs working in these fields are still few. The same goes for early warning systems capable of relating internal conflicts and violence to their impact on democratic institutions and the effects of this internationally. We will need to overcome a tradition, still present in the social sciences and overwhelming in NGOs, of confusing analysis with denouncing abusive practices and analytical understanding with normative positioning.

Integration of civil society, hemispheric institutions and the United Nations

Security sector reform will need to find solid support in the public debate and in civil society proposals. At the same time, it is important to recognize that civil society is not immune from criticism. Many civil society institutions have shown a defensive posture based on affirming idealistic principles while pitting themselves against and confronting the positions of legitimately constituted governments without offering alternative proposals and practical solutions. This posture leads to alienation from government bodies. Civil society cannot simply go against or denounce state practices, but should seek to work together with governments to democratize public institutions and the security sector through dialogue and partnerships.

Key questions for those working on human security issues in the region should include the following: How can we create a dialogue between the government and civil society around security issues? How can we expand the quantity and quality of work by non-governmental organizations to reduce violence and reform security sectors? How can we disseminate and exchange experiences, creating a forum of organizations in the region that work in this field?

Improving research and stakeholders' dialogue on border issues

Border issues and problematic regions is another field in which there is a lack of solid research. Weapons smuggling can't be dissociated from piece-meal smuggling (in particular in the Triple Frontier region where thousands of persons trade goods from Paraguay into Brazil and Argentina on a daily basis) which is the main factor in corrupting border officials. Certain authors believe that some regions, particularly the Amazon, have become privileged spaces for trafficking weapons and drugs, and for the activities of armed groups. The legitimate concern with state sovereignty, especially Brazil's for the Amazon, creates barriers for the development of collective security strategies and multilateral mechanisms. Further efforts should be made to improve customs controls and to advance the dialogue between researchers and NGOs working on security issues, border regions and human rights with the armed forces and the police.

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ABSTRACT

In a litigation before the Inter-American Court of Human Rights, when the Inter-American Commission petitions a state to the Convention, evidence becomes a core issue. The Convention itself, as well as the Rules of Procedure of the Court, do not contain any regulations concerning the treatment of evidential activity, and, as a consequence, the particularities adopted by the Court have in fact resulted from its case law. The following aspects are essential to the understanding of the role of evidence: (a) particularities of the evidential activity within the Inter-American system; (b) constitution of the evidence of the case; (c) burden of proof; (d) evidence assessment system; and (e) standards to identify infringements to the Convention. This issue is of crucial importance, given the particularities presented by serious infringements to human rights. Such peculiarities have been taken into special account in the Court precedents. [Original article in Spanish.]

KEYWORDS

Evidence – Assessment of evidence – Sound criticism – Burden of proof – Evidence standards

EVIDENTIAL ISSUES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Alberto Bovino

In a litigation conducted before the Inter-American Court of Human Rights, when the Inter-American Commission on Human Rights brings suit against a state party to the American Convention on Human Rights, evidential activity is a core issue.¹

The relevance of the means evidence is clear if we focus on the chapters of facts and proof of any sentence issued by the Inter-American Court.² In its jurisprudence, the Court has defined principles and standards regarding evidential activity. The peculiarities of the system developed by the IAHR Court, mainly jurisprudentially, are such as to warrant a thorough review.

In the jurisprudence of the Court, the following aspects are referred to concerning the evidential activity: (a) particularities of evidential activity in proceedings conducted before the IAHR Court; (b) constitution of the body of evidence for a specific case; (c) burden of proof; (d) evidence assessment system; and (e) evidence standards to identify violation of rights protected under the American Convention.

1. As from this point, the Inter-American Court of Human Rights is referred to as the use the Inter-American Court or the IAHR Court; the Inter-American Commission, as the Commission or the IACHR; and the American Convention on Human Rights, as the American Convention, the Convention or the ACHR.

2. In the Canese case, for example, of the 229 paragraphs in the sentence, 23 were devoted to the evidence (item V, The Evidence, paragraphs 46-68), and 69 to the facts (item VI, Proven Facts, paragraphs 1-69), summing up to a total of 92 paragraphs devoted to the issues of facts and evidence (40%). See IAHR Court, Ricardo Canese v. Paraguay case, judgment of 31 August 2004.

This issue is of critical importance, especially if we take into account the peculiarities of cases representing serious infringements to human rights.

Singularities

The specificities of the international law on human rights can be appreciated in the development of the jurisprudence of the Inter-American Court concerning evidence. As we will see further on, these specificities structure a very specific evidential system. Indeed, it has been pointed out that:³

135. The Court cannot ignore the special seriousness of finding that a state party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner (emphasis added).

This quotation points to the fact that the intrinsic gravity of any violation of human rights is taken into account as a determining variable in the evidential system. On the other hand, on the same occasion the IAHR Court pointed out:⁴

138. Since the Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

139. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

140. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the states responsible.

Summing up, what is set out is the singularity of international law in general, and of international human rights legislation specifically; a distinction is made between criminal law and international responsibility; the effective goal of the international law on human rights is defined.

These are the circumstances that must be taken into consideration if we are to comprehend and regulate evidential activity in proceedings conducted before the Inter-American Court:

3. IAHR Court, case of Godínez Cruz. Judgment of 20 January 1989.

4. Id.

70. *In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding possesses its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure the parties' legal security and procedural balance.*⁵

89. *With the aim of obtaining the largest possible evidence, this Court has been very flexible in the admission and evaluation of the proof, in accordance to the rules of logic and based on experience. The procedure set forth for litigious cases before the Inter-American Court boasts its own characteristics, which sets it aside from domestic law procedures, the former not being subject to the inherent formalities of the latter.*⁶

On the other hand, one must take into consideration that:

75. *Lastly, the Court has maintained that [u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the state authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the state's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the author of such violations.*⁷

For this reason, it is possible to read in the above-mentioned case of Paniagua-Morales:

87. *Moreover, with respect to Mr. González-Rivera and Mr. Corado-Barrientos, the Court considers that state agents were involved in their detentions and murders, whether or not they were "G-2" (Military Intelligence) or from the Treasury Police itself. This case was also included in the investigations on record in the National Police report which attributed responsibility to the agents of the state.*

So far the peculiarities of evidential activity before the Inter-American Court. We are here dealing with serious infringements to international obligations, under a

5. IAHR Court, case of Paniagua-Morales and Others. Judgment of 8 March 1998.

6. IAHR Court, case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of 31 August 2001.

7. IAHR Court, case of Villagrán Morales and Others ("Street Children" case). Judgment of 19 November 1999.

unique procedure which is characterized by its informality and alleged differences compared to domestic law, and which does not aim to impute criminal responsibility, but rather to compensate victims of human rights violations.

This protective human rights proceeding is regulated so as to make it possible to allow the greatest number possible of elements of evidence, with the aim of establishing the truth of what has happened. In this sense, the only relevant issue which needs to be proven is that the violation reported can be attributed to a government agent, without the need to identify a concrete author.

Evidence of the case

Although one of the principles of evidential activity is that of the adversary system, and the procedure conducted before the IAHR Court, regulated by its Rules of Procedure, is a procedure involving parties, the evidence that is valued in each concrete case is incorporated in a very specific fashion.

Firstly, the set of elements of conviction that will be incorporated in a concrete case are put together with the evidence offered by the claimant and defendant:⁸

84. Article 43 of the Rules of Procedure indicates the appropriate procedural moment to submit items of evidence and their admissibility, as follows

1. Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto.

[...]

3. Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

[...]

86. It is important to point out that the principle of presence of both parties to an action rules matters pertaining to evidence. This principle is one of the foundations for Article 43 of the Rules of Procedure, as regards the time at which evidence must be submitted for there to be equality among the parties.

Thus, the parties offer their evidence within a contradictory framework. Nonetheless, given the special nature of international law on human rights, the Inter-American Court has broad powers in terms of evidential activity, as it can

8. Mayagna Community case, op. cit.

exercise its authority to produce and incorporate elements of evidence *sua sponte*, that is to say, without the request of the party.⁹ In this sense, Article 45 of the Court Rules of Procedure provides:

The Court may, at any stage of the proceedings:

1. *Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.*
2. *Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.*
3. *Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.*
4. *Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence.*

This, for example, is how the Court dealt with the untimely incorporation of certain documents on behalf of the state:¹⁰

112. ... Although the state did not make any statement about the reasons for the time-barred presentation of these elements of evidence and, therefore, did not explain the exceptional circumstances that would justify their admission by the Court, the latter considers that they constitute useful evidence inasmuch as they contain information about the facts examined, and accordingly incorporates them into the probative evidence based on Article 44.1 of the Rules of Procedure and deems them to be circumstantial evidence within the probative evidence, in accordance with the principle of “sound criticism”.

In the same way, it was decided that:¹¹

71. The documents provided by the Commission during the public hearing were presented after the statutory time limit had elapsed. The Court has maintained that the exception established in Article 43 of the Rules of Procedure is applicable only in the case when the proponent alleges force majeure, grave impediment or supervening events. However, although the Commission did not demonstrate such circumstances in this case, the Court

9. On occasions, the Court uses these faculties to produce the evidence requested by parties who have missed the opportunity of having access to it.

10. IAHR Court, case of Bámaca Velásquez. Judgment of 25 November 2000.

11. IAHR Court, case of Ivcher Bronstein. Judgment of 6 February 2001.

admits them, in application of the provisions of Article 44(1) of the Rules of Procedure, as it considers that they are useful for the evaluation of the facts.

In an identical way, regarding the evidence requested by the Court, it was sustained that:¹²

58. ... the documents supplied during the public hearing held in the instant case – both the copies of the national identification documents and the birth certificates and provisional custody certificates of Matías Emanuel and Tamara Florencia Bulacio – in the body of evidence, to facilitate adjudication of the case.

Furthermore, it is worthwhile pointing out that additional evidential material can also be evaluated when issuing the sentence:

98. The body of evidence of a case is indivisible and is formed by the evidence tendered throughout all stages of the proceedings. For this reason, the documentary evidence tendered by the state and by the Commission during the preliminary objections stage is admitted into evidence in the present case.¹³

68. The Court will assess the probatory value of the documents, testimony, and expert opinions submitted in writing or rendered before the Court. Evidence submitted at all stages of the proceedings has been included in the same body of evidence, which is considered a whole.¹⁴

This principle is evident. It refers to the evidence incorporated in the contradictory stage of the oral hearings before the Inter-American Court, and it is natural that the elements of conviction should be incorporated into the set of elements of evidence that are to be taken into account when proffering the sentence. The same would happen if we were dealing with evidence presented requesting provisional remedies.¹⁵

Finally, in a somewhat questionable decision that contributes to dilute the political principle of immediacy – a principle that typically applies to oral and contradictory proceeding –, Article 44.2 of the Court's Rules of Procedure allows the incorporation of the following to the records of the case being dealt with before the Court: "Evidence rendered to the Commission shall

12. IAHR Court, case of Bulacio v. Argentina. Judgment of 18 September 2003.

13. Mayagna Community case, op. cit.

14. Bulacio case, op. cit.

15. See IAHR Court, case of Herrera Ulloa v. Costa Rica. Judgment of 2 July 2004, paragraph 68.

form part of the file, provided that it has been received in a procedure with the presence of both parties, unless the Court considers it essential that such evidence should be repeated”.

This is a risky rule, since it could play against the immediacy of the proceedings before the Inter-American Court. If we bear in mind that ever since the new Rules of Procedure came into effect, the Court has had to deal with many more cases than before, and that this entity pressures the parties to obtain written statements from the witnesses and from the experts and do not present their statements in court, this rule could increase the trend to convert into writing a proceeding that should be completely oral.¹⁶

So far, we have reviewed the set of evidential elements that are part of the material to be used to establish the facts under dispute in a concrete case. Let us move on to take a look at the specificities of the evidential activity within the framework of this procedure.

The burden of proof

The burden of proof of the facts contained in the trial lies on the Inter-American Commission,¹⁷ since it undertakes the role of plaintiff:

128. Before weighing the evidence, the Court must address some questions regarding the burden of proof and the general criteria considered in its evaluation and finding of the facts in the instant proceeding.

129. Because the Commission is accusing the Government of the disappearance of Saúl Godínez, it, in principle, should bear the burden of proving the facts underlying its petition.¹⁸

Nevertheless, several circumstances reduce the weight of responsibility for the burden of proof. Firstly, the possible defenses of the defendant state are limited.

16. See A. Bovino, *The Victim before the Inter-American Court of Human Rights*, (“Interights’ Bulletin”, London: The International Centre for the Legal Protection of Human Rights, v. 14, 2002). It should be remembered that with the long terms or periods extending between the different stages of a proceeding, the growing importance of documents, allegations and witness statements and expert opinions presented in writing, all operate against immediation.

17. Since the Court’s new Rules of Procedure came into effect on 1 June 2001, the victim, the family members and his/her representatives have the autonomous legitimacy to intervene and share in the evidential burden with the Commission. See Article 23.1 of the Court’s Rules of Procedure. Here we refer to the evidential burden of the Commission only.

18. Godínez Cruz case, *op. cit.*

In a Peruvian case several inmates disappeared from a prison during a mutiny, and the Court said:¹⁹

65 The Court feels that it is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisons and then the investigations were under the exclusive control of the Government, the burden of proof therefore corresponds to the defendant state. This evidence was or should have been at the disposal of the Government had it acted with the diligence required. In previous cases, the Court has said:

[i]n contrast to domestic criminal law, in proceedings to determine human rights violations the state cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the state's cooperation. The state controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a state's jurisdiction unless it has the cooperation of that state. (Velásquez Rodríguez case, supra 63, paras. 135-136; Godínez Cruz case, supra 63, paras. 141-142).

By the same token, in the Aloeboetoe case, the Court exempted the Commission from having to demonstrate the filiation and identity of several people based on documentary evidence, since the absence of such documents was due to negligence by the state: “Suriname cannot, therefore, demand proof of the relationship and identity of persons through means that are not available to all of its inhabitants in that region. In addition, Suriname has not here offered to make up for its inaction by providing additional proof as to the identity and relationship of the victims and their successors”.²⁰

On the other hand, it is not always necessary to comply with the burden of proof for all of the facts invoked in the petition, as according to the Rules of Procedure of the Commission, Article 39: “The facts alleged in the petition, the pertinent parts of which have been transmitted to the state in question, shall be presumed to be true if the state has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion”.

Article 38.2 of the Court's Rules of Procedure adds: “In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have

19. IAHR Court, case of Neira Alegría and Others. Judgment of 19 January 1995.

20. IAHR Court, case of Aloeboetoe and Others v. Suriname. Judgment of 10 September 1993, paragraph 64.

not been expressly denied and the claims that have not been expressly contested”.

Because of this, the Court, for example, was able to come up with the following considerations:²¹

67. In the instant case, the state did not directly contest the facts alleged by the Commission or the charges of violation of Articles 7, 4 and 5 of the American Convention and Articles 1, 6 and 8 of the Convention against Torture. In answering the application and in its final arguments, Guatemala concentrated its defense on the contention that the facts of the case had been investigated by the courts, which had issued a series of decisions on them – including a judgment of the Supreme Court – that may not be discussed by other public bodies, under the principle of the independence of the Judiciary.

68. In this respect, the Court considers, as it has done in other cases, that when the state does not specifically contest the application, the facts on which it remains silent are presumed to be true, provided that the existing evidence leads to conclusions that are consistent with such facts. ...

In short, although in principle the burden of proof falls upon the plaintiffs, there are situations in which this burden becomes the responsibility of the state, and others in which the burden of proof can be simply dismissed, the claims being presumed correct in the absence of opposition by the state.

Assessment of evidence

Systems to assess evidence

The evidence assessment process is the method whereby the different elements of conviction validly incorporated into the records to take a decision on the facts are assessed. It is a rational analysis of the elements of conviction, subject to certain rules that organize the process. There are three traditional evidence assessment systems:

- Intimate conviction: this system is based on the non-existence of rules established *a priori* that attribute evidential value to the elements of proof and furthermore, on the non-existence of the duty to justify the motives of the decision and the assessment process. What is required is that the person delivering judging informs the factual conclusion that has been reached, without explaining how this was done. This is the classical jury system used proceeding.
- Legal proof: “The law carefully regulates the conditions, whether positive

21. Villagrán Morales and Others case, op. cit.

or negative, that should exist before reaching a certain conviction (number of witnesses, amount of proof, confessions, etc.), whereby the reconstruction of the fact is converted into a juridical operation”.²²

- Sound criticism: The system is characterized by an absence of abstract rules for the assessment of evidence. It requires that the decision be explained, through an explanation of the motives on which it is based, with reference the elements of conviction that were taken into account and how these have been appraised. The basis of the assessment must be rational, respect the rules of logic, of psychology, of experience and proper human understanding. “This method allows the magistrate the freedom to admit any evidence deemed to be useful to clarify the truth, and to weigh it according to the rules of logic, of psychology and common experience”.²³

Among these three systems, sound criticism is, beyond doubt, the best when it comes to court decisions to be made by jurists. This is the most reliable method to carry out evidential activity and to assess the value of conviction of the results of this activity, using rational mechanisms and the analytical faculties of the person who judges. Furthermore, in the domestic sphere, this system allows for control through appeals.

It is not, as happens in the system of legal proof or appraised proof – inherent to the inquisitorial system –, a rigid method, used to attribute a legally determined value to each class of evidential means. On the contrary, it is a method that does not pre-determine the value of the conviction of the different items of evidence, but establishes general guidelines, inherent to human reasoning itself, applicable to all evidential elements.

This is the method which with some inconsistencies is used by the Court, according to what is stated in its own decisions. Furthermore, the Court, with certain exceptions, makes a clear distinction between the assessment system adopted in its proceedings as compared to that generally used in domestic law.

The system adopted by the Court

Regarding evidence assessment, the Court has adopted a unique system that it consistently enforces in litigations. According to the explicit manifestations of the Court, it has adopted a broader and less formal evidence assessment system, as compared to domestic law. The underlying principle is that of sound criticism.

22. Martín Abregú, *La sentencia*, in AA.VV., *El nuevo Código procesal penal de la Nación. Análisis crítico* (Buenos Aires: Del Puerto, 1993, p. 207).

23. Abregú, *op. cit.*, p. 209.

The Court has stated this circumstance in its own decisions:²⁴

76. In conclusion, any domestic or international tribunal must be aware that proper evaluation of evidence according to the rule of “sound criticism” will allow judges to arrive at a decision as to the truth of the alleged acts.

...

81. The Court grants circumstantial status to the numerous previous police reports used as a basis for the final report. These reports contain interrogations, declarations, descriptions of places and facts, legal practices such as those relating to the removal of the victims’ corpses and other information. These previous police reports are useful in the instant Case because, by the rules of sound criticism, they help form an opinion on the facts; all the more so in these situations of kidnappings and violent death, in which attempts are made to erase any trace that would betray their perpetrators.

As we will see, one thing is what the Court says and another is what the Court actually does when assessing elements of conviction on which it bases its premises and facts for its resolutions. The system applied by the Court resorts, in fact, to **two different methods** of assessing evidence.

When dealing with elements of proof that have not been opposed, objected to or attacked by the other parties, the Court will, as a rule: (a) consider them as valid; (b) incorporate them into the evidential body; and (c) consider as proven the fact the element of proof tends to demonstrate. Thus, in the Suárez Rosero case, the Court established that:²⁵

30. No objections were made either to the statement of witness Ms. Carmen Aguirre or the expert report by Dr. Ernesto Albán-Gómez. The Court therefore deems the facts stated by the former and the expert’s observations on Ecuadorian law to have been proven.

In this sense, the Inter-American Court resorts to a conclusive principle, ascribing evidential value to those elements of certainty or conviction not contested by the parties, without being overly concerned with the value of the conviction in the evidential situation.

Such elements of conviction are granted an evidential value, not as a result of an analysis of their intrinsic value, and neither because of their consistency with the overall evidential situation. In fact, their value of conviction is not dependent upon the rules of sound criticism, but, rather, on the absence of opposition or objection by the counterpart. Thus, the elements of proof not

24. Paniagua Morales case, op. cit.

25. IAHRC Court, Suárez Rosero case. Judgment of 12 November 1997.

objected to by the parties has evidential value as a result of the simple consent of the counterpart in recognizing its value of conviction.

By making these assumptions, the Inter-American Court leaves aside the regime of sound criticism and limits itself to taking into account the possibility of the contenders contesting the element of proof.

Sound criticism as applied by the Inter-American Court

On other occasions, the Court will strictly apply the sound criticism system. But the application of this assessment method, which should be applied to all elements of conviction that are part of the evidential situation, is limited to a pair of specific cases.

In effect, the Court resorts to the specific sound criticism evaluation criteria when faced with the opposition or objection from the parties, or when the element of conviction contains intrinsic problems that render it unreliable or not very credible.

Thus, for instance, the Court adopts a consistent approach when assessing the statements of witnesses who could have some interest in the cause:

32. It is the well-settled jurisprudence of this Court that any interest which a witness may have in the outcome of a case, is not enough, per se, to disqualify such witness. This principle is eminently applicable to the evidence given by Margarita Ramón de Suárez and Carlos Ramón. Moreover, their statements were not contested by the state and referred to facts of which the witnesses had direct knowledge. Consequently, those statements must be admitted as suitable evidence in this Case.

33. With regard to the statement of Mr. Rafael Iván Suárez-Rosero, the Court considers that, since he is the alleged victim in this case and has a possible direct interest in it, his testimony should be assessed in the context of all the evidence in the Case.²⁶

...

75. As for Mr. Ivcher Bronstein's declaration, since he is the alleged victim and has a direct interest in this case, the Court believes that his statements cannot be evaluated on their own, but rather in the context of all the evidence in the proceeding. However, Mr. Ivcher's declarations should be considered to have a special value, to the extent that they may provide greater information on certain facts and alleged violations committed against him. Therefore, the statement referred to is incorporated into the pool of evidence with the above-mentioned considerations.²⁷

In fact, if these depositions were not treated in this fashion, it would make no

26. Suárez Rosero case, op. cit.

27. Ivcher Bronstein case, op. cit.

sense to take them in the first place. What is necessary is to be aware of the possible interests the deponent may have in the resolution of the case, and take this variable into account when assessing the statements submitted by the witness.

At this point, it is interesting to point out that the Inter-American Court applies the rules of sound criticism in the same way they are applied in domestic law.²⁸ Beyond the manifestations of international jurisprudence, the substantial distinction the Court alleges exists between international law and domestic law when referring to the assessment of evidence cannot be perceived.

It is, however, possible to acknowledge a peculiarity of international law in this respect: the practice of granting high evidential value to certain elements of conviction, when faced with the absence of additional or corroborating proof regarding a specific fact or circumstance. This practice, accepted in international law, is inadequate under a sound criticism approach in criminal law – given the high evidential standard that has to be met before imposing a guilty verdict –, but it is totally appropriate for international law, especially in the sphere of the international law on human rights.

Object of the process

The uniqueness in the treatment of evidential activity by the Court is confirmed by the practice that makes it possible to alter the factual object to be proven in the suit to establish the international responsibility of the state.

In this sense, the Court has taken decisions regarding the practice of forced disappearances whereby it has become possible to prove the charges in a unique manner. Thus, the Court has accepted as follows:²⁹

130. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

...

132. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of

28. It is the facts generating personal penal responsibility and international responsibility that are profoundly different. This does not hinder the evidence evaluation system from being applied in almost identical ways in both judicial contexts.

29. Godínez Cruz case, op. cit.

Saúl Godínez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

In the case in point, the normal requirement would have been for the plaintiff to be under the obligation to demonstrate the actual disappearance of the victim.

Given the approach accepted by the Court, on the contrary, the object to be demonstrated has been shifted to two circumstances: (a) the systematic practice of disappearances; and (b) a certain relationship between the disappearance reported and such systematic practices.

Regardless of which means of proof used to consider these facts as proven – witness deposition, expert opinions, documentary evidence – what is certain is that the actual facts to be proven have been modified.

Content of sound criticism

In those cases in which the Court applies the regime of sound criticism, it resorts to all types of elements of conviction. Thus, already in its initial sentences, the Court maintained that:³⁰

135. The Court cannot ignore the special seriousness of finding that a state party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.

136. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

137. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.

As can be observed, all these categories of proofs are also used in the domestic sphere. What is not made clear is what the Court refers to with the term “presumptions”. In a generic sense, a presumption is understood as an uncertain fact that has not been demonstrated as being true based on the clear evidence of an autonomous fact.

According to Palacio, there are legal presumptions and judicial presumptions. Legal presumptions (*iuris tantum* and *iuris et de iure*) are defined normatively, whilst

30. Godínez Cruz case, op. cit.

simple or judicial presumptions, on the other hand “are subject to the criteria of the magistrate, whose conclusions are not subject to pre-established rules, but must be established in conformity with the principles of sound criticism”.³¹

In the latter assumption, not only are these simple presumptions or inferences, when carried out rationally, absolutely valid; they also form a natural component of the sound criticism approach.

In any domestic criminal proceedings, for instance, and save if an admission of guilt is made, it can be difficult, not to impossible, to demonstrate directly each and every element of the charges.³² For this reason, several elements are inferred in the evidential situation, through an overall analysis of the case. Circumstances such as fraud, the motivations for the crime, etc., do not tend to be the object of direct evidence, but of inferences made based on other issues that have been effectively proven.

As for the rest, the elements of conviction mentioned by the Court, in the paragraphs transcribed, are also used generally when the sound criticism approach is applied.

Conclusions

As stated by the Court in its awards, the general evidence assessment system inherent to its proceedings is unique, and differs from that commonly adopted in the domestic sphere.

The most notorious difference is probably the practice of the Inter-American Court that ascribes full evidential value to the elements of proof not challenged by the parties. In this respect, the principle used will be dependant on the will of the parties regarding the value of conviction of the elements of proof. If the parties do not challenge it, the analysis that is the essence of the sound criticism approach is eluded.

When dealing with elements of conviction that are either unreliable, or have been challenged, the Court applies the sound criticism approach, heeding the intrinsic value of conviction of the evidential element, and its degree of consistency with the remainder of the evidential situation. In this process, the Court will occasionally attribute value of conviction to certain elements of proof which could have been questioned or are scarce in the absence of other elements of conviction.

Furthermore, it should be pointed out that the evidence assessment method

31. Lino E. Palacio, *Manual de derecho procesal civil* (6. ed., Buenos Aires: Abeledo-Perrot, 1986), pp. 598 and following.

32. Consider, on the other hand, the fact that, if exceptions, incidents and challenges have been submitted, each evidence item will encompass a countless number of factual issues that are irrelevant to the charge.

applied by the Court included direct evidence, circumstantial evidence, indications, indirect evidence and inferences. In this aspect, the sound criticism approach used by the Court does not differ from the usage current on the domestic sphere.

Finally, it should be stressed that the factual object to be proven is determined by the peculiarities of international law on human rights and by the requirements of international responsibility. One should also bear in mind that evidence standards required to establish international liability of a state differ to those prevailing in domestic law.

Evidence standards

As we have seen, the sound criticism approach adopted by the Inter-American Court is indistinguishable from that prevailing domestically within each member state. What can be distinguished is the evidence standard for international law on human rights. “Evidence standard” is here understood as the degree of conviction that must be attained in order to deem a given fact proven at a specific point in time in the proceedings. Thus, for example, Article 294 of the National Code of Criminal Procedure (Argentina) requires “sufficient motive” to summon someone for a formal interrogation or deposition.³³

However, these evidence standards are independent of the regime to assess the means of conviction. The standard of a semi-complete evidence – or preponderance of the evidence – can be established, and get to it through other systems of evidence assessment.

On the other hand, it is not true that the international system is less formal regarding evidence appraisal as compared to domestic law. In fact, when it comes to assessing evidence, the sound criticism approach, seems to function in an identical manner in both judicial spheres. In other words, sound criticism is just as informal at the Inter-American Court as it is at the courts of the respective states parties.

What is inherent to international law on human rights, because of its peculiarities, are certain more lax evidence standards. Nevertheless, the Court has insisted on informality in the **process of assessing the evidence**:³⁴

96. With regard to the formalities required in relation to tendering evidence, the Court has stated that “the procedural system is a means of attaining justice and ... cannot be

33. Article 306, Argentine National Code of Criminal Procedure, requires “sufficient elements of conviction to deem there exists a criminal fact and that the former can be accused as an accomplice of the latter” in order to pursue the proceedings.

34. *Bámaca Velásquez case*, op. cit.

sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved”.

97. In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding has its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure legal certainty and procedural balance to the parties. This grants the Court a greater latitude to use logic and experience in evaluating the evidence rendered to it on the pertinent facts.

Although some precedents only make reference to the assessment, others place matters in a more correct perspective and refer to informality in the process of **admission** and assessment:³⁵

89. With the aim of obtaining the greatest possible number of proofs, this Tribunal has been very flexible in the admission and assessment of evidence, according to the rules of logic and based on experience. A criterion, which has been pointed out and applied formerly by the Court, is that of the absence of formalism in the assessment of evidence. The procedure set forth for the litigious cases before the Inter-American Court boasts its own characteristics, that differentiate it from those applicable in the processes of domestic law, the former not being subject to the formalities inherent to the latter.

90. That is why “sound criticism” and the non-requirement for formalities in the admission and assessment of evidence are fundamental criteria to assess this one, which is appraised as a whole and rationally.

Quite frankly, we do not believe it can be upheld that a decrease in evidence acquisition formalities will result in a less formal process of assessment. The assessment process will continue to be the same. The only variation will be the body of evidence, not the assessment system.

In the cases of disappearance, the Court has developed a specific standard. As we have seen, due to the lack of direct proof, it is sufficient to prove the existence of regular pattern of disappearance, or other violations to human rights, and, additionally, of the link between the disappearance reported and the pattern itself.³⁶

The evidence standard is lax, but not as a consequence of any difficulty in obtaining more conclusive evidence, but, rather, due to the peculiarities of international law on human rights. Its aim consists in protecting human beings

35. See, for instance, the Mayagna Community case, op. cit.

36. Godínez Cruz case, op. cit.

from the actions of the state. Attributing responsibility to the state requires less than attributing personal criminal responsibility.

This is the reason for laxer evidence standards; it stems not from the informality of the evidence assessment valuation method, but from the object and aim of this branch of law. As we have already seen, it is not even necessary to individualize the state agent responsible for the harmful act, it is sufficient to find that whoever the agent might be, he/she was an agent of a state party.

Inquisitorial remains

Confusion between the means of proof and evidential value

Regardless of the manifestations of the Inter-American Court, and given that one of the methods used to assess evidence is that of sound criticism, it is possible to detect some remains of the inquisitive culture in the Court precedents.

As we have already seen, the system of sound criticism disunites the rules to incorporate a means of evidence in the proceedings from the rules on how to appraise its evidential weight.

In the *Bámaca Velásquez* case, the claimants wanted to include in the records the verbal statements of a person that had been originally recorded on videotape. The Court's opinion:

103. To this respect, the Court considers that the videotape that contains the testimony of Nery Ángel Urizar García, contributed by the Commission as documentary proof, lacks autonomous value and the testimony, which is the content, cannot be admitted for not complying with the requirements of validity, such as the appearance of the witness before the Tribunal, his/her identification, taking of the oath, control on behalf of the state and the possibility of questioning by the judge.

Here the Court made two mistakes. Firstly, it considered as a testimony what was clearly a piece of **documentary evidence**. In effect, this is not, by any means, a testimonial statement, as the affirmations of a person about a fact or circumstance that only he knows about is a testimonial statement, when it is rendered within the framework of judicial proceedings, in the presence of a public agent duly authorized to receive it, and only if the statement is given under oath. None of these requirements exist in this assumption. Finally, it is evident that these interviews were not carried out within the framework of court proceedings. The doctrine points out, in this sense, another essential difference between a testimonial statement and documentary proof: "Emilio

Betti ... correctly observes that ‘the chronological distance between the act and the representative effect, differentiates the documentary proof from the testimonial one’, given that a document is presented to the judge after it has been composed and, contrariwise, the representative effect of the testimony is perceived by the judge at the moment of receiving it”.³⁷

The document is the result of a human act, but is in itself a thing or an object. It is not an act that is representative in itself, as the statement of a witness – or a confession – that is received directly by the tribunal, but, rather, a thing or an object used to represent a fact.

The cassettes and the video are documentary evidence, in the same way that an interview published in a newspaper, an interview broadcast on television, a letter in which a person states a fact which makes it possible to incriminate another person – or even him/herself. In this sense it has been stated:³⁸

A document is a means of indirect evidence, real, objective, historical and representative ... equally, it may at times contain an extra-judicial confession and other types of witness statements from third parties ... strictly speaking, however, it will always be an extra-procedural act.

... A document ... has evidential content, which, in the course of judicial proceedings, in case it is presented, can constitute a confession (if its author is part of the process and the documented fact either injures or benefits the opposing party) or testimonial (in the other cases); but this document is a means of autonomous proof and not a simple testimony nor a confession. For this reason there are significant differences among the former and the latter.

When one or more persons decide to document an act, they are not rendering “an extra-judicial testimony with a confessional content, but are creating a document and are documenting this act, with its autonomous evidential nature, notwithstanding its representative, declarative character and the testimonial or confessional meaning of its content. If such document is invoked in any future case, by a party foreign to the original parties to the document, in its benefit, it becomes even clearer that we are not dealing with the testimony of a third party, because a true testimony is only given in a proceeding”.

But the most serious mistake committed by the Court was to reject the admissibility of the document, on the basis that it was not a statement of testimony. What a person says can become part of a proceeding in a myriad of

37. Hernando Devis Echandía, *Teoría general de la prueba judicial* (6. ed., Buenos Aires: Zavallia, 1988), t. 2, p. 494.

38. *Id. ibid.*, t. 2, pp. 501, 502 and 503.

ways. Although the most common one is through the testimony of that person him/herself, there are many ways whereby such information can be included in the records. Thus, for instance: (a) statement of another witness; (b) audio or video tape; (c) written reports.

However, the Court not only made a mistake when it considered that an interview recorded on videotape is a testimonial statement; the conclusion it reached based on this misconception was even more incorrect, since it effectively hindered the inclusion in the records of this means of evidence as documentary proof, which was what it truly stood for.

The worst of all was the automatic connection the Court established between the lack of conformity with the requirements for an incorrect means of evidence – testimonial –, and the absolute impossibility of this evidence being declared admissible and, as a consequence, assessed.

This ruling draws attention because is the reiterated jurisprudence of the Court, to the effect that press releases, although not documentary evidence – which they also are, over and above their evidential value –, can be entered in the case and be assessed according to the criteria of sound criticism.³⁹

Clues

Within the framework of the sound criticism approach, the different **means of evidence**⁴⁰ – expert witness opinions, documentary, testimonial, identifications, witness confrontation – are only differentiated from the remainder regarding the rules that organize their incorporation into the proceedings. As to their evidential weight, however, the different means of evidence have, in principle, an identical value.

In the sound criticism approach, each and every one of the means and elements of evidence⁴¹ validly introduced into the proceedings are “clues”, in the sense that they “indicate” a certain degree of probability that the fact is true

39. Ricardo Canese case, op. cit.: “65. Regarding the press documents presented by the parties, this Tribunal has considered that even though they cannot be characterized as having documental proof per se, they could be assessed as they recompile public and notorious facts, declarations of state officials and corroborate aspects relating to the present case”.

40. “Means of evidence is, in the proceedings, the procedural act regulated by law whereby an element of proof is introduced into the proceeding and its contents, if any (a testimonial declaration, an expert opinion, a document)”. Julio B. J. Maier, *Derecho procesal penal argentino*. (Buenos Aires: Hammurabi, 1989), t. 1b, pp. 579 and following.

41. The “element of evidence which directly or indirectly leads to a certain or probable knowledge of an object of the proceeding”. Id., *ibid.*, p. 579.

or untrue. No means or element of evidence has a predetermined value, nor the ability to “fully” prove the fact, nor a greater value than the others. Its value of conviction will depend on the evidential value of the means of the proof and not on the circumstance that certain means of evidence would carry a greater value of conviction than others.

The tribunal is free to appreciate each evidential element and establish its value of conviction, as long as it offers the rational motives on which it based its assessment, and as long as such reasons respect the rules of sound criticism.

Within the framework of the sound criticism approach, each and every one of the means and elements of evidence are, in truth, clues. On very few occasions will an element of proof, taken in isolation, have the ability to provide a direct and reliable demonstration of the different factual elements that make up the procedural object.

In some cases, it is possible, of course, for a single piece of evidence to provide a direct and reliable demonstration of an element of the procedural object – for instance, an autopsy will inexorably prove that the victim is dead. Nevertheless, it should be admitted that even in those cases in which there are witnesses who have actually seen the crime, the need to provide additional elements of proof will continue to exist, so as verify all of the assumptions of international responsibility.

If, on the other hand, we put aside the technical means of registration or investigation, and focus on the relevance that testimonial proof has in most of the cases, we can understand more fully the rationality of the system. Empirical investigations and experience unequivocally point to the fact that testimonial statements are not very reliable pieces of evidence.

At the same time, it is also a fact that there are good and bad witnesses. For this reason, only the rules of sound criticism will allow for an individualized consideration of each specific statement of testimony – the element of proof – so that the magistrate can issue judgment on the credibility, reliability and evidential value of each statement, based on its specific characteristics.

In this individualized consideration, the magistrate ought to focus on the content of the element of proof as such, and also confront it with the rest of the evidential body. In the jurisprudence of the Court, when the element of conviction, for some reason, is found to be not completely credible – for instance, when dealing with the victim’s testimony, it resorts to confrontation. Therefore, it is said that the Court resorts to the formula “it must be assessed within the body of evidence for this process”⁴² when faced with a problem that could affect the credibility of the witness. But this confrontation, according to the rules of sound criticism, should be carried out with each piece of evidence and not merely with the problematic ones.

42. See IAHR Court, case of Blake v. Guatemala. Judgment of 24 January 1998, paragraph 46.

In short, the Court has developed a jurisprudence which, when it enunciates its principles, sounds reasonable, but which in practice, when concretely appraising the elements of proof, would seem to resort to certain elements of the legal proof system.⁴³

Conclusions

Evidential activity constitutes a core activity in litigations conducted before the Inter-American Court of Human Rights, in which a state party is sued for the violation of one or more rights guaranteed under the American Convention.

Such an activity, on the other hand, presents certain specific features that are inherent to international law on human rights, due to the object and purpose of this branch of law.

Respecting the principle of contradiction, the elements of proof that are admitted in the records of a case are: those offered by the parties in their petition and in their counterplea, respectively; the relevant elements of conviction entered at other procedural stages; and any proof that the Court may find fit to incorporate on its own initiative.

The means to incorporate evidence are more informal than the procedures used in domestic law. The guiding criteria that informs the evidential activity is the discovery of truth about a probable violation of one or more of the rights guaranteed under the American Convention.

Evidential activity presents some singularities that are specific to international law in the field of human rights. Criteria such as the gravity of the violation, the need to repair the damage caused by the violation, the procedural object which consists in attributing international responsibility, all distinguish the procedure before the Court from other procedures inherent to domestic law.

This procedure, which protects human rights, is regulated in a manner that makes it possible to enter the greatest amount possible of elements of proof, with the aim of determining the truth of what actually happened. In this sense, the only relevant issue that needs to be proven is that the violation reported can be attributed to a public power, without the need of having to identify a concrete author.

The treatment of the burden of proof also presents a certain uniqueness.

43. The Court has stated: "62. The Tribunal verifies that the opinions of expert witnesses Máximo Emiliano Sozzo and Emilio García Méndez have been contributed to the process through the brief that recompiles them... As has been done on other occasions, the Court will not allocate the characteristic of complete evidence, but will assess its content as part of the evidential body and by applying the rules of rational judgment" (emphasis added). IAHR Court, case of Bulacio v. Argentina, op. cit.

In principle, the burden of proving the facts object of the petition falls upon the Commission.

Nonetheless, this burden is moderated in two different manners. Firstly, on certain occasions, the plaintiff is exempted from the burden of evidence if the means of proof are inaccessible to him, e.g., by being in possession of the state. In such cases, the plaintiff will be exempted from proving one or more facts or circumstances.

Secondly, if the state does not object to the facts of the petition, these will be considered as true, based on the application of a statutory presumption.

There exists a normative vacuum in everything that relates to the assessment of evidence, as neither the Convention nor the Rules of Procedure mention the issue. Because of this, it is the case law established by the Court itself that has shaped the system currently in effect.

The evidence assessment approach adopted by the Court is that of sound criticism. Although its jurisprudence has pointed out that the appraisal system adopted by the IAHR Court differs from that current in domestic law, being more informal, they actually operate exactly like each other.

The Court considers that it has complete freedom regarding the appraisal of evidence. Nonetheless, in all material issues, it adopts the sound criticism approach, and assesses direct evidence, circumstantial evidence and the proof of clues, including the necessary inferences to provide the foundation on facts as required to issue a sentence. When it appraises evidence, however, the Court resorts to certain internal practices that pertain to the legal proof system.

The litigious procedure before the Inter-American Court is characterized by an evidence standard that is not very demanding when it comes to showing the international responsibility of the state petitioned.

The laxity in the evidence standard bears no relationship whatsoever to the proof assessment system, and arises from the object and the purpose of international law on human rights.

In the case of disappearances, the Court has developed a specific standard that requires proof of a systematic practice of disappearances, and a certain relationship between the fact reported and the aforementioned practice.

In short, it is possible to point out that the Inter-American Court of Human Rights has undergone a consistent jurisprudential development in terms of evidential activity. In this respect, it should be mentioned that the adoption of a sound criticism approach under which to appraise the elements of conviction still draws some practices from a legal proof system.

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ABSTRACT

What do the small Murray Islands, in the Torres Strait off the Queensland coast have in common with Namibia? Unlike the bloody German/Herero and Nama wars, no shot was fired when Her Majesty's administration in Queensland declared the Murray Islands a crown colony. Yet, the two peoples had a common history of submission to a colonial power; and although allowed to remain on their ancestral lands, they were not informed that they'd been colonized. One of the oldest justifications for the occupation of inhabited land, the so-called *terra nullius* rule, was abandoned due to a lawsuit brought by the Meriam people, the Mabo case. The example of the Mabo case provides an opportunity to approach the land reform program in Namibia from a different perspective, at least in the central and southern regions of the country. The Namibian Constitution guarantees private property rights. However, the idea that more than one right can exist over a farm is not unknown to both common law and statutory law in the country. In this article the author proposes a process where several strategies are used to obtain the final goal: a just distribution of land to all the peoples of Namibia in such a way that it contributes to peace, prosperity and stability. [Original article in English.]

KEYWORDS

Land rights – Colonial rights – *Res nullius* – Namibian land issue – Herero genocide

EDDIE MABO AND NAMIBIA: LAND REFORM AND PRE-COLONIAL LAND RIGHTS

Nico Horn

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* or “practically unoccupied” in 1788. The Crown’s property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.¹

What do the small Murray Islands (Mer, for the natives), which have a total land area of hardly nine square kilometers in the Torres Strait off the Queensland coast (Australia) have in common with Namibia? Surely not geography, nor even the history of their occupation. Unlike the bloody German/Herero and Nama wars, not a shot was fired when Her Majesty’s administration in Queensland declared the Murray Islands a Crown colony of the British Empire, in 1879.

The governor of Queenstown had exercised some power over the islands from 1870 even though it they weren’t part of the colony. In 1878 Queen Victoria

1. Judges Deane and Gaudron in *Eddie Mabo and Others v. The State of Queensland*, decision of the High Court of Australia, FC 92/014, delivered on 2 June 1992, point 9.

signed Letters Patent to include the Murray Islands (with others in the Torres Strait), thereby annexing them in the colony of Queensland. The inhabitants were informed of their new status as British subjects in September 1879.

In terms of understanding the colonial law of that time, when a territory became part of the Crown's dominions, the law of England (so far as applicable to colonial conditions) became the law of the Murray Islands and their inhabitants – the Meriam people. Her Majesty acquired absolute ownership of all land in the islands. Neither the Meriam people nor the individuals on the islands had any right or interest to any land in the territory, only the Crown could grant possession or ownership to anyone.²

The Namibian occupation was a bloody affair, unlike that of the Murray Islands. The boundaries of Namibia were, like most African countries, drawn by the European colonial powers at the end of the 19th century. Before the arrival of the German occupation forces, Namibia was populated by some twelve tribes with very different customs, and had vaguely demarcated areas over which the tribal kings had jurisdiction.

Between 1884 and 1890 Namibia stretched from the Orange River at the southern border with South Africa to the Kunene and Okavango Rivers in the north, and from the Atlantic Ocean in the west to the 21st parallel in the east. The German colonial authorities later obtained a finger of land next to the Zambezi River. Walvis Bay was not included in Namibia, since it was occupied by Britain.

European mission societies started working in Namibia in 1840. In 1890 German forces in Namibia started a vigorous crusade to make subjects of the native tribes. This resulted in the extermination of 75% of the Herero population and 50% of the Nama and Damara populations.

The two peoples had a common history of submission to a colonial power. The British authority over the Meriam people in Queensland, while allowing them to remain on their ancestral land, had not informed them that they had been colonized. Instead they pretended they were there to advance the Meriam people.³ The German colonial authority over the Namibians, however, was

2. This principle was confirmed by the Crown courts for more than hundred years, beginning with the case of *Attorney-General v. Brown* (1847) 1 Legge 312 and confirmed on a regular basis over the years. See *R. v. Kidman* (1915) 20 CLR 425; *Liquidators of Maritime Bank of Canada v. Receiver-General (New Brunswick)* (1892); AC 437, *The Commonwealth v. New South Wales* (1923) 33 CLR 1.

3. See *Mabo and Others* (n. 2, 1992) 175 CLR 1 F.C. 92/014, point 20: "Without pausing to enquire into the legal support for the 'system of self-government' instituted by Douglas or for the jurisdiction of the Island Court, it appears that the Meriam people came peacefully to accept a large measure of control by Queensland authorities and that officials of the Queensland Government became accustomed to exercise administrative authority over the Murray Islands. Formal annexation had been followed by an effective exercise of administrative power by the Government of Queensland".

determined to either drive the Herero people out of their motherland, or kill them.⁴

The two peoples also shared the effects of Western law, commonly interpreted as denying their rights to their ancestral land. In determining property rights, it didn't really matter whether the land had been occupied, or if it had been ceded or conquered.⁵ In 19th and early 20th century colonial legal thought, all "undiscovered land", that is to say lands where no Europeans had settled, were considered as *res nullius*. It was immaterial whether or not the natives had previously occupied the land.

While one may resent the arrogance of 19th century colonial mentality, it nevertheless made sense to classify uninhabited land as *res nullius*, at least in legal terms. However, to classify land that had been inhabited for centuries as *res nullius*, had no logical sense. To make sense of this nonsense, jurists had to give the term a definition other than its clear, logical meaning. Initially the term was widened to include land not cultivated by native inhabitants.⁶ But even this definition did not fit the Namibian or the Meriam people, as in both cases the land had been cultivated.⁷

Other philosophers worked within a theory of supremacy of European nations over the territories of backward nations.⁸ This theory was clothed in morality by legal theorists who pointed out the benefits that would be brought to the backward people through Christianity, and through European culture and civilization.⁹

4. The decree of General Lothar von Trotha is well-known: "The Herero people will have to leave the country. Otherwise I shall force them to do so by means of guns. Within German boundaries, every Herero, whether found armed or unarmed, with or without cattle, will be shot. I shall not accept any more women or children. I shall drive them back to their people – otherwise I shall order them to be shot. Signed: the Great General of the Mighty Kaiser, von Trotha".

5. E. Evatt, "The Acquisition of Territory in Australia and New Zealand", in *Grotian Society Papers* (1968), p 16.

6. See E. de Vattel, *The Law of Nations* [original edition, 1797], Book I, pp. 100-101. See also Castles, *An Australian Legal History* (1982), pp. 16-17, quoted in the Mabo case, point 33.

7. This argument is often raised in Namibia. See Horn, *Land Claims and History* (Unpublished lecture before the Seis Farmers Community), March 2003. However, while the land was not developed in a Western sense of the word, the Herero and Nama people were known to be cattle farmers and they were extremely successful in it.

8. See Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), chapters III and IV, quoted by Justice Brennan in Mabo case, point 47.

9. *Johnson v. McIntosh* (1823) 8 Wheat 543, at p. 573 (21 US 240, at p. 253).

In the first half of the 19th century legal philosophers were already questioning the morality of killing, massacring and destroying local communities and then classifying the land as *res nullius*.¹⁰ It was not possible to reconcile the moral ideals of Christianizing and civilizing the backward people of Africa with the vicious, sadistic edict of General von Trotha.

However, no matter how illogical the theory may have sounded, it gave rise to another legal fiction in British colonial law: all the colonial land acquired by subjects of colonial powers in Europe belonged to the sovereign or Crown of the colonial power. The courts further ruled that this possession included both the land title and sovereign government. In other words, after colonization, in whatever form, the European sovereign became the political sovereign and the *de facto* owner of all the lands of the country. It further meant that the representative of the sovereign started with a clean slate, as if the land he'd taken over was indeed *res nullius*. Consequently, only the property rights acknowledged by him were valid. As a rule, the representatives of the sovereign gave title only to European settlers.¹¹

British and colonial courts followed the fiction of the supreme power and title over property in colonized countries for more than hundred years.¹² Although England occupied Walvis Bay and administered it as part of the South African colonies, no indigenous land claims by Namibians were ever made against England in Southern African courts.¹³ The closest case to Namibia was possibly the Rhodesian case of 1919.¹⁴ In that case the court,

10. J. Blackstone, *Commentaries on the Laws of England* (1830), 17th ed. Book II, chapter 1, p. 7: "... so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising (sic) on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind".

11. See *Attorney-General v. Brown* (1847), for an example of how the British-controlled courts dealt with challenges to the Crown's authority over land in the colonies.

12. See *New South Wales v. The Commonwealth* (1975) 135 CLR 337; *Wade v. New South Wales Rutile Mining Co. Pty. Ltd.* (1969) 121 CLR 177; and *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 for judgments appreciative of *Attorney-General v. Brown*, more than a hundred years later.

13. J. Sarkin, "The Coming of Age of Claims for Reparation for Human Rights Abuses Committed in the South", (in *SUR International Journal on Human Rights* n. 1, São Paulo: 2004), pp. 88-89, points out that only in 2001, eleven years after Namibia's independence, the Herero People's Corporation filed the first case relating back to colonial days, against Deutsche Bank, Terex Corporation and Woermann Line for the atrocities suffered under colonial rule.

14. *In re Southern Rhodesia* (1919) AC 211.

not unlike the courts in other parts of the Commonwealth, worked from the premise of irreconcilability between the tribal and colonial systems:

*The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.*¹⁵

Consequently, the issue was not so much to determine if the indigenous people had land rights, but if those rights were close to the British legal understanding of land and possession. If the indigenous people failed the second part of this test for whatever reason, they had no entitlement to land. Especially detrimental to the applicants was the fact that their social organization was so low, “that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged”.

The claim by the applicants that they “were the owners of the unalienated lands long before either the Company or the Crown became concerned with them, and from time immemorial ... and that the unalienated lands belonged to them still” was rejected by the Lords judges because the maintenance of those rights was inconsistent with the white settlement of the country and the system that caused the development in the country. As a result, another system replaced the aboriginal one.¹⁶

The irreconcilability of native rights with western legal understanding of title remained the standard, especially in British common law and the laws of the colonies for more than hundred years.

Forerunners of Mabo

While the courts of the Commonwealth virtually ignored the radical changes in the international community that had started with the formation of the United Nations after World War II, and gained momentum in the 1950’s and ‘60’s with the independence of the colonies of Africa and Asia, international law had taken the first steps to evaluate the meaning of decolonization.

The High Court of Australia took cognizance of the international law, especially of the advisory opinion of the International Court of Justice on Western Sahara.¹⁷ There the majority judgment defined *terra nullius* as a territory not

15. *Id.*, pp. 233-234.

16. *Id.*

17. International Criminal Justice Review (ICJR, 1975).

belonging to anyone.¹⁸ The court stated that only then can a legal occupation take place, other than by cession or succession.¹⁹

Judge Brennan in the Mabo case (point 40) summarizes the Western Sahara opinion as follows:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title, but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not as original titles obtained by occupation of terra nullius.

The judges were unanimous in their ruling that Western Sahara was not a *res nullius* when it was occupied by Spain in 1884.²⁰

The judgment in the Mabo case

The High Court bench of seven ruled in favor of the plaintiffs with one dissenting voice. Eddie Mabo had passed away before the judgment, but as part of the Meriam people the other two plaintiffs were granted a right to the Murray Islands, while their specific entitlements were to be determined by reference to traditional laws or customs.²¹

18. See also Legal Status of Eastern Greenland, P.C.I.J., Series A/B, n.53, pp. 44 and 63.

19. ICJR, 1975, op. cit., p. 39.

20. ICJR, 1975, op. cit., p. 86.

21. The full text of the judgment reads as follows: "(1) that the land in the Murray Islands is not Crown land within the meaning of that term in S. 5 of the Land Act 1962-1988 (Q.); (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes, the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title; (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers provided any exercise of those powers is not inconsistent with the laws of the Commonwealth".

It is not important for the purpose of this paper to go into all the details of the judgment. The essence of the judgment entails the acknowledgement of the High Court of Australia that pre-colonial land rights of the aboriginal people not only survived colonialism; but that those rights are enforceable by law. While judge Brennan who wrote the majority judgment relied strongly on developments in international law, the judgment made clear that those rights are enforceable in the municipal courts of Australia.

The Advisory Opinion of the International Court of Justice in the Western Sahara case played a decisive role in the argument of the court, as already stated. More interesting still is the fact that two judges took cognizance of the positive evaluation of Vice-President Ammoun in a separate opinion.²² Vice-President Ammoun affirmatively referred to one of the parties' submissions that the essence of the rights of indigenous people to the land lies in the spiritual and "ancestral tie between the land, or 'mother nature', and the man who was born therefrom (sic), remains attached thereto, and must one day return thither to be united with his ancestors".²³

The Vice President went on to say:

This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom (sic). It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as terrae nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.

The importance of the Western Sahara case is that it excludes the possibility of considering inhabited land as *terra nullius* based on technical terms or some test of civilization. Judge Brennan observed that if the concept of *terra nullius* or inhabited lands is no longer supported in international law, the doctrines developed by the court to defend it must also be rejected. The position of the Rhodesian case²⁴ that native peoples may be "so low in the scale of social organization" that it is impossible to grant them land title in terms of Western law is obviously out of line with international law. Since common law is not static, and has kept in step with international law in the past, there is no reason why it cannot now correct the illogical thinking of the past.²⁵

Judges Deane and Gaudron pointed to the fact that even in conservative Commonwealth jurisprudence indications are that at least some property rights

22. Points 40 and 41 of Judge Brennan and point 19 of Judge Toohey.

23. ICJR, 1975, op. cit., pp. 85-86.

24. *In re Southern Rhodesia* 1919, AC 211, at pp. 233-234.

25. Judgment of Judge Brennan, point 41.

of the native people were not only recognized, but also protected by the new colonial power.²⁶

Thus, in In re Southern Rhodesia,²⁷ the Privy Council expressly affirmed that there are “rights of private property” such as a proprietary interest in land, of a category “such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them”. Similarly, in Amodu Tijani v. Secretary, Southern Nigeria (“Amodu Tijani”),²⁸ the Privy Council affirmed and applied the “usual” principle “under British... law” that when territory is occupied by cession, “the rights of property of the inhabitants (are) to be fully respected”.

While these were never a full acknowledgement of the right to title, and often in the form of usufructuary occupation, the Crown nevertheless respected them. In *Adeyinka Oyekan v. Musendiku Adele*²⁹ the Privy Council stated that the courts in the colonies operate with the assumption that the Crown will respect indigenous property rights and pay compensation for land expropriated.

While the court discussed certain limitations to what it called native title, it is not necessary for this paper to go into the details. However, these rights vested in the indigenous peoples of British colonies meant little since it was practically impossible for them to defend their rights in courts of law.³⁰ The judges nevertheless do not see these rights as totally unimportant.³¹

The practical inability of the native inhabitants of a British Colony to vindicate any common law title by legal action in the event of threatened or actual wrongful conduct on the part of the Crown or its agents did not, however, mean that the common law’s recognition of that title was unimportant from the practical point of view. The personal rights under the title were not illusory: they could, for example, be asserted by way of defense in both criminal and civil proceedings (e.g. alleged larceny of produce or trespass after a purported termination of the title by the Crown by mere notice as distinct from inconsistent grant or other dealing). More important, if the domestic law of a British Colony recognized and protected the legitimate claims of the native inhabitants to their traditional lands, that fact itself imposed some restraint upon the actions of the Crown and its agents even if the native inhabitants were essentially

26. Judges Deane and Gaudron, point 10.

27. (1919) AC 211, at p. 233.

28. (1921) 2 AC 399, at p. 407.

29. (1957) 1 WLR 876, at p. 880.

30. Judges Deane and Gaudron, point VI.

31. *Id.*, point 30.

helpless, if their title was wrongfully extinguished or their possession or use was forcibly terminated.

Deane and Gaudron evaluated what they called the Dispossession of the Original Inhabitants.³² Their judgment, after looking at the historical dispossession of the aborigines and their exclusion from the Commonwealth Parliament, was based on the theory that legally New South Wales was a *terra nullius* when occupied in 1788, and was unaffected by native title.

The Mabo case is an important judgment for dispossessed native inhabitants of former European colonies all over the world. For one thing, the High Court of Australia not only acknowledged the important leaps in favor of justice taken by international law; it actually changed Australian common law to bring it in line with international principles of justice. In the process one of the oldest justifications for the occupation of inhabited land was abandoned. This was the so-called *terra nullius* rule.

Further, it not only recognized the existence of pre-colonial land rights, but made it possible for the dispossessed to defend their rights in courts of law. Consequently, the racist theories that had introduced Western legal questions and thought like the category of “rights of private property”; or that natives “are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society”³³ can no longer be justifications for not recognizing pre-colonial rights.

Criticism of the Mabo judgment³⁴

The Mabo judgment was not left unchallenged, and the challenges are familiar to Namibian observers. Cooray calls it an edict rather than a judicial decision. Galligan also accuses the High Court of making law, but adds that it has always done so.³⁵

Cooray compares the results of the Mabo case with apartheid:

This will be analogous to the notorious South African homelands. But it will be different from the South African experience, in that the inhabitants of territories in Australia will sit on vast mining and economic resources. The productive agricultural land and the rich mining areas were outside the South African homelands. The beneficiaries in Australia will be a tiny minority and the deprived will constitute the vast majority of

32. *Id.*, point X.

33. See (1919) AC 211.

34. This section is based on an article of L. Cooray, “The High Court in Mabo – Legalist or L’égotiste” (1992), that appears on the internet: <www.users.bigpond.com/smartboard/mabo/index.htm>. Last access on 14 September 2005.

35. B. Galligan, “The Power of Seven” (*The Weekend Australian*, 17-18 July 1993).

the people. In South Africa under apartheid the beneficiaries were a tiny minority, and the deprived constituted the vast majority.

Marchant criticizes the judges, and accuses them of being dishonest with history.³⁶ His main concern is that a decision on a group of farmers in the Murray Islands was made applicable to the Aborigine people of the Australian mainland.

Brunton echoes the typical paternalistic view that the indigenous people should be thankful for their dispossession, since the conquerors brought with them the advantages of Western civilization.³⁷

How would Aborigines live if Australia had not been conquered? Would their economic standard of living be any better? Would their tribal law and customs be superior to the Common Law and statutory mix which prevail today? Would they have developed the land in the way it has been developed? A negative answer to the latter three questions springs to my mind from common sense and logic.

Cooray complains that the constitutional approach as envisaged by Judge Brennan³⁸ gives the judges a political rather than judicial function.

From the criticism it seems as if the opponents of the Mabo decision were concerned that the rights of the present title holders (and eventually all whites) will be affected by the decision, and that they will eventually be dispossessed. While the Aborigines are a poor minority in Australia the fears seem unfounded, and almost impossible to an observer from Namibia. However, if the Namibian Supreme Court arrives at a similar application the fears of an indiscrete land grab will undoubtedly grip the sons and daughters of the European colonists.

Namibia and Eddie Mabo

The Namibian Constitution guarantees private property rights.³⁹ The government has always vowed to abide by the Constitution in any land reform program.

However, the debate has not always been conducted on a level of mutual acceptance of *bona fides*. One of the main reasons for this is possibly the fact that

36. L. Marchant, *Law of Nations and European Annexation of Australia* (1993), from unpublished manuscript of book, which is in the press, quoted in Galligan, op. cit. (not seen by the author).

37. R. Brunton, "Mabo and Reconciliation" (*IPA Review*, vol. 46, n. 2, 1993).

38. Judge F. Brennan, "The High Court of Australia in Mabo AMEC Leederville" (unpublished paper delivered in Canberra on 16 July 1992 to a Human Rights Conference and referred to in P. Connolly & S. Hulme, 1993, quoted in Cooray, 1992, op. cit.). The judge allegedly stated that a Bill of Rights would bring the courts into the political process as a new and dominant force. "Once the right is defined, the Court must weigh the collective interest against the right of the individual. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialize questions of politics and morality".

the government works from the very specific premise that land reform should be aimed at returning land presently in the hands of whites to the original inhabitants of the land. A case in point is the Namibian President's interview with Baffour Ankomah, editor of the magazine *New African*. Nujoma states that the Constitutional Principles were introduced by Americans and the British "to favor the interests of individual white settlers who had, 'by hook or by crook' acquired and occupied Namibian land during the colonial era". The President went on to make it clear that the willing buyer-willing seller clause in the Constitution was never in line with SWAPO's policy plan to address the land issue.

On the other side of the issue, the white farmers have emphasized the Constitutional rights in terms of Article 16. However, none of the parties have thus far attempted to place their points of departure in a historical context. For the government, the original inhabitants of the land are synonymous with the previously disadvantaged; on the other hand, the white farmers have thus far not made an effort to consider the possibility of the other rights that may exist on their farms.

The idea that more than one right can exist over a farm is not unknown in both common law and statutory law in Namibia. For example, the rights of a farmer on his or her land can be restricted by a lease contract that is in place at the time of the purchase.⁴⁰ Mining rights are not included in the rights of an agricultural landowner.

The example of the Mabo case provides an opportunity to approach the land reform program from a different perspective, at least in the central and southern regions of the country. I shall not deal with the question of whether the German/Herero war constituted an act of genocide.⁴¹ For the purposes of this paper it is adequate to accept that Namibia, like Western Sahara, did not constitute a *terra nullius* at the time of the German occupation. I shall further

39. Article 16. The text reads: "(1) All persons shall have the right in any part on Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens". (2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

40. The common law dictum "*huur gaat voor koop*" (lease takes preference to purchase) is enforced by the Namibian courts on a regular basis.

41. I generally agree with J. Sarkin in an as yet unpublished paper, that although the term genocide was not known in 1904, it is possible to evaluate the acts of the German forces and the communications of their commander, General L. von Trotha, with the definition that became part of international law. See also his earlier article (2004, op. cit.), pp. 67-126; and M. Hinz, "One Hundred Years Later: Germany on Trial in the USA – The Herero Reparations Claim for Genocide" (*Namibian Human Rights Online Journal*, vol. 1, n. 1, 2003).

accept at this stage *prima facie* evidence that confirms the property rights of the Herero and Nama people at the time of the German occupation.⁴²

If the rights of the Herero and Nama people can be substantiated for at least certain parts of the land, the debate can be lifted to a new level. Those people who suffered under colonial rule can then be identified. In the words of Vice President Ammoun of the International Court of Justice, they can become known to the white farmers presently owning the land as well as to the government which will ultimately decide the future of the land as the people who have ancestral “ties with the land, or ‘mother nature’, and the people who were born therefrom (sic), remain attached thereto, and must one day return thither to be united with their ancestors”.⁴³

A tribunal can be set up to hear the specific land claims of people or peoples. The Land Reform Act already provides for a tribunal. Small amendments to the Act will make it possible for the tribunal to deal with claims emanating from the 1904 wars. The South African Lands Claims Court has been in operation for several years and can also serve as a helpful example.

Once a claim has been proven, the government can take the process over and deal with it in terms of a pre-determined program, while simultaneously acknowledging the Constitutional rights of the present owners. It must be emphasized that pre-colonial rights, while surviving colonialism, can nevertheless not destroy the present property rights guaranteed by the Constitution, just as colonization could not destroy the property rights of the indigenous peoples.

The proof of indigenous land rights, however, is not without meaning. Government (or even the tribunal) can begin to negotiate with the present owner on the basis of willing buyer-willing seller.

If government and the present owner can reach an agreement, the only issue remaining will be the amount of money to pay for the farm. Since the claims will be of an individual or sometimes tribal nature, they will possibly fall outside the present budget provisions of government (50 million Namibian dollars for the last financial year).

Several donor countries and even the European Union, however, can be requested to assist in the financing at that part of the process. In the past both the European Union and Germany have expressed their willingness to assist Namibia with the financing of the programmed land reform.

It is granted that the process may not go as smoothly as it may appear on paper. What if the present owner is no longer a white person, someone from a previously disadvantaged group? What will the government do if the present owner refuses to negotiate, or if after negotiations refuses to sell his or her farm? What will

42. The presumptions are based on preliminary discussions with traditional authorities from the Nama and Herero people at workshops in Windhoek and Keetmanshoop (2004).

43. ICJR, 1975, op. cit., note 17, pp. 85-86.

the consequences be when more than one group lays claim to the same land?

It is not possible to go into detailed discussions on each of the above questions. Suffice to say that under certain circumstances the government may be convinced that expropriation is in the best national interest, while aggrieved parties will always have the right to take the matter to a court of law. The legislator may want to establish an appeal to a higher tribunal, or simply determine the High or Supreme Court as the body to hear appeals. If no donor can be found, government may decide to divert some of the money budgeted for land reform to this project.

Conclusion

The principles of the Mabo case are surely not the only process that will take land reform forward. The acknowledgement of pre-colonial rights will offer several advantages. For one, it will create a mechanism to deal with one of the saddest pages in the history of Namibia. It will also bring justice to peoples who almost suffered extinction at the hands of their European colonizers. And it will restore the land rights of second and third generation descendants of the pre-colonial owners of the land.

Obviously, no program can remedy all the injustices of the past. Opponents of the restoration of pre-colonial land rights may object to the fact that it will not treat equally all the people of the country who have suffered under South African occupation and apartheid.⁴⁴ Unfortunately, this program does not deal with the second big injustice committed against the people of Namibia. But it does negate the fact that it can deal with the injustices of 1904 in an effective manner.

Others will complain that it does not deal with the injustices of the pre-colonial wars between the different groups in the southern and central parts of the country. And yet others would want to know how a tribunal could deal with the injustices committed against nomadic groups such as the San and the Himbas before, during, and after colonization.

But it is not the intention of this paper to recommend the restoration of pre-colonial rights as the best or only possible option for land reform in Namibia. I would rather propose a process which would include several strategies to achieve the final goal: A just distribution of land to all the peoples of Namibia, so that land distribution contributes to Namibian peace, prosperity and stability.

Consequently, the willing buyer-willing seller program can go on, while the government simultaneously proceeds with its programs to expropriate the farms of foreign absentee farmers and other farms, if that is in the national interest.⁴⁵

A land tribunal on rights lost through the German colonization can assist in bringing a new dimension to land reform.

44. See Sarkin, *op. cit.*, pp. 92-93.

45. Since the program is still in a planning stage, one will have to wait until government has either defined national interest or start with the process before commenting on the pros and cons thereof.

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ABSTRACT

The article examines the importance of access to justice as an essential instrument for the protection of human rights in Nigeria and demonstrates that it is only when an individual has access to courts that his fundamental rights can be enforced. It then looks at the reality of the Nigerian situation and posits that there are a number of obstacles to the realization of access to justice in the country. These obstacles, such as undue delay in the administration of justice, high cost of litigation, reliance on technical rules, *locus standi*, and illiteracy are then examined in turn, in validation of the proposition. Finally, it inquires as to the prospects for improvement of access to justice in Nigeria and opines that if mechanisms such as judicial reforms and resort to alternative dispute resolution mechanisms are encouraged and properly put in place, with less emphasis on technical rules, and if the Legal Aid Scheme is strengthened, there would be meaningful access to justice which will impact positively on the quest for the protection of human rights in the country. [Original article in English.]

KEYWORDS

Nigeria – Access to justice – Judicial reform – Human rights

ACCESS TO JUSTICE AND HUMAN RIGHTS PROTECTION IN NIGERIA: PROBLEMS AND PROSPECTS

Nlerum S. Okogbule

The political and constitutional development of Nigeria has been intertwined with the quest for the promotion and protection of human rights in the country. From the pre-independence constitutional conferences,¹ through the First and Second Republics² and the various military dispensations, to the present democratic government,³ human rights questions have received merited attention in legal and political discourse. There has been a sustained struggle for the protection of the human rights of individuals, groups and communities in Nigeria.

The Willinck Commission⁴ and the Oputa Panel⁵ are eloquent testimonies of this concerted effort to promote and protect human rights and justice in the country. While the purpose of the former was to assuage the feeling of marginalization by the minority groups in the country during the colonial era, the Oputa Panel examined instances of human rights abuses from 1st January 1984 to 28 May 1999.⁶ Although the report of the Oputa Panel was eventually not released for public knowledge,⁷ much less implementation, the point remains that its very constitution signaled the concern of the government to correct the mistakes of the past in respect of human rights abuses. While these formalistic approaches can easily be mentioned, the same cannot be said of the actual implementation of mechanisms designed to facilitate the realization of basic human rights.

This is because there is a wide gulf between official pronouncements of respect for human rights and their actual implementation. The explanation for this appears to be that there still exists a number of substantive and

See the notes to this text as from page 109.

procedural obstacles or impediments that not only inhibit the actual implementation of such measures, but preclude the masses in general from having access to justice in Nigeria.

The question is then what are these impediments and how can they be surmounted to guarantee access to justice for the vast majority of Nigerians? Are there any in-built legal mechanisms that can be deployed to ensure the attainment of access to justice in the country? What has been the response of successive governments to the quest for the enforcement of basic rights through increased access to justice?

This paper purports to examine these questions and to chart a new course in the quest for the promotion and protection of human rights in Nigeria through enhanced access to justice. We will first discuss the concept of access to justice and its relationship with human rights, before proceeding to examine the various substantive and procedural obstacles conspiring against effective access to justice.

The concluding part of the paper will deal with how the legal system can be made more responsive to the yearnings and aspirations of Nigerians by guaranteeing that individuals and groups will have access to justice in the country, and consequently enhance human rights protection.

Conceptual framework

Access to justice can be looked at from two main perspectives: the narrow and the wider senses. In the narrow sense of the term, it can be said to be co-extensive with access to the law courts while in the wider connotation it embraces access to the political order, and the benefits accruing from the social and economic developments in the state.⁸

One may therefore say that, generally speaking, access to justice implies access to social and distributive justice. It is however important to underscore the point that these perspectives are not necessarily disconnected since the extent to which one can have distributive justice in any system is largely determined by the level and effectiveness of social justice in the country. The consequence of this is that any discussion of one aspect of the concept will necessarily entail a reference to one or more components of the other. This is because without access to justice, it is impossible to enjoy and ensure the realization of any other right, whether civil, political or economic. Thus, while this paper will emphasize the concept from the narrow perspective, the wider conception of the term will also be incorporated in the analysis.

Bearing this in mind, one may therefore say that access to justice simply refers to the substantive and procedural mechanisms existing in any particular society designed to ensure that citizens have the opportunity of seeking redress

for the violation of their legal rights within that legal system. It focuses on the existing rules and procedures to be used by citizens to approach the courts for the determination of their civil rights and obligations.

It entails more. It has been said that access to justice is not limited to the procedural mechanism for the resolution of disputes but includes other variables like the physical conditions of the premises where justice is dispensed, the quality of the human and material resources available thereat, the quality of justice delivered, the time it takes for the delivery of justice, the moral quality of the dispenser of justice, the observance of the general principles of the rule of law, the affordability of the cost of seeking justice in terms of time and money, the quality of the legal advisers that assist the litigants, the incorruptibility and impartiality of operators of the system.⁹

It is therefore apparent that access to justice is a charged concept that embraces the nature, mechanism and even the quality of justice obtainable in a society as well as the place of the individual within this judicial matrix.

It is also important to underscore the fact that access to justice is undeniably an important barometer for assessing not only the rule of law in any society but also the quality of governance in that society. This brings to focus the present refrain about transparency, accountability and good governance as an effective panacea for socio-economic development.¹⁰

While justice itself is an elusive concept,¹¹ it can loosely be said that it implies equity and fairness; and for there to be meaningful access to justice, there must be some element of fairness and equity in a system to guarantee the realization of basic fundamental rights.

Moreover, to enhance access to justice in any society it is necessary for certain basic infrastructures to be put in place and the requisite number and quality of the personnel involved in the scheme.

For instance, where the courts are not sufficiently manned, or manned by men and women who are morally depraved, then such a State can hardly guarantee social justice to its citizens. Indeed, corrupt judicial officers may very well act as serious impediments to the attainment of justice even where the infrastructures and legal instruments are well-wrought and structured.¹²

Interface between access to justice and human rights protection

The relationship between access to justice and human rights protection stems from the fact that it is only when individuals have access to the courts that they can espouse and seek for the protection of their basic rights. In other words, the legal and institutional structures existing in a system may be such as to preclude the citizens from having access to the courts, who are therefore

unable to seek for the enforcement or protection of their basic rights.

While some of these legal and institutional mechanisms may have been put in place to achieve particular objectives, they may indeed constitute formidable obstacles to the promotion and protection of human rights.

Yet other obstacles may be traceable to the structure and composition of the political and economic systems operative in a given country. In the case of Nigeria, it does appear that a combination of the obstacles in the first and second categories has led to a systemic inability of the legal order to guarantee access to justice in the country. The importance of this second class of obstacles stems from the fact that for a third world country such as Nigeria, where the level of illiteracy is unacceptably high, and the conditions of existence extremely difficult for people to eke out a living, issues concerning human rights protection necessarily take a secondary position in the scheme of things.

Professor Claude Ake put the importance of these obstacles in their proper context and perspective when he observed as follows:¹³

For reasons which need not detain us here, some of the rights important in the West are of no interest and no value to most Africans. For instance, freedom of speech and freedom of the press do not mean much for a largely illiterate rural community completely absorbed in the daily rigors of the struggle for survival... if a Bill of Rights is to make sense, it must include, among others, a right to work and to a living wage, a right to shelter, to health, to education. That is the least we can strive for if we are ever going to have a society which realizes basic human rights ... in Africa, if liberal rights are to be meaningful in the context of a people struggling to stay afloat under very adverse economic and political conditions, they have to be concrete. Concrete in the sense that their practical import is visible and relevant to the conditions of existence of the people to whom they apply. And most importantly, concrete in the sense that they can be realized by their beneficiaries.¹⁴

Indeed, to a large majority of citizens, issues of human rights protection appear to be luxuries that they can hardly afford.¹⁵ The result is that it is often seen as an elitist past time designed to attract attention, even when the underlying objective is the promotion of corporate good.

Factors inhibiting access to justice in Nigeria

A number of obstacles conspire against access to justice in Nigeria. While some of these obstacles are substantive in nature, others are procedural and yet others have their roots in the present political and economic system in the country. We shall here examine some of these factors to see how they have continued to inhibit access to justice in Nigeria.

Delay in the administration of justice

That there is inordinate delay in the administration of justice in Nigeria is a pedestrian statement. What is however difficult to understand is how Nigerians have been able to live with this phenomenon for several decades without proffering a lasting solution to it. Very often, we see ordinary cases of unlawful termination of employment or even those for the enforcement of fundamental rights lasting between three to five years or even more. A number of circumstances could give rise to this delay: lawyers writing letters of adjournment of cases, inability of judges and magistrates to deliver judgments on time, failure of the police or prison authorities to produce accused persons in court for trial, the rule that once a magistrate or judge is transferred and a new one takes over a case, it has to start *de novo*, etc.¹⁶

The bottom line is that today it has almost become an accepted fact in Nigeria that cases must last several years in court before they are concluded.¹⁷ Under such circumstances, citizens would naturally be reluctant to initiate actions for the enforcement of their basic rights.

There is no doubt that such delays not only erode public confidence in the judicial process but also undermine the very existence of the courts (see Oputa, *op. cit.*, note 8). This is in spite of the fact that speedy trial is guaranteed by Article 36 (paragraph 1) of the 1999 Constitution which provides that: “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality”.¹⁸ In the same vein, Article 36 (paragraph 4) of the Constitution provides that whenever any person is charged with a criminal offense, he shall be entitled to a fair hearing within a reasonable time by a court or tribunal.

Unfortunately, the Constitution does not define the meaning of the expression “within a reasonable time” as used in these subsections. The Supreme Court however had cause to define this phrase in the case of *Gozie Okeke v. The State*.¹⁹ In his judgment, Justice Ogundare held that:²⁰

The word “reasonable” in its ordinary meaning means moderate, tolerable or not excessive. What is reasonable in relation to the question whether an accused has a fair trial within a reasonable time depends on the circumstances of each particular case, including the place or country where the trial took place, the resources and infrastructures available to the appropriate organs in the country. It is, therefore, misleading to use the standard or the situation of things in one or a particular country to determine the question whether trials of criminal cases in another country

involves an unreasonable delay ... A demand for a speedy trial, which has no regard to the conditions and circumstances in this country, will be unrealistic and be worse than unreasonable delay in trial itself.

His Lordship went further to state that in ascertaining whether the trial of an accused person was held within a reasonable time, the following four factors are to be considered, namely, “the length of the delay, the reasons given by the prosecution for the delay, the responsibility of the accused for asserting his rights and the prejudice to which the accused may be exposed”.²¹

Nevertheless, it is clear that any trial which lasts more than three to four years can hardly be said to be “within a reasonable time”. There are many causes of delay in the judicial process: some of these are endemic in the system like highly technical and complicated rules of procedure, while others are caused by operatives of the system, those who serve court processes, the lawyers who ask for unending adjournments of cases, and judges who lack the virtue of promptness (see Oputa, *op. cit.*, p. 162).

While it may be conceded that some delay may be unavoidable in civil or criminal proceedings, since the parties are to be given “adequate time and facilities”²² for the preparation of their cases, it becomes offensive and injurious to the due administration of justice when delay is inordinate. In this connection, the courts should consider seriously the issue of applications for adjournment of cases, and it may be suggested that adjournments designed to aid the due process of litigation should be considered, while those dictated by sheer laziness or a failure to grasp the real issues in dispute should not be entertained. This is because the court has a discretion to grant or refuse an adjournment.²³

However, even as we insist on the desirability of speedy disposal of cases, one must bear in mind the need to give all parties the opportunity to present their cases before final decision by the court. As Justice Mikailu pointed out in the case of *Governor of Ekiti State and 4 Others v. Prince James Osayomi*:²⁴ “Every party is entitled to a fair hearing and there should be no over speeding and no stampeding in order to enable the trial court arrive at a just decision. Justice delayed is justice denied but justice rushed may result into justice being crushed”.²⁵

Thus in this case where the trial court refused to give the defendants the opportunity to give evidence in the case, with the purpose of avoiding undue delay, it was held that the action violated the requirements of fair hearing and a retrial was ordered. This is because the doctrine of fair hearing is one of the immutable and fundamental principles of Nigerian Constitutional Law, and any other rule which offends it, no matter how well-intentioned, must necessarily take a secondary position.²⁶

Cost of litigation

It is a well known fact that, relative to the economic situation in Nigeria, the cost of litigation in the country is so high that the ordinary Nigerian can hardly afford adequate legal representation when he has a legal matter to pursue.

This is all the more so if one considers that the vast majority of Nigerians are constantly preoccupied with how best to make a living for themselves and their extended family.

Perhaps in order to enhance their own economic standing, legal practitioners in Nigeria have devised the method of collecting not only their professional fees but also transportation fees each time they go to court, thus invariably adding to the financial burden of the litigants. When this is considered against the background that a particular case could last up to four or five years, then the enormity of the financial burden on litigants can better be appreciated.

As if this were not enough, filing fees in some courts are so high that it is often impossible for majority of Nigerians to have access to the courts. This is particularly so in the case of the Federal High Court, where the filing fees are related to the amount of monetary claims made by litigants. The result is that Nigerians, especially those from the Niger Delta region who are the usual victims of oil spillages, pollution and other environmental hazards, find it extremely difficult to exercise their legal rights when these petroleum-related activities adversely affect their normal activities.²⁷

Under the current Rules of the Federal High Court,²⁸ for a claim of ten million naira, the litigant must pay a filing fee of over fifty thousand naira and this must be paid before the filing of the suit. Moreover, for matters requiring survey plans and valuation reports, the Nigerian citizen, rich or poor alike, is required to ensure that these are already attached to the Statement of Claim at the time of filing, even when it is known that the payment of these professionals could very well be beyond the financial capability of the litigants.

Effect of some constitutional provisions

It is ironical that some of the constitutional provisions basically designed to guarantee the protection of fundamental rights, unwittingly have the effect of precipitating delays in the judicial process. In this connection reference must be made to some provisions of the 1999 Constitution. Article 36(6).b for instance, provides that “every person who is charged with a criminal offense shall be entitled to be given **adequate time and facilities** for the preparation of his defense”.²⁹

How has this constitutional provision been interpreted or applied by the courts?

The guiding principle has been to ensure that an accused person is allowed to utilize the available opportunities to properly present his defense in a criminal case. This implies for instance, that if an accused person is arraigned in court and does not have a counsel, the court will oblige him with an adjournment to enable him secure the services of one.³⁰ Similarly, when he requires a particular document or court process for his defense and these are not immediately available, he should be given enough time to make arrangements to obtain the said document or court process or even file a process if he intends to do so.³¹ Ordinarily, the application of this rule should not result in undue delay, but in the peculiar circumstances of Nigeria, with the ubiquitous Nigerian factor,³² it has often resulted in prolonged delays and has often been abused.

Undue reliance on technical rules

Law is an inherently technical subject and this technicality is manifested in the various rules and procedures in place. For a litigant to be able to approach the courts, he has to retain the services of a legal practitioner who will initiate the appropriate action, on his behalf.

The litigant, however well educated he may be, is usually unable to understand the intricate processes and rules applicable to his case. The situation is certainly worse for an illiterate Nigerian, and when one realizes that a vast majority of Nigerians are illiterate then the actual picture can better be appreciated.

Add to this the procedural problems that are often encountered in the filing of suits for the enforcement of fundamental rights, and the picture is complete. There had been controversy as to the proper procedure to be followed in the commencement of actions for the enforcement of fundamental rights in Nigeria. This problem became more critical following the coming into effect of the Fundamental Rights (Enforcement Procedure) Rules 1979.³³ While some judges are of the view that the only acceptable procedure is that prescribed under the Rules, others take a contrary position. Thus in the case of *Din v. Attorney-General of the Federation*,³⁴ Justice Nnaemeka Agu declared that: “The Fundamental Rights (Enforcement Procedure) Rules 1979 have prescribed the **correct and only procedure** for the enforcement of fundamental rights which arise under Chapter IV of that Constitution”.³⁵

This procedure entails making a prior application *ex-parte* for leave to apply for the enforcement of the fundamental right, and subsequently filing a motion or originating summons together with the supporting statement and affidavit.³⁶

However, in the subsequent case of *Alhaji Dahiru Saude v. Alhaji Halliru Abdullahi*,³⁷ where the plaintiff commenced the action for the enforcement of his fundamental rights by originating summons after obtaining leave of court and the summons was not signed by the trial judge as prescribed in the Rules, the Supreme Court held that it was immaterial what procedure was adopted as long as it is clear that the relief sought was the enforcement of fundamental rights. In the words of Justice Kayode-Eso:³⁸ “It is my view that it would not matter by what manner that application has been made, once it is clear that it seeks redress for infringement of the rights so guaranteed under the Constitution”. He added that the Enforcement Procedure Rules are clearly worded and does not lay the procedure therein contained as the only procedure by which redress could be sought.³⁹

There is also the related problem of determining whether a claim for the enforcement of fundamental rights can validly be joined to one relating to other substantive claims.⁴⁰ The watershed in this area is the case of *Alhaji Umaru Tukur v. The Governor of Taraba State and 2 Others*,⁴¹ where the appellant was deposed as the Emir of Muri and kept under house arrest for several months. He commenced an action at the Federal High Court under the Fundamental Rights (Enforcement Procedure) Rules 1979, for the enforcement of his fundamental rights. The Supreme Court held that since the primary complaint of the appellant was his deposition as the Emir of Muri, the alleged breaches of his fundamental rights to fair hearing, liberty and freedom of movement were merely accessories to his primary complaint and so the proceeding by way of the Fundamental Rights (Enforcement Procedure) Rules was inappropriate in the circumstances”.⁴²

This insistence on technical rules relating to the principal and the accessory claim categorization has greatly hampered access to justice and the enforcement of fundamental rights in Nigeria. Although it is impossible to have a legal system with persons specially trained in that field without technical rules,⁴³ we suggest that the technicalities be minimized to an acceptable level to facilitate access to justice by a large majority of Nigerians.

Locus standi

One other factor that is often used to preclude access to courts in Nigeria is the overused concept of *locus standi*. This could indeed create a formidable obstacle in the quest for the protection of human rights. *Locus standi* is not an easy concept to define but one can say that it basically means the standing to sue. It refers to the right of a party to an action to be heard in a litigation before a court of law or tribunal or the legal capacity of instituting, initiating or commencing an action in a competent court of law or tribunal without

any inhibition, obstruction or hindrance.⁴⁴ In other words, “for a person to have *locus standi* in an action he must be able to show that his civil rights and obligations have been or are in danger of being infringed. Thus, the fact that a person may not succeed in an action does not have anything to do with whether or not he has standing to bring the action”.⁴⁵

It is pertinent to mention here that two tests are often used in determining the *locus standi* of a person, namely, the action must be justifiable, and there must be a dispute between the parties.

The courts have also taken the position, quite rightly in our view, that it is better to allow a party to go to court and be heard than to refuse him access to the court.⁴⁶ This is so because Nigerian courts have inherent powers to deal with vexatious litigants or frivolous claims. Justice should not be rationed.⁴⁷ Justice Fatayi-Williams underscored this point when he declared in the case of Senator Abraham Adesanya v. President of the Federal Republic of Nigeria⁴⁸ as follows:

*...I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumor-mongering is a pastime of the market places and the construction sites. To deny any member of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution ... access to the Court of Law to air his grievance on the flimsy excuse (of lack of sufficient interest) is to provide a ready recipe for organized disenchantment with the judicial process.*⁴⁹

Moreover, it is essential that before seeking redress in court a plaintiff must show that he has sufficient legal interest in the subject matter of the suit. However, it is in the determination of the term “sufficient interest” that the courts have given a number of decisions, some of which have actually operated against access to justice in the country. Thus in the case of Chief Irene Thomas and 5 Others v. Timothy Olufosoye,⁵⁰ the plaintiffs who are communicants of the Anglican Communion within the Diocese of Lagos challenged the appointment of Reverend Joseph Abiodun Adetiloye as the new Bishop of Lagos and asked the court to declare it void.

The plaintiffs in their statement of claim did not say that they had an interest in the office of the Bishop of the Diocese, or how their interest (if any) had been affected by the appointment of Reverend Abiodun Adetiloye.

They averred that they were not interested in a particular candidate but that the process of the appointment of Reverend Adetiloye contravened some provisions of the Constitution of the Church of Nigeria (Anglican Communion).

The Defense challenged the competence of the action on the ground

that the plaintiffs had no *locus standi* to institute the same. The Supreme Court held that the appellants indeed had no *locus standi* in the matter. In his concurring judgment, Justice Oputa⁵¹ made the following important pronouncement:

The question will then arise – who or what law invested the Plaintiffs with a legal right to defend the constitution of the Anglican Church in the Diocese of Lagos or does the mere fact that the Plaintiffs are “communicants of the Anglican Communion within the Diocese of Lagos” ipso facto and to quote, mutatis mutandis, the memorable words of my learned brother Bello, JSC in Senator Adesanya v. President of Nigeria (1981) 2NCLR 358 at p. 384 invest them with the right “to play the role of archivists and build a shrine to preserve the sacred provisions of the constitution of the Anglican Communion? Does it make them sentries to ward off all those they suspect to be potential transgressors of the constitution of the Anglican communion? Does it further enlist them in the army to take up arms against all those they consider to be aggressors of the constitution of the Anglican Communion? Or, are the Plaintiffs merely constituting themselves into ‘a busybody’ to perambulate the Diocese of Lagos suing and prosecuting all those they regard as constitutional (here constitution of the Anglican Church) offenders?”⁵²

Moreover, Justice Obaseki, in agreeing with the judgment stated that: “This court does not make the law. Its function is to administer and interpret the law. As the law stands, there is no room for the adoption of the modern views on *locus standi* being followed by England and Australia. The adoption of those views in England have found support in the statute law of England” (emphasis added).⁵³

It is clear that such conservative approaches have the effect of limiting access to justice in Nigeria, since it precludes a Nigerian, even a member of the House of Assembly, from taking legal action against a violation of the Nigerian Constitution. Happily, the courts have recently begun to adopt a more liberal approach to the issue of *locus standi*,⁵⁴ although relics of such conservatism can still be found.⁵⁵

Illiteracy

As already mentioned in the preceding, one other significant obstacle to the realization of access to justice in Nigeria is the high level of illiteracy prevalent in the country today. It is most unfortunate that the socio-economic structure of the country has made it impossible for the vast majority of Nigerians to have access to education, notwithstanding the various development plans and

programs by successive governments, which emphasize the importance of education.

This problem has been worsened by the current collapse of public schools, including universities which has now made education an exclusive commodity to be purchased and consumed by the bourgeoisie through private institutions.⁵⁶

Yet the inestimable value of education and its capacity to empower the citizenry can hardly be over-emphasized. An educated man will easily adapt to the realities of the situation and have the intellectual capacity to insist on the enforcement of his rights, quite unlike the illiterate. Education thus empowers him to maximize the opportunities and resources available in his environment.

The point must be made that since education has the capacity of liberating the individual from ignorance, poverty and disease, the lack of it has serious mental, political and economic implications which greatly impedes access to justice in Nigeria. At a particular level, it breeds poverty, docility, and even forced connivance with agents of oppression and marginalization. The net result is that, today, a large majority of Nigerians do not have access to social justice and are alienated from the political and economic structures of society.⁵⁷

Prospects and proposals for reform

The question of access to justice in Nigeria is so fundamental to the promotion and protection of human rights that it is necessary to appraise the prospects in the light of the deficiencies and inadequacies highlighted above.

There is no doubt that the present government is desirous of enhancing the promotion and protection of human rights in the country in tandem with democratic norms. Hortative declarations⁵⁸ emphasizing this concern can only be meaningful if concerted efforts are made to address the issues along the following lines:

Judicial reform

There is an overwhelming need for a reform of the judicial process in the country in line with the global concern for human rights protection. This is necessary because the judiciary plays a pivotal role in ensuring that individuals have access to justice. It is suggested that the starting point of such reform should be a review of the relevant court rules that inhibit access to justice. In this connection, the Federal High Court rules which preclude a large proportion of the citizens of the Niger Delta from enforcing their environmental rights through exorbitant filing fees and procedures must be

reviewed and the filing fees reduced. This will invariably lead to a marked reduction in the current agitations and crisis in the Niger Delta since it will enhance access to courts, and affords aggrieved persons the opportunity of ventilating their views and claims in a court of law.

As Justice Fatayi-Williams stated in the case of Senator Abraham Adesanya v. President of the Federal Republic of Nigeria, it is better for people to have access to the courts than for them to act on rumors about the activities of government. This is where judicial activism comes in, as the courts will act as veritable instruments for the espousal of claims and rights. It is gratifying that the Honorable Attorney-General of the Federation has recently declared the determination of the Federal government to encourage and support the review of the Rules of Court. According to him, the aims of such review will include:⁵⁹

- *to reduce the cost of litigation and broaden access to justice;*
- *to reduce delays so that cases can be decided speedily;*
- *to ensure that litigants have an equal opportunity regardless of their resources, to assert or defend their rights;*
- *to make the legal system understandable to those who use it.*

It is also necessary that conscious efforts be made to reduce the perennial delay in the attainment of justice in the country. A situation where a simple case of unlawful dismissal of an employee could last between 3 to 5 years before being disposed of, does not speak well of the legal system and makes mockery of the government's commitment to ensure increased access to justice by a large majority of Nigerians.

Alternative dispute resolution mechanisms

Even more significantly, efforts should be made to increase awareness of and resort to arbitration or other methods of alternative dispute resolution mechanisms in the country. Not only are these mechanisms more cost-effective, they are largely in tandem with the traditional method of dispute settlement, which had served African societies so well before the imposition of the received English system of adjudication.⁶⁰ Happily, there is now a growing trend to formalize and popularize the use of these mechanisms as viable alternatives to the judicial settlement of disputes in Nigeria.⁶¹

It can hardly be disputed that resort to this mechanism coupled with improvement in the socio-economic and political conditions of the masses will go a long way in ensuring increased access to justice by a large majority of Nigerians.

Enhancement of the Legal Aid Scheme

One important agency that can usefully be deployed to enhance access to justice in the country is the Legal Aid Scheme, which was established to provide assistance for indigent Nigerians unable to secure the services of private legal practitioners to enforce their legal rights.⁶²

Although the scheme has been unable to make significant impact in this endeavor over the years partly due to structural and operational problems,⁶³ it is suggested that it be made more proactive to meet the yearnings and aspirations of Nigerians through creating greater access to justice. This will necessarily entail the widening of the scope of its operations in terms of increase in the level and category of potential beneficiaries from the scheme the subject matter coverage, coupled with aggressive public enlightenment exercise.

This is because similar schemes have proved extremely successful in countries such as India, as an instrument for enhancing access to justice.

Conclusion

An attempt has been made in this paper to show the linkage between access to justice and the quest for the promotion and protection of human rights in Nigeria. We have also shown that there are a number of fundamental obstacles to the attainment of this highly desirable goal of increasing access to justice. While some of the obstacles are substantive, others are procedural. The point has further been made that some of the constitutional provisions which are geared towards ensuring human rights protection, also have the unintended effect of engendering undue delays, and consequently, conspire against access to justice.

The implication of this is that there is need to strike a delicate and beneficial balance between the desire to maximize human rights protection and the imperative of enhancing greater access to justice in Nigeria.

Thus, the right of an accused person to be given adequate time and facilities for the preparation of his defense need not result in undue delay in the dispensation of justice which has been said to be a three-way traffic; for the plaintiff, the accused and the society at large.⁶⁴ This calls for well-thought out schemes that take cognizance of these factors and considerations to enhance the attainment of justice.

It is only when we approach the issue along these lines that the overwhelming concern for increased access to justice in Nigeria will be realized and basic human rights given their proper place in the scheme of things.

NOTES

1. Some of these include the London Constitutional Conference and the Lagos Conference and they led to the adoption of several constitutions for the country, the Clifford's Constitution (1922), the Richards Constitution (1946), the Macpherson's Constitution (1951) and the Lyttleton Constitution (1954). See S. T. Hon, *Constitutional Law and Jurisprudence in Nigeria* (Port Harcourt, Nigeria: Pearl Publishers, 2004), pp. 4-8.
2. The First Republic spanned the period 1960-1966; the Second Republic extended from 1st October 1979 to 31 December 1983. Both civilian régimes were terminated by military coups.
3. The present civilian government came to power on 29 May 1999, after about 15 years of successive military regimes that were notorious for gross violations of human rights. See S. Tolofari, *Exploitation and Instability in Nigeria: The Orkar Coup in Perspective* (Lagos: Press Alliance Network, 2004). It also constituted the current National Political Reforms Conference as a way of stemming the increasing agitation by various groups and regions in the country.
4. This was established in 1957 and it made far-reaching recommendations to redress the injustices inflicted on the minority groups in the country. Unfortunately, their recommendations were never implemented by the government before the military coup of 1966.
5. Set up by the present government on 7th June 1999 with the objective, among others, of ascertaining and establishing the causes, nature and extent of human rights violations or abuses and identify the person or persons, authorities, institutions or organizations responsible for such violations or abuses, and make appropriate recommendations.
6. As contained in the Commission's terms of reference.
7. The Panel toured several areas of the country and took evidence from several victims of human rights abuses, at times with dramatic public shows. Unfortunately, it was dogged by litigation and eventually its recommendations could not be published, see Brigadier General A. K. Togun (Rtd) v. Hon. Justice Chukwudifu Oputa (Rtd) and 3 Others (2001) 16 *Nigerian Weekly Law Reports* (NWLR), pt. 740 p. 577; and Chief Gani Fawehinmi and 2 Others v. General Ibrahim Babangida (Rtd) and 2 Others (2003) 3 NWLR pt. 808 p. 604.
8. See Chukwudifu A. Oputa, *In the Eyes of the Law* (Friends Law Publishers, 1992), p. 50.
9. See M. I. Gwangudi, "Problems Militating against Women's Access to Justice in Nigeria" (*University of Maiduguri Law Journal* n. 5, 2002), pp. 13-14.
10. See G. Akinrinmade & O. Oloyide, "The Best Models for Good Governance in Africa", in D. A. Guobadia & E. Azinge (eds.), *Globalisation, National Development and the Law*, Proceedings of the 40th Annual Conference of Nigerian Association of Law Teachers (NIALS), 2005, p. 51.
11. See R. W. M. Dias, *Jurisprudence* (4. ed., Butterworths, 1976), p. 67.
12. In the words of C. Oputa (op. cit., p. 12), a retired Justice of the Supreme Court: "It is a calamity to have a corrupt judge, for money – its offer and its receipt – corrupts and pollutes not only the channels of justice but the very stream itself. Honesty and judicial rectitude are therefore the very minimal requirements of the judicial office".

13. C. Ake, "The African Context of Human Rights" being a paper presented at the International Conference on Human Rights in the African Context held in Port Harcourt, 9-11 June 1987, quoted in T. Akinola Aguda, *Human Rights and the Right to Development in Africa* (Lagos: Nigerian Institute of International Affairs, 1989), p. 26.

14. See also J. N. Aduba, "Human Rights and Social Justice in Nigeria: Issues, Dilemma and Options", in A. U. Kalu & Y. Osinbajo (eds.), *Perspectives on Human Rights* (Nigerian Federal Ministry of Justice, 1992, p. 220), pp. 229-231.

15. See T. A. Aguda, *The Crisis of Justice* (Akure, Nigeria: Eresu Hills Publishers, 1986), pp. 31-33.

16. This writer is at present handling an inherited land case that commenced in 1984 and is still pending at the Okehi High Court in Rivers State of Nigeria, largely as a result of the application of this *de novo* trial principle. By the time the hearing of the case gets to a certain level, a new judge will be posted to the division and then the trial will commence *de novo*. This has been the fate of this matter which has exerted so much, financially, from the litigants.

17. See the examples given by Dr. Aguda, 1986, *op. cit.*, pp. 15-16.

18. This provision has received judicial interpretation and application in several cases. See for example, *Ifeanyi Nwankwu and Another v. Oraegbunam Aniето, Esq.* (2002) 2 NWLR pt. 752 p. 729; *Governor of Ekiti State and 4 Others v. Prince James A. Osayomi and 2 Others* (2005) 2 NWLR 67 at ratios, 71-72.

19. (2003) 15 NWLR pt. 842 p. 25.

20. *Id.*, at 84-85.

21. *Id.*, p. 85.

22. As provided in Article 36 (4) of the Constitution, see *infra* for a discussion of this phrase.

23. The Supreme Court restated this principle in the recent case of *Alsthom S. A. v. Dr. Olusola Saraki* (2005) 3 NWLR pt. 911 p. 208 ratios 3, 4 and 5. See also *Fred Chiedozie v. Dayo Omosawan and 2 Others* (1999) 1 NWLR pt. 586 p. 317.

24. (2005) 2 NWLR pt. 909 p. 67.

25. *Id.*, p. 90. Justice Adolphus Karibi-Whyte has ably provided the rationale for this. According to him: "The aphorism justice delayed is justice denied is as accurate as the saying that quick justice inevitably results in injustice. The imperfection of human memory in recollecting the events, identifying the main participants and assessing the impressions long after the event is as risky as the impression when the freshness of the event leads to exaggeration when mistaken identify is without further reflection assumed to be the real thing. Hence both inordinate delay and hasty dispensation of justice are not conducive to the proper administration of justice". See A. G. Karibi-Whyte, "An Examination of the Criminal Justice System", in Y. Osinbajo & A. U. Kalu (eds.), *Law Development and Administration in Nigeria* (Federal Ministry of Justice, 1990), pp. 55-77.

26. See *Adebayo Ogundoyin and 2 Others v. David Adeyemi* (2001) 13 NWLR pt. 730 p. 403.

27. See J. F. Fekumo, "The Problem of Jurisdiction in Compensation for Environmental Pollution

and Degradation in Nigeria: A Fundamental Rights Enforcement Alternative" being a paper presented at the Nigerian Bar Association Annual Conference held in Abuja, 22-27 August 2004, p. 26.

28. Order 53 (1) and Appendix 2 of the Federal High Court (Civil Procedure Rules), 2000.

29. This provision goes a long way in protecting and safeguarding the fundamental rights of citizens.

30. This is because "the right to counsel is at the root of fair hearing and its necessary foundation". Per Ogwuegbu, JSC in *Solomon Ogboh and Another v. The Federal Republic of Nigeria* (2002) 10 NSCQLR pt. 1 p. 498 at 509.

31. This is the only way to give meaning to the fair hearing provision.

32. See N. S. Okogbule, "The Nigerian Factor and the Criminal Justice System" (*University of Benin Law Journal* n. 7, 2004), p. 165.

33. Made by the Chief Justice of Nigeria pursuant to the provisions of Article 42.3 of the 1979 Constitution. It came into effect on 1st January 1980.

34. (1986) 1 NWLR pt. 17 p.471.

35. *Id.*, p. 478.

36. By Order 1 Rules 2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules, 1979. For an appraisal of the Rule, see M. O. Unegbu, *Enforcement of Fundamental Rights in Nigeria, Notes, Cases and Precedents* (Deeplaw Professional Publishers, 1997).

37. (1989) 4 NWLR pt. 116, p. 387.

38. *Id.*, p. 419.

39. *Id.*, *ibid.*

40. See *Borno Radio Television Corporation v. Basil Egbuonu* (1991) 2 NWLR pt. 171 p. 81; *Federal Republic of Nigeria and Another v. Lord Chief Udensi Ifegwu* (2003) 15 NWLR pt. 842 p.113.

41. (1997) 6 NWLR pt. 510 p. 549. The earlier decision of the Supreme Court on another aspect of the case is reported in (1989) 4 NWLR pt. 117 p. 517.

42. This case had a chequered history. It was first commenced at the Federal High Court under the Fundamental Rights (Enforcement Procedure) Rules 1979 and the Supreme Court finally held that the Federal High Court had no jurisdiction to entertain the matter as it raised principally chieftaincy question. Another action was then commenced at the Yola High Court wherein the Supreme Court held that for an action to be commenced on the Fundamental Rights (Enforcement Procedure) Rules, the principal question must be the enforcement of a cognizable right; and that this one ought to have been commenced by a writ of summons.

43. Indeed, any profession worth its name must necessarily relish reliance on some technical rules, clauses and phrases and law is no exception.

44. See *Alhaji Adetoro Lawal v. Bello Salami and Another* (2002) 2 NWLR pt. 752 p. 687.

Babatunde Adenuga and 5 Others v. J. K. Odumeru and 7 Others (2003) 8 NWLR pt. 821 p. 163.
Attorney-General of Akwa Ibom State and Another v. I. G. Essien (2004) 7 NWLR pt. 872 p. 288.

45. Attorney-General of Akwa Ibom State and Another v. I. G. Essien, *supra*.

46. The rationale for this rule is to promote respect for the rule of law. See Senator Abraham Adesanya v. President of the Federal Republic of Nigeria (1981) 2 NCLR 358.

47. It should be made available to everybody notwithstanding the person's status or economic standing in society, but see J. N. Aduba, "The Impact of Poverty on the Realization of Fundamental Human Rights in Nigeria", in Y. Osinbajo & A. Kalu (eds.), *Democracy and the Law* (Federal Ministry of Justice, 1991), p. 200, on the disability of the poor to press for the enforcement of their basic rights.

48. *Id.*, *ibid*.

49. *Id.*, p. 131.

50. (1985) NWLR pt. 18, p. 669.

51. Paraphrasing the views of Bello, Justice of the Supreme Court (as he then was) in Senator Adesanya v. President of Nigeria, *supra*.

52. The current acceptance of the liberal approach to the interpretation of constitutional provisions should necessarily entail the presence of *locus standi* where the suit is designed to challenge constitutional breaches.

53. *Op. cit.*, p. 686. See however, A. Guobadia, "Constitutional Adjudication: Locus Standi; Recent Trends in Nigerian Courts" (*The Nigerian Juridical Review*, v. 3, 1978-1988, pp. 37-53); S.T. Hon, *op. cit.*, pp. 409 – 410; I. E. Sagay, *A Legacy for Posterity: The Work of the Supreme Court (1980-1988)* (Nigerian Law Publications, 1988), pp. 263-274.

54. See the case of J. K. Owodunni v. Registered Trustees of Celestial Church of Christ and 3 Others (2000) 79 LRCN p. 2406.

55. Such as the decision in the case of Babatunde Adenuga and 5 Others v. J. K. Odumeru and 7 Others, *supra*.

56. See A. G. Shettima, "Socio-Economic Obstacles to the Realization of a Just Society: The Nigerian Experience", in Y. Osinbajo et al. (eds.), *Human Rights, Democracy and Development in Nigeria* (Lagos: Legal Research and Resource Development Centre, 1999), pp. 100-104.

57. See Aguda, 1989, *op. cit.*, pp. 29-30.

58. By government officials of the governments' commitment to uphold the rule of law and respect for human rights are common place in Nigeria especially during conferences, valedictory court session for retiring judges and during the commencement of new legal years.

59. See A. Olujinmi, *Agenda for Reforming the Justice Sector in Nigeria* (Federal Ministry of Justice, 2004), p. 6. It is significant that these objectives are in line with our suggestions in this paper and it is hoped that they will be translated to effective implementation in the no distant future.

60. See A. O. Obilade, "The Relevance of Customary Law to Modern Nigerian Society", in Y. Osinbajo & A. U. Kalu (eds.), *Towards a Restatement of Nigerian Customary Laws* (Lagos: Federal Ministry of Justice, 1991), pp. 1-4; A. A. O. Okunniga, *Transplants and Mongrels and the Law: The Nigerian Experiment* (Inaugural Lecture Series 62, University of Ife Press, 1983), pp. 20-21.

61. The advantages of these mechanisms are highlighted in A. I. Chukwuemerie, *Studies and Materials in International Commercial Arbitration* (Port Harcourt, Nigeria: Lawhouse Books, 2002), pp. 1-31; see also G. C. Nwakoby, "Exploring Arbitration: A Commentary" (*Modern Practice Journal of Finance and Investment Law*, Jan.-April 2004, v. 8, n. 1-2, p. 1), pp. 8-16); on the Lagos Multi-Door Courthouse see K. Aina, "The Lagos Multi-Door Courthouse and the Judge: A New Beginning" (*Modern Practice Journal of Finance and Investment Law*, July-Oct. 2004, v. 8, n. 3-4, p. 340).

62. See the preamble to Cap. 205, *Laws of the Federation of Nigeria*, 1990.

63. These include inadequate funding, lack of sufficient manpower and the limited scope of its operations. See I. O. Omoruyi & O. Enabulele, "The Effectiveness of the Legal Aid as a Means of Access to Justice in Nigeria" (*Benin Journal of Public Law*, v. 2, n. 1, 2004), pp. 144-146.

64. See *Ogbonu v. The State* (1987) 2 NWLR pt. 54 p. 20.

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ABSTRACT

The Supreme Court of Argentina has recently overruled the laws of amnesty benefiting military personnel involved in gross violations of human rights during the military dictatorship. The laws of Full Stop and Due Obedience had left unpunished the majority of military personnel involved in crimes against humanity. The judicial decision reverting the situation of impunity and warranting the right of the victim to truth and justice is a matter of major political importance, inasmuch as it admits the reopening of the previously closed lawsuits involving torture, kidnapping and murder. The verdict was cast in the course of a long process that Argentine society has had to face in order to deal with the heritage of its recent past. This article comments the most outstanding points of this historic decision and revisits the events that preceded it and contributed to make it possible. [Original article in Spanish.]

KEYWORDS

Military dictatorship – Trials for truth – Torture – Supreme Court of Justice

REOPENING OF TRIALS FOR CRIMES COMMITTED BY THE ARGENTINE MILITARY DICTATORSHIP

María José Guembe

On 14 June 2005 the Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación – CSJN) declared unconstitutional the laws of Full Stop (23492) and Due Obedience (23521) that stayed any punishment for crimes against humanity committed by the state between 1975-1983. This judicial resolution is the corollary of an almost three-decade-long struggle against impunity fought by the human rights' movements.

The aim of the laws of Full Stop and Due Obedience was to provide amnesty for mid and lower-rank officers. The argument presented to the public opinion at the time when these laws were passed was that this was a necessary step in order to uphold social peace.

When the Supreme Court of Justice was called to analyze the validity of these laws for the first time, it held that these laws resulted from considerations specific to the political power regarding serious interests at stake and that, as such, should be admitted by the Courts.

That was the decision of the CSJN in 1987. On that occasion, the Court considered that it was not the role of the Judiciary to evaluate the convenience or efficiency of the means adopted by the Legislative Power in order to reach its aims except if basic individual rights were breached or were unreasonably out of proportion to the aims sought.¹

Some judges, even when challenging the main features of the Law of

1. CSJN decision of 22 June 1987, vote of the magistrates Caballero and Belluscio.

Due Obedience, resolved that the Congress was entitled to pass such a norm.² On that occasion, the Court decision was passed with only one contrary vote.

The years that followed witnessed an important evolution in domestic and international law, which compelled the judges to revise their position. Such judicial revision was carried out step by step, in different cases related to the breaching of human rights, committed during the military dictatorship.

The limits of political decisions in severe cases of violations of human rights

The incorporation, in 1994, of the international treaties on human rights to the National Constitution determined that political decision affecting the rights of the victims of severe violations of human rights could not be tolerated. By adopting the treaties of human rights and giving them constitutional hierarchy, the state acknowledged special obligations of international character.

There is a vast literature on the obligations of the states parties to the American Convention on Human Rights and to the International Covenant on Civil and Political Rights, in cases of severe violation of human rights. Both conventions determine the duty to respect and guarantee rights thereby acknowledged for the benefit of all the people under their jurisdiction (Articles 1.1 and 2.1, respectively)

What is fundamental to our subject matter is the interpretation that has been given to the provisions of these Conventions. It has been established that, as part of the generic obligation, if serious or systematic violations occur, specific obligations are imposed to indemnify the victim for the damages incurred, to punish those responsible for such damages, and to carry out institutional reforms in order to prevent the repetition of such atrocities. For many years, this interpretation has been upheld by the Inter-American Commission and by the Inter-American Court of Human Rights, as well as by the UN Human Rights Committee.

Additionally, the Supreme Court of Argentina has asserted that the jurisprudence that stems out of the organisms in charge of interpreting the treaties constitutes an indispensable guideline for the interpretation of the duties and obligations emanating from these treaties.³ Thus, obligations

2. Justice Petracchi said that complying with orders does not justify or excuse any conduct and that an irreversible presumption that the military of a lower rank acted obeying orders is a breach of the principle of separation of powers of the state as it forces the magistrates to disregard the empiric objective data. He understood, however, that the law was to be considered as an amnesty that lay within the sphere of competence of the Congress.

3. H. Giroldi, on the appeals, CSJN, award of 7 Apr. 1995, in *Jurisprudencia Argentina*, t. 1995-III.

undertaken at the constitutional sphere and accepted before the international community, the extent of which has become increasingly well defined in more recent years, have limited the power of domestic law to condone with or to omit the infringement of fundamental human rights. The Court has pointed out:

Even if it is true that ... the National Constitution upholds the entitlement of the Legislative Power to dictate general amnesties, such an entitlement has suffered important limitations as far as its scope is concerned. As a rule, laws of amnesty have historically been used as tools for social appeasement with the declared purpose of solving conflicts remaining after armed civil struggles were ended. In an analogous way, laws 23492 and 23521 have attempted to overcome the confrontations between “civilians and military”. However, and inasmuch as every amnesty tend to induce “forgetfulness” of gross violations of human rights, they are contrary to the ruling of the American Convention on Human Rights and of the International Covenant on Civil and Political Rights, and become therefore, constitutionally intolerable.⁴

We shall return to this decision of the Argentine Supreme Court; before, however, we shall revise other national and international events and circumstances that prepared the ground for the decision of the judges concerning these amnesties.

How the judges perceived the changes within the international sphere

The Velásquez Rodríguez case,⁵ in which the Inter-American Court declared that it was an obligation of the different states to investigate and punish violations of human rights, and the 28/92 report whereby the Inter-American Commission determined that the Argentine state had breached the Inter-American Convention, were the base for the judges to recognize the right to truth and opened proceedings to warrant it. This took place in the year 1995; nevertheless, a shift in judicial thinking and practice was still needed before the validity of the amnesties could be revised.

As from the recognition by the magistrates of their duty to investigate – the other side of the coin of the right to truth – “trials for truth” mushroomed all over the country. The Supreme Court of Justice admitted – not without a

4. CSJN, Simón, Julio Héctor and Others with reference to the illegal deprivation of liberty, etc. Case n. 17768, award of 14 June 2005, paragraph 16.

5. International Court of Human Rights, award of 29 July 1988, Series C, n. 4.

discussion – the right in the year 1998. At first they issued a verdict establishing the right to truth but they denied that the way to execute it was by means of criminal procedures such as the relatives of the victims intended. Quite to the contrary, it ascertained that it was to be achieved by means of the *habeas data*, intended, according to Argentine legislation, to obtain personal information registered in public or private data banks.⁶ Only some of the judges followed the jurisprudence of the Supreme Court and most of the cases continued being treated by criminal courts.

The lawsuits for the truth brought the military once again to Court and authorized means of investigation in order to find out what happened to each one of the victims of state terrorism. These trials kept the Judicial Branch with the lawsuits concerning the dictatorship that had been amnestied.

While this was happening on the domestic sphere, the position of the international community concerning the immunity in case of severe violations of human rights began to shift. The different states became increasingly unwilling to tolerate solutions where the rights of the victims remained totally overruled.

In 1995, work was initiated on drafting a treaty that might crystallize the will of having a catalogue of crimes against international law and a permanent International Criminal Court to judge them. This wish took shape in 1998, the very same year that Augusto Pinochet was arrested in London.

In 1996, applying the principle of universal jurisdiction, Spain began to conduct investigations into the events that had taken place in Argentine during the military dictatorship. The same court that had closed the cases against the Argentine military now secured the arrest of Pinochet in London to have him face the court in Madrid. Such a decision gave rise to a universal cry for justice and although the extradition to Spain never took place, it remained clear that the crimes Pinochet was charged with had to undergo trial.

Spanish courts as well as French, Italian and German magistrates began to demand the extradition of Argentine officers so that they could be judged abroad. These events placed an enormous pressure on Argentine authorities. This is how changes in the international sphere came to encourage changes at home.

6. This jurisprudence was established in two consecutive cases. The first was the Lapacó case, which established that the way to validate the right to truth was not filing criminal suits. The second, known as the Urteaga case, determined that the correct way was to petition for *habeas data*. The former resulted in a presentation being made to the Inter-American Commission of Human Rights at which a settlement was reached, whereby the Argentine state committed itself to admit the right to truth by means of a law and to define an appropriate procedure for its effective enforcement.

In 1998, the National Congress decided to derogate the laws of Full Stop and Due Obedience.⁷ Their derogation resulted from the activity of a group of congressmen who presented the bill that posed the annulment of these laws. This initiative generated a vigorous debate on the possibility and effects of the annulment of these laws as well as on the motivation that had led to their enactment. The most conservative warned against the institutional effects of the legislative annulment and the need to preserve juridical security. From the opposite side, the duty to investigate, prosecute and punish was proclaimed and the annulment was justified from the viewpoint of the international law on human rights. The result of this debate was a halfway resolution that did not satisfy the victims. The derogation did not eliminate the already accomplished effects of the laws and only affected those that were to be accomplished from that day on. The conservative sectors of the public opinion assuaged the military by asserting that the decision was merely symbolic and that it would not have any real effects. This statement was only partly true. Indeed, the derogation could also be interpreted as giving magistrates a green light to press forward along the path of justice that they had slowly begun to pace.⁸

Without making any declarations against the unconstitutionality of the laws of Full Stop and Due Obedience, the Argentine judges began to revise some issues that prevented them from making headway in the judging of the facts that had remained outside the ruling of the laws of impunity. Such is the case of the crime of appropriation of children born out of missing parents and the subsequent change of their identity. The first step in this direction was the acknowledgement of the fact that the offences committed by the military during the dictatorship were crimes against humanity and therefore presented features that were different of crimes described and covered by the Argentine Criminal Code.

This acknowledgement was to produce effects on such issues as the prescription of criminal action. As far as this point is concerned, one of the first decisions on this matter reads as follows:

The evolution of the law ... that has taken place particularly in the case of international law, has implied a significant change of the juridical outlook serving as a base for deciding the case we are dealing with. This is so because, in accordance with the international public law, the deeds under consideration, apart from displaying per se a permanent character as long as the fate and the location of the

7. The derogation was ordered by law 24952, published in the *Boletín Oficial* on 17 Apr. 1998.

8. Years later, the Congress should take a step forward and declare its complete annulment.

*missing people are still unknown, benefit from the statute of limitations, for these were transgressions against humanity, regardless of the date on which they were committed. ... The forced disappearance of people, a concept that includes the deeds here under scrutiny, is a crime against humanity and therefore cannot benefit from any statute of limitations, and this features overrules any domestic laws that may contain contrary provisions, regardless of the date on which the crimes were committed.*⁹

At a later date, the Supreme Court of Justice ratified the imprescriptibility of criminal action in cases of crimes against humanity. They did so also in one case that was not covered by the laws of impunity: the murder in Buenos Aires of a former chief of Chilean army, General Prats and his wife, by members of the Chilean Intelligence Service, during the Augusto Pinochet regime.¹⁰

The problem was that Argentina had ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity a long time after the deeds under investigation were committed. To overcome this obstacle, the Supreme Court declared that the above-mentioned convention merely **asserted** this permanent character that had already been acknowledged as a *ius cogens* norm.

*In this manner, the prohibition of the non-retroactivity of criminal law has not been infringed upon and a principle established by usage, already valid at the time the deeds were committed, is asserted. From this point of view, in the same way as it is possible to assert that international usage already deemed crimes against humanity as imprescriptible even before the convention, this usage was generalized in international law before the incorporation of the convention into domestic [i.e. Argentine] law.*¹¹

Consequently the Court ruled that:

... the deeds for which Arancibia Clavel was convicted could not be declared as

9. CFCyC, Videla on exception to statutory limitations.

10. General Carlos Prats, former commander in chief of the Army during the Salvador Allende administration was murdered in Argentina in September 1974. The murder was committed by members of the Chilean Intelligence Service, who were sent to Buenos Aires and could obviously count on collaboration of their Argentine counterparts.

11. CSJN, Arancibia Clavel, Enrique Lautaro on first-degree homicide and illicit association and others. Case n. 259, resolution of 24 Aug. 2004, paragraphs 28 and 29.

invalid due to the passing of time according to international law on the day they were committed, meaning that there is no retroactive application of the convention but that the rule was valid due to international usage since the 60s, a usage which the Argentine state had ratified. ... The rules of invalidity of criminal action foreseen in the domestic legal framework are superseded by international common law and by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹²

The statutory limitations on the crimes have been one of the most serious obstacles for the prosecution of the military and now this has been overcome. The Court was to return to the issue when the actual unconstitutionality of the law of impunity had to be dealt with.

The unconstitutionality of the laws of Full Stop and Due Obedience

The first decision to analyze the consistency between the laws of impunity, on one hand, and the Constitution and the treaties on human rights on the other was taken in 2001. As mentioned above, the Supreme Court declared these laws valid when they were first passed. The issue, however, reappeared in Court more than ten years later due to the fact that domestic and international law had changed and those changes were to affect the decision with respect to the validity of the laws.

In March 2001, a judge ruled for the first time the laws of Full Stop and Due Obedience to be unconstitutional.¹³ This resolution was based on the acknowledgement of the fact that the felonies, inasmuch as they were committed within the framework of a systematic plan of repression carried out by the government and due to their gravity – were tantamount to crimes against humanity. “Such circumstance demands that they should be judged with due concern to the legal regulations of the common law enforced in our country and that are a part of the internal legal order”, asserted the judge. The laws of impunity “... are opposed to long-standing universally acknowledged juridical principles and seriously disrupt the system of values on which our juridical system stands. The contradiction between these laws

12. *Id.*, paragraphs 33 y 36.

13. Gabriel Cavallo, at the time in charge of the 4th Federal Court for Criminal and Correctional Matters of the Federal Capital. Case n. 8686/2000, Simón, Julio and Del Cerro, Juan Antonio on the kidnapping of children under 10.

and the said norms leads, as we shall see in due time, to the declaration of their invalidity”.¹⁴

The judge admitted that the laws contradicted the provisions included in the international treaties to which Argentina was a party, which impose the obligation to investigate, prosecute and punish grievous violations of human rights. The obligation to respect and guarantee the rights protected by the Convention and the Covenant, as well as the duty to adopt measures on the domestic sphere to implement the provisions of these treaties implies a mandate for Argentina that involves all branches, including the Courts. In compliance with such obligation, the judge assessed the normative contradiction existing between laws 23492 and 23521 and the above quoted treaties.

With respect to the American Convention on Human Rights, the judge declared:

As has been demonstrated, the possibility of the injured party to accede to justice so that offences committed by members of the armed forces be duly investigated has been hindered by laws 23492 and 23521. In this way the possibility for an independent and impartial tribunal to arbitrate in a case of violation of human rights is eliminated, a fact that renders these laws illegal under the American Convention on Human Rights ... Consequently, the passing and the validity of laws 23492 and 23521 infringe the American Convention on Human Rights, inasmuch as they hinder the investigation required for the identification of authors and co-authors of violations of human rights committed by the de facto government (1976-1983) and the application of the corresponding penalties. Given that the enactment and the validity of laws 23492 and 23521 are inconsistent with the American Convention on Human Rights and the American Declaration of Human Rights and Duties, it is necessary to invalidate “Full Stop” and “Due Obedience” laws.¹⁵

With similar arguments, the judge stated: “The laws of ‘Full Stop’ and ‘Due Obedience’ are contrary to the International Covenant on Civil and Political Rights since they imply an effective obstacle of the duty to warrant a free and full exercise of the rights acknowledged by the aforementioned Covenant in its Articles 2.2, 2.3, and 9.5. This being the case, these laws are to be declared invalid in the light of what has been established by the aforesaid international treaty”.¹⁶

This judicial decision received a strong support when, a few days after it was laid down, the Inter-American Court of Human Rights emitted a verdict

14. Id., case n. 8686/2000.

15. Id.

16. Id.

in the Barrios Altos case¹⁷ and declared the laws of amnesty dictated by the government of Alberto Fujimori invalid.

In its resolution, the Inter-American Court took its stand on the incompatibility of the laws of amnesty with the obligations stemming out of the ratification of the American Convention on Human Rights. The Court asserted that the state is compelled to deprive these laws of any juridical effects on the domestic sphere, to investigate, prosecute and judge all grievous violations of human rights and to punish the culprits. The decision of the Court in the Barrios Altos case marked a new stage in the jurisprudence of the region.

In November 2001, the Chamber of Appeals ratified the judicial decision that had declared the laws of Full Stop and Due Obedience to be null and void.¹⁸ One of the central arguments for the decision of the court of appeals was the ruling by the Inter-American Court. “We are in the presence of an offence against humanity as an international crime, of which the imprescriptibility, contents, nature and conditions of responsibility are determined by international law, regardless of the criteria that may be determined in the domestic law of the states”, asserted the tribunal.¹⁹

The duty to judge crimes of such significance, according to the magistrates, is to be found in Article 118 of the Constitution (the human rights article). On the other hand, the international treaties incorporated into the constitution compel the Argentine state to judge and punish gross violations of human rights. The Inter-American Court of Human Rights has declared the laws of amnesty opposed to the Pact of San José, Costa Rica and therefore invalid. The decisions of this organization, competent as far as the interpretation and application of the Pact is concerned, must be taken into account by the Argentine tribunals in their resolutions.

The Chamber quoted verbatim the main paragraphs of the sentence of the Inter-American Court in the Barrios Altos case. Particular emphasis was laid on: “The impunity of conducts that seriously affect the fundamental juridical goods subject to the tutelage of both manifestations of International Law is unacceptable. The states are liable for the identification of these conducts and the prosecution and punishment of the culprits and this cannot be eluded by such means as the amnesty”.²⁰

International order does therefore, in accordance to the resolution of the

17. IACHR Court, Case of Chumbipuma Aguirre and Others v. Peru, judgment of 14 March 2001.

18. CFCyC, case n. 17889, appeal by Simón, Julio, judgment of 9 Nov. 2001.

19. *Id.*

20. *Id.*

Federal Chamber, render compulsory the prosecution and punishment of those liable of crimes against humanity. That is why the tribunal asserted that “apart from the laws of Full Stop and Due Obedience, there is no normative impediment to comply with this duty. But as long as these norms clash with the operability of the constitutional mandates the former are to be declared invalid and deprived of any effect”.²¹ The magistrates also voiced the following views:

*... there is no doubt that the Supreme Court is under a special obligation to impose respect for the fundamental human rights, since, within its sphere of competence, the Tribunal represents national sovereignty ... As such, it is the head of one of the branches of the Federal Government, competent, to settle issues that may involve international liability of the Argentine Republic, such as those that give rise to the intervention of the above mentioned supranational organisms foreseen in the American Convention.*²²

After an extensive and comprehensive argumentation, the tribunal concluded that “within the current context of our domestic law the declaration of nullity and unconstitutionality of laws 23492 and 23521 does not stand as an alternative, but as an obligation”.

Similar decisions were taken in many cases in different parts of the country.²³ Step by step, tribunals began to declare these laws to be void,

21. Id.

22. Id.

23. Other courts and chambers in different part of the country dictated resolution declaring the impunity laws unconstitutional: 3rd Federal Court for Criminal and Correctional Matters, case n. 16441/02 (“Massacre of Fatima”), 22 July 2004; 3rd Federal Court for Criminal and Correctional Matters, case n. 14216/2003 (formerly case n. 450 of the Federal Chamber) named “Suárez Mason, Guillermo and Others on aggravated homicide, aggravated illegal deprivation of freedom...” (16 Sept. 2003); 2nd Federal Court of La Plata, in case 7/7768 named Crous, Félix Pablo on his descendents (19 Sept. 2003); Federal Chamber of Salta, case 027/03, named “Cabezas, Daniel Vicente and Others, on Report – Palomitas – Cabezas de Buey” (29 July 2003); Federal Court of Chaco in the case named “Verbitsky, Horacio – C.E.L.S. on the unconstitutionality of laws 23521 and 23492” (6 March 2003); 11th Federal Court, case n. 6859/98 named “Scagliusi, Claudio Gustavo and Others on illegal deprivation of freedom” (12 Sept. 2002); 11th Federal Court for Criminal and Correctional Matters case n. 7694/99, named “Astiz Alfredo and Others, on crime in public action” (1 Oct. 2001). Finally, on 19 March 2004, the 3rd Federal Court for Criminal and Correctional Matters declared to be null and void the pardon decrees 1002/89 and 2746/90, in case 14216/2003 (formerly case n. 450 of the Federal Chamber), named “Suárez Mason, Guillermo and Others, aggravated homicide with illegal deprivation of freedom”. This decision was confirmed by the Court for Appeals and the opinion of the Supreme Court of Justice of the Nation is still pending.

thus giving rise to the reopening of the trials concerning violations of human rights during the dictatorship and that had remained off bounds for nearly 20 years.

It took the Supreme Court several years to solve this question. Consequently, the composition of the Court was now changed. Several members of the Court had been removed; others had resigned to evade impeachment and were replaced by means of a procedure that ensured the participation of the civil society.

On 14 June 2005, the Court emitted a sentence and declared the laws of impunity to be contrary to the Argentine Constitution. The Court took into account that the “laws of Full Stop, Due Obedience and the subsequent indults had been scrutinized by the Inter-American Commission for Human Rights in its report n. 28/92. On that occasion, the Court maintained that the fact that trials under the criminal code for violation of human rights – missing people, summary executions, tortures and kidnappings – committed by members of the armed forces had been cancelled, prevented or rendered difficult due to laws ... and to decree 1002/89 stands as a breach of the rights guaranteed by the Convention, and interpreted that such legislation was incompatible with Article 18 (Right to Justice) of the American Declaration of Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights”. It also recommended that the Argentine government should “adopt the necessary steps to shed light on the events and individualize the culprits of the violation of human rights that took place during the military dictatorship”.²⁴

The decision of the Inter-American Commission of Human Rights established clearly the limits of the power of decision of the states regarding events like the ones that took place during the dictatorship. Report 28/92, however, had no effect on the laws of amnesty. According to the Supreme Court, the concrete scope of the recommendation of the IAHR remained to be defined. According to the Court, it was not clear

... if it was enough to merely “shed light on the facts”, in the sense of the so-called judgments of the truth or if the duties (and the faculties) of the Argentine state in this scope also implied to deprive the laws and the decree under discussion of all their effects, for such a conclusion would spell a strong restriction of the principle according to which nobody can be judged twice for the same crime and the principle of legality, which prohibits any retroactive prescription of criminal lawsuits, in many cases already fulfilled.

24. CSJN, Simón, Julio Héctor and Others, above quoted case, paragraph 22.

These doubts were finally settled with the Barrios Altos case, in which the Inter-American Court considered that Peru was responsible for the violation of the rights to life and personal integrity arising from the massacre and also for the amnesty of such crimes. The amnesties violated the judicial guarantees, the right to judicial protection and the obligation to respect the rights and to adopt internal measures of protection. About the latter, the Inter-American Court pointed out explicitly:

41. ... provisions on the prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

...

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible ...

The Argentine Supreme Court determined – as indeed it had done before – that Argentine tribunals should take the decisions of the Inter-American Court as interpretative clues. Considering previous jurisdiction, the highest Argentine Tribunal resolved to accept the verdict in the case of Barrios Altos, and gave it a wide-ranging interpretation, as follows:

In order to comply with international treaties covering human rights, the suppression of the laws of Full Stop and Due Obedience cannot be delayed and must be carried out in such a way as to make sure that it will not turn into a normative obstacle for the prosecution of deeds such as those that are the object of the case in point. This means that the persons who were benefited by such laws cannot invoke the prohibition of retroactivity in criminal cases nor the benefit of the principle of not being judged twice for the same crime. This is so because in accordance with what has been stipulated by the Inter-American Court in the above-mentioned cases, such principles cannot hinder the annulment of the aforementioned laws or the prosecution of the cases that were declared extinct because of such laws, nor of any other cases that ought to have been initiated but never were so. In other words: the submission of the Argentine state to Inter-American jurisdiction prevents the principle of “non-retroactivity” in criminal law to be invoked in order to omit complying with the duties undertaken in the matter of prosecution of gross human rights violations.

The Court also referred to the opinions of the UN Human Rights Committee, according to which “whenever public officials or agents of the state have committed violations of rights recognized by the Covenant, they cannot exempt the authors from their personal responsibility as has been done in the case of certain amnesties”.²⁵ The Committee had told Argentina that the derogation of the laws of Full Stop and Due Obedience was not enough to revert the situation of impunity that these laws had created. “The gross violation of civil and political rights during the military government must remain liable to prosecution as long as necessary and with all the necessary retroactivity to secure the prosecution of the authors”.²⁶

The Court made its decisions consistently in accordance with decisions of international organisms; it declared therefore the unconstitutional character of the laws of Full Stop and Due Obedience and decided that no act based on them will have any effect that can be opposed to the progress of the suits submitted or to the trial and conviction of the culprits, or in any way create obstacles hindering the investigation of crimes against humanity committed on the territory of the Argentine Nation. It also resolved to confirm the validity of the law voted by the National Congress that annulled the laws of impunity.²⁷

The decision is signed by the Justices Enrique Petracchi, Antonio Boggiano, Juan Carlos Maqueda, E. Raúl Zaffaroni, Elena Highton de Nolasco, Ricardo Lorenzetti and Carmen Argibay. The only dissidence came from Justice Carlos Fayt. The ninth magistrate – Augusto Belluscio – decided to excuse himself. Three of the Justices who are current members the tribunal had taken part in the Court verdict under which these laws had been ratified in 1987. Enrique Petracchi altered his position and explained it quoting the pre-eminence of international law over Argentine law since the 1994 constitutional reform. Carlos Fayt repeated his previous position asserting that the context in which these norms had been issued required measures of that type. According to this judge, treaties of human rights are subordinated to the Constitution in spite of the fact that they are incorporated into it.

25. General Comment n. 31 adopted by the Committee of Human Rights, “The kind of the general juridical obligation imposed”, 80th period of sessions (2004) paragraphs 17 and followings.

26. Session 1893, 1st Nov. 2000, paragraph 9.

27. The National Congress had invalidated the laws in September 2003 by law 25779, published in the *Boletín Oficial* of 3 Sept. 2003. This law has been assessed as unconstitutional by the military involved in the case.

Current state of the obligations of the state

The obligation of the Argentine state to investigate the violations of human rights committed in the recent past was faced in 1984 with the appointment of the National Commission on Kidnapping (CONADEP) and, some time later, with the opening of the trials for the truth.

The obligation to prosecute and penalize was partially complied with inasmuch as the members of the military juntas were put to trial, in 1985.²⁸ Even if the commanders convicted on that occasion were subsequently pardoned by President Carlos Menem, the deeds for which they were being judged were aired in a criminal suit and responsibilities were clearly established. The pardons have been declared unconstitutional by magistrates of the court of the first instance and these decisions have been ratified by courts of appeal. The final decision will be issued by the National Supreme Court of Justice, which has yet to examine the case.

At present, the cases looking into the liability of the other members of the armed and security forces have been opened and are currently in the fact-finding stage. Some of them will be soon sent to oral and public trial. Many of these cases were ready for the oral trial when the laws of immunity were enacted. This is why it will not be long before they move on to the completion of the trial and the issue of the award. Others will have to wait until more thorough investigations have been carried out.

The obligation to compensate for violations of human rights has been object of a specific policy by the Argentine state. At this point, it is fitting to consider the norms that have provided economic compensation for the victims. The compensation came to be defined within the framework of several legal norms, most of them enacted as from 1994.

On one hand, a law was enacted determining a compensatory amount for people who had been illegally deprived of their freedom during the military dictatorship – Law 24043. The beneficiaries of this rule were people who, prior to 10 December 1983, had been detained and placed at the disposal of the Executive Branch by reason of the state of siege.²⁹ It also covered civilians detained by the decision of military tribunals, with or without a sentence.

At a later date, the Congress passed another law that granted economic compensation to the victims of kidnapping and the heirs of people murdered

28. CFCyC, case n. 13/85, sentence of 9 Nov. 1985.

29. The state of siege was declared on 6 Nov. 1974; the same decree by María Estela Martínez had ordered the “elimination of subversion”, which represented the beginning of state terrorism in Argentina.

by the military, members of the security forces or paramilitary groups.³⁰ There is no doubt that this was the law that brought about the greatest discussion on the meaning of economic compensation for the crimes of the dictatorship, even when no penalty was imposed. To understand the debate that arose, it is necessary to bear in mind the conflicts unleashed by the forcible disappearance of people: the refusal to give any information about the victims during the dictatorship, the lack of individualized answers after the re-establishment of democracy and the impunity of the culprits.

It was in the midst of this process of compensation that a new personal legal status emerged for people in the Argentine juridical order: that of a person “absent due to enforced disappearance”. In this way, missing people were legally declared as such and not as dead, and the money handed over by the state was granted to the victims and not to their legal heirs. The declaration by the state that the person is still missing implies an official acknowledgement and the presumption that the body has not been recovered and that their final fate is unknown.³¹

Even though there is no official information about the total amount paid by the Argentine state so far, it is possible to estimate that approx. 1,170 million pesos have been paid as compensation for arbitrary detentions³² and about 1,912,960,000 pesos as compensation for enforced disappearances and murders.³³ According to these data, the estimated total amount of indemnities paid would reach the figure of 3,082,960,000 pesos.

Compensation for the children that have been victims of the military dictatorship has been ordered by means of another recently enacted law.³⁴ This legislation provides compensation for people who were born while their mothers were deprived of freedom; children detained due to the detention or disappearance for political reasons inflicted on their parents and people who

30. Law 24411, enacted on 7 Dec. 1994. Its regulatory decree, n. 403/95, was signed on 29 Aug. 1995.

31. The official response to this problem was the passing of the Law of Absence by Forced Disappearance (24321, enacted on 11 May 1994), that does not presume that the person had passed away but that the state admits that he/she is not present due to illegal kidnapping by agents of the state and has never appeared, neither dead or alive. The relatives of the disappeared persons have almost unanimously applauded this solution.

32. To obtain this figure we calculated that an average of 150,000 pesos was paid to each one of the 7,800 people who collected the compensation.

33. 224,000 pesos were paid to 8,540 people.

34. Law 25914, passed on 30 Aug. 2004.

had been victims of illegal substitution of identity. The latter refers to the cases where children were stolen from their detainee-parents and registered as legitimate children of other families (in many cases as children of the very same policemen or military who had stolen them from their biological parents).³⁵

The Argentine state has also provided compensation for the Argentine victims whose rights had been breached in other countries of the region due to the so-called Condor Plan. This was a repressive coordination between several governments of the South Cone of America with the intent to carry out illegal repression. This coordination was first outlined in 1974 and went on until the end of the military dictatorships in the region. By means of this operation, national frontiers were eliminated as far as the repressive action was concerned, which allowed military regimes to violate human rights of their countrymen and women on the territories of other countries. This is how kidnappings and murders of foreigners took place in different countries of South America.

The Argentine state pressed for the passing of laws of reparation by the governments of other countries where Argentine victims of the Plan Condor existed – specially Chile, Uruguay, Paraguay, Bolivia and Brazil. These efforts were in most cases unproductive, except in the case of Brazil, which included the victims of Argentine nationality in their reparatory legislation.³⁶ Contrariwise, foreign victims of human rights violations in Argentina received the same compensation given to Argentines, as the laws enacted did not make distinctions based on citizenship.

The situation of exiled people required special discussion. For a number of years the discussion has raged in Argentina as to whether those forced into exile should receive an economic compensation. Opinions about this question were split and due to that, exiles were not included in reparatory laws.

On 14 October 2004, however, the Supreme Court of Justice decided that the situation of those who had to leave the country due to persecution by the military and the danger looming over their lives is similar to those who were deprived of their liberty and that, therefore, the economic compensation should be extended to these cases. As from then on, the national government promoted the passing of a law that takes specifically into account compensations for exiled people. So far this bill has received a partial approval from the Chamber of Deputies.

35. People who have had their real identity suppressed will in all likelihood receive an indemnity equivalent to what has been determined by law 24411, i.e., 224,000 pesos. For all the remaining cases contemplated by the law, the benefit consists in a single payment of the sum equivalent to 71,288 pesos.

36. Law 9140, enacted in December 1995, included in its Exhibit 1, which details the beneficiaries, the names of three victims of Argentine nationality.

Conclusions

This overview shows how far the Argentine state has complied with its international commitments in relation to the crimes of the past. Even though from the standpoint of the victims and their relatives, there is still a long way to go before their rights have been fully vindicated, it is fair to admit that an important headway has been made in the treatment of the past.

Progress achieved in these last years is consistent with the processes taking place in other countries of the South American region. Chile is going through processes similar to those taking place in Argentina with specific features concerning its political and social dynamics. Although lagging behind, Uruguay begins to discuss some of the issues related to human rights and to take steps in that direction. Peru has conducted a complete investigation of what happened in those years and is carrying out inquiries to determine the liability of the culprits.

These processes are very valuable politically, socially and culturally. A lot has been said about the transition to democracy in the 1980s and 1990s. At that time, the analysis of the political situation was a priority and it has even been said that the rights of the victims was the adjustable variable for the difficult achievement of peace or stability of democracy. Many years had to be elapsed before this equation could have been altered. It is becoming increasingly difficult for governments to adopt decisions breaching these rights.

The argument that impunity bolsters democracy has been proved wrong. Recent history has shown that democracy will thrive as long as it is capable to ensure that those who depart from it or uproot its values will pay a high price for that. This is the lesson Argentine institutions are learning.

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ABSTRACT

The purpose of this article is to analyze the information obtained from a survey entitled “Human Rights in the *comarca* of the city of Rio de Janeiro, Brazil: conception, application and qualification”, which proposes to investigate the extent of the justiciability of human rights in adjudication by trial court judges from the *comarca** or the judicial district of the city of Rio de Janeiro. The survey concludes that the type of *vara*** or trial court, the color of the judge and the amount of knowledge the judge has about the OAS and UN international human rights protection systems are all key variables in determining the way judges apply international human rights instruments as grounds for their sentences. The empirical explanation of the aforementioned variables is extremely valuable when it comes to implementing programs designed to broaden judges’ knowledge of the subject. The survey was conducted with the support of FAPERJ (Fundação de Amparo à Pesquisa do Estado do Rio de Janeiro). [Original article in Portuguese.]

KEYWORDS

Human rights – Justiciability – Judiciary

* The *comarca* is a territorial division of jurisdiction of the State Justice, in opposition to the Federal Justice. It usually extends over one or more municipalities, such as the *Comarca* of the city of Rio de Janeiro. In this paper, *comarca* will be translated as “judicial district”. [EN]

** The *vara* is a thematic sub-division of the *comarca*. Each *comarca* may encompass one or more *varas*. When the *comarca* has more than one *vara*, each *vara* will hold jurisdiction over a particular object, such as the rights of the child, family law, criminal law, and so forth. Each *vara* may have one or more judges in the beginning of their career. In this paper, *vara* will be translated as “trial court”. Although this translation is not precise, it is aimed at facilitating comprehension. [EN]

HUMAN RIGHTS AND JUSTICIABILITY: A SURVEY CONDUCTED IN RIO DE JANEIRO¹

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Human rights constitute the principal instrument for defending, guaranteeing and promoting public liberties and they are essential to material conditions for a life of dignity. While the executive and legislative branches of government are always required to observe human rights, the judicial branch is the last bastion of these rights and the hope that they will be respected. Accordingly, it is crucial to lobby the courts to enforce their protection.

The struggle for the enforcement of human rights within the judiciary has made it necessary to determine how judges perceive and apply human rights norms, particularly those which protect socio-economic rights. Therefore, the survey “Human Rights in the *comarca* of the city of Rio de Janeiro: conception, application and qualification” proposes to investigate the extent of the enforcement – **justiciability** – of human rights by courts.

The first stage of the survey, which will be analyzed in this paper, investigated the trial courts of the State System of Justice in the city of Rio de Janeiro.²

1. Ongoing survey, conducted by students and professors at the State University of Rio de Janeiro (UERJ), the Catholic University of Rio de Janeiro, the Getúlio Vargas Foundation in Rio de Janeiro and the Cândido Mendes University (Ucam).

2. The field research is still ongoing with judges from the Rio de Janeiro State Supreme Court (TJRJ) appellate courts.

The survey has been organized into two strands: one theoretical and the other practical. The theoretical strand involved a systematic study of the legal, philosophical and political fundamentals of human rights, drawing on the works of Carlos Santiago Nino, Antonio Enrique Pérez Luño, Chaim Perelman and Robert Alexy.

The empirical strand, meanwhile, consisted of a survey of 225 of the 244 *varas*, or trial courts, located in the city of Rio de Janeiro. A questionnaire was administered to the judges to investigate the way each magistrate responsible for adjudication in the court perceives and applies norms of human rights. The questionnaire was also designed to determine how qualified the judges are in the area of human rights.

For the main analysis, the data collected in the survey were statistically examined using the multinomial logistic regression model, specifically to find an explanation for the use of international human rights protection instruments as grounds for the sentences handed down by the judges, through an analysis of all the variables involved. Basically, the procedure used consisted of applying hypothesis tests to calculate the contribution of each variable to the model, at a significance level of 5%. Variables were rejected if their contribution was not considered significant, at the established level, in explaining the use of international instruments as grounds for sentences.

Considering that the primary subject of this survey is the judicial protection afforded by the action of the judge, it was necessary to gather data directly at the source, which was achieved through personal interviews with the judges.³ The *comarca* or the judicial district of the city of Rio de Janeiro was chosen both for its representativeness in relation to other state circuits/districts and for the larger quantity and diversity of cases.

The trial court was the research unit considered for the survey, since it is through this court that the judge operates, and it is through this court that citizens gain access to justice. This being the case, the questionnaire corresponds to the trial court or *vara*, not to the judge, even though the judge speaks for the court. In trial courts with more than one judge, a full judge and deputy judge(s), only one questionnaire was filled out. In some cases the same judge was responsible for more than one trial court or *vara*, so the responses were repeated and included for each court.

The research units were registered in accordance with the index of trial courts listed in November 2003 on the State Supreme Court's website:

3. Interviews were held, whenever possible, with the full judge or, whenever this was not possible, with the deputy judge. In cases when it was not possible to interview either, or when both turned down the interview, this was considered "no response".

<www.tj.rj.gov.br>. At that time there were 255 trial courts, including the central and regional courthouses. When contact was made in the field the registration was updated during the interviews, and it was discovered that some of the listed trial courts had either not been installed or had been merged with other existing trial courts. Consequently, the final tally was 244 trial courts.

To gather the data, 225 of the 244 registered trial courts were visited⁴ between January and May of 2004, and in nearly 40% of the courts the questionnaire was not filled out. The main reasons for this omission of information from those courts were: (1) an unexplained refusal by the judge; (2) a refusal by the judge under the allegation that human rights are not part of his or her job; (3) a refusal by the judge to see the researcher.

For a better understanding of the extent of judicial safeguards afforded to human rights, the questions were prepared to take into account both subjective and objective elements that make up the actual conditions affecting the decisions on the subject. As a result, the final version of the questionnaire contained questions relating to: the profile of the judges; pre-university and university qualifications; conception of human rights, and the extent to which they afford judicial protection. The data collection instrument was developed both to be used by researchers in personal interviews with the judge responsible for each of the trial courts as well as to be filled out independently in cases when judges refused to see interviewers.

Data analysis

What now follows is a classification of the information collected in the questionnaires, as well as an analysis of the responses.

Profile of the judges

The judiciary, as a social institution, still reflects a male predominance in positions of power. The majority of judges, or 60%, are males. Nevertheless, as these institutions have become more feminized over the years due to the changes in society, the difference between the two percentages has narrowed significantly. This phenomenon is most noticeable in trial courts, where new judges start their careers. It appears that the higher the court, the lower the percentage of female judges, as these courts are the workplace of older magistrates.

4. Given unanticipated limitations, we were unable to conduct the survey in the regional courts Campo Grande (11 trial courts) and Santa Cruz (8 trial courts).

The Table 1 (right) illustrates a division of the judges who took part in the survey, arranged by length of career and age bracket. From this table, we can tell that there is only a slim chance that anyone would become a full judge before they become 30 years of age. Only 2 (2%) of the full judges surveyed are in this age bracket. Of the 77 judges in the age bracket of 31-50 who represent nearly 75% of the interviewees, 44 have been judges for 11-20 years. And this is the age bracket that figures the most among trial court judges in the judicial district of the city of Rio de Janeiro. Not a single judge from this age group has had a career spanning more than 20 years, which leads us to believe that judges with more than 20 years experience are usually promoted to the state's appellate courts. The vast majority of judges, who are more than 50 years old, have had careers spanning from 11-20 years. In this age group, only 2 have been judges for less than 5 years. It is rare for people to become judges at this age; and it is also rare for full judges to continue working in a trial court once they have turned 50.

The most striking percentages – although by no means surprising – refer to the color or race of the judges, as we can see in Graph 1 (right). Judges who described themselves as white represent 86% of the total. This result confirms the existence of a marked exclusion of the black/mulatto population from the profession of judge, given that, according to Brazil's 2000 Census, blacks* and mulattos account for 44.6% of the Brazilian population.

Qualifications in human rights

Considering that in qualifying judges the inclusion of “human rights” as a subject is a factor capable of influencing their application of norms that ensure such rights, particularly during their baccalaureate graduate degree studies, the questionnaire asked about the existence of this subject at universities.

Subjects relating to human rights do not generally carry much prestige in university graduation courses. When asked whether a human rights course existed during their baccalaureate studies, 84% of the judges responded negatively. Among those who responded positively, only 4% said the subject was obligatory, while 12% said it was optional.

Despite the all but nonexistent provision of this subject in universities, yet considering the importance of the topic, the judges were asked about their interest in studying human rights. Their responses are shown in Graph 2 (right). An analysis of the graph enables us to conclude the

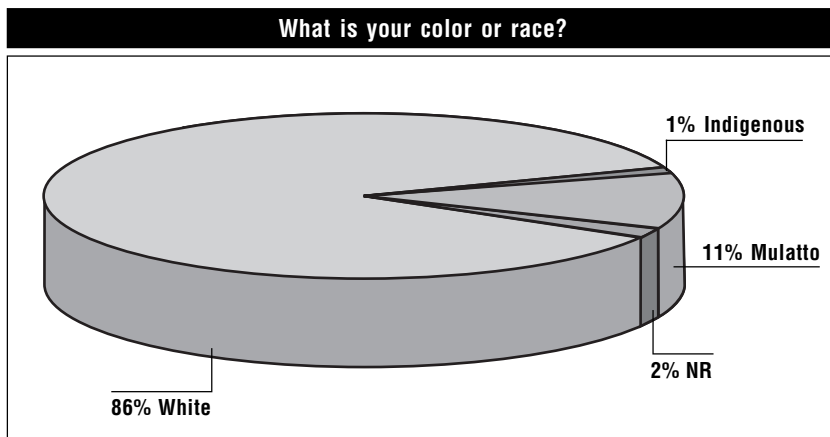
* Official research institute IBGE uses the term *preto* (negro) instead of *negro* (black). For the purposes of this survey, the term was substituted for black, while all the other categories are the same as those used by the institute. The IBGE's term *pardo* has been translated here as “mulatto”. [NT]

following: 42 judges (40%) have never studied human rights. This information reveals that four out of every 10 judges have had no formal instruction in the systematic examination of fundamental human rights issues.

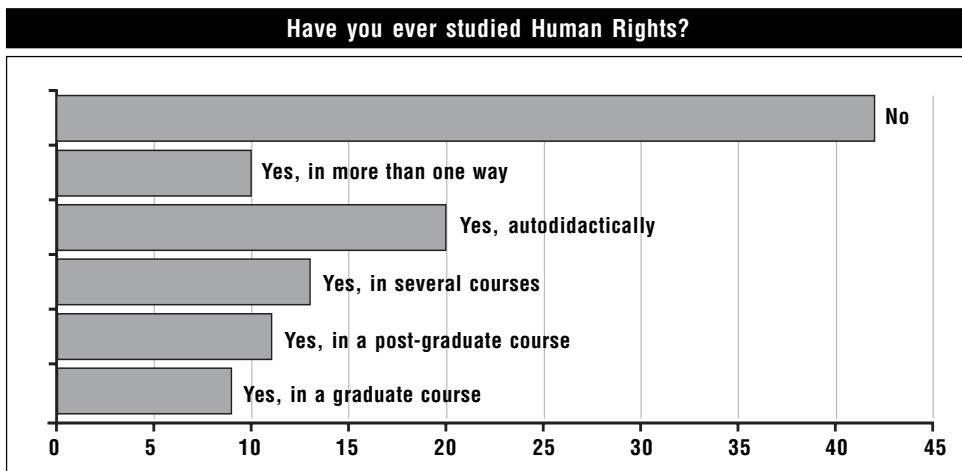
TABLE 1

Division of judges who took part in the survey by length of career and age bracket				
Age bracket	Length of career as judge (in years)			
	Less than 5	From 5 to 10	From 11 to 20	More than 20
Total	9	33	64	3
Up to 30	2	0	0	0
31 to 50	5	28	44	0
More than 50	2	4	19	3
NR	0	1	1	0

GRAPH 1



GRAPH 2



It is worth pointing out that despite the relative lack of training on the topic by the majority of the judges, many of them demonstrated an interest in taking courses on human rights: nearly 73% would be prepared to study the topic, as is shown on Graph 3 (below).

When asked whether they had any personal, hands-on experience in the area of human rights, the results revealed an even greater abyss between the judges and the topic. Only 6% of interviewees said they had engaged in any way in this area.

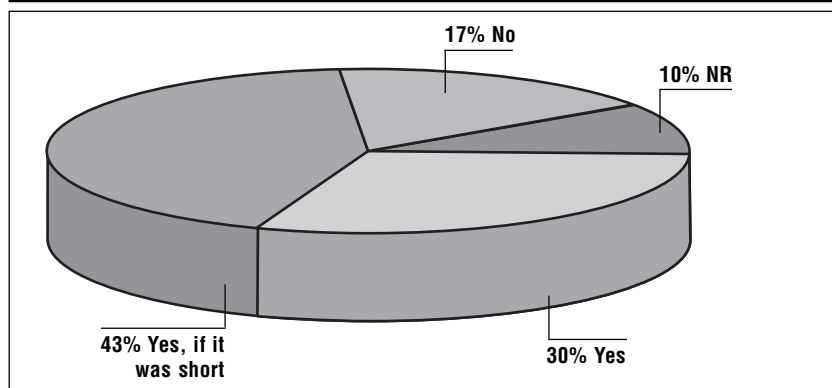
An analysis of this data helps us understand, at least preliminarily, why the rulings of these judges draw so infrequently on the human rights instruments of the United Nations (UN) and the Organization of American States (OAS) systems. With the subject so overlooked by the judges, the application of human rights norms is hampered.

Conception of human rights

When it comes to legal and political theory, there is a reasonable consensus on the fact that for a proper understanding of the Democratic State of Law, human rights are a fundamental topic. From this perspective, Jürgen Habermas (2003), when asserting the “equiprimordiality”, that is, the inner nexus between human rights and democracy (popular sovereignty), declared that a state cannot be considered truly democratic without the effective implementation of human rights. This means that citizens may only make effective use of their public autonomy if they are sufficiently independent, in virtue of the uniformly assured human rights. In this vein, Brazil will only be able to complete the democratization process prescribed in its Constitution when human rights become part of the daily life of its citizens, with full legal force. To achieve this,

GRAPH 3

If you have not yet taken a specific course on Human Rights, would you like to take such a course if the opportunity arose?



the state is expected to take effective steps to promote rights either by political action through the legislative and executive branches, or through guarantees from the judicial branch. Nevertheless, it is necessary, first and foremost, to ensure that judges – as the last bastions of justice – understand human rights.

In the Table 2 (below), we can see that, when questioned on the nature of human rights, 7.6% of judges affirmed that they were “unenforceable values”. For another 34.3%, human rights constitute “enforceable principles in the absence of a specific rule”, while 54.3% considered them “fully enforceable rules”. It is important to emphasize that nearly 7% of the judges conceived human rights merely as values that carry absolutely no legal clout, in spite of all the legal and political efforts made to assert these rights. This opinion is not so dissimilar from the 34.3% of judges who considered that these principles have a “supplementary nature”, and may be applied only in the absence of a specific rule. For this group of judges, any deliberation following a more specific rule, even if it is conflictive, would preclude the application of human rights norms. However, the majority of the responses demonstrated a strong conception of human rights, as more than 50% of the judges considered human rights fully enforceable rules.

Indivisibility of human rights

Delivering sentences that assure effective application of the different generations of human rights – not least the defense of these rights in a

TABLE 2

As far as you are concerned, Human Rights are:				
Opinion	Frequency	Percent	Cumulative frequency	Cumulative percent
Total	105	100		
Values that guide the legal system, but are not enforceable.	8	7.6	8	7.62
Principles that may be enforced on a supplementary basis in the absence of specific rules	36	34.3	44	41.90
Legal norms that are fully enforceable when a specific case demands.	57	54.3	101	96.19
A combination of more than one of the above.	3	2.9	104	99.05
NR	1	1.0	105	100.00

democratic State with limited financial resources – involves important issues that need be reflected and deliberated on by the executors of the law.

Historically, human rights emerged as civil rights opposing invasive action of the state in the area of individual liberties and private property rights, and requiring abstention on the part of the state. However, considering the “non-exhaustive” nature of human rights, since they emerge and evolve within a given social context, new generations of rights have developed what now constitute human rights. According to Norberto Bobbio (2004, p. 53), the rights enshrined in the 1948 Universal Declaration of Human Rights represent “a summary of the past and an inspiration for the future: but its dictates are not carved in stone”, as these rights are historical and constitute a group permanently open to fresh additions, specifications and upgrades.

We have moved from the context of a “liberal state of law” to a “state of social well-being”, with the respective protection of other rights, such as: health, education, housing, defense of the environment, and others. This shift has required the state to take positive regulatory action – and at times, intervene in the country’s social and economic reality. Controversies sometimes arise concerning the enforcement of these social and economic rights, as many argue that their promotion is the job exclusively of political action by the executive and legislative branches. In other words, it is not up to the judicial branch to protect these rights when this incurs an obligation for the legislative branch, which is autonomous in its legislative acts. The problem that arises is the following: are there acceptable legal arguments for not judicially guaranteeing these rights? To put the question another way: can the judiciary, as a branch of the state, abstain from assuring rights capable of endowing citizens with minimal conditions for subsistence, particularly in a society so profoundly unequal as Brazil’s?

Ultimately, this boils down to the important matter of the indivisibility of human rights. Regardless of the different classifications they receive, be they civil or political rights (to life, to liberty, to equality or to equal political participation) or economic and social rights (to housing, to work, to education and to health), human rights are complementary and interdependent. At this point, we might cite a 1977 UN General Assembly resolution, n. 32, which asserts the indivisibility of human rights and their inalienable character, while ratifying the mandatory character of economic and social rights (see Mello, 2001, v. I, p. 816).

The 1993 Vienna Declaration of Human Rights reiterates the indivisible conception of human rights by affirming, in paragraph 5, the universality, interdependence and interrelation between civil and political rights and economic, social and cultural rights. The firm guarantee to preserve the dignity of the human person presupposes the enforcement of all these rights. The exercise of citizenship would be impeded if, while the right to vote was

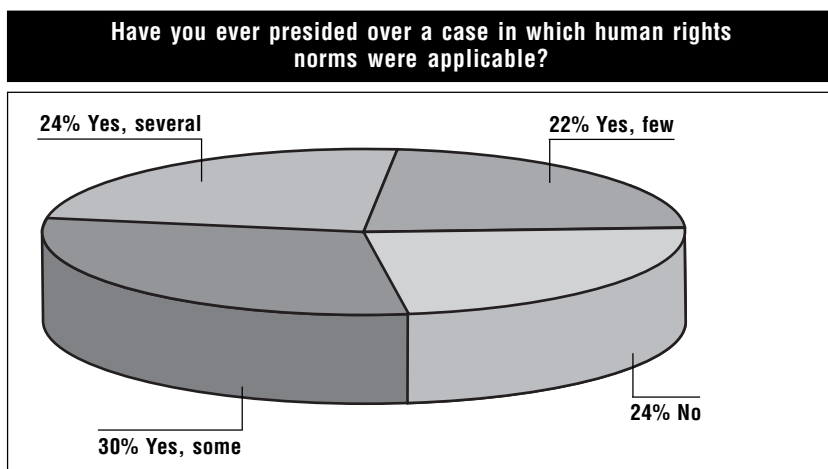
guaranteed, the same guarantee were not extended to the right to a high quality public education and healthcare.

Based on these considerations, we can now take a look at the opinion of the 105 judges who agreed to answer the following question: “Do you think that economic, social and cultural human rights can be judicially applied in the same way as civil and political human rights?”. A small minority of judges responded that the judicial application of economic and social rights cannot occur in the same way with civil and political rights. A minority of magistrates also believe that the judiciary should not interfere in promoting the enforcement of second generation rights, claiming that the implementation of public policies is not the job of the judiciary. Furthermore, others believe that the protection of these rights is the jurisdiction of the other two branches of government, or that application by the judiciary would result in the phenomenon of a judge legislating from the bench. However, the vast majority of magistrates (79%) defend that economic and social rights as well as civil and political rights can equally be judicially protected. In addition, they also consider that even rights that require the action of the State should be judicially protected. Therefore, a sizable portion of the interviewed judges, approximately 80%, assign to human rights, at least theoretically, the condition of fully enforceable norms, and they consider that even those rights that might interfere with the budget of the State should be assured by the courts.

Application of human rights norms

In our survey, one of the most significant questions referred to the justiciability of human rights, enquiring into the involvement of judges in the outcome of cases which required the application of human rights norms (see Graph 4, below).

GRAPH 4



The question was intended to ascertain whether the interviewee recognized the presence of human rights norms in the cases they preside over, given that these norms present themselves in multiple forms in the Brazilian legal system, veritably constituting normative developments in the judicial protection of dignity.

When asked about their involvement in cases in which human rights norms were applied, 24% of the judges responded negatively. Another 25% said they had presided over several proceedings requiring norms of this nature, 30% said they had presided over some cases in which human rights norms were applicable, while 22% said they had judged few such cases.

One can observe, therefore, that 52% of interviewed judges had presided infrequently over claims requiring human rights norms. What's more, if we consider both the judges who had only occasionally been involved in these proceedings and those who had never presided over such cases, the percentage rises to 76%. Paradoxically, however, the majority of the interviewed judges said that in the Brazilian legal system human rights are fully enforceable norms, although they are not effectively applied, since they are not inherent in the legal cases they have been submitted.

It must be pointed out, however, that such reasoning cannot be considered accurate. As a matter of fact, a sizable number of the cases submitted to the judiciary are conflicts that have human rights at their very core, and as often as not actually involve fundamental rights.

Therefore, this raises the hypothesis that the judges are ignorant about human rights: their lack of intimacy with the general concept of human rights and the norms of those rights may have clouded the perception of the interviewees, making it difficult for them to recognize cases dealing with this topic.

We should not forget, meanwhile, that in all cases submitted to the judiciary, the judge should take into account the full scope of the law, making a systematic interpretation. After all, legal norms are not the written laws or the body of laws themselves, but the meaning that is built from a systematic interpretation of the law.

Consequently, presiding judges should always take the dignity of the human person into account, as this is one of the fundamental values of the Brazilian democratic state, and as such has been enshrined in Article 1, Item III of the 1988 Brazilian Constitution.

It would seem reasonable then, that when the matter in question is an existentially subjective situation, the legal norm should be constructed based on human rights, either from the constitution or from international human rights norms, even if the intensity of the bond may be considered different (see Sarlet, 2002, p. 85). Non-recognition of such applicability may therefore be associated with questionable knowledge of, or even ignorance of the topic.

Affirmative action

One of the most valuable principles enshrined in the 1988 Federal Constitution is the concept of isonomy, which is engraved in Article 5, *caput*,* and which states that everyone is equal before the law. We must bear in mind, however, that the principle of isonomy was, historically, a victory won by the French and American revolutions at the end of the 18th century, and was aimed at abolishing the privileges of the nobility and the clergy.

At the time, it was important to formalize this equality. But over the years, experience has taught us that merely defining this right in law does not guarantee that all individuals have the same opportunities for effectively accessing the prerogatives available to society.

By way of an example, we might cite the dichotomy between free public schools and private institutions in Brazilian primary and secondary education. The former offer a questionable education to pupils with sparse financial resources, while private institutions, greater in number, provide an excellent service to well-to-do students. The situation is paradoxically reversed when it comes to university entrance examinations: the vast majority of students who are accepted into tuition-free public universities, which are renowned for their excellence, come from private secondary schools.

Until fairly recently, public institutions always selected students for higher education courses based entirely on the results of entrance examinations. Historical inequalities and the uneven access to education by students were ignored. As a result, a very controversial quota policy has been established in some Brazilian universities, that while always observing the results of entrance examinations for each category of candidate, also takes into account socio-economic criteria, and eventually will include ethnic parameters.

The aforementioned example is just one of the situations embraced by the policy of affirmative action, which symbolizes the attempt to make up for the shortfalls of the liberal model through the social action of public institutions. As such, equality can be conceived as having a dual dimension: formal and material. From the formal treatment conferred to the principle of isonomy, expressed in the maxim “everyone is equal before the law”, there is now an attempt to actually “materialize” these guarantees. In this context, “the state abandons its traditional position of neutrality and as a mere spectator of the conflicts that embitter the coexistence between mankind and starts to act actively in an attempt to enforce the equality substantiated in constitutional texts” (Gomes, 2001, p. 20).

One might say, then, that affirmative action policies aspire to combat

* The *caput* refers to the first, main clause of the article in the Brazilian Constitution. [NT]

political and social inequalities and consist of any form of incentive that will distribute rights that are unattainable for discriminated groups. It is important to emphasize that this is done within the established Brazilian constitutional order, which textually is within the context of a democratic state of law that ensures that development, equality and justice are supreme values guiding a fraternal, pluralistic and unprejudiced society.

From this point of view, it became important to question the judges about the constitutionality of affirmative action, since the policy appears to be a suitable means of “materializing” human rights.

Looking at the Table 3 (below), 22.9% of the judges said they consider affirmative action unconstitutional, as it breaches the principle of isonomy, which in turn illustrates that they consider equality purely in its formal sense. Among the interviewees, 10.5% chose not to respond, although 66.7% subscribed to the opinion that affirmative action is constitutional, given the need to make up for social and historical inequalities.

These data permit us to conclude that the legal conception of isonomy is still dichotomic, although the material dimension does prevail, since the vast majority of interviewees demonstrated that they accede to the principle of the democratic state of law that is present throughout the text of the Brazilian Constitution and is expressly enshrined in Article 1.

It should be noted, moreover, that by accepting the constitutionality of affirmative action, judges do not necessarily agree politically with the policy, but only with its admissibility in the legal-constitutional order.

The UN and OAS protection systems

The advent of the Universal Declaration of Human Rights (December, 1948) and the American Declaration of the Rights and Duties of Man (April, 1948) prompted the development of the UN and OAS International Systems of Human Rights Protection.

TABLE 3

In principle, what is your opinion on the policy of affirmative action?				
Opinion	Frequency	Percent	Cumulative frequency	Cumulative percent
Total	105	100		
It is unconstitutional, as it breaches the principle of isonomy.	24	22.9	24	22.86
It is constitutional, given the need to make up for social and historical inequalities.	70	66.7	94	89.52
NR	11	10.5	105	100.00

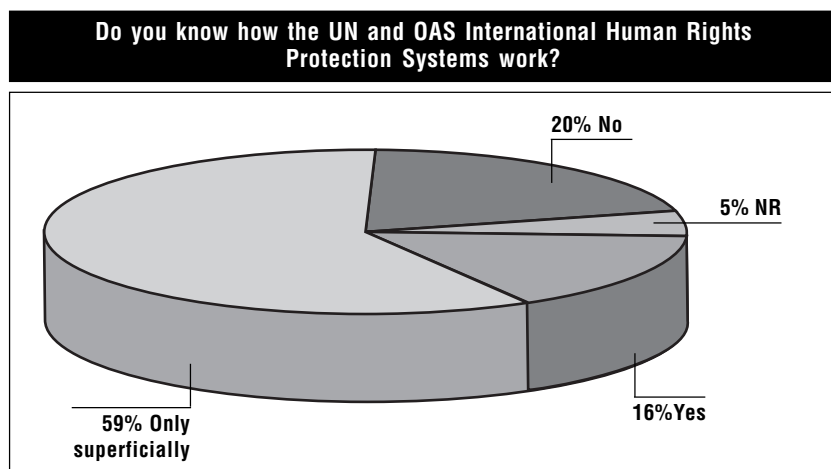
The UN Protection System is comprised of both norms of a general scope that take into account all individuals, in a generic and abstract way, and norms of a special scope, aimed at specific subjects and violations that require a differential response. Brazil has ratified the majority of these international instruments, namely: the Convention on the Elimination of All Forms of Racial Discrimination, on 27 March 1968; the Convention on the Elimination of All Forms of Discrimination Against Women, on 1 February 1984; the Convention on the Rights of the Child, on 24 September 1990; the Covenant on Civil and Political Rights, on 24 January 1992; and the Covenant on Economic, Social and Cultural Rights, on 24 January 1992. Nevertheless, in the case of analyzing individual claims, Brazil does not recognize the jurisdiction of their supervisory and monitoring bodies, such as the Human Rights Committee and the Committee against Torture.

Besides the UN Protection System, there is also the regional Inter-American Protection System. The two protect the same rights, and victims may select the most convenient of the two. They complement each other, providing an additional guarantee and a greater promotion and enforcement of the fundamental right of the dignity of the human person. At a regional level, European and African systems of human rights protection also exist.

When the judges were asked whether they had any knowledge of the workings of the UN and OAS protection systems, they gave the responses illustrated in Graph 5 (below): 59% have a superficial knowledge, while 20% do not know how the protection systems work.

Considering the two highest percentages together – the highest representing those who have a superficial knowledge and the second highest those who have no knowledge of the systems – a full 79% of the judges are not properly informed about International Human Rights Protection Systems.

GRAPH 5



Such ignorance constitutes an obstacle to the full enforcement of these rights by the judicial branch on a routine basis, since this lack of information is closely connected to the non-application of human rights instruments.

To a question which addressed their knowledge of the rulings of international courts of human rights, 56% of the judges responded that they only occasionally examine this information; 21% said they rarely do; 10% said they have never examined these decisions; and only 13% answered that they frequently look at this information (see Graph 6, right). There is no doubt that the percentage of 13% for judges who frequently access these decisions is extremely low for any real proliferation of a human rights culture.

When asked about the possibility that knowledge of these rulings would assist with and improve their own sentences, 50% of the interviewed judges answered yes; 41% said perhaps; and 9% answered no (see Graph 7, right). Therefore, although few of the judges know the details of these rulings, the majority believe that it would be useful to familiarize themselves with them. This illustrates the importance of establishing a means of publicizing the rulings of international courts of human rights at the State Supreme Court, as part of a process to foster a greater application and enforcement of these rights.

Specific use of human rights instruments

The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights

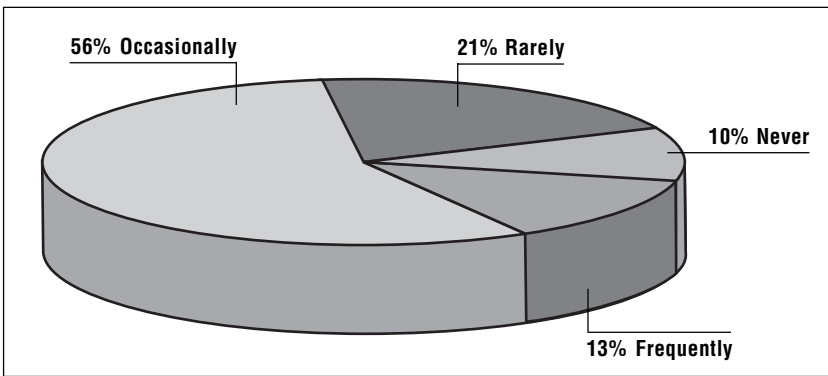
The United Nations General Assembly approved, on 16 December 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both ratified by Brazil in Legislative Decree n. 226 (12 December 1991) and enacted by Decree n. 592 (12 June 1992). It could be said that the ICCPR resembles the first Declarations of the Liberal State, while the ICESCR is more like the Constitutions of the Welfare State. Both texts specify the content of the Universal Declaration of 1948, and the elaboration of two covenants, not just one, as Fabio Konder Comparato (1999, pp. 276 and following) does well to point out, is illustrative of the natural divide between the capitalist and socialist blocs, given the polarization that was characteristic of the era.

With regard to the International Covenant on Civil and Political Rights, only 5% of the judges said they apply it with any regularity and 74% said they have never used it, while 19% said they do so only rarely (see Graph 8, right).

The results are even more worrying in relation to the Covenant on

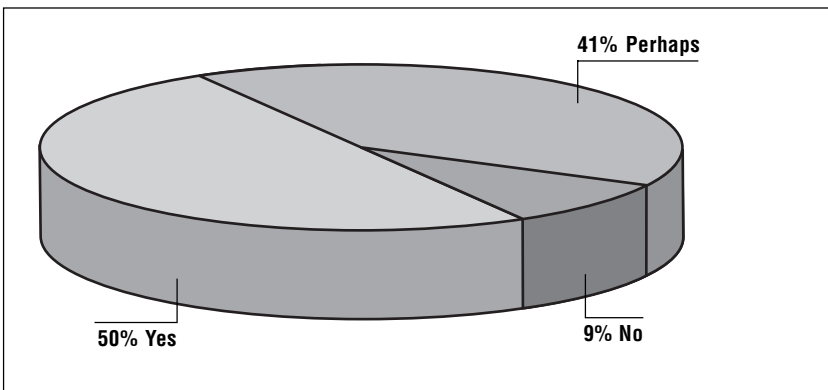
GRAPH 6

Do you get information on the rulings of international human rights protection courts?



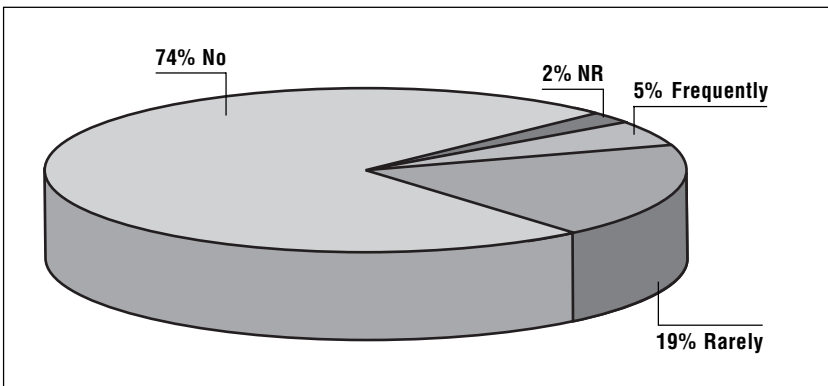
GRAPH 7

Do you think that knowledge of these rulings could assist with and improve your own sentences?



GRAPH 8

Do you use the International Covenant on Civil and Political Rights?



Economic, Social and Cultural Rights (Graph 9, right). Only 3% of the judges said they apply it frequently when sentencing; 20% rarely do so and 75% never use this instrument in their cases.

It is somewhat surprising that a mere 5% of judges from the judicial district of the city of Rio de Janeiro use the ICCPR, and that nearly 75% of them have never applied the ICESCR. Putting aside all the material and moral issues involved, it is also worth considering that the application of human rights instruments has more than merely a legal function per se, it is also **symbolic**. The application of these rules demonstrates that government agents and the community itself are aware of the fact that the protection and promotion of human rights are developed on two closely related dimensions: national and international.

American Convention and the Protocol of San Salvador

The human rights system of the Organization of American States holds states internationally responsible for human rights violations. Consequently, the invasion of a person's legally protected rights by the state makes it internationally accountable. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have been established and formed by impartial and independent people, with the intention of avoiding any selectivity by the system, and avoiding the eventuality that the offending state is simultaneously judge and party in the same case.

On this topic, 66% of the judges said they do not use the aforementioned convention (see Graph 10, right). This result reveals that, in spite of the advances made by the international community in establishing a minimum consensus on human rights, and in creating the necessary legal instruments to assure them in practice, many judges still ignore this process and its contribution to the strengthening of democracy.

The inter-American system initially relegated economic, social and cultural rights to a position of secondary importance. Taking this into account, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, or the Protocol of San Salvador, was adopted on 17 November 1988.⁵

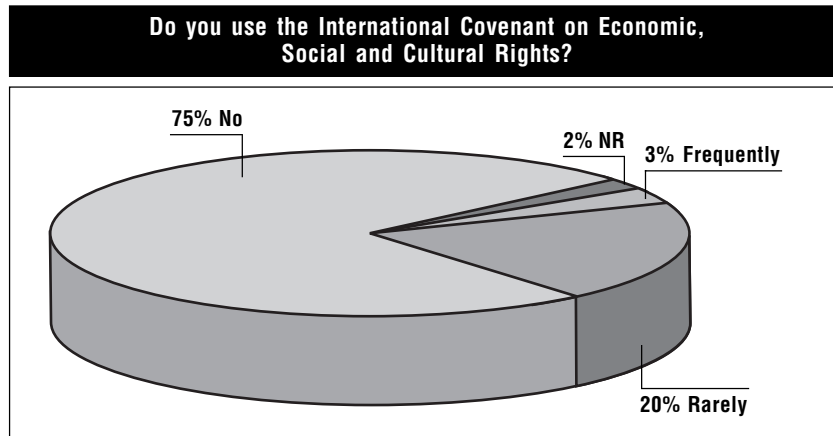
As can be seen in Graph 11 (right), when asked about the Protocol of San Salvador, 93% of the judges said they never or rarely used it. This is indeed alarming when one considers the reality of Brazil, which is marked by deep-rooted social inequalities. There can be no doubt of the importance of economic, social and cultural rights as a legitimate means of guaranteeing minimums of social well-being.

It is curious to note that 79% of the judges said they consider economic,

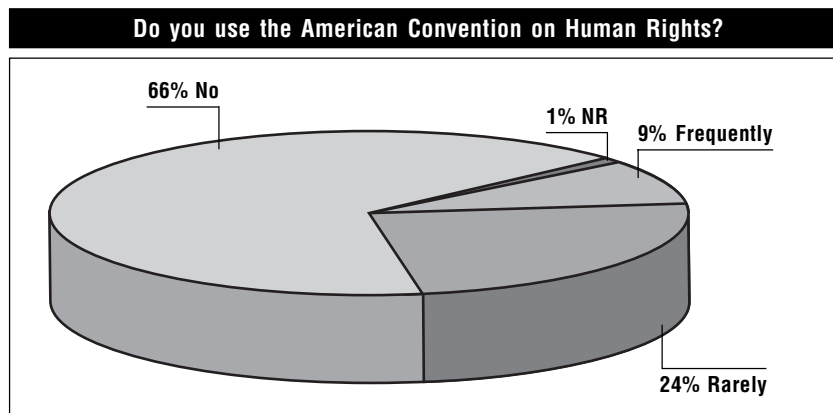
5. Adopted by Brazil through Legislative Decree n. 56/95 and Executive Decree n. 3321/99.

social and cultural rights norms just as effective and applicable as the norms assuring civil and political rights, but in practice, they do not draw on them as grounds for their decisions.

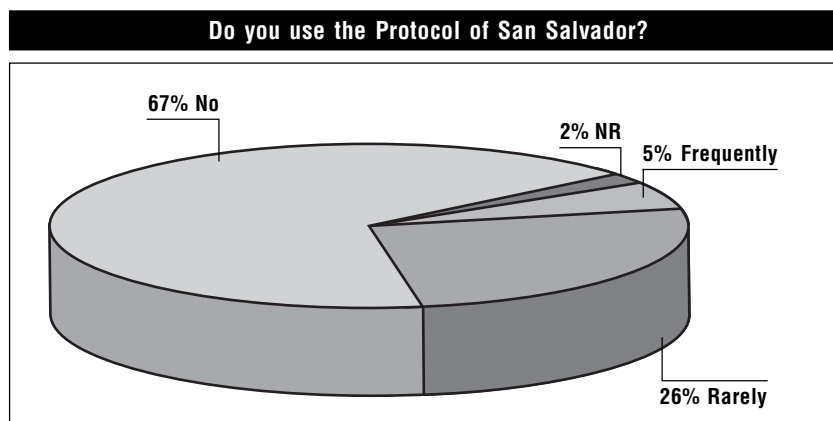
GRAPH 9



GRAPH 10



GRAPH 11



Convention on the Elimination of All Forms of Racism

Prompted by important historical events that occurred in the 1960s – including the admission of 17 new African countries to the United Nations; the 1st Non-Aligned Movement Summit in Belgrade (1961); and the resurgence of Nazi-fascist activities in Europe – the UN adopted, on 21 December 1965, the Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by Brazil on 27 March 1968.

This convention is part of the so-called Special System for the Protection of Human Rights. Special because, unlike the general system that targets protection for all people, abstractly and generically, the Special System for the Protection of Human Rights is aimed at particular subjects of law, considered in their specificity and in the reality of their social relations. This system is a complement to the general system, and focuses on protecting and promoting the equality of historically discriminated groups and individuals. It is grounded on the principle of equity, according to which differential treatment should be afforded to certain groups or individuals to help redress past inequalities. The Inter-American system has no international instrument for the elimination of forms of racial discrimination.

Concerning the Convention on the Elimination of All Forms of Racial Discrimination, the survey revealed that 75% of judges never draw on this international instrument, while 15% rarely do so (see Graph 12, right). This result is particularly unsettling in a country in which racist behavior is still a routine occurrence. The first step towards abolishing racism in our social environment is in recognizing that the problem exists and that it deserves urgent treatment. This matter must not be overlooked by the judiciary. In this vein, neglecting to use this convention is akin to rejecting a powerful weapon for combating racism in all its forms. This does not mean turning a blind eye to any fundamental role of the Brazilian Constitution, but rather incorporating an important instrument for eliminating racism.

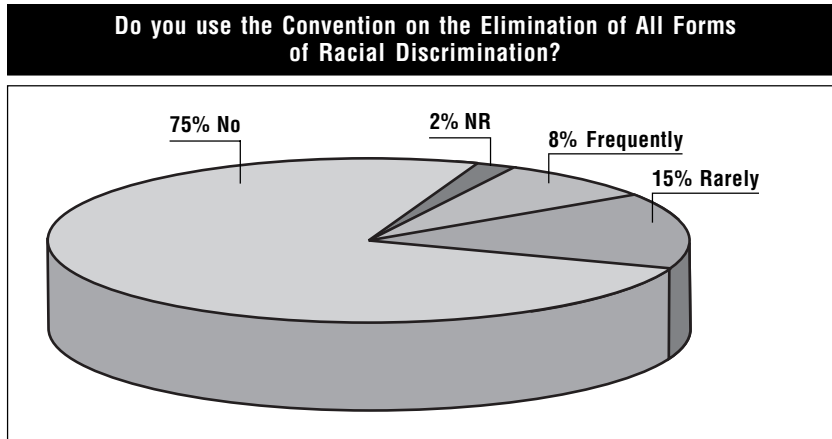
Convention on the Elimination of All Forms of Discrimination Against Women

Men and women have equal rights and duties. This is guaranteed by Article 5, Item I of the Brazilian Constitution, which reflects the concern of the original constituents to correct a situation that remains societally engrained in the most routine of daily occurrences. It is remarkable that in the 21st century women still do not enjoy the same treatment as men, in spite of the unquestionable doctrinal and legislative developments of the past few decades.

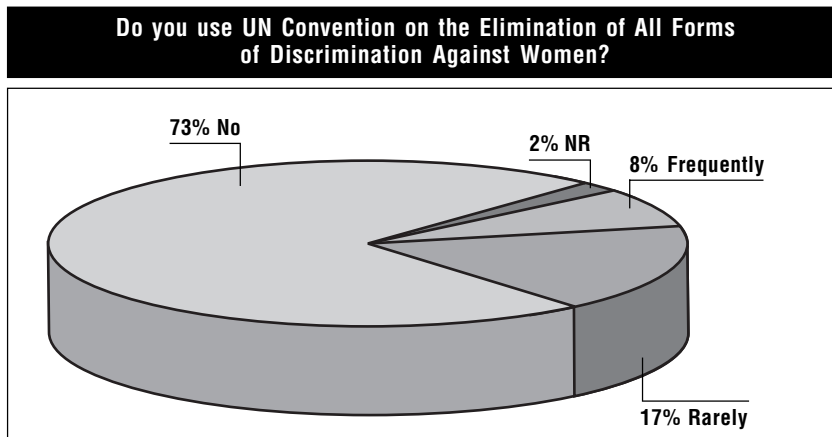
This survey found that only 8% of judges frequently employ the UN Convention on the Elimination of All Forms of Discrimination Against Women

and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (see Graphs 13 and 14, below). At the

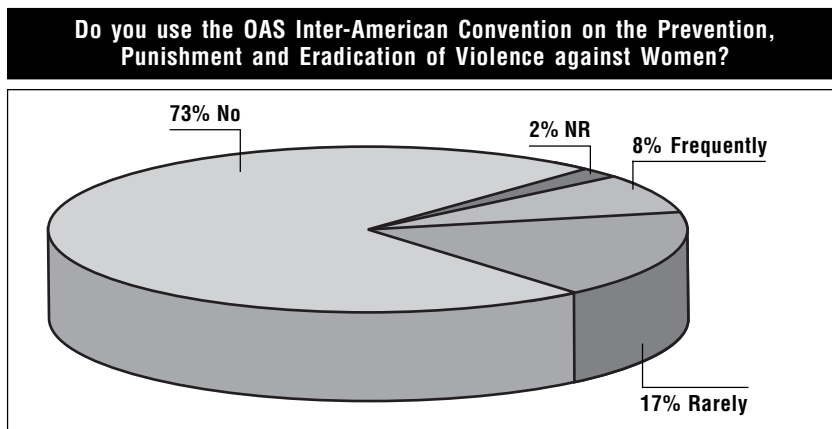
GRAPH 12



GRAPH 13



GRAPH 14



other end of the scale, 73% said they have never drawn on these conventions, while 17% said they have done so only rarely. This result can be interpreted both as an obstacle to the proper enforcement of fundamental rights, and as a barrier to the establishment of equality between men and women. This equality can only be achieved by a conjunction of two parallel movements: one is the cultural movement, which is more complex and long-term; the other is the legal movement, capable of producing more immediate results, but one that requires recognition and application of available legislation.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Universal Declaration of 1948 is doubtless the most important document when it comes to abolishing acts of torture. Thereafter, the absolute rejection of any such acts was reaffirmed by a series of broad-ranging covenants and conventions, such as: the European Convention on Human Rights (November 1950); the International Covenant on Civil and Political Rights (December 1966); the American Convention on Human Rights – the Pact of San José, Costa Rica (1969); the UN Convention (1984); and the OAS Convention (1985). Accordingly, torture has been recognized as a crime established in International Law, imposing upon states the obligation to prevent acts of torture, and to punish violators.

In Article 1.III; Article 4.II; and Article 5.I and 5.II, the Brazilian Constitution of 1988 demonstrates that it affords special or differential treatment to internationally enshrined rights and guarantees, accompanying the trend followed by other Latin American constitutions. Nevertheless, when asked whether they apply these conventions, only 10% of judges said they made frequent use of the Inter-American Convention against Torture and just 11% said they often used the protection system of the UN Convention. Only a slightly higher percentage said they rarely draw on these conventions – 16% and 14%, respectively, given that 1% and 2% did not respond. But the percentage of judges who never use these conventions in their sentencing is extremely high: 73% (see Graphs 15 and 16, right).

Despite the fact that these instruments establish rights for Brazilian citizens and obligations for Brazil in the eyes of the international community, they are of little value if the executors of the law keep silent.

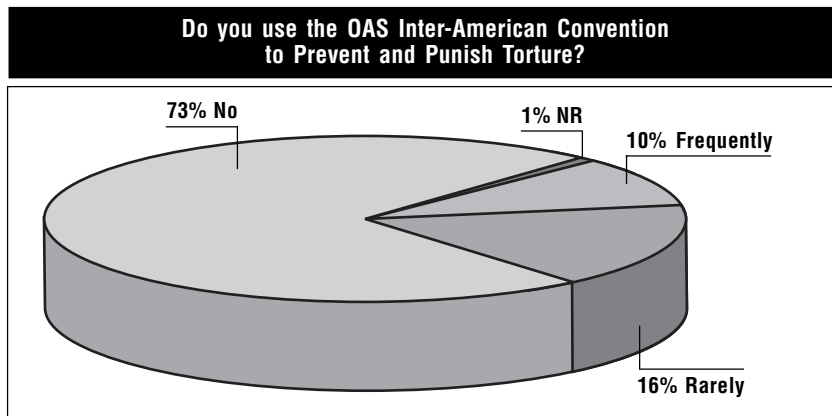
Convention on the Rights of the Child

Following the Declaration of the Rights of the Child, on 20 November 1959, and the International Year of the Child, in 1979, the doctrine of full protection for children prevailed, later expressed in the Convention on the Rights of the Child (20 November 1989). The 1959 Declaration had already professed that “mankind

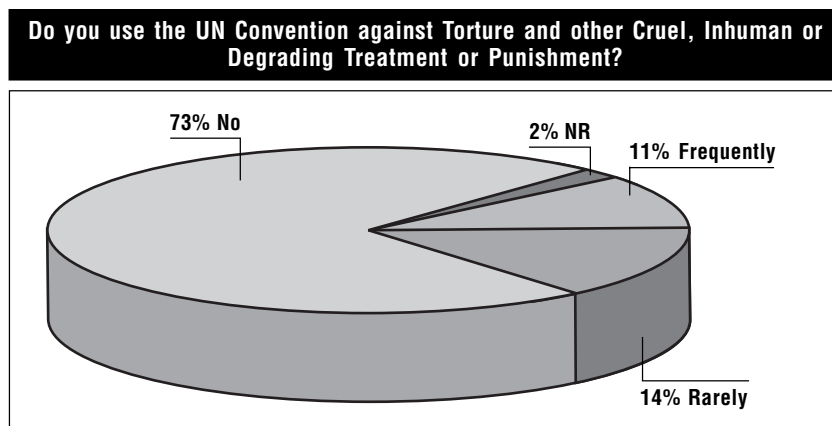
owes to the child the best it has to give”, thereby establishing a moral commitment to be assumed by future generations. However, history has proven to be particularly cruel to the infant and adolescent population. By way of example, each year thousands of children are compelled to leave school to help sustain their families.

Our fieldwork reveals, as illustrated in Graph 17 below), that just 30% of

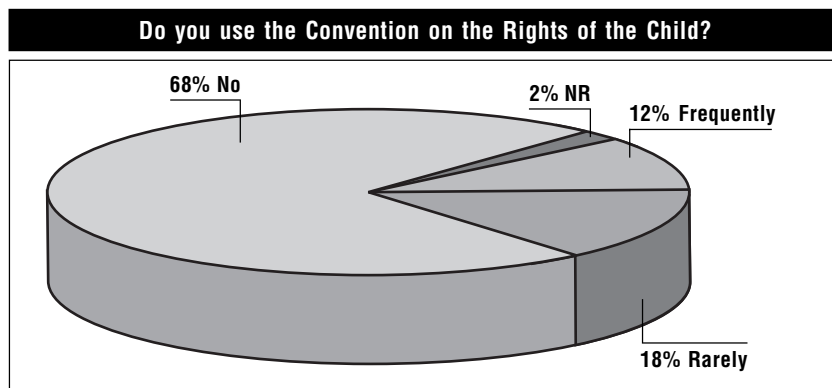
GRAPH 15



GRAPH 16



GRAPH 17



the trial court judges that took part in the survey apply the convention in question – a figure arrived at by adding the 12% that use it frequently and the 18% that do so rarely. In contrast, 68% have never used this instrument to protect the situation of Brazilian children. A Brazilian law, n. 8069/90, establishes the Child and Adolescent Statute (*Estatuto da Criança e do Adolescente – ECA*); a modern and sophisticated legislation protecting infants and juveniles. Particularly when considering the symbolic importance of using the inter-American and UN human rights systems, there can be no reason for omitting the application of the convention.

The historical and social context outlined above accentuates the need for and the importance of the United Nations Convention on the Rights of the Child; ratified by Brazil on 24 September 1990. It is worth pointing out that only two countries have not ratified the 1989 convention: the United States and Somalia.

Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities

The constitution of a fraternal, pluralistic and unprejudiced society founded on social harmony, as set forth in the preamble of the Brazilian Constitution of 1988, requires a substantial effort from all people to recognize and respect differences. In the specific case of persons with disabilities, the demand for respect is not just of a moral order, to substitute feelings of commiseration for those of solidarity, but of a social and political order, to substitute rhetorical discourse for effective action to promote inclusion.

This requires the implementation of policies to dismantle the numerous barriers confronting all persons with disabilities – from access to education to inclusion in the job market. It is along precisely these lines that the legal system enumerates, in the very constitution, specific provisions for this group of people, such as articles 7, 23, 37 and 203.

These provisions endow the Brazilian Constitution with all the conditions necessary to embrace the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities. The abovementioned convention was ratified in Brazil by Legislative Decree n. 198/2001 and Executive Decree n. 3956/2001. However, as the results of our survey reveal (see Graph 18, right), the convention is not commonly used by executors of the law as an effective instrument in the ongoing struggle for the rights of persons with disabilities.

When asked about the use of this convention as grounds for their sentences, just 10% of the judges said they used it frequently. Of all the judges interviewed, a full 71% said they had never drawn on the convention and 18% said they had done so rarely.

In a country with nearly 24 million people with some form of disability⁶ and very few effective societal policies capable of dismantling barriers; it is truly remarkable to note that this convention – an important legal tool – is so infrequently applied. As an explanatory hypothesis, one could point to a combination of two basic factors: (1) the low number of judicial claims made to guarantee the rights of persons with disabilities; (2) the lack of knowledge, on the part of judges, of the International Human Rights Protection Systems to which Brazil is a signatory.

Decisive variables in the application of human rights

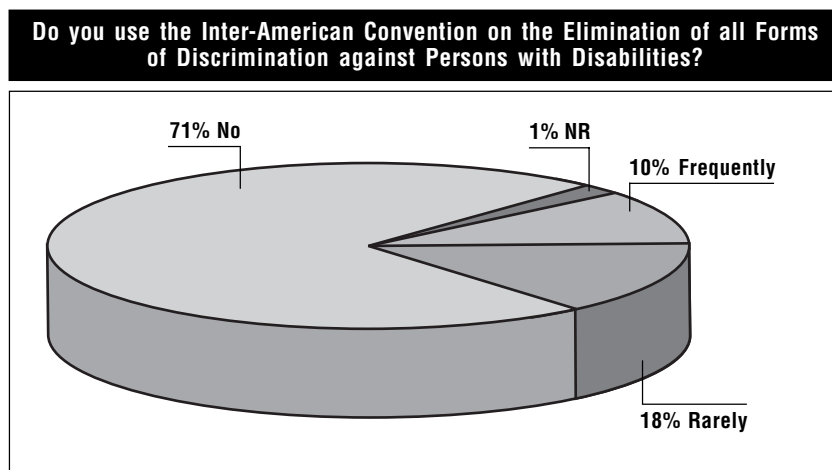
The choice of regression models as a tool to help analyze the data above is related to their applicability in hypothesis tests, used to test the influence of the profiles of judges, their qualifications, and their conceptions of the topic, in their application of the enforcement of human rights in the trial courts of the city of Rio de Janeiro.

To build the multinomial logistic models, the response variable was an indicator of the use of international instruments as grounds for the sentences handed down by the judges. This variable was created from the responses “frequently”, “rarely” or “never” given for each of the eleven instruments contained in the survey.

The indicator variable was considered “frequently” when this response was given for at least one of the instruments, and it was considered “rarely” when there was not any response of “frequently” but at least one response of “rarely”. It was considered “never” when this response was given for all the instruments.

The procedure adopted to build the models consisted of applying hypothesis tests to calculate the contribution of each variable to the model,

GRAPH 18



6. See IBGE, Demographic Census 2000.

at a 5% significance level. The variables that could be considered significant at the established level were used in the composition of the next model; then new hypothesis tests were applied. Finally, an adjusted model was obtained by excluding any variables that did not contribute significantly to the model.

The values of the statistics⁷ used to test the significance of the respective models can be seen in Table 4 (below). The results of the first hypothesis test, whose statistics and respective p-values are shown in this table, indicated

TABLE 4

Statistics of the significance test of variables for the model with 24 variables (Model 1)				
LR Statistics for type 1 analysis				
Source	Deviance	DF	Chi-Square	Pr > ChiSq
Type of trial court	399.7911	5	17.10	0.0043
Sex (2)	427.4586	1	3.26	0.0708
Age (3)	433.6336	3	0.18	0.9814
Color (4)	382.3783	3	25.80	<.0001
Length of career (5)	425.2816	3	4.35	0.2259
Time in type of trial court (6)	417.8612	4	8.06	0.0893
Secondary education (7)	417.6860	3	8.15	0.0430
Graduation (8)	383.2655	14	25.36	0.0312
HR in graduation (9)	427.7312	2	3.13	0.0708
Whether studied HR (10)	430.8308	1	1.58	0.2091
Would like to study HR (11)	413.0721	4	10.46	0.0334
Participation in NGO (12)	430.2227	3	1.88	0.5974
UN/OAS System (13)	403.1920	3	15.40	0.0015
International court rulings (14)	425.4045	3	4.29	0.2317
Improve sentences (15)	421.3918	2	6.30	0.0429
Order eviction (16)	428.7396	2	2.62	0.2694
Affirmative action (17)	428.0307	2	2.98	0.2257
Deprivation of freedom(18)	425.1317	3	4.43	0.2189
HR are (19)	429.4057	4	2.29	0.6826
ESCR and CPR (20)	433.7453	2	0.12	0.9417
HR protection and Executive spending (21)	433.2650	2	0.36	0.8351
HR norms unenforceable (22)	431.0908	3	1.45	0.6944
HR norms applicable (23)	421.2597	1	6.36	0.0117
Inter-American Court sentence (24)	430.2081	2	1.89	0.3889

7. These test statistics were obtained using SAS's Proc GENMOD.

that the following variables contributed, at a 5% significance level, to explaining the use of international human rights instruments by judges as grounds for their sentences: (a) type of trial court; (b) color and race of the judge; (c) type of school where most of their secondary education was received; (d) where they graduated; (e) their interest in taking a human rights course; (f) whether they know how the human rights protection systems of the UN and OAS work; (g) whether they think their own sentences could be assisted or improved with a knowledge of international court rulings; (h) whether they would order the eviction of a defendant who owned no other property; and (i) whether they have ever presided over a case in which human rights norms were applicable. These variables were used in the composition of the next model, to which a new hypothesis test was applied, after discarding the other variables. Statistics from the significance test for the model with eight variables are shown in Table 5 (next page).

The results of the new hypothesis test, whose statistics and respective p-values are shown in Table 5, led us to conclude that some variables – the type of school where judges received most of their secondary education or where they graduated; whether they think knowledge of international court rulings could assist with or improve their own sentences; and whether they have ever before presided over a case in which human rights norms were applicable – did not contribute significantly, at a 5% significance level, to explaining the use of international instruments as grounds for their sentences. These variables were then discarded and testing was adjusted to a new model which contained the four remaining variables, shown in Table 6 (next page).

The results of the final hypothesis test, whose statistics and respective p-values are shown in Table 6, led us to conclude that the fact that a judge may or may not be interested in taking a human rights course did not contribute significantly, at a 5% significance level, in explaining the use of international instruments as grounds for their sentences. This variable was then discarded, and we concluded that the model containing only three remaining variables explained the use of international human rights protection instruments as grounds for sentences handed down at the trial courts of Rio de Janeiro as well as the previously tested models. The statistics and respective p-values are shown in Table 7 (next page).

The adjusted model with the principle effects of the three variables can be obtained by applying to the general equation the estimated values of the parameters presented in Table 8 (next page).

The analysis of the parameters estimated values enables us to identify the type of contribution of each variable level in the use of international human rights protection instruments in sentences handed down by judges. What follows is an analysis of each of these three variables.

TABLE 5

Statistics of the significance test of variables for the model with 8 variables (Model 2)				
LR Statistics for type 1 analysis				
Source	Deviance	DF	Chi-Square	Pr > ChiSq
Type of court	4,030.958	5	19.09	0.0018
Color (4)	3,736.788	3	14.71	0.0021
Secondary education (7)	3,661.548	3	3.76	0.2883
Graduation (8)	3,250.368	14	20.56	0.1135
Would like to study HR (11)	3,022.778	4	11.38	0.0226
UN/OAS System (13)	2,699.890	3	16.14	0.0011
Improve sentences (15)	2,613.929	2	4.30	0.1166
HR norms applicable (23)	2,582.670	1	1.56	0.2112

TABLE 6

Statistics of the significance test of variables for the model with 4 variables – (Model 3)				
LR Statistics for type 1 analysis				
Source	Deviance	DF	Chi-Square	Pr > ChiSq
Type of court	4,030.958	5	19.09	0.0018
Color (4)	3,736.788	3	14.71	0.0021
Would like to study HR (11)	3,629.021	4	5.39	0.2497
UN/OAS System (13)	3,471.050	3	7.90	0.0482

TABLE 7

Statistics of the significance test of variables for the model with 3 variables – (Adjusted model)				
LR Statistics for type 1 analysis				
Source	Deviance	DF	Chi-Square	Pr > ChiSq
Type of court	4,030.958	5	19.09	0.0018
Color (4)	3,736.788	3	14.71	0.0021
UN/OAS System (13)	3,514.756	3	11.10	0.0112

TABLE 8

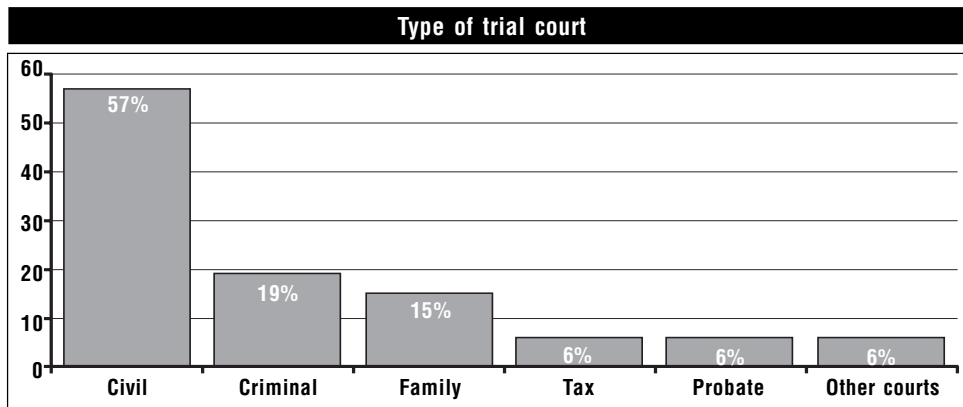
Estimated values of the parameters and the respective standard errors			
Analysis of estimated parameters			
Parameter	Level	Estimate	Standard error
Type of court	Criminal	0.1605	0.9656
	Other types of court	0.0000	0.0000
	Family	-0.7936	0.9862
	Probate	-0.9415	13.765
	Civil	-11.184	0.8695
	Tax	-11.484	12.206
Color or race	Mulatto	14.457	17.588
	Not informed	0.0000	0.0000
	Indigenous	-0.9477	23.034
	White	-16.863	15.914
UN and OAS	Yes	21.475	13.346
	Only superficially	14.382	11.866
	Not informed	0.0000	0.0000
	No	-0.2025	13.468

Type of trial court or vara

The trial court or *vara*, considered here the unit of research, is organized in accordance with various areas of the law, facilitating the role of the judge and the access to justice by society.

A majority of trial courts surveyed in the judicial district (57) belonged to the civil area. These are followed by criminal courts, 19 in all were surveyed, and family courts, 15 in total. Finally, six courts from each of three groups participated in the survey. These were: tax courts, probate courts, and “other courts” (see Graph 19, below).

GRAPH 19



To examine the conception and application of human rights by judges it is essential to consider the type of trial court in which the judge works, as the type of cases they handle is directly related to the application of some of the aforementioned instruments. In Table 9 (right), the types of court are organized in a declining order of their contributions to the use of international instruments as grounds for sentences.

When we make a comparative analysis of the types of trial courts, we can determine that in criminal courts the probability of international instruments being frequently used as grounds for sentences is greater.

At the other end of the scale are tax courts and civil courts, which present the least likelihood of using these instruments in sentences. It is surprising that the state (tax courts) and affairs between individuals (civil courts) are so far removed, in both the public and private sphere, from discussions on the recognition of the different models of fundamental rights efficiency.

The “other courts” category is also at this end of the scale – which includes youth courts, courts that oversee prison sentencing, military courts, family courts, probate courts, and courts of public records – in which the chances of judges using these instruments gradually diminishes.

Color or race

When looking at the descriptions of the judges who participated in the survey, presented in the previous section, some things that stand out are that only two judges declined to provide information on their color or race, and only one was self-described as of indigenous race. As a result, greater importance should be attributed to the white and mulatto (*pardo*) data. In Table 10 (right), the color or race of the judges is organized in declining order of their contribution to the use of international instruments as grounds for sentences.

One can observe that mulatto is the color or race associated with the greater probability that international instruments will be used. Meanwhile, white judges presented the greatest probability that these instruments will **never** be used. The category of judges who declined to provide information on their color or race (“not informed”) can be compared to the indigenous race which also presented a lower probability of frequently using international instruments in sentences.

The strong probability of mulatto judges using international human rights protection instruments to reinforce their sentences may be associated with a greater concern of this topic developed over the long history of social exclusion experienced by this social group. Even though Brazil is the country with the second largest population of African descent, the majority of people in this group endure an inferior social and economic status. The claim that ethnic exclusion does not exist in Brazil is not representative of what actually occurs

in practice. The presence of mulatto people is still insignificant in universities and management positions, as well as other high-ranking social positions.

The results of the survey demonstrate the consequences of a process of awareness. The privileged few from this social group who have had the opportunity to go to university and now hold the office of trial court judge act with critical awareness and concern about social inequalities. Although they are in the minority on the judicial district of the city of Rio de Janeiro, mulatto judges take a position compatible with the understanding that international human rights protection instruments are powerful allies when it comes to guaranteeing human dignity.

Knowledge of the UN and OAS International Human Rights Protection Systems

The majority of all the judges belong to a group that has no knowledge, or a superficial knowledge, of UN and Inter-American Human Rights Protection Systems. Just 17% said they have a comprehensive knowledge.⁸ A very brief analysis was enough to indicate that the use of human rights protection instruments by the judges is inadequate. Knowledge of these systems is reflected

TABLE 9

Estimated values of the parameters and the respective standard errors			
Analysis of estimated parameters			
Parameter	Level	Estimate	Standard error
Type of court	Criminal	0.1605	0.9656
	Other types of court	0.0000	0.0000
	Family	-0.7936	0.9862
	Probate	-0.9415	13.765
	Civil	-11.184	0.8695
	Tax	-11.484	12.206

TABLE 10

Estimated values of the parameters and the respective standard errors			
Analysis of estimated parameters			
Parameter	Level	Estimate	Standard error
Color or race	Mulatto	14.457	17.588
	Not informed	0.0000	0.0000
	Indigenous	-0.9477	23.034
	White	-16.863	15.914

8. See the section "UN and OAS protection systems", page 144.

strongly in the application of international instruments. The chance of an international instrument being applied is minimal by a judge who has no knowledge of the protection systems in question. The chance of their application increases as lack of knowledge is converted into superficial knowledge, and even more so when converted into full knowledge. Therefore, lack of knowledge of the UN and Inter-American Protection Systems is closely associated with the non-application of international human rights instruments.

In Table 11 (below), the degree of knowledge of the UN and Inter-American Human Rights Protection Systems are organized in declining order of their contribution to the use of international instruments in sentences.

Final considerations

The primary aim of this study was to investigate the extent of the enforcement, or **justiciability**, of human rights in adjudication by trial court judges from the *comarca* or the judicial district of the city of Rio de Janeiro.

A thought provoking paradox emerged during the course of the survey: if the judges demonstrate a keen concept of human rights and of the application in principle of the norms that guarantee them, very few of them actually do apply these norms, particularly those of the UN and Inter-American Human Rights Protection Systems. This might be explained by these facts: only 16% of the judges know how the UN and Inter-American Human Rights Protection Systems work, and 40% of them have **never** studied human rights. Nevertheless, 73% of the magistrates, or the vast majority, said that if the opportunity arose they would like to take a course on human rights.

By employing the regression model, three variables – type of trial court or *vara*, color of judge, and knowledge of the UN and OAS systems – were found to be decisively sufficient in explaining the behavior of the judges when it comes to the use of international instruments as grounds for their sentences.

Moving on to a comparative analysis of the variables, first by type of trial court; it was determined that the use of international instruments in sentences is greater in criminal courts, and is less frequent in civil courts and tax courts. Among the magistrates, there is also a mentality that conflicts with most modern

TABLE 11

Estimated values of the parameters and the respective standard errors			
Analysis of estimated parameters			
Parameter	Level	Estimate	Standard error
UN and OAS	Yes	21.475	13.346
	Only superficially	14.382	11.866
	Not informed	0.0000	0.0000
	No	-0.2025	13.468

doctrinal studies; studies which recognize the enforceability of fundamental rights in private affairs. And in affairs involving the state, it is possible to encounter with a certain ease hypotheses invoking human rights protection. For example, there are cases of dependent people who claim from the state supplies of medicine and the costs of their medical treatments, based on the constitutionally assured rights to life and health.

In relation to the second variable, it was observed that mulatto was the color or race most likely to make frequent use of international instruments, while the group least likely to use these instruments was white. This result is alarming considering that the majority of judges are white.

The third variable, on the knowledge of UN and OAS Human Rights Protection Systems, reveals what has already been asserted: the greater the knowledge of the international human rights protection systems, the greater the chance the aforementioned instruments will be used.

Finally, it needs to be emphasized that an understanding of the influence of each of these three variables on the use of international human rights instruments could be extremely valuable in an implementation of mechanisms aimed at an increase in the enforcement of human rights.

There is no doubt, therefore, that all judges should be made the target of information and training efforts for the purpose of broadening their knowledge on the subject of human rights, particularly the white judges who work in civil courts and tax courts. The **justiciability** of human rights is, after all, a matter of improving judicial protections.

REFERENCES

- AGRESTI, Alan. *Categorical Data Analysis*. New York: John Willey & Sons, 1990.
- ALEX, Robert. *Teoría del discurso y derechos humanos*. Bogota: Universidad Externado de Colombia, 1995.
- BLALOCK, Hubert M. *Social Statistics*. Tokyo: McGraw-Hill, 1972.
- BOBBIO, Norberto. "Presente e futuro dos direitos do homem". In: _____, *A era dos direitos*. Portuguese translation by Carlos Nelson Coutinho. Rio de Janeiro: Elsevier, 2004.
- COMPARATO, Fábio Konder. *A afirmação histórica dos direitos humanos*. São Paulo: Saraiva, 1999.
- COSTA NETO, Pedro Luís de Oliveira. *Estatística*. São Paulo: Edgard Blücher, 1977.
- DOBSON, Annette J. *An Introduction to Generalized Linear Models*. London: Chapman & Hall, 1996.

- EVERITT, B. S. & DER, G. *A Handbook of Statistical Analyses Using SAS*. London: Chapman & Hall.
- LOPES, José Reinaldo de Lima. “Justiça e Poder Judiciário ou a virtude confronta a instituição”. Dossiê Judiciário. *Revista USP*. São Paulo, n. 21, 1994.
- GAMERMAN, Dani & MIGON, Hélio dos Santos. “Introdução aos modelos lineares”. *Textos de métodos matemáticos* n. 27. Rio de Janeiro: Universidade Federal do Rio de Janeiro, 1993.
- GATTI, Bernardete Angelina. *Estatística básica para ciências humanas*. São Paulo: Alfa-Omega, 1978.
- GOMES, Joaquim B. Barbosa. *Ação afirmativa e princípio constitucional da igualdade*. Rio de Janeiro: Renovar, 2001.
- HABERMAS, Jürgen. “Sobre a legitimação pelos direitos humanos”. In: J-C. MERLE & L. MOREIRA (orgs.). *Direito e legitimidade*, pp. 67-82. São Paulo: Landy, 2003.
- LEVIN, Jack. *Estatística aplicada a ciências humanas*. São Paulo: Habra, 1987.
- MELLO, Celso D. da Albuquerque. *Curso de Direito Internacional Público*. 13th ed. rev. e ampl. Rio de Janeiro: Renovar, 2001.
- MINAYO, Maria Cecília de Souza (org). *Pesquisa social: teoria, método e criatividade*. Petrópolis: Vozes, 1994.
- NINO, Carlos Santiago. *Ética y derechos humanos: un ensayo de fundamentación*. Buenos Aires: Astrea, 1989.
- PASOLD, Cesar Luiz. *Prática da pesquisa jurídica: idéias e ferramentas úteis para o pesquisador do direito*. Florianópolis: OAB/SC Ed., 1999.
- PERELMAN, Chaïm. *Ética e direito*. São Paulo: Martins Fontes, 1996.
- PÉREZ LUÑO, Antonio Enrique. *Derechos humanos, estado de derecho y contitución*. Madrid: Tecnos, 1999.
- PIZZINGA, Adrian Heringer. *Modelos de regressão para respostas nominais politômicas*. Graduation monograph. Rio de Janeiro: Escola Nacional de Ciências Estatísticas (ENCE), 2000.
- POWERS, Daniel A. & XIE, Yu. *Methods for Categorical Data Analysis*. San Francisco: Academic Press, 2000.
- RATKOWSKY, David A. *Handbook of Nonlinear Regression Models*. New York: Marcel Dekker, 1989.
- SÃO PAULO (State). Office of the State Attorney General. Working group on human rights. *Direitos Humanos: construção da liberdade e da igualdade*. São Paulo: Centro de Estudos da Procuradoria Geral do Estado, 2000.
- SARLET, Ingo Wolfgang. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado, 2002.

Translation from Portuguese: Barney Whiteoak

PLAN OF ACTION SUBMITTED BY THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS*

Louise Arbour

We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.
(A/59/2005, paragraph 17)

The present plan of action, which was called for by the Secretary-General in his report entitled “In larger freedom: towards development, security and human rights for all” (A/59/2005), presents a strategic vision for the future direction of the Office of the United Nations High Commissioner for Human Rights (OHCHR). It builds on his assertion, shared by many, that much more needs to be done by the international community to address today’s threats to human rights and that OHCHR must be considerably better resourced to play its central role in meeting this challenge.

The plan is anchored in the mandate given to the High Commissioner to promote and protect the effective enjoyment by all of all human rights and it seeks, in particular, to remedy longstanding shortcomings in the mandated task to “... play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world ...” (see General Assembly Resolution 48/141, paragraph 4.f).

The historic legacy of the United Nations human rights programme is

*This is a summary of the plan of action drawn up by the United Nations High Commissioner for Human Rights, Louise Arbour, included as an annex to the UN Secretary-General Report “In larger freedom: towards development, security and human rights for all” submitted to the 59th session of the United Nations General Assembly (UN A/59/2005/Add.3, May 26 2005). The complete version is available at <www.ohchr.org>.

found especially in the wide-ranging body of human rights norms and standards produced in the past 60 years. But putting new resources and capacities to work in response to the human rights problems posed today by poverty, discrimination, conflict, impunity, democratic deficits and institutional weaknesses will necessitate a heightened focus on implementation.

Thus, the present plan envisages attention to a range of “implementation gaps” on the ground, including those related to knowledge, capacity, commitment and security. Helping to close those gaps and thereby protecting people and helping to empower them to realize their rights must be seen as the essential mission of the United Nations human rights office.

To these ends, the plan sets forth action points in five areas:

- a. Greater country engagement through an expansion of geographic desks, increased deployment of human rights staff to countries and regions, the establishment of standing capacities for rapid deployment, investigations, field support, human rights capacity-building, advice and assistance, and work on transitional justice and the rule of law.
- b. An enhanced human rights leadership role for the High Commissioner, including through greater interaction with relevant United Nations bodies and actors and regular system-wide human rights consultations, a reinforced New York presence, an annual thematic human rights report, a global campaign for human rights and more involvement in efforts to advance poverty reduction and the Millennium Development Goals.
- c. Closer partnerships with civil society and United Nations agencies through the establishment of a civil society support function, support for human rights defenders, stepped up commitment to Action 2 activities for rights-based approaches and national protection systems and human rights guidance to the resident coordinator system.*
- d. More synergy in the relationship between OHCHR and the various United Nations human rights bodies, an intergovernmental meeting to consider options for a unified standing human rights treaty body, including consideration of the possible relocation of the Committee on the Elimination of Discrimination against Women to Geneva and a review of the special procedures.
- e. Strengthened management and planning for OHCHR through the establishment of a policy and planning unit, significantly increased staffing levels, staff diversity initiatives, updated staff training, a staff field rotation policy and new administrative procedures.

* Action 2 is a global programme designed to strengthen the capacity of UN country teams to support the efforts of Member States, at their request, in strengthening their national human rights promotion and protection systems. [EN]

While the present plan of action focuses on the work of OHCHR, it is written against a backdrop of discussion on the future of the Commission on Human Rights, in the context of the Secretary-General's call for the Commission to be replaced by an upgraded Human Rights Council. OHCHR strongly supports the proposal that country scrutiny be exercised through an effective, fair and transparent system of peer review that should be built on the principle of universal scrutiny. OHCHR stands ready to contribute to discussions as to how best this might be achieved.

The present plan carries with it considerable consequences – strategic, operational and material. Consolidated action points are provided in section V for ease of reference.

The implementation of aspects of the plan can begin in the coming months through more effective prioritization of existing resources and improved planning and policy development so that all components of OHCHR can better work towards bridging implementation gaps, at the country-level, in a coordinated and sustained manner.

However, to be implemented in full the plan requires that OHCHR receive considerably more resources, otherwise it will remain merely aspirational. At present, the human rights program receives only 1.8 per cent of the United Nations budget. The bulk of OHCHR resources, including for key activities requested by United Nations bodies, are therefore in the form of extrabudgetary contributions. The total annual budget of OHCHR is US\$86.4 million. We estimate that in order to address the shortcomings identified in the Secretary-General's report and make a serious effort to step up the work of the Office along the lines suggested in the present plan of action, OHCHR will need to double its overall resources over the next five to six years.